

SOUTHERN AFRICA LITIGATION CENTRE

SUBMISSION BY THE SOUTHERN AFRICA LITIGATION CENTRE TO THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN PREPARATION FOR THE NATIONAL HEARING ON SOCIAL COHESION AND XENOPHOBIA IN SOUTH AFRICA

The Southern Africa Litigation Centre (SALC) is a regional NGO operating in 11¹ Southern African countries. As a result of this geographical mandate we are particularly interested in supporting efforts to counter xenophobia and intolerance. We have in the past made submissions relating to xenophobia in South Africa to various regional and international fora.²

CONTEXT AND OVERVIEW OF THE SAHRC 2009 REPORT ON THE SAHRC INVESTIGATIONS INTO ISSUES OF RULE OF LAW, JUSTICE AND IMPUNITY ARISING OUT OF THE 2008 PUBLIC VIOLENCE AGAINST NON-NATIONALS

In the aftermath of the 2008 outbreak of xenophobic violence the Consortium for Refugees and Migrants in South Africa (CORMSA) made a request for the SAHRC to carry out an investigation into the attacks. The investigation was commenced more than a year later in October 2009 and a report³ was produced in 2010.⁴ The report made recommendations to state institutions with a view to prevent future conflict or mitigate it more effectively. From information available publicly, these recommendations have not been fully complied with. It would be helpful for all the government departments cited in the report to make written submissions indicating the level of compliance with the recommendations.⁵

Selected recommendations

- 1) Through the National Disaster Management Centre (NDMC), the Department of Cooperative Governance and Traditional Affairs (DCoGTA) to develop a national-level evaluation and action plan to address obstacles to local, provincial and national responses to social conflict disasters.
- 2) Through NDMC, develop a set of guidelines on response to social conflict disasters to promote consistency in the nature and quality of disaster response.
- 3) The Department of Education (DoE) to work with the Department of Home Affairs (DHA) and the SAHRC to incorporate issues of migration and xenophobia into the national syllabus.

¹ SALC operates in Angola, Botswana, DR Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia, and Zimbabwe and to a limited extent in South Africa.

² The list of letters and submissions made by SALC are listed in the Appendix.

³ Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals (2010).

http://www.sahrc.org.za/home/21/files/Reports/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf

⁴ SALC's Director, Kaajal Ramjathan-Keogh, was at the time the Chair of CORMSA's Board and was involved in supporting the SAHRC investigation and report in this capacity.

⁵ The Department of Home Affairs provided an update in 2015 in answer to a question:

<http://www.politicsweb.co.za/politics/xenophobia-we-implemented-sahrc-report--malusi-gig>

- 4) DHA to provide to the SAHRC an annual assessment of cases brought against DHA and/or its contractors with respect to status determination, arrest, detention and deportation.
- 5) DHA to conduct and provide to the SAHRC an annual assessment of DHA progress in actioning its recommendations relating to abuses of process.
- 6) DHA to implement disciplinary procedures against officials who were responsible for departures from legislated administrative procedures or possible refolement.
- 7) Develop specific guidelines on the DHA's legislated xenophobia prevention and deterrence mandate.
- 8) The Department of Justice and Constitutional Development (DoJCD) to develop hate crimes legislation and support measures to institute it.
- 9) South African Human Rights Commission (SAHRC) work with the Department of Education and DHA to incorporate issues of migration and xenophobia into the national syllabus.
- 10) SAHRC to monitor the work of the implementation agency to be established in relation to the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.
- 11) Together with South African Police Service (SAPS), the South African National Defence Force (SANDF) draw up best practice guidelines (as envisioned by the Defence Act 2002) for reference in the event of a future request for cooperative service in conditions of civic violence.
- 12) SAPS together with the NPA, compile an evaluation of the 2008 joint agreement on xenophobia-related cases and the challenges in its implementation, providing concrete recommendations to minimise the weaknesses and promote the strengths of the response in case of a similar situation arising in the future.
- 13) Together with DoJCD, draw up a set of best practice guidelines that in the case of a future scenario would make the best and most efficient use of resources in the judicial system.

Noteworthy situations and outcomes

Between 2000 and March 2008, at least 67 people died in what were identified as xenophobic attacks in South Africa. In May 2008, a series of rapid large-scale attacks left 62 people dead and over 600 injured. Twenty-one of those killed were South African citizens, allegedly killed because they were perceived as foreigners. The attacks were apparently motivated by xenophobia, and have continued to occur every year since 2009. According to the United Nations High Commissioner for Refugees (UNHCR), at least 120 foreign nationals were killed, five of them burnt alive, 100 were seriously injured, at least 1,000 displaced, and 120 shops and businesses permanently or temporarily closed through violence or selective enforcement of bylaws in 2011.⁶ In 2012, the number of violent incidents increased: at least 250 incidents were recorded resulting in 140 deaths and 250 serious injuries. In 2013, an average of three major violence incidents were recorded per week⁷ and an estimated 300 incidents of violence against asylum seekers and refugees had been reported up to March 2014 with an estimated 200 shops looted and 900 persons displaced.⁸ More recently in 2015, another nationwide spike in xenophobic attacks against migrants and refugees occurred in January and again in April. The latter attacks, which began in KwaZulu-Natal Province, prompted a number of foreign governments to repatriate their citizens. The April 2015 attacks resulted in at least seven verified deaths, but the number is understood to be higher, with at least 5,000 migrants and refugees displaced.⁹

⁶ UNHCR, Protection from Xenophobia, An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes, 2015 at page 21.

