SOUTH AFRICAN HUMAN RIGHTS COMMISSION

National Human Rights Institution Report regarding the South African Government's Combined 2nd and 3rd Periodic Report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Contents

Introduction

1. The South African Human Rights Commission (SAHRC / Commission) welcomes the South African government's combined second and third periodic report (State report) to the Committee Against Torture (Committee) in respect of the country's obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention).

2. Albeit overdue, the SAHRC acknowledges the State report and appreciates the opportunity to submit a National Human Rights Institution (NHRI) report to the Committee. Noting the limited time period which the State report addresses, the SAHRC highlights specific recent developments so as to provide the Committee with a comprehensive insight on the application of the Convention in the country. Where applicable, the SAHRC's NHRI report provides recommendations that the Committee may wish to consider during its review of the South African government.

3. The SAHRC notes several references in the State report to the work of the institution as well as the request in para 13 of the Committee's List of Issues to provide updated information about the mandate, resources, activities and results of the work of the NHRI. In order to give effect hereto, the SAHRC has compiled its NHRI report in a manner which incorporates the institution's activities, complaints, investigations and research it has undertaken in matters relating to the rights listed under the Convention. For ease of reference, the SAHRC has categorised its NHRI report in thematic clusters and where relevant, cross-referenced to the applicable sections of the State report.

South Africa's National Human Rights Institution

4. The SAHRC is mandated by Section 184 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') to:

   (a) Promote respect for human rights and a culture of human rights;

   (b) Promote the protection, development and attainment of human rights; and

   (c) Monitor and assess the observance of human rights in the Republic.

5. Section 13(1)(b)(vi) of the South African Human Rights Commission Act[1] (SAHRC Act), specifically mandates the SAHRC to monitor the implementation of, and compliance with, international and regional human rights instruments.

6. The SAHRC is additionally guided by the Paris Principles adopted by the United Nations General Assembly in 1993[2] and been designated as an 'A' status NHRI.

7. As referenced in para 38 of the State report, in terms of Section 11 of the SAHRC Act, the institution may establish advisory bodies comprised of human rights experts and practitioners emanating from diverse disciplinary and institutional backgrounds. In this regard, the SAHRC has established a Section 11 Committee to advise broadly on matters related to law enforcement and the prevention of torture. The Section 11 Committee convenes regularly and advises the Commission on, *inter alia*, i) the sectorial developments on law enforcement and the prevention of torture; ii) the strategic and impactful interventions to address policy gaps in respect of law enforcement and the prevention of torture; iii) the interventions that address systemic challenges in law enforcement and the prevention and reporting of torture; iv) matters related to international and regional human rights treaties that advance efforts in law enforcement and the prevention of torture; and v) any other matter related to law enforcement and the prevention of torture on which the Commission seeks expert opinion. The SAHRC specifically highlights that it hosts a strong, reputable network of Section 11 members who comprise of, academics, experts and key civil society actors who are well-established stakeholders in the country's the torture prevention / criminal justice sector.

8. In furtherance of its promotion and protection mandate, the SAHRC points out that it has signed Memoranda of Understanding (MOU) with, i) the South African Police Service (SAPS); ii) the Independent Police Investigative Directorate (IPID); and iii) the Military Ombudsman of South Africa, respectively The purpose of these MOUs is to contribute toward the prevention of any form of cruel, degrading or inhuman treatment by State officials through monitoring, training and advocacy, and ultimately embedding a culture of human rights within the country.

[1] Act 40 of 2013.
[2] UN General Assembly Resolution 48/134 on National Institutions for the Promotion and Protection of Human rights (1993).

9. In terms of its capacity, the SAHRC's has eight Commissioners (six full-time, two part-time) who provide strategic direction to the Commission through annual strategic planning, exercising good corporate governance, and providing leadership and guidance on the professional work of the Commission. The performance of the SAHRC is monitored by the Commissioners together with the Chief Executive Officer. At the end of the 2017/18 financial year, the Commission's total staff complement included 211 permanent staff members and 12 contractors. Thus, a total of 223 persons serving approximately 57.5 million people[3] over a land mass of 1, 22 million km^2. This is approximately one Commission staff member to every quarter of a million people. The Commission's budget for the same financial year was ZAR 183 million (approximately EUR 11, 2 million), which was subsequently reduced for the 2018/19 financial year to ZAR 178 million (EUR 10, 9 million). For the 2019/20 financial year, the SAHRC's budget was increased to ZAR 189 million (EUR 11,6 million) with a ring-fenced allocation for the anticipated establishment of the National Preventive Mechanism (NPM) once the State ratifies the Optional Protocol to the Convention Against Torture and other cruel inhuman and degrading treatment or punishment (OPCAT). The SAHRC specifically highlights this to the Committee in order to contextualise the magnitude of the institution's mandate in comparison to its limited financial and human resources.

10. **SAHRC Recommendation to the Committee**

a) The South African government should allocate appropriate financial resources to enable the SAHRC to fully execute its mandate effectively.

Developments on the Optional Protocol to the UNCAT

11. The OPCAT was adopted by the UN General Assembly on 18 December 2002 and entered into force on 22 June 2006. South Africa signed the OPCAT on 20 September 2006 and has pledged to ratify it since 2007.[4] This was reiterated during South Africa's Universal Periodic Review (UPR) cycles where the government reaffirmed its intent to

[3] http://www.worldometers.info/world-population/south-africa-population/
[4] *Note verbale* dated 26 April 2007 from the Permanent Mission of South Africa to the United Nations addressed to the President of the General Assembly.

ratify the OPCAT but indicated that consensus was required on the structure of its National Preventive Mechanism (NPM) before formal ratification.

12. Notwithstanding the delay, the SAHRC brings to the Committee's attention that there has been positive developments and willingness on the part of the State to designate an NPM to monitor places where persons are deprived of their liberty.

13. After more than a decade of national discussions,[5] there is new momentum for the OPCAT ratification by the South Africa government. Since 2016, the Department of Justice and Constitutional Development (DoJCD) - tasked with leading consultations with relevant stakeholders and preparing all documentation in view of OPCAT ratification - resumed consultations regarding the possible structure of the South African NPM. The DoJCD engaged in discussions with the SAHRC, the Judicial Inspectorate for Correctional Services (JICS) and the Independent Police Investigative Directorate (IPID) regarding their potential role in such the monitoring mechanism, including the financial implications associated therewith.

14. Following robust engagement, consultation and comparative jurisdictional analysis, the preferred model proposed for South Africa is a multiple-body NPM, with the SAHRC playing a lead functional and coordinating role. The SAHRC intends to work with several statutory bodies such as the JICS, IPID, Military Ombudsman, and the Health Ombudsman and will strongly advocate that these bodies meet the requisite independence standards as set out by the OPCAT.

15. By way of update, the SAHRC is pleased to inform the Committee about the South African Cabinet decision on 28 February 2019, to refer the OPCAT to Parliament[6] for ratification in accordance with section 231 (2) of the Constitution.[7]

[5] In 2006, an ad hoc committee, the "Section 5 Committee", (now Section 11) was established within the SAHRC to promote the OPCAT ratification and implementation. In 2008, the Centre for the Study of Violence and Reconciliation (CSVR) also published a review of national existing mechanisms for torture prevention and investigation, whose findings and recommendations were debated among national and international actors. Several workshops were also held over the years, involving the SAHRC, national and international non-governmental organisations (NGOs) and various government departments, such as the Department of Justice and Constitutional Development (DoJCD), the Department of International Relations and Cooperation (DIRCO), the Department of Home Affairs (DHA), the Department of Police and the Department of Correctional Services (DCS).

