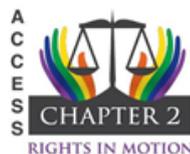


# REDRESS

Ending torture, seeking justice for survivors



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## Joint Submission to the Human Rights Council's Universal Periodic Review Working Group regarding the Review of South Africa

31 March 2022

### INFORMATION ABOUT THE ORGANISATIONS MAKING THIS SUBMISSION

**REDRESS** is an international human rights organisation founded in 1992 that delivers justice and reparation for survivors of torture, challenges impunity for perpetrators and advocates for legal and policy reforms to combat torture and provide effective reparations. As part of its Discrimination programme, we work to increase accountability for discriminatory torture perpetrated against LGBTIQ+ (Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer) people in African jurisdictions.

**Access Chapter 2 (AC2)** is a non-governmental organization established in 2014 that protects and promotes human rights of LGBTIQ+ people (Lesbian, Gay, Bisexual, transgender, and intersex), women, and young girls in South Africa. The organization seeks to uphold South Africa's bill of rights, found in Chapter 2 of the country's Constitution. We work to improve the lives of LGBTIQ+ people and women locally and globally through the values of ubuntu, informing public policy, fostering change, and promoting human rights and inclusion through provision of direct services, legal support and advocacy, education, research, and community engagement.

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regarding the Review of South Africa**

**31 March 2022**

**I. Introduction**

1. The Redress Trust (REDRESS) and Access Chapter 2 (AC2) make this submission as part of the Fourth Cycle of the Universal Periodic Review (UPR) of South Africa, to be held in October and November 2022. This submission focusses on the disproportionate violence and other human rights violations experienced by individuals who identify as LGBTIQ+ in South Africa. It raises concerns regarding legislative and practical gaps in the protection of LGBTIQ+ persons, the State's failure to prevent, investigate and prosecute acts of violence (including torture and other ill-treatment), and pervasive barriers to justice and redress for victims.
2. Forms of violence identified in this submission, which are often perpetrated due to discrimination based on sexual orientation or gender identity (SOGI), often amount to torture or other cruel, inhuman, or degrading treatment or punishment (CIDTP). It is noteworthy that, in its domestic legislation, South Africa includes discrimination as one of the purposes of torture, as provided under Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). As such, the State should implement effective mechanisms to prevent, investigate, prosecute, and provide redress for such acts of violence, in line with international standards.
3. South Africa accepted a number of important recommendations during the previous UPR cycle in 2017, including to: *(i)* expedite the legislative process relating to the Prevention and Combating of Hate Crimes and Hate Speech Bill; *(ii)* improve torture prevention by strengthening the South African Human Rights Commission (SAHRC) and other human rights monitoring mechanisms, ratifying the Optional Protocol to UNCAT (OPCAT) and establishing a National Preventive Mechanism (NPM); *(iii)* take urgent measures to prevent, investigate and prosecute discrimination and violent crimes based on SOGI, including hate crimes; and *(iv)* strengthen its efforts to provide redress for the victims of gender-based discrimination and violence.<sup>1</sup>
4. South Africa has since taken some steps to implement these recommendations. Nonetheless, there persists a lack of adequate protection of LGBTIQ+ persons in practice and little or no accountability for violence perpetrated against them. This submission notes specific areas where action and further efforts are needed and includes a number of important recommendations to be considered during the State's UPR examination.

**II. Enactment of the Prevention and Combating of Hate Crimes and Hate Speech Bill**

5. South Africa's Constitution rightly protects LGBTIQ+ individuals against discrimination on the basis of gender, sex, and sexual orientation (see Sections 9(3)-(5)).<sup>2</sup> We welcome the fact that, since its last UPR examination, South Africa also initiated an ongoing review of its national identity system to recognise different gender identities, including non-binary.<sup>3</sup>
6. In 2017, South Africa accepted a recommendation under the UPR to strengthen the protection of LGBTIQ+ individuals by classifying acts of violence against LGBTIQ+ persons as hate crimes, and accepted further recommendations to expedite the Prevention and Combating of Hate Crimes and Hate Speech Bill.<sup>4</sup> The Bill aims to increase the sentences for offences "recognised under any law" where these are motivated by hate and founded on discrimination, including but not limited to discrimination based on gender or gender identity, sex (including intersex), or sexual orientation (see Section 3(1) of the Bill).<sup>5</sup>

