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LRC
Legal Resources Centre

LEGAL RESOURCES CENTRE

RESPONSE TO THE REPORT SUBMITTED BY SOUTH AFRICA UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

(FOR CONSIDERATION AT THE 116TH SESSION, 7-31 MARCH 2016, UNDER ITEM 5 OF THE PROVISIONAL AGENDA)

12 FEBRUARY 2016

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ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ICCPR	International Covenant on Civil and Political Rights
INCLO	International Network of Civil Liberty Organisations
IPID	Independent Police Investigative Directorate
JSCI	Joint Standing Committee on Intelligence
LOIs	List of issues identified by the Human Rights Committee
LRC	Legal Resources Centre
POPI	Protection of Personal Information Act 4 of 2013
RICA	The Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002
SSA	State Security Agency

INTRODUCTION

1. This is a submission prepared by the Legal Resources Centre ("**LRC**") for consideration by the Human Rights Committee of the United Nations on the occasion of its 116th session to be held in Geneva from 7-31 March 2016.

2. The LRC is one of South Africa's oldest public interest law firms, focussing on human rights and constitutional law.[1] The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. In this regard, the LRC's clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental rights.

3. The LRC has been involved in a number of landmark constitutional law cases, both domestically and before other regional bodies. The LRC is further a member of several international coalitions, including the International Network of Civil Liberty Organisations ("**INCLO**") and supports the work of the African Commission on Human and Peoples' Rights ("**ACHPR**") Working Group on Extractive Industries, Human Rights and the Environment. Moreover, the LRC has on various occasions made submissions to relevant bodies of the United Nations, including the Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association.

4. In making this submission, the LRC does not purport to hold a mandate on behalf of all affected persons; rather, as will be seen from what is contained below, the focus of this submission is to provide the Human Rights Committee with the relevant framework and

[1] More information about the LRC can be found on our website, accessible at www.lrc.org.za.

developments that may be of assistance to the members, based on our experience as lawyers in the field of constitutional law and human rights in South Africa.

5. For the purpose of this submission, we have had regard to the following documents:

5.1. The report submitted by the South African government under article 40 of the International Covenant on Civil and Political Rights ("**ICCPR**"), dated 26 November 2014 ("**Initial Report**");

5.2. The list of issues in relation to the initial report identified by the Human Rights Committee, dated 19 August 2015 ("**LOIs**"); and

5.3. The reply of the South African government to the LOIs, dated 31 December 2015 ("**Reply**").

6. This submission will focus on particular aspects of the issues identified in the LOIs that are most directly pertinent to the work in which we are involved, with a view to providing particular developments and context that we would urge the Human Rights Committee to take into account when considering the report. (We note in this regard that the LRC has also contributed separately to submissions on the issues of non-discrimination and equality, and the treatment of migrants and asylum seekers, which therefore do not form part of this submission.)

7. This submission is set out as follows:

7.1. First, we set out the constitutional framework and the treatment of international law obligations in the domestic context;

7.2. Secondly, we examine the purpose of reporting under article 40 of the ICCPR;

7.3. Thirdly, we address the submissions made by the South African government in the Initial Report and the Reply, focusing in particular on the following aspects identified in the LOIs:

7.3.1. Prohibition of torture and cruel, inhuman or degrading treatment and treatment of persons deprived of their liberty (articles 7, 9 and 10 of the ICCPR);

7.3.2. Protection of human rights defenders (articles 2(3), 9 and 19 of the ICCPR);

7.3.3. Right to private communications (articles 17 and 19 of the ICCPR);

7.3.4. Right to participate in public life and the rights of minorities (articles 25 and 27 of the ICCPR).

8. We deal with each of these in turn below.

THE CONSTITUTIONAL FRAMEWORK AND THE TREATMENT OF INTERNATIONAL LAW OBLIGATIONS IN THE DOMESTIC CONTEXT

9. While the ratification of the ICCPR renders it binding on South Africa on the international plane, it also has important consequences at the domestic level. The Constitution of the Republic of South Africa, 1996 ("**the Constitution**") is the supreme law in South Africa; this means that any law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.[2] Chapter 2 of the Constitution sets out the fundamental rights that are constitutionally-entrenched,

[2] Section 2 of the Constitution.

and requires the government to "*respect, protect, promote and fulfil the rights in the Bill of Rights*".[3]

10. Importantly, the Constitution requires that when interpreting the Bill of Rights, a court "*must consider international law*";[4] and that when interpreting any legislation, a court "*must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*".[5] These provisions – peremptory in their terms – do not stipulate or limit which sources of international law must be considered and applied; rather, the Constitution requires the courts to consider the ambit of both binding and non-binding international law as appropriate under the circumstances. This is in line with the consistent jurisprudence of the South African courts, including the Constitutional Court, the highest court on constitutional matters.[6]

11. As stated by the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*:

> "*Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.*"

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[3] Section 7 of the Constitution states as follows:

> "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
>
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

[4] Section 39(1)(b) of the Constitution. (Emphasis added.)