[6] See Statement on the Cabinet Meeting of 27 February 2019 https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-27-february-2019 at para 14.

[7] Section 231 (2) of the Constitution states that, "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)".

16. **SAHRC Recommendation to the Committee**

a) The South African government should expedite the establishment of the NPM and ensure that the SAHRC, as the coordinating body, is adequately resourced to fully execute its mandate.

b) In order to mitigate against further delays in the establishment of the monitoring mechanism, the State should accelerate the possible legislative amendments to the enabling legislation of the JICS, IPID and other bodies which might form part of the NPM.

General issues relating to the implementation of the Convention

Delays in submitting the State report

17. The SAHRC notes with concern the delay in the submission of the State report notwithstanding the Commission's several recommendations to the South African government to comply with its international human rights reporting obligations. The SAHRC further expresses concern at the failure of the government to respond to the list of issues which was released by the Committee in 2009 and the timeous submission of its second and third periodic reports. This has subsequently resulted in an eight year delay in the submission of the State report which regrettably only includes information and developments up to 2013.[8] The absence of recent / updated information in the State report therefore provides an incomplete account of the prevalence of torture and ill-treatment in South Africa.

18. **SAHRC Recommendation to the Committee**

a) The South African government should provide reasons as to the delay in the periodic reporting and provide assurances that in future it shall fully adhere to its international human rights reporting obligations.

[8] The 2nd and 3rd state periodic reports were due in December 2009 and December 2013, respectively. The combined report was only submitted to the Committee in September 2017.

Legislative Developments

19. The SAHRC welcomes the adoption of the following pieces of legislation which strengthens the human rights architecture in the country:

a) Prevention and Combating of Torture of Persons Act, 13 of 2013;
b) Prevention and Combating of Trafficking in Persons Act, 7 of 2013;
c) Sexual Offences and Related Matters Amendment Act, 32 of 2007;
d) Correctional Services Amendment Act, 25 of 2008 (CSA);
e) Independent Police Investigative Directorate Act, 1 of 2011 (IPID Act); and
f) Child Justice Act, 75 of 2008.

20. Whilst the enactment of aforementioned legislation is welcomed, the SAHRC notes that the State report does not include an adequate, reflective analysis on the extent to which these statutes have been effective in the prevention and combating of torture. More specifically, the State report fails to provide information on the number of matters brought pursuant to the Prevention and Combating of Torture Act, nor does the State provide commentary on the proposed amendments to the IPID Act (despite the concerns regarding its independence).

South Africa's withdrawal from the Rome Statute

21. The SAHRC notes the references in paras 140 to 142 of State report in respect of ratification of the Rome Statute of the International Criminal Court (ICC / Rome Statute) and its domestication through the Implementation of the Rome Statute of the International Criminal Court Act.[9]

22. However, the SAHRC brings to Committee's attention that in October 2016, the South African government announced its withdrawal from the Rome Statute and the subsequent repeal of the domestic enacting legislation.[10] This action received considerable backlash from the general public, civil society organisations as well as political parties who challenged the government's decision before the North Gauteng High Court. Subsequently, in February 2017, in the matter of *Democratic Alliance v Minister of International Relations and Cooperation and Others,*[11] the High Court declared that the decision by the National Executive to deliver a notice of withdrawal

[9] 27 of 2002.
[10] https://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc
[11] (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP).

from the Rome Statute, without prior parliamentary approval, was unconstitutional and invalid.[12] In addition, in July 2017, the pre-trial chamber of the ICC held that South Africa violated its international legal obligations under the Rome Statute when it failed to arrest Sudanese President Omar Al-Bashir when he was on South African territory in June 2015.[13] Despite these developments, in December 2017, the South African government participated in the 16th session of the Assembly of States Parties (ASP) of the International Criminal Court (ICC), where the Minister of Justice and Correctional Services re-affirmed the government's position to withdraw from the Rome Statute.[14] The Minister opined that ''South Africa's continued membership to the Rome Statute, as it is currently interpreted and applied, carries with it the potential risk of undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere''.[15] The Minister further confirmed that government's notice of withdrawal from the Rome Statute would be presented to Parliament in the draft International Crimes Bill which was then subsequently tabled before the legislature in December 2017.[16] To date, there has been minimal progress on this matter and it remains unclear what the position of the State is with regard to the withdrawal process.

23. The SAHRC notes that without the necessary guarantees that South African courts will exercise universal jurisdiction over persons who are allegedly responsible for acts of torture and ill-treatment, including foreign nationals who are temporarily present in South Africa, an impunity gap may well result and the country regarded as a safe haven for perpetrators of these heinous acts.[17]

24. **SAHRC Recommendation to the Committee**

a) The South African government should provide clarity on the status of international criminal jurisdiction in the country in light of the uncertainty regarding the withdrawal from the Rome Statute.

[12] Ibid para 77.
[13] *In the case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir No.: ICC-02/05-01/09 (6 July 2017) <https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF> 53.
[14] See, Opening Statement by Adv. Tshililo Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa, General Debate: Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4-14 December 2017.
[15] Ibid.
[16] International Crimes Bill, B37-2017, see <https://pmg.org.za/bill/751/?via=homepage-card>.
[17] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168 (27 November 2013). The case involved the powers of the Acting National Director of Public Prosecutions (the NDPP), its Head of Priority Crimes Litigation Unit (the HPCLU) and the Acting National Commissioner of the South African Police Service not to institute an investigation into alleged crimes against humanity of torture committed by Zimbabwean police and officials against Zimbabwean citizens in Zimbabwe.

b) In the event that the South African government is still contemplating its position, it should be recommended that the State revokes its intention to withdraw from the ICC and remain committed to the international human rights obligations under the Rome Statute.

c) The State should ratify the Malabo Protocol for the creation of a regional criminal jurisdiction for the African Court of Justice and Human Rights (ACJHR).

Pre-constitutional democracy torture cases

25. The SAHRC notes that despite the enactment of the Prevention and Combating of Torture of Persons Act, its non-retrospective application results in the failure to prosecute apartheid-era cases of torture and ill-treatment, notwithstanding that this was a key recommendation emanating from the country's Truth and Reconciliation Commission (TRC).

26. In this regard, the SAHRC draws the Committee's attention to the June 2017 landmark judgment of the North Gauteng High Court wherein the 1972 inquest into the death of Mr Ahmed Essop Timol was formally re-opened.[18] The purpose of re-opening the inquest was to investigate the circumstances leading to the death of Timol in 1971, in the light of further evidence that was uncovered.[19] The inquest also revealed that there are many more families seeking closure in respect of unanswered questions concerning the death of their relatives in detention during the apartheid years.[20] The Court subsequently ruled that 'the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to having the initial inquest re-opened.'[21] In this regard, the Court recommended that the SAHRC, working in consultation with the law enforcement agencies, should be sufficiently resourced to take on this task.[22]

[18] *The re-opened inquest into the death of Ahmed Essop Timol,* case number: IQ01/2017, North Gauteng High Court.
[19] Ibid para 1.
[20] Ibid para 339.
[21] Ibid para 340.
[22] Ibid. The Judge specifically opined that 'without being prescriptive, it would assist if the Human Rights Commission and IPID are sufficiently resourced to undertake the task of preparatory work, in consultation with the National Prosecuting Authority (NPA), for the re-opening of such inquest at the request of the families concerned'.

