

Human Rights Committee

Concluding observations on the initial report of South Africa

1. The Committee considered the initial report of South Africa (CCPR/C/ZAF/1) at its 3234th and 3235th meetings (CCPR/C/SR.3234 and 3235), held on 7 and 8 March 2016. At its 3258th meeting, held on 23 March 2016, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the initial report of South Africa and the information presented therein, and regrets that it is 14 years overdue. It expresses appreciation for the opportunity to engage in a constructive dialogue with the State party's high-level delegation on the measures that the State party has taken since the entry into force of the Covenant to implement its provisions. The Committee is grateful to the State party for its written replies (CCPR/C/ZAF/Q/1/Add.1) to the list of issues (CCPR/C/ZAF/Q/1), which were supplemented by oral responses provided by the delegation, and supplementary information provided to it in writing.

B. Positive aspects

3. The Committee welcomes the following legislative and institutional steps taken by the State party:

(a) The enactment on 25 July 2013 of the Prevention and Combating of Torture of Persons Act, which criminalises torture;

(b) The enactment on 29 July 2013 of the Prevention and Combating of Trafficking in Persons Act, which became operational on 9 August 2015;

(c) The enactment of the Child Justice Act in 2008, which took effect on 1 April 2010, which enhances protections for children in conflict with the law;

· Adopted by the Committee at its 116th session (7–31 March 2016).

(d) The adoption of several legislative and institutional reforms aimed at combating violence against women, including the Domestic Violence Act of 2003 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, the re-establishment of specialized sexual offences courts, and the establishment of Thuthuzela Care Centres;

(e) The establishment in 2011 of the National Task Team to counter discrimination and violence against persons based on their actual or perceived sexual orientation and gender identity and expression, and the launch in 2014 of the National Intervention Strategy; and

(f) The passing of the Choice on Termination of Pregnancy Act in 1996 and other measures designed to increase access to safe abortion resulting in the significant decrease in maternal mortality and morbidity.

4. The Committee welcomes the ratification of, or accession to, the following international instruments by the State party since the entry into force of the Covenant in 1998:

(a) The Optional Protocol to the International Covenant on Civil and Political Rights, on 28 August 2002;

(b) The Convention on the Rights of Persons with Disabilities and its Optional Protocol, on 30 November 2007;

(c) The International Covenant on Economic, Social and Cultural Rights, on 12 January 2015;

(d) The Optional Protocols to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on 30 June 2003; and on the involvement of Children in Armed Conflict on 24 September 2009;

(e) The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, on 18 October 2005;

5. The Committee welcomes the State party's declaration made under article 41 of the Covenant, recognizing the competence of the Committee to receive and consider inter-State communications.

C. Principal matters of concern and recommendations

Domestic applicability of the Covenant

6. The Committee notes the apparent inconsistency between the text of the Constitution, which provides that a self-executing provision of an international agreement approved by Parliament is considered to be part of domestic law, and the information contained in the Core Document (HRI/CORE/ZAF/2014, para. 95), which states that provision of an international treaty cannot be invoked before or directly enforced by the Courts. The Committee also notes that only two individual communications have been submitted under the Optional Protocol to the Covenant since 2002, and that this may be illustrative of lack of awareness of the Covenant and the Optional Protocol (art. 2).

7. The State party should consider taking measures to give full legal effect to the Covenant under domestic law, and it should make more vigorous efforts to raise awareness about the Covenant and the Optional Protocol among judges, lawyers, prosecutors and the public at large. In the event of a violation of the Covenant, the State party should ensure access to an effective remedy, in accordance with article 2, paragraph 3.

Non-compliance with domestic court decisions

8. The Committee notes the ruling of the North Gauteng High Court, which considered the authorities' failure to detain Sudan President Omar al-Bashir in June 2015 pursuant to an International Criminal Court arrest warrant to be inconsistent with the Constitution, and expresses concern that President al-Bashir was authorized to leave the country in violation of an interim Court order (arts. 2, and 14).