[5] Section 233 of the Constitution. (Emphasis added.)

[6] See, for instance, *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC) at para 35.

12. It is relevant, therefore, that it is not just the ICCPR that our courts will be mindful of when deciding cases on civil and political rights, but may also look for guidance in the reports of the Human Rights Committee when interpreting and giving content to the human rights obligations to which South Africa is bound. This is also relevant when considering the purpose of state reporting under article 40 of the ICCPR, which we turn to deal with next.

THE NATURE OF THE OBLIGATIONS AND THE PURPOSE OF REPORTING UNDER ARTICLE 40 OF THE ICCPR

13. Article 2(1) of the ICCPR requires each State Party "*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the [ICCPR], without distinction of any kind*". Article 2(2) requires further that "*[w]here not already provided for by existing legislative or other measures, each State Party to the [ICCPR] undertakes to take the necessary steps, in accordance with constitutional processes and with the provisions of the [ICCPR], to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the [ICCPR]*".

14. All States Parties are required to give effect to the obligations under the ICCPR in good faith.[7] As has been noted by the Human Rights Committee, the obligations are both positive and negative in nature, and require that States Parties "*adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations*".[8] The Human Rights Committee has further noted that the positive obligations on States Parties will only be fully discharged if individuals are protected by the state, not just against violations of the ICCPR by state agents, but also

[7] Human Rights Committee, "General Comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant" (2004) at para 3.

[8] Above n 7 at paras 6-7.

against acts committed by private persons or entities that would impair the enjoyment of the rights under the ICCPR.[9]

15. The reporting obligation under article 40 of the ICCPR is for States Parties to "*submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights*". As stated in the relevant guidelines, the process of preparing the state reports also presents states with an opportunity "*to take stock of the state of human rights protection within their jurisdiction for the purpose of policy planning and implementation*", and the reporting process should "*encourage and facilitate, at the national level, public scrutiny of government policies and constructive engagement with relevant actors of civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant convention*".[10]

16. While the Initial Report and the Reply deal in detail with the legislative measures that South Africa has taken in respect of the rights under the ICCPR, we are concerned that not enough detail is provided on the practical implementation and realisation of these rights, as well as the challenges that are faced and the policies in place (or intended) to overcome these. As stated in the guidelines:

16.1. Reports should contain information sufficient to provide each respective treaty body with a comprehensive understanding of the implementation of the relevant treaty by the State;[11]

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[9] Above n 7 at paras 8. The Human Rights Committee has also identified that there may be circumstances in which a failure to ensure the rights under the ICCPR would give rise to violations by states parties of those rights as a result of the state permitting or failing to take appropriate measures to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

[10] United Nations, "Compilation of guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties" (2009) at paras 9-10.

[11] Above n 10 at para 24.

16.2. Reports should elaborate both the *de jure* and the *de facto* situation with regard to the implementation of the provisions of the treaty;[12]

16.3. Reports should not be confined to lists or descriptions of legal instruments adopted in the country concerned in recent years, but should indicate how those legal instruments are reflected in the actual political, economic, social and cultural realities and general conditions existing in the country;[13]

16.4. Reports should provide relevant statistical data, disaggregated by sex, age and population groups, which should allow comparison over time and indicate data sources; furthermore, states should endeavour to analyse this information insofar as it is relevant to the implementation of treaty obligations.[14]

17. South Africa's reporting on certain rights has had greater compliance with the above guidelines than with others. We are, however, concerned that there is insufficient information in the Initial Report and the Reply to actually portray the realities and challenges in realising the rights, and that a great deal of weight is placed on emphasising the legislative measures without adequately addressing the "*other measures*" that are also necessary to give effect to the rights under the ICCPR.

RESPONSE TO PARTICULAR ASPECTS OF THE STATE REPORT IDENTIFIED IN THE LIST OF ISSUES

Prohibition of torture and cruel, inhuman or degrading treatment and treatment of persons deprived of their liberty

(Arts 7, 9 and 10 of the ICCPR; paras 10-14 of the LOIs; paras 25-31 of the Reply)

[12] Above n 10 at para 25.

