



## **SOUTH AFRICAN PERMANENT MISSION GENEVA**

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Ref: 123/2022

The Permanent Mission of the Republic of South Africa to the United Nations Office at Geneva and other International Organisations in Switzerland presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to refer to the Joint Communication dated 1 July 2022, reference number: AL ZAF 3/2022.

The Permanent Mission of the Republic of South Africa hereby submits the Government of South Africa's response regarding joint Communication from the United Nations Special procedures on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the human rights of migrants.

The Permanent Mission of the Republic of South Africa to the United Nations Office at Geneva and other International Organisations in Switzerland avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 30 August 2022

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Dear Special Rapporteurs

**Response to Joint Communication from the United Nations Special Procedures on allegations of racism, racial and xenophobic discrimination, hate speech, and xenophobic violence against migrants, refugees, and asylum seekers in South Africa. (Ref: AL ZAF 3/2022).**

I refer to the above matter and more specifically to your joint communication of 01 July 2022.

I attach hereto and for your kind attention and consideration South Africa's response to the contents of your afore-mentioned joint communication.

South Africa attaches great importance to and supports the work of the Special Rapporteurs. We hereby confirm our willingness to cooperate with mandate holders of the Human Rights Council to ensure the fulfilment of their respective mandates. To this end, South Africa is ready to coordinate with the OHCHR to arrange for mandate holders to visit South Africa.

Please be assured of my Government's highest consideration and regard.

Your sincerely,

**Dr GNM Pandor, MP**

Minister of International Relations and Cooperation

Date: 29-8-2022.

**Ms Beatriz Balbin**

Chief, Special Procedures Branch

Office of the United Nations High Commissioner for Human Rights (OHCHR)

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**Ms E Tendayi Achiume**

Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance

**Mr Morris Tidball-Binz**

Special Rapporteur on extrajudicial, summary, and arbitrary executions

**Mr Felipe González Morales**

Special Rapporteur on the human rights of migrants



## **ANNEXURE A**

### **RESPONSE OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA TO THE JOINT COMMUNICATION FROM (1) THE SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE; (2) THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS; AND (3) THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS**

#### **1. Introduction**

- 1.1. On 1 July 2022, Ms E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Mr Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions; and Mr Felipe González Morales, Special Rapporteur on the human rights of migrants (collectively referred to as Special Rapporteurs) addressed a joint communication to Her Excellency Dr Naledi Pandor, Minister of International Relations and Cooperation of the Republic of South Africa (the Minister) containing information they received concerning “allegations of racism, racial and xenophobic discrimination, hate speech and xenophobic violence against migrants, asylum seekers, and refugees in South Africa including recent manifestations of xenophobic violence and hate speech related to the so-called Operation Dudula campaign.”
- 1.2. In their joint communication, the Special Rapporteurs request the Minister (and through her, the Government of the Republic of South Africa (the Government)), inter alia, to share her “observations” on a range of allegations made and

questions posed in their joint communication and to forward her response to them within 60 days i.e., by 31 August 2022. Upon receipt of the joint communication from Special Rapporteurs, the Minister referred its contents to relevant government departments at the national and provincial levels, including the Departments of Home Affairs (DHA), Police, Justice and Constitutional Development (DOJ&CD), Social Development, Employment and Labour, as well as the provincial governments of Gauteng and Kwazulu-Natal, and other agencies (e.g., the Independent Police Investigative Directorate (IPID)) requesting their comments and input. This was done to ensure a comprehensive response to the joint communication.

## **2. Background and historical context**

- 2.1 The South African government is aware of the incidents of violence that appear to disproportionately target foreign nationals. Much of this discrimination and violence stems from frustrations within sections in South African communities that feel that they are competing with migrants for scarce resources, whilst they are already struggling socially and economically. The South African government does not condone these actions and where people have engaged in unlawful conduct, including acts of violence against foreign nationals, the government has sought to ensure that those responsible are held to account through the criminal justice system. The rise in anti-foreigner sentiment is a source of concern and strategies to deal with this needs to be cognisant of the historical context of issues pertaining to migration, poverty, inequality and exclusion. This response will discuss these contexts and also describe the legal and policy framework which guide how the rights of migrants and their families are managed by the Government of South Africa. The latter part of the discussion is important given the averment by the special rapporteurs that the conduct of the South African government, that is, state practice, may in some instances be “racist and xenophobic”.
- 2.2 The background and historical context will help clarify and put in a proper perspective how the South African government, since 1994, has been working to address the domestic malady of apartheid and the legacy of racial

discrimination, and how the Government has sought to define and conduct its relations with countries around the world. This background and historical context is important as it locates the complex and stubborn problems that, not only South Africa, but the whole world is grappling with in relation to migration. The context will perhaps, also explain why the averment made by the Special Rapporteurs - that xenophobia and racial discrimination in South Africa are “institutionalised” i.e., that these discriminatory practices and forms of intolerance are the official policy of the South African Government is erroneous.

- 2.3 In 1994, South Africa was welcomed back into the family of nations after many years of isolation because of apartheid. The transition to democracy followed a painful period of three and half centuries (350 years) of brutal colonialism, virulent racism and apartheid (which the international community had described as a ‘crime against humanity’). The dawn of freedom, justice and democracy in South Africa in 1994 came about, in large part, as a result of the sterling role played by the international community (with the United Nations in the lead) and the unwavering support from people of goodwill around the world to rid South Africa then of a system of government that was synonymous with racial discrimination, human rights violations, organised disrespect for human life, and contempt for international human rights and humanitarian law.
- 2.4 After the fall of apartheid, the people of South Africa adopted a new Constitution as the supreme law of the Republic and committed themselves, as a country and People, to “build a united and democratic South Africa able to take its rightful place as a sovereign [and responsible] state in the family of nations” (preamble to the Constitution). When they made this commitment, the people of South Africa wanted to send a strong and assuring message to the family of nations, inter alia, that: (a) South Africa shall no longer be known as a pariah in the eyes of the international community but a cooperative member of the family of nations and shall be willing to be bound by and respect the rule of international law and promote resolution of conflicts through peaceful means and not war; and (b) South Africa will play a constructive role in international politics and help develop norms, standards and values at the regional and multilateral levels (e.g., in the field of human rights, humanitarian law, and the law of protection) that will foster

human solidarity, respect for human dignity, advancement of human rights and fundamental freedoms, and help bring an end to racism, racial discrimination and all other forms of intolerance.

- 2.5 The adoption of a new Constitution and the establishment of a constitutional democracy under the rule of law (in South Africa in 1994) was not the end of the search for freedom, justice, reconciliation, peace, and equality, but the beginning of a long and an even more arduous struggle to deal with centuries of colonialism, the terrible legacy of apartheid and racial discrimination, oppression, marginalisation of the majority of the population from meaningful economic participation, denial of rights; and to leave no stone unturned in the quest to “build a united and democratic South Africa able to take its rightful place as a sovereign [and responsible] state in the family of nations.”
- 2.6 The Government of South Africa has achieved a lot in the past 28 years of its democracy; but more still needs to be done to realise the goals of its democratic project. South Africa – like all countries around the world – strives to realise its socioeconomic and political objectives in an ever-changing world, which continues to grapple with existing and novel challenges, such as irregular migration, underdevelopment, inequality between and among states, rising intolerance as well as the challenges posed by the covid-19 pandemic. These challenges are global and require global responses guided by the principles of human solidarity. Describing the need for contextualising the global nature of these challenges and how these dynamics manifest themselves in the African region and its specific impact on South Africa, should not be interpreted as meaning that South Africa is shying away from its constitutional and international legal obligations. These issues are discussed next.
- 2.7 As part of its commitment to play a constructive role in the world and to be a truly cooperative member of the family of nations, South Africa (in 1994) embraced all the known tenets of international law that came to define interstate relations in the aftermath of the barbarism of WWII, including: respect for human rights, respect for the rule of international law, and advancement of fundamental freedoms. To this end, the South African government holds the Office of the

United Nations High Commissioner for Human Rights (OHCHR) in high regard and attaches significant importance to the work of the Special Procedures, including Special Rapporteurs.

