

THE PROTECTION OF HUMAN RIGHTS DEFENDERS AGAINST ASSASSINATION UNDER SOUTH AFRICAN LAW

by

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DECLARATION

I, 2245177 declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

Human rights defenders (HRDs) are under siege in South Africa. They face unprecedented attacks which, in the worst of circumstances and frequently, culminate in assassination. In that light, the research report examines the extent to which the South African law protects HRDs against assassination. To set out the extent of the risks countenanced by HRDs, the report discusses a few cases of assassination in the environmental, whistleblowing, and land rights categories. Turning to the law, it discusses and analyses domestic, international, and regional legal instruments before it finds that the available legal mechanisms can insulate human rights defenders against assassination. To gain insight into the protections extended by other jurisdictions, the report also scans through legal mechanisms meant to extend specific protection to HRDs in foreign jurisdictions and observes that despite the presence of these laws, human rights defenders in these jurisdictions still face unprecedented violations including assassination. Drawing from these instruments and the prevalence of assassination, the report argues that lack of commitment to implementation and the absence of political will to address the root sources of violations perpetuates a climate of impunity resulting in the scourge of assassination that takes place unabated. Ultimately, the research report concludes that while the available legal mechanisms can extend protection to human rights defenders, the executive arms of the state are lagging in their implementation responsibilities. As a remedy, amendments to the Protected Disclosures Act (PDA) and adoption a HRD specific legislation with sufficient implementation safeguards are recommended to alleviate the situation of HRDs. The proposed safeguards include establishment of an independent panel of experts to foster implementation, and amending the PDA to extend protection to whistle-blower HRDs against assassination while imposing hefty penalties for non-action.

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1 Introduction

A human rights defender (HRD) is anyone or a group of people who work to identify the failings of state or non-state actors (NSAs) in their obligations to promote, protect and respect human rights both on the domestic and international planes.¹ They raise alarm by exposing these shortcomings in the public domain. In short, anyone who promotes human, land, and environmental rights at local, national, or international level is a HRD. The wide ambit of the definition captures an array of activities and actors like community activists, whistle-blowers, journalists, and even medical doctors who speak out about the state of their patients in public hospitals.² HRDs must accept that human rights are universal and pledge allegiance to peaceful assertion of human rights.³ They are agents of social change who are indispensable in an open and democratic society committed to a broad range of human rights and fundamental freedoms. HRDs demand accountability from responsible parties while seeking justice for their communities.⁴ They do this variably in their spheres of influence to ensure diverse and inclusive societies where human rights and sustainable development thrive.⁵ Essentially, HRDs augment states in realising their human rights obligations if they are given the platform to pursue their calling unhindered.

The nature of human rights defence work exposes HRDs to a lot of criticism, and interference, from state and NSAs. This political and corporate opposition often results in a myriad of illegal acts designed to undermine their human rights work including but not limited to death threats, notoriously long detentions, arbitrary arrests, physical attacks, surveillance, smear campaigns, harassment, and sometimes legal action.⁶ These egregious violations disproportionately affect women HRDs given societal stereotypes emanating from the historical dominance of patriarchy which confined women to care-giving roles and the unpaid care economy.⁷ When they speak

¹ United Nations General Assembly Res 51/244 (8 March 1999) UN Doc A/RES/53/144 (UNGA) art 1.

² South African Human Rights Commission *The status of human rights defenders in South Africa* (April 2018) 8.

³ UNGA Res 217A (10 December 1948) UN Doc A/RES/217 (III). See also United Nations Human Rights Commission, Special Rapporteur on Human Rights Defenders, *About human rights defenders* <<https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders>>. (UNHRC).

⁴ International Service for Human Rights ‘Supporting Defenders Serving Humanity’ (ISHR) (2020) 6.

⁵ Ibid 13.

⁶ UNHRC ‘Report of the Special Rapporteur on the situation of Human Rights Defenders’ (10 December 2020) UN Doc A/HRC/46/35 7. See also Global Witness Report *Last Line of Defence* (10 September 2021) 10.

⁷ UNHRC 2012 ‘Report of the Special Rapporteur on the right to food’ (24 January 2014) UN Doc A/HRC/25/57 11. See also B Meyersfeld, ‘The rights of women and girls in HRIA: The importance of gendered impact assessment’ in N Götzmann (ed) *Handbook on human rights impact assessment*, (2019).

out against societal injustices, women HRDs encounter unpleasant gendered consequences which has a domino effect on their loved ones. In the worst of circumstances, HRDs pay with their lives. At least 38 assassinations were reported in KwaZulu Natal mining affected communities between 2016 and September 2020.⁸ This problem cascades to a global level where South Africa consistently appears in world statistics on killings. At least 1323 HRDs were assassinated worldwide between 2015 and 2019 with 14% being women and youth HRDs.⁹ In 2020, 331 HRDs were assassinated globally.¹⁰ The number jumped to 358 in 2021 translating to over 7 HRDs losing their lives for human rights defence work weekly.¹¹ More than half of these deaths are land and environmental HRDs. These numbers are just a glimpse of the true extent of the killings as underreporting is rife especially in rural Africa.¹² In South Africa and the world over, this is particularly the case for land and environmental HRDs in the extractives industry where capital interests seek to eliminate voices of dissent perceived to hinder their profit motive. Assassination of HRDs perpetuates human rights violations and has a chilling effect on activism.¹³

The assassination of HRDs clearly violates their fundamental rights and freedoms guaranteed by the Constitution of the Republic of South Africa, 1996 (the Constitution) and international law. One then ponders how such senseless violations happen in a democratic state with a deemed world-class constitution. This question informs the research report's analysis of the extent and adequacy of the protections that HRDs receive under South African law with a specific focus on assassination. The significance of constitutional rights to dignity, freedom and security of the person, equality, and the right to life foreground this report. Failure to respect, promote and protect these rights constitutes an attack on the most basic commitments and institutions in our democracy.

The research question will be unpacked by outlining the context within which HRDs operate, achievable through a discussion of the historical background of human rights violations and

⁸ Global Initiative Against Transnational Organized Crime 'eMpembeni mirrors the scourge of mining-related assassinations in KZN' <<https://www.dailymaverick.co.za/article/2020-09-14-empembeni-mirrors-the-scurge-of-mining-related-assassinations-in-kzn/>>

⁹ UNHRC (note 6 above) para 41.

¹⁰ Front Line Defenders *Global Analysis* (2020).

¹¹ Front Line Defenders *Global Analysis* (2021).

¹² UNHRC (note 6 above).

¹³ GroundWork *Warnings not heeded: Death of an activist* (October 2021) 15.

detailing the experiences of a few classes of HRDs. Then, a discussion of the legal framework governing HRDs in South Africa is followed by a summary-discussion of foreign jurisdictions with specialised legislative protections for HRDs to determine the impact this has had on HRD protection. An analysis of the South African legal framework follows which concludes that the existing laws albeit fragmented can protect HRDs. Primarily, HRDs are exposed to assassination and other forms of violations due to the lack of accountability measures and political will to realise the prescripts of the law as well as a complicit state. As a result, the report primarily recommends the need for effective implementation strategies to ensure that the existing legal framework is harnessed to achieve greater protection of HRDs. This can be achieved through an amendment of Protected Disclosures Act 26 of 2000 (PDA) and adoption of The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) with additional safeguards such as the establishment of an independent panel of experts and imposition of hefty sanctions to ensure that implementation is a reality while satisfying the safety needs of HRDs.

2 Contextual Overview

South Africa's colonial-apartheid history of gross human rights violations is contrasted with the present prevailing atmosphere, followed by a discussion of specific instances of assassination of environmental, land rights, and whistle-blower HRDs. These categories are neither distinctive nor exhaustive but serve as an exhibit for HRDs' exposure to assassination in South Africa. An environmental human rights defender can also be a land rights defender while a whistle-blower can be working on land and environmental rights issues. The focus on environmental and land rights HRDs is necessitated by their consistent appearance in world statistics as the deadliest human rights defence sectors.¹⁴ The South African landscape also closely reflects these statistics as environmental and land rights defenders frequently encounter unprecedented attacks. Their work is also inextricably linked to the topical issue of climate change and the imminent climate catastrophe. The activities they question - like fossil fuel extraction - are significant contributors to climate change.¹⁵ The aim is to unearth the reasons behind this worrisomely high-exposure to assassination and to contribute to the ongoing

¹⁴ Front Line Defenders (note 10 above) 4.