[13] Above n 10 at para 25.

[14] Above n 10 at para 26.

18. The conditions in prisons in South Africa is in a disturbing state, and while we acknowledge any steps that have been taken to improve this, we would submit that simply not enough has been done to appropriately improve these conditions.

19. According to the 2014/2015 annual report of the Department of Independent Police Investigative Directorate ("**IPID**"), the following complaints were submitted to IPID during the 2012/2013, 2013/2014 and 2014/2015 financial years: [15]

Table 1(c): Intake for the three year comparison	2012-2013	2013-2014	2014-2015
Section 28(1)(a)-deaths in police custody	275	234	244
Section 28(1)(b)-deaths as a result of police action	431	390	396
Section 28(1)(c)-complaint of the discharge of official firearm(s)	670	429	940
Section 28(1)(d)-rape by police officer	146	121	124
Section 28(1)(e)-rape in police custody	22	19	34
Section 28(1)(f)-torture	50	78	145
Section 28(1)(f)-assault	4131	3916	3711
Section 28(1)(g)-corruption	120	84	93
Section 28(1)(h)-other criminal matter	703	374	90
Section 28(1)(h)-misconduct	47	23	39
Section 28(2)-systemic corruption	6	12	3
Non-compliance with Section 29 of IPID Act	127	65	60
Total	**6728**	**5745**	**5879**

20. Although the overall number of complaints in 2014/2015 has declined from 2012/2013 (although increased from 2013/2014), there has been a marked increase in the number of allegations of torture in 2014/2015. While not all incidents will necessarily be reported – and not all cases will necessarily be prosecuted – the table above provides a

[15] Department of IPID, "Annual report 2014/2015" (2015) at p 43(accessible at http://www.icd.gov.za/sites/default/files/documents/IPID_Annual_Report%20_2014-15.pdf). The figures below relate both to the South African Police Services and the Municipal Police Services. In terms of section 28(1) of the IPID Act 1 of 2011, IPID is obligated to investigate, *inter alia*, the following matters: deaths in police custody; deaths as a result of police actions; any complaint relating to the discharge of an official firearm by a police officer; rape by a police officer, whether on or off duty; rape of any person while that person is in police custody; any complaint of torture or assault against a police officer against a police officer in the execution of his or her duties.

telling overview of the magnitude of the problem. At the Kgosi Mampuru Correctional Facility II, for example, it was reported in December 2015 that an investigation revealed *prima facie* evidence of at least 16 prisoners having been assaulted and tortured by the guards.[16] We note, as well, that in January this year, a man was detained for filming an incident of what appeared to be police brutality.[17]

21. In relation to IPID, it should also be noted that in a recent judgment of the High Court of South Africa (Gauteng Division, Pretoria), the court held that the Executive Director of IPID did not enjoy sufficient independence from the Minister of Police, and therefore struck down a number of legislative provisions, including sections of the IPID Act.[18] The matter has been referred for confirmation to the Constitutional Court, as is required by section 172(2)(a) of the Constitution where a declaration of constitutional invalidity has been made. The matter is expected to be heard by the Constitutional Court later this year.

22. Other important litigious matters that are pending before the courts this year include the following:

22.1. The LRC has launched civil claims on behalf of seven prison inmates against G4S Correction Services (Bloemfontein) (Pty) Ltd and the Minister of Justice and Correctional Services, all of whom were incarcerated at a stage at the Mangaung Correctional Centre, and all of whom allege severe torture and cruel, inhuman or degrading treatment;

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[16] News24, "Guards tortured prisoners, probe finds" (14 December 2015) (accessible at http://www.news24.com/SouthAfrica/News/guards-tortured-prisoners-probe-finds-20151214).

[17] News 24, "I was jailed for filming a police assault" (8 January 2016) (accessible at http://www.news24.com/SouthAfrica/News/i-was-jailed-for-filming-a-police-assault-journalist-20160108).

[18] *McBride v Minister of Police and Another* [2015] ZAGPPHC 830 (4 December 2015) (as yet unreported).