- 2.8 South Africa is committed to continue the efforts to entrench the rule of law at home and abiding by its international legal obligations. The need for South Africa to abide by its international legal obligations is an established principle of our nascent jurisprudence as iterated by the courts, including the Constitutional Court, in a myriad of cases since 1994. However, the Government of South Africa has not achieved every aspiration and goal contained in various pieces of legislation that govern both private and public life in South Africa. For example, unemployment, poverty and inequality are still some of the most pressing and stubborn challenges facing South Africa despite the promulgation of laws such as the Employment Equity Act 55 of 1998 and Broad-based Black Economic Empowerment Act 53 of 2003, which laws are aimed at addressing decades of discrimination and exclusion under apartheid. The fact that these challenges of underdevelopment still exist in South Africa cannot be translated to mean that Government is unconcerned about the challenges that face the people of South Africa and those who live within its borders, particularly the most vulnerable.
- 2.9 It is trite, the South African government has not been able, for various and complex reasons, to meet or fulfil all its obligations under both domestic and international law, including the realisation of all guaranteed rights under the Constitution and protection of the rights of all (particularly the most vulnerable groups) living within the borders of the Republic. In their joint communication, Special Rapporteurs identified some of the challenges relating to Government's efforts to address these matters. However, their characterisation of the challenges Government faces in its determined effort to deal with these problems is perhaps misplaced. For instance, the joint communication from the Special Rapporteurs is replete with accusations, that there is "widespread impunity" in South Africa and that this "culture of impunity" is caused by the Government's failure to meet some of its positive obligations. That characterisation of the challenges the Government faces is unjustified. It is doubtful that there is a

country in the world which, at any moment, has met and fulfilled each obligation it has assumed under its domestic laws and under international law.

2.10 South Africa is a constitutional democracy whose values are founded, inter alia, on respect for human dignity, non-discrimination, equality, advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law. South Africa has acceded to and ratified various international legal instruments as part of its commitment to ensuring protection, promotion, fulfilment and progressive realisation of all human rights without discrimination. As far as South Africa is concerned, all human rights should be enjoyed by everyone anywhere and without discrimination. The international instruments that South Africa has ratified/acceded to include the following: the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty; Optional Protocol to the CRC on the Involvement of Children in Armed Conflict; and the Optional Protocol to the Convention against Torture. It is fair to state that few other National Constitutions mirror the International Bill of Rights, to the extent that the South African Constitution does.

2.11 In the context of the region, South Africa is also a State Party to the following regional (African) human rights instruments: the African Charter on Human and Peoples' Rights; the African Union Convention Governing Specific Aspects of Refugee Problems in Africa; the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and the Protocol of the Court of Justice and Human Rights. These are just a few instruments and processes that South Africa has committed to in the quest to ensure an inclusive society that upholds human



rights for all. All these global and regional instruments are founded on the values enshrined in the Universal Declaration of Human Rights to which South Africa fully subscribes. The fact that South Africa has not achieved all the aspirational commitments in these instruments does not and should not be interpreted by anyone, including Special Rapporteurs to mean that South Africa is not committed to them or that it holds them in contempt.

2.12 South Africa – like its partners on the continent and around the world - will endeavour to fulfil and implement its obligations under these international human rights instruments. And it will do so within its means and capabilities guided by the Constitution and the laws of the Republic.

2.13 At the domestic level, and in the context of its international obligations, South Africa has promulgated various pieces of legislation aimed at ensuring that the rights of asylum seekers, refugees and migrants are protected. These interventions are supported by policy frameworks and programmes that seek to promote social cohesion at all levels. These positive developments have been achieved through collaborating and working in partnership with various partners both within government and in the broader society, as well as other stakeholders, including international organisations. South Africa is not an island. Its destiny is tied to that of the region, the continent, and the world. It operates in a region, continent and world fraught with many challenges, including those related to unemployment, poverty and inequality. It is for this reason that, from South Africa's point of view, the problems of irregular migration and its consequences in the region (and indeed in the world) require the cooperation of all countries, including countries from which migrants originate. Proposed solutions need to focus on the pull and push factors of migration. This includes the consequences of migration (e.g., economic exploitation of migrants in the countries of destination or transit) and the roots causes of forced and irregular migration such as economic mismanagement, corruption, failure of governance, political instability, and conflict in countries of origin.

2.14 The issues related to racism and xenophobia are complex phenomena involving an entire range of economic, political, historical, cultural, social, and

psychological factors. Owing to the history of apartheid that was characterised by racial, political, and economic segregation, there is certainly no doubt that the legacy of this past injustice continues to haunt the South African society across all social classes. The people of South Africa are alive to the devastating consequences of this terrible legacy. However, the fact that the road ahead is still rough and tough does not diminish their resolve “to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” (preamble to the Constitution). And part of healing the divisions of the past consists of all the efforts, programmes and policies the Government has put in place to deal with the root causes of many forms of intolerance (e.g., racism, xenophobia, tribalism, sexism) that still haunt, not only South Africa, but many societies and communities on the African continent and around the world.

2.15 Issues of discrimination and “othering” are rife across the world and South Africa is not immune to this global phenomenon. In trying to address issues related to racism, racial and xenophobic discrimination, and hate speech (to mention but a few), it is important that the Mandate Holders of the United Nations not find themselves inadvertently promoting or approaching these ills in a manner that perpetuates stereotypes and thereby fan the flames of discrimination and intolerance.

2.16 Given our history and the ideals of transformative constitutionalism, the claims made by the Special Rapporteurs that xenophobia and racism is part of South Africa’s state practise is a serious one. Given the gravity of these claims, it is worth looking at the evidence base relied on by the Special Rapporteurs in making these claims before responding to the specific questions which the Special Rapporteurs have posed. It is important to address, *in limine*, a few issues contained in the joint communication, including sources used to compile the joint communication to the Minister; recurring “themes” in the joint communication; and the “tools of analysis” employed to diagnose of the problems.

*a. The sources of information the Special Rapporteurs relied on*

- 2.16.1 In their joint communication, the Special Rapporteurs state that “the information we have received” which they relied on to compile their joint communication, comes from various sources, including previous communications, social media platforms, reports of the South African Human Rights Commission (SAHRC), civil society actors, and civil society reports. There are institutions of government (such as the SAHRC, the Independent Police Investigative Directorate (IPID), the Public Protector) and other independent organisations that have been documenting past incidents of violence, including sporadic attacks on foreign nationals. We have no reason to doubt the veracity and intentions of information compiled by these bodies.
- 2.16.2 We are however, concerned about the apparent over reliance on social media sources. There have also been numerous social media platforms such as whatsapp and other platforms that have been used in previous incidents of violence to “manufacture evidence or patterns of xenophobia and racism” in South Africa, which was later proven to be false. For instance, in the past incidents of “xenophobic attacks,” several videos were posted on social media (e.g., whatsapp) e.g., showing bodies of people flying out of a high-rise building which was engulfed by huge flames. These videos were posted on social media with reports that these were actual scenes from somewhere in South Africa where “xenophobic mobs” allegedly attacked and set alight a building which was allegedly occupied by foreign nationals(sic). These videos were proven false, and it was shown that those were images and scenes from a south-Asian country where a factory building burned, and people jumped out of high-rise windows to try to save their lives. There are numerous incidents of such misinformation that can be shared in discussion with the Special Rapporteurs. .
- 2.16.3 The point in the paragraph immediately above is not to deny that there have been serious incidents of violence and attacks on foreign nationals (and on South African nationals as well) but to point out that some of “the

sources of information” which many people and organisations produced and relied on in the past to “prove” the existence racism and xenophobia in South Africa are false and deliberately misleading and malicious. And if these videos and selective reports are some of the “sources” the Special Rapporteurs relied on to compile their present and past communications, then they (these videos and reports) need to be checked because they can strengthen the hand of those who might be hellbent to perpetuate stereotypes, misinformation and fake news about the Government and people of South Africa. This misinformation, including underplaying the economic and social hardships of poorer South Africans inadvertently makes the responses to the challenges of actual xenophobia much harder.

