



# DIALOGUE ON HUMAN RIGHTS AND POLICING

# POLICE

**12 SEPTEMBER 2019**  
**JOHANNESBURG, SOUTH AFRICA**

*Hosted by*  
African Policing Civilian Oversight Forum

*In partnership with*  
South African Human Rights Commission

*Funded by*  
The Sigrid Rausing Trust



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# ACRONYMS AND ABBREVIATIONS

<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ACJR</b>	African Criminal Justice Reform
<b>APCOF</b>	African Policing Civilian Oversight Forum
<b>CASAC</b>	Council for the Advancement of the South African Constitution
<b>CCL</b>	Centre for Child Law
<b>CCTV</b>	closed-circuit television
<b>CPF</b>	Community Policing Forum
<b>CSO</b>	civil society organisations
<b>CTICC</b>	Cape Town International Convention Centre
<b>CYCC</b>	child and youth care centre
<b>DG</b>	Director-General
<b>DHA</b>	Department of Home Affairs
<b>DSD</b>	Department of Social Development
<b>EU</b>	European Union
<b>FCS</b>	Family Violence, Child Protection and Sexual Offences Unit (of the SAPS)
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IPID</b>	Independent Police Investigative Directorate
<b>JICS</b>	Judicial Inspectorate for Correctional Services
<b>LHR</b>	Lawyers for Human Rights
<b>Luanda Guidelines</b>	ACHPR Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa
<b>MOU</b>	Memorandum of Understanding
<b>Nelson Mandela Rules</b>	United Nations Standard Minimum Rules for the Treatment of Prisoners
<b>NGO</b>	non-governmental organisation
<b>NPA</b>	National Prosecuting Authority
<b>NPM</b>	National Preventive Mechanism (in terms of OPCAT)
<b>OPCAT</b>	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>POP</b>	Public Order Policing Unit of the SAPS
<b>POPI</b>	Protection of Personal Information Act
<b>PROVJOINTS</b>	Provincial Joint Operational and Intelligence Structure
<b>PSIRA</b>	Private Security Industry Regulatory Authority
<b>R2K</b>	Right 2 Know Campaign
<b>RGA</b>	Regulation of Gatherings Act
<b>RICA</b>	Regulation of Interception of Communications and Provision of Communication-Related Information Act
<b>SAHRC</b>	South African Human Rights Commission
<b>SANDF</b>	South African National Defence Force
<b>SAPS</b>	South African Police Service
<b>SERI</b>	Socio-Economic Rights Institute
<b>SJC</b>	Social Justice Coalition
<b>SSA</b>	State Security Agency
<b>UN</b>	United Nations

## 1 | Background

The third annual Dialogue on Human Rights and Policing, hosted by the African Policing Civilian Oversight Forum (APCOF) in partnership with the South African Human Rights Commission (SAHRC), took place in Johannesburg on 12 September 2019. The event brought together a variety of role players in policing, government, statutory oversight bodies, academia and civil society organisations (CSOs) to discuss key issues relevant to human rights-compliant policing in South Africa. The dialogues aim to build a South African consensus on promoting human rights in policing, by:

- Creating a space for constructive discussion between various stakeholders to engage on human rights-related policing issues;
- Supporting and encouraging South African contributions and inputs to police policy developments; and
- Encouraging stakeholders to share experiences and comparative analysis of human rights in the policing context.

The 2019 dialogue featured short, focused inputs by expert panellists and human rights activists on a number of focal areas, followed by a discussion in plenary. This report summarises the expert inputs and discussion points under thematic headings.

This year's dialogue was held on the anniversary of the death of South African activist and Black Consciousness thinker, Steve Biko. Themes included:

- **Strengthening human rights compliance in places of custody.** South Africa's ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) has added fresh impetus to existing efforts to prevent torture in South Africa. All places where persons are deprived of their liberty against their will are now subject to independent monitoring. This, inter alia, includes correctional centres, police custody, child and youth care facilities, and repatriation centres. How will this work? What can we expect, and what will be our role?
- **Public order policing.** In January 2016, the then Minister of Police, Nkosinathi Nhleko, appointed a Panel of Experts on Public Order Policing with instructions to submit a report that would guide the transformation of the South African Police Service (SAPS) to a more professional, human rights-compliant and demilitarised service. The expert panel report was submitted to the present Minister of Police, Bheki Cele, in April 2018, but it has yet to be released to the public. Seven years after the 2012 Marikana Massacre, South Africa is still waiting for a resolution. In the meantime, new laws are being mooted, including the Critical Infrastructure Protection Bill, which expands the net of what is critical infrastructure and how it is to be policed. In addition, the idea of first responder being stretched to become a force multiplier is being entertained widely as metropolitan police departments acquire armoured vehicles.
- **Militarisation.** South Africans have long been concerned about the notion of militarisation of policing. The recent deployment of the South African National Defence Force (SANDF) in a crime-combatting support role in the Western Cape acts as a catalyst for further debate.
- **Criminalisation of poverty.** Many by-laws, particularly those aimed at regulating informal trading and vagrancy, can be regarded as criminalising poverty and homelessness, but how should we be responding?



Commissioner Chris Nissen (SAHRC) opens the Dialogue with Gen. Mathonsi (SAPS), Ambassador Cornaro of the European Union (EU) and Sean Tait (APCOF)

## 2 | Opening

### Welcoming remarks

**Commissioner Chris Nissen** of the SAHRC welcomed all present and invited them to participate in a partnership to find joint solutions to the challenges that face policing in South Africa. He tendered apologies from Commission Chairperson Prof. Bongani Majola and Chief Executive Officer Adv. Tseliso Thipanyane, neither of whom were able to attend. He thanked the Sigrid Rausing Trust for generously providing support for the dialogue, and the EU for supporting the SAHRC's role in South Africa's National Preventive Mechanism (NPM) in terms of OPCAT.<sup>1</sup> The SAHRC was pleased to have an ongoing partnership with APCOF on matters such as the NPM and stakeholder dialogues. The memorandum of understanding (MOU) between the Commission and the SAPS had provided a good basis for frank and open dialogue towards developing a human rights culture in the police. SAPS National Commissioner Lt.-Gen. Khehla Sithole would be represented at the current dialogue by Maj.-Gen. Thokozani Mathonsi.

**Sean Tait** of APCOF stated that it was a privilege to be able to host a dialogue on human rights and policing in partnership with the SAHRC and the SAPS. There was real value in having regular, structured discussions around the dynamic field of human rights and policing. The format of the day was structured to maximise participant interaction. There would be four thematic sessions, and each panellist would provide a frame-setting input, followed by time for questions and comments from the floor.

### Human rights-compliant policing – a view from development partners provided by the EU Delegation to South Africa

**Ambassador Marcus Cornaro** of the EU Delegation to South Africa noted that, in a democratic state based on the rule of law and informed by a human rights culture, the police are increasingly viewed as government officials who provide a service to the community, that is, are a service rather than a force. This service perspective of policing has been confirmed by several regional and international human rights documents, including the United Nations (UN) Code of Conduct for Law Enforcement Officials.

For many, the police are the most visible state representatives and the ones that people are most likely to encounter. The SAPS therefore represents the government in action. Because the police represent the state in the most visible manner, trust in the police is tantamount to trust in the state. The police must build trust with communities based on a sense of personal and public security. This is an important task, particularly with regard to the most marginalised categories. Protecting marginalised groups is an increasingly fundamental prerequisite of effective and successful police work.



**WATCH:** The European Union welcomes the establishment of the National Torture Preventive Mechanism (NPM) again, Ambassador Cornaro: <https://youtu.be/xeDBmikld-s> via @YouTube / #PolicingDialogue

The police have a special role in a democratic society, given their monopoly on the use of force. This comes with a margin of discretion that demands on-the-spot decision-making in potentially complex situations, which places pressure on the police to demonstrate a high degree of professionalism, strict legality of action, transparency, and accountability at all times. As they perform their duties, the police must refrain from actions that unduly interfere with human rights. They must take all necessary and appropriate steps to protect those rights. In fact, human rights are the objective of policing.

The SAPS has been tested during recent outbreaks of violence in Johannesburg and Pretoria, accompanied by widespread looting, that have variously been described as xenophobia or Afrophobia. The EU Delegation sees the government of South Africa as being committed to the protection of refugees in the country, including rights of employment. It is important to protect the lives and rights of all residents, South Africans and foreigners alike, and to fight crime regardless of who commits it.

The EU has supported approximately 100 projects to promote human rights in South Africa that are run by government, Chapter 9 institutions and CSOs. These have included projects against torture; projects to promote the rights of asylum-seekers and refugees; projects for the promotion of socio-economic rights, children's rights, and the rights of women; and projects promoting cultural- and gender-diversity rights.