22.2. On 14 December 2015, Lawyers for Human Rights, on behalf of Sonke Gender Justice, launched a semi-urgent court application in response to the severe overcrowding and inhumane conditions of confinement for remand detainees in Pollsmore Remand Detention Facility.[19] Lawyers for Human Rights reported that, as of 1 February 2016, Pollsmoor Remand Detention Facility was operation at approximately 309% capacity, accommodating 2985 more detainees than it is approved to do. According to Sonke Gender Justice, the implications of this overcrowding includes:

22.2.1. Detainees are forced to share cells built to accommodate 30 people with between 65 and 80 other detainees;

22.2.2. Detainees are forced to share beds or sleep on the floor without a mattress;

22.2.3. Cells have only one shower and toilet that is shared by the 65 or more detainees, and is not partitioned off for privacy;

22.2.4. There is no hot water, mop or cleaning products to clean the cells or to wash the bedding;

22.2.5. Detainees are often not let out of their cells regularly for exercise, with one detainee reporting that he was only allowed to exercise for one hour per month;

22.2.6. One deponent to the abovementioned court case contracted tuberculosis while detained, and was unable to access his anti-retroviral drugs during his detention;

[19] Sonke Gender Justice, "Overcrowding and inhumane conditions in Pollsmoor Remand Detention Facility" (3 February 2016) (http://www.genderjustice.org.za/news-item/overcrowding-and-inhumane-conditions-in-pollsmoor-remand-detention-facility/).

22.2.7. The unhygienic conditions in the cells has led to health implications such as skin infections, boils, scabies and lice;

22.2.8. In September 2015, there was an outbreak of leptospirosis, an infectious disease caused by exposure to rat urine, which resulted in the death of a remand detainee. Following this, it was reported that remand detainees and sentenced inmates were being moved out of Pollsmoor to facilitate the cleaning and fumigation of the cells, but Sonke Gender Justice has received no further information from the Department of Correctional Services in this regard.

23. This sample of cases currently being litigated is symptomatic of a much larger, insidious problem in relation to correctional services that needs urgent and effective remedying.

Protection of human rights defenders

(Arts 2(3), 9 and 19 of the ICCPR; para 25 of the LOIs; para 43 of the Reply)

24. It is submitted that both the Initial Report and the Reply fail to take proper account of the important role that human rights defenders play in South Africa, or of the particularly vulnerable position in which some of these defenders find themselves.

25. In particular, the LRC and its partners have witnessed the intimidation and harassment of members of rural communities who voice protest against actions that threaten their precarious rights to their customary land and resources. Most worrying is the trend of the police either turning a blind eye or, in some circumstances, participating in the violation of the rights of these human rights defenders.

26. The Xolobeni community in the Eastern Cape has faced the threat of titanium mining for almost a decade. The majority of the affected community members have resolved to oppose the development of a titanium mine in their coastal area. Throughout, they have

used the legal avenues available to voice their concerns and protests. The Legal Resources Centre acts for these communities.

27. Over the span of the 8 years, at least two activists in the community died from poisoning under mysterious circumstances. While the community has no doubt that they were murdered for their defense of the land and rights of the community, they could not prove it.

28. However, during the last year, members of the community in favour of the mining have started a public campaign of violence and intimidation against their neighbours who oppose it – and face no consequences. They have harassed people at their homes (while armed), and engaged in violent attacks against people opposed to the mining activity. Various members of the community, including the headwoman, have gone into hiding after a recent spate of attacks on their houses in December 2015 which saw at least five community members hospitalised.

29. Most disconcerting for the community, however, is the fact that some of the harassment has taken place in the presence of members of the South African Police Services ("SAPS"). Moreover, SAPS declined for some time to press charges against any of the known perpetrators of violence against the anti-mining protestors. In fact, in recent months the police has conducted mysterious raids specifically on the houses of people known to oppose the mining, ostensibly looking for guns – and finding none. This community now lives in fear.[20]

30. In Makhasaneni in KwaZulu-Natal, land activist Mbhekiseni Mavuso has faced a campaign of intimidation from the "official monthly Royal publication that covers news

[20] See http://amabhungane.co.za/article/2016-02-12-we-will-die-for-our-land-say-angry-xolobeni-villagers-as-dune-mining-looms; http://amabhungane.co.za/article/2016-02-12-we-will-die-for-our-land-say-angry-xolobeni-villagers-as-dune-mining-looms; http://www.dispatchlive.co.za/news/wild-coast-mining-feud-turns-violent/.

that is of specific relevance to the Monarch",[21] referring to the Zulu King Goodwill Zwelithini. Since 2011, Mr Mavuso together with other members of Makhasaneni community have been resisting the unannounced and damaging activities of a mining company, Jindal Africa (Pty) Ltd.[22]

31. Following the smear campaign against Mr Mavuso in the King's newspaper, he received several threats to his life. His attempts to have the newspaper withdraw its allegations resulted only in it publishing further defamatory material. Given that the newspaper is not affiliated to the South African Press Council, it has no obligation to adhere to the Press Code. However, its influence in rural areas and villages such as Mhakasaneni, is devastating to its victims.

