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Under Pressure

Shrinking Space for Civil Society in Africa



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Contents

- 4** **Editorial**
- 6** **Is South Africa Reverting to a Repressive State?**
Jane Duncan
- 17** **Interview**
A View from the Ground: State-Civil Society Relations in South Africa
Chumile Sali
- 20** **From Undemocratic Laws to Violence: How South Africa’s Mine-Hosting Communities Are Silenced**
Brendan Boyle
- 25** **Interview**
Shrinking Spaces for Nigerian Civil Society?
Eze Onyekpere
- 28** **The Role of the State in Shrinking Political Spaces for CSOs in Kenya**
Njeri Kabeberi
- 32** **Activists in the Trenches: A Profile of Kenya’s Wanjeri Nderu and Ruth Mumbi**
Edith Honan
- 36** **Interview**
After the Honeymoon: How the Sudanese Government is Stifling Civil Society and the Media
Nuba Reports

Editorial

In what can be described as the biggest crackdown on civil society since the end of the Cold War, activists, non-governmental organisations (NGOs) and social movements across the world are facing verbal hostility from politicians, new laws and regulations that curtail their ability to operate, and outright violence. Africa is no exception.

Uganda has become the latest African country to tighten state control over the civil sector and curb dissent. Among other concerns, the NGO Act 2016 gives a government-appointed NGO board the power to revoke or refuse to issue the required permit for organisations whose “objectives are in contravention of the law of the country”. In Uganda, homosexuality is outlawed and punishable by imprisonment.

As the articles in this edition of *Perspectives* show, restrictive NGO legislation is being mooted across the continent. In Kenya, President Uhuru Kenyatta’s administration has drafted amendments to the Public Benefit Organisations Act that would, among other things, limit foreign funding of local NGOs. Some organisations have been temporarily shut down in the name of anti-terrorism measures. Police brutality has reached alarming levels, as highlighted by recent nationwide protests against the extrajudicial killing of human rights lawyer Willie Kimani, along with his client, Josphat Mwenda, and their driver, Joseph Muiruri, in June 2016.

In Nigeria, the picture is mixed. Considering himself a “converted democrat”, former military leader and now elected President Muhammadu Buhari has sided with civil society against legislation that threatened their use of social media, while also acting with a heavy hand in his quest for peace and stability against Islamist extremism.

South African civil society organisations and popular movements are generally able to pursue their various causes freely. However, there is an increase in the number of incidents of political repression in violation of the country’s liberal constitution. Police brutality and the surveillance of activists by intelligence services are cause for serious concern. There are also threats to media freedom, instances where protests were unlawfully blocked, and political assassinations at grassroots level. In June, the information service *Africa Confidential* reported government plans to introduce new restrictive NGO regulations. Some observers link these trends to the increased influence of the “security cluster” in the administration headed by President Jacob Zuma.

It is however important to also acknowledge democratic successes. Buhari’s 2015 election triumph marked the first time that an opposition candidate came into power in Nigeria. South Africa’s 2016 local government election, which saw the opposition Democratic Alliance take major urban centres from the ruling African National Congress, highlighted the country’s democratic maturity. Nonetheless, the phenomenon of “shrinking space” for civil society is in line with an overall slowdown in democratic gains on the continent. In the latest Freedom House report, only 59 percent of sub-Saharan countries are categorised as “free” or “partly free”. This is still higher than in the early 1990s, but down from 71 percent in 2008. The majority of these states are elective but not liberal democracies – in other words, governments with a thin veneer of procedural democracy but little appetite for substantive accountability.

Although the increasing restrictions on civil society in Africa are driven by multi-

faceted and context-specific conditions, three recurring themes can be identified. Firstly, the growth of China's presence on the continent has mitigated Africa's political and economic dependence on the West and enabled African countries to push back against what some perceive as Western interference in their domestic affairs. China's own economic success has also revived and strengthened support for authoritarian models of growth. Secondly, the consequences of counter-terrorism measures – often promoted by the West – have had a debilitating effect on civil society. Thirdly, the Arab Spring uprisings against authoritarian regimes in North Africa have left governments in the rest of the continent acutely aware of the potential power of civil society and popular resistance.

It is this last point that provides for some optimism in the gloom. At least in some places, the pushback against civil society is also the result of their successes in holding

political and economic elites to account. Moreover, the combination of population growth, especially in Africa's urban areas, the increased mobility of people and ideas, and changes in the aspirations, expectations and values of the continent's emerging middle classes threatens to overwhelm the means of control of those in power. Venezuelan economist Moises Naim identifies these factors as contributing to the “decay” of power worldwide.

This, of course, does not mean that civil society can sit back to watch it all unravel. But it supports the confidence and hope that, in the long run, the struggle to safeguard political freedoms will not be in vain.

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Is South Africa Reverting to a Repressive State?

Jane Duncan

Since the Marikana massacre in 2012, several journalists, academics and media commentators have argued that South Africa is reverting to a repressive state. They have interpreted violence at the hands of the South African Police Service (SAPS) generally, and Marikana specifically, as signs that the post-apartheid social order can no longer be held in check through consent alone. They argue that the ruling African National Congress (ANC) and other powerful actors have concluded that naked violence is now needed to stabilise increasingly fractious social relations.¹ Some have even used the term “police state” to describe post-Marikana South Africa.² As a police state is one where the police act as a political force to contain social dissent using arbitrary force, it is an important manifestation of a more repressive state.

How likely is South Africa to descend into a state of full-blown repression? How likely is it that there will be more Marikanas? Needless to say, being able to answer these questions will have a major impact on the future trajectory of the country’s politics. There can be little argument with the statement that South Africa’s democratic government under its fourth president, Jacob Zuma, has strengthened the coercive capacities of the state, consisting of the police, the intelligence and the military and located in the Justice, Crime Prevention and Security Cluster. In fact, it would appear that this Cluster has become the praetorian guards of an increasingly embattled presidency.³ The well-reported growth in the levels of police violence against ordinary civilians and protesters and police militarisation are the

most visible manifestation of this shift, as is the normalisation of the military in domestic policing functions, which suggests a growing militarisation of society.⁴ However, the huge public controversies over police violence and police militarisation, mask the fact that there are fundamental shifts in the coercive capacities of the state, away from overt repression and towards less visible, more pre-emptive forms of repression. What are the indicators of this shift and why is it significant?

From Human Intelligence to Signals Intelligence

The first indicator is that intelligence work has become increasingly important to stabilising social relations. Surveillance provides the state with a politically low-cost form of social control, as abuses are very difficult to detect. Political surveillance is part of an arsenal of tools available to the state to profile problem subjects, and to use this knowledge to stymie protests they may consider to be problematic. The state can use such surveillance, or the threat of surveillance, to create fear that organised violence will be used against perceived opponents.

At the same time, the fear of being watched may force people to self-police their own behaviour.

In South Africa, the state has expanded its surveillance capacities over the past decade. In 2003, the Thabo Mbeki Presidency issued a directive requiring an expansion of the then National Intelligence Agency’s (NIA) mandate to include political and economic intelligence. In the case of political intelligence, the NIA was to focus on “...the



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strengths and the weaknesses of political formations, their constitutions and plans, political figures and their roles in governance, etc”.⁵ These changes led to the intelligence services ballooning in size. A year later, signs emerged that intelligence operatives were becoming embroiled in internal factional battles in the ANC: a problem that was proved to exist by a Commission of Enquiry, which partly blamed the culture of secrecy in the intelligence services as a source of the problem.⁶

Shortly after Zuma took office, the domestic and foreign intelligence services were centralised into the State Security Agency (SSA). The political intelligence-gathering mandate has also allowed the government to normalise spying on domestic political groupings on the most tenuous of grounds.⁷ A document leaked to the media, and apparently summarising the SSA’s National Intelligence Priorities for 2014 (which are classified, although they should not be) - and which are developed every year to guide the use of the state’s surveillance capacities - states that the SSA should investigate and engage in counter-planning for a “so-called “Arab Spring” uprising prior to [2014 national] elections’.⁸ The SSA claims it will resort to the “maximum use of covert human and technical means” to counter these threats.⁹ The document’s citing of the Arab spring – a legitimate struggle against authoritarianism – is significant, as it implies that this protest wave in the Arab region was essentially illegitimate. In the South African context, the risk of such a priority straying from the covert surveillance of illegal political activity into legitimate activities should be self-evident: a risk that is strengthened by the SSA’s overly broad mandate, excessive

secrecy, recent history of abuse of this mandate and inadequate reforms to increase public accountability.

The risk associated with human intelligence is that the identities of intelligence operatives deployed to spy on organisations can always be uncovered, leading to politically-costly scandals about intelligence abuses. As a result, the intelligence community has taken advantage of the digital “revolution” to shift away from using

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human intelligence (intelligence gathered through physical means) to signals intelligence (intelligence gathered from communications surveillance). It is difficult to tell whether South Africa has embraced this global shift, but it would be unsurprising if it has. While the government’s targeted interception capacities are regulated in terms of the Regulation of Interception of Communications and Provision of Communications-related Information Act (Rica), mass surveillance remains completely unregulated in terms of the law, which predisposes these capacities to abuse. In fact, not only does South Africa produce mass surveillance technology, but the state has funded its development¹⁰ and allowed it to be exported, including to authoritarian

regimes such as Libya, where the equipment was used to spy on Muammar Gaddafi's political opponents.¹¹

From Militarised Policing to Intelligence-led Policing

The second indicator, closely related to the first, is the shift from militarised policing to intelligence-led policing. As its name suggests, this policing model uses risk assessment as its main tool to direct policing decisions about where and how to intervene. The model is more recent than paramilitary policing, as it was conceptualised in Britain and the United States (US) in the 1990's, but it really gained currency after the September 11 attacks on New York and Washington. Intelligence-led policing relies heavily on covert techniques for crime-detection, including paying informants, spying on individuals and organisations, the use of Closed Circuit Television (CCTV) cameras, communications surveillance and the interception of voice and data traffic.¹²

Intelligence-led policing does not necessarily make human rights violations go away; it merely makes them less visible. This form of policing encourages problematic profiling of individuals or social groups that may resort to crime, which can lead to stereotyping of particular social groups as being predisposed to crime. Activists who are considered to be politically threatening to existing ruling groups may be placed under surveillance to gain more information about their activities and to intimidate them, which risks chilling political activity. The US police used intelligence-driven policing to infiltrate organisations linked to the anti-globalisation movement, to identify and isolate "troublemakers".¹³ But like overt forms of violence, generalised surveillance techniques also erode public trust in the state: in fact, the latter can do so more readily than the former as surveillance proceeds from the premise that states do not trust their citizens from the outset.