2.16.4 In the joint communication, the Special Rapporteurs frame the economic and social dimensions of these challenges in the following manner: *“[R]eportedly, xenophobic rhetoric and policy proposals in South Africa are often justified through persistent myths that foreign nationals are “stealing our jobs” or associated with criminality. These myths cannot be substantiated with disaggregated data, but are widespread, and often promoted by local and national politicians.”*

2.16.5 In doing so, unfortunately, the Special Rapporteurs overlook one of the disturbing consequences of migrant labour, not only in South Africa, but throughout the world, particularly in those countries with huge populations of migrants. In countries with huge populations of migrants, it is common cause that their (these countries) economies and small businesses (including domestic work) depend on foreign migrant workers. In these countries, migrants find themselves concentrated in menial jobs, working long hours and usually underpaid and unprotected by the labour laws of host countries. And because these migrants find themselves “displaced” in foreign lands where they do not have “family support structures” (unlike locals who, even when they are unemployed, can still rely on a support structure of some sort (e.g., social grants, family support, and other community support systems)), they (foreign migrants) are prepared to

make “sacrifices” and work their hands to the bone (something that locals are not willing to do) and work long hours for meagre wages (something locals shun). This is the hard reality and the tragedy of migrant labour. It happens in South Africa, and it happens in other parts of the world.

2.16.6 Flowing from the paragraph immediately above, it is an observed phenomenon that when the economy is doing well in those countries that rely on migrant labour, there is always never an issue about “foreigners stealing local jobs.” The issue becomes a problem when the economy is not doing well and there is widespread hardship because of unemployment and rising cost of living. In some countries, these issues become electioneering material. In some developed western countries, it is not usual to hear presidential candidates saying that in order to address unemployment back home, their companies which have invested overseas should “come back home” and that particular overseas countries should be stopped from “stealing our jobs” In some countries in the region, governments have passed laws and regulations that seek to demarcate certain areas of economic activity exclusively for their citizens/nationals. The point here is: there are no simplistic answers to complex and multi-dimensional problems. The South African government is aware of the dangers of populist rhetoric that can manipulate the real and material concerns of people to manifest as xenophobia and other forms of “othering” people. The South African government will do whatever is necessary to end discrimination and violence against migrants, but we do believe that the specific contextual economic dimension should not be underplayed as we engage on long term solutions.

2.16.7 With this being said, and in the light of the contextual issues raised above, we need to fully understand the claims of institutional racism being levelled at South Africa. South Africa’s history of apartheid means that this is a particular grave accusation, especially in the light of the policy and legislative frameworks in place that make unfair discrimination unlawful.

2.16.8 Unfortunately, in their brief joint communication, the Special Rapporteurs do not provide detailed analysis of these claims, but simply provide a litany of sweeping statements and conclusions based on their “sources”, some of which, as pointed out earlier, are unreliable. . We believe that, given the important role and responsibility that mandate holders have for promoting and protecting the human rights of all people, that the levels of research, investigations and engagements need to be more robust, especially when levelling accusations of state conducts as being racist.

### **3. Additional responses and comments on the joint communication**

3.1 What follows are additional responses/comments/reflections on some of the issues raised in the joint communication from the Special Rapporteurs.

3.2 The Special Rapporteurs requested the Minister to provide any additional information and/or comment(s) she might have on the allegations contained in their joint communication. It is important to reiterate and highlight the following: South Africa welcomes the opportunity to provide a response to the specific questions and the serious allegations outlined in the joint communication from the Special Rapporteurs by providing factual and more detailed information below. South Africa deems it prudent to raise the additional information regarding the alleged allegations and communication received in order to clarify or clear any misconceptions.

3.3 South Africa experiences both high levels of internal and external migration, leading, inter alia, to an influx in urban and more affluent areas and this leads to competition for scarce resources. Migration to South Africa is driven by the hope of a better life in search for better opportunities, mainly socio-economic opportunities. The tensions experienced in South Africa between some locals and foreign nationals are at times borne out of and exacerbated by increasing levels of unemployment and socio-economic inequalities as well as the increase in organised cross border crime. As stated above, the causes of many socioeconomic and political challenges in South Africa are complex and multifaceted.

- 3.4 South Africa recognises that a comprehensive approach to international migration is needed to optimise the overall benefits of migration, while addressing the risks and challenges for individuals and communities in countries of origin, transit and destination. In this regard, international and regional cooperation remains crucial. South Africa believes that the genuine factors that lead to (irregular) migration should be addressed with vigour and steadfastness. The adverse drivers and structural factors that compel people to leave their countries must be addressed, including poverty, inequality, underdevelopment, unemployment, food insecurity and conflict.
- 3.5 South Africa believes that reducing adverse drivers of migration would allow for migration through regular, predictable, and safe pathways. Management of international migration forms a core element of the overall demographic dividend and governance in South Africa. Due to the complexity of international migration in South Africa, migration management in the country and the region calls for increased international cooperation and addressing the critical root causes of forced migration towards safe, orderly and regular migration.
- 3.6 The racially based economic and social inequalities remain an ugly part of South African life and daily experience. The legacy of apartheid has entrenched tremendous economic inequalities within the country and South Africa is dealing with one of the highest inequality rates in the world. This legacy continues to impact society and continues to exacerbate various challenges experienced in the country today, including incidents of violent attacks in certain communities.
- 3.7 South Africa further recognises that illegal migration poses a risk to the country's security, stability and economic progress. Illegal migration affects service delivery and places additional burdens on essential services such as healthcare and education. Like any sovereign nation, South Africa retains the right to implement policies and measures that guarantee the integrity of its borders, protect the rights of South Africans and provide that all who reside within its borders have a legal right to be here. In this regard, the country is committed towards implementing the Objectives of the Global Compact on Safe, Orderly

and Regular Migration. The role of the international community in addressing the root causes of migration and mass displacements cannot be understated.

- 3.8 It has been observed that some of the challenges associated with irregular migration have to do with weaknesses in internal controls e.g., corruption in some public institutions, lack of resources, and institutional incapacity. There is indeed merit in this view. It is the responsibility of every government, including the South African government to ensure that its public administration and institutions, processes and procedures function optimally to reduce instances that could give rise to crime, insecurity, violence, unrest, and “othering.”
- 3.9 Law enforcement authorities must deal in a non-discriminatory way with those who commit crime. It should be clear that it is wrong to accuse foreign nationals (simply because they are foreign nationals) and put all the blame at their doorstep for all the crimes that are committed in South Africa. But those foreign nationals (and those South African nationals) who are found to be involved in criminal activities, they should all face the full might of the law without discrimination. There is an obligation on nationals and foreign nationals alike to respect and abide by the laws of the Republic.
- 3.10 As a general and sweeping proposition, foreign nationals cannot be blamed for crime in South Africa (simply because they are foreign nationals). In the same vein, the fact that some foreign nationals are involved in criminal activities cannot be denied for fear that, to say so, would be labelled “racist” and “xenophobic.” From the overall tone and demeanour of Special Rapporteurs’ joint communication, one is left with the impression that, to say foreign nationals are involved in criminal activities - even where there is evidence - is, by itself, “racist” and “xenophobic.”
- 3.11 The South African Government, through law enforcement authorities and other agencies, has dealt with and followed some of the specific incidents outlined in the joint communication since 1994 to September 2019. Some of the interventions that have been pursued, include various social cohesion



programmes implemented at national, provincial and local levels working with a multiplicity of stakeholders.

3.12 South Africa has acceded to various international instruments and agreements aimed at the promotion, protection, and fulfilment of the human rights of migrants, refugees, and asylum seekers, including: i) The International Covenant on Economic, Social and Cultural Rights; ii) The International Covenant on Civil and Political Rights; iii) International Convention on the Elimination of Racial Discrimination; iv) The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol; v) The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; vi) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; as well as recently supporting the adoption of vii) Global Compacts on Refugees and on Safe, Orderly and Regular Migration.

