

SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW | SOUTH AFRICA
LEGAL RESOURCES CENTRE
2016

INTRODUCTION

1. The Legal Resources Centre (“**LRC**”), established in 1979, is a not-for-profit organisation and public interest law firm in South Africa, focusing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. Operating across four cities, with three satellite offices, the LRC’s clients are predominately vulnerable and marginalised, including people who are poor, homeless and landless.
2. This submission is presented for consideration as part of the Universal Periodic Review (“**UPR**”) stakeholder report, and focuses specifically on the rights to freedom of expression and assembly, both of which are contained in the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”).¹ In making this submission, the LRC does not purport to hold a mandate on behalf of all communities. Rather, this submission is informed by the experience that the LRC has garnered in litigating and advocating for these rights.
3. This submission is divided broadly into two parts: Part I addresses freedom of expression; and Part II addresses matters relating to the policing of assemblies. Under each of these, we address the following: (i) our feedback on the previous recommendations from the Report of the Working Group on the UPR (9 July 2012)² (“**Working Group Report**”); (ii) key emerging issues; and (iii) our proposed recommendations.

4. We deal with each of these below.

PART I: FREEDOM OF EXPRESSION

Feedback on previous recommendations

5. The Working Group Report contained various recommendations regarding the proposed Protection of State Information Bill³ (“**POSIB**”). Since the previous review, POSIB has been amended – and improved – but the key substantive concerns have still not been addressed. This includes recommendations regarding provisions that retain excessive penalties for the publication of classified information, without there being a public interest defence;⁴ unduly impede access to public domain information;⁵ and undermine freedom of expression under the pretext of national security and national interest.⁶
6. Other recommendations in the Working Group Report went further in recommending that South Africa suspend the enactment of POSIB altogether.⁷ However, POSIB has neither been withdrawn nor enacted into law, and is presently awaiting signature by President Zuma. In the meantime, the apartheid-era Protection of Information Act⁸ remains the applicable law in South Africa for the classification of state information, and similarly falls foul of constitutional and international law standards.
7. In the light of the above, South Africa should be urged to:
 - 7.1. Establish a drafting committee, comprising members of civil society organisations, to revise the current text of POSIB in line with domestic and international law, including with a view to inserting public interest and public domain defences.**
 - 7.2. Refer the final text of POSIB to the Constitutional Court to consider the constitutionality thereof in terms of section 79 of the Constitution.**

Key emerging issues

A. Regulation of online content

8. There appears to be a worrying trend by the Government to seek to regulate the internet and online content in a way that unduly limits the right to freedom of expression. Two key examples of this are the draft Online Regulation Policy published for comment by the Film and Publication Board⁹ (“**draft ORP**”) in February 2015; and the draft Cybercrimes and Cybersecurity Bill published for comment by the Department of Justice and Correctional Services¹⁰ (“**CCB**”) in August 2015.
9. Some of the key concerns with the draft ORP include that various provisions are impermissibly vague, and it would provide the Film and Publication Board with powers that are not catered for in legislation. Of particular concern is the system of prior restraint that the draft ORP seeks to impose. The Constitutional Court has held that the prior restraint imposed by section 16(1) of the Films and Publications Act¹¹ constituted an unjustifiable limitation of the right to freedom of expression.¹² The draft ORP, rather than taking cognisance of the Constitutional Court’s ruling, seeks instead to further entrench the system of prior restraints – both for industry-created content and, more problematically, potentially for user-generated content.¹³
10. The CCB is worrying in that it replicates some of the most egregious provisions of POSIB. Of serious concern, it would create a range of structures effectively with powers to police the internet, who would report to the Ministry of State Security; the state would have the right to declare any part of the internet to be “National Critical Information Infrastructure”, which would give the state far-reaching powers over them (including by allowing the state to classify information on these networks and potentially be granted back-door access to any network); and criminalises various conduct of journalists and whistleblowers without there being a public interest defence.¹⁴

11. South Africa should accordingly be urged to:

11.1 Seek in all proposed laws that implicate the right to freedom of expression to promote the right in line with domestic and international law, including to ensure appropriate protections for the media and whistleblowers to properly and safely function.

