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Transforming society. Securing rights. Restoring dignity.

PREFACE

The events of August 2012 in Marikana in the North West Province of South Africa where 36 striking miners were killed at the hands of the South African Police Service (SAPS) caused a paradigm shift in the understanding of human rights in South Africa. The country hit global headlines when the true scale of this tragedy became apparent. This shocking and brutal event has brought about a perspective change in the general understanding of human rights recognising them as real, interlinking, indivisible and interdependence, as opposed to academic, separate and unrelated. While the Marikana miners were striking against the poor living and working conditions and dismal wages, their fundamental civil and political rights came under direct threat. The linkages between the miners' socio-economic rights and their civil and political rights became evident for all to see. Moreover, the events of Marikana cast a shadow back to South Africa's apartheid past of human rights abuse and inequality, as this was the largest number of deaths at the hands of the South African police since the Sharpeville Massacre of March 1960. The events of August 2012 therefore ushered in significant debates concerning how far South Africa has progressed since 1994 and the dawn of a democracy, from that not so distant era where the daily disregard for basic rights was a common place feature of the apartheid political dispensation.

Given this backdrop, this report attempts to foster debate on South Africa's democratic progression from an international perspective. Many of the United Nations' (UN) Conventions considered in this report were signed and ratified by South Africa post-1994 during the transition to democracy. They therefore mark the human rights aspirations of the new dispensation to shape a democratic society consistent with international best practice and underpinned by the notion of constitutional supremacy. This report reflects on the main human rights treaties and treaty bodies of the UN, with particular attention given to South Africa's compliance with each convention during the period under review, in terms of policy, noteworthy legal cases, and social and political developments. This report also considers national human rights obligations that fall on South Africa from its participation in the African Union (AU). It is hoped that this report will receive a wide reading from those interested and wishing to broaden their knowledge in South Africa's international and national obligations with regards to human rights.

The report has been collated by the South African Human Rights Commission (SAHRC), who continues to enjoy an "A" status as a national human rights institution (NHRI). This status reflects the highest status a NHRI can be awarded as ordained by the International Coordinating Committee (ICC), the branch of the UN which deals specifically with the coordinating of all National Human Rights Institutions (NHRIs), in accordance with the Paris Principles.¹ Being an "A" status NHRI allows the SAHRC speaking rights on any agenda item at the UN. The SAHRC has furthermore been elected Chair of the ICC with its term effective from May 2013. This Chairpersonship will be taken up by the SAHRC's Chairperson Advocate LM Mushwana. In addition, this report constitutes part of the SAHRC's obligation under the Paris Principles in that we are required to promote the ratification and effective implementation of international human rights instruments, the harmonisation of national legalisation with such obligations, and the periodic reporting in terms of such instruments.

¹ A set of soft law principles which set out the guidelines for NHRIs, see <http://www.asiapacificforum.net/members/international-standards>, last accessed February 2013.

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List of Acronyms

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Court on Human and People's Rights
AMD	Acid Mine Drainage
AMR	Annual Ministerial Review
ANA	Annual National Assessment
APRM	African Peer Review Mechanism
APT	Association for the Protection of Torture
CAT	Committee Against Torture
CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CERWC	Committee of Experts on the Rights and Welfare of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CGE	Commission for Gender Equality
CMW	Committee on Migrant Workers
CPTA	Committee for the Prevention of Torture in Africa
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
CSW	Commission on the Status of Women
DAC	Day of the African Child
DAFF	Department of Agriculture, Forestry and Fisheries
DBE	Department of Basic Education
DESA	Department of Economic and Social Affairs
DOHA	Department of Home Affairs
DOJ	Department of Justice and Constitutional Development
DPME	Department of Performance, Monitoring and Evaluation
DWCPD	Department of Women, Children and People with Disabilities
EAP	Economically Active Population

ECOSOC	Economic and Social Council
EOS	Extraordinary Session
FCS	Family Violence, Child Protection and Sexual Offences Unit
HDACC	Health Data Advisory and Coordination Committee
HRC	Human Rights Council
HSRC	Human Sciences Research Council
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR	International Covenant on Civil and Political Rights
ICD	Independent Complaints Directorate
ICEDAW	International Convention on the Elimination of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
IEC	Independent Electoral Commission
ILO	International Labour Organisation
IPID	Independent Police Investigative Directorate
JICS	Judicial Inspectorate of Correctional Services
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LIP	Lenasia Intervention Plan
LSSA	Law Society of South Africa
MDG	Millennium Development Goal
NHRI	National Human Rights Institution
NANHRI	Network of African National Human Rights Institutions
NCOP	National Council of Provinces
NCG	National Child Gauge
NDP	National Development Plan
NEEDU	National Education and Evaluation Development Unit
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NHI	National Health Insurance

NHRI	National Human Rights Institution
NKC	National Khoi-San Council
NPC	National Planning Commission
NPOA	National Programme of Action
NPA	National Prosecuting Authority
NPM	National Preventive Mechanism
NSNP	National School Nutrition Programme
OPAC	Optional Protocol on the Involvement of Children in Armed Conflict
OPCAT	Optional Protocol to the Convention Against Torture
OP-ICEDAW	Optional Protocol on the International Covenant on Elimination of All Forms of Discrimination against Women
OPSC	Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution
PAIA	Promotion of Access to Information Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALC	Southern African Litigation Centre
SAPS	South African Police Service
SASAS	South African Social Attitudes Survey
SERI	Socio-Economic Rights Institute of South Africa
SPT	Subcommittee on the Prevention of Torture
TRC	South Africa Truth and Reconciliation Commission
UN	United Nations
UNCAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations Children's Fund
UPR	Universal Periodic Review
WEGE	Women's Empowerment and Gender Equality Bill
WGEID	Working Group on Enforced or Involuntary Disappearances
ZHP	Zero Hunger Programme

The South African Human Rights Commission has a Secretariat, a CEO and Commissioners.
The CEO is Kayum Ahmed who commenced his duties on 1 August 2010.

The Commissioners and their portfolios are set out below:

Commissioner	Strategic Focus Area	Section 5 Committee	UN Treaty Bodies
Chairperson, Commissioner L M Mushwana	Asylum Seekers, Migration and counteracting Xenophobia, Housing, Equality	Non-nationals	Convention on the Elimination of Racial Discrimination
Deputy Chairperson, Commissioner P Govender	Basic Services, Access to Information, Women's Rights, Health	Basic Services, Women's Rights, Health	Convention on the Elimination of All Forms of Discrimination against Women
Commissioner B Malatji	Disabilities, Older Persons	Disability and Older Persons	Convention on the Rights of Persons with Disabilities
Commissioner L Mokate	Basic Education, Children	Basic Education and Children	Convention on the Rights of the Child
Commissioner J Love (part-time)	Environment, Natural Resources, Rural Development	Acid Mine Drainage	International Covenant on Economic, Social and Cultural Rights
Commissioner D Titus (part-time)	Human Rights and Law Enforcement, Prevention of Torture	Prevention of Torture	Convention against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights

1. INTRODUCTION

In 1945, shortly after the end of the Second World War, five countries - the United Kingdom, France, the United States of America, China and Russia – signed the United Nations Charter, replacing the ineffectual League of Nations with the United Nations. Today these countries continue to make up the permanent members of the Security Council, giving them the power of veto over substantive resolutions.

The United Nations is made up of five principle organs which work together for international cooperation, compliance with international laws, economic development, human rights and world peace. These five organs are the General Assembly, the Secretariat, the International Court of Justice, the Security Council, and the Economic and Social Council.

In 1948, the United Nations adopted the Universal Declaration of Human Rights (UDHR), which has since become the foundational document for the global understanding of human rights. Since then, various treaties have been drafted, signed and ratified which deal with numerous aspects of human rights, from the rights of children to the rights of migrant workers. Each treaty has a treaty committee made up of independent experts which monitor states' compliance to the treaty through the periodic submission of state reports. In this report, the various chapters that follow deal with a treaty and its treaty body, looking at significant developments in 2012 while reflecting on South Africa's progress in light of the treaty's respected rights group.

As part of the newly set up United Nations Human Rights Council (the Council), in 2006, a mechanism was developed called the Universal Periodic Review (UPR). This mechanism applies to all UN states parties and facilitates a process whereby the human rights record of each state is reviewed by the Council every four years. 2012 saw South Africa appear before the UPR for the second time. Chapter 12 of this report deals specifically with the UPR and South Africa's 2012 review.

The role of NHRIs, such as the South African Human Rights Commission (SAHRC), at the UN is continually developing. NHRIs have to date played an important role in relation to treaty bodies in their submission of independent reports to committees and participation in hearings. NHRIs, furthermore, hold the function of submitting independent reports to the UPR to be considered by the troika (3 country representatives) tasked with the overall review of a specific country – see Chapter 12 for further details. This report gives details of relevant activities undertaken by the SAHRC in relation to the treaty bodies.

This report also considers the African human rights system of the African Union (AU). South Africa aims to be a leader on the African continent with regards to human rights and so plays a significant role with the AU. This report looks at the two AU human rights charters: the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child, as well as the mechanisms in place for review of state compliance with these charters and for human rights redress. This report further considers South Africa's achievements for the period under review in light of these charters and AU review mechanisms.

PART A

THE INTERNATIONAL SYSTEM



2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) is a treaty that safeguards civil and political rights including the right to life, liberty, and security, freedom from torture and slavery, equality before the law, freedom of movement, association, thought, religion and expression, and privacy. The ICCPR along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR) comprises what is commonly known as the International Bill of Rights.

The Human Rights Committee (HRC) monitors the implementation of the ICCPR and its Optional Protocols and is composed of 18 independent experts who are elected to four-year terms and who meet three times a year.² There are two Optional Protocols to the ICCPR. The First Optional Protocol gives the HRC competence to examine individual complaints with regard to alleged violations of the ICCPR by states parties to the Protocol. The Second Optional Protocol compels states parties to abolish the death penalty. There are currently 74 signatories and 167 states parties to the ICCPR, 35 signatories and 114 states parties to the First Optional Protocol, and 36 signatories and 75 states parties to the Second.³

Article 1 of the ICCPR recognises the right of all peoples to self-determination, including the right to "freely determine their political status".⁴ Articles 2 – 5, place an obligation on states parties to enact domestic legislation, where necessary, to give effect to or protect the rights recognised in the ICCPR, which also provides recourse and effective legal remedy for any violation of those rights.

Article 4 provides that certain rights may be limited "in time of public emergency which threatens the life of the nation." However, such derogations must be temporary and proportional, and, even in times of national emergency, no derogation is permitted from the rights to life, freedom from torture and slavery, the freedom from retrospective law, the right to personhood, and freedom of thought, conscience and religion.

Articles 6 – 27 list the rights themselves, including:

- physical integrity, in the form of the right to life and freedom from torture and slavery (Articles 6, 7, and 8);
- liberty and security of the person, in the form of freedom from arbitrary arrest and detention and the right to *habeas corpus* (Articles 9 – 11);
- procedural fairness in law, in the form of rights to due process, a fair and impartial trial, the presumption of innocence, and recognition as a person before the law (Articles 14, 15, and 16);
- individual liberty, in the form of the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the right to privacy (Articles 12, 13, 17 – 24);

² In 2012, the Committee held its 104th Session in New York (12- 30 March 2012) and its 105th and 106th Sessions in Geneva (9-27 July 2012 and 15 October – 2 November 2012, respectively).

³ Ratification Status International Covenant on Civil and Political Rights, <http://treaties.un.org/Pages/Treaties.aspx?i=4&subid=A&lang=en> accessed 1 November 2012.

⁴ Article 1, ICCPR.

- prohibition of any propaganda for war as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law (Article 20);
- political participation, including the right to join a political party and the right to vote (Article 25);
- non-discrimination, minority rights and equality before the law (Articles 26 and 27).

The ICCPR also requires the rights be recognised "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and to ensure that they are enjoyed equally by women.⁵

Part 4 governs the establishment and operation of the HRC and the reporting and monitoring of the ICCPR. Articles 41 and 42 allow parties to recognise the competence of the Committee to resolve disputes between parties on the implementation of the ICCPR.

2.1. The Human Rights Committee

On 6 September 2012, a meeting of states parties to the ICCPR re-elected four members and elected five new members to the HRC. They were elected by secret ballot for four-year terms beginning on 1 January 2013 and ending on 31 December 2016.⁶ The terms of 9 of the 18 HRC members expired on 31 December 2012, including the members from Algeria and Egypt.

All states parties are obliged to submit regular reports to the HRC on how the rights are being implemented. States must report initially one year after acceding to the ICCPR. Periodic reports are due at the request of the HRC. The reporting cycle is normally every four years. Following examination on state reports on the various domestic measures taken to give effect to or protect civil and political rights in their jurisdiction, the HRC addresses its concerns and recommendations to the state party in the form of "concluding observations".

In addition to the reporting procedure, Article 41 of the ICCPR provides for the HRC to consider inter-state complaints pursuant to the ICCPR. The First Optional Protocol to the ICCPR gives the HRC competence to examine individual complaints with regard to alleged violations of the Covenant by state parties to the Protocol. Applicants using this mechanism must have first exhausted all available domestic legal remedies in order to have recourse to the HRC. The competence of the HRC extends to the Second Optional Protocol to the ICCPR on the abolition of the death penalty with regard to states who have accepted the Protocol. The HRC also publishes its interpretation of the various Covenant provisions in the form of "general comments" on thematic issues or its methods of work.

⁵ ICCPR, Preamble.

⁶ The re-elected members include Lazhari Bouzid (Algeria) and Ahmed Amin Fathalla (Egypt⁶). The meeting also elected by acclamation Rodney Charles (Trinidad and Tobago) as its Chairperson, replacing Dr. Zonke Majodina of South Africa as well as Ervin Nina (Albania) and Gemma Raduan Corrius (Andorra) to serve as Vice-Chairpersons⁶. Mr. Ben Achour (Tunisia), who was elected by acclamation, fills the vacancy resulting from the death of Abdelfattah Amor, also of Tunisia, on 2 January 2012. He will complete the remaining portion of Mr. Amor's term, which is slated to expire on 31 December 2014⁶. In addition to Nigel Rodley (United Kingdom) and Fabian Salvioli (Argentina). Newly elected to the Committee were Keshoe Parsad Matadeen (Mauritius), Victor Manuel Rodriguez-Rescia (Costa Rica), Anja Seibert-Fohr (Germany), Yuval Shany (Israel) and Konstantine Vardzelashvili (Georgia). See: States Parties to ICCPR elect 9 members to HRC for four year term", 6 September 2012 <http://www.un.org/News/Press/docs/2012/hr5104.doc.htm> and "Expert Elected to Human Rights Committee", 1 May 2012, <http://www.un.org/News/Press/docs/2012/hr5084.doc.htm>, accessed on 2 November 2012.

2.2. ICCPR and HRC in 2012

The HRC met three times during 2012 to consider the reports of 16 states parties. 13 states parties were reviewed with reports and Cape Verde was reviewed in the absence of a report. The consideration of reports in respect of Cote d'Ivoire and Mozambique were postponed until 2013 as these states parties had failed to submit the requisite reports.⁷

At its 105th Session, the HRC issued a statement on the UN High Commissioner for Human Rights' report on "[s]trengthening the United Nations human rights treaty body system", dated 12 June 2012. The HRC agreed that the system is in need of strengthening, including through the receipt of sufficient and sustained resources without which many of the proposals in the report cannot be realised. The HRC highlighted several key aspects of the report including the challenges facing the Comprehensive Reporting Calendar and the need for greater interaction between treaty bodies, civil society and NHRIs.⁸

At its 106th Session, the HRC adopted a paper on the role of, and the HRC's relationship with, NHRIs. It stressed greater and closer cooperation with NHRIs and their important role in terms of the reporting procedure, the working of the first Optional Protocol and input into General Comments.⁹ The HRC also held a public discussion at the 106th Session, on 25 October 2012, in preparation for a new General Comment on Article 9 of the ICCPR on the right to liberty and security of persons, in which participants suggested that the General Comment focus on issues such as: detention by non-state actors; detention in situations of armed conflict; in states of emergency; secret and incommunicado detention; detention in hospitals; and detention of immigrants.

This is the first public general discussion to have been held by the HRC on the preparation of a General Comment. The drafting of the forthcoming General Comment on Article 9 is in its early stages but was considered by the HRC to be urgent given the developments in the world affecting the right on liberty of persons and security of persons. The HRC heard from NGOs and other actors including Amnesty International, the International Committee of the Red Cross and Human Rights Watch on this issue.¹⁰ During 2012, Mongolia and Benin acceded to the Second Optional Protocol (in March and July respectively), effectively abolishing the death penalty. Madagascar also became a signatory to the Second Option Protocol in September 2012.

2.3. SOUTH AFRICA AND THE ICCPR

⁷ Human Rights Committee, Sessions, Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/hrc/sessions.htm>, accessed 2 November 2012.

⁸ "Preliminary Statement of the Human Rights Committee on the Strengthening of the United Nations Treaty Bodies", HRC 105th Session, 12 July 2012 <http://www2.ohchr.org/english/bodies/hrc/index.htm>, accessed 3 November 2012.

⁹ "The relationship of the Human Rights Committee with National Human Rights Institutions" (Advance Unedited version) Human Rights Committee, 106th session 15 October -2 November 2012. <http://www2.ohchr.org/english/bodies/hrc/index.htm>, accessed 12 November 2012.

¹⁰ "Human Rights Committee Holds General Discussion on Article 9 on the Right to the Liberty and Security of the Person" 25 October 2012, [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/7407A3D8BA484270C1257AA2004FD6F6?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/7407A3D8BA484270C1257AA2004FD6F6?OpenDocument), accessed 1 November 2012.

South Africa ratified the ICCPR on 10 December 1998, and it entered into force in March 1999. South Africa acceded to the First and Second Optional Protocols to the ICCPR on 28 August 2002. Although South Africa's initial report to the HRC was due in March 2000, to date South Africa's initial, second (2004), third (2008) and fourth (2012) periodic reports remain outstanding. South Africa has yet to appear before, or report to, the HRC.

2.3.1. Freedom of Expression and Access to Information

Paragraph 2, Article 19 of the ICCPR states that "freedom of opinion", includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice".¹¹ HRC General Comment 34 states that freedom of expression and opinion are the foundation stone of any free and democratic society, in that they are a necessary condition for the transparency and accountability that are necessary for the freedom and protection of human rights and other freedoms.¹²

The General Comment emphasises freedom of information, especially that held by public bodies and the influence of this on many rights protected under the ICCPR. Further, it states that Article 19, in conjunction with Article 25 of the ICCPR, means the right of access to information includes a right whereby the media has access to information on public affairs. In addition, the General Comment notes that for the right of the general public to receive media output "to give effect to the right of access to information, states parties should proactively put in the public domain Government information of public interest".¹³

However, the rights protected by Article 19 are not absolute and two limitative areas of restrictions on the rights are permitted, under paragraph 3 of Article 19, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order or of public health or morals. However, when a state party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.¹⁴ Restriction on access to information should always be the exception. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.¹⁵

South Africa has been grappling with these issues since the introduction of the Protection of State Information Bill (POSIB) in 2011. POSIB was subject to extensive review and comment throughout 2012 by the Ad-Hoc Committee on the Protection of State Information Bill of the National Council of Provinces (the NCOP). Several substantive amendments on some of the most controversial aspects of the Bill were secured in committee. On 29 November 2012, POSIB and proposed amendments were presented to a plenary session of the NCOP and passed by a margin of 34 to 16 against. POSIB and amendments will be returned to the National Assembly (the NA) in the new parliamentary year, for approval. POSIB will then be forwarded for Presidential consent upon which it will become law.

¹¹ International Covenant on Civil and Political Rights, Article 19 <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 1 November 2012.

¹² General Comment 34- Article 19, Human Rights Committee, 2011, United Nations, Ref. CCPR/C/GC/34, paragraph 1 <http://www2.ohchr.org/english/bodies/hrc/comments.htm>, accessed 15 December 2012.

¹³ Ibid.

¹⁴ Ibid paragraph 21.

¹⁵ Ibid paragraph 25.

The purpose of POSIB is to allow for classification of information in the interests of national security, and it creates an offence of seeking, coming into possession of or distributing that information, and imposes heavy penalties on those who do so. POSIB criminalises intentionally accessing and distributing or being in possession of classified information, even if it is already in the public domain. Further, it provides for espionage and hostile activity offences which punish the communication of classified information which the person “knows or ought reasonably to have known would directly or indirectly benefit” a foreign state or non-state actor or prejudice national security.¹⁶ These offences which carry an extremely harsh penalties of up to 25 years’ imprisonment are not covered by the public interest exception and do not require that the “perpetrator” must have intended to benefit a foreign state or hostile actor.

The Ad-Hoc Committee heard submissions from various interested parties, including the SAHRC and other Chapter 9 institutions.¹⁷ The SAHRC made a submission to the Ad Hoc Committee on 15 March 2012 outlining several major areas of concern, in particular: Clause 1(4), which provides that the POSIB would supersede the provisions of the Promotion of Access to Information Act (2000) (PAIA) in case of a conflict between POSIB and any other piece of legislation. The SAHRC also raised concerns around the lack of a definitive public interest defence for whistleblowers or journalists exposing corruption (a crime or other wrongdoing which would have no effective protection under PAIA remains a major issue) and the draconian sentences provided for in POSIB.¹⁸

PAIA allows access to any information held by the state and any information held by private bodies that are required for the exercise and protection of any rights. Critics of POSIB have noted that as PAIA reflects a constitutional requirement, the inclusion of the clause which overrides PAIA could render the POSIB unconstitutional. Opposition parties and civil society actors in opposition to POSIB have asserted that should it become law, even in its current amended form, they will seek to challenge its constitutionality through the Constitutional Court.

There has also been international condemnation of POSIB most notably expressed during South Africa’s UPR in September 2012, where several states raised concerns that the measures would limit public access to information, curtail the freedom of the press and come into conflict with the ICCPR. Several states¹⁹ made recommendations to this effect, which South Africa rejected on the basis that the legislation was still before Parliament. In response, the South African government asserted that POSIB was in line with national human rights law and reflects Article 19 ICCPR which allows for the right to freedom of expression and access to information may be limited, provided such limitation is provided by law and is necessary for the protection of national security and public order.²⁰

¹⁶ Protection of State Information Bill, available at <http://www.info.gov.za/view/DownloadFileAction?id=118894>, accessed February 2013.

¹⁷ I.e. Institutions established pursuant to Chapter 9 of the Constitution, otherwise known as “democracy supporting institutions”, including The Public Protector and the Auditor General.

¹⁸ South African Human Rights Commission, Submission on Protection Information Bill, accessed 15 March 2012, http://www.sahrc.org.za/home/21/files/POIB_NCOP%20Sub.16.212.pdf, accessed 16 January 2013.

¹⁹ Including Canada, Norway, Poland, Czech Republic, Switzerland, Portugal, Sweden, Germany and the United States.

²⁰ National UPR Report Annex A- recommendations acceptable to South Africa http://www.upr-info.org/IMG/pdf/a_hrc_21_16_south_africa_annex_e.pdf, accessed 1 November 2012.

The final Ad Hoc Committee meetings have resulted in the ruling African National Congress (ANC) agreeing to remove the controversial Clause 1(4), subject to the addition to the preceding clause which gives interpretative direction to the courts to avoid conflict between POSIB and other legislation. Notably, changes have also been made that would allow the so-called Chapter 9 institutions access to classified or protected information in pursuance of their mandate. Throughout the consultation and committee process, the issue of who can classify information has also been narrowed down from all state bodies to heads of the security services and their oversight structures, plus the Cabinet. The Minister for State Security can include other state bodies if they show good cause. However, POSIB in its current form still makes simple possession and disclosure of classified information by those not designated a crime.

There is a broad perception that POSIB, even as amended, confers too much power on the officials charged with its execution, especially the Department and Minister of State Security. The definition of “National Security” is considered particularly open ended and open to abuse. As mentioned above, limitations of the right to freedom of expression and information are possible under Article 19(3) of the ICCPR. However, the HRC has made it clear that laws or provisions relating to national security should be crafted in such a manner as to conform to the strictest possible interpretation of paragraph 3. Further, legislation should be proportional and the least intrusive instrument possible to achieve the protective function.²¹ In considering whether any law is compatible with the ICCPR, the state must demonstrate the precise nature of the threat and the necessity and proportionality of the measure.²²

2.3.2. Hate Speech and Free Speech

The HRC considers freedom of expression and opinion to be central to any free and democratic society. It is incompatible with the ICCPR to criminalise the holding of any opinion.²³ The HRC have affirmed in their jurisprudence that the scope of paragraph 2 of Article 19 also embraces expression which could be considered deeply offensive.²⁴ However, Article 20(2) provides that: “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In his report to the UN General Assembly in November 2012 the UN Expert on Freedom of Expression, Frank La Rue, stated that free speech is central to the elimination of hate speech and that freedom of expression must only be restricted in the most extreme cases. He criticised as misguided the efforts of many governments in combating hate speech by introducing ambiguous legislation with disproportionate sanctions. He advised that it would be more beneficial if alternative means of tackling the root causes of hate speech with education and other broad based policy measures were adopted.²⁵ During South Africa's 2nd UPR cycle, the government advised that a *Policy Framework on Combating Hate Crime, Hate Speech and Unfair Discrimination* is at an advanced stage. Hate speech in a South African context is examined further in Chapter 3 (ICERD).

²¹ General Comment 34- Article 19, Human Rights Committee, 2011, United Nations, Ref. CCPR/C/GC/34, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>, accessed 10 December 2012.

²² Ibid Paragraph 35.

²³ Ibid Paragraph 10.

²⁴ Communication No. 736/97, Ross v Canada, views adopted 18 October 2000.

²⁵ “Free speech is central to deterring hate speech” – United Nations Expert on Freedom of Expression, 6 November 2012 [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/FA75EC6369FF18DDC1257AAE0037CBFC?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/FA75EC6369FF18DDC1257AAE0037CBFC?OpenDocument), accessed 6 January 2013.

2.3.3. Access to Justice and Procedural Fairness

The re-introduction of the controversial Traditional Courts Bill (TCB) to the NCOP on 26 January 2012 reignited significant debate around access to justice and the rights to due process enshrined in both the South African Constitution and the ICCPR. Significant controversy has also arisen with particular regard to the rights of women in the context of the traditional court system envisioned by the TCB - this will be dealt with in more detail in Chapter 4 (CEDAW). The stated aim of the TCB is “[t]o affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law; and to provide for matters connected therewith.”²⁶

The provisions and implementation of the TCB would potentially limit access to justice and a fair trial as set out in Article 14 ICCPR for those living in rural areas falling under the jurisdiction of the proposed traditional courts - specifically, people living in the former “Homelands”, which were originally delineated under the apartheid legislation, Bantu Authorities Act of 1951. These courts will have jurisdiction over an estimated 17 million people.²⁷

The NCOP’s Security and Constitutional Affairs Committee held public hearings from 18-21 September 2012. Numerous groups both nationally and internationally voiced significant criticism of the Bill especially with respect to its potential impact on the rights of women and other vulnerable groups, notably lesbian, gay, bi-sexual, transgender and intersex (LGBTI) persons people living in rural areas.²⁸

On 24 October 2012, the Department of Justice and Constitutional Development (DOJ) presented its summary of the public hearings. The DOJ document only referred to two of the 22 submissions that were made at the public hearings in September. They were the submissions of the Department of Women, Children and People with Disabilities (DWCPD) and the SAHRC. To much controversy, submissions from civil society and rural people were disregarded as irrelevant by the parliamentary Portfolio Committee.²⁹ SAHRC stressed in its submission that communities falling under the jurisdiction of the traditional should be more adequately consulted in the drafting process of the TCB. SAHRC has furthermore recognised a key ambiguity in the TCB, as currently drafted, in that there is no clarity as to whether they are in fact courts, in which case the relevant Constitutional and ICCPR due process protections would apply, or whether they are a means of alternative dispute resolution which people can opt in to or out of.³⁰ The SAHRC also focussed on the detrimental impact that the TCB will have on women living in rural areas, as outlined in Chapter 5 (ICEDAW) and on South Africa’s international obligations under ICCPR.

²⁶ The Traditional Courts Bill [01-2012] <http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/J8RrLlwgs5bpg5plRiv6qjg-u3XtiJ1YhDx5Ecmt9k/mtime:1327502769/files/bills/120125b1-12.pdf>, accessed 1 November 2012.

²⁷ <http://www.africanscene.co.za/2012/03/traditional-courts-bill-a-travesty/>, accessed 16 January 2012.

²⁸ “The traditional courts bill threatens LGBT South Africans” 26 May 2012, <http://www.guardian.co.uk/commentisfree/2012/may/26/south-africa-gay-lgbt-traditional>, accessed 5 November 2012.

²⁹ Traditional Courts Bill: Department responses to public hearings, 24 October 2012. <http://www.pmg.org.za/report/20121024-presentation-department-justice-and-constitutional-development-dojcd>, accessed 12 November 2012.

³⁰ Traditional Courts Bill [B1 – 2012] SAHRC Submission to the National Council of Provinces, 15 February 2012 <http://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202%2012.pdf>, accessed 6 November 2012.

Article 14 ICCPR states unequivocally that all persons are equal before the law. One of the practical impacts of the TCB would be a segregated justice system where a person's access to justice and a fair trial would be based in large part on where they resided, and therefore to which forum they have access.

The jurisdiction of traditional courts as anticipated by the TCB is based on those set out in the "Traditional Leadership and Governance Framework Act" (2003), and in turn based on the Bantu Authorities Act (1951). These jurisdictions have been criticised as apartheid era constructs, not recognised in large part by the people living under them.³¹ It could also be interpreted as contrary to the right to enjoyment of a culture of one's choice, protected under the ICCPR, should a person be compelled to submit to a jurisdiction that they did not view as legitimate. In its current form, parties to a dispute in the jurisdiction of the traditional court, however, do not have the right to choose to have their matters heard in a mainstream court, i.e. a Magistrate's Court, as there is no clause to opt out of this system. They are bound and have no option but to be regulated in terms of the proposed TCB, as it will apply to all in the former homeland areas.

Under Sections 5 and 6 of the TCB³², traditional courts will have broad powers to deal with cases of a civil and criminal nature. There are however no checks and balances on the powers granted to traditional chiefs. The TCB is widely perceived to run the risk of fostering power without accountability and directly defies the separation of powers explicit in the Constitution. Unilateral power is given to traditional chiefs who, in the execution of their duties, will act as legislators, administrators and judicial officers of customary law.³³

Section 9(3) (a) of the TCB denies the right of legal representation proceedings before a traditional court. Lawyers are not allowed to participate in proceedings, even in respect of criminal cases, thereby infringing on a person's right to legal representation. Denying a party the right to legal representation will deny many persons, particularly the uneducated, the right to a fair trial in terms of ICCPR and the South African Constitution.

An order of the traditional court is final (see Section 12) and the TCB makes no provision for an internal appeal system, although a traditional court judgment may be appealed to a Magistrates' Court. Furthermore, the TCB fails to recognise basic due process rights, such as the right to a fair and public trial, the right to legal representation and in terms of Article 14 of the ICCPR. A further criticism is that traditional courts should not be able to hand down binding judgements unless basic fair trial rights have been met.

The HRC stated in its General Comment No. 32 that: "Article 14 contains guarantees that states parties must respect, regardless of their legal traditions and their domestic law" and further that "it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees".³⁴ The General Comment goes on to say that "Article 14 is also relevant where a State, in its legal order, recognises courts

³¹ Briefing on the Traditional Courts Bill, 30 May 2012, <http://www.pmg.org.za/report/20120530-traditional-courts-bill-briefings-uct-and-deliberations-process>, accessed 5 November 2012.

³² The Traditional Courts Bill [01-2012] <http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/J8RrLlwgs5bpg5plRiv6qjg-u3XtiJ1YhDx5Ecmt9k/mtime:1327502769/files/bills/120125b1-12.pdf>, accessed 1 November 2012.

³³ Traditional Courts Bill [B1 – 2012] SAHRC Submission to the National Council of Provinces, 15 February 2012 <http://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202%2012.pdf>, accessed 6 November 2012.

³⁴ General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, Human Rights Committee, 23 August 2007, para 4 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>, accessed 12 November 2012.

based on customary law, or religious courts, to carry out [...] judicial tasks.” It must be ensured that such courts cannot hand down binding judgments recognised by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters; meet the basic requirements of fair trial and other relevant guarantees of the ICCPR; their judgments are validated by state courts in light of the guarantees set out in the ICCPR; and can be challenged by the parties concerned in a procedure meeting the requirements of Article 14 of the ICCPR.

During South Africa’s 2nd UPR cycle, Norway in particular stressed the need to ensure that the TCB does not violate South Africa’s international obligations or its own Constitution in the context of access to justice, women’s rights and gender equality. South Africa did not accept this recommendation.³⁵ The South African President, Jacob Zuma, in his address to the House of Traditional Leaders has acknowledged the TCB’s failings but reinforced the importance of traditional justice and customary law and the need for TCB,³⁶ stating that traditional communities do not need to rely on the national justice system, as this is “the white man’s way”.³⁷

2.3.4. Torture, Inhuman or Degrading Punishment or Treatment

Torture, inhuman and degrading punishment and treatment are categorically prohibited under Article 7 of the ICCPR and furthermore in the subsequent Convention Against Torture (CAT), which is looked at in more detail in Chapter 6. The provisions of Article 7 are considered to be non-derogable, such that even in times of war or other states of emergency no exceptions to the right not to be tortured or treated inhumanely are permitted.

The HRC clarified the scope of Article 7 and its application in General Comment 20, at its 44th session in 1992.³⁸ General Comment 20 clarified that the overarching aim of Article 7 was to safeguard both the dignity and the mental and physical integrity of the individual and confirmed that no derogation from the provisions of Article 7 was permissible in any circumstances.³⁹ Intentional infliction of mental suffering, such as prolonged periods of solitary confinement as well as corporal punishment are also covered under the Article 7 prohibition.