The EU is currently supporting APCOF to promote the implementation of the Luanda Guidelines<sup>2</sup> in South Africa. This serves to promote compliance by the SAPS, through the regular and independent monitoring of detention in facilities under SAPS management, with international, regional and constitutional human rights protections guaranteed to persons who are deprived of their liberty.

According to the Universal Declaration of Human Rights, no one may be subjected to torture or cruel, inhumane or degrading treatment or punishment. Torture and other ill-treatment are among the most abhorrent violations of human rights, human integrity and human dignity. No exceptions are permitted under international law. It is important to have a comprehensive approach to the eradication of torture, encompassing all essential elements – prohibition, prevention, accountability, and redress for victims – as well as dialogue and cooperation between legislators, law enforcement agencies, administrators of justice, national human rights institutions, and civil society.

Ambassador Cornaro also welcomed South Africa's ratification of OPCAT in March 2019 as a very positive step in the fight against torture; the role the SAHRC is playing in the NPM as a result of being tasked with implementing OPCAT; and the implementation of the Istanbul Protocol.<sup>3</sup> He mentioned that the EU was very happy to have supported the SAHRC and the Department of Justice to help establish a properly independent and adequately resourced mechanism to effectively address any complaints about prison conditions and to advise prison authorities. He hoped that regular engagement would address all the questions that have been raised regarding South Africa's compliance with the UN Convention against Torture.



Dialogue participants



## Human rights-compliant policing – a view from the SAPS

Maj.-Gen. Thokozani Mathonsi observed that a fine balance must be struck between protecting the rights of alleged perpetrators and the rights of society at large. It is sometimes necessary to restrict the right to liberty of people who have violated the rights of others, but their other rights must be protected. The SAPS is doing everything it can to ensure that its members understand their role in upholding the law while protecting human rights. It is also necessary to educate communities about the responsibilities attached to their human rights.

The current dialogue was taking place at a time when there had been violence on the streets of Johannesburg and the police had to restore order. The SAPS has a mandate to protect all the residents of the country, and that is what its members do every day. Many events that require police attention take place every day all over the country and, in the majority of cases, SAPS members can protect the ability of people to enjoy their human rights. The police follow certain procedures when there are public demonstrations. Most protests are not violent, and there are no incidents. However, some people tend to use violence during demonstrations. In the small number of protests that do become violent, crimes such as looting, theft and assault may be committed. The law is clear – when a crime is committed in the presence of a police officer, that officer must act.

The SAPS adopted a turnaround vision in 2017, part of which was to strengthen its partnership with various stakeholders. The police service now has partnerships with the business community, traditional leaders and others. The National House of Traditional Leaders recently raised the issue of people being arrested and getting bail soon afterwards. Certain laws clash with traditional practices, so the SAPS engages with stakeholders to make sure that they understand that people may be arrested for certain things that are culturally accepted but illegal.

The SAPS must engage simultaneously in stabilisation and normalisation. ‘Stabilisation’ refers to intensive interventions to ‘put out fires’. It is not possible to negotiate at such a time because the police have to focus on the ‘fires’. But stabilisation goes hand in hand with normalisation, which is putting basic policing in place – in consultation with communities on the ground – when the situation has calmed down.

SAPS members must be sensitive to human rights, and conversant with policies and legislation that guide policing on the ground. The relationship between the SAPS and the SAHRC has been strengthened by the signing of an MOU that, among other things, organises joint programmes and regularly assesses whether SAPS training materials are conveying the right message about protecting human rights.

The SAPS has reviewed its basic training manuals. Ongoing human rights training takes place with members. Two years ago, the SAPS implemented the national government’s integrity strategy. No SAPS policies violate human rights, but sometimes police officers behave badly. When that happens, the SAPS has to take action against some of its members. People are encouraged to raise concerns and any person who is unable to report alleged offences directly to the police may use other channels such as the Independent Police Investigative Directorate (IPID) and the national hotline.

The SAPS cannot act as if it has answers to all the challenges on the ground. Responding to crime takes more than just policing – it is necessary to address the root causes of crime. The SAPS accepts the limitations of its knowledge about human rights and is working with experts to find the best way to deal with the challenges it faces. Maj.-Gen. Mathonsi concluded by saying that his organisation is open to partnership, ideas and inputs for shaping SAPS policies and training.

The relationship between the @SAPoliceService and the @SAHRCCommission will result in the development of training manuals for the SAPS. This will allow for improvement of the human rights culture within the SAPS. #PolicingDialogue @APCOF @MarcusCornaro

## **DISCUSSION POINT: The policing of protest marches**

**Dali Weyers** of the Social Justice Coalition (SJC) said that street protests are, by their very nature, intended to be disruptive. There is a massive difference between disruption and violence. If people want to disrupt the World Economic Forum meeting at the Cape Town International Convention Centre (CTICC), as they did on 4 and 5 September 2019, they should be able to do so. Protestors should not be encouraged to leave those spaces. On the first day, protesters were right at the door of the event, yet there were no major problems. On the second day, protesters were kept at a distance. They were being held to a standard that is accommodating to the state. This was unnecessary and contributed to protestors' frustrations. In the SJC 10 case in August 2018,<sup>4</sup> the Constitutional Court upheld the right to a peaceful protest and pointedly spoke to the fact that learners in schools do not have other avenues to raise issues – they were not present at the current APCOF–SAHRC meeting, and they are not able to vote either. However, learners should be invited to future dialogues.

**Commissioner Chris Nissen** said that protest marches are a powerful place for resistance and for the voices of people to be heard. The SAHRC had been present at the CTICC and at over 150 marches in order to protect the right to protest and the responsibility that goes with it.

**Thami Nkosi** of Right 2 Know (R2K) said that information on how the SAPS should police public protests is available in the SAHRC investigation report on the 2011 death of Andries Tatane, but it is not clear what has happened to those recommendations. The report of the Expert Panel on Public Order Policing that was mandated to review and make inputs into the development of public order policing following the 2012 Marikana Massacre is likely to contain relevant information for this debate. However, the report has never been released to the public.

**Edwin Makwati** of the Legal Resources Centre said that, during the violence in Johannesburg, the police had acted decisively at times but at other times did not act at all. Sometimes, they even joined the looters. The SAPS leadership therefore needed to be stronger. When police officers are witnesses to violence, they must act decisively to address this.

## **3 | Strengthening human rights compliance in places of custody**

**PANEL:** Dr Kwanele Pakati (SAHRC) (discussion facilitator); Alex Fitzgerald (SAHRC); Zita Hansungule (Centre for Child Law (CCL), University of Pretoria); Charne Tracey (Lawyers for Human Rights (LHR)); and Capt. Jeremiah Motlokwane (SAPS).

### **South Africa's National Preventive Mechanism under OPCAT**

Dr Kwanele Pakati said that South Africa had signed OPCAT in September 2006. It was ratified in March 2019 and the instrument came into force on 20 July 2019.<sup>5</sup> One of the reasons for this long delay is that the SAHRC had to work with the Department of Justice to find a suitable model for an NPM in South Africa. The NPM is a multi-body entity coordinated by the SAHRC and comprises the various state bodies that exercise oversight over places of custody and other places of deprivation of liberty. Examples of such places include correctional centres, police custody facilities, secure care facilities for children, child and youth care centres (CYCCs), and mental health institutions.<sup>6</sup> In addition to its coordinating role, the SAHRC also has a functional oversight role.

Commissioner Chris Nissen said that the SAHRC is a coordinating structure of all the bodies that are participating in the NPM. The Commission has also been designated as a functionary that visits places where persons are deprived of their liberty through a court process. The SAHRC has already visited several such places, but it does not have the capacity to visit every one. The Commission envisages vetting CSOs and training them to do this work on the NPM's behalf. Over time, it is expected that the NPM will become an independent body, and that every entity that contributes to the NPM's work will also become independent.<sup>7</sup> Parliament has indicated its support for enacting the necessary legislative amendments to make these bodies independent.



Zita Hansangule of the CCL and  
Kwanele Pakati of the SAHRC

## The SAHRC's monitoring of detention in the Lindela Repatriation Centre

**Alex Fitzgerald** said that, in 2014, the SAHRC secured a court judgment that gave it some access to the Department of Home Affairs' (DHA) Lindela Repatriation Centre in Krugersdorp.<sup>8</sup> The Commission leveraged this modest court remedy into a comprehensive and routine monitoring mandate which includes team monitoring of Lindela, formal reporting, and quarterly meetings with all the affected parties, including the private-sector facilities manager. The SAHRC insists on formal written responses from the DHA on matters it raises about Lindela.