7. The Bill was introduced to Parliament on 13 April 2018 but has since been delayed. In 2019, the Minister for Justice and Correctional Services committed his department to reviving the Bill, but there seems to have been little progress.<sup>6</sup> It is encouraging that the South African Parliamentary Monitoring Group invited stakeholders and interested persons to submit written submissions on the draft Bill between 26 August and 1 October 2021, but it is unclear what progress has been made since then.<sup>7</sup>
8. Urgent action on this important legislative proposal is paramount. In April 2021, a number of civil society organisations in South Africa, including AC2, called on the Government to take urgent action to finalise and enact the Bill in light of recent violent attacks against LGBTIQ+ individuals resulting in at least six deaths.<sup>8</sup>
9. It must be stressed that this violence against the LGBTIQ+ community in South Africa, contravenes a number of human rights treaties ratified by the State, including the International Covenant on Civil and Political Rights (ICCPR) and UNCAT, which categorically stipulate that every human being has the inherent right to life (Art. 6, ICCPR), and be free from torture and other ill-treatment (Art. 2, UNCAT). Such rights shall be protected by law and implemented in practice. No one shall be arbitrarily deprived of their life.
10. The urgent action referred to above is crucial to ensure effective implementation of the obligations under ICCPR and UNCAT. In particular, the enactment of the Bill is key to strengthening accountability for violence and other forms of discrimination against the LGBTIQ+ community perpetrated by both State and private actors.

### **III. Prevention of LGBTIQ+ violence through monitoring mechanisms**

11. LGBTIQ+ persons in South Africa are often victims of harassment, and serious physical and sexual violence by State and non-State actors, for example in the form of beatings and rapes (including so-called “corrective” rapes, which have been noted by the UN Independent Expert on SOGI as “linked to alleged intentions of conversion”,<sup>9</sup> although rapes against LGBTIQ+ persons are also practiced with the intent to punish). Many of these cases constitute torture, as defined under UNCAT and South Africa’s Prevention of Combating and Torture of Persons Act (PCTPA) 2013, or other ill-treatment.
12. Under international law, South Africa is required to take effective measures to prevent acts of torture and other CIDTP and systematically review such practices with a view to improve prevention strategies (Arts. 2 and 11 of UNCAT).
13. It is imperative to note that South Africa has been a signatory of UNCAT since 1993, having ratified it in 1998, and subsequently signed and ratified the optional protocol in 2006 and 2019 respectively. Article 5 of the Universal Declaration of Human Rights and article 7 of ICCPR also provide that no one shall be subjected to torture or to CIDTP. Therefore, we call on the South African government to adhere to its international obligations by putting in place and strengthening effective legislative, administrative and judicial or other measures to prevent acts of torture and violence against members of the LGBTIQ+ community in South Africa.
14. Following recommendations made in its last UPR examination,<sup>10</sup> South Africa ratified OPCAT on 19 June 2019 and has since established a multiple-body NPM, coordinated by the SAHRC and mandated to promote the respect for and protection of human rights.<sup>11</sup> As part of this mandate, it conducts regular monitoring of places of deprivation of liberty, with or without prior notice, in order to safeguard against abuse, torture and CIDTP.<sup>12</sup> These steps are welcomed to better prevent and monitor torture.
15. However, there are concerns about the NPM’s effectiveness in practice. The UN Human Rights Committee (HRC), previously expressed concern about the coordinating body, SAHRC, particularly regarding lack of adequate funding, lack of transparency in the selection of members, and the lack

of full independence and impartiality to fulfil its mandate.<sup>13</sup> The Committee against Torture (CAT) has now also noted issues with the bodies comprising the new NPM, including a lack of authority to visit all places of detention without prior notice, limited budgets, and the absence of institutional independence from the government departments that are supervised.<sup>14</sup> South Africa must comply with Article 18 of OPCAT by ensuring its NPM, and all bodies which comprise it, are independent, free from government influence and provided with the resources to carry out their work effectively.<sup>15</sup>

