

Republic of South Africa

Joint Civil Society Submission to the UN Universal Periodic Review (UPR)

Submitted 28 March 2022



1. INTRODUCTION

This is a joint CSO submission to the United Human Rights Council's fourth South African Universal Periodic Review which is due in 2022. The submission was produced with the technical assistance of the International Rehabilitation Council for Torture Victims (IRCT). The South African organisations¹ that contributed to this joint CSO submission include:

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¹ The following organisations also shared experiences of affected communities, victims and survivor groups that they work with: Women's Legal Centre, Mamadi Advice Centre, Ditshoswane Community Arts Centre, Public Interest-Durban, Melokuhle Foundation, Illovo Community, Durban, Boys and Girls Educational Foundation, Limpopo, Positive Women's Network, Western Cape, Future Champions Reading Club, Limpopo, Tshwaranf Projects, Limpopo, Fancy Stitch Women's Group, KZN, Expression Culture Academy, Northern Cape, South Community Peace Builders, KZN, Imvelo Future Earth Watchers, Gauteng, Wehere4U, Limpopo, Western Cape NPO Association, Sisonke National Sex Workers Movement and Mankweng Youth Development, Victim Empowerment, Programme.

2. CONTEXT OF THE REPORT

In this document, the Joint CSO Coalition examines the Government of South Africa's compliance with its international human rights obligations to uphold, promote and protect human rights within the Republic of South Africa. In its 3rd Universal Peer Review process, South Africa received 243 recommendations and has responded to 187 of those recommendations. This submission therefore highlights the state of human rights in the country within the period under review and makes recommendations to the Government of South Africa on steps to take towards realisation of those rights for all that live in South Africa. The thematic areas covered in this submission include (1) Gender Based Violence and Femicide, (2) Vulnerable Groups, (3) Torture, (4) Xenophobia and Migrants' Rights, (5) Women Human Rights Defenders, (6) Freedom of Expression, Association and Assembly, (7) Access to Justice and (8) Climate Justice and Environmental Rights.

This joint submission draws from a consultation with civil society actors, community-based organisations and experts working on the thematic issues of focus in South Africa and provides veritable lived experiences of victims and affected communities on the outstanding issues on South Africa's promotion and protection of human rights.

3. THEMATIC ISSUES OF CONCERN AND RECOMMENDATIONS

3.1. Gender Based Violence and Femicide

Past UPR recommendations and implementation

In the previous UPR review cycle South Africa received recommendations that called for the development and strengthening of specialised training for various front-line responders to GBV in South Africa, including police, prosecutors and other litigants, magistrates and other court officials. It was further recommended that the government develop concrete measures to improve the protection of women against GBV and to ensure that perpetrators are held accountable. Following the outcry from women's groups between 2018 and 2019, the government committed to eradicating GBV through strengthening the legal framework. The National Strategic Plan on Gender Based Violence and Femicide (NSP – GBVF) was adopted in 2020. The NSP- GBV provides a multi- sectoral, coherent strategic policy and programming framework that seeks to strengthen a coordinated national response to the crisis of GBV and femicide. Amongst other things, the NSP-GBVF seeks to address the needs and challenges faced by all, especially women in all their diversity, across age, sexual orientation, sexual and gender identities; and specific groups such as elderly women, women

who live with disability, migrant women and trans women, affected and impacted by the gender-based violence scourge in South Africa. On 3 June 2020, the South African Parliament's National Assembly passed three GBV bills namely, the Criminal and Related Matters Amendment (CRMA) Bill, Domestic Violence Act Amendment (DVAA) Bill and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment (SORMAAA) Bill, to address GBV and inequality. These three pieces of draft legislation were signed into law in January 2022.

Overview of issues

Notwithstanding these legislative and policy strides in combating GBV, South Africa continues to record high levels of Gender Based Violence (GBV). The World Health Organisation (WHO) estimates that 12.1 in every 100 000 women are killed by an intimate partner in South Africa each year – a figure which is over five times worse than the global average of 2.6. The advent of the Covid-19 pandemic in March 2020 further exacerbated the GBV crisis. Government-imposed movement restrictions to curb the spread of the pandemic left women and girls more vulnerable to existing and new forms of violence. Statistics recorded during this time show that adolescent girls were the most affected. Information from the Gauteng Department of Health shows that more than 23,000 girls under 18 gave birth between April 2020 and March 2021. This is in addition to the prevalence of intimate partner violence (IPV), that manifests as physical, psychological, emotional and sexual harm within an intimate relationship. Restrictions in movements resulted in many women and girls being trapped with violent perpetrators in their home setting.