11.2 Review the draft ORP in line with domestic and international law, including by addressing the proposed system of administrative prior restraints.

11.3 Review the CCB in line with domestic and international law, including by addressing the undue powers given to the security and intelligence services; the need for the establishment of independent oversight mechanisms; and the lack of a public interest defence.

B. Surveillance of the media

12. The concerns regarding the proposed legislation mentioned above – in particular, POSIB and the CCB – are exacerbated in the light of reported instances of state surveillance of prominent investigative journalists. On 6 May 2016, a criminal case against a former Crime Intelligence official began in the Specialised Commercial Crimes Court in Pretoria, in which the accused is charged with giving false information to a judge in order to intercept the communications of two Sunday Times journalists, Mr Mzilikazi wa Afrika and Mr Stephan Hofstatter.¹⁵ Similarly, it has recently emerged that amaBhungane journalist Sam Sole had his phone tapped while he was reporting on the investigation of corruption charges against President Zuma.¹⁶ Such abuses seriously inhibit the media's ability to function freely and independently, and have the potential to have a chilling effect on the right to freedom of expression.

13. South Africa should accordingly be urged to:

13.1. As a matter of urgency, investigate and prosecute, where appropriate, abuses of domestic and international law in the intelligence agencies.

13.2. Ensure that independent oversight mechanisms are created within the legal framework to guarantee that surveillance capabilities cannot be used against journalists and human rights defenders.

C. South African Broadcasting Corporation

14. There are a number of concerns around the structuring, management and editorial control of the public broadcaster, the South African Broadcasting Corporation (“SABC”).

15. From a structural perspective, there are significant concerns that Cabinet and Minister of Communications have an inappropriate influence on the appointment and removal of key positions of the SABC board. This has potential downstream effects on independent programming, finances and its ability to keep management to account. The former Chief Operating Officer, Mr Hlaudi Motsoeneng, was found, in a 2014 report by the Public Protector, to have fabricated his matric qualification and irregularly increased his salary, but to date remains in the employ of the SABC.¹⁷ The day-to-day management of the SABC has also repeatedly engaged in behaviour which undermines the independence of the organisation, including journalists being suspended without proper cause;¹⁸ an attempted ban on the reporting of “violent” protests shortly before the local government elections;¹⁹ and the prohibition of callers being able to call in to the SABC radio station to air their grievances.²⁰

16. South Africa should accordingly be urged to:

16.1. Take all necessary steps, including through appropriate oversight mechanisms and legislative reform, to guarantee the independence of the SABC and safeguard it against undue political interference.

16.2. Establish, and provide detail on, programmes to develop community and independent media and improve internet access to ensure alternative sources of media and information can be accessed by all people in South Africa.

PART II: POLICING OF ASSEMBLIES

Feedback on previous recommendations

17. In the Working Group Report, South Africa was urged by Costa Rica to establish human rights and training programmes for police and law enforcement officers.²¹

18. While certain steps may have been taken by South Africa, the period under review indicates that urgent and substantial redress is needed within the South African Police Service (“SAPS”) as a result of, among others, multiple incidents of the excessive use of force, the (mis)use of less-lethal weapons, and violations to the right to record policing operations. These incidents and recommendations on the establishment of human rights norms and training programmes are detailed below.

Key emerging issues

A. The use of force and police brutality by members of the SAPS

- Marikana (9 to 16 August 2012)

19. In the week of 9 to 16 August 2012, 44 people were killed near a Lonmin Plc-run mine in Marikana, a mining town in the North-West Province. Of those killed,

37 were protesting mineworkers who were shot by members of the SAPS; 34 of the protesting mineworkers were killed on Thursday, 16 August 2012.