16. This is particularly necessary because violence persists against persons deprived of their liberty: from 2019 to 2020, there was an 11% increase in deaths in police custody, as well as 120 instances of rapes by police officers, 216 reports of torture and close to 4,000 assaults in prisons.<sup>16</sup> From 2020 to 2021, rapes in police custody increased by an alarming 36%.<sup>17</sup> Anti-LGBTIQ+ attitudes among law enforcement officers render such individuals particularly vulnerable to violence, including as evidenced by reports of abuse and violence towards them perpetrated by police.<sup>18</sup> Recognising the vulnerabilities of LGBTIQ+ persons in detention, and the multiple forms of violence and ill-treatment that they face, the UN Subcommittee on Prevention of Torture, the CAT, the Special Rapporteur on Torture, and the UN Voluntary Fund for Victims of Torture have encouraged States to increase efforts to prevent such forms of violence, including by improved monitoring.<sup>19</sup> Encouragingly, South Africa committed in its last UPR to strengthen its systems for monitoring LGBTIQ+ violence and discrimination,<sup>20</sup> but the continued reports of such incidents suggest that further steps are required.
17. A failure to properly spread awareness of LGBTIQ+ issues also impacts LGBTIQ+ persons arriving at the South African border, who suffer discrimination, increased vulnerability to violence due to classification on official papers as being of a gender other than their lived gender, or outright denial of asylum based on misconceptions and doubts regarding their vulnerability in the country of origin, thus raising concerns regarding South Africa's compliance with the principle of non-refoulement (Art. 3 of UNCAT).<sup>21</sup>

#### **IV. Failure to investigate LGBTIQ+ violence**

18. In the last UPR examination, South Africa accepted recommendations to take 'urgent measures' to enable the investigation and effective punishment of perpetrators of discrimination and violence based on SOGI.<sup>22</sup> As explained above, SOGI-based violence often amounts to torture and South Africa has a duty to conduct prompt and impartial investigations "wherever there is a reasonable ground to believe that an act of torture has been committed" (Arts. 12 and 13 of UNCAT).<sup>23</sup> Such a duty applies to acts perpetrated by both State and private actors. In fact, CAT has held that a State may be held responsible for torture and other ill-treatment by private actors, when it fails to intervene, investigate, and punish perpetrators, as this may be interpreted as "encouragement and/or de facto permission" for such violence.<sup>24</sup>
19. Despite the existence of a National Task Team on Gender and Sexual Orientation-Based Violence, investigation of and accountability for torture against LGBTIQ+ individuals remains rare in South Africa, including due to discrimination and unwillingness on the part of the relevant authorities to investigate, arrest and prosecute perpetrators.<sup>25</sup> Various NGOs and CAT have noted both the culture of impunity within the South African police and the perpetration of new crimes against individuals who try to report allegations.<sup>26</sup> Indeed, LGBTIQ+ persons often suffer from verbal abuse, harassment and further discrimination when reporting a crime, and are often not believed or even blamed for the crimes they report. This in turn leads to secondary victimization (further harm to the victim as a result of reporting a violation). For these reasons, LGBTIQ+ violence from the community remains underreported.<sup>27</sup>
20. This type of secondary victimization and the underreporting that results is connected to a limited understanding of LGBTIQ+ rights within law enforcement agencies, particularly the police. Regional organizations have described this as an institution-wide concern resulting from a mix of

mal-intent, homophobia and mis-education, creating fear and mistrust among LGBTIQ+ individuals.<sup>28</sup> This lack of awareness is unlikely to be addressed adequately only with one-off training sessions from NGOs (albeit such initiatives are welcome), and primarily requires the inclusion of such issues in an appropriate manner in the official curriculum of law enforcement agencies.<sup>29</sup>