In South Africa, the Crime Intelligence Division of SAPS holds the key to this new policing strategy, so it is unsurprising that this Division has become so powerful (and controversial) in recent years, as this policing model makes it the lynchpin of policing strategies.¹⁴ Heightened power without heightened accountability is a recipe for disaster. A case currently being heard in the Pretoria Commercial Crimes Court points

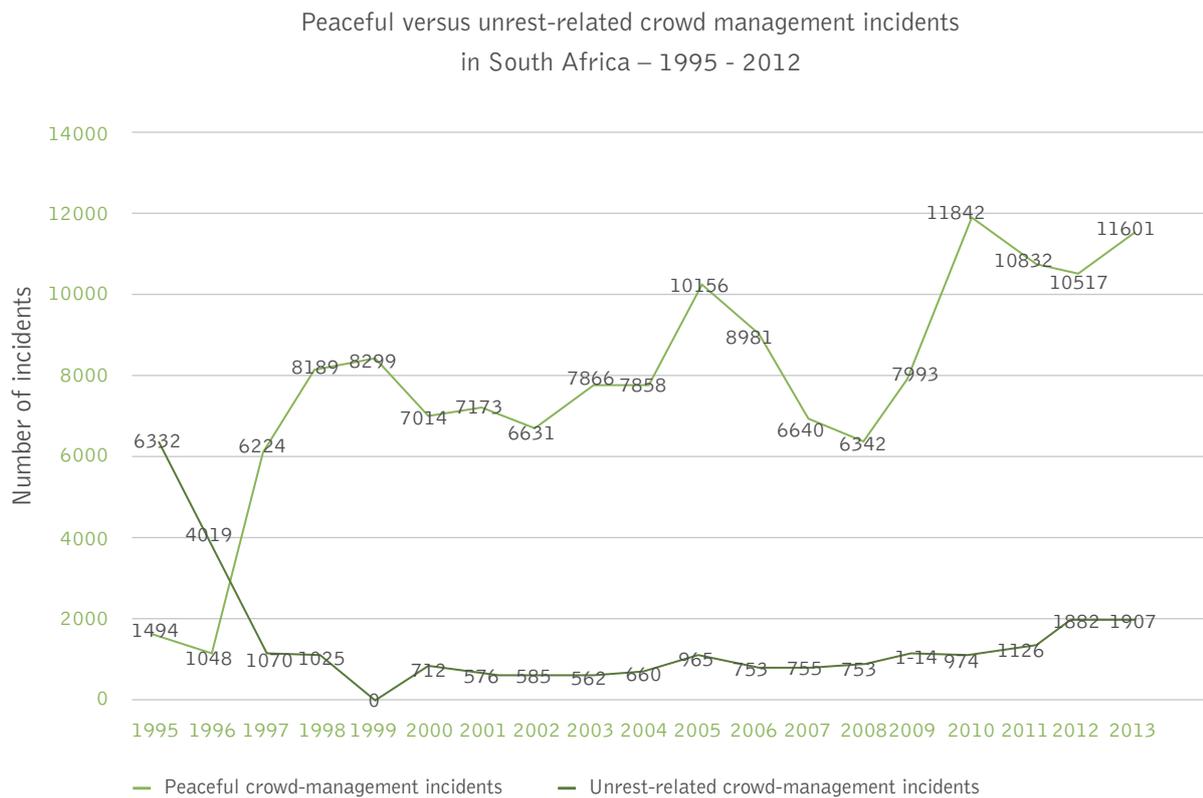
to members in the division having used the surveillance capacities of the state to spy on journalists. Yet, in spite of its increasing importance to policing work, there are signs of Crime Intelligence having lost its effectiveness, leading to a resurgence of organised crime.¹⁵

SAPS has embraced intelligence-led policing for several reasons. Police violence is eroding trust between the police and communities, making it more difficult to revert back to community policing.¹⁶ Yet at the same time, SAPS cannot risk many more high profile shoot-outs with protestors, as the long-term political costs will simply be too great. So, it stands to reason that the SAPS would search for a policing model that still allowed them to contain dissent using a less politically-risky approach, and intelligence-led policing provides just such a model.

From Post-hoc to Pre-emptive Repression of Protests

The third indicator is an increasing use of pre-emptive methods of containing protests through manipulations of the Regulation of Gatherings Act (RGA), to stop more protests from spilling out onto the streets in the first place. In a research study I led on the right to protest in eleven municipalities¹⁷ - and which involved the physical collection and logging of municipal data about gatherings and protests over a five year period (2008-13) - I found that none of the municipalities studied received a clean bill of health. A research team collected all notifications for protests and gatherings sent to municipalities in terms of the RGA: they yielded incredibly rich data about how many protests were taking place relative to gatherings, the reasons for the protests, the protest actors and municipal responses to the protests.

The municipal and the police statistics suggest that the majority of protests take place peacefully and uneventfully, which is not the dominant image of protests either in the media or the public imagination. In fact, from SAPS's Incident Registration Information System (IRIS) database for the areas with the most unrest-related incidents between 2009 and 2012¹⁸, it became clear that despite being labelled unrest-related, most of the protests did not escalate beyond barricade-building and tyre-burning, and in fact were recorded as being fairly incident-free.¹⁹ The protests recorded in the



municipal records constitute a humdrum of protests, taking place day in, day out throughout the country with little incident. Between the media and police hype about “violent service delivery protests”, it is this wider picture of peaceful protests that is so often missed, and unsurprisingly so. The security cluster can use images of marauding mobs, apparently predisposed to violence, to create moral panics in the public about protests, to turn the public against protestors (even those whose demands are legitimate), and to justify heightened security measures against them.

Yet in spite of protests remaining largely peaceful, all the municipalities surveyed instituted unreasonable restrictions on the right to protest, and these have curtailed this right to varying degrees. While the misapplication of the RGA has been a problem at least since the early 2000’s²⁰, a particularly significant shift became apparent from 2012 onwards. In the wake of the local government elections, the Department of Co-operative Governance sent out a circular to local governments that outlined proactive measures that municipalities need to take to deal with protests. These measures included “... [working] with the office of the speaker [and] public participation units to ensure ongoing engagement between councillors and communities and residents”.²¹ Several municipalities used this memo as a pretext

to change how they administered the RGA.

This shift increased the already-onerous bureaucratic obstacles municipalities put on protests, many of which already shared an assumption that the notification process in terms of the RGA was actually a permission-seeking exercise, and that they had the right to grant or deny “permission” to convenors to engage in a gathering or protest. This municipal misapprehension of the process set the tone for how notifications were dealt with, both by the municipalities and by the police. Practices that limited the right unduly included a requirement on the part of convenors to seek a letter from the institution or person they were marching against, guaranteeing that they would be willing to accept the memorandum. The rationale for seeking such an assurance appears to be to prevent frustration on the part of protestors, which could boil over into violence. However, it has also become a censorship device, where those who are being marched against can squash the protest simply by refusing to accept the memorandum.

The City of Johannesburg requires protest convenors to seek permission from a ward councillor to protest, and after the 2012 Co-operative Governance memo, they and the Mbombela municipality, instituted a filtering system to reduce the number of service delivery protests, where convenors need to show that a meeting took place

between the mayor's office, the community and the ward councillor involved in that community, or at the very least that an attempt was made to bring all parties to the table to resolve the issues at hand.²² But this prescription is not lawful, as the RGA does not prescribe what process people should follow before they take to the streets. The number of "approved" protests increased in Mbombela once the filtering process was introduced, suggesting that the potentially "troublesome" protests did not even enter into the system. But the municipality did admit that the condition had led to an increase in the number of "unrest-related"

While the municipalities studied have gradually closed spaces for the right to protest, this closure is highly uneven and subject to considerable contestation. Spaces were much more closed where the political and economic elite were united in their intentions to stifle protests.

protests, taking place outside the framework of the RGA, and that the police were more likely to be heavy-handed against such a protest. These were led mainly by individuals or organisations that were in dispute with the structures they were meant to negotiate with, suggesting that an increasingly restrictive approach towards protests on the part of the municipality was changing the character of the protests, forcing them to become what the authorities would consider "unlawful" and driving up the potential for the protests to become disruptive.

While the municipalities studied have gradually closed spaces for the right to protest, this closure is highly uneven and subject to considerable contestation. Spaces were much more closed where the political and economic elite were united in their intentions to stifle protests and prevent criticism and alternative forms of mobilisation: but this unity was not found uniformly across the municipalities. As Oliver has argued, erratic government repression arises not because the government has chosen to be erratic, but because of inconsistencies among political actors.²³ Furthermore, non-conventional actors are more likely to be repressed than conventional ones (such as unions or well-known political parties), as the security apparatus consider the former to be less predictable than the latter.²⁴

The evidence supports a view of the state put forward by Gramsci that it is not monolithic, but is rather a site where ruling class alliances take place or even shift.²⁵ In times of significant political de-alignment, elements of the state can even work against one another. Erratic repression is likely to occur when divisions have opened up within the political elite, or between the political elite and the bureaucratic layer: in such circumstances, spaces for alternative voices remained open, albeit constrained and subject to reversal.

Internationally, the academic literature has recognised the fact that ruling elites have expanded their repertoires of social control beyond outright repression: as a result, the literature has shifted away from focussing on the concept of repression, to that of pacification. According to Keinscherf, pacification includes measures that "...produce undisruptive and unthreatening forms of collective action".²⁶ However, this is not to say that repression as it is commonly understood, and pacification, are mutually exclusive: in fact, they can be complementary strategies. For instance, the intelligence services can be used to separate out "good" protestors from "bad" protestors, and the resulting protest policing may be either facilitative or militarised depending on the type of risk management strategies that the police identify through the intelligence gleaned.²⁷ But the fact that the elites have found it necessary to shift from more visible to less visible forms of social containment at all, is not a sign of their strength; rather it is a sign of their weakness as they recognise the fact that they lack the capacity to repress openly. Why is this so? The next section will attempt to answer this question.

Organic Crisis: Growing Popular Capacity for Independent Action

It seems fair to say that South Africa is manifesting more elements of a classic Gramscian organic crisis. For Gramsci, crises become organic when they are thrown up directly by contradictions in how the capitalist system functions, when they are dynamic in that they are not confined to particular actors, events, issues, or moments in time or place, and consequently when they are a process rather than a momentary eruption. The demands being raised may be diverse, and

at times even incompatible. Such crises usually arise when a particular regime of capitalist accumulation becomes unsustainable because of its own internal contradictions. In such circumstances, the ruling bloc (or the coalition of interests that underpin a particular ruling group) loses its legitimacy on a mass scale. An organic crisis develops when the following conditions obtain:

- Popular capacity for action increases;
- More people can be detached from the previous hegemonic bloc and be convinced to side with the subaltern classes;
- There is a decline in capacity of the elite to offer significant concessions, but;
- There is also a decline in the capacity of the hegemonic bloc to mobilise effective repression.

When these conditions obtain, the hegemonic bloc cannot offer concessions easily, yet neither can it repress easily either.²⁸

With regard to popular capacity for action increasing, while the number of crowd management incidents increased year-on-year since 1996, too little can be deduced from this upward swing, as the police database that logs these incidents (the IRIS system) records both protests and gatherings. However, from the municipal data referred to earlier, it is apparent that protests peaked in 2011 (the year of the local government elections) in municipalities such as eThekweni, Johannesburg and Lukhanji, which is when crowd management incidents recorded by SAPS peaked too. So it is not unreasonable to assume that the peaking of incidents in 2011 can be attributed at least in part to an uptick in protest action, suggesting an increase in popular capacity for action as expressed through protests.

There was little evidence of co-ordination across protest sites, though; co-ordination occurred when a trade union movement organised a national action, or where a strike took place in different parts of the country, for instance a public sector strike. While there was little evidence of these protests coalescing into more generalised political demands, they have the potential to if a national political movement comes into being that links these different struggles together. The municipal data pointed to high levels of organisation, and of new formations or even organisations emerging all the time, suggesting that Patrick Bond's

term "popcorn protests"²⁹ - used to describe seemingly sporadic, spontaneous protests - ignored the extent of organisation that actually exists. There was no evidence of unions and community organisations uniting around shared grievances. However, it was apparent from the municipal data that struggles at the point of consumption are becoming as important to the political life of direct action politics as struggles at the point of production, and in some cases (in the Makana municipality, for instance), the former are overtaking the latter as flash-points of struggle.

When South African protests are viewed in the global context, it becomes apparent that popular capacity for action is not only increasing, but these increases are being sustained. The protests could easily be described as a cycle in the sense used by Tarrow.³⁰ However, is the protest cycle in South Africa of even greater historical significance? For instance, could it be part of a broader regional or even global protest wave? The question of whether the protests, including those in South Africa, are part of a wave, rather than being isolated, single-country protest cycles, is an important one, as it speaks to whether the protests will fizzle out in time or escalate into fundamental and transformative challenges to the system on a worldwide scale. According to Colin Beck, the difference between a protest cycle and a protest wave is that the latter is present in at least two or more societies within a decade of each other, and these protests are tantamount to revolutionary situations.³¹ In other words, the protests affect more parts of the world over a longer period, and are not concentrated in a fixed period in time or driven by a small, well-defined set of actors. These features suggest that the unfolding struggles are responses to broader crises in the world economy, and in spite of their heterogeneity, they are capable of being sustained and even escalated into an insurrection precipitating an organic crisis.

The mobilisations in Chiapas, the Occupy movement in the United States, the "pink tide" in Latin America and "Arab spring", Palestinian struggles against Israeli occupation, and anti-austerity protests in different parts of the world, are all examples of challenges to the system in different regions of the world (some more successful than others). Less well-known and studied are the wave of protests that engulfed sub-Saharan Africa in the wake of the Tunisian and Egyptian political revolutions, with the

most pronounced ones erupting in Swaziland, Mozambique, Zimbabwe and Malawi.