The ICCPR does not expressly define torture, and the HRC has not and does not intend to draw up a definitive list of acts, omissions or occurrences that would qualify as torture or inhuman or degrading punishment or treatment in the context of Article 7, thus ensuring a broad application and interpretative discretion. While CAT Article 1 does go some way to defining torture, this is not comprehensive and a finding of torture will depend on the various non-exhaustive considerations such as: the type of treatment; the

³⁵ Recommendations and Pledges: South Africa’s responses to recommendations (as of 24.09.2012) http://www.upr-info.org/IMG/pdf/recommendations_to_south_africa_2012.pdf, accessed 1 November 2012.

³⁶ Traditional Courts Bill: Zuma’s doublespeak - the President concedes Bill is flawed but attacks those opposed to it, Alliance for Rural Democracy, 3 November 2012 <http://www.polity.org.za/article/sa-statement-by-the-alliance-for-rural-democracy-cross-section-of-civil-society-organisations-on-zumas-double-standards-on-the-traditional-courts-bill-05112012-2012-11-05>, accessed 7 November 2012.

³⁷ “Concern over Zuma’s remarks on justice”, IOL Online, 2 November 2012, http://www.iol.co.za/news/crime-courts/concern-over-zuma-s-remarks-on-justice-1.1417019#.UO0rx2_q1E, accessed 10 December 2012.

³⁸ Human Rights Committee, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10 March 1992.

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument), accessed 17 December 2012.

³⁹ Ibid Paragraph 1.

intention of the perpetrator; the status of the victim; and whether permanent damage to the health of the victim was caused by the treatment.

The HRC furthermore confirmed the positive obligation on states to protect individuals against torture or inhuman or degrading treatment inflicted by people acting in their official capacity, outside their official capacity or in a private capacity by taking the necessary legislative or other measures. While it is most common for instances of alleged torture or inhuman or degrading treatment to occur while in the custody of the state or state officials, it is important to note the levels of violent crime in South Africa, where cases of torture and inhuman or degrading treatment can occur in the context of abduction, house breaking etc. It is important that these crimes are also adequately prosecuted.⁴⁰

However, the HRC further noted that it is not sufficient simply to make torture a crime in national law and states parties should inform the HRC of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.⁴¹ Any legislation should also prohibit the use of evidence obtained under torture and *refoulement*.⁴²

South Africa has never reported to the HRC on the status of its compliance with its ICCPR obligations. Further, torture and inhuman and degrading treatment are not offences explicitly recognised in South African law. The Prevention of Torture of Persons Bill⁴³ is currently before Parliament and is examined in more detail in Chapter 5. There is an urgent need for such legislation given the widespread incidences of reported police brutality, in many cases amounting to torture, deaths in police custody and given the violent nature of crime in South Africa.

2.3.5. Police Brutality and Impunity in South Africa

The rights of the criminally accused are explicitly protected under the South African Constitution, however, the effective and consistent protection that these rights afford remains extremely problematic. Complaints of mistreatment while in police custody are numerous. In addition, the police are frequently seen to flout their own regulations and the law.

Use of excessive force by the police and a culture of impunity remain significant challenges for South Africa. The Independent Police Investigative Directorate (IPID) received 720 complaints regarding deaths in police custody or as a result of police conduct in the period 1 April 2011 to 31 March 2012 and a total of 4,923 complaints against SAPS.⁴⁴ While these figures are down on the preceding year, the scale of the problem is

⁴⁰ Ibid.

⁴¹ Ibid paragraph 8.

⁴² According to Article 33 (1) of the 1951 UN Convention on the Status of Refugees, 'no contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. In this sense, therefore, "refoulement" can be defined as the returning, by the state, of a victim of persecution to their persecutor. For further information see, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=438c6d972>, accessed March 2013.

⁴³ Prevention and Combating of Torture of Persons Bill [B21-2012].

⁴⁴ Annual Report 2011-2012, Independent Complaints Directorate, 31 July 2012.

[http://www.ipid.gov.za/documents/report_released/annual_reports/2010-2012/ICD_Annual_Report_-_Inside\[1\].pdf](http://www.ipid.gov.za/documents/report_released/annual_reports/2010-2012/ICD_Annual_Report_-_Inside[1].pdf), page 25, accessed 20 November 2012.

apparent. Following investigation, only 162 cases of death in police custody were referred to the National Prosecuting Authority (NPA), and only 13 convictions resulted from those referred.⁴⁵

The issue of police brutality and impunity in South Africa is evident in the case of Andries Tatane who died in 2011 during a service delivery protest in Ficksburg in the Free State Province. An investigation by the SAHRC found that Tatane died at the hands of the SAPS who were found to have used excessive force disproportionate to the factual circumstances of the protest, resulting in Tatane's death. The SAHRC's report was published in 2012.⁴⁶ Seven policemen have been charged with murder and assault; however the court date has been postponed until March 2013.⁴⁷

In 2012, this issue was again brought to the forefront of national consciousness by the Marikana incident in which 34 striking miners were shot and killed by SAPS and another 78 injured.⁴⁸ There remained a lack of clarity around the shootings with allegations from both sides. SAPS have maintained that its officers were acting in self-defence and that the miners were armed and had attacked them. While later there were allegations that many of the miners had been shot in the back and pursued by the SAPS to a confined area away from the initial site and gunned down at close range.⁴⁹ It was also later alleged that the police had tampered with the crime scene and planted weapons on or beside the bodies of dead miners and mistreated miners that had been arrested following the incident.⁵⁰ President Zuma has set up a Judicial Commission of Inquiry into the events at Marikana which began its term in late 2012.⁵¹ SAHRC will participate in the Commission of Inquiry as an interested party, providing submissions on police conduct, as well as the socio-economic living and working conditions of the miners, and other rights related issues. In addition, there have been further allegations of police brutality and the excessive use of force in the context of protests by striking farm workers in the Western Cape in late 2012, which the SAHRC is now investigating.⁵²

While the HRC has recognised that the police services may have to use force in execution of their duties, this should always be a last resort and should be proportional to a real or perceived threat.⁵³ The police should only use lethal force in the most extreme circumstances and avoid disproportionate and therefore excessive force in effecting an arrest. Such a use of force would breach Article 9 of the ICCPR, which includes the right to "security of the person". If the relevant use of force is extreme enough, it will amount to a breach of Article 7 on freedom from torture and cruel and degrading treatment.⁵⁴ The HRC has commonly

⁴⁵ Ibid at page 30.

⁴⁶ For SAHRC report on Andries Tatane case see www.sahrc.org.za.

⁴⁷ 'Tatane's cops' case postponed', IOL News, available at <http://www.iol.co.za/news/crime-courts/tatane-cops-case-postponed-1.1480151>, accessed March 2013.

⁴⁸ "South Africa's Lonmin Marikana mine clashes killed 34", 17 August 2012 <http://www.bbc.co.uk/news/world-africa-19292909>, accessed 12 November 2012.

⁴⁹ "Marikana's Small Koppie: 14 dead, 300 metres away from Wonderkop. Why?" 8 September 2012 <http://dailymaverick.co.za/article/2012-09-02-marikanas-small-koppie-14-dead-300-metres-away-from-wonderkop-why>, accessed 12 November 2012.

⁵⁰ "Cops tortured witnesses, Marikana commission told", 31 October 2012 <http://mg.co.za/article/2012-10-31-cops-tortured-witnesses-marikana-commission-told>, accessed 17 December 2012.

⁵¹ According to Section 2 of the Presidential Proclamation, the Farlam Inquiry has a period of 4 months within which to complete its work and must report to the President within 1 month of completing its investigation.

⁵² SAHRC worried about the reports of excessive force used by police during farm strikes in the Western Cape, launches an investigation <http://www.sahrc.org.za/home/index.php?ipkMenuID=25&ipkArticleID=172>, accessed 21 January 2013.

⁵³ World Organisation Against Torture, OMCT Handbook Series, PART III JURISPRUDENCE OF THE HUMAN RIGHTS COMMITTEE http://www.omct.org/files/2006/11/3979/handbook4_eng_03_part3.pdf, accessed 15 January 2013.

⁵⁴ Ibid.

recommended the adherence by state authorities to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁵⁵

2.3.6. Non-Discrimination: Lesbian, Gay, Bisexual, Transgender and Intersex Discrimination

Article 2 of the ICCPR provides that state parties must ensure that the rights protected in the ICCPR must be recognised and protected on a non-discriminatory basis. Article 3 of the ICCPR provides for the equal right of men and women to the enjoyment and exercise of the civil and political rights as enshrined in the Covenant. Article 26 goes further by stating that,

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICCPR does not specifically refer to sexual orientation. However, the HRC has found that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation and that laws which discriminate on the basis of sexual orientation or prohibit homosexuality violate international human rights law.⁵⁶ In addition, while the rights of women are protected by the South African Constitution and various pieces of domestic legislation, discrimination and violence against women remain significant challenges in South African society. These issues are discussed more fully in Chapter 4 on CEDAW.

The equality and non-discrimination principles set out in the ICCPR are especially important in respect of the rights of LGBTI persons. At present, there is no binding international treaty specifically concerning the rights of LGBTI persons. South Africa is therefore a world leader in the context of ensuring the formal protection of rights of LGBTI persons as the South African Constitution explicitly recognises these rights and prohibits discrimination on this basis. Furthermore, same-sex marriage has been legal in South Africa for several years, and in 2011, South Africa proposed a resolution at the Human Rights Council (the Council) affirming the rights of LGBT people, which was approved by the vast majority of delegates.⁵⁷

However, while constitutional recognition, formal protection and anti-discrimination legislation is in place⁵⁸ the reality on the ground is worlds apart and LGBTI people are often subject to discrimination and targeted violence. Many cases concern the phenomenon of “corrective rape” and violence against mostly black lesbians and transgender males persists.

One of the most high profile recent court cases involving the murder of lesbian Zoliswa Nkonyana was concluded in February 2012. Zoliswa Nkonyana was stoned and stabbed to death near her home in Khayelitsha in Cape Town in 2006, ostensibly on the basis of her status as a lesbian. The four accused

⁵⁵ Ibid.

⁵⁶ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁵⁷ A/HRC/17/L.9/Res.1.

⁵⁸ For example, PEPUA and the amended Sexual Offences Act.

were sentenced to 18 years in prison by the Regional Magistrates Court.⁵⁹ The sentencing was especially notable because the Magistrate recognised that hatred and homophobia were the primary motivators for the crime, and was notable for the length of the sentence. South African Press Association reported at the time that the sentence was a signal that hate crimes based on sexual orientation would not be tolerated.⁶⁰ The harshness of the sentencing shows that courts are alert to the issue of violent hate crimes against LGBTI persons. However while an anti-discriminatory constitutional and legislative framework is entrenched, violence and discrimination against LGBTI persons in South Africa persists due to deep-seated socio-cultural norms of gender roles and sexuality which an enabling legal framework in itself is unable to overcome.

These traditional views remain widespread and are typified by the remarks of Zulu King Goodwill Zwelithini in January 2012. He stated that “gays” were “rotten” and further that traditionally there were no same sex relationships and that they were “unacceptable”.⁶¹ The House of Traditional Leaders has also come out against the rights of homosexuals to the extent that they appealed to Parliament to debate removing the constitutional protection on the grounds of sexual orientation, and also that people were gay only because of the non-performance of certain cultural rituals, which could be remedied by traditional spiritual healers.⁶² While these utterances caused an outcry in the public domain and media, they reflect the on-going prejudice against gays and lesbians, particularly in traditional communities.

Further to this, should the TCB be passed by Parliament, LGBTI persons living in rural areas are likely to find their access to justice compromised. The Lesbian and Gay Equality Project, a civil society NGO, made a submission to Parliament on the TCB concerning the lack of access for rural women and the fact that TCB is silent as to how traditional or customary views on homosexuality will be dealt with in Traditional Courts. At present, the TCB provides no safeguards for such vulnerable groups.⁶³ A national task team was established in September 2011 to develop an intervention strategy on lesbian, gay, bisexual, trans-sexual and intersex-related crimes. While the Task Team held 12 meetings since its inception, its terms of reference and work streams have yet to be finalised, and they have yet to start producing policy and strategy recommendations.⁶⁴

Several recommendations were made by states in the course of South Africa's 2nd UPR cycle concerning the domestic protection and promotion of certain ICCPR rights, predominantly non-discrimination in the context of the rights of, and hate crimes against, LGBTI persons. Many countries, focussed on the need for the South African government to address discrimination and violence on the basis of sexual orientation or

⁵⁹“Cape lesbian's killers get heavy sentences” 1 February 2012

<http://www.sabc.co.za/news/a/77b534004a015e53ba5f2408abe82e/Cape-lesbians-killers-get-heavy-sentences-20120102>, accessed 21 November 2012.

⁶⁰ “Lesbian killers in South Africa get 18-year jail terms” 1 February 2012 <http://www.bbc.co.uk/news/world-africa-16835653>, accessed 21 November 2012.

⁶¹“Gays are rotten says Zulu King” 23 January 2012 <http://www.timeslive.co.za/local/2012/01/23/gays-are-rotten-says-zulu-king>, accessed 21 November 2012.

⁶² “Stop protecting gays, traditional leaders tell ANC” 6 May 2012 <http://www.citypress.co.za/SouthAfrica/News/Stop-protecting-gays-traditional-leaders-tell-ANC-20120505>, accessed 21 November 2012.

⁶³Press Statement: Submission by the Lesbian and Gay Equality Project on the Traditional Courts Bill http://www.equality.org.za/index.php?option=com_content&view=article&id=202:press-statement-submission-by-the-lesbian-and-gay-equality-project-on-the-traditional-courts-bill-that-has-made-many-rural-lesbians-extremely-worried&catid=34:articles&Itemid=11, accessed 20 November 2012.

⁶⁴ Response to Parliamentary questions no 1817, 27 July 2012

<https://www.google.co.za/search?q=Gender+and+Sexual+Orientation+based+Violence+Task+Team+terms+of+reference+&og=Gender+and+Sexual+Orientation+based+Violence+Task+Team+terms+of+reference+&aqs=chrome.0.57.4667&sugexp=chrome,mod=19&sourceid=chrome&ie=UTF-8>, accessed 21 November 2012.

gender identity. For example Belgium⁶⁵, France⁶⁶, the Netherlands⁶⁷, Canada⁶⁸ and the United Kingdom⁶⁹ highlighted the need to develop and implement specific policies and legislation that would aid in the proper investigation, prosecution and punishment of such crimes and that would provide redress to victims. Other countries⁷⁰ stressed that more public awareness of crimes motivated by gender identity and sexual orientation was necessary. New Zealand⁷¹, Denmark⁷² and the United States of America⁷³, placed particular focus on the need for training programmes for police and justice officials to enable proper investigation and prosecution of crimes of this nature.

The South African government's response to all of these recommendations was to refer to the *Policy Framework on Combating Hate Crime, Hate Speech and Unfair Discrimination*, which, according to their comments at the UPR, is at an "[a]dvanced stage of finalisation".⁷⁴ South Africa also highlighted its track record in the defence of the rights of LGBTI people, with particular reference to promotion of the resolution on human rights, sexual orientation and gender identity, adopted last year at the 17th Session of the Human Rights Council and the recent harsh sentencing of the rapists of a lesbian woman.

2.4. Conclusion and Recommendations

- 2.4.1 The DOJ should complete and submit South Africa's initial report to the ICCPR.
- 2.4.2 Reporting should be brought up to date by the submission of a consolidated report in lieu of the second, third and fourth periodic reports as soon as possible.
- 2.4.3 Government should revisit the TCB in the context of the ICCPR and constitutional due process rights, and further should reopen public consultation, paying particular regard to women from rural areas.
- 2.4.4 In the course of progress through Parliament, amendments should be incorporated to ensure that people in rural areas can opt out of the jurisdiction of the traditional courts and into the "mainstream" justice system.
- 2.4.5 Additional protections should be included regarding the rights of women, children and LGBTI persons.
- 2.4.6 Regarding the POSIB, Parliament should at the very least accept the amendments made by the NCOP committee when the POSIB is returned to the NA for approval in 2013.
- 2.4.7 Ideally, government should revisit the lack of a public interest defence, amongst other issues, and review controversial provisions within the context of the ICCPR and the jurisprudence of the HRC to ensure that freedom of information, expression and the media is not compromised.
- 2.4.8 The South African government needs to give particular attention to the "culture" of impunity which exists in the country, particularly the police services.

⁶⁵ Recommendation 124.84.

⁶⁶ Recommendation 124.51.

⁶⁷ Recommendation 124.81.

⁶⁸ Recommendation 124.83.

⁶⁹ Recommendation 124.82.

⁷⁰ Including Finland, Austria and Belgium.

⁷¹ Recommendation 124.79.

⁷² Recommendation 124.80.

⁷³ Recommendation 124.86.

⁷⁴ Recommendations and Pledges: South Africa's responses to recommendations (as of 24.09.2012) http://www.upr-info.org/IMG/pdf/recommendations_to_south_africa_2012.pdf, accessed 1 November 2012.

- 2.4.9 Deaths in custody and other crimes committed by the security services must be properly investigated and punished.
- 2.4.10 Government must ensure that the security services obey their own regulations and the law in all circumstances.
- 2.4.11 The SAPS should engage more meaningfully with communities, especially where there are popular protests and should be trained more effectively in a human rights based approach to dealing with such protests, particularly in terms of public order policing.
- 2.4.12 Additional training and education programmes should be developed and implemented for police and justice officials, especially with regard to violence against women, children, LGBTI persons and other vulnerable groups.
- 2.4.13 Expedite the development and passage into law of the Hate Crimes Policy Framework.
- 2.4.14 The Torture Bill should be brought into line with ICCPR and CAT, and brought into law as soon as possible.

3. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The rights protected by International Covenant on Economic, Social and Cultural Rights (ICESCR) include: the right to work; to just and favourable conditions of work; to form trade unions; to social security; to family protection; to an adequate standard of living; to physical and mental health; to water and sanitation; housing; education; and to take part in cultural life. These rights are fundamental to the achievement and enjoyment of all other rights and freedoms recognised and protected under international human rights law.

ICESCR currently has 160 states parties. Seven states, including South Africa and the United States of America, are signatories to the ICESCR but have yet to ratify the treaty.⁷⁵ The Optional Protocol to the ICESCR establishes an individual complaints mechanism for the ICESCR similar to that created by the first optional protocol to the ICCPR.⁷⁶

In relation to the ICESCR, it is important to consider the nature of the legal obligations arising out of ratification. As the rights included in the ICESCR are of a socio-economic nature, they are generally dependent on the availability of resources for their achievement. Thus, to a certain extent, they are not of an absolute nature and are said to be subject to progressive realisation. However, upon ratification of ICESCR, state parties are required, within a reasonably short space of time to take “deliberate, concrete and targeted” steps towards the realisation of the rights enshrined in the Covenant.⁷⁷ Such steps will usually take the form of legislation or other policy measures, and will form the basis of the state parties’ reports to the Committee. Despite this principal of progressive realisation, the satisfaction of certain minimum core obligations, for example access to essential nutrition, basic education, healthcare and housing are incumbent on state parties and failure to achieve these basic steps is a *prima facie* failure to discharge a party’s obligations under the ICESCR.⁷⁸ The progressive realisation of rights under the ICESCR is subject to a fundamental non-discrimination principle under Article 3.

3.1. The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR, meets biannually in Geneva. The CESCR was established under the United Nations Economic and Social Council’s (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the Covenant.⁷⁹ The CESCR is comprised of 18 independent experts elected to four-year terms.

Under articles 16 and 17 of the ICESCR, state parties are obliged to submit an initial report within two years of the entry into force of the ICESCR. Thereafter, a report must be submitted once every five years outlining the legislative, judicial, policy and other measures which have been taken to ensure the enjoyment of the

⁷⁵ Status of ratification ICESCR, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, accessed on 6 November 2012.

⁷⁶ The Optional Protocol will enter into force on the 13th May 2013, three months after Uruguay became the 10th State instrument of ratification.

⁷⁷ Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of states parties obligations*, 14 December 1990, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument), accessed 7 January 2013.

⁷⁸ Ibid paragraph 10.

⁷⁹ Committee on Economic, Social and Cultural Rights, <http://www2.ohchr.org/english/bodies/cescr/>, accessed 20 January 2013.

rights contained in the ICESCR. State parties are also requested to provide detailed data on the degree to which the rights are implemented and areas where particular difficulties have been faced in this respect.⁸⁰

3.2. The CESC and the ICESCR in 2012

CESC met twice in 2012. Its 48th session took place from 30 April 2012 to 18 May 2012, wherein it considered reports from 5 countries, including the initial - third periodic report from Ethiopia.⁸¹

In 2012, at its 48th session, the CESC adopted a statement in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication”. The statement stressed the linkages between economic, social and cultural rights and the environment and environmental protection, focusing on the right to development and the importance of sustainable development.⁸²

In May 2012, the chairperson of the CESC, Mr. Ariranga G. Pillay, issued a letter to states parties addressing the issues surrounding the promotion and attainment of economic, social and cultural rights in the context of the ongoing global economic and financial crisis.⁸³ The chairperson particularly stressed the potential for regression in the context of the rights enshrined in the ICESCR due to “austerity measures” aimed at national deficit reduction that have been implemented by many governments in recent years. Actions which would cause regression in terms of the achievement in economic, social and cultural rights are contrary to the principle of progressive realisation upon which the ICESCR is premised, whilst recognising that states parties have a margin of discretion within which set national policies to facilitate achievement of ICESCR rights. Mr. Pillay also highlighted that policies which would result in the infringement or denial of ICESCR rights could lead to ‘social insecurity and political instability’ and are likely to disproportionately impact the most vulnerable in society.⁸⁴

Mr. Pillay presented a statement to the 67th Session of the United Nations General Assembly on 23 October 2012, pursuant to General Assembly Resolution 66/148 in which the chairs of the CESC and HRC were invited to engage in interactive dialogue with the General Assembly under the item “Promotion and Protection of Human Rights, within existing resources.”⁸⁵ He further advised the assembly that the CESC would reduce from three to two meetings a year for the consideration of periodic reports.⁸⁶ The chairperson took the opportunity to reiterate the dangers posed to the realisation of ICESCR rights by national austerity measures and to strongly encourage states to ratify the Optional Protocol since, at that time, only two more ratifications were necessary to bring it into force.

⁸⁰ Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>, accessed 20 January 2013.

⁸¹ CESC 48th Session, Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/cescr/cescrs48.htm>, accessed 12 November 2012.

⁸² Statement in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication, Committee on Economic, Social and Cultural Rights, 4 June 2012 <http://www2.ohchr.org/english/bodies/cescr/statements.htm>, accessed 12 November 2012.

⁸³ Letter from Chairperson of CESC to States Parties, Mr. Ariranga G. Pillay, 16 May 2012, <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>, accessed 12 November 2012.

⁸⁴ Ibid, paragraph 3.

⁸⁵ Resolution A/ Res/66/148, United Nations General Assembly, 22 March 2012, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/148, accessed 12 November 2012.

⁸⁶ Ibid, page 3.

3.3. South African and the ICESCR

South Africa became a signatory to the ICESCR in 1994, but has not yet ratified the convention despite a great deal of national pressure to do so from civil society groups, and internationally from other states parties and various UN bodies.

Following concerted lobbying by the South African Campaign for the Ratification of the International Covenant on Economic, Social and Cultural Rights (the ICESCR Campaign), the South African cabinet, at a meeting on 10 October 2012, approved South Africa's accession to the ICESCR. The recommendation will be tabled in Parliament for ratification in line with Section 231 (2) of the South African Constitution.⁸⁷ It is unclear at the present time whether South Africa will concurrently ratify the Optional Protocol. As of the drafting of this report, the recommendation to ratify the ICESCR has not yet been submitted to Parliament. It is anticipated that it will be tabled during the 2013 Parliamentary year.

It is unlikely that South Africa will have to pass any additional implementing legislation upon ratification of the ICESCR since most of the socio-economic rights included in the Covenant are already codified in the South African Constitution. However, the ICESCR does guarantee other rights that are not clearly protected in the South African Constitution, such as the right to work. South Africa continues to experience high unemployment rates, working conditions and compensation are often inadequate, and 2012 has seen ongoing industrial unrest and violence, especially in the mining and agricultural sectors.

Ratification of the ICESCR will go some way to aiding South Africa in better addressing the various socio-economic challenges facing the country in the context of the international human rights framework and progress on implementation will be independently monitored by the reporting procedure. Following ratification, presumably in 2013, South Africa will be obligated to report to the CESCR within two years of formal accession and subsequently report periodically every five years.

3.3.1. *The Right to Work*

The right to work, as mentioned above, will constitute an additional socio-economic right to the set of rights already protected by the South African Constitution upon South Africa's ratification of the ICSECR. The unemployment rate in South Africa is extremely high at around 24.9% at the end of 2012⁸⁸, and poor working conditions and pay continue to be a significant problem. These issues have been brought to the fore in 2012 by high profile, violent protests.

The most high profile event of this kind in 2012 occurred at the Lonmin Mine at Marikana, in the North West Province, which culminated in the shooting of 34 miners on 16 August in what is considered the single most lethal use of force since the end of the apartheid era. On 10 August, workers at the mine began a wildcat strike in pursuit of rise in pay from R4500 to R12,500 a month. Confrontations between the miners, National Union of Miners (NUM), Association of Mineworkers and Construction Union (AMCU), mine security and the police over the next 5 days left 7 people including two police officers dead. The lead up to 16 August was

⁸⁷ Statement on Cabinet Meeting, Department of Government Communications, 10 October 2012

⁸⁸ <http://www.gcis.gov.za/content/newsroom/media-releases/cabstatements/11Oct2012>, accessed 6 November 2012.

⁸⁸ <http://www.tradingeconomics.com/south-africa/unemployment-rate>, accessed March 2013.

defined by tensions between supporters of the NUM and the rival AMCU. The confrontations reached its bloody apogee on 16 August 2012 when SAPS opened fire on the striking miners with live ammunition killing 34 and injuring a reported 78 more.⁸⁹ Following mediation between the striking miners and Lonmin, the miners accepted a 22% pay increase and agreed to return to work on 20 September 2012.⁹⁰ However, periodic disturbances have continued and unrest has spread to other mines. As previously stated, a Judicial Commission of Inquiry has been set up to investigate the incident to which the SAHRC is providing submissions (see *Chapter 1 ICCPR*).

The CESCR produced a General Comment on the Right to Work in 2005, focussing on the idea that the right to work, in reality, underpins and contributes to the attainment of many of the other rights guaranteed by the ICESCR and is fundamentally constituent to the notion of human dignity. The comment also focuses on anti-discrimination measures and fair working conditions.⁹¹ More recently, in 2011 the CESCR produced a statement on the obligations of the corporate sector in the realisation of ICESCR rights.⁹² Both of the comments are especially relevant to South Africa in the context of the recent industrial unrest.

3.3.2. *Right to Food*

The CESCR recognised in its 12th General Comment that the right to adequate food is fundamental and essential to the enjoyment of all others.⁹³ The right to adequate food and nutrition forms a crucial part of the right to an adequate standard of living under Article 11.1 and as a fundamental right to be protected from hunger and malnutrition under Article 11.2.⁹⁴ States have an obligation to ensure progressive realisation of the former and must ensure that all those reside within its jurisdiction are free from hunger by ensuring access to minimum essential food.⁹⁵ The comment also stresses that sustainability of food production and agriculture is a key component in ensuring and maintaining food security.⁹⁶

Following the visit of the Special Rapporteur on the right to food, Mr. Olivier De Schutter, from 7-15 July 2011, the final report on this mission was presented to the 19th session of the Human Rights Council on 13 January 2012.⁹⁷ While South Africa is deemed to be a largely food secure nation, many South Africans, especially in rural areas remain vulnerable to food insecurity, and this has been exacerbated in recent years by rising food, fuel and other living costs. A 2009 survey by Statistics South Africa alarmingly showed that around 20% of South African households have inadequate access to food.⁹⁸

In its response to the Special Rapporteur's questions Department of Agriculture, Forestry and Fisheries (DAFF) advised that the country's long term objective is to have a Food Security Act for South Africa.

⁸⁹ "South Africa's Lonmin Marikana mine clashes killed 34", 17 August 2012 <http://www.bbc.co.uk/news/world-africa-19292909> accessed 12 November 2012.
⁹⁰ <http://mg.co.za/article/2012-09-18-lonmin-strikers-accept-22-pay-increase>, accessed February 2013.

⁹¹ General Comment on the Right to Work, CESCR, 6 February 2006 <http://tb.ohchr.org/default.aspx?Symbol=E/C.12/GC/18>, accessed 12 November 2012.

⁹² "Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights", CESCR, <http://www2.ohchr.org/english/bodies/cescr/>, accessed 12 November 2012.

⁹³ Committee of Economic, Social and Cultural Rights, *GENERAL COMMENT 12 (Twentieth session, 1999) The right to adequate food (art. 11)*, 12 May 1999, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?OpenElement>, accessed 7 January 2013.

⁹⁴ Ibid paragraph 1.

⁹⁵ Ibid paragraph 14.

⁹⁶ Ibid paragraph 7.

⁹⁷ Report of the Special Rapporteur on the right to food, Olivier De Schutter. Mission to South Africa, http://www.srfood.org/images/stories/pdf/officialreports/20120306_southafrica_en.pdf, accessed on 6 November 2012.

⁹⁸ "Food Security", Directorate of Economic Services Productions Economics Unit, DAFF <http://www.nda.agric.za/docs/GenReports/FoodSecurity.pdf>, accessed 11 November 2012.

However, this could not be introduced until full implementation of the food security policies currently in place happened. As access to food and adequate nutrition are a constitutional right, the legislation could be open to constitutional challenge if such proposed legislation continues to be delayed.⁹⁹

On 7 August 2012, delegates from DAFF briefed Parliament's Select Committee on Land and Environmental Affairs on the UN Special Rapporteur's conclusions and recommendations following the 2011 special mission to South Africa. The briefing focused on policy and strategy currently in place to address food insecurity, such as the "Zero Hunger Programme" (ZHP) - a joint venture of the Departments of Agriculture, Forestry and Fisheries, Health, Social Development, Basic Education, Higher Education and Correctional Services. The current policy framework is generally focussed on rural communities, and the Special Rapporteur highlighted the neglect of the urban and peri-urban poor in relation to food insecurity.¹⁰⁰

Children are particularly vulnerable to food insecurity and South Africa has attempted to combat this through The National School Nutrition Programme (NSNP) which aims to enhance children's learning capacity by alleviating short-term hunger, provide an incentive for children to attend school regularly and punctually, and to address certain micro-nutrient deficiencies. The SAHRC has adopted the right to food as its special focus area for the 2013/2014 financial year.

3.3.3. *Right to Housing*

While the right to housing is dealt with in the ICESCR under Article 11 (the right to an adequate standard of living), the CESCR held in their 4th General Comment that the right to adequate housing is a stand-alone right in and of itself. The right to housing is defined more fully as "the right to live somewhere in security, peace and dignity".¹⁰¹ General Comment 7 on the right to housing in the context of forced evictions makes clear that forced evictions in the absence of suitable forms of protection or redress are *prima facie* violations of the ICESCR.¹⁰² This is reflected in the Constitution of South Africa and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (1998).

During 2012, there have been several high profile cases involving the right to housing and revolving around attempted or forced evictions. This highlights the shortcomings of the existing housing stock in South Africa, especially in the cities where rapid and on-going urbanisation places pressure on already strained resources. Currently, at least 10% of South Africa's 50 million people live in urban informal settlements, equating over 1.2 million households.¹⁰³ These informal settlements are often without access to basic services such as electricity and sanitation. Amongst other dangers, their residents are particularly vulnerable to the elements such as: disease; other dangers such as shack fires; and women are particularly vulnerable to violence as the streets are unlit and unsafe. The majority of the dwellings in these informal settlements do not conform to a minimum standard of housing pursuant to the right to live somewhere in "security, peace and dignity".

⁹⁹ Annexure 1: Responses to UN Special Rapporteur Questions, DAFF <http://www.pmg.org.za/report/20120807-agriculture-forestry-fisheries-united-nations-special-rapporteurs-cou>, accessed 6 November 2012.

¹⁰⁰ Report of the Special Rapporteur on the right to food, Olivier De Schutter. Mission to South Africa, http://www.srfood.org/images/stories/pdf/officialreports/20120306_southafrica_en.pdf, accessed on 6 November 2012.

¹⁰¹ "CESCR General Comment 4: The right to adequate housing", CESCR, 13 December 2012, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument), accessed 6 November 2012.

¹⁰² "CESCR General Comment 7: The Right to Housing: Forced Evictions", CESCR, 20 May 1997, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument), accessed 6 November 2012.

¹⁰³ "A New Response to Informal Settlements, Mark Misselhorn <http://www.afesis.org.za/Sustainable-Settlements-Articles/a-new-response-to-informal-settlements>, accessed 8 November 2012.

The lack of adequate government housing, the prevalence of informal settlements and squatting paired with development and urban regeneration means that informal communities often find themselves on a collision course with local authorities whereby forced eviction remains a prominent problem.