27. **SAHRC Recommendation to the Committee**

a) In light of the *Timol* judgment, and where possible, the State should prosecute perpetrators of pre-democracy torture cases and provide adequate redress / appropriate compensation to victims.

b) The State should provide clarity on how it intends to execute and implement the recommendations of the TRC as well as how it intends to capacitate the SAHRC to give effect to the role imposed on the institution through the *Timol* judgment.

Prevalence of torture

28. The SAHRC points out that during the period 2017/18, the IPID reported a total of 217 cases of torture and 3661 cases of assault by police officials.[23]

29. The SAHRC notes the lack of reference in the State report regarding the range of measures that the Convention prescribes for the prevention of torture and those that are effective in South Africa. The SAHRC specifically notes that para 13 of the State report limits its conceptualisation of torture prevention to training, which is only one of the preventative measures provided under the Convention. Furthermore, the State report does not reflect on the extent to which the training programmes have contributed to preventing incidents of torture and other ill-treatment. The SAHRC is of the view that at a minimum, the South African government should be reporting both on the existence as well as the effectiveness of the preventative measures such as the following, i) procedural safeguards and implementation thereof; ii) review of policies and procedures; iii) establishment and functioning of independent oversight mechanisms; iv) availability of redress for victims of torture; and, v) prohibition and monitoring on the use of certain equipment.[24]

30. Para 184 of the State report reads that, "the investigation of torture allegations in South Africa is conducted by two bodies: the IPID which investigates acts of torture

[23] Independent Police Investigative Directorate, Annual Report 2017/2018, p. 37. http://www.icd.gov.za/sites/default/files/documents/IPID_AR_2017_WEB_0.pdf (accessed 15 February 2019).
[24] Regarding the prohibition and monitoring on the use of certain equipment, the SAHRC endorses the submission made to the Committee on the List of Issues by Omega Research Foundation, Institute for Security Studies and Legal Resources Centre. Their submission provides substantial commentary on concerns regarding the manufacture, trade and use of equipment used for torture in South Africa and is available at, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ZAF/INT_CAT_ICO_ZAF_31687_E.pdf

committed by members of the SAPS; and the Judicial Inspectorate for Correctional Services (JICS) which investigates acts of torture allegedly committed in correctional centres." The SAHRC points out the inaccuracy of the statement and clarifies that the JICS mandate is primarily to inspect prisons; record complaints from inmates and attempt to resolve them with Department of Correctional Services (DCS); and to report on conditions of detention and the treatment of inmates to the Minister and to Parliament. Furthermore, the JICS mandate and powers are not specifically geared toward investigating allegations of serious human rights violations inside prison or non-compliance with the DCS statutory obligations. Its role, function and powers are therefore significantly different to that of the IPID. Despite being legally independent,[25] JICS enjoys neither administrative nor financial independence from the DCS. Its budget is allocated by DCS and the Chief Executive Officer (CEO), after being identified by the Inspecting Judge, is appointed by and financially accountable to the DCS National Commissioner.[26] By controlling the budget of its oversight institution, DCS essentially has the capacity to decide the extent to which JICS is able to fulfil its mandate and expand its capacity, should this be required.[27] The independence of the JICS is discussed in further detail under para 91 below.

Arrested, detained and accused persons

31. Section 35 of the Constitution stipulates the rights of arrested, detained and accused persons, while section 12 relates to the right to freedom and security of the person. It should be noted that over the last four years, complaints relating to the rights of arrested, detained and accused persons have consistently formed part of the top five rights violations complaints lodged with the SAHRC. Most of these complaints are from inmates detained in correctional services facilities requesting assistance to secure copies of trial transcripts, as well as assistance with appeals against their convictions and / or sentences with only a few complaints related to prison conditions. The SAHRC seldom accepts these complaints and most matters are referred to Legal Aid South

[25] Correctional Services Act, s 85(1).
[26] Correctional Services Act, s 88 A and 91; see also: Keehn, E., Nyembe, N., and Sukhija, T., (2013) *Evaluation of South Africa's Judicial Inspectorate for Correctional Services: Assessing its independence, effectiveness and community engagement*, Sonke Gender Justice Network, pp. 21 and 34.
[27] Concerns with the mandate and impact of JICS were expressed by the Jali Commission in its final report. While the Jali Commission recognised the value of lay visitors, it also recommended the establishment of an Ombudsman that would have more powers than the current structures. See *Report of Commission of Inquiry into alleged incidents of corruption, maladministration, violence or intimidation into the Department of Correctional Services (appointed by order of the President of the Republic of South Africa in terms of Proclamation No. 135 of 2001)* (2005) (Jali Commission Report), p. 614. (Unfortunately, the Jali Commission's recommendation was never considered by the DCS or Parliament).

Africa or to JICS who are tasked with a specific mandate to address complaints falling within the criminal justice system.

32. **SAHRC Recommendation to the Committee**

a) The South African government should establish robust awareness-raising and advocacy initiatives regarding the respective roles of the SAHRC, Legal Aid South Africa and JICS in respect of arrested, detained and accused persons.

Overcrowding and poor conditions in correctional centres

33. The SAHRC has regularly expressed concern at conditions in correctional centres, particularly regarding overcrowding, and the South African government's lack of a concrete response as to how it plans to improve conditions in detention. During its review of the government in 2016, the UN Human Rights Committee echoed similar sentiments and expressed concern over the poor conditions of detention at prisons, overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, lack of exercise, poor ventilation and limited access to health services.

34. Reasons for overcrowding include, i) a high number of prisoners awaiting trial; ii) bottlenecks in the parole process; iii) mandatory minimum sentencing; iv) the increase in life sentences; and, v) the lack of restorative justice. Furthermore, it should be noted that there is an increasingly high number of persons are being held in remand detention without being acquitted or convicted. The SAHRC remains cognisant of the challenges on the DCS posed by overcrowding and recognises that this phenomenon is indicative of the broader challenges within South Africa's criminal justice system. However, the SAHRC stresses that once inmates are within the custody of the DCS, it is imperative that human rights safeguards are entrenched to mitigate against the potential consequences of overcrowding (for example, violence between inmates and / or correctional services officials, health concerns, access to medical and support services etc).

35. The SAHRC further points out that most of South Africa's correctional facilities have been operating at more than their approved capacity. In the case *Sonke Gender*

Justice v Government of the Republic of South Africa and Another,[28] the Western Cape High Court ordered the government to reduce occupancy at Pollsmoor Male Remand Detention facility to 150 percent of its capacity over a six-month period. The SAHRC is pleased to note that by February 2017, a year after judgment was handed down, the DCS had already taken steps to reduce overcrowding at the facility from 252 percent to 174 percent.

36. Similarly, during 2018 in the matter *Participative Management Committee v Minister of Justice and Correctional Services and another*, the High Court in Johannesburg ordered the DCS to ensure that it complies with section 8(5) of the Correctional Services Act which states that:

> "*food must be well prepared and served at intervals of not less than four and a half hours and not more than six and a half hours, except that there may be an interval or not more than 14 hours between the evening meal and breakfast"*.[29]

37. In the aforementioned judgment, the Judge noted that issues of overcrowding ought to have been addressed in 2005 and that it is inhumane to keep prisoners in conditions where more than twice the number of prisoners are housed in a facility designed for half the number of prisoners.[30]

38. **SAHRC Recommendation to the Committee**

a) The South African government should urgently address the issue of overcrowding in correctional centres across the country and increase its efforts to guarantee the rights of detainees to be treated with humanity and dignity.
b) The State should explore restorative justice as an alternative to imprisonment and allocate with sufficient resources to relevant government departments to operationalise such alternatives.
c) The State should provide more concrete information and statistics on the reasons why inmates are serving life sentences and what their previous offence profiles are with a

[28] Cape Town HC 24087/15
[29] *Participative Management Committee v Minister of Justice and Correctional Services and Another* Case number: 17/16317.
[30] Ibid paras 5, 11-15, 19 and 32.

view to better understand the life imprisonment system in South Africa and execute the necessary reforms in this regard.

