



South African Human Rights Commission

*List of Issues Report to the Human Rights Committee on South
Africa's Implementation of the International Covenant on Civil and
Political Rights*

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South African Human Rights Commission

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Foreword by SAHRC Commissioner, Dr Danny Titus

Reporting obligations under international human rights instruments constitute that crucial moment where international law meets with national law, where state sovereignty is subjected to international scrutiny and where the role of the national state as implementer of its international commitments to human rights is established. Many states view international obligations as unnecessary, particularly against the backdrop of their internal constitutions and national legislation. The South African State Party to the International Covenant on Civil and Political Rights of 1966 has signed and ratified the Covenant. It committed itself thereby to the implementation of the rights contained in the Covenant and to report to the UN Human Rights Committee when requested to do so. Its initial report was due in 2000 and 14 years later in 2014 it was submitted. While it is heartening that the report was finally submitted, this late reporting cannot be condoned at all. South African citizens are deprived of the UN Human Rights Committee's considerations as well as the opportunity to present their human rights experiences and concerns to this international human rights scrutiny.

South Africa is in a serious state of transition from a past of human rights violations where its citizens were without fundamental human rights. It is now celebrating a democracy for the past 20 years where its citizens have the right to vote under the protection of a well-functioning Bill of Rights. South Africa also boasts a wide range of democratic institutions such as Parliament, the Executive and a dedicated judiciary, along with independent institutions such as the South African Human Rights Commission, the Office of the Public Protector, the Independent Electoral Commission and others. However, all this is not a guarantee for the fulfilment and enjoyment of fundamental human rights. In fact, human rights violations such as torture, xenophobic attacks, lack of basic water and sanitation and many other challenges still face our young democracy. The South African Human Rights Commission has an enormous task at hand regarding the protection and promotion of fundamental human rights. Racism although not legislated anymore, still raises its ugly head on numerous occasions. To deal with these legacies and present-day violations require many hands and continuous commitment.

The Covenant and the overall international framework of human rights have found their way into South African society and its institutions. However, much more needs to be done in these areas and the considerations and communications of the UN Human Rights Committee will be of substantial assistance in the ongoing promotion and protection of fundamental human rights in our country.



Dr Danny Titus

Part-time Commissioner of the South African Human Rights Commission

Acronyms

| | |
|--------|--|
| DAFF | Department of Agriculture, Forestry and Fisheries |
| DHA | Department of Home Affairs |
| DJCS | Department of Justice and Correctional Services |
| DSD | Department of Social Development |
| ICC | International Coordinating Committee of national human rights institutions |
| ICCPR | International Covenant on Civil and Political Rights |
| ICD | Independent Complaints Directorate |
| IPID | Independent Police Investigate Directorate |
| JICS | Judicial Inspectorate for Correctional Services |
| LGBTI | Lesbian, Gay, Bisexual, Transgender and Intersex |
| MPS | Municipal Police Services |
| NHRI | National Human Rights Institution |
| NPA | National Prosecuting Authority |
| OPCAT | Optional Protocol to the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| PEPUDA | Promotion of Equality and Prevention of Unfair Discrimination Act |
| SAHRC | South African Human Rights Commission |
| SAPS | South African Police Service |
| TCB | Traditional Courts Bill |
| UNCAT | United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| UNCRC | United Nations Convention on the Rights of the Child |
| VA | Voluntary Association |

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PART A – Report Overview

1. Introduction

South Africa ratified the International Covenant on Civil and Political Rights (ICCPR or the Covenant) on the 10th December 1998, together with the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. In accordance with the Covenant, South Africa was due to submit its initial country report in 2000. However, it was only in late 2014 that this initial country report was duly submitted to the Human Rights Committee (the Committee).

Given South Africa's history of apartheid, where civil and political rights such as the right of non-discrimination, freedom of movement and freedom of association, were routinely denied, the full implementation of the rights contained within the ICCPR are critical to the realisation of an equal and just society imagined in South Africa's Constitution of 1996.¹

In line with the reviewing process of the Committee and the responsibilities incumbent upon national human rights institutions (NHRIs), the South African Human Rights Commission hereby submits an informational report which offers insight and guidance to the Committee in the adoption of a list of issues on South Africa's implementation of the ICCPR. This report therefore presents the Committee with pertinent information relating to the level of enjoyment in South Africa of the rights set out in the ICCPR and any key issues facing the full realisation of such rights. The report draws largely from the work of the SAHRC, including case findings, public hearings and research reports. It is hoped that this report will assist the Committee in determining a list of issues at its 114th Session for review of South Africa's initial country report under the ICCPR. For ease of reference, this report is structured into Part A, which provides an overview of the report, including an overview of the key issues it sets out (see section 3 below). Part B presents a thematic analysis of the rights contained in the ICCPR.² And lastly, concluding comments to the report are found in Part C.

2. Mandate of the SAHRC

The SAHRC is an independent NHRI established under the Constitution of South Africa to promote, protect and monitor the development of human rights. The SAHRC holds a broad mandate with respect to the promotion and protection of human rights which is espoused under Section 184 of the Constitution.³ The South African Human Rights Commission Act 40 of 2013 - replacing the Human Rights Commission Act 54 of 1994 - gives effect to the SAHRC's constitutional mandate, and lays out a broad range of functions and powers of the Commission under Section 13.

¹ Constitution of the Republic of South Africa, Act 108 of 1996.

² Note that some rights are excluded from this report, notably Articles 4, 5, 11 and 18 as the SAHRC did not have pertinent concerns to raise in these regards. Further, some rights are grouped together according to similar themes and content.

³ Constitution of the Republic of South Africa, Act 108 of 1996.

With relevance to the promotion of international human rights law standards within South Africa, Section 13 (1) (b) (vi) provides that the SAHRC:

[...] must monitor the implementation of, and compliance with, international and regional treaties and conventions, international and regional covenants and international and regional charters relating to the objects of the Commission.

The SAHRC's mandate is in compliance with the *Principles on the Status of National Institutions* (known as the Paris Principles), which were adopted by the United Nations (UN) in 1993 to guide NHRIs in the fulfilment of their duties.⁴

In addition, the SAHRC has been accredited by the UN as an A Status NHRI, and the SAHRC currently chairs the International Coordinating Committee of NHRIs.⁵ It is therefore in line with the SAHRC's mandate, independence, and international role as an NHRI, that it submits the following report to the Committee in anticipation of the Committee's adoption of a list of issues in review of South Africa's initial report under the ICCPR.

3. Overview of Key Issues

The following serves as a comprehensive overview of the issues detail in this report, for the Committee's ease of reference. For an overall picture of the state of human rights in South Africa, it is worth noting that the highest number of cases received by the SAHRC relate to matters of equality and discrimination. For the 2013/2014 period, 11% of cases received related to issues of hate speech, racial discrimination, disability, sexual orientation, and religion. In addition, 10% of cases received by the Commission related to racial discrimination and hate speech in the work place. This serves as a stark reminder of the ongoing battles for equality in the Country. Some of these concerns are reflected below, in addition to the other pertinent concerns raised in this report.

| Right concerned | Issue | Page no. |
|--------------------------------------|--|----------|
| Article 1: Self-determination | - The Khoisan community of indigenous persons faces particular challenges in the enjoyment of their rights to determine their own cultural, linguistic and political status. | P. 10 |
| Article 3: Equal enjoyment of rights | - Gender based violence continues to be a major issue in South Africa, which faces notable challenges to addressing due to the unavailability of statistics, as well as discriminatory social attitudes towards women. | P. 15 |
| Article 6: Right to life | - There are a high numbers of deaths as the hands of South African law enforcement official and correctional centre warders which go investigated. | P. 16 |
| Article 7: Prohibition | - The SAHRC continues to receive complaints | P. 19 |

⁴ United Nations General Assembly Resolution 48/134, 1993.

⁵ The SAHRC's term is from 2013 – 2016.

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| of torture | regarding the use of torture in South African correctional centres, and remains additionally concerned with the lack of provisions related to victims of torture in the recent Prevention of Combating and Torture Act. | |
| Article 8: Prohibition of slavery | - Human trafficking is a reportedly significant issue in South Africa, which the SAHRC notes particularly affects vulnerable groups, such as women, children and, in certain circumstances, migrant economic labourers. | P. 21 |
| Article 9: Liberty and security of the person | - South Africa experiences high rates of violence, particularly in its informal settlements where a lack of visible and effective policing is a serious cause for concern. | P. 23 |
| Article 10: Treatment of detained persons | - With regard to the treatment of detained persons, one of the major issues is the overcrowding of South Africa's correctional centres, which breeds disease and results in the thin spread of resources, such as food. | P. 24 |
| Article 12: Freedom of movement | - The SAHRC has noted with concern the increasing erection of boom gates and gated communities which discriminatorily infringe upon the right to freedom of movement of those excluded from its borders. Further, the xenophobic episode of 2008 was an extreme example of the extent to which non-nationals in South Africa can suffer violations of this right. | P. 26 |
| Article 13: Rights of non-nationals | - One of the most concerning issues currently facing South Africa is the discriminatory attitudes towards non-nationals and the increase of hate crimes against this group. | P. 28 |
| Article 14: Principle of legality and fair trial rights | - The SAHRC has noted the difficulties faced by diverse and minority linguistic groups in accessing the mainstream legal system and enjoying their right of access to justice. | P. 30 |
| Article 17: Privacy | - With regard to the issue of privacy, the SAHRC has noted in particular the infringements upon the right to privacy of the erection of unenclosed toilets and the use of the bucket system in informal settlements. | P. 31 |
| Articles 19 and 20: Freedom of expression and access to information | - Hate speech, and predominantly racially motivated hate speech, remains a challenge in South Africa. - In addition, the pending passing of the Protection of State Information Bill will have a negative impact upon the enjoyment of the right of access to information, whistleblowing and the free expression rights of the media. | P. 32 |
| Article 21: Right of assembly | - South Africa has witnessed a tremendous increase in the number of protests, particular those relating to the failures of local government to deliver basic services. Of concern is the high percentage of these | P. 35 |

