

**SOUTH AFRICAN NGO SHADOW REPORT**

**On the South Africa State Report on the African  
Charter on Human and People's Rights and the  
Maputo Protocol**

**3/31/2016**

**COALITION OF SOUTH AFRICAN NGOS**

# NGO Shadow Report on the South Africa state Report on the African Charter on Human and People's Rights and the Maputo Protocol

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on Human and People’s Rights and the Maputo Protocol**

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## ACRONYMS

ACMS .....	Africa Centre for Migration Studies, Wits University
ACHPR .....	African Commission on Human and People's Rights
AfCHPR .....	African Charter on Human and People's Rights
CGE.....	Commission on Gender Equality
CHR .....	Centre for Human Rights, University of Pretoria
CSOs .....	Civil Society Organisations
DHA.....	Department of Home Affairs
DOJ.....	Department of Justice
DVA.....	Domestic Violence Act
ECOSOC Rights .....	Economic, Social and Cultural Rights
EEA.....	Employment Equity Act
FCS.....	Family Violence, Child Abuse and Sexual Offences Unit
FXI .....	Freedom of Expression Institute
GBV.....	Gender Based Violence
GOVSA .....	Government of South Africa
GPI.....	Global Peace Index
HURISA .....	Human Rights Institute of South Africa
IFC.....	International Finance Corporation
ISS.....	Institute of Security Studies
KZN.....	Kwa-Zulu Natal
LGBTI.....	Lesbians, Gays, Bi-Sexual, Transgender and Intersex
LHR .....	Lawyers for Human Rights
MPRDA .....	Mineral and Petroleum Development Act
MRC.....	Medical Research Council
Maputo Protocol .....	Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

NCCEMD.....National Committee on Confidential Enquiries in Maternal Deaths

NGO ..... Non-governmental Organisations

PAIA.....Protection of Access to Information Act

NSP.....National Strategic Plan

POWA.....People Opposing Women Abuse

RGA..... Regulation of Gatherings Act

RSDO..... Refugee Status Determination Officers

SAPS ..... South African Police Service

SAHRC..... South African Human Rights Commission

SGBV.....Sexual and Gender Based Violence

SALC..... South Africa Law Commission

SAPS.....South African Police Services

SOA..... Sexual Offences Act

UNSCR.....United Nations Security Council Resolution

SWEAT..... Sex Workers Education and Advocacy Taskforce

VAW.....Violence Against Women

## INTRODUCTION

1. This Shadow Report to the South Africa State report to the African Commission on Human and Peoples' Rights (ACHPR) is submitted as a joint report by a coalition of Civil Society Organisations working in South Africa on various thematic areas pertaining to human rights and the African systems.<sup>1</sup> As a coalition, we commend the Government of South Africa (GOVSA) for finally submitting its State Report on the implementation of the African Charter on Human and Peoples' Rights (AfCHPR).<sup>2</sup> We commend efforts made by the GOVSA to make the process of preparing this report inclusive of CSOs in the drafting process. We also congratulate the government for complying with the new reporting guidelines for the African Commission by incorporating Part B of the report on the implementation of Maputo Protocol towards ensuring the protection of the rights of Women in the country.<sup>3</sup>
2. We note that this current GOVSA State report is a combined report which combines the second (2005), third (2007), fourth (2009), fifth (2011) and sixth periodic reports (2013), and that at the end of the presentation of the last report in 2005, there were closing remarks and recommendations made to the GOVSA.<sup>4</sup> While the concluding remarks highlighted some areas of concern (such as the lateness of the First Periodic Report – 4 years lag; lack of CSOs involvement; the descriptive nature of the report; lack of details on measures taken to eradicate Xenophobia against African migrants in particular; high incidents of sexual violence against women and children; and insufficient awareness of the Charter by a vast majority of South Africans), the recommendations were required to be incorporated into the preparation of the next report. Thus, the GOVSA was amongst other things, required to:

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<sup>1</sup> The following NGOs contributed submissions based on various thematic areas for this report: Human Rights Institute of South Africa (HURISA), Centre for Human Rights (CHR), Consortium for Refugees and Migrants in South Africa (CoRMSA), Lawyers for Human Rights (LHR), Coalition of African Lesbians (CAL), Freedom of Expression Institute (FXI), Centre for the Study of Violence and Reconciliation (CSVR), Tshwaranang (TSLA), Legal Resources Centre (LRC), Studies in Poverty and Inequality Institute (SPII), Scalabrini, Community Law Centre, Civil Society Prison Reform Initiative, Just Detention International – South Africa, Africa Centre for Migration Studies (ACMS),

<sup>2</sup> Article 62 of the African Charter on Human and People's Rights, requires States Parties to report every two years, on the legislative or other measures taken to give effect to the rights guaranteed by the African Charter.

<sup>3</sup> African Commission Reporting Guidelines on the African Charter on Human and People's Rights

<sup>4</sup> See: *Concluding Observations and Recommendations to the First Periodic Report of the Republic of South Africa. Adopted at the 38<sup>th</sup> Ordinary Session of the African Commission on Human and People's Rights (21 November – 5 December 2005)*, Banjul, The Gambia.



- Intensify efforts to enhance awareness creation on the African Charter and the African Commission among citizens – adults, youths and children alike.
  - More actively incorporate CSOs in the preparation of the State Report (Status: Done);
  - Make the Declaration under Article 34(6) of the Protocol to the African Charter on Human and People’s Rights to the establishment of the African Court on Human and People’s Rights (Status: Not Done);
  - Remove the reservation which the State made on Article 6(d) when it ratified the Protocol on the Rights of Women (in Africa) – the Maputo Protocol (Status: Not Done);
  - Take appropriate administrative measures to expedite the processing of the applications of asylum seekers in the country; and
  - Submit reports regularly (This has not been adequately complied with as noted above based on the number of outstanding reports before the submission of the current combined report).
3. It must be noted that while the GOVSA endeavoured to include CSOs in the drafting process of this current report, it has still failed to sign the declaration which gives access to individuals to directly approach the African Court on Human and Peoples’ Rights.
4. Also, the current GOVSA State report on the African Charter on Human and Peoples’ Rights was submitted to the African Commission on February 1<sup>st</sup>, 2016. This was only the second State Periodic Report submitted by South Africa after the initial report which was submitted and heard in 2005. Thus, South Africa had been behind with about four (4) State Periodic Reports after having failed to submit any report since 2005. These include:
- a. The 2002 – 2004 (Second Periodic) Report
  - b. The 2005 – 2007 (Third Periodic) Report
  - c. The 2008 – 2010 (Fourth Periodic) Report
  - d. The 2011 – 2013 (Fifth Periodic) Report
  - e. The 2014 – 2016 (Sixth Periodic) Report.

5. It must be noted that this current report which combines reports from 2002 to the end of year 2013 actually coincides with the 2014 – 2016 reporting year. In essence, the country is already due to submit the Sixth Periodic Report when it is only submitting the Second Periodic Report. It also follows that the observation from the last report, made by the African Commission, will be repeated again though within an even longer time lag (2005 – 2016).
6. This non-compliance with its reporting obligations has impacted negatively on the reporting on the Maputo Protocol and its implementation. It has also negatively affected the implementation of various Economic, Social and Cultural (ECOSOC) rights, Civil and Political rights, Women's rights, rights of Children and Youths, among others.
7. Thus, while the government needs to be commended for finally submitting its report, the report was still submitted late and this gave little or no room for NGOs and Civil Society to engage adequately with the report and to develop a sufficient response to this report based on what the government has reported (as well as drawing from previous communications and recommendations made to South Africa based on the previous report which was submitted in 2005).
8. This late submission of the current report impacted negatively on the CSOs ability to adequately and timeously fulfil its obligation and responsibility of producing a Shadow Report on the State Periodic Report.<sup>5</sup> In other words, this late submission (or rather, the timing of South Africa's submission of its report) made it impossible for civil society to comply with the Rules of Procedure on the submission of shadow reports. This also made it extremely difficult for CSOs to develop a proper response to the report given the shortened timeframe.
9. Also in the same vein, this report failed to follow, or at least mention, the ACHPR's Guidelines on the implementation of Socio-Economic Rights despite repeated requests from civil society that South Africa (should) follow, or at least mention, the ACHPR's Guidelines on the implementation of Socio-Economic Rights in its reports. These are important issues that require a great deal of improvement going forward.

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<sup>5</sup> Article 74 of the ACHPR Rules of Procedure requires sending of contributions including shadow reports 60 days prior examination of the Report. The Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2nd ordinary session held in Dakar (Senegal) from February 2 to 13, 1988 and it was revised during its 18th Ordinary Session held in Praia (Cabo-Verde) from October 2 to 11, 1995.

## **SHADOWING THE COMBINED REPORT OF SOUTH AFRICA (2002 – 2013)**

10. The South African legal frameworks, policies and administrative processes are premised on the principle of *Ubuntu* and most government departments promote the *Batho Pele* principles and values respecting the individual human dignity. These principles also underpin the very framework through which Civil Society engages the government in the advocacy around human rights concerns in the country.
11. This report, having noted the above observations based on the timing of the report from the South African government, provides the following comments based on the issues reported by the government of South Africa in line with the new reporting guidelines of the African Commission. These comments are presented here based on different themes and clusters identified based on the African Charter on Human and Peoples' Rights and Protocol on the Rights of Women in Africa.

### **PART A: THE AFRICAN CHARTER**

#### **Chapter One: Civil and Political Rights**

##### **Article 1**

12. In this report, there is no mention made pertaining to the progress made (if any) by the State to adopt legislation(s) or other measures to give effect to rights enshrined in the African Charter, despite the duty that is placed upon South Africa to do so under this Article.

##### **Articles 2 and 3: Prohibition of Discrimination and the Right to Equality**

13. **With reference to paragraphs 13 – 19 and 22**, the Government does not recognise the status of stateless persons in South Africa. Stateless persons in South Africa are stateless for a variety of reasons including gaps in the nationality laws of different countries to which the person may have a legal link, lack of birth registration and deprivation of citizenship. Currently there is no legal mechanism in the South African legislative framework to recognise the status and rights of stateless persons. The Immigration Act, 2002 contains a provision which could provide permanent residence to stateless persons, but it is inconsistently applied, if at all, and is not regulated and is costly. The right to nationality is the right from which all other rights flow. Without nationality, there can be no equality. Stateless persons' rights are routinely discriminated against for their lack of documentation

and status, thus making it impossible for them to enjoy the right to equality, the right to life and personal integrity, the right to dignity, prohibition of torture and slavery, the right to liberty and security of person, the right to freedom of conscience and religion, the right to freedom of association, the right to freedom of movement and the right to participate in government.

14. **Paragraph 22** addresses the *Bhe v Magistrate Khayelitsha* case with regards to equality. However, the findings of this case are not being applied when it comes to the birth registration of children born to unmarried parents. Langa DCJ notes in this judgement that *“when section 9(3) prohibits unfair discrimination on the ground of “birth”, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children’s parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.”*<sup>6</sup> The Births and Deaths Registration Act, 1992 still differentiates between children born within and outside of marriage. The Regulations to this Act prevent unmarried fathers from registering the birth of their children when the mother is unavailable or undocumented, perpetuating the cycle of lack of documentation and leads to statelessness.<sup>7</sup>

15. **With regards to the right to equality as it relates to hate speech:** The state report omits the obstacles faced with the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). Although this Act is enacted according the Section 9 of the Constitution, Section 10 of the equality Act needs to be fine-tuned to clarify what constitutes hate speech.

16. There is an inconsistency that poses a potential interpretive challenge for equality courts. The Constitution in Section 16 provides for freedom of expression, however limits it where such expression constitutes advocacy to hatred based on race, ethnicity, gender or religion specifically. The Equality Act on the other hand limits advocacy for hatred that is based on an array of prohibited grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. This suggests that the grounds covered by the Equality Act are wider than those provided in the Constitution.

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<sup>6</sup> 2005 (1) SA 563 (CC)

<sup>7</sup> Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC, 31 October 2015 – Lawyers for Human Rights and The Institute for Statelessness and Inclusion.

17. The definition of hate speech is also very broad in the Equality Act – speech that demonstrates clear intention to harm, hurt, promote or propagate hatred based on the above stated prohibited grounds. While current jurisprudence permits judges to proclaim certain speech as hate speech on the basis that it is harmful, the broadness of the hate speech clause makes it difficult to define and implement. This would have implications of freedom of expression. The pending case of *SAHRC v Jon Qwelane* is hoped to address the above stated challenges.<sup>8</sup>

#### **Paragraphs 167 – 171 (with reference to customary marriages)**

18. Stateless persons in South Africa do not enjoy the rights afforded to married persons in customary or religious marriages. Stateless persons are largely undocumented by virtue of the fact that a stateless person is a person who is not recognised as a national by any state under the operation of its laws and is therefore not often issued with identifying documentation. In order to register a marriage or a customary, religious or civil union one needs to possess an identifying document issued by the country of nationality. Stateless persons are unable to register marriages as a result of this. Their unions are not recognised formally and all the rights and privileges which flow from formally recognised marriages are likewise unrecognised.

#### **Article 4: The right to life and personal integrity (Paragraphs 38 – 44)**

19. Contrary to the position adopted by the South African Government in its state report (**paragraph 41 about non-extradition**), in the 2009 *Jeebhai*<sup>9</sup> decision of South Africa's Supreme Court of Appeal, the Court declared the detention of Mr Khalid Mahmood Rashid by representatives of the DHA at the Cullinan Police Station in South Africa and his subsequent removal and deportation to Pakistan to face terrorism charges to be unlawful. Upon conviction, Mr Rashid could have faced the death penalty in Pakistan.

20. Stateless persons in South Africa routinely suffer arrest and detention for lack of status and documentation in South Africa. Many stateless persons are routinely arrested and even assaulted by police. Some are detained indefinitely, because no country will accept them for deportation as they are stateless.

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<sup>8</sup> <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2014/334.html&query=qwelaneSAHRC>. The application on this matter is likely to be heard towards the end of 2016.

<sup>9</sup> *Jeebhai and Others v Minister of Home Affairs and Another* [2009] ZASCA 35; [2009] 3 All SA 103 (SCA); 2009 (5) SA 54 (SCA) (31 March 2009).

## Paragraphs 38 – 39 (non-refoulement)

21. Although reference is made to the protection afforded by the Refugees Act and International Protection instruments, the asylum protection system in South Africa is a far cry from these ideals and the progressive legal framework which prevents against *refoulement* does not translate into real protection. The South African Refugee Status Determination procedure is riddled with inefficiencies, lack of capacity, corruption and under-resourcing. The result is that first and second level decision making processes (by Refugee Status Determination Officers and then subsequently by the Refugee Appeal Board) are characterised by a lack of training, a misunderstanding and misapplication of basic legal concepts and a disregard for even cursory country of origin information. Immense backlogs (hundreds of thousands of claims) plague the system and create bottle necks in status determination. This cumulatively results in a decision making process which lacks credibility and integrity and bona fide refugees are routinely rejected and *refouled* to countries where they face danger and persecution.
22. There is also a systemic failure by the Department of Home Affairs (DHA) to properly apply the OAU clause which recognises refugees in a situation of general war or country unrest which unlawfully limits the number of applicants who may receive protection and be protected from *non-refoulement*. Civil society organisations routinely bring cases for judicial review to the High Courts in South Africa for the setting aside of poor decisions. In these limited cases, *refoulement* is avoided for the named applicants. Because of the prohibitive expense of court procedures, this is a remedy available to very few and the remaining applicants have no recourse when rejected by a system which is incapable of performing adequate status determination. The situation is exacerbated by the closure of inland Refugee Reception Offices – a move which has been declared unlawful by the courts. The government remains in contempt of court and defiance of those court orders and has still not re-opened the Refugee Reception Offices (RROs) in question despite clear and final orders from the courts to do so. The government's 2015 "Operation Fiela" saw numerous non-nationals being detained unlawfully and *refouled* to their country of origin despite being asylum seekers or refugees in South Africa. The legality of the *Operation Fiela* was challenged in Court and the matter is on-going on Appeal. In addition to this, numerous court applications were brought at this time to secure the release of asylum seekers and refugees and prevent their intended *refoulement* by the government.

23. While the Government correctly represents the finding of South Africa's Constitutional Court in *Tsebe*,<sup>10</sup> it fails to indicate that it had launched an unsuccessful counter-application to the effect (under **paragraph 42**). The government had been requested to extradite a person to a foreign State to face a criminal charge which could lead to the imposition and execution of a death sentence and when the South African Government asked that State to give the requisite assurance but that State refused the South African Government was then entitled to, either or not, extradite or deport the person concerned to that State. Accordingly, it was Mr Tsebe and Mr Phale, and not the South African Government, who were compelled to obtain an order restraining the South African Government from extraditing or deporting them to Botswana to face the death penalty.

24. In relation to the *Mohamed*<sup>11</sup> case, the Government fails to indicate that the decision of South Africa's Constitutional Court was as a result of Mr Khalfan Khamis Mohamed's unlawful rendition to the United States of America on 7 October 1999 by agents of the United States' Federal Bureau of Investigation, with the assistance of South African immigration officials. As a result, South Africa's Constitutional Court, and not the South African Government, directed its Registrar to send a copy of its judgment to the relevant Federal Court in New York. The judgment held that South Africa's Constitution did not permit extradition/rendition of a person to countries where the death penalty may be imposed and that the South African Government should seek an assurance to this effect from the receiving country, which it had not done.

**Article 5: Right to Dignity, Prohibition of Torture and Slavery, (Paragraphs 63 – 65 - legislative measures to prevent slavery and trafficking in persons)**

25. **Paragraph 46** of GOVSA report highlights the enactment of the Prevention and Combating of Torture of Persons Act as a major policy gain during the reporting period. While this Anti-torture legislation is a milestone towards South Africa's preventing and combating torture, gaps still exist when it comes to redressing the violation of torture. The Prevention and Combating of Torture of Persons Act does not expressly provide for redress for victims of torture which include

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<sup>10</sup> *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (27 July 2012).

<sup>11</sup> *Mohamed and Another v President of the Republic of South Africa and Others* ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (28 May 2001).

rehabilitation, compensation, restitution, satisfaction and guarantees of non-repetition.

26. The Act instead only provides for common law remedies for torture victims through a civil law claim for damages through the courts – a rather expensive and long-winded process which most torture victims cannot afford. The lengthy litigation process also results in secondary traumatising for torture victims and their families. There is a need to address torture victims' redress through existing mechanisms and processes such as the Victim Empowerment Programmes where torture victims can be added on victim groups and psycho-social training is provided for social workers to enable them to support torture victims.
27. Furthermore, although the Prevention and Combating of Torture of Persons Act provides for education and training for public officials involved in custody, interrogation or treatment of arrested, imprisoned or detained persons on the prevention and combating of torture; such training have not been carried out in a coordinated and consolidated manner and the trainings have not been rolled out nationwide. Furthermore, there is a gap when it comes to training and capacity building officers in the criminal and civil justice system. The criminalisation of torture calls for the officials in the criminal justice system, specifically the police officers, prosecutors, legal practitioners, magistrates and judges to be training on the Act and such training will enhance effective application, interpretation and enforcement of the Act's provisions.
28. Lastly, although the Act exists, the Regulations to operationalise the Act to aid its implementation have not been passed. The Regulations to the Prevention and Combating of Torture of Persons Act will strengthen procedural aspects of reporting and ensuring that perpetrators of torture are brought to book.

### **On Restoration of dignity for torture and other victims of gross human rights violations during the apartheid era**

29. The South African government has achieved a lot towards ensuring reparation for victims. In the implementation of the Truth and Reconciliation Commission Recommendations, The President's Fund for reparation for apartheid victims is being channelled to address collective harm and collective violations in South African Communities. However there is no clear differentiation between the use of these funds for community developmental projects on the one hand, and addressing harm and ensuring direct reparations for communities and individual victims of torture. There is a need to have such reparative processes for gross



human rights violations to address direct harm and further to benefit victim groups as opposed to addressing the developmental needs of the community.

### **With Regards to Preventing and Combating Human Trafficking**

30. Under Section 15 of the Prevention and Combatting of Human Trafficking Act, a visitor's visa is available for certain foreign victims but this visa is only valid for a period not exceeding three months, and may only be extended once. The current validity period for a visitor visa is wholly inadequate in terms of a survivor's reparative needs and also hinders the Republic's ability to prosecute crimes of trafficking. The provisions of the Act do not currently conform with the standard of relief afforded victims of trafficking in other major jurisdictions, nor with the declarations included within the Palermo Protocol (in particular, Articles 6 & 7).

### **Article 6: Right to Liberty and Security of Person**

#### **(Paragraphs 66-142: Detention of migrants, asylum seekers, refugees and stateless persons)**

31. The South African Constitution (Section 11) provides all persons within the Republic with the right to freedom and security of the person. The Constitution guarantees certain rights of arrested, detained and accused persons. An arrested person must appear before a court within 48 hours of arrest or as soon as reasonably possible thereof. The Constitution also ensures that every person who is detained is informed promptly of his rights, the reason for his detention as well as the right to consult a legal practitioner. The Constitution affords prisoners the rights of dignity as well as the right to be treated in a dignified manner which is not inhumane or degrading. These rights are meant to be held at the helm of South African law regarding detention and imprisonment.

32. The State report outlines at length the legislation, policies and institutions in place to address the rights of arrestees and detainees in South Africa and which, indeed, by and large uphold their fundamental rights. However, the main challenge lies in the implementation of the legislation and policies and the operational framework of the said institutions. Evidence shows that law enforcement officials enjoy *de facto* impunity for gross human rights violations they commit, including for acts of torture, despite specialised oversight institutions in place to inspect prisons and to investigate serious crime committed by police. There is a need to review the practice, and in some instances the powers and mandate, of these oversight institutions and the prosecution practices that follow.

Too many people die at the hands of the police, which may be facilitated by legislation authorising the use of deadly force by police even when lives are not immediately in danger. The Marikana massacre is an extreme example of such abuse of force. Furthermore, vulnerable groups are the target of abusive and unnecessary arrests. Also, conditions of detention in prison amount to a violation of the right to security and dignity of prisoners, in particular as they are exposed to high levels of violence from other prisoners and from officials, are detained in overcrowded cells, do not have access to adequate healthcare, do not have access to adequate care or rehabilitation services and are not examined for parole in accordance with legal prescripts.

33. The above rights are domesticated in the Criminal Procedure Act<sup>12</sup> which provides the procedures which need to be followed in order to achieve the above legal principles. However, immigration detention does not fall within the ambit of this Act and is solely regulated by the Immigration Act. Persons in immigration detention are deprived of their right to liberty in both law and practice. Undocumented persons, those who do not have a visa or who have allowed their visa to expire, are considered “illegal foreigners” under the Immigration Act<sup>13</sup> and are subject to arrest and detention.

34. Asylum seekers are allowed to enter the country without any documentation as long as they report without delay to a refugee reception office.