⁷ *Id* at page 21.

⁸ *Id*.

⁹ SALC AU Statement 10 June 2015; <http://www.osisa.org/general/south-africa/open-letter-african-union-resurgence-xenophobic-violence-south-africa>

SPECIFIC RESPONSES TO SAHRC QUESTIONS:

1. *What in your view are the underlying causes of ongoing stigma and discrimination by migrant communities in South Africa?*

- 1.1. The absence of a formal government policy on the reception and integration of migrants and refugees into local communities;
- 1.2. The hostile provisions of the immigration laws which do not permit ordinary work seekers to apply for and receive permits for low skilled employment. We would recommend such a permit for citizens of SADC member states;
- 1.3. There are reciprocal visa admission arrangements with most SADC countries.¹⁰ Despite provisions for a 3 month visa free entry in particular for Zimbabwe and Mozambique, certain borders like Beitbridge and Ressano Garcia, continue to issue visas of a shorter duration to Zimbabweans and Mozambicans who are visiting the country making it difficult for them to comply. Once someone has overstayed, they are less likely to leave the country within a short period as there is less of an incentive to do so;
- 1.4. A hostile asylum process which is fraught with maladministration and corruption makes it extremely difficult for asylum seekers to apply for and receive the permits to which they are entitled. The long duration of the asylum seeking process prejudices genuine asylum seekers who are in need of protection and increases their vulnerability to crime, exploitation and discrimination;
- 1.5. An innate suspicion and dislike of foreigners in South African communities has shown itself to be pervasive and the cause of outbreaks of violence;
- 1.6. The scapegoating of immigrants as the cause of limited resources such as jobs and education and responsible for the rise in poverty, violence and crime;^{11 12}
- 1.7. The stereotyping of immigrants and other outsiders as illegals and criminals feeds into a climate of suspicion and reinforces false narratives about foreigners being a threat to physical security;¹³
- 1.8. Discriminatory and inflammatory views promulgated by public figures and people in authority such as politicians and the police.^{14 15}

2. *Does the existing conception and implementation of law and policy serve the interests of migrant communities and provide adequate protection? If not how can law and policy be improved?*

South Africa's national legislation incorporates the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services. However, some public institutions do not recognize refugees' permits, preventing them from benefitting fully from these

¹⁰ Exceptions are Angola and Namibia (<http://www.dha.gov.za/index.php/immigration-services/exempt-countries>).

¹¹ Ngozi Odia ka, The Face of Violence: Rethinking the Concept of Xenophobia, Immigration Laws and the Rights of Non-Citizens in South Africa, 4(2) Brics Law Journal 40-70 (2017), page 42.

¹² "...unregulated human mobility continues to be seen as a threat to the economic and physical well-being of citizens, and prejudice against foreigners is often reflected and exploited in political scapegoating, baseless inflation of immigration statistics..." UNHCR, Protection from Xenophobia, An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes , 2015 at page 21.

¹³ Landau, Ramjathan-Keogh, Singh; Xenophobia in South Africa and problems related to it, 2004.

¹⁴ 'The previous Minister of Home Affairs stated in Parliament: "if we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme". Senior police officers have also lent legitimacy to xenophobic perceptions by linking foreigners with crime.' The Presidency "Xenophobia" Statement from the Office of the President of the Republic of South Africa (01-12-2009) Appendix A.

¹⁵<http://edition.cnn.com/2015/04/18/africa/south-africa-xenophobia-explainer/index.html>

rights. The current socio-economic environment—high unemployment, poor service delivery, and economic inequality—has strained relations between refugees, asylum-seekers and host populations.

There is a need for an improvement of the asylum laws to provide access and protection to refugees. This has not been the case for many years. Over 2016/17 the DHA produced the White Paper on International Migration (WPIM) which was approved by the Cabinet on 29 March 2017 and gazetted on 28 July 2017 for public comment. The WPIM provided a new policy framework that would guide the comprehensive review of immigration and related legislation¹⁶. These plans include the setting up of one stop border centres which will attend to the processing of asylum applications in the border regions; whilst not admitting asylum seekers to the country until their application has been finally adjudicated. In essence this will amount to administrative detention of asylum applicants and is likely to lead to the creation of shanty towns in border regions where this processing will take place.

