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SOUTH AFRICAN BORDERS: HOW MUCH CONTROL IS LEFT?*

1. INTRODUCTION

The view held by many South Africans that border control, and specifically border-line protection and control in South Africa, has serious shortcomings, will undoubtedly be strengthened by a recent statement by the Minister of Home Affairs. She is reported to have stated that South Africa would not tighten border control despite illegal immigrants entering the country (a record number of more than 300 000 were deported in 2007). Furthermore, "economic migrants will always find a way of moving into areas where they should not be", and that the "emphasis is on facilitation of movement rather than tighter border control ... then you know who is in the country and what they are doing". Tighter border control would "actually encourage illegal migration".¹⁾

The above statements led to media comments that amongst others, stated that the Minister was actually saying that border control

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is so weakly implemented, that it may as well be abandoned, also in view of the 2010 FIFA World Cup event in South Africa.

2. SADC PROTOCOL ON THE FACILITATION OF MOVEMENT OF PERSONS

The *Protocol on the Facilitation of Movement of Persons* (at times incorrectly referred to as "freedom of movement"), was adopted by Southern African Development Community (SADC) countries in 2005. In May 2007, the South African Home Affairs Portfolio Committee adopted the SADC Protocol and the chairperson believed that it was important that the Protocol be ratified.²⁾

In the Preamble to the Protocol, reference is made to the Treaty establishing SADC, and it is stated that: "Pursuant to Article 5(2)(d) of the Treaty which requires SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States" and to "support, assist and promote the efforts of the African Union which is encouraging free movement of persons in African Regional Communities as a stepping stone towards free movement of persons in an eventual African Economic Community", the Heads of State or Government of SADC Member States agree to the provisions of the Protocol.³⁾

The overall objective of the Protocol is set out as the development of policies aimed at the "progressive elimination" of obstacles to the movement of persons of the Region generally into and within the territories of State Parties". Specific objectives of the Protocol are set out as follows, namely to facilitate:⁴⁾

- (a) entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned;
- (b) permanent and temporary residence in the territory of another State Party; and
- (c) establishment of oneself and working in the territory of another State Party.

No specific timeframe for implementation was stipulated, but would be

determined by an agreed upon Implementation Framework. The date was subsequently set as 2010. The Protocol can be temporarily suspended where for instance a serious threat to national security, public order or public health occurs in a State Party, which then has to inform the other State Parties of the temporary suspension.

The Protocol was signed by half of the SADC Member States in August 2005 and enters into force after ratification by two-thirds of SADC Member States.

3. SOME SALIENT ISSUES RELATING TO THE PROTOCOL

The Protocol clearly stipulates that State Parties agree to "preventing illegal movement of persons into and within the Region".⁵⁾ This implies that during the phasing in period of the Protocol, as well as after full implementation, movement of citizens of SADC State Parties into the territory of other State Parties will also still be restricted by limiting the period for entry into the territory of a State Party for visitors; stipulating that residence shall mean permission to or authority to live in the territory of a State Party in accordance with the legislative and administrative provisions of that State Party, and that permission to reside in the territory of another State Party "shall be sought through an application for a residence permit"; and that establishment related to economic activities and professions means "permission or authority granted by a State Party in terms of its national laws, to a citizen of another State Party".⁶⁾

Obviously, "freedom of movement" based on the Schengen-model in Europe has little chance of being acceptable or workable in Africa, including SADC. Who will control and protect the external borders of the region (stretching as far as the Democratic Republic of the Congo) if internal borders provide for total free movement of people? The uneven economic development levels in SADC will also probably result in a few countries being overwhelmed by nationals from other SADC countries.

4. MAINTAINING SECURE BORDERS

Border control at legal entry points, as well as border-line control, is of course not only about attempting to restrict illegal entry of persons into

a country, but also to prevent the illegal movement of goods and cross-border crime in general. Protecting borders in the context of maintaining sovereignty and territorial integrity is of course the main overall objective from a military point of view, but policing of borders is equally important. The extent to which organised crime especially, spills over borders, and the effect of drug smuggling, human trafficking and small arms proliferation in Southern Africa, underlines this point. Disease especially, whether it affects humans or livestock, is not deterred by boundaries, but the spread of epidemics (such as cholera) can be contained. Angola recently, for instance, temporarily closed its border with the Democratic Republic of the Congo (DRC) in order to attempt to prevent an outbreak of Ebola in the DRC spreading into Angola.

The domestic impact of illegal migrants has also become a cause for concern in countries such as South Africa, Botswana and Angola. Increases in crime levels are amongst others, linked to the increased presence of foreigners (mostly illegal migrants but also refugees, and legal foreigners as no real distinction between these categories is made when actual links to crime or perceptions are involved). Although even in South Africa, specific statistics are not available regarding the incidents of crime positively linked to foreigners (with the exception of numbers of foreigners, whether they are in South Africa legally or illegally who are currently serving prison sentences, and deportation figures relating to foreigners convicted for committing crimes specifically). The latter figure has increased annually to more than 2 000 in 2007.

As in the case of statistics reflecting crime incidents or ratios over a specific period of time in any given country, obviously only reported crimes are captured on the data system, and of these reported crimes, only certain percentages lead to arrests and convictions. Hence, even if more statistics regarding the involvement of foreigners in crime were available, these would still be subject to the above constraints.

