

# South Africa

## Submission to the UN Universal Periodic Review

First session of the UPR Working Group, 7-11 April 2008

In this submission, Amnesty International provides information under sections C and D (as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review). Under heading C, we describe concerns related to violence against women, barriers to the realisation of the right to health of people living with HIV and AIDS, use of torture and excessive force by police and prison authorities, and the protection of refugees and asylum-seekers and suspected illegal immigrants against *refoulement*. In section D, Amnesty International makes a number of recommendations in the areas of concerns listed.

### C. PROMOTION AND PROTECTION OF HUMAN RIGHTS

#### Violence against women

By 2004 South Africa had incorporated into national law and become a State party to all of the key international instruments intended, among other things, to:

- promote and protect women's right to equality with men and in the political, public, cultural and private spheres and before the law,
- ensure the elimination of all forms of discrimination against women including in relation to access to education, health, housing and employment, and
- protect their sexual and reproductive rights, and their right to freedom from all forms of violence and abuse.

Notwithstanding this vital progress in reforming and strengthening the normative framework, there remain weaknesses in the institutional framework – for instance in the resources for and effectiveness of the Commission on Gender Equality and other bodies in the state “gender machinery” -- in the implementation of laws and policies intended to combat violence against women and in the efforts to address women's socio-economic disadvantage. Black South African women, particularly those living in rural areas, are disproportionately represented amongst the poor and the unemployed. These circumstances place women at increased risk of violence and of HIV infection.

South African Police Service (SAPS) statistics for reported incidents of rape show a small decrease of 4.2 percent over six years from the year April 2001/March 2002 to April 2006/March 2007. However the total for the most recent year was still very high, at 52,617, to which should be added 9,327 reported cases of “indecent assault” – offences which include incidents of anal rape and other types of sexual assault which did not then fall within the new legal definition of rape (see below). These statistics should be regarded as conservative indications of the true scale of sexual violence, as research and service-providing non-governmental organizations have documented for many years the discrepancy between reported and actual incidents. Amnesty International has been informed by rape survivors and nongovernmental service-providing organizations (SPOs) about cases of failed police response to these crimes, including by exhibiting gender-insensitive and prejudiced attitudes towards complainants, among them lesbian women; by delaying the complainants' access to urgent and appropriate medical examination and treatment; and by taking incomplete statements and conducting inadequate investigations. There are also examples, however, of improved police practice where strong cooperation between police, SPOs and healthcare providers has enhanced victims' access to health services and justice.

In November 2007, the South African Parliament ended a nearly ten year legislative reform process when it passed the Criminal Law (Sexual Offences and Related Matters) Amendment Bill. The new Act, which awaits presidential signature, should enhance the ability

of the state to investigate and prosecute crimes of sexual violence, assisted by the requirement in the Act for the development of a national policy framework and national instructions to ensure implementation by government departments and agencies. The new Act contains an expanded statutory offence of rape in gender-neutral terms, applicable to all forms of 'sexual penetration' without consent and defines forms of coercion which would indicate lack of consent. The implementation of the Act may also improve complainants' access to justice as a result of provisions which, for instance, exclude as a valid defence for the accused that "a marital or other relationship exists or existed between him or her and the complainant". This provision gains particular significance in view of the high proportion, according to SAPS statistics, of reported rapes involving "people known to one another." However, the Act's protective measures for complainants, including regarding the leading of evidence on previous sexual history, and for other vulnerable witnesses, are not as robust and extensive as proposed in earlier versions of the draft law. The state's obligations to provide post-sexual assault medical care and treatment services, without discrimination as to the victim's economic status, have been narrowed to the provision of post-exposure prophylaxis (antiretroviral medication) to a victim who reports to a police station or a "designated health establishment" within 72 hours. The provision allowing for the compulsory HIV testing of arrested suspects may prove not to be in the best interests of the complainant and may infringe rights to privacy and fair trial for the accused.

Between July 2006 and June 2007, the police recorded a total of 88,784 incidents of "domestic violence".<sup>1</sup> During this period in about 38 percent of cases the complainants opened criminal cases against the perpetrators. However, the National Commissioner of Police, in his report in October 2007 to a national parliamentary portfolio committee, commented, without explanation as to the reasons, that "sadly many of those charges are later withdrawn".<sup>2</sup> Although the National Commissioner presented an encouraging picture of the program of training for new recruits and ongoing refresher courses for SAPS members to equip them with investigation skills and an understanding of their professional obligations under national law, he acknowledged that the number of complaints against police handling of these cases had increased. Amnesty International has been informed by non-governmental organizations involved in training of magistrates, police, health workers and others on the implementation of the Domestic Violence Act (DVA) that they continue to encounter amongst SAPS members a failure to understand that they have legal obligations to protect complainants. In testimonies taken by Amnesty International, the police response appeared very uneven, nearly ten years after the promulgation of the Act. Complainants described the police as having referred the complaint back to the family to resolve, or failing to seize dangerous weapons, or refusing to take any steps unless the complainant appeared at the police station or filed a criminal charge first, or failing to assess the security risks faced by the complainant, in a context where there was little or no provision of shelters. There were, however, also examples of police responding with due diligence and ensuring that women were able to access Protection Orders.

