



Republic of South Africa

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NGO in General Consultative Status with ECOSOC
And
Human Rights Institute of South Africa (HURISA)
And
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- 1.1** CIVICUS is a global alliance of civil society organisations (CSOs) and activists dedicated to strengthening citizen action and civil society around the world. Founded in 1993, CIVICUS has members in more than 180 countries throughout the world.
- 1.2** Human Rights Institute of South Africa (HURISA) is a CSO formed in 1994 whose mission is to provide human rights training, research and advocacy interventions. HURISA collaborates with other CSOs, special target groups, national institutions and government departments to strengthen regional and international human rights systems and promote justice, peace, human rights and democracy in South Africa and beyond.
- 1.3** The Centre for the Study of Violence and Reconciliation (CSVR) is an independent, non-profit, multidisciplinary organisation established in 1989 which engages in research, community interventions, policy formation, service delivery, education and training. For three decades, CSVR has worked to understand violence, heal its effects, reconcile communities and build sustainable peace in South Africa, the continent and elsewhere in the world. CSVR undertakes targeted research and advocacy in partnership with civil society and affected communities in order to hold state, continental and global institutions accountable. CSVR's work is rooted in an analysis of the shifting forms of conflict and violence within societies enduring a transition to democracy.
- 1.4** In this submission, the authors examine the Government of South Africa's compliance with its international human rights obligations to create and maintain a safe and enabling environment for civil society. Specifically, we analyse South Africa's fulfilment of the rights to the freedoms of association, peaceful assembly and expression and unwarranted restrictions on human rights defenders (HRDs) since its previous UPR examination in May 2017. To this end, we assess South Africa's implementation of recommendations received during the 3rd UPR cycle relating to these issues and provide a number of follow-up recommendations.
- 1.5** During the 3rd UPR cycle, the Government of South Africa received five recommendations relating to the space for civil society (civic space). Of these recommendations, three were accepted and two were noted. An evaluation of a range of legal sources and human rights documentation addressed in subsequent sections of this submission demonstrates that the Government of South Africa has not implemented four recommendations relating to civic space and has partially implemented one recommendation.
- 1.6** While the government has persistently failed to address unwarranted restrictions on civic space since its last UPR examination, acute implementation gaps were found

with regards to the right to expression along with issues relating to peaceful assembly and the safety of HRDs.

1.7 We are deeply concerned by the restrictive legal framework, which undermines the freedoms of expression and opinion.

1.8 We are further alarmed by the threats, intimidation and attacks against HRDs, in particular women HRDs (WHRDs) and those defending land and environmental rights, housing rights and whistleblowers. The continued use of excessive force by security forces in response to protests is another cause for concern.

1.9 As a result of these issues, civic space in South Africa is currently classified as 'obstructed' by the CIVICUS Monitor, indicating the existence of significant civic space restrictions.¹

- Section 2 of this submission examines South Africa's implementation of UPR recommendations and compliance with international human rights standards concerning the freedom of association.
- Section 3 examines South Africa's implementation of UPR recommendations and compliance with international human rights standards related to the protection of HRDs, civil society activists and journalists.
- Section 4 examines South Africa's implementation of UPR recommendations and compliance with international human rights standards concerning the freedom of expression, media freedom and access to information.
- Section 5 examines South Africa's implementation of UPR recommendations and compliance with international human rights standards related to the freedom of peaceful assembly.
- Section 6 contains recommendations to address the concerns raised and advance implementation of recommendations under the 3rd cycle.
- An annex on the implementation of 3rd cycle UPR recommendations related to civic space is in Section 7.

2. Freedom of association

2.1 During South Africa's examination under the 3rd UPR cycle, the government did not receive any recommendations on the right to the freedom of association and creating an enabling environment for CSOs.

2.2 Article 18 of the South African Constitution guarantees the right to the freedom of association. Article 22 of the International Covenant on Civil and Political Rights

¹ CIVICUS Monitor: South Africa, <https://monitor.civicus.org/country/south-africa>.

(ICCPR), to which South Africa is a state party, also guarantees the freedom of association. However, despite these commitments, the government has not fully implemented the right to the freedom of association.

- 2.3** CSOs in South Africa are registered under the Nonprofit Organisations (NPO) Act of 1997, upon compliance with the requirements listed in the Act. The NPO Directorate, based in the capital, Pretoria, is responsible for overseeing this registration process. We remain concerned that bureaucratic inefficiencies and the centralisation of the registration process in the capital are key obstacles faced by CSOs seeking to get established.²
- 2.4** The NPO Act states that registration applications must be processed within two months. Although the NPO directorate provides an online registration platform that has hastened the process significantly, organisations still have to wait weeks for the actual registration certificate to arrive via mail after the organisation has been registered online.
- 2.5** In October 2021 the Department of Social Development published the Non-profit Organisation Amendment Bill 2021 for public comment.³ While the Bill proposes several progressive changes such as simplifying accessibility procedures, it also proposes compulsory registration of foreign CSOs that intend to operate in South Africa. This would pose a big risk that the law may be used to control international funding of organisations or media that could be seen as critical of the government.⁴
- 2.6** Some categories of CSOs face challenges in operating. For instance, opening a bank account is often a challenge for community-based organisations that are established as voluntary associations, as they have to wait for registration under the NPO Act to enable them to open a bank account or receive funding from government departments and agencies.
- 2.7** CSOs also face blatant attacks and raids on their offices because of their work. In May 2019, Abahlali baseMjondolo (AbM), a grassroots civil society movement working to address housing rights and rights of shack dwellers, had its office broken into by unknown people. An external hard drive and the internal hard drives of two computers were stolen, along with the keys to a safe. Other easily portable items

² Enabling Environment National Assessment, HURISA, 2018, <https://hurisa.org.za/wp-content/uploads/2020/04/HURISA-EENA-CR...pdf>.