20. In September 2012, the Marikana Commission of Inquiry (“**Marikana Commission**”) was established to investigate the events at Marikana that led to the deaths of the 44 people and the injuries to more than 70 people.²² The report of the Marikana Commission was made available to the public in June 2015.²³

21. Some of the key findings in the report of the Marikana Commission include: (i) police radio communications should be recorded and preserved;²⁴ (ii) R5 rifles should be withdrawn from the SAPS Public Order Police and not used in crowd control;²⁵ (iii) political influence in policing decisions should be transparent and accountable;²⁶ (iv) the SAPS should be demilitarised;²⁷ (v) in large and special operations, the Executive should only give policy guidance and not make any operational decisions;²⁸ (vi) SAPS should review the adequacy of the training of members who use specialised equipment, like water cannons and video equipment, and ensure that all members who use such equipment are adequately trained to do so;²⁹ and (vii) the National Prosecuting Authority should investigate individual SAPS shooters to determine whether criminal proceedings should be initiated, and prosecute accordingly.³⁰

22. In relation to a multiplicity of civil claims for damages instituted by families of the deceased mineworkers and those who were injured and arrested on 16 August 2012, the South African Government stated in a press release issued on 18 August 2016 that the “Government has conceded 100% [of the] merits of legitimate legal claims”.³¹ However, the full implementation of the recommendations of the Marikana Commission, particularly those in relation to the liability of individual SAPS shooters, has been persistently delayed.

- The South African Human Rights Commission's findings relating to the death of Andries Tatane (30 October 2012)

23. On 13 April 2011, Andries Tatane, a 33-year-old community activist, took part in the service delivery protest alongside thousands of other community members in the Free State province.³²
24. During the protest, Mr Tatane was beaten repeatedly with police batons and shot twice in the chest by members of the SAPS from a range of approximately 1.5 metres with rubber bullets. Mr Tatane died on the scene 20 minutes later, before he could be taken to a local hospital.³³
25. Following the acquittal of the accused members of the SAPS in a local magistrates' court, the South African Human Rights Commission found on 30 October 2012, among other things, that the members of the SAPS failed to comply with the provisions of the Regulations of Gatherings Act³⁴ by using excessive force, which resulted in the injury and/or death of Mr Tatane. It also found that the police used a degree of force that was disproportionate to the circumstances of the case.³⁵

- The death of Mido Macia (26 February 2013)

26. On 26 February 2013, 27-year old Mido Macia died in police custody at the Daveyton Police Station in Gauteng. Mr Macia, alleged to have committed a traffic violation, was hand-cuffed to the back of a police van and dragged on the tarmac for over 500 metres to the police station. Mr Macia was found dead later that evening; alleged to have suffered severe head trauma and internal bleeding.³⁶
27. The eight members of the SAPS responsible were suspended and convicted of Mr Macia's murder on 25 August 2015.

28. With regards to the use of force, South Africa should be urged to:

28.1. Ensure, through the adoption, implementation and application of relevant policies, that: (a) automatic firearms and live ammunition are never used in the policing of assemblies; and (b) that less-lethal weapons are used only in exceptional circumstances, and that all members of the SAPS responsible for acts of police brutality are held accountable.

28.2. Fully implement the Marikana Commission's recommendations, as a matter of urgency, to prevent the reoccurrence of the excessive use of force by SAPS members.

28.3. Implement extensive and continuing training programs within the SAPS which focus on domestic and international human rights standards in relation to the use of force.

B. The (mis)use of less-lethal weapons by members of the SAPS

29. The SAPS Public Order Policing Unit are equipped with, among others things, pepper spray, CS teargas grenades, stun grenades, shotguns "with approved rounds", and a 9 mm sidearm firearm and rounds of ammunition.³⁷ The 2014/2015 SAPS Annual Report also indicates that the SAPS procured eleven Long Range Acoustic Devices ("LRADs") within that procurement cycle.³⁸

30. Whilst less-lethal weapons are theoretically designed to offer an option for reduced force, in the context of policing protests in South Africa, they are often used in an indiscriminate manner.³⁹ This is largely due to the lack of adherence by SAPS members to regulations under domestic law. Additionally, there is insufficient testing, oversight and control over the procurement of less-lethal weapons in South Africa.