35. Section 41 of the Immigration Act requires that every person who is approached *on reasonable grounds* by a police or immigration officer must be able to identify him or herself as a citizen, temporary or permanent resident. If the officer is not satisfied that the person is lawfully within the country, the person in question may be detained for up to 48 hours for an investigation into their status. If indeed the person does not have authorisation to remain in the country and is not an asylum seeker he or she may be detained for an initial period of 30 days without a warrant pending deportation. If the person is not removed from the country within the first 30 days a court may authorise an additional 90 day detention period. This authorisation is done without the detainee present. If the 120 day total period expires without the deportation taking place, the Supreme Court of Appeal has made it clear that he or she must be immediately released, although the deportation process does not necessarily have to end.

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<sup>12</sup> Act 51 of 1977

<sup>13</sup> Act 13 of 2002

36. Besides the Act being unconstitutional and violating of certain rights the implementation of this particular law is often unlawful as well. Detainees are held for days, and in some cases even weeks, while the Department of Home Affairs verifies their documents. They are then transported to Lindela Repatriation Centre where they are kept for 30 days without being informed or presented with any order of the court. If anything is being communicated to them or they are asked to sign documents, the documents or communications are often in a language they do not understand and translations are not provided. In most cases, detention is automatically extended beyond the initial 30 days without an order from a magistrate. Those who do not have legal representation to assist them are in some cases detained for longer than the 120 days and are kept in the facility until arrangements are made for them to be deported instead of them being released after 120 days knowing that the deportation process will still continue. The conditions at Lindela Repatriation Centre are extremely poor with overcrowding and hygiene being some of the detainees' main concerns. Detainees constantly highlight the lack of adequate medical services and the infestation of lice and other insects in the cells. Despite the Constitution making provision for the respect of dignity for all within the Republic, even those detained and imprisoned, it does not seem to be the current reality in South Africa.
37. Despite the Act allowing for 5 days for a new comer to seek asylum, in reality many foreigners are arrested upon arrival due to the lack of documentation and ignorance of the law of police officials. Police and immigration officials often ignore these persons' pleas on unfounded suspicion that they are economic migrants that are abusing the asylum system. They are not afforded the opportunity to seek legal representation, explained the charge and their rights in a language they understand or given an opportunity to seek asylum but are rather transferred to Lindela Repatriation Centre ("Lindela") to be deported.
38. The legislation which deals with detention (The Immigration Act) has been ruled to be unconstitutional in the recent case of *Lawyers for Human Rights versus the Minister of Home Affairs*<sup>14</sup>. In particular, Judge Janse Van Nieuwenhuizen held that Section 34(1) (b) and Section 34(1) (d) of the Act are both unconstitutional. Judge Janse Van Nieuwenhuizen went on to say that it is unconstitutional for a detainee to request confirmation of her detention from a court without making representation to that court. The judgement further states that extension of the detention period over and above the initial 30 days without an appearance before the court to make such an order is unconstitutional. This serves to prove that the

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<sup>14</sup> Caseno. 39171/2014

discrepancies in the legal framework put non-nationals in a compromised position.

39. Asylum seekers and refugees are routinely detained, in contravention of the Refugees Act and the Immigration Act 13 of 2002. It has maintained in court papers that the right to 'sojourn' found in Section 22(1) of the Refugees Act may be exercised from detention, despite court rulings declaring this unlawful.
40. Despite the rights that are accorded to asylum seekers under South African law, in practice claimants struggle to access schooling, health care, and financial services. These difficulties are exacerbated by the constant need to travel to Refugee Reception officers to renew asylum documentation.

#### **Article 9: Freedom of information and expression (*Paragraphs 185 to 191*)**

41. Freedom of expression is guaranteed in the Bill of Rights under Section 16 (1) of the South African Constitution. Besides Section 16, citizens are accorded the right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any right in order to foster a culture of transparency and accountability in public and private bodies under Section 32 of the Constitution. The Promotion of Access to Information Act (PAIA), (2 of 2000) gives effect to Section 32.
42. The SAHRC's (2008-2012) audit on PAIA compliance revealed that there is low compliance by local municipalities in facilitating access to information. PAIA obliges municipalities to develop responsive processes and materials that are usable by community members. However, compliance with this and other requirements currently stands at less than 5% across the country. Further, in the cases where an attempt at compliance has been found, this has been negated by overly bureaucratic processes and materials that are not accessible and usable. Furthermore, appeal procedures have been undermined by the lack of oversight mechanisms of the Information Regulator and limited access to the courts by communities.

#### **Paragraphs 174-177**

43. Submission under **paragraphs 174 -177** shows that the South African Human Rights Commission's responsibility of promoting the right to access information and monitoring role for compliance with the ACT is impeded by lack of political will and adequate resource for the SAHRC to implement fully its mandate accorded by the Act. The state report is accurate in that there is low utilisation of

PAIA. As the SAHRC reports that only 5% of municipalities have fulfilled their PAIA obligations.

44. There are challenges regarding general practical application of the right to freedom of expression by citizens. This is informed by a number of laws, mostly a hangover from the apartheid period that still in the country's statute book which negatively affect the right to freedom of expression. These include the National Key Points Act (1980) and certain sections of the Criminal Procedure Act (1977).
45. Lastly after a year of debate, a contentious Bill was passed by the National Assembly in April 2013 dubbed the 'Secrecy Bill' by its opponents, the finalised version of the Bill criminalises the public for possessing information that has already been leaked, protects apartheid-era secrets, and still contains broad definitions of national security that will in all likelihood be used to suppress legitimate disclosures in the public interest.
46. In short, this stands to undo many of the gains on freedom of expression in the post-apartheid period, and which civil society have been vehemently opposing. President Jacob Zuma has sent the Bill back to the National Assembly for reconsideration in September 2013.

## **Media Freedom**

47. Freedom of expression has triumphed in a number of notable instances in South Africa. This is observed mainly through the media whose role in promoting an open democracy is indispensable. A progressive victory in terms of access to information in 2016 was the decision by the Gauteng High Court that live streaming would now be allowed in courts. The decision came after a case was brought forward by a media company called Combined Artistic Productions who cover an investigative programme called Carte Blanche.
48. Despite some positives, community journalists do not have full ability to expose the issues going on in grassroots communities. Many community radio and newspapers are state controlled therefore are not viable avenues to engage political discussions openly. In some instances, there is the suspicion of the community that government collaborates with multinational companies, particularly mines to avoid covering stories about the effect of these businesses on environmental rights. Professional journalists as well as citizen journalists and others who contribute to shaping public debate and public opinion on the internet should be recognised as agents of the larger society who enable the formation of opinions, ideas, decision making and democracy. Attacks on them as a result of

their work constitute attacks on the right to freedom of expression. Accordingly, all appropriate steps should be taken to ensure their protection in terms of both preventative measures and effective investigations and action whenever they come under attack.

**49. The Statutory Media Appeals Tribunal:** The period has seen the revival of the notion of the need for media regulation in South Africa. Advocates of Statutory Media Regulation argue that South Africa needs such a body in order to ensure that media are accountable. However, those who oppose it believe that a statutory body that regulates the media will have a chilling effect on media reportage. Driven by limited political agendas, the debates have continued to be largely positional and little movement or understanding of some of the bigger challenges has taken place. Real challenges of media freedom, diversity and transformation remain broadly unaddressed. Valid and oppositionist critiques of accountability systems are not dealt with in any substantial manner with the result that little real focus is given to issues of media quality and reporting marginalised issues like social justice. Given that the debates on the possibility of a media appeals tribunal are still ongoing, we would want to find out where the South African government stands on this as this will have a material impact on media freedom in the country.

**50. The ICT Policy Vacuum:** There has been no development on the Information Communication Technology (ICT) policy review. Despite being a core element of South Africa's National Development Plan (NDP),<sup>15</sup> there is no clarity as to which department or ministry is responsible or who is taking which elements forward. Despite this, there has been some positive movement around provision of access to the internet. In Tshwane for example there is a clear effort to provide free internet access via Wi-Fi in public spaces. While this is very positive, it is too limited and does little to reduce the overall costs of internet access. Data costs remain high and there continues to be a deafening silence on the importance of digital literacy. What is clear is that digital literacy is currently not being addressed by government or the private sector with only a few voices from civil society raising the issue. Yet without digital literacy citizens will not be empowered to access their right to information.

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<sup>15</sup> The NDP can be accessed here:

<http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20lo-res.pdf>

**51. The Conservative Online Regulation and/or Internet Governance:** In the period we have seen the Film and Publication Board (FPB) issue draft online regulations<sup>16</sup> that have been influenced by conservative views and an approach to regulation of the Internet that borders on sheer megalomania. Despite convergence being a reality in technology, it would seem the FPB and other conservative figures seek to fight back against technology. In a dramatic throwback to the apartheid era they view the growth and integration of technology into society as a sign from the devil with paedophiles sitting behind every computer and/or mobile device connected to the internet. While this may sound dramatic it is really as bad as it sounds if not worse.

52. In its submissions on the FPB's draft online regulations, Media Monitoring Africa<sup>17</sup> and many other civil society organisations echoed that the regulations in their current form are impractical, illegal, overboard and will not achieve their stated aims. The regulations were also drafted in isolation with other processes undertaken by the Department of Justice and Constitutional Development (particularly the Cybercrimes and Cybersecurity Bill) as well as the ICT policy review and the National Development Plan.

**53. The Cybercrimes and Cybersecurity Bill:** In the period we witnessed the Department of Justice and Constitutional Development (DOJ & CD) publishing the Cybercrimes and Cybersecurity Bill. There is no doubt that such legislation is needed as "the Internet is one of the fastest growing areas of technical infrastructure development. ICTs are omnipresent and the trend towards digitisation is growing. The demand for Internet and computer connectivity has led to the integration of computer technology into products that have usually functioned without it, such as cars and buildings."<sup>18</sup> At present, South Africa has no legislation that addresses Cybercrimes and Cybersecurity, whether it is to describe what constitutes a Cybercrime, how to enforce the law governing Cybercrime, or to determine appropriate correctional sentencing for those convicted of offences in this realm. While the Bill is a welcome development as it will bring South Africa in line with international laws governing internet-based crimes, it is excessively far-reaching, not practical and in many instances it grants

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<sup>16</sup> The draft online regulations can be accessed here: <http://www.fpb.org.za/profile-fpb/legislation1/514-draft-online-regulation-policy-2014/file>

<sup>17</sup> Media Monitoring Africa's submissions can be accessed here: [http://www.mediamonitoringafrica.org/index.php/resources/entry/mmms\\_submission\\_on\\_the\\_film\\_and\\_publications\\_boards\\_proposed\\_online\\_regulat/](http://www.mediamonitoringafrica.org/index.php/resources/entry/mmms_submission_on_the_film_and_publications_boards_proposed_online_regulat/)

<sup>18</sup> Read "Understanding Cybercrime: Phenomena, Challenges and Legal Responses" here: <http://www.itu.int/ITU-D/cyb/cybersecurity/docs/Cybercrime%20legislation%20EV6.pdf>

a concerning level of discretion to the South African Police Service (SAPS) and the State's security cluster.<sup>19</sup>

54. **Surveillance:** Laws have been passed like the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA) which has been criticised for surveillance of journalists and human rights defenders. Concerns regarding the interception of people's information without them knowing are raised and whistle blowers are open to the risk and not protected. In addition, the existence of this law brings to mind the apartheid era of secretive *modus operandi* and is reported to be open to abuse.<sup>20</sup>

55. As the right to privacy enshrined under Section 14 of the Bill of Rights is constantly infringed.<sup>21</sup> There are new paradigm shifts taking direction of intolerance to those advocating for truth and exposing malpractice persisting in state institutions. They are subjected to aggression, surveillance, stigmatisation, arbitrary reallocations, summary suspensions from work, compromised to defend human rights as enshrined in Bill of Rights. Attempts have been made to interfere with the independence of the judiciary and national human rights institutions, established with Constitutional mandates to function independently, without fear, favour and prejudice.<sup>22</sup>

56. This is very serious as this suppression of human rights practice is even demonstrated at UN level where the state voted no to a Resolution that sought to protect human rights defenders. The state official defended a no vote of the state by posing a question during a radio interview such as: "who is a human rights defender, and what do they do?" The African Commission has developed a handbook to assist State Parties with human rights principles that elaborate who

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<sup>19</sup> For more issues concerning the Cybercrimes and Cybersecurity Bill, see Media Monitoring Africa's submissions on the Bill here:

[http://www.mediamonitoringafrica.org/index.php/resources/entry/written\\_submissions\\_by\\_the\\_media\\_monitoring\\_africa\\_mma\\_on\\_the\\_cybercrimes\\_a/](http://www.mediamonitoringafrica.org/index.php/resources/entry/written_submissions_by_the_media_monitoring_africa_mma_on_the_cybercrimes_a/)

<sup>20</sup> Right2know campaign provided that implementation of South Africa's data protection law, the Protection of Personal Information Act (POPI) has been delayed. Including appointment of Inspector General, a crucial body that could have started protecting the public's right to privacy, (and appointment of POPI and PAAI Information Regulator).

<sup>21</sup> This includes their person, property, possessions not to be searched and private communication not to be infringed.

<sup>22</sup> Junior Sikhwivhilu – HURISA Programme Officer for SOTU Project: Chapter 9 Institutions, like the Public Protector's, Constitutional and Legislative powers and enforceability of decisions of this office were questioned. Fear of human rights defenders to speak about corruption exposed from institutional and executive levels. The potential stigmatisation of officials who raise human rights issues and human rights defenders with litigation mandate like the Southern Africa Litigation Centre, are criticised for successful litigation holding government accountable for breach of international and regional obligations.



a human rights defender is. The handbook is also developed to assist Member States to recognise, promote and protect human rights defenders through implementation of resolutions calling Member States to stop intimidation, harassment and reprisals against human rights defenders who cooperate with the Africa Commission or strengthen the African system of human rights.

57. The fundamental problem with the Bill is that it uses broad terms that are loosely defined such as 'critical data'. In addition, the Bill loosely uses the words 'unlawful' and 'intentionally,' and these are the only words standing between a lawful person, organizations, businesses and criminals.<sup>23</sup> What is startling is that a bill of this nature makes very little reference or even acknowledges freedom of speech.<sup>24</sup>
58. To ignore freedom of speech is to ignore the basic principle of most laws, that the same rights that people have offline must also be protected online.<sup>25</sup> The bill is too vague and all encompassing, to the point that it is likely to impact negatively on personal and public freedoms online. It is not framed from the perspective of public interest and therefore compromises those in possession of information or data, such as journalists, journalists' sources, bloggers and whistle-blowers, with the intention of sharing this data or publishing it to expose corruption or wrongdoing.
59. South Africa should use a model law on freedom of information prepared by African Commission, Special Rapporteur on Freedom of Expression and Access to Information in Africa as a guide for development of information and communication bills including the Cybercrimes and Cybersecurity Bill<sup>26</sup>.

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> The Model Law on Freedom of Information adopted by ACHPR in 2010. Also see the ACHPR Resolution to modify Freedom of Expression to include Access to Information. Online: <http://www.achpr.org/sessions/51st/resolutions/222/>

## **Articles 10 and 11: Freedom of Association and Freedom of Assembly**

### ***(Paragraph 192)***

#### **Article 10: Freedom of Assembly**

60. The right to assembly is enshrined in the Constitution under section 17 and this right is given life through its empowering legislation the Regulations of Gatherings (RGA) 205 of 1993. This Act has been referred to in the State report in submission 194. The RGA has over the years of application been abused by authorities in the most atrocious ways. Members of the community who wish to organise protests have indicated that municipal authorities are unaware of the Regulations of Gatherings Act. Their lack of awareness leads to rejection of notices for demonstrations and/or protests, making it difficult for people to organise gatherings legitimately.

61. The Police misconstrues provisions of RGA, in particular Sections 3 and 4. The convenor of an assembly is required to give notice of the gathering, but the police have turned this into authorisation of assemblies. Police also politicise and intimidate convenors in implementation of Section 4 of the Act requiring pre-consultations to be conducted with convenors.

62. There is evidence that municipalities have requested convenors to produce additional documents not required by the Act, such as permits to use a public road. There are instances where assemblies have been declared illegal due to permission to hold a march not given by police. Police have frequently used excessive force in dispersing persons in marches, including use of live bullets to shoot and kill demonstrators even when this right is constitutionally safe guarded, including the Act's disapproval of the use of weapons likely to cause serious bodily injury or death. Police brutality and impunity persist in the new dispensation similar to apartheid era. (Marikana massacre, Andries Tatane, and even the #FeesMustFall students' campaign in Parliament in 2015 are testimony to this).

63. Furthermore, the State report does not mention the fact that community activists are targeted for arbitrary arrests especially service delivery protests that are taking place in the country. Examples of incidences include, the so called 'Boiketlong four' who are community members in the North West Province. They were arrested in 2015 and sentenced for 16 years for arson during a service delivery protest. One of the four is said not to have been part of the protests on the day the three were convicted. He is however currently serving jail time due to

his association with community activism. The sentence is too harsh and some community based organisations have been trying to context the harsh sentence placed on the four.

64. Another incident involves a community activist based in Thembelihle in the Gauteng Province called Bhayzer Miya. He is currently in jail for arson even though he did not participate in the particular protest for which he was arrested. In this same light, General Moyo from Makause Informal Settlement in the Gauteng Province has also been a victim of arbitrary arrests due to his involvement in service delivery protests. Moyo is currently out of prison but is susceptible to arrests.

### **Article 11 Freedom of Association (*Paragraph 197*)**

65. Section 18 of the Constitution and the NGO Act of 1997 guarantee freedom of association. The latter places voluntary and free registration of NGOs by the NPO Directorate within the Department of Social Development. An online registration is also created for submission of applications. However, the application form is written in English language while majority of South African people are not English speaking. This perpetuates exclusion and discrimination to the historically disadvantage communities. Also, the website of the Directorate is outdated and confusing and the Directorate is not sufficiently capacitated to handle online applications and as such offers no assistance to applicants with online registration. Thus<sup>27</sup>:

- a. Whereas the government is commended for free registration of CSOs, however DSD tends to work with agents who use the lack of information and knowledge among applicants to exploit them by demanding huge sums of money before registering their organisations.
- b. Incapacity (including an ineffective filing system) in the NPO Directorate negatively affects the registration process.
- c. In the event of incomplete applications, organisations are made to re-start the application process all over again thus wasting time, energy and resources.
- d. The online registration process is dysfunctional which hampers the ability of CSOs to make use of it. When the problem of poor access to, and the lack of adequate knowledge in the use of, the internet among the rural population is

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<sup>27</sup> HURISA, Enabling Environment of the CSOs (EENA) Workshop Report, 10 June 2015.

added, it becomes even clearer that the online registration process is a hindrance for many CSOs.

- e. There is a long delay in the issuing of registration certificates. Many organisations have to wait over 5 or 6 months to receive their certificates of registration.
- f. De-registration of CSOs without prior information to the members is a major challenge. There is no transparency in this process and there are strong suspicions that corruption is involved. For instance officials will inform a CSO that it is being de-registered whereas the reality is that the de-registration is only an attempt to hijack the project or projects proposed by that CSO<sup>28</sup>.
- g. CSOs in rural areas lack resources to make the trip to the Directorate Head Office in Pretoria to ensure registration of their associations
- h. Funders require CSOs to be registered before they can apply for funding. Given the long delays experienced with the registration process, many aspiring CSOs simply collapse while awaiting their registration certificates.

## **Article 12: The Right to Freedom of Movement (Paragraphs 201 – 211: Legislative and policy measures to protect asylum-seekers and refugees)**

66. Although asylum seekers have many *de jure* rights, the South Africa Government has taken steps to limit their *de facto* realisation.

67. Notwithstanding the gradual decrease of applications for asylum over the reporting period – which decreased to 70,010 in 2013 but increased slightly to 71,914 in 2014<sup>29</sup> - asylum seekers continue to face severe difficulties in receiving Refugee Status Determination Officer (RSDO) or Refugee Appeal Board (RAB) decisions, often waiting for years for determinations on their status.

68. **Paragraph 203:** The insinuation that most applicants for asylum are work-seekers (or economic migrants) is generalised and unfortunate. The South African Government points to the high rejection rate in the status determination process as proof that most people in the asylum system are, in fact, economic migrants. However, the status determination process is not an adequate reflection of the nature of people in the asylum system because of the problems

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<sup>28</sup> Ibid.

<sup>29</sup> See: <https://pmg.org.za/committee-meeting/22109/>

in this process which have been well documented by the African Centre for Migration & Society.<sup>30</sup>

69. **Paragraph 204** states that the Bill of Rights applies to all people in the country including the right to dignity. **Paragraph 206** mentions that refugees are entitled to permanent residence after five years of continuous residence in South Africa. However, Angolan refugees underwent a 'cessation' process from 2012 to 2016 in which the government withdrew the refugee status of Angolan refugees as the conditions which caused their flight in Angola had been extinguished.<sup>31</sup> They have been denied permanent residence despite their continuous residing in South Africa.

70. The government issued former Angolan refugees with two year temporary residence permits with relaxed conditions under a special dispensation within the Immigration Act (No 11 of 2002). The permits have now expired resulting in the former Angolan refugees being undocumented in the country as no special consideration for renewals was provided for; the onerous requirements of the Immigration Act make applications for Permanent Residence or Work Permits virtually impossible. This policy has had a devastating impact on the former Angolan refugee community in the country who have resided in the country for an average of 18 years. Many of their dependants such as third country national wives and children (who have spent their entire lives in South Africa) now face an uncertain future and will either remain undocumented in South Africa or be forced to return to Angola, a country they do not know.<sup>32</sup> Due to administrative deficiencies in the 27(c) permanent residence process and a lack of awareness about this process, many Angolans were unable to access the permanent residence process as provided for by the Refugees Act.

71. We submit that this policy is contrary to the right to dignity under the Charter and South African Constitution and does not represent a durable solution to the former refugees.

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<sup>30</sup> See, for example, Amit, R. (2012) *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*. Research Report June 2012 ACMS, Wits, Johannesburg and Amit, R. (2010) *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions*. Report April 2010 ACMS, Wits: Johannesburg.

<sup>31</sup> UNHCR, 'Implementation of the Comprehensive Strategy for the Angolan Refugee Situation, including UNHCR's recommendations on the applicability of the "ceased circumstances" cessation clauses' (January 2012).

<sup>32</sup> Scalabrini Centre of Cape Town, *Angola is Just a Picture in My Mind* Research Report (April 2015)

72. **Paragraph 207** expresses that South Africa does not host refugee camps, and that asylum seekers can move freely around the country. The report does not mention that South Africa has embarked a policy of closing urban Refugee Reception Offices (RRO) which effectively makes certain parts of the country, such as cities such as Cape Town and Port Elizabeth who host significant refugee populations, impossible to reside in for asylum seekers who now are required to report to either Musina, Pretoria, or Durban RROs for documentation. The closure of three urban Refugee Reception Offices in 2011 been found unlawful by the courts but at the time of writing none of the RROs have been reopened. The refusal by the South African Government to reopen them despite court orders compelling them to do so, has greatly curtailed claimants' access to the asylum system. The government has instead continued with the closures and has discussed the move of RROs to the border and possible establishment of a camp-like scenario.<sup>33</sup> The decision implies that thousands of asylum seekers will either have to abandon the idea of residing in the Cape Town area while their asylum applications are assessed, or they will need to spend time and money to travel on a number of occasions to RROs in the north of the country. If they have work in Cape Town, they may lose it because of the need to take off three or four days for each attendance at an RRO. If they have dependants, they would need to leave them in the care of others or travel with them.<sup>34</sup>

73. The result of this policy is as described, with large numbers of asylum seekers having difficulty with access to RROs and asylum procedures, often becoming undocumented and being severely limited in their movement.