For Cox, if protest cycles are sustained in more than one region of the world over a period of at least fifteen years, then this is a further indication that the crisis is organic, rather than episodic; as a result, the multiple resistances that have been mounted against the system could be described credibly as a revolutionary wave. Sustained regional disruptions usually happen at least once every twenty years. The fact that some have not led to regimes falling, and where political revolutions have been achieved, they have not necessarily deepened into social revolutions, becomes less significant if revolutionary waves are understood as a process rather than an event. If these protests have brought new political actors onto the streets, resulting in new forms of organisation, and extracted significant concessions from ruling elites, shaking the state in the process, then they could be described as moving in an anti-systemic direction. This is because the protests build confidence in the power of collective action, and consequently have the potential to extract even more significant concessions in future.³² When viewed in this global context, it becomes apparent that South Africa's protests are of world-historical significance, and point towards them being part of a broader global wave of heightened popular action. They are also likely to place popular limits on the state's ability to use organised violence, as doing so may well intensify popular action rather than dampen it.

In fact, while the protests cannot be said to have a distinct ideological character, the data points to the hegemony of the ANC diminishing.

With respect to more people detaching themselves from the hegemonic bloc, the municipal data before 2011 pointed to the ANC alliance dominating the protest space – especially in smaller towns and rural areas – but that its dominance declined after 2011. The ANC alliance has proved to be a combustible one, with political alignments with the ruling party coming under considerable pressure. At community levels, the municipal data suggested that the South African National Civic Organisation (Sanco) – often considered to be a fourth member

of the ANC alliance – is largely a spent force, and is being overtaken by a host of independent community organisations or civics. In fact, while the protests cannot be said to have a distinct ideological character, the data points to the hegemony of the ANC diminishing. This does not support arguments advanced by Booysen and Fakir that the protests are merely about holding the ANC to account³³: rather there is growing evidence of more communities becoming subjectively available for alternative politics to that offered by the ANC alliance.

Organic Crisis: Concessions or Repression

With respect to Gramsci's two other conditions for an organic crisis, namely that the elite cannot offer concessions very easily, but neither can they repress very easily, the neo-liberal phase of capitalism has entered a period of organic crisis in several regions of the world. This phase is characterised by the financialisation of the economy, the rise of permanent mass unemployment and declining rates of profit, creating conditions for a political crisis. In other words, these features make this phase particularly unstable in that it creates conditions for mass revolt, as fewer concessions can be offered than in earlier expansionary periods (such as was the case under social democracy), while the system cannot generate enough profit to prevent itself from contracting and even collapsing, worsening the socio-economic conditions even more. In the case of South Africa, while the Zuma administration promised a more redistributive state, and undoubtedly many of its more principled office bearers remain subjectively committed to a more just and equal society, the objective conditions in which they came to office did not favour radical redistribution.

Yet at the same time, managers of the neo-liberal system – governments, financiers and other big capitalists – need to maintain consent in order to continue ruling, which they find increasingly difficult to obtain. If they resort to coercion to stabilise the system, they risk legitimacy and state violence is used most effectively when consent remains for its use.³⁴ Their inability to resolve these crises lie at the heart of the current period's organic crisis. For instance, there are limits on the extent to which paramilitary policing can be used

to contain growing dissent. While many police are clearly “getting away with murder”, public antipathy is building against the police and the political order they seem to be propping up. There have not been nearly the same levels of protests against police violence in South Africa as there have been US cities such as Ferguson, in the wake of Michael Brown’s fatal shooting by the police. But, Marikana has hastened political shifts that have been underway for some time now, and has not dampened protest levels: to that extent, it has not been a particularly successful massacre for the ruling elite. The massacre was a precipitating factor in the formation of the Economic Freedom Fighters (EFF), and Cosatu’s largest affiliate, the National Union of Metalworkers of South Africa (Numsa), has been expelled from the federation, spurring it on to form a United Front in collaboration with community organisations and social movements. The state cannot risk going even further down this path. Violence against dissenters on a mass scale is likely to eat into the ANC’s still-considerable legitimacy, and hasten its slow but steady demise at the polls. This is especially so if a national movement comes into being that generalises protestors’ demands, and relates them to the neo-liberal system

of governance. Workers and the poor, who face the brunt of the system, are increasingly unlikely to consent to supporting and funding their own oppression.

Another factor that makes full-scale repression unlikely is that the security cluster appears to be an increasingly divided house, and not insignificant cracks are beginning to show. The police commissioner at the time of the Marikana massacre, Riah Phigeyi, has been suspended and may well be dismissed for her role in the massacre.³⁵ A spate of top management resignations in the SSA in 2011 has been linked to refusals to use the surveillance capacities of

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the state to spy on Zuma’s detractors ahead of the ANC’s elective conference in Mangaung.³⁶ Furthermore, in order to repress openly, the police would probably need the

Striking mine workers demonstrate near Lonmin’s Karee Platinum Mine demanding a wage increase on 16 August 2012 in Marikana, South Africa. © Gallo Images



assistance of the military. But the military is industrialised and unionised. In spite of arguments that unionisation can compromise combat-readiness, in 1999 the South African Constitutional Court legalised the formation of military unions.³⁷ There is evidence that a significant number of soldiers have a consciousness of themselves, not just as soldiers, but as workers, who are exploited like other workers. Frustrations with poor working conditions boiled over during the ill-fated march on the seat of political office, the Union Buildings, in August 2009. This very public confrontation – the dynamics of which were misreported by many media organisations³⁸ – led to the Chief of the Army, Solly Shoke, accusing the soldiers involved of mutiny, and warning them that some other countries would have shot them for their actions.³⁹

In view of these fractious relations, the political elite face a gamble: if the current administration put soldiers in front of exploited, protesting workers (like the soldiers are), and told them to shoot, what would they do? What if they refused? Can they really risk a rebellion in the military, which really would amount to mutiny? The political risks could be too great for them to gamble on the military.

The more historically-aware security officials are also likely to make political calculations about how long they will last if they intensify open repression. As the embarrassingly weak presidency of Jacob Zuma splutters to a close, the ignominious fates suffered by the likes of Saddam Hussein and Muammar Gaddafi, could well be top of mind when they attempt to weigh up the long-term political costs of engaging in an all-out defence of their positions. Regimes that relied on repression to maintain power have never lasted.⁴⁰ It is not coincidental that since 2009 – the year that Zuma came to office – evidence has mounted of some even resorting to political assassinations to silence their critics, especially in Mpumalanga and KwaZulu/Natal.⁴¹ The 2014 murder of Abahlali base Mjondolo activist Thuli Ndlovu by two ANC councillors is a case in point.⁴² But resorting to informal repression is itself an indication that more violent sections of the political elite recognise that they cannot engage in open repression. The conviction of Ndlovu's killers makes it less likely that political assassinations will escalate into unstated state policy, although as the country heads up to possibly its most fractious local gov-

ernment elections yet, it would be naïve to ignore that the risks are there.

Conclusion

The current government's ability to offer meaningful concessions is limited, but so too is its ability to repress easily. This means that the South African political landscape bears all the hallmarks of having entered an organic crisis. Crises of this nature are not necessarily negative; they can allow fundamental societal contradictions to surface in ways that force society to confront them, grow from them, and move forward. In spite of fact that the current political moment seems so dark, the fact needs to be recognised that the political space is wide open, and is actually pregnant with great promise. Does the state have the capacity to repress on a broader scale? It appears not. There are unlikely to be more Marikanas in the sense of an organised, armed assault on protestors, although the possibility cannot be ruled out that state violence could occur as an unplanned reaction to particular events. While there are clear and well-acknowledged legal limits on its ability to use violence, the political limits, and more specifically the limits imposed by popular agency, are less well-acknowledged.⁴³

This is because repression is often studied as a static structural factor constraining movement activities, but not as a factor that is changed dynamically through interactions between state structures and popular agency. Arguably, the social and political conditions that would allow the state to use ongoing (as opposed to sporadic) violence, do not exist in this current conjuncture, as the balance of power is shifting gradually towards popular movements outside the hegemonic bloc. No matter how powerful the men and women with guns seem, there are important signs that they are actually quite vulnerable, and the shifting modes of repression point to that. While overstatements about the power of the coercive capacities of the state are understandable in the wake of Marikana, they are not helpful, as they can lead to fear, and even political paralysis. What Cox has referred to as "repression horror"⁴⁴, can lead to movements seeing the state as omniscient and omnipotent, even when this is, in fact, not the case.

But this does not mean that democratic movements must become complacent. Appropriate activist strategies to counter

repression and win back democratic space are likely to be both timely and effective. On the other hand, ill-considered, misdirected ones, may be ineffective. In this regard, campaigns that focus on the accountability and transparency of the intelligence services are particularly important, as are campaigns to defend the right to protest from administrative censorship (and not just police violence). In the wake of the Edward Snowden revelations, civil society and social movements are waging a global fightback against unaccountable mass surveillance, and already, they have won sig-

nificant victories. For instance, the Barack Obama administration in the US has been forced to roll back some of its most pernicious mass surveillance programmes.⁴⁵ But in South Africa, the most effective method of limiting state violence in all its forms, is for movements to intensify popular organisation and action, and deepen the political shifts that are already underway. ■■■

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- 1 See: McMichael, C. 2015: 'Police wars and state repression in South Africa', *Journal of Asian and African Studies*, 51(1): 3-16 and Pithouse, R. 2016: *Writing the decline: on the struggle for South Africa's democracy*, Johannesburg: Jacana Media.
 - 2 See: Hlongwane, S. 2014: 'This brutal police state in which we live', *Business Day*, 22 January. Available at: <http://www.bdlive.co.za/opinion/columnists/2014/01/22/this-brutal-police-state-in-which-we-live> (accessed 15 April 2016); Kasrils, R. 2013: 'Mr. President, arrest this descent into police state depravity', *Mail & Guardian*, 6 March. Available at: <http://mg.co.za/article/2013-03-06-mr-president-arrest-this-descent-into-police-state-depravity> (accessed 15 April 2015); Essop, R, Grootes, S. and Eliseev, A. 2015: '#SONA2015: opposition parties accuse ANC of turning SA into a police state', *EWN Eyewitness News*. Available at: <http://ewn.co.za/2015/02/13/Opposition-MPs-accuse-ANC-of-turning-SA-into-police-state> (accessed 15 April 2016); and Bezuidenhout, J. 2016: 'Political observers: SA has become a police state', *Mail & Guardian*, 8 April. Available at: <http://mg.co.za/article/2016-04-07-fears-that-sa-has-become-a-police-state> (accessed 15 April 2016).
 - 3 Duncan, J. 2014: *The rise of the securocrats: the case of South Africa*, Johannesburg: Jacana.
 - 4 Nicolson, G. 2015: 'Military is the new normal: the army's extended Fielde deployment', *Daily Maverick*, 8 July. Available at: <http://www.dailymaverick.co.za/article/2015-07-08-military-is-the-new-normal-the-armys-extended-fielde-deployment/#.V0gYcjV97IU> (accessed 27 May 2016).
 - 5 Africa, S. 2012: 'The policy evolution of the South African intelligence services: 1994 to 2009 and beyond' (unpublished paper). Available at: [http://repository.up.ac.za/bitstream/handle/2263/20766/Africa_Policy\(2012\).pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/20766/Africa_Policy(2012).pdf?sequence=1) (accessed 25 May 2016): 117.
 - 6 Ministerial Review Commission on Intelligence 2008: 'Intelligence in a constitutional democracy', final report to the Minister for Intelligence Services, the Honourable Mr. Ronnie Kasrils MP. Available at: <http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ReviewCommSept08.pdf> (accessed 25 May 2016).
 - 7 Right 2 Know Campaign 2015: *Big Brother Exposed: stories of the South African intelligence agencies' monitoring and harassing activist movements (handbook)*. Available at: <http://bigbrother.r2k.org.za/wp-content/uploads/Big-Brother-Exposed-R2K-handbook-on-surveillance-web.pdf> (accessed 20 May 2016).
 - 8 Swart, H. 2016: 'You always feel like somebody's watching you? They probably are', *Daily Maverick*. Available at: <http://www.dailymaverick.co.za/article/2016-06-03-you-always-feel-like-somebodys-watching-you-they-probably-are/#.V1UzsTV97IU> (accessed 6 June 2016).
 - 9 *Ibid.*
 - 10 Page, K. 2013: 'South African government provided funding for development of mass surveillance technologies found in Libya', *Privacy International*, 18 November. Available at: <https://www.privacyinternational.org/blog/south-african-government-provided-funding-for-development-of-mass-surveillance-technologies> (accessed 20 May 2016).
 - 11 Vermeer, A. 2013: 'Privacy International files complaint with South African export control body regarding the export of surveillance tech to Libya', *Privacy International*, 23 October 2013. Available at: <https://www.privacyinternational.org/blog/privacy-international-files-complaint-with-south-african-export-control-body-regarding-export> (accessed 20 May 2016).