Channels of justice for women victims and survivors of GBV are either inaccessible or lack the required capacity to assist victims in getting justice. Implementation of the NSP-GBVF and the new GBV laws will require adequate budgeting to curb GBV as well as nation-wide popularisation and sensitisation of the new laws and measures put in place to meaningfully address GBV in South African communities. A recent report highlighted that the NSP GBVF has not been embedded into government departments and this translates to limited political will to implement plansⁱ.

Recommendations

- Ensure the entire NSP GBVF is funded for its effective implementation, including funding for victim/survivor-centred prevention programmes, M&E access to justice and social services.
- Fully implement the Criminal and Related Matters Amendment (CRMA) Act, Domestic Violence Act Amendment (DVAA) Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment (SORMAAA) Act.
- Orient the justice system officers on the new provisions of the new GBV laws.

- Raise awareness at the community level on the processes, laws and other legal instruments that protect from or prevent GBV especially on the newly passed laws.
- Ensure collection of reliable and disaggregated data on types of GBV crimes, gender, age, disability, geographical area and the nature of relationship between victims and perpetrator to create solutions that respond to the lived realities of communities affected by GBV.

3.2. Vulnerable Groups (elderly persons, persons with disability, albinism, LGBTIQ+ and sex workers)

Past UPR recommendations

The 3rd Cycle UPR process noted that vulnerable groups in South Africa such as elderly persons, persons with a disability, albinism, refugees, LGBTIQ+, sex workers) continue to exist at the periphery of society with little protection from Government, the law and the justice system. It was noted that most people within this group experience challenges in accessing basic services.

Overview of issues

Whilst South Africa has a progressive Constitution and a legislative framework that promotes and protects the rights of vulnerable groups in society, gaps still exist when it comes to the protection of the rights of sexual minorities, elderly persons, sex workers, persons with disability.

The situation for LGBTIQ+ people in South Africa has been deteriorating as campaigners and individuals live and operate in a hostile environment characterised by hate speech, death threats and killings. Statistics show that [44% of the queer community reportedly experience](#) verbal, physical and/or sexual discrimination in their everyday lives due to their sexual orientation, and sensitive issues are often remarkably under-reported. A survey of more than 2,000 LGBTQ people by Out found that within a two-year period, 39% had been verbally insulted, 20% had been threatened with harm, 17% “chased or followed,” and nearly 10% physically attacked, and about half of all black respondents knew people who had been murdered because of their sexual orientation.

Implementation of the Older Persons Act of 2006 is still limited as older persons continue to be subjected to negative societal ageism perceptions that paint them as a burden with little to contribute to society or the economy. Their safety is also limited particularly for women in rural areas who stay alone. Cases of elderly women being raped in South African rural areas in Eastern Cape, Free State and KwaZulu Natal Provinces are rampantⁱⁱ.

Sex work continues to be a criminal act which makes it hard for sex workers to access essential services leading to a disproportionate increase in sexual related infections especially HIV. GBV is also

rampant in this demographic as sex workers are not able to report cases of GBV without further exposing themselves to victimisation from the police.

While the South Africa government has made commendable strides in creating an enabling environment for people living with disabilities through legislative and policy framework, implementation remains a challenge which in turn deny the affected citizens full enjoyment of their rights. The situation is even more dire for persons with disability living in rural areas, those with mental health challenges and children. It is estimated that close to 600 000 children with disabilities are on waiting lists to be placed in a school or institution, whilst many of those in school to attend special schools far away from their homes and schools for persons with disability continue to lack adequate support staff.

Recommendations

LGBTIQ

- Guarantee the safety and protection of all LGBTQI+ members in the country as enshrined in the constitution.
- Fast track the passing into law of the Hate Speech and Hate Crimes Bill.
- Invest in gender sensitisation workshops to foster harmony and understanding of the LGBTQI+ community.
- Ensure an enabling environment for LGBTQI+ rights organisations and human rights defenders to operate.

Sex workers

- Enact a policy or legislation to protect sex workers.
- Decriminalise sex work.
- Put measures in place to ensure that sexual and reproductive health services are easily accessible to sex workers.