Solitary confinement

39. The SAHRC notes that para 152 of the State report refers to the abolition of solitary confinement. Whilst the disciplinary punishment of solitary confinement was removed from South Africa's legislation in 2008, there is a widespread view that this phenomenon continues to persist under the guise of 'segregation'.

40. In this regard, the SAHRC points out that originally the distinction between solitary confinement and segregation was clear in the legislation. Solitary confinement was a punishment following a disciplinary procedure, while segregation was a mechanism used for a range of other purposes. Under the Correctional Services Act, segregation is permissible under the following conditions: i) if a prisoner requests to be placed in segregation;[31] ii) to give effect to the penalty of the restriction of amenities; iii) if prescribed by a medical practitioner; iv) when a prisoner is a threat to himself or others; v) if recaptured after escape and there is reason to believe that he will attempt to escape again; and, vi) at the request of the police in the interests of justice.[32]

41. Prior to the amendment of the Correctional Services Act in 2008, there a clear limitation that for solitary confinement may not exceed 30 days and that there was no possibility of an extension.[33] Following the 2008 amendment, the Correctional Services Act states that in the event of serious and repeated transgressions, a prisoner may be placed in segregation, "in order to undergo specific programmes aimed at correcting his behaviour", with a loss of gratuity[34] up to two months and a restriction of amenities[35] for up to 42 days.[36]

[31] See also s 7(2)(e) of the Correctional Services Act 111 of 1998.
[32] Ibid s 30(1).
[33] s 24(5)(d) of the Correctional Services Act prior to the amendment by the Correctional Services Amendment Act 25 of 2008.
[34] Gratuity is a small monetary payment made to prisoners who are performing certain labour, such as working in the prison kitchen.
[35] Amenities refers to recreational and other activities, diversions or privileges which are granted to inmates in addition to what they are entitled to as of right and in terms of the Correctional Services Act, and includes exercise; contact with the community; reading material; recreation; and incentive schemes.
[36] s 24(5)(d) read with 24(5)(b and c).

Deaths in custody

42. As noted herein as well as the State report, the IPID is the independent body established to investigate any deaths as a result of police action or that occur in police custody, as well as to investigate complaints of brutality, criminality and misconduct against members of the SAPS and municipal police services.

43. During the period 2015 /16, the IPID reported a total of 216 deaths in police custody and 366 deaths as a result of police action. Deaths in custody are a result of natural causes, suicide, injuries sustained prior to custody and injuries sustained in custody by an SAPS official. However, it is noted that most deaths are as a result of police action which occurred during police operations, where suspects were shot with a firearm either during the course of an arrest or during the commission of a crime.[37] As noted above, the investigation of deaths and allegations of torture or cruel, inhuman or degrading punishment in correctional centres is conducted by the JICS. The JICS relies on the DCS to distribute its reports of unnatural deaths so that these can be analysed and feedback provided to stakeholders. However, the SAHRC notes with concern that the electronic system used to capture this information is currently dysfunctional, which subsequently affects the ability of JICS to fully perform its oversight role.

44. **SAHRC Recommendation to the Committee**

a) The South African government should ensure that the IPID is adequately resourced to undertake investigations into deaths at the hands of police officers.
b) Measures should be put in place to expedite and further strengthen the institutional independence of the JICS in order to fully investigate deaths and allegations of torture or cruel, inhumane or degrading punishment in correctional centres.
c) The DCS should improve its reporting so as to ensure that the relevant information is accessible to the JICS to execute its oversight role.

[37] While the IPID has reported a national decrease in the number of deaths in police custody as a result of police action, the Mpumalanga province saw a staggering 93 percent increase in the number of deaths in police custody, and a 75 percent increase in the number of deaths as a result of police action.

Extradition and *non-refoulement*

45. The SAHRC notes the Committee's request in the List of Issues for further information in respect of extradition and the principle of *non-refoulment.* While South Africa's courts will not sanction the deportation of both *de jure* and *de facto* refugees, the SAHRC is concerned about the practical implications of policy implementation. This was recently identified in the Constitutional Court judgments reaffirming the codification and customary international law status of the principle of *non-refoulement* in *Ruta v Minister of Home Affairs.*[38] In this matter, the Court further confirmed the applicability of the principle of *non-refoulment* to *both de jure* and *de facto* refugees.[39]

46. Similarly, in *Minister of Home Affairs and Others v Tsebe and Others* in 2012, a national of Botswana, Mr Tsebe, sought an order declaring that in the absence of the requisite assurance, his extradition or deportation would be unlawful and unconstitutional.[40] The Constitutional Court subsequently granted the order restraining key government officials, including, *inter alia*, the Minister of Home Affairs, as well as the Minister of Justice and Constitutional Development from extraditing or deporting the applicants to the Republic of Botswana without a written assurance from the latter government that the death penalty would not be imposed upon the persons to be extradited.

47. **SAHRC Recommendation to the Committee**

a) The South African government should ensure that there are adequate safeguards to guarantee respect for the principle of *non-refoulement*.
b) The State ought to establish whether there are substantial grounds to indicate that an asylum seeker might be in danger of torture or ill-treatment upon deportation to the country of origin.

[38] [2018] ZACC 52.
[39] Ibid para 27-29.
[40] See, *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others*, (CCT 110/11, CCT 126/11) [2012] ZACC 16.

Monitoring of unlawful detention at Lindela and privately-run facilities

48. In August 2014, the Gauteng High Court passed a judgment in favour of the SAHRC (and others) in the matter of, *South African Human Rights Commission and Others v Minister of Home Affairs.*[41] The SAHRC challenged the detention of 39 non-nationals at South Africa's 'Lindela Repatriation Centre', who were held beyond the requisite time frame of 30 days as stipulated under section 34 of the Immigration Act. In this instance, persons were detained for over 120 days without a warrant. The Court accordingly found that the extended detention period was unlawful and unconstitutional[42] and ordered the respondents to, take all reasonable steps to terminate such unlawful detention practices.[43] The Court further held that the respondents should provide the SAHRC with a written report on a 'regular or at least a quarterly basis', setting out, i) the steps taken to comply with the judgment to ensure that no person is detained in contravention of the order;[44] and, ii) full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.[45] In addition, the respondents were directed to provide the SAHRC with regular access to the Lindela Repatriation Centre and its detainees.[46]

49. In giving effect to the judgment, during 2016 the SAHRC released its Report on the Lindela Monitoring and Oversight Project.[47] The SAHRC's monitoring revealed several systemic issues at Lindela, including, i) allegations of abuse, corruption and/ or bribery; ii) the use of isolation as a conflict management tool; iii) overcrowding; iv) consistent outbreaks of infections and deficient hygiene standards; v) detention of unaccompanied and separated migrant children; and vi) continued detention of undocumented migrants beyond the prescribed periods.[48] The SAHRC's report

[41] *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014] ZAGPJHC 198, (SAHRC v Home Affairs), available at <http://www.saflii.org/za/cases/ZAGPJHC/2014/198.html>
[42] Ibid para 52.2. (Also see, <http://ewn.co.za/2014/08/29/SAHRC-immigration-case-and-outright-victory>)
[43] Ibid para 52.3.
[44] Ibid para 52.4.1.
[45] Ibid. These particulars include: The person's full names; person's country of origin; The reason for the person's detention; The date on which that person was arrested; The basis on which the respondents seek to justify that person's continued detention beyond the 30 day period and whether a warrant for extension of the detention beyond 30 days has been authorised in terms of section 34(1)(d) of the Immigration Act (with a copy of such warrants to be provided).
[46] *SAHRC v Home Affairs* (note 41 above) para 52.5.
[47]. SAHRC Report on the Lindela Monitoring and Oversight Project (hereafter the SAHRC's 2016 Lindela Monitoring Report). Covering the period, January to August 2016.
[48] Also refer to para 4.6.1, pp. 49 to 50 of the SAHRC's 2016 Lindela Monitoring Report.

contains a host of recommendations to several government departments to address the widespread and continued violation of the rights of persons detained at Lindela.