9. **The State party should continue its investigation of the events surrounding the failure to comply with the interim Court order on President Al-Bashir and take the necessary measures to ensure compliance with rulings of domestic courts, including in cases relating to the State party's international treaty obligations.**

Oversight and monitoring mechanisms

10. While acknowledging the important work of State institutions exercising oversight over government operations in connection with the protection of Covenant rights, the Committee is concerned about various challenges faced by some of these oversight bodies in terms of budget limitations, lack of institutional independence from supervised government departments, and limited mandates and powers. The Committee notes the State party's intention to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but it is concerned about the absence of independent and sustained monitoring of places of deprivation of liberty other than prisons (arts. 2, 6 and 7).

11. **The State party should ensure that all oversight bodies are institutionally independent, adequately funded and equipped with the necessary powers and functions to deal with complaints and investigations promptly and effectively, hold authorities accountable, and facilitate access by victims of human rights violations to an effective remedy. The State party is encouraged to speed up the preparations for the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and should establish a system for the regular and independent monitoring of all places of detention, as well as a confidential mechanism for receiving and processing complaints lodged by persons deprived of their liberty.**

Truth and Reconciliation Commission

12. The Committee commends the State party for the work of the Truth and Reconciliation Commission in investigating gross human rights violations perpetrated during the apartheid era. It is concerned, however, that the recommendations of the Commission have not been fully implemented, in particular with regard to prosecution of perpetrators, investigations of cases of disappearances, and adequate reparation to all victims (arts. 2, 6 and 7).

13. **The State party should increase its efforts to implement the recommendations of the Truth and Reconciliation Commission, investigate cases of serious human rights violations documented by the Commission, including those involving enforced disappearances, prosecute and punish perpetrators, and provide adequate reparation to all victims.**

Racism and xenophobia

14. The Committee is concerned about numerous manifestations of racism and xenophobia, including violent attacks against foreign nationals and migrants, refugees and asylum-seekers, resulting in deaths, injuries, displacement and property destruction. The Committee is further concerned about the inability of the authorities to prevent and address

racist and xenophobic attacks and to hold perpetrators accountable (arts. 2, 6, 7, 9, 17, 20 and 26).

15. The State party should redouble its efforts to prevent and eradicate all manifestations of racism and xenophobia, protect all communities in South Africa against racist or xenophobic attacks, and improve policing responses to violence against non-nationals. Effective investigations into alleged racist or xenophobic attacks and other hate crimes should be systematically conducted, perpetrators should be prosecuted and, if convicted, punished with appropriate sanctions, and victims should be provided with adequate remedies. The State party should also pass as soon as possible appropriate legislation explicitly prohibiting hate crimes and hate speech.

Persons living with HIV/AIDS

16. While acknowledging the many efforts taken by the State party to promote and protect the life and health of persons living with HIV/AIDS, the Committee remains concerned at the persistence of stigma and discrimination against such persons and at barriers to the equal access to health services for such persons, particularly for women and persons living in poor or rural areas (arts. 2, 6, and 26).

17. The State party should continue its efforts to:

(a) Raise awareness on HIV/AIDS with a view to combating prejudices and negative stereotypes and discrimination against people living with HIV/AIDS;

(b) Speedily adopt the draft National Policy on HIV, STIs and TB and implement its sexual and reproductive health policy, especially towards adolescents;

(c) Ensure that all persons at risk or living with HIV/AIDS have equal access to medical care and treatment, including adequate counselling services.

Harmful cultural traditions and practices

18. The Committee is concerned at the persistence of harmful traditional or cultural practices as *ukuthwala*, virginity testing and witchcraft, and about reports suggesting the prevalence of death and injury resulting from the practice of *initiation*. The Committee is also concerned at the existence in law and in practice of polygamous customary marriages in the State party, which undermine the principle of non-discrimination, as provided under the Covenant in the field of marriage and family relations (arts. 2, 3, 6, 7, 17, 24 and 26).

19. The State party should amend the Children's Act with the aim of prohibiting virginity tests for children, irrespective of their age, and undertake effective measures, including education campaigns, designed to combat harmful traditional, customary or religious practices. It should also take adequate measures to reduce the incidence of polygamy, with a view to bringing about its abolition. Initiation schools should be strictly regulated and monitored throughout the territory.

Violence based on sex, gender, sexual orientation and gender identity

20. While acknowledging the considerable efforts invested by the State party in this field, the Committee is concerned that gender-based and domestic violence remains a serious problem in the State party, that the conviction rate for such acts is low, and that there is a lack of disaggregated data on the phenomenon. It is also concerned about the persistence of stigma against persons on the basis of their real or perceived sexual or gender orientation, gender identity or bodily diversity, and that such persons are subject to harassment, acts of discrimination and to sexual and physical violence (arts. 2, 3, 6, 7 and 26).

