

SOUTHERN AFRICA LITIGATION CENTRE

Submission to the Ad Hoc Committee on Probing Violence against Foreign Nationals

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Introduction

The following submission has been prepared by the Southern Africa Litigation Centre (SALC) for the Ad hoc Committee on Probing Violence Against Foreign Nationals. The submission sets out national and international human rights concerns the organisation believes the ad hoc committee should consider during its oversight work and in its final report. It further provides recommendations for possible solutions to such incidences of violence.

SALC is a non-governmental organization based in Johannesburg, South Africa. It aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. The organisation is deeply concerned about the incidence of xenophobic attacks in South Africa and mobilised over 120 organisations from across the continent in responding to the incidences which have occurred this year. SALC, in collaboration with other organisations across the continent, has provided recommendations to the African Commission on Human and Peoples' Rights, as well as the African Union in relation to the xenophobic attacks.

Human rights concerns

Violations of rights, including non-derogable rights

The attacks against foreign nationals in South Africa have resulted the loss of lives, injuries to persons, damage to private property and the infringement of dignity of migrants and refugees living in South Africa, which are a grave violation of a number of national and international human rights which South Africa is obliged to protect in terms of its Constitution, as well as international human rights treaties which it has signed.ⁱ In May 2015, the African Commission published a resolution condemning the attacks against foreign nationals in South Africa and calling on the government, among other things to take appropriate measures to ensure that the rights of all immigrants are protected in accordance with the applicable international and regional human rights instruments.ⁱⁱ

There have been concerning statements from individuals regarding the legal status of those affected by the attacks. In fact, even President Jacob Zuma during a Freedom Day event in April made a statement that Mozambican national Emmanuel Sithole (aka Emmanuel Josias) who was brutally killed during these attacks was an illegal immigrant using a false name.ⁱⁱⁱ Such statements seem to imply and feed the sentiment that as the foreign nationals were reportedly undocumented, they did

not enjoy rights in South Africa. It must be emphasised that the right to life, not to be subjected to torture, cruel, inhuman and degrading treatment, and the right to strict equality before the law are non-derogable rights - not dependent on a person's status in a country. The status of foreign nationals who were and are likely to be victims of such attacks in South Africa is therefore irrelevant.

Both the 2008 and 2015 attacks affected not only undocumented foreign nationals, but also documented foreign nationals, South African nationals perceived to be foreign, as well as refugees and asylum seekers. Attacks against all these groups of people is a concern. However, the situation of asylum seekers and refugees is of special concern as they should receive special protection but were left in a vulnerable and desperate situation following these tensions.

During the violence, a number of governments, including South Africa provided or offered to provide assistance to foreign nationals leaving the country. Such assistance was necessary and crucial for those foreign nationals who wanted to leave, but did not have the means to do so. However, it also played into the agenda of those carrying out the attacks by assisting them to achieve their objective of ridding South Africa of foreign nationals. The solution to the violence should not be to repatriate all foreign nationals, but to ensure an environment in the country in which their rights are protected.

Incitement to violence by persons in positions of authority

During the 2015 violence a number comments were made by persons in positions of authority and influence which may amount to incitement to violence and played a role in perpetuating xenophobia and intolerance in the country. We are aware that the South African Human Rights Commission has an investigation underway into the serious comments made by King Goodwill Zwelithini and are hopeful that this investigation deals with that situation decisively and with the requisite seriousness that it deserves. The right to freedom of expression is recognized in South Africa's national and international human rights obligations. However, this right does not extend to incitement of violence or advocacy of hatred. While some official statements have been made to condemn the violence, not enough has been done to curb the abuse of freedom of expression and hold individuals accountable for statements which amount to incitement to violence and hatred. The African Commission resolution condemning the attacks in South Africa calls for South Africa to hold those responsible for the attacks accountable.^{iv} This extends to those responsible for inciting the violence.

