

ADVOCACY BRIEF

89TH ORDINARY SESSION OF THE AFRICAN COMMISSION
ON HUMAN AND PEOPLES' RIGHTS

From Reaction to Anticipation

Preventing xenophobia and protecting non-nationals
in Africa: an anticipatory governance agenda



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The Question Before Us

From responding to xenophobia to preventing it

Xenophobic violence has recurred in several African states for decades. In 2026 it again drew grave alarm from the African Commission and renewed attention from the Pan-African Parliament, strained relations between African states, and appeared in new settings, with South Africa and Kenya as recent examples. Alongside it, a second risk is emerging: the transfer of people deported from outside Africa to African states, often without transparency or safeguards.

In both cases the risks were foreseeable: warning signs were visible, yet preventive action was absent, late or uneven. This brief sets out the preventative mechanisms that governments, regional institutions (including the African Commission and the Pan-African Parliament), universities and civil society can adopt collectively, so that the next crisis is prevented rather than managed.

THE CONTEXT WE START FROM

Unemployment, inequality and pressure on public services are real, and public frustration is genuine. States have a legitimate right and duty to regulate migration, and to do so lawfully, through the state and the state alone.

The central concern is the speed and adequacy of the state's response when frustration is turned into scapegoating, vigilantism and violence, and the safeguards that must exist before people are moved across borders.

Five Perspectives, One Shared Agenda

Lens	The question it asks
Legal	What do the African Charter, refugee law and domestic law require, and who may lawfully enforce them?
Political	What is the role of governments in preventing scapegoating, and what does a late response cost states diplomatically and regionally?
Economic	How do economic pressures, such as unemployment and inequality, become redirected into hostility towards migrants, and what is the case for lawful pathways?
Social	What narratives and words turn neighbours into targets, and what builds cohesion?
Government positions	What have governments committed to and done, and how effectively are those commitments being implemented?

How the Brief Is Organised

PATTERN Pages 3–4 Where we have been and where we are	LANGUAGE & LAW Pages 5–6 Why words matter; the legal anchor	HORIZON Pages 7–8 Externalisation and future scenarios	MECHANISMS Pages 9–10 The anticipatory governance toolkit	ACTION Pages 11–12 Our roles, our asks, resources
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Each page ends with an ASK: a concrete step for a named audience.

A CYCLE WE MUST BREAK

A Recurring Pattern

Common drivers, common consequences, and delayed responses

According to Xenowatch, between 1994 and June 2026, South Africa recorded **1,362 incidents** of xenophobic discrimination and violence, resulting in **705 deaths** and **133,362 displacements**. While these figures relate specifically to South Africa, recent developments in Kenya (page 4) demonstrate that xenophobic hostility and violence are not confined to one country. Comparable data across the continent, however, remain limited.

These incidents reflect a recurring pattern of scapegoating, escalating hostility, violence and delayed responses. When perpetrators are not held accountable and underlying drivers remain unaddressed, the conditions for further violence persist. The cycle below illustrates how these dynamics unfold and where timely intervention can prevent escalation.

The Cycle, and Where It Can Be Broken



Break points: Between 1 and 2, responsible leadership and communication. Between 2 and 3, clear law and prompt enforcement against private "enforcement". Between 3 and 4, rapid protective response. Between 4 and 5, accountability. After 5, learning.

The Cost of Delayed Action

People	Institutions	The region	Credibility
• Deaths, injuries and displacement • Exclusion from healthcare, schools, livelihoods • Fear that keeps people from seeking help	• Private actors assume state functions • Court orders go unenforced • Public trust in the rule of law erodes	• Strained relations between states • Evacuations of nationals (reported) • Damage to solidarity and integration	• African Commission “grave alarm” (June 2026) • Gap between continental commitments and national implementation

BEYOND ONE COUNTRY

In September 2026 Kenya’s President called for the closure of small-scale businesses run by foreign nationals; the African Commission then expressed grave concern about reported attacks, looting and destruction of businesses, particularly of Burundian nationals. The pattern is continental, not confined to one country.

ASK

- Treat early warning signs, such as scapegoating rhetoric, public ultimatums and blockades of services, as triggers for preventative action.