- 12 Bezuidenhout, C. 2008: 'The nature of police and community interaction alongside the dawn of intelligence-led policing', *Acta Criminologica*, CRIMSA conference special edition, number 3. Available at: http://repository.up.ac.za/bitstream/handle/2263/9445/Bezuidenhout_Nature%282008%29.pdf?sequence=1, 59 (accessed 20 May 2016).
- 13 Fernandez, L. 2008: *Policing dissent: social control and the anti-globalisation movement*. Toronto: Rutgers University Press.
- 14 South African Police Service 2010: *South African Police Service Strategic Plan 2010-2014*. Available at: http://www.saps.gov.za/saps_profile/strategic_framework/strategic_plan/2010_2014/strategic_plan_2010_2014_2.pdf, 8.
- 15 Burger, J. 2013: 'A dysfunctional Crime Intelligence Division has severe implications for reducing crime', *Institute for Security Studies Today*, 8 October. Available at: <https://www.issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime> (accessed 17 May 2016).
- 16 Bezuidenhout, C. 2008, *op. cit.*.
- 17 The following municipalities were studied: the Rustenburg municipality, the Nelson Mandela metro, Lukhanji, Makana and Blue Crane (all Eastern Cape), Breede Valley, Witzenberg, Langeberg (all municipalities falling into the Cape Winelands District Municipality), Mbombela (Mpumalanga), eThekweni (KwaZulu/ Natal) and the Greater Johannesburg Metropolitan Council (Gauteng).
- 18 According to SAPS's IRIS records for the period, the largest number of unrest-related crowd management incidents, relative to peaceful incidents, took place in Mpumalanga in the following areas: KaNyamazane, Tonga, Kabokweni, Calcutta, Masoi, Leslie.
- 19 'KaNyamazane unrest-related crowd management incidents, 24/01/2102, 26/01/2012, 26/01/2012, 26/01/2012, 27/01/2102/ 27/01/2012, 11/02/2012', IRIS-BIS information released by SAPS to South African Research Chair in Social Change, University of Johannesburg, 2014.
- 20 Duncan, J. 2010: 'Thabo Mbeki and dissent', in Glaser, D. *Mbeki and after: reflections on the legacy of Thabo Mbeki*, Johannesburg: Wits University Press: 105-127.
- 21 Department of Co-operative Governance, 'Guidelines for managing service delivery protests and public marches', 19 June 2012, unpublished memo to the Heads of Department responsible for local government and the South African Local Government Association.
- 22 Lehlhonolo Majoro's discussion with Mr. Heunis, responsible officer on terms of the Regulation of Gatherings Act, Mbombela Municipality, 2 February 2014.
- 23 Oliver, P.E. 1998: 'Diffusion models of cycles of protest as a theory of social movements', unpublished paper, July. Available at: http://www.ssc.wisc.edu/~oliver/PROTESTS/ArticleCopies/diffusion_models.pdf (accessed 20 May 2016).
- 24 Combes, H and Fillieule, O. 2011: 'Repression and protests structural models and strategic interactions', *Revue française de science politique* (English), 2011/16, 61: 8.
- 25 Cox, L. 2013: 'Changing the world without getting shot: how popular power can set limits to state violence', in *Australia Study Centre for Peace and Conflict Resolution* (eds), *State of peace conference*, Vienna/ Berlin: LTI-Verlag.
- 26 Kienscherf, M. 'Beyond militarisation and repression: liberal social control as pacification', *Critical Sociology* (forthcoming). Available at: https://www.academia.edu/9631849/Beyond_Militarization_and_Repression_Liberal_Social_Control_as_Pacification (accessed 5 February 2015).
- 27 *Ibid.*
- 28 Cox, L. 2014: 'Waves of protest and revolution: elements of a Marxist analysis', (unpublished paper). Available at: <http://eprints.maynoothuniversity.ie/4867/> (downloaded 1 February 2015).
- 29 Bond, P. 2012: 'Protests and repression in South Africa', *Counterpunch*, 17 July. Available at: <http://www.counterpunch.org/2012/07/17/protest-and-repression-in-south-africa/> (accessed 26 January 2015).
- 30 Tarrow, S. 1989: *Democracy and disorder: protest and politics in Italy, 1965 – 1975*, Oxford: Oxford University Press.
- 31 Beck, C. 2011: 'The world-cultural origins of revolutionary waves: five centuries of European contention', *Social Science History*, Volume 35, Number 2, pp. 167-207.
- 32 Cox, L. 2014, *op. cit.*.
- 33 See: Booysen, S. 2011: *The African National Congress and the regeneration of political power*, Johannesburg: Wits University Press and Fakir, E. 2014: 'Circling the square of protests: democracy, development, delivery and discontent in Bekkersdal', *Ruth First Memorial Lecture*, University of the Witwatersrand, 13 August. Available at: http://witsvuvuzela.com/wp-content/uploads/2014/08/FinalRuthFirstLecture2014.EF_.pdf (accessed 14 January 2015).
- 34 Cox, L. 2013, *op. cit.*.
- 35 Nicolaidis, G. 2016: 'Marikana tragedy enquiry is a witch-hunt, says Phigeya', *Eyewitness News*. Available at: <http://ewn.co.za/2016/02/03/Marikana-tragedy-investigation-is-a-witch-hunt-says-Phiyega> (accessed 19 April 2016).
- 36 Molele, C, Letsoalo, M and Sole, S. 2011: 'Minister versus top spooks', *Mail & Guardian*, 16 September. Available at: <http://mg.co.za/article/2011-09-16-minister-vs-top-spooks> (accessed 19 April 2016).
- 37 Sachs, A. 1999: Concurring judgement, *South African National Defence Union v. Minister of Defence and Chief of the South African National Defence Force*, 26 May 1999, Constitutional Court of South Africa judgement CCT/27/98, pg. 33.
- 38 Duncan, J. 2014, *op. cit.*.
- 39 Hosken, G. 2009: 'They would've been shot for mutiny', *Independent Online*, 5 September 2009. Available at: <http://www.iol.co.za/news/south-africa/they-wouldve-been-shot-for-mutiny-457509> (accessed 19 April 2016).
- 40 Cox, L. 2013, *op. cit.*.
- 41 Duncan, J. 2014, *op. cit.*.
- 42 Pillay, T. 2016: 'Durban councillors found guilty for hit on activist', *Times Live*, 20 May. Available at: <http://www.timeslive.co.za/local/2016/05/20/Durban-councillors-found-guilty-for-hit-on-activist> (accessed 20 May 2016).
- 43 Cox, L. 2013, *op. cit.*.
- 44 *Ibid.*
- 45 Jacobs, D and Roberts, B. 2015: 'NSA reform: Bush-era powers expire as US prepares to roll back surveillance', *The Guardian*, 1 June. Available at: <http://www.theguardian.com/us-news/2015/may/31/nsa-reform-senate-deal-as-patriot-act> (accessed 30 May 2016).

A View from the Ground:

State-Civil Society Relations in South Africa

Interview

Chumile Sali

HBS: Representatives of the South African government are increasingly reverting to negative characterizations of non-governmental organisations (NGOs). Do words matter?

Sali: Words do matter. The negative characterisation of social movements by political leaders is aimed at mobilising communities against them. Social movements in South Africa are often referred to as part of the “third forces” and “regime change agents” that seek to destabilise and overthrow the democratic government. For example, the minister of state security responsible for the country’s intelligence sector, David Mahlobo, has labelled NGOs as “enemies of the state” and “counter-revolutionary”. Such allegations are absurd and baseless.

Social movements and NGOs in South Africa are advocating for the respect and implementation of the provisions of the Bill of Rights enshrined in our Constitution. The Social Justice Coalition [SJC] in Khayelitsha, Cape Town is advocating for access to basic services such as toilets. How is that campaign for access to services an agenda to overthrow the state?

Political leaders are hiding their failures behind inflammatory words and rhetoric. This has, to a certain extent, impacted on the attitudes of community members against social movements. I remember in October 2015, we were advocating for a fair re-allocation of police resources in black communities. I received a text message from an ANC [African National Congress] ward councillor in Khayelitsha that read, “SJC is a truly counter-revolutionary organisation. It needs to be nipped out of our society.”

What other developments do you observe that threaten to close down the space for civic engagement?

A major threat to civil society is the harassment of activists and social movements by state security agencies.

Many different examples can be cited here: the surveillance of activists by state intelligence services, as documented in Right2Know’s report, *Big Brother Exposed*; the disappearance and subsequent arrest of Vusi Mahlangu, an #OutsourcingMustFall activist in Umtata, Eastern Cape in March 2016; or the detention without trial of some SJC members while collecting evidence for the Khayelitsha Commission of Inquiry that investigated the breakdown of relations between the South African Police Services and the community of Khayelitsha.

The attempted murder of Andile Lili, the leader of Ses’khona People’s Rights Movement in Cape Town, or the killing of EFF [Economic Freedom Fighters] supporters in hostels in Tembisa, Johannesburg



Chumile Sali is an activist with the Social Justice Coalition (SJC), a mass member-based social movement campaigning for safe, healthy and dignified communities in some of South Africa’s largest, most underdeveloped townships. He is currently serving as the head of the Safety and Justice Programme.



Members of the Social Justice Coalition protest outside the High Court in Cape Town, South Africa.
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during the local government elections campaigns in 2016, exposes the high level of intolerance and willingness to use violence against political opponents in our country.

In May 2016, the Durban High Court found guilty two ANC councillors for the murder of a branch chairperson of Abahlali baseMjondolo. Thuli Ndlovu was silenced by machine guns and bullets because she fought and advocated for the restoration of dignity of black people residing in informal settlements. Thuli is one of many Abahlali baseMjondolo members who lost their lives because of their activism. Unlike in Thuli's case, in most cases of violence against activists there are no arrests or convictions made.

The February 2015 anti-TAC [Treatment Action Campaign] protest by the ANC Youth League in Free State is also worrying. The ANC Youth League called for the deregistration of an organisation that is doing nothing but advocating for better healthcare services for black people in that province.

Lastly, there is the current stance by the public broadcaster, SABC, to broadcast more happy sunshine news and to not broadcast violence and "sad" news. This is a direct attack on civil society and active citizenry. The SABC attempts to delegitimise the campaigns of grassroots organisations and other movements that dare to question the government. The SABC's action also closes space for critical engagement and deprives South Africans of a right to fair and unbiased information.

To what extent does legislation play a role? Are there efforts to introduce restrictive NGO regulation?

In June 2016, *Africa Confidential* reported that there is a draft legislation that is aimed at closing the space for NGOs in South Africa. The publication alleges that the draft legislation intends to monitor foreign funding of NGOs in South Africa and also threatens deregistration of the so-called "enemies of the state". Nothing has been made public as of yet.

But there are also other pieces of legislation that threaten civil society and the fundamental values and principles of our Constitution. This includes the Protection of State Information Bill, which seeks to muzzle whistle-blowers and, among other issues, is in contravention of section 16 of the Constitution, which guarantees freedom of expression. This so-called Secrecy Bill has however not been signed into law yet and has been gathering dust on President Zuma's desk since November 2013.

In October 2015, 94 community healthcare workers in Free State province were found guilty in the Bloemfontein Magistrate's Court for contravening the Regulation of Gatherings Act. The workers held a peaceful night vigil calling for the betterment of healthcare services in public hospitals.

The Regulation of Gatherings Act criminalises activism. Fifteen or more people gathering for a political cause and human rights issues are deemed criminals if they were not issued a notice by local authorities, and yet 15 or more people gathering to watch a football match or a public music concert in a shopping centre are not deemed to be criminals. The Regulation of Gatherings Act is intended for a police state and not for a constitutional democracy.

SJC has its very own experiences with the Regulation of Gatherings Act. Tell us more about them.

In September 2013, 21 SJC activists were arrested for chaining themselves outside of the Cape Town Civic Centre. The activists were peacefully requesting the mayor of Cape Town to improve sanitation facilities in the 204 informal settlements in Cape Town.