¹⁵ Global Witness (note 6 above) 7.

discussions on the interplay between climate change and human rights defence work as well as possible solutions to avert such environmental evils. The report also discusses instances of assassination of whistle-blower HRDs because of the rampant levels of corruption and misgovernance that trouble South Africa and the necessity of such exposés to a state whose inhabitants equally benefit from its resources.¹⁶

2.1 Historical background of human rights violations in South Africa

Indigenous inhabitants in colonial and apartheid South Africa were subjected to inhumane treatment like routine torture and violations.¹⁷ They were deemed inferior and confined to Bantustans unless they were permitted to work for the white man in the cities under restrictive conditions.¹⁸ As a crime against humanity, apartheid involved heinous acts like assassination and incarceration (under inhumane conditions) of those that dared question, or speak out against the regime's policies.¹⁹ The colonial-apartheid era also had devastating intersecting gendered effects on women of colour who suffered at the hands of the state apparatus in their quest to unite with their families and earn a decent living.²⁰ That human beings are equal with intrinsic worth was unknown to South Africa until the dawn of democracy.²¹ Hence, when the Constitution promised a move away from this humiliating past to a place where human dignity, equality, and freedom would be central tenets, it was celebrated by many.²²

In the early 1990s, the expectation was societal and political transformation through the Constitution and the African National Congress (ANC) which emerged as the ruling political party.²³ However, a glance into contemporary South African affairs is not indicative of these promises. Almost three decades into democracy, South Africa tops world statistics on poverty

¹⁶ Society, Work & Politics Institute Working Paper 10 *The political economy of corruption: elite-formation, factions and violence* (2019); Transparency International *Corruption Perceptions Index* (2018) <https://www.sipotra.it/wp-content/uploads/2019/02/2018_CPI_AfricanUnion_Map_EN.pdf>.

¹⁷ *Brink v Kitshoff* 1996 (4) SA 197 para 40; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 26.

¹⁸ African Feminist Forum 'South African Women Protest Pass Laws' <<http://www.africanfeministforum.com/south-african-women-protest-pass-laws/>>.

¹⁹ *Nelson Mandela Foundation Trust v Afriforum NPC* (EQ2/2018) [2019] ZAGPJHC 324 para 78.

²⁰ *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) paras 98 & 102.

²¹ *Rahube v Rahube* 2019 (2) SA 54 (CC) para 1.

²² Preamble.

²³ S Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, Democracy and Development* 384, 385-6; T Madlingozi 'Social Justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stell LR* 123, 131.

and inequality gaps.²⁴ White supremacy lingers as wealth remains controlled by the white minority.²⁵ Land struggles are still rampant with an overwhelming majority of arable land remaining in the hands of the minority while that which is state-owned is highly politicised.²⁶ Violations of fundamental rights and freedoms of the poor masses is the order of the day. The new dispensation simply incorporated a few black middle class into the status quo while the majority of South Africans languish in their plight characterised by assassination, human rights violations, oppression, and subjugation.²⁷ This persistent exclusion is humiliating and should be condemned in the strongest of terms.²⁸ The constitutional promise of a radical break is correctly questionable.²⁹ In contemporary terms, the historically disadvantaged remain oppressed, excluded, and marginalized.³⁰ This gloomy state of affairs necessitates the presence of camps that question and demand accountability from those tasked with bringing the Constitution to life. As a result, speaking out on the questionable conduct of the state and NSAs - as HRDs do - in a way breathes life into the Constitution by forcing engagement on problematic issues in South Africa.

2.2 Environmental human rights defenders

Environmental HRDs (EHRDs) strive on preserving a healthy and conducive environment for current and future generations' well-being.³¹ In South Africa, their work is inspired by the looming climate crisis and everyone's constitutional entitlement to an environmental right.³² They play a considerable role in the world battle against climate change and pollution which disproportionately affect the global south, specifically the poor and vulnerable.³³ Their work is among the riskiest in human rights defence.³⁴ EHRDs often defy the odds and stand up against giant private enterprises like multi-national corporations (MNCs) who usually operate

²⁴ Sibanda (note 23 above) 388.

²⁵ C Albertyn & D Davis 'Legal Realism, Transformation and the Legacy of John Dugard' (2010) 26 *SAJHR* 188, 203. J Modiri 'Conquest and Colonialism: First thoughts of an alternative jurisprudence' (2018) 34 *SAJHR* 300, 305.

²⁶ See for example GroundWork report (note 15 above) 18.

²⁷ Madlingozi (note 23 above) 125.

²⁸ *Mahlangu* (note 20 above) para 115.

²⁹ Modiri (note 25 above). D Davis 'Is the South African Constitution an obstacle to a democratic post-colonial state?' (2018) 34 *SAJHR* 359, 361.

³⁰ Modiri (note 25 above) 309.

³¹ Global Witness 'Defending Tomorrow' (July 2020) 24.

³² Section 24.

³³ Global Witness (note 6 above) 16.

³⁴ *Ibid*; Frontline Defenders (note 10 above) 4.

unsustainably.³⁵ They defend their land, environment, and natural resources against exploitation, degradation, and pollution perpetuated by profit-centred corporates who externalise these gains at the expense of poverty-stricken host-communities.³⁶ EHRDs therefore strive to shield their environment to which they attach historic, cultural, and economic significance from unsustainable corporate activities. In South Africa and the world over, EHRDs are mainly concentrated in the rural areas where incidences of violations and assassinations are rife, underreported and largely invisible due to limited media reach which translates to limited public scrutiny.³⁷ Consequently, there is hardly any incentive for responsible parties to adhere to human rights obligations or to sustainably develop these areas which exacerbates the plight of rural-based HRDs.

2.2.1 Case studies

There is a concerning prevalence of assassination of environmental HRDs in South Africa. In 2020, mam Fikile Ntshangase - a staunch believer in environmental justice - was assassinated for her environmental activism. She lost her life for opposing Tendele Coal Mine's expansion into hers and the communities' land and homes in Mtubatuba KwaZulu Natal.³⁸ Having experienced the negative effects of coal mining - like pollution from coal dust that resulted in poor health and cracked dwellings in the community - mam Ntshangase among other leaders of the Mfolozi Community Environmental Justice Organisation resisted the proposed displacements.³⁹ When attempts to persuade her to concede failed, she was shot dead in the full glare of her minor dependants.⁴⁰ Her killing is directly linked to her opposition of the mine's proposed expansion and the resultant land and environmental degradation which is indicative of the cunning nature of capital interests where profit and dividend is concerned. The corporate in question incited violence against opposing community members by threatening their

³⁵ Global Witness Report (note 32 above)12.

³⁶ B Meyersfeld 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' (2016) *Business and Human Rights Journal* 1, 18; Global Witness (note 6 above)16-17.

³⁷ Global Witness 'Time for a climate revolution' (2020) 29. UNHRC (note 6 above) para 5; GroundWork, Centre for Environmental Rights, Human Rights Watch & Earthjustice 'We know our lives are in danger' (2019) 30.

³⁸ Asina Loyiko <<https://asinaloyiko.org.za/news/the-killing-of-somkhele-environmental-activist-fikile-ntshangase-a-joint-statement>>; Letters addressed to the President and Minister by GroundWork on 27 October 2020 <https://GroundWork.org.za/wp-content/uploads/2022/08/Letter_F_Ntshangase_President_RSA_221021.pdf>.

³⁹ GroundWork (note 13 above) 4-5.

⁴⁰ Ibid 17; Front Line Defenders (note 10 above) 14.

employees with job losses and missed 13th cheques if the opposition against the proposed expansion prevailed.⁴¹ It also fuelled these violations by withholding pay-outs for those members willing to relocate until the opposing members had signed.⁴² Mam Ntshangase's killing was preceded by death threats through phone calls, text messages, and physical threats which were reported to the local police, but no meaningful investigations were carried out and no protection was provided to ensure her safety.⁴³ Other opposing community members were also subjected to these attacks and threats.⁴⁴ Civil society organisations and international bodies like the United Nations have called on the Office of the President and law enforcement authorities to urgently act and guarantee protection of EHRDs from assassination and violations to no avail.⁴⁵

The indigenous community of Xolobeni in the Eastern Cape is haunted by a similar wave of assassination, violations, and abuses. For decades, they have been resisting the raw power of politicians and state-backed corporate power by standing firm against unsustainable development.⁴⁶ They demand development in which there is sufficient consultation and meaningful engagement.⁴⁷ In 2016, their resistance culminated in attacks which led to the assassination of the Amadiba Crisis Committee's chairperson, Mr Sikhosiphi Radebe. He was assassinated for leading the resistance to a titanium mining establishment, a development which the movement and the greater community deemed unsustainable.⁴⁸ The MNC involved, Mineral Commodities Limited, also denied any involvement in the preceding threats and resultant assassination yet it was clear that Mr Radebe's central role in opposing the corporate's establishment in this indigenous community was inextricably linked his demise.⁴⁹ The Xolobeni community also persistently reported death threats and the environment of fear in the community to the local police station leading up to Mr Radebe's assassination but no

⁴¹ GroundWork (note 13 above) 8.