Persons with a Disability

- Develop a single piece of legislation to specify, coordinate and govern services for children with disabilities and developmental delays.

3.3. Torture

Past UPR recommendations and implementation

During the 3rd UPR process, South Africa received numerous recommendations to ratify the Optional Protocol to the Convention against Torture (OPCAT) with a view to establishing the National Preventive Mechanism (NPM) against torture and to open up its places of detention for international inspection. It was further recommended that South Africa takes all necessary measures to ensure that all reports of ill-treatment and torture in prisons and centres of detention are adequately investigated. In response to this recommendation, South Africa ratified OPCAT in June 2019 and the NPM coordinated by the South African Human Rights Commission (SAHRC) was established in July 2019.

Overview of issues Notwithstanding the existence of the Prevention and Combating of Torture of Persons Act, an anti-torture legislation enacted by South Africa in July 2013, cases of torture are on the rise in South Africa. In 2021, the Independent Police Investigative Directorate (IPID) investigated 6,122 cases of police misconduct with the majority of these cases relating to police brutality complaints and 665 torture cases and thousands of assault cases. Although the anti-torture legislation has been in force since 2013, there is no record of torture cases adjudicated through the courts using this legislation and victims do not access reparation and rehabilitation from the State. Most cases reported to IPID, which fit the definition of torture continue to be captured and adjudicated as assault cases. Once torture cases are investigated by the IPID, none of the cases are referred to the National Prosecuting Authority for criminal prosecution of perpetrator police officers. Cases of torture are instead sent back to the South African Police Services for internal disciplinary actions, with limited accountability to the general public and the victims on the outcomes of the cases. During the implementation of hard lockdowns in South Africa, owing to COVID-19, both the South African police services and the army committed torture against unarmed civilians and the cases were not prosecuted as torture cases under the anti-torture legislation and the perpetrators were prosecuted for having committed torture. Lastly, although the anti-torture legislation is in place, the Regulations to operationalise it and set out standards and processing the crime of torture have not been promulgated and this contributed to the non-use and lack of prosecution of torture cases in South Africa.

In March 2021 the United Nations High Commissioner for Refugees in a press release revealed that there are 266,946 refugees and asylum-seekers in South Africa, the highest figure in Southern Africa. Information from the Department of Home Affairs shows that there was an annual average of 63,339 asylum seeker applications in South Africa between 2009 and 2019.

Refugees without valid papers in South Africa face a myriad of challenges that include limited or no access to basic service such as enrolling their children into local schools, health services and opening a bank account. They often at times face arrest and deportation and are easy targets for exploitation by unscrupulous employers and corrupt police. During COVID-19, many refugees and asylum seekers had their bank accounts frozen due to expired refugee and asylum seeker permits and were unable to access their wages and salaries. They were also initially excluded from accessing the Temporary Employment Relief Scheme (TERS) benefits due to their non-nationality status and were only included after intervention from public interest litigation organisations.

Recommendations

- Promulgate Regulations to set standards, procedures and processes to prosecute torture cases using the Prevention and Combating of Torture of Persons Act 13 of 2013.
- Implement the Prevention and Combating of Torture of Persons Act through sending torture cases to the National Prosecuting Authority for prosecution, not for internal disciplinary action at the South African Police Service.
- Establish a national rehabilitation programme where all victims of all forms of torture can access quality rehabilitation to rebuild their lives.
- Speed up the investigation and process of prosecuting torture cases committed by the South African army and the police during the national lockdown in 2020.

3.4 Freedom of Expression, Association and Assembly,

Overview of issues South Africa has in the past been lauded as a beacon of democracy and liberty in the continent with citizens being able to fully enjoy and exercise their civil liberties. However, the rising inequality and poverty, which have been worsened by the economic and social impacts of the Covid-19 pandemic, have resulted in a rise in protests resulting in the police and army resorting to heavy handed methods to restore order.

Recent events in the country have seen civil liberties such as the freedoms of expression, assembly and association being undermined with impunity by state agencies. In July 2021 the country witnessed an unprecedented event as thousands of citizens took to the streets after the arrest of former President Jacob Zuma. This resulted in the death of 300 people, arrest of at least 3,000 people and looting and damage of goods and property worth billions. Angry mobs looted and vandalised shopping malls and businesses in Gauteng province, which includes Johannesburg, and KwaZulu-Natal. Government deployed the army to help the South African Police bring the situation

under control.