The South African judiciary has recognised the obligation of government in terms of provision of housing. Several prominent cases arose in 2012 in the context of forced evictions. Notably, in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another*, the Constitutional Court ruled that the 5,000 residents who had been summarily evicted from a block of flats that had been labelled unsafe and unfit for habitation, again in the absence of court orders, had to be temporarily re-housed at the municipality's cost while the building was renovated.¹⁰⁴

Furthermore, the Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* found that the City of Johannesburg was obligated to provide suitable alternative accommodation for the evicted residents of an abandoned central Johannesburg building and found the city in breach of its duty to provide adequate housing on a progressive basis.¹⁰⁵ As part of the ruling, the Constitutional Court declared the city's housing policy unconstitutional, because it undermined the equality of the poor by distinguishing between those living in privately owned and city-owned properties. The Constitutional Court further found that the city was obliged to have contingency policies and procedures in place in the event that people were evicted from its own or privately owned buildings.¹⁰⁶

On 2 May 2012, the City of Johannesburg confirmed that the evicted residents had been re-housed in appropriate accommodation in compliance with the order of the court.¹⁰⁷ However, it transpired that many of the evicted residents were living in homeless shelters as they could not afford to rent the alternative accommodation provided.¹⁰⁸

The Lenasia instance represents a watershed moment on the right to housing and the extent of the state's obligation to same in South Africa. In Lenasia, the City of Johannesburg tried to forcibly evict residents on the grounds of illegal use of land. The SAHRC intervened through a court action in which it sought a stay of evictions and demolitions pending an investigation.² The SAHRC furthermore made recommendations to the Gauteng Department of Housing's Lenasia Intervention Plan (LIP) framework document. The recommendations were informed by legal precedents, as well as domestic and international obligations. The recommendations propose an approach to housing that recognises the requirement of a human rights centric response by the Department as relating to: proper communication and information sharing; meaningful engagement and consultation; proper procedure on evictions and relocations; maintenance of stands and issuing of notices; as well as on anti-fraud and corruption measures. The SAHRC further aims to engage all

¹⁰⁴ *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* (CCT 23/12) [2012] ZACC 26 (9 October 2012).

¹⁰⁵ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011).

¹⁰⁶ *Ibid.*

¹⁰⁷ "New Homes for Sartoga Residents", City of Johannesburg Communications Department, 2 May 2012

http://www.joburg.org.za/index.php?option=com_content&view=article&id=7987&catid=88&Itemid=266, accessed 8 November 2012.

¹⁰⁸ "Shelter no solution for Jozi's poor", Mail and Guardian, 11 May 2012 <http://mg.co.za/article/2012-05-11-shelter-no-solution-for-jozis-poor>, accessed 8 November 2012.

relevant stakeholders in the near future on issues of rights and obligations, by way of a roundtable discussion.

While these cases clearly show that the right to adequate housing or shelter and protection from forced eviction is well established in the South African Constitution and its emerging jurisprudence, the public authorities have been unable to provide for the progressive realisation of this right on a practical and consistent basis and in many cases a minimum standard is yet to be met.

3.3.4. The Right to Water and Sanitation

Lack of access to clean water and adequate sanitation facilities has been one of the most controversial issues in South Africa in 2012. The issue came to the fore in 2011 following two high profile court cases against local government in the Western Cape and the Free State provinces, as well as findings by the SAHRC, centred on the installation of open air toilets without enclosures. It was held that this constituted a contravention of the right to dignity and the local government had a *prima facie* obligation to provide these services to an acceptable standard.

In a statement issued on 13 March 2012 the City of Cape Town confirmed that in accordance with the court's instruction, the city undertook door-to-door surveys in conjunction with a community facilitator to determine whether or not individual residents consented to the said enclosures. After extensive consultation, a total of 1030 toilets out of 1316 toilets were enclosed with a concrete structure. However, the SAHRC, after an onsite inspection, determined that many of these enclosures remained inadequate as many were without lights or access for disabled persons.

These cases and the level of publicity that they generated led to the commissioning of a report by the Office of the President through the Department of Performance, Monitoring and Evaluation (DPME) in conjunction with the Department of Water Affairs and the Department of Human Settlements, which was issued in March 2012.

DPME reported the following: that approximately 16 million people do not enjoy access to adequate sanitation; 9% of people living in formal settlements do not have adequate services; and 64% of people in informal settlements have been making use of interim services on an on-going basis. The report estimates that approximately R50 billion is needed to address the backlog and upgrade infrastructure.¹⁰⁹

In response to these finding, the SAHRC launched a series of provincial hearings entitled 'Water is life; Sanitation is dignity'. Nine provincial hearings took place between August and November 2012, and will culminate in a National Hearing in March 2013 where the Commission's findings will be presented. These hearings have been well attended by representatives of national, regional and local government, NGOs and members of the local community.

¹⁰⁹ "Report on the Status of Sanitation in South Africa", DPME, page 3 <http://www.thepresidency-dpme.gov.za/MediaLib/Home/Publications2/Sanitation%20Report.pdf>, accessed 8 November 2012.

3.3.5. *The Right to Education*

The ICESCR guarantees access to free primary education for each child, widely accessible secondary education and access to tertiary study based on equality of opportunity. While primary school enrolment is high in South Africa, “school life expectancy”, i.e. the age at which a child will leave school is approximately thirteen years old.¹¹⁰ School facilities and quality of education vary widely across the country and often on the basis of socio-economic status.

Delivery of school text books to public schools became a prominent issue 2012, when it was discovered that textbooks and other materials had not been delivered to schools in the Limpopo Province for the 2012 school year. Consignments of text books in new condition were discovered dumped in the countryside instead of being delivered late. The publicity generated led to the establishment of a Presidential Task Team on school procurement to investigate the shortcomings in the educational procurement system. The Presidential Task Team, reporting on 5 October 2012, criticised the failure of the Limpopo Department of Education and the National Department of Education to efficiently procure and deliver the text books. The task team further found that the crisis had occurred “in the context of allegations of fraud and corruption”, especially with respect to the award of tenders for the procurement and delivery of the text books.¹¹¹

In the latter half of 2012, the SAHRC instituted a nationwide investigation of school procurement and deliveries to establish whether the problem was more widespread. Human rights organisation Section 27 instituted a court case against the Department of Basic Education, in which the North Gauteng High Court ruled that the Department had a duty to put in place adequate remedial measures in respect of the pupils who were adversely affected by the delivery failure. At the centre of the ruling was the concept of the department’s duty to ensure access to basic education.¹¹² The Department of Basic Education had argued in an affidavit to the court that like other socio-economic rights the right to education was qualified by resource limitation.¹¹³ This interpretation was rejected on the basis that basic education, unlike other socio-economic rights, was not subject to progressive realisation. This ruling conforms to the jurisprudence of CESCR.

Schools in South Africa struggle with many of the same infrastructural deficiencies discussed elsewhere in this chapter. Research by the NGO Equal Education suggests that more than 3500 of South Africa’s 25000 schools still do not have electricity supply, 11450 use pit latrine toilets and 2402 lack a water supply. More than 22000 schools do not have adequate computer facilities, 23552 lack stocked science laboratories and more than 90% do not have functional libraries.¹¹⁴

In March 2012, Equal Education brought a case against the Minister for Basic Education, in the Bhisho High Court in the Eastern Cape seeking an order compelling the respondent to prescribe basic norms and standards for school infrastructure. The case was concluded out of court. The out of court settlement,

¹¹⁰ CIA World Fact Book, South Africa <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>, accessed 12 November 2012.

¹¹¹ Section 27 Welcomes Report of Presidential Task Team, <http://www.ngopulse.org/press-release/section27-welcomes-report-presidential-task-team-non-delivery-textbooks-limpopo-school>, accessed 8 November 2012.

¹¹² Section 27 and Others v Minister of Education and Another (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP) (17 May 2012).

¹¹³ Right to Education: Pupils Can Wait, 3 August 2012 <http://mg.co.za/article/2012-08-03-pupils-can-wait-says-motshekga>, accessed 6 November 2012.

¹¹⁴ Ibid.

recorded by the court, provides that the Minister promulgate regulations to create binding Minimum Norms and Standards for School Infrastructure. According to the settlement, the norms and standards will be published for public comment by 15 January 2013, and finalised by 15 May 2013.¹¹⁵ According to the South African Schools Act, the norms and standards must provide for but are not limited to the availability of: (i) classrooms; (ii) electricity; (iii) water; (iv) sanitation; (v) a library; (vi) laboratories for science, technology, mathematics and life sciences; (vii) sport and recreational facilities; (viii) electronic connectivity at a school; and (ix) perimeter security.

3.3.6. The Right to Healthcare

Access to adequate healthcare remains a prominent and persistent issue, with wide disparities in the standard of and access to care in evidence between rich and poor, and urban and rural areas. In August 2011, the South African government approved plans to introduce the National Health Insurance (NHI) scheme, with the aim being to phase the scheme in over the next 14 years. The purpose of the NHI is to bridge the gap between the privileged and the poor in access to health care.

The NHI will cover all South African citizens and legal permanent residents, with refugees and asylum seekers provided for in line with the Refugees Act of 1998. The scheme was to be introduced in April 2012 and initially rolled out in pilot schemes across eleven predominantly rural areas. The 2012 budget allocated one billion rands to the pilot. It is estimated with full implementation planned by 2025, that public health financing will need to be raised from current levels of 4% of GDP to 6%.¹¹⁶ There are few reports at the present time as to how NHI is functioning in the selected areas. Piloting of the initiative will continue for the next five years with more areas being added to the programme. Some experts however are pessimistic for the success of the scheme, especially in rural areas where aging and inadequate infrastructure may be unable to cope with increased demands in the system.¹¹⁷

HIV and AIDS remains the preeminent healthcare challenge in South Africa, with approximately 17.8% of adults infected with HIV according to 2009 estimates.¹¹⁸ However, in October 2012 the UN High Level Task force for Women, Girls and HIV visited South Africa and commended the South African government on measures taken to reduce mother to child HIV transmission from 3.5% in 2010 to 2.7% in 2011. On this basis, South Africa is set to eliminate this form of HIV transmission by 2015.¹¹⁹

3.4. Conclusion and Recommendations

- 3.4.1 Expedite the passage of ICESCR ratification instrument through Parliament to achieve ratification without delay in 2013, and commence preparation of initial report to CESCR;
- 3.4.2 Consider ratification of the Optional Protocol in conjunction with the Covenant;

¹¹⁵ Equal Education, 'Equal Education, with LRC support, secures a victory in the campaign for school infrastructure' 19 November 2012, <http://www.equaleducation.org.za/node/756>, accessed 17 December 2012.

¹¹⁶ NHI Budget Comments Confuse Health Researchers, Mail and Guardian, February 2012 <http://mg.co.za/article/2012-02-24-nhi-budget-comments-confuse-health-researchers>, accessed 12 November 2012.

¹¹⁷ <http://mg.co.za/article/2012-06-04-low-potential-for-nhi-success-in-rural-health>, accessed March 2013.

¹¹⁸ HIV and AIDS estimates 2009, UNAIDS, <http://www.unaids.org/en/regionscountries/countries/southafrica/>, accessed 12 November 2012.

¹¹⁹ UN Commends SA Battle Against HIV, SAPA, 28 October 2012, <http://www.timeslive.co.za/lifestyle/2012/10/28/un-commends-sa-battle-against-hiv>, accessed 12 November 2012.

- 3.4.3 Government should consider schemes to tackle the high rate of unemployment.
- 3.4.4 DAFF should push for the Food Security Act in line with the Constitution.
- 3.4.5 Taking note of the Constitutional Court rulings concerning the obligation of local government to provide housing and the absolute nature of the right to basic housing, ensure contingencies plans are in place to house displaced people; ensure that extra-judicial evictions of the type discussed cease;
- 3.4.6 Consider how to progressively improve housing policy to move towards a position where as many people as possible are properly and safely housed in permanent structures.
- 3.4.7 The Department of Human Settlements needs to develop a minimum standard with regards to adequate housing provision, and needs to develop policies which speak across the board to all informal settlements, whether from pre- or post- 1994.
- 3.4.8 The DPME should move on to considering phrase 2 of its deliverables on the status of sanitation in South Africa, to ensure that municipal weaknesses and policy oversights are addressed in the elimination of the sanitation backlog.
- 3.4.9 Government needs to adopt a human rights based approach to tackling the water and sanitation backlog as outlined by the DPME's report to ensure that vulnerable groups have access, and further violations of rights do not occur.
- 3.4.10 Ensure swift promulgation and effective implementation, with suitable expert and interested party input, of the minimum infrastructure standards for schools.
- 3.4.11 Address the issue of access to healthcare in remote and rural areas through continual and effective monitoring of the NHI pilot schemes, as well as a broad based assessment of the infrastructure challenges and possible remedies: the government should take cognisance of the major obstacle to healthcare access being unavailability of public/affordable transport, and therefore consider rolling out free transport to and from clinics for remote areas.
- 3.4.12 Continue the work with regards to the elimination of HIV/Aids and particularly mother to child transmission: effective monitoring and evaluation from the DPME, as well as the sharing of best practices from other countries similarly affected, is required to ensure that South Africa's objective of a HIV free generation is achieved.

4. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is a comprehensive instrument prohibiting discrimination based on race, descent, national and ethnic origin. It further includes the prohibition of hate speech and the criminalisation of membership in racist organisations.

Article 1 defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."¹²⁰ However, distinctions made on the basis of citizenship are specifically excluded.

State parties are obliged to not discriminate on the basis of race, not to sponsor or defend racism, and to prohibit racial discrimination within their jurisdictions. They must also review their laws and policies to ensure that they do not discriminate on the basis of race and commit to amending or repealing those that do.

The ICERD imposes a specific commitment on state parties to eradicate racial segregation and the crime of apartheid within their jurisdictions.¹²¹ Parties are also required to criminalise the incitement of racial hatred¹²² and criminalise organisations and membership thereof which espouse racial hatred, to ensure judicial remedies for acts of racial discrimination and to engage in public education to promote understanding and tolerance. Article 5 expands upon on the general obligation of Article 2 and creates a specific obligation to guarantee the right of everyone to equality before the law regardless of "race, colour, or national or ethnic origin" and also to the full and equal enjoyment of the range of civil and political and socio-economic and cultural rights. There are currently 175 states parties to ICERD, in addition to 86 signatories.¹²³

4.1. Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) was established pursuant to Article 8 of ICERD. The CERD monitors the implementation of the ICERD and meets twice a year in Geneva for three-week sessions which are normally held in February and August.¹²⁴ The CERD is composed of 18 members, each of whom is elected for a term of four years. The CERD member representing South Africa is the newly elected Ms Patricia Nozipho January Bardill. CERD members include representatives from African nations, including: Algeria; South Africa; Burkina Faso; Togo; and Niger.¹²⁵ State parties to the ICERD must submit an initial report within a year of ratification and thereafter every two years.

¹²⁰ ICERD, Article 1.

¹²¹ ICERD, Article 3.

¹²² ICERD, Article 4.

¹²³ Status as at : 22-01-2013, ICERD, UN Treaty Collection, Chapter IV Human Rights

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en, accessed 22 January 2013.

¹²⁴ All sessions of the Committee on the Elimination of Racial Discrimination can be accessed at

<http://www2.ohchr.org/english/bodies/cerd/sessions.htm>.

¹²⁵ Current Committee members are: Mr Noureddine AMIR (Algeria), Mr Avtonomov (Russian Federation), Ms January Bardill (South Africa), Mr Cali Tzay (Guatemala), Ms Crickley (Ireland), Ms Dah (Burkina Faso), Mr Diaconu (Romania), Mr Ewomsan (Togo), Mr Gouttes (France), Mr Huang (China), Mr Kemal (Pakistan), Mr Lahiri (India), Mr Kut (Turkey), Mr Lindgren Alves (Brazil), Mr Murillo Martinez (Colombia), Mr Saidou (Niger), Mr Thornberry (United Kingdom), Mr Vazquez.

Pursuant to Article 14 of ICERD, state parties may at any time recognise the competence of CERD to receive individual complaints from individuals or groups claiming to be victims of violations of the rights protected under ICERD. 54 states parties, including South Africa, have accepted the individual complaints procedure.¹²⁶

4.2. ICERD and CERD in 2012

In 2012, the CERD held its 80th and 81st sessions and considered 23 state reports in total.¹²⁷ A common theme emerging from these sessions was the need for states' education systems to incorporate the teaching of native and minority culture studies, and the respective local languages, into the school syllabuses. State reports acknowledged that creating an awareness of minorities and allowing children and young people to learn about cultures different from their own, would facilitate understanding and acceptance.

In considering the state report from Senegal (the only African country to submit a report), CERD urged the Senegalese government to re-address the caste based discrimination in the country and recognise the existence of discrimination based on work and descent, especially in the socio-economic sphere.¹²⁸ The CERD recommended that the Senegalese legal system incorporates specific constitutional and legislative measures for the abolition of their discriminative system in accordance with the CERD General Recommendation No.29. Both CERD and the Senegalese NGO RADDHO¹²⁹ concluded that these acknowledgements, mechanisms and the use of disaggregated data will motivate state and non-state actors to work harder to eliminate racial discrimination, and will encourage victims to seek justice and redress.

On 28th August 2012, the CERD held a day of thematic discussion on "Racist Hate Speech". This endeavoured to highlight the use of hate speech to disseminate ideas of racial superiority or racial hatred used to motivate racial violence. It highlighted the challenges faced by modern multicultural, democratic societies in addressing racist hate speech i.e.

- (i) attempts to hijack the principles and mechanisms of democracy in order to legitimise racist and xenophobic platforms and hate speech;
- (ii) the link between the protection and promotion of freedom of speech, but ultimately the prohibition of hate speech; and
- (iii) legal and cultural promotion of a form of multiculturalism that is democratic, egalitarian and interactive.¹³⁰

The discussion also highlighted the challenges created by "new media" and the internet in tackling racist hate speech. The SAHRC also held a roundtable discussion in November 2012 on cyberspace and hate

¹²⁶ List of states parties accepting Article 14 CERD, 21 September 2012, http://www.bayefsky.com/complain/cerd_statesparties.php, accessed 22 January 2013.

¹²⁷ <http://www2.ohchr.org/english/bodies/cerd/sessions.htm>, accessed 26 February 2013.

¹²⁸ Alternative Report on the Situation of Castes in Senegal: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/RADDHO_IDSN_Senegal81.pdf, accessed February 2013.

¹²⁹ Rencontre Africaine pour la Défense des Droits de l'Homme (African Assembly for the Defence of Human Rights; Senegal).

¹³⁰ Committee on the Elimination of Racial Discrimination, Eighty-first session Summary record of the 2196th meeting http://www2.ohchr.org/english/bodies/cerd/docs/SR/SR_2196.pdf, accessed 26 February 2013.

speech, which addressed similar issues and concluded that the current South African legal framework was not fit for purpose of tackling hate speech propagated online.

2011 was designated the International Year for People of African Descent and was created with the aim of strengthening national activity and cooperation for the benefit of persons of African descent in relation to their rights, their participation in all aspects of society and the promotion of a greater knowledge of, and respect for, their heritage and culture. However in 2012, the Chairperson of the Working Group of Experts on People of African Descent, Ms Verene Sheperd of Jamaica, said that the tribute year had not achieved its objectives, and therefore the International Decade for People of African descent would continue over a longer period of time in order to “move states along to address discrimination against people of African descent, especially where discord existed between policy and practice”.¹³¹ This decade will strive to achieve the elimination of racial discrimination through increasing minority awareness and implementing influential legislation and the Durban Declaration and Program of Action.¹³²

4.3. South Africa and ICERD

South Africa ratified ICERD on 10th December 1998. However, South Africa submitted its initial report five years late and in conjunction with its second and third periodic report in 2005. The reports covered extensive historical background to racial discrimination in South Africa, highlighting its colonial and apartheid history and the efforts to dismantle the apartheid legal framework since 1994. The consolidated report was examined by the CERD at its 69th session in August 2006.¹³³

In its concluding observations, the CERD highlighted at the outset the profound significance of the report from South Africa, given its history¹³⁴ but noted that the report was five years overdue and requested that in future reporting deadlines be respected. The CERD expressed the following concerns with the report and requested that these issues be addressed in the next periodic report:

- (iv) that the report had not provided information on the ethnic composition of the population, without which an accurate assessment of effective enjoyment of the rights provided for in ICERD could not be made, and requested that such information be made available;
- (v) the lack of provision of detail on the role and effectiveness of the Traditional Leadership Governance Framework;
- (vi) the *de facto* segregation that persists in South African society;
- (vii) the persistence of racist hate speech and hate crimes, and the lack of concrete action on relevant legislation that has been under discussion since 2000;
- (viii) the persistent extreme poverty which is especially prevalent along race lines;
- (ix) the prevalence of violence against women, especially from among disadvantaged racial and ethnic groups;

¹³¹ Human Rights Council Holds Interactive Dialogue with Working Group of Experts on People of African Descent: 25 September 2012.

¹³² See, <http://www.un.org/durbanreview2009/ddpa.shtml>, accessed February 2013.

¹³³ <http://www2.ohchr.org/english/bodies/cerd/cerds69.htm>, accessed 25 February 2013.

¹³⁴ CERD, Concluding Observations South Africa, 19 October 2006, <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ZAF.CO.3-new.pdf>, accessed 26 February 2013.

- (x) the lack of specific anti-human trafficking legislation;
- (xi) the situation of indigenous peoples;
- (xii) the prevalence of HIV/AIDS among disadvantaged ethnic groups;
- (xiii) the backlog of refugee applications and the mistreatment of non-citizens by police and other state officials;
- (xiv) the lack of information on cultural rights for minority groups, including the right to receive education in ones' native language;
- (xv) the impediments to access to justice for poor and disadvantaged ethnic groups; and
- (xvi) the persistence of extremely negative xenophobic attitudes within the State and the lack of effective measures to address this and the resultant violence.¹³⁵

South Africa is yet to address these issues in a subsequent report to CERD. Most of the issues highlighted by CERD are still as applicable six years later. The CERD issued a letter to South Africa in March 2011 under its early warning procedure¹³⁶, expressing its concern over the spate of xenophobic violence and racist attacks against non-citizens, with particular regard to refugees and asylum seekers. It requested that the South African government apprise the CERD of steps taken to investigate the attacks and punish the perpetrators. The CERD requested that South Africa clarify its position before 31 July 2011. The Government has so far failed to do so. The CERD also noted in the letter that South Africa's combined fourth, fifth and sixth periodic reports have been overdue since January 2010 and requested that the government rectify the situation as soon as possible.¹³⁷

Many countries involved in South Africa's 2nd UPR cycle made recommendations to South Africa on working towards improving social cohesion. This remains a particular challenge for South Africa given the past legacy of enforced racial segregation.

4.3.1. Xenophobic and Racist Violence

During its 2nd UPR cycle, numerous countries such as Namibia, Iran, Ecuador, Morocco, Palestine, Mozambique, Thailand and Paraguay¹³⁸ recommended that South Africa take further and concrete steps to combat racism, xenophobia and related intolerance. The South African government responded by advising that the "National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance" is being finalised by government with a view to submission to the UN by May 2013.¹³⁹

In their 2012/2013 strategic plan, the DOJ announced its intentions to introduce the Prohibition of Racism, Hate Speech, Xenophobia, and Related Intolerance Bill to Parliament.¹⁴⁰ In the meantime, open dialogue continues as part of the progress towards criminalising conduct "which constitutes hate speech, racial discrimination/racism, xenophobia and related intolerance that is based on race, gender, sex, ethnic or social

¹³⁵ Ibid.

¹³⁶ For more on CERD's early warning procedures see, <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>, accessed February 2013.

¹³⁷ CERD Statement to South Africa, 11 March 2011, http://www2.ohchr.org/english/bodies/cerd/docs/SouthAfrica_11March2011.pdf, accessed 16 January 2013.

¹³⁸ Recommendations 124.37, 124.38, 124.34, 124.35, 124.36, 124.45, 124.341 and 124.39.

¹³⁹ UPR Recommendations Acceptable to South Africa.

¹⁴⁰ See <http://www.saflii.org/za/journals/DEREBUS/2013/36.html>, accessed March 2013.

origin, colour, nationality, sexual orientation, disability, culture, religion, conscience, belief, language and birth.”¹⁴¹

4.3.2. ICERD and Black Economic Empowerment and related measures

ICERD aims to realise *de jure* and *de facto* racial equality. Article 1(4) of ICERD provides that,

[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

ICERD recognises that special measures, such as affirmative action or similar policies, may be necessary to correct historical imbalances, but it stresses that such measures should be temporary and should not violate the rights of other groups in the course of advancing those that were previously disadvantaged.¹⁴² Given their temporary nature, such measures should be goal orientated and the subject of continuous follow up and monitoring to review their efficacy. Detailed information on the justification for and implementation of such special measures should be provided in periodic reports to the CERD.¹⁴³ South Africa is in a relatively unique position *vis-a-vis* other societies in that the beneficiaries of such special measures are in fact the majority population.

4.4. Conclusion and Recommendations

- 4.4.1 The South African government must bring reports to the CERD up to date with respect to measures taken to realise the recommendations made by CERD's concluding observations
- 4.4.2 Parliament should give the necessary attention to the Prohibition of Racism, Hate Speech, Xenophobia, and Related Intolerance Bill to ensure its timely passage into law.
- 4.4.3 Ensure the National Action Plan against of Racism, Racial Discrimination, Xenophobia and Related Intolerance is ready for submission to the UN by the intended May 2013 deadline, and that a suitable budget is assigned to it in order to ensure its effective realisation.
- 4.4.4 The South African government look to speedily clarify its position to the CERD on the spate of xenophobic violence which caused the CERD to issue a letter under its early warnings procedure, clarifying steps taken to ensure the attacks were thoroughly investigated and perpetrators were brought to justice.

¹⁴¹ Legislative Programme: Department of Justice and Constitutional Development: 2010.

¹⁴² Pastor Elias Murillo Martínez, CERD Expert, AFFIRMATIVE ACTION MEASURES OR SPECIAL MEASURES: For Redressing Historical Injustices and Structural Discrimination against Afro-Descendants Summary, March 2011.

¹⁴³ CERD, General Recommendation no.32 The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, 24 September 2009. http://www2.ohchr.org/english/bodies/cerd/docs/GC32_English.pdf, accessed 16 January 2013.

5. INTERNATIONAL COVENANT ON ELIMINATION OF DISCRIMINATION AGAINST WOMEN

The International Covenant on the Elimination of Discrimination Against Women (ICEDAW) was adopted by the UN General Assembly in 1979, and it came into force on 3 September 1981. There are currently 187 states parties to ICEDAW, in addition to 99 signatories.¹⁴⁴

Article 1 ICEDAW defines discrimination against women in the following terms:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁴⁵

Under Article 2, state parties must address all aspects of their legal obligations under ICEDAW to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that state parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that state parties protect women from discrimination by private actors¹⁴⁶ and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women. The obligation to fulfil requires that state parties take a wide variety of steps to ensure that women and men enjoy equal rights *de jure* and *de facto*.¹⁴⁷

Discrimination can occur through the failure of states to take necessary legislative measures to ensure the full realisation of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws. Likewise, state parties have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specifically vulnerable groups in particular. States' obligations are non-derogable in times of conflicts and national emergency.¹⁴⁸ Women can be particularly vulnerable in times of conflict, as highlighted by the Committee on the Elimination of Discrimination Against Women (CEDAW) in 2012 (*see below*). State parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory. Obligations apply to citizens and non-citizens alike, including refugees, asylum seekers, migrant workers etc.¹⁴⁹

¹⁴⁴ Status as at March 2013: Chapter IV, Human Rights, UN Treaty Collection, ICEDAW, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&lang=en, accessed 15 January 2013.

¹⁴⁵ ICEDAW, Article 1.

¹⁴⁶ ICEDAW, General recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>, accessed 14 January 2013, Ibid paragraph 13.

¹⁴⁷ Ibid paragraph 13.

¹⁴⁸ Ibid, paragraph 11.

¹⁴⁹ Ibid, paragraph 12.

As in the case of the ICCPR, the complaints mechanism for the Convention is contained in an Optional Protocol (OP-ICEDAW), a separate treaty which was adopted on 6 October 1999. State parties to the parent Convention may decide to ratify OP-ICEDAW to recognise the competence of CEDAW to receive complaints from persons within their jurisdiction alleging violations of their right under the Convention. There are currently 65 states parties and 72 signatories to the Optional Protocol.¹⁵⁰

5.1. Committee on the Elimination of Discrimination against Women (CEDAW)

CEDAW is the body of independent experts that monitors implementation of ICEDAW. It consists of 23 experts on women's rights from around the world. December 2012 saw the expiration of the terms of 11 of these members and elections by states parties through secret ballot were held to fill these positions on 23 June 2012. Two African members were elected, Ms. Theodora Oby Nwankwo of Nigeria and Ms. Hilary Gbedemah of Ghana.¹⁵¹

State parties are obliged to submit a report on the legislative, judicial, administrative or other measures that they have adopted to implement the ICEDAW within a year after its entry into force and periodic reports at least every four years thereafter, or whenever the CEDAW requests. During its sessions, the CEDAW considers each state party report and addresses its concerns and recommendations to the state party in the form of concluding observations. In accordance with the OP-ICEDAW, the CEDAW is also mandated to receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the ICEDAW to the CEDAW in circumstances of grave or systematic violations of women's rights. The CEDAW also formulates general recommendations on its interpretation of ICEDAW rights and state obligations. In 2012, Austria, Hungary, the Philippines and Mauritania became states parties to OP-ICEDAW, while Chad became a signatory.

5.2. ICEDAW and CEDAW in 2012

CEDAW held 3 sessions in 2012, 51st, 52nd and 53rd, considering the reports of 20 states parties. Furthermore in 2012, CEDAW celebrated the 30th anniversary of its first meeting in 1982. To mark this occasion, CEDAW held a panel discussion on "Women's Political Participation and Leadership" during its 52nd session in July 2012.¹⁵²

Education for girls and women became a key focus for CEDAW in 2012, in the aftermath of the shooting of 14 year-old girls' education activist Malala Yousufzai by Taliban fighters on her way to school in Afghanistan. Education for girls and women was recognised as the most powerful tool in the achievement of women's equality and rights. On 19 October 2012, at the conclusions of its 53rd Session, CEDAW adopted a statement on the Protection of Girls' Right to Education.¹⁵³ Education is central to ICEDAW. The obligation is set out in Articles 2 and 10 of the ICEDAW as well as in other international human rights documents such as the

¹⁵⁰ Chapter IV, Human Rights, UN Treaty Collection, OP- ICEDAW,

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-9-b&chapter=4&lang=en, accessed 15 January 2013.

¹⁵¹ Election of the members of the Committee on the Elimination of Discrimination against Women to replace those whose terms are due to expire on 31 December 2012 http://www2.ohchr.org/english/bodies/cedaw/result_elections2012.htm, accessed 15 January 2013.

¹⁵² 30th Anniversary of the Committee on the Elimination of Discrimination against Women.

¹⁵³ Committee on Elimination of Discrimination Against Women, "Protection of Girls' Right to Education", adopted 19 October 2012 <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/CEDAWstatementGirlsEducationAsAdopted.pdf>.

Millennium Development Goals (MDG) and the Education for All (EFA) Dakar Framework for Action.¹⁵⁴ The statement highlighted illiteracy as largely a “feminised” phenomenon as 66% of the reported 739 million adults lacking basic literacy skills are female.¹⁵⁵ The statement concluded with CEDAW calling on states to dismantle “patriarchal barriers and entrenched gender stereotypes, to guarantee and to ensure that girls are able to enjoy their basic human right to education in every region of the world”.¹⁵⁶

Another focus for 2012 was the plight of women in conflict situations. In this regard, a regional consultation on this issue was held in Addis Ababa, Ethiopia, in April 2012.¹⁵⁷ Women are particularly vulnerable to violence and especially to sexual violence in conflict situations and often have minimal input into building the new post-conflict order. The plight of women in Syria and Mali was particularly highlighted.¹⁵⁸

5.3. ICEDAW and South Africa

South Africa ratified ICEDAW in December 1995 and OP-ICEDAW in 2005. South Africa’s constitutional order is seen as being particularly progressive with respect to the advancement of women’s rights, but despite this, South African women continue to face discrimination and high levels of violence.

South Africa submitted its initial report to the CEDAW in February 1998, a year late. After failing to submit its second and third periodic reports in January 2001 and January 2005, respectively, South Africa consolidated these with the fourth periodic report in January 2009. This was presented to the Committee at its 48th Session in February 2011, and covered the period 1998-2008.¹⁵⁹ As CEDAW considered the report in 2011, the next South Africa report to CEDAW is due in 2015.

5.3.1. Violence against Women

Despite South Africa’s progressive legal framework, violence and especially sexual violence against women and girls remains endemic in South Africa. In 2012 numerous countries involved in the Working Group on the UPR expressed concern at the levels of violence against women and girls in South Africa.¹⁶⁰ CEDAW criticised South Africa’s lack of a response to the concerns raised by other states by saying that sexual violence against women and girls was “socially normalised, legitimised and accompanied by a culture of impunity and silence”.¹⁶¹

Article 1 of ICEDAW includes gender based violence in its definition of “discrimination”. CEDAW have averred that full implementation of ICEDAW requires states to work towards eliminating violence against

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ <http://www.ohchr.org/EN/NewsEvents/Pages/PromotingWomenRightsInConflict.aspx>, accessed 15 January 2012.

¹⁵⁸ Ibid.

¹⁵⁹ Combined second, third and fourth periodic report of States parties, 24 March 2010, CEDAW/C/ZAF/2-4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/288/63/PDF/N1028863.pdf?OpenElement>, accessed 9 January 2012.

¹⁶⁰ Report of the Working Group on the Universal Periodic Review, South Africa, 9 July 2012 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/151/29/PDF/G1215129.pdf?OpenElement>, accessed 12 November 2012.