³ 'Civic Freedom Monitor: South Africa', International Centre for Not-for-Profit Law, <https://www.icnl.org/resources/civic-freedom-monitor/south-africa>.

⁴ 'Controlling the purse-strings: Proposed new law on non-profit organisations is vague and confusing – we need clarity', Daily Maverick, 20 October 2021, <https://www.dailymaverick.co.za/opinionista/2021-10-20-controlling-the-purse-strings-proposed-new-law-on-non-profit-organisations-is-vague-and-confusing-we-need-clarity>.

such as cash and electronic equipment were not stolen, which drew suspicion that the break-in was targeted at acquiring data and information from the organisation. The stolen hard drives contained spreadsheets with details of AbM's members.⁵

3. Harassment, intimidation and attacks against human rights defenders, civil society activists and journalists

- 3.1 Under South Africa's previous UPR examination, the government received no recommendations specifically addressing the protection of HRDs, journalists and civil society representatives.
- 3.2 Article 12 of the UN Declaration on Human Rights Defenders mandates states to take the necessary measures to ensure the protection of HRDs. The ICCPR further guarantees the freedoms of association, peaceful assembly and expression.
- 3.3 On 19 November 2021, South Africa joined dozens of other countries in co-sponsoring the draft resolution on 'Implementing the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms through providing a safe and enabling environment for human rights defenders and ensuring their protection', which was adopted by the UN General Assembly on 18 December 2019.⁶ The resolution has a focus on ensuring a safe and enabling environment for HRDs and calls on states to strengthen the protection of WHRDs.
- 3.4 However, as examined in this section, HRDs, particularly WHRDs and those working on corruption, housing rights and land environmental rights, continue to face intimidation, harassment and threats by state and non-state actors. Additionally, journalists have faced physical attacks and online harassment.

⁵ 'Abahlali baseMjondolo loses data after an office break-in, fears it could be used to target the members', People's Dispatch, 18 May 2019, <https://peoplesdispatch.org/2019/05/18/abahlali-basemjondolo-loses-data-after-an-office-break-in-fears-it-could-be-used-to-target-the-members>.

⁶ 'Implementing the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms through providing a safe and enabling environment for human rights defenders and ensuring their protection', United General Assembly resolution A/RES/74/146, 18 December 2019, <https://digitallibrary.un.org/record/3847133?ln=en> ; also see 'Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms. Report of the Third Committee', A/74/399/Add. 2, United Nations General Assembly, 29 November 2019, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/388/21/PDF/N1938821.pdf?OpenElement>.

- 3.5** On 22 October 2020, unknown assailants shot and killed community and environmental activist Mama Fikile Ntshangase in her home in Ophondweni, KwaZulu province. Ntshangase, who was part of the environmental group Mfolozi Community Environmental Justice Organisation (MCEJO), was vocal in her opposition to the expansion of an opencast coal mine in Somkhele, operated by Tendele Coal Mining (Pty), which would see 21 families, some MCEJO members, evicted from their traditional lands. Six weeks before her death, Ntshangase reportedly refused to sign a ‘memorandum of understanding’ with Tendele, with the aim of removing MCEJO from court cases against the mining company, which was signed by several other MCEJO committee members.⁷ She reportedly received threats before her killing.⁸
- 3.6** The killing of Ntshangase highlighted the dangerous context in which community activists who oppose mining activities by extractive industries and the adverse effects on the environment operate. A 2019 report by GroundWork, the Centre for Environmental Rights, Human Rights Watch and Earthjustice highlighted the threats, harassment and attacks activists in mining-affected communities in the provinces of Eastern Cape, KwaZulu Natal, Limpopo and Northwest are subjected to, which often go unreported or fail to receive public attention. Perpetrators are often unknown, but activists believe the attacks might be facilitated by police, government officials, private security firms and others working on behalf of the mining companies. According to the report, threats also emanate from community members themselves, who perceive the mines as offering economic benefits and opportunities, with government officials or companies in some cases creating or exploiting community divisions.⁹
- 3.7** The use by companies of Strategic Lawsuits against Public Participation (SLAPPs) has become another way of silencing environmental rights defenders.¹⁰ In the most telling case, the Australian company Mineral Commodities (Ltd) (MRC) and its local subsidiary Mineral Sands Resources slapped six environmental activists – two community activists, two lawyers for the Centre for Environmental Rights, a private lawyer and a social worker – with a series of defamation suits, for an amount totalling 14.25 million Rand (approx. US\$980,000). The lawsuits were brought after

⁷ ‘Warnings not heeded - Death of an activist’, GroundWork, October 2021,

https://www.groundwork.org.za/specialreports/Warnings_not_heeded-death_of_an_activist.pdf.

⁸ ‘Final warning: death threats and killings of human rights defenders. Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor’, Special Rapporteur on the situation of human rights defenders, 24 December 2020, <https://digitallibrary.un.org/record/3898237>.

⁹ ‘“We Know Our Lives Are in Danger”. Environment of Fear in South Africa’s Mining-Affected Communities’, Human Rights Watch, GroundWork Earthjustice & Centre for Environmental Rights 2019, https://www.hrw.org/sites/default/files/report_pdf/southafrica0419_web.pdf.

¹⁰ SLAPPs are meritless lawsuits that are not primarily focussed on winning, but rather on intimidating environmental activists by draining their time and resources for their legal defence, and on having a chilling effect on other activists.

three of the activists – Davine Cloete, Tracey Davies and Christine Redell – spoke out at the University of Cape Town Summer School in January 2017 against the environmental damage caused by MRC’s Tormin mine on the West Coast and its non-compliance with environmental and mining laws. The other three activists, John Clarke, Cormac Cullinan and Mzamo Dlamini, had been vocal about MRC’s conduct in the Xolobeni community.¹¹ In a positive development, the South African High Court ruled on 9 February 2021 that the defamation suits brought against the six environmental activists by MRC and its subsidiary was an abuse of the legal process.¹² Despite the ruling the fact remains that these activists had to defend themselves for years in court, at the cost of substantial resources and time.