Additionally, whilst the Draft National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP)¹⁷ is commendable it lacks a focus on xenophobia and an inadequate account of the challenges faced by foreign nationals, including refugees and asylum-seekers in South Africa.¹⁸ The NAP also lacks a focus on addressing the national and local structures that affected individuals come into contact with as well as the processes which are meant to assist them in navigating immigration and employment barriers. Further, it does little to address the culture of impunity and lack of accountability which was clearly revealed following the 2008 attacks.

South Africa presently hosts 91,043 refugees compared to 218,299¹⁹ asylum seekers, the majority from Zimbabwe — those still in the long and arduous evaluation system that can take several years — and certainly many more undocumented migrants. By comparison Malawi, Zambia, Zimbabwe, Mozambique host far fewer refugees. Ethiopia, Kenya (refugees 552, 272), Chad (420,000 refugees), Uganda (428, 397) are carrying the burden of hosting the largest numbers of refugees in Africa and have been doing so for many years.

Currently there is a huge appeal backlog in the asylum processing system with the UNHCR reporting 1,096,100 pending asylum claims by the end of 2015 revised to 218,300 by the end of 2016.²⁰ No plans are in place to deal with this backlog, and further impediments are being put in place to deter asylum seekers and make the process even more unfriendly.

South Africa plays a significant role in influencing policy, laws and practice in relation to migration in Southern Africa. It does this in a selfish and haphazard way without always taking into account the interests of migrants or third countries. In 2015, the official figures released for asylum seekers were grossly inflated giving the impression that South Africa had the largest number of asylum seekers anywhere in the world. These figures were subsequently revised in 2016 from 1.1 million to 218,300 as a result of changes in statistical methodologies²¹ and South Africa having no provision for the withdrawal of asylum applications once lodged.²² Such inaccuracies create panic and a climate for the conception of unduly tough laws and policies which do not serve the best interests of migrant communities. Improving the accuracy of statistics would enable policy makers to create laws which best serve the interests of both the migrant communities and the larger South African population and accurately reflect reality.

¹⁶ <https://pmg.org.za/committee-meeting/25305/>

¹⁷ <http://www.justice.gov.za/docs/other-docs/NAP/NAP-A4-PublicConsultationBook.pdf>

¹⁸ UNHCR Submission on South Africa: UPR 27th Session, August 2016, at page 3. Available at: <http://www.refworld.org/docid/5a12b5482.html>.

¹⁹ UNHCR Global Trends Forced Displacement In 2016, at page 63. Available at <http://www.unhcr.org/globaltrends2016/>.

²⁰ *Id* at page 45.

²¹ *Id*.

²² <https://africacheck.org/spot-check/south-africa-not-1-million-asylum-seekers-waiting-processed/>

3. What specific challenges do migrant communities face in relation to issues surrounding community integration?

Migrants are able to access employment but this is more often in the informal sector. They continue to face huge difficulties accessing bank accounts, admission to schools for children, safe mechanisms for the transmission of remittances to their home countries and access to health care.

Migrant children face a myriad of problems including the lack of a safe and protective environment particularly during outbreaks of xenophobic violence; being turned away from school and clinics due to lack of documentation; challenges for unaccompanied children's placement in foster care or children's homes and the absence of laws allowing for the integration of unaccompanied and undocumented children as they become adults.²³

Migrants who own and operate small businesses and have intentions of integrating into the communities they exist in face a number of problems from the communities they live in as well as law enforcement agencies who would normally be relied on for protection. They receive vicious threats and illegal eviction notices as well as selective and discriminatory enforcement of laws at the hands of the police and local authorities.²⁴ They are often blamed for crimes committed by criminals alleged to be of their nationality and their shops and businesses targeted for looting and burning during outbreaks of xenophobic violence.²⁵

4. What role, if any, has the media and public figures played in combatting or perpetuating stereotypes relating to migration and migrant communities?

Both the media and public figures have a huge role to play in combatting or perpetuating stereotypes relating to migration and migrant communities. It has been observed for many years that police officers tend to arrest persons suspected of being undocumented as part of immigration enforcement. This task should not fall on police officers to carry out. Police should instead focus on crime prevention and crime control; rather than chasing illegals to prop up their arrest records. It is important to note that these two issues are separate. Arresting undocumented migrants does not appear to be a good use of police time and resources and nor does it necessarily reduce the rates of violent crime.

Public figures and the media often link the prevalence of crime to apparently high migration figures. However, official crime statistics²⁶ released by the South African Police Service do not have a category identifying the perpetrators of crime as foreign migrants nor is there one looking at crime related to immigration offences. Despite this, public figures routinely draw links between migrant communities and the prevalence of violent crime for which they are blamed.