⁴² Ibid 9.

⁴³ Ibid 17; UNHRC (note 6 above) para 1.

⁴⁴ GroundWork report (note 13 above) 9.

⁴⁵ GroundWork 'Letter to the President' (27 October 2020) <https://old.GroundWork.org.za/archives/2020/gW_Letter_to_Pres_&_Min_re_Fikile_Ntshangase_271020.pdf>; Civil society organisations joint correspondence to the office of the President (22 October 2021) <https://GroundWork.org.za/wp-content/uploads/2022/08/Letter_F_Ntshangase_President_RSA_221021.pdf>. UNHRC (note 6 above) para 1.

⁴⁶ GroundWork et al (note 38 above) 27; *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP).

⁴⁷ See *Baleni* ibid; *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk).

⁴⁸ L Chamberlain 'Growing Threats To Environmental Human Rights Defenders: The Latest SLAPP Suit Developments In South Africa' (2020) 26 *SA Journal Of Environmental Law And Policy* 18.

⁴⁹ GroundWork et al (note 38 above) 27-28.

meaningful action was taken.⁵⁰ Almost 7 years later, Mr Radebe's assassins still run loose. International, regional, and domestic civil society organisations (CSOs) have also called on the government of South Africa to act against senseless assassination and egregious violations.⁵¹

In the case of EHRDs, the state typically approves operating licences without proper environmental impact assessments and consultations of the affected communities which results in negative impacts on these communities like ill-health and mining-induced resettlements.⁵² There is a long line of cases where the state has been dragged to court by EHRDs and their communities for dishing out operating licences without the necessary consultations and environmental impact assessments.⁵³ The state's incompetence in this regard is fuelled by misgovernance, corruption, and political greed of those trusted with the state's well-being. In many instances, state actors collude with capital interests to further private agendas at the expense of the poorest and most vulnerable members of society while labelling them enemies of progress.⁵⁴ It is when these individuals and communities resist such development and injustices that conflict arises which culminates in assassination of leading voices.⁵⁵ The realisation by HRDs - through intra-community exchanges and education campaigns by CSOs - that the aftermath of the extraction activities is a scarred environment and relatively poorer communities fuels their resistance.⁵⁶ Consequently, EHRDs to an extent shield the looming climate catastrophe by asking the right questions and ensuring that those responsible for environmental harm account.⁵⁷ They therefore deserve heightened protection to enable their instrumental work.

⁵⁰ Front Line Defenders 'Stop the killing of human rights defenders' (2016) 9.

⁵¹ OMCT 'Killing of anti-mining activist Sikhosiphi "Bazooka" Rhadebe' <<https://www.omct.org/en/resources/urgent-interventions/killing-of-anti-mining-activist-sikhosiphi-bazooka-rhadebe>>.

⁵² *Baleni* (note 46 above); *Sustaining the Wild Coast* (note 48 above); GroundWork report (note 13 above) 9. GroundWork et al (note 38 above) 27; TE Downing 'Avoiding New Poverty: Mining-Induced Displacement and Resettlement' 2002 *MMSD*.

⁵³ *Baleni* (note 47 above); *Sustaining the Wild Coast* (note 47 above); *The trustees of the GroundWork Trust v Acting Director-General: Department of Water and Sanitation WT02/18/ MP; Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP).

⁵⁴ South Africa Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* (2016) 1. GroundWork report (note 13 above) 3.

⁵⁵ Front Line Defenders *Global Analysis* (2019) 7.

⁵⁶ Meyersfeld (note 36 above) 2, 6, 15; Global Witness (note 6 above) 7.

⁵⁷ *Ibid.*

2.3 Land human rights defenders

The land rights struggle has been historically contentious and is still a heavily politicised issue in contemporary South Africa. Hence, land HRDs face serious risks in their work.⁵⁸ A sombre case in question is that of the Abahlali baseMjondolo movement which has to date lost 24 of its members to assassination.⁵⁹ The movement represents the plight of poor and landless shack dwellers in South African urban settlements. They advocate for social justice by demanding access to land and basic governmental services necessary for dignified livelihoods.⁶⁰ Their struggle reflects that of many black South Africans who find themselves in precarious land situations. Abahlali members have been at the receiving end of assassination and egregious violations since its inception in 2005.⁶¹ Attacks on the movement have recently intensified in eKhenana, Durban in the KwaZulu Natal province where three members were assassinated within a space of four months in 2022.⁶² They assert their rights to land, housing, and service delivery through self-help measures which unsettles the political heavy weights in the province who perceive this struggle as a threat to formal politics.⁶³ The latest victim, Mr Lindokuhle Mnguni was a leader in the movement who had been imprisoned on fabricated charges related to his land rights activism. He had just returned to the settlement from a safe-house when he was assassinated in his shack in the early morning of August 2022, a few weeks after another woman leader in the movement, Ms Nokuthula Mabaso succumbed to gunshots.⁶⁴ Ms Mabaso was assassinated a day before she was to appear in court as a key witness to the ongoing repressions and assassination while her minor children looked on.⁶⁵ These lethal attacks on Abahlali members confirms the reality of violations and victimisations countenanced by land rights defenders. The ANC provincial leadership in the province is implicated in the

⁵⁸Business & Human Rights Resource Centre ‘Land & Environmental Defenders’ <<https://www.business-humanrights.org/en/big-issues/human-rights-defenders-civic-freedoms/land-environment-defenders/>>

⁵⁹SERI ‘Community Practice Note: Abahlali baseMjondolo: Living Politics’ (September 2022). Civil Society organisations letter to the president dated 9 September 2022 < http://seri-sa.org/images/140922_Civil_society_letter_re_Abahlali_baseMjondolo_human_rights_defenders_assassinations_logos.pdf>

⁶⁰Joint statement by civil society organisations at the 51st session of the UNHRC dated 30 September 2022 <<https://ishr.ch/latest-updates/hrc51-civil-society-calls-for-accountability-for-the-killings-of-human-rights-defenders-in-south-africa/>>

⁶¹< <https://abahlali.org/> >

⁶²Ibid.

⁶³SERI Community Practice Note (note 59 above) 66, 85.

⁶⁴Ibid 46, 55.

⁶⁵Ibid.

assassination and victimisation of the movement's members.⁶⁶ In one case, an ANC party councillor was apprehended for the assassination of a comrade in the Abahlali movement.⁶⁷

Members of the movement live in an environment of fear and uncertainty as the crackdown persists. The leaders are constantly in hiding for fear of these reprisals. However, their commitment to social justice means that they continue to organise in hiding while occasionally returning to their settlements for important meetings and events.⁶⁸ Other movements, Non-Governmental Organisations (NGOs), and CSOs including the United Nations Human Rights Council have registered solidarity with Abahlali comrades and have urged the South African government to act against this repression.⁶⁹

2.4 Whistle-blower human rights defenders

Whistle-blower HRDs play a vital role in alerting responsible authorities of irregularities in the management of state affairs that may cost the public financially.⁷⁰ This is especially true when state organs are involved given the entitlement of a state's residents to good governance and their public law right to basic governmental services.⁷¹ Mal-administration, fraud, and corruption cripples the economy and drains the public purse resulting in neglect of service delivery responsibilities of government to its citizens. Corruption is also inextricably linked to and implicates human rights because it undermines the rule of law, democracy, and realisation of social justice.⁷² It is a cancer that disrupts the smooth-functioning of government hence those working to expose it deserve elevated protection.⁷³ Yet, whistle-blowers who expose such issues out of human rights concerns are greatly exposed to risks of assassination and other forms of violations.⁷⁴ For instance, the R332 million covid-19 PPE procurement exposé in the Department of Health culminated in the assassination of Mrs Babita Deokaran in August

⁶⁶ Ibid 40, 93-97.

⁶⁷ Ibid 93.

⁶⁸ Z Pikoli 'Third Abahlali baseMjondolo leader – Lindokuhle Mnguni – murdered in cold blood' <<https://www.dailymaverick.co.za/article/2022-08-21-third-abahlali-basemjondolo-leader-lindokuhle-mnguni-murdered-in-cold-blood/>>.

⁶⁹ Letter by civil society organisations (note 61 above); Joint Statement (note 60 above).

⁷⁰ <<https://www.gov.za/anti-corruption/whistle-blowing>>

⁷¹ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 34-35.

⁷² *Glenister President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 57.

