

December 1, 2010

BY E-MAIL AND FASCIMILE

Ms. Margaret Sekaggya
United Nations Special Rapporteur on the Situation of Human Rights Defenders
urgent-action@ohchr.org
Fax: +41 22 917 9006

Re: Urgent Appeal Regarding Abahlali baseMjondolo, Durban, South Africa

Dear Ms. Sekaggya:

Twelve individuals—all members of the human rights movement Abahlali baseMjondolo—are facing serious criminal charges for the September 26, 2009 violent attacks on the Kennedy Road Informal Settlement. The trials against the twelve individuals began yesterday, November 29, 2010. We write to request an urgent appeal and investigation into the South African authorities': (a) on-going failure to conduct an impartial investigation into the violent attacks on the Kennedy Road Informal Settlement (Kennedy Road) on the night of September 26, 2009; (b) threats of arrests, arrests, arbitrary detention, charges and pending prosecution of Abahlali baseMjondolo members, their families and leaders; (c) on-going failure to protect Abahlali baseMjondolo members, their families and leaders.

I. STATUS AS HUMAN RIGHTS DEFENDERS

Abahlali baseMjondolo (AbM) began in Durban, South Africa, in early 2005 and is the largest poor people's movement in post-apartheid South Africa.¹ AbM promotes and protects the human rights of shack dwellers, which make up 10 percent of households in South Africa. AbM seeks enforcement of favorable land and housing laws in Durban, KwaZulu Natal and throughout South Africa and challenges retrogressive laws and policies that threaten the human rights of poor South Africans.

AbM promotes open democratic values and challenges actions by the Government of South Africa (GSA) that fail to meet basic standards of participatory democracy. AbM has often criticized the GSA for failing to meet its obligations under international and domestic laws for community representation in development decisions. These principles are enshrined in the South African Constitution, requiring "meaningful engagement" before and during land rights disputes, as well as the local and national government's decisions in land and housing policies.

¹ See Abahlali baseMjondolo official website, at <http://www.abahlali.org/>.

AbM has successfully challenged the GSA in domestic South African courts, preventing the GSA from illegally evicting shack dwellers. Perhaps most significantly with respect to this appeal, the AbM recently fought against the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act of 2007 (“Slums Act”), which re-introduced displacement tactics reminiscent of the apartheid era. Strong similarities were drawn between the 2007 Slums Act and the apartheid-era Prevention of Illegal Squatting Act of 1951.² The 2007 Act aimed to “eliminate slums” in KwaZulu-Natal by 2014 by criminalizing the occupation of land without permission from the landowner and mandating that landowners and municipalities seek evictions.³ The Slums Act also enabled municipalities to set up “transit camps” for people evicted from their homes, and criminalized all attempts to stop evictions.⁴ AbM, along with other groups, successfully challenged that law in the Constitutional Court of South Africa in *AbM, et. al v. KwaZulu-Natal*.⁵ The Constitutional Court found that Section 16 of the Slums Act was in violation of the Constitution and violated shack dwellers’ constitutional right to housing.

Through these and other activities, the AbM movement, its leadership and membership of thousands of shackdwellers are human rights defenders as defined in the preamble of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (“Declaration on Human Rights Defenders”).

II. PERPETRATORS

The perpetrators relevant to this appeal include: (i) the armed group that attacked the Kennedy Road settlement on September 26th through 27th; (ii) the Sydenham and other police forces which failed to respond to calls for assistance during the attack and/or did nothing to protect members of AbM and Kennedy Road during the attack, failed to investigate the attacks against Kennedy Road residents, and who conducted unsubstantiated arrests in the absence of evidence; (iii) the judicial officials and prosecutors who delayed the setting of bail for the members and supporters arrested in conjunction with the attacks and in an absence of evidence against the AbM arrestees; and, (iv) the GSA and its various offices and officials which failed to conduct an adequate independent investigation into the attack despite notice, and also failed to prevent incitement of violence or protect AbM from retaliation. In general, the victims of the attack have been unable to press charges against the attackers. Only one or two individuals, such as the AbM movement’s president S’bu Zikode, have been permitted to press charges, but two months after the attacks and following pressure to permit him to do so.