The most comprehensive set of statistics available do not support the conclusion that migrant communities are responsible for the rise in violent crime. This set of statistics was presented to Parliament on 23 June 2017²⁷ by Minister of Justice and Correctional Services, Michael Masutha. The

²³ <https://www.dailymaverick.co.za/opinionista/2016-06-20-a-bleak-reality-of-migrants-and-their-children-in-south-africa/#.Wh5Z7FWWYdU>

²⁴ *Supra* note 5.

²⁵ <https://www.sowetanlive.co.za/news/2017-02-21-foreign-shops-looted-in-atteridgeville-pretoria/> [accessed on 29 November 2017]; <http://observers.france24.com/en/20170222-residents-south-africa%E2%80%99-suburbs-burn-down-brothels-loot-foreign-owned-homes> [accessed on 29 November 2017].

²⁶ Back to Basics Towards a Safer Tomorrow, Crime Situation in South Africa, 1 April 2016 - 31 March 2017 [available at https://www.saps.gov.za/services/final_crime_stats_presentation_24_october_2017.pdf]

²⁷ <https://pmg.org.za/committee-question/5880/>

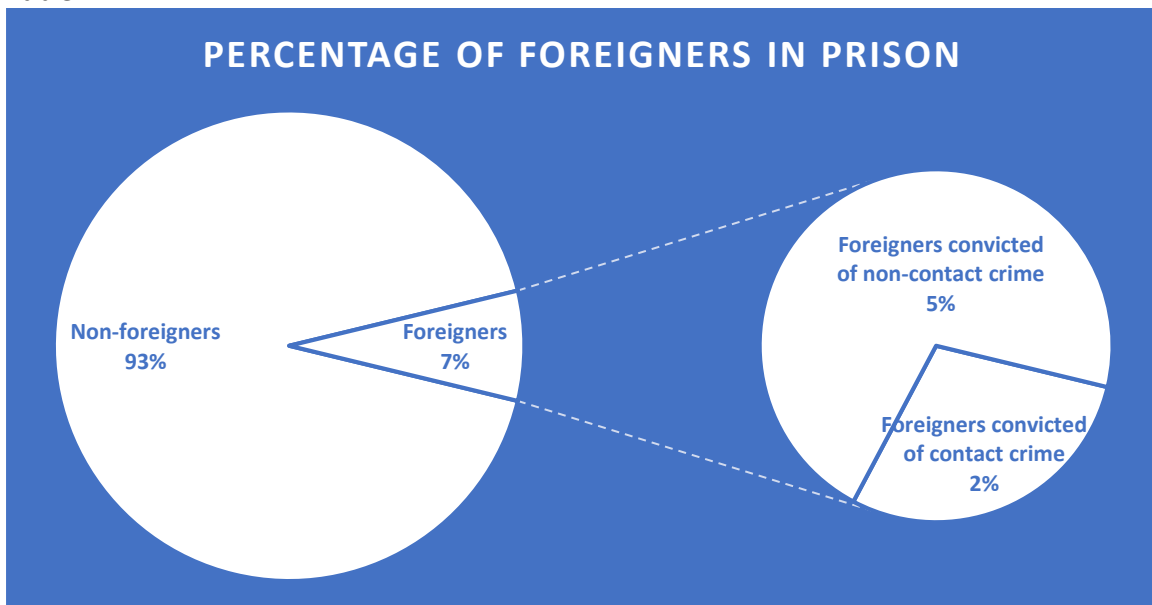
statistics reveal that of the total prison population of 157013²⁸ at the end of 2016, only 11842 were foreign. This means that only 7.5% of the entire prison population is foreign (see Table 1, below). Further, of the 11842 foreign prisoners 7345 had been sentenced and 4497 were awaiting trial, with 1380 being prosecuted for being in the country illegally.²⁹ Of the 7345 foreigners actually sentenced for crimes only 3434 were convicted of contact crimes³⁰, a major concern of most South Africans (see Table 2, below). This would suggest that only 29% of foreign prisoners have been convicted of contact crimes; this makes up only 2% of the entire prison population in South Africa. Additionally with an estimated 1.6 million³¹ foreign-born individuals living in South Africa in 2016, those sentenced for contact crimes make up only 0.21% of the migrant community. This is hardly sound basis for blaming the entire community for the increase in crime (see Tables 3 and 4, below).

And yet, all too often both the media and public figures continue to perpetuate the myth that rises in crime, particularly violent crime, is attributable to migration and migrant communities. These assertions are not borne out by the facts.

