EXECUTIVE SUMMARY¹

STRENGTHENING THE ROLE OF CIVIL SOCIETY IN HOLDING THE POLICE ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF PUBLIC PROTEST POLICING

15 July 2019

¹ The full report of this workshop is available at https://www.seri-sa.org/images/SERI_ISS_APCOF_Workshop_Report_FINAL.pdf. All resources presented at the workshop including additional background information can be found here: https://drive.google.com/open?id=1YRF6Jt0GeN8Ty87NUVwn0gNtvmGT7PR.
BACKGROUND

On 18 and 19 March 2019, the Socio-Economic Rights Institute (SERI), the Institute for Security Studies (ISS), the African Policing Civilian Oversight Forum (APCOF), the Omega Research Foundation (UK) and the Right2Protest (R2P) hosted a workshop for civil society and community-based organisations from around the country on the role of civil society in holding the police accountable for human rights violations.

The workshop brought together civil society and community-based organisations and a range of experts in the law, policing ‘best practice’, police weapons and on forensic investigations following ‘use of force’ incidents. The two-day workshop provided participants with a forum to discuss direct experiences of policing, the current state of public order policing and in light of the 19 November 2018 Constitutional Court ruling on the Regulation of Gatherings Act and the continued failure of the Minister of Police to release publicly the Post-Marikana Expert Panel Report on Public Order Policing.

The workshop also sought to equip civil society and community-based organisations by:

• Strengthening capacity to hold the police accountable for human rights violations that arise from the unjustified use of force and violations of other rights associated with the right to peaceful assembly.
• Identifying and contributing to advocacy strategies aimed at improving the conduct of public order policing to ensure it is compliant with South African and international law on the use of force, consistent with international policing best practice, and accountable and protective of the right to peaceful assembly and associated rights.

This executive summary highlights the key themes and conclusions that emerged across the panels and during discussions on improving public order policing in South Africa.

KEY THEMES & CONCLUSIONS

1. The law is clear on the right to peaceful assembly and the state’s obligation at all levels to protect and facilitate that right.

The expert panel on the law and the right to peaceful assembly confirmed that the state, at all levels, has an obligation to protect and facilitate that right. The panellists also confirmed that there was complete agreement on this issue between International and Africa regional human rights law and South African law.

The panel drew attention to the specific vulnerability of rural and remote communities with many seeking to exercise their right to peaceful assembly being subjected to possible collusion by officials seeking to use criminal justice proceedings as a deterrent to activists. This often includes abuse of the bail system and arbitrarily charging protestors with the common law offence of public violence.

Finally, the panel noted specific elements of the convergence between International, Africa Regional and South African law on the protection of the right to peaceful assembly and to South Africa’s specific legal obligations, through its membership of the United Nations and of the African Union. In particular they drew attention to the United Nations Human Rights Council’s Joint Report on the proper management of assemblies (UN Joint Report), adopted in 2016, which emphasises government’s obligation to facilitate and provide an enabling environment for peaceful assembly in public areas and privately-owned spaces that are open to the public. The state’s obligation extended also to taking appropriate measures to investigate misconduct by both state law enforcement officials and private security companies.

The panel also described the detailed and practical presentation of these standards and obligations in the African Commission on Human and Peoples’ Rights (ACHPR) Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa.
The speakers drew attention to two key Constitutional Court judgements, which have contributed to providing valuable protection of the right to peaceful assembly, by rolling back some of the ways in which the right has been infringed upon in practice.

In Garvas\(^2\), 2012, the Constitutional Court ruled against allowing of the 1993 Regulation of Gatherings Act (RGA) to implicate all members of an assembly in acts of violence including property damage. The judgement upheld the right to peaceful assembly on the basis of there being a need to differentiate between the intentions of individuals in a protesting group and not allowing the RGA to implicate all members of an assembly in acts of violence against property or persons.