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| | protests that turn violent, and the disproportionate use of force by the police to quell demonstrations. | |
| Article 24: Rights of children | - The use of corporal punishment in schools across South Africa remains a considerable cause for concern. | P. 37 |
| Article 25: Participation in government | - Of concern with regard to the right of public participation is the need to augment the ways in which the public can meaningfully participate in the creation and implementation of policies, particularly at the local government level. | P. 38 |

PART B – Thematic Analysis

1. Article 1: self determination

1.1. Background and overview of concerns

Self-determination, a bedrock principle of any legitimate democracy, is all the more vital in modern South Africa, given the radical change that the country underwent over two decades ago and the transformation from a regime of systematic discrimination and oppression to one of constitutional democracy. The South African Constitution recognizes how important self-determination is to an open and free society, and resolves in a number of Sections to protect it, both explicitly and implicitly. For example, Section 7 of the Constitution, which introduces and frames Chapter 2, the Bill of Rights, places equality and freedom—values that are inextricably intertwined with true self-determination—centre-stage as the prism through which all rights should be interpreted and realized. Further, the Bill of Rights enshrines a broad range of civil and political rights, including: freedom of religion, belief and opinion (Section 15); freedom of expression (Section 16); the right to peaceably assemble, demonstrate, picket and petition (Section 17); the right to make a full range of political choices (Section 19); the right to use one’s own language and practice one’s own culture (Section 30); and the right to further engage with any cultural, religious and/or linguistic community (Section 31).

Section 235 of the Constitution also entrenches the rights of the State and communities to self-determination.⁶ The South African government has given effect to this provision by granting communities self-governing rights under the principle of cooperative governance. As stated in Section 40(1) of the Constitution, the government is comprised of national, provincial and local spheres, which are distinctive, interdependent and interrelated. Local communities such as indigenous communities are therefore able to influence and play an active role in local spheres of

⁶ Section 235 states: ‘the right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation’.

government. However, given that indigenous communities are, at present, minorities groups with little if any economic power to influence local politics and policies, they continue to be marginalized.⁷ [For further information on the rights of minorities, see Section 19 below on Article 27 of the ICCPR].

Right to freely determine political status

Self-determination for the indigenous peoples of South Africa is a complex matter. Firstly, as with many African countries, there is no specific criterion for the classification of indigenous people in legal discourse in South Africa;⁸ the term ‘indigenous’ is often used to describe languages and legal customs of the majority black African population as opposed to the other races.⁹ This is contrary to the criteria proposed by the African Commission’s Working Group of Experts on Indigenous Populations / Communities, whose emphasis is on self-identification – a term used to describe groups that are in a structurally subordinate position to dominating groups and the state, and within the South Africa context is applied to refer to the various San and Khoi ethnic groups.¹⁰

Recently, the National Khoi-San Council has been demanding the official and legal recognition of San and Khoi traditional authorities. The Council comprises of 21 representatives of five main groupings of the Khoisan communities: Griqua, Korana, Cape Khoi, Nama and San – and is a national non-statutory body. Established on 22 May 1999, the Council’s main focus has been to engage the government on the issue of recognition of indigenous peoples’ traditional structures and authority.¹¹ Discussions for greater legislative and constitutional recognition for the indigenous people are still ongoing, and constitute a significant issue facing the political status of these groups.

In a submission to the Office of the High Commissioner of Human Rights on the right to participate in public affairs¹², the Commission noted with concern that indigenous persons, such as the Khoisan, have been historically under-represented in South Africa’s Parliament. In the recent national elections of 2014, the Khoisan people entered their own political party for the first time: the Khoisan Kingdom and All People party. The party did not, however, win any seats in Parliament.¹³

Additionally, the SAHRC’s Gauteng Provincial Office recently received a complaint from an Afrikaner group wishing to exercise their right to political self-determination to call for the establishment of their own independent state which would furthermore serve to protect the cultural, linguistic and religious traditions of this community. Notably, the SAHRC did not take up this matter as it assessed

⁷ Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples: South Africa. Centre for Human Rights, University of Pretoria 2009: p, 25.

⁸ R Chennels and A du Toit ‘The Rights of Indigenous Peoples in South Africa’ in R Hitchcock and D Vinding (ed) *Indigenous Peoples’ Rights in Southern Africa IWGIA* (2004) 98.

⁹ Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples: South Africa. Centre for Human Rights, University of Pretoria. 2009: p, 1.

¹⁰ *Ibid*, p 1.

¹¹ *Ibid*, p 27.

¹² Dated from February 2015.

¹³ South African Human Rights Commission, Submission to the Office of the High Commissioner of Human Rights on the right to participate in public affairs, February 2015.

this claim against the Constitution, and determined that such an independent state may further polarize South Africa's diverse society, and their rights to cultural integrity had not been violated.

Right to freely pursue economic, political and cultural development

Additionally, in 1999, the Commission began an investigation into the state of human rights of the Khomani San (a sub-grouping of the San people) and published a report of its findings in 2004. Among the many human-rights violations that the SAHRC asserted in their report, the Commission noted many unjustifiable limitations of the community's right to self-determination. The SAHRC's report investigated the Khomani San's problematic attempts to reclaim and settle large areas of land in the Andriesvale-Askam area of the Kalahari Desert (pursuant to the Restitution of Lands Right Act), thereby highlighting the community's inability to fully realize its right to free cultural development. The SAHRC found that 'there currently exists a situation of disarray among the Khomani San people that benefitted from the land claim process and a situation of incoherent management of the Kalahari land,' owing in part to failures during the land-claim implementation process 'to protect basic human and other rights of the land claim beneficiaries'.¹⁴ Additionally, the SAHRC found that the municipality of Mier in the Northern Cape Province of South Africa had abdicated its responsibility to facilitate the implementation of the Khomani San Settlement and Development Strategy, a failure that resulted in the unjust limiting of many socioeconomic rights, in addition to civil and political rights such as the right of self-determination.¹⁵

Finally, the Commission found that '[m]any of the issues raised and the incidents that have occurred since the settlement [...] may be ascribed to poor relationships and communication at several levels.'¹⁶ Specifically, it stated that the relationships between the Khomani San people and the Local Council of Mier, as well as the Department of Land Affairs and the Department of Provincial and Local Government, 'need immediate attention and drastic intervention'.¹⁷ The SAHRC asserted that, without substantial re-evaluation of such relationships, just administrative action cannot be ensured for the Khomani San people, and therefore their human rights—and their rights to self-determination and free cultural development, in particular—cannot be fully realized.

Right to freely dispose of natural resources and not be deprived of the means of subsistence

In the SAHRC's Strategic Focus Area Report for 2013-14, which focused on South Africa's constitutional right to food, the Commission described agriculture in the country as divided into two distinct groups: small-scale subsistence farmers purposes, and large, well-resourced commercial farmers who produce food for local and international markets.¹⁸ The Commission engaged with farmers and other relevant parties, and heard complaints regarding the fact that the current system

¹⁴ Ibid, p. 27.

¹⁵ Ibid, p. 27.

¹⁶ Ibid, p. 31.

¹⁷ Ibid, p. 31.

¹⁸ South African Human Rights Commission, Strategic Focus Area Report 2013-2014: The Right to Food, p. 35.

unfairly favours those who produce food for commercial markets rather than as a means of subsistence.¹⁹

The SAHRC found that services and resources intended for small-scale farmers from government often fail to effectively reach such persons, due to 'inefficiencies at the local level'.²⁰ Subsistence farmers complained of a 'lack of access to financial resources to sustain their operations, the high cost of electricity and diesel, and theft', amongst other issues, including lack of access to basic water.²¹ The Commission noted with concern that cost-ineffectiveness and a lack of local agricultural monitoring programs make these small-scale farmers unable to compete, and thus threaten their means of subsistence and their right to self-determination.

In addition, the Commission has received numerous complaints about the difficulties of subsistence fishermen to gain permits from the Department of Agriculture, Forestry and Fisheries (DAFF). These complainants have alleged that even their existing subsistence fishing quotas have been slashed without warning, while those of commercial fishers have remained unaffected or have even been increased. Such practices and policies by DAFF can leave families of these fishermen without sufficient food for their households.²²

Moreover, in its Land Restitution Report of 2013, the Commission expressed serious concern regarding the inefficiencies and ineffectiveness of the country's ongoing post-Apartheid land-restitution processes. In many cases, individuals and communities were dispossessed of land during the Apartheid era, and now this land has been subsequently utilized for economic benefit and issues exist surrounding the calculations and determination of the value of this land.²³ The Commission specifically raised the issue of 'losses that communities face from their exclusion from the benefits of the mineral resources in and under their land, which have also rendered their surface rights to the land impossible' as an important issue that needs to be clearly addressed.²⁴ Without so addressing these problems, many South Africans who were historically deprived of their lands now face a deprivation of their right to self-determination, in that they are unable to freely dispose of the natural resources that they are entitled to.

¹⁹ Ibid, p. 36.

²⁰ Ibid, p. 36.

²¹ Ibid, p. 37. See also, SAHRC report on the Right of Access to Safe Water and Decent Sanitation, available at www.sahrc.org.za.

²² This has also been noted in a report by Oxfam and others entitled 'Hidden Hunger in South Africa: The Faces of Hunger and Malnutrition in a Food-Secure Nation' (2014), available at www.oxfam.org/grow.

²³ South African Human Rights Commission, Report of the SAHRC Investigative Hearing: Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa, available at www.sahrc.org.za, p. 46.

²⁴ Ibid, p. 46.