74. The closures have a particularly negative effect for vulnerable populations such as unaccompanied minors and asylum seekers with disabilities – for vulnerable individuals in Cape Town, it has become impossible to lodge a claim at the Cape Town RRO or have a file transferred requiring multiple trips to other RROs for documentation matters.

75. In Cape Town, several High Court applications have been lodged seeking to allow asylum seekers with permits from other offices the opportunity to have their claim finally adjudicated in Cape Town. In *Abdullahi and Others v Director-General of the Department of Home Affairs and Others*<sup>35</sup> the court ordered that

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<sup>33</sup> Bobby Jordan 'Refugee camp plans for SA borders' *The Sunday Times* (2 December 2012) available at: <http://www.lhr.org.za/news/2012/refugee-%E2%80%98camps%E2%80%99-plan-sa-borders>.

<sup>34</sup> *Scalabrini Centre, Cape Town and Others v The Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) at para 110.

<sup>35</sup> *Abdullahi and Others v Director-General of the Department of Home Affairs and Others* (7705/2013) [2015] ZAWCHC 131 (27 February 2015)

1,123 asylum seekers have their refugee claims adjudicated in Cape Town. Further litigation on the matter is also ongoing seeking to broaden access to the Cape Town RRO to all asylum seekers residing in the Western Cape requesting to have their claims finalised in Cape Town.

76. The government has also indicated further curtailments to freedom of movement of asylum seekers in the legislative draft bill the Refugees Amendment Act (2015)<sup>36</sup> which places a number of restrictions on asylum seekers. Most concerning is the possibility of the Government to require asylum seekers to report to certain areas; while these provisions have not been passed or clarified, we remain concerned that the result of such a policy will be the creation of areas similar to detention centres where asylum seekers will be required to stay while awaiting adjudication. Given the lengthy period of adjudication, often taking several years or more, this will have enormous implications for asylum seekers and the right to family unity, the right to dignity, and equality. Coupled with the Draft Amendment Bill's removal of the right to work for asylum seekers (except for those who are granted the right to work, locate a possible position and receive an offer of employment, and then return to the RRO for a work endorsement), These provisions have the possibility of creating a humanitarian crisis and will likely lead to high numbers of undocumented asylum seekers and increased possibility of *refoulement*.

77. Further, asylum seekers often work in low-wage jobs and cannot afford to take the time off work, nor can they afford the travel costs associated with traveling to another city in order to obtain and /or renew documents.

78. Importantly, asylum seekers are only permitted to receive asylum documentation from the Refugee Reception Offices at which they applied, which are often hundreds of kilometres away from places of their work residence.

### **Paragraphs 201 – 216: Xenophobia in South Africa (Measures to address attacks on foreign nationals)**

79. The xenophobic attacks did not start in 2008, nor did they end after the 2008 outbreak. Following the violence in 2008, from mid-2009 to late-2010 there were 20 reported deaths of foreign nationals; 40 serious injuries; 200 foreign-owned shops looted; and 4000 people displaced. In 2011, 120 foreigners were killed (5 burnt alive), 100 seriously injured, 120 foreign-owned shops closed, and 1000

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<sup>36</sup> Draft Refugee Amendment Bill (2015).

people displaced. In 2012, there were 140 deaths of foreign nationals and 250 serious injuries. In 2013 there was an average of 3 violent attacks against foreign nationals per week. There was another outbreak of xenophobic violence in January and March 2015. Paragraph 214 states South Africa has developed a “multi-faceted and integrated plan” but this it is not specific. All of the above statistics can be attributed to continuing xenophobic attacks against foreign nationals.

80. Furthermore, after the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban in 2001, government started drafting a “National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance”. **Paragraph 210** provides statistics on prosecutions since xenophobia sparked in country in 2008. This is more than a decade that there’s no hate crimes legislation in terms of which to prosecute the perpetrators of these crimes. We have been informed that the draft or the plan has not been finalised.
81. With reference to the 2008 xenophobic attacks, it was only after considerable delay that the police responded and managed to contain the violence by isolating (but not intervening at) hot spots. Since 2008 there have been 350 deaths of foreign nationals but only one prosecution for *murder*.
82. The African Commission passed Resolution, (Res. ACPHR 131 of the African Commission) in 2008, urging South Africa to protect the properties, the life of migrants and prosecute the perpetrators of their rights. In 2015, the ACHPR Resolution 304 condemned the xenophobic attacks in South Africa and the government was urged to implement Resolution 131. But the number of prosecutions and convictions arrived at by the South African courts is very low to all attacks committed since 2008 -2015. Clearly, South Africa is not doing enough to address the rampant xenophobic scourge affecting the country.
83. Of particular concern, and one of the major shortcomings of the Report, is the State’s failure to address the surge in xenophobic violence that occurred in 2015. While **paragraph 3 of the Report** notes that the time period captured is from 2002 to the end of 2013, it is necessary for the State to reference updated information on the current situation facing refugees, asylum seekers and migrants. In April 2015, widespread looting of shops and attacks on non-South African nationals took place in Durban and Johannesburg. In October 2015, hundreds of people were displaced due to xenophobic violence in Grahamstown. The position of government officials has largely been to deny that such violence



was rooted in xenophobia, which leaves refugees, asylum seekers and migrants without adequate State protection.

84. It has been noted that South African's response to xenophobia has been very pathetic and characterised by "denialism" and dominated by the "just crime not xenophobia" discourse that resulted not surprisingly in "no need" for specific interventions. As a result, government officials and political leaders often make xenophobic pronouncements that shape or reinforce public opinion and behaviour. Since xenophobic violence in 2008, there has been no official national policy response to xenophobia except the government's "swift response" to contain the violence and prevent the spread of attacks. The Report mentions the following as a response to the xenophobic attacks:

- a. The establishment of an Inter-Ministerial Committee to address threats or violence against foreign nationals;
- b. The monitoring, regulation and protection of businesses owned by foreign nationals;
- c. An August 2008 Social Dialogue on Xenophobia;
- d. A March 2010 report by the South African Human Rights Commission on the State's response to the attacks;
- e. The government's multi-faceted plan to prevent outbreaks of violence, established in July 2010; and National Summit on Social Cohesion, held in July 2012.

85. Furthermore, after the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban in 2001, government started drafting a "National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance". It has taken until 2016 for Cabinet to approve a draft that is now open for public comment. This 15-year delay in complying with an outcome of a UN conference hosted by the government of South Africa indicates the denialism and lack of urgency to develop a comprehensive anti-discrimination policy.

86. **Paragraph 210** provides statistics on prosecutions since xenophobia sparked in country in 2008. Since 2008 there have been 350 deaths of foreign nationals but only one prosecution for *murder*. In the absence of hate crimes legislation it is not possible to disaggregate crime statistics on the basis of xenophobic attacks. We welcome the announcement that the South African government will be introducing a draft Hate Crimes Bill this year.

87. **Paragraph 212** addresses the SAHRC regarding the attacks and highlights that the SAHRC report has made some recommendations toward improving government preparedness and response to xenophobic attacks but does not indicate if and how it is incorporating these recommendations into policy.
88. The biggest threat to refugee protection in South Africa presently is the proposed amendments to the existing Refugees Act. The Refugees Act in its current form is a progressive piece of legislation and when read with the Constitution and accompanying jurisprudence, a wide variety of rights are given to asylum seekers and refugees. Most of these are set out in the report and although it is noteworthy that the rights conveyed by legislation often do not translate themselves meaningfully into the lived realities of asylum seekers and refugees, the general outline of legal protection in South Africa is presently commendable. The gap between legal rights and implementation is often vast with many asylum seekers battling to enforce their most basic rights including accessing health care, education, documentation and work. The report is however notably silent on the proposed unconstitutional amendments which are currently before Parliament for consideration in the form of an amendment Bill.
89. The extent of the impact of the proposed amendments is vast and is comprehensively canvassed in the annexure containing Lawyer's for Human Rights comments<sup>37</sup> on the proposed amendments drafted for the attention of the Department of Home Affairs. The proposed amendments seek to undermine legal jurisprudence from the Constitutional Court (and other courts) as well as the fundamental principles of the Constitution itself. It is highly recommended that the annexed comprehensive submissions are studied in detail to fully understand the extent of the attack which the proposed amendments pose to the rule of law, democracy and constitutionalism. It is crucial that these amendments are stopped since the passage of a blatantly unconstitutional legislation, which has regard for neither the existing court judgements nor the constitution itself, is a dangerous move for a government which is governed by a supreme Constitution.
90. The amendments are not just a "refugee issue", they are a move which undermines the very premise of constitutional supremacy in that, among other concerns;
- They seek to take away the right of asylum seekers to work, despite clear jurisprudence from the Supreme Court of Appeal affirming this right;

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<sup>37</sup> Annexure: LHR's comprehensive submissions to the DHA on the illegality of the proposed amendments to the Refugees Act.

- They seek to limit the ability of asylum seekers to establish independent livelihoods;
- They seek to limit the freedom of movement of asylum seekers and implement border processing centres which would not allow asylum seekers to move inland;
- They seek to restrict and limit those who may apply as dependants of refugees in a manner which contradicts jurisprudence on this point;
- They seek to impose incremental movements to “housing facilities” and/or an encampment situation and make the UNHCR and NGOs responsible for the care and wellbeing of asylum seekers without due regard for the health and social risks attached to an encampment model of protection.

## **Article 13: Right to Participate in Government**

### ***Paragraph 217***

91. Historically, opposition members of parliament have been at risk of being silenced, such as in the incidence in 1997 where Member of Parliament Patricia De Lille, threatened to release the names of the African National Congresses and was suspended as a result. In the same vein, there is currently a trend in Parliamentary proceedings where members of opposition parties complain about not being afforded enough platforms to speak. This was specifically noted in the two **“State of the Nation”** Addresses (2014 and 2015) where members of the opposition were forcefully removed from parliament because they had not followed parliament etiquette.

### ***Paragraph 221***

92. The report, here, speaks on the increase in number of registered voters. However, to be registered as a voter, one has to be registered as a South African citizen on the National Population Register. There is still a significant population of South African citizens whose births have not been registered for various reasons. One of the reasons is that the regulations to the Births and Deaths Registration Act, 1992 prescribe a strict set of requirements for the late registration of a birth (after 30 days of the birth) which are impossible to fulfil for many South Africans as a result of their birth outside of a hospital or lack of parents’ documentation or death certificates amongst others. The Department of Home Affairs has made it clear that the Late Registration of Birth Process will be

ended completely in 2016. This would mean that no child or adult can be registered as a citizen after 30 days of the birth. Not only will this lead to mass statelessness, but it also prevents these people from participating in government which is their right as citizens.

## Chapter Two: Economic, Social and Cultural Rights

### Article 14: Right to property

93. **Paragraph 234** indicates that the Department of Rural Development and Land Reform aimed at “curing the blight of poverty by the creation of vibrant, equitable and sustainable rural communities.” To achieve this vision, **paragraph 235 states** that the department aimed to facilitate integrated development “through partnerships with all sectors of society. The State Report indicates that Land Reform within the department consists of four pillars, namely restitution, redistribution, tenure reform and development.

94. **Paragraph 232** acknowledges that the restitution process has encountered significant challenges. What it does not mention is that, despite these huge difficulties that have rendered the restitution process all but paralysed, parliament not only re-opened the restitution process shortly before the 2014 elections,<sup>38</sup> but increasingly expects restitution to do the job of the other legs of land reform. For example, in a class action brought on behalf of labour tenants to force the department to implement the Labour Tenants Act which provides for tenure security for this group, the department went on affidavit saying that they have decided not to implement tenure security for this group but rather accommodate them under restitution.<sup>39</sup> This is not only unlawful; it is entirely impractical in light of the department’s own understanding of the difficulties of the restitution process.

95. The State Report indicates that the Restitution of Land Rights Amendment Bill was on its way to parliament. In fact, the Bill was rushed through parliament just

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<sup>38</sup> At the opening of parliament in 2013 already Prof Zuma promised the reopening of the restitution process despite evidence that the first restitution process was in disarray. See ‘Haste over land rights bill not just in aid of buying votes’ by Aninka Claassens in *Business Day*, 10 April 2014; ‘Only 8% of land has so far been redistributed’ Trove Lund, *Financial Mail* 24 October 2013; ‘Land claims: legislation likely to backfire’ by Trove Lund, *Financial Mail* 13 October 2013.

<sup>39</sup> In the matter of *Mwelase and Four Others v The Director-General for the Department of Rural Development and Land Reform and Two Others* Case number 107/2013, affidavit on file with the Legal Resources Centre.

before the 2014 elections despite an outcry from claimant communities who lodged their claims before the cut-off date in 1998 but are still waiting for restoration of their land. This within a context where the Restitution Commission has been incapable of handling pure restitution claims lodged before December 1998 with approximately 20 000 claims (or 37%) outstanding at the time of the re-opening.<sup>40</sup> It cannot possibly accommodate other legs of land reform.

96. Experts have shown that at the current rate of the Commission for Restitution of Land Rights of settling 2949 claims a year, the new claims in addition to the outstanding existing claims will take 144 years to complete. The department estimated that handling the re-opening will cost R180 billion. Only R8.7 billion was set aside for restitution claims over the 3 years from 2014 to 2015.<sup>41</sup> The election promises of restoration through restitution were really unrealistic.

97. The Communal Land Rights Act that was passed in 2004 was declared unconstitutional in 2010<sup>42</sup> and never came into force. As a result, black communities on communal land in South Africa are still unable to assert ownership over their land. Instead, the apartheid model of the State holding the land in trust for these communities persists and hinders these communities' ability to protect their land. President Zuma has repeatedly<sup>43</sup> made it clear that he sees the restitution process as the way for communal land to be transferred out of the hands of the State – but not to be transferred to communities, rather to traditional leaders. While the South African Constitution recognizes traditional leaders, this recognition is subject to customary law. Zuma and many traditional leaders ignore the fact that it was only a colonial distortion of customary law that made traditional leaders the owners of land on behalf of their communities. There is no legal basis for President Zuma's position. More importantly, it is not in the

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<sup>40</sup> See Policy Brief 34 by Ben Cousins, Ruth Hall and Alex Dubb available at <http://www.plaas.org.za/sites/default/files/publications-pdf/Policy%20Brief%2034%20Web.pdf>. Approximately 80 000 claims were lodged between 2 December 2014 and 31 December 1998. Of those, 87% were urban claims that were largely settled through standard cash pay outs. Of the more complicated rural claims where communities insist on the restoration of land, many remain outstanding – approximately 20 000 claims.

<sup>41</sup> 'Land restitution: re-opening claims with less money' Ruth Hall and Tara Weinberg available at <http://www.customcontested.co.za/land-restitution-re-opening-claims-less-money/>.

<sup>42</sup> See Paragraph 241 of the State Report.

<sup>43</sup> Notably in his opening addresses to the National House of Traditional Leaders in 2014, 2015 and 2016. See 'Parliament: Zuma seeks to move the goalposts on land reform' by Marianne Merten *Daily Maverick* 3 March 2016; 'Zuma promises land reform role for chiefs' available at [legalbrief.co.za](http://legalbrief.co.za); 'Land reform: find a good lawyer, says Zuma' *Mail & Guardian* 27 February 2014.

interest of communities to support the traditional leadership line that they own and control the land under their jurisdiction.

98. **Paragraph 237** indicates that development is the *'fourth leg'* of land reform and mentions the Recapitalisation and Development Policy (RECAP). This programme was initially conceptualized as funding to rescue the many restitution projects that had failed due to a lack of post-settlement support. In recent years, however, the RECAP programme has replaced all other development funding streams within the department. The result is that, whether you are a restitution, redistribution or tenure security claimant, you must follow the identical process in accessing funds from the department. That process entails getting a so-called strategic partner and developing a business plan with the partner based on a template. The process is the same whether you are a small farmer needing just enough money to buy spades and seeds for 1 hectare of land or a large-scale commercial farmer needing millions of Rands for infrastructure and capital input. The result of this streamlining, according to a report commissioned by the Office of the Presidency itself,<sup>44</sup> is that 80% of all funding available for development within the department has been allocated to a small number of large scale commercial farmers. Instead of ensuring better post-settlement support for restitution projects, small scale farmers are all but entirely side-lined according to the statistics.

## **Article 15: Right to Work and the Right to Just and Favourable Conditions of Work**

### **Paragraphs 242 – 271 - Right to Work**

99. The proposed amendments to the Refugees Act seek to introduce provisions which would essentially divide asylum applicants into two groups – those who can sustain themselves and their dependants for a period of four months (with the assistance of family and friends) and those who cannot sustain themselves for a period of four months. The amendments introduce a provision which states that those who cannot sustain themselves and their dependants may be offered shelter and basic necessities from the UNHCR and its partners.

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<sup>44</sup> See "Implementation Evaluation of the Recapitalisation and Development Programme (from inception in 2010 to June 2012) prepared by Business Enterprises at University of Pretoria for The Presidency of the Republic of South Africa: Department: Performance Monitoring and Evaluation. Published 10 October 2013.

## **Article 16: Right to health (including the right to food and water and sanitation)**

100. The annual government health budget of 11%, which is comparable to African countries that qualify as low – income countries, should be increased to at least 15% due to the fact that South Africa is a middle-income country.
- a. The National Health Insurance Scheme is a commendable initiative. However the National Health Insurance plan has been rolled out over a period of 14 years, which is a very long and protracted process, and should ideally be shortened.
  - b. The doctor to patient ratio of 0.77:1000 cannot be accepted for middle – income country such as South Africa. Besides that, it should be highlighted that the percentage of black doctors is still quite low considering South Africa’s demographic population. All universities together have an annual output of 1200 doctors a year. The training of doctors in the country should be up-scaled urgently. To achieve this objective all universities should be assisted by the Department of Higher Education and Training as well as the Department of Health to establish (or increase the capacity of) medical schools. To expedite the training of doctors, the state could incentivize studying medicine through more government bursaries and other means of support.
101. Taking into account the HIV/AIDS prevention endeavours that have been taken by the state, special mention should be made of Most at Risk Populations such as Men who have Sex with Men (MSMs). Even though the Constitution of South Africa prohibits discrimination on many grounds, there is a likelihood of this particular group being marginalized due to attitudes that are still persistent against gays and lesbians and transgender persons in South Africa. Since sex work (prostitution) is illegal in South Africa, it is likely that sex workers are not adequately considered. Therefore special attention should go to people working in the sex industry.
102. All court orders on socio-economic rights cases in the Constitutional Court of South Africa must be adhered to and the situation of water and sanitation improved across the country urgently. Water and sanitation are fundamental to the community as a whole and more in particular to rural communities. The aforementioned communities do not always have the means to foresee in proper water and sanitation. For this reason, public health inspection should be increased and civil society should be encouraged to improve the living conditions in order that those basic rights can be provided to all people.

## **Paragraphs 384 - 393 (Refugees' and asylum seekers' right to health)**

103. Refugees and asylum seekers face numerous discriminatory practices when trying to access health care in South Africa – despite being afforded rights mostly similar in stature to South African citizens. Rejection from primary and secondary health care facilities by frontline staff, xenophobic utterances and abusive practices (notably in maternal health care and childbirth experiences) are widely experienced and reported. Legal interventions are often needed to ensure protection of the most basic rights and in some cases, litigation has proven to be necessary to save the life of refugee patients (an example includes the case of a 12 year old Somali child who needed heart surgery and without the urgent intervention of the court would have died on the basis of a Pretoria state hospital's unlawful refusal to treat her). There is also a discriminatory section in the National Health Act which prohibits anyone who is not a South African citizen or a permanent resident from accessing a transplant or ancillary treatment from a state hospital. This has resulted in the deaths of numerous refugees with, for example, chronic kidney failure. This provision fails to take into account the fact that refugees cannot return home for such treatment (due to the principle of *non-refoulement*) and is an effective death sentence. Report of Department of Performance Monitoring and Evaluation reflect that 16 million people have no access to adequate sanitation in South Africa and 3,5 million do not have access to clean drinking water. The South African Human Rights Commission found some municipalities accountable for failure to provide quality water and sanitation. Madibeng local municipality and North West Department of Education were found in failure of providing proper sanitation at Polonia Primary School in Mmakau village. Setsoto local municipality, Matjhabeng local municipality in Free State Province, Emalahleni local municipality in Mpumalanga Province are also municipalities that failed to provide quality water and sanitation for their communities. Reports of sewerage water pumped into agricultural land and over 400, 000 South African Children have no water and proper sanitation. Affected communities have no option but to believe that Black people have no human rights

## **Article 17: Right to Education and Culture**

104. **Traditional Leadership and Governance Framework Act 41 of 2003:** This law entrenches patriarchy and subjugation of rural women. Particularly, women



living in rural areas are discriminated against by this law and it perpetuates their subservience as they are limited to 30% participation in traditional governance. This contradicts the Constitutional Equality Clause 9 and Article 2 of the African Charter which promotes equality regardless of sex or gender. Their equal participation and representation in all electoral processes, as well as in decision making is enshrined in provisions of the African Charter.

105. South Africa recognizes customary law which is defined as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the cultures of those peoples.<sup>45</sup> Customary law is regarded as a primary source of law which the Courts must apply when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.<sup>46</sup> The definition of customary law is broad enough to include African people residing in South Africa, which will include, but is not limited to Refugees and Asylum Seekers originally from neighbouring African countries. South Africa also recognizes customary marriages through the Recognition of Customary Marriages Act 120 of 1998.

106. In practice we find that Asylum Seekers and Refugees conclude customary marriages:

- a. In their countries of origin before they fled to South Africa; or
- b. In South Africa where new families are formed; or
- c. By proxy where families are formed remotely in terms of traditions and customs.

It was found that some refugees marry wives remotely, or 'by proxy', in terms of their customary or traditional laws and that these marriages take place after the refugee has been recognized in South Africa.<sup>47</sup>

107. The Department of Home Affairs indicated informally that it will not recognize the spouse of a recognized refugee as a dependent if the spouses married after they arrived in South Africa.<sup>48</sup> This position is cause for concern since it suggests an automatic assumption that all refugees enter into a marriage of convenience once they obtain status in South Africa. Refugees are protected by the Constitution of Republic of South Africa. Section 10 of the Constitution clearly

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<sup>45</sup> Section 1 of the Recognition of Customary Marriages Act 120 of 1998

<sup>46</sup> Section 211(3) of the Constitution of the Republic of South Africa 1996

<sup>47</sup> University of Cape Town Refugee Rights Clinic *Assessing protection for the dependants of refugees, and the principle of family unity* p4

<sup>48</sup> University of Cape Town Refugee Rights Clinic *Assessing protection for the dependants of refugees, and the principle of family unity* p3

states that “everyone has inherent dignity and the right to have their dignity respected and protected.”<sup>49</sup> The right to dignity enshrined in Section 10 includes the right to a family life, and in particular the 'core element' of the right to family life, the right of spouses to live together in a 'community of life'. To deny refugees the benefits of a spousal relationship violates their right to dignity. Section 9 of the Constitution requires that everyone receive equal protection and benefit of the law and prohibit the state from directly or indirectly discriminating against anyone.