¹⁶¹ Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 23 March 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/124/72/PDF/G1212472.pdf?OpenElement>, accessed 15 January 2013.

women.¹⁶² CEDAW General Recommendation No. 19 focused on violence against women. In particular, it recognised the harmful impact of traditional attitudes by which women are regarded as subordinate to men in perpetuating practices involving “violence and coercion such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision.”¹⁶³

Violence is used to control women in such situations, often under the guise of “protecting” them or the “honour” of their family. It prevents women from enjoying or exercising their rights on an equal basis of men due to fear of reprisals or threat of violence; this perpetuates the cycle of subordination, lower levels of educational attainment, unequal access to services and fewer opportunities to work outside the home. Rural women are particularly at risk in this context.¹⁶⁴

In South Africa, women who do not conform to traditional roles can be particularly susceptible to gender based violence especially in traditional communities. Domestic violence and rape statistics are notoriously unreliable due to issues around non-reporting and prosecution of these offences. However, there is a general consensus that the rate of violence against women in South Africa is extremely high. According to statistics released in 2012 by the SAPS, 64 514 incidents of sexual offences were reported in 2011/2012¹⁶⁵. Furthermore, the consolidated report on the implementation of the Criminal Law (Sexual Offences and Related Matters) Act highlighted that only 3.3% of SAPS personnel were receiving specialised sexual offences training, that sexual offences cases are often handled incorrectly, and that very few perpetrators are prosecuted resulting in a conviction.¹⁶⁶

The National Council Against Gender-Based Violence was launched by Deputy President Motlanthe on 10 December 2012 at the closing of the *16 days of Activism for no Violence Against Women and Children*, a global initiative observed by the South African government since 1999.¹⁶⁷ At the launch of the National Council Against Gender-Based Violence, Motlanthe said statistics have shown that 90% of women in South Africa have experienced emotional and physical abuse, 71% have experienced sexual abuse and 60% of such cases were committed by partners.¹⁶⁸ The 20 member council will support victims and survivors of gender-based violence and address all forms of violence against women and children. It will coordinate the 365 Days National Plan of Action against Gender-based Violence, a national initiative by the DWCPD which extends upon the *16 days of Activism for no Violence Against Women and Children* and recognises the need for a year-long sustained prevention and awareness campaign, involving all spheres of government and various civil society stakeholders.¹⁶⁹

¹⁶² CEDAW, General Recommendation no. 19, Violence Against Women, 11th Session, 1992, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>, accessed 14 January 2013.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Crime Research and Statistics - South African Police Service

http://www.saps.gov.za/statistics/reports/crimestats/2012/categories/total_sexual_offences.pdf accessed 16 January 2013.

¹⁶⁶ Statement by Dianne Kohler Barnard, Democratic Alliance Shadow Minister of Police, 6 August 2012, <http://www.polity.org.za/article/sa-statement-by-dianne-kohler-barnard-democratic-alliance-shadow-minister-of-police-on-less-than-33-of-saps-members-trained-to-handle-sexual-offences-06082012-2012-08-06>, accessed 16 January 2013.

¹⁶⁷ For further information on 16 Days of Activism for No Violence Against Women and Children see <http://www.info.gov.za/events/national/16days.htm>, accessed March 2013.

¹⁶⁸ Government Communications and Information System, “New council to give gender based violence further boost” 10 December 2012, <http://www.sanews.gov.za/rss/12/12121015151001>, accessed 16 January 2013.

¹⁶⁹ For further information see, <http://www.womensnet.org.za/365-national-action-plan-end-violence-against-women-and-children>, accessed March 2013.

5.3.2. *Traditional Practices*

As discussed above, traditional attitudes to the role and worth of women often legitimise violence against women in the eyes of the community and have been a great impediment to the advancement of women. Unfortunately, harmful and limiting traditional attitudes towards women remain prevalent in South Africa, despite its progressive constitution and legal framework. Women in rural areas continue to suffer disproportionately, especially due to the continuing prevalence of harmful traditional cultural attitudes and practises, such as *ukuthwala*, whereby older men abduct young women for purposes of marriage, polygamy and the belief in and killing of “witches”.

Although South Africa is governed by the Witchcraft Suppression Act of 1957,¹⁷⁰ which outlaws the accusing of someone as a witch, this legislation does little to stop the accusations and accompanying abuse faced by many women, predominantly within rural areas. Indeed, in May 2012 two cousins were sentenced to 10 years imprisonment for killing their grandmother in Grahamstown after suspecting her to be a witch. Such cases are unfortunately not isolated incidents, and it is chiefly older women who become victims of such accusations and attacks.¹⁷¹

Following the consideration of South Africa’s report to CEDAW in January 2011, the Committee made several recommendations on such practices which adversely affect women and girls, which require follow up and implementation from the South Africa government. These include implementing a comprehensive national strategy, including legislation, to modify or eliminate harmful cultural practices and to promote understanding of the equality of men and women.¹⁷²

CEDAW and the Committee on the Rights of the Child are in the process of drafting a General Recommendation on Harmful Cultural Practices, which are often embedded in cultural or traditional norms. It aims to provide a conceptual framework and recommendations for state parties to deal with such practices in their jurisdiction.

5.3.3. *The Traditional Courts Bill*

Notwithstanding the violation of basic due process rights, as discussed in Chapter 2, the effects of the Traditional Courts Bill (TCB) will be particularly grave for women living under their jurisdiction, whose access to justice would be severely hampered. While the TCB provides at Article 9(2), that in the course of proceedings that presiding officers must ensure “that women are afforded full and equal participation in the proceedings, as men are,” there are minimal protections for women in the TCB, let alone affirmative action measures that would attempt to redress the historical and culture disadvantage faced by women, especially in rural areas.

SAHRC in its submission to Parliament emphasised that there is no provision for the appointment of female presiding officers in the TCB, and that in many cases women are not permitted to even enter certain

¹⁷⁰ Witchcraft Suppression Act 3 of 1957, available at <http://www.justice.gov.za/legislation/acts/1957-003.pdf>, accessed March 2013.

¹⁷¹ <http://www.dailymaverick.co.za/article/2012-05-30-witch-hunts-the-darkness-that-wont-go-away/>, accessed March 2013.

¹⁷² CEDAW, Concluding observations of the Committee on the Elimination of Discrimination against Women, 5 April 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/418/78/PDF/G1141878.pdf?OpenElement>, accessed 20 January 2013.

traditional courts. In its submission to Parliament, the SAHRC stressed that the TCB needs to specifically affirm women's right to be present and heard at proceedings, in conjunction with an affirmation to the right to a public hearing.¹⁷³

The Minister for Women, Children and Disabled Persons has been a notable opponent of the TCB, going so far as to label it unconstitutional.¹⁷⁴ The Minister, along with numerous civil society groups, has consistently opposed the TCB. There has been major criticism of the government in the drafting and consideration of the TCB, one strong view being that rural women have not been sufficiently consulted. Further, it is also noteworthy that there are no female MPs serving on the NCOP Select Committee on Security and Constitutional Development who are responsible for processing the TCB.¹⁷⁵ However, the "Women's Parliament" held on 30th and 31st August 2012, under the theme '*Mainstreaming gender equality in all sectors of South African society: the Traditional Courts Bill and its impact on women*', ultimately decided to support the TCB but recognised the need for further consultation and amendments.

The TCB prohibits the right to legal representation, and in many cases women are not permitted to represent themselves or even speak at traditional proceedings. They must be represented by a male family member.¹⁷⁶ This entrenches traditional, discriminatory practices and views. Another significant gap in the TCB is the fact that there is no explicit recognition of crimes such as physical and sexual abuse which are currently considered private or 'domestic' matters not fit to be brought before a traditional court.¹⁷⁷

As women comprise approximately 60% of traditional communities,¹⁷⁸ it is a concern that their dignity will not be protected, unless the fundamental right to equality is protected. The protection and recognition of women's rights will be undermined by the proposed legislation, as customary law is highly rooted in the patriarchal system, especially with regard to marriage, property and inheritance rights. Indeed, historically under traditional systems, women were considered perpetual minors.

The Law Society of South Africa (LSSA) summed up the plight of women in rural areas by saying that "should this Bill be enacted, many women in rural areas, where development is happening at a very slow pace, will find themselves having to struggle against the twin threats of both poverty and oppression from their male counterparts".¹⁷⁹ These disadvantaged women should be able to turn to the justice system for redress, support and affirmation of their rights, rather than have traditional disadvantages further entrenched upon them.

The TCB has undergone, and will no doubt continue to undergo, significant amendments in its passage through the NCOP. However, legislators should take specific note of Article 5 of ICEDAW which sets out

¹⁷³ SAHRC, Submission on the Traditional Courts Bill, 15 February 2012, <http://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202%2012.pdf>, accessed 16 January 2013.

¹⁷⁴ <http://mg.co.za/article/2012-09-21-00-traditional-courts-bill-revamped-beyond-recognition>, accessed 16 January 2013.

¹⁷⁵ Rashaad Alli, 2012 Review, <http://www.pmg.org.za/node/35734>, accessed 16 January 2013.

¹⁷⁶ Law Society of South Africa, LSSA says Traditional Courts Bill infringes on constitutional rights, <http://www.saflii.org/za/journals/DEREBUS/2012/32.html>, accessed 7 December 2012.

¹⁷⁷ Hawkridge. C., "Traditional Courts a Travesty", <http://www.africanscene.co.za/2012/03/traditional-courts-bill-a-travesty/>, accessed 16 January 2013.

¹⁷⁸ Law Society of South Africa, LSSA says Traditional Courts Bill infringes on constitutional rights, <http://www.saflii.org/za/journals/DEREBUS/2012/32.html>, accessed 7 December 2012.

¹⁷⁹ Ibid.

state parties obligation to take appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹⁸⁰ More fundamentally, Article 15 obliges states to ensure the equality of men and women before the law.¹⁸¹

5.3.4. *Domestication of CEDAW*

State parties are required to give effect to CEDAW and to strive for *substantive* equality through their national legislation.¹⁸² In addition to the constitutional rights afforded under Section 9 of the South African Constitution are several pieces of relevant legislation in place, including most notably the Promotion of Equality and Prevention of Unfair Discrimination Act (2000), (PEPUDA).

Section 8 of PEPUDA provides that, subject to section 6, no person may “unfairly discriminate against any person on the ground of gender”, this includes:

- (a) gender-based violence;
- (b) female genital mutilation;
- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- (f) discrimination on the grounds of pregnancy;
- (g) (g) limiting women’s access to social services or benefits, such as health, education and social security;
- (h) (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- (i) (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.¹⁸³

Women make up 42.3% of parliamentarians in the NA and 32.1% of permanent representatives in the NCOP.¹⁸⁴ This places South Africa in 8th place globally for women’s representation in national legislatures. Women also comprise 50% of senior management positions in the public service. During South Africa’s

¹⁸⁰ ICEDAW, Article 5(a).

¹⁸¹ ICEDAW, Article 15(1).

¹⁸² The concept of substantive equality arose out of the recognition that formal equality may not be sufficient to ensure that women enjoy the same rights as men. An ostensibly gender-neutral policy, while not excluding women per se, may result in a de facto discrimination against women by not taking into consideration, for example, that women bear children. For further information on formal versus substantive equality see <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf>, accessed March 2013.

¹⁸³ PEPUDA, Section 8.

¹⁸⁴ Inter-Parliamentary Union, Women in National Parliaments, Country Classification, as of 31 October 2013 <http://www.ipu.org/wmn-e/classif.htm#1>, accessed 20 January 2013.

second UPR cycle, these statistics were commended by CEDAW.¹⁸⁵ In terms of the private sector, the Business Women's Association of South Africa conducted a "Women in Leadership Census", the results of which were released in June 2012. It found women occupied 3.6% of CEO positions, 5.5% of chairperson posts, 17.1% of directorships and 21.4% of executive management positions in the country.¹⁸⁶

A further instrument being currently established within South Africa to realise the domestication of CEDAW is the Women's Empowerment and Gender Equality Bill (WEGE). The Bill was publicised by the DWCPD in the Government Gazette in September of 2012 and sets out concrete targets and mechanisms for the monitoring and enforcement of a prohibition on discrimination on the basis of gender and systemic inequality. The WEGE does this by providing the Minister for Women, Children and People with Disabilities with the authority to monitor, review and oversee gender mainstreaming and integration of gender equality considerations into all programmes of government and other sectors.¹⁸⁷

WEGE further aims to address gender based structural labour divisions. The draft Bill was approved by Cabinet for publication in the Government Gazette in August 2012 and was then opened for public consultation. The SAHRC generally views the WEGE as a positive step for women in South Africa. SAHRC highlighted the fact that WEGE would be the first piece of legislation drafted specifically for the empowerment and advancement of women since the ratification of CEDAW.¹⁸⁸ Significant recommendations from the SAHRC include the presence of specific reference to women with disabilities and recognition of the fact that women are also often disadvantaged on various intersecting levels, for instance a woman may be discriminated against on the basis of her gender but also on the basis of race, religion, ethnicity, age etc. SAHRC advised that the WEGE recognise the cross cutting dimensions of gender discrimination and address gaps in the legislation by closer reference to the provisions of ICEDAW.¹⁸⁹ The WEGE will further be considered by Parliament during 2013.

5.3.5. *Trafficking*

Women and girls are particularly vulnerable to trafficking, which often results in sexual exploitation. Within Africa, South Africa is a primary destination for women and girls who are being trafficked. They often come from conflict zones and poverty stricken areas. Most female victims are trafficked for the sex trade. Article 6, ICEDAW, places a positive obligation on state parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." South Africa has also signed the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children also known as the "Palermo Protocol".¹⁹⁰ Signatories are required to adopt necessary legal steps to establish criminal offences relating to human trafficking.

¹⁸⁵ Human Rights Council, Compilation of UN Information prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 23 March 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/124/72/PDF/G1212472.pdf?OpenElement>, accessed 15 January 2013.

¹⁸⁶ SA women executive numbers up slightly, 1 June 2012 <http://www.southafrica.info/news/business/2072453.htm>, accessed 21 January 2013.

¹⁸⁷ Women Empowerment Bill Published for Comment, 3 September 2012 <http://www.sabinetlaw.co.za/social-affairs/articles/women-empowerment-bill-published-comment>, accessed 21 January 2013.

¹⁸⁸ SAHRC, (*unpublished*) Submission on Women's Empowerment and Gender Equality Bill, September 2012.

¹⁸⁹ *Ibid.*

¹⁹⁰ For further information see, http://www.palermoprotocol.com/index.php?option=com_fjrelated&view=fjrelated&layout=blog&Itemid=634, accessed March 2013.

The US State Departments' annual Trafficking in Persons Report recognised South Africa as a source, transit, and destination country for men, women, and children subjected to forced labour and sex trafficking. According to the report, persons are trafficked mainly within the country, from poor rural areas to urban centres.¹⁹¹ Trafficking into South Africa for the sex trade is more prevalent, but there are cases of South African women being trafficked out of the country. In 2011, South African trafficking victims were discovered in Bangladesh and Turkey.¹⁹²

Women and girls from Thailand, Cambodia, the Democratic Republic of the Congo, India, Russia, Ukraine, Bulgaria, China, Taiwan, Mozambique, Swaziland, and Zimbabwe are recruited for legitimate work in South Africa, but are then subjected to prostitution, domestic servitude, and forced labour in the service sector or are taken onward to Europe for forced prostitution.¹⁹³

In February 2012, the Human Trafficking, Prostitution, Pornography and Brothels Task Team, set up by national government to specifically tackle the issue of trafficking and prostitution in South Africa, conducted a successful raid on a brothel, facilitating the rescue of 16 females – including eight children, some as young as 13 – and arresting and charging four offenders with sex trafficking and drug and prostitution offenses.¹⁹⁴

There is no specific anti-trafficking legislation in force in South Africa. However, the Prevention and Combating of Trafficking in Persons Bill¹⁹⁵ (the "Trafficking Bill") was tabled in Parliament in 2010. The Trafficking Bill has been under discussion and formulation for several years prior to this, having its genesis in a recommendation from the 2008 Law Reform Commission report. The Trafficking Bill seeks to create a comprehensive legislative framework to combat and prevent trafficking and to provide assistance for victims. The stated purpose of the Trafficking Bill is:

To give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to prevent and combat the trafficking in persons within or across the borders of the Republic; to provide for measures to protect and assist victims of trafficking in persons; to provide for the establishment of the Inter-sectoral Committee on Prevention and Combating of Trafficking in Persons; and to provide for matters connected therewith.¹⁹⁶

The Trafficking Bill was approved by the National Assembly's Justice Portfolio Committee on 5 June 2012¹⁹⁷ and passed by the National Assembly on 14 June. The Bill is now under consideration by the NCOP's Security and Constitutional Development Portfolio Committee, who have expressed concerns with regard to

¹⁹¹ US State Department, Trafficking in Persons Report 2012, <http://www.state.gov/j/tip/rls/tiprpt/2012/192368.htm>, accessed 16 January 2013.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ See, <http://www.iol.co.za/news/south-africa/girl-13-found-in-brothel-1.449049?ot=inmsa.ArticlePrintPageLayout.ot>, accessed March 2013.

¹⁹⁵ The Prevention and Combating of Trafficking in Persons Bill 7 of 2010, <http://www.info.gov.za/view/DownloadFileAction?id=118892>, accessed March 2013.

¹⁹⁶ Ibid.

¹⁹⁷ <http://www.pmg.org.za/report/20120605-deliberations-prevention-and-combating-trafficking-persons-bill>, accessed 16 January 2013.

funding and implementation given the inter-sectoral approach of the Bill, and whether illegal immigrants would abuse the provisions of the Bill by claiming to have been trafficked.¹⁹⁸ This latter point highlights the fact that unfortunately trafficking and exploitation of women and the vulnerability they face may not be fully understood by policy makers for its seriousness and gravity.

5.4. Conclusion and Recommendations

- 5.4.1 Improve record keeping and statistics with respect to violence against women and rape in order to obtain a clearer picture of the problems in order to tackle them more efficiently.
- 5.4.2 Consider amending WEGE Bill to take into account the struggles faced by rural South African women outside of an urban, professional context
- 5.4.3 Fully address and combat violence against women and girls in South African society;
- 5.4.4 Develop education policy to address harmful traditional attitudes and practices which perpetuate discrimination and violence against women and girls;
- 5.4.5 Halt the progress of the TCB through the NCOP in order to engage more fully with rural women;
- 5.4.6 Following further public consultation, if the TCB is to be retained, consider amending the Bill to include a mechanism whereby people can opt out of the traditional courts, include specific recognition of women's disadvantaged status and include provisions to combat this, such as providing for the appointment of female presiding officers and ensure the right of women to be present at hearings.
- 5.4.7 Include further checks and balances on the powers of Traditional Leaders.
- 5.4.8 Parliament should proceed with the passage of the Trafficking Bill in line with the Palermo Protocol.

¹⁹⁸ Prevention and Combating of Trafficking in Persons Bill [B7B-2010]: briefing, 21 November 2012, <http://www.pmg.org.za/report/20121121-briefing-department-justice-and-constitutional-development-dojcd-prev>, accessed 14 January 2013.

6. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is the international treaty body tasked with ensuring that states implement measures to prevent the use of torture, and that they do not return persons to a country where they are likely to be tortured. In 2012, the treaty body celebrated its twenty-fifth anniversary.¹⁹⁹

Article 1 of UNCAT defines torture as:

any act by which severe pain, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁰⁰

Part I of UNCAT defines torture as set out above and obliges parties to taking effective measures to prevent any act of torture in any territory under their jurisdiction²⁰¹. These obligations include ensuring that torture is a criminal offence, establishing jurisdiction over acts of torture committed by or against a party's citizens, ensuring that torture is an extraditable offense and establishing universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited. State parties must also commit to the principle of non-refoulement, under Article 3, whereby they cannot deport or extradite people to a country where there are substantial grounds to believe that they will be tortured. Parties also commit to promptly investigating any allegations of torture and victims of torture must have an enforceable right to compensation. Evidence obtained under torture must not be admissible in any court of the state party. Under Article 16, state parties are also obliged to prevent other acts of cruel, inhuman or degrading treatment or punishment, and to investigate any allegation of such treatment within their jurisdiction.

6.1. The Committee against Torture

The Committee against Torture (CAT) was established under Article 17 of UNCAT and is comprised of ten independent experts who meet twice a year in Geneva to review the reports of member states. State parties to CAT are required to submit reports within a year of ratification and thereafter every four years. The Committee may also, in certain circumstances, consider individual complaints or communications from

¹⁹⁹ "Statement by the UN High Commissioner for Human Rights Navi Pillay on the International Day in support of victims of torture, and the 25th anniversary of the Convention Against Torture", The United Nations Office at Geneva (26 June 2012), [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/CEE1152CC5C8A55DC1257A2900336F0E?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/CEE1152CC5C8A55DC1257A2900336F0E?OpenDocument), accessed October 2012.

²⁰⁰ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.un.org/documents/ga/res/39/a39r046.htm>, accessed March 2013, Article 1.

²⁰¹ Ibid, Article 2.

individuals claiming that their rights under the UNCAT have been violated, undertake inquiries and consider inter-state complaints.²⁰²

6.2. UNCAT and CAT in 2012

In 2012, UNCAT was ratified by the Dominican Republic, the Lao People's Democratic Republic and Nauru and acceded to by the United Arab Emirates, bringing to 153 the number of states parties.²⁰³ In May and June, CAT held its 48th session and reviewed the reports of eight countries, including Rwanda.²⁰⁴ The CAT recommended that Rwanda implement its new penal code criminalising torture as soon as possible, and to ensure that the definition it contains matches that of the Convention. It also recommended that public officials be extensively trained regarding the provisions of the UNCAT, and that the principle of non-refoulement should be properly applied by the courts to ensure that persons are not expelled, extradited or returned to states where there are substantial grounds for believing that they would be in danger of being subjected to torture.²⁰⁵

These recommendations are particularly relevant to South Africa. In October and November, the Committee examined the reports of a further nine countries, including Gabon (initial report), Senegal (third periodic report) and Togo (2nd periodic report)²⁰⁶. CAT noted that Gabon, like South Africa, is yet to have a definition of "torture" in its legal framework, and that breaching the 48 hour custody limit and preventative detention were on-going problems.

In January 2012, the United Nations General Assembly released a report prepared by Juan E. Méndez, the Special Rapporteur on torture and other cruel, inhuman, or degrading punishment. This gave an overview of his activities during the reporting cycle, with a thematic focus on commissions of inquiry. This is of particular interest to South Africa in the context of the establishment and work of the Marikana Commission of Inquiry, as discussed earlier. The purpose of the report was to generate further discussion of the standards that apply to the establishment and conduct of commissions of inquiry, and the relationship between such commissions and the fulfilment by states of their international legal obligations with regard to torture and other forms of ill-treatment. The Special Rapporteur analysed the complementary role that commissions may play, but stressed that the mechanism does not relieve states of their legal obligations to investigate and prosecute torture and other forms of ill-treatment, and to provide effective remedies to victims of past violations, including reparation for harm suffered and to prevent its reoccurrence.²⁰⁷

²⁰² "Committee against Torture: Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment", The Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/cat/index.htm>, accessed October 2012.

²⁰³ "Status as at : 08-01-2013, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-9&chapter=4&lang=en, accessed January 2013.

²⁰⁴ Other reports reviewed were those of Albania, Armenia, Canada, Cuba, Czech Republic, Greece and Syrian Arab Republic; "Sessions of the Committee Against Torture", The Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/cat/sessions.htm>, accessed October 2012.

²⁰⁵ "Consideration of reports submitted by States parties under article 19 of the Convention; Concluding observations of the Committee against Torture on Rwanda in the 48th session", the Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/cat/cats48.htm>, accessed October 2012.

²⁰⁶ Other reports to be reviewed are those of Mexico, Norway, Peru, Qatar, Russian Federation and Tajikistan; "Sessions of the Committee Against Torture", the Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/cat/sessions.htm>, accessed October 2012.

²⁰⁷ "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez", United Nations General Assembly, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-61_en.pdf, accessed October 2012.

CAT issued its 3rd General Comment in December 2012, on the implementation of Article 14 (redress for victims of torture) by state parties. This General Comment clarifies the scope of Article 14 of UNCAT, which provides that each state party must ensure that its legal system provides that victims of torture obtain redress and have an enforceable right to adequate compensation and access to rehabilitation. CAT considers this to be applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment without discrimination of any kind.²⁰⁸ There are two aspects, one procedural and one substantive, to the obligation of state parties to provide redress under Article 14.

On a procedural level, state parties are obligated to enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies who must be capable of determining the right to, and awarding redress for, victims of torture and ill-treatment, and to ensure that these mechanisms and bodies are effective and accessible. At the substantive level, state parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.²⁰⁹ Redress may take the form of compensation, guarantee of non-repetition, restitution or rehabilitation.

6.3. OPCAT and the Subcommittee on the Prevention of Torture

The Optional Protocol to the Convention against Torture (OPCAT) was introduced in 2003 and entered into force in 2006. In 2012, Austria and Mauritania ratified and Hungary and the Philippines acceded to OPCAT, while Chad became a signatory. This brings the number of states parties to 65 and signatories to 72.²¹⁰

OPCAT aims to prevent torture by establishing a National Preventive Mechanism (NPM) under which a series of regular visits are made to all facilities where persons are deprived of their liberty. Presenting to the General Assembly on 24 October 2012, the Subcommittee on the Prevention of Torture (SPT) stressed the importance of NPM, that only 36 of 64 states parties to the Optional Protocol had established a NPM, and the importance of their being allowed access to places of detention unannounced and unhindered as this is where the real need for human rights protection in the context of CAT arises.²¹¹

The 25-member SPT convenes for a one-week session, three times a year, at the United Nations office in Geneva and is authorised to visit detention facilities in countries where OPCAT has been ratified. South Africa is a signatory to OPCAT, but is yet to ratify and implement it, a measure that would require the country to establish an NPM as a tool in preventing torture.²¹² Elections of 12 members of SPT were held 25 October 2012, at the 4th meeting of SPT, to replace those representatives whose terms expired on 31 December

²⁰⁸ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.un.org/documents/ga/res/39/a39r046.htm>, accessed March 2013.

²⁰⁹ Ibid paragraph 5.

²¹⁰ Status at 8-01-2013 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-9-b&chapter=4&lang=en, accessed 8 January 2013.

²¹¹ "Surprise visits to detention centres by independent national bodies vital to eliminate torture – UN expert body", 24 October 2012, www2.ohchr.org/english/bodies/cat/opcat/spt_visits.htm, accessed 13 November 2012.

²¹² "Optional Protocol to the Convention Against Torture other Cruel, Inhuman or Degrading Treatment or Punishment," UN Doc A/RES/57/199, Office of the United Nations High Commissioner for Human Rights (22 June 2006), <http://www2.ohchr.org/english/law/cat-one.htm>, accessed October 2012.

2012. This included the re-election of Mr Paul Lam Shang Leen of Mauritius, one of the two representatives from the African continent on the committee.²¹³

6.4. South Africa, UNCAT and OPCAT

Torture is an issue of historic significance in South Africa given that the practice was widespread and institutionalised during the apartheid era. Indeed, the nefarious circumstances surrounding the death of Steve Biko in 1977 provided the impetus for the finalisation of UNCAT itself.²¹⁴ South Africa signed UNCAT in 1993 and ratified it in 1998. In 2005, South Africa submitted its initial report to CAT, by which time it was five years overdue. The following year, the Committee reviewed the report and requested that South Africa provide additional information within a year of its request. This request has not been adhered to, and the additional information remains outstanding. South Africa has since failed to report to CAT, and its subsequent periodic reports remain outstanding.²¹⁵ A consolidated report covering the years 2002-2011 is still under departmental consideration. The target date for completion is March 2013.

On 26 September 2006, the South African government signed OP-CAT, but is yet to ratify. During South Africa's second UPR cycle, many states urged South Africa to: complete the ratification process for the OPCAT; encouraged the swift adoption of legislation criminalising acts of torture; and to raise awareness of law enforcement officials regarding the absolute prohibition of the use of torture and other inhumane and degrading treatment.²¹⁶ South Africa's response to HRC recommendations stressed its commitment to CAT and the Robben Island Guidelines and highlighted the passage of the Torture Bill through Parliament. In its foreword to the UPR National Report, South Africa reiterated its intention to ratify outstanding international human rights instruments, including OP-CAT.²¹⁷

Although torture and inhumane and degrading treatment are prohibited by the South African Constitution and international human rights instruments to which South Africa is party including UNCAT and the ICCPR, "torture" is not yet a statutory criminal offence in South Africa. Campaigners stress the fact that a definitive legal framework is required to adequately tackle the problem. SAHRC marked International Day in Support of Victims of Torture on 26 June 2012 by urging Parliament to expedite the processing of the long-awaited Preventing and Combating of Torture of Persons Bill (the Torture Bill). It further urged Parliament to ratify OPCAT and establish an NPM.²¹⁸

²¹³ "Elections of members to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to be held on Thursday, 25 October 2012 at 10.00 a.m. in Conference XIX, Palais des Nations" <http://www2.ohchr.org/english/bodies/cat/opcat/elections2012.htm>, accessed 12 November 2012.

²¹⁴ "The betrayal of Steve Biko – South Africa's Initial Report to the UN CAT and responses from civil society," Muntingh, L., AJOL, <http://ajol.info/index.php/idd/article/view/52879/41480>, accessed October 2012.

²¹⁵ "Provisional Agenda and Annotations of the Forty-eighth session of the Committee Against Torture", the Office of the United Nations High Commissioner for Human Rights, http://www2.ohchr.org/english/bodies/cat/docs/CAT-C-48-1_en.pdf, accessed October 2012.

²¹⁶ "Report of the Working Group on the Universal Periodic Review: South Africa", United Nations General Assembly, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/151/29/PDF/G1215129.pdf?OpenElement>, accessed October 2012.

²¹⁷ Annex A: Recommendations Acceptable to South Africa, annexed to Addendum: Views on conclusion and/or recommendations, voluntary commitments and replies presented by the state under review, 18 September 2012, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx> accessed 13 November 2012, accessed October 2012.

²¹⁸ "SAHRC commemorates International Day in Support of Victims of Torture", South African Human Rights Commission (25 June 2012), <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=105>, accessed October 2012.

The Torture Bill was introduced into Parliament in 2012, and the Portfolio Committee on Justice and Constitutional Development was briefed on 13 June 2012.²¹⁹ Public hearings were held on 4 September.²²⁰ In the course of the hearings, the SAHRC emphasised the international condemnation of South Africa resulting from its failure to ratify OPCAT and implement domestic legislation criminalising torture, and highlighted the Marikana incident as an example of the urgent need to introduce the legislation.²²¹ On 19 September, the Portfolio Committee reported on the public hearings, the overarching view of which was that the Bill, in its current form, only addresses the bare minimum in terms of South Africa's obligations under CAT, and that the scope of the Bill should be extended to better conform to international standards and the jurisprudence of CAT. The Portfolio Committee were generally of the view that following the UNCAT as closely as possible was desirable in this case.²²²

In a recent version of the Bill, the DOJ has removed references to "cruel, inhuman or degrading treatment" as the Bill is intended to concentrate only on the prevention of torture. The Portfolio Committee also debated whether a preventative mechanism, in line with OPCAT, should be included in the Bill, but decided that this would be dealt with upon ratification of OPCAT.²²³ The working draft presented to the Portfolio Committee on 6 November 2012 included alternate wording for Clause 3, which details which acts constitutes torture, which would reflect that an act of torture could also be a crime of omission. This wording reflects that of UNCAT and was, after deliberations, accepted by Committee.²²⁴

However, as it currently stands, the Bill does not create an NPM, nor does it hold the state accountable for torture inflicted by officials in their official capacity. Additionally, it does not clearly state that evidence obtained by use of torture must be excluded in any legal proceedings except as evidence against a person accused of torture, nor is the principle of non-refoulement mentioned in the Bill. Furthermore, there are no guarantees for redress, reparation or compensation for torture victims. Incidents of torture currently have to be prosecuted under the common law offences of use of excessive force or assault. The lack of a specific "torture" offence, taking into account its unique nature and seriousness, reduces effectiveness and awareness and potentially blocks adequate access to justice in such cases.

As discussed in Chapter 1, there have been allegations of ill-treatment and torture in connection with the Marikana incident. Allegations of mistreatment by the SAPS have been made in connection with the events of 16 August themselves, where police officials allegedly handcuffed and abused injured miners,²²⁵ in

²¹⁹ "Prevention and Combating of Torture of Persons Bill", Minister of Justice and Constitutional Development, http://www.parliament.gov.za/live/commonrepository/Processed/20120613/436199_1.pdf, accessed October 2012.

²²⁰ Other contributors included: The Centre for Constitutional Rights, The Centre of Applied Legal Studies, South African Catholic Bishops Conference, National Youth Development Agency, Civil Society Prison Reform Initiative, Amnesty International, South African No Torture Consortium Woman's Legal Centre, Sex Workers Education & Advocacy Taskforce and Sisonke.

²²¹ "Miner claims highlight need for torture bill", IOL Daily News, http://www.iol.co.za/dailynews/news/miner-claims-highlight-need-for-torture-bill-1.1376379#UFBXmY5c_FJ, accessed October 2012.

²²² Prevention & Combating of Torture Bill: Summary of submissions & Departmental responses, 19 September 2012, <http://www.pmg.org.za/report/20120919-justice-constitutional-development-responses-submissions-protection-c>, accessed 15 November 2012.

²²³ "Prevention & Combating of Torture Bill: Working Draft 15", 23 October 2012, <http://www.pmg.org.za/report/20121023-prevention-combating-torture-bill-working-draft-15-public-protector-c>, accessed 15 November 2012.

²²⁴ Prevention and Combating of Torture of Persons Bill: finalisation and adoption, 6 November 2012

<http://www.pmg.org.za/report/20121106-deliberations-prevention-and-combating-torture-persons-bill>, accessed 15 November 2012.

²²⁵ "Farlam commission: Police tied hands of Marikana wounded", 14 November 2012 <http://mg.co.za/article/2012-11-14-farlam-commission-miners-set-to-take-the-stand>, accessed 15 November 2012.

connection with the arrests immediately following the shooting²²⁶ and subsequently in connection with the arrests made in October following a series of murders around Marikana.²²⁷ Various groups acting for the miners have alleged that the treatment suffered by these detainees amounts to torture and is an attempt at intimidation of witnesses by the police.²²⁸ Amongst other issues which have arisen in connection with the Commission of Inquiry, these alleged attempts to influence testimony are threatening to prejudice the future of the inquiry.²²⁹

Issues of torture were also debated in the press in May when a court in Pretoria ruled that South Africa must investigate Zimbabwean officials, who had travelled to the Republic over allegations they tortured opposition figures in 2007, in line with South Africa's obligations with regards to the Rome Statue.²³⁰ Supporters of the then-opposition Movement for Democratic Change say they were tortured after a raid on their party headquarters. Although the Zimbabwean Justice Minister dismissed this ruling, saying South Africa has no jurisdiction over events in Zimbabwe, the court order still places obligation on SAPS and the NPA to investigate the case.²³¹ The court order is in line with UNCAT which provides for universal jurisdiction in cases where torture is known to have occurred and where an alleged torturer cannot be extradited, at Article 5.²³²

6.4.1. 10th Anniversary of the Robben Island Guidelines

2012 also marks the tenth anniversary of the Robben Island Guidelines. They were adopted by the African Commission on Human and People's Rights (ACHPR) and became the first regional instrument for the prohibition and prevention of torture.²³³ They call on states to prohibit torture, to prevent torture and look at ways of responding to the needs of victims of torture. In August 2012, a commemorative seminar was held by the ACHPR's Committee for the Prevention of Torture in Africa, in collaboration with the SAHRC, the HRC, and the Association for the Prevention of Torture (APT). Discussions focused on how the Guidelines have been used to improve national systems to prevent torture and other ill-treatment. There was also dialogue around the challenges that still remain in the fight against torture in Africa and the possible solutions.²³⁴

²²⁶ "Torture, SA's never-ending curse" 17 October 2012 <http://dailymaverick.co.za/article/2012-10-17-torture-sas-never-ending-curse>, accessed 19 November 2012.