WHERE WE ARE NOW

Government Commitments and Their Implementation

South Africa and Kenya: what governments have said and done

SOUTH AFRICA	KENYA
What is happening. Anti-migrant groups, including Operation Dudula and March and March, have blocked or sought to control access to healthcare facilities, schools and other essential services, and have threatened to expel migrants. In June 2026, the African Commission expressed grave alarm. On 8 October 2026, protests over asylum applications in Durban and Soweto turned violent, with vehicles set alight and shops looted (media reports).	What happened. On 2 September 2026 the President called for the closure of small-scale businesses operated by foreign nationals. Reported incidents followed: physical attacks, intimidation, harassment, looting and destruction of businesses, particularly of Burundian nationals. The Commission’s response. It expressed grave concern, noting that Kenya may regulate migration and economic activity, but must do so with due process and

What the government has said.

- June 2026: the President condemned xenophobia, vigilantism and unlawful demands for documents, and stressed that immigration enforcement rests with the state alone.
- July-August 2026: committed to firm action, and said perpetrators would be arrested and charged; special envoys sent to African states.
- May-July 2026: the foreign ministry (DIRCO) condemned attacks and vigilantism, engaged regional counterparts (including through SADC and bilateral talks with Ghana and Nigeria), and stated that law enforcement is the exclusive prerogative of the state.
- Nov 2025: the High Court interdicted Operation Dudula and directed implementation of the National Action Plan against racism and xenophobia. It found no evidence of collusion by the police or Home Affairs.

Enforcement and asylum. Policy is also tightening: immigration courts to speed deportations, reception offices moving toward the border, and a White Paper with a “first safe country” principle. Courts have drawn limits: in May 2026 the Constitutional Court barred repeat applications after final rejection; on 7 July 2026 it found provisions of the Refugees Act unconstitutional where they blocked access to the asylum process because of irregular entry or missed deadlines. A Home Affairs directive of 28 September 2026 instructing offices to receive applications was withdrawn on 9 October 2026, after reception offices were overwhelmed and protests turned violent. The department says the judgment remains binding and that it will develop a new approach, but has not yet set out interim arrangements (media reports).

fundamental rights, and without inciting hatred or violence.

Solidarity. Kenyan civil society and members of the public rejected xenophobia and stood with foreign nationals, and human rights organisations challenged measures that risked legitimising discrimination.

Government action. A temporary regularisation period for undocumented East African nationals, and a stated zero-tolerance approach to xenophobic harassment and intimidation.

WHY IT MATTERS

Regularisation shows that lawful pathways can be a pressure valve, and that communities can resist scapegoating.

RECOGNISING THE FRAMEWORK, AND THE DELIVERY GAP

Governments are managing real legal, political and economic constraints, and there are important commitments on the record. The question going forward is delivery and speed:

- What has been investigated and prosecuted since governments committed to hold perpetrators to account?
- How far are national action plans and protocols implemented, and who monitors them?
- What strategies or mechanisms are used in host countries to safeguard the rights of migrants, not only after court orders?
- Do enforcement and asylum reforms, in South Africa, Kenya and elsewhere, keep non-refoulement and due process in practice?

ASK

- **Governments:** report publicly on investigations and prosecutions, implementation of national action plans and protection of access to essential services.
- **The Commission:** continue engagement with South Africa and Kenya, and request follow-up information.

LANGUAGE & LAW

Language That Legitimises Violence

Why we say “irregular migrant”, not “illegal migrant”

1 DIGNITY

No human being is “illegal”. An act, such as an irregular entry, may breach a rule. A person cannot be illegal.

2 LAW

Irregular status is an administrative matter, handled through status determination, deportation decisions and due process, all state functions. It is not evidence of criminality, and it gives no role to private individuals.

3 SAFETY

“Illegal” slides in the public mind to “criminal”, and “criminal” is the step vigilantes use to justify “arrests” and blockades. The same chain feeds the rhetoric that migrants “steal our jobs”.