The project is quite modest, involving only two or three people doing the actual monitoring. The responsible SAHRC Commissioner attends the quarterly meetings. The project has been effective in improving the general conditions at Lindela, and has improved relationships with affected parties. However, this can never be a substitute for unscheduled monitoring visits by people working on the ground. Unannounced visits are far more likely to result in immediate responses to problems. There have been some cases of insider whistle-blowing regarding potential or actual violations of human rights in Lindela.

The SAHRC had become aware that, sometimes, immigration officers take arrested persons to police stations which are not registered places of detention, and that the police stations then proceed to detain those people anyway. It is important that SAPS members do not make themselves complicit in illegal detentions initiated by other departments. Station commanders often have a poor understanding of what their role and responsibilities are in respect of immigration officers. In one case, a person was detained illegally and did not appear before a magistrate, but the immigration officer claimed that the person had appeared and provided what seemed to be documentary evidence. However, when the SAHRC monitoring team checked the documentation at the station, there was no evidence that the person had ever left the station in that period. The immigration officer could not prove the person had appeared before a magistrate and was disciplined. The police can help to uncover immigration corruption in this way.

The SAHRC has developed a good relationship with the DHA. The DHA reaches out to the Commission for help in reducing the risk of human rights violations, especially where the SAHRC has raised the DHA's awareness of such a risk. Examples are those where transgender persons or persons with mental health conditions are taken into custody.

Using the Nelson Mandela Rules,<sup>9</sup> national legislation and legal precedent, the Commission has been able to leverage some substantial 'wins' in this work. However, the limitations of the current SAHRC approach to monitoring Lindela include: relying extensively on good personal relationships; having the same people doing the monitoring; being willing to raise the same issues over and over again; and doing the hard administrative work of constantly reminding people of their commitments to act on specific human rights issues.

The recent change of Minister and the fact that the DHA Director General (DG) is in the post in an acting capacity have made it difficult for the SAHRC to keep up its engagement on Lindela. Generally, officials in state departments tend to be slow and unresponsive, and there is a culture of non-compliance. In May 2019, the SAHRC had to subpoena the acting DG of Home Affairs to explain his failure to cooperate with the Commission.

Because the SAHRC has a very broad mandate, it is very difficult to keep the focus on a particular topic. There have been various emergencies and crises to which people have demanded an immediate response from the Commission. Keeping this monitoring project going has required lobbying for resources, as well as focus and attention, both internally and externally. One thing that has helped to keep Lindela in focus is branding it as a business and human rights issue – a matter involving a private company that has been managing the facility on behalf of the state.

**Zia Wasserman** of Sonke Gender Justice referred to the Judicial Inspectorate of Correctional Services (JICS) quarterly statistics report which states that, in 34 prisons the Inspectorate visited, there were 19 500 foreign nationals in detention. She asked about when an arrested foreign national is held in Lindela, and when in prison.

**Alexandra Fitzgerald** said that the answer is not clear-cut. If a person is sentenced for a crime, he or she goes to prison. However, the Departments of Justice and Correctional Services will often release a person in custody to the DHA, calling it ‘bail for purposes of deportation’, even though it is not legally possible to detain a person released on bail.



**WATCH:** Alexandra Fitzgerald, Senior Legal Officer, details SAHRC monitoring work of Lindela Repatriation Centre: <https://youtu.be/5gRLwTeHPgo> via @YouTube / #PolicingDialogue

## Monitoring child and youth care centres

**Zita Hansungule** of the CCL said that oversight of the Department of Social Development’s (DSD) CYCCs, formerly known as children’s homes, was weak. CYCCs are supposed to provide therapeutic and rehabilitation services for children in conflict with the law while they await trial, and sometimes when they have been sentenced to spend time at such a centre. Judges and magistrates may send children accused of crimes such as shoplifting to CYCCs because they believe the children will receive therapy and rehabilitation in that setting.

However, the CCL has established that conditions in CYCCs are not always as they should be. In the Soshanguve CYCC, for example, the Centre found that therapeutic services and education were being provided only sporadically; that some of the facilities were in a very poor condition; that there were no showers; and that the children were having to sleep in cold rooms. Because there is no independent oversight, the Centre had to petition the High Court to order the DSD to have an independent quality-assurance assessment carried out at the Soshanguve CYCC.

What the CCL and other children’s rights CSOs would like from the NPM process is the establishment of an independent children’s rights unit in the SAHRC that, among other things, monitors CYCCs. Such a unit should be a multidisciplinary team that includes social workers, lawyers and psychologists who can make inputs to the work of the NPM.



SAHRCommission  
@SAHRCommission  
September 13

**WATCH:** Not all convicted children receive rehabilitation services at Child and Youth Care Centres, Zita Hansungule: <https://youtu.be/Oev6FPzMTgw> via @YouTube / #PolicingDialogue

## Monitoring of refugee centres

**Charne Tracey** of the LHR Detention Monitoring Project said that verification (determining whether a person is in South Africa legally) is a necessary legal step that must be taken before a foreign national can be detained under section 34 of the Immigration Act. However, many foreign nationals are being detained without any verification taking place.

Verification is a simple process of assessing readily available documents of the person involved, or contacting the person's family. Police officers in charge are obliged to assist with verification within 48 hours. However, because police and immigration officers fail to comply with the verification procedure, a lot of foreign nationals are placed in Lindela immediately, awaiting imminent deportation, even if they are in the country legally. Asylum-seekers are being arrested even before they apply for asylum-seeker status. The LHR has secured multiple releases of newcomer asylum-seekers held at Lindela because the police did not undertake verification at the arrest stage.

The LHR does some monitoring of prisons and intervenes mostly when foreign nationals have been granted parole but are released for deportation. Foreign nationals, especially new asylum-seekers, may be arrested under section 49 of the Criminal Procedure Act rather than section 34 of the Immigration Act. If they are convicted of a criminal offence, they will go to a prison rather than a refugee centre.

The police raids that took place in the Johannesburg city centre in the week of 11 September 2019 saw foreign-national shop owners being targeted, regardless of their documentation status. This sort of xenophobia-fuelled police action invites society to behave in xenophobic ways as well. Police and immigration officials should take note that, if they stop and detain a foreign national, it must be on reasonable grounds. Ethnic and racial profiling does not constitute 'reasonable grounds'.

After the raids, there were serious shortcomings in the way matters were managed in the Johannesburg Magistrate's Court. The magistrates did not know how to handle section 34 cases. The court proceedings were chaotic. Charne Tracey and another CSO attorney were under instructions from 200 clients. In spite of the mass arrests that had been made, the court insisted on handling each case individually. The court then decided to split the group into separate hearings of men and women. When the two attorneys pointed out that they could not be in two courtrooms at the same time, the groups were split up again, and hearings took place in five courtrooms simultaneously with only two attorneys in attendance.

**Sean Tait** suggested that the SAHRC and the SAPS take up the matter of distinguishing between refugees and illegal immigrants through their regular review of human rights-compliant training, and that this issue should also be considered in the training provided for judicial officers by the Justice College.



## **New national instructions on SAPS custody management**

**Capt. Jeremiah Motlokwane** of the SAPS said that custody management begins from the time of arrest. Once a person has been advised of his or her rights and informed of the reasons for arrest, such person is already in custody. The arrested person's human rights must be protected in terms of the Constitution and the South African Police Service Act. New instruments affecting the management of persons in custody have addressed identified shortcomings relating to such matters as cleanliness, meals and mealtimes. Policies, guidelines, standing orders and national instructions as to how members should conduct themselves are reviewed regularly. These are circulated for immediate implementation and are available on the SAPS intranet.

National Instruction 11 of 2019, which replaced a standing order on the arrest, treatment and transportation of persons in custody, has been approved and circulated throughout the SAPS. On arrest, a person must be read his or her rights. Further, the transportation of such a person must take place safely in safe vehicles. Arresting officers must also assess the risk of transporting an arrested person. The vehicles must be locked, and may not contain equipment that could endanger an arrested person's life. Arrested persons must be treated with dignity and must be protected.

National Instruction 12 of 2019 addresses the arrest and treatment of foreign nationals, in line with the provisions of the Immigration Act. There are minimum standards for the detention of foreign nationals from the time of arrest.

The SAPS Management Intervention Unit carries out inspections of all police stations and detention facilities, and intervenes where necessary. Ongoing training of members is provided with regard to human rights and policing. Children in conflict with the law, and those in need of care and protection, must be correctly handled. The SAPS is in regular communication with other departments concerned with detention management, including the Department of Correctional Services, the Department of Health, the DHA and the DSD.

