

SOUTH AFRICAN HUMAN RIGHTS COMMISSION: ANNUAL INTERNATIONAL REPORT 2011

1 INTRODUCTION

The SAHRC's International Report 2011 is an annual publication which explores human rights developments at an international and regional level. The Report extracts and highlights developments that are of interest to South Africa and Africa, and sets out the level of formal compliance that South Africa currently enjoys in relation to its international and regional treaty obligations. Finally, the Report highlights the judicial and legislative developments, as well as popular new stories that have made headlines during the year.

The Report gives effect to the SAHRC's international obligations as an 'A' status national human rights institution (NHRI) to promote the ratification and effective implementation of international instruments; to promote and ensure the harmonisation of legislation and policy within international human rights instruments; and to report on human rights in the country in general. Institutions accredited 'A' status by the International Coordinating Committee, the international coordinating body of NHRIs, are institutions that are in full compliance with the UN Principles relating to the Status of National Institutions (Paris Principles), and enjoy much greater access to UN human rights treaty bodies and other organs than other NHRIs.

2 SOUTH AFRICA'S COMPLIANCE WITH CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND ITS OBLIGATION UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

The Report considers the current core international human rights treaties and South Africa's compliance with each, and examines treaty body actions, including observations and recommendations issued to States Parties and legal, policy, and social developments in South Africa that are of significance to the international human rights treaty regime. The Report also examines South Africa's obligations under Africa's regional human rights system, along with other human rights mechanisms outside of the core international treaty bodies, such as the various African Courts and the African Peer Review Mechanism.

2.1 The International System

- **International Covenant on Civil and Political Rights (ICCPR):** South Africa's initial country report to the Human Rights Committee (HRC) was due in March 2000, (a year after ratification), but remains outstanding, as does the second and third periodic reports. South Africa has yet to appear before the HRC.

- **International Covenant on Economic, Social and Cultural Rights (ICESCR):** South Africa has yet to ratify the Covenant and, despite playing an active role in its drafting and adoption, South Africa has yet to sign or ratify the Optional Protocol. The President of the Republic previously indicated that the delay in ratification is due to a possible conflict between the ICESCR and the Constitution, and with and without difficulties in identifying a lead department to service its implementation.
- **International Convention on the Elimination of all forms of Racial Discrimination (ICERD):** South Africa ratified the Convention in 1998 and was requested to submit a report on hate crimes, hate speech, xenophobia and racist behaviour by 15 August 2007. The report is still outstanding. The last periodic report, due in January 2010, is also outstanding. Although a draft bill on the Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance has been underway since 2010, the Bill has not yet been tabled in Parliament.
- **Convention on the Elimination of all forms of Discrimination Against Women (CEDAW):** South Africa ratified CEDAW in 1995 and acceded to the Optional Protocol in 2005. A combined country report was submitted in July 2010. The Committee on the Elimination of all forms of Discrimination Against Women's Concluding Observations was released in April 2011. The recommendations were, amongst others, enhancing the visibility of the Convention and its Optional Protocol to the women of South Africa; amending the Traditional Courts Bill to bring it in line with the constitutional principles of anti-discrimination; encouraging the prohibition of harmful practices such as ukuthwala, polygamy, killing of 'witches' and virginity testing; and expediting the promulgation of the Prevention and Combating of Trafficking of Persons Bill.

The Trafficking Bill seeks to close gaps in existing criminal legislation used to prosecute human traffickers by providing a clear definition of the crime; and sets a comprehensive approach to combating human trafficking including the identification and protection of victims, and introduces the concept of in-human trafficking. The SAHRC expresses concern regarding the availability of government to effectively implement the Trafficking Bill once it is passed.
- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT):** South Africa ratified UNCAT in 1998 and submitted its initial report to the Committee Against Torture in 2005, by which time it was five years overdue. In 2006 the Committee reviewed the report and requested additional information within a year of its request, to which South Africa failed to adhere. The second periodic report, due on 31 December 2009, is yet to be submitted. In October 2010, the Committee criticised South Africa for failing to submit its second report. South Africa signed the Optional Protocol to the Convention in 2006, but has not yet ratified it. The SAHRC Section 5 Committee on Torture, including representation from civil society, academy, independent institutions such as the Judicial Inspectorate of Correctional Services and the Independent Complaints Directorate met in August 2011 to discuss the best ways to promote the ratification and implementation of UNCAT and OPCAT in South Africa.