Mass deportation without due process

The nationwide police raids which followed the xenophobic attacks in April further violated South Africa's national and international laws. These police raids were carried out, with military presence

on the streets, apparently intended to combat crime, but predominately involve arresting and deporting migrants alleged to be illegally present in the country. These raids were apparently carried out without any procedural safeguards in terms of South African law^v such as investigations into immigration status; access to legal representation; ability to make representations to a court and steps taken to ensure that no refugees and asylum-seekers, to whom a duty of international protection applies, were not subjected to forcible returns. Furthermore, the raids violated Article 12 of the African Charter on Human and Peoples' Rights which prohibits the mass expulsion of foreign nationals.

The African Commission has stated on a number of occasions that mass expulsions of foreign nationals without due process are a violation of rights.^{vi} In a decision against Angola, the African Commission stated, "Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights". This type of deportations calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17 paragraph 1) and results in the violation by the State of its obligations under article 18 paragraph 1 which stipulates that "the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health". By deporting the victims, thus separating some of them from their families, the Defendant State has violated and violates the letter of this text..."^{vii} The African Commission has further made it clear that such mass expulsions cannot be justified on the basis of the protection of states' economies from foreign nationals.^{viii}

Recommendations

In 2008, the xenophobic attacks left at least 62 dead, hundreds wounded, and contributed to the displacement of 100,000 people or more. Following those attacks, the South African Human Rights Commission (SAHRC) prepared a report with their findings and recommendations. SALC calls on the ad hoc committee to remind the South African government of this report and call upon the government and the SAHRC to immediately take steps to implement the recommendations found therein. In addition, SALC requests the ad hoc committee to call upon the government of South Africa to:

- i. Protect migrants, refugees and other vulnerable foreign nationals from further attacks, including by increasing impartial and effective police presence in high-risk areas and immediately implementing conflict resolution initiatives in these areas involving the Department of Home Affairs;

- ii. Provide humanitarian and other social assistance to those affected by the xenophobic attacks in the country, including counselling for trauma and access to information on services and on durable solutions for refugees and asylum-seekers;
- iii. Bring perpetrators of violence against foreign nationals to justice. To facilitate such prosecutions the Department of Justice should set up special courts, as was done during the 2010 World Cup in South Africa, to deal with all cases of violence against foreign nationals in a bid to ease the burden on the courts. Information on accessing these courts should be widely disseminated;
- iv. Investigate and bring to justice the instigators behind the perpetration of the violence;
- v. Condemn unequivocally comments by persons in positions of authority and influence which may amount to incitement to violence;
- vi. Effectively engage the broadest possible South African public, in order to curb and eradicate xenophobia and xenophobic violence. These messages should be repeated, constantly re-iterated and not only heard after crises moments. They should be accessible, in local languages, should be expressed directly to communities, and should involve local leaders;
- vii. Advise and assist all those who have been victims of violence to seek redress;
- viii. Assist refugees and asylum seekers who have lost their permits to have these re-issued and put in place concrete plans for their reintegration into communities.

ⁱ These include the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights

ⁱⁱ 304: Resolution Condemning The Xenophobic Attacks In The Republic Of South Africa - ACHPR/Res.304 (LVI) 2015, <http://www.achpr.org/sessions/56th/resolutions/304/>

ⁱⁱⁱ This is repeated in the official communication dated 28 April of the Inter-ministerial committee issued by Minister Jeff Radebe.

^{iv} Resolution Condemning The Xenophobic Attacks In The Republic Of South Africa, Ibid, paragraph 3(c)

^v In terms of Sections 34 of the Immigration Act 12 of 2002 (as amended)

^{vi} See Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola, African Commission on Human and Peoples' Rights, Comm. No. 159/96 (1997). Communication 292/2004, Institute for Human Rights and Development in Africa v Republic of Angola; and Recontre Africaine pour la Défense des Droits de l'Homme v Zambia [(2000) AHRLR 321 (ACHPR 1996)]

^{vii} Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola, African Commission on Human and Peoples' Rights, Comm. No. 159/96 (1997). Communication 292/2004, Institute for Human Rights and Development in Africa v Republic of Angola

^{viii} Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola, Ibid