21. **The State party should redouble its efforts to prevent and combat sexual, gender-based and domestic violence and to eradicate discrimination and violence against persons on the basis of their real or perceived sexual or gender orientation, gender identity or bodily diversity, including through implementation of the National Intervention Strategy. The State party should also facilitate reporting and collection of data on sexual and gender-based crimes, and ensure that all such crimes are promptly and thoroughly investigated, that perpetrators are brought to justice and that victims have access to full reparation and means of protection, including access to State- and NGO-run shelters or centres throughout the State party's territory. The State party should also ensure adequate training for law enforcement and health service personnel regarding domestic and gender-based violence, and violence based on sexual orientation and gender identity.**

Civil remedies for victims of torture

22. The Committee notes with concern that the Prevention and Combating of Torture of Persons Act does not itself provide for civil claims for redress of torture, and that such claims consequently need to be framed as a common law tort claim for assault or related less serious offences, since torture is not recognized as a tort (art. 2 and 7).

23. **The State party should consider amending the Prevention and Combating of Torture of Persons Act with a view to including specific provisions relating to the right of civil redress and remedy for victims of torture.**

Corporal punishment

24. The Committee is concerned that corporal punishment in the home is not prohibited, and is traditionally accepted and widely practiced, and that it is still lawful in private education institutions and continues to be used in certain schools as a means of discipline, despite its legal prohibition (arts. 7 and 24).

25. **The State party should take practical steps, including through legislative measures, where appropriate, to put an end to corporal punishment in all settings.**

Excessive and disproportionate use of force

26. The Committee is concerned about numerous reports of excessive and disproportionate use of force by law-enforcement officials in the context of public protests, which resulted in loss of lives. The Committee is also concerned about the slow pace of the investigation into the Marikana incident, including with respect to the criminal responsibility of members of the South African Police Service and the potential liability of the Lonmin Mining Company (arts. 6, 7 and 21).

27. **The State party should:**

(a) Expedite the work of the Ministry of Police Task Team, and the Panel of International Experts in implementing the recommendations of the Farlam Commission of Inquiry, revise laws and policies regarding public order policing and the use of force, including lethal force by law enforcement officials, to ensure that all policing laws, policies, and guidelines are consistent with article 6 of the Covenant and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;

(b) Take all necessary measures, particularly in terms of training and equipment to prevent law enforcement and security forces from using excessive force or using lethal weapons in situations that do not warrant recourse to such force;

(c) Ensure that prompt, thorough, effective, independent and impartial investigations are launched into all incidents involving the use of firearms and all allegations of excessive use of force by law enforcement officers, as well as the potential liability of the Lonmin Mining Company for the Marikana incident, prosecute and punish perpetrators of illegal killings, and provide effective remedies to victims; and

(d) Review the compliance of companies with their responsibilities under all relevant legal standards for operations in the mining sector.

Violence, torture, ill-treatment, and deaths in custody

28. The Committee is concerned about the number of reported cases of violence, including sexual violence, excessive use of force, torture and other forms of ill-treatment against detainees, as well as deaths resulting from actions of police and prison officials. It also notes with concern that few investigations into such reported cases have led to prosecutions resulting in the punishment of those responsible (arts. 2, 6, 7 and 10).

29. The State party should ensure that all deaths occurring in detention and all cases of violence, committed in State or contract-managed prisons are properly investigated by an independent mechanism. It should also ensure that perpetrators of and accomplices in such violent acts are duly prosecuted and punished in accordance with the law, and that victims and their families are provided with remedies, including rehabilitation and compensation.

Prison conditions

30. The Committee is concerned at poor conditions of detention in some of the State party's prisons, particularly with respect to overcrowding, dilapidated infrastructures, unsanitary conditions, inadequate food, lack of exercise, poor ventilation, and limited access to health services. The Committee notes with concern the conditions of detention in the two super-maximum security prisons and the segregation measures imposed, for instance in Ebongweni super-maximum prison where prisoners are locked up 23 hours a day for a minimum period of six months (art. 10).