The CAT Committee expressed concern that South Africa failed to eliminate torture in police cells and has not criminalised torture in its national legislation. A draft bill, the Combating of Torture Bill, which criminalises acts of torture in South Africa in order that instances of torture may be dealt with appropriately through the criminal justice system, has been tabled and is currently before Parliament. The Bill will ensure that South Africa complies with its international obligations in terms of UNCAT. The SAHRC raises a concern that the draft bill does not directly address the designation of a national preventive mechanism as required by the Optional Protocol, but does not indicate whether this has been raised with the PC.

- **Convention on the Rights of the Child (CRC):** South Africa ratified the CRC in 1995, and submitted its initial report to the Committee in 1995, but did not submit its second or third periodic reports (no indication is given of when these were due). The fourth report was due on 15 June 2012. South Africa acceded to the Optional Protocol on the Sale of Children, Child Pornography and Child Prostitution (OPSC) in 2003, and ratified the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) in 2009. South Africa's initial OPSC and OPAC reports are also outstanding. The Report indicates that South Africa is far from reaching the SADC target of reducing the maternal mortality rates by 2015. The current trend suggests that it is increasing and much needs to be done to reach South Africa's MDG target of reducing this figure to 20 per 100 live births.
- **International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW):** Despite attracting significant numbers of migrant workers, South Africa has neither signed nor ratified the ICRMW. Although domestic legislation, such as the Labour Relations Act aims to protect the rights of employees, migrant workers are often subject to ill treatment and discrimination. The Immigration Amendment Act 13 of 2011 (to come into operation in a date yet to be determined by the President) and Refugees Amendment Act 33 of 2011 (to come into operation immediately after the commencement of the Refugees Amendment Act 33 of 2008) were enacted in 2011. The former UN Special Rapporteur on human rights of migrants in a visit to South Africa in February 2011 recommended that government address the number of undocumented immigrants or face a repeat of the widespread attacks on migrants in 2008. In May 2011, at the UN Office of the High Commissioner for Human Rights panel discussion, a call was made for the state to develop legislation relating to hate crime and prejudice, which could then be used to tackle xenophobic crime.
- **Convention on the Rights of Persons with Disabilities (CRPD):** South Africa ratified the CRPD and its Optional Protocol in 2007. Article 33(2) of the CRPD requires State Parties to establish an independent monitoring mechanism distinct from their implementation mechanism. Internationally, national human rights institutions have been identified as the ideal bodies to perform this role. The Report indicates that one of the main areas of concern affecting persons with disabilities is unemployment, and that the 2011 Employment Equity Commission Report highlights that persons with disabilities still lag behind at most levels when measured against the Economically Active Population. The Department of Local and Provincial Government has established a

framework under which it aims for persons with disabilities to constitute 2% of the public and private sector workforce by 2014. Disability also seriously affects access to basic education, with an estimated 10% of children with disabilities not attending school. The Report indicates that the needs of disabled learners are not addressed in the National Development Plan that was released in November 2011. With regard to accessibility, new measures were instituted to allow greater voter accessibility to persons with disabilities in the April 2011 elections.