21. Inefficiency, corruption, inaction and sometimes complicity with perpetrators (as well as being the primary perpetrators of violence) among police officers are also barriers to accountability.<sup>30</sup> CAT has noted a high number of deaths in police custody and a low number of corresponding investigations into and prosecutions of such deaths.<sup>31</sup> Effective investigations are further impeded by a fear of reprisals, arising from a lack of adequate safeguards for victims.<sup>32</sup> CAT has also noted that politicians have at times used “unambiguous and openly hostile language” with regards to acts of torture and rape by police officials, potentially deterring victims from reporting.<sup>33</sup>
22. In light of the above challenges faced by the authorities in the investigation of LGBTIQ+ violence, further efforts are needed in South Africa to ensure that allegations of violence and discrimination against LGBTIQ+ persons, including torture, are adequately addressed.

#### **V. Prosecution of violent crimes against vulnerable groups**

23. In its most recent UPR, South Africa accepted recommendations to enhance the prosecution of violent crimes against individuals belonging to vulnerable groups, including the prosecution of SOGI-based crimes.<sup>34</sup> Progress has been impeded by a general lack of prosecutions for violent crime amounting to torture, combined with specific failures to secure criminal accountability for the perpetration of violence against LGBTIQ+ persons.
24. The State’s PCTPA prohibits and criminalizes torture in line with the definition in Article 1 of UNCAT. However, CAT has expressed concerns that the PCTPA fails to stipulate a minimum sentence for acts of torture, and therefore allows the imposition of suspended sentences for violence amounting to torture.<sup>35</sup> It is of even greater concern that no public officials had been prosecuted under the stand-alone anti-torture legislation as of May 2019.<sup>36</sup> Despite a 19% increase in complaints of alleged torture by a police officer in the execution of their duties between the 2019/2020 and 2020/2021 financial years, there has been no criminal accountability.<sup>37</sup>
25. Lack of accountability is also an acute problem with respect to alleged violations in prisons, where ‘rampant’ overcrowding is at the root of multiple forms of violence, including torture, sexual violence, and excessive use of force. Despite acts amounting to torture and other ill-treatment under South African legislation, police officers were “only exceptionally” prosecuted for acts of torture.<sup>38</sup>
26. Although it is encouraging that prosecutors in South Africa recently secured their first conviction for the gang rape of a gay male (though not treated as torture),<sup>39</sup> there continues to be incidences of impunity for violence based on SOGI discrimination. This includes, for example, lack of accountability for attacks against black lesbians and so-called “corrective” rapes by State actors.<sup>40</sup> As mentioned above, such acts often amount to torture and should be prosecuted accordingly under section 3(b) of the PCTPA, to better shed light on the pervasive issue of discriminatory violence and to seek proper accountability to reflect the gravity of such crimes.
27. South Africa must take increased efforts to properly train judicial and law enforcement officers on the use of the PCTPA as it relates to LGBTIQ+ violence and encourage the prosecution of acts of violence as torture, where relevant.

#### **VI. Access to justice and redress**

28. During its 2017 UPR examination, South Africa noted the need to improve access to justice, redress, and rehabilitation for all victims of torture, and accepted recommendations to strengthen

its efforts to provide redress particularly for victims of gender-based discrimination and violence, including on the grounds of SOGI.<sup>41</sup>