### **Realisation of the right to health for people living with HIV and AIDS**

South Africa has obligations under international human rights law, regional human rights treaties and national law to eliminate discrimination in the realisation of the right to health. In addition to the country's commitments under the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on the Rights of Women in Africa, and the

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<sup>1</sup> Under the provisions of the Domestic Violence Act (116 of 1998), the reported incidents could have included acts involving physical, sexual, emotional, verbal, psychological and economic abuse; intimidation, harassment, stalking, damage to property; entry into complainant's residence without consent; or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to the safety, health or well-being of the complainant (section (viii)(a-j))

<sup>2</sup> Safety and Security Portfolio Committee, 31 October 2007, Domestic Violence Report & SAPS Annual Report 2006/7 by National Commissioner (Accessed: <http://www.pmg.org.za/viewminute.php?id=9685>)

Convention on the Elimination of All Forms of discrimination against Women, it has signed but not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which prohibits discrimination in the realisation of the highest attainable standard of physical and mental health. The Constitutional Court has considered the standards set out in the ICESCR as well as the authoritative interpretation of the ICESCR by the UN Committee on Economic, Social and Cultural Rights while interpreting the South African Bill of Rights in the Constitution.<sup>3</sup>

South Africa has the largest number of people living with HIV and AIDS globally, with an estimated 5.5 million people HIV-infected. Population survey data in 2005 indicated a prevalence level of 16.2 percent among adults of 15-49 years. Women under 25 years of age are three to four times more likely to be HIV-infected than men of the same age group. Provincial antenatal prevalence rates vary considerably, ranging from 15.7 percent in the Western Cape to 39.1 percent in KwaZulu Natal. Women's socio-economic disempowerment and the impact of gender based violence contribute to women's significantly higher infection rates. For a number of years national government responses to the epidemic were characterised by ambivalence, a lack of a sense of urgency and bureaucratic obfuscation. However, in April 2007 a new National Strategic Plan on HIV/AIDS for 2007 to 2011 (NSP) was adopted, following six months of intensive and consultative discussions involving government, civil society organizations and healthcare providers. The NSP aims to tackle systemic barriers -- such as poverty, gender-based discrimination, stigma and health system weaknesses -- to prevention, treatment and care for people at risk of or living with HIV and AIDS.

According to the government's Mid-Term Report on the Millennium Development Goals in May 2007, "a cumulative total of 303,788 patients" were in antiretroviral therapy (ART) treatment programs at 316 public sector healthcare sites across the country. However, health rights monitoring organizations observed at the time that this still represented less than half of those needing ART. While treatment is free in public health sector facilities, other factors operate to undermine the availability, accessibility and quality of health services for people living with HIV and AIDS. These include, from Amnesty International's field observations, a critical shortage of health personnel, particularly in rural and other under-served areas; delays by national and provincial departments of health in the "accreditation" of additional healthcare facilities to provide ART, especially in certain provinces such as Mpumalanga; the physical inaccessibility of healthcare facilities providing ART for people living in circumstances of poverty due to distances and/or cost of travel; lack of daily access to adequate food which is essential for coping with the side-effects of and adhering to treatment; and unaddressed socio-economic inequalities, particularly for rural women, which increase the risk for them of HIV infection and affect their access to and ability to adhere to treatment.

#### **Violations of the prohibition against torture and other forms of ill-treatment**

South Africa is a party to a number of human rights treaties which prohibit torture and cruel, inhuman or degrading treatment or punishment, including the International Covenant on Civil and Political Rights, the UN Convention against Torture, the African Charter and is signatory to the Optional Protocol to the Convention against Torture. Its constitution prohibits torture and other forms of ill-treatment. Torture is not yet criminalised under ordinary law. The draft Combating of Torture Bill is flawed and has not been promoted by a government department actively enough to ensure it progresses through the parliamentary process, although it has been urged to do so by the Committee against Torture, following hearings in November 2006 (the follow-up report requested by the Committee against Torture was due in November 2007;

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<sup>3</sup> This is in line with section 39 of the South African Constitution, which requires all courts to consider international law when interpreting the Bill of Rights. See ruling of the Constitutional Court on 4 October 2000 in *Government of the Republic of South Africa and Others v. Grootboom and Others*, Case CCT 11/00, paragraphs 26-33, 36, 45.

however, at the time of writing it had not yet been received). Currently complaints of torture can only be investigated and prosecuted as crimes involving common assault, assault with intent to cause grievous bodily harm (GBH) and/or attempted murder. There is a statutory oversight body, the Independent Complaints Directorate (ICD), responsible for the independent investigation of complaints against the police, in particular deaths in custody and deaths as a result of police action, allegations of torture and assault GBH, and corruption. However, the ICD is under-resourced in relation to the size of the police services whose conduct it monitors. There is also an oversight body, the Judicial Inspectorate of Prisons, responsible for monitoring conditions in detention and complaints of ill-treatment and other abuses.