² See Centre on Housing Rights and Evictions, Business as Usual? Housing Rights and Slum Eradication in Durban, South Africa 6 (September 2008).

³ See Centre on Housing Rights and Evictions, Business as Usual? Supra, 6.

⁴ See Centre on Housing Rights and Evictions, Business as Usual? Supra, 6.

⁵ *Abahlali baseMjondolo Movement of South Africa and Another v. Premier of the Province of KwaZulu-Natal and Others* 2009 (4) BCLR 422 (CC) (S. Afr.).

III. VIOLATIONS COMMITTED AGAINST ABM AND ENUMERATED INDIVIDUALS

The GSA's failure to protect AbM as human rights defenders—and the allegations of the GSA's involvement in the attacks and subsequent arrests—create an on-going threat of violence and repression against AbM. The Kennedy Road attack signifies one in a series of efforts to prevent the enforcement of international human rights standards and South African law consistent with such norms. The AbM members that face trial this week, therefore face a highly politicized trial. As a result, CCR is concerned the individuals will not be afforded impartial access to justice. Moreover, the fear of retaliation and further repression for human rights activity threatens the ability of AbM and other human rights defenders to engage in the critical work of promoting and protecting the human rights of shackdwellers in South Africa.

September 2009 Attack on Kennedy Road Informal Settlement

The night of September 26, 2009, an armed group of approximately fifty individuals attacked the Kennedy Road settlement looking for AbM members and leaders of the Kennedy Road Development Committee (KRDC) and AbM. The armed group self-identified as supporters of the African National Congress. The group increased in size as men in the settlement were awakened, some threatened by weapons, to join them. Witnesses say there were about 200 to 400 armed men roving, broken up in smaller groups, within the settlement.

Human rights groups and AbM believe the armed group had an ethnic discriminatory motive and acted as part of an effort to undermine recent achievements by AbM in the area of human rights. During the night there were a number of violent clashes as people spontaneously sought to protect themselves against the armed group. The community faced grave threats and violence: homes were demolished and burned; women were threatened with rape; individuals received death threats; and people were stabbed and beaten. Two people, Mthokozisi Ndlovu and Ndumiso Mnguni, are believed to have been killed during these incidents. Residents were forced to flee and many individuals, including women and children, became homeless. (*See also, Section V Links Between Violations and Human Rights Work.*)

Although the Sydenham Police, Metro Police and Provincial Crime Intelligence Officer had been in the Kennedy Road settlement for other reasons on September 26th, they did not adequately respond to calls for assistance. Having arrived with the police, representatives of the African National Congress replaced AbM and KRDC leadership, banning AbM from Kennedy Road.⁶ The Safety and Security Minister, Willies Mchunu told the press that an official resolution had been made “to dissolve the Abahlali.” Leadership of AbM and KRDC and their families were forced to flee after receiving death threats and demolition of their homes. Many displaced persons have not been afforded government assistance. In Durban, the disaster management office of the municipality would normally provide immediate assistance following shack fires or floods, but they have not adequately done so for the victims of the Kennedy Road attacks.

⁶ Press Release, Abahlali baseMjondolo (AbM), The ANC's coup in Kennedy Road (Oct. 7, 2009) (available at <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=145844&sn=Detail>).

Moreover, the Kennedy Road AbM office was dismantled and ransacked; and AbM therefore operated for many months, and in some ways continues to operate, in hiding.