29. While the South African Constitution provides for “appropriate relief” for individuals subjected to torture,<sup>42</sup> the PCTPA is silent on the right to redress. Torture victims can bring common law tort claims, but this is problematic:
  - a. Such claims involve a costly, long, and highly sophisticated court process, often leading to victims’ re-traumatisation.<sup>43</sup>
  - b. Torture is not recognized as a tort. This results in claims being brought as assault or other less serious offences, in turn limiting the availability of adequate compensation.<sup>44</sup>
  - c. There have been reports of evasive tactics used by police forces to discourage victims from continuing with claims.<sup>45</sup>
30. Proper redress for acts of violence amounting to torture or other CIDTP under Article 14 of UNCAT should include the right to fair and adequate compensation, including the means for full rehabilitation. Redress for discriminatory torture also encompasses the implementation by the State of measures of non-repetition, including measures to tackle the root causes of discrimination and ensure proper investigation of future violations.<sup>46</sup> Given the continuing instances of discrimination and violence against LGBTIQ+ persons described in this submission, and the lack of proper accountability in such instances, South Africa is encouraged to consider stronger approaches to ensuring real and comprehensive access to redress for LGBTIQ+ victims of torture.
31. In a positive development, South Africa’s Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 2020 removed the 20-year limitation period within which prosecutions for torture had to be instigated.<sup>47</sup> As statutes of limitation are a specific obstacle impeding the enjoyment of the right to redress,<sup>48</sup> this recent legal reform is an important development for torture victims in South Africa.

## 32. Recommendations

### 33. Legislative reform:

- a. Enact the Prevention and Combating of Hate Crimes and Hate Speech Bill.

### 34. Prevention and monitoring:

- a. Ensure that the SAHRC and all bodies comprising the NPM are adequately resourced, independent and carry out visits to all places of detention, including prisons, police cells, and immigration detention facilities.<sup>49</sup>
- b. Provide an ongoing and rolling program of obligatory training on LGBTIQ+ rights (including sensitisation programmes)<sup>50</sup> and anti-torture standards (including in relation to LGBTIQ+ violence) for State institutions and public officials, including national human rights institutions, police and prison officers, border guards, immigration officers, medical personnel, prosecutors, and members of the judiciary.
- c. Where possible, establish a specific task team within the NPM trained to pay particular attention to the treatment of vulnerable groups in places of detention, including LGBTIQ+ persons. Ensure all other visiting officers are also trained on these issues.<sup>51</sup>

### 35. Investigations:

- a. Consider creating separate investigative units within the National Prosecuting Authority and/or the judiciary with a specific mandate for investigating torture, in line with a protocol on investigation as detailed below.

- b. Train the existing National Task Team on Gender and Sexual Orientation-Based Violence on the provisions included in the PCTPA and the application of the law on torture to instances of SOGI-based violence.
- c. Develop a binding national protocol on investigations into violence against LGBTIQ+ persons, including torture, which adopts a gender approach and requires investigative authorities to:
  - i. take all reasonable measures to collect and secure evidence;
  - ii. explore all practical means of discovering the truth concerning the incident;
  - iii. take all reasonable steps to investigate possible discriminatory motives and establish whether feelings of hatred or prejudices played a role in the events; and
  - iv. deliver fully reasoned, impartial, and objective decisions, without omitting suspicious facts that may be indicative of violence motivated by gender-based discrimination.<sup>52</sup>
- d. Ensure that investigations are conducted promptly and with reasonable expedition.

#### 36. Prosecution:

- a. Law enforcement officers, including prison and police, should adopt a “zero tolerance” policy in relation to torture and other ill-treatment by, inter alia, issuing public statements and adopting internal regulations condemning practices of torture that clearly state that anyone committing such acts or otherwise participating or assisting in their commission will be criminally prosecuted and shall receive appropriate penalties upon conviction.
- b. Amend the strategic plan of the National Prosecuting Authority to make the prosecution of perpetrators of torture a priority.
- c. Encourage lawyers, prosecutors, and judges to make use of the PCTPA and/or criminal laws to prosecute violence perpetrated against LGBTIQ+ persons, and to characterise (and prosecute) it as torture where relevant.<sup>53</sup>

#### 37. Redress:

- a. Ensure that civil claims regarding cases of torture and other ill-treatment are conducted based on a victim-centred approach, including by (a) supporting the victims throughout the case with social assistance, and expert psycho-social support where necessary, and (b) ensuring that the victims are informed and able to participate in proceedings.
- b. Also ensure that such proceedings are conducted with a view to provide adequate remedy for victims of torture as well as all relevant types of redress, including compensation, rehabilitation, satisfaction, and guarantees of non-repetition (which tackle the root causes of discrimination against LGBTIQ+ persons with a view to preventing violence).