The 21 activists were charged for contravening section 12 (1)(a) of the Regulation of Gatherings Act. In April 2015, 10 of the 21 activists were found guilty and were handed a suspended sentence. In the judgment, Magistrate Alta Fredericks found that there is a reasonable prospect that the Regulation of Gatherings Act may be found unconstitutional by the High Court and convictions may be set aside.

The Social Justice Coalition views the Regulation of Gatherings Act as an apartheid piece of legislation that was passed in 1993 to stifle freedom to protest and to criminalise civil actions. We are therefore challenging the constitutionality of the Act. Criminalising the convening of a gathering merely because no notice was given in terms of section 12 (1) (a) of the Act limits the right to freedom of assembly enshrined in section 17 of the Constitution of the Republic of South Africa.

Such limitation is not reasonable and justifiable in terms of section 36 (1) of the Constitution – the limitation clause. Therefore, section 12 of the Regulation of Gatherings Act must be declared unconstitutional and invalid. If the section is declared invalid, the basis for the conviction of 10 SJC activists will fall away.

Should the Western Cape High Court and subsequently the Constitutional Court indeed declare section 12 invalid and unconstitutional, the decision will have far reaching impacts. This will bring to an end the criminalisation of activism in South Africa. ■■■

From Undemocratic Laws to Violence: How South Africa's Mine-Hosting Communities Are Silenced

Brendan Boyle

The rural Amadiba community of Xolobeni on South Africa's picturesque Wild Coast won a rare victory in July when an Australian company gave up its 13-year battle to mine titanium from the dunes that have sustained them for generations.¹

That victory came at great cost. Four people were killed in the conflict, most recently in March 2016 when activist leader Sikhosiphi "Bazooka" Rhadebe was shot and killed by attackers posing as police. The struggle has also left the community deeply divided between the minority who were set to gain from a close relationship with the proposed miner and the majority who wanted nothing to do with mining.

Mineral Resources Commodities (MRC), the Australian majority owner of Transworld Energy and Mineral Resources, cited the persistent resistance of the community as the reason it was abandoning its application for a mining right in Xolobeni. When MRC pulled out, it divested its interest to a local company set up in anticipation of sharing the project. Whether another consortium will try to revive the project is not immediately clear.

The Xolobeni case made world headlines because of the violence against the community and the unique environmental wealth of the region. The internationally acclaimed documentary film *Shorebreak* was a game-changer for the Amadiba people. But with an average of 11 public protests a day to choose from², South Africa's media tend to report on those that happen nearest to their own newsrooms – or that produce the most spectacular images. Against competition at

this level, rural people fighting for a voice on mining that affects their land seldom make the front pages.

As the mining industry's pursuit of new resources shifts increasingly towards rural areas such as the Wild Coast, politically connected elites are using a mix of money, political influence, legislation and intimidation to exclude local people from the benefits of mining and to silence their protests.

The interlocking laws and regulations that govern mining do require a limited level of consultation with communities that will be affected by prospecting and extraction. But when that consultation is inadequate or does not happen, when the wrong people are asked, or when community views are ignored, the onus falls on those who have been wronged to tackle the mining juggernaut.

Community members who dare to demand a seat at the negotiating table face a politically connected triumvirate of business, government and traditional leaders who together control mining in rural areas. Their arsenal includes deep corporate pockets, distorted interpretations of custom that position traditional leaders as autocrats, increasingly oppressive legislation, and violence.

As the potential earnings from mines in these remote areas increases, the space for ordinary people to speak, and to protest where necessary, is shrinking.

Entrenching Apartheid's Footprint through Legislation

Twenty-two years after the end of white rule, South Africa has failed to erase the spatial footprint of apartheid. Around 18 million



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of the country's 54 million people still live within the boundaries of the 10 so-called "homelands" to which most black people were confined. They are the poorest people in the country. They are least likely to find work. They have the weakest schools, the least effective clinics and the hardest road out of poverty.

After 1994, South Africa's first democratic government tried to halt and then to reverse the destructive legacy of colonial and apartheid rule with a new Constitution and a flurry of legislation. The task was huge and urgent. One of the shortest and least equivocal acts of the new parliament sought to prevent further dispossession of rights to customary land pending the adoption of a comprehensive land policy. That policy is still outstanding.

The three-page Interim Protection of Informal Land Rights Act (IPILRA 1996)³ uniquely allows people to refuse to be deprived of their land rights, except by expropriation. It recognises "beneficial occupation" as a basis of a right in land. Any decision to dispose of a right in land owned by a community must be endorsed at a public meeting by a majority of all the rights holders – not just a majority of those in attendance.

After these early efforts to dismantle the apartheid infrastructure, the government has more recently entrenched the former homeland borders, with chiefs exercising extraordinary power within them. The fulcrum of this reversal is the Traditional Leadership and Governance Framework Act (TLGFA) of 2003, which, 11 years after the end of white rule, reaffirmed the "tribal" boundaries imposed under the Bantu Authorities Act of 1951, a cornerstone law of apartheid. The TLGFA recognised traditional councils and gave them powers over all the people living within their territory. Unelected traditional leaders preside over these councils and appoint 60 percent of their members. The remaining members must be elected by their communities, but some provinces have yet to hold these elections. In North West Province, two elected members of the Bapo Ba Mogale council were suspended by the unelected majority in 2014 when they demanded a higher level of accountability for community funds and insisted that people should be properly consulted about decisions affecting their land.

New legislation that is now in the pipeline will further dilute rights in land, including the right to consultation. This includes

the Traditional and Khoi-San Leadership Bill (TKLB). In its current form, it again entrenches the homeland boundaries and proposes that traditional authorities should have apparently unlimited rights to transact on communal land. It also proposes to drop any obligation to consult the people who will be affected.

In other words, the institutions of traditional leadership, which should defend the interests of people living on communal land, have been handed autocratic powers in post-liberation policies and laws and seduced by the promise of personal wealth through mining.⁴ The former "homeland" of Bophuthatswana is a case in point. Most of the world's richest platinum field, the fabled Merensky Reef, lies beneath its soil in what is now North West Province. The region hosts some of the biggest mining companies listed on the London Stock Exchange.

The Bafokeng community, often referred to as "the richest tribe", boasts a ZAR41 billion investment portfolio, built from mining revenue on their land.⁵ In reality, this wealth is held and enjoyed by an elite minority, with 63 percent of the people in this province left to survive on a monthly income below ZAR604 (about USD40).⁶ Royal Bafokeng Holdings may refer to community members as "shareholders", but they cannot access their own share of that communal wealth for any personal purpose, such as to respond to a medical crisis in the family. The earth of this former homeland may be rich, but the people who live on it are not.

The fact that the accessible remainder of South Africa's mineral wealth, valued at an eye-watering USD2.5 trillion⁷, lies mainly within the boundaries of these former homelands has raised the stakes for everyone who can claim, buy or just usurp land rights.

The diversion of what should be enough for everyone into the pockets of an elite minority has ignited years of simmering anger at the continued marginalisation of the rural poor. Although the odds are stacked against them, an increasing number of communities are joining with like-minded grassroots formations and non-governmental organisations (NGOs) to resist the elite capture of the revenue and opportunity that should be theirs.

No Money, No Mobilising

Apart from the competition for attention among so many legitimate needs in a coun-

try recovering from the destructive effects of apartheid, the rural location of most mining operations makes mobilisation especially difficult. The Mapela in Mokopane, Limpopo Province, for example, live in 42 villages up to 30 kilometres apart. They cannot walk to a meeting place, nor can they afford taxi fares. Mobile phones should offer an alternative for planning meetings, but the cost of networking a dozen community organizers for a 30-minute conference call – around USD 15 – is prohibitive for people living below almost every poverty line. Mobilising to fight for a bigger slice of the platinum pie, or even just to know how big the pie actually is, costs more than they can afford.

From Xolobeni on the southern coast to Mapela in the far north, people are standing up to the mining juggernaut and demanding, in the words of the People's Mining Charter adopted by communities in June, "Nothing about us without us".

The courts are too costly for communities on their own. Companies and traditional leaders can always outspend them. The Bakgatla Ba Kgafela Traditional Council paid just one lawyer ZAR49 million over three years, mainly to fight community attempts to find out where their mining revenue went.⁸

The cost of equipment, even smart phones, the bandwidth required, and the training needed to get community members involved through social media platforms means there is a long way to go before rural community voices are noticed by mainstream media and, as a result, by policymakers or legislators.

Violence and Divided Communities

Xolobeni is just one of many mining-affected communities hit by violence. The Land & Accountability Research Centre (LARC) at the University of Cape Town has documented multiple attacks on people and their property in North West Province, Limpopo and KwaZulu-Natal. The police massacre of 34 mine workers during a wage strike at Marikana in August 2012 is an example of the collusion between elites to silence those who bear the brunt of their race for extreme

wealth.⁹ A subsequent official enquiry revealed that corporate and government actors colluded to suppress legitimate labour activists.

Complex Agreements

Communities that want to hold mining companies to account have to interrogate highly technical documents: a task that is beyond the means of any private constituency. Environmental impact assessments, which take years of specialist work to prepare, must be challenged within a period of weeks. The deals struck between miners and the government are equally dense, and key elements often are withheld.

In 2014, an opaque deal between Lonmin Plc, the department of rural development and land reform and the Bapo Ba Mogale, a community of about 40 000 people in North West Province, swapped the community's existing 7.5 percent share of the promising Pandora platinum-mining joint venture and their right, protected by the Mineral and Petroleum Resources Development Act (MPRDA), to a 12 percent royalty on platinum profits from their land and the surface rights to that land, for ZAR640 million in cash and equity.¹⁰ Two years later, affected landholders still have not been allowed to see the documents that detail the deal's provisions.

With the help of the overstretched Legal Resources Centre, the pro bono division of a major law firm in Cape Town and LARC, two community-based organisations (CBOs) launched an application in 2015 to review the decision-making processes that led to the deal. It is another uneven battle. Lonmin has employed many top-flight lawyers and the Traditional Council is paying its own legal bills from the very funds the community seeks to protect. The CBOs have to beg and borrow just to be able to pull their litigation committee together for a meeting. A year after the case was launched, the applicants have only recently received copies of the transaction documents – and then only after signing confidentiality agreements.

The laws that govern mining rights introduce highly technical requirements, but none offer communities assistance in evaluating or challenging the interpretations of investors and developers who want their land.

The MPRDA, for example, requires mining companies to develop and implement social and labour plans (SLPs) to support

both their workers and host communities. Although these plans are supposed to be about them, members of those communities routinely are refused sight of them. Communities first have to fight for access to the plans themselves and then they have to fight – and possibly litigate – to find out what was actually done.

An extensive study by the Centre for Applied Legal Studies at the University of the Witwatersrand, which was released in May 2016, found that communities affected by mining are not consulted about these SLPs and most of the promises made are neither monitored nor kept.¹¹

Mining companies allege that government departments insist they deal only with traditional leaders and their largely appointed traditional councils, although this is not supported by any law or policy. Communities must work with civil society partners to prove and claim their customary, common and statutory rights to be consulted and not merely represented by leaders whose status they dispute.

Conclusion

Colonialism and apartheid deliberately confined black people to the 13 percent of

South Africa that white people did not want. Now that this land has been found to hold most of the country's remaining mineral treasure, wealthy and politically connected elites want access to it on the least onerous terms they can impose. They rely on the law to block avenues for dissent, on the state to enforce those laws and on cynically empowered traditional leaders to insulate them from popular rage.