Human rights consultant **Mary Rayner** asked whether the implementation of new SAPS standards on custody management includes close scrutiny of the registration book that has to be kept at a police station to ensure that the exact time a person arrived under custody is recorded. This is necessary to avoid the practice of 'offshoring' a person for interrogation before he or she is formally placed under police custody.

**Capt. Motlokwane** replied that the exact time of arrest and interview is recorded in the custody management register. The first few pages of each register comprise guidelines for correctly filling in the register, supported by national instructions to which every member must adhere. Station managers are responsible for conducting first- and second-level inspections of the register. SAPS members are issued with pocketbooks and are reminded at parades to record all activities in their pocketbooks, including details of attending to complaints as well as times of arrest. The time of arrest recorded in a member's pocketbook is then transferred to the register, supported by the statement taken and the records in the occurrence book. Any shortcomings in register management are addressed through training. Relief commanders must interview an arresting officer before they register a case in order to find out on what charges a person has been arrested and to determine whether the arrest was reasonable.

**Mxolisi Mgulwana** of the Western Cape Police Ombudsman's Office said that, while he commended the SAPS for developing more progressive guidelines on custody management, there was still room for improvement. There are still complaints that people are not being read their rights, and detention registers do not always contain the signatures of arrested persons confirming that they have been read their rights. Some policing precincts do not have detention facilities, and some have facilities that have been declared unfit for use. Where this is the case, police who have arrested a suspect have to take that person to a facility which may be 100 km away, exposing the suspect to danger, and taking a SAPS vehicle out of circulation for a long period. When police arrest foreign nationals under section 34 of the Immigration Act, these persons must be charged within 48 hours. However, charges are often not laid in time because the police are waiting for immigration officials to undertake verification rather than undertaking verification themselves.

**Capt. Motlokwane** said that Standing Order 361 was replaced by National Instruction 13 of 2019 to give better effect to an arrested person's constitutional rights. Police explain arrested persons' rights in a language that they can understand. If the person does not have his or her own legal representative, the arresting officer must tell the person that he or she will be represented by a lawyer appointed by the Legal Aid Board. Sometimes, people do not want to acknowledge in writing that they have been read their rights because they do not want to sign anything at that point. Arrested persons must be correctly detained at the nearest police station and must be safely transported in line with an assessment of the likelihood of injury, the likelihood of escape, and any other risks.

## 4 | The criminalisation of poverty

**PANEL:** Chumile Sali (APCOF) (discussion facilitator); Assistant Prof. Lukas Muntingh (Africa Criminal Justice Reform (ACJR)); Clare Ballard (LHR); Zia Wasserman (Sonke Gender Justice); and Commissioner Chris Nissen.

### The decriminalisation of petty offences in Africa

**Assistant Prof. Lukas Muntingh** said that, in November 2017, the Principles on the Decriminalisation of Petty Offences in Africa were adopted by the African Commission on Human and Peoples' Rights (ACHPR) as part of a broader regional effort to articulate standards for acceptable human rights practices, particularly in respect of access to justice. The adoption of the Principles was preceded in 2003 by the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa. This declaration encouraged state parties to the African Charter on Human and Peoples' Rights (African Charter) to address prison overcrowding by, among other things, decriminalising petty offences so that fewer people would be entering the prison system.

'Decriminalisation' refers to the process of removing an act that was deemed to be criminal and its associated penalties from the ambit of the law. Petty offences are minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or a short term of imprisonment – the latter, often for failure to pay the fine. Examples of petty offences include: being a rogue and vagabond; being an idle or disorderly person; loitering; begging; being a vagrant; failure to pay debts; being a common nuisance; disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities such as hawking and vending.

Petty offences are entrenched in legislation and, in most countries, fall within the broader category of minor offences, misdemeanours, summary offences or regulatory offences. Some petty offences have colonial-era origins and some are new, for example in Kenya where the counties established under the 2010 Constitution started to draft a myriad of new laws that created new offences.

Petty-offence laws are discriminatory in their nature. Police officers have no obligation to arrest a person suspected of a petty offence – they have discretionary powers of arrest in such cases. How police officers use their discretion to arrest is important. Discriminatory petty laws are in conflict with Article 2 of the African Charter, which provides that every person is entitled to the enjoyment of rights and freedoms without distinction of any kind, such as on the grounds of race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status. The word 'fortune' is important here, because poor people most often bear the brunt of the enforcement of petty offences.

Article 3 of the African Charter confirms the equality of every individual before the law and equal protection under the law, but a particular group of people is being targeted in the enforcement of



petty-offence laws, for example street traders, beggars, poor people and homeless people. Petty offences also have a disproportionate impact on poor and vulnerable people<sup>10</sup> and on key populations.<sup>11</sup>

The impact of punishment for petty offences is to control, segregate, and undermine the dignity of certain groups in society. This often has significant socio-economic consequences for arrested people and their dependants. Article 5 of the African Charter enshrines the right of every individual to dignity. In the enforcement of petty-offence laws, people generally end up in places of detention, which are often in a poor condition. Arrested people feel embarrassed and publicly humiliated about having been arrested. Petty arrests make overcrowded facilities even more crowded. There are frequently mass arrests of, for example, street children, street traders and hawkers for infringing municipal by-laws. Mass arrests are often 'fishing expeditions' to determine whether some or other crime has been committed.

It is important to ask whether there is a real intention to prosecute a person arrested for a petty offence, or whether arrests on such grounds are really just about rounding up people, detaining them overnight, and releasing them the next morning. Article 6 of the African Charter provides that nobody may be deprived of freedom except for reasons and conditions previously laid out in law. In other words, people may not be arbitrarily arrested or detained. The enactment, interpretation and enforcement of these laws must comply with the rule of law, be legitimate, necessary and proportionate, and satisfy regional and international human rights standards.

The Working Group on Arbitrary Detention states that an arrest is arbitrary if the grounds for arrest are illegal, the arrested person is not informed of the reasons for the arrest, and the procedural rights of the arrestee are not respected.

What should states do? The Principles encourage states to decriminalise certain petty offences, especially if they are broad, vague, ambiguous and discriminatory, and particularly if they target the life-sustaining activities of poor people.<sup>12</sup> States are encouraged: to provide alternatives to arrest and detention such as diversion, decriminalisation and mediation; to address root causes such as poverty and other forms of marginalisation; to provide legal aid and assistance; and to disseminate the Principles. Judicial officers and law enforcement officers should receive ongoing and comprehensive training on their obligations to protect and respect the human rights of all persons. The ACHPR should regularly report on progress made. Data should be collected to monitor key indicators such as the size of the pre-trial population and length of detention.

Certain behaviour in public places is problematic but a criminal justice response is not always the best form of response. Asking sensible questions that take multiple interests into account and that focus on harm reduction and a developmental approach can result in sensible solutions.

## **Municipal by-laws in South Africa**

Clare Ballard said that the complaint concerning the regulation and enforcement of petty offences in many African countries is that such offences are vaguely worded, for example 'being a rogue and vagabond', with considerable discretion allowed in respect of interpretation and arrest. By contrast, the petty by-laws she had investigated in 11 South African metropolitan municipalities tend to be very specific. Municipalities are very clear about what they want to criminalise, for example spitting, being horizontal on a park bench, making a fire on a beach, or camping in a forest. Often these by-laws seem to be motivated by archaic ideas about what should be permitted in public that are reminiscent of the apartheid era (e.g. curfews), but they have been drafted in the democratic era. Petty by-laws in South Africa are therefore a current problem, not a hangover of the colonial era.

The text of by-laws is difficult to find. In Buffalo City, there are so-called 'draft laws' that may or may not be in force, so they lack legality. By-laws that can be implemented and enforced in discriminatory ways can be divided into three broad categories: (1) informal trading; (2) health and sanitation (e.g. keeping agricultural animals in areas that are not zoned for agriculture); and (3) regulating behaviour in public places, something that particularly affects the homeless and indigent. Examples of the third category include being horizontal on a park bench, making a fire on a beach, pushing a trolley on a highway, walking on a highway, obstructing a signboard, obstructing a road, and obstructing a



vehicle on a road. People are being branded as offenders simply for carrying out their daily activities such as washing in public, washing themselves in public, and urinating in public.

