



CoRMSA Submission to the Portfolio Committee on Police: Comment on the Independent Police Investigative Directorate Bill and the Civilian Secretariat for Police Service Bill

August 2010

The Consortium for Refugees and Migrants in South Africa (CoRMSA) welcomes the opportunity to make a written submission to the Portfolio Committee on Police on the Independent Police Investigative Directorate Bill and the Civilian Secretariat for Police Service Bill. CoRMSA is the national network of organisations working with refugees and migrants in the country. CoRMSA member organisations include Lawyers for Human Rights, Forced Migration Studies Programme and the Black Sash. Given the importance of the issues raised within the submission, CoRMSA trusts that these concerns will be addressed in the process of finalising legislation and drafting the regulations.

1. INTRODUCTION

South Africa at present is affected by persistent and sometimes high levels of xenophobic violence and violence specifically targeting refugees and migrants (hereafter referred to in this submission as 'foreign nationals'). The police play a critical role in addressing such violence by providing protection to all in South Africa, including foreign nationals, and by holding perpetrators of violence accountable for their actions. However, at present, there are major challenges in ensuring that police provide effective protection to foreign nationals in the country. Whilst the police responded effectively to threats and incidents of violence against foreign nationals following the 2010 World Cup, this has not always been the case. The present challenge is therefore to ensure that police officers respond and provide consistent protection to foreign nationals in the country, regardless of their legal status (as provided by the Constitution), in a manner consistent with the protection of South African citizens.

Recent research has established that foreign nationals are less likely to report crimes committed against them to the police, compared with South African citizens.¹ There are many reasons for this, including fear of the police and lack of trust in or knowledge of the South African justice system. Effects of this disconnection between foreign victims of crime and the police include: impunity for perpetrators of crimes against foreign nationals; incentives for criminals to target foreign nationals; and public perceptions that violence against foreign nationals is officially sanctioned and supported by the police.

Ensuring equal protection of foreign nationals will require action from oversight bodies as well as policy development. To this end, CoRMSA welcomes the opportunity to comment on the new proposed legislation on an Independent Police Investigative Directorate (henceforth 'the Directorate') and the Civilian Secretariat for Police Service (henceforth the 'Secretariat'). This submission focuses on issues regarding the police protection of foreign nationals and makes a number of recommendations in relation to the new proposed legislation.

¹ Research conducted by the Wits Forced Migration Studies Programme, UN Office for the Coordination of Humanitarian Assistance and the South African Red Cross Society, 2009, Johannesburg.

2. CURRENT CHALLENGES IN POLICE PROTECTION OF FOREIGN NATIONALS

There are two major challenges inhibiting effective police protection of this potentially vulnerable group. The first relates to the negative experiences many foreign nationals have with police as the result of police abuses, negligence or corrupt practices. These are further outlined within this submission. The second relates to the police's role in 'policing immigration' or conducting checks on immigration documentation. Both of these challenges result in many foreign nationals perceiving the police with fear rather than as 'protectors'. This means that foreign nationals are less likely to report crimes to the police, assist the police in gathering intelligence on crimes and approach the police for protection. Addressing these challenges requires important roles to be played by both the Directorate and the Secretariat.

3. THE ROLE OF THE DIRECTORATE

In April 2010, CoRMSA made a submission to the Independent Complaints Directorate (ICD) regarding its concerns about patterns of abuse of foreign nationals by police officers as well as gaps in the protection of foreign nationals by police officers. Abuse and lack of protection of foreign nationals by police officers is particularly concerning given the history of violence specifically targeting foreign nationals in South Africa. CoRMSA's submission to the ICD specifically brought to their attention the following concerns regarding police treatment of foreign nationals:

1. Allegations of abuse and theft of property during police raids on places occupied by foreign nationals;
2. Allegations of police collusion with perpetrators of violence against foreign nationals;
3. Allegations of police negligence resulting in violence against foreign nationals;
4. Allegations of extortion and harassment of foreign nationals by the police;
5. Allegations of wrongful arrests of foreign nationals on immigration charges; and
6. Allegations that police refused to open a case for a foreign national.

The complete submission to the ICD providing further information on these concerns is attached as an appendix to this document.

Following the submission to the ICD, various positive steps have been taken. In June, CoRMSA presented its concerns to the ICD national *lekgotla* and requested that the ICD specifically flags complaints of abuse or corruption made by or on behalf of foreign nationals as a means of detecting patterns of police abuse of foreign nationals. The ICD has agreed to look into this. CoRMSA has also met with the ICD Gauteng office and the ICD Gauteng office will be training representatives of refugee and migrant community organisations to report cases to the ICD and will meet monthly with these representatives as a means of proactively addressing patterns of abuse. These meetings will also allow for scope to call in members of police management to share ideas on how some of the emerging patterns of abuse or corruption could be addressed proactively.

4. THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE BILL

The new Independent Police Investigative Directorate Bill clarifies the role of the Directorate and provides a specific mandate in terms of its investigations. CoRMSA's specific concerns regarding the new Independent Police Investigative Directorate Bill concern the provisions of Section 25. The provisions of Section 25 currently **compel** the Directorate to investigate the following:

- a. any deaths in police custody, or deaths as a result of police actions;
- b. rape by a police officer, whether the police officer is on or off duty;
- c. rape of a detainee by other detainees while that detainee is in police custody;
- d. any matter that is referred to it by the Minister or an MEC through the Executive Director;
- e. any complaint of torture which is referred to it by a Station Commissioner, Magistrate, Judge, legal representative or the complainant in the case where the complainant is unrepresented; and
- f. any other matter referred to it as a result of a decision of the Executive Director, or if so requested by the Minister, an MEC or the Secretary, as the case may be.

The Directorate **may** also investigate the following:

- a. systemic corruption involving the police;
- b. corruption matters within the police initiated by the Executive Director or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be; and
- c. inefficiency of the police to carry out its duties.

CoRMSA is concerned that these provisions will limit the ability of the Directorate to be able to investigate and address specific patterns of abuse involving foreign nationals for the following reasons:

1. The provisions of Section 25 appear to limit the proactive measures the Directorate may take and limit its scope instead to investigating the prescribed incidents or patterns. Many of the patterns of police abuses of foreign nationals outlined in the CoRMSA brief to the ICD are excluded from the mandate prescribed for the new Directorate. As a result, the ability of the new Directorate to tackle police abuse of foreign nationals will be severely limited.
2. Cases of police extortion of foreign nationals may potentially be seen as 'petty corruption' rather than 'systemic corruption' and as a result would then be excluded from the mandate of the Directorate. By viewing each case in isolation, this prevents the Directorate from collecting information on the patterns of such 'petty corruption' cases that may indicate evidence of 'systemic corruption'.

5. RECOMMENDATIONS

To remedy the concerns raised above, CoRMSA recommends the following:

1. **Provide scope in the legislation for the Directorate to investigate patterns of abuse or corruption specifically targeting potentially vulnerable groups such as refugees and migrants.**
2. **Provide scope within the Independent Police Investigative Directorate Bill for the Directorate to work proactively with stakeholders as a means of understanding and addressing patterns of police abuse, negligence and corruption affecting specific groups such as refugees and migrants. This could serve to increase the effectiveness of the Directorate's oversight and investigation role.**
3. **Clarify the meaning of the term 'systemic corruption' to include scope for the Directorate to investigate cases of 'petty corruption' where such cases appear to form part of a pattern targeting specific groups of people such as refugees and migrants.**

Whilst it may be suggested in response to this submission that the Secretariat will play the proactive role called for in this submission, CoRMSA would argue for a mandate for both the Secretariat and the Directorate to play proactive roles. Both the policy development function of the Secretariat and the oversight role of the Directorate would benefit from mandates allowing proactive actions. Whilst the Consultative Forum for the Directorate and the civil society reference group for the Secretariat at national level are crucial, these are also important at the provincial level for both structures. Within certain provinces the Secretariat and Directorate may decide that it is appropriate to meet jointly with their respective Consultative Forums and civil society reference groups as a means of developing both accountability and proactive strategies to address emerging challenges. It may also be useful to develop a number of smaller informal forums to focus specifically on issues that may need distinct attention such as police abuse of foreign nationals, sex workers, and informal traders, respectively.

CoRMSA again welcomes this opportunity to make a submission to the Portfolio Committee on Police regarding the new legislation. CoRMSA believes that by implementing these recommendations, the Directorate and Secretariat will, respectively, be better positioned to hold police accountable for abuses of foreign nationals, and develop specific policies to improve police protection of foreign nationals.

6. APPENDIX

CoRMSA Brief for the Independent Complaints Directorate: Police Harassment and Abuse of Foreign Nationals

April 2010

A. Introduction

The Constitution prescribes the role of the South Africa Police Force (SAPF) as being “to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”² Municipal Police Services also have a role to play in preventing crime, subject to the provisions of the Constitution, in terms of the Police Service Amendment Act of 1998. Both the SAPF and Municipal Police Services therefore are mandated to protect all who live in the country, including foreign nationals. The Bill of Rights also includes civil and political rights such as the right “not to be deprived of freedom arbitrarily or without just cause”,³ “to be free from all forms of violence from either public or private sources”,⁴ and to have “equal protection of the law”⁵. These rights are guaranteed to all within South Africa, regardless of their nationality or legal status.