3.13 A wide range of provisions in the South African Constitution provide for non-discrimination and equality and are supported further by an array of legislation providing, in greater detail, the normative and institutional framework for the protection of human rights in South Africa. South Africa has a progressive Constitution and an independent judiciary. The Constitutional Court, which is the highest court in the Republic, has discharged its mandate effectively as the *Guardian of the Constitution* by ensuring protection of the rights of all who live within the borders of the Republic, including the human rights of asylum seekers, refugees, and migrants in general over the years. The case of Khalfan Khamis Mohamed (*Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another)* 2001 (3) SA 893 (CC)) is a clear example of the commitment of the South African judicial system to protect the rights of all, including ‘foreign terror suspects’, asylum seekers, refugees and migrants.

3.14 The case of *Mohamed* involved the handing over to the US authorities (FBI) by South African authorities (‘rendition’) of Khalfan Khamis Mohamed – a Tanzanian national and ‘terror suspect’ who was accused of masterminding the bombings of the US embassies in Nairobi and Dar-es-Salam in 1998. Mohamed had fled to

South Africa and entered illegally under false pretences. He was traced by the FBI to Cape Town where, together with South African authorities he was arrested and handed over to the FBI and flown out of the country. All that drama unfolded in the context where Mohamed was not provided an opportunity to seek legal defence and challenge his arrest before he was 'renditioned' to the US. When he was in the US, he approached the South African Constitutional Court (and was joined in support by the South African Society for the Abolition of the Death Penalty in South Africa and another *Amicus curiae*) arguing that his handing over to the US was illegal, unconstitutional and violated his constitutional rights to life, due process and equal protection of the law.

3.15 In the US, Mohamed faced the real possibility of a death sentence for capital crimes he was charged with. In the Constitutional Court, the South African government argued forcefully against any order directing it (the South African government) to intercede with US authorities to bring Mohamed back to South Africa and/or to spare his life. The government contended that 'it was not for this Court [the Constitutional Court], or any other court, to give instructions to the executive.' (at para 70). The Constitutional Court disagreed. In upholding Mohamed's application, the Constitutional Court held that the South African government acted unconstitutionally when it handed Mohamed over to the US authorities. The Court held that, before Mohamed could be handed over to the FBI, the South African government was supposed to have sought and obtained a firm guarantee from the US authorities that if convicted, Mohamed will not be sentenced to death, but that if the death sentence was the competent sentence according to US law, then South African authorities should have obtained a further guarantee that Mohamed will not be executed. In an unprecedented move, the Constitutional Court directed the Registrar of the Court to send the judgment of the Court to the Federal judge trying Mohamed in New York to bring to the attention of that judge the fact that Mohamed's rights were violated in South Africa when he was handed over to the FBI without affording him his constitutional protections. At the end of his trial in the US, Mohamed was found guilty, convicted and sentenced to life without parole in 2001. This case demonstrates the seriousness with which the rights of all, including foreign nationals are safeguarded by the judicial system.

3.16 The case of *Mohamed* is but one of the many cases in which South African courts have demonstrated their full independence and dispensed justice without fear, favour or prejudice, even in cases that involve foreign nationals. It is therefore concerning that the Special Rapporteurs would write in their joint communication that: “[I]nstitutionalised xenophobia results in discrimination in the administration of justice, as well as xenophobic discrimination in access to economic and social rights.” This averment is unjustified. There are numerous court cases where the rights of migrants to access socio-economic rights which are justiciable in South Africa has been protected. State action including action by the Executive that is not in line with the Constitution is unlawful and the courts have ensured that the state remains accountable to its obligations. Therefore, the accusation that racism and xenophobia are institutionalised needs to be interrogated with the Special Rapporteurs.

3.17 South Africa has a broad body of constitutional and legislative frameworks that govern migration management and refugee protection, e.g., the Citizenship Act 88 of 1995; Immigration Act 13 of 2002; and the Refugees Act 130 of 1998 (as amended.) In the recent past, the Department of Home Affairs (DHA) amended the Immigration and Refugees Act and implemented regulations and strategies to address glaring gaps in legislation. South African courts have upheld rights enshrined in international refugee law and standards.

3.18 It is in the context of constitutional supremacy that following statement of the Special Rapporteurs needs to be reflected on: “[T]he Government frequently considers discriminatory bills and laws in the context of immigration, and it has so far failed to widely collect data disaggregated by ethnicity and other characteristics.” It is a constitutional requirement in South Africa that laws emanating from Parliament must be consistent with the Constitution, otherwise they are invalid and of no force or effect (supremacy of the constitutional principle). Therefore, the claim by the Special Rapporteurs that “The government frequently considers *discriminatory bills and laws...*” (emphasis added) is indeed concerning. This claim directly questions the independence and competence of South Africa’s judiciary. The Constitution provides, in relevant sections, that it is

only the Constitutional Court that may (a) decide the constitutionality of any parliamentary or provincial Bill (section 167(4)(b)); (b) decide on the constitutionality of any amendment to the Constitution (s167(4)(d)); and (c) decide that Parliament or the President has failed to fulfil a constitutional obligation (s167(4)(e)). The Constitution further provides (in section 167(5) that *“[T]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”*

3.19 Considering these provisions of the South African Constitution, it is only the courts of law that can pronounce on the constitutionality, validity and legality of bills and laws. It is a feature of the South African justice system that in many cases, litigants have applied to courts to challenge the constitutionality of certain provisions of laws (judicial review)(as it is their constitutional right to do so). In some cases, the courts have upheld the applications, and in some cases, the courts have dismissed such cases. It is therefore of great concern that the Special Rapporteurs appear to be questioning the rationality and legality of South Africa’s law-making processes based on an inchoate understanding of how the legal system in South Africa works.

3.20 Within the constitutional context just discussed, it is important to note that the Minister of Home Affairs is empowered to establish Refugee Reception Centres, and this is in line with South Africa’s White Paper on International Migration. South Africa does not practice or intend to introduce a refugee encampment system (unlike many other countries around the world that run these camps). However, to ensure efficiency in rendering services and enhancing the protection of asylum seekers and refugees, South Africa is considering the introduction of dedicated Refugee Reception Centres in areas close to ports of entry.

3.21 The decision of the South African government not to establish refugee camps in South Africa but to allow refugees, asylum seekers and migrants to integrate freely in communities without limitation as to where they can live can hardly be associated with a country that is hostile to foreign nationals. The claim by Special

Rapporteurs that *“[M]igrants in South Africa frequently encounter a hostile environment which limits their effective enjoyment of constitutional and legal rights and their ability to access basic resources and resources”* should therefore be contextualised. The hostile environment is not due to policies and laws and therefore does not amount to state action. The assertion that *“[t]he presence of foreign nationals in South Africa is negatively presented by Government actors and vocal portions of the population”* also does not represent state action or institutional xenophobia. The hostile environment as pointed out earlier is of concern to the South African government as this anti-foreigner sentiment can spill over into anti-constitutionalism, given that protective nature of the constitution. The Special Rapporteurs go on to charge that *“[S]outh African officials continue to exclude and stigmatise migrants despite their obligations under international refugee law and international human rights law.”* Given the earlier discussion these claims by Special Rapporteurs are not consistent with the practice of the South African government in the past 28 years. Even at this moment when the challenges of migration have augmented significantly, the South African government still believes in integrationist solutions to these challenges. This is in contradistinction to the approaches that other governments have taken in recent years, which include measures to deport foreign nationals under the veneer of ‘bilateral cooperation in the field of migration’ or build more detention centres with the sole objective of squelching any possibility of integration with local communities.