31. The State party should continue to strengthen its efforts to improve conditions of detention by taking practical measures to, inter alia:

(a) Reduce overcrowding, particularly through the promotion of alternatives to detention, the loosening of bail requirements, and the revision of arrest quotas as indicators of police performance, and by ensuring that bail determinations are made promptly and that persons on remand are not kept in custody for an unreasonable period of time;

(b) Increase efforts to guarantee the right of detainees to be treated with humanity and dignity and ensure that conditions of detention in all of the country's prisons, including those operated by private contractors, are compatible with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules);

(c) Ensure that de facto solitary confinement measures, including segregation, are used only in the most exceptional circumstances and for strictly limited periods of a short duration.

Human trafficking and labour exploitation

32. While taking note of the progress made with regard to combating trafficking in persons, the Committee is concerned that the State Party still lacks proper identification and

referral mechanisms for victims of trafficking in persons. The Committee welcomes the adoption of the Labour Relations Amendment act, 2014 (Act No 6 of 2014), which provides greater protection for workers placed in temporary employment service, but it remains concerned at reports of migrant workers employed through labour brokers' services to work in the mining industry, who are victims of exploitative labour conditions (arts. 7, and 8).

33. The State party should continue its efforts to prevent and eradicate trafficking in persons and take the necessary steps to outlaw and hold responsible labour brokers involved in the exploitation of workers in violation of articles 7 and 8 of the Covenant. It should also step up its efforts to identify and protect persons who may be vulnerable to human trafficking and establish a nationwide identification and referral system for victims of trafficking.

Access to refugee determination process

34. The Committee is concerned at increased difficulties in accessing refugee status determination processes due to the closure of several urban Refugee Reception Offices, and about the reports of inadequate safeguards in the status determination process. The Committee is concerned about allegations that some immigration officers refuse to provide asylum seekers with transit permits at the port of entry, putting them at risk of immediate arrest or deportation. The Committee is concerned about allegations that these obstacles have resulted in the development of corrupt practices and have increased the vulnerability of migrants, especially children, rendering them undocumented and stateless (arts. 6, 7 and 13).

35. The State party should facilitate access to documentation and fair procedures for asylum seekers, including translation services and, where the interest of justice so require, access to legal representation. It should ensure that asylum applications are processed expeditiously and that the principle of non-refoulement is respected under all circumstances.

Immigration detention

36. The Committee is concerned about reports of: (a) cases of undocumented migrants detained in police stations and in prison facilities; (b) individuals detained at Lindela Repatriation Centre for lengthy periods of time without a warrant; and, (c) protracted detention of stateless persons and their deportation to countries where they were not recognised as citizens. It also notes with concern the poor conditions at Lindela Repatriation Centre, including overcrowding, lack of hygiene and of medical services (arts. 6, 9, 10 and 23).

37. The State party should ensure that detention pending deportation is applied as a last resort only, with special regard being given to the needs of particularly vulnerable persons, and that individuals detained for immigration-related reasons are held in facilities specifically designed for that purpose. The State party should also strengthen its efforts to ensure adequate living conditions in all immigration centres, by reducing overcrowding, providing adequate health-care services, and ensuring proper sanitary conditions.

Juvenile justice

38. The Committee welcomes the delegation's statement that the age of criminal responsibility will be increased from 10 to 12 years old, with a rebuttable presumption (*doli incapax*) for children aged between 12 and 14. The Committee also welcomes efforts to strengthen the juvenile justice system, but notes with concern the lack of funding allocated

to community diversion programmes and the over-use by courts of placement in Child and Youth Care Centres, where children in need of care are reportedly not always separated from children in conflict with the law (arts. 9, 10, 14 and 24).

39. The State party should allocate adequate funding to community based diversion programmes for children and reduce the number of children held in Child and Youth Care Centres. It should also ensure that children in conflict with the law are separated from children in need of care. When raising the age of criminal responsibility to 12 years old, the State party should ensure that the current level of protection afforded to children aged between 12 and 14 years old is maintained.

Protection of Human Rights Defenders

40. The Committee is concerned about reports of threats, intimidation, harassment, excessive use of force and physical attacks, some resulting in deaths, by private actors and police forces against human rights defenders, in particular those working on corporate accountability, land rights, and transparency issues, as well as LGBTI and HIV activists. It also notes with concern reports about the lack of due diligence of law enforcement officers in protecting human rights defenders, including registering and investigating allegations of human rights violations, and in securing accountability for such violations (arts. 2, 6, 9, 19, 21 and 22).