3.8 AbM members have continued to face threats and some of its activists have been killed.¹³ On 23 May 2018, S’fiso Ngcobo, the chair of the movement’s chapter in eKukhanyeni, Mariannhill, KwaZulu Natal province, was shot and killed near his home by three unidentified assailants.¹⁴ On 17 December 2017, two AbM members, Smanga Mkhize and Soyiso Nkqayini were shot in a land occupation at eNkanini, Cato Manor, near Durban, KwaZulu Natal province.¹⁵ Nkqayini, the eNkanini youth league organiser, was killed, while Mkhize was seriously injured. A month earlier, Sibonelo Mpeku, the chairperson for Sisonke village branch in Lamontville, a township south of Durban, was taken from his dwelling and stabbed to death.¹⁶ Because several Abahlali members have been killed in the past few years – the

¹¹ ‘A momentous legal victory for environmental activism and free speech’, Centre for Environmental Rights, 21 February 2021, <https://cer.org.za/news/a-momentous-legal-victory-for-environmental-activism-and-free-speech>.

¹² Ibid.; Mineral Sands Resources & Zamile Qunya v. Christine Reddel, Tracey Davies and Davine Cloete, Case No. 7595/2017, Western Cape High Court, 9 February 2021, <https://www.business-humanrights.org/en/latest-news/s-africa-court-slams-mining-giant-for-attempting-to-use-a-slapp-suit-to-silence-criticism-and-environmental-activism>.

¹³ See also ‘Joint UPR Submission’, CIVICUS and HURISA, 2016, <http://www.civicus.org/images/CIVICUS%20HURISA%20UPR%20Submission%20South%20Africa.pdf>.

¹⁴ ‘Shack dweller movement’s KZN leader ‘assassinated’’, News24, 23 May 2018, <https://www.news24.com/News24/shack-dweller-movements-kzn-leader-assassinated-20180523>; ‘Another Abahlali activist shot dead’, GroundUp, 23 May 2018, <https://www.groundup.org.za/article/another-abahlali-activist-shot-dead>; Shack dwellers leader ‘assassinated’, Times Live, 23 May 2018, <https://www.timeslive.co.za/news/south-africa/2018-05-23-shack-dwellers-leader-assassinated>.

¹⁵ ‘Another Cadre has Fallen in a Land Occupation’, Abahlali baseMjondoli, 19 December 2017, <http://abahlali.org/node/16352/#more-16352>; ‘Two human rights defenders shot, one killed’, Front Line Defenders, 20 December 2017, <https://www.frontlinedefenders.org/en/case/two-human-rights-defenders-shot-one-killed>.

¹⁶ ‘Sibonelo Patrick Mpeku killed’, Front Line Defenders, 4 December 2017, <https://www.frontlinedefenders.org/en/case/sibonelo-patrick-mpeku-killed>.

movement said in October 2018 that six of its members have killed since 2017¹⁷ – others live in fear for their lives or have gone into hiding due to threats. For example, S’bu Zikode, the leader of the movement in Durban, says he received a call from police in July 2018 that his life was under threat.¹⁸

3.9 On 19 August 2021, Malibongwe Mdazo, a trade unionist and voluntary recruiter for the National Union of Metalworkers of South Africa (NUMSA), was shot and killed outside the Commission for Conciliation, Mediation and Arbitration (CCMA), a labour relations dispute resolution body, in Rustenburg, North West province.¹⁹ Mdazo was at the CCMA to verify NUMSA’s membership forms in order to obtain recognition as a union in the five companies contracted to Impala Platinum Holdings Limited. This was part of a conciliation process following a two-month strike in June and July 2021, with one of the demands being the recognition of NUMSA in the five companies.²⁰ According to NUMSA, one other member and one member of the public were also shot and wounded.

3.10 In the context of a judicial inquiry into allegations of state capture under former President Jacob Zuma and corruption investigations, anti-corruption activists and whistleblowers have increasingly become a target for harassment, intimidation and, in the case of whistleblower Babita Deokaran, killing. Deokaran, chief director of financial accounting for the Gauteng Department of Health, was gunned down outside her residence in Johannesburg on 23 August 2021.²¹ Deokaran was a key witness in a probe by the Special Investigating Unit into fraudulent contracts for the purchase of Personal Protective Equipment (PPE) during the COVID-19 pandemic. Six people were arrested and charged with murder, attempted murder and illegal possession of ammunition and a firearm, with the prosecutor claiming that the assassination was politically motivated.²²

3.11 Athol Williams, a whistleblower who implicated several people and companies in his testimony before the State Capture Commission, decided in November 2021 to flee

¹⁷ ‘Why the shack dwellers’ movement poses a threat to the ANC’, Al Jazeera, 8 October 2018, <https://www.aljazeera.com/features/2018/10/8/why-the-shack-dwellers-movement-poses-a-threat-to-the-anc>.

¹⁸ Ibid.

¹⁹ ‘Workers living in fear after union recruiter is shot dead outside CCMA offices’, IOL, 24 August 2021, <https://www.iol.co.za/the-star/news/workers-living-in-fear-after-union-recruiter-is-shot-dead-outside-ccma-offices-33505e78-bfb2-4e59-8fbf-dc028d9fa79b>.

²⁰ ‘Platinum mine tense after assassination of trade unionist’, GroundUp, 26 August 2021, <https://www.groundup.org.za/article/workers-tense-platinum-mine-after-assassination-union-recruiter>.