108. Stateless persons in South Africa therefore do not enjoy the rights afforded to married persons in customary or religious marriages. Stateless persons are largely undocumented by virtue of the fact that a stateless person is a person who is not recognised as a national by any state under the operation of its laws and is therefore not often issued with identifying documentation. In order to register a marriage or a customary, religious or civil union one needs to possess an identifying document issued by the country of nationality. Stateless persons are unable to register marriages as a result of this. Their unions are not recognised formally and all the rights and privileges which flow from formally recognised marriages are likewise unrecognised.

**Article 18 – Right to protection of family, women, children and the disabled (Paragraphs 390 – 404, including the right to housing and social security)**

109. **Paragraph 390** highlights that the *Prevention and Combating of Trafficking in Persons Act (2013)* “is a comprehensive law dealing with the issue of trafficking” but the Act does not adequately provide a definition for those who qualify as a “victim of trafficking”. Rather the Act defines the act of trafficking and then defines a “victim of trafficking” as meaning either a child who is identified as a victim of trafficking after an assessment, or an adult who has been issued with a letter of recognition after an assessment. As it is, victimhood is only recognised based on an assessment rather than a legal provision. Having a legal definition is essential for promulgating adequate standardised assessment tools and for ensuring that victims have access to the legal protections they deserve.

110. Human trafficking survivors require both emergency and long-term services to address the wide range of problems they experience and to truly assist with their rehabilitation. Emergency services might include medical attention for physical

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<sup>49</sup> Section 10 of the Constitution of the Republic of South Africa 1996.

violence injuries, basic food and shelter provisions, and in some cases substance abuse treatment since traffickers often employ substance abuse as a control mechanism to maintain victim compliance. In terms of long-term services, many survivors require mental health services and support groups. Also key to the true rehabilitation of many survivors is the provision of basic life training, such as literacy education and employment training, in order to encourage self-reliance and promote social re-acclimatisation. Victims also tend to require legal advocacy and translation services.

111. Training is important for ensuring that survivors are treated with dignity as enshrined in the Constitution, as well as for encouraging efficient prosecution of trafficking crimes and the rehabilitation of survivors. Currently, however, there is a lack of specialised victim-centred, trauma-informed training.

112. As it currently stands, South Africa does not have enough dedicated housing facilities for human trafficking survivors. There is a need for such facilities beyond short-term stay shelters. Many first responders are still unaware of what specific services are available for qualified trafficking survivors, and many service providers lack sufficient resources to increase their networking. This in turn harms the survivor in that they are deprived from accessing the victim services they deserve.

### **Chapter Three: Peoples' Rights**

#### **Article 21: Natural Resources and Environmental Rights (Right to Restitution and Redistribution of land)**

113. Access to and disposal of natural resources cannot be divorced from land rights. Although communities who were dispossessed of their lands may launch a restitution claim, that process is ineffective, as was already highlighted by the UN Special Rapporteurs on Indigenous Communities (E/CN.4/2006/78/Add.2) and on the Right to Food (A/HRC/19/59/Add.3). The beneficiary communities are amongst the poorest and most vulnerable in the country. If they are aware of their rights, they are hardly able to engage in the lengthy procedure of land restitution. A successful claim does also not entail that their situation actually improves, as government does not give them support to make the lands truly productive, beyond mere subsistence agriculture.

114. Furthermore, government is not necessarily cooperative in relation to LRA claims, as was strikingly demonstrated by the Bengwenyama judgments. The Bengwenyama community had already in 1998 lodged an LRA claim, and their application received a positive recommendation from the Regional Land Claims Commissioner. Notwithstanding the community's interest in prospecting themselves, the rights were granted to a company, Genorah, without the community even being consulted. In a first set of proceedings, the Constitutional Court ultimately set this administrative decision aside. Following that judgment, the DMR adopted a new decision granting prospecting rights to a joint venture of Genorah and another community, while dismissing the application by the Bengwenyama community. The community thus again applied for judicial review, and the Supreme Court of Appeal upheld the High Court's decision setting aside and correcting the administrative decision.

### **Consent v. consultation:**

115. Regardless of their land rights, communities are continuously at risk of being displaced for mining, as was also held by the Special Rapporteur on the right to food "*in conditions that may not always comply with the standards of international human rights law*" (A/HRC/19/59/Add.3). Although the Government claims that the MPRDA seeks to redress past discrimination, this objective is far from being materialized.

116. One major flaw in the MPRDA is that participation rights of communities are limited to consultation. Mining companies claim that the MPRDA trumps other legislation, such as the IPILRA, that demand consent instead of consultation. Nevertheless, in its landmark Endorois decision the African Commission held that as regards "any development or investment projects that would have a major impact [...], the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."

117. The government does not comply with this decision. In line with the latest amendments to the NEMA, new regulations on environmental impact assessments (GNR 982) were adopted. Section 39(1) stipulates that a person applying for an authorization has to obtain the prior written consent of the landowner. Nevertheless, Section 39(2) excludes three types of projects, including all activities related to mineral extraction as well as strategic projects under the IDA.

118. When mining companies are nonetheless willing to seek consent, they exploit the collective nature of customary land rights, as they only engage with the traditional authority, whose consent is not uncommonly obtained through malicious means. This situation is further aggravated by the fact that the provisions on consultation are vague as regards who should be consulted and how. As a result, communities that do not live on land subjected to prospecting or mining are often not consulted at all. Nevertheless, those activities can seriously affect their livelihood, for instance by degrading the environment in which they are farming.

#### **Lack of restitution in relation to mineral rights:**

119. In its Periodic Report, the government rightly observes that significant progress was achieved in relation to fishing rights – Communities' fishing rights are recognised, and they are entitled to restitution. In relation to mineral resources, however, they are discriminated against. The problem is that while communities used to be legally excluded from ownership rights over land and mineral resources – which would allow them to apply for the conversion of 'old order' rights into 'new order' rights under the MPRDA – all mineral resources are now owned by the State, without any possibility for restitution.

#### **Social and labour plans (SLPs):**

120. The SLPs that mining companies have to adopt in terms of the MPRDA comprise inter alia a local economic development plan, which must include infrastructure and poverty eradication projects to the benefit of the host community. Nevertheless, communities do not need to be consulted on the content of SLPs, and are often not even informed about its content. Moreover, as adequate monitoring is lacking, mining companies are reluctant to comply with their SLPs. Consequently, the profits of extraction do not trickle down to the communities, who are simultaneously confronted with increased pressure on local services due to the influx of workers.

#### **Recent developments:**

121. In 2012 a new MPRDA Amendment Bill was gazetted. However, the President eventually had to send the Bill back to Parliament in January 2015, because the Bill was adopted in blatant disregard of constitutional procedures. Moreover,

while the government claims to act in the interest of previously discriminated communities, they never consulted the communities on this Bill and one of its significant substantive flaws was that the provision about which the Government boasts in the periodic report, was deleted – *id est*, the Minister’s discretionary power to afford communities participation privileges.

## **Article 23: Rights to Peace and Security**

### **Legislation and policy measures to combat terrorism and transnational crime : (Paragraphs 489 – 496)**

122. South Africa does not currently provide legal protections for those victims of human trafficking who suffer from unfair prosecutions. Different forms of Safe Harbour Laws have been used in other major jurisdictions to shield victims of human trafficking from criminal prosecution for committing crimes they were forced to commit by their traffickers. Victims of sex trafficking are often arrested, prosecuted, and convicted of prostitution and related crimes instead of being identified as trafficking victims. In certain jurisdictions, the negative affect of misidentification of victimhood has been dealt with by vacating or expunging convictions and sentences.

#### **Paragraph 489:**

123. South Africa is commended for the progressive developments advanced in ratifying international treatise to combat terrorism as outlined in its periodic report. The progress in domestication of international treatise like the Rome Statute of the ICC Act, 2002, has however shed a bleak future as to where South Africa stands regarding its duty to implement this Act since the government has consistently refused to accept responsibility in breach of its international obligations by allowing the President of Sudan, Omer Al Bashir indicted by the ICC to enter the country, including allowing him to leave the country when the Pretoria High Court had ordered otherwise.<sup>50</sup>

#### **Paragraphs 501 – 505: Corruption**

124. In the context of asylum and refugee processing, Lawyers for Human Rights and the African Centre for Migration Studies have conducted comprehensive

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<sup>50</sup> Southern Litigation Centre v Republic of South Africa in June 2015; Legal Resources Centre and Centre for Human Rights (UP) joined as Amicus Curiae during the appeal hearing in March 2016

research<sup>51</sup> and published a damning report which demonstrates that the asylum system is riddled with corrupt practices at all levels of operation. The report details corruption experienced by both asylum seekers and refugees from security guards, Refugee Status Determination Officers, interpreters and officials at all stages of the process. The report is conclusive proof that the asylum system in South Africa is corrupt in nature and this is an effective barrier to proper refugee status determination procedures and contributes to the high rate of illegal *refoulement* of asylum applicants.

125. **Paragraph 502-504** – the effectiveness of the AFU strategic decision to make more use of Chapter 6 of the Prevention of Organised Crime Act, 1998 and also becoming part of the Anti-Corruption Task Team in 2010/2011 – is yet to be seen. As the Auditor General’s Report dated 2008- 2009/- 2012/13 reflects improper accounting of nearly 69 billion lost from State departments tracking back for over five years. The improper accounting relates to unauthorised spending of 9.2 billion during 2012/13, with 11.6 billion irregular spending and fruitless or wasteful expenditure of 815 million. The audit also revealed that of 319 municipalities and entities which were audited, just 30 (about 9%) got unqualified audits. This was also explained as a huge improvement from 5% during the previous years. But this is a staggering concern that conditions in poor communities continue to depict squalor due to incapacity, incompetency, fraud and corruption of officials. The AG lamented that all these financial embarrassment happened when most of these municipalities spent nearly 700 million on financial consultants.

126. Limpopo province which had been placed under national administration had regressed for the third year in a row. In particular, the Lepelle Nkumpti municipality in Lebowakgomo and Ba-Phalaborwa received disclaimer audits opinions for three consecutive years. The tenderpreneurship have unlawfully pocketed about 828.5 million tenders and contracts were found to have been awarded through flouting of laws regulating procurement processes. While six municipalities, including Sekhukhune, Mopani, Giyani, Tzaneen, Molemole and Polokwane were not audited because their documents were not submitted on the stipulated deadline on 15 February 2015.

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<sup>51</sup> Queue Here for Corruption – report into the prevalence of corruption in the asylum system, produced by LHR (Lawyers for Human Rights) and ACMS (African Centre for Migration Studies)

## **Article 24: The right to a satisfactory environment**

127. Section 24 of the Constitution safe guards everyone's rights to an environment that is not harmful to their health or well-being. The duty of the government to protect this right extends to the prevention of pollution, ecological degradation, promotion of conservation. With reference to **Paragraphs 506-509**, there's no doubt in the list of world class legislation adopted to prevent pollution and ecological degradation, especially since submission of the first periodic report. However, the country experiences acute environmental degradation, especially in communities populated by the majority of people. These peoples' homes are situated next to open and dangerous streams and there are a number of communities whose children drowned in floods when walking to schools due to poor infrastructure bad roads and bridges. These remain critical issues of concern.

128. The Waste Act of 2008 requires public education for citizens to play a role for effective prevention of pollution, promotion of conservation and regulation of waste management. However, the reality of the Act remain in paper only because the levels of pollution in the country is incredible, which is attributable to littering of paper, plastic, bottles on pavements, side-walks, parks , taxi ranks in urban areas, informal settlements and rural areas. This situation poses degradation and health hazards to people, mainly Black people. Rain water storm drains are also not serviced and poses danger on roads during floods.

## **Chapter Four: Specific Duties**

### **Article 25 (Duty to Promote Awareness of the Charter)**

129. The State's duty to popularise the African Charter through teaching, education and publication to ensure understanding of freedoms as well as rights and corresponding obligations of the Charter is not honoured. Human rights organisations with observer status have continued engaging the government to forge partnership for comprehensive and sustainable promotion of domestication and implementation of the African Charter with little success. Human rights organisations have set a precedence of initiating pre-meetings for participation in Ordinary Sessions of the African Commission in effort to strengthen awareness on the African system of human rights in the country. Human Rights Defenders initiate Africa Human Rights Day events, including popularising the significance of



the day through capacity workshops, meetings and engaging with media annually on 21 October.<sup>52</sup>

130. The South African Human Rights Commission (SAHRC) is also not provided adequate resources to host activities for promotion of ACHPR. There has been no constructive activity initiated either by the SAHRC or government to promote the Africa Human Rights Day. The SAHRC played a prominent role in harmonisation of roles of national human rights institutions with Affiliate Status for contribution on work of the African Commission. However, SAHRC has been irregular in attending sessions of the African Commission including playing a minimal role in development of the African system of human rights. The country remains unaware of provisions of the African Charter and instead the State gives priority and accountability towards UN mechanisms and processes.<sup>53</sup>

#### **Article 26: Duty to guarantee the independence of the courts**

131. The State's duty to guarantee the independence of the courts and national institutions is enshrined in the Constitution. These institutions are highlighted in Chapter 9 of the Constitution as State institutions supporting constitutional democracy. These national institutions are established independently, according to the Paris principles and execute their functions and powers without fear, favour and prejudice. They also serve as watch dogs over government abuse of power and guardians of the Bill of Rights.

132. These institutions however face incapacity, under-resource, and they experience political interference, especially in respect of recommendations they pass in holding government officials accountable to corruption. The Public Protector's recommendations have been received with antagonism, intolerance, dehumanisation with claims misleading the public that the Public Protector is a CIA agent. This was after releasing the most disturbing report findings on corruption and misappropriation of state funds into upgrades of the president's property. The Chief Justice was also questioned for passing favourable decisions to opposition and other claimants brought against the government.

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<sup>52</sup> HURISA SOTU (South Africa) Compliance Report 2013.

<sup>53</sup> Ibid.

## **PART A RECOMMENDATIONS**

This section of the shadow report presents a number of recommendations which CSOs have developed based on a number of issues identified in terms of the second periodic report presented by the GOVSA. These recommendations are organised mainly according to thematic areas in relation to the form in which the state report was presented. In essence, these recommendations focus on chapters one, two, three and four. There is also a special attention given to the rights of migrants, refugees and asylum seekers.

### **Chapter 1: Civil and Political Rights**

- 1) South Africa must fulfil its obligation under the Charter to develop legislation to give effect to guaranteed freedoms and rights.
- 2) The regulations to the Births and Deaths Registrations Act should be amended to allow the unmarried father to register the births of their children when the mother is unavailable or undocumented.
- 3) Government should amend the regulations to the Births and Deaths Registrations Act to accommodate persons who have not been registered within 30 days of birth and introduce a discretion to register where applicants cannot meet each and every requirement, but nonetheless qualify for South African citizenship.
- 4) On judgments relative to Article 5 of the African Charter, and for effective implementation of the Prevention and Combating of Torture of Persons Act, Section 39(1) (b) of the Constitution should be applied where the judiciary and the legal profession are mandated to consider International Law (i.e. Article 14 of the United Nations Convention against Torture which provides for redress for torture victims).
- 5) The government should enact Regulations to the Prevention and Combating of Torture of Persons Act to provide accompanying procedural measures for effective and full implementation and enforceability of the Act.
- 6) In addition to training public officials involved in custody, interrogation or treatment of arrested, imprisoned or detained persons, the government must also ensure capacity building and educational training of relevant actors including police and judicial officers on the Prevention and Combating of Torture of Persons Act.

- 7) The Equality Review committee must put clearer guidelines in terms of hate speech regulations and how to enforce them so that equality norms are upheld while not being used to limit freedom of expression.
- 8) The government should work to revolutionise the way community media is run so that it can reflect the diverse views held by South Africans. There may be a need to task the South African Human Rights Commission to investigate the anomalies within the community media system.
- 9) The state must take consideration of the SAHRC findings on compliance of PAIA and begin to implement the recommendations in this 2008-2012 report.<sup>54</sup>
- 10) It is recommended the state intervenes by responding to the concerns of civil society who feel that courts have erred in their decisions, particularly the case of the Boiketlong four.
- 11) In considering a media regulation body, there needs to be an independent assessment of existing accountability mechanisms in order to effectively contribute to debates on this crucial issue.
  - **On ICT policy vacuum:** It would be useful to initiate community-owned and community-driven access systems as well as the provision of digital literacy skills so that citizens can claim and make full use of the potential of the internet. Independent, well resourced, multi-stakeholder bodies should be established to guide internet policy at the national level. Access and affordability policies and regulations that foster unfettered and non-discriminatory access to the internet, including fair and transparent market regulation, universal service requirements and licensing agreements, must be adopted.
  - **Internet governance:** A genuine multi-stakeholder forum should be organised to bring civil society, industry and government players together to develop South African positions on a range of internet governance issues, not just children's online safety but a range of privacy and other online matters – all of which have a profound impact on people's ability to receive and share information. It is important that multi-stakeholder decision making policy formulations are improved at the national level in order to ensure the full participation of all interested parties. National internet governance mechanisms should serve as a link between local concerns and regional and global governance mechanisms, including of

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<sup>54</sup><http://www.sahrc.org.za/home/21/files/Consolidated%20PAIA%20Audit%20Report%202012.doc2.pdf>

the evolution of the internet governance regime. The internet governance framework must be open, inclusive, accountable, transparent and collaborative.

- **On Cybercrimes Bill:** Continuous research and training of IT security personnel, finance services sector personnel, police officers, prosecutors and the judiciary is recommended in order to keep them abreast of advancing computer technology.<sup>55</sup> At the end of the day, a balanced approach that considers the protection of fundamental human rights and the need for the effective prosecution of cybercrimes is the way forward.

### **Article 9 Freedom of Expression and Information**

- 1) The State should amend laws that impede the right to freedom of expression; government should also promote laws that give effect to the Constitutional values aimed at ending intimidation and harassment of journalists and those who defend the Constitution and human rights in the country
- 2) To end interception of people's information without them knowing through the use of Interception of Communications and Provision of Communication-Related Information Act (RICA) and protect whistle blowers, human rights defenders and journalist.
- 3) Use 2010 Model Law produced by the Special Rapporteur on Freedom of Expression and Access to Information in Africa for promotion and protection of the right to information,<sup>56</sup> and
- 4) Develop a law for promotion and protection of Human Rights Defender's in the Country by complying with the African Commissions' 2003 Kigali Declaration,<sup>57</sup> Resolution on Reprisals to protect human rights defenders and end stigmatisation, arbitrary reallocations, restrictions on those who defend the constitution and human rights.

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<sup>55</sup> Ibid.

<sup>56</sup> See Model Law. Online: [http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf)

<sup>57</sup> Ibid.

## **Article 10 Freedom of Assembly**

- 1) The State is urged to incorporate human rights in Regulations of Gatherings Act 205 of 1993, ensuring its alignment with the Constitutional provision accorded to citizens Freedom of Assembly,
- 2) To end policy brutality with impunity and excessive powers in dispersing people in assembly.
- 3) To end inordinate enforcement of the Act and misconstruction in facilitation of demonstration ensuring protection to all people, including women, people with disabilities, LGBTI, refugees among others
- 4) To ensure speedy implementation of Marikana Farlam Commission of Inquiry
- 5) To use African Commission Special Rapporteur on Human Rights Defenders Research Study on Freedom of Association and Assembly in Africa, to harmonise legislation and implementation of Freedom of Association and Assembly.

## **Article 11 Freedom of Association**

- 1) Satellite offices should be established to assist communities with the online registration process.
- 2) Application forms for registration, together with the application process itself, should be in all official languages of the country.
- 3) Applications for tax exemption should be integrated into the application process in order to simplify matters.
- 4) Constant capacity building is required to enhance people's understanding of the registration processes.
- 5) To implement the outcome of a historic summit held in August 2012, involving a wide range of NPOs and the government, in Johannesburg in particular, to do the following;
- 6) Decentralise the registration process and reduce the registration process
- 7) Make user-friendly the application and reporting forms prescribed in the NPO Act
- 8) Make use of application for registration in other South African languages (Sotho, Zulu, Xhosa, Tsonga, Tswana, Pedi for instance) and not just English.

- 9) Improvement in the DSD generally, and in the NPO Directorate in particular so as to minimise the risk of missing documentation.
- 10) Improve communication amongst key institutions dealing with NPOs.
- 11) Establish a self-regulatory Council for NPOs.

## **Chapter 2: Economic, Social and Cultural Rights**

### **Article 16: Right to Health**

- 1) The annual national health sector budget should be increased to at least 15%;
- 2) The rollout of the National Health Insurance plan period should be shortened;
- 3) The employment of doctors in the public health sector should be increased to comply with the demand for public health services;
- 4) Regarding the prevention of HIV/AIDS, special attention must be given to Most at Risk Populations such as Men who have Sex with Men (MSMs) and people working in the sex industry.

### **Women's Rights in the Africa Charter**

#### ***Article 18 (Prevention and combating trafficking – Right to protection of family, women, children and the disabled (including the right to housing and social security)***

- 1) The Prevention and Combating of Trafficking Act, 2013, should be amended to include a more adequate definition of a "Victim of Human Trafficking." A standardised human trafficking assessment tool should also be developed.
- 2) The Prevention and Combating of Trafficking in Persons Act should be amended to specifically include the provision of services related to basic life skills training in areas such as cooking, reading, personal scheduling of time, navigating public transit, and handling money. Survivors should also be legally afforded legal, medical, and translation services.
- 3) The State should develop specialized victim-centred, trauma-informed training; establish more dedicated housing facilities for human trafficking survivors; and enhance communication networks among service providers and first responders and provide a comprehensive list of local service providers to facilitate ease of victim referral.

## Chapter Three: Peoples' Rights

### **Article 21: (Right to restitution and redistribution of land, under Natural Resources and Environmental Rights)**

- 1) The State should undertake positive legal, judicial and other action to enable communities to file land restitution claims & provide support to communities whose claim is successful.
- 2) Be cooperative and active in ensuring the preferment right of communities;
- 3) Ensure that all members of any interested and affected community are adequately consulted before prospecting and mining rights are granted;
- 4) Address corruptive practices by mining companies in seeking the consent of traditional authorities;
- 5) Ensure that if communities need to be resettled, they are compensated with land that is at least commensurate in quality, size and value, or are provided with adequate financial compensation if they prefer so;
- 6) Include a restitution chapter in the MPRDA;
- 7) Ensure that communities are consulted on the contents of SLPs, secure the trickling down of benefits to communities and strictly monitor compliance with SLPs.
- 8) Pass a Safe Harbour Law and allow trafficking victims to vacate prostitution convictions. This is in relation to **paragraph 495 – 496** (Legislative and policy measures to combat trafficking in persons under the framework of **Article 23: Rights to peace and security**).

