



Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
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Being the last of the front line states to gain independence and because of its history of fighting against racial discrimination and hatred, South Africa is expected to demonstrate leadership in observance of human rights and the instruments and protocols that SADC (Southern Africa Development Community) states are developing. It is also expected to be the vanguard in the democratisation of the Southern African region. Product of the anti-apartheid struggle and foundation of the new democracy, the *1996 Constitution* defines the Bill of Rights as the cornerstone of the new regime. It embodies a broad and progressive conception of human rights, providing important protection not only for civil and political rights but also for economic, social, and cultural rights.

However, South Africa is also a country faced with many domestic challenges, in particular in terms of development, social equity and racial discrimination. Unemployment affects about 40% of the active population, and as much as 80% in some areas. While the GDP is significant, there remains huge disparities within the country; 12% of the population does not have a sustainable and safe access to water; HIV prevalence is 19% within the population between 15 and 49 year old¹; about a third of the urban population lives in slums. This tight social context favours strong human rights violations, notably regarding the issue of immigration and the rights of migrants, a specific situation that FIDH would like to highlight here.

Vulnerable Migrants

As growing domestic and international concerns have been expressed regarding the human rights situation of vulnerable migrants in South Africa, FIDH decided to conduct a fact-finding mission from 26 February to 5 March 2007 to examine the legal and policy framework applying to their entry and stay as well as their actual working and living conditions. Most migrants entering South Africa, both regularly and irregularly, come from countries of the SADC. Highest numbers come from **Mozambique, Zimbabwe** and **Lesotho**, with an increase of Zimbabweans in recent years due to the political situation in their country.

Even though both international (**UN Convention on the rights of all migrant workers and members of their families**²) and South African law (**2002 Immigration Act and 1998 Refugees Act**) provide for a wide protection of the human rights of migrants, including undocumented migrants and including in the area of social and economic rights, undocumented migrants, which represent around 500 000 persons for a

¹ World Bank data and statistics (2006)

² Regretfully, South Africa did not ratify, nor even signed this essential Convention.

population of 47 millions, are amongst the most exposed to human rights violations and have the least legal protection and support to defend their rights:

- **The right to freedom and personal security:** migrants, even documented, live in permanent insecurity. Police control and harassment is a common experience among foreign migrants. Interviews and reports indicate that ID control are frequent and may come with police officers asking for bribes or sexual favours, extorting money or goods, inflicting verbal or physical abuse. Such migrants are also faced with hasty deportation at the country borders without adequate verification of their legal status, with police violence, including lack of physical security, intimacy, destruction of identity documents and properties, etc.

In its November 2006 concluding comments on South Africa's initial report, the **UN Committee Against Torture** was concerned by the return of persons by the authorities to States where there are substantial grounds for believing that they would be in danger of being subjected to torture or sentenced to death. The Committee recommended South Africa to examine thoroughly the merits of each individual case and to ensure that adequate judicial mechanisms for the review of the decision are in place. The Committee also encouraged the State to ensure effective post-return monitoring arrangements, when determining the applicability of its *non-refoulement* obligations under article 3 of the Convention against torture.

- **The right not to be arbitrarily arrested and detained as well as rights during arrest and detention:** migrants also run the risk of being arrested (including wrongfully), detained (including for longer periods than authorised by law: in 2006 hundreds of suspected illegal immigrants detained at Lindela Repatriation Centre were unlawfully held beyond the period allowed under the Immigration Act (30 days or 120 days with a court warrant)) and deported. These practices clearly contravene migrants rights to dignity, personal security and property.

In its November 2006 concluding comments, the **Committee Against Torture** expressed concerns with the difficulties affecting documented and undocumented non-citizens awaiting in deportation centres, who are unable to contest the validity of their detention and without access to legal aid. The committee was particularly concerned about allegations of ill-treatments, harassment and extortion of non-citizens by law enforcement personnel. The Committee urged the South African authorities to take all necessary measures to prevent and combat ill-treatment of non-citizens detained in repatriation centres, especially in Lindela Repatriation Centre.