- 3.22 The proposed refugee reception centres are not refugee camps as they are known and practiced in other countries. These refugee reception centres will help ease some of the challenges the system is experiencing now regarding processing and rendering services and enhancing the protection of asylum seekers and refugees. This measure belies the assertion made by Special Rapporteurs when they say: *“[D]etention and deportation remain the primary tools of immigration enforcement in South Africa.”* As stated above, the establishment of these refugee reception centres close to ports of entry is sanctioned by law in South Africa. The establishment of these centres for the purposes that they must serve should not be interpreted as further demonstration

of Government's "racist" and "xenophobic" treatment of refugees. Nor should this measure be seen as denial of refugee rights.

3.23 In law, no person may be refused entry into South Africa, expelled, extradited or returned to any other country or be subjected to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country. In South Africa, the asylum regime is sometimes conflated with economic migrants and therefore the Department of Home Affairs has embarked on a review of policy framework, which will provide a clear distinction between economic migrants and asylum seekers.

3.24 On allegations of xenophobic mobilisations and violence: The discussion on the constitutional framework does suggest that the allegation that racism and xenophobia are "institutionalised" and are the official policy of the South African government are inaccurate. Such allegations are not borne by the facts and are inconsistent with the norms, values and principles that underpin the constitutional fabric of and have no place in South African society

3.25 On the issue of "Operation Dudula," the Government is not aware of any "political group" that launched that campaign. From the information at Government's disposal, "Operation Dudula" movement emanated from within communities themselves and was initially launched because of the discontent from the community with basic service delivery and electricity shortages. Cabinet has also condemned incidents of public violence, and which have resulted in the violation of other people's rights. While the Constitution guarantees the right of free association and speech, these rights are limited by the requirement that no one can mobilise for the purposes of inciting violence or taking up arms. Thus,

Government does not and will not tolerate any deliberate mobilisation of violence against any group or category of groups of people residing in the country. The South African government does not in any way support the actions of groups like Dudula.

- 3.26 In the quest to find solutions to all challenges associated with migration in South Africa, it is important to consider that all relevant actors need to play their part in changing perceptions and misinformation around the issue of migration, refugees, and asylum seekers as well as the facts regarding racism and xenophobia. All stakeholders within society, including Government, Civil Society, Non-Governmental Organisations, media, academia, business, religious and faith-based organisations as well as media, have a fundamental responsibility in combatting racism, racial discrimination, xenophobia and related intolerance. Similarly, the critical role of the United Nations Special Procedures in holding stakeholders accountable and monitoring violations of domestic and international law cannot go unheeded.
- 3.27 The incidents of violence where foreign nationals and any other group or community were attacked are dealt with within the South African criminal justice system in accordance with applicable laws and procedures. It should be noted that one of South Africa's flagship programmes in the multilateral system is to collaborate with partners to combat racism and ending discrimination in all its forms. Part of that campaign is to pursue the promotion and protection and full realisation of the rights of People of African descent.
- 3.28 At the national level, and in addition to the various laws, policies and programmes aimed at combating racism and other criminal acts that might also affect asylum seekers, refugees and migrants, the South African Government adopted the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) on 27 February 2019. The NAP is based on the collective conviction of the people of South Africa that, given that the ills of unfair discrimination and inequality are human made, we have the means and capacity to completely eradicate these ills from our society. The NAP was developed through a comprehensive consultation process involving government, various

institutions supporting constitutional democracy and civil society, and is informed by general principles of universality, interdependence and indivisibility of human rights, participation and inclusion, progressive realisation of rights, accountability, equality and non-discrimination. It commits all sectors of the South African society to the promotion and protection of human rights, and to raising awareness about anti-racism, equality and anti-discrimination issues. It calls for a partnership in implementing anti-racist and anti-discrimination education.

- 3.29 As a government policy framework, the NAP will inform future development of domestic legislation to combat racism, racial discrimination, xenophobia and related intolerance. The NAP also makes provision for the identification of legislation that needs to be amended or adopted with a view to improving the protection of victims, the building of a more equal society, and strengthening of the rule of law and democracy. Further actions will include the collection of data regarding racism and discrimination to combat these problems and improve such interventions as the prosecution of offenders and psychosocial support for victims.
- 3.30 In this regard, South Africa welcomes the offer to make full use of the combined expertise and resources of the Office of the High Commissioner for Human Rights and valuable support from special procedure mandate holders.
- 3.31 In their joint communication, Special Rapporteurs requested “information on the measures taken to prevent the propagation of racist and xenophobic statements, including against migrants by public officials and to hold persons responsible for such acts accountable.” It needs to be reiterated that the Government of South Africa does not “promote propagation of racist and xenophobic statements.” Statements of this nature are unlawful and do lead to litigation before the Equality Courts, which are mandated to deal with, inter alia, issues of discrimination and hate speech. The South African Constitution guarantees for everyone living in South Africa the right to equal access to courts. Equality Courts were created under the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA), to deal with cases of “unfair discrimination”, “harassment” and “hate speech”. The Equality Courts make it easy and inexpensive for people to



bring their complaints relating to unfair discrimination, hate speech and harassment to court and people do not need the services of a lawyer to bring a complaint to the Equality Court. The Clerk of the Court assists complainants when needed.

3.32 Some of the constitutional and legal frameworks governing the rights of migrants, refugees, and asylum seekers in South Africa as well as its obligations under international law towards the elimination of racism, racial discrimination, xenophobia, and related intolerance have been outlined above. Special Rapporteurs allege that South African “public officials” propagate “racist” and “xenophobic” statements; and this allegation is not qualified. It is made as a general and sweeping allegation against “public officials” thus creating a false perception that racism and xenophobia are official policies of the South African government which are carried out by docile officials.

3.33 It is important to note that section 197(1) of the South African Constitution imposes a firm obligation on all public officials to “loyally execute the *lawful policies* of the government of the day” (with emphasis on “lawful policies”). Racism and xenophobia (and any other form of intolerance for that matter) are not official policies of the South African Government. In fact, if Government or any of its officials were to try to make these forms of intolerance official policies of government, they would be acting unlawfully and in violation of the Constitution. There is nowhere in the official documents of the South African government (national, provincial or local) where racism, xenophobia and other forms of intolerance and enshrined as official policies of Government.

3.34 It is important to indicate that the Prevention and Combating of Hate Crimes and Hate Speech Bill is before Parliament for consideration. The Bill currently states that a hate crime is an offence recognised under any law, the commission of which is motivated on the basis of that person’s prejudice, bias or intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member: race; gender; sex, which includes intersex; ethnic or social origin;

colour; sexual orientation; religion; belief; culture; language; birth; disability; HIV status; nationality; gender identity; albinism; or occupation or trade.

3.35 Promulgation of this specific legislation on hate crimes will have several advantages. It will assist in creating a shared definition of hate crime amongst all those involved in the criminal justice system; will send a clear public message that hate crimes will not be tolerated in South Africa; will provide additional tools to investigators and prosecutors to hold hate crime perpetrators accountable; will provide a means to monitor efforts and trends in addressing hate crimes; and will allow for effective coordination between government service providers to reduce the impact of secondary victimisation on hate crimes victims. Laws against hate speech serve a dual purpose. They protect the rights of the victim and the target group and ensure that society is informed that hate speech is neither tolerated, nor sanctioned.

3.36 As far as ensuring that everyone, without distinction as to race, colour or national or ethnic origin and/or migration status is guaranteed equality before the law, as well as substantive equality in the enjoyment of civil, political, economic, social, and cultural rights: (refer to preceding paragraphs where the issues of non-discrimination in the application of the law were canvassed). In addition, it is important to highlight that the Bill of Rights in the Constitution provides that most rights are guaranteed to “everyone” – i.e., not only to South Africans, but to foreign nationals alike who are within the borders of the Republic. Only four sections apply to “citizens.” Therefore, foreign nationals do enjoy the same rights to healthcare, education and social security as citizens do. The founding provisions of the Constitution recognise that South Africa is founded upon the values of human dignity, the achievement of equality, the advancement of human rights and freedoms and non-racialism and non-sexism. Section 9 of the Constitution recognises that everyone is equal before the law and has the right to equal protection and benefit of the law. The protection against discrimination embodied in the Constitution extends to both nationals and non-nationals.