### **Article 23: Right to National and International Peace and Security**

- 1) The State should support the AG and Minister of Finance for considering the introduction of new sets of values that would discourage fraud and corruption with messages that say: don't steal public money and control your greed. As municipalities are vested with huge constitutional obligations, they are required to be accountable, transparent and consult with communities.

- 2) It is the responsibility of the States to respect the rule of law and enforcement of courts judgments, particularly judgements passed by the High Court and AD on the State obligation under the ICC Rome Statute Act.

## **Chapter Four: Specific Duties**

### **Article 25: Duty to Promote Awareness of the Charter**

It was recommended that:

- 1) The State should take more practical steps towards popularising the African Charter by engaging with CSOs working on the African Human Rights system towards organising more training workshops on the African systems of human rights.
- 2) Media platforms such as TV, Radio and even the new media should be used as practical platforms through which the state can popularise the African Human Rights mechanisms.
- 3) The State should endeavour to abide by the provisions of Chapter 9 of the South African constitution which establishes the institutions necessary to promote democracy in South Africa.

### **Article 26: Duty to Guarantee the Independence of the Courts**

The State is urged to:

- 1) End interference with the independence of the judiciary and national human rights institutions, established with mandates to function independently without fear, favour and prejudice and provide adequate resources for these institutions to execute their important Constitutional and Legislative functions.

## **The Rights of Migrants, Refugees, and Asylum Seekers**

The following recommendations are proffered to South Africa in relation to the rights of Migrants, Refugees, Asylum Seekers as well as Stateless person:



- 1) The State should allocate resources to up-skill decision makers in the asylum process, prioritise anti-corruption<sup>58</sup> measures and ease the burden of existing RROs by re-opening the closed RROs, in compliance with validly obtained court orders.
- 2) Government should adopt a statelessness determination procedure through which stateless persons may be identified, documented and afforded the rights to permanent residence, the right to work, the right to formally enter into marriages and a pathway to nationality from which flow all other rights.
- 3) The validity of a visitor's visa available to recognised victims of human trafficking under Section 15 of the Act should be extended from three months to one year, with option to extend. Such a visa should afford a victim with permission to live and work in the Republic for the valid period.
  - The Act should be further amended to provide for a separate visa beyond the continued presence option for victims who are physically present in the Republic, who would face extreme hardship involving unusual and severe harm if removed, and who meet certain immigration admissibility requirements.
  - Such a visa should give survivors the right to live and work in the Republic for a period of four years, and should also allow holders to bring certain family members to the Republic for reunification.
- 4) Section 17 of the Act should be amended to apply to victims who cooperated with law enforcement and who would face extreme hardship involving unusual and severe harm if removed.
- 5) Government should amend the Immigration Act in order to allow a person arrested for immigration purposes to be brought before a court within 48 hours without having to request such an appearance and to ensure their right to be brought before the court again when the warrant of detention is sought to be extended.
- 6) Government should put measures in place to ensure that persons are not detained for periods longer than is allowed for by the Immigration Act and to create policies regarding alternatives to detention. The practice of detaining persons for immigration purposes at police stations for longer than 48 hours should be stopped.

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<sup>58</sup> Annexure: Queue Here for Corruption – report into the prevalence of corruption in the asylum system, produced by LHR (Lawyers for Human Rights) and ACMS (African Centre for Migration Studies).

- 7) The State is urged to ensure that children are assumed to be minors until proven to be majors, thereby preventing their detention with adults in cases of doubt.
- 8) The State should develop a 'SADC Work Seekers Permit'. This would enable SADC citizens to legally enter and leave the RSA, diminishing illegal border crossings and undocumented migrants. This would be a step towards the realisation of the SADC Protocol on the Facilitation of Movement of Persons, signed by South Africa but not yet in force.
- 9) Government should find an appropriate durable solution for the former Angolan refugees and their dependants to preserve family unity and their right to dignity that recognises the need for durable solutions and the strong links the former Angolan refugees have made to South Africa. This may include granting them permanent residency.
- 10) Government should comply with the court judgments and re-open the Refugee Reception Offices with full services to new-comers in Cape Town, Johannesburg and Port Elizabeth. In the same vein, the state is urged to withdraw the sections of the Refugee Amendment Bill that will limit the rights of asylum seekers to work.
- 11) The state should ensure that the current draft Hate Crimes Bill is expedited and goes out for public comment – the Bill should remain focused on hate crimes and let it not include criminalisation of hate speech.
- 12) Government should revisit the recommendations of the South African Human Rights Commission report and implement the recommendations under the management of the Inter-Ministerial Task Team on Migration established after the 2015 xenophobic attacks.
- 13) It seems that the government's stated plan to curb and avert xenophobic violence is in itself discriminatory – there is somewhat of a xenophobic sentiment within government when it states: "Strict monitoring of proliferation of businesses owned by foreign nationals and lack of regulation thereof". If monitoring the proliferation of businesses and business regulation is an issue, this should apply to all businesses owned by both non-nationals and citizen.

- 14) Government is urged to ensure that all outstanding asylum applications are finalised, without undue delay. The validity of asylum seeker applications should be assessed based on the personal circumstances of the claimant and not on generic country specific information. The South African Government is urged further to definitively eradicate corrupt activities in the asylum system.
- 15) Government is also urged to implement a national immigration system which permits the transfer of asylum applications between Refugee Reception Offices. The South African Government is urged further to abide by court orders and re-open Refugee Reception Offices, without delay.
- 16) The State urged to prevent any further unlawful detentions at the Lindela Repatriation Centre, or elsewhere, without delay. The South African Government is urged further to consider alternatives to arrest and detention
- 17) State-led educational initiatives should be implemented, at the national and provincial levels, to quell troubling stereotypes about refugees, asylum seekers and migrants. High level authorities should be responsible for personally condemning all acts of discrimination and violence against non-South African nationals.
- 18) Government is urged to remove the “sustainability” provision from the proposed amendments thereby allowing all asylum seekers the right to work.
- 19) The State should consider methods to allow for more effective and expedient adjudication of asylum claims in urban areas that avoids the establishment of detention centres or de facto refugee camps in border areas to reinforce the urban refugee protection framework and enhance local integration measures.
- 20) The Refugees Act should not be amended in the manner proposed by the DHA. Border processing of refugees and any incremental movements to a model of encampment should be rejected in their entirety.
- 21) The National Health Act be amended to include refugees as eligible for transplants and ancillary treatments when their condition is life threatening.

## PART B THE PROTOCOL

### INTRODUCTION

1. The Protocol to the African Charter on Human and People's Rights (ACHPR) on the Rights of Women in Africa herein after referred to as the Maputo Protocol was adopted by the African Union in July 2003 to advance the implementation of Women's rights in Africa. South Africa ratified the Maputo Protocol in December 2004 and it came into force in the country in November 2005.
2. This report has been compiled by Civil Society Organisations (CSOs) including Non- Governmental Organisations (NGOs) from selected provinces and Human Rights Defenders in South Africa. We welcome this report and congratulate the Government of South Africa for submitting its very first report on the Maputo Protocol. The report complies with the African Charter reporting requirements although it exceeds the stipulated length.
3. **Constraints in Delayed Reporting:** The Maputo Protocol came into force in South Africa in November 2005. According to Article 62 of the ACHPR State parties shall submit two year reports on legislative and other measures taken to give effect to the rights and freedoms recognised and guaranteed by the Charter. The Maputo Protocol reporting guidelines are in accordance with Article 62 of the ACHPR and South Africa's first report was due in 2007. The government has therefore been lagging behind with reports from 2007 up until the Commission developed the guidelines for the joint reporting. While we acknowledge that the government may have practical constraints reporting timeously, our concern is that such delays impact on the State's ability to account on as well as address implementation challenges identified which further compromises on the full realisation and enjoyment of women's fundamental rights. Also, whilst we commend the government for the comprehensive report detailing progress made in promoting and protecting the rights of women in the country, we also note that this has not fully captured the challenges faced by the country in realising these rights. Further, the process of developing this report started five years ago and at that point civil society organisations were consulted by government. However over the years the process collapsed which halted the consultations. CSOs would have appreciated an ongoing involvement to ensure that gaps identified in the report are filled. As such civil society has not had an opportunity to give input in the more updated or revised version of the report hence the development of this shadow report.

4. **Reservations:** When South Africa ratified the protocol it made reservations in respect of Article 4 (2) (j), Article 6(d) and Article 6(h). Reasons for reservation to Article 4(2) (j) which deals with the imposition of the death penalty on pregnant and nursing mothers is that this does not apply to South Africa as there is no death penalty. We however submit that such reservation should be removed as it is not necessary since the mentioned provision does not violate or contradict South African law.
5. South Africa also made interpretative declarations to Article 1(f) which defines 'discrimination against women' and Article 31 that deals with the question of whether the South African Constitution offers more favourable human rights protection than the Protocol. Article 31, was also interpreted in a manner that would preclude the violation by the national laws of the rights guaranteed in the Protocol.
6. While we acknowledge the reasoning for the reservation on Article 6(d) whose requirement is that a marriage shall be recorded in writing and registered in accordance with national laws for it to be legally binding, this position which may leave women in customary marriages vulnerable and unprotected. The experience in South Africa is that whilst the Recognition of Customary Marriages Act, 1998 encourages the registration of customary marriages, many of these are still unregistered. As provided in the Act, this does not in any way invalidate the recognition of the institution however women in unregistered marriages continue to face various forms of discrimination. In light of this, we call upon the state to take more pro-active measures in protecting women in customary marriages particularly polygamous unions where reservation of this clause alone may not be adequate in protecting their rights.
7. Finally we would also like to commend the government for making a reservation on Article 6(h) and ensuring the protection of children's right to citizenship in South Africa.

#### **Institutional Mechanisms to combat all forms of discrimination against women**

8. While it is commendable that South Africa has passed enabling legislation to ensure that women are protected from discrimination and the Equality Court has been established to ensure that this right is protected, this is merely the starting point. The enacting of laws and the establishment of the Equality Court alone is hardly enough to achieve transformation and positive changes for women. The stark reality is that despite the removal of discriminatory laws and policies, patriarchy has become so well perfected in our societies that women are unable

to immediately enjoy the benefits because the pressures of society demand that women remain in an inferior position to men<sup>59</sup>. There is therefore a need to institutionalise democratic norms of women's equality, autonomy and freedom in society. This means that the principles and values entrenched in laws and policies need to be translated into the private spheres of women's lives.

9. Further, whilst the intention behind the establishment of the Equality Courts is good, the lack of implementation on the part of the State has meant that these forums offer little to no redress to women. In October 2006 the Department of Justice reported that of the 330 magisterial districts identified for the location of equality Courts, only 220 had been designated. Less than 700 cases had been referred to the courts and most of these were in relation to hate speech and racism.<sup>60</sup> The South African Human Rights Commission (SAHRC), in submissions to the Parliamentary Equality Review process pointed out the lack of usage of the courts by the public<sup>61</sup>, insufficient and inadequate training of court officials to assist members of the public who are unrepresented<sup>62</sup> and the lack of public awareness of the courts.<sup>63</sup> At the same review process, the Commission for Gender Equality (CGE) gave the reasons for the low usage of the Equality Courts as, "*.... many of the courts were not fully functional. Where they did exist, there was little to indicate that this was in fact a court, and there was lack of procedures to access the courts. This resulted from lack of education, lack of commitment to the running of the courts and the small allocation of resources.*"<sup>64</sup> Both the CGE and the SAHRC reported that there were few referrals to them as alternative forum bodies. The CGE, particularly, stated that

*"The mandate called upon the CGE to be the custodian and monitor the ... Equality legislation, but the budget had not previously allowed this to develop properly. Another challenge was monitoring the Equality Courts. Many had been established, but there were problems, as the Department of Justice (DOJ) was not working with the CGE. Many cases that should be in the equality court were not getting there."*<sup>65</sup>

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<sup>59</sup> Ageng'o, C. (2007). International Women's Day - Can we dare celebrate? In P. Burnett, S. Karmali & F. Manji (Eds.), *Grace, Tenacity and Eloquence*. Nairobi: Fahamu-Networks for Social Justice.

<sup>60</sup> Department of Labour, 2007: 49

<sup>61</sup> October 2006, "Impact of the Promotion of Equality and Prevention of Unfair Discrimination Act hearings" <http://www.pmg.org.za>.

<sup>62</sup> Ibid

<sup>63</sup> Ibid, 14

<sup>64</sup> Ibid, 8

<sup>65</sup> Minutes of the SAHRC briefing to Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women, 16 October 2006

10. Of the very few reported Equality Court judgments, by far the majority deal with discrimination on the basis of race. Only one reported judgment deals with gender, and the applicant is a white male.<sup>66</sup> The recent case where the CGE utilized the court to obtain an apology from a community that beat up a woman for wearing trousers did attract some publicity, but it is submitted that the weakness of the remedy will not encourage women to approach the Equality Courts for relief.

## **Public Education**

11. The Maputo Protocol is commended for its promotion and protection of the rights in Africa including expanding on pertinent issues affecting women in the continent such as violence against women, protecting the rights of widows and sexual and reproductive rights. This instrument has the potential to improve the rights of women in many spheres. In order for that to happen women need to have an understanding of how this instrument applies to their lived reality. This of course requires that public education is conducted. However such efforts have not been made by the state to ensure its popularisation. Many women in various parts of the country are not aware of this instrument, and it is our view that this has to be the starting point for any state to realise the rights provided in this instrument.

## **CONSOLIDATION OF CIVIL SOCIETY COMMENTS PER ARTICLE**

### **Article 2: Elimination of Discrimination**

#### **Paragraph 72**

12. Notwithstanding the enactment of laws to combat discrimination against women, many women in South Africa still face discrimination in public and private spaces such as work places and at family level.

13. Studies<sup>67</sup> indicate that up to 76% of career women in South Africa have been harassed in some or other form in the workplace. It can be assumed that an even higher percentage of women are harassed or abused in the more vulnerable jobs, the informal sector, and illegal work such as sex work, all of which are made up by predominantly women. Due to poverty, high unemployment levels

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<sup>66</sup> October 2006, "Impact of the Promotion of Equality and Prevention of Unfair Discrimination Act hearings" <http://www.pmg.org.za>, 16 October 2006

<sup>67</sup> Special Rapporteur on Adequate Housing Mission to South Africa UN Doc A/HRC/7/16/Add.3 (dated 29 February 2008) paragraph 85

and their disproportionate burden of household maintenance, women are less likely to challenge unfair labour practices and gender based violence in the workplace. Thus in sexual harassment cases, the element of gender subordination will often co-exist with racial and class dimension.

### Paragraph 76

14. The State report has alluded to the establishment of the Equality Court. However the SAHRC, in submissions to the Parliamentary Equality Review process<sup>68</sup> pointed out the lack of usage of the courts by the public, insufficient and inadequate training of court officials to assist members of the public who are unrepresented<sup>69</sup> and the lack of public awareness of the courts.<sup>70</sup> Of the very few reported Equality Court judgments, by far the majority deal with discrimination on the basis of race. Only one reported judgment deals with gender, and the applicant is a white male.<sup>71</sup>

### Paragraph 80

15. The government report makes reference to court decisions which supposedly had a positive impact on women. The *Carmichele* case arose from an instance of police dereliction of duty and the Minister of Safety and Security filed an appeal which was clearly unlikely to succeed. Consequently, the case does not demonstrate political will or that the government took action to advance women's rights. The judgment in *Masiya v Director of Public Prosecutions Pretoria (CC)* was handed down while the Sexual Offences Bill was pending in Parliament. It is important to note that the reason why the magistrate in the original trial took the unconventional step of amending the definition of rape was because parliament had delayed in enacting appropriate legislation for eight years. The Constitutional Court noted that at the hearing a concern was raised with counsel for the Minister of Justice and Constitutional Development regarding the delay in the promulgation of the 2003 Sexual Offences Bill. It should therefore be borne in mind that if Parliament had exercised due diligence in prioritizing the enactment of the Sexual Offences Act, as it is obliged to do under the Convention and

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<sup>68</sup> October 2006, "Impact of the Promotion of Equality and Prevention of Unfair Discrimination Act hearings" <http://www.pmg.org.za>

<sup>69</sup> Ibid

<sup>70</sup> Ibid page 14

<sup>71</sup> October 2006, "Impact of the Promotion of Equality and Prevention of Unfair Discrimination Act hearings" <http://www.pmg.org.za>, supra at 7



General Recommendation No 19, this matter would not have come before the Constitutional Court.

### **Article 3: The Right to Dignity**

#### **Paragraph 81- 90**

16. While the State report mentions that the right to dignity is a non-derogable right enshrined in the Bill of Rights of the South African Constitution of 1996, women's dignity continues to be violated particularly in relation to sex workers. Sex workers have the following rights as entrenched in our Constitution:
- a. The right to equality
  - b. The right to dignity
  - c. The right to freedom from all forms of violence
  - d. The right to access to health
  - e. The right to fair labour practices.
17. The current legal framework, in which both the sex worker and the client commit criminal offences, creates an environment in which the above constitutional rights of sex workers are often violated and sex workers are subject to discrimination because they are sex workers. Police harassment and abuse of sex workers not only violates the constitutional rights mentioned above, but also section 205(3) of the Constitution, which states that the police service must: "Combat and investigate crime; maintain public order; protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law".
18. The Constitutional court in **S v Jordan (2002) 6 SA 642 (CC)**, considered the vulnerability of sex workers, finding that the legislature should consider the appropriate legal framework but also was obliged to ensure the rights of sex workers are protected. The majority of the court did not find the criminalisation of the sex worker and not the client, to be unfair discrimination. The minority, however, did. The minority judges stated that, "it would be unconstitutional to penalize only one party to the act of prostitution"
19. The State unfortunately missed the opportunity to reform the law holistically in line with the constitution, and rather inserted a section into the Sexual Offences Act, 2007 which also criminalises the actions of clients of adult sex workers. This was done without consideration of the process already underway with the South

African Law Reform Commission. The effect of this, apart from the fact that it requires police entrapment to enforce, was to drive sex workers and their clients further underground, exposing sex workers to more violations and to provide impetus for the State to increase arrests without prosecutions (harassment) of sex workers. As the minority in Jordan acknowledged, the criminalisation of sex work entrenches stereotypes which undermine the equality of women and stigmatise the sex worker. Sex workers suffer many challenges, for example, Sex Workers' Education and Advocacy Taskforce's (SWEAT)<sup>72</sup> has conducted research, which shows that sex workers are unable to access health care, sexual and reproductive health services, and are the victims of police violence, unlawful arrests and extortion.

20. In 2012 the Women's Legal Centre, together with SWEAT and Sisonke interviewed over 300 sex workers in Cape Town, Johannesburg, Pretoria, Durban and Limpopo and compiled a report of human rights violations by police against sex workers in South Africa. Seven out of ten sex workers who spoke with the organization had been abused by the police, and one out of six had been physically or sexually assaulted.<sup>73</sup> Evidence suggests that sex workers are routinely beaten, pepper sprayed, and sexually assaulted by police during arrests, which is in clear violation of their rights. Police regularly fail to follow proper procedure when arresting sex workers, and frequently detain them beyond the maximum 48 hours, often in inadequate conditions and without provision of food. In 2010<sup>74</sup> the Western Cape High Court found that members of the South African Police Service were unlawfully harassing sex workers. The judgment in the matter interdicts members of the SAPS from arresting sex workers without the intention to bring them before Court, but evidence suggests this interdict has been systematically ignored. While women in sex work face grave discrimination and continue to be humiliated, the Criminal law and Sexual Offences Act criminalising prostitution does not address some of its causes.

## Paragraph 92

21. Notwithstanding the existence of laws providing for equality and the rights of LGBTIs such as the Constitution of the Republic of South Africa which prohibits discrimination on the basis of gender and sexual orientation amongst others, the factual reality on the ground demonstrates that laws, on their own, are not sufficient to give women the protection they need. Lesbians like other women, do

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<sup>72</sup> Gould C and Fick N, (2008) *Selling Sex in Cape Town*, Institute for Security Studies and SWEAT, Cape Town 2008

<sup>73</sup> WLC, "Stop harassing us! Tackle Real Crime!" <http://www.wlce.co.za/images/stopharassingus.pdf>

<sup>74</sup> SWEAT v The Minister of Police and Others

not enjoy safety in the nation's most public spaces like parks, without the fear of some violation. They are still punished or regulated through violence, humiliation and intimidation for their perceived same sex practices and/or their non-conforming gender presentation. The person who commits the crime often intends to send a message or threat to a community about women who behave, act, dress, and talk in a manner that is deemed inappropriate by society, by men

### **Paragraph 100**

22. Lesbians continue to experience not only physical violations but a number of different types of discrimination, including but not limited to, being pushed out of school resulting in substance abuse and poverty. There have been documented cases of young lesbian women who have been forced to leave school as a result of bullying from their peers, principals and teachers, who on the premise of their religious prejudices regarding homosexuality, have discriminated against and marginalized these young women to a point of expulsion.

### **Sexual Harassment (Paragraph 103)**

23. Sexual harassment remains a problem in the workplace, schools and in public and private places, yet the State Report fails to detail the extent of the problem and how the State's failure to respond to it impacts on the enjoyment of the right to equality for women. The South African Human Rights Commission concluded after hearings on school based violence in 2006 that schools were "the most likely place where children would become victims of crime, including crimes of sexual violence". This confirmed the earlier finding of Human Rights Watch that: *"On a daily basis, in schools across the nation girls of every race and economic class encountered sexual violence and harassment at schools that impedes the realization of the right to Education"*

24. The Human Rights Watch study revealed that one of the reasons for the reluctance to report incidents of sexual violence to the schools was inappropriate and/or incomplete failure by the school authorities to address the issue of sexual abuse. Studies<sup>75</sup> indicate that up to 76% of career women in South Africa have been harassed in some or other form in the workplace. It can be assumed that an even higher percentage of women are harassed or abused in the more vulnerable jobs, the informal sector, and illegal work such as sex work, all of which are made up by predominantly women. Due to poverty, high unemployment levels and their disproportionate burden of household

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<sup>75</sup> Special Rapporteur on Adequate Housing Mission to South Africa UN Doc A/HRC/7/16/Add.3 (dated 29 February 2008) paragraph 85

maintenance, women are less likely to challenge unfair labour practices and gender based violence in the workplace. Thus in sexual harassment cases, the element of gender subordination will often co-exist with racial and class dimension. Bonthuys<sup>76</sup> points out that in addition to being the most likely targets of sexual harassment, the most disadvantaged women will be the least able to resist it because they lack the resources to litigate, because work is scarce and their families tend to depend on their income.