- **International Convention for the Protection of all Persons from Enforced Disappearance (ICPED):** Despite the SAHRC's continued encouragement to government, South Africa is yet to sign or ratify the ICPED, which was adopted by the UN in December 2006. This is also despite the fact that during the apartheid era, there were many incidents of enforced disappearances including targeted abduction operations, abductions of detainees from police stations, disappearance of prisoners due to be released and disappearances during period of unrest in townships.
- **Human Rights Council (HRC):** The South African Government in 2011 tabled a resolution at the HRC requesting a report to be issued concerning the position of lesbian, gay, bisexual, transgender and intersex (LGBTI) citizens around the world. The High Commissioner issued the requested report on 17 November 2011. The report recalls the Concluding Observations of the CRC, the CAT and the CEDAW in relation to South Africa, and recommends the elimination of discrimination based on sexual orientation and gender identity. The UN Special Rapporteur on Violence against Women of South Africa has also highlighted the targeted murder of lesbian women in South Africa.

The Universal Periodic Review (UPR) is a state-driven process that reveals the human rights records of all UN Member States once every four years. South Africa submitted its first UPR Report in 2008, and is yet to indicate if it accepts or rejects the recommendations thereon. South Africa was scheduled to appear before the HRC as part of the second cycle of review during 2012.

- **Economic and Social Council:** In terms of South Africa's participation in the 55th Session of the Commission on the Status of Women held during 2011, media attention was directed at the South African government officials who were present at the session, but failed to attend many of the session's events. It was reported that the Correctional Services Minister, B. Dlamini, failed to attend any of the sessions. The SAHRC is following up on these reports via the CGE, which is constitutionally mandated to attend to matters concerning gender equality.

2.2 The Regional System

- **African Charter on Human and Peoples' Rights (ACHPR):** South Africa became the eighth country to ratify the AU Charter on Democracy, Governance and Elections. The SAHRC noted that the promotion and protection of human rights in Africa has greatly improved over the years, despite the numerous social, economic and political challenges that continue to confront the African continent; and called upon the AU to encourage

states to ratify, domesticate and implement international and regional instruments. The Commission also drew attention to the Working Group on People with Disabilities and the Elderly recently established by the ACHPR, noting that issues that affect these two vulnerable groups are distinct, and advocating for the working group to be split in two in order to deal effectively with the two vulnerable groups separately. South Africa acceded to the African Charter in July 1996, and ratified the African Women's Protocol on 17 December 2004, with reservations. The initial country report was submitted in October 1998, and the second report in May 2005, combining the third and fourth reports to the ACHPR. Subsequent reports remain outstanding (no indication is given of when these were due).

- **The African Charter on the Rights and Welfare of the Child (ACRWC):** The ACRWC was drawn up in response to the sentiment shared by many African states that the continent had been marginalised during the 10-year drafting process of the UNCRC. The ACRWC set some higher standards than the UNCRC, for instance by having a higher minimum age of 18 years for children to be recruited into the armed forces, compared with UNCRC's age of 15. Although South Africa ratified the ACRWC in 2000 its initial report to the ACRWC is still outstanding.
- **The regional and sub-regional courts system:** The AU in 2008 signed a protocol that merged the African Court on Human and People's Rights with the still to be established African Court of Justice to form an **African Court of Justice and Human Rights**. The Court will come into effect once 15 AU Member States have ratified the Protocol. At this stage only three States (Burkina Faso, Libya and Mali) have ratified the Protocol (Congo and Benin have since ratified the Protocol during 2012).

On a sub-regional level, the **SADC Tribunal** was instructed in 2010 by the 13th SADC Summit to refrain from accepting any new cases, and blocked the re-appointment of eligible judges. Currently there are only four judges (10 judges constitutes a full bench), and the Court consequently cannot constitute itself to hear matters.

- **African Peer Review Mechanism (APRM):** South Africa submitted its second National Programme of Action report to the APRM in 2011. The APRM noted that there were still outstanding matters in the implementation of the NPOA, and the country is required to submit a third report responding to all outstanding matters by 2013.