²¹ ‘Murder of Gauteng health official Babita Deokaran: Investigators probe link to her PPE whistle-blowing’, Daily Maverick, 24 August 2021, <https://www.dailymaverick.co.za/article/2021-08-24-murder-of-gauteng-health-official-babita-deokaran-investigators-probe-link-to-her-ppe-whistle-blowing>.

²² ‘Six accused of murdering whistle-blower Babita Deokaran in court for bail hearing’, Daily Maverick, 10 December 2021, <https://www.dailymaverick.co.za/article/2021-12-10-six-accused-of-murdering-whistle-blower-babita-deokaran-in-court-for-bail-hearing>.

South Africa out of fear for his life.²³ In a statement, Williams said that trusted allies and a CSO had warned him of a ‘coordinated effort’ against him, while highlighting the failure of the government to proactively protect whistleblowers.²⁴

3.12 LGBTQI+ rights have deteriorated in South Africa, as rights campaigners and individuals live and operate in a hostile environment characterised by hate speech, death threats and killings. For example, LGBTQI+ activist Lindokuhle Cele was stabbed and killed on 6 February 2020 in the township of Umlazi near Durban, KwaZulu Natal province.²⁵ In March 2021, the Durban High Court qualified the killing as a hate crime and sentenced Mvuyisi Noguda to 25 years in prison for Cele’s murder.²⁶

3.13 Journalists have been subjected to physical attacks, harassment, intimidation and threats. On 15 May 2020, police officers reportedly verbally and physically attacked Paul Nthoba, journalist and editor of the weekly local newspaper Mohokara News, in the township of Meqheleng, Free State province. According to the journalist, the incident started when the officers saw Nthoba taking photographs of them as he was reporting on the visibility of security forces during the COVID-19 lockdown.²⁷ He was reportedly further assaulted at the police station in Ficksburg when he tried to file a complaint and was charged with ‘obstructing law enforcement’ under section 31 (1)(b) of the COVID-19 emergency regulations, the 2002 Disaster Management Act.²⁸ Nthoba fled to Lesotho out of fear for his life when he noticed marked police cars patrolling the street where he lives. A case was reportedly opened at the

²³ ‘Athol Williams: South Africa corruption whistle-blower flees for his life’, BBC, 8 November 2021, <https://www.bbc.com/news/world-africa-59205368>; ‘Athol Williams: ‘I will continue whistle-blowing and make the corrupt uncomfortable’’, Daily Maverick, 28 November 2021, <https://www.dailymaverick.co.za/article/2021-11-28-athol-williams-i-will-continue-whistle-blowing-and-making-the-corrupt-uncomfortable>.

²⁴ ‘Public Statement: Forced to Leave’, Athol Williams, 7 November 2021, <https://www.atholwilliams.com/forced-to-leave?fbclid=IwAR26aJr05HPad4NBqjEh7Ij-r1leYMKqZG701burNDVGwAyy4yaWs1kHZBc>.

²⁵ ‘Durban man to appear in court for brutal stabbing of gender activist’, Sowetan Live, 10 February 2020, <https://www.sowetanlive.co.za/news/south-africa/2020-02-10-durban-man-to-appear-in-court-for-brutal-stabbing-of-gender-activist>.

²⁶ ‘Lindo Cele’s killer sentenced to 25 years for hate crime murder’, Mamba Online, 30 March 2021, <https://www.mambaonline.com/2021/03/30/lindo-celes-killer-sentenced-to-25-years-for-hate-crime-murder>.

²⁷ ‘SANEF Calls On SAPS to Ensure the Protection and Safety of a Journalist Forced to Go into Hiding’, South African National Editors’ Forum, 20 May 2020, <https://sanef.org.za/sanef-calls-on-saps-to-ensure-the-protection-and-safety-of-a-journalist-forced-to-go-into-hiding>; ‘Police assault reporter in Free State: ‘They punched, kicked and choked me’’, City Press, 17 May 2020, <https://www.news24.com/citypress/News/police-assault-reporter-in-free-state-they-punched-kicked-and-choked-me-20200517>; AL ZAF 1/2020, Mandates on the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on torture and other cruel inhuman and degrading treatment or punishment, 3 June 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25320>.

²⁸ ‘AFEX Deplores Assault and Harassment of Journalist in South Africa’, African Freedom of Expression Exchange, 26 May 2020, <https://www.africafex.org/freedom-of-expression-violations/afex-deplores-assault-and-harassment-of-journalist-in-south-africa>.

Independent Police Investigative Directorate.

- 3.14** Attacks on and threats against journalists, including public vilification, also emanate from non-state actors, including from supporters and members of political parties and members of the public. In September 2018, Meokgo Matuba, Secretary General of the African National Congress (ANC) Women's League, sent a picture of a gun to Sunday Times journalist Qaanitah Hunter's mobile phone after Hunter contacted Matuba for questions. Hunter had previously reported on an alleged meeting of ANC officials to seek to oust President Cyril Ramaphosa.²⁹ When asked if the message was meant for her, Matuba said that she was not aware who sent the picture as many people have access to her phone.³⁰
- 3.15** During a protest by opposition party Economic Freedom Fighters (EFF) at pharmacy retail chain Clicks in Plumstead, Cape Town, members of the party shoved and pushed eNCA journalist Nobesuthu Hejana. Following the incident, EFF member of parliament Mbuyiseni Ndlozi commented on Twitter, saying 'Merely touching her is not harassment. The touch has to be violent, invasive, or harmful to become harassment!'³¹
- 3.16** Business Day's columnist Peter Bruce and its editor Tim Cohen were threatened and assaulted³² in June 2017 by around 20 members of the Black First Land First movement, in what they believe was retaliation for an opinion piece in which Bruce detailed being targeted by the influential Gupta family for writing critical articles about them.³³
- 3.17** Journalists, particularly women journalists, have been targeted by online harassment and threats. For example, in March 2019, journalist Karima Brown was sent 'a barrage' of threatening messages and phone calls, including threats of rape, violence and death threats, after EFF leader Julius Malema made Brown's telephone number public in a Twitter post and the EFF, in a statement, accused her of being an

²⁹ 'SANEF strongly condemns ANC Women's League threats against Sunday Times journalist', South African National Editors' Forum, 10 September 2018, <https://sanef.org.za/sanef-strongly-condemns-anc-womens-league-threats-against-sunday-times-journalist>.