The Escalator: How Legal-Sounding Language Legitimises Violence



Common Claims by Vigilante Groups and Some Public Figures, and What the Law Says

The claim	What the law and the courts say
“We can make citizen’s arrests of illegal foreigners.”	Section 42 of the Criminal Procedure Act of South Africa lets a private person arrest without a warrant only in a few cases: someone committing, or suspected of committing, a serious (Schedule 1) offence; someone being pursued by a person with authority to arrest; an affray; or where another law allows it. Owners or occupiers may also arrest someone found committing an offence on their property. None of these covers arresting someone for being undocumented. Immigration arrests and ID checks are for immigration officers and police, and the Government has publicly confirmed these limits.
“We can demand people’s papers.”	Only an immigration officer or police officer may do so under section 41 of the Immigration Act (High Court, 4 Nov 2025: <i>Kopanang Africa Against Xenophobia v Operation Dudula</i> [2025] ZAGPJHC 1102). The President: no individual may stop a person to demand documents.
“Asylum seekers are illegal.”	Asylum seekers are individuals seeking international protection, and their status should not be conflated with unlawful immigration. A person holding a valid asylum seeker permit is lawfully present in South Africa while their claim is pending, subject to applicable legal provisions. Article 31 of the 1951 Refugee Convention protects refugees from penalties for irregular entry or presence under specified conditions, while the 1969 OAU Refugee Convention broadens the definition of a refugee to include people fleeing external aggression, occupation, foreign domination or events seriously disturbing public order. In July 2026, South Africa’s Constitutional Court affirmed that irregular entry or missed application deadlines cannot, in themselves, prevent access to the asylum process. Despite these legal protections, implementation gaps persist, including situations where asylum seekers’ documentation or lawful status is questioned or disregarded.
“Migrants steal our jobs.”	Migrants held about 3.7% of formal jobs in 2024, while unemployment stood near 33% in early 2026 (Wits SCIS and Stats SA data, as reported by Africa Check, July 2026). ISS research (2022) found no evidence that immigrants take jobs from South Africans, and that they often create employment. Unemployment is driven by the wider economy, not by migration. The Government’s own emphasis is on employers who hire undocumented workers: an administrative, state-led response.

✓ USE

irregular migration

person in an irregular situation

undocumented migrant

asylum seeker

refugee

non-national

✗ AVOID

illegal immigrant

illegal foreigner

"illegals"

aliens

any term that merges status with criminality

ASK

- **Officials and media:** adopt status-neutral language and plain-language public guidance on **who** may lawfully do what.

LEGAL ANCHOR

The Legal Framework

Regional and international frameworks that apply to everyone within a state's jurisdiction

Framework	What it protects	Why it matters now
African Charter, Arts 2 & 3	Non-discrimination; equality before the law	Targeting people because of nationality or perceived status
Art 4 and Art 5	Life and integrity; dignity; freedom from cruel, inhuman or degrading treatment	Violence against migrants; conditions of detention
Art 6 and Art 7	Liberty and security; protection from arbitrary arrest; right to have one's cause heard	Private "arrests"; prolonged detention without charge or a court
Art 12	Seek and obtain asylum (12(3)); limits on expulsion and no mass expulsion (12(4)–(5)); freedom of movement	Expulsion threats by vigilante groups; transfers without a hearing
Art 16 and Art 18	Health; protection of the family	Blocked clinics; interrupted medication; separation
Art 28	Duty to respect others without discrimination and promote mutual tolerance	Applies to every individual, including community and political leaders
OAU Refugee Convention (1969); 1951 Convention and 1967 Protocol	Refugee protection; non-refoulement; non-penalisation for irregular entry (Art. 31 of the 1951 Convention)	Asylum access; third-country transfers; onward removal
ICCPR; Convention against Torture; ICERD	Prohibition of torture and ill-treatment; non-refoulement; racial discrimination	Basis for claims before UN bodies and domestic courts

Framework	What it protects	Why it matters now
Continental and global initiatives	Pan-African Parliament Draft Resolution on Xenophobia; Second International Decade for People of African Descent (2025–2034); Global Compacts on migration and refugees	Frameworks to turn commitments into national and community action

THREE PRINCIPLES UNDERPINNING THE BRIEF

- **Obligations attach to everyone within a state’s jurisdiction**, regardless of status. A deportation initiated outside Africa does not diminish the obligations of the receiving African state.
- **Immigration enforcement belongs to the state**, exercised lawfully. It cannot be appropriated by private actors, and states must prevent and respond to private abuses.
- **Non-refoulement is absolute in effect**: no one may be sent, directly or indirectly, to a place where they face persecution, torture or other irreparable harm.