3.37 In South Africa, the rights to human dignity, life and equality are enjoyed by the citizens and non-citizens alike; human dignity has no nationality, it is inherent to

all people. Migrants, asylum seekers and refugees acquire the legal entitlements to residence, employment, and study in the Republic. Furthermore, asylum seekers and refugees are entitled to an administrative action that must be lawful, reasonable and procedurally fair. Most recently, a court has ruled that the right to education extends to undocumented children of migrants.

3.38 The rights and privileges of migrants, refugees and other foreign nationals are safeguarded through the above-mentioned pieces of legislation and measures. However, there is no perfect asylum or refugee system anywhere. In an attempt to comply with the provisions of the law and prescribed procedures, there are bound to be instances where things may not work perfectly. Those instances where these gaps occur, cannot, surely, be used to tarnish the entire system and its procedures. Where foreign nationals are unlawfully restricted from the rights and services they are entitled to, the South African government and the judiciary will commit to ensure that these practises are cured.

3.39 Asylum seekers and refugees enjoy rights and privileges, such as social grants, basic healthcare services, birth records, travel documents and equality before the law. Legal aid mechanisms for all persons in South Africa (inclusive of foreign nationals) and specific vulnerable groups have been strengthened through Legal Aid regulations, for instance, by providing that legal aid may also be provided for maintenance, domestic violence and harassment cases. Legal aid may further be provided to asylum seekers and in Hague Convention cases, also to children in civil proceedings involving the child.

3.40 Asylum seekers are only detained at the Lindela Facility once their applications for refugee status have been proven to be manifestly unfounded and they are bound to be deported. Those who are detained, pending deportation, are held at Lindela where they have access to NGOs, lawyers, the South African Human Rights Commission (SAHRC) and Ambassadors from their respective countries of origin. It is worth noting, that the South African Human Rights Commission conducts visits at Lindela to monitor the conditions under which the detainees are held. Furthermore, the Portfolio Committee (of Parliament) on Home Affairs frequently visits Lindela in fulfilment of its Parliamentary oversight role. In

addition, Lindela has a dedicated human rights office which is used by the SAHRC, the Red Cross, Amnesty International, Doctors Without Borders, human rights groups and NGOs playing a monitoring and oversight role. The allegation by the Special Rapporteurs that “deportations are carried out in an unlawful manner” is therefore in our view, without merit.

3.41 The smooth and prompt deportation is sometimes impeded by delays in the verification of identities and nationalities of deportees as well as acquisition of travel documents from the country of origin. If these delays should extend beyond requisite prescribed time frames, government is required to apply to a competent court for an extension and to obtain an appropriate court order in this regard. In furtherance of ensuring that everyone enjoys their fundamental human rights and freedoms, South Africa does not practice the encampment system as is done in many countries across the world. Again, the allegations by the Special Rapporteurs that there is no oversight of detention facilities; that decisions are not taken in accordance with legal prescripts; that bodies that do oversight are not independent are worrisome as these actions would be unlawful. We have not come across data to suggest that these practises are widespread and that contraventions of the prevailing laws are not being dealt with.

3.42 It should be highlighted that South Africa does not currently have legislation that defines “xenophobic attacks.” Attacks against foreign nationals are covered under and are dealt with in terms of the Criminal Procedure Act. Thus, any sanctions related to attacks against foreign nationals will be covered under the relevant legislation including restorative justice where appropriate.

3.43 On efforts to encourage integrationist multiracial organisations and movements and other means of eliminating barriers between South African citizens and foreign nationals: As a constitutional democracy, South Africa does not prohibit the establishment and operations of any organisation that is legally established, including organisations whose focus is on promoting social cohesion and eliminating barriers between various groups of people in the country.

3.44 Government, through collaborative partnerships between the Department of Justice and Constitutional Development (DOJ&CD), the Department of Social

Development (DSD), the South African Police Service (SAPS) and various other key role-players, continues to conduct a number of campaigns and related activities in collaboration with key stakeholders to address the root causes of intolerance and sporadic attacks against foreign nationals. A National Anti-Xenophobia Task Team (NTT) was established in 2017 to focus on developing a programme that will facilitate ending attacks against foreign nationals. Furthermore, Government is a member of the United Nations Protection Working Group (UNPWG). The UNPWG's focus is on ensuring the promotion of social cohesion in communities whilst ensuring that communities are safe for all inhabitants, both citizens and foreign nationals, including refugees and asylum seekers alike. The UNPWG drafted Standard Operating Procedures (SOPs) in response to violence against foreign nationals in South Africa. The overall objective of these SOPs is to ensure that proper standards are met to enhance efficiency and effectiveness of the UNPWG in the case of responding to attacks on foreign nationals, including refugees and asylum seekers, and other issues related to protection.

3.45 Specifically, the SOPs provide a detailed outline of all emergency response processes from information sharing, convening a meeting, sharing the response plan with government, field/scoping mission, convening a follow-up meeting, implementation of action and review and reflection on lessons learnt from the response. The SOPs are intended to serve as guidelines and outline responsibilities for members involved in the functions of the UNPWG. The UNPWG Advisory Group has been formed to oversee the emergency response by both government and all relevant role-players during the sporadic attacks on foreign nationals.

3.46 In addition, Government has collaborated with several civil society organisations to conduct activities within communities, including both citizens and foreign nationals e.g., to commemorate Africa Month, World Refugee Day, International Migrants Day and other key international and national days aimed at promoting social cohesion. These ongoing collaborative efforts were in the form of awareness campaigns; celebrations of culture and heritage; community dialogues and stakeholder engagements between government, Chapter 9

Institutions and civil society organisations which include organisations such as the African Diaspora Forum. Government also disseminates human rights education material in the form of copies of the Constitution, NAP booklets and related material at all events and activities that it participates in.

3.47 As part of the implementation of the NAP 5-year Implementation Plan, there is a specific focus on the development of an Early Warning System regarding xenophobia and a Rapid Response Mechanism to such incidents. The DOJ&CD as the focal agency responsible for coordinating the implementation of the NAP, will, during the initial five year cycle of implementation, engage continuously with relevant departments and other role-players to ensure that the commitments made in the NAP, inter alia, relating to developing and implementing anti-discrimination programmes, conducting community dialogues and public engagement on combating all forms of discrimination, and the promotion of constitutional and human rights awareness, are achieved.

3.48 To provide for a national strategy on social cohesion and nation-building in South Africa, the Department of Sports, Arts and Culture is implementing the National Strategy for Developing an Inclusive and a Cohesive South African Society. Additionally, planning for mobility / migration is critical for promoting social cohesion by bringing people closer to services, providing needed skills, injecting entrepreneurial energy, enriching the labour market, and opening important opportunities for poverty reduction. Failing to plan for mobility will exacerbate social fragmentation, economic marginalisation, poor access to services, violence, and inter-group conflict.

3.49 It should also be noted that there are many South African NGOs (e.g., religious groups, humanitarian organisations, civic groups, community-based organisations) as well as migrant and refugee-run organisations operating in South Africa which also engage with local communities with the aim of promoting social cohesion.

3.50 On how the Government intends to address what Special Rapporteurs label “racial or ethnic profiling” and unlawful use of force against migrants, refugees and asylum seekers by “vigilante groups” in the country, in order to comply with

their obligation to respect and ensure the right to life and physical integrity guaranteed to all without discrimination: In South Africa, all persons within the borders of the Republic are entitled to the following rights, which are non-derogable even during states of emergency: the right to human dignity, the right to life, the right not to be tortured in any way, and the right not to be treated or punished in a cruel, inhuman or degrading way.

