



**Joint Stakeholder Submission to the UN Human Rights
Council
Universal Periodic Review of South Africa**

(27th Session – April to May 2017)

Submitted by:

1. The International Bar Association's Human Rights Institute (IBAHRI)
2. The Law Society of South Africa (LSSA)
3. The Southern Africa Litigation Centre (SALC)

1. INTRODUCTION

1.1. This submission has been prepared for the Universal Periodic Review (UPR) of the Republic of South Africa in May 2017 by the International Bar Association's Human Rights Institute (IBAHRI),¹ the Law Society of South Africa (LSSA)² and the Southern Africa Litigation Centre (SALC).³

1.2. Established in 1947, the International Bar Association (IBA) has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents and has considerable experience in providing assistance to the global legal community. The IBA's Human Rights Institute (IBAHRI) was established in 1995 and works across the IBA helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession worldwide.

¹The International Bar Association's Human Rights Institute, <http://www.ibanet.org/IBAHRI.aspx>

²The Law Society of South Africa, <http://www.lssa.org.za/>

³The Southern Africa Litigation Centre, <http://www.southernafricalitigationcentre.org/>



- 1.3. Since 1998, the LSSA has represented the attorneys' profession by bringing together its six constituent members in a national, non-statutory body.⁴ Among other things, the LSSA speaks nationally on behalf of the attorneys' profession and provides leadership and support to the profession through policy development and stakeholder relations. It also seeks to protect and promote the independence of the judiciary and the legal profession; as well as support the efficient administration of the justice system in South Africa.
- 1.4. SALC is a non-governmental organisation based in Johannesburg, South Africa, which promotes and advances human rights and the rule of law in southern Africa, primarily through strategic litigation support and capacity building. It aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. SALC has worked on transitional justice and regional human rights concerns related to South Africa since 2005, including through litigation.

2. METHODOLOGY

- 2.1. The content of this submission is based on information obtained by the IBAHRI, LSSA and SALC in the course of their work. Concerns raised include: failure to ratify human rights treaties in accordance with the country's undertaking under the last UPR cycle; violations of the right of access to justice and an effective remedy; respect for the independence of the judiciary; and xenophobia. The submission further recognises legislative progress that has been made with regard to making legal services more accessible to the majority of people in the country.

3. NORMATIVE FRAMEWORK

A. Scope of international obligations

- 3.1. During the last UPR in May 2012, South Africa undertook to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ and its Optional Protocol,⁶ as well as the Optional Protocol to the Convention against Torture (OP-CAT).⁷ It acceded to the ICESCR on 12 January 2015, but has not yet ratified its Optional Protocol or OP-CAT which it signed in 2006.⁸
- 3.2. Recommendations for South Africa to ratify the International Convention for the Protection of All Persons against Enforced Disappearance (CED),⁹ the International

⁴The six constituent members: the Black Lawyers Association, Cape Law Society, KwaZulu-Natal Law Society, Law Society of the Free State, Law Society of the Northern Provinces and National Association of Democratic Lawyers.

⁵Recommendations 124.2 to 124.10 by the UK, Hungary, Brazil, Chad, Palestine, Slovenia, Portugal, France and Spain, Matrices of recommendations, UPR of South Africa (2nd Cycle – 13th session), Thematic list of recommendations, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>

⁶Recommendations 124.6 to 124.8 by Palestine, Slovenia and Portugal, Supra

⁷Recommendations 124.2; 124.9; 124.55 and 124.57 by the UK, France, the Czech Republic and Costa Rica respectively, supra

⁸http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN

⁹Recommendations 124.10 and 124.11 by Spain and Argentina respectively, supra

Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)¹⁰ and the ILO Convention 189 on Decent Work for Domestic Workers¹¹ initially did not meet with the country's favour. However, South Africa later committed to ratifying these.¹² In June 2013, it ratified ILO Convention 189. CED and ICRMW are yet to be ratified.

Recommendation 1:

- (a) Ratify all protocols the country has committed to ratifying including: the Optional Protocol to ICESCR, OP-CAT, CED and ICRMW;
- (b) Take steps to ratify all other outstanding human rights treaties, including the Optional Protocol to the Convention on the Rights of the Child on a communications procedure
- (c) Domesticated into law the provisions of human rights treaties and ensure these are justiciable and implemented.