1.2. Recommendations to the Committee

In light to the above, the SAHRC wishes to urge the Committee to consider the following questions when reviewing South Africa's initial country report:

- What measures has the government put in place to facilitate and promote the political organization of the country's historically disenfranchised groups, including but not limited to the Khoisan people?
- How has the government worked to establish trust and cooperation between the Khomani San and government agencies, such as the police force? What steps has the government taken to help this community fully realize its right to pursue true cultural development, free from discrimination and other human rights abuse?
- How will the government ensure that existing programs intended to aid subsistence farmers are in fact doing so? Going forward, in what ways does the government plan to further enable such farmers to maintain their operations in the face of competition from commercial farms that threatens their livelihoods?
- What changes will the government make to its policies regarding subsistence fishing permits and quotas to ensure that fishermen applying for and fishing pursuant to such allowances are able to sufficiently feed their households?
- What steps has the government taken to reform and improve its land-restitution processes? Can the government assure the Committee that it is properly valuing land that is rich in mineral resources and due to be returned to communities?

2. Article 2: Right to effective remedy

2.1. Background and overview of concerns

Within the South Africa Constitution, there is not an explicit provision enshrining the right to effective remedy. However, Section 34 of the Constitution provides for the right of access to courts, including the right to have disputes heard before a fair tribunal or hearing. And further, Section 33 enshrines the right to just administrative action.

However, the SAHRC, as an independent body established under Chapter 9 of the Constitution is granted the power to hear and investigate complaints, and is mandated under the Constitution to 'take steps to secure appropriate redress where human rights have been violated'.²⁵ The SAHRC was originally empowered by the South African Human Rights Commission Act 54 of 1994, which has since been replaced by the South African Human Rights Commission Act 40 of 2013, and which sets out the Commission's functions under Section 13. The SAHRC's mandate to secure appropriate redress falls broadly under its protection of human rights mandate. The Legal Services Unit (LSU) of

²⁵ Section 184 (2) (b) of the Constitution.

the SAHRC was established to fulfil this mandate, and is located in all nine provincial offices of the Commission. In its 2014 Annual Report, the SAHRC reported receiving 9217 cases in the period under review which were handled by the LSU.²⁶ The SAHRC does not have jurisdiction over criminal cases, and thus transfers them to the appropriate court. Despite working to fulfil its mandate as fully as possible, the SAHRC is constrained by a lack of resources allocated to it by National Treasury.

The Judicial Inspectorate for Correctional Services (JICS) was established to enact oversight over correctional services in South Africa, and hear complaints in this regard. However, JICS faces criticism concerning its lack of independence, as under its current mandate it reports to, and receives its budget from, the Department of Justice Correctional Services (DJCS).²⁷

2.2. Recommendations to the Committee

In light of the above, the SAHRC urges the Committee to consider addressing the following concerns with the South African government in reviewing its initial report under the ICCPR:

- What measures are in place to strengthen the independence of JICS?
- What measures are being put in place to strengthen the capacity of the SAHRC to seek appropriate redress for victims of human rights violations?

3. Article 3: Equal enjoyment of rights between men and women

3.1. Background and overview of concerns

Although men and women enjoy *de jure* equality of the civil and political rights contained in the Constitution, in practice, women face systemic discrimination in South Africa. Indeed, South Africa has extremely high levels of gender based violence, a phenomenon which violates women's rights to liberty and security of the person, amongst others. It is unfortunate to note that whilst the national statistics agency, Statistics SA, produces a report on gender statistics from time to time, the report notes that Statistics SA is unable to gather accurate data relating to levels of gender based violence and domestic violence, although it notes that this is a highly concerning issue facing South Africa.²⁸ [For further information on the issues facing women's enjoyment of their right to freedom and security of the person, see Section 7 below].

²⁶ 8550 of these cases were finalised during this period. See SAHRC Annual Report 2014, available at http://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf.

²⁷ In September 2013, the SAHRC brought these concerns regarding the independence of JICS to the attention of the then Parliamentary Committee of Correctional Services. See SAHRC Annual Report 2013, available at www.sahrc.org.za, and Parliamentary meetings available at <https://pmg.org.za/committee-meeting/16393/>.

²⁸ Statistics SA 2011 Gender Statistics Report available at <http://www.statssa.gov.za/publications/Report-03-10-05/Report-03-10-052011.pdf>.

Further, in 2008 the Traditional Courts Bill (TCB) was introduced to Parliament, which provided for the establishment and regulation of courts to hear traditional and customary law disputes. The TCB was met with much criticism and eventually lapsed from Parliament, however an aspect of the Bill which received particular criticism was its lack of protection offered to the rights of women. In its submission to Parliament on the Bill, the SAHRC pointed out the lack of affirmative measures which the Bill should put in place to redress the historical and cultural disadvantage that faces women in traditional systems of law. The Bill made no provision for the appointment of female presiding officers, which may have the effect of further marginalising the plight of women as often women are not granted the right even to enter certain traditional courts. Although the Bill has now lapsed, there remains concern about the levels of access to justice for women living under traditional systems in South Africa.

3.2. Recommendations to the Committee

The SAHRC therefore submits the following recommendations to the Committee in light of the information presented above:

- The Committee should seek to ascertain from the government what steps are being taken to collate gender disaggregated data, and particularly gender relating to domestic and gender based violence.
- The Committee should seek information from the government concerning whether there are any plans to reintroduce the TCB and what measures, if any, are being implemented to secure access to justice for women residing under traditional systems of law.

4. Article 6: Right to life

4.1. Background and overview of concerns

According to the South African Constitution, the right to life is absolute. In addition, South Africa abolished the death penalty in 1995,²⁹ and is under legislative obligation not to extradite persons who may face the death penalty in another country.³⁰ However, despite these guarantees, there continues to be high numbers of deaths at the hands of law enforcement authorities.

For the period 2013/2014, the Independent Police Investigate Directorate (IPID), a state body established to investigate matters of police offences or misconduct,³¹ reported the following statistics on the total number of cases received under Section 28³² of the IPID Act, 1 of 2011:³³

²⁹ See *S v Makwanyane and Another 1995 (6) BCLR 665 (CC)*.

³⁰ Section 2 of the Refugees Act, 130 of 1998.

³¹ IPID was established under the IPID Act 1 of 2011, to receive complaints related to offences and misconduct of the police, including both the Municipal Police Service and the South African Police Service. IPID replaces its predecessor, the Independent Complaints Directorate. It is important to note that the extent to which IPID is

| Type of matter investigated | Number of complaints received |
|--|-------------------------------|
| Section 28 (1) (a) – deaths in police custody | 234 |
| Section 28 (1) (b) – deaths as a result of police action | 390 |
| Section 28 (1) (c) – complaint of the discharge of official firearm(s) | 429 |
| Section 28 (1) (d) – rape by police officer | 121 |
| Section 28 (1) (e) – rape in police custody | 19 |
| Section 28 (1) (f) – torture | 78 |
| Section 28 (1) (f) – assault | 3916 |
| Section 28 (1) (g) – corruption | 84 |
| Section 28 (1) (h) – other criminal matter(s) | 374 |
| Section 28 (1) (h) – misconduct | 23 |
| Section 28 (2) – systemic corruption | 12 |
| Non-compliance with Section 29 of IPID Act | 65 |
| Total | 5745 |

In addition, the 2013/2014 annual report of the Department of Justice and Correctional Services (DJCS)³⁴ reported the following statistics in relation to the causes of death in custody:³⁵

| Cause of death | Number of reported incidences |
|------------------|-------------------------------|
| Suicides | 21 |
| Medical Overdose | 4 |
| Accidents | 2 |
| Food poisoning | 1 |
| Causes unknown | 24 |
| Assaults | 9 |
| Total | 63 |

The SAHRC notes with concern the high incidences of death occurring in places of detention, as well as the troubling percentage of cases where the cause of death is unknown. These figures are in addition to the number of persons killed by South African Police Services (SAPS) officials during

independent is limited by the fact that it receives its budget from, and therefore also reports to, the Ministry of Police, viz, the department it is mandated to investigate.

³² Section 28 of the IPID Act refers to types of matters which can be investigated by IPID.

³³ Independent Police Investigative Directorate: Annual Report 2013/2014, p, 27, available at http://www.icd.gov.za/documents/report_released/annual_reports/2014/IPID%20ANNUAL%20REPORT%20LA%20TEST.pdf.

³⁴ Note that prior to the May 2014 Elections and subsequent cabinet reshuffle, the Department of Justice and Correctional Services was two distinct departments: the Department of Justice and Constitutional Development and the Department of Correctional Services.

³⁵ Department of Correctional Services: Annual Report 2013/2014, p, 55, available at <http://www.dcs.gov.za/docs/landing/DCS%20Annual%20Report%202013-14.pdf>.

public protests which, according to the prominent civil society organisation the Right2Know, have been steadily increasing in recent years.³⁶

Indeed, the SAHRC has investigated a number of matters relating to the disproportionate use of force and police brutality during public protests, many of which have involved violations of the right to life. In 2013 the SAHRC published its findings on the matter involving the death of Andries Tatane at the hands of SAPS during a service delivery protest in the Free State Province of South Africa.³⁷ The SAHRC found that SAPS officials used excessive and disproportionate force against Tatane - an unarmed civilian - violating his right to life, amongst other rights.³⁸

In addition, in 2012 a complaint was lodged at the SAHRC regarding the incident at Marikana mine in August 2012 where 44 mine workers lost their lives as a result of police action, alleging a violation of the right to life of the deceased miners by SAPS. Notably this incident marked the single most lethal use of force by South African security forces since 1960. As a result of the receipt of this complaint, amongst others, the SAHRC made the decision to support the Commission of Inquiry into Marikana by monitoring proceedings and bringing evidence related to certain human rights aspects.³⁹ One of the written submissions made to the Commission of Inquiry relating to the first stage of its investigation on the use of force by SAPS reminded this Commission that: 'the failure of a State to conduct a full, proper and impartial investigation into suspected arbitrary killings is itself a violation of the right to life'.⁴⁰ The SAHRC's statement here is particularly relevant in relation to the high percentage of deaths in prison whose cause was unknown, as noted above. Additionally in relation to the right to life, the AHRC's written submission questioned the lack of reference in the Commission of Inquiry's Terms of Reference to "human rights", "constitutional rights", and particularly the "right to life".⁴¹

³⁶ See, Right2Know Secret State of the Nation Report 2014, available at <http://www.r2k.org.za/2014/09/09/r2k-secret-report-2014/>.