In Mlungwana\(^3\), 2018, the Constitutional Court, confirmed the ruling of the High Court that section 12(1)(a) of the RGA is unconstitutional in that it made the failure to give notice or providing inadequate notice by protest and gathering conveners a criminal offence. The Constitutional Court found that the RGA provision did not serve to facilitate the right to peaceful assembly nor did it prevent “disruptive assemblies” and it reiterated the importance of the right to peaceful assembly including everyone’s right to “express their frustrations, aspirations or demands”.

**Main conclusions on the law and right to peaceful assembly:**

- International and Africa regional human rights law, as well as South African law converge in agreement that the right to peaceful assembly is a right not a privilege and a cornerstone of democracy.
- The South African government at all levels must not only refrain from violating the rights of individuals involved in an assembly, but act to ensure the rights of those involved and to facilitate an enabling environment for exercising that right.
- All levels of government, including authorities at the provincial and municipal level, must allow the police to conduct their operations professionally in managing gatherings;
- Officials must not misuse the Regulation of Gatherings Act nor the criminal justice system to deter people from expressing their right to peaceful assembly.

2. **Policing to uphold the right to peaceful assembly:** The state’s obligation is to facilitate the realisation of this right and to ensure a culture of best practice in the policing of assemblies, avoiding the use of force unless “strictly unavoidable” and “proportionate to the threat posed”.

In the context of the state’s legal obligations, the expert panel on this new topic explored a range of areas of concern on the policing of assemblies. They also drew attention to core principles in ‘best practice’.

The panel noted that in line with the state’s obligation to uphold the right to peaceful assembly, its duty is to ensure that law enforcement officials are trained, equipped and lawfully instructed to protect and facilitate the right to peaceful assembly. The South African Police Service (SAPS) is obliged to follow their Constitutional mandate including regulations on the management of assemblies. In response to any public gatherings, they are explicitly required to use “soft skills”\(^4\) to identify and diffuse possible sources of conflict before it escalates to violence.

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\(^2\) South African Transport and Allied Workers Union (SATAWU) and Another v Garvas and Others 2013 (1) SA 83 (CC) (Garvas)

\(^3\) Mlungwana and others V State and Another (with Equal Education, Right2Know Campaign and UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association as Amici Curiae), CCT 32/18

\(^4\) Emphasised by panellist Commissioner Chris Nissen and as required in terms of SAPS National Instruction 4 of 2014.
In respect of the overall pattern of protests in South Africa, the panel referred to analysis of Data from the SAPS Incident Registration Information System (IRIS) database and of a database of media reports on protest. Professor Kate Alexander, the presenter on the police IRIS and media data, argued that the information did not lend itself to a simple binary classification of “violent” and “peaceful” in relation to reported incidents. The analysis of the speaker and her colleagues included a categorisation of protest that involves “disorderly or disruptive” conduct. This approach conforms with international human rights law and standards and the rulings of the Constitutional Court on the right to peaceful assembly. In practical terms, this approach should guide the police response to protests in terms of their legal obligations, instructions and tactics.

Against the background of the convergence in law, standards and principles on the use of force, police training and conduct concurrent with those standards, the panel drew attention to:

- Where the use of force is “strictly unavoidable” it must be used in accordance with the principles of legality, necessity and proportionality; and
- Police should observe the prohibition against arbitrary arrest and detention, which effectively criminalises assemblies and dissent.

The next speaker on this panel described four key principles in the police management of assemblies: facilitation, knowledge, communication and differentiation. Mr White referred to the first principle listed below as the overarching principle, achievable with the implementation of the remaining three principles.

- Facilitation, through –
  - Developing knowledge by planning, information and intelligence gathering and making risk assessments; and from this basis identifying appropriate tactical options;
  - Maintaining clear and continuous communications, building trust by using “soft skills” in maintaining engagement with organisers and participants; and
  - Differentiation - identifying which particular individuals may be posing a threat and how this specific threat can be managed. The principle of differentiation is crucial to decision-making on the lawful use of force.