In the last two years, there has been a marked increase in police brutality cases as excessive force has been used to disperse protests. In 2021 a 35-year-old bystander, Mthokozisi Ntumba, lost his life when he got shot by police when they were trying to disperse a protest by University of the Witwatersrand students in Johannesburg.

This is in spite of the Constitutional Court unanimous judgement that re-emphasised the guaranteed right to protest – regardless of a permission as required by the Regulation of Gathering Act

Recommendations

- Hold the police and army accountable for crimes related to violations of freedom of expression, association and assembly.
- Amend Regulations of the Gatherings Act to incorporate human rights tenets
- Build the capacity of state agencies on the citizens right to freedom of expression, association and assembly.

3.5. Xenophobia and migrants' rights

Past UPR recommendations and implementation

In the 3rd UPR process, South Africa received wide ranging recommendations to take measures to prevent risk of violence against non-nationals, refugees, migrants and asylum seekers. Amongst others, it was recommended that South Africa redoubles efforts to prevent and eliminate all manifestations of racism and xenophobia, improve police action in response to violence against non-citizens and enact the Prevention and Combating of Hate Crimes and Hate Speech Bill in conformity with the International Convention on the Elimination of All Forms of Racial Discrimination. In March 2019, the South African government adopted the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.

Overview of issues

The enactment of the Prevention and Combating of Hate Crimes Bill is still outstanding. The Bill was gazetted in 2018 and is currently before the National Assembly in Parliament, awaiting passing by the National Assembly before it is signed into law by the President. Following the adoption of a national action plan to combat xenophobia in 2019, very little has been done to ensure that attacks by members of the public, the police, and government officials are investigated and that those responsible are held accountable. Instead, the cases of xenophobic violence are on the increase.

Non-nationals in South Africa, including refugees and asylum seekers are scapegoated and blamed for economic insecurity, crimes, and government failures to deliver services and have been targets of nationwide protests characterized by mob violence, looting, and torching of their businesses, as well as shutdowns and national operations mounted by the police and the South African army. In September 2019, mobs wielding weapons and chanting anti-foreigner slogans attacked and forcibly displaced non-nationals, destroying thousands of their business and homes. Between 2018 and 2021, a number of discriminatory and abusive law enforcement raids have been mounted and carried out against non-nationals, “to crack down on counterfeit goods”, remove undocumented migrants allegedly committing crime in South Africa and to curb illegal immigration. Rhetoric by local government leaders has also been xenophobic, blaming criminality, lack of service delivery and unemployment on presence and existence of non-nationals in the country. Since 2021, Operation Dudula, an anti-migrant vigilante campaign mounted by South Africa citizens which started in Soweto has since spread to other townships and part of the country, with an aim to “root out illegal undocumented foreign nationals and those engaging in criminal activities. This campaign has been violent, leading to the assault and forced removal of non-nationals from their homes and places of work.

Recommendations

- Speed up the process of enacting the Prevention and Combating of Hate Crimes Act to address cases of xenophobia and intolerance.
- Ensure accountability for instigators of xenophobia and xenophobic violence.
- Put in place urgent, concrete measures and strategies for implementing the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.

3.6. Women Human Rights Defenders

Overview of issues

Women Human Rights Defenders, particularly activists working in the environmental and human rights sector continue to face victimisation, sexual harassment and violations as they carry out their work. The killing of environmental rights activist, Mama Fikile Ntshangase, in her house in KwaZulu-Natal province in 2020, highlighted the plight of women human rights defenders in mining-affected communities across the country. Activists have experienced threats, physical attacks, and damage to their property because of their activism—which police have continuously failed to investigate. As of November 2021, no arrests had been made in connection with Ntshangase’s killing. WHRDs in the

Non- Governmental Organisations (NGO) sector in South Africa have also experienced sexual harassment in the workplace. An attorney from the LEGAL Resources Centre was accused of sexual harassment by two women in 2017 and the public interest litigation organisation “allowed” the accused to resign without to resign without public censured, notwithstanding an independent investigation upholding the evidence of his accusers. It is mostly women human rights activists who risk their lives and wellbeing by signing affidavits to go to court to fight against the use of their land for mining in the name of economic development, with very limited protection against reprisals for their activism. Women HRDs are more at risk of suffering certain forms of violence, prejudice, exclusion and repudiation, not experienced by their male counterparts, as they are perceived as challenging accepted socio-cultural norms, traditions, perception and stereotypes about their femininity, sexual orientation, and the role and status of women in society.