A convincing constitutional argument can be made for the decriminalisation of by-laws. Taking a step back, it is clear that the authorities are using by-laws to create streets for a certain class of person. A pavement is simply a pavement, but the cities have decided it is not for stalls or for sitting on but for people on the move. It is dangerous for people to walk on the highway, but the by-law refers to pedestrians obstructing cars, rather than preventing pedestrians from being killed. The rhetoric of public safety in by-laws is steeped in criminal justice rather than a public-welfare, public-safety, developmental paradigm. That is acutely distressing for a constitutional democracy founded on dignity and equality. There are very few by-law offenders in the prison population – though harassed by law enforcement they are seldom convicted of any offence. The threat of arrest is used to move homeless people from place to place. As offenders, which homeless people typically are (e.g. for sleeping in the park), they are reluctant to approach the police for assistance themselves. Sex workers, for example, are unlikely to report a rape. Homeless people experience crime all the time – their things are stolen and they are assaulted but they do not report it because they have already been branded as offenders. They are a category of citizens removed from the protections that are constitutionally afforded to everyone.

Certain behaviour in public is problematic, but solutions should be driven by also looking after the vulnerable and not just the middle class. Some people working with the homeless have a paternalistic attitude. The state says that it is giving the homeless many options, but they are not affording themselves of those options. Homeless people should be offered responsive, meaningful services in the same way as anyone else. Individual problems need individual responses. If the reason that a person is homeless is drug addiction, the response should differ from one that is appropriate for someone who has run away from a violent home.



**WATCH:** Commissioner Chris Nissen asks why municipal by-laws are only implemented against the poor: <https://youtu.be/1aOpV-1TaIA> via @YouTube / #PolicingDialogue

## Criminalising the homeless

**Zia Wasserman** said that a recent spate of fines issued to homeless people had prompted a coalition of CSOs to campaign to decriminalise some by-laws in South Africa. One of the key groups targeted by these by-laws are the homeless. Homeless people are continually harassed by the police: their possessions are confiscated and they are subjected to verbal and physical abuse. They find it very difficult to make complaints to the police. Part of the CSO campaign included writing case studies based on the stories of homeless people themselves and their experiences of the implementation of these by-laws. Since no homeless people were present at the dialogue, Zia Wasserman said that she would read out parts of these case studies to illustrate some of their real-life experiences.

*We [homeless people] are being physically and psychologically abused. My gender rights have been violated.*

*I now have severe asthma. I struggle to breathe. It was never like that before they [the police] sprayed me in my face with pepper spray.*

*In the early morning, law enforcement arrived and pulled the blankets off me... They put me naked into the van and rode away. They hit me. I took them on and asked why they picked me up. One of them just hit me with a baton. They also put teargas into the van; I could hardly breathe. They drove around with me and eventually they let me out at a bridge.*

*One time after SWEAT<sup>13</sup> had sponsored [our] groceries after our dwelling had burned down, the groceries we bought from Spar were confiscated by law enforcement. We had done nothing wrong when we were stopped by law enforcement. When we deal*



*with law enforcement, they are not friendly to us. They are aggressive and don't see us as people. They see us [as] animals.*

*Law enforcement abuses us in the mornings, waking us up at 5 a.m. and just swearing at us. They pull our blankets off and make us get up and chase us away from where we are sleeping.*

*Law enforcement victimises us every month-end when they do a clean-up campaign. My plea is for ... law enforcement to have mercy on us, because we are also human beings, we are not criminals.*

*I was raped and made a complaint at Cape Town Central SAPS. The detectives never followed up with me and I was not told when the court date would be. I later found out that my rapists were out of jail.*

*I was gang-raped. It was difficult to lay a charge at the police station. They laughed at me. They said, 'You are not important.' Their questions are so upsetting you feel that you can't go on with the case.*

These are the real-life stories of homeless people being harassed, Zia Wasserman said. Criminalising the conditions that homeless people find themselves in, through by-laws and enforcing such by-laws, will never get rid of homelessness. Homeless people say that the police tear up their identity documents. Sex workers say that the police burn their antiretroviral drugs and their condoms. Enforcement of by-laws is a waste of police resources. The police should be detecting and investigating real crime. There should be a social-justice response to homelessness rather than a punitive, criminal-justice response. Interventions should address the causal and underlying factors contributing to homelessness. They should be proactive, not discriminatory. The SAPS is there to protect the vulnerable, and people who are homeless are among the most vulnerable groups in South Africa.

## **The impact of by-law enforcement on informal traders**

**Commissioner Chris Nissen** said that one of his focal areas at the SAHRC is the decriminalisation of petty offences. When law enforcement officials started to fine homeless people in Cape Town, the Commission resolved to take the by-law concerned on review to assess its constitutionality. Informal traders are the heart of the economy in many countries in the East and in cities like Hong Kong, building the economy, creating jobs, creating opportunities and making goods available to consumers. South Africa is a capitalist society with a free-market economy, yet informal traders are subject to many rules and regulations that are not conducive to a free market. Having some rules in place is reasonable, but there is still a Calvinistic approach in South Africa to what people may or may not do. Informal trading is criminalised. Informal traders are having their goods confiscated, are not getting them back, are losing income, and are being fined. Sometimes, their papers are confiscated and they have to apply again for others. In Cape Town, by-laws are applied selectively. They are applied in the city centre to get informal traders out of sight, but are not applied in the suburbs. Normally, the authorities say they are responding to complaints about noise, litter, and not being able to walk on the pavements. Informal traders should be assisted to adhere to reasonable standards and unfair by-laws should be challenged. Informal trading by-laws are normally enforced by the metro

police rather than the SAPS. However, if they do so brutally and harshly, they deprive people of an income and pave the way for people to become criminals.

There are homeless people all over the world, and some have lived on the street for 40 or 50 years. A number of homeless shelters are available in South Africa, but shelters are not the only answer. Some are just money-making businesses established in order to obtain grants, and people staying there must be in by 6 p.m. and out by 6 a.m. One Cape Town councillor referred to homeless people as 'the vermin that needs to be removed from society'. Authorities cannot be telling homeless people, 'Go back where you came from.' In 2010, the City of Cape Town took hundreds of people out of Cape Town and dumped them far away. In 2019, the city started to fine homeless people, but these are people who cannot possibly pay a fine. The city says people urinate all over the place, but this is because it has closed public toilets. The city must provide facilities for everyone. Other countries have made a plan, and South Africa should do so too.

### **DISCUSSION POINT: Illegal mining**

**A person from the floor** asked whether illegal mining could be made legal, especially where the *Zama Zamas*<sup>14</sup> are eking out a living from mines that are no longer productively used by the mine owners.

**Commissioner Chris Nissen** said that the former Minister of Minerals and Energy had brought small-scale miners together to re-mine old dumps in Kimberley and Upington and that this is working quite well. However, laws are necessary because there are cases of criminal syndicates forcing miners to go underground in dangerous conditions.



## **5 | Public order policing**

**PANEL:** Alana Potter (SERI) (discussion facilitator); Prof. Christof Heyns (University of Pretoria and Member: UN Human Rights Committee); Zama Khumalo (SERI); Thandi Mathews (SAHRC); and Chumile Sali (APCOF).

**Alana Potter** sketched the current background to public order policing in South Africa as follows: increasing inequality; and dissatisfaction and dissent coupled with an under-resourced, under-capacitated and arguably ill-equipped SAPS Public Order Policing (POP) component that is particularly under-resourced in less affluent areas where protest is more likely. In addition, POP has an increasing role in combating crime rather than managing, negotiating, differentiating and communicating with respect to the management of gatherings and protests. The Expert Panel Report on Public Order Policing that followed the Marikana Commission of Inquiry has not yet been released. There have also been new legislative developments: the Critical Infrastructure Protection Bill has been sent to the President for assent, and there may be amendments to the Regulation of Gatherings Act.

## The right to assemble

**Prof. Christof Heyns** said that he is a member of the UN Human Rights Committee, which is the body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). He is currently engaged in drafting a general comment on peaceful assembly that will give content to Article 21 of the Covenant. There are 36 such general comments, and they constitute international standards on the topics they cover. UN documents of this nature do not immediately change things on the ground, but they do set a standard, a gravitational pull and a direction, all of which are useful for advocacy on the domestic level.

In his capacity as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Prof. Heyns had, in 2016, and together with the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, produced a joint report for the Human Rights Council on the international standards for peaceful assemblies.

Also in 2016, they had produced the Minnesota Protocol on the Investigation of Potentially Unlawful Death. This Protocol goes through the whole chain of a potentially unlawful or suspicious death: scene of death, first responders, police investigation, forensics, ballistics, prosecutors and tribunals. If one of these links in the chain is broken, it impacts on accountability in respect of protecting the right to life. The Protocol has been translated into all the UN languages and is the gold standard for securing the right to life. The right to life has a substantive component encompassing when the police may use force and, once force has been used, what the proper standards of investigation are.