The media, in the mean time, continue to report on the involvement of foreign nationals in crime, but mostly without any indication of their status in a given country (whether they are there legally or illegally). Foreigners may act on their own, or include citizens of a country where crimes are committed, in an organised crime syndicate.

In the case of South Africa, the above is illustrated by amongst

others, the following selection of reports about the alleged involvement of foreign nationals in crime in South Africa in January 2009 alone:

- "Six Nigerians and one Tanzanian national were arrested in Rustenburg for prostitution and drug trafficking on Sunday, North West police said".⁷⁾
- "Police bust a rhino poaching syndicate and are now hoping to link the men to a spate of poaching incidents in KwaZulu-Natal.
To date 11 people have been arrested and charged for the poaching of black and white rhino, police spokesman Senior Superintendent Vish Naidoo said.
Five Mozambicans, three Chinese men, two South Africans and one other person were arrested, he said".⁸⁾
- "Police foiled a restaurant robbery and arrested seven Zimbabweans on Saturday morning, Gauteng police said".⁹⁾
- "Eight foreigners have been arrested after police confiscated seven bags of dagga worth R150 000 on Tuesday morning.
They were arrested after residents of Schoemansdal south of Malalane alerted police about a group of men who were seen carrying large bags on their backs. ...
The suspects are Mozambican, Malawian, Tanzanian and Zimbabwean nationals".¹⁰⁾

It was also reported that of 17 cable thieves arrested near Johannesburg at end January 2009, most were illegal migrants, including Mozambicans and Zimbabweans.¹¹⁾ Six Nigerians and a Tanzanian were arrested in North West Province for alleged involvement in human trafficking.¹²⁾

Furthermore, in December 2008, it was reported that a public prosecutor was arrested for withdrawing cases against accused by pretending that he did not have certain dossiers available. These cases included serious crimes, and more than half of the accused in the cases that were withdrawn, are believed to be illegal migrants.¹³⁾

In addition to the preceding issues, the socio-economic implications of larger numbers of illegal migrants are obvious, for instance, pressure on infrastructure, competition for urban space, jobs etc, whether in the formal sector (illegally employed) or in the informal sector. It

would be naïve to blame crime in South Africa largely on foreign nationals, just as it would be naïve to argue that cholera is only spread from Zimbabwe and does not also originate in South Africa itself. However, it is equally naïve to believe that foreigners (and especially illegal migrants) have no or a negligible share in crime.

5. SOME CURRENT SOUTH AFRICAN POLICY RESPONSES

Many of the SADC countries, including South Africa, have already agreed on a bilateral basis, to visa-free entry for tourists from certain other SADC Member States, for a maximum period of 30 days. One of the arguments in this regard though, namely that visa-free entry reduces illegal migration is, however, debateable. A substantial proportion of those entering without a visa overstay the maximum period allowed, hence effectively becoming illegal migrants.

A further problem seems to reside in the refugee issue, with for instance, 80 per cent of Zimbabweans crossing the border not being eligible for refugee status. In the first nine months of 2008, 70 000 Zimbabweans applied for asylum in South Africa, compared to 10 000 in the corresponding period in 2007.¹⁴⁾ During a meeting of the South African Department of Home Affairs Portfolio Committee in 2007, it was also stated that the "entire process of asylum seeking was under review as it was currently unnecessarily lengthy and susceptible to corruption". The process of registration of refugees at the border was also a problem, as "many refugees were not properly traced after crossing the border and hence potentially not included in the system".¹⁵⁾

By mid-January 2009, the Department of Home Affairs announced that the *Immigration Act* would be reviewed to address the issue of the large numbers of immigrants, mostly Zimbabweans, crossing the South African border. The possibility of providing "special status" to Zimbabweans who did not qualify for refugee status, but who were in fact "economic migrants" would be considered, but the *Refugee Act* was in line with international standards and could not be changed.¹⁶⁾

The main question is of course to what extent any initiatives by the South African government not to deport illegal migrants from Zimbabwe would only lead to a greater influx, and whether this would include those who enter South Africa without passing through an official

border post. Currently South Africa also still requires visas for Zimbabweans entering the country.

Ultimately, the point is that humanitarian concerns are obviously important, but so are national security considerations, and there is no legal obligation (domestic or international, including the stipulations of the SADC *Facilitation of Movement Protocol*), to waive border and border-line control, or to stop deportations of illegal migrants. It is exactly for this reason that even the *Facilitation of Movement Protocol* provides for temporary suspension of the provisions of the Protocol.

In October 2008, the Justice and Crime Prevention and Security Cluster (JCPS) reported that the total number of South African Police Service (SAPS) members deployed on borders were as follows:¹⁷⁾

- Zimbabwe – 75
- Mozambique – 320
- Swaziland – 72
- Lesotho, Free State/Eastern Cape – 127
- Botswana/North West – 37
- Namibia – 32.

This is obviously hopelessly inadequate, and it has often been stated that withdrawing the military from border-line security was a major mistake, as the police did not have the experience, manpower or equipment to manage this. Also, the Border Control Operations Co-ordinating Committee (BCOCC) and the National Integrated Border Management Strategy seem to focus mainly on ports of entry, and not on border-line control. Among those affected by the lack of effective border-line control, the farming community features prominently. In a statement released in February 2009, AgriSA noted that farmers especially, were unhappy about ineffective international border control. "Influx and border control should be upgraded urgently to protect South Africa's farming sector. The ineffective international border control holds serious implications for the agricultural industry because of the possible spread of animal and human diseases".¹⁸⁾

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