- **The right not to be subjected to forced labour and the right to fair and decent conditions of work:** documented and undocumented migrants are exposed to exploitation at work. Our mission reported that many of them are *paid below the legal minimum wage* (experienced Zimbabwean teachers we interviewed, whether documented or undocumented, were paid between 600 and 800 rands per month, and one as little as 350 rands, when teachers in government schools often start at 2 000 rands per month or more), *work for longer hours* than authorised by law, without obtaining necessary break and leave (They often work long hours, working 8 hours or more per day, sometimes up to 7 days a week and are made to work even on certain public holidays or Sundays), with no or limited access to compensation for injuries and occupational hazards and diseases, etc. Above all, migrant workers, particularly undocumented ones, are more vulnerable to abuses at work because of their precarious legal situation. Most of the time, they will not claim their rights nor seek redress as this would expose them to the risk of being arrested and deported. Inspections conducted by the Department of labour remain rare and rarely lead to imposing penalties on the employer.
- **The right not to be subjected to xenophobic attitudes and acts:** A number of recent studies and surveys have shown how prevalent xenophobic feelings are amongst the population. This xenophobia is mostly directed at Black Africans and mostly based on the vision that migrants are linked with or even responsible for social ills and crimes. Reports indicate that xenophobia within the police is not limited to feelings or attitudes but also translates into extortion, abuse and physical violence. In the media, the treatment of migration issues tends to promote a largely negative and unanalytical representation of migration and foreign migrants and to favour dramatic stories. While the situation has greatly improved over the past decade, some daily papers, continue to spread a dramatic and negative image of migration to South Africa. Popular xenophobia takes many different shapes. As highlighted in many reports and confirmed in our interviews, many migrants recount it as a daily experience, in the shape of

discrimination in access to shops, jobs or services, exclusion from interpersonal relations or community life, verbal abuse, etc.

In its November 2006 concluding comments on the initial to third periodic report submitted by South Africa, the UN **Committee on the Elimination of Racial Discrimination** remained concerned at persistence of xenophobic attitudes and negative stereotyping of non-citizens, including by law enforcement officials and in the media. The Committee recommended then that South Africa strengthen its existing measures to prevent and combat xenophobia and prejudices which lead to racial discrimination.

- **The right to access to information** on the permit system, on the procedures and services involved: our interviews as well as numerous reports – from NGOs and the Public Protector – and press articles point to the widespread and continuous problems faced by asylum-seekers and refugees throughout the asylum application process. On entry in South Africa, would-be asylum-seekers may inform immigration officers of their intention of applying for asylum. They should then be granted a temporary permit, under which they have to report within two weeks to a refugee reception office in order to apply. However, many would-be asylum-seekers are not aware of this possibility, are afraid that immigration or police officer at the border may harass them, turn them away, immediately arrest them and deport them, illegally detain them or extort money from them. A significant number therefore enter South Africa illegally, which exposes them to the risks of being exploited by smugglers and fellow migrants, arrested by the police, or of suffering physical hardships.
- **The right to access to economic and social rights** for themselves and their family. According to numerous accounts, migrants find it hard to access **health services and facilities**, even for emergency cases. They may be faced with medical staff who keep them waiting for abnormal length of time, provide them with exams and treatment which are below the minimum standards, verbally abuse them, treat them with little sensitivity and attention to their pain or specific conditions, have them pay outpatient fees, or deny them access to hospitals either straightforwardly or on the claim that they do not have adequate documentation. **Housing** is often another difficult aspect of migrants' life, many migrants living in particularly precarious conditions, with little space, little or no comfort and privacy, sometimes no or little access to water, electricity, heating and other facilities. Access to **education** is similarly very limited. Even documented migrant workers, refugees and asylum-seekers are often unable to enrol their children in public schools on the claim that they do not have adequate documentation.
- **The particular situation of migrant children:** According to recent studies, there is a growing number of children entering South Africa through the Zimbabwean and Mozambican border posts, both accompanied and unaccompanied; they seem to be staying in Gauteng and border areas, working on farms, in informal trade, etc. In its 2000 concluding observations on South Africa's initial report, the UN **Committee on the Rights of the Child** expressed concerns about the absence of formal legislative and administrative measures to ensure family reunification and to guarantee the right of access to education and health for refugee children. The Committee recommended the authorities to develop a legislative and administrative framework to guarantee and facilitate family reunification and to implement policies and programmes to guarantee adequate access to all social services for refugee and asylum-seeking children.
- **The particular situation of migrant women.** There are growing numbers of women and children amongst undocumented migrants. Women migrants coming to work irregularly in South Africa may travel with a partner or a relative, or on their own. Although they have proportionally a higher level of education than men, they are more likely to work in less skilled and more informal activities as well as to become undocumented migrants. Their main areas of employment are agriculture, domestic work, services and trade. These women, who come in growing numbers to South Africa, are particularly exposed to abuses and sexual abuse, exploitation at work, health risks, etc. While acts of violence against all women are widespread in the country, migrant women are much more exposed to rapes and domestic violence, with the lack of an effective State policy to prevent and combat such violence. According to police statistics, for the year April 2005 to March 2006 there have been 54,926 reported rapes, with 42.7 per cent of them against children under the age of 18. Since it is estimated that only 1 out of 9 rapes is reported, the real number of rapes might be far larger with a higher number of migrant women.