When the general comment on peaceful assembly is complete, it will represent the international standard on peaceful assembly in terms of Article 21 of the ICCPR. Prof. Heyns had presented the first draft to the Human Rights Committee in July and there have been consultations with non-governmental organisations (NGOs) and state parties on the draft. The draft document sets out a rationale for a peaceful assembly – it is a particular mode of expression, a type of political participation that takes the form of being actively involved in shaping one's society. Peaceful assembly has inherent value because it allows one to participate and express oneself. It also has an instrumental value because it has been the vehicle through which many other rights have been given content, for example rights against discrimination and environmental rights. In addition, peaceful assembly is a way of registering and resolving disputes, as well as determining how much support a position has. The scope of the right entails people assembling for a public purpose in a particular space in a non-violent manner. It is important to know when there is violence and when there is hate speech, and what obligations these place on the state. There is an obligation on the state to allow peaceful assembly, and also a positive obligation to facilitate peaceful assembly and protect those who are engaged in peaceful assembly. There are limitations as to what the state may do, for instance the conduct of the police must remain within acceptable limits. The most important obligation on the state is to be content-neutral, that is, not to decide whether what the assembly says is right or wrong, but to allow the assembly space to do so, within the limits of hate speech, and to allow people in the assembly to express themselves within the sight and hearing of those to whom they are addressing their message.

Authorisation systems are not permissible. The very idea that a person has a right means he or she does not have to ask for it. The UN Human Rights Committee says that notification is not required in all cases. Where there is a spontaneous assembly, it is not permissible to require notification. The Committee will say there should generally not be a requirement to pay to protest in order to exercise the right to assemble. This is part of having a right. The obligation is on the state to facilitate assembly, for example by stopping traffic or diverting it, and by providing security services. The document will set out when the police may use force and firearms in any situation, for instance in the case of an arrest. The document uses the term 'non-lethal weapons', but it is now known that there is no such thing as a non-lethal weapon. Calling something a non-lethal weapon, or less-lethal weapon, does not mean it is not lethal. That part of the law has not yet been developed internationally. There are plans to release a document as to when weapons like tasers, teargas, cattle prods and water cannons may be used, and also when it is permissible to use drones. There is a requirement that non-lethal weapons may be used only if they have been tested. This is expected to fill a gap in the management of peaceful protest and police use of force – when and how force may be used, and when force may not be used.

## Seven years after Marikana

**Zama Khumalo** said that SERI had brought a civil case against the Minister of Police for loss of support on behalf of some of the families who had lost family members during the Marikana Massacre. Most of the families have been paid. SERI is now fighting for constitutional damages on the grounds that not only did the families lose breadwinners, they also lost husbands, and their children lost parents and the right to family life. Nine police officers have been arrested and are on trial in the North West High Court on charges of murder, attempted murder, defeating the ends of justice, as well as of contravening the IPID Act for not reporting a body that was found in one of the police vans.

Nobody has been arrested for the events of 16 August 2012 in which 34 mineworkers were killed. However, the families want to know what actually happened and who is responsible for killing those mineworkers. SERI has been engaging with IPID and the National Prosecuting Authority (NPA) on this matter. IPID has advised that it does not have the money to reconstruct the scene in order to be able to identify who did what. The NPA says it has sent queries to IPID, and IPID blames the NPA for the delay. It has been seven years since the event, which suggests there is no political will to bring this matter to conclusion. It is frustrating for everyone who went and gave evidence to the Marikana Commission of Inquiry. Families thought they would obtain justice. Close to R150 million was spent on the Commission. The families are asking for an apology. Various Ministers of Police and the President have indicated that they will atone for what happened, but there has been no contact with the families about this promised apology.

The SAPS has not changed the way it responds to protest. For example, the police used live ammunition in the week of 9 September 2019 when they raided a building in Johannesburg looking for stolen goods. A number of people came into the SERI office because they had been shot with live ammunition during that raid. The Expert Panel Report on Public Order Policing should be released so that its recommendations can be implemented by the SAPS.

## Amending the Regulation of Gatherings Act

**Thandi Mathews** said that most of the work that the SAHRC has done on gatherings is recorded in its reports on the state of human rights defenders. The right to protest is protected in terms of section 17 of the Constitution, but people who protest in order to claim rights to basic services such as housing, education, water, sanitation and electricity are getting shot at by the police. The Commission wants to collect recommendations from CSOs that it can present at regional and international level to hold the state accountable for its obligations.

The Regulation of Gatherings Act (RGA) is limiting freedom of assembly by requiring the organiser of a gathering to provide the authorities with a notification of intention to gather, the details of leadership, the purpose of the gathering and the proposed route, as well as time in which to ensure that the gathering receives adequate protection. However, contrary to international best practice, the notification process has been interpreted by government authorities as a permission-seeking exercise, resulting in a high number of protests being denied permission and therefore being deemed illegal, including those that are peaceful.

The SAHRC welcomes the recent *Mlungwana* judgment<sup>15</sup> that does away with the RGA requirement to notify the authorities of a gathering of more than 15 people, but protests are still being criminalised, and protestors who are assembling peacefully are still being brutalised by the police. The judgment relates only to the notification element of the Act, but other parts of the RGA should also be brought under review.

Researchers have raised concerns about the quality, credibility and reliability of data that the SAPS releases on gatherings because such data does not constitute a systematic record system that uses clear protocols, definitions and categorisations. The SAPS refers to public order incidents as crowd-related events which include recreational, religious, cultural and sports events. These incidents are either classified as peaceful (where no police intervention was necessary) or arrest-related (where the police may have intervened, e.g. by making arrests or clearing a blocked road). It is not clear how the SAPS defines a violent protest. A lack of disaggregated data has been a general issue regarding the SAPS, for instance the way in which it records gender-based violence cases.

Unless the root causes of a protest are understood, no appropriate interventions can be made. The SAHRC is trying to be proactive as a human rights institution. Instead of simply making recommendations to the state, the Commission is seeking to work with the SAPS through the MOU between the two organisations in order to build the kind of society it would like to see. The SAHRC is aware that it is important to go beyond influencing the top level of decision-makers, and that its training efforts reach every level of government.



**WATCH:** Senior Researcher, Thandi Matthews, on the work of the SAHRC on policing and human rights: <https://youtu.be/360uHvC7JwQ> via @YouTube / #PolicingDialogue

## Discussion points on public protest and the RGA

**Thami Nkosi** encouraged organisers to let go of the idea that they have to request permission for a gathering under the RGA. Instead, they should simply inform the authorities that the gathering will be taking place, and the authorities will then have to ensure that the event is appropriately policed.

**Mxolisi Mgulwana** said that the Western Cape Police Ombudsman's Office has a mandate to monitor police conduct in the province, including police conduct during gatherings. Sometimes, police officers do not know the RGA rules and regulations. Because the number of police deployed at a gathering must be proportional to the number of participants, the police will ask the organisers to estimate how many people will attend. Protestors must understand their rights, and they must also understand their responsibilities. Sometimes, people think they can damage the property of others or violate the rights of others, for example by looting. They must, however, understand that there will be consequences for such criminal acts.

Independent consultant **Annelise van Wyk** said that the Expert Panel Report on Public Order Policing should be released without delay. The police have a responsibility to protect protestors, walking with them as they go along, but often they are waiting at the place where the protestors expect to hand over a memorandum. Protestors are already angry when they gather. If the person representing the state is not there to receive the protestors' memorandum or hear what the protestors have to say, the protestors will be even more angry, and their anger is likely to be directed at the police.

**Sean Tait** said that, in its *Mlungwana* judgment, the Constitutional Court had decided that it is unconstitutional to require notification of a gathering and had instructed Parliament to rectify the shortcomings of the Act. The RGA is premised on the idea of notification and a 'golden triangle' comprising the organiser, the police and the local authority. The more preparation and notice, the more effective the protection measures can be on both sides. Stakeholders need to consider whether piecemeal amendments will rectify the shortcomings of the RGA, or whether there should be a rethink of the entire Act.

**Mary Rayner** said that there are documented cases where activists have been targeted through close relationships between police, magistrates, prosecutors, councillors and municipal officials.

## The Critical Infrastructure Protection Bill

**Chumile Sali** indicated that the Critical Infrastructure Protection Bill, which replaces the National Key Points Act, has been passed by both houses of Parliament and has been sent to the President for assent. He said that APCOF, the SJC, R2K and amaBhungane had raised a number of issues regarding the Bill in submissions to the Portfolio Committee on Police. Section 16 of the Bill defines 'critical infrastructure' too broadly – it could be interpreted to include facilities where basic services are delivered, such as schools, universities and clinics. Section 24 of the Bill gives private security companies the right to deal with public order policing in respect of critical infrastructure, subject to such companies being accredited for this purpose by the State Security Agency (SSA). This infringes section 205(3) of the Constitution, which makes the maintenance of public order the responsibility of the SAPS rather than any private company. Section 25 of the Bill deals with how private security companies deal with access control and searches. At any time, a security company could search people and their belongings. This infringes the right to privacy (section 14 of the Constitution). Section 26

of the Bill criminalises recording a photographic image of, or reporting on, critical infrastructure by reporters, researchers and activists. This restricts the right of access to information (section 32 of the Constitution). The penalties for contraventions of the Bill were initially up to 35 years' imprisonment, but it was successfully argued that these were too severe, and the maximum period of imprisonment for contravening the Bill is now five years. If the Bill is signed as it stands, even a private institution such as a bank may be declared to be critical infrastructure.