PREVENTIVE OBLIGATIONS

States’ duties under the Charter are not confined to responding after harm has occurred. Read together, Article 28 and the state’s duty to protect point to preventive obligations: to address scapegoating, regulate the conduct of private actors and plan for foreseeable risks. Pages 9–10 translate these obligations into concrete mechanisms.

ASK

- **States**: confirm and publish ratification and domestic implementation of the instruments above.
- **The Commission**: consider guidance linking Articles 2, 3, 5, 6, 12 and 28 to state prevention duties regarding xenophobia and migration externalisation.

THE SECOND HORIZON

Externalisation: The Protection Risks of Third-Country Removals

Third-country deportations to African states, and what Equatorial Guinea shows

WHAT IS HAPPENING

The United States has been deporting asylum seekers and other migrants to African countries with which they have no prior connection, often without their consent. Countries receiving deportees include Eswatini, Ghana, Rwanda, South Sudan, Equatorial Guinea, Cameroon and the Democratic Republic of the Congo, while other states have entered into or considered similar arrangements.

The United Kingdom previously pursued a comparable arrangement with Rwanda to transfer asylum seekers for processing. However, the scheme was discontinued in 2024 before any enforced removals took place.

These developments reflect a broader trend towards the externalisation of migration control and asylum responsibilities. They raise serious human rights concerns, particularly regarding transparency, due process, access to asylum procedures and the principle of non-refoulement. They also raise fundamental questions about the legal obligations of receiving African states and the safeguards required to ensure that responsibility for protecting individuals is not diminished or evaded through third-country transfers.



Reported third-country deportation arrangements (not exhaustive). Source: Centre for Human Rights, 87th Session statement. Boundaries are illustrative. Base map outline derived from Mapswire (CC BY).

Equatorial Guinea: Risks Flagged at the 87th Session, and What Has Since Been Reported

Risk flagged	Reported developments (attributed)
Arbitrary or prolonged detention	Deportees reportedly held for extended periods without clear legal justification, including in hotels repurposed as detention facilities and under heavy security.
Ill-treatment	Allegations of threats, physical abuse and intimidation, including reports of police officers pointing firearms at deportees (Reuters, September 2026).
Inadequate healthcare	Reports of interrupted access to medication for chronic conditions and inadequate treatment for illnesses, including malaria.

Risk flagged	Reported developments (attributed)
Denial of access to legal representation	Phones confiscated; lawyers reportedly obstructed, intimidated or threatened with arrest; some deportees held in undisclosed locations, leaving lawyers and families unable to establish their whereabouts or access them (Amnesty International)
Denial of access to asylum procedures	Some people previously protected from removal reportedly told asylum is unavailable and that they could be returned
Risk of onward refoulement	A complaint submitted to the African Commission in June 2026 sought provisional measures to prevent further removals. Lawyers allege that onward deportations continued despite protection concerns. Amnesty International also reported the detention without charge of two deportees following their public criticism of their treatment (Amnesty International)

All items are allegations reported by third parties.

KEY MESSAGE

Third-country deportation cannot be used to circumvent non-refoulement. Safeguards must come before signature, not after harm.

A RELATED RISK: TRAFFICKING INTO ARMED CONFLICT

Amnesty International (September 2026) reported that individuals from several African countries had been recruited into the Russian armed forces through deception, with Ghana reporting that 272 of its nationals had been drawn into such recruitment. Affected individuals should be identified and assessed as potential victims of trafficking rather than automatically presumed to have enlisted voluntarily. Governments must also investigate the possible involvement of immigration officials, airline personnel, recruitment agents and other intermediaries who may have facilitated these movements, including by circumventing established immigration, travel documentation and border control procedures. Where complicity is established, those responsible must be held accountable.

ASK

- **The Commission:** engage Equatorial Guinea urgently; ensure compliance with Provisional Measures; consider regional guidance on externalisation (transparency, detention, legal access, asylum, independent monitoring).
- **All states:** publish arrangements, assess human rights impact before concluding them, and allow independent monitoring.