32. In the Bapo ba Mogale community in the North West province, members of a structure created to protect the interest of three local communities in the face of mining interests in their land and mineral resources, have experienced threats of violence and intimidation against their families and their homes, even at public meetings. An instigator of these attacks appeared to be the close advisor to the traditional leader. The victims brought criminal charges but continue to fear for their lives. The LRC represents the community in its litigation against the mining company.

33. The right to freedom of opinion and expression is also inextricably linked to the protection of human rights defenders. The importance of freedom of expression is well-recognised in South African law. For instance, the Constitutional Court has described freedom of expression as a "*sine qua non for every person's right to realise her or his*

[21] According to its official rate card. See Yeni, Stha *Bayede Newspaper, traditional leaders and mining deals in KwaZulu-Natal* 25 August 2015.

[22] Jindal arrived in Makhasaneni and began prospecting in people's fields without consulting the community or the people who depended on the produce grown on the fields destroyed in the process. After the prospecting began, a number of cattle and goats died from poisoned water. Ancient family graves were damaged, crop fields were destroyed and water streams became poisonous and ultimately ran dry.

full potential as a human being, free of the imposition of heteronomous power",[23] and as being "*essential to the proper functioning of our constitutional democracy*".[24]

34. However, even with this constitutional guarantee firmly entrenched, there are still a number of matters regarding freedom of expression, particularly media freedom, that are cause for concern, including:

34.1. The Protection of State Information Bill, which has been passed by Parliament but not yet signed into law by the President. It remains unclear when, if at all, the President still intends to sign this into law.

34.2. The draft Online Regulation Policy published by the Film and Publication Board, which, despite its purported intentions, have draconian consequences for online users, and is arguably *ultra vires*, impermissibly vague and falls foul of imposing prior restraints on publication.[25]

34.3. The draft Cybercrimes and Cybersecurity Bill, which, as described by the Right2Know campaign:[26]

> "*[C]reates a regime that is so broad and overarching that almost all possible crimes that could exist on the internet are dealt with using the same set of tools – from the risk of terrorist cyberattacks to the imagined crimes of an ordinary Facebook or BBM user. In attempting to police practically all of the internet, the Bill hands wide-ranging powers to state-security structures to secure vast parts of the internet as assets of state-security, rather than common spaces for the good of all. The Bill would*

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[23] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC) at para 29.

[24] *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)* [2011] ZACC 11; 2011 (4) SA 191 (CC) at para 141.

[25] LRC, "Submission to the Film and Publication Board on the draft Online Internet Regulation Policy" (15 July 2015) (accessible at http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2015_07_15_Submission_online_regulation_policy_FPB.pdf).

[26] Right2Know Campaign, "Preliminary position on draft Cybercrimes and Cybersecurity Bill" (30 November 2015) (accessible at http://www.r2k.org.za/wp-content/uploads/R2K-Preliminary-Position-on-the-draft-Cybercrimes-and-Cybersecurity-Bill.pdf).

> *put in place new offences which are over-broad and open to abuse. These would criminalise a range of lawful activities and place dangerous penalties on freedom of expression and access to information, while also giving the state new invasive surveillance powers with little protection for ordinary people's privacy.*"

35. According to the most recent Freedom House report, under the heading "Freedom of expression and belief", Freedom House describes the South African position as follows:[27]

> "*Freedoms of expression and the press are protected in the constitution and generally respected in practice. South Africa features a vibrant and often adversarial media landscape, including independent civic groups that have helped push back government efforts to encroach on freedom of expression. Nonetheless, concerns about press freedom have grown in recent years as the ANC government has appeared to exert increasing political pressure on both state-run and independent outlets.*
>
> *Most South Africans receive the news via radio outlets, the majority of which are controlled by the SABC. The SABC also dominates the television market, but two commercial stations and satellite television are expanding their reach. The government is highly sensitive to media criticism and has increasingly encroached on the editorial independence of the SABC. Some government critics have been barred from SABC programs; a number of programs have been canceled due to political considerations; and there is strong pressure on journalists to refrain from critical reporting of the ANC and Zuma.*
>
> *Private newspapers and magazines are often critical of powerful figures and institutions and remain a crucial check on the government. However, government allies own a growing share of independent media. A number of key staff members have left the Independent News & Media South Africa claiming political interference since the company was acquired by the ANC-connected Sekunjalo Investments. Internet access is unrestricted and growing rapidly, though many South Africans cannot afford the service fee.*
>
> *The government has recently enacted or proposed several potentially restrictive laws, with significant pushback from civil society, judicial authorities, and opposition parties. In part because of such opposition, Zuma has yet to sign into law a revised version of the controversial Protection of State Information Bill, which would allow state agencies to classify a wide range of information as in the "national interest" and thus restrict its publication . . .*
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> *In January 2014, freelance photojournalist Michael Tshele was allegedly shot and killed by police while covering protests in North West province. He was the first journalist killed in South Africa since 1994.*"