Table 1

Total prison population	157013
Number of Foreign prisoners	11842
Number of foreign prisoners convicted of contact crimes	3434
Percentage of foreign prisoners as share of total prison population convicted of contact crimes	2%

Table 2



²⁸ This figure increased to 161 054 by March 2017; DEPARTMENT OF CORRECTIONAL SERVICES, Annual Report - http://pmg-assets.s3-website-eu-west-1.amazonaws.com/1/DCS_AR_2016_17_WEB.pdf

²⁹ <https://africacheck.org/factsheets/factsheet-the-state-of-south-africas-prisons/>

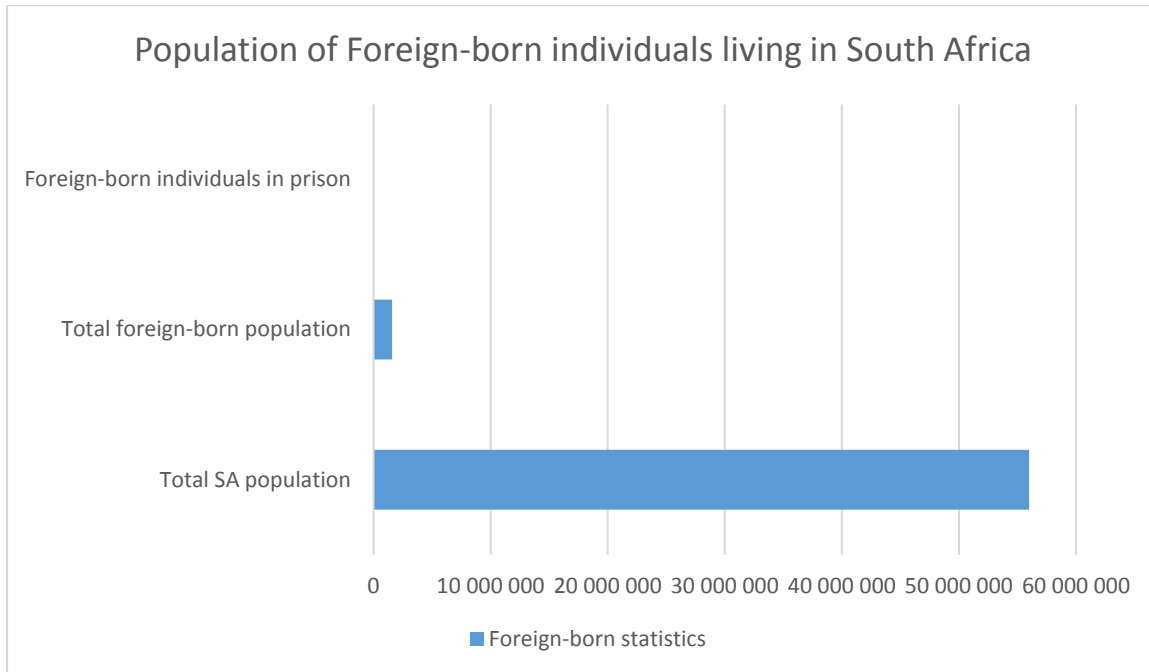
³⁰ Contact crimes are crimes where the target is a person i.e. Murder, Attempted Murder, Sexual Offences, Assault GBH, Common Assault and Common Robbery as per SAPS categorisation: https://www.saps.gov.za/services/final_crime_stats_presentation_24_october_2017.pdf

³¹ Statistics South Africa Community Survey 2016; http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-Statistical-releas_1-July-2016.pdf [accessed on 30 November 2017]

Table 3

Total population of South Africa	55 600 000
Foreign-born population	1 600 000
Foreign-born prisoners	11842
Total prison population	157013

Table 4



1. Political Leaders and government officials fanning the flames of racial discrimination and xenophobia

1.1 Comments associated with Johannesburg Mayor, Herman Mashaba and the Democratic Alliance

The Johannesburg Mayor, Herman Mashaba has over the 2016/17 period made statements which have been reckless and have had the potential to inflame xenophobic tensions. These appear to be an attempt to make good on election promises to clean up the inner city. He has on several occasions stated that the Johannesburg inner city is made up of 80% undocumented foreigners. Yet, different sources of data contradict his claim on the numbers of undocumented foreigners living in Johannesburg. According to current statistics migrants make up 26.2% of inner city residents.³² The Quality of Life survey of the inner city's wards showed that of the respondents in the inner city:³³

- 26.2% had migrated to Gauteng from another country;
- 25.4% had migrated from another province;

³² The [Gauteng City Region Observatory](#) (GCRO) is a partnership between the Universities of [Johannesburg](#) and the [Witwatersrand](#) as well as the [Gauteng provincial government](#). The GCRO builds datasets that can be used to inform the development of cities in the province.

³³ <https://africacheck.org/reports/mayors-claim-80-joburg-inner-city-residents-undocumented-foreigners-absurd/>

- 48.5% had been born in Gauteng.

According to the [African Centre for Migration and Society](#) at the University of Witwatersrand, SA may undercount the number of foreigners but “there is no reason to believe that their estimates are off by an order of magnitude”. As illustrated above, there is no evidence that high crime rate is due to migration. In fact migrants are more vulnerable to high crime exposure and are less likely to receive protection from police. Despite the absence of evidence to support his position, Mayor Mashaba persists in developing this narrative which is extremely reckless particularly in a city which has witnessed waves of xenophobic violence resulting in deaths, displacements and serious injuries. Mashaba’s political party, the Democratic Alliance, has failed to reign him in or hold him to account as a result of these statements.