AbM and human rights groups have questioned the police investigation and arrests that ensued. According to AbM, police only took statements from the attackers and not from people linked with AbM or KRDC. Several of those arrested had been performing in a public dance in another town the night of the attacks.⁷ On both October 19 and November 4 during the bail hearings of the arrested men, the investigating officer acknowledged in open court the destruction of the homes of all thirteen arrested men. Yet police have made insufficient inquiries or investigations into the retaliatory property destruction and other crimes committed against the AbM leaders, their families and those shack dwellers affiliated with AbM. The two September 26th deaths have not been investigated impartially.⁸

Arrests and Trials of AbM Members

On September 27th and in the weeks following the attack, a total of thirteen people, all affiliated with AbM or KRDC, were arrested in connection with the attacks. Charges against Simbongile Magaqana were dropped in November 2009. The twelve currently facing trial on charges related to the attacks are: Simvumile Limaphi, Thokozani Mtwana, Thobuxolo Mazeka, Sibulelo Mambi, Zamandla Mazeka, Nkosisizwe Njiyela, Fundisile Nkoyi, Khaliphile Jali, Zandisile Ngutyana, Situtu Koyi, Sicelo Mambi, and Samkeliso Mkokelwa. The charges against those arrested range from property crimes to public violence and murder. Very little information has been released to the public by the police or the GSA, increasing the perception of unfairness in the investigation and prosecution of the attacks.

Several individuals were denied bail and held in the Westville Prison, a detention facility known for its deplorable conditions, without specific evidence in support of the charges. An October 2009 Amnesty International report expressed concern that a number of the eight individuals police arrested on the night of the attacks may have been arrested due to their links with AbM, not because reasonable suspicion linked them to the attacks.⁹

Reports indicate that arrestees were detained without evidence and assaulted in detention.¹⁰ Seven of the thirteen were released in November 2009, but the bail hearings for the remaining five were adjourned after the prosecutor and investigating officer did not appear in court. These five were not released until July 13, 2010, ten months after the attack on Kennedy Road.

⁷ Press Release, Abahlali baseMjondolo, The ANC's coup in Kennedy Road (Oct. 7, 2009) (available at

<http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=145844&sn=Detail>).

⁸ See Statement issued by Mr. Eddie Makue, General Secretary of the South African Council of Churches, Police accused of sitting on their hands during 24hrs of violence against Abahlali baseMjondolo (Oct. 2, 2009) (available at <http://politicsweb.co.za/politicsweb/view/politicsweb/>).

⁹ Press Release, Amnesty International, South Africa: Failure to conduct impartial investigation into Kennedy Road violence is leading to further human rights abuses (Dec. 16, 2009).

¹⁰ See Press Release, AbM, Statement on the Anniversary of the Attack on Abahlali baseMjondolo (Sept. 26, 2010) (available at <http://www.abahlali.org/node/7324>).

The courts have also allowed public demonstrations during hearings to undermine the right to a fair trial. Demonstrators at the Durban Magistrate Court, some wearing the insignia of the African National Congress party, made threats against members of AbM, faith-based organizations supporting them and human rights monitors. Demonstrators also displayed signs in the presence of the magistrate that called the president of AbM a “leader of killers” and demanding life sentences for the arrestees. Based on the information publically available, the GSA has taken no steps to address the threats of violence.

The trials against the twelve began on Monday, November 29th. Based on information publically available, one of the State’s witnesses contradicted information previously presented to the Court and as a result the Court adjourned the proceedings.

Ongoing Failure to Conduct an Impartial Inquiry or Investigation

The continuing failure to conduct a full and impartial inquiry into the Kennedy Road attacks and government officials’ actions in the immediate aftermath of the attacks has placed AbM and its leaders in danger and increased harassment and threats. Of particular concern to CCR is suggestion and mischaracterization, by the GSA and others, that AbM’s movement a threat to the State or a “terrorist group” as a result of their work to defend and promote their human rights.

The apparent unwillingness of the relevant authorities to investigate these crimes and the official denunciation of the AbM has discouraged AbM members, supporters and others perceived to be supporters from lodging formal complaints with the police concerning continuing threats of violence made against them. AbM has called on the government to hold a commission of inquiry.