⁷³ UNHRC 'Report of the Special Rapporteur on the situation of Human Rights Defenders' (1 April 2022) UN Doc A/HRC/49/49 paras 7, 16.

⁷⁴ Ibid paras 18-19.

2021.⁷⁵ She was the whistle-blower who unearthed the irregular misuse of the taxpayer's money through corrupt deals involving some of the department's officials and ANC politicians.⁷⁶ The syndicate uses a cartel-style modus operandi where those deemed as threats to their ill-gotten gains are eliminated. Mrs Deokaran had been under surveillance for her exposé and eventually succumbed to gunshot wounds.⁷⁷ Concerns surrounding her safety were known to her employer – the government – but no action was taken until she succumbed to assassination. Another whistle-blower, Moss Phakoe suffered the same fate in 2009 after disclosure of corrupt deals by fellow ANC councillors, municipal managers, and a mayor in Mpumalanga.⁷⁸ Years later, these and similar cases remain unresolved while whistle-blowers are continuously victimised for revealing irregularities in state-run institutions.

2.5 Women HRDs

Women HRDs include individuals and organisations working on women, gender, and sexuality rights as well as women advancing human rights.⁷⁹ The history of women suppression and structural inequalities in power relations dates back time immemorial. Patriarchy and the joint history of apartheid and colonialism perpetuated women's subordination and designation as inferior human beings.⁸⁰ In many instances, this has resulted in women's confinement to the unpaid care economy or menial, low-paying jobs which exacerbates the stereotyping and catalyses violence against women in all realms of existence. Hence, being a woman and a HRD is a double tragedy. It involves daring to speak up against gender stereotypes, societal and cultural norms as well as challenging powerful corporate and state entities. In the environmental and extractive industries realm, women are the first to bear the brunt of unsustainable operations.⁸¹ It is therefore unsurprising that their voices are prominent in resisting violations. Women HRDs are also exposed to a myriad of unique risks like sexual

⁷⁵ News 24 'Why Babita was murdered' <<https://specialprojects.news24.com/silenced/index.html> >

⁷⁶ Ibid.

⁷⁷ Vincent Cruywagen 'Slain whistle-blower Babita Deokaran potentially unveiled a criminal syndicate at the Department of Health' <<https://www.dailymaverick.co.za/article/2021-08-28-slain-whistle-blower-babita-deokaran-potentially-unveiled-a-criminal-syndicate-at-the-department-of-health/>>

⁷⁸ Alison Tilley 'The price of speaking out as a whistle-blower in South Africa is high. Just Ask Moss Phakoe's family' <<https://www.dailymaverick.co.za/opinionista/2018-08-27-the-price-of-speaking-out-as-a-whistle-blower-in-south-africa-is-high-just-ask-moss-phakoes-family/>>

⁷⁹ UNHRC 'Report of the Special Rapporteur on the situation of Human Rights Defenders' (4 March 2010) UN Doc A/HRC/13/22/Add.3.

⁸⁰ *Mahlangu* (note 20 above) para 96.

⁸¹ GroundWork et al (note 38 above) 37

violence and abuse, character assassination, and harassment which in many instances culminate in assassination.⁸² They therefore face amplified risks which has exacerbated effects for women headed households. It is therefore crucial to employ a gendered lens when assessing and addressing assassination and violations against women HRDs which in turn paves way for a conducive and enabling atmosphere for their work.⁸³

In light of the ugly historical socio-political context of violence against women and their unique role and place in our societies, our apex courts have emphasised the need to treat them with utmost dignity and respect.⁸⁴ They have held strongly against state institutions for failure to protect the bodily integrity of women.⁸⁵ Women stereotyping and gender-based discrimination impairs women's enjoyment of their rights and fundamental freedoms hence the need for the state to take a strong stance against such violations.⁸⁶ In the instances narrated above, women HRDs faced amplified risks compared to their male counterparts. Their minor dependants - others with special needs - were deprived of primary caregivers and financial support.⁸⁷ Women HRDs therefore defy the odds and societal labels to ascertain their rights despite the severe dangers associated with their work which necessitates an elevated need for protection.

3 Analysis of the Contextual Overview

Most of the cases narrated above and beyond have not been resolved or concluded as law enforcement authorities fail at apprehending or prosecuting perpetrators. In the few instances of apprehension, these are the trigger men and not the powerful (political) figures behind these attacks. The state's deafening silence in the face of growing calls for protection of HRDs against assassination and violations from civil society organisations and the international community is baffling. It reflects an absence of the government commitment – at executive

⁸² African Commission on Human & People's Rights 'Report of the Study on the Situation of Women Human Rights Defenders in Africa' (2012) (ACHPR) para 52.

⁸³ ACHPR (note 82 above) para 53.

⁸⁴ *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) and *Bwanya v Master of the High Court, Cape Town* 2022 (3) SA 250 (CC).

⁸⁵ *K. v. Minister of Safety and Security* 2005 (6) SA 419 (CC) para 62.

⁸⁶ *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) para 62. ACHPR (note 82 above) para 26.

⁸⁷ eNCA 'Babita Deokaran's daughter still in mourning, wants justice' <<https://www.enca.com/news/deokaran-murder-my-mother-didnt-die-vain-daughter-says>>; <https://www.globalwitness.org/en/blog/i-cannot-sell-out-my-people-and-if-need-be-i-will-die-for-my-people/>>; Abahlali baseMjondolo Press statement on the death of Nokuthula Mabaso (6 May 2022) <<https://abahlali.org/node/17486/>>.

level – to address fatal risks faced by HRDs, yet they are a necessary watchdog to the exercise of state power. The prevalence of alarming levels of assassination as a consequence of human rights activism flies in the face of the post-apartheid democracy and freedom mantra.

The contribution of EHRDs to the realisation of environmental rights and sustainable development either intentionally or coincidentally - considering the United Nation's vision 2030 on Sustainable Development Goals (SDGs) - cannot be underestimated.⁸⁸ They advance realisation of SDGs like the climate change goals when they speak out against undesirable conduct of large for-profit corporations in their communities and environment. Further, the views and needs of indigenous peoples and communities are equally important in the decisions on perceived long-term sustainable development. The state's failure to create an enabling environment for HRDs and to hold perpetrators to account exacerbates the unprecedented attacks and assassination of HRDs.⁸⁹ Yet, it is the state's responsibility to effectively manage the expectations of communities and corporations at the backdrop of their primary constitutional responsibility to protect, promote, and respect human rights.⁹⁰ The diverse interests implicated in land and environment rights issues like profit motives, natural resource exploitation, misgovernance, and corruption also fuel violations against HRDs.

The risks and the significant contribution of HRDs to a healthy democracy set out above necessitates a discussion and analysis of the existing legal landscape to determine its role in insulating HRDs against assassination.

4 Legislative protections for HRDs.

Domestic and international legal instruments have underscored the significance of fundamental rights and freedoms which speak to the core of humanity as well as the important role of HRDs in democratic societies and their entitlement to heightened and specialised protection by the state. The failure by HRDs to advance their work or worse still, losing their lives in the process violates their fundamental rights and causes untold suffering to their loved ones.

⁸⁸ ISHR (note 4 above) 13.

⁸⁹ Global Witness (note 6 above)17.

⁹⁰ Section 7(2) of the Constitution.

4.1 The Constitution and Caselaw

The main domestic legal instrument regulating human rights is the Constitution of the Republic of South Africa, 1996. It guarantees HRDs a myriad of entitlements ranging from the right to life, equality, dignity, and fundamental freedoms like that of expression, assembly, association, and freedom and security of the person. Our apex courts echo similar sentiments. The triad of justiciable and enforceable rights cum values – equality, life, and dignity - undergird constitutional interpretation of the bill of rights as well as limitation of fundamental rights.⁹¹ These rights are inextricably linked, interdependent, and indivisible.⁹² Courts are also bound to advance these values in adjudication.⁹³ They are truly the cornerstone of South African democracy. These rights have a wide ambit and are only subject to the general limitation provision in the Constitution unlike other rights which are clothed with internal limitations.⁹⁴ Collectively, these rights and freedoms cement protection of HRDs under the Constitution as discussed below.

4.1.1 Implicated rights

Section 7(2) of the Constitution places primary negative and positive human rights obligations on the state. In that regard, the state must proactively strive for realisation of all rights enshrined in the Constitution while acting decisively against violations. The right to life is a universal entitlement in South Africa.⁹⁵ It is intricately connected to the right to dignity, bodily integrity, and that not to be subjected inhumane and degrading treatment.⁹⁶ This interplay means that it can only be limited in extreme circumstances.⁹⁷ Where the state upholds its constitutional obligations towards the right to life, it ameliorates violations and arrests a climate of impunity.⁹⁸ The right to dignity recognises every individual's intrinsic self and societal worthiness following the constitutional drafters' commitment to the constitutional principles

⁹¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 44. Preamble to the Constitution.