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[27] Freedom House, "Freedom in the world: South Africa" (2015) (accessible at https://freedomhouse.org/report/freedom-world/2015/south-africa).

36. The right to freedom of assembly must also, necessarily, be considered when examining the protection of human rights defenders. Protest is an important and powerful tool by which members of the public can make their concerns and dissatisfaction known. While the Regulation of Gatherings Act 205 of 1993 imposes a number of conditions for the exercise of the right, and is onerous in its application, there are concerns relating to the suppression of lawful dissent over and above this.

37. In a recent publication by the Socio-Economic Rights Institute, the position was summarised as follows:[28]

> "*This wave of protests has resulted in the police playing a significant role in managing community dissatisfaction and frustration. The South African government, through the police, has responded to the surge in protests with growing intolerance, ranging from overtly brutal repression, including the use of disproportionate and sometimes lethal force, to suppression through less visible means. The more subtle instances of suppression include unduly restrictive interpretation of the legislative framework governing protests to prohibit or restrict collective mobilisation through protest, increased police brutality, specifically targeting local community activists and the abuse of the criminal justice system.169 It further seems that the state is increasingly utilising the criminal justice system not so much for the genuine prosecution of criminal activity, but rather to deter, intimidate and suppress popular dissent. Although many of the challenges that plague the policing system in South Africa relate to systemic issues of corruption, maladministration and incompetence, there also seems to be a clamp-down of visible expressions of popular dissent.*
>
> *These claims were substantiated by various respondents, who argue that there is been a marked increase in the "political repression of [popular] discontent". One respondent stated that the forceful repression by the state has been epitomised in a number of high-profile matters including the Marikana massacre, the killing of Andries Tatane and the ongoing abuses in the policing of public protests. Other respondents underscored the growing intolerance of the state toward protests in general, describing this development as a "push back" on the part of the state. Recently, there have been attempts to enforce 'blanket prohibitions' of protests organised by certain groups, as well as the large-scale arrest and detention of peaceful protestors.*
>
> *Public interest legal services organisations have experienced growing demand for criminal defence services, including bail applications. They have also publicised systemic failings in policing, including police partiality and brutality. The*

[28] Socio-Economic Rights Institute, "Public interest legal services in South Africa: Project report" (July 2015) at pp 31-33 (accessible at http://www.raith.org.za/docs/Seri_Pils_report_Final.pdf).

Marikana Commission of Inquiry also became a key site for civil society engagement with police repression and brutality."

38. This suppression of lawful dissent by traditional leaders has also reached dangerous proportions, in particular because it continues with impunity. Despite the Constitutional Court finding in 2013 that communities have the right to meet to discuss their dissenting views from their traditional leader (after the leader successfully interdicted the community from doing so in the High Court),[29] the practice of 'gag' orders against any member of a community that opposes or challenges the traditional leader continues unabated.[30]

39. In the Makgodu village in Limpopo province, the traditional leader employs his own private army to harass, beat, abduct and illegally detain members of his community who "disrespect" him. Disrespect simply constitutes any form of questioning of the practices of the tribal authority. Remarkably, the police declined to get involved in the Chief's activities and the local magistrate's court assists in enforcing the suppression of the community members. The villagers recently instituted proceedings in the High Court in an attempt to protect themselves from the Chief's conduct. The matter is ongoing.

40. In 2010, Mrs Prisca Shabalala represented the Rural Women's Movement in making written and oral submissions to the National Assembly on the repeal of apartheid legislation. She is an activist in her community in Matiwaneskop in KwaZulu-Natal. Her submissions included references to abuses of her traditional leader. In 2012 she again made submissions on behalf of RWM on the Traditional Courts Bill. One of the Members of Parliament present, who is also a traditional leader, threatened her after her submissions and told her that she should not bring grievances with traditional leaders to

[29] *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC)
[30] For example the Bafokeng Tribal Court interdicting members of the Thekwane community for holding meetings, Emily Chokwe v Albert Boreman "Mpeta" Chokwe and One Other, Case No 718/2015.

parliament. She was subsequently brought before the Chief's tribal court and she was threatened with being banished from the community.