### Discussion points on private agencies and the policing of protest

**Sean Tait** said that the SAPS is the body that has the expertise and training to respond to protests and gatherings, but other parties with no similar expertise are being drawn in. Municipal police are expected to be first responders. The Critical Infrastructure Protection Bill brings in private security. There should be a clear boundary between guarding and managing protest. The Bill blurs that line. The only body with the expertise to manage public protest and protect constitutional rights is the SAPS, so only the SAPS should be performing this function.

**Thami Nkosi** said that a SERI report on #FeesMustFall described collusion between the SAPS and private security companies in the name of assisting the police. The SAPS regulates, through the Private Security Industry Regulatory Authority (PSIRA), how far private security companies can go when it comes to public order policing. The general media narrative is to portray protestors as barbaric, almost criminalising their struggles. Protestors can be charged with interfering with the police in their duty, and with intimidation. This represents a war against the poor and marginalised. Disenfranchisement is violent, and it is to be expected that protestors' responses will be violent.

**Mary Rayner** said that any organisation that is capable of exercising force is not a private body but a public one.

**Thami Nkosi** said that, if the Defence Amendment Bill is passed in its current form, people protesting on SANDF land will be subject to a different set of regulations. The people of Marievale, for example, may not protest because they live on military land, and, if they do, they are subject to a different law than everyone else.

## 6 | Crime and policing: The role of militarisation and privacy

**PANEL:** Thami Nkosi (R2K) (discussion facilitator); Adv. Collen Weapond (Information Regulator, South Africa); Dumisani Ghandi (University of Pretoria); Martin Makhasi (Chairperson, Nyanga Community Policing Forum (CPF)); and Prof. Elrena van der Spuy (University of Cape Town).

Thami Nkosi said that there was a general trend towards militarisation, as could be seen from the SANDF being deployed in the Western Cape to help fight gangsterism, a militaristic SAPS, and a militaristic approach to the policing of protest and the policing of public space. Another notable trend is the use of technology in policing, for example the use of closed-circuit television (CCTV) cameras in Johannesburg, and the impending introduction of drone surveillance in Cape Town. Subjecting people to this kind of mass surveillance has major implications for personal privacy. The SSA carries out bulk surveillance of people in South Africa and has infiltrated CSOs such as R2K, Greenpeace and the Council for the Advancement of the South African Constitution (CASAC). This suggests that the state is afraid of civil society. A judgment in a case involving R2K and amaBhungane regarding the SSA's use of the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA) was due to be handed down shortly.<sup>16</sup>

## Information protection and policing in South Africa

**Adv. Collen Weapond** indicated that he is one of five members of the Information Regulator and has been designated as the person in South Africa responsible for regulating personal information. Parts of the Protection of Personal Information Act (POPI) are in effect but most are not. Once the entire Act is brought into effect, the POPI Regulations will also come into effect. Because the SAPS will never have all the equipment that is necessary to conduct and enforce surveillance-related activities across South Africa, it has partnerships with the private sector. The SAPS is the 'responsible party' in such a partnership, because it determines the means and purpose for processing personal information, for instance placing a surveillance camera in a particular place. The 'operator' is the private security company that deploys such a surveillance camera. Surveillance cameras are not permitted to run all day because they will then over-collect personal information. They may only be used for the purpose for which they were installed. Cameras that are only activated when there is movement or that are programmed to run for the purpose for which they were installed are permitted, but old-style analogue cameras are not. Over time, jurisprudence will emerge that makes it clear what is acceptable under POPI regarding the use of surveillance cameras in public and private spaces. At that point, the Information Regulator will issue guidelines.

The Information Regulator aims to secure a reasonable level of regulation. For example, the DHA is a 'responsible party', meaning that it is responsible for the information it is supposed to generate, for example identity documents, passports and information about births, deaths and marriages. The DHA is in the process of developing new information systems, and the Information Regulator has encouraged the department to enable privacy by design rather than privacy by default. Information that is deposited with the DHA may be shared with certain other parties, for instance private sector banks that are authorised to issue identity cards on behalf of the DHA. The SSA is permitted to collect facial-recognition information for national security purposes, for example for the detection and prevention of terrorism, provided that this is done in a way that is a reasonable means of achieving the purposes for which it is being collected (e.g. to identify a specific individual who might be a suspect in matters that affect national security).

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The 4th session on crime and policing raised very important issues on surveillance in policing as well as the growing militarisation of policing, particularly in light of the deployment of the SANDF in Cape Town: #PolicingDialogue

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## CCTV in the age of the Protection of Personal Information Act

**Dumisani Gandhi** said that CCTV surveillance has expanded from the private sector (e.g. precious minerals mining and processing facilities) into the public sector (e.g. city centres, retail outlets, stores, malls, and public parks). During the 2010 Soccer World Cup, there was a major expansion of CCTV in stadiums and other public places. For privacy advocates, this represents a dystopian environment in which there is mass surveillance wherever one goes.

The SAPS does not have the money to roll out CCTV surveillance, so this is being done by the private sector. Private security companies are installing 15 000 cameras in the northern suburbs of Johannesburg. People have cameras installed in their homes for personal safety, on the assumption that CCTV has the potential to reduce and prevent crime. The PSIRA annual report lists CCTV as the third-most wanted security measure after alarms, locks and keys.

The recording and storage of information has privacy impacts. Security companies which install CCTV systems have a statement to the effect that they will install cameras, and that they respect privacy, but it is not clear what they mean by 'respect for privacy'. Some local municipalities (e.g. Stellenbosch) have already started developing privacy policies in anticipation of POPI and its regulations being brought into force.



There is a role for the Information Regulator to regulate the enormous amount of personalised data that is collected by different organisations in the public and private sectors through these cameras (e.g. vehicle number plates and data processed by facial-recognition software). It is clear that metro police use the information captured by CCTV networks, but it is not clear whether and how the SAPS and others have access to this information.

Responding to a question about technological developments such as Google Maps and face-recognition technology that can identify an individual in a crowd of 60 000 people, Dumisani Gandhi said that regulation tends to lag behind developments in technology. Some of these technologies come from the military where the primary concern is having an advantage over an adversary. The default setting of social media, for example, is for users to give away their personal information, and people need to take all the necessary steps to protect their own privacy.

**Adv. Collen Weapond** said that it was interesting that Google Vice-President Caroline Atkinson had asked the Information Regulator not to over-regulate at the expense of innovation, because innovation can contribute to job creation.

### **DISCUSSION POINT: Body-worn cameras**

**Sean Tait** said that ongoing discussions are taking place about the obligations and restrictions that will have to apply if body-worn cameras are introduced for police officers. Small APCOF experiments with body-worn cameras suggest that there is a significant lag in the SAPS regulatory environment. SAPS national instructions and operating procedures must be in place before body-worn cameras are introduced.

**Adv. Collen Weapond** said that the Information Regulator would engage with the SAPS regarding guidelines on the use of body cams.

### **The deployment of SANDF troops on the Cape Flats**

**Martin Makasi** said that the most recent annual SAPS crime statistics confirmed once again that, with 289 murders in the previous year, Nyanga remains the 'murder capital' of South Africa. There is lawlessness all over the Cape Flats and gangsters have infiltrated every part of that community, filling the space that has been created by an absent government and a state that is disengaged from the community.

During the Western Cape Safety Summit, heads of department admitted that the Provincial Joint Operational and Intelligence Structure (PROVJOINTS) was not working well and that there is a lack of coordination in the criminal justice system. There is no real application of the intergovernmental frameworks that compel the three spheres of government to work together. All that communities are seeing is politicians from different spheres attacking each other rather than prioritising working with each other. Communities are treated as groups that must be controlled, and vocal people get flagged and targeted.

Nyanga is one of 15 priority areas on the Cape Flats where SANDF troops have been deployed in Operation Lockdown from Thursday to Sunday every week. At no stage did the Nyanga CPF support the deployment of SANDF troops. Community structures were only informed about the details of the operation three weeks after the army was already on the ground. Those who called for the deployment of troops said that the SAPS were incompetent, but the soldiers participating in Operation Lockdown fall under the command of the SAPS while the police normalise and stabilise communities. Children fear the presence of soldiers in the townships, just as they did in the pre-1994 era.