In applying these principles, the speaker noted that the police would be managing assemblies premised on the fact that the right to assemble is a right and not a privilege. The extent to which the police can achieve this would also be reflective of a government’s tolerance of dissent and upholding the operational independence of the police from the government.

The final speaker on this panel drew attention to concerns raised about “Less Lethal Weapons” (LLWs), which are typically used by SAPS’ Public Order Police (POP) units, such as shotguns and approved rubber rounds and stun grenades. Despite being referred to as “less than lethal” they can cause severe injuries or death though misuse. In the speaker’s view these weapons are not suitable for crowd management, because they are indiscriminate in their effects and can be deliberately misused to cause harm. As a result, the speaker

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5 See more detail of Professor Kate Alexander’s analysis in the full report on the workshop.
6 The UN Joint Report on the management of assemblies, the ACHPR Guidelines for policing assemblies, the Organisation for Security and Co-operation in Europe (OSCE) and their Office for Democratic Institutions and Human Rights and in South Africa’s developing law on this issue
7 Gary White, a former police officer and expert witness on policing to the Marikana Commission of Inquiry
8 Adele Kirsten
9 Adele Kirsten’s concern regarding weapons used in public order policing was also dealt with by other speakers in a later panel, in more detail.
encouraged activists to develop skills for documenting and recording the misuse of weapons in protest contexts.

**Main conclusions on upholding the right to peaceful assembly:**

- The state should contribute to building a culture of best practice in policing of assemblies that avoids the use of force unless strictly necessary and must be proportionate to a specific risk posed.
- Government is obliged to ensure that the police are trained, equipped and lawfully instructed to protect the right to peaceful assembly;
- The operational independence of the police must be respected;
- The development of a clear police reform programme:
  - an overhaul of the senior management structure of the SAPS and the appointment of skilled, experienced and capable women and men of integrity to positions of senior management in the SAPS.
  - Police training must be based on human rights principles. Training should emphasise the core principles of facilitation, knowledge, communication and differentiation. They should have self-protection equipment.
- The government must ensure that any weapons permitted for use offensively in public order policing is not indiscriminate in its effects and can be used without causing harm.

3. **Promoting police accountability** to change police practice and to ensure non-repetition of human rights violations in the context of protests.

The third panel of the workshop drew attention to key dynamics which were serving to undermine the professionalism of the police units used to respond to and manage public protests, with consequent risks of human rights violations. Serious failures in the systems of accountability were also highlighted, creating additional risks of repetition of abuses and undermining peoples' freedom to exercise their right to peaceful assembly and associated rights.

The first speaker\(^{10}\) drew attention to a low level of government support for maintaining a sufficient capacity of trained, appropriately managed and equipped Public Order Policing (POP) units. There had been little growth in personnel since the parliamentary discussion in 2014 on this concern. The speaker also noted that the applicable SAPS regulation\(^{11}\) governing the duties of POP units combined both public order policing duties and “the combatting of serious and violent crime”. This situation created the risk of a ‘contamination of mind-sets’ and potentially the undermining of POP training intended to inculcate a commitment to ‘negotiated management of protest and minimising the use of force’.

The remaining members of the panel focused on the vital importance of the state fulfilling its obligation to ensure accountability for human rights violations, a necessary condition for preventing the repetition of abuses. As speaker Gary White emphasised in his comments, police accountability is what drives a virtuous cycle of ‘public confidence’, ‘police effectiveness’ and ‘legitimacy’.\(^{12}\) Values-based leadership, internal mechanisms of control and accountability, he emphasised, are central to addressing a prevailing culture of impunity within the police.

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\(^{10}\) David Bruce, comments on the management and mandate of the POP.