³⁷ Report available at <http://www.sahrc.org.za/home/21/files/Report%20Comm%20%20SA%20Police%20Service%20301012.pdf>.

³⁸ The other rights violated included the right to freedom and security of the person (protected under Section 12 of the Constitution), as well as the right to engage in peaceful assembly, demonstration, picket and petition (protected under Section 17 of the Constitution). Ibid.

³⁹ For an overview of the role of the SAHRC in the Marikana inquiry see <http://www.sahrc.org.za/home/index.php?ipkContentID=114&ipkMenuID=95>.

⁴⁰ First written submission of the SARHC available at <http://www.sahrc.org.za/home/21/files/SAHRC%20PHASE%20ONE%20FINAL%20WRITTEN%20SUBMISSIONS.pdf>. Quotation from p. 23.

⁴¹ Ibid, see p. 26.

4.2. Recommendations to the Committee

The SAHRC therefore makes the following recommendations to the Committee in anticipation of the Committee's review of the right to life under the ICCPR in South Africa:

- What measures is the government putting in place to strengthen the capacity of institutions such as IPID to investigate incidences of death in places in detention in South Africa?
- Noting the increasing violence of public protests in South Africa, what is the government doing to address this phenomenon and promote peaceful protests?
- What are the interim findings of the Marikana Commission of Inquiry with regard to the right to life of the mine workers who died at the hands of SAPS?

5. Article 7: Prohibition of torture

5.1. Background and overview of concerns

The right not to be tortured in any way is protected under Section 12(1)(d) of the South African Constitution. Although this has not always been the case, South Africa is taking proactive steps in eliminating torture from its law enforcement departments. South Africa is a signatory to and has ratified the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Additionally, South Africa has signed but not ratified the Optional Protocol to UNCAT. To fulfil its obligation and recommendation from the UN Committee against Torture, South Africa passed the Prevention of Combating and Torture of Persons Act in 2013,⁴² criminalising torture as a punishable offence. In addition to these legislative developments, in the case of *Mthembu v the State* the Court ruled that evidence obtained through torture would not be accepted.⁴³

However, despite these developments, each year the IPID report incidences of torture by police officials (as noted in the statistics presented on page [?] above), and numerous allegations are made concerning the use of torture in correctional centres.

The SAHRC commented extensively on the Prevention of Combating and Torture of Persons Bill in order to ensure that human rights principles were included in the drafting of the Act. Regrettably, the needs of the victims were not incorporated in the Prevention of Combating and Torture of Persons Act, despite recommendations for the inclusion of this by the SAHRC. Therefore, as it stands,

⁴² Prevention of Combating and Torture of Persons Act 13 of 2013.

⁴³ See *Mthembu v the State* (2008) ZASCA 51 (10 April 2008).

the only avenues for victims of torture to seek redress or remedy is through counselling centres or by seeking compensation through civil rights lawyers.

For the SAHRC, one of the most concerning cases of torture happened at the St Albans correctional centre in the Eastern Cape Province in 2005, and allegedly again in 2014 (a complaint was received by the SAHRC⁴⁴). In 2005, Mr. Bradley McCullen was tortured, along with more than 100 other inmates by the Emergency Security Team at this correctional centre. In 2010, after lodging a complaint with the UN Committee at the UN Committee, South Africa was found guilty of torture and failure to provide effective redress for victims thereof. The DJCS is currently still investigating this case, but the National Prosecuting Authority (NPA) has decided against prosecution due to lack of suitable evidence.

In addition, the SAHRC is currently investigating the Manguang private correctional centre for allegedly using psychotropic drugs on offenders against their will, and in violation of Section 12 of the Constitution which includes the right 'not to be subjected to medical or scientific experiments without informed consent'.⁴⁵ The Manguang correctional centre is the only private correctional centre in South Africa and is operated under the auspices of the G4S security group. The SAHRC has noted with concern the difficulties surrounding the regulation of private correctional centres, in addition to issues surrounding their levels of public accountability and transparency. Therefore, the SAHRC's ongoing investigation of the matter with the Manguang correctional centre will serve as an instructive case for understanding the operations of private correctional centres.

It is also important to note that South Africa is yet to ratify the Optional Protocol to CAT (OPCAT), which establishes a national preventative mechanism to monitor issues of torture nationally. Ratifying the OPCAT will constitute a significant step to addressing any future incidences of torture occurring in police cells or correctional centres across South Africa. The SAHRC has on numerous occasions brought this non-ratification to the attention of Parliament and the Portfolio Committee on Justice and Correctional Services.

⁴⁴ The SAHRC referred this matter to JICS to investigate. The SAHRC will monitor the investigation and outcome thereof.

⁴⁵ Section 12 (2) (c).

5.2. Recommendations to the Committee

In light of the above, the SAHRC makes the following recommendations to the Committee in relation to the prohibition of torture in South Africa, pursuant to its obligations under Article 7 of the ICCPR:

- The Committee should recommend that the Prevention of Combating and Torture of Persons Act (or regulations thereof) be reformed to include specific provisions relating to the right of redress and remedy for victims of torture.
- What immediate steps is the government taking to ensure torture does not take place in South African police cells or correctional centres?
- How does the South African government intend to ensure that private correctional centres are held to the same degree of public accountability as publicly operated centres?
- When is South Africa ratifying the OPCAT?

6. Article 8: Prohibition of slavery, servitude and forced labour

6.1. Background and overview of concerns

Although South Africa has signed various international conventions relating to the abolition and prohibition of slavery, as well as holds a robust domestic legislative framework,⁴⁶ trafficking in persons is a significant issue for the country. Indeed, the SAHRC notes with concerns the fact that South Africa is a notable destination, source and transit zone for trafficked persons, despite the right to be free from slavery, servitude and forced labour being enshrined under Section 13 of the Constitution.

In 2014, the SAHRC conducted an investigation into the Mavericks gentlemen's club after receiving an instruction from the Western Cape High Court to look into 'whether human rights of dancers [of Mavericks] are being infringed and, if so, what steps can be taken to alleviate their plight.'⁴⁷ The SAHRC found that the business relationship with these women constitutes a prima facie violation of the right to fair labour practices, right to privacy, and right to freedom and security of the person.

⁴⁶ South Africa has signed and ratified the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956. Additionally South Africa has implemented the Basic Conditions of Employment Act 75 of 1997. The Act also includes a chapter on children and forced labour. It also prohibited the employment of children under 15. The Correctional Services Act 11 of 1998, explicitly states the offenders may not be forced to work. Offenders can chose to work should they wish.

⁴⁷ See Mavericks report, available at www.sahrc.org.za.

However, due to a lack of evidence – which is, in itself, telling⁴⁸ - the SAHRC was not in a position to make a finding regarding whether the female dancer's rights to freedom of movement and freedom from slavery, servitude or forced labour were infringed upon.

In addition, South Africa is plagued by issues relating to migrant labour. South Africa attracts the largest number of migrants in the Southern African region, the majority coming from South Africa's neighbouring countries, such as Zimbabwe. It is estimated that over 5.7 % of South Africa's population are migrants.⁴⁹ Of concern is the high number of migrant workers who come to work in South Africa's mining industry, and whose employment is often sourced from illicitly operating labour brokers, who prey on the vulnerability of migrant workers, offering them far less remuneration for their labour as well as less secure work than their colleagues.⁵⁰ The SAHRC recognizes migrant workers as a minority group who are vulnerable to violations of their rights. As such, the SAHRC has a dedicated Commissioner - SAHRC Chairperson Laurence Mushwana - who provides strategic leadership on promoting and protecting the rights of foreigners and migrant workers.

6.2. Recommendations to the Committee

With regard to the right to be free from slavery, servitude and forced labour in the context of South Africa, the SAHRC makes the following recommendations to the Committee to inform its engagement with South Africa's initial ICCPR country report:

- The Committee should question the South African government on the measures it is adopting to address the phenomenon of human trafficking in South Africa, and particularly where the victims of trafficking are women and children.
- The Committee should recommend that the South African government take steps to outlaw labour brokers, and specifically target the mining industry.

⁴⁸ The SAHRC was unable to garner sufficient evidence from the Mavericks dancers, who were for various reasons, unwilling to be interviewed by the SAHRC, despite being aware of the fact that the dancers were not allowed access to their travel documents and passports, nor were they properly remunerated for their services. See report, as above.

⁴⁹ For a report on this trend see, for example, Labour Market Intelligence Partnership Working Paper 1, 'Mining Sector Wages in South Africa' (2013), available at http://www.lmip.org.za/sites/default/files/documentfiles/WP%201%202013%20Mining%20Sector%20Wages%20WEB_0.pdf.

⁵⁰ Ibid.

7. Article 9: Right to liberty and security of person

7.1. Background and overview of concerns

South Africa entrenches the right to liberty and security of person in Section 12 of the Constitution. However, in relation to security of persons, South Africa has had continuous challenges, especially in the protection of non-nationals and vulnerable groups.

The SAHRC has noted with extreme concern the perpetration of violence against the LGBTI community, and supports the ongoing work of the National Task Team in this regard. Furthermore, in response to the continued plight of non-nationals living in South Africa, the SAHRC has conducted a number of investigations into such matters, including into the xenophobic crisis of 2008. During this time, thousands of non-national Africans living within South Africa experienced actual or perceived threats to their right to freedom and security of the person, with large scale attacks perpetuated by South Africans against non-nationals at their businesses and places of residence, resulting in thousands of internally displaced persons.⁵¹ In the report emanating out of the SAHRC's investigation into this matter, the Commission found that there was a significant lack of SAPS presence in the informal settlements where the majority of the violent attacks against non-nationals took place. Indeed, this effectively amounted to an inability by SAPS to fulfil their constitutional duty and protect such persons against violations to their rights to freedom and security of the person.⁵² Although South Africa has not again witnessed the extent of violence experienced in May 2008, non-nationals living within South Africa continue to experience violence and threats to their freedom and security of the person, and the SAHRC continues to receive complaints of this nature.