25. A research study by REACH, “*Sexual Harassment: is it really a problem on farms?*” revealed that 32% of both women and men experienced some form of sexual harassment ranging from unwelcome comments or remarks of a sexual nature to its worst form, rape. The study further revealed that the majority of the farms do not have a policy or code of good practice on sexual harassment. The State refers to the Employment Equity Act and the Code of Good Practice in relation to Sexual Harassment promulgated there-under as a response to the problem of sexual harassment in the workplace. While the law does provide a remedy, this is not accessible to many women due to the problems related to access to justice such as affordability, geographical remoteness, lack of access to legal representation and lack of knowledge of existing rights. Further, the Code is only a guideline and the guidelines do not go far enough in imposing obligations on employers to eradicate the environment conducive to sexual harassment. When viewed in the context of the high levels of violence against women and the disproportionate levels of poverty suffered by women in our society, the cases of sexual harassment that remain unreported are a cause for concern. In order to give effect to equality in the workplace, an environment that is conducive to reporting sexual harassment without repercussions is essential. The State itself, as an employer, has been found negligent in relation to taking steps to prevent sexual harassment.<sup>77</sup> In order to meet its obligations as an employer and to promote, protect, fulfil and respect the rights contained in the Bill of Rights, the State ought to :

- adhere to its own policies and obligations as employer,
- strengthen the legislative and enforcement mechanisms,
- make the guidelines in the Code compulsory,
- penalise employers that do not comply,

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<sup>76</sup> Special Rapporteur on Adequate Housing Mission to South Africa UN Doc A/HRC/7/16/Add.3 (dated 29 February 2008) Para 89.

<sup>77</sup> Zaesne D, The Effectiveness of the Employment Equity Act and the Code of Good Practice in reducing sexual harassment (2001) 17 SAJHR 503 at 507-508.

- improve access to justice,
- educate women on their rights in the workplace
- rate employers on their compliance with the guidelines when assessing general compliance under the affirmative action provisions of the EEA and the laws relating to black economic empowerment

## **Article 4: Right to Life, Integrity and Security of Person**

### **Paragraph 107-109**

26. While the regulations and laws in the country have outlawed the death penalty, women continue to face a different form of “death penalty” as a result of the high levels of gender based violence in the country. A research conducted by the Medical Research Council<sup>78</sup> revealed that the killing of a woman is the most extreme form of intimate partner violence and that every 8 hours a woman was killed by an intimate partner, which is five times higher than the global rate.<sup>79</sup> Enactment of laws has proven insufficient in protecting women’s lives due to a variety of reasons including poor implementation, lack of adequate training of law enforcement agents as well as lack of political will to effectively administer the law.

### **Paragraph 109**

27. For the period under review, numerous items of legislation and policies have been developed and adopted, however, despite these developments, the following challenges are important to note:-

- *Lacunae in existing legislation:* in theory, the Domestic Violence Act is indeed a progressive piece of legislation. However it does have some loopholes as it fails to take into account the intersectionality between violence, poverty and HIV and AIDS. It does not make reference to HIV/AIDS anywhere in the text despite the fact that the majority of women affected and infected by HIV/AIDS also experience domestic violence. Another example is the silence in respect to delays in criminal trials and its impact on complainants; the Criminal Procedure Act only protects the rights of accused to a speedy trial.

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<sup>78</sup> <http://www.mrc.ac.za/policybriefs/everyeighthours.pdf>

<sup>79</sup> <http://carteblanche.dstv.com/shocking-sa-femicide-statistics>

- *Lack of education for public and training for implementers around new legislation- Equality Act and Sexual Offences Act:* Despite the passing of the minimum sentencing legislation courts continue to disregard the minimum sentencing principles and continue to give out lenient sentences...
  - *Inadequate costing and budget allocation for the implementation of legislation:* the Sexual Offences Act provides for survivors to give their statements to female police officers, in practice this often results in delays while survivors wait for female officers to be called to take the statements. A study conducted in 2005 found that no specific budget dedicated to its implementation and that allocations were only for ad-hoc once off projects for training and publicity around DVA and that these funds were provided by international donors rather than the State (Goldman Budlender, 1999; Vetten and Khan, 2002b). Further despite the State's reliance on civil society organizations to provide services to survivors of violence, it fails to adequately resource these organizations. Without the NPOs and community-based organisations, women experiencing gender-based violence would have very few options. Gillit (2002) states
    - *"there would be no rape crisis assistance, no help for women trying to navigate their way through the justice system or health system, which so shamefully often lets them down. There are some wonderful policies and fantastic legislation, but it all falls flat in the practical implementation,"*
28. Funding by government is very difficult to access despite it being available. Many organisations need funding as they provide services such as shelters or court programmes which are essentially government functions

### **Paragraph 110-111**

29. Government efforts at addressing violence against women and children have not yielded the desired results. According to Gender Links research, 77% percent of women in Limpopo province, 51% of women in Gauteng, 45% of women in the Western Cape and 36% of women in KwaZulu-Natal have experienced some form of violence -emotional, economic, physical or sexual in their lifetime, both within and outside intimate relationships.<sup>80</sup> The report notes that "the majority of violence reported occurred within women and men's private lives, with 51% percent of women in Gauteng, 51% in Limpopo, 44% in the Western Cape and 29% in KwaZulu-Natal reporting having experienced intimate partner violence in

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<sup>80</sup> Study reveals extent of gender violence at <http://www.southafrica.info/services/rights/gender-051212.htm#.UUBG8xxgfw> [Accessed on 13 March 2013].

their lifetime.”<sup>81</sup> Specifically, domestic violence has been described as one of the most prominent features in post-apartheid South Africa.<sup>82</sup>

30. The South African Police Services (SAPS), in their Report for January 2010 to December 2010, recorded 100,877<sup>83</sup> cases of domestic violence. The reality in South Africa is that notwithstanding the Country’s progressive Bill of Rights and commendable jurisprudence echoing international and regional human rights standards, the protection of women against sexual and domestic abuse remains, in practice, very limited and ineffective. Insecurity of women both in the public and private sphere is a daily phenomenon. Sexual violence continues to be the daily experience of many women while perpetrators continue to enjoy widespread de facto impunity.

### **Paragraph 112- 114**

31. According to Vetten (2007) the work of the Family Violence Child Abuse and Sexual Offences Units (FCS) is far superior to that of ordinary detectives, they make more arrests and have fewer cases that are withdrawn at court. In 2010 the South African government re-launched the Family FCS and according to the South African Police Services 176 units have been established.<sup>84</sup> However in a study conducted by Tshwaranang Legal Advocacy Centre in 2015<sup>85</sup> found that many of the FCS units face human and financial resource challenges. Some officials mention that there are at times not enough vehicles to ensure that rape survivors are properly attended to. As such end up having to make decisions around which matters to prioritise. It is clear that if these are to operate to their optimum, significant changes have to be made.

32. Equally frustrating is the lack of policing capacity in rural areas to deal with domestic violence cases, the lack of legal aid offices in rural areas to provide legal assistance to the poor and marginalized amongst other things. Clearly laws have not manifested themselves in substantial change in the lives of people within communities and legislation is not being implemented at sufficient speed to

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<sup>81</sup> Ibid.

<sup>82</sup> L Vetten *Addressing domestic violence in South Africa: Reflections on strategy and practice* (2002) Expert paper in Violence against women: Good Practice in combating and eliminating violence against women 1 and 2.

<sup>83</sup> Briefing to the Portfolio Committee on Police on 23 August 2011. Recommendations of the ICD six monthly report on the Domestic Violence Act and the promotion of effective policing of crimes against women and children.

<sup>84</sup> See SAPS website <http://www.saps.gov.za/newsroom/msspeechdetail.php?nid=4936>

<sup>85</sup> Tshwaranang Legal Advocacy Centre (2015) Medico-legal barriers to the effective prosecution of Rape cases in Four provinces retrieved from [www.tlac.org.za](http://www.tlac.org.za)

ensure that the rights enshrined in the constitution become a reality in people's daily realities.

### **Paragraph 118-125**

33. The State's report fails to adequately acknowledge the broad spectrum of non-compliance by state officials to the various policy and legislative imperatives in protecting and defending women's rights. According to the research findings on the implementation of the DVA;

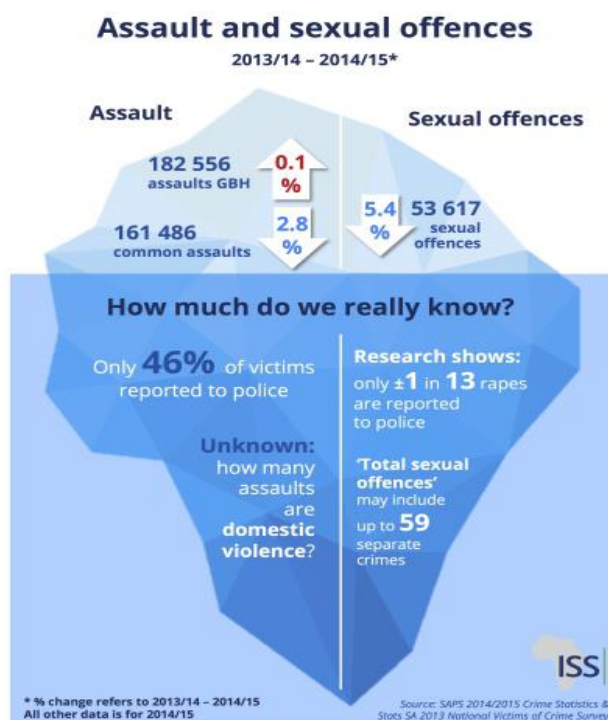
- Most women in rural areas lack of knowledge on the remedial measures available to them in the Domestic Violence Act ;
- Lack of persons to assist women in filling out required forms for protection orders in the courts .Whilst the Domestic Violence Act provides for clerks of the court to assist with filling in the application forms in many of the courts this function is provided by the non- governmental organisations .Survivors of domestic violence narrate that oftentimes they are faced with negative attitudes by court staff making it difficult for them to further pursue the relief from the courts;
- Police are unhelpful and insensitive to women who report domestic violence and they often place more value on privacy and family considerations rather than on a survivor's right to access justice. There have been increasing allegations of women being ridiculed and discouraged by police to lay charges;
- There have also been increasing cases of rape, sexual assault and physical abuse in which members of South African Police Services are actually the perpetrators.

### ***Levels of violence against women***

34. The pandemic levels of violence against women and girls in South Africa continue to reflect the country's inability to stem the tide. Unfortunately, whilst women's rights organisations continue to use all their resources and energies towards this problem, there is a perception that the political climate is becoming antagonistic and rolling back the gains made. This may have serious implications for government commitment and result in a lack of dedicated attention and resources to address this scourge.



35. A lack of understanding of the extent of the problem can seriously inhibit an effective response to violence against women and girls. For many years there has been a call to address the inaccuracy of statistics, and consequently the analysis of it to ensure that there is a realistic reflection and understanding of the numbers of women and girls affected by violence. This factsheet<sup>86</sup> provides an overview of assault and sexual crime trends between 1 April 2014 and 31 March 2015 as recorded by the South African Police Service.<sup>87</sup>



### ***So how real are the decreases?***

- The number of cases of assault with the intention to inflict grievous bodily harm (GBH) recorded by the police increased by 0.1% between 2013/14 and 2014/15, from 182,333 to 182,556 recorded incidents.
- Cases of common assault recorded by the police decreased by 2.8% from 166,088 to 161,486 incidents.

<sup>86</sup> We are highly indebted to the Institute for Security Studies (ISS) and Africa Check for this fact sheet. *This fact sheet was prepared in collaboration with the Shukumisa campaign by Lizette Lancaster, Chandre Gould, Lisa Vetten and Romi Sigsworth.*

<sup>87</sup> *The Institute for Security Studies is using the recalculated figures released by the South African Police Service on 29 September 2015 for the years 2004/05 to 2014/15. The Institute for Security Studies takes no responsibility for the accuracy of these statistics.*

- Figure 1 (below) shows that the rate of common assault (per 100,000 population) recorded by the police almost halved in the past 12 years and assault GBH rates reduced by almost 40%.
- There is, however, reason to doubt that these figures reflect a real reduction in assault levels. Police statistics for assault are notoriously unreliable because most victims do not report these crimes to the police. Since the victim and perpetrator may be related (such as in a case of domestic violence) victims are often reluctant to disclose assault. The Statistics South Africa National Victims of Crime Survey found that most assault victims knew the perpetrators. The perpetrators were either from the same community (34.2%), a spouse or lover (16.8%) or a relative (9.2%). Less than a quarter were described as unknown or categorised as “other”.
- Another reason to doubt the accuracy of official assault statistics is that the tendency among victims to report assault incidents to the police is declining. The victims of crime survey shows a 7% reduction in the proportion of assault victims who reported the incident to the police, from 52.6% of victims in 2011 to 45.6% of victims in 2013. This may signal a loss of trust in the police or that the police are not recording as many in an attempt to show a decrease in violent crime so they can achieve the targets set for them. Similarly, an increase in reported cases of assault may indicate either an increase in public confidence in the police, or that the police are making it easier to report cases

### **Paragraph 126**

36. Psycho-Social support services for victims, including shelters and counselling services, are inadequate due to inappropriate budgetary allocations by the state. The provision of such services needs dedicated attention and funding from government, but has largely been left to civil society. The DVA does not clearly stipulate the provision of psycho-social support services and so the Act in itself is problematic in that it is reactive in nature in addressing the behaviour of the abuser while the abused is left to fend for herself.

37. Where these services do exist, many SAPS officers fail to inform victims about where and how to gain access to them, even though SAPS has an obligation to do so in terms of the National Instructions issued under the DVA. The manner in which survivors of domestic violence are treated by service providers is another challenge. Many women report feeling victimised by Clerks and police officers as if they are to blame for the abuse that they have endured. This opens the door for secondary victimization. Application forms are in most instances processed in the

open with personal details being discussed out in the open. This impacts negatively on women who experience sexual violence such as rape as they are required to discuss intimate details in a public area. The lack of training on other aspects of family law for Clerks further exasperates the situation as a Clerk receiving training on the DVA in 2013 disclosed that she did not know anything about the Recognition of Customary Marriages Act and has always advised women married in terms of custom that their marriages were not recognized. Yet she is tasked with the implementation of the DVA which deals with interpersonal relationships.

### **Paragraph 131**

38. With regards sexual violence, statistics often do not provide a true reflection of the situation given that these crimes are greatly underreported mainly due to stigmatization and lack of survivor-friendly services. This is confirmed by the South African Law Commission (SALC), which estimates that about 1.69 million rapes occur every year, but on average only 54 000 rape survivors lay charges each year.<sup>88</sup> A recent SAPS study estimates that authorities are only informed of 1 in 36 incidents of rape (this translates to about 2.8% of all cases).<sup>89</sup>
39. The State report does not make mention of the plight of women such as immigrants where sexual offences are concerned, yet factual evidence demonstrates their vulnerability in this regard. The lack of government attention focused on obligations to protect vulnerable groups has led many foreign migrant women to believe they are not entitled to protection from the South African government. Strong xenophobic sentiments have been demonstrated in South African politics, media, and social attitudes, and there has been significant violence against foreigners, including before and after the May 2008 attacks. The Centre for Study of Violence and Reconciliation (CSV), in a study on 'The Gendered Nature of Xenophobia in South Africa' found that, migrant women are said to be the most vulnerable victims of xenophobic attacks because they are seen as easy targets since they have less recourse to the criminal justice system and protection than South African women.

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<sup>88</sup> P Govender *Draft Report on Violence Hearings. Ad Hoc Joint Committee on Improvement of Quality of Life and Status of Women* Parliament of South Africa (Cape Town, Government Printers, 1998) as cited by Britton at 146 'Land Where a Woman is Raped Every 83 Seconds'..

<sup>89</sup> *SABC News* 'South Africa, world's rape capital: Interpol' accessed at <http://www.sabc.co.za/news/a/a424c0804af19b5e983fd7db529e2d0/South-Africa,-worlds-rape-capital:-Interpol-20121904> on 24 July 2012.

### **Paragraph 139**

40. The State's report makes reference to the rights' articulated by the Victims' Charter. This charter is not legally binding as it only has policy status and is rarely used by judges and magistrates if none at all. There are a number of problems with the Charter, both in terms of its content, application and enforceability. The Charter only speaks to victims' rights as they relate to the criminal justice system and state services offered to victims. The rights are only intended to be conferred on those victims that choose to report crimes and engage with the criminal justice system. The Victims Charter therefore does not protect all victims of crime. Overall, it contains a number of vague promises of improved service delivery without really detailing how to access these or what to do if they are not provided (Moran 2004).

### **Paragraph 140**

41. A study commissioned by the Department of Justice on Implementation of the Domestic Violence Act demonstrates the huge gaps between theory and practice. One such example is Government funding for the establishment and operation of Thuthuzela Care Centres as a flagship response to the need for one-stop services for survivors of violence. However, funding has been minimal. The establishment of these centres at Thohoyandou and Ntlaza (for example) can only go ahead with donor funding. Another example is all training in support of the establishment of the sexual offences courts that are an integral part of the one-stop centre concept is currently funded by international donors such as the Canadian High Commission.<sup>90</sup> Women in Tembisa who make use of the Thuthuzela Centres have revealed that in most instances the women are not fully informed of the process relating to medical examination, in some instances receive no treatment at all, and complain of the insensitivity of the medical personnel hence secondary victimization by a government institution.<sup>91</sup>

## **Article 5: Elimination of Harmful Practices**

### **Paragraph 164**

42. While the State recognises harmful practices of *Ukuthwala*, there is no specific law to address the practice and protect women. Currently the practice is being

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<sup>90</sup> South Africa CEDAW Shadow Report (2011) to CEDAW Committee, 48<sup>th</sup> Session (POWA – Unpublished draft)

<sup>91</sup> Ibid

regulated in a fragmented manner which addresses the acts associated with the practice without condemning the practice itself. This is done through separate statutes and common law rules which include, inter alia, the Children's Act, The Recognition of Customary Marriages Act, the Sexual Offences Act, and common law charges of abduction or kidnapping. Perhaps this is why there is some confusion about the legality of the practice among important role players such as the police and social workers who, based on experience, do not always know what their roles are in terms of the criminal aspects and social welfare obligations of this practice.

43. As a result minor girls as young as 12 continue to be kidnapped, raped and forced into marriage by grown men old enough to be their fathers. They have had to drop out of school because they fall pregnant and/or are required to stay home to take care of household chores, placing them in perpetual poverty and dependency on their male counterparts. Also, a lot of the young girls have had difficult and, in some cases, fatal experiences with child birth as they are too young to be delivering babies. They are also exposed to the risk of contracting sexually transmitted diseases and HIV/AIDS as they cannot navigate consensual sexual intercourse with a partner who engages in sexual activities while in the city where he works or is based.
44. As there is no law directly addressing the practice of *Ukuthwala*, it is difficult to ascertain how many girls fall prey to the practice every year. In 2009 there were media reports that more than 20 girls in Eastern Cape per month were being removed from school as a result of *ukuthwala*, but it is uncertain what the source of those numbers were. The Commission for Gender Equality has voiced concern over the fact that there are no statistics available on the practice of *ukuthwala* in Kwa-Zulu Natal and other areas.
45. Figures released by South African Police Services (SAPS) to the Select Committee on Women, Children and People with Disabilities show that only a handful of arrests were made for *ukuthwala* abductions in 2011. In the Eastern Cape over the 2012/2013 period there were 116 reported *ukuthwala* abduction offences, and only 17 arrests. In KZN over the same period there were 138 reported abduction offences and 3 arrests. Nationally there were 255 *ukuthwala* related abduction cases in total with only 21 arrests, and this excludes Gauteng which has 171 abduction cases over 2012/2013, but it is not clear how many of these were *ukuthwala* related.

## Paragraph 166-168

46. The re-emergence of the practice of virginity testing has led to concerns being raised about the potential invasion and violation of guaranteed constitutional rights of the young women who are tested.
47. Public debates and mixed reactions on the practice of virginity testing have recently resurfaced after 16 girls from KwaZulu-Natal received ‘virginity bursaries’ from the UThekela district municipality to undertake studies at university, on the condition that they remain virgins. As part of the agreement, the young girls had to agree to be subjected to ‘virginity testing’ every holiday when they returned home. If they failed the test, they would lose their bursary. The Mayor of UThekela municipality and founder of the Maidens Bursary Award category Mayor Dudu Mazibuko defended the controversial bursary stating that it is meant to encourage young girls to abstain from sex and focus on education. On the contrary, as People Opposing Women Abuse (POWA) commented, the practice of virginity testing is unconstitutional and should not be aligned with the right to education.

#### **Article 6 and 7: Rights Related to Marriage**

48. The South African Marriages Act of 1961 regulates the legal requirements, process and administration of civil marriages between men and women in South Africa. The age of consent to enter into such a marriage is 18 years, but Section 26 of the Act states that: *“No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage, except with the written permission of the Minister or any officer in the public service authorised thereto by him.”*
49. The Act in its current form therefore allows for an exemption from the minimum age of consent to enter into a marriage.
50. The Recognition of Customary Marriages Act 1998 regulates administration of marriages concluded in terms of the recognised custom of the parties to the marriage. The age of consent for such a marriage is 18 years, but the Act also contains an exemption provision allowing for two persons below the age of 18 to marry each other where the consent of the Minister of Home Affairs has been

obtained<sup>92</sup> or where the consent of the parents or guardians<sup>93</sup> of the parties has been obtained.

51. There can be no justification for the distinction between girls and boys in the current framework of the Marriages Act, which allows for the marriage of girls who are only 15 years old. It is based wholly on preconceived notions of women as wives and mothers, which is deeply imbedded in patriarchy. Allowing for an exemption from the required age for marriage is really allowing for state-sanctioned child marriage, a harmful practice that entrenches discrimination and inequality.

### **Paragraph 193**

52. The Marriages Act does not recognise marriages concluded in terms of the Islamic Faith in South Africa. As a result of such failure, there is no legal age, registration or permission requirement in respect of minors concluding marriages in terms of the Islamic faith. Young girls below the age of 18 years are therefore often married off when they fall pregnant so as to avoid shaming the family. Since this marriage is performed by someone who is not a recognized marriage officer, the marriage is not legally valid. No consent is obtained from the Minister of Social Development or the Minister of Home Affairs to conclude the marriage. There is therefore a very real risk of forced marriage where a teenage girl might not wish to get married, but would feel compelled to do so because it is culturally and religiously expected of her. Very often these young girls leave school to commence their lives as married woman and are not able to complete their education, effectively continuing the cycle of poverty and entrenching their positions within the community as care providers.

## **Article 8: Access to Justice and Equal Protection before the Law**

### **Paragraph 232**

53. The criminal justice system in South Africa fails to respond adequately to incidents of violence against women. The system places more value and consideration on the rights of the accused with direct conflict in the rights of the survivor. A rape survivor (usually women) goes through rigorous process to access justice only to have an accused receive a lenient sentence. The legal process in itself tends to be traumatic to rape survivors. The Constitutional Court in *S V Baloyi* **2000** (2) SA 425 CC summed up the situation as follows;

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<sup>92</sup> Section 3(4)(a) and (c)

<sup>93</sup> Section 3(3)(a)

*“The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated.”*

Therefore, the failure of the Government to address the problems of backlog and delay in many court systems could constitute denial of access to justice.