\(^{11}\) SAPS National Instruction 4 of 2014

\(^{12}\) Derived from a policing accountability model shared by Gary White.
Speaker Dr Faull reviewed concerning trends in the data on SAPS’s disciplinary hearings spanning the period 2007/8 to 2017/18, showing a 44 per cent decline in the number of hearings during this period. In the same review period dismissals annually had declined by nearly 50 per cent.\textsuperscript{13} Between 2012/13 and 2017/18, an average of 62% of SAPS disciplinary cases were withdrawn on a finding of not guilty. The speaker noted that these outcomes contrasted poorly in comparison with the Department of Correctional Services, as shown in his cited findings of Dr Lukas Muntingh’s 2019 analysis.

The speaker also drew attention to negative trends in the outcomes from criminal investigations by the external oversight body, the Independent Police Investigative Directorate (IPID). In the period 2017/18, IPID reported that 90 per cent of the complaints were "dismissed, declined, unsubstantiated or unfounded."\textsuperscript{14} From the 1,428 criminal recommendations sent by IPID to the National Prosecuting Authority (NPA), IPID was awaiting responses on 72 per cent of the cases.\textsuperscript{15}

Public interest litigants such as Lawyers for Human Rights noted that their efforts to seek accountability were challenged by police interference in investigations and intimidation directed at their clients seeking accountability for police unlawful conduct against them.\textsuperscript{16} Both SAPS disciplinary processes and IPID complaint processes do not always result in successful disciplinary and accountability outcomes even despite the intervention of legal representation. As the speaker, Attorney Ncube, described it, in some cases the personal costs of seeking accountability are too high to bear for clients unable to protect themselves against intimidation and reprisals from implicated police officers.

However, in the past decade the cost to the state (that is the public) from civil damages suits against the police has cumulatively increased to the current annual R300 million. This information was raised during the workshop by Gareth Newham from the ISS.\textsuperscript{17} While some complainants were clearly managing with legal support to gain access to some measure of justice, the remedy does not produce direct and indirect consequences for implicated police officers or the SAPS institutionally.

### Main conclusions on promoting police accountability:

- There is a need to entrench effective disciplinary and criminal investigation processes to ensure non-repetition of abuses by police.
- The government and parliament should urgently address the crisis in ensuring effective accountability. IPID is challenged in its resources, insufficient independence and lack of responsiveness from the prosecution authorities;
- Complainants in cases of misuse of force and injury related cases from police public order operations should be treated with respect and urgency, and not as criminal suspects;
- Failing accountability systems entrench a culture of impunity and can only lead to an increase in human rights violations and other abuses by the police.

### 4. Documenting the misuse of force: Methods to document and confirm evidence of the unlawful use of force and to identify weapons which should be excluded in public order policing contexts.

The final panel provided information on techniques to identify the type of weapons used by police or other armed security officers in order to analyse the legality of their use and to

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\textsuperscript{13} Data analysis shared by Dr Andrew Faull
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid.
\textsuperscript{16} Lawyers for Human Rights Attorney Wayne Ncube shared with the panel some of his experiences of representing clients, who are seeking accountability from the police.
\textsuperscript{17} Intervention from the floor as responder to the Panel by ISS’s Gareth Newham, noting that costs of civil claims made by the public have risen to over R300 million annually, representing almost an 800% increase in 10 years.
document injuries arising from their misuse. Speaker Neil Corney from the Omega Research Foundation encouraged monitors to pay attention to the shape, dimensions, markings and ‘mechanisms of use’ of weapons and the features of vehicles used by the police in specific situations.\textsuperscript{18} He referred with concern to the ‘double ball rubber bullets’, fired from 12 gauge shotguns and commonly used by SAPS’ POP units in response to protest situations. The weapon is indiscriminate when fired in a crowd situation, capable of causing multiple and serious injuries, and the bullets difficult to identify in later accountability processes.