1.2 Inflammatory statements justifying xenophobia by President Jacob Zuma

South African President Jacob Zuma during a Freedom Day event in April 2015 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.³⁴ The immigration status of foreign nationals who are victims of the attacks in South Africa is irrelevant. South Africa has an obligation to protect all persons within its borders. South Africa should also deter political leaders from making inflammatory statements which could appear to justify xenophobic violence and sentiment. Political leaders have an obligation and responsibility to promote tolerance and harmony, so it is disappointing to see views emanating from various political parties and government institutions which display the precisely the opposite view.

1.3 Discriminatory remarks by police officials

In 2017, Gauteng Police Commissioner Lieutenant-General Deliwe de Lange made a statement that about 60% of the suspects arrested for violent crimes in the province were illegal immigrants.³⁵ This was accompanied by a headline: “More than half of violent crimes in Gauteng committed by illegal immigrants”; she went to add, “I am not xenophobic.” De Lange was speaking after presenting the latest provincial crime statistics to the Gauteng Community Safety Committee at the Provincial Legislature in the Johannesburg CBD. Murder increased by 6.7% from 3842 from April 2015 to March 2016 to 4101 in 2016/17. This was an increase from 28.2 to 29.3 per 100 000.³⁶ Police Commissioner De Lange also said that most of the repeat crime offenders in the province are illegal immigrants³⁷ despite their being no evidence for this statement. However, a close scrutiny of the Statistics South Africa website and its reports as well as the most recent crime report from the South African Police Service do not reveal any connection between the crimes reported and illegal immigrants. Further, the claims made by De Lange are not supported by any reference to published official statistics drawing a link between illegal immigrants and crime in South Africa. As highlighted in the figures above, foreigners convicted of violent crimes make up only a small proportion of those in prison. There is no evidence linking this small number of individuals to the rise in violent crime.

Additionally, experts have questioned the veracity of such claims in view of the fact that the South African Police Service rarely are able to identify perpetrators of violent crime. The Institute for Security Studies has observed that:

³⁴ <http://ewn.co.za/2015/04/27/Zuma-Emmanuel-Sithole-used-a-false-name>

³⁵ <https://www.sowetanlive.co.za/news/south-africa/2017-11-14-more-than-half-of-violent-crimes-in-gauteng-committed-by-illegal-immigrants/>

³⁶ <http://ewn.co.za/2017/11/15/de-lange-most-repeat-offenders-in-gauteng-are-illegal-immigrants>

³⁷ <http://ewn.co.za/2017/11/15/de-lange-most-repeat-offenders-in-gauteng-are-illegal-immigrants>

According to its 2016/17 annual report, the SAPS is able to detect perpetrators in only 23.9% of murders and in 17.9% of aggravated robberies. This means that in more than 75% of murders and in over 80% of aggravated robberies, the police have no idea who the perpetrators are. It therefore isn't possible to make accurate assertions that undocumented foreign nationals commit most crimes such as murder and robbery.³⁸

Further, given the SAPS' efforts in arresting and repatriating foreign undocumented migrants—in the first three months of the Operation Fiela 15 396 undocumented foreign nationals were repatriated—it is quite telling that violent crime rates have not fallen, a fact picked up by the Institute for Security Studies:

If most people who commit violent crimes are undocumented foreign nationals and the police are arresting large numbers of them, why has this not brought down the level of serious violent crimes in recent years?

Over the past five years in Gauteng, the number of murders has increased by 36.9% and aggravated robbery has increased by 53%. This suggests that Gauteng police are targeting the wrong people. If they were effectively targeting and arresting the people who were committing murders and robberies, these crimes would be decreasing substantially.³⁹

Headlines like this from a 2015 news24 article, “300 suspected illegal immigrants arrested in Joburg”⁴⁰ create the impression that foreigners are arrested for committing crime. This is an inaccurate portrayal of the situation. In this case, these were people who were not in possession of any identification and were arrested until their immigration status could be verified.

2. Slow pace of the development of Hate Crimes Legislation

Government has been developing legislation to deal with hate speech for a number of years. The slow pace of the progress of this legislation is indicative of the level of priority which is given to tackling hate speech and xenophobia. The Department of Justice opened the Hate Speech Bill for comment until 1 December 2016 and many submissions were received. The submissions raised concerns that the Bill will not pass constitutional muster. In view of South Africa's history of marginalisation and exclusion the Bill does need to consider issues of openness, accountability and transparency. This requires the Bill to strike a balance between hate speech, freedom of expression and non-discrimination. The current Hate Speech Bill fails that delicate balancing act in its narrow definition of hate speech. There are many recommendations for the parameters of the Hate Speech Bill to be construed narrowly, in line with the Constitution in order not to unjustifiably infringe on other freedoms. The Bill should also include a range of defences or exemptions such as a defence of truth or public interest to counter a charge of defamation.