B. Constitutional and legislative framework

Reform of the legislative framework regulating the legal profession

- 3.3. The legal profession in South Africa has been criticised as unrepresentative of the majority of the people in the country. The low numbers of women in the Bar Councils, Law Societies and in decision making positions in law firms remain a concern. So too does the sparsity of lawyers in townships and rural areas. These factors have been seen as creating obstacles to accessing justice for many.
- 3.4. Principle 11 of the Basic Principles on the role of lawyers¹³ provides, "In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups."
- 3.5. Principle 10 of the Basic Principles on the role of lawyers further requires, "governments, professional associations of lawyers and educational institutions [to] ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory."

¹⁰ Recommendations 124.12 and 124.13 by Nicaragua and Burkina Faso respectively, *supra*

¹¹ Recommendations 124.13 and 124.14 by Burkina Faso and Chad respectively, *supra*

¹² South Africa, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, Twenty-first session of the UPR, 18 September 2012, A_HRC_21_16_Add.1_South Africa_E-Annex, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/ZASession13.aspx>

¹³ Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba

27 August to 7 September 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

- 3.6. In September 2014, a positive step was taken in rectifying some of these concerns when South Africa passed a new law regulating the legal profession.¹⁴ The Legal Practice Act (LPA) aims to make the legal profession more accessible to the majority of people. It provides for setting up of a mechanism to ensure legal fees are within the reach of individuals; measures to increase access to legal services in rural areas through candidate and legal practitioners; restructuring the legal profession to make it more broadly representative of the demographics in the country;¹⁵ and the establishment of a legal services ombudsman to protect and promote public interest.¹⁶
- 3.7. In terms of Chapter 2 of the LPA, the South Africa Legal Practice Council is to be set up to facilitate the objectives of the LPA. The groundwork for the establishment of this Council is being laid by the National Forum on the Legal Profession, set up in February 2015. The Legal Practice Council comes into operation three years after the commencement of the National Forum.

Recommendation 2:

- (a) Continue to take steps to ensure the legal profession is more representative in accordance with the provisions of the Basic Principles on the Role of Lawyers.
- (b) Continue to take steps to ensure those provisions of the LPA which aim to make the legal profession more accessible are operationalised.
- (c) Implement awareness raising activities to tackle unconscious bias as a means of increasing diversity in the legal profession.

4. PROMOTION AND PROTECTION OF HUMAN RIGHTS

A. Administration of Justice – Access to Justice and the right to an effective remedy

- 4.1. South Africa's response to the court order for the arrest of Sudanese President Omar Al Bashir, whilst he was visiting the country in 2015; as well as its signing of the revised Protocol on the Tribunal of the Southern Africa Development Community (SADC) in 2014 brings into question its commitment to the promotion and protection of the right of access to justice and to an effective remedy; as well as its respect for independence of the judiciary.

Disrespect of a court order for the arrest of President Al Bashir

- 4.2. In June 2015, President Al Bashir travelled to South Africa for an African Union Summit. Following his arrival in the country, SALC approached the North Gauteng High Court seeking

¹⁴ The Legal Practice Act No. 28 of 2014, <http://www.lssa.org.za/upload/documents/Legal%20Practice%20Act%20GG%2038022%20of%2022%20September%202014.pdf>

¹⁵ Section 3 of LPA

¹⁶ Chapter 5 of LPA

his arrest in accordance with an International Criminal Court (ICC) arrest warrant. The Court ordered his arrest on 15 June; however, it was then revealed that the government had permitted President Al Bashir to leave the country in direct contravention of an interim court order of 14 June 2015. The state justified this by saying that President Al Bashir, at the time of his visit, enjoyed certain privileges and immunities.¹⁷ It further appealed against the order for his arrest.