## **Article 9: Right to Participation in Political and Decision making**

### **Paragraph 238**

54. Despite legislative reforms and the prominence of South African women in the highest echelons of government and in regional and international human rights bodies, the practical experience on the ground, especially at local level, indicates strong elements of resistance to women’s participation in decision-making. This is attributed in part to the development of laws that impede the participation of women. For instance in the Traditional Leadership and Governance Framework Act, at least a third of the total number of council members must be female, in order for tribal authorities to be deemed traditional councils, and thereby retain their legal status. All traditional authorities were required to retrospectively meet these requirements within seven years after the enactment of the Act but have not done so to date. There is therefore uncertainty about the legal status of traditional councils; even more there is uncertainty about gender representation in traditional councils as contemplated under the Act. Also, by setting the bar at only 30% this law limits women participation at traditional governance and entrenches patriarchy and subjugation of rural women to discrimination and subservient roles.<sup>94</sup> This contradicts the Constitutional Equality Clause 9 and Article 9 of Maputo Protocol which promotes women participation without any discrimination in all elections, to be represented equally in all levels with men in all electoral processes, as well as in decision making.

55. Other impediments relate to the conflation of separation of powers where traditional leaders will serve as guardians of traditional practices and also as presiding officers hearing disputes on cultural problems.<sup>95</sup> This violates the right of women as equal partners with men at all levels of development and

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<sup>94</sup> HURISA SOTU 2013 at [www.sotu-africa.org](http://www.sotu-africa.org)

<sup>95</sup> CGE Annual Report 2011-2012. p23.



implementation of state policies and programmes. Also, Women in decision-making positions are generally concentrated at the lowest end of the economic ladder.

### **Paragraph 259**

56. Human Rights South Africa (HURISA) in the State of the Union report states that while the numbers of women in the judiciary system and law enforcement organs of the state have increased, they are still under represented in comparison to their male counterparts. By 2014, of the 243 judges in South Africa, 79 were females. There are 35 African females, 25 white females, 12 Indian females, and eight coloured females (this adds up to 80 and not 79). Hence, to date there is an uneven representation of women in the judicial system contrary to the provisions of Article 8(e) of the Protocol.<sup>96</sup>

## **Article 10: Right to Peace**

### **Paragraph 277**

57. South Africa does not yet have a systematic programme for promoting the United Nations Security Council Resolution (UNSCR) 1325 in its peace-making, peacekeeping and peace building engagements internationally, and we are vulnerable to transnational crime, cyber-crime and terrorism, each in turn with gendered impact. Women are not appointed to serve as peace mediators and to be in peace negotiations<sup>97</sup>.

## **General Comments**

58. South Africa's attainment of peace for women is impeded by the pervasive patriarchal cultures, high crime and murder rates with a high incidence of Sexual and Gender Based Violence (SGBV), challenges with access to justice, poverty and inequality, xenophobia, poor education and training, access to health, access to basic services, food security and a lack of national healing; that is, structural violence and human security challenges.<sup>98</sup>

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<sup>96</sup> HURISA, Supra at note 35

<sup>97</sup> HURISA, CSV, POWA Peace and Security Project 2013-2015

<sup>98</sup> Professor Cheryl Hendricks, **Civil Society National Action Plan Steering Committee : Development of National Action Plan on Women, Peace and Security : 14 /09/2015**

59. Physical violence in societies is a much larger and more pervasive phenomenon than just civil war violence”,<sup>99</sup> which has been the dominant focus to date for work on women peace and security. High murder rates make this a particularly violent country – of the 17 068 people killed in the year March 2013 to February 2014, 2 354 were women, which is five times higher than the global average.<sup>100</sup> The Global Peace Index (GPI), produced annually by the Institute for Economics and Peace, measures placed South Africa at 136 out of 162 countries. As such, South Africa is often described as a “country at war with itself”.<sup>101</sup>
60. The Medical Research Council has estimated that only one in nine rapes are reported to the police,<sup>102</sup> and a 2010 study in Gauteng found that while one in 13 women raped by a non-partner reported the matter to the police, only one in 25 women raped by their partners reported the offence.<sup>103</sup>
61. The staggering reports for 2013/2014 from the annual crime statistics revealed that women were the victims in 2 354 murder cases, 2 651 attempted murder cases, 54 621 common assault cases, and 80 672 assault with the intent to cause grievous bodily harm cases.<sup>104</sup> However, merely knowing the number of contact crimes perpetrated against women and/or children does not give us enough information to understand the extent and complexities of domestic violence in South Africa. It has been estimated that abused woman stay in an abusive relationship for an average period of 10.5 years before seeking outside assistance.<sup>105</sup>
62. LGBTI persons continue to experience widespread discrimination, harassment and violence, despite the constitution guaranteeing their rights to safety regardless of sexual orientation or gender identity. Lesbians and gay men are raped to ‘make them straight’ or to ‘correct’ their sexuality. Although there are no accurate statistics for these hate-crimes, it is estimated that more than ten lesbians are raped or gang-raped weekly, and at least 500 lesbians become

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<sup>99</sup> Hoeffler, A. and Fearon, J., (Working Paper, August 22, 2014) *Conflict and Violence Assessment Paper; Benefits and Costs of the Conflict and Violence Targets for the Post-2015 Development Agenda, Copenhagen Consensus Centre*.

<sup>100</sup> [http://www.saps.gov.za/resource\\_centre/publications/statistics/crimestats/2014/crime\\_stats.php](http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2014/crime_stats.php)

<sup>101</sup> Institute for Economics and Peace, 2015. Global Peace Index.

[http://www.visionofhumanity.org/sites/default/files/Global%20Peace%20Index%20Report%202015\\_0.pdf](http://www.visionofhumanity.org/sites/default/files/Global%20Peace%20Index%20Report%202015_0.pdf)

<sup>102</sup> R Jewkes and N Abrahams, *The epidemiology of rape and sexual coercion in South Africa: an overview, Social Science and Medicine*, 55:7, 2002, 1231–1244.

<sup>103</sup> M Machisa et al., *The war at home – GBV indicators project*, Gender links, 2010.

<sup>104</sup> South African Police Service, 2014, ‘RSA: April to March 2004 - 2014: Crime Categories Figures and Ratios’. Available at:

[http://www.saps.gov.za/resource\\_centre/publications/statistics/crimestats/2014/crime\\_stats.php](http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2014/crime_stats.php)

<sup>105</sup> Amien W, (1998) *Recent Developments in the area of women’s rights in South Africa: Focus on Domestic Violence and Femicide*, University of Cape Town

victims of corrective rape annually. Once again, crimes of violence against LGBTI people are often under reported due to fear of secondary victimisation by the police and other service providers because of their sexual orientation.<sup>106</sup> The government established a task team in 2011 to develop a legal framework to end violence and discrimination against LGBTI people. However, there is a lack of publicity about the progress made by the task team and its programme and strategies to end this violence.

## **Article 11: Protection of Women in Armed Conflicts**

### **Paragraph 293**

63. Women have to flee their home countries to avoid sexual violence and seek asylum in South Africa. However, a number of women's asylum applications are adjudicated negatively, leaving them vulnerable. The Department of Home Affairs Refugee Status Determination Officers (RSDOs) lack a proper understanding of the South African law, which leads to the rejection of claims for asylum based on sexual violence and rape. The lack of training and understanding has led to secondary victimization, where women report being traumatised during their asylum interviews because RSDOs do not have an understanding of the situation in their home countries or appreciate the psychological trauma that a survivor of sexual violence suffers.

64. South Africa's domestic law also allows for sexual and gender non-conforming persons to apply for refugee status based on their sexual orientation and/or gender identity as members of a particular social group. Sexual and gender non-conforming applicants are often unwilling and unable to approach their government for protection as there are existing homophobic laws and attitudes in their countries of origin. The South African government has an obligation to grant protection to asylum seekers and refugees in need of such protection. The Government has however thus far rejected claims of asylum based on persecution as a result of sexual orientation and gender identity due to credibility and other concerns. Often, adjudicators dismiss cases, citing lack of evidence of harm experienced or a failure to seek domestic protection, neither of which are requirements under the law. Prevalent in South Africa is the notion that the claimants can continue to live free from persecution in their countries if they continue to hide their sexual orientation or gender identity. This form of reasoning is prevalent in RSDO decisions, which include statements such as "no one knew

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<sup>106</sup> Tshikululu Social Investments, 'Reframing Interventions to end GBV in South Africa'. Available at: [http://www.tshikululu.org.za/uploads/files/FR\\_CSI\\_that\\_Works\\_GBV\\_Research\\_Report\\_final\\_Feb\\_2014.pdf](http://www.tshikululu.org.za/uploads/files/FR_CSI_that_Works_GBV_Research_Report_final_Feb_2014.pdf)

you were gay” and “if you lied low nothing would happen to you. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.

65. In their 2012 survey gathered from LGBT refugees and asylum seekers in South Africa, the Open Society Foundation for South Africa reports discriminations and difficulties that the Department of Home Affairs (DHA) presents to LGBT asylum seekers and refugees, including the women. According to the report, LGBT asylum seekers and refugees were treated differently despite the fact that persecution on the grounds of sexual orientation or gender identity is a recognised basis for seeking asylum. The majority of the LGBT asylum seekers and refugees use section 22, which constitutes a temporary permit or asylum seeker permit for extended periods as South African retrogressive policies create challenges granting a Section 24 permit or formal recognition of refugee status.

## **Article 12: Right to Education and Training**

### **Paragraph 309**

66. Whilst enrolment rates are high and show little difference between girls and boys, attendance and drop-out rates are higher among girls. Family responsibilities which make particular demands on female learners also present a high educational risk. Furthermore, school attendance of girls living in homes affected by HIV and AIDS is impacted more severely than for boys. The Maputo Protocol provides for the state to take specific positive action to promote literacy, education and training for women in all levels and in all disciplines, especially in the field of science. Despite the huge investments made by the government on education, unfortunately, tangible dividends are not very visible especially as regards women and girls.

### **Paragraph 314**

67. The government has claimed that the rates of women and girls completing their primary education have improved in the country. While, there might be some truth in this assertion; recent studies have highlighted South Africa’s rankings in the area of gender enrolment at the primary or basic levels as worrisome. Also, while entry into higher education in South Africa has increased, women remain under-represented within the science, engineering and technology (SET) sectors. Gender imbalances in the workplace continue and key national instruments designed to develop highly skilled people do not specifically address the issue of women’s participation in the sector

### **Paragraph 333- 336**

68. The government has rightly admitted in its report the fact that access to quality education for women and girls have remained a challenge because of factors like pregnancy, poverty and other socio-economic conditions prevalent in the country. This point is further buttressed by the 2013 Good Governance Africa report, which highlights other barriers to access to education for women to include the teachers, their teaching methods, how these teachers are managed as well as the socio-economic factors.
69. Some of the socio economic factors that affect girls include the dire situation of sanitation in schools, both in rural and urban settings, and the impact that it has on learners' attendance particularly when girls are menstruating. Research undertaken by Section 27 indicate that some girls could very well miss one week of school per month as they do not have access to sanitary pads and the sanitation at schools is too poor to accommodate their period. Further research indicates that 1 in 10 girls will miss an average of four days of schooling per month as a result of poor to no access to sanitary towels. Poor sanitation at schools further increases opportunities for children to be subjected to intimidation and violence, both in school toilets and when they are forced to seek alternatives. Many poor children do not have adequate sanitation at home and school toilets are therefore essential to their health and safety.
70. Being forced into an early marriage contributes to high teenage pregnancy rates and has lasting implications of the rights to education and health. This early marriage in most cases results in the end of the adolescent girl's schooling as she prepares to become a mother and homemaker. The patriarchal view that pregnant girls should not be attending school continues to make its way into the media from time to time which signifies that schools still enforce discriminatory policies. For young rural girls the issue of care for the baby while the mother school is difficult as she already bears the burden of a caregiver and home maker. Very often these young girls leave school to commence their lives as married women and are not able to complete their education, effectively continuing the cycle of poverty and entrenching their positions within the community as care providers.

### **Paragraph 342-347**

71. Though legislative framework provides for the Department of Education to ensure that schools are safe spaces for children to learn, and expressly prohibits any form of gender based violence, girls are often at risk of violence and harassment

in schools from both learners and teachers. Incidents of rape, along with the attendant vulnerability to HIV infection, and interruption of education are growing concerns in South Africa and continue to undermine the practical access of girls to adequate education.

72. The level of violence against children, and particularly sexual violence, is unacceptably high and has a disproportionate impact on girls. Teenage girls are very vulnerable and are at risk of being forced out of the education system as a result of sexual violence or pregnancy which creates a life of perpetual poverty. Over and above the scourge of sexual violence, many children find that abuse is institutionalised within the school system. Often, cases are not reported because of feared retaliation or intimidation from the perpetrator, especially when the perpetrator is a teacher or administrator.
73. Exposure to drugs and alcohol at a young age is another challenge which has a highly detrimental impact on children's development. In most communities, alcohol can be purchased close to schools, contrary to the legislation regarding the sale of alcohol. This is particularly worrying because in about 50% of rapes perpetrated against children, the victim had consumed alcohol or drugs prior to the event.<sup>107</sup> Drugs and alcohol also have an impact on the rate of teenage pregnancy.

## **Article 13: Economic and Social Welfare Rights**

### **Paragraph 358**

74. Women in South Africa have greater difficulty accessing credit than men, which is why most of them form part of the informal sector of the economy. This is caused not only through systematic and structural flaws, but also constraints placed on women from birth, which include everything from cultural and social beliefs that allow women secondary access to education and skills development to gender discrimination and fewer opportunities. Due to the inability or difficulties in accessing formal means of credit, there is a greater percentage of vulnerable groups, women included, engaging in informal credit, such as stokvels, burial societies, borrowing from a loan shark, or as in most cases borrowing from friends and family. Debt acquired by the most vulnerable groups in South Africa

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<sup>107</sup> The LRC will work to ensure that legislation and regulations on the sale of alcohol close to schools are actually implemented.

is mostly used to purchase basic needs such as food, clothing and education, not for long-term assets or investments such as housing or business development.

75. The micro-enterprise concept was mooted by the government to eradicate poverty and provide work opportunities for the unskilled. Sewing co-ops, chicken farming, candle-making, gardening and arts and crafts are a few of the micro-enterprise projects initiated collectively by women's community groups. A common feature of most of these activities reflect an extension of women's homemaking skills and are generally undertaken in combination with other domestic or income generating activities. Research into these activities revealed that private and public sector support for such activities are lacking, exposing women to high risks and poor outcomes. The gendered dimensions of the work environment reflects the over representation of men in the formal economy and women in the informal economy. According to the World Bank's International Finance Corporation (IFC), women own around 48 per cent of all enterprises in Africa. However they have the hardest time gaining access to finance. Surveys such as GCIS, Finscope and Labour Force widely acknowledge that:

*“... black women's usage of financial services is dominated by informal savings, funeral and burial schemes with little or very expensive credit reaching their enterprises.”*

76. Even though women have better credit repayment records than men, they still find it harder to raise financing than their male counterparts. Among the obstacles that women face in the financial environment is the lack of financial literacy; there is very little understanding of bank, microfinance's services and credit bureaus. Only one out of South Africa's four major banks is contemplating a specific programme to increase its share of women owned enterprises. Women also lack awareness of development finance, and bank services and products are often unaffordable and asset based lending disqualifies most from accessing business loans. Black women have a participation rate in the labour force of 73%, compared to 59% of white women. Nonetheless, black women have the lowest level of formal employment rates, and are the largest self-employed group of the population. Nowadays most women running businesses run micro enterprises, employing four or less people. Among different race and gender segments, of all the self-employed, not only do black women encompass the majority of this group, but are also those who earn the least, and therefore rely on forms of informal credit. This is why in 2005, only 38% of black women were banked. There is also a need for adequate business development support for women in order to broaden their chances of accessing finance and credit loans.

This includes training, advice and mentoring, full support in their entrepreneurial ventures, business registration, financial and business management skills.

### **Paragraph 362**

77. The Isivande Women's Fund was established after different studies commissioned by the Department of Trade and Industry proved that women were at a disadvantage when it came to finance, which inhibited the establishment, growth and sustainability of their enterprises. Although a great amount of information is available online regarding the Isivande Women's Fund that explains under which circumstances it flourished, why it was created, what issues it tends to assess, and whom it targets, there is no data available on how many women have benefited from it. The fund was created in 2006, but it has to reach the most vulnerable women, as many of them have never heard of it, as found in workshop sessions held by the Black Sash.

## **Article 14: Health and Reproductive Rights**

### **Paragraph 383**

78. Reality suggests that South Africa is still lacking in its human rights approach to health and access to health services for women. Unfortunately women and girls in South Africa remain disproportionately denied not only the right to the highest attainable standard of health including sexual and reproductive health but also access to health services. This point was buttressed in a 2014 Amnesty International study, which reports the increasing and high maternal mortality rates in South Africa despite commendable health policies, by the government.

### **Paragraph 392**

79. Article 14(2) (a) recognises the right of women to the provision of adequate, affordable and accessible health services especially in rural areas. The government in its report mentioned the introduction of mobile clinics to resolve the challenge of adequate access to health services particularly for women living in isolated areas. The government also reported a significant increase in the use of primary health care services. It further claimed that access to primary health care in both rural and urban areas has become better between the periods of 1995-1998.

80. However, while these efforts are commendable, research has highlighted the unreliability of mobile clinic services particularly in some provinces in the country.



Further research has also suggested that in 2013, the South African Human Rights Commission (SAHRC) established gross violations to the right to access to health services by one of the country's provincial Department of Health as a result of the lack of adequate access to primary health facilities as well as a scarcity of human resources imperative to quality health care service delivery in the country. There is also the challenge of lack of medical practitioners especially doctors in most of these public primary health care facilities. The 2011 report of the Department of Health showed disparity in the distribution of doctors and nurses between urban and rural areas, where only 19 per cent of the country's physicians and 12 per cent of the nurses are serving the rural communities which constitute 44 per cent of the population.<sup>108</sup> In addition, the distribution of human resources within districts also varies significantly within the private sector setting. Further challenges relate to sub-standard care resulting from non-adherence to standard protocols, a lack of motivation on the part of health workers to use and understand guidelines, and the lack of a supportive enabling environment that promotes and demands best practice and accountability.<sup>109</sup>

81. The closure of nursing colleges during the 1990s led to a reduced number of nurses and the emergence of home-based caregivers.<sup>110</sup> The health workforce is identified as having a weak knowledge base, as acknowledged in the national report "Human Resources for Health South Africa: Strategy for the Health Sector 2012/13-2016/17". The report notes serious inconsistencies between databases on the number of public health sector employees with the margin of error being as high as 30 per cent.<sup>111</sup>
82. The system of home based caregivers is recognised in South Africa with the majority of these caregivers being women from community-based organisations.<sup>112</sup> The care work sector in South Africa is largely unrecognized, and community care workers in South Africa generally do not possess any formal, professional health care qualifications. Most home based care works work on a voluntary basis while a limited number are poorly remunerated. The government has attempted to provide some form of payment and support to home-based care workers through the 2004 integration of careers into the government's Comprehensive Care, Management and Treatment Programme, as well as the inclusion of home-based HIV caregivers and early childhood development practitioners in its Extended Public Works Programme. However,

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<sup>108</sup> Angeli Rawat. Africa Portal: Back Grounder 31 June 2012

<sup>109</sup> DFID, 31 August 2011.

<sup>110</sup> Coovadia, 2009: 830.

<sup>111</sup> Herein referred to as HRH SA 2012/13-2016/17.

<sup>112</sup> Ibid 104.

these efforts have had unsatisfactory results and limited effect on recognition and protection of care workers.

### **Paragraph 395- 397**

83. Articles 14(1) (a) (b) (c) (f) is concerned with the rights of women to control their fertility and choose the adequate method of contraception and family planning. This includes the rights that women have to decide freely on issues pertaining to their bodies without the state interfering unduly. While this right to bodily integrity and autonomy is also protected and guaranteed by our Constitution, there is a contradiction in the actual practice of respecting women's rights. In the case of women living with HIV and women with disability, this was evident when the right to bear children was contested and in some cases blatantly restricted. Public health interventions, though coming from a genuine concern often have unintended consequences, where individuals would be deprived of services because they refused to partake in the services offered by the health care provider.

84. The Global Coalition on Women and AIDS notes that women living with HIV are subjected to many forms of institutional violence, including forced sterilizations and abortions; denial of voluntary sterilizations and safe legal abortions; discriminatory practices at health care settings that constitute further barriers to services. Despite the fact that the National Health Act requires consent before administration of any surgery, there is some evidence that women may be given consent forms while in labour and informed that receipt of medical attention depends on signing the form.<sup>113</sup> Disabled girls in South Africa are discriminated on, particularly in rural areas, where they are forced and coerced into sterilization because of their disability. In most cases, it's not the disabled girls that choose to be sterilized; instead, it's their parents or legal guardians who consent on their behalf. In some instances sterilized is in order to manage their menstrual periods and prevent pregnancy.

### **Paragraph 399**

85. Despite the government's claim that the use of contraception is improving in the country, factual evidence on the ground shows that women and girls, especially teenage girls are still unsure of methods of contraception to use to prevent unwanted pregnancies. This is occasioned by inadequate access to

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<sup>113</sup> Nondumiso Nsiband, POWA.

contraception, lack or inadequate access to accurate information as regards contraceptive use, the poor literacy levels of girls in the rural areas as well as the high levels of poverty in these areas. This buttresses the point that contraception use in the country remains a challenge, as the government admitted in its report.

### **Paragraph 403**

86. As the State report has acknowledged that maternal mortality is very high in the country. According to a 2012 report by the National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD), 4 867 maternal deaths were recorded between 2008 and 2010 in public healthcare facilities in South Africa. Of these, 186 women died of a septic miscarriage, 23 per cent of which were the direct result of an unsafe abortion.<sup>114</sup> Unfortunately, the government has also failed to achieve its goal of reducing the maternal mortality rate to 38 deaths per 100 000 live births by 2015. As such, there seems to be a wide gap between the right to health and health care services for women as provided in the Maputo Protocol as well as the Constitution, and what exists in reality in South Africa

### **Paragraph 416 -421**

87. Since the Choice on Termination of Pregnancy Act 92 of 1996 came into force, the number of unsafe abortion-related deaths has decreased by up to 90 %. However, the Act appears to have made little progress in decreasing the number of illegal abortions taking place in South Africa.<sup>115</sup> Lack of knowledge among South African women about when abortion is possible under the Act, as well as personal reluctance and often negative attitudes of public healthcare facility staff members, continue to act as barriers to accessing safe and legal abortions.