In the face of the GSA failure to do so, religious leaders and a range of NGOs and civil society organizations announced their intention to establish an independent inquiry.¹¹ In October 2009, Amnesty International raised concerns about the September attack and the official response to the attack in letters to the Premier of KwaZulu-Natal Province, Dr. Zweli Mkhize, and the provincial Minister for Transport, Community Safety and Liaison, Mr. Willies Mchunu.

In a May 12, 2010 report, the Centre on Housing Rights and Evictions (COHRE) also called on the GSA Minister of Safety and Security to establish an independent and credible commission of inquiry into the attack and ongoing intimidation of AbM members and to ensure that such threats or attacks are prevented and those responsible are brought to justice. Human Rights Watch¹² and

¹¹ Press Release, Bishop Rubin Phillip and Paul Trehwela, A travesty of justice (Nov. 19, 2009) (available at <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=151639&sn=Detail>).

¹² See J. Wilson, ‘Slum dwellers’ body wants Langa to lead attack probe, Business Day, Nov. 5, 2009, available at <http://www.businessday.co.za/articles/Content.aspx?id=86059>.

the Centre for the Study of Democracy¹³ have also supported the call for an independent commission.

IV. ACTIONS BY AUTHORITIES

See Section III Violations Against AbM and Enumerated Individuals.

V. LINKS BETWEEN VIOLATIONS AND HUMAN RIGHTS WORK

The AbM works to enforce human rights standards, and has gained significant strides in realizing the human right to housing in South Africa. Under international human rights law, evictions can only occur lawfully in exceptional circumstances and never when for discriminatory purpose. All feasible alternatives must be explored in consultation with affected persons. Even then, evictions should not render individuals homeless or vulnerable to other human rights violations, and governments must therefore ensure that adequate alternative housing is available to affected persons. International human rights standards consider forced evictions a gross violation of human rights. Particularly in South Africa do forced evictions and relocations raise concerns of historical racism and oppression, and the components of location and participation within the right to housing are particularly salient.

South Africa has recently taken great strides to implement international human rights standards into its constitution, legislation and jurisprudence. Under the South African Constitution, “Everyone has the right to have access to adequate housing” and “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”¹⁴ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no. 19 of 1998) (“The PIE Act”) implemented the housing rights of the Constitution and replaced the apartheid-era Prevention of Illegal Squatting Act of 1951, which in effect allowed for forcible evictions on the basis of race.¹⁵

Under the PIE Act, eviction of an unlawful occupier is illegal, unless the eviction is authorized by a court order and meets several procedural requirements.¹⁶ In issuing an eviction order, a court must weigh the rights and needs of certain vulnerable groups of unlawful occupiers, including the elderly, children, women-headed households and the disabled. In the case of unlawful occupiers who have been in occupation of the property for over six months, the court must consider whether land is available for relocation, or can reasonably be made available, by the owner or the local municipality. A court may only then grant the order if it is satisfied that all conditions have been met and no valid defenses have been raised.

¹³ Press Release, Professor Steven Friedman, Director of the Centre for the Study of Democracy, Call for President to Establish a Commission of Inquiry into Violence Against Shackdwellers (June 11, 2009) (available at <http://www.ngopulse.org/group/civil-society>).

¹⁴ S. Afr. Const. 1996, S. 26.

¹⁵ See Centre on Housing Rights and Evictions, Business as Usual? *Supra*, 4-5.

¹⁶ See Centre on Housing Rights and Evictions, Business as Usual? *Supra*, 4-5.