3 OISD RECOMMENDATIONS

The OISD recommends the following:

- **International Covenant on Civil and Political Rights (ICCPR):** That the PC Justice request the Department of Justice (the lead Department on the Instrument) to provide explanations for why the periodic country reports are still outstanding, as well as what progress have been made towards submitting these reports.
- **International Covenant on Economic, Social and Cultural Rights (ICESCR):** That the PC Justice request the Department of Justice to brief them on developments made towards acceding to the Convention.

- **International Convention on the Elimination of all forms of Racial Discrimination (ICERD):** That the PC on Justice request the Department of Justice to report why the reports have not been submitted and what progress have been made in this regard; and to provide an update on the current status of the proposed Bill on Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance.
- **Convention on the Elimination of all forms of Discrimination Against Women (CEDAW):** That the PC on Women, Children and Persons with Disabilities request the Department of Women, Children and Persons with Disabilities on a progress report of the implementation of the CEDAW Committee's recommendations.
- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT):** That the PC on Justice Request the Department of Justice to brief them on progress made toward the ratification of the Optional Protocol; progress made towards submitting the outstanding country report; and on progress made towards the ratification of the Optional Protocol and the relevant implications and obligations that the adoption of the Optional Protocol would have for South Africa.
- **Convention on the Rights of the Child (CRC):** That the PC on Women request the Department of Women to report on the progress of the submission of the outstanding country reports, as well as the measures taken to reduce child and infant mortality to meet the SADC and MDG targets.
- **International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW):** That the PC on Labour requests the Department of Labour to brief them on the treatment of migrant workers, in order to identify and address the challenges; and that the PC on International Relations and Cooperation request the Department of International Relations and Cooperation to brief them on the reasons why South Africa did not ratify or sign the Convention; and what the necessary obligations would be for South Africa should the Convention be ratified.
- **International Convention for the Protection of all Persons from Enforced Disappearance (ICPED):** That the PC on International Relations and Cooperation request the Department to brief them on the reasons why South Africa has not adopted the Convention, and on any progress made in this regard, as well as what South Africa's obligations would be should the Convention be adopted.
- **Human Rights Council (HRC):** That the PC on Women request the Department to brief them on whether the recommendations contained in the Report of the High Commissioner have been accepted or rejected, as well as on the implementation of the accepted recommendations.
- **Economic and Social Council:** That the PC on Women request the SAHRC and CGE to submit reports on the Session of the Commission on the Status of Women held during 2011, and that the government officials who failed to attend the session's events be asked to account to the Committee for their non-attendance.
- **African Charter on Human and Peoples' Rights (ACHPR):** That the PC on Women request the Department to indicate what measures have been taken to ensure that the

country reports are tabled timeously; and when the outstanding reports are expected to be submitted.

- **The African Charter on the Rights and Welfare of the Child (ACRWC):** That the PC on Women request the Department for Women to provide reasons why the country reports were not submitted, and indicate when the outstanding reports are expected to be submitted.
- **African Court of Justice and Human Rights:** That the PC on International Relations and Cooperation requests the Department to brief them on whether, and if so, when, South Africa is expected to ratify the Protocol on the African Court of Justice and Human Rights; and what the implications thereof would be for South Africa.
- **African Peer Review Mechanism (APRM):** That the PC on International Relations and Cooperation requests the Department to brief them on the progress made towards the submission of the third report and outstanding matters.

4 CONCLUSION

The Report provides a summary of the most important human rights developments both internationally and domestically, amongst others to assist in creating a growing awareness of international human rights law in South Africa. There are no specific findings or recommendations. The Report demonstrates the importance of international human rights law to issues that are being grappled with in South Africa.

South Africa has yet to ratify the ICESCR, the ICRMW, the ICPED and the Optional Protocol to the Convention Against Torture (OPCAT). South Africa is a *signatory* to the ICESCR and OPCAT.

The instances mentioned in the Report where South Africa has received negative attention of the international human rights communities, include its bad reporting record to international bodies; violence against LGBTI persons and violence in prisons. A notable concern is the fact that a number of South Africa's country reports under various instruments are outstanding.