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<sup>1</sup> UN Human Rights Council (UNHRC), Report of the Working Group on the Universal Periodic Review - South Africa (**Report of the Working Group**), 18 July 2017, UN Doc. A/HRC/36/16, Recommendations 139.7 – 139.12, 139.17, 139.18, 139.42 to 139.59, 139.89, 139.98, 139.99, 139.100, 139.101, 139.102, 139.195 and 139.215; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (**Views on conclusions and/or recommendations**), 19 September 2017, UN Doc. A/HRC/36/16/Add.1, paras. 5, 9, 12 and 13.

<sup>2</sup> The Constitution of the Republic of South Africa, 1996, Arts. 9(3)-(5). Further protections are included in other legislation, such as the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, s 6; the Employment Equity Act, 1998, s 6; Rental Housing Act, 1999, s 4; Alteration of Sex Description and Sex Status Act, 2003; and the Civil Union Act, 2006. See also Equaldex, *LGBT Rights in South Africa*.

<sup>3</sup> Quartz Africa, [South Africa wants to enshrine the right to be non-binary](#), 22 April 2021.

<sup>4</sup> UNHRC, Report of the Working Group, 18 July 2017, UN Doc. A/HRC/36/16, Recommendations 139.42 to 139.59 and 139.99; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, 19 September 2017, UN Doc. A/HRC/36/16/Add.1, para. 9.

<sup>5</sup> [Prevention and Combating of Hate Crimes and Hate Speech Bill](#), 2018.

<sup>6</sup> Government of the Republic of South Africa (RSA), [Deputy Minister Hlengiwe Mkhize: LGBTQI Sector Intergenerational Dialogue](#), 28 August 2019.

<sup>7</sup> Parliamentary Monitoring Group, [Parliament Preview 2022: Legislation](#), 28 February 2022.

<sup>8</sup> [Joint Statement from Lawyers for Human Rights and others](#), 21 April 2021; Global Citizen, [LGBT+ South Africans Resist 'War on Queerness' as Activists Demand Justice After Killings](#), 17 May 2021.

<sup>9</sup> UNHRC, [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: Practices of so-called "conversion therapy"](#), 1 May 2020, UN Doc. A/HRC/44/53, para. 39.

<sup>10</sup> UNHRC, Report of the Working Group, 18 July 2017, UN Doc. A/HRC/36/16, Recommendations 139.7 – 139.12, 139.14, 139.17, 139.18, 139.38, and 139.102; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, 19 September 2017, UN Doc. A/HRC/36/16/Add.1, para. 5.

<sup>11</sup> RSA, [South African Permanent Mission, Geneva](#), 25 August 2020. See also the Constitution of the Republic of South Africa, 1996, Art. 184.

<sup>12</sup> South Africa Human Rights Commission, [What is a National Preventative Mechanism?](#)

<sup>13</sup> UN Human Rights Office of the High Commissioner (OHCHR), [Committee against Torture examines the situation in South Africa](#), 1 May 2019.

<sup>14</sup> CAT, [Second report of South Africa: Concluding observations](#), 7 June 2019, UN Doc. CAT/C/ZAF/CO/2.

<sup>15</sup> Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (OPCAT), Art. 18.

<sup>16</sup> South Africa Independent Police Investigative Directorate (IPID), [Annual Report 2019/2020](#), 9 November 2020, pp. 40 and 43.

<sup>17</sup> Ibid, pp. 47 and 50.

<sup>18</sup> Astraea Lesbian Foundation for Justice, [South Africa LGBTI: Landscape Analysis of Political, Economic & Social Conditions](#), 2015.