Research has established that foreign nationals are less likely to report crimes committed against them to the police, compared with South African citizens.⁶ There are many reasons for this, including fear of the police and lack of trust in or knowledge of the South African justice system. Effects of this disconnection between foreign victims of crime and the police include: impunity for criminals; incentives for criminals to target foreign nationals; and public perceptions that violence against foreign nationals is officially sanctioned and supported by the police.

Given the ongoing threat of further wide-spread xenophobic violence, with the impact this has on the reputation and stability of the country, these effects are of extreme concern. Lack of trust and access by foreign nationals to the police is something that many police officers, researchers, as well as local and international organisations have identified as needing to be addressed.⁷ One of the ways in which this can be tackled is by ensuring police officers who fail to perform their duties or who engage in illegal practices are held accountable for their actions. This is the focus of this briefing document for the Independent Complaints Directorate (ICD).

B. Scope of the Problem

In order to effectively tackle crime, police need the support and cooperation of the public, including foreign nationals. Police need to ensure that all crimes are reported and that all members of the public, including foreign nationals, are able to request and rely on police protection when necessary. Unfortunately, the cooperation and support of the police by foreign nationals and the ability of foreign nationals to seek police protection are severely compromised by the behaviour of some police officers who either refuse to perform their duties or else engage in illegal behaviour, such as extorting money from foreign nationals. The impact of such behaviour goes far beyond the person such officers target or

² Constitution of the Republic of South Africa, Chapter 11, Section 205 (3).

³ Constitution of the Republic of South Africa, Chapter 2, Section 12 (1a).

⁴ Constitution of the Republic of South Africa, Chapter 2, Section 12 (1c).

⁵ Constitution of the Republic of South Africa, Chapter 2, Section 9 (1).

⁶ Research conducted by the Wits Forced Migration Studies Programme, UN Office for the Coordination of Humanitarian Assistance and the South African Red Cross Society, 2009, Johannesburg

⁷ See for example: Bruce, Newham and Masuku, 2007, *In Service of the People's Democracy: An assessment of the South African Police Service*.

refuse to assist. It reinforces a broader sense within migrant and refugee communities that police officers cannot be trusted and are likely to be 'predators' rather than 'protectors'.

There are a large number of police officers who do excellent work in assisting and protecting foreign nationals. CoRMSA is therefore requesting the assistance of the ICD to help root out illegal behaviour towards foreign nationals and ensure that police perform their duties in line with the police's Constitutional mandate. The ICD's role in holding individual officers to account where their actions fall outside of the law is crucial, and this role can be strengthened by working with community organisations to encourage greater reporting of illegal actions by police officers. This strategy will help to build greater confidence in South Africa's police forces, encourage greater reporting of crimes, and assist in collecting local crime intelligence.

C. Types of Current Illegal Actions by Police Officers

There are a variety of types of cases where police have been recorded as abusing the rights of foreign nationals. Some extreme cases, such as deaths in police custody and allegations of police torture have also occurred, but the list below represents the more common types of cases that are often reported to human rights groups:

1. Allegations of Abuse and Theft during Police Raids

There are often allegations of assault by police officers or theft during major operations conducted by police officers. During the raid on the Central Methodist Church in January 2008, SAPF officers were alleged to have assaulted a number of people staying inside the church and to have stolen personal items and money from church inhabitants as well as the church itself. During a further raid in July 2009, Metro Police officers were alleged to have assaulted and shocked foreign nationals staying at the church using hand-held Tasers. In Mitchells Plain in Cape Town in March 2008, SAPF officers were accused of assaulting and stealing money from foreign nationals during a raid on informal traders. During the raid, an officer is alleged to have kicked a pregnant woman in the stomach, resulting in her later suffering a miscarriage. It was also alleged that officers stole R26 000 from a woman during the raid. The money had been collected by community members to help her get the medical attention she needed. Following the incident, the woman was too afraid to lay a complaint against police officers for fear of reprisals from the police. No action was taken against the police in any of these cases.

2. Allegations of Police Collusion with Perpetrators

There have also been a number of cases where it has been alleged that police colluded with perpetrators of crimes against foreign nationals. During the xenophobic violence of May 2008, there were a number of allegations of police standing by whilst looters removed goods from the shops of foreign nationals. There were also allegations that some police officers assisted the looters in removing goods whilst others helped themselves to goods from the looted shops. In Cape Town, these allegations were confirmed by a senior City official. In a village in Limpopo in July 2009, police vehicles were seen transporting perpetrators of violence to attack Zimbabwean nationals. This occurred despite warnings of the threat of violence and the allegations of police complicity being passed on to senior local police officers. After the attack, explanations by the police for the presence of police vehicles at the site of the attack were unsatisfactory and included suggestions that citizens had taken police vehicles without permission (despite witnesses observing police in the vehicles). No action was taken against the police for these actions.