³⁰ 'ANCWL leader apologises for gun picture sent to journalist', News24, 11 September 2018, <https://www.news24.com/News24/ancwl-leader-apologises-for-gun-picture-sent-to-journalist-20180911>.

³¹ 'Mbuyiseni Ndlozi lambasted for defending manhandling of eNCA journalist Nobesuthu Hejana', IOL, 10 September 2020, <https://www.iol.co.za/news/politics/mbuyiseni-ndlozi-lambasted-for-defending-manhandling-of-enca-reporter-nobesuthu-hejana-7853ca98-c42d-54b5-9b11-ff8f78ee00ad>.

³² 'Mob attacks top journalists', Sunday Times, 30 June 2017, <https://www.timeslive.co.za/news/south-africa/2017-06-30-mob-attacks-top-journalists>.

³³ 'The price of writing about the Guptas', Peter Bruce, 29 June 2017, <https://www.businesslive.co.za/bd/opinion/columnists/2017-06-29-peter-bruce--the-price-of-writing-about-the-guptas>.

ANC operative and claimed she was not a legitimate journalist.³⁴ In June 2019, the South Gauteng High Court ruled that Malema and the EFF violated the Electoral Code when they did not stop their members and supporters sending threatening messages.³⁵ In addition, journalist Ferial Haffajee and other journalists were targeted by social media trolls after reporting extensively on state capture.³⁶

4. Freedom of expression, media freedom and access to information

- 4.1** Under the 3rd UPR cycle, the government received five recommendations relating to the freedom of expression, media freedom and access to information. For example the government pledged to ‘Continue to combat hate crimes and hate speech, and ensure that the provisions of the Prevention and Combating of Hate Crimes and Hate Speech Bill cannot be used to restrict the rights to freedom of expression and religion’ and to ‘Safeguard journalists and writers, especially those working for State-owned media houses or public broadcasters, so they can work freely and without fear of reprisal for expressing critical opinions or covering subjects that the Government may find sensitive’. Of the five recommendations received, the government accepted three and noted two. However, as discussed below, the government did not take effective measures to implement these recommendations and has only partially implemented one recommendation.
- 4.2** Article 19 of the ICCPR guarantees the right to the freedoms of expression and opinion. Article 16 (1) of the Constitution of South Africa also guarantees the right to the freedom of expression. Section 32 of the Constitution also provides for the right to access information. However, in practice, a restrictive legal framework undermines the full enjoyment of the right to the freedom of expression.
- 4.3** On 1 March 2022, the amended Film and Publications Act came into effect.³⁷ The Act, which among several changes includes harsher rules with the stated aim of protecting children from disturbing and harmful content, regulates the online distribution of content such as films and games. The law leaves the Film and Publications Board with wide discretion to decide what content is acceptable

³⁴ ‘Brown v. Economic Freedom Fighters’, Global Freedom of Expression, <https://globalfreedomofexpression.columbia.edu/cases/brown-v-economic-freedom-fighters>.

³⁵ ‘EFF suffers second court defeat in a week’, Mail and Guardian, 6 June 2019, <https://mg.co.za/article/2019-06-06-eff-suffers-second-court-defeat-in-a-week>.

³⁶ ‘Fake News Twitter Trolls, Ferial Haffajee is Coming For You’, Huffington Post, 23 January 2017, https://www.huffingtonpost.co.uk/2017/01/22/fake-news-twitter-trolls-ferial-haffajee-is-coming-for-you_a_21660438.

³⁷ ‘Ramaphosa puts Internet censorship law into operation’, My BroadBand, 1 March 2022, <https://mybroadband.co.za/news/internet/435714-ramaphosa-puts-internet-censorship-law-into-operation.html>.

online,³⁸ raising concerns that it could be used as a means of censorship for online content.

- 4.4** The Protection of State Information Bill, also known as the ‘Secrecy Bill’, was passed by the National Assembly in April 2013. The Bill, which deals with the classification and protection of state information, proposes to criminalise the leaking, possessing and ‘receiving’ of such information and imposes a sentence of up to 25 years’ imprisonment. The Bill however uses overly broad language³⁹ and contains provisions that disproportionately infringe on the rights to the freedom of expression and access to information.⁴⁰ The broad definitions of ‘national security’ and ‘state security matter’ allow for classifying bodies to unilaterally interpret the terms as they see fit. In June 2020, President Ramaphosa returned the Bill to the National Assembly for consideration of his reservations about its constitutionality. The Bill remains pending in parliament.⁴¹
- 4.5** The Prevention and Combating of Hate Crimes and Hate Speech Bill, known as the Hate Speech Bill, published in October 2016,⁴² aims to provide for the offences of hate crimes and hate speech and the prosecution of people who commit these crimes.⁴³ The Bill has however raised civil society concerns as it lacks a definition of racism and criminalises speech as opposed to racially driven acts.⁴⁴
- 4.6** The Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA), South Africa’s main surveillance law, previously served as the basis for the lawful interception of citizens’ communications, but was subjected to misuse by the authorities who sometimes used it to spy on journalists. In February 2021, the Constitutional Court upheld a 2019 decision by the High Court that declared RICA to be unconstitutional for failing to protect the right to privacy.⁴⁵

³⁸ ‘Ramaphosa signs Internet censorship bill into law’, My BroadBand, 2 October 2019, <https://mybroadband.co.za/news/government/321898-ramaphosa-signs-internet-censorship-bill-into-law.html>.