³⁸ Institute for Security Studies: Do foreigners really commit SA's most violent crimes? https://issafrica.org/iss-today/do-foreigners-really-commit-sas-most-violent-crimes?utm_source=BenchmarkEmail&utm_campaign=ISS_Today&utm_medium=email [accessed on 30 November 2017].

³⁹ *Id.*

⁴⁰ <https://www.news24.com/SouthAfrica/News/300-suspected-illegal-immigrants-arrested-in-Joburg-20150918>

3. Anti-xenophobia initiative at cross purposes with its original intention: Operation Fiela

In 2015, SAPS launched Operation Fiela as an anti-xenophobia initiative. The end results however did not offer protection to foreign nationals, much the opposite is true. Operation Fiela was initially launched to combat attacks on foreigners and has been criticised for then targeting foreigners and rushing their deportations. According to Minister in the Presidency Jeff Radebe, between April and July, 15 396 people were deported for being in the country illegally.⁴¹

5. What steps can be taken to continuously advance social integration and ultimately reduce inequalities associated with exclusion in national identity? Which actors are best placed to take these steps?

5.1 Promotion of regularisation programmes

South Africa has implemented two regularisation processes directed at Zimbabwean and Lesotho nationals. These processes have been progressive and have recognised the need to find a mechanism to regularise economic migrants who are in SA but who are unable to regularise their immigration status.

Special Dispensation for Zimbabweans Project (DZP) – this project was initially introduced in 2009 and has undergone two incarnations; the first was met with much suspicion and skepticism and resulted in 294 511 applications and 242 731 permits granted.⁴² The second ran from 2014-2017 and was called the Zimbabwe Special Dispensation Permit (ZSP), applicable to those already in SA and who participated in the first DZP process. In 2017, the Zimbabwe Exemption Permits (ZEP)⁴³ were launched and open to those already in possession of the ZSP. The new permits will be effective from January 2018 to December 2021.

The Lesotho Special Permit (LSP) was launched in February 2016 and will run until December 2019. The permit is open at all Lesotho nationals who work, study or do business in South Africa and had been in the country in such capacity before 30 September 2015.⁴⁴ However, the registration process posed some challenges for some Lesotho nationals due to the requirement to register online and the fact that not all Lesotho nationals wishing to regularise their stay in South Africa had identity documents. One of the key commendable features of the LSP was the amnesty provided to all Lesotho nationals who had previously obtained ID documents fraudulently.

These processes recognise that there are significant numbers of undocumented SADC citizens in particular in South Africa who are already part of the work force and who are contributing to the growth of the country. Similar regularisation programmes should be extended to a wider group of persons and a broader range of countries. We would recommend for Mozambique and Malawi nationals to be considered for similar programmes.

⁴¹ <https://www.dailymaverick.co.za/article/2015-09-08-operation-fiela-thousands-of-arrests-doubtful-impact/#.Wha2iVWWYdU>

⁴² <https://pmg.org.za/committee-meeting/17791/>

⁴³ <https://www.timeslive.co.za/news/south-africa/2017-09-15-8-things-you-need-to-know-about-the-zimbabwean-exemption-permit/>; <http://www.dha.gov.za/index.php/statements-speeches/1034-statement-by-minister-mkhize-on-the-closure-of-the-zimbabwean-special-permit-zsp-and-the-opening-of-the-new-zimbabwean-exemption-permit-zep>

⁴⁴ <https://www.gov.za/speeches/lesotho-special-permits-28-jun-2016-0000>

5.2 Promotion of Access to Birth Registration and a move towards universal birth registration in SADC

Low levels of birth registration in SADC countries has resulted in many nationals being unable to access identity and travel documents. Changes to SA laws have resulted in undocumented migrant mothers being unable to register the births of children born in SA. Without a birth certificate these children will be unable to claim their citizenship. This could potentially result in a whole generation of stateless persons—who will be unable to access basic rights—like health care and education and be unable to pass on citizenship to their children. An inability to register the births of children born to undocumented parents in South Africa ensures that these children will remain stateless and would be unable to regularise their immigration status. SALC recommends that a system of universal birth registration be promoted throughout the SADC region in order to alleviate this situation which is a growing problem.