The second speaker, Dr Steve Naidoo, concurred with this analysis and documented evidence of the deliberate misuse or the indiscriminate effects of shotguns and rubber bullets, causing serious injuries such as loss of an eye, or multiple severe gunshot injuries to protestors fleeing a police dispersal line. He added information on similar injury patterns from these weapons in other countries. Some of his examples were drawn from the documentation which he undertook for SERI and with the third speaker, Dr Mary Rayner, of injuries sustained by students during the #FeesMustFall protests.\textsuperscript{19} The injuries resulted from the indiscriminate firing or misuse of weapons under circumstances, which violated some or all of the human rights principles of legality, necessity and proportionality in the use of force. Victims were posing no threat, were unarmed, or in some cases seeking to negotiate and communicate with POP officers, or were fleeing a dispersal line, when they were injured by police.

In these and other cases on which he presented, Dr Naidoo highlighted the long-term medical and personal impacts of injuries caused by the misuse of or indiscriminate effects of these weapons.\textsuperscript{20}

Both Neil Corney and Dr Naidoo agreed that stun grenades are also not appropriate for crowd management given their military origin and the risks from the misuse of this weapon, including blast injury, pressure wave-hearing loss, shrapnel penetrating injury and heat-burns.

Documentation and media reporting on other situations, such as the Westbury protests in 2018, provided further examples of the police misuse of force and the injuries seen during the student protests. Sumeya Gasa also highlighted the challenges which journalists and monitors face in their efforts to fulfil their professional duties particularly in the face of such conduct by the police.\textsuperscript{21} The speaker and her colleagues made efforts to obtain a Promotion of Access to Information (PAIA) response from the SAPS regarding the weapons used during the period of the student protests. The resulting report confirmed that the police used excessive force to respond to the student protests.

**Main conclusions on documenting the misuse of force:**

- Government and police authorities need to review and end the use of certain ‘public order policing’ weapons for law enforcement purposes where evidence strongly indicates risk of serious harm.

\textsuperscript{18} Information shared by Neil Corney who presented on the use, manufacturing and trade in weapons internationally.


\textsuperscript{20} Dr Steve Naidoo shared information (anonymously presented) from his experiences as a forensic medical and injury expert dealing with injuries and fatalities arising from the unlawful use of shotguns, rubber bullets and stun grenades in South Africa and elsewhere.

\textsuperscript{21} Journalist, Sumeya Gasa, shed light on her experiences of documenting the Westbury protests of 2018.
CIVIL SOCIETY STRATEGIES AND ADVOCACY

There was consensus from working group discussions that civil society and CBOs should:

- Familiarise themselves with the contents of the new Protection of Critical Infrastructure Bill through public education, media commentary and to seek opportunities to raise concerns through parliament.


- Influence the agenda of the new Parliamentary Police Portfolio Committee to focus on systems for enhancing police accountability and to ensure that the revision of the Regulation of Gatherings Act enhances the protection of the right to peaceful assembly.

- Engage the media for more responsible and human rights-based reporting on public protests through engaging with editors and journalists and offering training on human rights, policing standards and protests.

- Collect and disseminate data and evidence which can assist in holding the police, including the POP, accountable for their conduct and to challenge various public misconceptions about protest.

WORKSHOP PANELLISTS & FACILITATORS

Professor Kate Alexander, Centre for Social Change, University of Johannesburg
David Bruce, Independent Researcher on Policing and Criminal Justice issues
Neil Corney, Research Associate, OMEGA
Dr Andrew Faull, Senior Researcher, Institute for Security Studies (ISS)
Sumeya Gasa, journalist
Advocate Kathleen Hardy, Johannesburg Society of Advocates
Zamantungwa Khumalo, Attorney, Socio-Economic Rights Institute (SERI)
Adele Kirsten, Director, Gun Free South Africa
Dr Steve Naidoo, forensic medical expert on injury identifications
Commissioner Chris Nissen, South African Human Rights Commission
Wayne Ncube, Attorney, Lawyers for Human Rights (LHR)
Dr Mary Rayner, human rights researcher and workshop coordinator
Chumile Sali, Project Officer, African Policing Civilian Oversight Forum
Gary White, Independent Expert on policing ‘best practice’ in the context of assemblies
Nomzamo Zondo, Director of Litigation, Socio-Economic Rights Institute (SERI)