50. Relatedly, in September 2014, the SAHRC released its findings of an investigation into violations of access to health for detainees at the Lindela Repatriation Centre. The investigation revealed that there was a lack of provision for TB testing and isolation of infected persons, and psychological care; availability of condoms and lack of voluntary counselling and testing (VCT); unavailability of tetanus vaccines; overcrowding in rooms; and time intervals between the serving of the evening meal and breakfast not complying with the time periods prescribed in the Regulations to the Immigration Act at Lindela.[49]

51. The SAHRC's monitoring of Lindela demonstrates the critical need for South African government to ratify the OPCAT and ensure that places of detention, are adequately monitored and that preventive mechanisms are put in place to curtail any abuse of rights.

52. The SAHRC further highlights that in 2017, the Constitutional Court handed down a judgment confirming the constitutional invalidity of section 34(1)(b) and (d) of the Immigration Act which, in practice, excluded automatic judicial oversight and confirmation of the lawfulness of detention. The Court confirmed its earlier jurisprudence that persons arrested and detained for purposes of deportation enjoyed the rights and protection afforded in sections 12 and 35(2) of the Constitution.[50]

53. More recently, the SAHRC is deeply concerned by the allegations of acts of torture and/ or ill-treatment at the privately run maximum security correctional centre in Mangaung. It is therefore necessary to consider the role of private institutions such as African Global (previously Bosasa) and G4S Security Group in running places of detention in light of allegations of torture and/ or ill-treatment.[51] For instance, African Global provides management services at the Lindela Repatriation Centre including the

[49] http://www.sahrc.org.za/home/index.php?ipkArticleID=296

[50] Section 12: the right to freedom and security of the person, including protection against arbitrary detention and detention without trial, the right to be protected against violence, freedom from torture, freedom from cruel, inhuman or degrading punishment, the right to bodily integrity, and reproductive rights. Section 35(2): the rights related to detention and its conditions. See also, *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22.

[51] Cameron J, Constitutional Court of South Africa 'Visit to Lindela Repatriation Centre, Krugersdorp' (2012): http://www.constitutionalcourt.org.za/site/PrisonVisits/Cameron/Prisons-Lindela-Report-Monday-29-October-2012-FINAL.pdf; *SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012 (6) SA 45 (GSJ); SAHRC 'Baseline Investigation Report' Complaint No: GP/2012/0134 (2012); https://africacheck.org/factsheets/lindela-repatriation-centre-migrants/; https://www.dailymaverick.co.za/article/2015-05-05-mangaungs-hellish-prison-g4s-not-held-accountable-for-human-rights-violations/; https://mg.co.za/article/2013-10-25-00-mangaung-prison-is-a-private-hell/

provision of accommodation, administration, catering, health and safety. However, it should be noted that at all times the Department of Home Affairs (DHA) is legally and administratively responsible for matters relating to the apprehension, holding, processing, repatriation and release of those detained at Lindela. Furthermore, the DHA's constitutional obligations extend beyond its normal contractual obligations with service providers for outsourced services. In *AllPay Consolidated Investment Holdings*,[52] the Constitutional Court stated the following:

> *"Organs of state have obligations that extend beyond the merely contractual …the Bill of Rights binds all organs of state…even if not state departments or part of the administration of the national. Provincial or local spheres of government, must thus respect, promote and fulfil the rights in the Bill of Rights*..."[53]
>
> *In determining whether an entity is an organ of state, the presence or absence of governmental control over that entity is a factor, but in our constitutional era, is not determinative…the function that it performs – the country-wide administration … – is fundamentally public in nature*.[54]

54. It is thus appropriate to pay attention to the allegations levelled against African Global in light of the functions it performs for and on behalf of the DHA at Lindela. Despite the existence of a contractual relationship, the DHA does not absolve itself of its constitutional commitments. Therefore, it must ensure that all private entities with which it has enlisted certain of its functions comply with the Constitution and the rule of law.[55]

55. Similarly, in the matter of *AAA Investments*, the Constitutional Court stated that 'the exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of the Constitution'.[56] The Court went on further to highlight the multi-dimensional (horizontal and vertical)

[52] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC).
[53] Ibid para 49.
[54] Ibid para 52.
[55] In *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC), the court acknowledged the increasing notion in privatisation of state functions as held by the High Court *(sitting as court of first instance*), while emphasising on the applicability of the constitutional obligations to the private entities exercising public functions.
[56] Ibid para 29.

applicability of the Bill of Rights, in that organs of state, cannot contract out of their respective human rights obligations by enlisting private entities.[57]

56. **SAHRC Recommendation to the Committee**

a) The South African government should ensure that the DHA improve its efforts to ensure adequate living conditions in all immigration centres in the country.

b) The SAPS should ensure that the detention of undocumented migrants at police stations which have been classified as immigration detention centres, comply with the minimum standards of detention, the provisions of the Immigration Act and the court order in the matter *South African Human Rights Commission and 40 others v Minister of Home Affairs and 4 Others*.

Children

57. The SAHRC notes several references in the State report regarding the Child Justice Act, 2008 and its establishment of Child and Youth Care Centres (CYCCs). However, the report fails to note the inadequacies in monitoring both the physical conditions of detention, as well as the services offered to children.

58. The current framework of CYCCs provides residential care to children outside of a family environment in accordance with a residential care program. There are currently 366 CYCCs in South Africa, 30 of which are classified as Secure Care Facilities. The CYCCs are established under the Children's Act, 2005 (Children's Act), which also sets out operational regulations, norms and standards. Provincial Departments of Social Development have primary oversight responsibility for CYCCs. In addition, Section 211 of the Children's Act sets out the quality assurance process for CYCCs and includes provisions for independent teams to conduct assessments of centres and establish and implement organisational development plans for each CYCC. The 'Blueprint Minimum Norms and Standards for Secure Care Facilities in South Africa' (Blueprint Norms and Standards) provides further guidance on conducting quality assurance processes.

59. Notwithstanding the aforementioned, the SAHRC notes the weakness in the oversight mechanism for CYCCs including that:

[57] Ibid paras 29, 40-41 and 44.

i. There are limited oversight mechanisms for CYCCs and urgent legislative review is needed to strengthen the effectiveness of mechanisms provided for in the Child Justice Act, 2008, the Probation Services Act, 1991 and the Children's Act;
ii. Many CYCCs do not have an established complaints management system and there are inconsistencies in complaints reporting and management across CYCCs;
iii. The Child and Youth Care Application Information Management System, which records the number of children in care, is not being used consistently;
iv. Independent appointments to quality assurance teams are not funded, which creates difficulties in attracting qualified persons; and
v. There is no policy for sentenced children in Secure Care Facilities, resulting in process inconsistencies across provinces.