²²⁷ "Cops Tortured Witnesses Marikana Commission Told", 31 October 2012, <http://mg.co.za/article/2012-10-31-cops-tortured-witnesses-marikana-commission-told>, accessed 12 November 2012.

²²⁸ Ibid.

²²⁹ "Marikana lawyers threaten to halt Farlam Commission 29 October 2012, <http://mg.co.za/article/2012-10-29-marikana-lawyers-threaten-to-halt-commission>, accessed 14 November 2012.

²³⁰ Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others (77150/09) [2012] ZAGPPHC 61.

²³¹ "South Africa court orders Zimbabwe torture investigation", BBC News (8 May 2012), <http://www.bbc.co.uk/news/world-africa-17988527>, accessed October 2012.

²³² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, p. 85 <http://treaties.un.org/doc/publication/UNTS/Volume%201465/v1465.pdf>, accessed 19 November 2012.

²³³ "Robben Island Guidelines - 10 years later", Association for the Prevention of Torture (3 August 2012), http://www.apr.ch/index.php?option=com_k2&view=item&id=1247%3Arobben-island&lang=en, accessed October 2012.

²³⁴ "10th Anniversary of the Robben Island Guidelines: Putting an end to torture in Africa", the South African Human Rights Commission (15 August 2012), <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=114>, accessed October 2012.

6.5. Conclusion and Recommendations

- 6.5.1 Consider amendment of the Torture Bill to more closely reflect the letter and spirit of UNCAT, as discussed above.
- 6.5.2 Within the Bill, include creation of an NPM, make specific provisions for non-refoulement, ensure mechanisms of redress and compensation for victims of torture, ensure that evidence acquired through torture and other inhumane and degrading treatment is excluded from legal proceedings, and allow for prosecution of officials acting in their official capacity.
- 6.5.3 Expedite the passage of the Bill into law.
- 6.5.4 Bring South Africa's country reporting on CAT up to date as soon as possible, by expediting the submission of the 2001-2011 consolidated report.
- 6.5.5 Ensure swift ratification of the OP-CAT in line with South Africa's commitments in the 2012 UPR National Report.
- 6.5.6 Initiate a training program for law enforcement officials to increase awareness of the prohibition of the use of torture and other inhumane and degrading treatment.

7. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (UNCRC) defines the universal rights and legal and social status of children. There are two optional protocols to the UNCRC, the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) and the Optional Protocol on the Sale of Children, Child Pornography and Child Prostitution (OPSC). South Africa acceded to the OPSC in 2003 and ratified the OPAC in 2009. The UNCRC is the most widely ratified human rights treaty body with only Somalia, South Sudan and the United States not parties.

7.1. The Committee on the Rights of the Child

The Committee on the Rights of the Child (CRC), which monitors the implementation of the Convention of the Rights of the Child, is comprised of 18 different experts.²³⁵ The CRC holds three sessions per year, each consisting of a three-week plenary and a one-week pre-session working group. State parties to the UNCRC are required to submit reports two years after accession to the UNCRC and every five years thereafter.

7.2. UNCRC and CRC in 2012

During 2012, Swaziland, Malaysia, Niger, Cote D'Ivoire and Grenada acceded to the OPAC and Nigeria and Indonesia ratified it.²³⁶ Myanmar, Granada and Swaziland acceded to the OPSC and Micronesia, Suriname, Finland and Indonesia ratified it.²³⁷ On the 19th December 2012, elections for 9 new members of the CRC were held.²³⁸ It has subsequently been announced that one of the new members, previously of the African Committee of Experts on the Rights and Welfare of the Child, Mr Benyam Dawit Mezmur of Ethiopia has been elected as a committee member.²³⁹

During the course of this year, the CRC's three sessions and preparatory sessions entailed the reviewing of 38 state reports in total.²⁴⁰ The Annual Report of the UNCRC was published in June of 2012. It outlined, amongst other issues, trends and challenges to implementation of the UNCRC.²⁴¹ Positive trends included increased social investment and protection, increased democratic stability and open political mobilisation. Emerging and persisting challenges were cited as being ramifications of the global financial crisis and climate change, a rise in discrimination and xenophobia as well as in violence against women and children, the weakening of children's rights in the criminal justice system through lowering the age of criminal capacity, and the deprivation of family care in the face of policy and inequality.

²³⁵ CRC Members are: Ms Agnes Akosua Aidoo (Ghana), Ms Amal Aldoseri (Bahrain), Ms Aseil Al-Shehail (Saudi Arabia), Mr Jorge Cardona Llorens (Spain), Ms Sara De Jesus Oviedo Fierro (Ecuador), Mr Bernard Gastaud (Monaco), Mr Peter Guran (Slovakia), Ms Maria Herczog (Hungary), Ms Olga A. Khazova (Russian Federation), Mr Hatem Kotrane (Tunisia), Mr Gehad Madi (Egypt), Mr Benyam Dawit Mezmur (Ethiopia), Ms Yasmeen Muhamed Shariff (Malaysia), Mr Wanderlino Nogueira Neto (Brazil), Ms Maria Rita Parsi (Italy), Ms Kristen Sandberg (Norway), Ms Hiranthi Wijemanne (Sri Lanka), and Ms Renate Winter (Austria). From, www2.ohchr.org/English/bodies/crc/members.htm, accessed March 2013.

²³⁶ Further information available at http://www.unicef.org/protection/files/Status_OPSC_and_OPAC_01_October_2012.pdf, accessed 7 February 2013.

²³⁷ Available at http://www.unicef.org/protection/files/Status_OPSC_and_OPAC_01_October_2012.pdf, accessed 7 February 2013.

²³⁸ Further information available at <http://www.crin.org/resources/infodetail.asp?id=29334>, accessed 7 February 2013.

²³⁹ Available at <http://www2.ohchr.org/english/bodies/crc/elections14th.htm>; <http://www.crin.org/resources/infodetail.asp?id=29334>, accessed 7 February 2013.

²⁴⁰ A tabulated list of reports received and reviewed is available at: <http://www2.ohchr.org/english/bodies/crc/sessions.htm>, accessed 7 February 2013.

²⁴¹ Report of the Committee on the Rights of the Child, United Nations General Assembly 67th Session (2012) p7, available at: <http://tb.ohchr.org/default.aspx?ConvType=20&docType=36>, accessed 7 February 2013.

The 3rd Optional Protocol on the Rights of the Child on a Communications Procedure opened for signature on 28 February 2012, with 20 states giving their signature thus far.²⁴² As articulated by Save the Children, “[t]he new Protocol will allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two Optional Protocols on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict”.²⁴³ It requires the ratification of 10 states to enter into force. The SAHRC has made advocacy for South Africa’s ratification an explicit objective in the 2013/14 year.

On the 28 September 2012, the CRC held its annual General Day of Discussion. This year, the theme was “The Rights of All Children in the Context of International Migration”. The report of this event included several key recommendations, including recommendation 78 which specifies that children should not be criminalised or subject to punitive measures because of the immigration status of their parents.²⁴⁴ In addition, 2012 marked the first celebration of “International Day of the Girl Child” on the 11th October in accordance with UN General Assembly Resolution 66/170. The theme assigned to this year’s occasion was “Ending Child Marriage”.²⁴⁵ Finally, the UN Secretary-General launched the Global Education First Initiative - an endeavour to ensure global compliance with international norms and standards pertaining to education.²⁴⁶ These endeavours promote compliance with the provisions of the UNCRC and serve to raise awareness of its contents.

7.3. South Africa and the UNCRC

South Africa signed the UNCRC in 1993 and ratified it in 1995. It submitted its initial report to the CRC in 1999, but by the 15 June 2012 its second, third and fourth state reports, combined with its initial OPSC and OPAC reports, were still outstanding. In accordance with the provisions of General Comment 2 to the UNCRC, the SAHRC, in its capacity as an NHRI, has the competence to both comment on the state report, as well as to submit a report directly to the CRC.²⁴⁷ This has been prioritised by the SAHRC for the 2013 year.

The South African legal system incorporates the principles contained in the UNCRC both within our Constitution²⁴⁸ and within enabling national legislation.²⁴⁹ Despite this, implementation is poor and remains beset with many challenges. Institutions such as the SAHRC, members of civil society, research institutions and branches of government such as the DPME, the National Planning Commission (NPC) and the DWCPD undertake measures to monitor and report on UNCRC compliance both directly as well as indirectly.²⁵⁰ An

²⁴² States who signed the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure are: Slovakia, Slovenia, Costa Rica, Portugal, Serbia, Uruguay, Brazil, Chile, Germany, Morocco, Montenegro, Spain, Austria, Belgium, Finland, Italy, Luxembourg, Maldives, Mali and Peru. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en, accessed 7 February 2013.

²⁴³ See <http://resourcecentre.savethechildren.se/content/news/third-optional-protocol-convention-rights-child-opens-signature-28-february-2012>, accessed 7 February 2013.

²⁴⁴ Available at <http://www2.ohchr.org/english/bodies/crc/discussion2012.htm>, accessed 7 February 2013.

²⁴⁵ Available at <http://www.un.org/en/events/girlchild/>, accessed 7 February 2013.

²⁴⁶ Further information available at www.globaleducationfirst.org, accessed 7 February 2013.

²⁴⁷ See General Comment No 2 to the UNCRC (2002), United Nations available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>, accessed 7 February 2013.

²⁴⁸ The Constitution of the Republic of South Africa, 1996.

²⁴⁹ See, *inter alia*, the Children’s Act 38 of 2007, the Child Justice Act 75 of 2008, the South African Schools Act 84 of 1996, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 38 of 2005.

²⁵⁰ Further information in this regard can be found at each of these institution/department’s websites.

annual publication providing concise, up-to-date information on UNCRC compliance is the annual Child Gauge, compiled by the Children's Institute based at the University of Cape Town.²⁵¹ The SAHRC supports this organisation for this important initiative.

In 2012, the South African government published its response to the recommendations emanating from the UPR reports submitted in 2011.²⁵² The South African government accepted the recommendations made regarding the rights of children (including those pertaining to child health, education, mainstreaming of children's rights and others).²⁵³ Further, the National Development Plan 2030 (NDP) was launched in August 2012,²⁵⁴ with an express focus on promoting basic education rights, child health, poverty alleviation and social cohesion.²⁵⁵ This is important as it shows harmonisation with UNCRC principles not only at the level of national legislation, but also through infusion of these principles in key policy and planning documents.

South Africa has also utilised certain international campaigns as a platform for enhanced UNCRC compliance. Examples include the annual *16 Days of No Violence Against Women and Children* Campaign which was held worldwide from the 25 November to the 10 December 2012 for which the DWCPD undertook nationwide endeavours.²⁵⁶

7.3.1. Child Poverty and Inequality

Child poverty and inequality are debilitating factors which often prevent children from accessing other integral rights. The NPC estimates that 39% of children live below R432 per month.²⁵⁷ South Africa is one of the most unequal countries in the world with a gini-co-efficient of 0.69.²⁵⁸ While South Africa has a spectrum of instruments in place to address this,²⁵⁹ government experiences difficulty in penetrating into extremely impoverished areas. These patterns of exclusion serve to perpetuate and enforce barriers.²⁶⁰ In 2012, the aforementioned Child Gauge has as its focus "Children and inequality: closing the gap."²⁶¹

7.3.2. Corporal Punishment

While abolished by statute in all institutions,²⁶² corporal punishment continues to be practiced within the household setting without legal sanction. In addition, it has been reported that many schools are non-

²⁵¹ Annual editions of this document can be found at www.ci.org.za, accessed 7 February 2013.

²⁵² Available at

http://children.pan.org.za/sites/default/files/publicationdocuments/UPR%20SOUTH%20AFRICA%20ANNEX%20%20RECOMMENDATIONS%20ACCEPTED%20AND%20REJECTED%20A_HRC_21_16%20Add.1_South%20Africa_E_Annex%20%2820%20September%202012%29.pdf, accessed 7 February 2013.

²⁵³ For more information go to <http://www.npconline.co.za/>, accessed 7 February 2013.

²⁵⁴ National Development Plan: Vision for 2030 (2012), National Planning Commission. Available at

<http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>, accessed 7 February 2013.

²⁵⁵ Available at:

<http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>, accessed 7 February 2013.

²⁵⁶ This included Information regarding South Africa's campaign is available at: <http://www.info.gov.za/events/national/16days.htm>, accessed 7 February 2013.

²⁵⁷ *Topical Guide: Child Poverty and Inequality*, Policy Action Network: Children (UNICEF and HSRC) 2012 p3, available at children.pan.org.za/node/9058, accessed 8 February 2013.

²⁵⁸ World Bank, 2009.

²⁵⁹ This includes the White Paper on Social Welfare (Department of Welfare, 2007); the Medium term Strategic Plan (Ministry of Economic Development, 2010), Delivery Outcome 4: Decent Employment through Inclusive Growth (The Presidency, 2010) and the National Development Plan: 2030 (National Planning Commission, 2012).

²⁶⁰ *Topical Guide: Child Poverty and Inequality*, Policy Action Network: Children (UNICEF and HSRC) 2012 p5 available at children.pan.org.za/node/9058, accessed 7 February 2013.

²⁶¹ The South African National Child Gauge, available at

www.ci.org.za/index.php?option=com_content&view=article&id=997&Itemid=399, accessed 7 February 2013.

²⁶² Section 10 of The South African Schools Act 84 of 1996.

complaint with the provisions of legislation, practicing this form of discipline with alarming frequency on learners. In numerous instances, the SAHRC has received reports of violence within schools escalating beyond the purview of “corporal punishment”, encompassing the definitional elements of the common law crime of assault. In 2012, the SAHRC received and addressed numerous complaints in this regard and has also undertaken advocacy initiatives such as holding workshops in order to devise a just and equitable way forward.

7.3.3. Education

In South Africa, the right to basic education is constitutionally entrenched. It is an unqualified socio-economic right, not subject to progressive realisation, and thus is immediately enforceable.²⁶³ South Africa’s national legislation and policy accords with the UNCRC imperative, that primary school education must be “*compulsory and free to all*”.²⁶⁴

The path to realisation of this right, however, has been fraught with challenges. In 2012, much advocacy was undertaken to address these deficits,²⁶⁵ including litigation surrounding the non-delivery of textbooks in the Limpopo Province²⁶⁶, the failure of the Department of Basic Education to promulgate Minimum Norms and Standards for School Infrastructure²⁶⁷, and the improper appointment of teachers to posts in the Eastern Cape.²⁶⁸

Given its multi-dimensional nature, in order to concretise this right, and to form a clear and consolidated statement of obligations, in 2012, the SAHRC began an intensive consultative process to create a Charter on Basic Education Rights.²⁶⁹ This is intended to serve as a roadmap, monitoring tool and a legally-grounded document through which government can be held accountable.²⁷⁰ The Charter has been expressly endorsed by the Department of Basic Education and developed in partnership with the United Nations Children’s Fund (UNICEF).²⁷¹

South Africa has high rates of school enrolment and attendance with 97% of children attending some kind of educational facility in 2010.²⁷² Of much concern however, has been South Africa’s poor performance in both science and mathematics. This is reflected in the Department of Basic Education’s Annual National Assessment 2012.²⁷³ This shows that children are both graduating from primary school and entering the senior phase of secondary school without adequate proficiency in reading, writing or mathematics. Of great concern is the fact that in 2012, South Africa ranked last in the World Economic Forum’s Annual Report on

²⁶³ *Concretising the Right to a Basic Education* MacConnachie Cameron and MacConnachie Chris, SALJ., vol 129 Part 3 (2012).

²⁶⁴ Article 28 UNCRC.

²⁶⁵ Article 28 UNCRC.

²⁶⁶ For more information see www.section27.org.za including court judgements and other documents, accessed 7 February 2013.

²⁶⁷ This case settled out of court. For further information, including the settlement agreement and other court documents, see:

http://www.equaleducation.org.za/policy_documents/Minimum-Norms-%2526-Standards, accessed 7 February 2013.

²⁶⁸ For more information see: <http://www.section27.org.za/2012/08/06/eastern-cape-high-court-orders-the-appointment-of-teachers-in-the-eastern-cape-2>, accessed 7 February 2013.

²⁶⁹ For more information on this process go to <http://www.sahrc.org.za/home/index.php?ipkContentID=78&ipkMenuID=60>, accessed 7 February 2013.

²⁷⁰ The South African Basic Education Charter on Children’s Basic Education Rights, 2013, SAHRC, available at <http://www.sahrc.org.za/home/index.php?ipkContentID=17&ipkMenuID=20>, accessed 7 February 2013.

²⁷¹ This initiative was launched in January 2013.

²⁷² www.ci.org.za/depts/ci/pubs/general/gauge2012/sa_child_gauge2012.pdf p91, accessed 7 February 2013.

²⁷³ <http://www.education.gov.za/LinkClick.aspx?fileticket=YyzLTOK5IYU%3D&tabid=298>, accessed 7 February 2013.

Financial Development in an assessment on 62 countries.²⁷⁴ Poor educational outcomes in South Africa have been linked to a number of factors. These include: challenges based on poverty; geography; language; gender; disability; educator conduct, competencies knowledge and lack of accountability; infrastructure, facilities and basic service backlogs and others.²⁷⁵

7.3.4. Child Survival

Child survival, as an imperative, is explicitly set out in Article 24 of the UNCRC.²⁷⁶ Infant and under-five mortality rates are most frequently used as indicators of health status and socio-economic development. In 2012, the Health Data Advisory and Coordination Committee (HDACC) indicated that the 2009 baselines for under-five rates are 56 per 1000 live births and the infant mortality rate is 40 per 1000 live births.²⁷⁷ The targets set by HDACC for 2012 are 50 and 36 respectively.²⁷⁸ This means that it is unlikely that South Africa will reach the MDG of 20 under-five deaths per 1000 live births by the year 2015.²⁷⁹ According to the 2012 National Child Gauge, an estimated 450 000 children under 15 years of age were HIV positive, while others had died or become ill due to AIDS or AIDS-related illnesses.²⁸⁰ Many children in South Africa continue to die because of illnesses that are easily preventable through medical treatment or proper nutrition.

7.4. Conclusion and Recommendations

- 7.4.1 The South African government works swiftly towards submitting all outstanding reports.
- 7.4.2 Given South Africa's extensive efforts at assimilating the content of the UNCRC into domestic law and policy, the current focus should be on ensuring effective and timeous implementation thereof.
- 7.4.3 Create and utilise accountability mechanisms, which ensure the realisation of these commitments.
- 7.4.4 Allocate resources towards grassroots implementation and capacity building.
- 7.4.5 Government should remain cognisant of the fact that the most vulnerable groups in society – particularly children – have a priority claim on state resources and this should resonate in policy and budgetary decisions.

²⁷⁴ Financial Development Report, World Economic Forum (2012).

²⁷⁵ PAN Children Topical Guide, Education (2012), Policy Action Network: Children, children.pan.org.za/node/9050, accessed 7 February 2013.

²⁷⁶ Article 24 UNCRC.

²⁷⁷ The South African National Child Gauge 2012, available at www.ci.org.za/depts/ci/pubs/general/gauge2012/sa_child_gauge2012.pdf p91, accessed 7 February 2013.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid page 92.

8. INTERNATIONAL COVENANT ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is an international agreement providing for the protection of migrant workers and their families. It was signed on 18 December 1990 and entered into force on 1 July 2003, after the threshold of 20 ratifying states was reached in March 2003. The Committee on Migrant Workers (CMW) monitors implementation of the Convention.

ICRMW recognises the human rights of migrant workers and promotes their access to justice as well as to humane and lawful working and living conditions. It provides guidance on the requirements of national migration policies and for international cooperation based on respect for human rights and the rule of law. It sets out provisions to combat abuse and exploitation of migrant workers and members of their families throughout the migration process. The ICRMW does not create new or different rights for migrants, but rather seeks to protect those living and working outside of their country of nationality by recognising that migrants can be particularly vulnerable to violations of their rights and exploitation.

ICRMW applies to anyone engaged in remunerated work in a country of which they are not a national and is applicable to all migrant workers and their families without distinction as regards “sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”.²⁸¹

Article 2 distinguishes between different types of economic migrants, for example, seasonal workers, itinerant workers, seafarers, project workers and the self-employed.²⁸² However, Article 3 excludes employees of international organisations or other states (for example, diplomats) investors, students or trainees, and refugees.²⁸³

Part three of ICRMW sets out basic civil and political and socio-economic rights to which migrant workers and their families are entitled to exercise and to the protection of, whether they are documented or undocumented.²⁸⁴ The ICRMW recognises that the documented migrants have legitimacy to claim more rights in their host country, in terms of access to services, than undocumented migrants. However, the ICRMW at Article 35 explicitly does not attempt to imply that there is a right to regularisation of a migrant workers' status in their host country.²⁸⁵

Part IV sets out rights to which documented or migrants in a “regular situation” are entitled, for example to leave their host country temporarily and be re-admitted,²⁸⁶ freedom of movement within the territory of their

²⁸¹ United National Treaty Collection, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, <http://www2.ohchr.org/english/law/cmw.htm>, 13 January 2013.

²⁸² ICRMW, Article 2.

²⁸³ ICRMW, Article 3.

²⁸⁴ ICRMW Article 5 addresses the documentation of migrant workers.

²⁸⁵ ICRMW, Article 35.

²⁸⁶ ICRMW, Article 38.

host country,²⁸⁷ the right to unionise,²⁸⁸ the right to participate in public affairs of their host country,²⁸⁹ and the right to equality of access with nationals to educational institutions, housing, social and health services.²⁹⁰

There are currently 35 signatories and 46 states parties to ICMRW.²⁹¹ It is notable that the vast majority of signatories and states parties are less developed countries that are generally countries of origin for migrants, as opposed to more developed migrant receiving countries. No major destination country or region has ratified the ICMRW. Notably, no western European country is a party neither are the Gulf States, the United States of America or South Africa.²⁹²

8.1. Committee on Migrant Workers (CMW)

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body of 14 independent experts that monitors implementation of ICRMW by its state parties. CMW procedure is largely similar to that of other treaty bodies. State parties are obliged to submit regular reports to the CMW on how the treaty is being implemented. States must submit their initial report one year after acceding to the ICRMW and thereafter every five years. The CMW examines each report and addresses its concerns and recommendations to the state party in the form of concluding observations. CMW also holds general days of discussion on issues pertaining to ICRMW and publishes general comments.

CMW will also, under certain circumstances, be able to consider individual complaints or communications from individuals claiming that their rights under the ICRMW have been violated once 10 states parties have accepted this procedure in accordance with Article 77 of the Convention. Currently, only two states have accepted this procedure.²⁹³ The Committee meets in Geneva and normally holds two sessions per year.

8.2. Special Rapporteur on the Human Rights of Migrants

The mandate of the Special Rapporteur on the Human Rights of Migrants was created in 1999 by the Human Rights Commission, pursuant to resolution 1999/44.²⁹⁴ Since then, the mandate of the Special Rapporteur has been extended by the Commission on Human Rights resolutions 2002/62 and 2005/47 and Human Rights Council resolutions 8/10 and 17/12, each for a period of three years.²⁹⁵ The overhaul of the UN human rights apparatus in 2006, which replaced the Commission on Human Rights with the Human Rights Council, led to a strengthening of the Special Rapporteur's mandate in these latter two resolutions.

²⁸⁷ ICRMW, Article 39.

²⁸⁸ ICRMW, Article 40.

²⁸⁹ ICRMW, Article 41.

²⁹⁰ ICRMW, Article 43.

²⁹¹ STATUS AS AT: 13-01-2013 05:03:54, Chapter IV, Human Rights, 13. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, United Nations Treaty Collection

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en, accessed 13 January 2013.

²⁹² STATUS AS AT: 20-01-2013, ICRMW, UN Treaty Body Collection

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en, accessed 21 January 2013.

²⁹³ Office of the High Commissioner for Human Rights, The International Convention on Migrant Workers and its Committee Fact Sheet No. 24, <http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>, accessed 21 January 2013.

²⁹⁴ The Commission on Human Rights was subsequently superseded in 2006 by the Human Rights Council.

²⁹⁵ Office of the High Commissioner on Human Rights,

<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx>, accessed 25 February 2013.

Given that so few reception countries of migrants have ratified ICRMW, it is especially important to note that the mandate of the Special Rapporteur extends to all countries regardless of whether they have ratified the treaty, and further, does not require the exhaustion of domestic remedies to act.²⁹⁶ In 2012, the Special Rapporteur, currently Mr François Crépeau, focussed particularly on the issue of the detention of migrants in an irregular situation.

The previous Special Rapporteur, Jorge Bustamante, had conducted a country visit to South Africa in January 2011. While he noted that some progress had been made in regularising the situation of Zimbabweans and attempting to address xenophobic violence against foreigners, he was concerned at the lack of coherent and comprehensive immigration policy, the difficulties of migrants in integrating into society and accessing services, and the lack of regional and multilateral agreements on the migration of persons.²⁹⁷

8.3. ICRMW and CMW in 2012

In 2012, the CMW held its 16th and 17th sessions, reviewing respectively the reports of Paraguay and Tajikistan,²⁹⁸ and Bosnian & Herzegovina and Rwanda.²⁹⁹ Further in 2012, Mozambique became a signatory³⁰⁰ and Indonesia ratified the Convention.³⁰¹ The CMW is in the process of drafting a General Comment on the rights of migrant workers and members of their families in irregular situations. The General Comment was discussed at the 17th session of the CMW and opened for comment by external stakeholders.³⁰²

18th December is UN International Migrants Day. It is a day on which the international community reaffirms that human rights are rights for all persons, including migrants, who are particularly vulnerable to human rights abuses. In a joint statement issued in recognition of International Migrants Day, the Special Rapporteur on the Human Rights of Migrants and the Chairperson of the CMW reiterated their concern over the fact that some states continue to criminalise irregular migration. Laws which penalise irregular migration, the use of excessive and disproportionate force during migration control operations, the detention of migrants in an irregular situation, deportations without due process, and also xenophobic statements by the authorities which encourage the stigmatisation of migrants, are all contrary to the promotion and protection of migrants' human rights, increase the vulnerability of migrants and have not been shown to deter migration.³⁰³

Deep concern was expressed by the use of punitive detention in cases of irregular migration and the lack of attention paid to the due process rights of those migrants detained. Such circumstances, as outlined below, are particularly applicable to the South African context.

²⁹⁶ Ibid.

²⁹⁷ Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Mission to South Africa 2 May 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/36/PDF/G1113036.pdf?OpenElement>, accessed 25 February 2013.

²⁹⁸ Committee on Migrant Workers, 16th Session (16-27 April 2012), <http://www2.ohchr.org/english/bodies/cmw/cmws16.htm>, accessed 13 January 2013.

²⁹⁹ Committee on Migrant Workers, 17th Session (10-14 September 2012), <http://www2.ohchr.org/english/bodies/cmw/cmws17.htm>, accessed 13 January 2013.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² For more information on Draft General Comment 2 on Migrant Workers in an irregular situation and their families see, <http://www2.ohchr.org/english/bodies/cmw/GC2.htm>, accessed February 2013.

³⁰³ Joint statement by UN experts*, the IACHR Rapporteur on the Rights of Migrants and the ACHPR Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants, "Migrants deserve full recognition as rights holders" 18 December 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12897&LangID=E>, accessed 25 February 2013.

8.4. South Africa and ICRMW

ICRMW has yet to be signed or ratified by South Africa. Recommendations made to South Africa during the first UPR cycle included one that South Africa ratify ICRMW as soon as possible. This recommendation was not followed and the same recommendation was again made during South Africa's 2nd UPR cycle held in May 2012. South Africa remains a major destination for migrants on the African continent. While, South Africa does attract skilled immigrants and many investor migrants, the vast majority are poor, from neighbouring countries, many leaving conflict zones or areas of severe economic deprivation. Zimbabweans, many of whom cross the border unlawfully, make up a significant proportion of migrant workers in South Africa. ICRMW specifically does not apply to refugees or asylum seekers, although many asylum seekers or refugees can also be migrant workers. Such workers may find themselves particularly vulnerable to exploitation, harassment and violence.

8.4.1. Legal Protection for Migrant Workers

Article 29 provides that “each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality”.³⁰⁴ During South Africa's 2nd UPR cycle in 2012, Slovakia³⁰⁵ and Mexico³⁰⁶ recommended that South Africa take steps to ensure that all children born in South Africa are issued with birth certificates, with particular focus on the children of migrants, to facilitate their access to various social services. South Africa responded by saying that all children born in South Africa are registered at birth not later than 30 days after birth by law and that all children have access to social services.³⁰⁷ This issue was also a theme of a two day ministerial conference, entitled “*Giving Children an Identity – Right from the Beginning*” held in Durban September 2012 under the auspices of the AU and the UN.

During 2012, several refugee reception centres were closed making it more difficult, if not impossible, for refugees to regularise their status and obtain the required documentation allowing them to work to support themselves and access vital services. In Cape Town, the Department of Home Affairs (DOHA) closed the Maitland Refugee Centre and advised that all new applications would only be processed in Musina, Pretoria or Durban, each being several thousand kilometres away and essentially impossible to reach for refugees and migrants located in the Western Cape Province. However, a High Court order in July 2012 ruled that the process of having the closure approved had not been followed and that new applications must be accepted at an existing DOHA facility in Cape Town.³⁰⁸ The case remains on-going and recently DOHA have been held in contempt for failing to implement the original judgment.³⁰⁹ Similarly, the High Court in Port Elizabeth ruled in March 2012 that the DOHA had acted outside of the law in shutting down the essential function of the local reception centre and ordered the centre reopened to applications.³¹⁰

³⁰⁴ ICRMW Article 29.

³⁰⁵ Recommendation 124.151.

³⁰⁶ Recommendation 124.150.

³⁰⁷ Human Rights Council, Outcome Report of the Working Group, Annex A, Recommendations Acceptable to South Africa, 9 July 2012, A/HRC/21/16, pg. 1 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>, accessed 16 January 2013.

³⁰⁸ IOL, Home Affairs ordered to aid asylum seekers 31 August 2012 <http://www.iol.co.za/news/crime-courts/home-affairs-ordered-to-aid-asylum-seekers-1.1373420#.USzM6TCLB1E>, accessed 25 February 2013.

³⁰⁹ Home Affairs in court for contempt over closure of refugee reception office, 7 February 2013. <http://westcapenews.com/?p=5910>, accessed 25 February 2013.

³¹⁰ Lawyers for Human Rights, Court orders re-opening of PE refugees reception office <http://www.lhr.org.za/news/2012/court-orders-re-opening-pe-refugee-reception-office>, accessed 15 February 2013.

There remain persistent reports of mistreatment of migrants, refugees and asylum seekers in South African facilities operated by DOHA. In June 2012, the SAHRC launched an investigation into the situation at the Lindela Repatriation Centre in Gauteng, where inmates, many from the Democratic Republic of Congo, had protested due to the conditions of their detention and treatment by officials, and the fact that they had been detained for longer than the legally specified period before their cases were settled.³¹¹ The SAHRC embarked on an urgent court action in November 2012 over 39 non-nationals held illegally at Lindela for longer than the 120 days specified in the Immigration Act.³¹² Upon filing of the cases, Lindela had commenced releasing the detainees before the case was heard.³¹³

In September 2012, the SAHRC was again called upon to investigate claims of mistreatment of immigrants attempting to regularise their status by the DOHA in Cape Town, on the basis that they were being denied their rights to just administrative action, freedom and security and had, on occasion, been physically mistreated. These two incidents, among many, go some way to underlining the human rights concerns around the immigration system in South Africa, and that fact that abuses of the rights of migrants and refugees are becoming endemic in a system that is no longer fit for purpose.³¹⁴

8.4.2. Xenophobia and Violence Against Migrants

The rights of non-nationals, their protection against racial discrimination and violence was a prominent theme in South Africa's 2nd UPR cycle, as it had been during South Africa's first cycle review. Paraguay, Thailand, Ireland and Germany, amongst others, recommended that South Africa take further and concrete steps to ensure the rights of migrants and to combat xenophobia.³¹⁵

In 2010, the SAHRC published a report into the xenophobic violence of 2008. It made the important point that the rights protected by the South African Constitution apply to all those that live in the country, not only citizens, migration status notwithstanding.³¹⁶ The wide ranging recommendations of the report have to date not been adequately implemented in policy and legislation. In July 2012, there was another upsurge of violence against non-nationals when shops run by foreign nationals, predominantly Somalis, were attacked and gutted in areas of Cape Town. Further, 500 foreign nationals were displaced in the Free State.³¹⁷ At the time, it was reported that in response to the attacks, the ANC in the Western Cape proposed that foreign nationals be banned from running small businesses and from renting accommodation from South Africans,

³¹¹ Lawyers for Human Rights Press Release, SAHRC Investigates Abuse of Immigrants <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/36/PDF/G1113036.pdf?OpenElement>, accessed 25 February 2012.

³¹² Immigration Act 2002 as Amended by Act19 of 2004, see, <http://hurisa.org.za/wp-content/uploads/2012/01/hurisa-refugee-rights-leaflets-english-20111.pdf>, accessed March 2013.