Amnesty International continues to receive reports of torture and other forms of ill-treatment and misuse of excessive force against arrested crime suspects, prisoners awaiting trial or sentenced and community-based and other political activists involved in public demonstrations. Widespread public concern about high levels of violent crime and continuing police fatalities on duty have remained as continuing contexts for police misconduct and institutional weaknesses with internal and external accountability mechanisms.

Including as recently as October 2007, corroborated cases of torture have included the police use of dogs against prone and shackled crime suspects, suffocation and electric shock devices, as well as kicking and beating of suspects. In some cases injured detainees have been denied urgent medical care. In several cases the detainees died as a result of the torture and denial of access to medical care.

From 2004 police have had to respond to an increasing number of public protests about a range of socio-economic and political grievances. In the majority of cases they have done so without resorting to the use of excessive force. However, throughout this period and as recently as September 2007, police units have in a number of incidents resorted to unlawful levels of force, including with prohibited sharp ammunition, precipitous use of rubber bullets – the weapon of “last resort” under SAPS regulations - the misuse of pepper spray against demonstrators already under police control and indiscriminate beatings against unarmed demonstrators notwithstanding their compliance with regulations governing public gatherings.

In November 2006 the government made public the report of the Jali Commission of Inquiry into corruption and other abuses within the prison system. The report drew attention to institutionalised corruption and maladministration, to the routine use by C-Max Super-Maximum security prison of solitary confinement, and that sexual violence was rife, with warders implicated in facilitating or covering-up incidents. Impunity for abuses was fostered by management failure to institute hearings and follow up on criminal charges with the police service. In a recent example of this failure of accountability, prison authorities at Westville Prison in October and November 2007 blocked independent medical access to prisoners injured as a result of apparently unjustified use of excessive force involving dogs, electric shock shields and batons. Inhumane prison conditions persist due to severe overcrowding. The same concern was raised by the UN Working Group on Arbitrary Detention which expressed alarm during its 2005 visit at the rate of overcrowding in detention facilities.

Incidents of *refoulement* have continued to occur. Government officials, in their response to the presence of large numbers of illegal immigrants and asylumseekers, and in respect of anti-terrorism measures, have failed to fulfil their obligations under Article 3 of the Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights and Article 33 of the Convention relating to Status of Refugees of 1951. Several deliberate and high profile incidents of *refoulement* have occurred, but they more routinely happen as a consequence of systematic failures within the Department of Home Affairs which have led to breaches of the State's obligations.

**D. Achievements, best practice, challenges and constraints**

While South Africa exhibits many examples of best practice in terms of its ratifications record, legal, institutional and policy frameworks, Amnesty International would like to point out some key challenges that the government of South Africa must address to uphold its commitment to human rights protection, including as a member of the Human Rights Council:

- To take increased measures to protect and provide redress to women at risk of or subjected to gender-based violence;
- To take increased measures to eliminate discriminatory barriers to access to health services for people living with HIV and AIDS;
- To take immediate steps to ratify the International Covenant on Economic, Social and Cultural Rights;
- To complete the process of developing and adopting legislative measures to prevent, prosecute and punish acts of torture and ill-treatment, in line with international standards, and to ratify the Optional Protocol to the Convention against Torture;
- To take concrete and effective measures to protect the rights to non-violent freedom of assembly and expression and ensure that law enforcement officials are fully trained and equipped to maintain public order without resort to excessive force, with any breaches vigorously and independently investigated;
- To ensure that all necessary measures are taken to implement the recommendations of the Jali Commission of Inquiry;
- To ensure that the principle of *non-refoulement* is fully understood and upheld by all state officials involved in enforcing the law relating to immigration and asylum-determination procedures, and upholding the country's obligations to combat terrorism.

**Appendix: Amnesty International documents for further reference**

- Amnesty international annual report 2007
- Amnesty international annual report 2006
- Amnesty International annual report 2005
- *Briefing for the Committee against Torture*, (AFR 53/002/2006)
- South Africa: Government must investigate circumstances of “disappeared” Pakistani’s transfer (AFR 53/001/2006)
- Pakistan/South Africa: Khalid Mehmood Rashid appears after 18 months of secret detention (AFR 53/003/2007)
- South Africa: Realising the right to health: addressing the consequences of gender-based violence, discrimination and poverty for women at risk of or living with HIV (AFR 53/001/2008) (available in February 2008)