Rural people are fighting back. It is their houses that are cracked by the blasting, their children who become ill from the dust, their perennial water sources that have dried up or been poisoned and their grazing and cropping land that is being dug up. From Xolobeni on the southern coast to Mapela in the far north, people are standing up to the mining juggernaut and demanding, in the words of the People's Mining Charter adopted by communities in June, "Nothing about us without us".¹²

The response from government has so far leaned in favour of the corporate constituency, which offers gifts, empowerment shares and sometimes police protection, and their compliant partners. The Xolobeni story shows, however, that this will not be enough. Eventually, the people will have to be heard. ■■■

Not all members of the Bafokeng community benefit from mining. Resident at Thekwana village near Rustenburg, South Africa. © Gallo Images



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- 1 Business Day, 2016: Community wins fight against miner, 19 July.
 - 2 Mail & Guardian, 7 June 2016. Available at: <http://mg.co.za/article/2016-06-07-new-stats-show-that-nine-out-of-11-protests-a-day-are-peaceful>.
 - 3 Centre for Law and Society, 2015: Communal Land Policy and IPILRA, Centre for Law and Society. Available at: http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf.
 - 4 See: Claassens A. & Matlala B. 2014: Platinum, Poverty and Princes in Post-apartheid South Africa: New Laws, Old Repertoires, in *New South African Review* 4, Wits University Press.
 - 5 Royal Bafokeng Holdings. Available at: <http://www.bafokengholdings.com/our-investments/investment-mandate-and-strategy>.
 - 6 See: Table 6 at: http://www.saspri.org/SASPRI/wp-content/uploads/Docs/SAIMD_2011_ward_level_National_Report_for_Web.pdf.
 - 7 Hermanus M, 2015, Council for Scientific and Industrial Research. Available at: http://www.parliament.gov.za/live/content.php?Item_ID=7656.
 - 8 Internal audit by BDO Spencer Steward, 2012.
 - 9 SA History Online. Available at: <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012>.
 - 10 Lonmin regulatory announcement. Available at: <https://otp.tools.investis.com/clients/uk/lonmin/rns/regulatory-story.aspx?cid=1327&newsid=644241>.
 - 11 Centre for Applied Legal Studies, 2016: Social and Labour Plans, Wits University. Available at: <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf>.
 - 12 People's Mining Charter. Available at: https://www.evernote.com/l/AZrvqE5RnpXByr6ByA7n1_7nQANTLF5u4nk.

Shrinking Spaces for Nigerian Civil Society?

Interview

Eze Onyekpere

HBS: Former military coup leader and now democratically elected president of Nigeria Muhammadu Buhari has described himself as a “converted democrat”. How would you describe the current state of relations between civil society and the Nigerian state?

Onyekpere: When analysing these relations, it is important to distinguish between the different arms and levels of government.

Until recently, the senate considered the so-called Frivolous Petitions Bill. It prescribes stiff penalties for spreading false information through social media and for presenting false petitions. The bill mandates a petitioner to swear an affidavit either at a federal or a state high court in support of a petition.

While the Chief Justice of Nigeria supported the bill, the executive chose to disassociate itself from it. The Attorney General of the Federation, as the chief law officer of the Federation of Nigeria, also spoke out against the Bill.

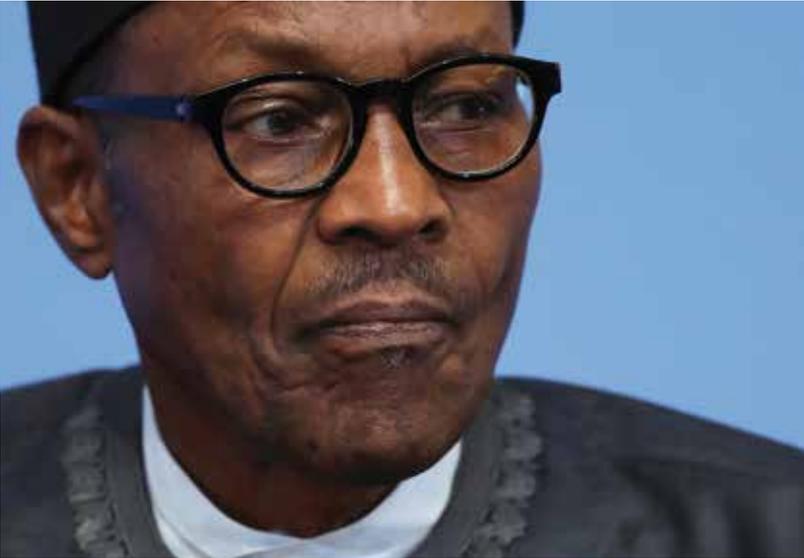
Although the feud between the executive, led by Buhari, and the leadership of the National Assembly may have reasons rooted more in power-political struggles between the two than in concerns for civil society, in effect the executive sided with civil society against the Bill.

Eventually strong public opposition led the Senate to retreat. It is not clear, though, whether the Bill has been withdrawn or just stood down to be reintroduced at another opportune time.

However, there now also is a private members bill to regulate NGOs [non-governmental organisations] in the national assembly that has passed second reading in the House of Representatives. The bill, which was introduced by a member of one of the opposition parties, seeks to establish an NGO Regulatory Commission with wide powers to register NGOs or decline registration if it considers their mandate not to be in the national interest. The Commission is to issue two-year renewable operational licenses to NGOs as it deems fit. It also has the power to cancel such a license if the licensee violates the terms and conditions attached to it. NGOs are to submit their annual work plan and budget for approval. Foreign NGO workers need the special permission of the Commission to operate in Nigeria; vehicles of NGOs must be branded; donors cannot dispose of project assets at the end of a project, as all assets will be deemed to belong to the Federal Government of Nigeria; whilst the supervising minister can give instructions to the Commission for sanctions against “erring” NGOs. The Commission is to develop a code of conduct for NGOs relating to funding, foreign affiliations, national security, etc. Offences are created with various degrees of sanctions.



Eze Onyekpere is the director of the Centre for Social Justice in Abuja, Nigeria. He has led a wide range of civil society interventions, including on improving fiscal governance, financial reform and sustainable access to energy. Eze is a columnist for *The Punch* newspaper and served on the editorial board of Independent Newspapers.



Nigerian President Muhammadu Buhari at an international anti-corruption summit in London.
© Dan Kitwood / Getty Images

Neither the president nor the ruling party has expressed an opinion on the Bill. Thus, the position of government is unclear at this stage.

You just mentioned the need to distinguish between the different levels of government. What are the particular challenges at state level and how do they differ from national level?

State-level governance is less transparent and open compared to the federal government. Many of the states have not passed freedom of information laws, as there is legal controversy over whether the federal Freedom of Information Act applies to states. Essentially, information for in-depth

engagement by civil society is not available at the state level. Also, state governors are generally less tolerant of criticism and opposition. Some activists have been hounded with frivolous charges in the courts.

Apart from legislation that would have a direct negative impact on how NGOs can operate, what are some of the other challenges civil society faces in terms of the law?

There are a number of legislative acts that, in theory, should assist civil society organisations and the public at large to hold government to account. In practice, however, these are not always enforced or are used to frustrate the work of NGOs.

In 2011, Nigeria enacted a Freedom of Information Act which sought to liberalise access to public records and information. The Act allows access to public records and information to the extent consistent with public interest and the protection of personal privacy. It also protects serving public officers from adverse consequences for disclosing certain types of official information permitted by the Act.

However, the experience of government's response to freedom of information requests is mixed. Whilst a few agencies are ready and willing to provide information as contemplated in the Act, others prefer long costly litigation to wear out the petitioners.

Another example is budgeting and fiscal transparency. There is a wide gap between the provisions of the law and what actually happens. The Fiscal Responsibility Act enjoins the minister of finance in the preparation of the medium-term expenditure framework to hold public consultation on the macroeconomic framework, the fiscal strategy paper, the revenue and expenditure framework, and the strategic social, economic and developmental priorities of government. Such consultation is to be open to the public, the press, and any citizen or authorised representative of any group of citizens who may want to attend and be heard on the subject matter. However, since 2007 when the Act was enacted, consultations have been held only thrice – and none in the last three years.

Buhari was elected on the promise that he would ensure peace and stability. How has the volatile security situation in parts of the country impacted on civic-state relations?

The federal government treats civil society groupings that it considers threats to national security with a heavy hand. The testimonies coming out of the panel of enquiry looking into the clashes between Shiites and

the army in 2015 are frightening. Between 12 and 14 December 2015, hundreds of supporters of the Islamic Movement of Nigeria based in Zaria, Kaduna State were killed extra-judicially by the military authorities.

More troubling is the fact that federal government has refused to prosecute the military officials indicted in the massacre.

Government has also responded disproportionately to campaigners demanding sovereignty for Biafra state. Rallies and demonstrations by unarmed agitators are dispersed with maximum force, using live bullets. This is against the professional rules of engagement of both the military and the police in Nigeria. President Muhammadu Buhari has said that Nigeria's unity is not negotiable and that those who agitate for Biafra seem to re-open a case that was settled during the Nigerian civil war. He therefore forecloses any dialogue or meaningful engagement with the group.

Another big promise of Buhari was to stamp out corruption. Have there been any negative side effects by his anti-corruption war on civil rights thus far?

The right to personal liberty is part of the constitutional fundamental rights. Generally, arrest and detention should not exceed 48 hours for offences that do not attract capital punishment. The state is enjoined to do its investigation properly before effecting arrest so that suspects can be charged in court as soon as they are taken in. The Administration of Criminal Justice Act seems to have liberalised detention without trial over a long period of time totalling 42 days – three consecutive tranches of the 14 days in detention currently provided for under the Act. The offences where the law enforcement agents have used this are all bailable offences. As of now, it is mostly used in corruption cases but there is nothing in the law indicating it cannot be used for other alleged offences. This looks like a throwback to the era of legalised detention without trial as practiced by the former military governments. And there is the fear that critics of government may be held on trumped-up charges under this law in the future.

Looking into the future, how do you see the space for civic engagement in Nigeria developing?

Nigeria has a vibrant civil society and there seems to be no government-wide consensus on how to abridge this vibrancy. Attempts have been made in the past to shrink the space but the attempts were not properly coordinated. The current legislative attempt to circumscribe NGO work needs to be confronted head-on by civil society. It should be fought to a standstill, as existing laws are enough to deal with whatever challenges there may be in the sector. Vigilance and proactive action is imperative, whilst we need to continue expanding and expounding the frontiers of the existing space. At the level of individual states, the space is more closed when compared to the federal level. It is therefore especially at the state level where the push for more openness needs to be intensified. ■■

The Role of the State in Shrinking Political Spaces for CSOs in Kenya

Njeri Kabeberi

Born in the toughest of times, under the repressive regime of Daniel arap Moi (1978–2002), Kenya's civil society has grown resilient and vibrant over the decades. Dominated by youth and with strong links to growing social movements, it has become a beacon of hope to the many Kenyans who continue to struggle for the full realisation of their political, social and economic rights and freedoms. Together with a bold mainstream press and highly interactive social media, it works to hold those in positions of power to account and to enhance citizens' participation in the political process.

However, many influential leaders in the sector left to join government after a euphoric 2002 election, weakening civil society's ability to speak out and engage within and outside the sector. Questions have also been raised about its accountability and transparency to its constituencies, in particular to the communities and the public in whose name (and need) they seek funding from donors. This issue has been used and abused by the Jubilee Coalition that came into power in March 2013.

The anti-NGO sentiment of the current administration should not come as a surprise. President Uhuru Kenyatta and his deputy William Ruto were elected on a largely anti-foreign platform that took particular aim at the International Criminal Court (ICC), which probed the two's involvement in the post-election violence of 2007–08. The notion of NGOs conspiring with the ICC against Kenyan leaders delivered politicians the justification for calls to reduce NGO freedoms and access to funds.

Civil society soon became “evil society” in public discourse.¹

The Public Benefit Organisation Act

A core objective of the Public Benefits Organisations (PBO) Act is to encourage public benefits organisations to maintain high standards of governance and management through effective self-regulation.

The long-awaited Act was to replace the NGO Co-ordination Act of 1990, which had been enacted at a time of mutual suspicion between government and the civic sector. The legislation was greatly flawed and did not provide an enabling regulatory and institutional framework for the effective growth and development of civil society organisations in Kenya.

From 2009, several civil society organisations (CSOs), under the umbrella of the Civil Society Organisations Reference Group, spearheaded a campaign to mobilise CSOs to help develop and implement a new legal, regulatory and institutional framework. The new PBO Act was eventually enacted into law in 2012 and assented to by then-President Mwai Kibaki in January 2013.

Unfortunately, notwithstanding the good efforts of the 10th Parliament and the Kibaki administration to create a conducive relationship between civil society and the state, the law remained mute and inoperative for three and a half years. Only on 9 September 2016 did the government of Kenya finally sign the PBO Act of 2013 into life.