Similarly in relation to the higher incidences of violations to freedom and security of the person which take place in informal settlements in South Africa, the SAHRC made a submission relating to systemic violations of this right experienced by women, children and other vulnerable groups to the Khayelitsha Commission of Inquiry.⁵³ This Commission of Inquiry was set up to investigate allegations into police inefficiency and a breakdown of relations between SAPS and the community in Khayelitsha, an informal settlement.⁵⁴ The SAHRC's submission noted the inextricable link between a lack of enjoyment of adequate socio-economic rights provisions, including housing, water and sanitation, and heightened levels of violations against the right to freedom and security of the person. The SAHRC stated that the housing provision for persons living in Khayelitsha were insecure, exposing women, children and other vulnerable groups to violence and crime. In addition, the SAHRC's submission noted that the erection of toilet facilities by the local municipality at far

⁵¹ SAHRC Xenophobic Report of 2010, available at <http://www.sahrc.org.za/home/index.php?ipkContentID=15&ipkMenuID=19>.

⁵² Ibid.

⁵³ SAHRC Submission to the Khayelitsha Commission of Inquiry, available at <http://www.khayelitshacommission.org.za/bundles/bundle-one/category/4-1-b-public-submissions.html>.

⁵⁴ Khayelitsha is a large informal township just outside Cape Town, in the Western Cape Province of South Africa.

removed locations from the houses of Khayelitsha residents increased the vulnerability of persons visiting such facilities during the night to violence and assault.⁵⁵

7.2. Recommendations to the Committee

In light of the above, the SAHRC makes the following recommendations to the Committee:

- The Committee should seek to establish from the South African government what plans are in place to strengthen the efficiency of SAPS in informal settlements, and to protect the rights of vulnerable groups and persons.

8. Article 10: Treatment of persons deprived of liberty

8.2. Background and overview of concerns

Under the Constitution, all detained persons within South Africa have the right to be treated with humanity and dignity.⁵⁶ Specifically, the rights of arrested and detained persons are enshrined in Section 35 of the Constitution, and include the right to be arrested in a fair and procedural manner and the right to basic conditions of detention.

As of 2014, South Africa currently holds 157,170 inmates in correctional centres across the country, of which 43,712 (28%) are remand detainees and 113,458 are sentenced offenders.⁵⁷ On average, 15% of remand detainees (approximately 8,700 inmates) are in custody despite having been granted bail.⁵⁸ Although remand detainees are housed by DJCS, SAPS are responsible for them. However, it is important to note that prisons and correctional centres are not the only places where persons are deprived of their liberty. In South Africa, the Department of Social Development (DSD) is responsible for other places of detention including secure care centres and care centres which house vulnerable children and children who have been in conflict with the law. Additionally, South Africa allows for the remand of persons with mental disabilities in mental health care hospitals under the Mental Health Act.⁵⁹ These places of detention often fall outside of official oversight mechanism such as IPID and JICS, and have been notable sites of violations of the human rights of those persons detained.

⁵⁵ For more information see the SHARC's report on the Water and Sanitation Hearings of 2012, where this issue was brought up a number of times, available at www.sahrc.org.za.

⁵⁶ Section 35 of the Constitution covers an extensive list of rights for detained persons.

⁵⁷ Department of Correctional Services: Annual Report 2013/2014, available at <http://www.dcs.gov.za/docs/landing/DCS%20Annual%20Report%202013-14.pdf>.

⁵⁸ Ibid, p, 11.

⁵⁹ Mental Health Act 18 of 1973.

One of the most significant issues within correctional centres currently concerns the over-use of remand detention and general overcrowding. Currently in South Africa's correctional centres there is a 29.7% overcrowding rate.⁶⁰ The levels of overcrowding has a significant effect on the overall conditions in correctional centres, with resources spread thinly and outbreaks of contagious diseases (largely tuberculosis). With regard to remand detainees, there is currently a high number of remand detainees in correctional centres, further burdening an already overburdened system.

Prisoners in South Africa are often subjected to a range of human rights abuses. For example, on 9 January 2013, the Commission became aware of media reports that more than seven hundred inmates at the Groenpunt Maximum Security Correctional Centre (Groenpunt) in Deneysville, Free State Province, had staged a riot following complaints they had lodged concerning the quality of food that they were being provided and the living conditions they were subjected to.⁶¹ The Commission subsequently opened an investigation into potential human-rights violations at this prison.

Ultimately, the Commission found that Groenpunt administrators and officers, in failing to 'adequately and timeously address inmates' complaints and grievances,' fostered an environment that ultimately led to the riots.⁶² The Commission stated that these officials' actions—or lack thereof—did indeed amount to a violation of the prisoners' human rights, including those protected by Section 35 of the Constitution.⁶³ The Commission thus recommended that Groenpunt overhaul its service-provision infrastructure, including prisoners' access to health care, basic food necessities and rehabilitative programs.⁶⁴ The Commission also urged Groenpunt administrators to improve the manner in which they handle prisoner grievances, including complaints of corruption and irresponsible behavior of officials.⁶⁵

The SAHRC has also conducted numerous investigations into the treatment of non-nationals. This includes a report on the Lindela Repatriation Centre (Lindela). The SAHRC noted the unique challenges presented with realizing and protecting civil and political rights for detainees at Lindela, as the short-term nature of their detentions (in the words of Justice Cameron) 'make[s] detainees vulnerable to abuse (since they will soon leave and not be able to testify),' but also because this means that there are 'no long-term institutional or social disincentive[s] against fabricating complaints.'⁶⁶ The SAHRC found that the detention centre had effectively been holding these migrants extra-legally by holding them for periods in excess of 120 days without informing them of their rights. Further, the Commission found that these detentions amounted to a violation of the detainees' rights to freedom and security of their persons.⁶⁷ Moreover, Justice Moseneke agreed with the Commission with respect to Lindela's practice of delaying deportations, stating in his inspection report that 'a situation where only detainees who can afford their own transport to their

⁶⁰ Department of Correctional Services: Annual Report 2013/2014, p. 45.

⁶¹ South African Human Rights Commission, Groenpunt Report, August 2013, available at www.sahrc.org.za.

⁶² Ibid, p. 37.

⁶³ Ibid, p. 37.

⁶⁴ Ibid, p. 38-39.

⁶⁵ Ibid, p. 39.

⁶⁶ South African Human Rights Commission, Investigative Report: Lindela, September 2014, available at www.sahrc.org.za, p. 53.

⁶⁷ Ibid, p. 57.

home countries are deported without delay is unacceptable. Government budgeting processes must seriously be reviewed in order to eliminate the undue deprivation of liberty.⁶⁸

Finally, the Commission found that, by failing to provide a 'comprehensive package of services' to detainees, including: specific efforts to screen, diagnose and provide treatment services for HIV and TB; comprehensive screening for those suffering from psychological infirmities; or measures to ensure continuity of treatment with respect to chronic medication needs, those responsible for the operation of Lindela had infringed the right to health care of those detained.⁶⁹

8.2. Recommendations to the Committee

In light to the above, the SAHRC wishes to urge the Committee to consider the following questions when reviewing South Africa's initial country report:

- What measures has and/or will the government put in place to improve the conditions in its various detention centres, including but not limited to the severe overcrowding therein?
- How has the government responded to the serious concerns raised in the reports that resulted from the Commissions' investigations into human-rights abuses at Groenpunt and Lindela, specifically?
- How does the government plan to improve upon existing programmes intended to help and treat those in detention, in order to best situate these detainees for a successful life and the full enjoyment of their human rights upon leaving their detention?

9. Article 12: Freedom of movement and residence

9.1. Background and overview of concerns

The right to freedom of movement and residence (enshrined in Section 21 of the South African Constitution) is a significant right in South Africa given the country's apartheid history where discrimination against the movement of black persons was routinely administered, including through spatial segregation and apportionment of land. It is in large part for these historical reasons that the right to freedom of movement and residence is fundamentally connected to the right to equality within the South African context. Despite being 20 years into democracy, the General Household Survey of Statistics SA (2013) revealed that 13.6% of the population resided in informal settlements

⁶⁸ Ibid, p. 58.

⁶⁹ Ibid, p. 58-59.

(or townships), and that 95% of these residents were belonged to the black African population group.⁷⁰

The SAHRC has noted with concern the ongoing racialised spatial segregation in South Africa, and the limiting and discriminatory effects it has on the enjoyment of the rights to freedom of movement and residence by many previously disadvantaged South Africans. In 2004, the SAHRC conducted public hearings on the use of public road closures, boom gates and gated communities, following a series of complaints on these issues.⁷¹ The SAHRC noted that such measures were predominant in South Africa and were utilized by certain communities for security purposes. However, the Commission found that the use of road closures and boom gates “has the potential to and does indeed in practice violate a number of rights as indicated in the Report”,⁷² including the right to freedom of movement and residence and the right to equality. These rights were infringed upon by the arbitrary denial of certain persons or groups of persons to access certain public spaces in South Africa. In addition, the report stated that these measures “cause social division, dysfunctional cities and lead to the further polarization of our society”.⁷³

Despite the publication of the SAHRC’s report in 2004 which pointed to the disparity between communities with regard to the levels of enjoyment of the rights to freedom of movement and residence in South Africa, the statistics quoted above demonstrate the continued limitation to these rights that previously disadvantaged groups in South Africa often suffer by residing in townships or informal settlements.