After concerted efforts by CSOs, South Africa adopted a Resolution that acknowledges and recognises the plight of WHRDs and recommends the development of legislation on women human rights defenders.

Notwithstanding the constitutional and legislative guarantees of gender equality and protection of womxn’s rights, there is insufficient implementation of laws that seek to address the multiple vulnerabilities experienced by WHRDs in particular and there is no specific law that seeks to address their direct and gendered experiences and realities.

Recommendations

- Take concrete measures to end harassment, intimidation, persecutions and reprisals against WHRDs.
- Take legislative and other measures to ensure that the environment in which WHRDs operate is enabling to the protection of their rights and responds to religious and cultural norms that subjugate WHRDs.
- Develop legislation that promotes and protects the rights of women human rights defenders in particular.

3.7. Access to justice for women

Overview of issues

A number of impediments exist when it comes to access to justice for women, particularly rural women and women living in remote areas where formal courts are non-existent, and knowledge of

their operation is also limited for women victims. The Traditional Courts Bill, aimed at regulating traditional courts, which was also envisaged to bridge the access to justice gaps for women, given their proximity to communities and their informal nature and accessibility, has been shrouded in controversy and has faced backlash from civil society and women's rights activists. With traditional courts operating under traditional leaders, they are dominated by men who uphold patriarchal systems and beliefs that are unfavourable to women. Although traditional courts are recognised as courts in the South African legal system, they apply unwritten versions of customary law – the practices of an indigenous community. Although these courts have limited powers in theory, in practice, they have been used as the first port of call for resolving wide ranging matters in rural communities including marriage, inheritance, rape and assault cases and disputes.

Civil society actors and women's rights organisations have advocated against passing the Traditional Courts Bill in its current state, because the Bill fails to provide people, particularly women, a right to opt out of proceedings in traditional courts where the legitimacy of the traditional court decision is in dispute or where the rights of women are violated by the decision. The National Assembly has postponed the passing of the Traditional Courts Bill to obtain a legal opinion on the constitutionality of not including the opt-out mechanism.

While the Traditional Courts Bill awaits the legal opinion on the constitutionality, there is a gap when it comes to access to justice for women in rural areas. Denying people the right to opt out of the traditional court system also unjustifiably infringes the rights to a fair trial and equality. Forcing citizens, particularly in rural areas who are generally the less privileged and most vulnerable in society into traditional courts using the current system adversely subjects them to a different justice system from their urban counterparts.

Legal Aid South Africa which provides professional legal services and legal advice to persons who cannot afford these services, are inundated with legal cases, making it difficult to prioritise women's access to justice, particularly vulnerable and less privileged women.

c. Recommendations

- Accelerate the process of finalising the Traditional Courts Bill with amended language on the right to opt out for people whose cases are brought before the traditional courts.
- Harmonise the Traditional Courts Bill, particularly the traditional courts system and ensure that proceedings are conducted in conformity with the formal justice system when it comes to fair trial and non-discrimination principles.

- Facilitate establishment of specialised units within the Legal Aid South Africa to support the legal needs of women.

3.8 Climate Justice and Environmental Rights.

Overview of issues

South Africa is one of the world's top coal producers and this continues to endanger the lives of environmental activists who often face threats, intimidation and in extreme cases death. Communities in South Africa have over the years had to fight energy related multilateral companies to protect their land, water and air from degradation and contamination.

In October 2021 a well-known activist Fikile Ntshangase was shot dead in her home. At the time of her death she was involved in a legal dispute over the extension of an opencast mine near Somkhele, close to Hluhluwe–Umfolozu park, the oldest nature reserve in Africa.

Recommendations

- Government to protect environmental activists.
- Government to promote alternative energy sources that preserve the environment.

ⁱ https://www.gov.za/sites/default/files/gcis_document/202108/nsp-gbv-year-1-rollout-report-2020-2021-final-version-web.pdf

ⁱⁱ <https://www.sanews.gov.za/south-africa/elderly-woman-raped-men-posing-sandf>. See also <https://journals.sagepub.com/doi/abs/10.1177/0025802416683610> and <https://www.myjoyonline.com/91-year-old-woman-and-roommate-75-raped-in-south-africa/>