

Submission

to the

**Special Rapporteur on the rights to freedom of peaceful assembly and of
association**

For

The report at the 47th session of the Human Rights Council

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INTRODUCTION

- 1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. CALs is also a law clinic, registered with the Legal Practice Council of South Africa. Accordingly, CALs connects the worlds of both academia and social justice. CALs' vision is that of a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights.

- 1.2. CALs operates across a range of programmes including the civil and political justice, business and human rights, environmental justice, home, land and rural democracy, gender justice and environmental justice. CALs' Civil and Political Justice Programme aims to advance certain civil and political rights, such as the right to protest, the right to freedom of expression, the rights of the arrested and detained, and the right of access to information.

- 1.3. CALs makes these submissions jointly with the Right2Protest Project. These submissions are limited to the scope of the work conducted by CALs and the Right2Protest Project.

- 1.4. The Right2Protest Project (R2P) is a coalition of civil society organisations and is based at the Centre for Applied Legal Studies at the University of Witwatersrand.

R2P focuses on the promotion and protection of the constitutional right to peaceful assembly through advocacy and litigation. R2P mainly engages in bail applications on behalf of participants of a protest in the event of arrests.

RESPONSES TO QUESTIONNAIRE

Question 1

The government of South Africa has made attempts to ensure access to justice for violations and abuses of the rights to freedom of assembly and association by calling for public participation in policy making.¹ However, we have noted with great concern, the closing of civic space in South Africa.²

Human rights defenders, particularly those in mining affected communities continue to face obstacles and harassment when trying to exercise their constitutional right to protest. Activists face arbitrary arrests and fabricated criminal charges brought against them with the intention to intimidate and curb their activism.³

We have noted, in litigation defending human rights defenders, how mining companies continue to use interdicts to target human rights defenders and how this has played a role in the closing of civic space in South Africa. Indeed, in a number of our cases, the

¹ Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at para 98.

²South African Litigation Centre Report (2018), "Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa". Available from: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/11/SALC-Closing-Civic-Spaces-Report-FINAL-lo-res.pdf>.

³ South African Human Rights Commission Report (2019), "National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities". Available from: <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>. See also the Centre for Applied Legal Studies Report (2018), <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/Activist%20Victimisation%20Report%20for%20web%2028%20August%202018.pdf>.

court interdicts by mining companies are a tactic to evade accountability for failure to implement social labour plans (SLPs). Therefore, the litigation resulting to such interdicts is aimed at frustrating activism.⁴ Costs for opposing the interdict applications are cumbersome on activists. Once the court has granted an interdict application to a mining company, the company uses the interdict to prohibit protests and even dictate the arrest of those who insist on protesting. This shows the sometimes toxic collusion between the state and some big business. A key problem is the wording of these interdicts. Some of the prevalent wording in such interdicts are “the Respondents are prohibited from 200m in proximity to the mine property”. This suppresses the right to freedom of assembly because the location of the protest is central to the course of the protest. Human rights defenders, especially ones working in the mining and environmental space, often have very little resources and as a result they do not have access to attorneys and are heavily reliant on civil society organisations in general and public interest litigation organisations in particular for legal assistance. The result is that many human rights defenders often lack access to justice and ability to exercise their constitutional right to protest because public interest litigation organisations are overwhelmed and overstretched.

⁴ Ibid.

Accountability

In many cases, the government of South Africa has failed to ensure accountability. Perpetrators of violations and abuses of the rights to freedom of assembly and association have not been held accountable for their actions.⁵

August 2021 will mark 9 years since the Marikana Massacre. To date, none of the police officers and government officials involved in the Marikana Massacre have been held accountable for their role in the massacre.⁶

In 2013, a police officer shot and killed an unarmed protester, Andries Tatane, during a service delivery protest. The police officer responsible for the killing of Andries Tatane remains a member of the South African Police Service (SAPS). Although South Africa has the necessary mechanisms in place to ensure accountability such as the Independent Police Investigative Directorate (IPID) which is tasked with investigating criminal offences committed by members of the South African Police Services, there is a general lack of political will to ensure accountability.

In October 2019, Mam' Fikile⁷ Ntshangase, an anti-mining activist was killed in her home. She had been very vocal against the expansion of Somkhele coal mine which is owned Tendele Coal Mining, she was also a leader of the Mfolozi Community Environmental Justice Organisation. To date, no arrests have been made.

⁵ Right2Protest Report [2018], "State of Protest Report". Available from: https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/r2p/Right-to-protest_masterset_web.pdf.