3. Allegations of Police Negligence resulting in Violence against Foreign Nationals

There are also cases where there are allegations that police were negligent and took no action to prevent violence against foreign nationals. One such example is the case in January 2009 when an armed mob shouting xenophobic slogans entered a Durban city centre building inhabited by foreign nationals and later forced three foreign nationals to jump from sixth floor windows. A ward councillor from Durban is one of those on trial at present. Witnesses reported that the mob had marched directly past the police station prior to the attack carrying weapons in plain view and

chanting. Employees at the building where the attack took place stated that they called the police for assistance but the police did not arrive. No action has been taken against the police for this.

4. Allegations of Extortion and Harassment by the Police

Some of the most frequent allegations made against the police are those of harassment and extortion of foreign nationals. Foreign nationals have complained of police harassing them as soon as they believe the person is not from South Africa and then demanding to see immigration documents. Some foreign nationals who have produced legal documentation have complained that this has been destroyed by police officers, or that police officers then threatened to arrest the person for spurious charges such as 'loitering' or 'urination in public' despite the lack of truth in these charges. A bribe is then demanded by the police officer to release the person. In the same way, those who are unable to produce immigration documentation on demand are threatened with arrest and deportation by police officers unless a bribe is offered. South African law does not require a person to carry documentation on them at all times and the Immigration Act expressly states that person must be allowed the opportunity to collect their documentation if necessary. Business owners report similar harassment with police officers demanding to see immigration documentation or business registration documents in attempts to solicit bribes. Many of these cases of police abuses are not reported.

5. Allegations of Wrongful Arrests

There are frequent allegations of wrongful arrests of foreign nationals by the police. Police are frequently accused of wrongfully arresting on immigration charges foreign nationals with legal documentation, of destroying the immigration documentation of foreign nationals, or of not following due procedure and allowing suspected illegal immigrants to obtain proof of their legal right to be in the country by collecting the documentation or contacting someone who can verify their identity. Such cases have resulted in foreign nationals wrongly detained and deported without being able to access legal recourse, and in some cases, of South African citizens being deported to other countries due to police negligence in not confirming an individual's identity. In some cases where South Africans have been deported, legal action has ensued resulting in large damages claims being awarded against the Minister of Police. Yet legal recourse is not available to all. For most foreign nationals wrongfully arrested on immigration charges, unless they are fortunate and can access lawyers whilst waiting deportation or can confirm their identity with an immigration officer at the Lindela Repatriation Centre, they will be deported and no action will be taken against the police.

6. Allegations that Police Refused to Open a Case for a Foreign National

A final category of allegations is cases where police refused to assist foreign nationals in opening a case despite the foreign national having a valid complaint. A number of foreign nationals have complained about such cases and with some reporting little success when they attempted to resolve the matter with the station commissioner. In a number of such cases, the person reports that they were told that foreign nationals are not allowed to open cases against South African citizens and that 'South Africans have the right to do as they please as this is their country'. Such cases have ranged from complaints about an abusive landlord, or the reporting of a minor traffic accident. to serious cases involving allegations of police abuse. A Cape Town-based NGO complained of an incident in January 2010 where two SAPF officers allegedly assaulted and stole money from a foreign national. When he tried to lodge a complaint at the police station he was further abused and assaulted. The NGO then went with him to the police station and reported openly xenophobic remarks being made by police officers. Even with the NGO present, the foreign national was not allowed to open a case. These are the primary types of cases that foreign nationals report concerning police negligence and abuse and are the types of cases that individuals or organisations will request the ICD to investigate. Further information on the cases listed above can be supplied to the ICD on request.

D. Suggested Way Forward

The ICD's mandate is to investigate complaints of brutality, criminality and misconduct allegedly committed by members of the SAPF and Municipal Police Services. As such, CoRMSA is requesting the development of a partnership with the ICD consisting of the following:

1. The ICD identifies police abuse of foreign nationals as a priority area and raises awareness within the ICD regarding the nature and impact of police abuses and the types of cases that occur.
2. The ICD facilitates contact for CoRMSA with provincial representatives so that CoRMSA can set up meetings or workshops with local ICD staff and migrant and refugee organisations or representatives in the regions to encourage greater reporting of cases where police abuse or negligence is alleged.
3. CoRMSA continues to raise awareness of the ICD processes amongst migrant and refugee groups and lobbies government in support of the ICD's role in holding police officers accountable for the abuse of foreign nationals.
4. The ICD flags cases involving alleged police abuse of foreign nationals within its intake system so as to assist in generating statistics or monitoring trends of allegations of police abuse of foreign nationals including noting clusters of cases relating to specific police stations.
5. CoRMSA and the ICD continue to meet on a regular basis to monitor the success of efforts to address police abuse of foreign nationals and resolve any obstacles that may emerge.