³¹³ NGOPulse, "CoRMSA Celebrates the Release of Non-nationals from Lindela Repatriation Centre" 16 November 2012 <http://www.ngopulse.org/press-release/cormsa-celebrates-release-non-nationals-lindela-repatriation-centre>, accessed 25 February 2013.

³¹⁴ A study by the African Centre for Migration & Society (ACMS) at Wits University has referred to this system as being in a state of collapse, see, New DHA Minister to Inherit Dysfunctional Asylum System <http://www.migration.org.za/press-statement/2012/new-dha-minister-inherit-dysfunctional-asylum-system>, accessed 25 February 2013.

³¹⁵ Human Rights Council, Outcome Report of the Working Group, Annex A, Recommendations Acceptable to South Africa, recommendation number 124.96, 9 July 2012, A/HRC/21/16, pg. 1. <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>, accessed 26 February 2013.

³¹⁶ Monson, T. (2010). Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals. <http://www.migration.org.za/publication/monson-t-2010-report-sahrc-investigation-issues-rule-law-justice-and-impunity-arising-ou>, accessed 25 February 2013.

³¹⁷ Xenophobia bomb going off while the government dithers, 13 July 2012. <http://www.timeslive.co.za/opinion/editorials/2012/07/13/xenophobia-bomb-going-off-while-the-government-dithers>, accessed 17 January 2013.

as well as be prohibited from working while their asylum applications are processed.³¹⁸ However, these proposals would appear to be aimed at treating the visible effects of immigration in the short terms, rather than the causes for xenophobic sentiment.

Following the May 2008 xenophobic attacks which, in over two weeks left 60 dead, dozens raped and over a hundred thousand displaced,³¹⁹ various studies attempted to get to the root causes of the level and scale of xenophobia in South Africa. A major study by the HSRC identified as a major driving force of the violence: “relative deprivation”; specifically intense competition for jobs; housing challenges in low income areas; high levels of crime; and poor service delivery.³²⁰ The SAHRC’s report identified similar causes.

Recent studies have shown that 25% of South African’s want a total ban on immigration, while 54% rejected the notion that a non-national should have the same right to housing as a South African. Disturbingly, 65% of black African respondents said they would be “likely” or “very likely” to “take action” to prevent people from other countries operating a business in their area.³²¹

8.5. Conclusion and Recommendations

- 8.5.1 South Africa should take international leadership as one of the reception country for migrants and ratify the ICRMW, particularly the provisions of the ICRMW as consistent with the rights regime already in place and guaranteed by the South African Constitution;
- 8.5.2 The South African government should be encouraged to review its migration and asylum policies, fight impunity, eradicate corruption and foster social cohesion within communities, through raising awareness around foreign nationals, in order to pro-actively combat xenophobia.
- 8.5.3 A specific anti-xenophobia strategy, including the implementation of an early warning system for potential violence and unrest, should be initiated by government in order to tackle the widespread issue and intolerance.
- 8.5.4 The Immigration Act and Refugee Act needs to be revisited by Parliament to ensure thorough protection for foreign nationals.
- 8.5.5 DOHA should review its policies and training with regards to the handling and treatment of foreign nationals, especially from other African countries. The DOHA is the first port of call for many migrant workers entering the country and, in this way, needs to set a reasonable standard of ensuring the rights of foreign nationals are realised and protected.
- 8.5.6 Particular attention needs to be given to the monitoring of repatriation centres across the country to ensure violations of rights do not occur here.

³¹⁸ Ibid.

³¹⁹ Landau, L. B., Segatti A., Misago J. P., Ngwato T. P., Monson T., & Vigneswaran D., *Exorcising the Demons within: Xenophobia, Violence and Statecraft in Contemporary South Africa*, 2011, <http://www.migration.org.za/publication/book/2011/exorcising-demons-within-xenophobia-violence-and-statecraft-contemporary-south>, accessed 21 January 2013.

³²⁰ Human Science Research Council, “Violence and xenophobia in South Africa: Developing consensus, moving to action”, <http://www.hsrc.ac.za/Document-2994.phtml>, accessed 18 January 2013.

³²¹ Ibid.

9. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The International Convention on the Rights of Persons with Disabilities (ICRPD) was adopted on 13 December 2006. It seeks to bring about equal realisation of rights for disabled persons, eradicate discrimination against persons with disabilities, and ensure their full and equal participation within society. On 3rd May 2008 ICRPD came into force with the Optional Protocol, which establishes an individual complaints mechanism.

9.1. The Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (CRPD) monitors the implementation of the ICRPD. There are currently 18 members on the CRPD, nine of whom are holding terms set to expire at end of 2012.³²² In September 2012 nine new members of the Committee were elected to serve four-year terms from January 2013 to December 2016.³²³ The CRPD includes members from four African nations, namely Algeria, Tunisia, Uganda and Kenya.³²⁴ All state parties are required to submit their initial report to the CRPD within two years of ratifying the ICRPD and thereafter periodic reports are due every four years.

9.2. ICRPD and CRPD in 2012

During 2012, Afghanistan, Benin, Djibouti, Dominica, Estonia, Ghana, Greece, Malta, Mauritania, Mozambique and Swaziland all ratified both the Convention and the Optional Protocol. Bulgaria, Cambodia, Israel, Liberia, Poland and Russian Federation also ratified the Convention in 2012. In addition, Singapore became a signatory to the ICRPD. Therefore, by the end of 2012 the Convention had 155 signatories and 127 parties.³²⁵

In 2012, three resolutions were adopted by the UN General Assembly relating to disability. The first resolution, adopted on 12th December 2012, relates to addressing the socio-economic needs of individuals, families and societies affected by Autism Spectrum Disorder, Development Disorders and associated disabilities. The second resolution concerns the realisation of the Millennium Development Goals (MDG's) and other internationally agreed development goals for persons with disabilities towards 2015 and beyond. The third resolution relates to a status report to be submitted to the General Assembly on the ICRPD and its Optional Protocol.³²⁶ Furthermore, in March 2012 the UN General Assembly adopted three resolutions. They related to, the Convention on the Rights of Persons with Disabilities; Optional Protocol; the Realisation of

³²² Election of six Members of the Committee on the Rights of Persons with Disabilities to replace those whose terms are due to expire on 31 December 2010, and to increase the membership of the Committee by six members to attain a maximum number of eighteen members', UN Office of the High Commissioner for Human Rights, accessed at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDElections.aspx>.

³²³ New members elected in September 2012 are Mr Mohammed Al-Tarawneh (Jordan), Mr Martin Mwesigwa (Uganda), Mr Monthian Buntan (Thailand), Ms Maria Soledad (Chile), Mr Laszlo Gabor (Hungary), Ms Diane Mulligan (United Kingdom of Great Britain and Northern Ireland), Ms Safek Pavey (Turkey), Ms Ana Pelaez Narvaez (Spain), Ms Silvia Judith Quan Chang (Guatemala). Ibid.

³²⁴ Committee members are Amna Ali Al-Suwaidi (Qatar), Mr. Mohammed Al-Tarawneh (Jordan), Mr. Monsur Ahmed Chowdhury (Bangladesh), Ms. Maria Soledad Cisteras Reyes (Chile), Ms. Theresia Degener (Germany), Mr. Gabor Gambos (Hungary), Ms. Fathia Hadj-Salah (Algeria), Mr. Hyung Shik Kim (Republic of Korea), Mr. Lofti Ben Lallhom (Tunisia), Mr. Stig Langvad (Denmark), Ms. Eda Wangechi Maina (Kenya), Mr. Mc Callum (Australia), Ms. Ana Pelaez Narvaez (Spain), Ms. Silvia Judith Quang-Chang (Guatemala), Mr. Carlos Rios Espinosa (Mexico), Mr. Damjan Tatic (Serbia), Mr. German Xavier Torres Correa (Ecuador), Ms. Jia Yang (China).
³²⁵ <http://www.un.org/disabilities/default.asp?navid=14&pid=150>, accessed February 2013.

³²⁶ All information on GA Resolutions to be accessed at <http://www.un.org/disabilities/default.asp?id=36>, accessed February 2013.

the Millennium Development Goals and other Internationally Agreed Development Goals for Persons with Disabilities; and World Down Syndrome Day.³²⁷

In June 2012, the World Health Organisation (WHO) and the World Bank (WB) developed and launched a comprehensive report entitled World Report on Disabilities.³²⁸ The report was developed in keeping with the ICRPD and at its effective implementation. The report assembles the latest scientific knowledge and data on disabilities. Further, it provides the first world estimates of persons with disabilities since the 1970s and gives an overall global status of disability.³²⁹ Indeed, the report estimates that 15% of the world's population have disabilities, with over 110 – 190 million experiencing very severe disabilities.³³⁰

From the 12th - 14th September 2012 the Fifth Session of the Conference of States Parties to the ICRPD was held in New York, in attendance was commissioner B Malatji and representatives from the Department of Women, Children and Persons with Disabilities (DWCPD). The Conference is in line with Article 40 of the CRPD which requires that state parties to the ICRPD meet regularly to consider matters with regards to the implementation of the Convention.³³¹ The theme of the Fifth Session was “Making the CPRD Count for Women and Children”, with the sub-themes of “Technology and Accessibility”, “Women and Disabilities” and “Children and Disabilities”.³³²

9.3. South Africa and the CRPD in 2012

Since 2007, South Africa has been signatory to, and has ratified, both the Convention and its Optional Protocol. In 2012, the DWCPD released a draft initial state report for comment by civil society and the SAHRC. However, this report was due for submission to the Committee in 2009, two years after ratification of the ICRPD.

In November 2012, the DWCPD launched a month of activities in awareness of disability rights. The month-long campaign fell under the banner of “removing barriers to create an inclusive and accessible society for all”.³³³ As part of the campaign numerous activities took place including the National Disability Awards which took place on the 3rd December 2012 to commemorate International Day of Persons with Disabilities.³³⁴ The categories for awards were: the National Disabilities Young Leader Award; the National Disabilities Business Leader Award; the National Disabilities Champion Award; the National Disabilities Company Award; the National Disabilities Higher Education Institution Award; the National Disabilities Woman Award and the Lifetime Achievement Award 2012.³³⁵

³²⁷ Ibid.

³²⁸ Information available at, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:23063040~menuPK:282704~pagePK:148956~piPK:216618~theSitePK:282699,00.html>, accessed February 2013.

³²⁹ Information from <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:23018212~menuPK:6963139~pagePK:210058~piPK:210062~theSitePK:282699,00.html>, accessed February 2013.

³³⁰ Information from World Report on Disabilities Fact Sheet, available at http://siteresources.worldbank.org/DISABILITY/Resources/World_Report_on_Disability_Fact_Sheet.pdf, last accessed February 2013.

³³¹ See <http://www.un.org/disabilities/default.asp?navid=46&pid=1595>, accessed February 2013.

³³² Ibid.

³³³ Information on DWCPD Disabilities campaign, see <http://www.info.gov.za/events/2012/disability/2012disability-month-programme.pdf>, accessed February 2013.

³³⁴ Ibid.

³³⁵ Ibid.

9.3.1. *Water and Sanitation*

During the SAHRC's 2012 National Water and Sanitation Campaign, provincial hearings highlighted the difficulties still faced by persons with disabilities in accessing their rights to water and sanitation.³³⁶ On-site inspections to various informal settlements as part of the campaign revealed how disabled persons in these communities were unlikely to have safe access to sanitation and toilet facilities as toilets were built at unreasonable distances from their residences with no special access for the disabled. In its report, due for publication in March 2013, the SAHRC recommends that local government ensure that all service delivery projects for the delivery of water and sanitation are both cognisant of the needs of persons with disabilities and consult such persons in the planning of projects.

9.3.2. *Education*

Article 24 of the ICRPD outlines the obligations upon state parties with regards to the realisation of fair and equal access to education for persons with disabilities. In 2012, a South African Non –government organisation (NGO), Nappy Run, released their report which undertook research revealing that over half of the estimated disabled children in South Africa do not attend school. Nappy Run concluded that this was due to exclusion of disabled learners within schools as well as a lack of specialised facilities.³³⁷ Further, those that are admitted into the education system face a range of barriers to learning including an inadequate skills base of teaching staff, discriminatory attitudes, and inaccessible physical environments. To this end, the SAHRC, in the 2012 launched the Charter on Children's Basic Education Rights which stresses the need to ensure access to school for all, particularly for those with disabilities, and to ensure that children with disabilities have access to any special teaching they may need.³³⁸

In July 2012, the Department of Basic Education, after a court order was passed down from the Western Cape High Court in 2011, released a report outlining the development of a framework for the provision of services to children with severe and profound intellectual disabilities.³³⁹ The framework, however, is criticised by NGOs, such as Nappy Run, for its lack of initiatives for children with physical and other disabilities.

9.4. *Conclusion and Recommendations*

- 9.4.1 During the 2012 UPR process, it was highlighted that South Africa needs to designate an independent monitoring mechanism under ICRPD, Article 33 (see Chapter 12 on the UPR for more information).
- 9.4.2 It is recommended that the South African government speedily submit their country report to the CPRD, which is currently standing at three years overdue.
- 9.4.3 The government should particularly take into account the needs of disabled persons when creating systems for the accessing of basic services such as water and sanitation.

³³⁶ For further information on the SAHRC Water and Sanitation Campaign see Chapter 2 ICESCR.

³³⁷ See, http://www.nappyrun.org.za/downloads/NCPDSDA_MediaRelease_Research_Oct12.pdf, accessed March 2013.

³³⁸ See, <http://www.sahrc.org.za/home/index.php?ipkContentID=17&ipkMenuID=20>, accessed March 2013.

³³⁹ Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another (2011) (5) SA 87 (WCC)) [2010] ZAWCHC 544; 18678/2007 (11 November 2010).

- 9.4.4 The DWCPD should continue its work to broaden knowledge and awareness on the rights of disabled persons within South Africa, and consider the use of various forms of media in order to allow their message to target all South Africans.
- 9.4.5 The Department of Education should comply with the court order to ensure that an effective framework is developed for the education of children with severe and profound intellectual disabilities. The framework should be accompanied by a suitable budget and monitoring or oversight mechanism to ensure full and effective realisation.
- 9.4.6 There is a need for South Africa to review its compliance with the provisions of the ICRPD that address disability, and determine if its legislative framework is adequate to ensure that the rights contained therein are realised.

10. INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PEOPLE FROM ENFORCED DISAPPEARANCE

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) aims to: prevent enforced disappearances taking place; uncover the truth when they do occur; punish the perpetrators; and provide reparations to the victims and their families. The ICPED is modelled largely after the CAT, and the two Conventions are heavily interrelated. An enforced disappearance takes place when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law. Enforced disappearances also violate the rights of the families of those disappeared and contribute to a culture of fear and impunity in countries where such disappearances occur.

Enforced disappearance violates a range of human rights including:

- The right to recognition as a person before the law;
- The right to liberty and security of the person;
- The right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment;
- The right to life, when the disappeared person is killed;
- The right to an identity;
- The right to access to justice;
- The right to a fair trial and to judicial guarantees;
- The right to an effective remedy, including reparation and compensation;
- The right to know the truth regarding the circumstances of a disappearance.³⁴⁰

On 18 December 1992, the General Assembly, by resolution 47/133, proclaimed the Declaration on the Protection of All Persons from Enforced Disappearance (the Declaration) as a body of principles for all states. However, ICPED, unlike the Declaration, is legally binding on state parties, who are obligated to enact domestic legislation to prevent and investigate enforced disappearances.

According to the Committee on Enforced Disappearances (CED) who are responsible for monitoring the Convention, the ICPED is an international treaty with a “preventative character”, which “fills the gaps” between other human rights treaties and international criminal law.³⁴¹ The ICPED was adopted on 20 December 2006 during the 61st session of the General Assembly.³⁴² It came into force on 23 December 2010, in accordance with Article 39 (1), 30 days following the deposit of the 20th instrument of ratification. Under Article 35(1), the ICPED deals only with enforced disappearances which commenced only after its entry into force for each state party. The CED, established under Article 26, is elected by the Convention’s

³⁴⁰ Office of the High Commissioner for Human Rights, Fact Sheet No. 6/ Rev.3, Enforced or Involuntary Disappearances, <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>, accessed 14 January 2013.

³⁴¹ Decaux, E., Chair, Committee on Enforced Disappearances, Letter dated 25 January 2012 to Member States promoting ratification and cooperation with the Committee, http://www.ohchr.org/Documents/HRBodies/CED/LetterStates25Jan12_en.pdf, accessed 14 January 2013.

³⁴² General Assembly Resolution A/RES/61/177.

state parties. Parties are obliged to report to this committee on the steps they have taken to implement ICPED. There are currently 91 signatories and 37 states parties to ICPED.³⁴³

The ICPED represents significant progress in international law, in particular by defining the non-derogable right not subject to an enforced disappearance. Article 1 of ICPED states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”³⁴⁴ Article 2 defines an “enforced disappearance” as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”³⁴⁵ The systematic use of enforced disappearance is defined as a crime against humanity by Article 6.³⁴⁶

ICPED creates an obligation on States to make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

Parties to the convention undertake to:

- ensure that enforced disappearance constitutes an offence under its criminal law;³⁴⁷
- investigate acts of enforced disappearance and bring those responsible to justice;³⁴⁸
- establish jurisdiction over the offence of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident;³⁴⁹
- cooperate with other states in ensuring that offenders are prosecuted or extradited, and to assist the victims of enforced disappearance or locate and return their remains;³⁵⁰
- respect minimum legal standards around the deprivation of liberty, including the right for imprisonment to be challenged before the courts;³⁵¹
- establish a register of those currently imprisoned, and allow it to be inspected by relatives and counsel;³⁵²
- ensure that victims of enforced disappearance or those directly affected by it have a right to obtain reparation and compensation.³⁵³

The Preamble and Article 24 of the ICPED affirms the right of any victim (including family of the disappeared) to know the truth of the circumstances surrounding the enforced disappearance and the fate of the

³⁴³ ICPED, UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-16&chapter=4&lang=en, accessed 22 January 2013.

³⁴⁴ ICPED, Article 1.

³⁴⁵ Ibid, Article 2.

³⁴⁶ Ibid, Article 6.

³⁴⁷ Ibid, Article 4.

³⁴⁸ Ibid, Article 3.

³⁴⁹ Ibid, Article 9.

³⁵⁰ Ibid, Article 15.

³⁵¹ Ibid, Article 17.

³⁵² Ibid, Article 17(3).

³⁵³ Ibid, Article 24 (4).

disappeared.³⁵⁴ The Working Group on Enforced or Involuntary Disappearances (WGEID³⁵⁵) produced a General Comment on the right to truth in cases of enforced disappearance, which stated that the right of the relatives to know the fate of the victim is absolute and non-derogable.

10.1. Committee on Enforced Disappearances (CED)

The CED is the body of independent experts which monitors implementation of the Convention by states parties. The Committee meets in Geneva and normally holds two sessions per year. It held its first session in November 2011, and has yet to consider the reports of any state party. All state parties are obliged to submit regular reports to the Committee on how ICPED is being implemented. States must report initially within two years of accepting the Convention. In accordance with Article 31, a state party may at the time of ratification of this Convention, or at any time afterwards, declare that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by this state party of provisions of ICPED. Article 30 provides for an urgent action procedure.

The CED is newly constituted, and has not yet amassed a body of jurisprudence. The WGEID has been in existence for over 30 years and has reviewed thousands of cases of enforced disappearances. The two bodies are complementary and will work together to prevent and investigate enforced disappearances. The WGEID meets annually to report on their activities and share information.

The key difference between the two bodies is that the CED only has competence in respect of enforced disappearances perpetrated in a state party to ICPED, whereas the remit of WGEID is not dependent on the ratification status of states. Furthermore, while the CED may only consider cases of enforced disappearance which took place after the entry into force of ICPED, WGEID may consider cases which occurred before that.³⁵⁶

10.2. Working Group on Enforced or Involuntary Disappearances (WGEID)

WGEID was established in 1980 by then Commission on Human Rights (now the Human Rights Council)³⁵⁷. The Working Group reports annually to the Human Rights Council on its activities.

WGEID's mandate is to assist relatives of disappeared persons to ascertain the fate of their disappeared family members. To this end, WGEID examines reports of disappearances received from relatives of disappeared persons or organisations acting on their behalf. After determining their admissibility, WGEID transmits individual cases to the governments concerned, requesting them to carry out investigations and to inform the WGEID of the results.

³⁵⁴ International Convention for the Protection of All Persons from Enforced Disappearance, Preamble, Article (24) <http://www2.ohchr.org/english/law/disappearance-convention.htm>, accessed 7 January 2012.

³⁵⁵ See below for further information on WGEID.

³⁵⁶ Office of the High Commissioner for Human Rights, "The Working Group and the Committee on Enforced Disappearance", <http://www.ohchr.org/EN/Issues/Disappearances/Pages/WGInternationalConvention.aspx>, accessed 14 January 2013.

³⁵⁷ Human Rights Commission, resolution 20 (XXXVI) 29 February 1980.

The mandate of WGEID is purely humanitarian and unrelated to whether the government concerned has ratified any relevant human rights treaty providing for an individual complaints procedure. It acts essentially as a channel of communication between the families of disappeared persons and governments. To avoid any delays in its attempts to save lives, the WGEID has established an urgent action procedure for cases of disappearance alleged to have occurred in the three months before they are reported to it. In 2012, WGEID examined 17 reported cases of enforced disappearance under its urgent action procedure, as well as more than 400 cases, including newly-submitted cases and previously accepted ones.³⁵⁸ There are still 42,000 cases pending before the WGEID, in more than 80 countries.³⁵⁹

During its session, the group of independent experts focused on, among other issues, reparations and specific country situations, in particular regarding the obstacles encountered in the implementation of the Declaration, methods of work, past and potential country visits, as well as future activities. The members also adopted two general comments: one on women affected by enforced disappearances and the other on children and enforced disappearances.³⁶⁰ There is one South African member of WGEID, Mr Jeremy Sarkin who was appointed in 2008.

10.3. ICPED and CED in 2012

In 2012, the CED held two sessions, its 2nd and 3rd, in March and November. At its 2nd session, CED adopted its rules of procedure, guidelines and forms for urgent action requests under Article 30 and submission of complaints under Article 31, guidelines for state party report under Article 29 and a strategy to encourage states to ratify the ICPED.³⁶¹ Throughout 2012, Austria, Bosnia & Herzegovina, Colombia, Costa Rica and Mauritania ratified the Convention and Peru acceded, while Thailand became a signatory.³⁶²

At the 3rd session held in November 2012, the CED declared itself fully operational and ready to commence its work and discussed synergies with WGEID, for example in coordinating country visits. It discussed potentially considering a third session throughout the year to avoid the reporting backlog which affects other human rights treaty bodies.³⁶³ During the two-week session, the CED participated in an event marking the 20th anniversary of the Declaration, which was organised by WGEID to explore best practices and challenges to protect women from enforced disappearances. Addressing the event, the Chairman of CED, Mr. Decaux, said that the WGEID and the CED were complementary and must reinforce each other. While they had different mandates and methods of work, they shared the same objective of the fight against the “heinous crime of enforced disappearances”.³⁶⁴ Particular concern was expressed about the on-going situation in Syria and the aftermath of the recently ended civil strife in Nepal in which enforced or involuntary disappearances have been a feature.

³⁵⁸ Enforced Disappearances: UN experts study over 400 cases, 17 under their urgent action procedure, Press Release, Geneva 9 November 2012 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12760&LangID=E>, accessed 14 January 2013.

³⁵⁹ Joint Statement by UN expert bodies on enforced disappearances, 25 October 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12701&LangID=E>, accessed 14 January 2013.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² ICPED, UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en, accessed 22 January 2013.

³⁶³ <http://www.ohchr.org/EN/HRBodies/CED/Pages/Session3.aspx>, accessed 22 January 2013.

³⁶⁴ Committee on Enforced Disappearances concludes third session, 9 November 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12769&LangID=E>, accessed 14 January 2013.

On the 5 November during a meeting between CED, states parties, NHRIs and NGOs, the Mr. Decaux emphasised the extremely important role of NHRIs in the implementation of this newest international treaty, providing invaluable information to CED on the legislative situation on the ground and acting as a conduit of communication between states parties and the CED.³⁶⁵

10.4. South Africa and ICPED

South Africa is not yet a party to ICPED. Ratification of ICPED (and other outstanding international human rights instruments) was recommended in South Africa's 1st UPR cycle, and again recommended by various states during South Africa's 2nd UPR cycle.³⁶⁶

During the apartheid era, enforced disappearances and targeted abductions, either directly by the police or using agents, were commonly used tactics of the security forces. The South African Truth and Reconciliation Commission (the TRC) established following the dawn of democracy received 1500 victim statements regarding people who "disappeared after being forcibly abducted,"³⁶⁷ The fate of 477 of these people was still unclear at the time the TRC published its final report in 2003.³⁶⁸

Following the report of the TRC, a Missing Persons Task Team, under the authority of the NPA, was set up to investigate and follow-up on the cases of those still missing and disappeared.³⁶⁹ However, despite the recommendation for the formation of such as task team emanating as far back as 1998, the real work of the Task Team in locating remains and uncovering the truth did not begin in earnest until 2005.³⁷⁰ By 2011, the Task Team had solved more than 60 cases and returned 44 bodies to families.³⁷¹

10.5. Conclusion and Recommendations

- 10.5.1 Given South Africa's unique historical experience of enforced disappearances, government should seek to ratify ICPED as soon as possible, and with it, prepare its initial report.
- 10.5.2 Ensure that enforced disappearances constitute an offense under criminal law, and establish jurisdiction over an enforced disappearance within South Africa's borders even if the victim is not a citizen or resident.
- 10.5.3 Cooperate with other states to ensure that offenders are prosecuted or extradited and to assist the victims of enforced disappearances (including the locating and returning of remains).
- 10.5.4 Ensure there are measures for redress and compensation for victims of enforced disappearances.

³⁶⁵ Press Release, *Committee meets with States Parties, National Human Rights Institutions and Non-Governmental Organizations* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12762&LangID=E>, accessed 14 January 2013.

³⁶⁶ See Chapter 1.

³⁶⁷ Report of the Human Rights Violations Committee, Volume SIX • Section FOUR • Chapter ONE ABDUCTIONS, DISAPPEARANCES AND MISSING PERSONS http://www.info.gov.za/otherdocs/2003/trc/4_1.pdf, accessed 22 January 2013.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Emily Dugan, "CSI South Africa: Apartheids' Last Murder Mystery", 16 January 2012, <http://www.independent.co.uk/news/world/africa/csi-south-africa-apartheids-last-murder-mystery-2182912.html>, accessed 22 January 2013.

³⁷¹ Ibid.

11. HUMAN RIGHTS COUNCIL

The Human Rights Council (the Council) is an inter-governmental body within the UN system comprised of 47 states elected by the UN General Assembly responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 to replace the Commission on Human Rights and was tasked principally with addressing situations of human rights violations and making relevant recommendations.³⁷² Remigiusz Achilles Henczel of Poland is currently President of the Council.

The Council has the following subsidiary bodies, created by resolution 5/1³⁷³:

- Universal Periodic Review Working Group
- Advisory Committee
- Complaint Procedure
- Expert Mechanism on the Rights of Indigenous People
- Forum on Minority Issues
- Social Forum
- Forum on Business and Human Rights

The Council also works with the UN Special Procedures established by the former Commission on Human Rights and now assumed by the Council. These are made up of special rapporteurs, special representatives, independent experts and working groups that monitor, examine, advise and publicly report on thematic issues or human rights situations in specific countries. Currently, there are 36 thematic and 12 country mandates.³⁷⁴ The Council holds at least 3 sessions a year in March, June and September. Further emergency sessions may be called at the behest of a member state.

11.1. The Human Rights Council in 2012

During 2012, the Council held three regular sessions, the 19th³⁷⁵, 20th³⁷⁶ and 21st³⁷⁷ sessions. In addition, it convened its 19th special session on 1 June 2012 to urgently discuss the deteriorating human rights situation in Syria,³⁷⁸ and the fourth session concerned this crisis. Further, the Council held a special panel discussion at its 21st Session on the occasion of Nelson Mandela International Day, which focused on how the values of reconciliation, peace, freedom and racial equality inspired by the life and actions of Nelson Mandela and should continue to inspire the work of the Council and its subsidiary bodies.³⁷⁹

³⁷² General Assembly, Resolution Adopted by The General Assembly: 65/281 Review of the Human Rights Council, 20 July 2011, A/RES/65/281 http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/281&Lang=E, accessed 5 January 2012.

³⁷³ Other Subsidiary Bodies, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OtherSubBodies.aspx>, accessed 16 January 2013.

³⁷⁴ Special Procedures of the Human Rights Council, Introduction, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>, accessed 16 January 2013.

³⁷⁵ Held between 27 February and 23 March 2012.

³⁷⁶ Held between 18 June and 6 July 2012.

³⁷⁷ Held between 10 and 28 September 2012.

³⁷⁸ The 16th, 17th and 18th Special Session held in 2011 also concerned the human rights situation in Syria.

³⁷⁹ Press Release, Human Rights Council, 21st session Nelson Mandela International Day Panel Opening Statement by Ms. Navi Pillay High Commissioner for Human Rights, Geneva, 21 September 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12564&LangID=E>, accessed 16 January 2013.

Elections to the Council were held on 12 November 2012. Council member states are elected directly and individually by secret ballot of the majority of members of the General Assembly. The following member states were elected to serve three year terms beginning January 2013: Argentina, Brazil, Côte d'Ivoire, Estonia, Ethiopia, Gabon, Germany, Ireland, Japan, Kazakhstan, Kenya, Montenegro, Pakistan, the Republic of Korea, Sierra Leone, the United Arab Emirates, the United States and Venezuela.³⁸⁰

On 20 September 2012, a panel discussion was held on the economic, social and cultural rights of women, which noted that while significant progress had been made, further work was required in advancing the rights of women to attain substantive equality with men.³⁸¹ Deputy Chair of the SAHRC, Commissioner Pregs Govender, took part in the discussion, commenting on the important human rights commitments made by South Africa in its Constitution, domestic legislation and international obligations. However, she stated that these had been "undermined by international and national trade choices, with devastating impact on the rights of women and gender equality".³⁸² She highlighted that political will by government was often a crucial factor in advancing the human rights of citizens.

Commissioner Govender further called on the South African state to account for the role of the police in the tragic killings of 45 striking miners at Marikana. She emphasised that "businesses such as mining companies must also be held to account for human rights. Globally economic and trade policy drives poverty, inequality and the vulnerability of women to the abuse of their human rights. We call on all States in the UNHRC to ensure that economic policy, including trade agreements be scrutinised for their negative human rights impact."³⁸³

The relationship between business and human rights was highlighted in 2012, at the first UN annual Forum on Business and Human Rights which took place on 4-5 December 2012, under the guidance of the Working Group on the issue of human rights and transnational corporations and other business enterprises. This forum is designed to promote the implementation of the Guiding Principles on Business and Human Rights,³⁸⁴ a set of internationally accepted principles which provide a global standard for preventing and addressing the risk of negative human rights violations.³⁸⁵ The UN Forum on Business and Human Rights will bring together, among others, representatives from multinational corporations in the areas of mining, oil and energy, chemicals, banking and finance, electronics and textile and garments, with persons affected by their activities.

³⁸⁰ "In single secret ballot, General Assembly elects 18 member states to serve three-year terms on Human Rights Council", Department of Public Information Press Release, 12 November 2012 <http://www.un.org/News/Press/docs//2012/ga11310.doc.htm>, accessed 7 January 2013.

³⁸¹ Human Rights Council holds Panel Discussion on Economic, Social and Cultural Rights and the empowerment of women, 20 September 2012 <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12554&LangID=E>, accessed 16 January 2013.

³⁸² Ibid.

³⁸³ SAHRC urges Human Rights Council to hold business to account for human rights violations, 21 September 2012, <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=129>, accessed 16 January 2013.

³⁸⁴ Human Rights Council, Resolution 17/4 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. <http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>.

³⁸⁵ These Guiding Principles are commonly known as the Ruggie Principles after John Ruggie who authored them.

11.2. Universal Periodic Review (UPR)

The UPR mechanism is a state led process which reviews the human rights situation in each UN member state every four years. The 13th UPR session of the Council saw the start of the second UPR cycle. South Africa was examined at the 13th session, held from 21 May – 4 June 2012, along with Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, United Kingdom, India, Brazil, the Philippines, Algeria, Poland and the Netherlands.³⁸⁶

The 14th UPR session was held between 22 October and 5 November 2012 and examined a further fourteen states: Czech Republic, Argentina, Gabon, Ghana, Ukraine, Guatemala, Benin, Republic of Korea, Switzerland, Pakistan, Zambia, Japan, Peru and Sri Lanka.³⁸⁷

11.3. South Africa and the Human Rights Council in 2012

In March 2012 the Council held its first-ever formal UN inter-governmental debate on violence and discrimination against LGBTI persons. South Africa (alongside Brazil) sponsored the panel discussion which was in turn moderated by the Ambassador of South Africa, Mr Abdul Minty. Mr Minty spoke of the South African philosophy of “ubuntu”, “I am because you are”, and reaffirmed the point made by an African NGO, Coalition of African Lesbians, that LGBTI persons are not asking for new rights, but simply for African governments to comply with their obligations under international and national instruments.³⁸⁸ Indeed, this is an issue which South Africa has taken the leading role on at the Council, as it proposed a resolution on the matter in 2011 (A/HRC/17/L.9/Res.1) which was accepted by the majority of other states parties.³⁸⁹

Chapter 12 furthermore sets out a broad overview of South Africa’s 2nd UPR cycle before the Council, which focuses on the submissions made and the interactive dialogue between South Africa and the Council in September of 2012.

³⁸⁶ Session 13- May 2012, <http://www.upr-info.org/-Session-13-May-2012-.html>, accessed 8 January 2013.

³⁸⁷ <http://www.upr-info.org/-Session-14-Oct-2012-.html>, accessed 8 January 2012.

³⁸⁸ UN Human Rights Council: Landmark report and Panel on Sexual Orientation and Gender Identity, available at www.ighrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1494.html, accessed March 2013.