41. Recently, the traditional leader instituted legal action against Mrs Shabalala insisting that she publish a retraction and publicly apologise to the leader. It seems that this latest action relates to her submissions to parliament in 2010.

42. Lastly, it is worth noting that in December 2015, it was reported that a member of Cabinet expressed the view that certain non-governmental organisations were "*enemies of the state*".[31] In a statement issued by the Executive Committee of the Council for the Advancement of the South African Constitution, made up of leading constitutional law experts (and, themselves, human rights defenders), it was emphasised that:[32]

> "*Instead of allowing itself to succumb to paranoia, the government should welcome any contribution to developing a culture of human rights and democratic accountability – principles of progressive constitutionalism which countless people struggled to attain and to which the members of the council are committed.*
>
> . . .
>
> *Government should stop trying to intimidate such organisations and anyone who serves them, including retired judges. It is not becoming of a democratically elected government and threatens the hard-won international reputation of South Africa as a country committed to constitutional democracy, human rights and the rule of law.*"

43. The right to private communications, and to be free from any unlawful physical or digital surveillance, is also intrinsically linked to the protection of human rights defenders. We turn to consider this issue next.

Right to private communications

(Arts 17 and 19 of the ICCPR; para 26 of the LOIs; paras 44-45 of the Reply)

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[31] City Press, "Government's twisted logic on the judiciary" (23 December 2015) (accessible at http://city-press.news24.com/Voices/governments-twisted-logic-on-the-judiciary-20151219).

[32] Above n 31.

44. We have had regard to the submission prepared by Privacy International, the Association of Progressive Communicators and the Right2Know Campaign to the Human Rights Committee, and support the contents thereof.[33] The present framework in South Africa is wholly insufficient to deal with the growing concerns relating to digital surveillance the world over.

45. In particular, we wish to highlight the following:

45.1. There are a number of concerns with the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 ("**RICA**"). In this regard, two of the key concerns relate to the low level of oversight contained in RICA, and that there is no procedure for notification of a subject of surveillance, even once the surveillance activities have been completed.

45.2. The most recent Annual Report of the Joint Standing Committee on Intelligence ("**JSCI**") for the year ended 31 March 2015, presented to Parliament in January 2016, is scant in detail and does not provide any meaningful information about the security services.[34] Importantly, what appears from the report is that, of the 387 directions sought under RICA for the period under consideration, only 5 were refused;[35] the need for better technology in order to perform interception activities;[36] and the recognition that RICA may need to be revised in light of the obligations South Africa may incur if it accedes to the African Union

[33] Privacy International, Association of Progressive Communicators and Right2Know Campaign, "The right to privacy in South Africa" (April 2015) (accessible at http://www.r2k.org.za/wp-content/uploads/PI-submission-South-Africa-FINAL.pdf).

[34] JSCI, "Annual report of the [JSCI] for the year ended 31 March 2015" (31 March 2015).

[35] Above n 34 at p 37.

[36] Above n 34 at p 36.

Convention on the Establishment of a Credible Legal Framework for Cybersecurity in South Africa.[37]

45.3. The Right2Know Campaign's publication on the surveillance of activists highlights a number of deeply concerning case studies.[38] Additionally, there are two further important developments that must be noted:

45.3.1. The first is that, in February 2015, the Al Jazeera news network published leaked intelligence cables revealing that South Korea had sought information from the South African government in relation to Mr Kumi Naidoo, the Executive Director of Greenpeace. It is not clear what response was provided to this.[39]

45.3.2. Furthermore, the second is that, in June 2015, the Investigatory Powers Tribunal in the United Kingdom handed down a ruling that the interception of communications from an email address associated with the LRC was in breach of the United Kingdom Government Intelligence Headquarters' internal policies.[40] This was held to be in breach of article 8 of the European Convention on Human Rights.

45.4. In relation to the two incidents above, the LRC submitted access to information requests in terms of the Promotion of Access to Information Act 2 of 2002 to the State Security Agency, seeking information regarding *inter alia* any requests for information, any response to such request, and/or any request for an order or

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[37] Above n 34 at p 36.

[38] Right2Know Campaign, "Big Brother exposed: Stories of South Africa's intelligence structures monitoring and harassing activist movements" (accessible at http://bigbrother.r2k.org.za/).