60. As noted in the State report, the Child Justice Act addresses children in conflict with the law. The SAHRC has often raised the issue regarding the overuse of prosecutorial or court-ordered diversion programmes for child offenders, due to a lack of funding for other community-based diversion options and restorative justice approaches as set out in the Act.

61. The SAHRC has also expressed concern at the age of criminal capacity in South Africa, which is contrary to General Comment 10 of the UN Committee on the Rights of the Child (concerning children's rights in juvenile justice). The SAHRC has previously recommended that the minimum age be raised to 14 years (with the removal of the legal presumption clause). The SAHRC is however pleased to note that in November 2018, Parliament approved amendments to the Child Justice Act to raise the minimum age of criminal capacity from 10 to 12 years old.

62. **SAHRC Recommendation to the Committee**

a) The South African government should ensure that sufficient resources are allocated to fund community-based programmes for children, and report on measures taken to ensure children in conflict with the law are placed separately from children in need of care.

Corporal punishment

63. While corporal punishment in schools is prohibited, it however, remains a sad reality which continues to plague South African society. The SAHRC has called on the National Department of Basic Education to expedite the establishment of a national protocol to enforce the statutory prohibition of corporal punishment in schools, address the shortcomings in the current legislative and policy frameworks, and provide for the prosecution of teachers and educators who continue to administer corporal punishment.

64. Currently, corporal punishment is still permitted in the private sphere (in the home). In 2016 the SAHRC published an Investigative Report on a complaint lodged against a church's religious doctrine that condones the use of corporal punishment against children. The SAHRC examined international, regional and South African law and made the following findings: corporal punishment in any form is inconsistent with constitutional values and violates the provisions of international and regional human rights standards; corporal punishment amounts to a violation of the right of every child to be protected from maltreatment, neglect, abuse or degradation, and violates children's rights to freedom and security of the person; and corporal punishment or chastisement amounts to a violation of the right to equality and human dignity.

65. The SAHRC is pleased to note that in November 2018, the Constitutional Court considered the constitutionality of the use of corporal punishment in the home and the defence of 'reasonable chastisement' as a form of discipline of children. The case followed the appeal of the ruling by the South Gauteng High Court that reasonable chastisement violates the rights of children and the protection of children against all forms of violence. The Constitutional Court is expected to hand down its judgment in this regard during the course of 2019.

66. The SAHRC also notes that during the course of 2018, the Department of Social Development (DSD) released a call for comments in respect of the amendment to the Children's Act, which includes, *inter alia*, the removal of the common law defence of reasonable chastisement and the prohibition corporal punishment in the home. The SAHRC is encouraged that the DSD is recognising the need to amend the legislation to ensure that all forms of violence against children are prohibited.

67. **SAHRC Recommendation to the Committee**

a) The South African government should expedite the establishment of a national protocol to enforce the statutory prohibition of corporal punishment in schools, address the shortcomings in the current legislative and policy frameworks, and provide for the prosecution of teachers and educators who continue to administer corporal punishment.

b) The DSD must accelerate the processing of the proposed amendment to the Children's Act in order to give effect to the prohibition of corporal punishment in the home, to provide for children's access to justice, and to provide for appropriate remedies and penalties against offenders.

c) The State should encourage non-violent forms of discipline as alternatives to corporal punishment and roll-out extensive public awareness programmes in this regard.

Persons with disabilities and older persons

68. The SAHRC was recently seized with a matter which demonstrated the challenges of stigma and abuse that people with disabilities continue to face in South Africa. Subsequent to the receipt of a complaint, the Commission facilitated the removal of a person who had been locked up and isolated by his mother for 19 years due to his disability. While the Commission facilitated medical treatment as well as psychosocial interventions, the case demonstrates that the challenge of educating people about disability in South Africa within the context of its socio-economic realities remains a pervasive one. The Commission continues to monitor the situation and recognises the need for sustained public education as a means of reducing the incidence of such gross human rights violations.

69. The state of school infrastructure in special schools presents a great risk not only to the safety and security of children with disabilities but also to their dignity. The Commission has conducted numerous inspection *in locos* at special schools where it has found that hostels in special schools lack basic infrastructure and are in violation of national safety regulations. The absence of safety mechanisms such as fire alarms has already proven to be fatal. In 2015, a hostel at the North West School for the Deaf caught fire and resulted in the injury of over 50 children and the death of 3 girls.

70. The SAHRC has identified unregistered Residential Facilities for Older Persons as a systemic issue of concern that is denying older persons the realisation of their constitutionally guaranteed rights. In accordance with the Older Persons Act 13 of 2006 (OP Act), the DSD is obliged to ensure that all residential facilities are registered. Section 18 (1) (A) of the OP Act states that no person may operate a residential facility unless it has been registered under the Act. The Commission has observed that there are numerous residential care facilities that are unregistered and are accommodating older persons in environments that are a detriment to their health, dignity, and well-being.

71. Furthermore, it should be noted that residential facilities that are unregistered are currently not monitored by the DSD. As a result, the abuse of residents, lack of provision of basic socio-economic rights, the maintenance of facilities, and the compliance with safety and security regulations, are all overlooked and unchecked. For example, safety and security at residential care facilities has become a major concern. In recent years, older persons have died in fires, which mostly occurred at night when there are minimal staff on site. This is a result of residential care facilities not complying with National Building Regulations, including the Building Standards Act, and the Occupational Health and Safety Act, such as installing smoke detectors or fire blankets.[58]

72. **SAHRC Recommendation to the Committee**

b) The South African government should ensure that as a matter of urgency that, i) all residential facilities are registered and monitored, and ii) school infrastructure is improved.

c) The State should provide information on measures undertaken to ensure that the liberty of persons with disabilities is monitored and that monitoring mechanism envisaged in article 33(2) of the Convention on the Rights of Persons with Disabilities is operationalised.

[58] An audit conducted on state funded residential facilities in 2010 by the DSD further found that only 5 of the 58 homes assessed did not have any 'high risk' issues . A facility is deemed 'high risk' if the building and its occupants are endangered by non-compliance with occupational health and safety regulations or any other regulation governing a specific issue.

Life Esidimeni deaths

73. During 2016, South Africa experienced a tragedy in the disability sector after 94 mental health care patients with psychosocial and intellectual disabilities died in 16 non-governmental organisations (NGO) and 3 hospitals. These tragic events were precipitated by a decision of the Gauteng provincial Department of Health, in line with its de-institutionalisation policy (and to save on costs), to terminate the contract of its service provider, Life Esidimeni Health Care Centre (Esidimeni) and instead relocate more than 1300 patients to unlicensed, under-resourced mental health facilities.

74. The SAHRC notes with appreciation that in December 2016, four UN Special Rapporteurs, issued a collective formal call for the South African government to establish a, 'policy framework to guide its de-institutionalisation process, inclusive of a plan of action with timelines and benchmarks, the redistribution of public funds from institutions to community services, and the development of adequate housing and community support for persons with disabilities, such as housing assistance, home and family support, and respite care.'

75. Subsequently, the Minister of Health commissioned the Health Ombud to investigate the deaths, with the latter finding that the transfer process demonstrated a disregard of the rights of the patients and their families, including the right to human dignity; right to life; right to freedom and security of person; right to privacy; right to protection from an environment that is not harmful to their health or well-being; right to access quality health care services, sufficient food and water; and right to an administrative action that is lawful, reasonable and procedurally fair.[59]

76. In February 2017, the National Minister of Health requested that the SAHRC undertake a systematic and systemic review of human rights compliance and possible violations in respect to mental health. By November 2017, the SAHRC subsequently convened a National Investigative Hearing into the Status of Mental Health Care in South Africa. The SAHRC's national hearing sought to collect information so as to identify the underlying systemic and structural challenges that undermine access to and the quality of mental health care as well as develop recommendations designed to address those

[59] Health Ombud *Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province: No Guns: 94+ Silent Deaths and Still Counting* (2017).

challenges.[60] The report on the outcomes of the hearing is currently in the process of finalisation and will be accessible via the SAHRC's website.