31. A recent international report by Physicians for Human Rights and the International Network of Civil Liberties Organisations emphasises that, coupled with the lack of a regulatory framework around less-lethal weapons, the health-consequences of these weapons are not yet fully understood.⁴⁰
32. In relation to the (mis)use of less-lethal weapons, South Africa should be urged to:
- 32.1. Ensure that weapons initially developed for military purposes, such as LRADs, should not be used for the purpose of crowd control; weapons designed for military purposes are inappropriate unless they have been adapted for crowd-control purposes or tested for appropriateness and effectiveness for that task.⁴¹**
 - 32.2. Strictly regulate the use of less-lethal weapons through regulations and operational guidelines and/or protocols which relate to specific less-lethal weapons or weapons categories.**
 - 32.3. Ensure that, prior to procurement, less-lethal equipment is subject to transparent and independent assessment to determine compliance with international human rights law and standards.**
 - 32.4. Ensure that weapons should be procured based solely on identified operational needs and in light of the domestic context under which law enforcement operates or intervenes in protest activities.**
 - 32.5. Ensure there is sufficient capacity to continuously train members of the SAPS effectively on the proper use of less-lethal weapons.**

C. The right to record policing operations

33. In South Africa, SAPS Standing Order 156⁴² guides members of the SAPS in their duty to respect an individual's right to exercise their freedom of expression and record policing operations. The order is outdated, vague and non-inclusive. It has

had the effect of creating a negative and circumspect perception of journalists and individuals who exercise their right to record during protests. The Standing Order only affords protection to “media representatives” and does not cater for members of the public – or citizen journalists – who exercise their right to record.

34. Further, as opposed to promoting the right to freedom of expression, members of the SAPS have repressed and violated the right to record. On 3 January 2016, Eduard Grebe witnessed an arrest taking place near his home in Cape Town and filmed the incident.⁴³ During the course of filming the arrest, Mr Grebe was threatened and then detained overnight, only to be released the following morning.

35. In relation to the right to record policing operations, South Africa should be urged to:

35.1. Revise Standing Order 156 to prohibit any interference with the recording of police operations by any person, including the seizure or damage of any recording equipment.

Conclusion

36. South Africa’s key human rights priorities over the next four years should include a concerted effort to respect, promote and fulfil the rights of freedom of expression and protest. The state should also commit to implementing the recommendations from the previous reviews, as well as from the current review.

37. Please feel free to contact us via email (michael@lrc.org.za / avani@lrc.org.za) should you require any further information. We thank you for the opportunity to provide these submissions.

¹ Section 16 of the Constitution provides as follows:

“Freedom of expression

(1) Everyone has the right to freedom of expression, which includes–

(a) freedom of the press and other media;

-
- (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and the incitement to cause harm.”

Section 17 of the Constitution provides as follows:

“Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”

² Report of the Working Group on the Universal Periodic Review, A/HRC/21/16 (9 July 2012).

³ Accessible at http://www.r2k.org.za/wp-content/uploads/Protection-of-State-Information-Bill-POSIB_bill06D-2010.pdf.

⁴ Working Group Report at Recommendation 124.101: Reconsider the Protection of State Information Bill to ensure its conformity with ICCPR, in particular by removing excessive penalties for publication of classified information and the inclusion of a public interest defence (Czech Republic).

⁵ Working Group Report at Recommendation 124.100: Ensure that the Protection of State Information Bill and other statutory measures do not violate the right to freedom of expression or unduly impede access to public domain information (Canada).

⁶ Working Group Report at Recommendation 124.102: Continue amending and improving the project of the Protection of State Information Bill as this law, in the form proposed to the Parliament earlier this year, has the potential to undermine the right to access to information and freedom of expression under the pretext of national security and national interest (Poland).