³⁹ Announcements, Tablings and Committee Reports, Parliament of the Republic of South Africa, <https://www.parliament.gov.za/storage/app/media/Docs/atc/fda14e58-c35d-4e56-8bf4-53aca463d727.pdf>.

⁴⁰ ‘Secrecy Bill is Fundamentally Flawed and needs to be reconsidered’, Daily Maverick, 9 July 2020, <https://www.dailymaverick.co.za/article/2020-07-09-secrecy-bill-is-still-fundamentally-flawed-and-needs-to-be-reconsidered>.

⁴¹ Bills currently in Parliament, Parliament of South Africa, <https://www.parliament.gov.za/bills>.

⁴² Government Gazette No. 40367. The Bill is available at <http://www.justice.gov.za>.

⁴³ Section 1 of the Hate Speech Bill.

⁴⁴ Enabling Environment National Assessment, HURISA, op. cit.

⁴⁵ ‘CPJ welcomes South African Constitutional Court’s ruling condemning surveillance’, Committee to Protect Journalists, 4 February 2021, <https://cpj.org/2021/02/cpj-welcomes-south-african-constitutional-courts-ruling-condemning-surveillance>.

- 4.7** According to a 2018 report⁴⁶ by advocacy group Right2Know, journalists who have exposed deep-rooted corruption in the National Prosecuting Authority, the State Security Agency (SSA), the Crime Intelligence unit and the Directorate for Priority Crime Investigation (known the Hawks) are increasingly being targeted by state and private sector spies.
- 4.8** In March 2021, reports emerged that officials from Crime Intelligence had bugged Jeff Wicks, a journalist from News24. The reports indicated that Wicks was being targeted to establish his sources through a phone-tracking device, after his involvement in reporting on discontent within the police force and Crime Intelligence unit.⁴⁷
- 4.9** In July 2018, AmaBhungane Centre for Investigative Journalism filed a court case to challenge RICA after learning that the SSA had been listening to private discussions of one of its journalists for several months.⁴⁸ It was this case brought by AmaBhungane that resulted in the High Court's nullification of RICA for unconstitutionality.
- 4.10** There have also been cases of intimidation. Following the October 2017 publication of the book *The President's Keepers*, the State Security Agency sent its author Jacques Pauw and its publisher a cease-and-desist letter over what it called 'unlawful publication of classified information'.⁴⁹ The letter also threatened them with legal action if they failed 'to withdraw the book'. The book narrates the alleged 'corrupt and compromised power networks' in the government of President Zuma. In February 2018 it was reported that Hawks officers raided Pauw's home looking for 'secret state security files'.⁵⁰

5. Freedom of peaceful assembly

- 5.1** During South Africa's examination under the 3rd UPR cycle, the government received no recommendations on the right to the freedom of peaceful assembly.

⁴⁶ 'Spooked – Surveillance of Journalists in South Africa', Right to Know, 2018, <https://www.r2k.org.za/wp-content/uploads/R2K- Surveillance-of-Journalists-Report-2018-web.pdf>.

⁴⁷ 'One Person Killed by Police during student protest', CIVICUS Monitor, 6 April 2021, <https://monitor.civicus.org/updates/2021/04/06/one-person-killed-police-during-student-protest>.

⁴⁸ 'Journalist surveillance: Spooks are back in action', Mail and Guardian, 4 July 2018, <https://mg.co.za/article/2018-07-04-journalist-surveillance-spooks-are-back-in-action/?src=ilaw>.

⁴⁹ 'South African Security Services move to ban expose of Jacob Zuma government', The Guardian, <https://www.theguardian.com/books/2017/nov/07/south-african-security-ban-expose-jacob-zuma-government-jacques-pauw-the-presidents-keepers>.

⁵⁰ 'Protests Over Corruption Rock South Africa Prior To Zuma's Departure In February', CIVICUS Monitor, 19 April 2018, <https://monitor.civicus.org/updates/2018/04/19/protests-over-corruption-rock-south-africa-prior-zumas-departure-february>.

- 5.2** Article 17 of the Constitution guarantees the right to the freedom of peaceful assembly. Article 21 of the ICCPR also guarantees this right. However, in practice, this right is undermined by legal restrictions, misapplication and misinterpretation of the law and the use of excessive force by police officers.
- 5.3** The right to peaceful assembly is regulated by the Regulation of Gatherings Act (205 of 1993). The Act requires organisers of assemblies to provide seven days' notification to local authorities about protests or pickets of more than 15 persons.⁵¹ Contravention of the provisions of the Act can result in a fine of 20,000 Rand (approx. US\$1,300) or imprisonment for up to a year.⁵²
- 5.4** A decision by the Constitutional Court on 19 November 2018 validated an order by the High Court of South Africa, Western division, ruling as unconstitutional section 12(1)(a) of the Regulation of Gatherings Act, which makes convening an assembly of more than 15 people without notifying authorities a criminal offence.⁵³ This followed an application by members of the Social Justice Coalition, a civil society group that advocates for the rights of inhabitants of informal settlements, who were arrested and found guilty of contravening the Act by failing to notify the authorities of a protest outside Cape Town civic centre in September 2013.⁵⁴
- 5.5** Section 11 of the Regulation of Gatherings Act also limits the freedom of peaceful assembly as it holds organisers of protests liable for property damage caused by individual protesters even when the protest organiser has taken reasonable steps to ensure there is no destruction of property. While the Constitutional Court ruled that this limit is reasonable and justifiable, such provisions undermine international best practice, which stipulates that 'the right to freedom of peaceful assembly is held by each individual participating in an assembly. Acts of sporadic violence or offences by some should not be attributed to others whose intentions and behavior remain peaceful in nature'.⁵⁵
- 5.6** The Regulation of Gatherings Act is at times misinterpreted and misapplied by municipal authorities and police officers, leading to arbitrary prohibitions and

⁵¹ Regulation of Gatherings Act, <http://www.gov.za/documents/regulation-gatherings-act>.