- 4.3. On 15 March 2016, the Supreme Court of Appeal ruled that the government's failure to arrest President Bashir was unlawful. The state has appealed this decision to the Constitutional Court, which is due to hear the matter on 22 November 2016.¹⁸
- 4.4. By refusing to arrest President Al Bashir, South Africa failed to afford equality before the courts and an effective remedy for all. National and international human rights laws provide for the right of all persons to an effective remedy, to have their case heard by a competent court¹⁹ and the right of equality before the court.²⁰ International human rights standards further oblige states to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation."²¹
- 4.5. The Constitution of South Africa requires organs of the State to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.²² The Rome Statute, which the country has ratified and domesticated,²³ extends this obligation to the ICC with regard to the arrest of individuals suspected of war crimes, crimes against humanity and genocide. In addition, the Basic Principles and Guidelines on the Right to a Remedy and Reparation require states to cooperate with international judicial organs in respect of crimes under international law.
- 4.6. Furthermore, the actions of the state in relation to President Al Bashir's arrest runs counter to "the duty of all governmental and other institutions to respect and observe the independence of the judiciary."²⁴

Recommendation 3:

- a) Respect the rule of law and independence of the judiciary by adhering to and executing orders of the court in accordance with international standards on fair trials.

¹⁷ <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/State-Explanatory-Affidavit-including-Lubisi-supplementary.pdf>

¹⁸ <http://www.southernafricalitigationcentre.org/cases/on-going-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/>

¹⁹ ICCPR 2, section 34 of the Constitution of the Republic of South Africa of 1996 (CRSA)

²⁰ ICCPR 14(1), CRSA section 9

²¹ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on the Right to a Remedy and Reparation), Principle II 3 (c)

²² Section 165(4) of the CRSA

²³ The Implementation of the Rome Statute of the International Criminal Court, Act 27 of 2002.

²⁴ Principle 1 of the U.N. Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

- b) Ensure respect, promotion and protection of the right of equality before the law, access to justice and an effective remedy for all, including by reconsidering the position taken with regard to immunity for heads of state suspected of war crimes, crimes against humanity and genocide.
- c) Encourage adherence and compliance with international law and human rights treaties which the country has ratified

South Africa's Involvement in Weakening the SADC Tribunal

4.7. In August 2014, South Africa signed the amended Protocol on the Tribunal of the Southern Africa Development Community (SADC). The SADC Tribunal is a regional human rights court which individuals could access where their governments were unable or unwilling to provide effective protection of human rights. If duly ratified, the amended protocol will remove individual access to the Tribunal as well as the human rights jurisdiction of the court. The LSSA have brought a case against the state challenging the signing of this revised protocol and SALC has been admitted as amicus curiae.²⁵

4.8. The SADC Tribunal was suspended in 2010 following a challenge by Zimbabwe to its mandate and legitimacy. The terms of office of five of the SADC Tribunal judges were not renewed, nor were these judges replaced. Although an independent commission of inquiry found in 2011, that the Tribunal was properly constituted with powers to hear human rights cases, the heads of state and government of Southern Africa have failed to lift the suspension.²⁶ The terms of all the judges have since expired and no new judges have been appointed.

4.9. In its concluding observation to Namibia, which also signed the revised protocol, the Committee on Economic, Social and Cultural Rights (CESCR) stated that the revised Protocol of the SADC Tribunal violates the right of access to justice.²⁷ It called on Namibia to, “reconsider the position taken and take the initiative in promoting the reinstatement of the right of access of natural and legal persons to the Tribunal”

4.10. In addition, the office of the UN Special Rapporteur on the Independence of Lawyers and the Judiciary has indicated that the suspension of the SADC Tribunal impacts on the independence of the judiciary²⁸ and runs counter to the principles of respect for the independence of the judiciary; prohibition of inappropriate or unwarranted interference with the judicial process;²⁹ and security of tenure of judges.³⁰

²⁵ <http://www.lssa.org.za/our-initiatives/advocacy/sadc-tribunal-matter> and <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-supporting-regional-individual-access-to-justice-in-sadc/>

²⁶ “Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal”, WTI advisors 6 March 2011, accessible at <http://lawyersofafrica.org/wp-content/uploads/2014/02/Annexure-6-B-Report-of-the-World-Trade-Institute-Advisors-of-6-March-2011.pdf>

²⁷ Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of Namibia, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/062/16/PDF/G1606216.pdf?OpenElement>, paragraph 8

²⁸ [https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_\(6.2011\).pdf](https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_(6.2011).pdf)

²⁹ Principle 4 of the Basic Principles on the Independence of the Judiciary

³⁰ Principle 11 and 12 of the Basic Principles on the Independence of the Judiciary

4.11. The Human Rights Committee has stated, “the requirement of independence of the judiciary ... is an absolute right that is not subject to any exception.”³¹ It has stated that independence refers to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure, the cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.”³² South Africa’s involvement in the weakening of the SADC Tribunal therefore also infringed national and international human rights laws and standards for the protection of the courts and independence of the judiciary.