41. The State party should take all the necessary steps to protect the right of human rights defenders to freedom of expression, association and peaceful assembly. It should ensure that police officials receive adequate training regarding the protection of human rights defenders. The State party should also thoroughly investigate all attacks on the life, physical integrity and dignity of these persons, bring perpetrators to justice and provide victims with appropriate remedies.

Right to privacy and interception of private communications

42. The Committee is concerned about the relatively low threshold for conducting surveillance in the State party and the relatively weak safeguards, oversight and remedies against unlawful interference with the right to privacy contained in the 2002 Relation of Interception of Communications and Provisions and Provision of Communications Related Information Act (RICA). It is also concerned about the wide scope of the data retention regime under the Act. The Committee is further concerned at reports of unlawful surveillances practices, including mass interception of communications, carried out by the National Communications Centre and at delays in fully operationalizing the Protection of Personal Information Act, 2013, due in particular to delays in the establishment of an Information Regulator (arts. 17 and 21).

43. The State party should take all necessary measures to ensure that its surveillance activities conform to its obligations under the Covenant, including article 17, and that any interference with the right to privacy complies with the principles of legality, necessity and proportionality. The State party should refrain from engaging in mass surveillance of private communications without prior judicial authorization and consider revoking or limiting the requirement for mandatory retention of data by third parties. It should also ensure that interception of communications by law enforcement and security services is carried out only on the basis of the law and under judicial supervision. The State party should increase the transparency of its surveillance policy and speedily establish independent oversight mechanisms to prevent abuses and ensure that individuals have access to effective remedies.

Land claims

44. While welcoming the reopening of the land claims process and the development of a policy and legislation on exceptions to the 19 June 1913 cut-off date to accommodate the descendants of the Khoi-San communities, the Committee is concerned about delays in processing of claims before the Restitution Commission pursuant to the 1994 Restitution of Land Act, and the inability of Khoi-San communities dispossessed prior to 1913 to benefit from the land restitution process (art. 27).

45. The State party should step up its efforts to ensure the processing of land restitution claims lodged under the Restitution of Land Act, 1994, and the Restitution of Land Rights Amendment Act, 2014. In addition, it should consider legislative measures to ensure that dispossession of indigenous peoples of their lands prior to 1913 is adequately addressed.

Indigenous peoples

46. While welcoming the introduction of the Traditional and Khoi-San Leadership Bill into parliament in September 2015, the Committee notes concerns raised by traditional and indigenous communities, including with regard to some of the recognition criteria. It is concerned that some of the Khoi-San languages are on the verge of extinction. In addition, the Committee is concerned that existing subsistence fishing quotas of indigenous groups have been taken away on a temporary basis without warning, leaving families with insufficient means of livelihood (arts. 2, 25, 26 and 27).

47. In consultation with indigenous and traditional communities, the State party should revise the Traditional and Khoi-San Leadership Bill with a view to taking into consideration their concerns. It should step up its efforts to promote and preserve Khoi and San indigenous languages. The State party should ensure that small scale fishing communities are not discriminated against in their access to traditional means of subsistence.

D. Dissemination of information relating to the Covenant

48. The State party should widely disseminate the Covenant, the two Optional Protocols to the Covenant, its initial report, the written replies to the Committee's list of issues and the present concluding observations with a view to raising awareness of the rights enshrined in the Covenant among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, and the general public. The State party should ensure that the report and the present concluding observations are translated into its official languages.

49. Pursuant to rule 71, paragraph 5, of the rules of procedure of the Committee, the State party should provide, within one year, relevant information on the implementation of the recommendations made by the Committee in paragraph 13 (Truth and Reconciliation Commission), 15 (racism and xenophobia) and 31 (prison conditions) above.

50. The Committee requests the State party to submit its next periodic report by 31 March 2020 and to include in that report specific up-to-date information on the implementation of the recommendations made in the present concluding observations and of the Covenant as a whole. The Committee also requests the State party, in preparing the report, to broadly consult civil society and non-governmental organizations operating in the country, as well as minority and marginalized groups. In accordance with General Assembly resolution 68/268, the word limit for the report is 21,200 words.