- 3.51 In South Africa, the use of force in effecting arrest is statutorily governed by section 49 of the Criminal Procedure Act. The agency responsible for ensuring accountability on the part of the police in South Africa is the Independent Police Investigative Directorate (IPID). IPID's mandate is derived from the Independent Police Investigative Directorate Act (No. 1 of 2011). The Directorate is required to investigate, among others, any deaths in police custody; deaths as a result of police actions; any complaint relating to the discharge of an official firearm by any Police Officer; alleged rape by a Police Officer, whether the Police Officer is on or off duty; and alleged rape of any person while that person is in police custody.
- 3.52 Furthermore, the Government regards the prevention of crime as a national priority. The perpetrators of crime, regardless of whether they are foreigner or citizen will be held accountable under the Prevention of Organised Crime Act 121 of 1998. Fighting crime and acts of violence remains the focus of Government's efforts. These efforts are carried out without discrimination and with the objective of protecting lives, property and livelihoods.
- 3.53 South Africa signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2000, and ratified it in 2008. Furthermore, the country signed the OPCAT in September 2006 and ratified it on 20 June 2019. In accordance with Article 17 of the OPCAT, one of the obligations imposed on State Parties is to establish domestic mechanisms for the prevention of torture, known as the National Preventive Mechanism (NPM). The South African Government decided to adopt a multi-body NPM which envisages the SAHRC playing a coordinating role together with other oversight bodies such as the Judicial Inspectorate for Correctional Services (JICS), the

Military Ombudsman, Health Ombudsman and the Independent Police Investigative Directorate (IPID).

3.54 The Special Rapporteurs requested “information on Bills and legislation at the local and national levels that have the purpose or effect of economic exclusion of non-nationals.” Recent amendments to the body of legislation and bills governing migration and refugees and the implementation of regulations and strategies are aimed at addressing the glaring gaps in South Africa’s national immigration and refugee legislation. The country’s formal international migration policy has remained in place since 1999 despite significant changes in the country, region and world. It became increasingly clear over the past few years that South Africa needed innovative, radical policy transformation around labour migration to meet the needs and expectations of its citizenry as well as those of its partners in the region. The dependency of neighbouring countries on migrant workers’ remittances created by decades of sending workers to South Africa, however, continued well beyond the recent changes in the South African labour market. Any Bills or conduct that does not meet stringent adherence to the Bill of Rights will not be passed by the Constitutional Court.

3.55 After 1994, and as part of Government’s determined effort to redress the terrible legacy of apartheid exclusion and marginalisation, Government embarked on an important project, inter alia, of repealing those pieces of legislation which were patently and manifestly illegal and unjust, and reviewing others to make sure that they are consistent with the new democratic ethos. In many instances, Government had to enact new laws to respond to the new environment. In this regard, various pieces of legislation were promulgated, for example, in the economic field with the specific intention of addressing the legacy of exclusion of the majority of the population from meaningful economic participation because of the discriminatory laws of the past. For instance, many laws were promulgated which sought to provide for affirmative action and preferential procurement practices that would favour enterprises and businesses owned and controlled by previously disadvantaged persons, women, youth and people living with disabilities. The project of including these citizens in the economy continues and



Government will continue exploring other innovative ways to achieve that objective.

3.56 The Government recognises and accepts the valuable role played by foreign nationals in economic activities in the country, including at provincial level and more specifically, in the township economy. The Government (at the national, provincial and local levels) does not have laws in place that are deliberately aimed at discriminating unfairly against foreign nationals. However, Government is of the view that the differentiation in relation to the provision of financial assistance, loans and credit that is provided for in some laws and regulations is rationally connected to a legitimate government purpose and is therefore consistent with the Constitution - considering the rights of “everyone” and those of “citizens” that are guaranteed in the Constitution.

3.57 In their joint communication, the Special Rapporteurs state that in a previous communication (OL ZAF 2/2021, dated 24 February 2021), they raised certain concerns about the possible exclusionary effect (against foreign nationals?) of the then Gauteng Township Economic Development Bill of 2020. In parenthesis, that Bill is now an Act of the Gauteng provincial parliament (The Gauteng Township Economic Development Act, 2022 (Act No. 2 of 2022)(“the Act”). The core purpose of the Act is not to exclude foreign nationals from participating in the economy of the province, nor to fuel discrimination. On the contrary, the Act creates an enabling environment to encourage economic activity within townships without discrimination. Again, limitations on rights of all, including those for migrants can only be done through a Law of General Application that must adhere to constitutional values and rights. To date, this Act has not been challenged in the Constitutional Court and it is doubtful that it would have been passed if it did not meet constitutional requirements.

3.58 The Act seeks to promote economic development in townships by those enterprises that are based in townships. In this regard, Section 2(1) of this Act provides for its guiding principles and states as follows:

***“Guiding principles***

2. (1) *This Act seeks to facilitate and promote inclusive economic growth along a transformative paradigm to build a cohesive and more equal society which is underpinned by-*
- (a) *a growing and inclusive economy that harnesses the potential of all people in the Republic who are residents in Gauteng province;*
  - (b) *diversify the ownership patterns in the economy; and*
  - (c) *facilitates easier access by new entrants into all sectors of the economy.”*

3.59 The Act provides numerous benefits that township-based enterprises may access, including assistance with letting of land owned by the provincial government, capacity-building programmes, and technology transfer and acquisition. It is only the provision of financial assistance and the provision of loans and credit that are limited to South African citizens. The fact that the Act makes a distinction between citizens and non-citizens in the provision of loans and credit should not be construed as unfair discrimination against foreign nationals. It is within the competence of government to take a decision to make certain resources available to “everyone” without discrimination and to make other resources available to “citizens” for reasons that are rationally connected to a legitimate government purpose. In South Africa, the courts have clarified, inter alia, the requirements that public officials must comply with when taking decisions, in this case, to implement the provisions of the Act in pursuit of economic development in the Gauteng province. The point was made earlier in this response that it is the Constitutional Court that has the power to ultimately decide on the constitutionality/validity of laws, including provincial and national laws. The Act has not been challenged for constitutionality. If there are sections of the Gauteng community – and this includes foreign nationals – who believe that some or all the provisions of the Act are unconstitutional in the sense that they have the effect of “discriminating” or “excluding” them, they have the right (under the right of access to court provisions in the Constitution) to approach the courts for redress.

3.60 In dealing with complaints (e.g., “discrimination in the provisions of loans and credit”) that could be brought under the Gauteng Act, South African courts have

clarified some of the “rule of law” principles that would apply, in this case, the need for any decision to be rational i.e., to be rationally related to a legitimate government purpose sought to be achieved. For instance, in the case of *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2002 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85, the Constitutional Court stated:

*“It is the requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”*

3.61 Other legislative provisions: The preamble of the Immigration Act, 2002 (Act No. 13 of 2002) (the “Immigration Act”) sets out a few key policy considerations relating to the entry and departure of foreigners. Some of the considerations that should be taken into account in deciding on immigration include the following: that “economic growth is promoted through the employment of needed foreign labour; foreign investment is facilitated; the entry of exceptionally skilled or qualified people is enabled; skilled human resources are increased; academic exchanges within the Southern African Development Community are facilitated; and tourism is promoted.” In addition to these, it is also important that the contribution of foreign nationals in the South African labour market “does not adversely impact on existing labour standards and the rights and expectations of South African workers” and that intolerance is prevented and countered.

3.62 The Immigration Act provides for the instances in which a foreign national may enter South Africa, and procedural requirements for doing so, while recognising that there is no general right to enter the country. This is consistent with Article 13 (2) of the Universal Declaration of Human Rights and the entry control policies adopted by many countries across the world. To enter South Africa legally, a

foreign national must either obtain a visa (in accordance with several specified categories), or as a refugee or asylum seeker. And - like in many countries around the world - an illegal foreigner may be deported since they would not have been granted any authorisation to enter or remain in the country.

3.63 Like many other countries, South Africa has the right to regulate who enters which professions/occupations and what skills are required for that purpose in line with its identified socio-economic and political interests/priorities. In a recent case (2 August 2022) of *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29 (“*Rafoneke*”), the Constitutional Court considered the position of Basotho (Lesotho nationals) who satisfied all the requirements for admission and enrolment as legal practitioners in South Africa except for those relating to the requirement that the person be a citizen or permanent resident, and be admitted as a legal practitioner in designated foreign jurisdictions.