<sup>19</sup> See the Statement by the Committee Against Torture (CAT), the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and UN Voluntary Fund for Victims of Torture on the International Day for the Victims of Torture 2016, [Targeted and Tortured: UN Experts Urge Greater Protection for LGBTI People in Detention](#), 2016. See also SPT, [Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 2016, UN Doc CAT/C/57/4, paras. 60, 66, 76.

<sup>20</sup> UNHRC, Report of the Working Group, 18 July 2017, UN Doc. A/HRC/36/16, Recommendations 139.12 and 139.102; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, 19 September 2017, UN Doc. A/HRC/36/16/Add.1, para. 5.

<sup>21</sup> Legal Resources Centre, [LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity](#), April 2021, pp. 21-22, 34, 35-39.

<sup>22</sup> UNHRC, Report of the Working Group, 18 July 2017, UN Doc. A/HRC/36/16, Recommendation 139.100; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, 19 September 2017, UN Doc. A/HRC/36/16/Add.1, para. 12.

<sup>23</sup> The same duty applies in the case of other cruel, inhuman or degrading treatment or punishment. See Art. 16 of UNCAT.

<sup>24</sup> CAT, [General Comment No. 2](#), 24 January 2008, UN Doc. CAT/C/GC/2, para. 18; CAT, [Dzemajl and Others v. Yugoslavia](#), 21 November 2002, UN Doc. CAT/C/29/D/161/2000.

<sup>25</sup> REDRESS, [Accountability for Torture Against LGBTIQ+ Persons in Africa](#), forthcoming 2022.

<sup>26</sup> OHCHR, [Committee against Torture examines the situation in South Africa](#), 1 May 2019.

<sup>27</sup> Astraea Lesbian Foundation for Justice, [South Africa LGBTI: Landscape Analysis of Political, Economic & Social Conditions](#), 2015; The Network of African National Human Rights Institutions & The South African Human Rights Commission, [In – Country Meeting On Sexual Orientation, Gender Identity And Expression](#), 29 and 30 November 2017.

<sup>28</sup> Contribution of local organisations during Roundtable discussion held in January 2022 by REDRESS and the Centre for Human Rights at University of Pretoria. See also Arcus Foundation and Iranti, [Data Collection and Reporting on Violence Perpetrated against LGBTQI Persons in Botswana, Kenya, Malawi, South Africa and Uganda](#), pp. 65-66.

<sup>29</sup> Ibid.

<sup>30</sup> Astraea Lesbian Foundation for Justice, [South Africa LGBTI: Landscape Analysis of Political, Economic & Social Conditions](#), 2015; The Network of African National Human Rights Institutions & The South African Human Rights Commission, [In – Country Meeting On Sexual Orientation, Gender Identity And Expression](#), 29 and 30 November 2017; For a definition of secondary victimisation, see the European Institute for Gender, [Glossary & Thesaurus: Secondary Victimisation](#).

<sup>31</sup> CAT, [Second report of South Africa: Concluding observations](#), 7 June 2019, UN Doc. CAT/C/ZAF/CO/2, para. 22.

<sup>32</sup> Ibid, para. 24.

<sup>33</sup> Ibid, para. 32(d).