⁹² *Khosa v Minister of Social* 2004 (6) BCLR 569 (CC) para 40. *Bhe* (note 86 above) para 48.

⁹³ *Tsebe v Minister of Home Affairs* 2012 (1) BCLR 77 (GSJ) para 68; See also section 39(1) of the Constitution.

⁹⁴ *Makwanyane* (note 91 above) para 138.

⁹⁵ Section 11 of the Constitution. *S v Walters* 2002 (7) BCLR 663 (CC) para 5. *Makwanyane* (note 91 above).

⁹⁶ *Makwanyane* (note 91 above) para 126.

⁹⁷ *Ibid* para 139.

⁹⁸ *Ibid* para 222.

which aimed to make up for a past characterised by inhumane and degrading treatment.⁹⁹ Together with the right to equality, the right to dignity also underly interpretation of other constitutional rights.¹⁰⁰ They are the golden thread that permeates through the constitution.¹⁰¹ The right to equality also recognises the unique risks faced by women. In pursuance of s 9, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted which is a blanket anti-discrimination legislation that also extends protection to women including those that defend human rights. Moreover, s 12 of the Constitution provides for the right to freedom and security of the person. It also demands respect for the bodily and psychological integrity of all persons and includes a right to be free from any form of violence, arbitrary arrest, detention, and torture.¹⁰²

The above constitutional and legislative outline accentuates the paramountcy of protection due to all who live in South Africa. Read together, these instruments recognise the worth and value of human life which should be preserved and protected always. The rights discussed therein are central to a constitutional democracy given the unpleasant colonial-apartheid history. HRDs are equally entitled to these protections. The existence of these rights and values alone suffices for a state to jealously guard the lives of its citizens, but as observed thus far, this is a dream so far, yet so near for HRDs who continue to be butchered in every corner of South Africa.

4.2 The Protected Disclosures Act

The Protected Disclosures Act 26 of 2000 (PDA) protects whistle-blower HRDs making them one the few groups of HRDs with specific legislative protections. According to the PDA, whistle-blowers are protected from occupational detriment which may result from their whistleblowing where occupational detriment refers to any negative consequences of whistleblowing in relation to the employment of the whistle-blower which fall short of dismissal.¹⁰³ It also has a whistle-blower transfer program which aims to remove the whistle-

⁹⁹ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SA 1 (CC) para 45; *Dendy v University of the Witwatersrand, Johannesburg* 2007 (5) SA 382 (SCA) para 367; *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

¹⁰⁰ Section 7(1) and s 1(a) of the Constitution; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 para 35; *S v Mamabolo* 2001 (3) SA 409 (CC) para 41. *Khosa* (note 92 above) para 42.

¹⁰¹ *Ibid.*

¹⁰² Section 12(1) & 12(2) of the Constitution.

¹⁰³ Section 3.

blower from a potentially tense working environment.¹⁰⁴ On the face of it, the PDA reflects a thoughtful piece of legislation to protect whistle-blower HRDs. However, this protection significantly falls short. The PDA does not protect whistle-blowers from grave consequences of whistleblowing encountered outside of the employment environment like assassination, death threats, and surveillance.

It is this research report's argument that risk of assassination is the most imminent consequence of whistleblowing, not occupational detriment. The centrality of human rights and the South African landscape on unjustified killings of HRDs calls for a PDA that is equipped with protective measures for whistle-blowers to insulate them from assassination and other serious consequences of whistleblowing. As a result, there may be need for revision of the legislation to reflect current threats to protected disclosure with assassination and related death threats encompassed in these protections. From an occupational detriment as currently defined in the act perspective, the transfer programs perfectly works. However, the transfer program lacks as it must be at the request of the whistle-blower which is not helpful in the context of risks like assassination because a whistle-blower may never know about the threats to their lives until they are assassinated. This then necessitate the existence of a whistle-blower protection programme, similar to a witness protection program in the criminal justice system that is automatically triggered whenever a whistleblowing case involving significant state funds or implicating powerful political figures arises. Otherwise, the continued killings and threats will dissuade other potential whistle-blowers from exposing irregularities for fear of consequences which exacerbates the porosity of the system and creates a conducive atmosphere for corruption which ultimately costs the poorest and most vulnerable in our societies. A comprehensively worded PDA which caters for this gap may encourage employees and workers elsewhere to come forth with information regarding irregularities in their workplaces.

4.3 International and Regional Law

4.3.1 Significance of International law in South Africa

International law serves two purposes in our domestic legal landscape - as an interpretive instrument and a source of rights and obligations.¹⁰⁵ In interpreting the bill of rights, the

¹⁰⁴ Sections 4(3) and 4(4).

¹⁰⁵ *Glenister* (note 73 above) para 106.

Constitution requires South African courts and similar forums to consider international law which encompasses both soft and hard law.¹⁰⁶ It also encourages the interpretation of legislation in a manner that conforms with international law.¹⁰⁷ The Constitution also stipulates that international agreements are to be adopted as law in South Africa by identifying the responsible arms of government tasked with adoption.¹⁰⁸ As universal entitlements, human rights apply at international and domestic levels alike. The South African Constitution confirms this by acknowledging that customary international law is akin to domestic law as long as it conforms to the constitution and domestic legislation.¹⁰⁹ To give effect to these provisions, our courts have considered international law provisions where applicable in adjudication.¹¹⁰ South Africa therefore has a constitutional mandate to consider international law which together with the international community, exist to defend human rights abuses.¹¹¹ It is therefore imperative to consider international law and comparable foreign law on HRDs to holistically determine South Africa's stance in its human rights obligations.

4.3.2 Substantive provisions

Several initiatives have been developed by international and regional bodies in recognition and support of HRDs entitlement to specialised protection in light of the *sui generis* risks they encounter in their work. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) is the primary specialised instrument that extends protection to HRDs.¹¹² It restates and elaborates the rights contained in the core international conventions as they apply to HRDs and was adopted by consensus of United Nations (UN) member states.¹¹³ Hence, it is arguably binding by implication. Significantly, the Declaration on Human Rights Defenders enshrines a unique

¹⁰⁶ Section 39(1)(b). *Glenister* (note 72 above) para 96; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁰⁷ Section 233.

¹⁰⁸ Section 231.

¹⁰⁹ Section 232.

¹¹⁰ *Grootboom* (note 105 above); *South Africa National Defence Union v Minister of Defence* 1999 (4) SA 469 paras 25–27; *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA).

¹¹¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Foreword.

¹¹² UNGA Res 53/144 (9 December 1998) UN Doc(A/RES/53/144).

¹¹³ UNHRC 'The Declaration on Human Rights Defenders: OHCHR and protecting and expanding civic space' <<https://www.ohchr.org/en/civic-space/declaration-human-rights-defenders>>.

right to defend human rights.¹¹⁴ It further prescribes states to take positive steps to ensure protection of HRDs and their universal human right entitlements.¹¹⁵ Article 2(2) mandates states to enact national laws to protect HRDs especially against risks like assassination. The Universal Declaration on Human Rights (UDHR) – a customary international law instrument - espouses the right to life, and freedom and security of persons.¹¹⁶ Its articles 1 and 7 affirm the equality of everyone before the law hence HRDs who deserve and lament for protection just like other members of society cannot be ignored. It further stipulates that the states have positive and negative obligations to protect HRDs.¹¹⁷ The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) echo similar sentiments.¹¹⁸ General comment 36 of 2018 on art 6 of the ICCPR emphasises state obligations to protect its citizens against attacks for promoting and defending human rights by underscoring the need for adequate mechanisms. It also urges states to adopt specialised measures to protect persons who are at higher risk of death threats and violations like HRDs.

The African Charter on Human and Peoples' Rights also recognises the inviolability of the right to life and the need for all human beings to be treated with dignity and integrity.¹¹⁹ It protects the freedom and security of the person as well as freedom to express and disseminate opinions.¹²⁰ Article 30 creates the African Commission on Human and Peoples' Rights (ACHPR) which has recognised through numerous resolutions HRD entitlement to protection from the state because of the immense risks they countenance in defending human rights.¹²¹ It also identifies the specialised risks faced by women HRDs.¹²² Further, the OAU: Grand Bay (Mauritius) Declaration and Plan of Action, 1999 urges member states to implement the prescripts of the Declaration on Human Rights Defenders and recognises that all human rights

¹¹⁴ UNGA Res 53/144 (note 116 above) art 1.

¹¹⁵ Ibid art 2.

¹¹⁶ UDHR (note 110 above) art 3.