Recommendation 6:

- a) Refrain from ratifying the revised SADC Tribunal protocol which violates the right of access to justice
- b) As has been recommended to other states in relation to the SADC Tribunal, “reconsider the position taken and take the initiative in promoting the reinstatement of the right of access of natural and legal persons to the Tribunal ..., with a view to providing the citizens of the member States of the Southern African Development Community the right to assert and vindicate their human rights”³³
- c) Take the lead in ensuring respect for the independence of the judiciary in relation to the SADC Tribunal, including through working for the lifting of the court’s suspension, appointment of judges and reinstatement of the court with its original mandate in accordance with the UN Basic Principles on the independence of the judiciary

B. Racial discrimination and xenophobia

5.1. In 2012, following a spate of xenophobic attacks in the country in 2008 which left at least 62 people dead, South Africa received and accepted 9 recommendations for it to take steps to combat racial discrimination and xenophobia. Despite acceptance of these recommendations, xenophobic attacks have continued and, in some cases, prominent individuals appear to have incited such attacks.

5.2. In 2015, there was another spike in attacks against foreigners in the country. At least 6 migrants were killed. Concern was raised regarding statements by high profile individuals which some felt amounted to incitement of hatred and violence.³⁴ The South African Human Rights Commission (SAHRC) carried out an investigation into these allegations. While the SAHRC fell short of a finding of incitement to violence, it did ask for a public

³¹ General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f32&Lang=en, paragraph 19

³² Supra

³³ Recommendation of CESCR to Namibia, paragraph 9, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/062/16/PDF/G1606216.pdf?OpenElement>

³⁴ See <https://www.theguardian.com/world/2015/apr/14/south-africa-xenophobic-violence-outbreak>; at <https://www.enca.com/south-africa/listen-zulu-king-foreign-national> and <http://www.news24.com/SouthAfrica/News/Hate-speech-complaint-laid-against-Zumas-son-20150402>.

apology from at least one individual for such remarks. At the time of writing, the apology had not yet been given.³⁵

- 5.3. On 27 April 2015, the government launched “Operation Fiela” – sweep out the dirt – which it stated was aimed at combatting crime in the country. Under this operation, police and members of the South Africa National Defence Force carried out raids and mass arrests of individuals. The areas raided were those perceived as high crime areas which are also areas with high numbers of foreigners. Some South Africans were arrested, but most of those arrested were foreigners. These raids and arrests were carried out with recourse to violence and there were reports of the police and defence force members calling those being arrested ‘*makwerekwere*’ – a word viewed by many as a derogatory term for foreigners.
- 5.4. In the concluding observations of South Africa’s review under the ICCPR, the Human Rights Committee raised concern about the xenophobic attacks in the country and, “the inability of the authorities to, “prevent and address racist and xenophobic attacks and to hold perpetrators accountable.”³⁶

Recommendation 7

- a) Send a clear message that xenophobic attacks will not be tolerated, including by investigating cases of human rights violations and incitement of violence against foreigners and by bringing all perpetrators to justice in a trial meeting international human rights standards
- b) In accordance with the recommendation by the Human Rights Committee, “redouble efforts to prevent and eradicate all manifestations of racism and xenophobia, protect all communities in South Africa against racist and xenophobic attacks, and improve policing responses to violence against non-nationals.”

³⁵ See

<http://www.sabc.co.za/news/a/e33d32804b715bfd95ebf743e5868fd4/Kingundefinedwon%E2%80%99tundefinedapologiseundefinedforundefinedallegedundefined%E2%80%9CChateundefinedspeech%E2%80%9D-20162501>

³⁶ Human Rights Committee, Concluding observations on the initial report of South Africa, paragraph 14, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CPR%2fC%2fZAF%2fCO%2f1&Lang=en