- <sup>34</sup> UNHRC, Report of the Working Group, 18 July 2017, UN Doc. A/HRC/36/16, Recommendations 139.89 and 139.101; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, 19 September 2017, UN Doc. A/HRC/36/16/Add.1, paras. 9 and 12.
- <sup>35</sup> OHCHR, [Committee against Torture examines the situation in South Africa](#), 1 May 2019.
- <sup>36</sup> Ibid.
- <sup>37</sup> IPID, [Annual Report 2020/2021](#), 16 September 2021, p. 38. For criminal convictions, see IPID, [Annual Report 2020/2021](#), 16 September 2021, p. 79 and IPID, [Annual Report 2019/2020](#), 9 November 2020, p. 84.
- <sup>38</sup> OHCHR, [Committee against Torture examines the situation in South Africa](#), 1 May 2019.
- <sup>39</sup> Pink News, [Three found guilty of gang raping gay man in landmark verdict for South Africa](#), 8 February 2022.
- <sup>40</sup> HRW, [“We’ll Show You You’re a Woman”](#), December 2011; Amnesty International, [Making Love a Crime: Criminalization of Same-Sex Conduct in Sub Saharan Africa](#), 24 June 2013.
- <sup>41</sup> UNHRC, Report of the Working Group, 18 July 2017, UN Doc. A/HRC/36/16, Recommendations 139.16, 139.195 and 139.215; UNHRC, Report of the Working Group - Addendum, Views on conclusions and/or recommendations, 19 September 2017, UN Doc. A/HRC/36/16/Add.1, paras. 6 and 13.
- <sup>42</sup> The Constitution of the Republic of South Africa, 1996, Art. 38.
- <sup>43</sup> The Centre for the Study of Violence and Reconciliation, [Submission to the United Nations Committee Against Torture for the 66th Session](#), June 2018.
- <sup>44</sup> Human Rights Committee, [Concluding observations on the initial report of South Africa](#), 27 April 2016, UN Doc. CCPR/C/ZAF/CO/1, para. 22.
- <sup>45</sup> Research by REDRESS, including interviews with stakeholders in the region.
- <sup>46</sup> Inter-American Court on Human Rights, [Case of Azul Rojas Marín et al. v. Peru \(Azul\)](#), 12 March 2020, paras. 227 and 288.
- <sup>47</sup> See the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 2020, s 3, which repealed and replaced the previous limitation period of 20-years provided by the Criminal Procedure Act 1977, s 18(1).
- <sup>48</sup> CAT, [General Comment No. 3, 13 December 2012](#), UN Doc. CAT/C/GC/3, para. 38.
- <sup>49</sup> CAT, [Second report of South Africa: Concluding observations](#), 7 June 2019, UN Doc. CAT/C/ZAF/CO/2, para. 25(a) – (d).
- <sup>50</sup> Global Citizen, [LGBT+ South Africans Resist ‘War on Queerness’ as Activists Demand Justice After Killings](#), 17 May 2021.
- <sup>51</sup> CAT, [Second report of South Africa: Concluding observations](#), 7 June 2019, UN Doc. CAT/C/ZAF/CO/2, para. 25(b).
- <sup>52</sup> In the European system of human rights, see, for example, [Identoba and Others v. Georgia](#), App no. 73235/12 (European Court of Human Rights (ECtHR), 7 October 2014); [MC and AC v Romania](#), App no. 12060/12 (ECtHR, 12 July 2016); [Aghdomelashvili and Japaridze v Georgia](#), App no. 7224/11 (ECtHR, 8 January 2021). In relation to effective investigation into cases of violence due to discrimination on other grounds, such as race and ethnicity, see, for example: [Sakir v Greece](#), App no. 48475/09 (ECtHR, 24 March 2016), [Jeronovičs v Latvia](#), App no. 44898/10 (ECtHR, 5 July 2016). More recently, [M.F. v Hungary](#), App no. 45855/12 (ECtHR, 5 March 2018) on the authorities’ failure to investigate whether or not discrimination may have played a role in the events (no substantive violation, only procedural – Art. 14 taken in conjunction with Art. 3 ECHR). In the Inter-American system of human rights, see: [Azul](#) and [Vicky Hernández and others v. Honduras](#), Series C No 422 (26 March 2021). It must be noted that, according to the European Court of Human Rights jurisprudence, the duty to investigate the discriminatory purpose does not translate into an obligation of result and is not absolute. It relates to efforts employed by authorities, that is, the State has the ‘obligation to use best endeavours’. See, for example, [Aghdomelashvili and Japaridze v Georgia](#), App no. 7224/11, 8 January 2021, para 38.
- <sup>53</sup> PCTPA, s 3(b); UNCAT, Art. 1.1.