The **Committee on the elimination of all forms of discrimination against women** considered the initial report of South Africa during its 19th session in June 1998. In accordance with Article 18 of the CEDAW Convention, “States Parties undertake to submit [...] a report [...] within one year after entry into force for the State concerned and thereafter at least four years and further whenever the Committee so requests”. Regretfully, South Africa has not submitted yet its periodic reports to the Committee. However yet in its 1998 concluding comments, the Committee recommended the South African authorities to make all relevant efforts to prevent and combat violence against women, to deal with stereotypical attitudes among the root causes of violence against women and to emphasize the unacceptability of such violence. The Committee also regretted that insufficient attention was being devoted to the problem of trafficking in women and recommended that both legal situation and the reality with regard to trafficking in women be addressed.

Regarding this issue of trafficking in women, the **UN Committee on the Elimination of Racial Discrimination**, in its 2006 concluding comments, also recommended the state to adopt legislation, and other effective measures to combat and punish human trafficking, bearing in mind that women, and women from ethnic and minority groups are the main victims.

- **The right to access to real and affective remedies.** A major factor preventing migrants from defending their rights is the lack of effective remedies, whether administrative or legal, to expose violations and seek redress. In principle, administrative and legal remedies are open to migrants, including vulnerable groups such as undocumented migrants, refugees or asylum-seekers. However, most migrants are not aware that these remedies exist and are available to them or fear to be reported to law-enforcing personnel. Government approach also tends to give precedence to migration laws over labour and social laws, so that undocumented migrants whose rights have been violated find it hard to get redress.

In its 2006 concluding comments, the **Committee Against Torture** clearly recommended South African authorities to provide non-citizens with adequate information about their rights and the legal remedies available against any violation of these rights.

In order to prevent and redress current and future human rights violations on migrants, FIDH urges the South African authorities to:

- **ensure respect for due process and migrants’ rights and dignity throughout arrest, detention and deportation. In particular, the government should put an end to hasty deportation done at the borders or within the country without adequate verification of the legal status of those arrested and which may contravene South Africa’s obligation of ‘non-refoulement’;**
- **improve conditions of detention at Lindela repatriation centre and in other detention facilities, in particular in terms of ill-treatment, access to information and legal aid, and access to food and healthcare. To promptly carry out independent investigation of all allegations of ill-treatments of non-citizens;**
- **develop inspections of workplaces (through hiring more labour inspectors and capacity-building) in order to enforce respect of basic labour rights and standards to the benefit of the entire workforce; reinforce sanctions against employers who contravene labour standards and publicise the sanctions;**
- **ensure that, in the hierarchy of law, provisions of the Bill of Rights and labour law protecting migrants’ rights are not subordinated to immigration law;**
- **develop information materials and set up information desks (e.g. at the main border posts, in refugee reception offices, city councils, etc.) for migrants to know about their rights and available remedies;**
- **provide widespread training on migrants’ rights and against xenophobia to police services, immigration services, public health and education services and local administrations and to publicly and explicitly condemn and sanction xenophobic behaviours and incidents committed both by public servants and the communities;**
- **apply the recommendations made by the different UN Committees to improve migrants’ human rights situation and to submit to the UN CEDAW Committee its delayed periodic**

reports;

- **ratify the two major international human rights instruments it has not yet adhered to: the International Covenant on Economic, Social and Cultural Rights and the International Convention on the rights of migrant workers and members of their families;**
- **ratify the SADC Protocol on the Facilitation of Movement of Persons, signed in 2005.**