⁵² Ibid.

⁵³ Mlungwana and others vs the State and Minister of Police, <https://www.concourt.org.za/index.php/judgement/291-mlungwana-and-others-v-s-and-another-equal-education-right2know-campaign-and-un-special-rapporteur-on-the-rights-to-freedom-of-peaceful-assembly-and-of-association-as-amici-curiae>.

⁵⁴ 'Joint UPR Submission', CIVICUS and HURISA, op. cit.

⁵⁵ 'Factsheet: Recommendations on managing assemblies', UN Special Rapporteur on the rights to peaceful assembly and of association Maina Kai and UN Special Rapporteur on extrajudicial, summary or arbitrary executions, March 2016, <http://freeassembly.net/wp-content/uploads/2016/03/Protest-recommendations-factsheet-final.pdf>.

violations of the constitutional right to protest.⁵⁶ For example, the civil society coalition Right2Protest noted in its 2021 report that it assisted the Vaal Environmental Justice Association (VEJA), which was told by a municipal manager that its protest would be prohibited if VEJA did not submit a written confirmation from the person who would receive the protest memorandum, which is not a legal requirement in the Act.⁵⁷

- 5.7** At times, peaceful protesters are arbitrarily arrested and charged. For example, 11 protesters against gender-based violence were arrested on 4 September 2019, held in police custody for 11 hours and charged with section 12(1)(G)(J) of the Regulation of Gatherings Act,⁵⁸ relating to the obstruction and hindering of members of the police.
- 5.8** In August 2018, 12 women were arrested during a peaceful protest in Colenso, KwaZulu Natal province, and charged with public violence. They were denied bail and held for 60 days in detention in Newcastle, more than 100km away from their homes and families. The 12 pleaded guilty, despite the absence of violence in the protest, in order to get released after their prolonged detention as they were told this would end their case sooner. The women were sentenced to 200 hours of community service, three years of house arrest and a prison sentence of three years, suspended for a period of five years on condition that they do not commit a similar offence.⁵⁹
- 5.9** Eight people were arrested during a protest at Bekkersdal Police Station in Westonaria, Gauteng province, on 16 June 2020. Protesters demanded the release of a convener of a peaceful community gathering, who was arrested for contravening lockdown regulations. The eight protesters were charged with public violence and held for two days. The prosecutor dropped the charges on 18 June 2020 as the state could not prove the matter beyond reasonable doubt.⁶⁰

⁵⁶ 'The State of Protest Report. Right2Protest Project report on the state of protest in South Africa 2018-2019', Right2Protest Project, October 2019, <http://www.r2p.org.za/wp-content/uploads/2020/06/State-of-Protest-2019.pdf>.

⁵⁷ 'The State of Protest Report. Right2Protest Project report on the state of protest in South Africa 2020-2021', Right2Protest Project, December 2021, <http://www.r2p.org.za/wp-content/uploads/2021/12/State-of-Protest-Report-2021-2.pdf>.

⁵⁸ 'Arrested GBV protesters arrive for court hearing, but state seems unlikely to prosecute', Daily Maverick, 9 September 2019, <https://www.dailymaverick.co.za/article/2019-09-09-arrested-gbv-protesters-arrive-for-court-hearing-but-state-seems-unlikely-to-prosecute>.

⁵⁹ 'Ndleda and Others v. the State ('Colenso')', Socio-Economic Rights Institute of South Africa, <https://serisa.org/index.php/19-litigation/case-entries/1140-ndleda-and-others-v-the-state-colenso>.

⁶⁰ 'The State of Protest Report. Right2Protest Project report on the state of protest in South Africa 2019-2020', Right2Protest Project, 2020, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/r2p/State%20of%20Protest%202020.pdf>.

5.10 Additionally, peaceful protests have been met with excessive force by police officers, including rubber bullets and teargas, which at times have led to the killing and injury of protesters and bystanders. Bystander Mthokozisi Ntumba was killed on 10 March 2021 when police officers fired shotguns, likely loaded with rubber bullets,⁶¹ to disperse a group of protesting students from the University of Witwatersrand in Braamfontein, Johannesburg.⁶² Three protesters were injured.⁶³ Four members of the South African Police Service were arrested and charged with four counts of murder and attempted murder.⁶⁴

5.11 On 27 August 2020, police fired rubber bullets and stun grenades into a crowd of hundreds of community members in Eldorado Park, a suburb of Soweto, who were protesting at the killing of Nathaniël Julius, a 16-year-old teenager with a disability, who was killed the previous day by police officers.⁶⁵

6. Recommendations to the Government of South Africa

CIVICUS, CSVR and HURISA call on the Government of South Africa to create and maintain, in law and in practice, an enabling environment for civil society, in accordance with the rights enshrined in the ICCPR, the UN Declaration on Human Rights Defenders and Human Rights Council resolutions 22/6, 27/5 and 27/31.

At a minimum, the following conditions should be guaranteed: the freedoms of association, peaceful assembly and expression, the right to operate free from unwarranted state interference, the right to communicate and cooperate, the right to seek and secure funding and the state's duty to protect. In the light of this, the following specific recommendations are made:

6.1 Freedom of association

⁶¹ 'South Africa: Police Kill Bystander at Protest', Human Rights Watch, 15 March 2021, <https://www.hrw.org/news/2021/03/15/south-africa-police-kill-bystander-protest>.