88. The National Department of Health has taken stock of shortcomings in healthcare services and has released the 2012-2016/17 strategic plan, which aims to provide an effective supportive regulatory environment for human resource health, equitable staffing, health workers and the re-engineering of primary healthcare provision. It also prioritises maternal, child and women's health, maintains the fight against HIV and AIDS, and promotes strengthened community-based healthcare. However, this new vision remains largely unseen in needy provinces and communities in a context where more than 80 percent of

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<sup>114</sup> National Committee on Confidential Enquiries into Maternal Deaths (2012). Saving Mothers 2008-2010: Fifth Report on Confidential Enquiries into Maternal Deaths in South Africa. May 2012. [http://www.doh.gov.za/docs/reports/2012/Report\\_on\\_Confidential\\_Enquiries\\_into\\_Maternal\\_Deaths\\_in\\_South\\_Africa.pdf](http://www.doh.gov.za/docs/reports/2012/Report_on_Confidential_Enquiries_into_Maternal_Deaths_in_South_Africa.pdf).

<sup>115</sup> Marie Stopes South Africa (2012). Unsafe Abortion in South Africa: A Preventable Pandemic. 2 July 2012. <http://www.mariestopes.org.za/sites/www.mariestopes.org.za/files/Unsafe%20abortion%20factsheet%20%20Marie%20Stopes.pdf>;

the South African population depends on state provincial healthcare institutions which are often some distance away from communities who cannot afford to travel.

## **Article 15: The Right to Food Security**

### **Paragraph 439**

89. The state has recognised the need to address food insecurity, especially in the wake of the economic crisis. However, throughout the review period food security has remained a huge problem. Food Bank South Africa states that currently 19 million citizens, or 40% of the population, are food insecure. The State Report shows that there is no single, specific government department at national, provincial or local level dedicated primarily or exclusively to the realisation of the right to food. There is also no demonstration of how the different departments are concerned with this right work together to ensure its realisation.

## **Article 16: The Right to Adequate Housing**

90. Despite efforts by the state to provide access to adequate housing in the country, poor households in rural or semi-urban areas in South Africa continue to live in informal settlements and find it difficult to improve their housing to decent formal housing due to lack of access to land as well as limited incomes to keep up with their housing loans.

91. There are a number of important areas where gender has not been sufficiently integrated into policies and programmes, for example, housing development. There is currently no dedicated national housing programme that makes provision for women with special housing needs, including women experiencing domestic violence, and women with disabilities. While these women may at times benefit from existing housing programmes that allow for so-called 'institutional subsidies' to be utilised for women's shelters, these funding mechanisms are not always suitable and do not cover the full spectrum of women's special housing needs. During April 2007, the Special Rapporteur on Adequate Housing undertook a mission to South Africa at the invitation of the government. In his subsequent report<sup>116</sup>, he notes the efforts of the South African

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<sup>116</sup> Special Rapporteur on Adequate Housing Mission to South Africa UN Doc A/HRC/7/16/Add.3 (dated 29 February 2008)

government at all levels to meet its goal of delivering 30% of housing to women-headed households. However, the lack of affordable housing, lack of timely access to public housing, and inadequate government provisions for long-term safe housing, particularly in rural areas, means that many women are still forced either to remain in, or return to, situations of domestic violence, and continue to live in inadequate housing where they risk the safety and health of their children and themselves. Such situations violate not only the right of access to adequate housing but the human right to be free from violence. In addition, the Special Rapporteur noted that there is no specific housing programme to address vulnerable groups.<sup>117</sup> This is in spite of the fact that the Housing Act calls for “the meeting of special housing needs including, but not limited to, the needs of the disabled;” and “... the housing needs of marginalized women and other groups disadvantaged by unfair discrimination.

## **Article 17: The Right to Positive Cultural Context**

### **Paragraph 494**

92. It is noted that while traditional leadership plays a very important role in the cultural policies of the state, a disproportionate number of women are able to participate in traditional politics and decision-making processes. The one-third proportion of women in traditional leadership makes them the minority, hence unable to adequately influence key decisions and policies on cultural issues. Traditional leadership continues to entrench patriarchy and unequal power relations between men and women in the rural areas.

## **Article 18: The Right to a Healthy and Sustainable Environment**

### **Paragraph 503-504**

93. The state report is lacking in adequately discussing the implementation of Articles 18(2)(d) and (e) of the Maputo Protocol on state obligation to ensure that proper standards are followed for the management, processing, storage, transportation and disposal of domestic and toxic waste.

94. According to the project report from Action Aid in partnership with South African Green Revolutionary Council in Mpumalanga, the state mining industry has violated the rights of women in the area with regards to access clean water, food

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<sup>117</sup> Ibid

and a clean environment. While Mpumalanga holds the largest reserves of coal and has the largest number of coal fired power plants generating 94% of electricity in South Africa, which can be seen as part of economic development, the coal power stations use significant amounts of water, leaving many communities with no water or with contaminated water due to Acid Mine Drainage (AMD). AMD causes air pollution and contaminates the community water, which negatively impacts on women disproportionately, particularly in Emalahleni local municipality, Mpumalanga.

95. Women play domestic roles that involve collecting water, cooking, washing utensils and clothes amongst others. Access to clean tap water is about 500 meters away from the informal settlement where women have to wait in long queues at times or wait for occasional municipal water trucks to bring water when the tap water runs out. Where the municipal truck fails to supply water to the community, community members unable to afford to buy water are forced to collect the dirty contaminated water for drinking and domestic chores, which in turn poses a health risk to the users.
96. This environmental pollution is in contravention of the right to a safe environment as enshrined in Section 24 of the South African Constitution. This right is reinforced by the provision of Article 18 of the Maputo Protocol on the right of women to live in a healthy and sustainable environment. This right is not being realised for the women in Mpumalanga Province and requires appropriate corrective actions by the state government.

## **Article 19: Right to Sustainable Development**

### **Paragraph 512**

97. Despite various legislative measures by the government, women from poor historically marginalised groups continue to struggle for access to needed resources and livelihoods such as land<sup>118</sup>, clean water, sanitation and electricity. Collection of firewood and water remains a common challenge in rural areas.<sup>119</sup> There is the continued challenge of managing the growth in informal settlements especially in and around the larger urban areas. Challenges around health, shelter, water and sanitation services are most pronounced in Johannesburg, Pretoria and Cape Town where the influx from rural areas contributes to pollution, dumping and littering.

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<sup>118</sup> Only 13.29 per cent of women own land in South Africa.

<sup>119</sup> HURISA: Socio-Economic Rights Programme for Women and Children Living in Rural Areas 2010-2011.

98. Poverty continues to affect millions of people around the country, most of whom are women and many of whom reside in the rural areas. There is continued widespread unemployment in the formal sector of the economy, estimated at 40 per cent of the economically active population. The increasing growth of the economically active population in conjunction with a declining or stagnant rate of growth of the economy suggests that the level of unemployment is unlikely to decrease.

### **Article 20: Widows Rights**

99. Article 11 of the Maputo Protocol promotes the widow's right to an equitable share in the estate of her late husband. In South Africa there have been cases of widows being robbed of their husband's inheritance due to lack of knowledge of the law in this regard. According to the traditional law that is often applied in communities, a widow should marry her late husband's relatives, especially the eldest male relative. The only way a widow can continue to enjoy the inheritance is through compliance with this practice. This contradicts the Maputo Protocol which accords women the right to continue living in the matrimonial house if they remarry especially where the house belongs to the wife or has been inherited from her late husband.

### **Article 21: Right to Inheritance**

#### **Paragraph 521**

100. The Maputo Protocol also encourages positive traditional law to be practiced among societies for advancement of women and development in the society. South Africa's Judiciary should be commended for the positive judgement that contribute to the development of African jurisprudence in the cases of *Bhe and Others v Magistrate, Khayelitsha and Others* 2005(1) SA 580(CC). This Constitutional Court case referred to South Africa's regional obligations under the Maputo Protocol, in an effort to provide women with remedies and abolition of all laws that discriminate against them. In *Gumede v President of the Republic of South Africa and Others* (2008) ZACC 23, the Constitutional Court cited Articles 2, 6 and 7 of the Maputo Protocol in support of its position on eradication of all laws and practices that discriminate against women, noting that it was not only a constitutional obligation but an obligation that flowed from the regional instrument ratified by South Africa. This significant judicial precedent is not noted in the state report.

## **Article 26: State Obligations vis-à-vis the Maputo Protocol**

On the obligation to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights provided by the Maputo Protocol

101. South Africa was the first African country to have adopted gender budgeting in 1995. This initiative was driven by CSOs and Parliamentarians and achieved great success in the first eight years. However, subsequently, the initiatives started becoming more sporadic. Although the government engaged in the gender budgeting initiatives, its involvement was not a continuous one. Ideally, gender budgeting initiatives have to be within the government for it to achieve its purpose, which is the allocation of sufficient resources to realise women's human rights.

## **PART B RECOMMENDATIONS**

This section addresses recommendations made by the contributing organisations based on the issues they have raised. They are organised in accordance with the Maputo Protocol Articles.

### **Article 2: Elimination of Discrimination**

It is recommended that the state puts in place programmes to educate people on the existence of legal remedies on discrimination. Particularly:

- The state should ensure geographical easy accessibility of equality courts to all people;
- The state should train and equip staff at equality courts, so they are able to acquire the required skills;
- The state should ensure that the private sector is well regulated to reduce discrimination of women especially at work places. Recruitment and promotions should be based on merit and not otherwise.
- The state should invoke Article 2 (2) of Maputo Protocol to modify the social and, cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices 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 women and men



### **Article 3: The Right to Dignity**

- Decriminalisation of sex work appears to be the only option in respect of ensuring that the rights of sex workers are protected and promoted. Continued criminalisation leads to rights violations, but more importantly perpetuates the stigma and myths around women's agency in respect of their bodies and sexuality.
- Create a safe working environment through law reform and sensitisation programmes aimed at police and service providers
- Document bullying in schools and in online communities
- Creation of dialogue spaces which will allow for a shared chance for ideas to flow and be owned
- The State should work on uprooting the causes of degradation of women's dignity such as working to strengthen social security schemes and programmes on poverty eradication;
- The State has to ensure that human rights education is essential to communities so as to uphold equality and dignity for women. This must extend to comprehensive sexuality education that addresses sexual orientations, gender identity and expressions and the stigma that lesbian women in communities face;
- Amend the criminal law (Sexual Offences and Related Matters Act) 2007 to include the offence of corrective rape so as to serve justice to victims of the same sexual orientation.

### **Article 4: Right to Life, Integrity and Security of Person**

- It is recommended that the State adopts a gender responsive budget which comprehensively expands on the budgeted expenditure around issues of domestic violence;
- The State should engage in more preventive measures to curb violence against women, like a provision of human rights education, which emphasises on the equality between men and women, and deals with patriarch systems. The State must work in collaboration with religious/traditional leaders in these undertakings. The State must sensitise on the laws on domestic violence and popularise the system through which victims of domestic violence can have redress;
- The State must increase programmes aiming to eradicate poverty and the unemployment rate amongst women and youths;

- The State has to put emphasis on helping foreign women, inmates and prisoners and women with disabilities as they also face violence.
- There is need for integrated gender sensitive training of officials in the justice system on their roles in the criminal justice chain and how each links to the other on an ongoing basis
- National guidelines for dealing with victims of sexual offences should also be created.
- Effective monitoring and evaluation of all government policies and programmes dealing with gender-based violence should be implemented. Resources should also be better allocated so that all police stations have adequate resources to respond to issues of gender-based violence.
- Specialised courts to deal with domestic violence should be established and suitably qualified Magistrates need to be appointed.
- Concerning xenophobic violence, government funded programmes that attempt to address common misconceptions about immigrants and create cohesion have to be developed, and complaints of gender-based violence from foreign women must be taken seriously by the SAPS and the courts. The government has an obligation to protect vulnerable people, notwithstanding their nationality or immigration status, and serious steps must be taken to meet this obligation.

#### **Article 5: Elimination of Harmful Practices**

- The State must commit to public education, sensitisation and awareness creation of the negative effects of harmful practices on the health of girls and women;
- There must be implementation of stringent punishments on perpetrators to serve as deterrence of such harmful practices;
- The State has to focus on political participation of adequately sensitised women in traditional leadership positions and key decision-making processes especially in regions of the country where harmful practices continue
- .It is recommended that the government should rationalize the regulation of this practice into one new statute instead of complex amendments to the current fragmented regulatory framework. Issues of forced marriage and *ukuthwala* are not restricted to children, but also affect adult women. Establishing an Act that criminalises forced and child marriage enables the recognition of *ukuthwala* as part of a bigger problem that affects an intersection of women and children, as well as enables the regulation of the practice of *ukuthwala* specifically. This would enhance legal certainty and

simplicity. The focus of proposed new legislation should not be limited to the practice of *ukuthwala* in its distorted form, but should provide protection to all children and women who are forced into marriage, whether because of custom, religious beliefs or other circumstances. Customary practices that directly or indirectly lead to forced and child marriages should also be addressed.

- To protect the human dignity of young girls by ending stereotypes in virginity testing practice which is unconstitutional and should not be aligned with the right to education.
- The State should popularise the report on the situation of Women Human Rights Defenders developed by the Special Rapporteur on Human Rights Defenders to address the harmful traditional practices in the country and protect the human dignity of women.

#### **Article 6 & 7: Rights Related to Marriage**

- It is recommended that South Africa remove exceptions to the age of consent in order for all marriages to be contracted between two parties over the age of 18;
- The State must put in place a clear strategy and systems to address root causes of child and forced marriages, and ensure that victims of *ukuthwala* have a platform to complain. These systems must take into account the role of schools to intervene and to report such cases;
- The State further has to engage people at the community level on the negative effects that *ukuthwala* has on the girl child.
- States should encourage monogamous marriages as stipulated under Article 6 (c) and protect rights of women in polygamous marriages
- Legislation should also be passed recognizing and regulating marriages conducted according to all religious faiths in the country.

#### **Article 8: Access to Justice and Equal protection before the Law**

South Africa has been facing implementation challenges for over a decade, to the detriment of many victims of gender violence, women and children in particular. It is put view that the country needs to move away from rhetoric prioritise addressing these challenges.

- The state needs to review the Domestic violence Act to ensure that it places obligations on other departments such as the Department of Social Development in the provision of shelters
- Integrated trainings between the SAPS, medico-legal staff and National Prosecutions Authority to ensure better coordination of services for victims of rape
- Public Education must be a priority on any legislative developments relating gender based violence. The Domestic Violence Act , Sexual Offences and the Protection from Harassment Acts are key pieces of legislation which need to be priorities in public efforts
- Adequate human and financial resourcing must be prioritised for all key institutions mandated to address violence against women. Costing of legislation remains key in ensuring that implementation challenges are addressed.
- The collection of accurate data on VAWG cannot be emphasised \,this will help the country to understand the true extent of the scourge in the country. It will also help give direction to the kind of interventions required to eliminate this scourge.
- As recommended by the UN Special Rapporteur on Violence against Women, a fully costed National Strategic Plan must be developed.

#### **Article 9: Right to Participation in Political and Decision making**

- It is recommended that the State speedily oversees and/or facilitates the implementation of section 3(2) of the Traditional Leadership and Governance Framework Act 2003. The State should repeal provisions of this Act as it gives a 30% threshold for women representation in the Traditional Council as it clashes with its obligations under the Maputo Protocol. This is important, as it will assist in ensuring the fair and equitable gender representation of women on traditional councils;
- The State has to consider reforming its electoral laws, by incorporating a quota system in its electoral laws giving justifiable advantage and preference to female candidates on party candidate lists;
- The State must further prepare a national strategy that will guide the Judicial Service Commission in transforming the judiciary to meet affirmative action and gender representation requirements, particular in as far as the appointment of suitably qualified and credible female candidates for judicial office, on the Supreme Court of Appeal and Constitutional Court levels are concerned.

## **Article 10: Right to Peace**

- South Africa should fast track development of National Action Plan to address the peace and security challenges faced by the women in the country and ensure selection of women as peace brokers and mediators within and outside South Africa. In order to facilitate women their right to peaceful existence and to participate in promotion and maintenance of peace at local, national, regional, continental and international peace decision making structures.

## **Article 11: Protection of Women in Armed Conflicts**

- The State has to adopt and implement progressive asylum legislation and policies in line with international law that protect asylum seekers and refugees particularly on claims relating to sexual orientation and gender identity;
- The State is recommended to undertake continuous public education and sensitisation of DHA officials on best practices in relating with LGBTI asylum seekers and refugees. DHA is also recommended to take cognisance of the implications of rape as a tool of war. The department must employ staff who are properly skilled, ensure that RSDOs receive the necessary training to not only adjudicate on claims in line with the provisions of the law, but also to treat asylum seekers with the necessary gender sensitivity.
- The State must conduct an analysis of the impact that the controlled expenditure on military has had on the expenditure on women's human rights.
- It is recommended that women asylum seekers be interviewed by trained female officials to create the best possible environment as they may not be comfortable disclosing their ordeal to a stranger more so of the opposite sex.
- The State should protect all women, including asylum seekers, refugees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation and consider declaring such acts as war crimes, genocide and crimes against humanity and hold perpetrators of these acts accountable, as stipulated under Article 11 (3)

## **Article 12: Right to Education and Training**

- Ensure that quality educational outcomes are met particularly for women and girls to justify the huge investment that is spent on education and access to education in the country;

- Ensure that efforts or accountability mechanisms are put in place by the government to guarantee that the existing laws and policies related to quality education outcomes are properly implemented, monitored and evaluated in the country;
- Ensure that efforts are in place to improve the quality of teaching staff and their teaching methods particularly at the primary/basic education levels. This includes ensuring that the teaching staff is properly trained;
- Ensure that efforts are in place to guarantee that existing initiatives improve the number of women and girls studying science – oriented courses actually have the required impact;
- Ensure that efforts or accountability mechanisms are in place to deal with maladministration issues, poor teaching methods financial management as well as shortages in quality teaching staff;
- Ensure that highlighted barriers, particularly socio-economic circumstances, that hinder access to education and quality educational outcomes for women and girls especially in rural and isolated areas is tackled;
- Ensure that efforts or accountability mechanisms are in place to ensure that these programmes and initiatives that are introduced to tackle access to education are properly and carefully monitored and evaluated to be certain it is achieving the needed impact;
- Ensure that practical measures are being taken by the government to address the legitimate demands of students at the university and higher education level which includes free education, equality and non-discrimination, These need to be adequately addressed to ensure that the recent spate of crises at this level is eliminated in the country;
- Ensure that primary education is available, accessible and affordable for women and girls particularly in rural and isolated areas in the country. This is to ensure that the gender enrolment ranking of the country justifies its huge investments.
- Remedy inadequate sanitation facilities, as well as gaps in relevant legislation. Government should undertake public private partnership and funding opportunities with companies and businesses that manufacture and produce sanitary pads and tampons to enable the provision of these critical feminine hygiene products for adolescent girls.
- There is also a significant need to increase community understanding of rights, obligations, and criminal justice processes concerning violence in schools, as well as for capacity building of all stakeholders of the education system. In particular, there is a need for programmes that create opportunities for parents to understand and unlock the value of their role in

school structures (School Governing Bodies, School Management Teams), family law, teenage pregnancy, diversion and restorative justice. The State must ensure that the Department of Social Development: Directorate: Substance Abuse Prevention effectively coordinates other Departments including strategic sectors/partners in campaigns to decrease youth substance abuse.

#### **Article 14: Health and Reproductive Rights**

- Ensure that the gap is closed between the existing robust legal framework as regards the right to health including sexual reproductive rights as provided in the Constitution and the Maputo Protocol and the lived realities of women particularly in rural areas in the country;
- Ensure that women particularly women in rural areas, women with low levels of literacy and education as well as poor women have access to good quality, affordable and available health care services so as to reduce the high rates of maternal mortality. This includes strengthening pre natal, delivery and post natal services;
- Ensure that programmes and services that are introduced to tackle the high maternal mortality rates in the country are properly and carefully monitored and evaluated to be certain it is achieving the needed impact;
- Ensure that women particularly women in rural areas, women with low levels of literacy and education as well as poor women are properly educated and have access to the right, complete and accurate information as regards HIV testing, family planning and contraceptive methods;
- Ensure that good and functional accountability mechanisms are put in place and properly monitored to deal with maladministration issues, financial management as well as staff shortages in primary health facilities;
- Ensure that practical measures are taken to consistently question and dismantle the patriarchal and traditional tendencies and attitudes that exacerbate the risk of women to HIV in the country? This includes the gendered stigma that HIV infected women face especially when compared to men;
- Ensure that health care workers are properly trained especially when dealing with matters of privacy, confidentiality and informed consent;
- Ensure that abortion services are safe, available, accessible and affordable for women particularly in rural and isolated areas in the country.

- A comprehensive needs assessment of healthcare delivery systems, infrastructure, and management and human resource needs is required in order to integrate these considerations into the national health plan.
- Provide formal recognition to the contribution and the work done by caregivers as an important recognition of personal, social, and political value. This recognition should, among other things, include regulation of minimum wages to ensure adequate and fair remuneration. Care givers should also be provided with adequate training and support, including financial, emotional and technical support.

### **Article 15: Right to Food Security**

- The State is recommended to increase efforts in creating employment opportunities for youths that can provide financial resources needed to access food;
- The State is further recommended to invest in loans and finances for small-scale entrepreneurs especially in rural areas that can improve incomes and guarantee food security.

### **Article 16: Right to Adequate Housing**

- The government is recommended to conduct a national assessment to understand housing demand that will enable the government plan adequately and provide for future housing needs;
- The State needs to come up with a comprehensive housing demand model that takes into account the issues of housing demands in the country especially, low-income earners in rural areas and suburbs.

### **Article 17: Right to Positive Cultural Context**

- Corrective measures should be taken by the State to take in positive actions in the elimination of stereotypes towards women full participation in determining cultural policies;
- The State to engage in public education on the rights of women as entrenched in the Constitution and the important role they can play in the formulation of cultural policies.



## **Article 18: Right to a Healthy and Sustainable Environment**

- The State is recommended to protect the rights of citizens especially women by holding extractive companies accountable for actions that directly or indirectly violate the realisation of rights to a healthy and sustainable environment;
- The State has to ensure that women enjoy from their right to a healthy and sustainable environment by prioritising women's rights as an inclusive part of national legislation and policies;
- The State has to ensure that women participate equally in decision-making processes in all sectors of governance including environment.

## **Article 19: Right to Sustainable Development**

- The State is recommended to continue introducing a gender perspective in its national development planning procedures that promote women's access to land and guarantee their right to property.

## **Article 26 (2): The obligation to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights provided by the Maputo Protocol**

- The State is recommended to adopt gender budgeting so that the future state reports can be informed by figures budgeted for women's human rights;
- The State is urged to involve all the departments in gender budgeting initiatives so that gender is mainstreamed in the expenditure of all departments;
- The State is further recommended to have a focal point for gender budgeting to regulate the gender budgeting exercises of all the departments;
- In the event there is not sufficient expertise within the government, the state is recommended to consult with experts in civil society organisations.

## **Article 27**

- South Africa should ensure fulfilment of Article 27 of Maputo Protocol by granting women, complainants and women human rights defenders direct access to the African Court on Human and People's Rights, according to Article 34 (6) of the Protocol Establishing the African Court on Human and People's Rights.