77. **SAHRC Recommendation to the Committee**

b) The South African government should ensure that all parties involved in implementing the recommendations in the Health Ombud's report on the Life Esidimeni deaths are adequately resourced and capacitated to do so, including the SAHRC.

c) The government should provide information regarding any measures to effect systemic reform that will prevent a similar tragedy from recurring.

d) The government should provide feedback in respect to the recommendations contained in the joint statement of the four Special Rapporteurs and what measures have been put in place to give effect thereto.

LGBTI persons

78. The SAHRC brings to the attention of the Committee the matter of *Jade September v Mr Subramoney N.O. and Another,*[61] wherein the applicant, a transgender woman detained at Helderstroom Maximum Correctional facility, sought an order directing that, i) the correctional services officials should allow her to express and identify as female; and ii) that the officials must desist from subjecting her to solitary confinement. While judgment is pending, the case points to policy gaps with respect to vulnerable groups, identity and classification in places of detention. It further demonstrates a glaring lack of standards or guidelines on the management and care of lesbians, gay, bisexual, transgender and intersex (LGBTI) persons in detention with respect to safeguards against discrimination and abuse. It should be noted that similar issues were observed in 2016 at the Lindela Repatriation Centre (Lindela) in respect of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC).

[60] <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/986-media-statement-sahrc-to-host-a-national-investigative-hearing-on-the-status-of-mental-health-care-in-south-africa>.
[61] In the High Court sitting as the Equality Court in Cape Town, Case Number: EC 10/2016.

79. **SAHRC Recommendation to the Committee**

a) The South African government should develop standards or guidelines on the management and care of LGBTI persons in detention, particularly with respect to safeguards against discrimination and abuse without placing them in *de facto* isolation or restricting their participation in activities and access to services.

Marikana Commission of Inquiry

80. In August 2016, the SAHRC released its report entitled, 'An overview of the South African Human Rights Commission's participation at the Marikana Commission of Inquiry',[62] which was duly tabled with Parliament in September 2016. The report highlights that the SAHRC's involvement in the matter emanates from complaints received from affected communities at Marikana, regarding the violent conduct of the South African Police Services. The SAHRC, therefore, resolved to participate in the Marikana Commission proceedings in the investigation of the complaints and to avoid duplication of several investigations on similar issues.[63] The SAHRC accordingly contributed procedurally and substantively to the Marikana Commission hearings. In its procedural role, the SAHRC monitored the proceedings and ensured fairness, transparency and impartiality, whereas substantively, the SAHRC brought independent experts to address any gaps in existing evidence presented before the Marikana Commission.[64] The participation of the SAHRC in the Marikana Commission made various positive contributions to the process and ultimately the findings and recommendations made by the Commission. [65] Although largely positive, the SAHRC remains disappointed at the manner in which the Marikana Commission investigated the underlying causes of the events at Marikana.[66] The SAHRC's report in this regard, therefore sets out the shortcomings of the Marikana Commission,[67] particularly in relation to the material conditions experienced by mining-affected communities.

[62] SAHRC Report on, 'An overview of the South African Human Rights Commission's participation at the Marikana Commission of Inquiry', August 2016.
[63] Ibid p.1.
[64] Ibid.
[65] Ibid p.23.
[66] Ibid.
[67] Ibid pp 23 – 25.

81. Furthermore, it should also be noted that in 2016 the UN Human Rights Committee expressed concern regarding the slow pace of investigation into the Marikana massacre, recommending *inter alia* that South Africa: expedite the work of the task team and panel of international experts established by the Ministry of Police in implementing the recommendations of the Marikana Commission of Inquiry; revise laws and policies regarding public order policing and the use of force; and prosecute and punish perpetrators of illegal killings and provide effective remedies to victims. The SAHRC is concerned that these recommendations have not been fully implemented by the South African government, particularly the prosecution of police officers implicated in the killings, and the settling of civil claims made by the families of those who were murdered in August 2012.

82. **SAHRC Recommendation to the Committee**

a) The South African government should ensure the prosecution of the police officers implicated in the Marikana deaths, and prioritise the settling of civil claims made by the families of those victims who were murdered during the August 2012 tragedy.

b) The State should provide information on what measures have been put in place to give effect to the recommendations issued by the SAHRC as well as the UN Human Rights Committee.

Status of human rights defenders

83. During the 2017/18 financial year, the SAHRC recorded close to 1 900 complaints specifically with regard to civil and political rights.[68] These violations related to issues of personal privacy and surveillance, political violence, excessive use of force during protests, freedom of association, access to justice, just administrative action, freedom of expression and access to information. The cross-cutting nature of these violations committed by both State and non-State actors affects individuals and organisations working to advance civil, political, social, economic and cultural rights in South Africa, and contributes to the closing of political space. This has become increasingly more worrying as the country approaches national elections due to be held in May 2019 and grapples with the triple threat of unsustainable levels of inequality, high unemployment and extreme forms of poverty.

[68] SAHRC, Annual Trends Analysis Report 2017/2018.

84. Protestors demanding the delivery of housing, education, and basic services such as water, sanitation and electricity, are shot at by the police with water cannons, tear gas, stun grenades, and rubber bullets.[69] Between 2004 and 2014, media reports estimate that at least 43 protestors were killed by police.[70]

85. Public demonstrations in South Africa are regulated by the Regulations of Gatherings Act, 1993 (RGA).[71] Yet, rather than facilitating the right to freely assemble, many local government authorities have applied the provisions of the RGA in a manner that restricts its intended implementation. Bureaucratic obstacles and misinterpretations of the RGA have led to an increasing number of unauthorised and unregulated gatherings taking place, thus deemed "illegal".[72] The failure to allow protected demonstrations and the breakdown in police-community relations has had devastating consequences, including the destruction of both private and public property, such as schools,[73] libraries and hospitals, and increasingly more loss of lives. The SAHRC thus welcomes the 2018 Constitutional Court judgment declaring section 12(1)(a) of the RGA unconstitutional and invalid. The relevant section criminalised the failure to give notice of a protest comprising more than 15 protestors.[74]

86. It should be noted that reports have emerged of threats and intimidation by political party actors and State authorities levelled at a number of human rights civil society organisations and those critical of the government in South Africa. In 2016, for example, then State Security Minister Mr David Mahlobo stated that he had evidence of NGOs involved with State and non-State actors that have allegedly tried to 'destabilise the country' and influence political affairs.[75] During 2016, the South African Broadcasting Corporation (SABC), a public broadcaster tasked with providing a platform to all in the country to participate in the country's democracy, came under scrutiny amidst claims of political interference. The Supreme Court of Appeal subsequently found that the use of a 'signal jammer' by the State Security Agency to

[69] Right2Know Campaign, R2K Statement: We are concerned over the shrinking space for dissent in South Africa!, 2017; See also: SAHRC, Civil and Political Rights Report, 2017 and SAHRC, Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery, 2015.
[70] Laura Grant, Research shows sharp increase in service delivery protests, *Mail & Guardian (*12 February 2014).
[71] No. 205 of 1993.
[72] Lizette Lancaster, At the heart of discontent: Measuring public violence in South Africa, *Institute of Security Studies,* 2016.
[73] SAHRC, Report: National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa (2016).
[74] *Mlungwana and Others v S and Another*, CCT 32/18.
[75] EWN, Minister Mahlobo 'has evidence' there are NGOs destabilising SA (29 April 2016).

prevent journalists from screening scenes of disorder in Parliament, to be unconstitutional and unlawful, amounting to censorship.[76] More recently, journalists have increasingly reported threats of intimidation by members of political parties.[77]

87. The SAHRC also notes the ostensible lack of accountability for human rights defenders that have been murdered allegedly as a result of their activism. In March 2016, land rights activist Mr Sikhosiphi Rhadebe, chairperson of a community-based organisation opposing mining activity on communal land, was shot dead at his home in the Eastern Cape Province by two men claiming to be police officers.