9.2. Recommendations to the Committee

In light of the above, the SAHRC wishes to urge the Committee to consider the following question when reviewing South Africa’s initial country report:

- What measures the government has put in place to address the continued polarisation between those persons in informal settlements and townships and those in more affluent neighbourhoods. Specifically, the Committee should seek to ascertain the specific measures taken to ensure persons residing in informal settlements fully enjoy their rights to freedom of movement and residence.

⁷⁰ Statistics garnered from Stats SA General Household Survey 2013, pp. 33 and 122. Note that these statistics may perhaps under-represent the number of persons living in informal settlements and townships in South Africa.

⁷¹ South African Human Rights Commission, “Road Closures/Boomgates” (2004), available at www.sahrc.org.za.

⁷² Ibid at page 26.

⁷³ Ibid.

10. Article 13: Rights of non-nationals

10.1. Background and overview of concerns

Though South Africa's immigration policy formally draws its structure from its national Immigration Act (as amended) and the International Bill of Rights, rights of non-nationals are recognized and protected throughout the South African Constitution's Bill of Rights. The vast majority of the civil and political rights therein are guaranteed to 'everyone', rather than to subgroups based on citizenship or otherwise. Constitutionally, protecting the human rights of non-nationals is a matter of serious import, given the country's history of racial and ethnic division. By extending the rights enshrined to non-nationals, the Constitution serves its mission (presented in Section 7) to guarantee 'rights [for] *all people in [the] country* and [affirm] the democratic values of human dignity, equality and freedom' (emphasis added).

The United Nations High Commissioner for Refugees reports that there are about 65,000 recognized refugees in South Africa, and points to the country's own Department of Home Affairs (DHA) figures, which show that there are another 230,000 asylum-seekers with applications still pending, leaving them without due legal status in the country.⁷⁴ The vast majority of these refugees have fled political strife and conflict in their home countries, such as the Democratic Republic of Congo, Ethiopia and Somalia. It is critical that South Africa treats these migrants—and all non-nationals—with the dignity and respect that the Constitution envisions and all open and democratic societies necessitate.

The SAHRC has investigated the failure of the government in several instances to uphold and protect the rights of non-nationals. The SAHRC has issued multiple reports finding that unjustifiable limitations of civil and political rights—such as the rights to movement and freedom and security of the person—have occurred during the administrative processing of these persons by various government agencies. In 1999, the SAHRC issued a wide-ranging report on the arrest and detention of suspected undocumented migrants, finding in part that, '[t]he number of wrongly detained persons at [the Lindela Repatriation Facility] is a strong indictment of the current system for the identification and apprehension of suspected undocumented migrants,' calling these 'systemic flaws' 'grossly unacceptable'.⁷⁵ The Report of 1999 also found that 'there was a substantial failure of enforcing officers to comply with even [the Aliens Control Act 96 of 1991's] minimal requirements with regards to migrant detention'.⁷⁶ In 2014, the SAHRC published the findings of another investigation on Lindela, which reported widespread substandard service-provision at the facility,⁷⁷ and moreover found that its administrators had effectively been holding many migrants extra-legally by detaining them in excess of 120 days without informing them of their rights⁷⁸; the SAHRC documented similar abuses in its 1999 report.⁷⁹

⁷⁴ Statistics garnered from the United Nations High Commissioner of Refugees country operations profile on South Africa, available at <http://www.unhcr.org/pages/49e485aa6.html>.

⁷⁵ South African Human Rights Commission, "Report into the Arrest and Detention of Suspected Undocumented Migrants" (1999), hereinafter "Report of 1999," at 16, available at www.sahrc.org.za.

⁷⁶ *Ibid* at 17.

⁷⁷ South African Human Rights Commission, "Lindela Report" (2014), available at www.sahrc.org.za.

⁷⁸ *Ibid* at 57.

⁷⁹ Report of 1999 at 32 and 42.

Additionally, the SAHRC has noted with concern the shortcomings of the DHA with regard to documenting migrants seeking refugee status in the country. In the SAHRC's Report of 1999 on Lindela, the SAHRC found that 6% of those persons' interviewed claimed to be undocumented refugee applicants.⁸⁰ As the SAHRC stated in its report, 'all persons have the right to make, and have considered, a claim for refugee status,'⁸¹ echoing Article 13 of the ICCPR. Further, the SAHRC found that, by not proactively ensuring that persons reasonably believed to satisfy the criteria for refugee status indeed have the opportunity to apply for such status, apprehending officers at Lindela had fallen short of their duty under the Aliens Control Act.⁸² The SAHRC's concerns with the intake practices of the DHA continue to date, in light of the Department's recent attempt to close the Cape Town Refugee Reception Office to new applicants for asylum; even though the Supreme Court of Appeals has since ordered the DHA to maintain a fully functioning office in Cape Town,⁸³ one has not existed since 30 June 2012, rendering migrants unable to fully enjoy their constitutional rights.

These human-rights violations against non-national and within detention centres have been perpetrated against the social and political background of a country wherein xenophobic tendencies are still all too prevalent. A sharp rise in violence against non-nationals in the late 1990s led the SAHRC to open its 1999 investigation into the human-rights abuses of migrants at Lindela. Similarly, the violent xenophobic outburst in May 2008 that left 62 dead and hundreds wounded⁸⁴ serves as another stark reminder that tensions still run high in the country in this respect, and thus human-rights organizations must remain vigilant in their oversight to ensure that the constitutionally protected rights of non-nationals are indeed being upheld in South Africa.

⁸⁰ Ibid at 28. Note that these figures may represent an inflated percentage of the detainee population.

⁸¹ Ibid at 28.

⁸² Ibid at 28.

⁸³ See *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others (735/12, 360/13) [2013] ZASCA 134; 2013 (6) SA 421 (SCA); [2013] 4 All SA 571 (SCA) (27 September 2013)*.

⁸⁴ The SAHRC conducted an investigation into the social and political environment leading up to, during, and after these attacks, finding ongoing issues regarding the government's preparedness for such conflict, as well as the ability of victims to attain justice. It is available at www.sahrc.org.za.

10.2. Recommendations to the Committee

In light of the above, the SAHRC wishes to urge the Committee to consider the following questions when reviewing South Africa's initial country report:

- What measures has the government put in place to address the serious and ongoing violations of rights of non-nationals, both with respect to refugees and migrants being held in detention centres such as Lindela—where the SAHRC found continued violations of rights over a 15-year period—as well as with regard to document foreigners that have been the target of recent xenophobic violence?
- What proactive measures is the government taking to ensure due process is being afforded to non-nationals, both during their initial processing and documentation as migrants and throughout their time spent living in the country?

The SAHRC recommends that the Committee seek specific details from the South African government relating to how policies and practices have changed within Lindela and other repatriation facilities in the time since the SAHRC's respective reports have been published.

The SAHRC further hopes that the Committee will question the South African government on the extent to which they have implemented policies and practices that will ensure discrimination is not taking place against foreigners by public officials, in line with the recommendations the SAHRC made in its Report on the May 2008 xenophobic violence.¹

11. Articles 14, 15, 16 and 26: Equality before the law and fair trial rights

11.1. Background and overview of concerns

South Africa has entrenched the right of equality before the law, the principle of legality, and fair trial rights in its Constitution.⁸⁵ Despite these legal standings, however, access to justice is a complex social issue that largely affects the poor and marginalised in South Africa. This is in part because of the complexity of the South African legal system, and the lack of access to legal services. In addition, the majority of laws are gazetted only in Afrikaans and English, and therefore remain linguistically inaccessible to the many other linguistic communities of South Africa.⁸⁶ Further, the issues surrounding Traditional Courts Bill illustrate the discrimination faced by women in accessing justice. [This issue is discussed in greater detail in Section 3 above].

⁸⁵ See sections 9, 33, 34, and 35 of the South African Constitution.

⁸⁶ Note that South Africa has 11 official languages.

11.2. Recommendations to the Committee

With regard to the rights to fair trial, legality and equality before the law, the SAHRC makes the following recommendations to the Committee:

- The Committee should seek information from the government relating to the measures being put in place to improve access to free legal aid services by the poor.
- Additionally, the Committee is advised to request the government to provide information regarding measures taken to ensure that laws and policies are available in all 11 official languages of South Africa.

12. Article 17: Right to Privacy

12.1. Background and overview of concerns

The right to privacy (protected under Section 14 of the South African Constitution) is a significant right within the South Africa context, and one which has been oftentimes linked to the right to human dignity (protected under Section 10).

The SAHRC would like to point the Committee to a matter relating to the right to privacy, which was first dealt with by the SAHRC in 2010, and which later sparked a national campaign which the Commission conducted over a period of four years. In 2010, the SAHRC received two complaints regarding unenclosed toilets being erected in two informal settlements across the country. The SAHRC investigated the matters and found that in both cases the local municipalities responsible for erecting the toilets were responsible for violations of the respective communities' rights to dignity and to privacy. Indeed, the SAHRC noted in this matter that "the question of privacy is inextricably linked to the question of dignity".⁸⁷ As a result of these findings, the SAHRC embarked on a nationwide campaign on the rights to water and sanitation, which included hosting public hearings in all nine provinces of South Africa. At the hearings the Commission learnt firsthand of the other rights implicated where violations of the right to privacy occur when communities are provided with inadequate sanitation provisions, or in areas where the bucket system is used.⁸⁸ For example, the SAHRC noted how persons such as women and children are particularly vulnerable to violence, including sexual assaults.

In addition, the SAHRC has been monitoring the conditions in correctional centres in South Africa. In 2010, the Committee issued a Communication on the Bradley McCallum matter, in which it noted that the overcrowding of South African correctional centres infringed upon the offender's already limited right to privacy.⁸⁹ The SAHRC notes with concern the fact that despite this Communication

⁸⁷ SAHRC "Makhaza Open Toilet Finding" (2010) and "Free State Open Toilet Finding" (2011) available at www.sahrc.org.za.