³⁸⁹ See, www.ilga.org/ilga/static/uploads/files/2011/6/17/RESOLUTION%20L9rev1.pdf, accessed March 2013.

12. ECONOMIC AND SOCIAL COUNCIL

The UN Economic and Social Council (ECOSOC) is a founding UN Charter body established in 1946. It is where the world's economic, social and environmental challenges are discussed and debated, and policy recommendations issued. Thus, its primary mandate and focus is not human rights *per se*, rather, it seeks to promote economic and social development and promotion of human rights, especially socio-economic rights.

Human rights issues are mostly dealt with by subsidiary bodies such as the UN Commission on the Status of Women and the UN Permanent Forum on Indigenous Issues. However, the Committee on Economic, Social and Cultural Rights monitors the compliance with the International Covenant on Economic, Social and Cultural Rights.³⁹⁰

The functions and powers of the ECOSOC are set out in Chapter X of the Charter of the United Nations. The so-called “new functions of ECOSOC” were decided at the 2005 World Summit, which mandated the Economic and Social Council to convene Annual Ministerial Reviews (AMR) and a biennial Development Cooperation Forum. The objective of the forum is to enhance the coherence and effectiveness of activities of different development partners by reviewing trends and progress in international development cooperation. The forum provides policy guidance and recommendations to improve the quality and impact of development cooperation. These new functions were endorsed by the UN General Assembly in November 2006.³⁹¹

ECOSOC is made up of 54 member states,³⁹² which are elected by the General Assembly for overlapping three-year terms. Seats on the Council are allotted based on geographical representation with 14 allocated to Africa, 11 to Asia, six to Eastern Europe, 10 to Latin America and the Caribbean, and 13 to Western Europe and other states. ECOSOC has broad responsibility for some 70% of the human and financial resources of the entire UN system through nine functional commissions,³⁹³ and five regional commissions.³⁹⁴ It furthermore coordinates the work of the UN specialised agencies.³⁹⁵

The ECOSOC holds regular meetings throughout the year with prominent academics, business sector representatives and governmental organisations. ECOSOC holds its annual, month-long substantive session in July.³⁹⁶ The session is divided into 5 segments: high-level; coordination; operational activities;

³⁹⁰ The Economic and Social Council <http://www.humanrights.ch/en/Standards/UN-Institutions/ECOSOC/index.html>, accessed 19 January 2013.

³⁹¹ About ECOSOC, <http://www.un.org/en/ecosoc/about/index.shtml>, accessed 14 January 2013.

³⁹² A full list of member Governments and the expiry of their terms is available here: <http://www.un.org/en/ecosoc/about/members.shtml>.

³⁹³ Namely, Statistical Commission, Commission on Population and Development, Commission for Social Development, Commission on the Status of Women, Commission on Narcotic Drugs, Commission on Crime Prevention and Criminal Justice, Commission on Science and Technology for Development, Commission on Sustainable Development, and United Nations Forum on Forests.

³⁹⁴ Namely, Economic Commission for Africa (ECA), Economic and Social Commission for Asia and the Pacific (ESCAP), Economic Commission for Europe (ECE), Economic Commission for Latin America and the Caribbean (ECLAC), and Economic and Social Commission for Western Asia (ESCWA).

³⁹⁵ Food and Agriculture Organization of the United Nations (FAO), International Civil Aviation Organization (ICAO), International Fund for Agricultural Development (IFAD), International Labour Organization (ILO), International Maritime Organization (IMO), International Monetary Fund (IMF), International Telecommunication Union (ITU), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU) World Bank Group, World Health Organization (WHO), World Intellectual Property Organization (WIPO)

World Meteorological Organization (WMO), and World Tourism Organization (UNWTO).

³⁹⁶ About ECOSOC, <http://www.un.org/en/ecosoc/about/>, accessed 17 January 2013.

humanitarian affairs; and general — which cover both global issues and technical and administrative questions.

The objective of the AMR is to assess progress in achieving the internationally agreed development goals arising out of the major conferences and summits. It consists of an annual thematic review and national voluntary presentations on progress and challenges towards achieving the Internationally Agreed Development Goals, including those contained in their national MDG-based development strategies.

12.1. ECOSOC in 2012

The 2012, the AMR took place during the High-level Segment of the substantive session of the ECOSOC in July at United Nations in New York. It focused on the theme: “Promoting productive capacity, employment and decent work to eradicate poverty in the context of inclusive, sustainable and equitable economic growth at all levels for achieving the MDGs”.³⁹⁷

Nine countries - Algeria, Brazil, Ecuador, Kenya, Mauritius, Qatar, Russia, Senegal and Ukraine - made National Voluntary Presentations during the 2012 AMR session.³⁹⁸ The 2012 AMR highlighted economic growth models that promote job creation, are sustainable, inclusive and equitable and can be tailored to the particular needs of countries, while also promoting social protection and rights at work.³⁹⁹ Several other activities have taken place at the national, regional and global levels in preparation for the 2012 AMR, including the regional meeting for Africa on “Small and medium enterprises as drivers of productive capacity and job creation”, which took place in Addis Ababa on 25 March 2012.⁴⁰⁰ South Africa was elected to ECOSOC in November 2012. It will assume its membership in January 2013 and its term will expire in 2015.

12.2. UN Commission on the Status of Women

The UN Commission on the Status of Women, one of ECOSOC’s nine functional commissions, held its 56th session 2012. The priority theme of the session was the empowerment of rural women and their role in poverty and hunger eradication, development and current challenges.⁴⁰¹ Discussions focussed firstly on empowering rural women economically and then on their role in governance and institutions. There was agreement that action should be taken to combat patriarchal traditions, gender stereotypes and cultural norms and attitudes which hinder women’s empowerment in rural areas.⁴⁰²

³⁹⁷ 2012 Annual Ministerial Review, <http://www.un.org/en/ecosoc/newfunct/amr2012.shtml>, accessed 18 January 2013.

³⁹⁸ 2012 Annual Ministerial Review, <http://www.un.org/en/ecosoc/newfunct/amr2012.shtml>, accessed 18 January 2013.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ <http://www.un.org/womenwatch/daw/csw/56sess.htm#news>, accessed 18 January 2013.

⁴⁰² UN Commission on the Status of Women, “*The role of gender-responsive governance and institutions for the empowerment of rural women*”, 7 March 2012 <http://www.un.org/womenwatch/daw/csw/csw56/panels/panel2-moderators-summary.pdf>, accessed January 2013.

13. UNIVERSAL PERIODIC REVIEW

13.1. The Universal Periodic Review Mechanism (UPR)

The UPR is a process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is presided over by the Human Rights Council and is a state-led process which provides the state under examination the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. The process also allows an opportunity for civil society and other states to question those state actions and provide recommendations. The UPR assesses the extent to which states respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the state is party; (4) voluntary pledges and commitments made by the state; and, (5) applicable international humanitarian law.

The UPR was created pursuant to General Assembly resolution 60/251, which established the HRC. The ultimate aim of this new mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. The reviews are conducted by the UPR Working Group which consists of the 47 members of the Council.⁴⁰³ However, any UN member state can take part in the discussion with the reviewed states. Each state review is assisted by groups of three randomly selected states, known as “troikas”, who serve as rapporteurs.

The documents on which the reviews are based are: 1) information provided by the state under review i.e. a “national report”; 2) information contained in the reports of independent human rights experts and groups, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including NHRIs and NGOs. The review takes the form of an interactive dialogue between the state under review and the members and observer states of the HRC. At the end of each review, the Working Group adopts an outcome document, which is subsequently considered and adopted by the Council at a later session.

South Africa had previously undergone examination through the UPR mechanism in 2008. As of the 12th UPR session in 2011, all states have been reviewed and the 2nd cycle began in the 13th session held between 21 May 2012 and 1 June 2012. The Outcome Report was subsequently adopted by a decision of the 21st Session of the Human Rights Council, on 15 October 2012.⁴⁰⁴

13.2. South Africa Universal Periodic Review 2012

South Africa was examined on 31 May 2012. The troika for South Africa’s review was made up of the Czech Republic, Cameroon and the Maldives.

⁴⁰³ Refer to chapter 10 on the Human Rights Council (HRC) for the current composition of the HRC.

⁴⁰⁴ UN Human Rights Council, Human Rights Council Decision 21/114, Outcome of the Universal Periodic Review: South Africa, 15 October 2012 <http://daccess-ddsny.un.org/doc/RESOLUTION/GEN/G12/175/98/PDF/G1217598.pdf?OpenElement>, accessed 17 December 2012.

13.2.1. National Report

The National Report of South Africa (the National Report) was submitted on 7 March 2012 and considered by the Council on 31 May 2012. The National Report outlines the progress made in implementing the 22 recommendations which emanated from the 1st UPR cycle. The report started by stating that the current administration came into power in April 2009 and immediately began a process of evaluation and assessment of government performance to date. As part of this assessment, 6 key priorities were identified in government's Medium Term Strategic Framework for the period 2009-2014. These key priority areas are: education, health, growing the economy and creation of decent jobs, fighting corruption and crime, and rural development and land reform.⁴⁰⁵

An upshot of the review was government structural reforms aimed at improving efficiency and accountability. Two new strategic government departments were created - the Department of Performance Monitoring and Evaluation (DPME) and the Department of National Planning - as part of the office of the Presidency, in addition to the creation of the National Youth Development Agency. Furthermore, the new Department of Women, Children and People with Disabilities (DWCPD) was established to monitor, promote and realise the rights of those vulnerable groups. A new Department of Traditional Affairs was established to coordinate traditional affairs including traditional leadership structures, courts, languages, indigenous knowledge systems and other valued community practices. The Department of Education was divided into separate departments of Basic Education and Higher Education and Training. A new Department of Military Veterans was also created.

Performance and monitoring has become a government priority and the National Report advised that the President has signed performance agreements with Cabinet Ministers to ensure achievement of national goals and fulfilment of South Africa's international obligations.⁴⁰⁶ The National Report further stressed that the constitutional framework under which all domestic policy is made is fundamentally geared towards the protection and achievement of human rights and freedoms. The National Report highlighted the following key policy initiatives in the context of South Africa's international obligations and domestic policy priorities:

- The forthcoming Prevention of Torture of Persons Bill, which will create a statutory offence of torture. At the time of the UPR this was in draft form and was under consideration by the Cabinet. It has since been approved by Cabinet and is before the National Assembly (see Chapter 5 for further details).
- Women's Empowerment and Gender Equality Bill has been introduced to Parliament (see chapter 4 on CEDAW for more information).
- Government has approved policy on comprehensive social security, which includes the provision of national health insurance (see Chapter 2 on the ICESCR for more commentary on socio-economic rights).

⁴⁰⁵ "National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: South Africa", 7 March 2012 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/116/29/PDF/G1211629.pdf?OpenElement>, accessed 28 November 2012.

⁴⁰⁶ Ibid page 3.

- A draft Cyber Security Policy is in development to combat cyber crimes, in violation of human rights and to regulate internet governance.⁴⁰⁷

13.2.2. Information Provided by Stakeholders

The UPR process provides for the participation of all relevant stakeholders, including NHRIs and NGOs, who submit their own reports on the overall human rights situation in the country under review or on specific issues. SAHRC made a submission to the Council, which highlighted the following areas: (i) South Africa's ratification status in terms of outstanding treaty bodies and optional protocols; (ii) South Africa's cooperation with the International Treaty Bodies to which it is a party, in terms of reporting; and (iii) South Africa's implementation of international human rights obligations.⁴⁰⁸

The SAHRC report emphasised that South Africa still needs to ratify ICESCR and its Optional Protocol, ICRMW and OP-CAT. It also highlighted the need to designate an independent monitoring mechanism under CRPD, article 33.⁴⁰⁹ SAHRC advised that South Africa's reporting status under the various international human rights instruments to which South Africa is a party was in many cases severely overdue. The following reports were advised to be outstanding:

- the ICCPR initial report,
- the CRC 2nd and 3rd reports,
- the CRC-OPSC initial report and CRC-OPAC initial report
- the CAT 2nd report,
- the CERD report and
- the CRPD initial report.⁴¹⁰

SAHRC also highlighted the following specific areas of concern, in terms of implementation of international human rights obligations:

- (i) The continuing prevalence of violent hate crimes, including xenophobic attacks, committed on the basis of nationality, gender and sexual orientation;
- (ii) The delay in introducing the Combating of Torture Bill,⁴¹¹
- (iii) The high levels of violence against women and low levels of prosecution and awareness;
- (iv) Certain traditional practices that violate the rights of people, especially women, living in traditional areas, including "ukuthwala"⁴¹², polygamous marriages and the killing of people suspected of being witches;
- (v) The continuing challenges posed by widespread poverty and poor service delivery to the achievement and maintenance of human rights, especially in rural areas;
- (vi) Lack of universal access to clean water and sanitation;
- (vii) Increasing maternal mortality;

⁴⁰⁷ Ibid page 6.

⁴⁰⁸ South African Human Rights Commission, "NHR written submission to the Universal Periodic Review (UPR)" Mechanism 2012.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Prevention and Combating of Torture in Persons Bill [B21-2012].

⁴¹² A traditional practice by which older men abduct young women for purposes of marriage.

- (viii) The relatively low proportion of HIV infected persons receiving anti-retroviral treatment; and
- (ix) Socio-economic barriers to education and the uneven quality of education, largely to the detriment of poor and rural children.⁴¹³

However, the following developments and improvements made by South Africa since the previous UPR cycle were also noted with approval by the SAHRC including:

- (i) The reinstatement in 2011 of the specialised Family Violence, Child Protection and Sexual Offences Unit;
- (ii) The introduction of the Prevention and Combating of Trafficking in Persons Bill 414 to Parliament in March 2010;
- (iii) The launch in 2010 of the National Planning Commission (NPC), tasked with the development of long term strategies for development and growth; and
- (iv) The progress in addressing HIV/AIDS, in line with first cycle UPR recommendations 12, 13 and 14. Notably, in April 2010, a new AIDS treatment policy and awareness campaign was launched under which 14 million people had been counselled and over 13.5 million tested for HIV. Those found HIV-positive were referred for further support and care.

The following organisations also made submissions to the review of South Africa:

- (i) Amnesty International, which focussed on a wide range of rights including HIV/AIDS, poverty, women's rights and the right to health, discrimination on the grounds of sexual orientation and gender identity, refugees and migrants rights, xenophobia, torture and extra-judicial executions.⁴¹⁵
- (ii) The Community Law Centre at the University of the Western Cape, whose submission focussed on children's rights, socio-economic rights, good governance and challenges related to the realisation of socio-economic rights, and prison reform and torture.⁴¹⁶
- (iii) The International Commission of Jurists (ICJ), which focussed on access to justice, sexual violence, migrant rights, police accountability and oversight, and international instruments and mechanisms.⁴¹⁷
- (iv) The Global Initiative to End All Corporal Punishment of Children (GIEACPC), focussing on the rights of the child, specifically in relation to corporal punishment.⁴¹⁸
- (v) Human Rights Watch, whose submission concentrated on freedom of expression and information, women's rights, the rights of refugees and migrants, the rights of vulnerable workers, and discrimination and violence based on sexual orientation and gender identity.⁴¹⁹

⁴¹³ South African Human Rights Commission, "NHRI written submission to the Universal Periodic Review (UPR)" Mechanism 2012.

⁴¹⁴ Prevention and Combating of Trafficking in Persons Bill [B7-2010].

⁴¹⁵ Amnesty International, Submission to the UN Universal Periodic Review 13th session of the UPR Working Group, May - June 2011.

⁴¹⁶ Community Law Centre, University of the Western Cape, *Submission to Universal Periodic Review of South Africa*, November 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/CLC_UPR_ZAF_S13_2012_CommunityLawCentre_E.pdf

⁴¹⁷ International Commission of Jurists, *SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF SOUTH AFRICA* November 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/ICJ_UPR_ZAF_S13_2012_InternationalCommissionofJurists_E.pdf.

⁴¹⁸ The Global Initiative to End All Corporal Punishment of Children, *BRIEFING FOR THE HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW – 13th session, 2011*, November 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/GIEACPC_UPR_ZAF_S13_2012_GlobalInitiativetoEndAllCorporalPunishmentofChildren_E.pdf.

⁴¹⁹ Human Rights Watch, *Universal periodic Review Submission South Africa*, November 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/HRW_UPR_ZAF_S13_2012_HumanRightsWatch_E.pdf.

- (vi) The Institute for Human Rights and Business, whose submission focussed on the link between business and human rights, particularly labour rights, working conditions, health and safety and environmental issues.⁴²⁰
- (vii) Omega Research Foundation, which focussed on torture and other cruel, inhuman or degrading treatment or punishment.⁴²¹
- (viii) PEN International (PEN), which focussed on freedom of expression and information.⁴²²
- (ix) South African Pagan Rights Alliance, which focussed on the issue of witch hunts in South Africa.⁴²³
- (x) Ubuntu Centre, South Africa, focussing on the rights of persons with disabilities.⁴²⁴
- (xi) World Vision South Africa, focussing on the right to health and access to health care.⁴²⁵

Additionally, the following Joint Submissions were made:

- (i) Joint Submission 1 by the Care Excellence Development Centre, Umthatha Child Abuse Resource Centre and Save the Children Southern Africa Regional Office, focussing primarily on the rights of the child;⁴²⁶
- (ii) Joint Submission 2 by Istituto Internazionale Maria Ausiliatrice and International Volunteerism Organisation for Women, Education and Development, focussing primarily on the rights of the child;⁴²⁷
- (iii) Joint Submission 3 by the Human Rights Institute of South Africa, People Opposing Women Abuse, Consortium for Refugees and Migrants in South Africa, Centre for Human Rights and Coalition of African Lesbians, focussing on violence against women, gender equality and non-discrimination, children's rights, the rights of refugees and migrant workers, xenophobia and racism, and gender and sexual orientation discrimination and hate crimes;⁴²⁸
- (iv) Joint Submission 4 by the Association for Progressive Communications, Centre for Applied Legal Studies - University of Witwatersrand, CIVICUS: World Alliance for Citizen Participation, Gender

⁴²⁰ Institute for Human Rights and Business, *Submission to the United Nations Human Rights Council Universal Periodic Review Session 13: South Africa*, November 2011,

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/IHRB_UPR_ZAF_S13_2012_InstituteforHumanRightsandBusiness_E.pdf.

⁴²¹ Omega Research Foundation, *Submission on South Africa: UN Universal Periodic Review, Second Cycle, 13th Session, 2012*, November 2011,

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/ORF_UPR_ZAF_S13_2012_OmegaResearchFoundation_E.pdf, accessed December 2012.

⁴²² PEN International and South African PEN, *Contribution to the 13th session of the Working Group of the Universal Periodic Review Submission on the Republic of South Africa*, 24 November 2011,

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/PEN_UPR_ZAF_S13_2012_PENInternational_E.pdf, accessed December 2012.

⁴²³ South African Pagan Rights Alliance, *Stakeholder Submission*

OHCHR Universal Periodic Review- Witch Hunts in South Africa, November 2011,

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/SAPRA_UPR_ZAF_S13_2012_SouthAfricanPaganRightsAlliance_E.pdf, accessed December 2012.

⁴²⁴ The Ubuntu Centre, *South Africa submission for: 13th Session of Human Rights Council Universal Periodic Review*, 28 November 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/UC_UPR_ZAF_S13_2012_UbuntuCentre_E.pdf, accessed December 2012.

⁴²⁵ World Vision South Africa, *Universal Periodic Review: South Africa – The Right to Health*, November 2011,

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/WVSA_UPR_ZAF_S13_2012_WorldVisionSouthAfrica_E.pdf, accessed December 2012.

⁴²⁶ Joint Submission 1 “Children’s Rights Organisations Submission to the Universal Periodic Review of South Africa – 13th Session in 2012”

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS1_UPR_ZAF_S13_2012_JointSubmission1_E.pdf, accessed 21 February 2013.

⁴²⁷ Joint Submission 2 “The Situation of the Rights of the Child in South Africa”,

http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS2_UPR_ZAF_S13_2012_JointSubmission2_E.pdf, accessed 21 February 2013.

⁴²⁸ Joint Submission 3 “Joint Submission to the UN Universal Periodic Review 13th Session of the UPR Working Group 28 November 2011”, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS3_UPR_ZAF_S13_2012_JointSubmission3_E.pdf, accessed 21 February 2013.

Links, Highway Africa Chair in Media and Information Society, Rhodes University, IDASA: An African Democracy Institute, Open Democracy Advice Centre, Right 2 Know Campaign, Southern African NGO Network, Section27 and the Socio-Economic Rights Institute of South Africa (SERI), focussing on freedom of expression, the right to information, freedom from censorship, freedom of the press, the right to privacy, and the importance of affordable access to the internet;⁴²⁹

- (v) Joint Submission 5 by Lawyers for Human Rights and CoRMSA;⁴³⁰
- (vi) Joint Submission 6 by Centre for Applied Psychology of the University of South Africa, CoRMSA, Durban Lesbian and Gay Community Health Centre, Forum for the Empowerment of Women, Gay and Lesbian Memory in Action, Gay and Lesbian Network, Human Rights First, Independent Projects Trust, Scalabrini Centre of Cape Town, Sonke Gender Justice and South African Jewish Board of Deputies, focussing on the rights of refugees and migrants;⁴³¹
- (vii) Joint Submission 7 by Child Welfare South Africa, focussing on violence against children.⁴³²

Many of the stakeholder submissions were critical of the South African government's alleged failure to fully implement the recommendations of the first UPR cycle, and while they often acknowledged that some progress had been made in various areas, there was still grave cause for concern in many areas and significant further efforts were required. Joint Submission 3, in particular, noted with concern that South Africa's human rights organisations or 'democracy supporting institutions', including the SAHRC, were not adequately supported by government.⁴³³

With regard to cooperation with treaty bodies, Joint Submission 1 recommended that the government establish a mechanism that will coordinate reporting on child rights to treaty bodies and the UPR. It encouraged the government to establish and fund a formal machinery to promote the participation of many civil society organisations in consultations and to make reporting processes more participatory. The ICJ recommended that South Africa accept visit requests by the various Special Rapporteurs dealing respectively with 1) the right to food, 2) extrajudicial, summary or arbitrary executions, and 3) racism, racial discrimination, xenophobia and related intolerance. IHRB recommended that South Africa invite the UN Working Group on Business and Human Rights and enable it to perform an audit on the level of human rights protection from the actions of local and multinational business enterprises.

The various submissions noted numerous areas of concern and made recommendations in terms implementation of international human rights obligations, including:

⁴²⁹ Joint Submission 4 "Joint Submission to the Universal Periodic Review of The Republic of South Africa, Submitted 28 November 2011" http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS4_UPR_ZAF_S13_2012_JointSubmission4_E.pdf, accessed 21 February 2013.

⁴³⁰ Joint Submission 5, "The situation of the rights of refugees and migrants in South Africa: follow-up since 2008" http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS5_UPR_ZAF_S13_2012_JointSubmission5_E.pdf, accessed 221 February 2013.

⁴³¹ Joint Submission 6, "Violent Hate Crime in South Africa" http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS6_UPR_ZAF_S13_2012_JointSubmission6_E.pdf, accessed 21 February 2013.

⁴³² Joint Submission 7 "UN Submission for Universal Periodic Review on Status of Human Rights" November 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS7_UPR_ZAF_S13_2012_JointSubmission7_E.pdf, accessed 5 December 2012.

⁴³³ Joint Submission 3 "Joint Submission to the UN Universal Periodic Review 13th Session of the UPR Working Group 28 November 2011", http://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/JS3_UPR_ZAF_S13_2012_JointSubmission3_E.pdf, accessed 21 February 2013.

- gender based violence against women and girls and continued hate crimes against LGBTI persons;
- continuing violent xenophobic attacks on migrants; discrimination against migrants and poor migration policy and structures;
- continuing high levels of police brutality and the perceived culture of impunity in the criminal justice system.;
- lack of specific torture legislation;
- lack of specific human trafficking legislation;
- high levels of physical and sexual abuse of children;
- the potential restrictions on the freedom of the press imposed by the Protection of State Information Bill;
- issues surrounding labour standards especially in the agricultural and mining sectors;
- lack of access to basic services including water and sanitation;
- disparities in access to healthcare and education dependent on income and location;
- and lack of adequate housing.

13.2.3. The “Outcome Report” of the Working Group

The “Outcome Report” provides a summary of the interactive dialogue between the state under review and the states taking part in the discussion. It therefore consists of the questions, comments and recommendations made by states to the country under review, as well as the responses by the state under review.

The recommendations acceptable to South Africa are contained in Annex A of the Outcome Report.⁴³⁴ The recommendations cover the following main areas:

- a) Promotion, protection and fulfilment of economic, social and cultural rights and the attainment of the MDGs.
- b) Attainment of social cohesion and social transformation.
- c) Empowerment and protection of vulnerable groups: marginalisation, social exclusion and economic disparities.
- d) Elimination of racism, racial discrimination, xenophobia and related intolerance.
- e) Combating incitement to hatred and punishing hate crimes (see Chapter 1 ICCPR).
- f) Violence against women and children, manifestations of domestic and social violence and human trafficking.
- g) Criminalisation of torture and other cruel, inhuman or degrading treatment and punishment.
- h) Ratification of outstanding IHL and IHRL instruments.
- i) Compliance with international treaty law and obligations.
- j) Recommendations numbers 124.1, 124.2, 124.3, 124.4, 124.5, 124.6, 124.7, 124.8 and 124.9 of Iraq, Burkina Faso, UK, Hungary, Brazil, Chad, Palestine, Slovenia, Portugal, Argentina, Spain, Nicaragua, Slovakia, France recommended that South Africa “ratify ICESER and its Optional Protocol, OP-CAT, Enforced Disappearances, Migrant Workers, ILO 189, OP-CRC without delay”.⁴³⁵

⁴³⁴ Human Rights Council, Outcome Report of the Working Group, Annex A, Recommendations Acceptable to South Africa, 9 July 2012, A/HRC/21/16, pg. 1 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>, accessed 17 December 2012.

⁴³⁵ Ibid.

13.2.4. Recommendations not Acceptable to South Africa (Annex B)

- a) Recommendation Number 124.95 by Norway to ensure that the Traditional Courts Bill (TCB) does not violate South Africa's international human rights obligations or its own Constitution in the areas of women's rights and equality.⁴³⁶ This was not acceptable to South Africa on the basis that the TCB was still the subject of "national consultation and dialogue" and it was therefore not appropriate to make comment on the bill at the time⁴³⁷ (see Chapter 7 for further discussion of the TCB in the context of the rights of women and CEDAW).
- b) Recommendations⁴³⁸ relating to concerns over the Protection of State Information Bill (POSIB) raised by Norway, Canada, Czech Republic, Poland, Switzerland, Portugal, Sweden, USA, Germany, Austria.⁴³⁹ South Africa did not accept the recommendations on the basis of the assertion that POSIB is in line with international human rights law (particular Article 19 ICCPR) and the South African Constitution. Further, as with the TCB, comment on this matter would not be appropriate as the legislation is still before Parliament and the subject of on-going national consultation⁴⁴⁰ (see Chapter 1 for further discussion of POSIB in the context of the ICCPR).

13.2.5. Recommendations Rejected by South Africa (Annex C)

- a) Canada recommended that the South African government investigate without delay all allegations of sexual exploitation and abuse by South African peacekeepers in Africa, prosecute and punish offenders, take measures to prevent future offences and report to UN peacekeeping authorities on such measures.⁴⁴¹ South Africa rejected this recommendation on the basis that it considered the claims exaggerated and politically motivated. On this basis, the South African government would take the issue up on a bilateral basis with the Canadian government.⁴⁴²

⁴³⁶ Human Rights Council, *Outcome Report of the Working Group, Annex B, Recommendations Not Acceptable to South Africa*, 9 July 2012, A/HRC/21/16, pg. 1 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>, accessed 17 December 2012.

⁴³⁷ Ibid.

⁴³⁸ Recommendation numbers 124.97, 24.98, 124.99, 124.100, 124.101, 124.102, 124.103, 124.104, 124.105, 124.106 and 124.107.

⁴³⁹ Ibid Page 3.

⁴⁴⁰ Ibid.

⁴⁴¹ Human Rights Council, *Outcome Report of the Working Group, Annex C, Recommendations Rejected by South Africa*, recommendation number 124.96, 9 July 2012, A/HRC/21/16, pg. 1 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>, accessed 17 December 2012.

⁴⁴² Ibid.

PART B

THE REGIONAL SYSTEM



14. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights (ACHPR) (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms on the African continent.

The Organisation of African Unity (OAU) (now the African Union) adopted a resolution at its 1979 Assembly of Heads of State and Government, calling for the creation of a committee of experts to draft a continent-wide human rights instrument, similar to regional instruments already in existence, for example the European Convention on Human Rights, while taking into account the particular African context.

The Charter was approved at the OAU's 1981 Assembly and came into effect three months following "the reception by the Secretary General of the instruments of ratification or adherence of a simple majority"⁴⁴³ of the OAU's member states, on 21 October 1986 – in honour of which 21 October was declared "African Human Rights Day". In accordance with Article 62 of the African Charter on Human and Peoples' Rights, states parties to the ACPHR are required to submit every two years a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter.

The ACPHR recognises most universally accepted civil and political rights, similar to those set out in the ICCPR. The civil and political rights recognised in the ACPHR include: the right to freedom from discrimination (Article 2 and 18(3)); equality (Article 3); life and personal integrity (Article 4); dignity (Article 5); freedom from slavery (Article 5); freedom from cruel, inhuman or degrading treatment or punishment (Article 5); rights to due process concerning arrest and detention (Article 6); the right to a fair trial (Article 7 and 25); freedom of religion (Article 8); freedom of information and expression (Article 9); freedom of association (Article 10); freedom to assembly (Article 11); freedom of movement (Article 12); freedom to political participation (Article 13); and the right to property (Article 14).

The ACPHR also recognises certain economic, social and cultural rights similar to those set out in the ICESCR, and overall the Charter is considered to place considerable emphasis on these rights. The ACPHR recognises the right to work (Article 15), the right to health (Article 16), and the right to education (Article 17). Through a decision by the African Commission on Human and Peoples' Rights (the African Commission), *SERAC v Nigeria* (2001), the ACPHR is also understood to include a right to housing and a right to food as "implicit" in the Charter, particularly in light of its provisions on the right to life (Article 4), right to health (Article 16) and the right to development (Article 22).

It diverges from other regional or international human rights documents by its focus on "Peoples' rights". The Charter awards the family protection by the state (Article 18), while "peoples" have the right to equality (Article 19), the right to self-determination (Article 20), to freely dispose of their wealth and national resources (Article 21), the right to development (Article 22), the right to peace and security (Article 23) and "a generally satisfactory environment" (Article 24).

⁴⁴³ African Charter of Human and People's Rights, Article 63.

14.1. African Commission on Human and Peoples' Rights

The African Commission was established in 1987 and is charged with oversight and interpretation of the ACHPR and is now headquartered in Banjul, Gambia. The African Commission is an independent organ established under the ACHPR with the mandate to promote and protect human and peoples' rights in Africa. The African Commission comprises 11 Members elected for a term of six years, renewable once. The members serve in their personal capacity, in an independent and impartial manner. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created (see Chapter 15 for further details). The protocol came into effect on 25 January 2005.

One of the main functions of the African Commission is receive, investigate and opine upon communications submitted by individuals, NGOs and states parties to the Charter, alleging violations of human rights by these states.⁴⁴⁴ The African Commission will only hear communications of persons or groups of persons of a state alleging violations if that state has ratified the Charter. If it is a state submitting a complaint against another state, then both must have ratified the Charter. Furthermore, complainants must have exhausted all available domestic legal remedies.

14.2. ACHPR and African Commission in 2012

The African Commission held two ordinary sessions, the 51st and 52nd in May and December 2012 respectively; 52nd Ordinary Session coincided with the 25th anniversary of the establishment of the Commission.⁴⁴⁵ 2012 also saw the First Annual Joint Meeting of the African Commission with the African Court on Human and Peoples' Rights, held in Algiers in July.⁴⁴⁶

Two extraordinary sessions (EOS) (the 11th and 12th) were convened during 2012 and held in March and August. The extraordinary sessions were convened to deal with the backlog of Communications amongst other outstanding matters. The 11th EOS examined 14 Communications and adopted two Resolutions, one on the human rights situation in Senegal and the other on the human rights situation in northern Mali. The 12th EOS examined: 18 Communications and adopted the Reports of the Promotion Mission to the Central African Republic; the Promotion Mission undertaken by the Committee for the Prevention of Torture in Africa to the Islamic Republic of Mauritania; and the Working Group on Communications. The "Manual for the Promotion and Protection of the Rights of Indigenous Peoples/Communities" was also adopted during the 12th EOS.⁴⁴⁷

2012 marked the 25th anniversary of the establishment of the African Commission. During the 52nd ordinary session, held in December 2012, the African Commission held panel discussions aimed at reviewing the work and performance of the African Commission since its establishment. The panel discussion covered the

⁴⁴⁴ Organisation for African Unity, The African Commission Human and Peoples' Rights, Guidelines for the submission of communications http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf, accessed 16 January 2013.

⁴⁴⁵ ACHPR, 32nd and 33rd Activity Reports, http://www.achpr.org/files/activity-reports/32-and-33/achpr5152_actrep32and33_eng.pdf, accessed 19 February 2013.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

relationship between the African Commission and its member states, other AU bodies and its partners, including NHRIs, NGOs and the United Nations, in addition to the jurisprudence of the Commission. Panellists included former Chairpersons of the Commission, other AU organs, states parties, NHRIs, inter-governmental institutions, international and regional organisations, civil society organisations, and a former Secretary to the Commission.