88. The SAHRC notes with appreciation that in May 2016, the Chairperson of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, together with several other UN mandate holders,[78] addressed an official letter to the South African government regarding allegations over the assassination of environmental human rights defender, Mr Rhadebe.[79] The mandate holders expressed grave concern that the deceased's death appeared to be directly related to his work in the promotion and protection of the rights of a mining community, and called on the South African government to fully investigate the matter and provide the mandate holders with detailed responses on several issues surrounding the death, by 31 August 2016. The SAHRC, however, points out that in February 2017, the Special Rapporteur on the situation of human rights defenders reported that that South African government failed to respond to the letter.[80] The Special Rapporteur further highlighted the urgent need for increased protection measures by State authorities of defenders who are advocating for environmental rights in the context of the operation of extractive industries.

89. The SAHRC also points out the trial of a police officer charged with killing 17-year-old housing rights activist Ms Nqobile Nzuza during a protest in Durban in 2013. The trial only commenced in February 2017 and in January 2018, the Court sentenced the

[76] SAHRC, Civil and Political Rights Report (2017).
[77] MSN News, Karima Brown threatened with rape by EFF supporters (5 March 2019).
[78] Namely, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on extrajudicial, summary or arbitrary executions.
[79] See letter, Ref: AL ZAF 1/2016, available at, <https://spdb.ohchr.org/hrdb/33rd/public_-_AL_ZAF_31.05.16(1.2016).pdf>.
[80] *Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst Addendum Observations on communications transmitted to Governments and replies received*, A/HRC/34/52, (February 2016) para 126.

perpetrator to 10 years imprisonment. Similarly, in May 2017, two councillors representing the governing African National Congress (ANC) and a co-accused hitman were found guilty and sentenced to life imprisonment for murdering housing rights activist Ms Thulisile Ndlovu in 2014.[81]

90. **SAHRC Recommendation to the Committee**

a) The South African government should provide information on the measures it will undertake to train the SAPS and State authorities of the recent developments of the RGA.

b) The State should provide information on efforts which will be undertaken to ensure the protection of journalists from threats of intimidation, particularly by members of political parties, and especially in light of the upcoming national elections.

c) The State should provide information on the measures it intends to undertake to ensure the swift resolution of outstanding cases of human rights defenders who have been murdered. In addition, it should clarify what measures are in place to ensure access to legal services by human rights defenders.

Independence and capacity of JICS

91. As previously noted herein, the JICS has confronted a number of challenges in fulfilling its mandate, including administrative and financial obstacles, shortage of staff and a lack of responsiveness from the DCS to their requests, reports and recommendations. The SAHRC has stressed that the role of JICS as an independent oversight body is crucial for the effective functioning of the criminal justice system as a whole, and the DCS in particular, and that JICS ought to be placed in a position to be both reactive (responding to conditions of detention in correctional centres and treatment) and proactive (allowing for a system of unannounced visits to correctional centres and own accord investigations). In early 2017, two civil society organisations (CSOs) launched an application seeking a declarative order of constitutional invalidity, arguing that unless JICS is given sufficient financial, institutional and operational independence to fulfil its functions, thousands of inmates are left without effective recourse when their human rights are violated.[82]

[81] Amnesty International, Report 2016/17: The state of the world's human rights (2017).
[82] *Sonke Gender Justice v The Minister of Justice and Correctional Services and another* Case Number 24227/2016.

92. **SAHRC Recommendation to the Committee**

a) The South African government should strengthen the JICS through the review / amendment of its enabling legislation for the JICS to ensure full independence including, i) the allocation of a budget separate from the DCS; ii) the power to institute legal proceedings in its own name; iii) establishing a clear mandate for JICS to refer cases to the SAPS or the NPA in cases of criminal conduct by DCS officials; and iv) a mandate which encompasses the role it will play under the NPM.

b) The government may wish to consider the inclusion of the JICS as a member of the Forum of Institutions Supporting Democracy.

Independence and capacity of IPID

93. The SAHRC notes the incongruence between the acts of assault and torture as contemplated in the Prevention and Combating of Torture of Persons Act and the IPID Act. The SAHRC is of the view that it is critical to ensure consistency between the two statutes in order to strengthen the protection and legislative framework pertaining to torture.

94. The SAHRC points out that the IPID currently experiences low rates of investigation and finalisation of cases pertaining to the allegations of torture. Of the 173 cases of torture received by IPID during the 2016/17 financial year, only 63 were investigated, resulting in a 36 percent completion rate.[83] Delays are partly attributed to budget constraints and impediments in obtaining technical reports from the laboratory, skin biopsy and blood test reports.[84] In addition, the IPID refers between 980 and 1500 cases to the National Prosecuting Authority (NPA) annually recommending criminal prosecution.[85] However, challenges persist as feedback information is often not forthcoming from the NPA on whether it a matter will be prosecuted or not. By way of example, the SAHRC points out that during 2016/17, the IPID reported that it was awaiting a response from the NPA in 96 percent of cases. For the 2017/18 financial year, this figure dropped to 72 percent, the lowest level since 2013/14. It also ostensibly appears that the NPA is reluctant to prosecute police officials and as such,

[83] IPID Annual Report 2016/2017, pp. 55-56.
[84] Ibid p. 27.
[85] See IPID Annual Reports 2011/12 to 2017/18.

is failing in its duty to hold persons accountable for criminal acts, regardless of their official status.

95. The SAHRC draws the Committee's attention to the fact that the IPID's independence has been subject to a successful challenge at the Constitutional Court where it was ruled that legislative amendments ought to be enacted in order to further safeguard the independence of the oversight body.[86] The failure of the Executive to prioritise these amendments and strengthen the IPID is tantamount to undermining South Africa's obligations under the Convention pertaining to the effective investigation of complaints and availability of redress.

96. In its analysis of the State report, the SAHRC notes that there is no reference to the fact that South Africa currently does not have a system of regular and independent monitoring of police cells. In this regard, the SAHRC informs the Committee that it is presently piloting a Lay Visitors Scheme (LVS) for independent police custody monitoring in collaboration with the African Policing Civilian Oversight Forum (APCOF).

97. **SAHRC Recommendation to the Committee**

a) The South African government should ensure that perpetrators of torture, regardless of their official status, ought to be prosecuted and that regular feedback with reasons are provided to the IPID in instances where recommendations to prosecute were not actioned.

b) The State should be encouraged to provide a supportive and cooperative environment to enable the SAHRC to carry out the pilot project to implement the recommendations of the LVS for independent police custody monitoring.

Conclusion

98. The SAHRC wishes the Committee well in its review of the South African government and avails itself to provide further information where required.

END

[86] *McBride v Minister of Police and Another* [2016] ZACC 30 and the High Court judgment in *McBride v Minister of Police and Another* [2015] ZAGPPHC 830.