¹¹⁷ Ibid art 2

¹¹⁸ International Covenant on Economic, Social, and Cultural Rights." Treaty Series 999 (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) preamble, art 3, & art 6.1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble, art 2.

¹¹⁹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 3, 4 & 5.

¹²⁰ Articles 6 & 9.

¹²¹ ACHPR/Res.376 (LX) 2017; ACHPR/Res.345 (LVIII) 2016 & ACHPR/Res.245 (LIV) 13.

¹²² ACHPR/Res.336 (EXT.OS/XIX) 2016.

are based on core underlying values like the sacrosanctity of life.¹²³ This was confirmed in the AU: Kigali Declaration, 2003 (Kigali Declaration) which highlights the significance of the right to life especially for women and children.¹²⁴ The Kigali Declaration also highlights the central role of HRDs in promotion of human rights in the continent hence their elevated need for protection.¹²⁵ The OSCE: Guidelines on the Protection of Human Rights Defenders in provision 14 emphasises the need for appropriate and proportional sanction for responsible parties who undermine the human rights of HRDs like the right to life.

The UN Charter also emphasises on everyone's inherent dignity, and intrinsic equal worth.¹²⁶ The Convention on the Elimination of all Forms Discrimination Against Women (CEDAW) implores states to protect women's rights while strongly discouraging states from discriminating against women.¹²⁷ It also demands that states eliminate historical and societal prejudices and stereotypes that subordinated women.¹²⁸ The CEDAW further acknowledges the unique circumstances of rural women and urges states to facilitate protection for them in line with their distinctive risks.¹²⁹ It also provides that the state must take appropriate measures to prevent violation of women's fundamental rights and freedoms.¹³⁰

The UN also has an office of the Special Rapporteur on Human rights defenders which is aimed at ensuring and encouraging states to offer maximum protection of HRDs in light of the specialised work that they do.¹³¹ The African Commission on Human and Peoples' Rights has a similar office.¹³² These offices have simultaneously released reports on the plight of HRDs in the region and internationally.¹³³ In many instances, South African HRDs have been identified as experiencing a scourge of violations like assassination.¹³⁴ The Special Rapporteurs have also strongly recommended that states adopt laws where necessary to ensure protection

¹²³ Article 5(a); ACHPR (note 84 above) para 42.

¹²⁴ Preamble.

¹²⁵ Provision 28.

¹²⁶ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI art 55.

¹²⁷ UNGA Res 34/180 (18 December 1979) UN Doc A/RES/34/180 arts 2, 3, 6, 11, 12 & 16.

¹²⁸ Ibid art 5(a).

¹²⁹ Ibid art 14.

¹³⁰ Ibid arts 1, 2, 3, 6, 11, 12 & 16.

¹³¹ UNHRC 'Special Rapporteur on human rights defenders' <<https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders>>.

¹³² ACHPR 'Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa' <<https://www.achpr.org/specialmechanisms/detail?id=4>>.

¹³³ Ibid; UNHRC (note 130 above)

¹³⁴ Ibid; UNHRC (note 6 above).

of HRDs.¹³⁵ The African commission in *Suleiman v Sudan* also recognised the important work of HRDs and confirmed their need for specialised attention.¹³⁶

4.3.3 Analysis

As the above legal framework discussion illustrates, the various international and regional instruments – consisting of both hard and soft law – expressly or implicitly extends protection to HRDs against risks associated with their work including assassination by providing for a right to defend human rights and the protection of their right to life. The ubiquity of these laws and institutions demanding action indicate a commitment by regional as well as international law and organisations to see through the protection of the lives of HRDs. This adds to the local body of law that mandates and urges South Africa to protect and realise fundamental rights and freedoms like the right to life which can extend to HRDs. It is astounding that more than two decades after the coming into effect of the Declaration on Human Rights Defenders, South Africa is yet to adopt an equivalent law to extend these specific protections to HRDs while South African HRDs lament for protection and justice. This lack of drive to adopt the Declaration on Human Rights Defenders as a binding mechanism in South Africa and non-implementation of existing binding law is indicative of the lack of political will on the part of those tasked with implementing the laws to act. Adoption of a Declaration on Human Rights Defenders with provisions tailor-made to address specific HRD issues in South Africa as detailed in the recommendations section may act as the necessary trigger for responsible authorities to take action.

5 Model Law

Following the need to encourage nation states to implement the Declaration on Human Rights Defenders, the International Service for Human Rights (ISHR), an independent and non-profit human rights organisation with an international footprint since 1984, developed the Model Law for the Recognition and Protection of Human Rights Defenders (Model Law) in collaboration with approximately 500 human rights defenders from across the world.¹³⁷ The Model Law was settled and adopted by leading human rights experts and jurists in 2016 and extends specialised

¹³⁵ UNHRC ‘Special Rapporteur on human rights defenders’ (note 130 above); ACHPR ‘Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa’ (note 131 above).

¹³⁶ *Law Office Of Ghazi Suleiman v Sudan* (Communication No. 228/99) [2003] ACHPR 47; (29 May 2003).

¹³⁷ ISHR ‘Model Law’ <<https://ishr.ch/defenders-toolbox/model-law/>>.

protections to HRDs against violations of their fundamental rights and freedoms.¹³⁸ It is a blueprint intended to guide and inform states and stakeholders in the implementation of the Declaration on Human Rights Defenders considering the need for HRD protection from assassination, reprisals, attacks, and unreasonable restrictions.¹³⁹ It encourages states to use this law to inform their domestic legislation that promote protection of HRDs from risks associated with their human rights work.¹⁴⁰ Civil society can also make use of this law as a benchmark to assess the efficiency of governments and domestic legislation and regulations in protecting HRDs.¹⁴¹ The model law draws heavily from the UDHR and other binding international covenants like the ICCPR and the ICESCR. It importantly provides for the right to protect and defend human rights.¹⁴² It also specifically recognises the unique and gendered nature of risks faced by women HRDs and strives to extend specialised protection to them. It frowns upon subjection of HRDs to reprisals and intimidation for their human rights work and recognises the inviolability of the right to life for HRDs.¹⁴³ The model law also affirms that states have primary obligations to protect HRDs and to conduct thorough investigations in the unfortunate instances of violations while ensuring timely resolution of such investigations.¹⁴⁴ It also urges states to adopt specific measures that protect the lives of HRDs.¹⁴⁵ Adopting a similar law in South Africa could be of great significance to HRDs and it can act as a direct reference point and basis for HRDs claims against violations. Presence of a direct law extending protection to HRDs against assassination might as well act as a deterrence mechanism to perpetrator institutions like corporates who may not want to be involved in this assassination in the knowledge of a law that carries legal consequences such as sanctions. As further discussed below, adoption of this or the Declaration on Human Rights Defenders must be accompanied by specific provisions that foster implementation.

¹³⁸ Model Law for the Recognition and Protection of Human Rights Defenders (adopted in 2016).

¹³⁹ ISHR 'Model Law' <<https://ishr.ch/defenders-toolbox/model-law/>>.

¹⁴⁰ UN Special Rapporteur on human rights defenders 'Legislation on the protection of human rights defenders' <<https://srdefenders.org/resource/legislation-on-the-protection-of-human-rights-defenders/>>.

¹⁴¹ Model Law (introduction page).

¹⁴² Section 3.

¹⁴³ Sections 15 & 34(i).

¹⁴⁴ Section 28.

¹⁴⁵ Section 34.

6 Foreign jurisdictions which extent specialised legal protection to HRDs

In the continent, west African states have taken the lead in adopting regulatory mechanisms that extent specific protection to HRDs. In 2014, Côte d'Ivoire adopted a legislation that seeks to specifically protect HRDs in their line of work.¹⁴⁶ It obliges the state to aide and facilitate the work of HRDs.¹⁴⁷ Amidst a concerning rate of implementation of this law, the UN Human Rights Council and NGOs like ISHR in collaboration with the Ivorian civil society have stressed the importance of implementing the laws that protect HRDs to maximise their effectiveness.¹⁴⁸ HRDs and civil society in Côte d'Ivoire have also been encouraged to follow up with the state to ensure that these laws which are intended to insulate them from violations are implemented in order to achieve acceptable levels of protection.¹⁴⁹ While it is encouraging that the Ivorian government extends specific protection to HRDs, this law is essentially a place holder as HRDs continue to wallow in their plight and face grave dangers in their line of work.¹⁵⁰

The Burkinabe government also promulgated a legislation in 2017 which extends specific protection against reprisals and attacks on HRDs.¹⁵¹ The law obliges the state to respect and take measures to ensure non-interference with HRDs rights to privacy.¹⁵² It also makes it an offence for public or private bodies and persons to intimidate and arbitrarily violate the fundamental rights and freedoms of HRDs.¹⁵³ However, lack of specific provisions that protect women HRDs have been identified as a shortcoming of the legislation.¹⁵⁴ Political arms of government in Burkina Faso are also charged with manipulating the law to suit their needs. For instance, the government amended the Criminal Code in 2019 to further restrict fundamental freedoms like expression, access to information, and press freedom thus limiting the defence of human rights.¹⁵⁵ The later law counters any forms of protection which may have been

¹⁴⁶ Loi no. 2014-388 de 20 Juin 2014 Portant Promotion et Protection des Défenseurs des Droits de l'Homme

¹⁴⁷ Article 15.