⁸⁸ The bucket system refers to the use of a bucket as a toilet.

⁸⁹ Bradley McCallum v. South Africa, Communication No. 1818/2008, U.N. Doc. CCPR/C/100/D/1818/2008 (2010).

from the Committee South Africa continues to experience gross overcrowding in correctional centres. Noting that the Department of Correctional Services has not published statistics on prisoner populations since 2011, the latest reports indicate that the national overcrowding level is at 137% with over 45,000 offenders housed in correction facilities above the national capacity. [For further information relating to overcrowding, see Section 8 above].

Lastly, the SAHRC notes with concern the delay in establishing the Information Regulator which is the independent institution created under the newly promulgated Protection of Personal Information Act 4 of 2013. This Act provides for the establishment of an institution to handle matters and complaints relating to the processing of personal information, and is key to protecting against violations of the right to privacy.

11.2. Recommendations to the Committee

In light of the above, the SAHRC wishes to urge the Committee to consider the following question when reviewing South Africa's initial country report:

- What measures have the government put in place to coordinate the eradication of the bucket system in South Africa, as recommended by the SAHRC in its water and sanitation campaign?
- Noting with concern the effects on the right to privacy that overcrowded correctional centres produce, what are the key issues facing the overcrowding of South African correctional centres, and what measures are being implemented to prevent overcrowding and the human rights violations they lead to? Further, what priority does the issue of overcrowding in correctional centres take for the Department or Correctional Services?
- When is the Information Regulator set to be established, and what measures are being put in place to ensure that it coordinates efforts with the SAHRC to protect against violations of the right to privacy?

13. Articles 19 and 20: Freedom of expression, access to information and hate speech

13.1. Background and overview of concerns

Within the South African context, the right to freedom of expression is broadly conceived. Not only does the Constitution provide for the right of freedom of expression under Section 16, which includes the freedom to receive and impart information, as well as the freedom of the press and

media, but the Constitution also protects the right of access to information under Section 32.⁹⁰ This section is therefore divided into two parts which highlights pertinent information relating to the state of enjoyment of the rights to freedom of expression and access to information.

Access to Information

Despite the pioneering inclusion of the right of access to information as a separate and distinct right in the Constitution, recent legislative developments are threatening its usage and enjoyment in South Africa. In April 2013 the Protection of State Information Bill⁹¹ was approved by the two houses of Parliament⁹², and passed to the President's office where it continues to await to be signed into law.⁹³ However, this Bill has caused significant controversy due to a number of its provisions which in practice would limit enjoyment of the right of access to information, as well as the right of freedom of expression. In particular, the Bill criminalises holding or disseminating information in the public interest, as the Bill does not include a public interest clause and criminalises access to or use of classified information. In practice this would have a detrimental effect on journalists and whistleblowers seeking to expose government wrongdoing or corruption, as well as limiting the freedom of expression of the media.⁹⁴ At the time the SAHRC made several submissions to Parliament laying out the above concerns with the Bill.

The SAHRC also wishes to remind the Committee that when South Africa was examined under the Universal Periodic Review in 2012, several countries made recommendations relating to concerns over the Bill.¹ Notably, South Africa did not accept these recommendations on the basis that the Bill was in line with the ICCPR and the South African Constitution.

Freedom of Expression

In South Africa, issues surrounding freedom of expression often concern the use of hate speech. Indeed, this is true for the majority of cases received by the SAHRC involving this right. In such matters, the SAHRC is tasked with determining whether the statements in question qualify as protected speech pursuant to Section 16 of the Constitution, which outlines the right to freedom of

⁹⁰ The inclusion of this right in the Constitution was particularly groundbreaking, demonstrating South Africa's commitment to a constitutional democracy based on transparency and public participation through the exercise of this right.

⁹¹ The objective of this Bill is broadly to regulate the limitations on freedom of information necessary for protecting national security. For more information on the SAHRC's positions on this Bill, see www.sahrc.org.za.

⁹² The National Assembly (lower house of Parliament consisting of elected members proportional to the party list representation) and the National Council of Provinces (upper house of parliament largely representing the provincial governments).

⁹³ Note that although both houses of Parliament approved the Bill, it was approved due a majority from the leading party – the African National Congress, with most opposition parties voting against the Bill. The Parliamentary processes around this Bill have also been critiqued, see for example <https://www.nelsonmandela.org/news/entry/what-is-still-wrong-with-the-protection-of-state-information-bill>.

⁹⁴ It is important to note that several key civil society organisations in South Africa are preparing to challenge the Protection of State Information Bill at the Constitutional Court when it is signed into law by the President.

expression, or whether the speech should instead be classified as “hate speech” prohibited by Section 16(2) of the Constitution, and Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

The SAHRC has noted with concern the number of reported incidences of hate speech occurring in the work place and in education centres, as well as more recently on social media sites. The Commission concluded a matter in 2014, for example, relating to the use of racially discriminating language at a Boys High School in the Eastern Cape Province of the country. The SAHRC found that the use of language in this matter constituted hate speech and that such conduct must be categorised as a serious offence under the school’s code of conduct.⁹⁵ In matters such as these, the Commission often seeks alternative dispute resolution mechanisms, such as mediation, which looks to promote apology, reconciliation and more broadly, nation building. The SAHRC understands the phenomenon of hate speech in South African society as a manifestation of the continued social divisions and racist attitudes, and in its recent Equality Report of 2013/2014,⁹⁶ noted with particular concern the use of hate speech on social media platforms, especially by the South African youth (or “born-free generation”⁹⁷ as they are colloquially termed).

In addition, the SAHRC has noted from its extensive work on the plight of farm workers in South Africa, that such persons routinely suffer acts of hate speech from their employers. The Commission found that hate speech significantly contributed to violence on farms and in farming communities.⁹⁸ Furthermore, during its work on the xenophobic attacks of 2008, the SAHRC noted the role of hate speech to further divide society, and prevent social cohesion, especially towards non-nationals. The Xenophobic Report of 2010 calls for the speedy introduction of the Prohibition of Racism, Hate Speech, xenophobia and Related Intolerance to Parliament. At present, despite various communiqués from Parliament and the Department of Justice and Constitutional Development to table this Bill, it is yet to be introduced to Parliament.

13.2. Recommendations to the Committee

- The SAHRC recommends that the Committee call upon the South African government to withdraw the Protection of State Information Bill on the grounds of its unconstitutionality.
- The SAHRC further recommends that the Committee question the South African government on the legislative passage of the Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance Bill, and request the speedy introduction of the Bill to Parliament.

⁹⁵ See *Bikitsha v Queens College* report, available at www.sahrc.org.za.

⁹⁶ Equality Report 2013/2014, available at www.sahrc.org.za.

⁹⁷ This term refers to those people born post apartheid, after 1994.

⁹⁸ See SAHRC Farm Worker Hearing reports available at www.sahrc.org.za/hearings.

14. Article 21: Right of assembly

14.1. Background and overview of concerns

Under Section 17 f the Constitution, everyone has the right to assemble peacefully in South Africa. This allows everyone the right to picket, demonstrate or protest against anything of their choice, in a peaceful manner and in full recognition of the rights of others.⁹⁹ Additionally, the right to peaceful assembly is further regulated under the Regulation of Gatherings Act 205 of 1993. This normative framework prescribes the conditions under which assembly can legally take place, including the obligation to inform the local SAPS of any intended protest action 24 hours prior, and the obligations upon the police with regard to the use of force.

The SAHRC has been extensively involved in a number of matters relating to the right to assembly. Protest in South Africa has proliferated greatly in the last few years, with the most recently available statistics from SAPS reporting 13575 crowd relating incidences over the 2012/2013 period, of which 14% were deemed violent.¹⁰⁰ In large part, these protests are concerned with protesting against inefficiency and corruption by the local government in the delivery of basic services, such as water and sanitation. The SAHRC has received a number of complaints regarding the disproportionate use of force by SAPS during such protests, for example the matter concerning Andries Tatane which is discussed in Section 4 above. However, broadly speaking, there is a dire need for the government to address the failures at local government which are the root cause of protest action.

14.2. Recommendations to the Committee

With regard to the right to assembly, protect under both the South African Constitution and the ICCPR, the SAHRC recommends that the Committee address the following questions to the government:

- What measures is the South African government taking to address the inefficiencies of local government which are at the heart of service delivery protests?
- What plans does the government have to adhere to the recommendations put forward by the SAHRC in various reports, including the Water and Sanitation Report of 2014, regarding improving coordination between all spheres of government and increasing the capacity of local government to effectively deliver basic services to its communities?
- What efforts are being put in place to train SAPS in ensuring protests remain peaceful?

⁹⁹ This is regulated under the Regulations of Gatherings Act 205 of 1993.

¹⁰⁰ Quoted from Institute for Security Studies webpage, available at <http://www.issafrica.org/iss-today/politicians-not-the-police-must-solve-public-dissatisfaction-in-south-africa>.

15. Article 22: Freedom of association

15.1. Background and overview of concerns

South Africa allows for the right of freedom of association, including the right to form and join trade unions.¹⁰¹ The right to freedom of association also plays an integral role in the right to assembly, as discussed above.

Noting the number of complaints received regarding discriminatory and exclusionary practices of voluntary associations (VAs), the SAHRC drafted a summary report of the human-rights implications of VAs excluding certain groups or individuals from their membership rolls.¹⁰² The Commission held public hearings in July of 2005, seeking submissions and representations from individuals, along with cultural and religious organizations, regarding the constitutionality of their exclusionary practices, in hopes of gaining a better understanding of the role and importance of VAs in South African society.¹⁰³

The Commission recognized the existence of a whole range of VAs that ‘seek to achieve a variety of constitutionally sanctioned objectives and which adopt exclusionary admission policies’,¹⁰⁴ and thus determined to establish a guiding framework with which the reasonableness of a limitation of rights can be determined.