The outcome of these discussions included the following recommendations:

- (i) the need for continuous and constructive dialogue between the African Commission and all stakeholders and especially states parties;
- (ii) the need for political will on the part of states parties to cooperate with the African Commission and comply with the Commission's requests, recommendations and decisions;
- (iii) the need for adequate funding from the AU for the activities of African Commission;
- (iv) the need for the African Commission to improve collaboration with other AU Organs with a human rights mandate, as well as with NHRIs, NGOs and other partners;
- (v) the continuing need for the African Commission to interpret the ACHPR in light of African traditions and values to respond to Africa's specific needs, and to do this without compromising or losing the essence of international instruments and other human rights norms;
- (vi) the need for the ACHPR to be reviewed to either create a permanent Chair or adequately resource it as a temporary position, and to give the African Commission greater involvement in the recruitment of staff including the Secretary; and
- (vii) the need to expedite the consideration of Communications.⁴⁴⁸

Other events were held throughout the continent in 2012 to commemorate this anniversary.

14.3. South Africa and the ACHPR and African Commission in 2012

South Africa ratified ACHPR in 1996 and submitted its initial report in January 1998, covering the period 1996-1998.⁴⁴⁹ South Africa's first periodic report, covering the period 1998-2001 was submitted in May 2005 and considered by the Commission at its 38th Ordinary Session.⁴⁵⁰

In its concluding observations to South Africa's first periodic report the African Commission highlighted the following areas of concern:

- (i) The lateness of the report, being four years overdue, in particular the fact that the vast majority of the information and statistics therein was severely outdated by the time the report was reviewed by the African Commission,⁴⁵¹

⁴⁴⁸ Ibid.

⁴⁴⁹ Republic of South Africa: Initial Report on the African Charter on Human and Peoples' Rights: 1998

http://www.achpr.org/files/sessions/25th/state-reports/1st-1996-1998/staterep1_southafrica_1998_eng.pdf, accessed 16 January 2013.

⁴⁵⁰ Republic of South Africa: First Periodic Report on the African Charter on Human and Peoples' Rights: 2001

http://www.achpr.org/files/sessions/38th/state-reports/1st-1994-2001/staterep1_southafrica_2001_eng.pdf, accessed 16 January 2013.

⁴⁵¹ African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa, 38th Ordinary Session, 21 November- 5 December 2005, http://www.achpr.org/files/sessions/38th/conc-obs/1st-1999-2001/achpr38_conc_staterep1_southafrica_2005_eng.pdf, accessed 20 February 2013.

- (ii) The lack of involvement of institutions involved in the promotion and protection of various civil, political and socio-economic rights and civil society actors in the preparation of the report, as required by Article 62 of the ACHPR;⁴⁵²
- (iii) The lack of depth and analysis in relation to particular challenges faced by the South Africa and policy measures taken to combat them in the context of the rights protected under the ACHPR;⁴⁵³
- (iv) The lack of detail provided by South Africa in relation to the measures taken to eradicate xenophobic violence directed against migrants;⁴⁵⁴
- (v) The extremely high levels of sexual violence suffered by women and children in South Africa;⁴⁵⁵ and
- (vi) The lack of general awareness of the ACHPR and its provisions in South Africa.

The African Commission further recommended that the South African government:

- (i) work more closely with civil society and the international community to ensure effective enjoyment of the rights protected under the ACHPR;⁴⁵⁶
- (ii) take measures to ensure widespread knowledge and understanding of the ACHPR throughout the country including in rural areas, including making the text available in local languages, and to pursue effective implementation of the Charter;⁴⁵⁷
- (iii) take appropriate measures to ensure the speedy and effective consideration of asylum applications;⁴⁵⁸
- (iv) undertake studies in order to develop and implement effective policy and measures, including care and rehabilitation to prevent and combat the sexual exploitation of children;⁴⁵⁹
- (v) take all appropriate measures to ensure that the rights of children belonging to minority groups, including the Khoi-Khoi and San, are guaranteed, particularly those rights concerning culture, religion, language and access to information;⁴⁶⁰
- (vi) take the necessary measures to fully implement the recommendations of the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa;⁴⁶¹
- (vii) make the declaration under Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of An African Court on Human and Peoples' Rights;⁴⁶² and
- (viii) ensure that anti-terrorism complies with the provisions of the various human rights instrument to the with South Africa is a party, including the ACHPR;⁴⁶³

The African Commission further advised that South Africa should take steps to present its next periodic report to the Africa Commission in a timely fashion in accordance with Article 62 of the ACHPR, which report should address the concerns highlighted by the African Commission in its concluding observations and set

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid.

out the progress made in the achievement of the recommendations summarised above. However, to date South Africa's second, third and fourth periodic reports remain outstanding.⁴⁶⁴

14.3.1. Marikana Mine Incident

On 23 August 2012 the African Commission sent an urgent appeal to the government of South Africa in relation to the tragic events at Marikana on 16 August in which 34 protesting miners were shot dead by police. The African Commission requested that the Government, in light its obligations under the ACHPR and other regional and international instruments:

- (i) Fully investigate the acts of violence which have been perpetrated by the striking
- (ii) workers and the police;
- (iii) Ensure that all the perpetrators are brought to justice; and
- (iv) Take all necessary measures to ensure the protection of its civilians in accordance with its regional and international human rights obligations.⁴⁶⁵

14.3.2. Prevention of Torture

In August 2012, a three day commemorative seminar was held in Johannesburg to mark the 10th anniversary of the adoption of the Robben Island Guidelines the Committee for the Prevention of Torture in Africa (CPTA), a subsidiary mechanism of the African Commission, in collaboration with the SAHRC, the Office of the United Nations High Commissioner for Human Rights (OHCHR), and the Association for the Prevention of Torture (APT).⁴⁶⁶

The primary aim of the seminar was to enhance torture prevention efforts in Africa through the assessment of the impact of the Robben Island Guidelines ten years since their adoption, to share good practice and experiences in implementation, to identify specific challenges that hinder the effective implementation and to propose and discuss possible solutions to these challenges. The result of the seminar was the 'Johannesburg Declaration and Plan of Action on the Prevention and Criminalisation of Torture'.⁴⁶⁷ This outcome document placed emphasis on the need for all African countries to take immediate steps ratify CAT and OPCAT and fully adhere to their obligations under these instruments and to criminalise torture in their jurisdictions.⁴⁶⁸

14.3.3. Peoples' Rights

The ACHPR departs from other international human rights instruments by the particular emphasis placed on the respect for and promotion of peoples' rights. For instance, under the ACHPR, indigenous peoples' have the right to equality (Article 19), the right to self-determination (Article 20), to freely dispose of their wealth and national resources (Article 21), the right to development (Article 22), the right to peace and security (Article 23) and "a generally satisfactory environment" (Article 24).

⁴⁶⁴ State Reporting, ACHPR, <http://www.achpr.org/states/>, accessed 19 February 2013.

⁴⁶⁵ Press Statement on the 10th Anniversary of the Adoption of the Robben Island Guidelines and on the Deaths of Miners at the Lonmin Marikana Mine, 23 August 2012, <http://www.achpr.org/press/2012/08/d124/>, accessed 20 February 2013.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ Johannesburg Declaration and Plan of Action on the Prevention and Criminalization of Torture, 23 August 2012, <http://www.apr.ch/content/files/region/RIG+10%20Seminar%20Outcome%20Document.pdf>, accessed 22 February 2013.

It has been difficult to effectively identify who is “indigenous” in the context of South Africa’s racial and ethnic makeup. Any persons of non-European origin in South Africa could be considered as “indigenous peoples” and this is often the case in South African discourse.⁴⁶⁹ However, in the report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities the criteria proposed placed more emphasis on self-identification and groups that are in a structurally-subordinate position to the dominating groups and the state. The term is therefore applied to refer to the various San and Khoi ethnic groups.⁴⁷⁰ Marginalisation and discrimination are considered key considerations in the identification of a group as indigenous for the purposes of the protection and promotion of the rights of these groups. In the South African context, it is interesting to note that group of Afrikaners have twice attended the United Nations Working Group on Indigenous Populations claiming indigenous status and concordant protections. This claim has been rejected.⁴⁷¹

In South Africa, there currently exist five main groupings self-identifying as indigenous (in terms of the United Nations guidelines). They are namely Nama; Griqua; Cape Khoi; San and Koranna. Each grouping is sub divided into different tribal groupings. These five main groupings are represented in a forum called the National Khoi-San Council (NKC).⁴⁷² South Africa’s colonial and subsequent apartheid history led to the disenfranchisement of these indigenous groups and the suppression of their culture - note that the various Khoi and San languages are not amongst the 11 official recognised languages of South Africa. During apartheid, these groups were classified as “coloured,” further engraining the denigration of these traditional cultures.

The South African Constitution establishes the right of communities to live under customary laws and there are structures, such as the National House of Traditional Leaders, which advises national government on traditional affairs and customary laws, and the Department of Traditional Affairs in place to protect and promote the rights of indigenous peoples. Post-apartheid, the Khoi and San are the only indigenous communities whose leadership is not formally recognised along with their traditional lands.⁴⁷³

A National Traditional Affairs Bill was proposed in 2011 and remains under consultation. The NKC reiterated in 2012 the need for statutory recognition of indigenous peoples. However, interestingly the various Khoi and San peoples and their traditional structures were not considered in the drafting of the TCB, currently before Parliament, which focuses exclusively on the former Bantu homelands.

⁴⁶⁹ Centre for Human Rights, “South Africa: Constitutional, Legislative and Administrative provisions concerning indigenous peoples” 2009, http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_SouthAfrica.pdf, accessed 23 February 2013.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² The Griqua National Forum (GNF) and the Khoe Cultural Heritage and Development Council (KCHDC), Collective Statement, 2012, http://naturaljustice.org/wp-content/uploads/pdf/NKC_Statement.pdf, accessed 21 February 2013.

⁴⁷³ Ibid.

15. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child (ACRWC)⁴⁷⁴ is a region-specific children's rights instrument which builds on the UNCRC. It entered into force on November 29, 1999. As of 2010, all member states of the AU have signed the Charter and all but eight have ratified it.⁴⁷⁵

According to Professor Frans Viljoen, there are five additional rights protected in the ACRWC, and that are not in the UNCRC.⁴⁷⁶ These include the obligation of state parties to ensure equality of rights and responsibilities of spouses and to provide for the necessary protection of the child in the event of the dissolution of the partnership;⁴⁷⁷ detailed provisions specific to the abolition and discouragement of harmful traditional and cultural practices against children;⁴⁷⁸ the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination as well as states subject to military destabilisation;⁴⁷⁹ the provision of protection of children with imprisoned mothers;⁴⁸⁰ and finally the responsibilities of the child in accordance with age and ability.⁴⁸¹ In some instances, the ACRWC also sets higher standards than the UNCRC, for instance, by having a higher minimum age of 18 years for children to be recruited into armed forces, as opposed to the UNCRC's 15 years.

15.1. African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (CERWC) was established by the ACRWC. It is mandated under Article 42 of the ACRWC to promote and ensure the protection of the rights of the child enshrined within the Charter. The CERWC holds two sessions per year. Sessions normally consist of representatives from partner organisations providing a brief presentation, consideration of state reports and discussion of other critical issues. The CERWC is comprised of 11 experts who serve in their individual capacity for a term of five years.

In accordance with article 62 of the African Charter, state parties to the ACRWC are required to submit a report to the CERWC every two years on the legislative or other measures taken to give effect to the rights and freedoms recognised and guaranteed by the ACRWC.

The CERWC is empowered to receive and examine reports submitted by state parties on the measures they have adopted to give effect to the provisions of the ACRWC and the progress received in the exercise of the rights recognised. Initial reports are expected to be submitted two years after the CERWC starts its work, and thereafter every three years. The CERWC is the only child rights treaty body in the world with competence to receive complaints against states. Grievance against state parties may relate to any issue covered by any individual, group or non-governmental organisation recognised by the AU, a member state or

⁴⁷⁴ See Charter at acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acerwc/, accessed 8 February 2013.

⁴⁷⁵ See ratification table at aceraw.org/wp-content/uploads/2011/03/French-and-English-ACERWC-Updated-Status-of-the-ACRWC.pdf, accessed 8 February 2013.

⁴⁷⁶ Viljoen, F: *African Human Rights Views* in Human Rights: Universality and Diversity, Martinus Nijhoff Publishers, the Hague, 2001.

⁴⁷⁷ Article 18, ACRWC.

⁴⁷⁸ Article 21 ACRWC (which is illustrated in Article 24(3) of the UNCRC, but without detail or reference to specific practices).

⁴⁷⁹ Article 26, ACRWC.

⁴⁸⁰ Article 30, ACRWC.

⁴⁸¹ Article 31, ACRWC.

the UN. The CERWC may investigate or conduct fact-finding missions in state parties to discover systematic or gross violations of child rights.⁴⁸² In 2011, the Committee handed down its first decision on the rights of children of Nubian Descent.⁴⁸³

15.2. ACRWC and CERWC in 2012

The Committee's 19th and 20th sessions were held from the 26th - 30th of March 2012 and from the 12th - 16th November 2012. Both took place in Addis Ababa.⁴⁸⁴ The Day of the African Child was held on the 13 June 2012. Its theme was "The rights of children with disabilities: the duty to protect, promote and fulfil".⁴⁸⁵ Each year, the Day of the African Child provides an opportunity to raise awareness of a particular issue, for state parties to renew their on-going efforts in the realisation of rights and overcoming barriers to doing so, and for consolidation of efforts to improve the lives of vulnerable children.⁴⁸⁶ State parties are then requested to report in the coming year on their activities related to the DAC of the previous year. It has been noted with concern by the Committee that most states routinely fail to do so.⁴⁸⁷

15.3. South Africa and the ACRWC

South Africa has been a signatory to the ACRWC since 1997 and ratified it in 2000. South Africa's initial report to the ACRWC is still outstanding. There has been an increasing movement nationally and regionally towards lobbying for compliance with reporting requirements to this regional treaty body. In 2012, the Child Rights Network of Southern Africa was launched at the Second Conference on Children's Rights in Southern Africa. One of the key components of the resultant conference statement was to "guarantee timeous reporting to treaty bodies, especially the African Charter on the Rights and Welfare of the Child".⁴⁸⁸

There are many parallels between this regional instrument and its international counterpart; namely the UNCRC. Given that South Africa has largely harmonised the provisions set forth in these two instruments in its Constitution and in national legislation, it is important to note that instances of CRC compliance amount to concomitant ACRWC compliance. This chapter of the report should thus be read with Chapter 6, which pertains to the UNCRC. It is also important, however, to note that there are certain provisions of the ACRWC which are unique, and which inform the way in which law, policy and implementation need be crafted by its state parties.

The following encapsulates examples where South Africa has gravitated specifically toward increased ACRWC compliance. Allegations of harmful traditional and customary practices against children continued to surface in 2012. Incidents of these human rights violations are extremely difficult to monitor as they are often unreported or unrecorded by police. One such practice is that which arises in certain instances of *Ukuthwala*,

⁴⁸² See acerwc.org.za, accessed 8 February 2013.

⁴⁸³ www.ihrda.org/wp-content/uploads/2011/09/002-09-Nubian-children-v-Kenya-Eng.pdf, accessed 8 February 2013.

⁴⁸⁴ See the Session Report at: acerwc.org/sessions/, accessed 8 February 2013.

⁴⁸⁵ *Concept Note on the Commemoration of the Day of the African Child* 16 June 2012 (ACRWC) www.crin.org/docs/Concept-note-of-day-of-the-african-child-2012.pdf, accessed 8 February 2013.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Conference Report: Second Southern Africa Conference on Children's Rights in Southern Africa. See Conference Statement at childrensrighstconference2012.blogspot.com/, accessed 8 February 2013.

the abduction and forced marriage of underage girls. The South African Commission for Gender Equality released a report on its investigation into this practice. It recommended that a crisis-line be established for girls at risk for becoming subject to this practice, that government designate officials to receive reports of *Ukuthwala*, and that a co-ordinated response strategy be developed to ensure dispatch of relevant officials to ensure matters are addressed accordingly.⁴⁸⁹

Furthermore, there has been an increasing recognition on the need to promote advocacy for both children to have age-appropriate responsibilities as well as rights. The responsibilities of children are inextricably linked to the right of the child to participate and thus the concept of active citizenship.⁴⁹⁰ A poignant example of a child-led initiative in this regard is the Girls/Boys Education Movement (G/BEM). The Gauteng West District hosted its first Annual Conference convened and run by child members of this organisation. Commissioner Lindiwe Mokate of the SAHRC presented and acted as panellist in numerous sessions, including the rights and responsibilities of children. Initiatives of this nature are firmly aligned with the ethos of the ACRWC as they both empower children to make a positive contribution to their families and communities and also ultimately to become informed and responsible adults.

15.4. Conclusion and Recommendations

- 15.4.1 As articulated in the chapter on the UNCRC, South Africa has largely assimilated its international obligations into its national legal framework. A progressive framework, however, means nothing without duty-bearers ensuring that this reaches the children it was created to benefit. While this is not a uniquely South African problem, it is a challenge which is common to many states on the African continent. Increased monitoring and accountability mechanisms are required in order to address this.
- 15.4.2 As a country with a mixed legal system, and where African customary law is applicable to the majority of children living in South Africa, it is important to increase and promote understanding of how this law currently operates towards children. In particular, this denotes that harmful traditional and cultural practices in their entirety should be eradicated. This should be done through education, the enforcement of existing sanctions, continued research, monitoring and advocacy.

⁴⁸⁹ See a summary report at www.info.gov.za/speech/DynamicAction?pageid=461&sid=33373&tid=95041, accessed 8 February 2013.

⁴⁹⁰ Active citizenship is highlighted as an important part of the realisation of the objectives of constitutional democracy as set forth in the National Development Plan 2030. The Plan is available at: <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>, accessed March 2013.

16. AFRICAN REGIONAL AND SUB- REGIONAL COURTS

16.1. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (the Court) was established by virtue of Article 1 of the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol), which was adopted by member states of the then OAU in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004 after it was ratified by more than 15 countries.

To date, only 26 states have ratified the Protocol: Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.⁴⁹¹

The Court has jurisdiction over cases and disputes submitted to it concerning the interpretation and application of the ACHPR, the Protocol and any other relevant human rights instrument ratified by the party States. According to Article 5 of the Protocol and Rule 33, the Court may receive complaints and/or applications submitted to it either by the ACHPR, state parties to the Protocol or African intergovernmental organisations. Ngos with observer status before the ACHPR and individuals may only make direct applications to the Court if they are from states which have made a declaration accepting the jurisdiction of the Court. As of October 2012, only five countries had made such a declaration. Those countries are Burkina Faso, Ghana, Malawi, Mali, and Tanzania.⁴⁹²

The Court is composed of eleven judges who are nationals of member states of the AU. The first Judges of the Court were elected in January 2006, in Khartoum, Sudan and sworn in before the Assembly of Heads of State and Government of the African Union on 2 July 2006, in Banjul, the Gambia.

The judges of the Court are elected in their individual capacity but must be first nominated by their respective state. The judges are elected for six or four year terms, which are renewable once. The judges of the Court elect a President and Vice-President of the Court who serve a two year term. They can only be re-elected once. The President of the Court resides and works on a full time basis at the seat of the Court, while the other ten (10) judges work on a part-time basis. In the accomplishment of his/her duties, the President is assisted by a registrar who performs registry, managerial and administrative functions of the Court.

On Monday, 17 September 2012, newly elected judges of the African Court on Human and Peoples' Rights were sworn in at its seat, at the Mwalimu Julius Nyerere Conservation Centre, Arusha, Tanzania in accordance with Article 16 of the Protocol establishing the African Court and Rule 4 (2) of the Rules of the Court.

⁴⁹¹ The African Court on Human and Peoples' Rights, <http://www.au.int/en/organs/cj>, accessed 15 January 2013.

⁴⁹² Ibid.

The judges who were sworn-in are Mr Ben Kioko (from Kenya) and Justice El Hadji Guissé (from Senegal). They were appointed by the 19th Assembly of Heads of State and Government of the African Union on 16 July 2012 for a six (6) year term each.⁴⁹³

The Court delivered its first judgment in 2009 following an application dated 11 August 2008 by Mr Michelot Yogogombaye against the Republic of Senegal. As at June 2012, the Court has received 24 applications. It has already finalised 12 cases and rendered decisions thereon. Currently, the Court has a certain number of pending cases on its table to examine including one Request for advisory opinion. Four ordinary sessions (24th, 25th, 26th and 27th, in March, June, September and December respectively) of the Court were held in 2012, and one extraordinary session (the 5th) was also held in October.⁴⁹⁴ The Court finalised 3 cases in 2012,⁴⁹⁵ two of which involved South Africa.⁴⁹⁶ Eight cases remain pending at the time of writing.⁴⁹⁷

16.2. South Africa and the Court in 2012

Delta International Investments S.A., Mr and Mrs A.G.L. De Lange brought a case against the Republic of South Africa alleging torture, discrimination and violation of their rights to dignity, property and information in contravention of the South African Constitution and the ACHPR. The Court struck out the application on the basis that it lacked jurisdiction.⁴⁹⁸ South Africa has not made a declaration accepting the jurisdiction of the Court.

The Court has been criticised as lacking commitment and impetus to take governments to task over human rights violation. This is reflected by the delays in the establishment of the Court and the fact that since its establishment it has received only 23 applications,⁴⁹⁹ despite myriad human rights abuses across the continent. As mentioned above, only five states have adopted the Declaration accepting the jurisdiction of the Court, so that NGOs and individuals may make applications, reflecting an unwillingness of governments to subject themselves to censure. The Court has held “sensitisation” seminars throughout Africa to outline the role of the Court. One such seminar was held in Johannesburg in 2011. The event was attended by the SAHRC and CGE.⁵⁰⁰ However, it has been pointed out that it is unusual for Courts to have to raise their public profile or solicit work,⁵⁰¹ reflecting a lack of knowledge or interest on the part of governments and the lack of concrete achievements by the Court.

⁴⁹³ Judges El Hadji Guissé and Ben Kioko Sworn-in, 17 September 2012, <http://www.african-court.org/en/index.php/news/latest-news/269-new-judges-sworn-in-at-the-african-court>, accessed 17 January 2013.

⁴⁹⁴ African Court's Calendar of Events <http://www.african-court.org/en/index.php/news/calendar-of-events>, accessed 14 January 2013.

⁴⁹⁵ Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v Republic of South Africa, Case 002/2012; Emmanuel Joseph Uko and Others v Republic of South Africa, case 004/2012; and Amir Adam Timan v. Republic of Sudan, case 005/2012.

⁴⁹⁶ Cases Status, Applications Received as at May 2012, <http://www.african-court.org/en/index.php/about-the-court/brief-history/40-cases-status/124-cases-status1>, accessed 16 January 2013.

⁴⁹⁷ Ibid.

⁴⁹⁸ Application No 002/2012 - Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v. The Republic of South Africa <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases/2-home/187-application-no-002-2012-delta-international-investments-s-a-mr-and-mrs-a-g-l-de-lange-v-the-republic-of-south-africa>, accessed 16 January 2013.

⁴⁹⁹ African Court of Human and People's Rights, List of all cases <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases>, accessed 18 January 2013.

⁵⁰⁰ See, http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=34&Itemid=4&lang=en&limitstart=4, accessed March 2013.

⁵⁰¹ <http://mg.co.za/article/2012-02-24-lack-of-commitment-dooms-africas-human-rights-court>, accessed 18 January 2013.

16.3. The Southern African Development Tribunal

The Southern African Development Community Tribunal (SADC Tribunal) was initially established as an international court for southern Africa with the mandate to apply SADC law, relevant human rights instruments and applicable national law, pursuant to Article 9 of the SADC Treaty. It was not a court of appeal for domestic courts and could only be approached by natural or juristic persons after all domestic remedies had been exhausted.

In one of its first and ultimately most controversial cases, *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*⁵⁰² the SADC Tribunal decided that the government of Zimbabwe may not evict farmer Mike Campbell from his land, and that farm evictions per Amendment 17 of Zimbabwe's constitution amount to *de facto* discrimination against Whites. Following this decision, Zimbabwe pulled out of the SADC Tribunal, challenging its legitimacy and jurisdiction to enforce decisions. As a result, the 2010 SADC summit then ordered a review of the "functions and [...] terms of reference of the SADC Tribunal",⁵⁰³ a step that a group of legal and human rights organisations describes as "virtually suspending"⁵⁰⁴ this inter-regional court.

At the 2012 SADC summit, which was expected to reinstate the SADC Tribunal, it resolved to limit the jurisdiction of the Tribunal to "disputes between member states", barring individuals and companies from bringing cases. Until 2012, only natural and juristic persons had approached the Tribunal for resolution of complaints, after having first exhausted all domestic remedies. The mandate of the Tribunal was limited to the interpretation of the SADC Treaty and protocols relating to disputes between member states.⁵⁰⁵ The result is that individuals will no longer be able to access the tribunal.⁵⁰⁶ This calls the necessity of the SADC Tribunal into question. Numerous groups including the Commonwealth Lawyers Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association, have criticised the decision as limiting access to justice for citizens of the SADC region.⁵⁰⁷ The SADC Lawyers' Association, have also been extremely critical and have agreed not to support the Tribunal in its current proposed form stating as "an interstate court, governments alone would be able to take each other to the court and that this was highly unlikely to happen, meaning that the court would become a white elephant".⁵⁰⁸

⁵⁰² *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) <http://www.saflii.org/za/cases/SADCT/2008/2.html>, accessed 16 January 2013.

⁵⁰³ Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, 19 August 2010, <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=12314&tid=15559>, accessed 18 January 2013.

⁵⁰⁴ Nomfundo Manyathi, "Outcry over interstate SADC Tribunal", De Rebus, <http://www.saflii.org/za/journals/DEREBUS/2012/27.html>, accessed 16 January 2013.

⁵⁰⁵ Communiqué of the 32nd Summit of SADC Heads of State and Government, 18 August 2012 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf, accessed 16 January 2013.

⁵⁰⁶ Nomfundo Manyathi, "Outcry over interstate SADC Tribunal", De Rebus, <http://www.saflii.org/za/journals/DEREBUS/2012/27.html>, accessed 16 January 2013.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

17. AFRICAN PEER REVIEW MECHANISM

The African Peer Review Mechanism (APRM) was established in 2003 by the African Union in the framework of the implementation of the New Partnership for Africa's Development (NEPAD). It is a voluntary mechanism open to any AU country.⁵⁰⁹ A country formally joins the APRM upon depositing the signed Memorandum of Understanding (MOU) of March 9, 2003 at the NEPAD Secretariat.

The APRM's mandate covers four thematic areas:

- Democracy and Political Governance;
- Economic Governance;
- Corporate Governance; and
- Socio-economic Development.

The APRM is used by member countries to self-monitor all aspects of their governance and socio-economic development. The exercise is not limited to the executive arm of government. It includes the legislative and judicial branches of government as well as an assessment of the private sector, civil society and the media in the areas of governance and socio-economic development.

The National Programme of Action (NPOA) is implemented after the peer review of a Member State at a Summit of the APRM Heads of State and Government (APR Forum). The NPOA is divided into short-term, medium term and long-term goals that can be monitored on a continuous basis.

17.1. APRM in 2012

The 16th and 17th Summits of the Committee of Heads of State and Government Participating in the African Peer Review Mechanism (the APR Forum) were held on 28 January 2012 and 14 July 2012 respectively at the AU Commission headquarters in Addis Ababa, Ethiopia. Jacob Zuma, President of South Africa, attended both summits.

At the 16th summit, the Chairperson announced that the Heads of State of Cape Verde, Equatorial Guinea and Niger were expected to sign the accessional MOU, bringing the number of member states to 33.⁵¹⁰ The peer review of Sierra Leone was conducted and the Forum decided to postpone the peer review of Zambia and Kenya and consider progress reports on the implementation of the National Programmes of Action (NPOA) of Algeria, Nigeria, Uganda and Mali at the next summit.⁵¹¹

⁵⁰⁹ Current Member Countries: Algeria, Republic of Congo, Ethiopia, Ghana, Kenya, Mozambique, Nigeria, Rwanda, South Africa, Uganda, Burkina Faso, Cameroon, Gabon, Mali, Senegal, Mauritius, Egypt, Benin, Angola, Lesotho, Malawi, Sierra Leone, Tanzania, Sudan, Zambia, São Tomé and Príncipe, Djibouti, Mauritania, Togo, Liberia and Niger.

⁵¹⁰ Communiqué issued at the end of the Sixteenth Summit of the Committee of the Heads of State and Government participating in the African Peer Review Mechanism, 28 January 2012, <http://aprm-au.org/sites/default/files/16TH%20APR%20FORUM%20-%20FINAL%20COMMUNIQUE.pdf>, accessed 16 January 2013.

⁵¹¹ Ibid.

The Forum considered and adopted the consensual version of the Operating Procedures for the APRM presented by the APRM Focal Point for South Africa. The 17th summit peer-reviewed the progress reports on the implementation of the National Programmes of Action (NPOA) of Algeria, Uganda and Burkina Faso. The revised APRM questionnaire was presented at the 17th Summit. The APRM Forum expressed the view that it is more focused and responsive to country-specific issues and, it was adopted without amendment.⁵¹² In 2012, Niger became the 31st member country to APRM following signature of the MOU.⁵¹³ Cape Verde and Equatorial Guinea have been accepted as members pending their signing and depositing of the MOU.⁵¹⁴

17.2. South Africa and APRM

South Africa was a founding signatory to the APRM MOU and has played a prominent role since its inception. In January 2012, former Deputy President of South Africa Baleka Mbete was appointed to APRM Panel of Eminent Persons.⁵¹⁵

In April 2012, South Africa hosted an APRM “Focal Points” meeting in Durban. The purpose of the meeting was to discuss making operational of the newly adopted Operating Procedures for the APRM and consider the Revised Country Self-Assessment Questionnaire for the mechanism.⁵¹⁶ South Africa was the fourth APRM member state to be peer reviewed on 1st July 2007 at the 7th Summit. The first NPOA progress report was presented at the 10th Summit of the APRM Forum held on 31st January 2009.⁵¹⁷ In 2011, South Africa submitted its 2nd NPOA report entitled ‘Implementation of South Africa’s APRM Programme of Action’ which examined the country’s track record in fighting corruption, managing diversity, addressing xenophobia and racism, managing elections, consolidating democracy and upholding the rule of law and effective service delivery.

South Africa’s report focused on democracy and political governance including increased civil society participation, advancement of gender equality, access to information on human rights and institutions of justice, and tackling corruption. Concerning economic governance and management, the report focused on unemployment, service delivery challenges, public expenditure management and economic integration in Southern Africa. Finally, the socio-economic development section draws attention to poverty alleviation, the 10-point plan of the health sector to tackle HIV/AIDS and access to education.⁵¹⁸ The APRM noted that there are still outstanding matters in the implementation of the NPOA, thus South Africa shall submit a third report responding to all outstanding matters by 2013.

The DPSA made a presentation to the parliamentary Portfolio Committee on Public Service and Administration on 22 February 2012 on the APRM and South Africa’s progress on implementation of APRM

⁵¹² Communiqué issued at the end of the Sixteenth Summit of the Committee of the Heads of State and Government participating in the African Peer Review Mechanism ECHANISM, 14 July 2012 http://aprm-au.org/sites/default/files/17TH%20APR%20FORUM%20-%20FINAL%20COMMUNIQUE_0.pdf, accessed 16 January 2013.

⁵¹³ Ibid.

⁵¹⁴ <http://aprm-au.org/aprm-map>.

⁵¹⁵ <http://mg.co.za/article/2012-01-29-mbete-appointed-to-african-peer-review-mechanism-panel>, accessed 16 January 2013.

⁵¹⁶ South African Government Information Services, President Jacob Zuma to address meeting of African Peer Review Mechanism (APRM) Focal Points, 12 April 2012 <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=26589&tid=64214>, accessed 16 January 2013.

⁵¹⁷ APRM, Country Overview, <http://aprm-au.org/knowledge-network/south-africa>, accessed 16 January 2013.

⁵¹⁸ PMG, 2nd Report on the Implementation of South Africa’s APRM Programme of Action, 28 January 2011, pmg.org.za/node/24944, accessed 16 January 2013.

National Programme of Action.⁵¹⁹ The Department advised that the way forward included plans to convene a national dialogue on xenophobia in 2012 to engage on the issue, undertake interventions to manage diversity, violence against women, crime and corruption, and unemployment. Note that the proposed 2012 national dialogue on xenophobia does not appear to have taken place.

⁵¹⁹ PMG, African Peer Review Mechanism (APRM): briefing by Department of Public Service & Administration, 22 February 2012 <http://www.pmg.org.za/report/20120222-pc-pservices-department-public-service-and-administration-african-pee>, accessed 17 January 2013.

18. CONCLUSION AND RECOMMENDATIONS

2012 has been a significant catalyst for South Africa with regards to human rights awareness and compliance with international and regional human rights mechanisms. South Africa's appearance before the UPR in September 2012 brought about national and international awareness of the major human rights issues the country is experiencing. South Africa is therefore at an important time. Awareness particularly on international human rights obligations is strong and growing. To this end, this report recommends that the government expeditiously seek to bring international treaty body reporting up to date, specifically with regards to the ICCPR which is yet to receive its initial report from South Africa, CERD and the CRC. It is furthermore recommended that the South African government look to ratify the ICRMW, ICPED, and the Optional Protocol to CAT. Additionally, the proposed ratification of the ICESCR in 2013 should be realised.

This report has endeavoured to provide an overview of the international and regional mechanisms for human rights, reflecting both on the 2012 year in general and particular developments as regard to South Africa. It has looked at some of the major human rights events of 2012 for South Africa and analysed their relationship to international and regional human rights mechanisms. Of particular note, were the tragic deaths of the miners at Marikana in August 2012. It is hoped that this tragedy, amongst others, will serve as a catalyst to expedite ratification of outstanding treaty bodies, such as ICESCR and OP-CAT.

The SAHRC has played, and will continue to play, a significant role for South Africa with regards to its treaty body commitments. This report hopes to bring about greater awareness of these commitments and the steps that still need to be taken to ensure that South Africa fully complies and encourages a positive human rights culture both within its borders and across the African continent. Going forward both legislative commitments and full compliance with treaty obligations, including the drafting and submission of country reports will help to go some way towards deepening South Africa's human rights resolve.

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