5.3 Promotion of the free movement of people: SADC Free Movement Protocol

In January 2014, the Government of South Africa publicly stated that it was considering a visa for Southern Africa Development Community (SADC) economic migrants, which may reduce new asylum applications.⁴⁵ This was followed by the Green Paper on International Migration gazetted for the public to submit comments from the 1st of July 2016 to the 30th of September 2016. In July 2017, the Department of Home Affairs released the White Paper on International Migration for South Africa.⁴⁶ This proposes among other things to:

- provide a legal route for SADC economic migrants;
- provide reciprocal visa free travel for SADC citizens;
- expand special dispensations for economic migrants from certain SADC countries;
- introduce a SADC special work visa: This is a visa which will allow the holder to work in South Africa for a prescribed period of time;
- introduce a SADC traders' visa: A long-term, multiple-entry visa for cross border traders who enter and exit the Republic frequently is proposed;
- introduce a SADC small medium enterprise (SME) visa. This visa would be for self-employed people and small business owners.

These proposals are welcome and if implemented will go a long way in addressing the plight of many migrants from the region.

CONCLUSION

In conclusion xenophobia continues to be a major issue in South Africa, one that blights the collective conscience of South Africans and undermines government and other parties' efforts to address it. Despite the recommendations of the 2009 SAHRC Report, a number of matters remain unaddressed resulting in sporadic outbreaks of xenophobic violence against foreigners, xenophobic comments by public figures, scapegoating and stereotyping of migrants in the media and a divided society with migrants (particularly undocumented ones) largely unintegrated into mainstream South African society. While commendable steps have been taken with regard to WPIM, NAP, the special dispensations for Zimbabwean and Lesotho citizens and efforts to initiate free movement for SADC citizens; more can and should be done to counter false narratives about migrants, regularise other foreign nationals and develop laws and policies better suited to encourage social cohesion and protect the interests of migrants.

⁴⁵ UNHCR Global Appeal 2015, <http://www.unhcr.org/5461e604b.pdf> [accessed 3 December 2017].

⁴⁶<http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>

Summary of SALC recommendations

1. We recommend that government departments cited in the SAHRC 2009 REPORT make written submissions indicating the level of compliance with the recommendations.
2. We recommend a permit for ordinary migrant work seekers particularly for low skilled employment;
3. We recommend improving asylum laws and practices to provide access and protection to refugees;
4. We recommend the government rethink its plans under WPIM to set up one stop border centres which will attend to the processing of asylum applications in the border regions. This could amount to administrative detention of asylum applicants and is likely to lead to the creation of shanty towns in border regions where this processing will take place;
5. We recommend an increased focus on xenophobia and the specific challenges faced by refugees and asylum seekers in the draft NAP;
6. We recommend that public statements made by the media and public figures blaming the migrant community for the rise in violent crime be supported with accurate statistics and evidence. Further government and political parties should accept responsibility and accountability when their representatives make xenophobic or intolerant remarks;
7. We recommend the Hate Speech Bill to be construed narrowly, in line with the Constitution in order not to unjustifiably infringe on other freedoms. The Bill should also include a range of defences or exemptions such as a defence of truth or public interest for example to counter a charge of defamation;
8. We recommend regularisation programmes similar to those in place for Zimbabwe and Lesotho nationals be extended to a wider group of persons and a broader range of countries. We would recommend for Mozambique and Malawi nationals to be considered for similar programmes;
9. We recommend that a system of universal birth registration be promoted throughout the SADC region in order to alleviate the situation where children born to undocumented migrant mothers are left potentially stateless;
10. We also recommend reforming the birth registration process in South Africa to enable all parents regardless of immigration status or gender to be able to register the births of their children.

Appendix

1. Statement by the Southern Africa Litigation Centre (SALC) to the African Commission Regarding the Xenophobic Attacks in South Africa - http://www.achpr.org/files/southern_africa_litigation_centre.pdf
2. SALC Submission on The Prevention and Combatting of Hate Crimes and Hate Speech Bill - https://www.ellipsis.co.za/wp-content/uploads/2017/02/PaCoHCaHS_SALC.pdf
3. SALC Submission to the Ad Hoc Committee probing violence against foreign nationals - <https://southernafricalitigationcentre.org/2015/12/02/submission-to-the-ad-hoc-committee-probing-violence-against-foreign-nationals/>
4. Open letter to the African Union on the resurgence of xenophobic violence in South Africa presented on the occasion of the AU summit in Sandton Johannesburg (June 2015) - <https://southernafricalitigationcentre.org/2015/06/10/open-letter-to-the-african-union-on-the-resurgence-of-xenophobic-violence-in-south-africa-presented-on-the-occasion-of-the-au-summit-in-sandton-johannesburg-june-2015/> - <http://www.osisa.org/general/south-africa/open-letter-african-union-resurgence-xenophobic-violence-south-africa>

5. Open letter to the African Commission regarding the xenophobic attacks in South Africa - <https://southernafricalitigationcentre.org/2015/04/23/open-letter-to-the-african-commission-regarding-the-xenophobic-attacks-in-south-africa/>
6. Open letter – SALC urges SADC to take action against xenophobia - <https://southernafricalitigationcentre.org/2015/04/22/open-letter-salc-urges-sadc-to-take-action-against-xenophobia/>

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