Community structures have asked the SAPS and the SANDF to make presentations on their understanding of Operation Lockdown. The SAPS made a 'universal' presentation because it did not want to expose its shortcomings, but the SANDF presentation was more useful. Communities said that they expected the SANDF to restore the authority of the state through stabilisation and normalisation, but what they were seeing was the SANDF closing down illegal shebeens. It made no sense to close down these shebeens. The police were effectively getting 'VIP protection' from the SANDF.

The government has commissioned research and barometer studies into the issues it faces, but it has failed to implement the recommendations of the studies it has commissioned. It has not implemented the recommendations of the Khayelitsha Commission either – recommendations that would be of benefit to other communities too.

The Nyanga CPF has taken a conscious decision not to complain to government about its situation; it will, however, cooperate with CSOs that support its work. The Nyanga CPF joined the SJC in an Equality Court application regarding inequitable deployment of police resources. The court ruled in favour of the applicants but, for eight months, the SAPS did not act. Finally, the SAPS came up with something the Forum could work with and provide feedback regarding improvement.

The call of the Nyanga CPF is for closer relationships with civil society partners. When communities become vocal, there is huge government resistance and people are identified as being part of the problem rather than part of the solution. The Forum will no longer sit and wait for government. It works in partnership with others to consider how relevant research recommendations can be implemented.

With their deployment on the Cape Flats, there was a narrative that soldiers are there to solve gang-related crimes. This does not take the systemic issues into account. The statistics show that there is a high level of interpersonal violence, for instance many murders that are the result of domestic violence, misunderstandings or arguments. There are no mechanisms for resolving these deep systemic issues, and bringing in the SANDF is an attempt to quickly solve a deep systemic problem. Nyanga has the second-highest level of reported rapes in the Western Cape, but it does not have a Family Violence, Child Protection and Sexual Offences (FCS) Unit. People wanting to report this kind of crime therefore have to go all the way to the Mitchells Plain precinct, which is not even part of the Nyanga cluster. This, it was said, showed that the SAPS has abandoned the women of Nyanga.

## The militarisation of policing

**Prof. Erena van der Spuy** said that the debate on the militarisation of policing is not specific to South Africa. A comparative perspective on the militarisation of policing would allow a better understanding of the driving forces behind militarisation and the social context that is conducive for militarisation to flourish. It would also permit critical reflection on the intended and unintended consequences of police militarisation.

Some literature suggests that militarisation is an inevitable consequence of the professionalisation of policing. Modern professional policing institutions tend to have militarised trappings.

The term 'police militarisation' means different things in different contexts. For a long time, South Africans were obsessed with police demilitarisation, focusing on changing the rank structures and hierarchies of the old South African Police. Sometimes, the term 'militarisation' is used to refer to police mentalities and attitudes rather than ranks and hierarchies. Sometimes, militarisation of the police is associated with specialisation, for example the establishment of tactical response teams and anti-gang units, the utilisation of the military as is being done in the Western Cape, and the utilisation of scarce police resources to buy military-type equipment. Sometimes, militarisation is used to refer to discourses, for instance 'making war' on terror, crime or gangs. It may therefore be useful to define exactly what is meant by the term.



**WATCH:** Militarisation of the police is a hot topic across the world, Prof Erena van der Spuy, University of Cape Town: <https://youtu.be/t0YntgnqMPA> via @YouTube / #PolicingDialogue

There is a very strong normative element in conversations about police militarisation, but militarisation may not always be bad or pathological. There may be a place for some form of militarisation.

The focus of criticism regarding militarisation tends to be the police. While it is important to want to keep the SAPS on a democratic track, it is also important to attend to the impact of militarisation in other quarters, for example in private security companies and in local government.

The militarisation of policing is a form of dramatic politics. It is a theatrical display of state power, in Lavender Hill, in Nyanga, in the absence of substantive governance, and in the presence of state disarray and the implosion of the criminal justice system. It may be more for drama than for real.

South Africa does not yet have substantive research evidence on the impact and consequences of militarisation. It is possible that militarisation does help to reduce crime. It is possible that it can bring peace in some contexts. It may pacify social evils in society. It is not necessarily true that there is less accountability when policing is militarised. Evidence-based decision-making requires gathering evidence about the actual impact and consequences of police militarisation.

Lastly, urban conflict is extraordinarily complicated in South Africa. Multilayered contestations play themselves out on the Cape Flats and in many other places in a context where key state institutions have become weakened, where law enforcement is in disarray, where the tentacles of corruption have spread far and wide, and where the illicit economy poses an extraordinary challenge for any modern government. There is a mammoth challenge of social development in the face of brutal inequality.

## **Discussion points on professionalisation and demilitarisation of the SAPS**

**Assistant Prof. Lukas Muntingh** said that ‘professionalisation’ has not been defined in the policing context. The term had been used in three different ways in three successive SAPS annual reports. The term ‘professional’ comes from the professions (e.g. being a doctor or a lawyer). People go to a professional because that person has specialist knowledge to be able to manage a risk in a client’s life. The question then becomes what expertise police must have to manage a risk in people’s lives.

**Sean Tait** said that the Civilian Secretariat of Police has produced a research report on demilitarisation of the police, but there has been no engagement with that report, and the Expert Panel Report on Public Order Policing has still not been released two years after it was written. Partnership requires stakeholders to be able to engage with the research and knowledge that already exists about militarisation, public order policing and other important topics.

**Prof. Elrena van der Spuy** said that the idea of professionalising the police has changed over time. In the early days of police reform, professionalising the SAPS took the form of training officers in interpersonal skills, conflict resolution and being civil so that they could build a community-based form of policing. In the context of combating organised crime, professional policing means intelligence-led policing. In the context of democratisation, familiarity with human rights principles is seen as professional policing. In the context of detecting crime, professional policing means developing a strong capacity to investigate crimes.

## **7 | Closing remarks**

**Dr Kwanele Pakati** thanked those who had participated and noted that fruitful discussions had taken place. The one question that remained for him was what a modern, professional SAPS would look like in the future. He was pleased to note that the Information Regulator was in the process of drawing up regulations about the dissemination of information. The deployment of the army in the Western Cape seemed to be more complex than it had at first appeared – the militarisation of policing functions may have far-reaching implications that had not been considered when the deployment was made.

# ENDNOTES

- 1 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. OPCAT is a treaty under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 2 ACHPR Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa.
- 3 Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 4 *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018).
- 5 An SAHRC fact sheet entitled 'Introducing South Africa's NPM' was distributed during the dialogue.
- 6 The SAHRC fact sheet notes that the following institutions have been proposed as potentially having a contribution to make to the work of the NPM, subject to appropriate amendments to their enabling legislation regulating their independence, powers and functions: the JICS, IPID, the Military Ombud, the Health Ombud, the Compliance Inspectorate of the Office of Health Standards Compliance, the DSD's monitoring mechanism for secure care and CYCCs, and mental health review boards.
- 7 See endnote 6 above.
- 8 Lindela is a detention centre for undocumented migrants.
- 9 UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).
- 10 'Vulnerable persons are persons who are marginalised in society and the criminal justice system because of their status, or an intersection of one or more statuses. This includes, but is not limited to, the economically or socially marginalised, including persons living in poverty, homeless persons, street children, beggars, older persons, persons marginalised on the basis of sexual orientation or gender identity, key populations, persons with disabilities, street traders and vendors' (Principles on the Decriminalisation of Petty Offences in Africa).
- 11 'Key populations are people who inject drugs, men who have sex with men, transgender persons, sex workers, and prisoners' (Principles on the Decriminalisation of Petty Offences in Africa).
- 12 'Performance of life-sustaining activities means to move, sleep, eat and exchange food, trade, tout, hawk, and engage in hygiene-related activities in public places' (Principles on the Decriminalisation of Petty Offences in Africa).
- 13 Sex Worker Education and Advocacy Taskforce.
- 14 Illegal miners using manual methods of mining.
- 15 See endnote 4 above.
- 16 This judgment was handed down on 16 September 2019 in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* (25978/2017) [2019] ZAGPPHC 384 (16 September 2019).

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### **The African Policing Civilian Oversight Forum**

The African Policing Civilian Oversight Forum (APCOF) is a not-for-profit trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve, namely: to assist in restoring public confidence; developing a culture of human rights, promoting integrity and transparency within the police; and good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

[www.apcof.org](http://www.apcof.org)

### **South African Human Rights Commission**

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