¹⁴⁸ ISHR 'Côte d'Ivoire: The law on the promotion and protection of human rights defenders needs to be implemented' <<https://ishr.ch/latest-updates/cote-divoیره-the-law-promotion-and-protection-human-rights-defenders-needs-be-implemented/>>.

¹⁴⁹ Ibid.

¹⁵⁰ ISHR 'Côte d'Ivoire: Establish a mechanism to protect human rights defenders' <<https://ishr.ch/latest-updates/cote-divoیره-establish-mechanism-protect-human-rights-defenders/>>.

¹⁵¹ Avant-Projet de Loi Portant Protection des Défenseurs des Droits Humains au Burkina Faso (2012).

¹⁵² Article 13.

¹⁵³ Articles 19-29 as interpreted by the Model Law s 30.

¹⁵⁴ Front Line Defenders *Global Analysis* (2018) 14.

¹⁵⁵ Front Line Defenders *Global Analysis* (2019) 7.

extended by the 2017 law that intended enhance protection of HRDs. Mali's laws suffer the same flaws.¹⁵⁶

In west Africa, existence of specialised legislation that extends protection to HRDs seems not to deter assassination and violations of HRDs. Despite the presence of laws, concerning rates of non-implementation still exposes HRDs to violations. Rather, vibrant civil societies in these jurisdictions have played a pivotal role in calling out the responsible authorities to prioritise implementation and adherence to the prescripts of these legislative instruments.¹⁵⁷ This signals the need for stronger implementation mechanisms

7 The Role of other stakeholders in protection of HRDs

7.1 Non-state Actors (NSAs)

Section 8(2) of the Constitution imposes human rights obligations on juristic persons. That corporations have negative human rights obligations has been confirmed by the apex courts in a growing jurisprudence of caselaw some of which have opened the door to a possibility of imposing positive obligations on corporations.¹⁵⁸ Further, the Companies Act 71 of 2008 indicates that corporations must respect human rights.¹⁵⁹ The United Nations Guiding Principles on Business and Human Rights (UNGPs) in its second and third pillars also imposes on businesses negative obligations to respect human rights and to remedy their human rights violations.¹⁶⁰ Corporate actors must be attentive to community grievances that emanate from the undesirable consequences of their business activities and must remedy these wrongs whenever they arise. Similarly, the Organisation for Economic and Cultural Development Guidelines for Multinational Enterprises imposes negative obligations on corporations. However, instruments regulating business conduct and responsibilities in relation to human rights obligations are notorious for their non-binding nature which weakens their potential to elevate protection for HRDs as holding corporate NSAs accountable for human rights

¹⁵⁶ Frontline Defenders 'Mali guarantees the protection of human rights defenders in the country' <<https://www.frontlinedefenders.org/en/statement-report/mali-guarantees-protection-human-rights-defenders-country>>.

¹⁵⁷ Frontline Defenders (2017) 10; Frontline Defenders (2016) 9.

¹⁵⁸ *Governing Body of the Juma Musjid Primary School v Essay* 2011 (8) BCLR 761 (CC); *Daniels v Scribante* 2017 (4) SA 341 (CC); *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC).

¹⁵⁹ Section 7(1)(a).

¹⁶⁰ Principles 11, 17, 18(b), & 22.

violations becomes an impossible mission.¹⁶¹ The mantra ‘*the business of business is business*’ translates to corporate actors prioritising profit at the expense of human and environmental rights.¹⁶² In these circumstances, HRDs can only hope that corporations put in place self-reporting mechanisms to enhance protection and respect for their human rights. In light of the need to cement protection for HRDs, the growing calls for a binding regulatory regime for businesses as far as human rights are concerned are therefore valid and justified.¹⁶³ This binding instrument will ensure respect for human rights and remedies for violations.

7.2 The National Human Rights Institution

The South African Human Rights Commission (SAHRC) is a chapter 9 institution established by s 184 of the Constitution and the South African Human Rights Commission Act 40 of 2013 to serve as a watchdog for democracy. It is mandated with ensuring that human rights flourish in South Africa by prioritising and encouraging state accountability and respect for human rights. The SAHRC has indicated its commitment to see its mandate through but has identified lack of resources as an obstacle for fulfilling its human rights mandate.¹⁶⁴ That the institution is significantly funded by the state potentially compromises its independence as it may be easily politicised and weakened. The SAHRC’s effectiveness is questionable because human rights violations are still the order of the day in South Africa. In the socio-economic rights realm, the SAHRC has consistently failed to produce annual reports on the progress of other relevant state organs in promoting socio-economic rights. It has also failed to seek the audience of the state on its recommendations, findings, and reports.¹⁶⁵ Similar arguments can be advanced in the context of other human rights which in turn allows the state to escape its human rights obligations. Where the SAHRC fails, HRDs usually occupy this gap but they are victimised and assassinated in this pursuit. Yet, they have significant potential to augment the SAHRC to realise its constitutional mandate had it not been for the spate of violence that is associated with

¹⁶¹ D Bilchitz ‘The Necessity for a Business and Human Rights Treaty,’ (2016) 1 *Business and Human Rights Journal* 203, 208-210; MK Addo ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’ (2014) 14 *Human Rights Law Review* 33.

¹⁶² Global Witness (note 6 above) 17.

¹⁶³ Global Witness (2021) 19.

¹⁶⁴ SAHRC Responses to OHCHR Questionnaire on Human Rights Defenders (22 October 2012) 12.

¹⁶⁵ AJ Beredugo & F Viljoen ‘Towards a greater role and enhanced effectiveness of national Human Rights Commissions in advancing the domestic implementation of socio- economic rights: Nigeria, South Africa and Uganda as case studies’ 2015 *XLVIII CILSA* 419.

human rights defence work. They ideally should look to the SAHRC for protection but that has not been the case because the institution is non responsive to their calls for protection.

7.3 Civil Society Organisations

Civil society organisations are key players in contributing to the realisation of constitutional ideals and the South African dream of a society where human rights flourish. Public interest organisations in South Africa have been relentlessly researching and documenting incidences of HRD violations and assassinations. The Centre for Applied Legal Studies has produced reports on the general situation of HRDs in South Africa and the scourge of violations they encounter in their work.¹⁶⁶ The Socio-Economic Rights Institute and other public interest NGOs have consistently registered their dissatisfaction with the inaction of government in the face of HRD assassination in the Abahlali movement.¹⁶⁷ Groundwork has also been at the forefront of mobilising and raising the profile of assassination of environmental HRDs and have consistently sought audience of the highest government offices.¹⁶⁸ Similarly, media houses relentlessly report and investigate circumstances of assassination and victimisation of HRDs. The UN in conjunction with other international, regional, and domestic civil society organisations have registered their concerns on the onslaught of HRDs in South Africa.¹⁶⁹ In summary, civil society has been vigilant in condemning the repressions and speaking with one voice against persistent assassination and other forms of violations suffered by HRDs in South Africa. It is commendable that the South African civil society organisations have displayed true independence in their conduct and do not hesitate to call the state to action whenever it fails to act. It is unfortunate that the state does not always lend audience to our civil society as their correspondences go unacknowledged which in turn leaves HRD issues unaddressed.

¹⁶⁶ See for instance Centre for Applied Legal Studies ‘the Victimisation Experiences of Activists in South Africa’ (2018).

¹⁶⁷ SERI reports and press statements (note 59 above).

¹⁶⁸ GroundWork’s correspondences (note 45 above).

¹⁶⁹ Ibid.

8 Analysis of SAs protection to HRDs

The South African society is characterised by lawlessness and South Africa has one of the highest murder rates per capita in the region and globally.¹⁷⁰ Assassination is highly prevalent as a way of eliminating opponents in the political and business arena particularly in KZN and in the ruling ANC.¹⁷¹ All killings are unacceptable and must be condemned in the strongest of terms. Raising the profile of HRD assassination in South Africa therefore should not be read as discounting other incidences of assassination in various sectors of our society. The specialised work of HRDs as advocates of human and environmental rights which entitles them to greater protection is the underlying theme of this report. Given the shortcomings of the SAHRC, a South African society without HRDs and a vibrant civil society is unimaginable. South Africa could descend into anarchy when arbitrary exercise of authority goes unquestioned.