[39] Al Jazeera, "Greenpeace among intelligence targets" (24 February 2015) (accessible at http://www.aljazeera.com/news/2015/02/spy-cables-greenpeace-intelligence-targets-150224115107221.html).

[40] LRC, "Press release: LRC emails intercepted by British Intelligence" (22 June 2015) (accessible at http://lrc.org.za/press-releases/3520-press-release-lrc-emails-intercepted-by-british-intelligence). The ruling is accessible at http://www.ipt-uk.com/docs/Final%20_Liberty_Ors_Open_Determination.pdf.

directive in terms of RICA in relation to Mr Naidoo or the LRC. No response has been received to these requests.

45.5. It should also be noted that there are two important vacancies at present that are relevant to surveillance: the Inspector General of Intelligence, and the Information Regulator.[41] In relation to the Information Regulator, it appears that the Protection of Personal Information Act 4 of 2013 ("**POPI**") cannot be brought into force. Even once POPI is brought into force, however, this is not a complete answer to the difficulties. Firstly, even once brought into force, there will still be a one-year grace period (which may be extended) before the rights and obligations under POPI will be implemented. Furthermore, Section 6(1)(a) of POPI provides that POPI does not apply to the processing of personal information by or on behalf of a public body which involves national security. This makes it crucial for there to be proper oversight from the relevant security agencies.

46. This sample is indicative of a deeply worrying framework in which surveillance takes place, without proper oversight to ensure that it is done in a manner that is compliant with South Africa's constitutional obligations and obligations under the ICCPR. Notably, and concerningly, South Africa did not respond to the query raised by the Human Rights Committee in paragraph 26 of the LOIs regarding its surveillance practices.

Right to participate in public life and the rights of minorities

47. We note in particular the issues raised by the Committee in paragraphs 28 and 29 of its LOIs and the reply from the State. We would like to note the following:

[41] See Daily Maverick, "Missing in action: Inspector General of Intelligence and Information Regulator" (9 February 2016) (http://www.dailymaverick.co.za/article/2016-02-09-missing-in-inaction-inspector-general-of-intelligence-and-information-regulator/#.Vr2vv_l97IU).

47.1. The Traditional Khoi-San Leadership Bill mentioned by the State was recently introduced in parliament and a first stakeholder consultation held in February 2016. The Bill was widely rejected by both the Khoi-San groups and academics and activists speaking on behalf of traditional communities. The most common complaint against the proposed legislation is that it provides no effective mechanisms of accountability against traditional leaders for community members and it entrenches the imposed and racist boundaries first drawn by the apartheid government in 1951. The LRC was also invited to make submissions and did so.

47.2. With regards to the land restitution programme, the State reply notes the re-opening of the land claims process. It does not note the wide condemnation of this decision by scholars and communities largely on the basis of the complete failure of the Restitution Commission to process claims and the lack of a dedicated budget to implement the programme. Last week, parliament heard from noted scholars that it will take an estimated 144 years to settle the claims already lodged at the current pace.[42] Several communities, represented by the LRC, have approached the Constitutional Court to order the re-opening must provide for the ring-fencing of outstanding claims lodged before the first cut-off of 1998. That matter will be heard in the Constitutional Court on 16 February 2016.

47.3. Finally, we note that the State does not reply to the question of the denial of the rights of traditional fishing communities, known as small scale fishing communities in South Africa. These fishers, represented by the LRC, won an Equality Court case in 2007 to force the Minister to develop a policy that will recognise, promote and fulfil their socio-economic and customary rights to access the resource. They argued that the marine resource regime created in 1998 completely excluded them in favour of commercial and recreational fishers.

[42] http://city-press.news24.com/News/it-could-take-144-years-to-settle-land-claims-warns-researcher-20160203

47.4. The Department did develop a policy on small scale fishers which was finally published in 2012. However, the implementation of the policy has continued to be delayed and indications are that the Department is taking no steps to ensure that their rights are realised. The LRC continues to represent small scale fishers in this battle.

CONCLUSION

48. This year, on 4 February 2016, marked the twentieth anniversary of the Constitution coming into operation. It is therefore an apt and opportune moment for South Africa, as stated in the reporting guideline, "*to take stock of the state of human rights protection … for the purpose of policy planning and implementation*".[43] While many gains have been made since the advent of democracy in 1994, there is still a wide array of challenges that are presently faced.

49. The LRC appreciates the opportunity to make this submission, and would like to thank the Human Rights Committeefor its consideration of this. Please do not hesitate to contact us should you require any further information or assistance.

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[43] Above n 10 at para 9.