The Prevention of Slums Act, which the AbM successfully fought, circumvented the requirements of the PIE Act and undermined international human rights standards. It is believed that the September 2009 attack on the Kennedy Road settlement represents a backlash against the AbM's success in the Constitutional Court and its progress in working with the Durban municipality to improve settlement conditions. The attack against the Kennedy Road and the AbM has therefore been called politically motivated, in an effort to remove resistance to evictions.¹⁷

All of the 13 people arrested were affiliated with AbM and appeared to have a specific ethnic profile as Xhosa-speakers originally from the Eastern Cape Province. These trials potentially implicate the conflict between Zulu and Xhosa-speakers, as well as a struggle to control policies affecting shack dwellers. In October 2009, Amnesty International found, based on its own inquiries and information:

- There had been a significant delay in the police response to calls for assistance made by members of the KRDC and AbM during the night of 26 September;
- During that night armed men appeared to be looking for specific individuals and members of specific organizations, including from the KRDC and the President and Deputy President of AbM;
- The men also used language which identified targets to be removed from Kennedy Road in ethnic terms, as “amaMpondo” (Xhosa-speakers) or as non-Zulus; and
- Some of the eight individuals police arrested on September 27th in connection with the violence may have been arrested due to their links with AbM, not because reasonable suspicion linked them to the attacks.¹⁸

The following December, Amnesty International reported that:

Amnesty International is concerned that the issue of the political control over the direction of development for Kennedy Road may have formed part of the motivation for the violent attack. . . [T]he threats against and displacement of the KRDC members from Kennedy Road in September has undermined their ability to continue as a partner with the eThekweni (Durban) Municipality's Housing Department in a development “upgrade project” for the residents of the settlement. These consequences are particularly worrying in view of media and other reports that in the weeks prior to the violent attack at Kennedy Road, governing party officials at provincial and local levels were expressing a determination to dissolve these community based organizations.¹⁹

¹⁷ Letter from Salih Booker, *Supra*.

¹⁸ Amnesty International, South Africa, *Supra*.

¹⁹ Press Release, Amnesty International, South Africa: Failure to conduct impartial investigation into Kennedy Road violence is leading to further human rights abuses (Dec. 16, 2009) (available at <http://www.amnesty.org/en/library/asset/AFR53/011/2009/en/53fce922-d49e-4537-b3bb-84060cf84c85/afr530112009en.html>).

The attacks, subsequent threats and harassment have negatively impacted AbM's ability to act as human rights defenders and threaten the movement's ability to operate freely and openly. For example:

- AbM members, leaders and supporters were received death threats in the weeks and months following the attacks;
- AbM's office that was based in Kennedy Road settlement was ransacked and dismantled;
- AbM leadership and their families was forced into hiding following numerous death threats and illegal displacement;
- AbM members fear making formal complaints to the police about the Kennedy Road attacks or the continued threats;
- AbM continues to face threats and negative treatment by the GSA;
- AbM members' homes were burned down or destroyed and many continue to face homelessness;
- The AbM child care center and job development center were dismantled, taken over and shut down;
- AbM movement was operating in hiding, holding meetings in undisclosed locations for fear of further attacks and retaliation.

The GSA's failure to adequately respond and investigate the Kennedy Road attacks and its failure to ensure judicial impartiality and access has the impact of criminalizing the AbM movement. Furthermore, AbM and others believe the attacks were carried out to intimidate and prevent AbM from continuing its work to protect shack dwellers from human rights violations.

VI. THIS INFORMATION IS SUBMITTED BY THE CENTER FOR CONSTITUTIONAL RIGHTS

The instant request for an urgent appeal to the Government South Africa is submitted by the Center for Constitutional Rights. The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change. CCR is based in New York but works throughout the United States and internationally to promote and protect human rights.

Due to this week's on-going trial of the twelve AbM members facing charges for the Kennedy Road attacks, we seek your immediate action. Please contact Sunita Patel, Staff Attorney at the Center for Constitutional Rights, at spatel@ccrjustice.org or (212) 614-6439 with any further questions or concerns. Thank you for your immediate attention to this matter.

Sincerely,

Sunita Patel
Staff Attorney

(by electronic mail and facsimile)

cc:

United Nations Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living

United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance

United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences

United Nations Advisory Group on Forced Evictions

United Nations Working Group on Arbitrary Detention