HRDs are at a higher risk of assassination in South Africa and beyond. They continuously succumb to assassination at the hands of the state and NSAs which perpetuate violations of their fundamental freedoms and rights like that to bodily integrity. As seen above, the state has primary obligations and responsibilities under international, regional, and domestic law to protect HRDs against violations of their human rights. However, the same state is complicit in these violations and does not take any meaningful action when HRDs report violations and threats. In many instances, it also perpetrates these violations. Yet, the legal framework as set out earlier indicates some level of sufficiency of South African laws to address the plight of HRDs if utilised optimally. This disjuncture between expectation and reality is concerning. Consequently, unwavering commitment to enforcement by the implementing quarters of government, political will, adequate resourcing, and binding human rights obligations for NSAs are prerequisites to resolving the issues of HRD vulnerabilities. Without substantive realisation of the offering of the above legal mechanism - for protection of HRDs from assassination - the laws serve as no more than empty palliatives that do not address root sources of the problem.

¹⁷⁰ World Population Review 'Murder Rate by Country 2023' <<https://worldpopulationreview.com/country-rankings/murder-rate-by-country>>.

¹⁷¹ M Shaw & K Thomas 'The commercialization of assassination: 'Hits' and contract killing in South Africa, 2000–2015' (2017) 116 *African Affairs* 597.

For land and environmental HRDs, it is concerning that communities are excluded from negotiations between business and the state as these deals are shrouded in secrecy despite our jurisprudence's emphasis on the importance of public participation and fundamental freedoms. The state also arbitrarily approves unsustainable projects without the necessary prerequisites like environmental impact assessments which results in irreparable environmental harm. Understood this way, the executive and sometimes the political arms of the state are the genesis of the resultant violations experienced by HRDs. It necessitates the conditions that trigger HRDs to speak out. In response to the scourge of assassination and violations against HRDs, other states have enacted legislation that specifically extends protection to HRDs. However, an analysis of these foreign laws indicate that laws are a nice to have while implementation is a must have. Governmental meddling in these jurisdictions which in turn infringes human rights is synonymous to the South African landscape considering that the government is the 'third force' perpetuating and creating a conducive assassination environment in South Africa.

South Africa has fared badly as its law enforcement arms - primarily the South African police Service (SAPS) and the National prosecuting Authority (NPA) - are sleeping on the job. There is a glaring absence of meaningful investigations into assassination, arrests, apprehension, and prosecution of perpetrators which creates a climate of impunity. In other instances, state institutions like the SAPS aid corporate sponsored violations. They harass and intimidate HRDs and act at the instruction of powerful corporate actors and political elites which undermines and downplays the effect of existing legal mechanisms.

A collective reading of the above legal instruments reflects availability of the necessary tools to protect HRDs. If used effectively, this combination of entitlements, rights, and responsibilities could alleviate the plight of HRDs. The Constitution, the PDA (with the proposed modifications), and various international legal mechanisms discussed above have the potential to be a powerful force for protection of HRDs against assassination. We have potentially ideal laws with non-existent governmental commitment to enforcement of the black letter of the law. Hence, these laws are moribund unless governmental conduct changes, in terms of political will and executive enforcement. It is therefore necessary that the implementing arms of the government adhere to the laws enacted by parliament. Non-adherence to governing laws is synonymous to gross malfeasance which perpetuates the ills that have befallen HRDs. It is therefore imperative that the relevant state organs like the SAPS and the NPA receive the necessary training that encourages them to commit to their duties and

responsibilities. This ensures that justice is served and is seen to be done. To promote implementation and enhance protection, it will also be recommended that an independent panel of experts be established to lobby for ex-ante protections for HRDs and to police the law enforcers and other responsible institutions like the SAHRC.

9 Conclusion

South Africa is a melting pot. HRDs are assassinated when defending human and environmental rights yet they are the last line of defence – together with civil society organisations - that hold the ropes to a true democracy. The state perpetuates, is complicit, or does not act on incidences of violations. Private corporations also perpetrate violations against HRDs or spectate amidst killings which in many instances are ignited by their questionable business activities. The lack of concern by duty-bearers is worrisome as it breeds a climate of impunity whilst the rule of law and human rights suffer. The main blocker to adequate protection is absence of commitment to enforcement and political will to make the necessary changes, as well as lack of resources and inadequate training for the relevant organs of state. Commitment in word and in deed by government to fulfilling their international, regional, and domestic obligations necessitates alleviation of the scourge that plagues HRDs. While the law does extend some form of protection to HRDs albeit in fragmented sources of law, the failure to implement effectively these laws creates a gap that could be rectified by a concomitant commitment to enforcement of the existing laws. To facilitate this, it is recommended that the PDA should be amended to extent certain level of protections and a HRD specific law should be adopted in South Africa as a specific reference mechanism for all HRD protections. Further, both laws should provide for establishment of an independent panel of experts which will ensure that the HRDs receive the necessary protections prior to risk exposition.

10 Recommendations

A stitch in time saves nine. Going forward, we should not wait until HRDs have lost their lives to act. Neither should we place the burden of requesting state protection on them. In that regard, our laws should be proactive and provide ex-ante rather than ex-post protection to the precious lives of our HRDs because a life lost is one too many. This background informs some of the recommendations that follow.

- a. The PDA must be amended to specifically include whistle-blower protections against assassination and other grave risks like death threats encountered by whistle-blower HRDs in their work. This should be accompanied by additional provisions mandating the relevant actors to swiftly establish state funded safe houses with state protection for HRDs once they have reported a potential case of wrongdoing. Hefty penalties and sanctions should also be introduced for the public and private actors who fail to act to provide the necessary protections to whistle-blowers.
- b. South Africa should adopt a tailor-made Declaration on Human Rights Defenders or the Model Law equivalent to ensure that specific protections are extended to HRDs. Despite the non-implementation of existing laws, a specific law tailor-made for HRD protection could go a long way in triggering action. Further, it will be an easy reference point for HRDs who may want to claim protection from the state whenever they are found wanting. As suggested for the PDA, this law should also have provisions that mandate state-sponsored safe houses for HRDs whose life is at risk. Leaving this responsibility to CSOs who operate on tight budgets is tantamount to neglecting the needs of HRDs. It should also provide for hefty penalties and sanctions for relevant stakeholders who ignore HRD demands for protection.
- c. Most importantly, both the PDA and the proposed HRD law should provide for an independent panel of experts which will be responsible for ensuring that the SAHRC, law enforcement agencies, and the NPA are extending the needed protection to HRDs. This could be done through following up with these institutions to ensure that all reported cases of threats are timeously resolved, and that protection is extended. This panel should consist of expert representatives from all relevant sectors including HRDs across their areas of practice to ensure that their plight is heard, represented, and addressed. HRDs should be a core part of this body as it is the affected who have the capacity of crafting workable solutions. The panel should have subpoena powers as well as authority to proactively canvass for the protection of HRDs against assassination.
- d. Additionally, the implementing arms of government need an overhaul as they have displayed concerning lack of commitment to address issues of HRDs when brought to their attention by our vibrant civil society. There is also need for effective governance which ensures that the prescripts of our legal instruments are religiously implemented.
 - i. It is concerning that many years later, the assassins of most of our slain HRDs have not been apprehended or prosecuted. The SAPS and the NPA should commit to swift action in instances of assassination by apprehending, investigating and

prosecuting perpetrators. The panel of experts as recommended above would also act to ensure that HRD cases of violation and victimisation which have been reported are properly and timeously actioned before a limb is lost. Failure to do so, the panel should have the power to subpoena these institutions to account and sanction them accordingly.

- ii. The National Human Rights Institution - the SAHRC - must be adequately funded. The government must ensure that it channels sufficient funds that enable the SAHRC to investigate cases of violations as reported by HRDs. Further, the SAHRC must be independent. The independence can be facilitated by the work of the independent panel of experts which will ensure that the SAHRC acts on HRDs human rights complaints even where those complaints are against state actors and institutions.
- iii. Our vibrant civil society has been working hard to raise the profile of HRD victimisation on shoestring budgets. Those in the environmental justice space have been working overtime to ensure that the corporations implicated accept responsibility and desist from victimising HRDs. On this journey to a binding business and human rights treaty to hold corporate actors fingered in HRD assassinations to account, the government should partner with CSOs to capitalise on their willpower to push the agenda of reprieve for those affected by the business dealings of these powerful corporations – namely HRDs.

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