The extended period of ambiguity caused by this delay had led CSOs to peti-



Njeri Kabeberi is the newly appointed executive director of Greenpeace Africa. Before joining Greenpeace, Njeri was the chief executive officer of the Civil Society Reference Group in Kenya. Previous to that, she worked for eleven years as the executive director of the Centre for Multi-Party Democracy Kenya. Njeri regularly writes and comments on issues of equality, governance, democracy and human rights.



tion the High Court against both the cabinet secretary for devolution and planning and the attorney-general. Their petition, filed in late August 2015, argued that the delay in bringing the law into operation undermined the constitution and had led to illegal conduct by the Non-Governmental Organisations Coordination Board. Established by the 1990 NGO Co-ordination Act, the board is responsible for regulating and enabling the NGO sector, with the NGO Bureau acting as its executive arm.² Today, the lines between board and bureau have become blurred, such that the executive director of the bureau is misusing his authority to harass the civic sector under a defunct law.

Over the past three and a half years, and in cahoots with the cabinet secretary, the bureau helped to draft four sets of harmful amendments to the PBO Act that would cap foreign funding at 15 percent, undermine self-regulation, and impose excessive national executive regulation. In December 2014, the bureau deregistered 540 organisations, only to reinstate 179 of them two weeks later after they proved they were in full compliance with the law.

With the rise of terrorist activity in

Kenya, security issues took a greater part in justifying the shrinking of civic space. In June 2015, on the recommendation of the bureau, the government froze the accounts of Muslims for Human Rights (Muhuri) and another human rights organisation called Haki-Africa, citing allegations that they fund terrorist activities. Less than two months later, the High Court found that the two organisations had no case to answer.

On 31 October 2015, the CSO Reference Group reacted to threats of deregistration against another 970 NGOs with a press statement that the "bureau has been acting in an alarmist and punitive manner" and that the sector is slowly being choked to death by clumsy, short-sighted legislation and a smear campaign.

In May 2016, newly appointed Cabinet Secretary Mwangi Kiunjuri attempted to introduce new amendments, in total disregard of conservatory orders issued by the High Court in August 2015 to prevent any amendments until the CSO Reference Group's petition is heard substantially and ruled on. That highly anticipated judgment, which was expected to be delivered in July 2016, was postponed indefinitely. In light of

the surprising gazetting of the law in September, one may assume that the government realised that it could not win the case, which has now been rendered redundant.

The Reference Group's legal battle gained additional strength from a second approach mounted through the legislature. In April 2016, MP Agostinho Neto proposed an amendment to the PBO Act 2013 that would cause the Act to come into force within 14 days of its publication. This amendment was informed and motivated through the engagement between the Reference Group and the Kenya Parliamentary Human Rights Association (KEPHRA), of which Neto is a member. The Bill proposed to remove the powers conferred upon the

All in all, the attempted or threatened amendments to the legal and institutional framework have served to intimidate the media, which induces self-censorship and undermines the role of the media as the guardian of civic spaces.

cabinet secretary to determine when the Act will come into force. At the time of writing, Neto's bill had gone through the first and second readings.

Most recently, Kenyan-based international NGOs have also come under attack. While the government's demands that international NGOs hire locals first and address salary disparities may sound "reasonable" to the ears of the public, beneath the surface one soon encounters a systematic anti-foreign and anti-NGO sentiment. In addition, a number of local and international NGOs reportedly have been forced to pay to be removed from the NGO Bureau's deregistration list and to receive work permits for their international staff.

Attacks on Media

Amidst the worst chaos ever witnessed in a Kenyan parliament³, Speaker of the National Assembly Justin Muturi bulldozed parliament into passing one of the most controversial laws in independent Kenya: the Security Laws (Amendments) Bill. Despite robust constitutional protections for freedom of expression, Kenyan legislators enacted legislation on 18 December 2014 that not only threatened to curtail media coverage of terrorist attacks and

security operations in the country but also amended 21 other laws, among them the Penal Code, Criminal Procedure Code, Evidence Act, Prevention of Terrorism Act, and the National Police Service Act. The president signed this controversial bill into law a day after the chaotic parliamentary sitting and it was gazetted three days later.

The celebrations of the ruling coalition were, however, short-lived. Two months later, the High Court ruled in favour of a petition brought by the Kenya National Commission on Human Rights that challenged many of the Bill's provisions on grounds that they violated free speech, media freedom and other civil liberties. The court struck down Section 12 of the Act (which curtailed rights to publish, broadcast and distribute materials through print, digital or electronic media and to report on action/investigation of security operations by security forces) for "violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution".⁴

Two other restrictive laws had been adopted in late 2013: the Kenya Information and Communication (Amendment) Act (KICA) and the Media Council Act, which created a government-appointed Communication and Multimedia Appeals Tribunal with the power to hear appeals on complaints initially handled by the statutory Media Council of Kenya. The tribunal is "authorized to withdraw media accreditation and seize any property or other assets to cover fiscal penalties. Individual journalists face fines of up to 500 000 shillings [USD 5 000], and media companies up to 20 million shillings [USD 200 000], if they are found in breach of a government-dictated code of conduct drafted by legislators".⁵

These legislative changes serve as the backdrop against which a general attack against free forms of media can be observed. From January to September 2015, the international human rights organisation Article 19 recorded 65 cases where individual journalists and social media users were threatened with physical violence, threats by phone and text, summons by police, or legal restrictions. Of these, 22 cases related to journalists covering corruption, 12 to protests, and eight to terrorism and crime stories. Only three of these 42 cases have been investigated and the perpetrators taken to court, which is, as the director of Article 19 in Nairobi Henry Maina has argued, "an unacceptably high level of impunity".⁶

All in all, the attempted or threatened

amendments to the legal and institutional framework have served to intimidate the media, which induces self-censorship and undermines the role of the media as the guardian of civic spaces.

Police Brutality

Article 37 in Chapter 4 of the Constitution provides that “Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities”. Yet despite this very clear and progressive provision, Kenya has witnessed unprecedented police brutality. The recent torture and killing of a human rights lawyer affiliated to International Justice Mission, his client, and their driver are a sign of how deeply entrenched the culture of impunity is.⁷ The incident led to nationwide protests. In July 2016, Human Rights Watch released a report documenting 34 cases of Kenyans who disappeared at the hands of security agencies between 2013 and 2015. These cases have occurred on the pretext of fighting the armed Islamist group Al-Shabaab. In the same period, at least 11 bodies of people last seen with security officers were discovered.

Police brutality has a more immediate political utility, too. During protests against Kenya’s controversial electoral commission in May and June 2016, police officers shot live ammunition towards these largely peaceful gatherings, killing at least 5 people and wounding 60 others. Human Rights Watch reported that uninvolved bystanders, students in school or on their way home, and people at work or in their homes were

seriously injured or killed in situations where lethal force was unnecessary. One witness said police shot a man coming out of a bank and appeared to take his money. The shootings have violated Kenyan law and international guidelines on the use of force by law enforcement officials.⁸ In an absurd turn of events, presidential spokesman Manoah Esipisu claimed those shot during the recent protests had been looting supermarkets.⁹

The police’s unfettered discretion in their use of force systematically threatens to create a police state.

The Road Ahead

The Kenyan government has shown a disturbing determination to clamp down on independent and dissenting voices. As Human Rights Watch’s Otsieno Namwaya noted in reaction to the police’s heavy-handed response to protests, “[t]hese images rekindle memories of the repression in the 1990s when the KANU administration tried to suppress civil society leaders and the political opposition’s campaign for reforms to enshrine basic rights in Kenya’s Constitution.”¹⁰

Threats to civil society’s operating space and existence are set to continue. Ahead of the August 2017 elections, political interests are likely to drive the desire to control independent voices, domestic and international. However, Kenya’s civics have proven to be resilient and undeterred in the face of the worst oppression. Their recent success in arm-twisting the government to gazette the PBO Act is strong testimony to that. ■■■

1 Brass, J. 2016: Kenya’s clampdown on civil society is against its self-interest, *The Conversation*. Available at: <http://theconversation.com/kenyas-clampdown-on-civil-society-is-against-its-self-interest-62019>.

2 See: www.ngobureau.or.ke.

3 Capital FM, 2014: Chaos in Kenyan Parliament. Available at: <https://www.youtube.com/watch?v=D-f5V1zLuHg>.

4 Reporters Without Borders, 2015: Controversial security law provisions ruled unconstitutional, 26 February 2015 and updated 20 January 2016. Available at: <https://rsf.org/en/news/controversial-security-law-provisions-ruled-unconstitutional>.

5 Freedom House, 2015: Kenya - Freedom of the Press, Washington DC.

6 The Guardian, 2016: Kenya clamps down on journalists covering war on Al-Shaabab. Available at: <https://www.theguardian.com/world/2016/jun/27/kenya-clamps-down-on-journalists-covering-war-on-al-shabaab>.

7 Also see “Activists in the Trenches: A Profile of Kenya’s Wanjeri Nderu and Ruth Mumbi” in this edition. In recent years, such killings and forced disappearances at the hands of police have been particularly prevalent in the coastal areas, targeting people alleged to be related to the Al-Shabaab militia from Somalia.

8 Human Rights Watch, 2016: Kenya: Police Killings during Protests, Nairobi. Available at: <https://www.hrw.org/news/2016/06/20/kenya-police-killings-during-protests>.

9 BBC, 2016: Kenya opposition protests turn deadly in Kisumu, 6th June. Available at: <http://www.bbc.com/news/world-africa-36456885>.

10 Nyamwaya, O. 2016: Dispatches: Police Brutality Threatens Rights in Kenya, Human Rights Watch. Available at: <https://www.hrw.org/news/2016/05/18/dispatches-police-brutality-threatens-rights-kenya>.

Activists in the Trenches:

A Profile of Kenya's Wanjeri Nderu and Ruth Mumbi

Edith Honan

When poor Kenyans need help, whether because a family member has been raped in one of Nairobi's sprawling slums or someone they know disappeared after an interaction with the security services, they are unlikely to go to the police or to a non-governmental organisation (NGO). Instead, they seek out an activist like Wanjeri Nderu or Ruth Mumbi as their best hope.

The two women are part of a shadow army of human rights defenders in Kenya's capital, and their work does not come without risks. Both women have received death threats, and they have been followed, physically assaulted, and viciously harassed. Their work brings in little, if any, money. They have no access to the institutional support that provides physical cover and resources.

The recent killing of Nairobi human-rights lawyer Willie Kimani, along with a client he was representing in a dispute with a police officer and their driver, has drawn international attention to a problem that freelance activists like Mumbi and Nderu face every day. Security forces in Kenya enjoy almost absolute impunity, including when they are accused of retaliating against human rights whistleblowers. The brazenness of the Kimani attack – plucking a lawyer and his client from his taxi after a court appearance, kidnapping, mutilating and then brutally murdering them – suggests the problem is getting worse.

The government has disparaged the support of NGOs for the International Criminal Court's investigation of the explosion of violence that followed the 2007 presidential elections. The ICC cases against now-

President Uhuru Kenyatta and his deputy, William Ruto, have collapsed, but many activists say that the stigma against the human rights community remains.

Nderu and Mumbi, like the hundreds of other activists who operate outside of formally organised civil society, are among the most vulnerable as Kenya's civil space shrinks and their activism becomes more risky. "They're at the sharp end of the spear. And the fact that they have no institutional infrastructure behind them makes them incredibly vulnerable," said Abdullahi Halakhe, a researcher at Amnesty International in Kenya.

It's no surprise that they have thought about giving up. But they don't give up, for one clear reason: if not them, then who? "I think, OK, if I quit, that child who's going to be raped tomorrow, who is going to help them? That woman who's going to be beaten up tomorrow, who's going to help them?" said Nderu.

Nderu, who micro-blogs about human rights in Kenya on Twitter and Facebook, tries to help people who fall through the cracks left by an overstretched, and sometimes uncaring, civil society and NGO sector. Every week her inboxes fill with desperate messages and pleas for help – a woman trying to flee an abusive husband, a girl who has just been gang-raped. The victims who reach out to her say there's no one else – but not everyone in the community is grateful that Nderu steps in.

A year ago, she was attacked in a grocery-store parking lot in Nairobi's outskirts. It was around 8 pm, and she had just finished her shopping. "This guy came to me with metal knuckles and he told me in Kiswahili, 'You need to shut up, or otherwise we will shut



Edith Honan is an American journalist. She covered American courts and politics for Reuters in New York and she has also written for such publications as the *Financial Times*.

you up.' And he just swung at me." He hit the side of her face. A doctor later told her that she came close to losing her eye, and for three weeks she barely left her house. "I was in-between, thinking, 'Do I give up? Do I continue?'"