⁶ Alex Mitchley (2020), "Marikana massacre: Children of miners killed still waiting for justice to be served, 8 years on". Available from: <https://www.news24.com/news24/southafrica/news/marikana-massacre-children-of-miners-killed-still-waiting-for-justice-to-be-served-eight-years-on-20200813>.

⁷ Centre for Environmental Rights (2020). "The killing of Somkhele environmental activist Fikile Ntshangase: A joint statement". Available from: <https://cer.org.za/news/the-killing-of-somkhele-environmental-activist-fikile-ntshangase-a-joint-statement>

Question 2

Through the work conducted by the Centre for Applied Legal Studies and the Right 2Protest Project and other civil society organisations we have identified the following groups of people as some of the most vulnerable:

- **Mining affected communities/ Environmental Activists:** human rights defenders in mining affected communities are often targeted for their activism. They face abuse from members of the SAPS and private security companies that are colluding with the mines. This has resulted in activists being assaulted by either member of the SAPS or private security companies during protest action.
- **Women:** Women working in the mining and extractives industry continue to face prejudice and unfavourable working conditions particularly for pregnant women who are unable to take time off when needed. Women who find themselves in these positions are unable to voice their dissent as they fear losing their jobs.
- **Sex Workers:** Sex workers are unable to exercise their rights freely due to the criminalisation of sex work in South Africa. The criminalisation of sex work has contributed to the marginalisation and abuse of sex workers who face violations by members of SAPS. In most instances, sex workers are unable to report police officers that violate them due to the nature of their work. Sex workers are further side lined due to their socio-economic status.

- **Migrants:** Although certain constitutional rights are reserved for South African citizens, the constitutional right to freedom of assembly is a right guaranteed to everyone within the borders of the Republic. However, migrants are seldom afforded this right. In 2020, the government of South Africa deported refugees and asylum seekers who had engaged in a protest.

Question 3

The establishment of Legal Aid South Africa which is mandated to provide legal services to South Africans who otherwise cannot afford private legal representation has played an important role in ensuring access to justice. To this end, the Special Rapporteur could assist by providing recommendations to our State to capacitate this office and channel more resources and funding so as to ensure that it is able to function better. Currently, it is inundated with case work and unable to meet the high demand for such services, which in turn hamper on access to justice.

- A. The State has established commissions of inquiries in response to calls for accountability of law enforcement agencies such as the South African Police Services (“SAPS”) which have played a major role in infringing on the right of freedom of peaceful assembly. The commissions established such as the Marikana Commission of enquiry in response to the mass killing of mine employees, who were in peaceful assembly for better wages. The commission’s role was to uncover details that led to the massacre as well as make

recommendations to the state on how members of SAPS whom were negligent in the execution of their duties could be held accountable. It is however questionable whether such measures have been effective in ensuring accountability because senior officials from the SAPS and other state members involved are yet to account for their actions.

On the other hand, civil society's role has always been to take measures to ensure that unlawful practices and laws are eliminated in order to ensure protection of the right to freedom of peaceful assembly. Such measures include, litigating against unlawful practices and laws; lobbying parliament for amendments to unlawful legislation; making comments and submissions to parliament's portfolio committees on existing or proposed legislation on the right to peaceful assembly.

Peaceful Assembly

A) We are of the view that the existing laws and policies in South Africa are sufficient. However, laws and policies are only as good as their implementation. In South Africa, the proper implementation of laws regulating the right to freedom of assembly are poorly and incorrectly implemented. For example, whilst the Regulation of Gatherings Act 205 of 1993 specifies that a protest is notice based, the authorities interpret that as a permission seeking process. Law enforcement officers even go to the extent of requesting protesters for a "permission letter" and failure to produce same may lead to arrest, police brutality or requesting the protesters to disperse.

B) *“On the measures to assist us as lawyers in defending this crucial and fundamental right, I think it is important to challenge the criminalization of these rights by the authorities. This is the only right we as the marginalized and dissenting voices have, but we are being criminalized for it. The other challenge accompanying this, is the barrier of getting the legal representation once we have been charged with a criminal record. The ProBono legal representation doesn't assist with the criminal charges/ cases, so if a protester or organiser is criminally charged then it will be very expensive and difficult to get a criminal lawyer. As an organiser I've sought legal assistance in notifying the authorities in a process of prohibition and suppression of our right to protest/ assembly. I also sought legal representation for the wrongful arrests of protesters and myself as the targeted organiser. I sought such assistance in order to be able to exercise and defend that right, we also used such assistance in dealing with the authorities in case they try to prohibit or give us any challenges in our goal of voicing out our frustrations.”* **General Moyo- Activist**