⁶² 'WATCH. One person shot dead in Braamfontein as cops disperse Wits fees protesters', News24, <https://www.news24.com/news24/southafrica/news/just-in-one-person-shot-dead-in-braamfontein-as-cops-disperse-wits-fees-protesters-20210310>.

⁶³ 'Joburg police officers charged with Mthokozisi Ntumba's murder enter 'not guilty' plea', Daily Maverick, 17 January 2022, <https://www.dailymaverick.co.za/article/2022-01-17-joburg-police-officers-charged-with-mthokozisi-ntumbas-murder-enter-not-guilty-plea>.

⁶⁴ Ibid.

⁶⁵ 'Women shot 8 times with rubber bullets during Eldorado Park protest won't give up on getting justice for Nathaniel Julies', IOL, 29 August 2020, <https://www.iol.co.za/saturday-star/news/woman-shot-8-times-with-rubber-bullets-during-eldorado-park-protest-wont-give-up-on-getting-justice-for-nathaniel-julies-e2e8517b-fcb9-479a-aab6-901d09d1a88b>.

- Take measures to foster a safe and enabling environment for civil society, including by removing legal measures that unwarrantedly limit the right to association.
- the NPO Act by setting up offices to assist rural CSOs to register, enable application forms to be found in all local languages and improve understanding of the registration process.
- Involve civil society in the discussions on amending the NPO Act.
- Investigate and prevent unwarranted raids on CSOs and unjustifiable disruptions to legitimate activities organised by CSOs.

6.2 Protection of human rights defenders

- Provide civil society members, HRDs and journalists with a safe and secure environment in which to carry out their work, conduct impartial, thorough and effective investigations into all cases of attacks, harassment and intimidation against them and bring the perpetrators of such offences to justice.
- Implement UN General Assembly resolution A/RES/74/146 by ensuring a safe and enabling environment for HRDs and by strengthening the protection of WHRDs.
- Ensure that HRDs are able to carry out their legitimate activities without fear or undue hindrance, obstruction, or legal and administrative harassment.
- Undertake a consolidated process of repeal or amendment of legalisation and decrees that unwarrantedly restrict the legitimate work of HRDs, in line with the UN Declaration on Human Rights Defenders.
- Publicly condemn at the highest levels of government instances of harassment and intimidation of CSOs and activists.
- Systematically apply legal provisions that promote and protect human rights and establish mechanisms that protect HRDs, including by adopting a specific law on the protection of HRDs in accordance with Human Rights Council resolution 27.31.

6.3 Freedom of expression, media freedom and access to information

- Ensure the freedom of expression and media freedom by bringing all national legislation into line with international standards, including by applying the Model Law on Access to Information for Africa adopted by the African Commission on Human and Peoples' Rights.
- Review the Film and Publications Act and the Prevention and Combating of Hate Crimes and Hate Speech Bill, in order to bring them into line with best practices and international standards in the area of the freedom of expression.
- Ensure that journalists and writers can work freely and without fear of retribution for expressing critical opinions or covering topics that the government may find sensitive.
- Take adequate steps to lift restrictions on the freedom of expression and adopt a framework for the protection of journalists from persecution, intimidation and harassment.
- Amend the State Information Bill to remove unwarranted restrictions on the freedom of expression, including unwarranted persecution of whistleblowers.
- Refrain from adopting any laws providing for censorship or undue control over social and conventional media content.
- Refrain from censoring social and conventional media and ensure that the freedom of expression is safeguarded in all arenas, including in the arts.

6.4 Freedom of peaceful assembly

- Adopt best practices on the freedom of peaceful assembly, as put forward by the 2012 report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, which calls for simple processes for the notification of assemblies being held rather than permission being required, and by General Comment No. 37 on the right to peaceful assembly adopted by the UN Human Rights Committee in 2020.
- Amend the Regulation of Gathering Acts in order to guarantee fully the right to the freedom of peaceful assembly.
- Unconditionally and immediately release all protesters, HRDs and journalists arbitrarily detained for exercising their right to the freedom of peaceful assembly and review their cases to prevent further harassment.

- Immediately and impartially investigate all instances of excessive force committed by security forces in the context of protests.
- Review and update existing human rights training for police and security forces, with the assistance of independent CSOs, to foster the more consistent application of international human rights standards, including the UN Basic Principles on the Use of Force and Firearms.
- Publicly condemn at the highest levels all instances of the use of excessive and brutal force by security forces in response to protests, launch formal investigations into such instances and bring the perpetrators to justice.
- Provide recourse to judicial review and effective remedy, including compensation, in cases of unlawful denial of the right to the freedom of peaceful assembly by state authorities.

6.5 Access to UN Special Procedures mandate holders

- The Government should extend a standing invitation to all UN Special Procedure mandate holders and prioritise official visits by the: 1) Special Rapporteur on the situation of human rights defenders; 2) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; 3) Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association; 4) Special Rapporteur on the independence of judges and lawyers; 5) Special Rapporteur on extrajudicial, summary or arbitrary executions; 6) Special Rapporteur on the right to privacy; and 7) Working Group on Arbitrary Detention.

6.6 State engagement with civil society

- Implement transparent and inclusive mechanisms of public consultations with CSOs on all issues mentioned above and enable the more effective involvement of civil society in the preparation of law and policy.
- Include CSOs in the UPR process before finalising and submitting the national report.
- Systematically consult with civil society on the implementation of UPR recommendations, including by holding periodical comprehensive consultations with a diverse range of civil society.

- Incorporate the results of this UPR into action plans for the promotion and protection of all human rights, taking into account the proposals of civil society, and present a midterm evaluation report to the Human Rights Council on the implementation of the recommendations of this session.