⁷ Working Group Report at Recommendation 124.107: Safeguard the freedom of the press, through the abrogation of the Protection of Information Bill (Germany); Working Group Report at Recommendation 124.104: Consider suspending the enactment of the Protection of State Information Bill, approved last November (Portugal).

⁸ Act 84 of 1982.

⁹ Accessible at http://www.gov.za/sites/www.gov.za/files/38531_gen182.pdf.

¹⁰ Accessible at <http://www.justice.gov.za/legislation/invitations/CyberCrimesBill2015.pdf>.

¹¹ Act 65 of 1998.

¹² *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC).

¹³ The LRC’s submission on the draft ORP is accessible at <http://www.ellipsis.co.za/wp-content/uploads/2015/07/Legal-Resources-Centre.pdf>.

¹⁴ See <http://www.r2k.org.za/2015/11/30/whats-wrong-with-the-cybercrimes-bill-the-seven-deadly-sins/>.

¹⁵ See <http://www.r2k.org.za/2016/05/05/6594/>.

¹⁶ Id.

¹⁷ See <http://www.bdlive.co.za/national/media/2016/09/23/presidency-respects-scas-decision-removing-hlaudi-mots-oeneng-from-his-post>.

¹⁸ See <http://www.bdlive.co.za/national/media/2016/07/27/sabc-to-reinstate-all-seven-fired-journalists>.

-
- 19 See <http://www.bdlive.co.za/national/media/2016/07/11/sabc-ordered-to-back-down-on-violent-protest-ban>.
- 20 See <http://city-press.news24.com/News/sabc-bans-radio-callers-20160227>.
- 21 Working Group Report at Recommendation 124.94 (Costa Rica).
- 22 Statistics released by the South African Police Service during the Marikana Commission indicate that 466 R5 / R1 and 1679 mm live rounds were discharged against protesters in comparison to 507 rubber rounds and 15 CS gas canisters and / or stun grenades. See “Discharge Statistics” (exhibit “FFF8”), accessible at <http://www.marikanacom.org.za>.
- 23 The report of the Marikana Commission is accessible at <http://www.thepresidency.gov.za/medialib/downloads/downloads/Full%20Report%20of%20the%20Marikana%20Commission%20of%20Inquiry.pdf>.
- 24 Id at page 551.
- 25 Id at page 549.
- 26 Id at page 370.
- 27 Id at page 371.
- 28 Id at page 551.
- 29 Id at page 552.
- 30 Id at pages 518, 543, 546, and 547.
- 31 Accessible at <http://www.thepresidency.gov.za/pebble.asp?relid=22517>.
- 32 See <http://protestinfo.org.za/crowd-control-weapons/kinetic-impact-projectiles/south-africa-the-death-of-andries-tatane/>.
- 33 Id.
- 34 Act 205 of 1993.
- 35 See pages 19-20 of the Report of the South African Human Rights Commission, accessible at: <http://www.sahrc.org.za/home/21/files/Report%20Comm%20%20SA%20Police%20Service%20301012.pdf>.
- 36 See <http://www.bbc.com/news/world-africa-34786559>.
- 37 See http://protestinfo.org.za/download/crowd-control_weapons/PAIA-Disclosure-Equipment-used-by-South-Africas-Public-Order-Police-26-August-2016.pdf.
- 38 See: http://www.saps.gov.za/about/stratframework/annual_report/2014_2015/SAPS_AR_2014-15_for_viewing.pdf.
- 39 See, for example, the misuse of less-lethal weapons at Marikana and in the killing of Andries Tatane.
- 40 See <http://protestinfo.org.za/crowd-control-weapons/>.
- 41 Id.
- 42 Accessible at http://protestinfo.org.za/download/saps_standing_orders/Standing-Order-156-Media-Communication-in-the-SAPS-2003.pdf.
- 43 See <http://www.groundup.org.za/article/i-was-jailed-filming-police-assault/>.