Three Paths From Here

Illustrative scenarios to guide planning, not predictions

SCENARIO A

Repetition

Each wave is met late. Violence recurs in new countries; court orders and commitments lag; externalisation deepens and deportees are held in legal limbo. Regional trust erodes.

What drives it

- Economic pressure without inclusion
- Scapegoating pays politically
- Weak early warning and impunity
- Opaque external pressure

You are on this path if...

- Rhetoric rises before elections and goes unchallenged
- Few or no prosecutions
- Agreements remain secret

SCENARIO B

Patchwork

Some states act, others do not. Protection depends on where you are. Gains are fragile, and tension is displaced across borders rather than resolved.

What drives it

- Uneven capacity and political will
- Reactive crisis management
- Fragmented regional rules

You are on this path if...

- Good laws, inconsistent enforcement
- Responses follow media attention
- No shared indicators

SCENARIO C

Anticipation

Early-warning systems trigger swift, graduated responses. Officials model status-neutral language. Safeguards precede any transfer arrangement. Lawful pathways ease pressure; accountability is routine.

What drives it

- Shared indicators and foresight exercises
- Pre-agreed protocols and standards
- Active universities and civil society
- Regional peer review

You are on this path if...

- Warning signs lead to action within days
- Prosecutions and remedies are routine
- Agreements are published and monitored

Key Drivers of Emerging Migration and Protection Risks

Economic pressure and youth unemployment

Electoral cycles and political incentives

Digital misinformation and online mobilisation

Climate-related and conflict displacement

External migration-control pressure

Regional integration (AfCFTA, free movement)

Warning Signs That Demand Early Action

- Senior officials or politicians scapegoating migrants
- Vigilante groups gaining a public platform or uniforms
- Blockades of clinics, schools, workplaces
- Public ultimatums and deadlines for departure
- Targeted online misinformation and hate speech
- Attacks on organisations that assist migrants
- Earlier incidents left unresolved or unprosecuted
- Opaque agreements to receive deportees

ASK

- **All actors:** agree a shared set of indicators and review them regularly, so that warning signs reliably trigger action.

THE TOOLKIT (1 of 2)

Anticipatory governance: Sense, Commit, Protect, Account, Learn

Mechanisms to put in place before the next crisis

Responses that start after violence begins are always late. These mechanisms work at every stage of the cycle, so that the pattern is interrupted early and learned from.



1. SENSE: Identify and Monitor Emerging Risks

Mechanism	Lead / key actors
Shared early-warning indicators (see page 8), tracked jointly by national human rights institutions, civil society and academia, and reported to responsible ministries, security services and regional bodies.	NHRIs; civil society; universities; ministries
Annual horizon-scanning and scenario exercises on drivers such as unemployment, elections, displacement and online mobilisation, so contingency planning precedes pressure.	Governments; AU/RECs; universities
Community listening and rumour tracking: local dialogue forums and trusted-messenger networks (e.g. the Community Dialogue Toolkit).	Community and faith leaders; CSOs

2. COMMIT: Establish Preventive Safeguards

Mechanism	Lead / key actors
Communication standards for senior officials and public bodies: status-neutral language that does not merge migration status with criminality.	Heads of state and government; parliaments; media regulators
Contingency plans for foreseeable flashpoints (announced marches, deadlines, elections), with pre-positioned protection of clinics, schools and trading areas.	Police; health and education ministries; local government

Legal clarity: enforceable protection for access to health and education; plain-language, multilingual public guidance on who may lawfully enforce immigration law and the limits of citizen's arrest.	Justice and home affairs ministries; courts; NHRIs
Human rights impact assessment, publication and parliamentary scrutiny before any third-country arrangement; an independent monitoring clause; no onward transfer without individualised assessment.	Executives; parliaments; independent monitors
Lawful pathways (regularisation windows, free-movement frameworks) as pressure valves, alongside lawful enforcement.	Governments; RECs

THE TOOLKIT (2 of 2)