3.64 In considering the matter, the Constitutional Court had regard to section 22 of the Constitution which provides that “[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.” The court further had regard to the right to equality, considering whether there was a rational connection between the relevant legislation and its intended purpose, as well as to whether the differentiations (between citizens and foreign nationals, including those without valid visas, and between those foreign nationals that were admitted practicing law in designated jurisdictions and those who had not yet been admitted) amounted to discrimination which is unfair.

3.65 It was acknowledged that, like many countries worldwide, South Africa adopted a policy relating to the requirements for foreign nationals to enter the legal profession. A further policy decision, in furtherance of section 22 of the Constitution, was taken that certain work which does not entail a scarce or critical skill is preserved for citizens or permanent residents. The legal profession has not been classified as a critical skill in accordance with the provisions of the Immigration Act, 2002 (Act No. 13 of 2002) (the latest critical skills list was

published in Government Gazette No. 47182 under Government Notice No. 2334 dated 2 August 2022, and the legal profession did not appear in its predecessor published on 2 February 2022). After meticulous consideration, the Constitutional Court found that these policy positions were neither arbitrary nor illegitimate and were rationally connected to a legitimate government purpose.

3.66 The judgment in *Rafoneke* demonstrates the robust scrutiny of government action against the Bill of Rights in the Constitution, and the developing jurisprudence to give effect thereto. While most rights are universal, i.e., all persons are entitled to these, some rights have been reserved for citizens. In giving effect to these rights and maintaining a distinction in limited circumstances between citizens and foreign nationals, legislation and government policy have, on several occasions, been held to be rationally connected to a legitimate government purpose.

3.67 Considering the above-cited court decisions, it is important to note that South African courts attach great significance to human rights protection in immigration and employment fields and to ensuring that laws in these areas of public life (as in all other areas) are applied in accordance with constitutional norms and principles. Any suggestion that there are laws and policies in South Africa which impact on foreign nationals (migrants, refugees and asylum seekers) which are applied and implemented in flagrant disregard for the rights of this community and with the sole purpose of “excluding” them from meaningful participation in the socioeconomic and political life of South Africa should be rejected. And any suggestion that the distinctions made in the application of laws and implementation of policies (which are done in accordance with constitutional prescripts) are “racist” and “xenophobic” is not accurate.

3.68 There is an important issue relating to South African immigration policy that is often overlooked and is overshadowed by incidents of violence and attacks on foreign nationals and counterattacks on South African nationals (vicious cycles of senseless violence). There are hundreds and thousands of foreign nationals who live and work in South Africa and who have chosen this country as their home. They come from every continent and are part and parcel of South African

society and participate actively in both private and public life in various activities and professions where they occupy leading positions in business, healthcare, sport, arts and culture, education, and entertainment. What is more, in the past 28 years – apart from the period at the height of covid-19 – tourism has been one of the key drivers of South Africa’s positive economic trajectory, with tourists coming from all four corners of the globe, including the African continent. All these positive developments fly in the face of incorrect assertions made by Special Rapporteurs in their joint communication, inter alia, that South Africa is “hostile” to foreign nationals; that South Africans are “racist” and “xenophobic”; that “xenophobia” is “institutionalised” in South Africa; that foreign nationals are “denied rights” and are “excluded” from meaningful participation in the economic and political life of this country; and that South Africans “hate” foreign nationals. These statements are, unfortunately, not consistent with the daily experiences of many foreign nationals who live and work and have chosen South Africa as their home.

3.69 On the question of how the South African government intends to continue fulfilling its obligations under international human rights law and international humanitarian law and international refugee law considering challenges of the COVID-19 pandemic: South Africa remains committed to honouring its national and international obligations. The COVID-19 pandemic had a catastrophic impact on every aspect of South African life. It also impeded effective implementation, inter alia, of effective migration management as well as the achievement of the SDGs. SA is not alone in this difficulty. Many countries face the daunting challenge of how they build back better in the aftermath of this pandemic. Nevertheless, South Africa remains fully committed to adopting progressive migration policies that are in line with international conventions and standards. Similarly, South African courts uphold rights enshrined in international refugee law and standards and will continue to do so.

3.70 During the height of the covid-19 pandemic, certain liberties were restricted in the country like in many other countries across the world as measures were put in place to curb its spread. In this regard, South Africa declared a National State of Disaster, and by virtue of directions issued in terms of the Disaster

Regulations, the Minister of Home Affairs (DHA), extended the validity of visas and permits of asylum seekers and refugees until the Refugee Reception Offices and the Department of Home Affairs offices were reopened. Therefore, during this period, i.e., between March 2020 to 15 April 2022, asylum seekers continued their stay in South Africa notwithstanding the expiry of their documents.

3.71 To ensure that no asylum seekers, refugees or migrants were excluded from support during the height of the pandemic, Government ensured that they were included in social protection measures that were introduced to cushion the harsh impact on vulnerable groups and to protect them from any further negative impact. These measures included free covid-19 vaccination for all asylum seekers, refugees and migrants without discrimination.

3.72 On measures to be taken to eliminate corruption in the asylum system: Government has put in place several national efforts in its fight against unlawful activities and corruption, including within the migration and asylum systems. Government has taken significant steps to root out corruption in the migration system, including the establishment of the Ministerial Review Committee, which have made concrete recommendations to close the gaps in the manipulation of the IT migration system. Likewise, the Anti-Corruption Unit within the DHA in collaboration with other law enforcement agencies continues to make significant gains in the fight against corruption.

3.73 In addition, there are several ways an aggrieved asylum seeker can seek redress including making an appeal to statutory bodies such as, the Standing Committee on Refugee Affairs (“SCRA”) and Refugee Appeal Authority (“RAA”); and in most instances, the asylum seekers are legally represented during the appeal process before the RAA. Legal avenues to challenge the decisions of the RSDOs, SCRA and RAA in a court of law are also available, with the assistance of NGOs who assist the asylum seeker in the judicial process. Once the asylum seeker has exhausted all his/her avenues in line with the 1951 Convention and the Refugees Act, only then would the Government start with the deportation process.

3.74 In their joint communication, the Special Rapporteurs allege that foreign nationals are denied their constitutional rights; that they are excluded from

meaningful economic and social participation; that they are discriminated against; that the administration of justice treats them unfairly; and a host of other allegations. The measures that the Government has taken to address the issues relating to immigration, social cohesion, fostering inclusion, compliance with the law, and protection of rights (to mention but a few) demonstrate that, the sweeping and hyperbole allegations contained in the joint communication from the Special Rapporteurs are not borne by the facts.

#### **4. Concluding remarks:**

- 4.1 South Africa is committed to its founding principles. It will endeavour to pursue the objective of addressing the domestic malady of apartheid and playing a positive role in global politics as a sovereign and responsible member of the family of nations. In pursuit of these objectives, South Africa will be guided by its supreme law.
- 4.2 Consistent with its obligations under both domestic and international law, South Africa will endeavour to advance human rights and fundamental freedoms, including the human rights and fundamental freedoms of all who lives within its borders – including migrants, refugees and asylum seekers.
- 4.3 Racism, xenophobia and related forms of intolerance are not “institutionalised” in South Africa, i.e., these forms of intolerance have never been, and are not now, and will never be the official policies of the South African Government; nor will they be tolerated in our society.
- 4.4 The problems associated with migration are stubborn and complex. They are global problems. They are not the problems of any one country. They require genuine collective response that must be driven by human solidarity and the realisation that we are children of our common human heritage and that our destiny as a family of nations is inextricably intertwined. These problems cannot be approached superficially. The world cannot be happy with simplistic solutions based on superficial and inchoate understanding of the genuine issues humanity is grappling with.



4.5 The South African Government remains available to answer any further questions that Special Rapporteurs may have in relation to this communication. Finally, Government reiterates its commitment to receive Special Rapporteurs and will provide requisite support to ensure the fulfilment of their respective mandates.