With regard to the limitation of the constitutional rights to association under Sections 18, 30 and 31 (which members of exclusionary VAs argue will occur should they be forced to allow open admission), the Commission noted that the Constitution as read must indeed permit ‘some exclusionary policies, rules and conduct provided that they are not constitutionally offensive.’¹⁰⁵ In determining the constitutional merit of these policies, the Commission pointed to the limitation clause of the Constitution, stressing that a VA should have the opportunity to justify its practice as proportional. The Commission found that the degree of impact on the complainant is of central importance in determining fairness, and that such impact must be balanced against the associative rights of the organization.¹⁰⁶

¹⁰¹ The Constitution of the Republic of South Africa, 1996.

¹⁰² The complaints were received from a broad swath of the public alleging unjust limitation of their rights to freely associate by several different organizations, including private businesses and clubs, sports administration bodies, housing developments and religious centers.

¹⁰³ South African Human Rights Commission, Report on The Exclusionary Policies of Voluntary Associations: Constitutional Considerations, available at www.sahrc.org.za.

¹⁰⁴ *Ibid*, p. 34.

¹⁰⁵ *Ibid*, p. 18.

¹⁰⁶ *Ibid*, p. 20.

15.2. Recommendations to the Committee

In light to the above, the SAHRC wishes to urge the Committee to consider the following questions when reviewing South Africa's initial country report:

- How will the government work with communities in South Africa to ensure that VAs with exclusionary policies are indeed operating fairly and within the boundaries of the Constitution? What steps will the government take to maintain a proper balance between the associative rights of these organizations and the adverse impact that their policies have on those excluded from membership?

16. Article 24: Rights of children

16.1. Background and overview of concerns

In 1995, the first international instrument ratified by the new democratic South African government was the UN CRC. South Africa has enshrined the rights of children under Section 28 of the Constitution and has enacted the Child Act which further prescribes the rights and responsibilities of children.

The SAHRC has undertaken significant work in relation to promoting and protecting the rights of the child.¹⁰⁷ Recently, in 2013, the SAHRC hosted a hearing into the rights of children in 2013. The hearing attempted to answer questions on the rights of children, and how to better implement the current policies. One of the reoccurring issues with regards to protecting the rights of children concerns the use of corporal punishment at homes and at schools. In 2014 the SAHRC conducted a conference on this issue, and further published a report. The conference and proceedings thereof noted with concern the ongoing use of corporal punishment in schools, despite it being formally illegal.¹⁰⁸ In addition, the Commission has noted a legislative gap with regard to the fact that corporal punishment still permitted in the home under certain parameters, despite it being constitutionally problematic.

16.2. Recommendations to the Committee

The SAHRC recommends the Committee to question the government on the effectiveness of policies put in place to eradicate the use of corporal punishment in schools across South Africa.

¹⁰⁷ For more detail on the work of the SAHRC in relation to child's rights is available at www.sahrc.org.za.

¹⁰⁸ Ibid.

17. Article 25: Participation in government

17.1. Background and overview of concerns

The South African Constitution protects the political rights of individuals under Section 19.¹⁰⁹ However, challenges remain with respect to public participation in government.

Parliament's public participation processes have often been the subject of criticism.¹¹⁰ A recent example of this is the attempted passage of the Traditional Courts Bill, which was originally introduced in Parliament in 2008¹¹¹, and which was again brought to the floor in 2012, but ultimately lapsed in Parliament in 2014 due to lack of adequate public engagement. The Commission and civil society groups had made submissions to Parliament prior to the lapse calling for wider public consultation, particularly with those communities and persons who would be most affected by the legislation.

The Commission further notes with concern that such a lack of public participation has hindered the realization of other human rights for society broadly. To illustrate, the Commission recently conducted a nationwide investigation into the state of the access to the right to water and sanitation, holding public hearings in all nine provinces of South Africa. At these hearings, the Commission heard many complaints from the public about the lack of engagement that they had with local government officials with regard to the provision of these constitutionally protected basic services.¹¹² Ultimately, the SAHRC issued a comprehensive report, in which it made several recommendations to improve the levels of government engagement with local communities, as well as increase the opportunities for community members to participate in the planning and monitoring of these local policies.¹¹³

Furthermore, the SAHRC has noted how indigenous peoples in South Africa face major difficulties when attempting to engage with and participate in government. For instance, on a procedural level Chapter 12 of the Constitution establishes 'the National House of Traditional Leaders', which functions as an advisory body at a national level. However, indigenous Khoisan communities are not represented as part of the House of Traditional Leaders. Additionally, although South Africa has eleven official languages, many more are spoken within various cultural communities across the country. As a result, persons belonging to South Africa's diverse linguistic and cultural minorities often face discrimination in participating equally in public affairs.¹¹⁴ The lack of adequate

¹⁰⁹ South Africa is quite liberal with respect to whom it allows to vote in its elections. The Constitutional Court has held that criminals are permitted to vote, and, in addition, citizens who are outside of the Republic during an election may vote *ex parte* at their nearest embassy.

¹¹⁰ See, for example, Nkosikhulule Nyembezi and Sam Waterhouse 'Open Parliament to the People' (03 August 2012) which quotes from the National Planning Commission's vision for 2013: 'In its vision for 2030, the national planning commission raised "serious concerns about whether Parliament is currently fulfilling its role adequately in the building of a capable, accountable and responsive state" – one that can address poverty, inequality and provide public services', available at <http://mg.co.za/article/2012-08-02-open-parliament-to-the-people>.

¹¹¹ See Section 3 and Section 11 for more information on the Traditional Courts Bill.

¹¹² See SAHRC *Report on the Right to Access Water and Sanitation*, available at www.sahrc.org.za.

¹¹³ Ibid.

¹¹⁴ For more information on the struggles of the indigenous Khoisan people to participate effectively in government, see Part 1 of this Report's Article 1 – Self-Determination, *supra*.

information on government activities in all of South Africa's languages has often resulted in people being shut out from engaging in government, and as a result their needs have gone unrecognized and underrepresented.

The Commission has a designated Commissioner, Dr. Danny Titus,¹¹⁵ tasked with providing strategic guidance on matters relating to civil and political rights, as well as indigenous rights. In October 2014, Commissioner Titus conducted public hearings in Upington in the Northern Cape province. The hearings were designed to establish a platform for indigenous communities to raise their human-rights concerns directly with the SAHRC. The Commission noted that many of the complaints received thereat concerned the lack of constitutional and political representation of these indigenous communities throughout the country. [For further information see also Section 1 above].

17.2. Recommendations to the Committee

In light to the above, the SAHRC wishes to urge the Committee to consider the following questions when reviewing South Africa's initial country report:

- In what ways has the government acted to improve public awareness of, access to and involvement in South Africa's national, provincial and local legislative and policy-making processes?
- What measures has the government pursued to improve indigenous peoples' position in civil society, including but not limited to their participation in government?

18. Article 27: Rights of minorities

18.1. Background and overview of concerns

The rights of minorities are entrenched in section 31 of the Constitution.¹¹⁶ Although there is another independent body established under the Constitution to promote and protect the rights of cultural, religious and linguistic communities,¹¹⁷ the SAHRC has noted a number of concerns with regard to the rights of indigenous persons. [See also Sections 1 and 18 above].

The SAHRC has previously conducted hearings into the rights of indigenous people, as mentioned above, and has planned another hearing for 2015. The hearings focused on the rights of indigenous people and how they related to the Constitution, including the issue of language (which is not

¹¹⁵ Commissioner Danny Titus is also a member of the UN Expert Mechanism on the Rights of Indigenous Persons.

¹¹⁶ Section 31 states that 'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

¹¹⁷ The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

included in the Constitution as an official language), the rights to land, and the rights to a formal indigenous house (similar to the House of Traditional Leaders, as mentioned above).

In addition, the SAHRC has received complaints regarding the murder of a Khomani San person by the SAPS, as well as incidents of general harassment and victimization of the community by the police.¹¹⁸ The Commission stated that such serious allegations of police misconduct have 'either been proved true, or at least left the community with a sense of being without local safeguard and protection,' adding that most Khomani San do not understand the policing processes and methods of the SAPS, further contributing to their mistrust.¹¹⁹ Khomani San children also faced ethnically driven discrimination in their local school, including allegations that some children had even been sexually abused.¹²⁰

18.2. Recommendations to the Committee

The SAHRC notes with extreme concern the ongoing discrimination and exclusion of indigenous persons in South Africa. To this end, the SAHRC recommends that the Committee question the South African government on the extent to which it is aware of this issue and any measures it plans to address it.

PART C – Concluding Comments

¹¹⁸ South African Human Rights Commission, Report on the Inquiry into Human Rights Violations in the Khomani San Community, November 2004, available at www.sahrc.org.za.

¹¹⁹ Ibid, p. 29.

¹²⁰ Ibid, p. 5.

The SAHRC is pleased to be submitting the report contained herein to the Committee, to assist in the adoption of a list of issues on South Africa's initial country report under the ICCPR, and in fulfilment of the SAHRC's mandate to promote and protect human rights in South Africa. It is hoped that this report will assist the Committee by providing first hand information relating to the status of the enjoyment of the rights contained within the ICCPR in South Africa. Although South Africa has a relatively robust legislative framework promoting the realisation of these rights, pursuant to the broad list of rights enshrined in the Constitution, violations of human rights occur daily within different spheres of South Africa. In particular, the SAHRC takes concerns with violations of rights which occur as a result of discriminatory social attitudes, such as racism against non-nationals and renouncement of LGBTI persons. Such violations are demonstrative of the extent to which South Africa must still strive to seek social cohesion and bind together an equal and just nation based on the constitutional values of non-discrimination, human rights and the rule of law.

To this end, the SAHRC is committed to working further to promote and protect all human rights and, in discharging its mandate, fully recognizes the interdependence and indivisibility of all rights. The SAHRC is available to provide the Committee with further information on any matters contained within this report, and is additionally available to engage further with the Committee where requested.