Protect, Account, Learn

From a fast response to lasting change



3. PROTECT: Ensure Rapid, Coordinated Protection Responses

Mechanism	Lead / key actors
A graduated response ladder tied to the early-warning signals, with published time standards. Illustrative proposal: public condemnation by senior leadership within 24 hours; protective deployment at service points and contact with affected communities within 72 hours; investigation opened and regional or diplomatic notification within 7 days.	Presidency or head of government; police; foreign ministries
One accountable lead and a joint operations centre (police, health, education, home affairs, local government), so the response is not fragmented.	Executive; interdepartmental structures
Support and access for affected people: safe reporting, documentation, healthcare and legal aid, whatever their status.	Health and justice ministries; CSOs; UN and AU agencies

4. ACCOUNT: Strengthen Accountability and Access to Justice

Mechanism	Lead / key actors
Prompt investigation and prosecution, with public reporting of cases, including of leaders who incite hatred and of private groups who impersonate or assume state functions.	Police; prosecuting authorities; courts
Independent oversight and enforcement of court orders, with national human rights institutions mandated and resourced to investigate.	NHRIs; courts; parliaments

Compliance with Commission measures and recommendations, including Provisional Measures, and effective remedies and reparation.	States parties; African Commission
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5. LEARN: Strengthen Accountability and Institutional Learning

Mechanism	Lead / key actors
Published after-action reviews within a fixed period (e.g. 90 days) after every major incident.	Governments; NHRIs; independent experts
Peer review and state reporting: include migration, xenophobia and externalisation in reporting to the Commission and in peer-review processes; engage the Special Rapporteur on refugees, asylum seekers, migrants and IDPs.	States; Commission; AU organs
Regional learning exchanges and follow-through on the Pan-African Parliament Draft Resolution once adopted.	PAP; RECs; universities; CSOs

ASK

- **All actors:** choose at least one mechanism per stage to start with, and report back at the next Ordinary Session.

OUR ROLES AND CALLS TO ACTION

What Each of Us Can Do to Drive Change

Universities, civil society and the institutions we ask to act

The Role of Universities and Civil Society in Anticipatory Governance

Stage	Universities and research centres	Civil society organisations
Sense	Independent data, indicators and foresight research	Community monitoring, documentation, hotlines
Commit	Legal analysis, model guidance, impact-assessment templates	Public legal education, submissions to parliaments, advocacy
Protect	Training; dialogue facilitation (Community Dialogue Toolkit)	Legal aid, accompaniment, service-point monitoring, rumour management
Account	Expert evidence, strategic legal support, shadow reports	Litigation, complaints and observer statements before the Commission
Learn	Evaluation, comparative research, publication	Peer exchange, feedback loops, survivor-centred review

OUR COMMITMENTS

(1) co-develop a shared early-warning indicator framework; (2) convene foresight workshops with NHRIs and CSOs; (3) offer the Community Dialogue Toolkit and training to community

leaders; (4) publish a legal note on third-country deportations; (5) contribute to drafting of regional guidance; (6) report on follow-up at the next Ordinary Session.

The Action We Call For

Audience	We ask them to...
African Commission and its Special Mechanisms	• Urge states to adopt prevention measures: early warning, communication standards, response protocols, accountability. • Continue engagement with South Africa and Kenya on situations already identified. • Urgently engage Equatorial Guinea; ensure compliance with Provisional Measures. • Consider developing regional guidance on third-country deportations and the externalisation of migration control, and on prevention of xenophobia. • Monitor deceptive recruitment of Africans into foreign armed conflicts.
Governments (South Africa, Kenya, Equatorial Guinea, and all states)	• Prevent, investigate and prosecute xenophobic violence; keep immigration enforcement with the state; protect access to services. • Publish early-warning and response protocols; use status-neutral language. • Before any third-country arrangement: publish it, assess its human rights impact, and allow independent monitoring. • Equatorial Guinea specifically: end arbitrary detention, guarantee access to lawyers, healthcare and asylum, and respect non-refoulement.
Pan-African Parliament	• Advance the Draft Resolution on Xenophobia, with early warning, oversight of migration agreements and regular reporting. • Support translation of commitments into national and community action.
Universities, CSOs, NHRIs	• Join shared monitoring and foresight; share data; keep communities informed with accurate, rights-based information.