Horrible as the attack was, Nderu, who is 37, says it did not ultimately slow her down. Nor does the regular deluge of hate mail, including vivid threats of assault, or the sudden intrusion of memories of that night in the parking lot. "He had this cologne that, still today ... You know, it's a common cologne in Nairobi among the men. I just freeze, because I remember how he smelled."

Ruth Mumbi, who is 35 and works in the Huruma slum in eastern Nairobi, traces her activism to an early awareness of the risks that poor women like her faced in the slums, and her frustration at the absence of a support structure. Women could be gang-raped, or they could die in a poorly managed maternal-health clinic, and nothing would happen.

Much of her work was done in obscurity until she began advocating for a victim of police brutality. Then she received death threats and noticed that she was being followed. Early one morning, as she was rolling chapattis in her kitchen, a message flashed on her phone. "It said, who do I think I am? I'm just a small cockroach who can be eliminated any moment, if I don't stop what I am doing. And then it named all these people who had been assassinated."

A group that protects human rights workers whisked Mumbi off to northern England and enrolled her in a protection programme. When she returned to Nairobi six months later and was installed in a safe



Wanjeri Nderu at a protest against extrajudicial killings and police brutality in Nairobi, Kenya. © Edith Honan

house with her three children, she decided she had had enough. "I hadn't realised that what I had ventured into was that risky. I think I was even going crazy," she said.

Just a month later, her 17-year-old brother-in-law, Steven Gichuru, a young acrobat so good he had toured in China, was shot and killed in broad daylight by two police. Mumbi was thrust back into her old role, this time successfully campaigning to have the officers dismissed from their jobs.

When it comes to sustaining the day-to-day work, money is a problem. What has brought Nderu to the brink of throwing in the towel is not the fact that she was viciously attacked, but the feeling that she is letting down her husband and three kids by not having a paying job.

Both women know there aren't many other activists like them, willing to work more for the mission than the money, making sure their communities don't fall through the cracks.

Nderu gave up a good job as a financial advisor to commit herself to her brand of activism – connecting people with NGOs, providing support, and drumming up publicity to pressure authorities to act. But she does all this as a volunteer. She sells the cabbages and kale she grows in her small garden to fill her car with petrol, but she's not the income-earner she used to be.

"I can't afford to do this anymore. I am not bringing anything in, and I am taking everything out, so it's becoming a problem even at home, even with my spouse. We're in, you know, a very serious financial posi-

tion because of my decisions," she said recently, sitting in her brightly coloured living room, wearing a Save the Elephants t-shirt. "I've even posted on my social media accounts, please stop sending me any more cases."

Nderu says her former employer will always welcome her back, and sometimes she even goes through the motions of her old routine. But she can't seem to go through with it. "Last week, on Monday, I got in the car and I was already calculating the route I was going to use to avoid traffic. I had my suit, my stockings, my heels. The works," Nderu said. "And then I just walked back into the house."

A few hours later, she got a new message. An unemployed widower living in Mathare, a Nairobi slum, had returned home to find that his teenaged daughter had been gang-raped and his son had been attacked with a machete. Nderu didn't know if she even had enough petrol in her car to drive there.

Mumbi, who supports herself with various small businesses, also has financial pressures. A single mother with three children, she worries constantly about what would become of her children if anything were to happen to her. There have been times when she had to take money intended for food for the children to fund her case-work.

Both women know there aren't many other activists like them, willing to work more for the mission than the money, making sure their communities don't fall through the cracks.

Mumbi has struggled with the limits of Kenya's space for activism and the silence that often accompanies cases involving women and girls. In 2008, she helped set up



a Grassroots Women's Parliament to champion local social justice issues like police brutality, sexual harassment and access to quality maternal healthcare. One of their first acts was to do away with the membership fees that were common with other community organisations. The fees, she said, had effectively barred women from participating.

"For us, we wanted to have a unique platform where women can share and exchange their views about things that are not going right at the community level," she said. "At the end of the day, we wanted to see if maybe we could intervene, and also break this cycle of silence."

Nderu's work is very much in the trenches. Most of the cases she takes on

are low-profile and fall through the gaps left by well-funded professional human rights organisations – groups she says are too bogged down or simply uninterested in picking up the cases. She believes this approach makes her different from Nairobi's highly visible and mostly male "celebrity activists", the ones who are invited around the world to sit on panels and talk about human rights in Kenya.

"I know so many activists, especially in the slum areas, who do so much more than most celebrity activists do," she said. "Being an activist is not just about making noise, it's about making sure that what you're doing actually changes someone's life. If you see me going online, it means I am frustrated up to here." ■■■

Ruth Mumbi at a protest against extrajudicial killings and police brutality in Nairobi, Kenya.

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After the Honeymoon:

How the Sudanese Government is Stifling Civil Society and the Media

Interview

Nuba Reports

HBS: The Comprehensive Peace Agreement between the Sudanese government and the Sudan People's Liberation Movement/Army (SPLM/A), which was signed in 2005, ended Africa's longest-running civil war and allowed for a referendum for South Sudan to decide whether or not to secede from Sudan. Civil society then had more space to operate – especially with the international focus on Sudan. How has the relationship between civil society and the government developed?

Nuba Reports: Civil society groups were allowed to develop a strong presence in the years following the agreement, especially in urban areas. Activist movements were formed, such as the pro-democracy pressure group Girifna (meaning “fed up”) and the women-led No to Women's Oppression campaign. They held events at neighbourhood social clubs and universities, distributed material through the media, and inspired other groups to grow.

However, the honeymoon is definitely over. Since March 2009, when the International Criminal Court indicted Sudanese President Omar al-Bashir for war crimes and crimes against humanity, the state has increasingly cracked down on civil society, accusing it of supporting and collaborating with the court. The secession of South Sudan in 2011 took international pressure off Khartoum. Authorities further sought to silence dissent as civil war recommenced in the Sudanese southern states of South Kordofan and Blue Nile in the same year as South Sudan's secession.

What are some of the measures through which the state is clamping down on civil society organisations?

Measures range from indirectly cutting off access to international donor support by blocking organisations' access to registration to trumped-up charges.

Between 2010 and 2016, nearly a dozen civil society organisations were closed down. This includes human rights organisations such as the Salmah Women's Resource Centre and also cultural centres such as the Al-Khatim Adlan Centre for Enlightenment and Human Development [KACE].

Every year the attacks grow more aggressive. Instead of simply shutting them down, authorities are now implicating civil society organisations and other actors in court cases that could lead to even the death penalty.

In 2015, two prominent civil society leaders, Farouk Abu-Issa and Dr Amin Mekki Medani, were arrested after signing a document called the Sudan Call: A Political Declaration on the Establishment of a State of Citizenship and Democracy, which brought together Sudanese



Nuba Reports is a network of citizen reporters dedicated to providing credible coverage of the ongoing conflict in the Nuba Mountains and across Sudan. For more information visit www.nubareports.org.

armed and unarmed political forces and civil society actors. They were imprisoned for months as they faced charges including waging war against the state and undermining the constitution, which carry the death penalty.

Currently, ten individuals tied to a civil society organisation called the Centre for Training and Human Development – known as TRACKS Centre – are facing numerous charges, including espionage. The organisation is accused of working as a front for KACE, which was shut down in 2012. If sentenced, the centre's staff faces the death penalty or life imprisonment.

All of this is implemented as part of a broader government policy to control all sectors of Sudanese society in the name of national security.

By increasing its control of the press, the state is set to criminalise civil society activities further through shaping public opinion to view such organisations in the same way as armed groups that are a “threat” to national security.

How have these attempts to control the press played out?

Repeated detentions of journalists and confiscations of print runs of newspapers have intimidated many media houses into submission. Between May and July 2016, security forces confiscated at least six print runs of newspapers, rarely giving any explanation, even though they caused severe economic losses. The biggest target has been the private daily, Al Jazeera, which had four print runs confiscated since May. Although this is not the first instance of harassment the newspaper has faced, the scale was unprecedented.

In March 2016, journalists working for Al Tayar newspaper organised a three-day hunger strike – the first of its kind – protesting the state-led closure of their publication in December 2015 for a series of editorials criticising government cuts to the energy subsidy. The newspaper had a small victory in court: Sudan's highest court ruled to allow the paper to resume publishing after the protest. But few newspapers besides this have dared to protest state suppression, as many fear the consequences of publishing critical material.

Censorship is par for the course in Sudan. All newspapers are reviewed by an officer from the National Intelligence and Security Services before publication. If any article slips through the cracks and is broadly viewed as threatening “national security” or “public morals” or a list of sensitive issues seen by the authorities as red lines, publishers face confiscations, legal battles and suspensions.

For journalists, the professional consequences are dire. Dozens of journalists have been banned from writing in Sudanese newspapers. Others, like Ali Al Daly and Nada Ramadan in May 2016, face trumped-up legal charges brought by national intelligence or are embroiled in legal battles against the state. Trials can last for years – and if even if one is not summoned to court, charges are never dropped and they continue to threaten livelihoods, work and safety. Even independent online newspapers such as Sudanile face harassment, including hacking or punitive laws to supervise and monitor their work.

The minister for information said in parliament that controlling online and social media should be part of the Press Act and vowed to establish a centre to control and monitor social media and what he termed “rebellious bloggers”.

Are there any professional associations that can provide civil society space?

Independent trade unions have come under pressure just like everyone else. Due to their role in the unseating of previous dictator-

ships, they are viewed with a lot of suspicion. In June 2010, authorities arrested the head of the Central Committee of Sudanese Doctors and others for organising mass strikes for better pay and working conditions. A national and international outcry led to their release but the intimidation is ongoing. Last year the Ministry of Culture shut down the Sudanese Writers Union. Fearing mass public congregations, security forces also closed down the monthly Mafroush Book Fair. The fair is one of the most important events for writers, artists, journalists and musicians in the country.

The Sudanese and European governments have recently forged closer ties again, cooperating to counter the influx of migrants and refugees from and via Sudan to Europe. How has this renewed cooperation affected Sudanese civil society?

In April 2016, Neven Mimica, the European Commissioner for International Cooperation and Development, travelled to Sudan and announced a grant of EUR100 million for Sudan. The money is part of the EU Emergency Trust Fund for Africa, which was decided upon in 2015 already. The trust fund is not just supposed to better the situation of internally displaced persons and refugees inside of Sudan but to “tackle instability and the root causes of irregular migration and forced displacement”. This new international engagement with the Sudanese government will make it more ruthless as it continues to crack down on civil society. This engagement means that the EU has turned a blind eye to myriad human rights violations in Sudan and that the government of Sudan will continue to not be held accountable as it wages war on its civilians in the peripheries of the country and wages a different kind of war against the civil society in the urban centres.

What future do you foresee for civil society in the country?

In August, the State Crimes Prosecution Office transferred the eight human-rights defenders connected to the TRACKs case – excluding two defenders living outside of Sudan – to Al-Huda Prison in Omdurman and filed capital charges against them. After almost three months in a four-by-four-metre cell with 26 detainees and no ventilation, the detainees, along with three others affiliated with TRACKs, are facing serious charges of undermining the constitutional system, waging war against the state, espionage, and forming a criminal or terrorist organisation. The government continues to smear the defendants through articles in pro-government newspapers that paint them as spies and foreign agents as well as by using an entire trial session to show pornographic films and pictures that were allegedly found on the laptops of the defendants, causing confusion inside the courthouse and changing the discourse of the trial from a criminal to a moral one. The case is a critical juncture for Sudanese civil society, whose environment is much bleaker now.

As civil society clearly cannot operate freely anymore, many organisations consider going underground. However, it will require serious efforts to come up with a framework that can operate underground while maintaining transparent financial and management systems. Access to fiscal support from international sources will prove challenging.

Similar to oppressive countries such as neighbouring Ethiopia, the visibility of Sudan’s civil society will undoubtedly diminish in the years ahead but it may operate covertly at the local level. ■■■

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Batoul was awarded residencies at the Thami Mnyele Foundation in Amsterdam (2007), the Ecole Nationale Supérieure des Arts Visuels (La Cambre) in Brussels (2005), l'Appartement 22 in Rabat with Faouzi Laatiris (2005), and the Cité des Arts, Paris (2003). She also won the Prix de Jeune Talent at the Dakar Biennale, Senegal (2002).

