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Xenophobia in South Africa: A Socio-legal Analysis



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University of Fort Hare
A dissertation submitted in fulfillment of the requirements for the degree
Together in Excellence

LLM (Master of Laws Human Rights)

In the Faculty of Law Fort Hare University

Prepared under the supervision of Prof. A Keet

April 2011

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DECLARATION

I, Samukeliso Sibanda, hereby solemnly declare that the work contained in this dissertation is my own original work and that where other works have been used; they are clearly indicated and acknowledged. This research has never been presented in its entirety or in part to any other University for the award of a degree.

Signed.....

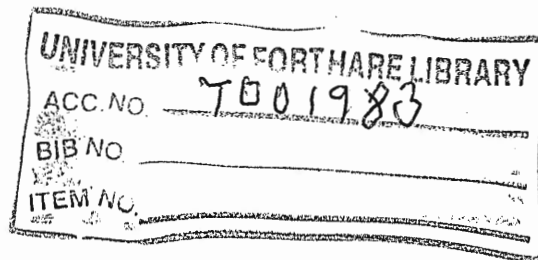
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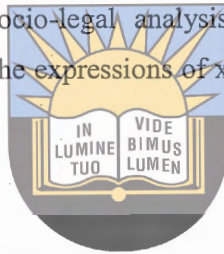
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ABSTRACT

The ways in which xenophobia continues to express itself in South Africa deserve to be noted at an advanced study. Over the past 15 years the expressions of xenophobia have been accompanied by increased deaths, more discrimination, increase of stereotyping of people of African descent and increased violence towards non-nationals, especially in the poorer parts of South Africa. Many of such xenophobic expressions have gone unnoticed and where they have been noticed, they have received little attention, leading to the exacerbation of the problem. The researcher of this study dwelt on a socio-legal analysis of xenophobia in South Africa. Appreciating the legal connotations and the expressions of xenophobia in South African society is a major concern of this study.



To fulfill the objectives of this study, the researcher explores the extent and expression of xenophobia, in addition to analyzing and assessing the efficacy of legislative and other measures aimed to protect non-nationals in South Africa. The study investigates the role of state organizations, government and civil society and evaluates the impact of xenophobia on the enjoyment of human rights by non-nationals. A central objective of this study was to suggest alternative ways of explaining and understanding xenophobia and the responses to it.

Empirical research was conducted to explore the extent of xenophobia in South Africa and how and why it is manifested in the way it is. Through in-depth face-to-face interviews it was revealed that the extent and manifestation of xenophobia differs in relation to particular communities, economic set ups and social settings; with poor communities being the most vulnerable to violent xenophobic attacks. Further, it was interesting to note that people have no firm understanding of what xenophobia entails as a social, legal, political and economical phenomenon. Again, it became evident that xenophobia still manifests in a country founded on values of equality, dignity and justice. Moreover, it was established that there is a weak link between law, human action and human behavior. It also became evident that education and

sensitization need to be employed if xenophobic perceptions and behaviors are to be sufficiently dealt with.

Recommendations were provided upon completion of the study. These included developing the law consciously, thus ensuring that the law has public legitimacy; effective law enforcement and prosecution; human rights education and training (especially in government departments, civil society organizations and institutions of learning); use of media and other communication channels to advocate for non discrimination, equality and respect for human rights, values and integration. Finally, the fight against xenophobia, racial discrimination and other related forms of intolerance needs to be taken up by all members of South African society and Africa at large.



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DEDICATION

I dedicate this work to my family, especially my late father Jeconiah, my late brother Victor, my late aunt Rhoda, my uncle Zeblone, my mother Emely, my brothers Bongani, Tony and Blessings. I also dedicate this work to all my lovely sisters; Nothando, Zanele, Ntandoyenkosi, Victoria and Shantelle. I also dedicate this work to my best and faithful friend Nkululeko. You guys make life worth living. Finally, this dissertation is also dedicated to all those who have fallen due to xenophobic attacks, those who have fought against xenophobia and all those who will continue to preach love, peace and hospitality for all.

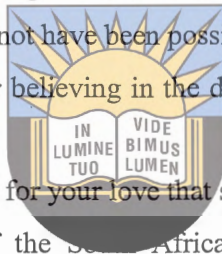


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This dissertation, while an individual work, benefitted from the insights and direction of several people.

- I would like to express my sincere gratitude to my supervisor and mentor, Prof. André Keet, for guiding me and for his moral support through the task of writing this dissertation. Without your informed guidance, constructive criticism, encouragement and hospitality this dissertation would not have been possible. Thank you so much!
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- To my friends and family, thank you so much.
- Above all, I want to thank the Almighty God, my King, my source of strength, joy, love, wisdom and understanding. You give me a reason to live. I love you Lord!



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LIST OF ABBREVIATIONS

ANC	African National Congress
AAX	Action against Xenophobia
APOA	Alexandra Property Owners Association
AU	African Union
CC	Constitutional Court
COSATU	Congress of South African Trade Unions
COSS	Centres of Safe Shelter
CPF	Community Policing Forum
CoRMSA	Consortium for Refugees and Migrants in South Africa
CRAI	Citizenship Rights in Africa Initiative
CRGA	Concerned Residents Group of Alexander
CSO	Civil Society Organisation
CSVR	Centre for the Study of Violence and Reconciliation
DA	Democratic Alliance
DHA	Department of Home Affairs.
DMC	Disaster Management Centre
DPLG	Department of Provincial and Local Government
FBO	Faith Based Organization
FDP	Foundation for Professional Development
GoG	Gift of the Givers



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GNP	Gross National Product
HRW	Human Rights Watch
HSRC	Human Sciences Research Council
IFP	Inkatha Freedom Party
JRS	Jesuit Refugee Services
IOM	International Organization for Migration
LHR	Lawyers for Human Rights
MEC	Member of Executive Council
MMA	Media Monitoring Africa
MSF	Medecins Sans Frontiers
NHRI	National Human Rights Institutions
NCRA	National Consortium on Refugee Affairs.
NEPAD	New Partnership for African Development.
NMF	Nelson Mandela Foundation
NGO	Non-governmental organization
NPA	National Prosecuting Authority
OED	Oxford English Dictionary
OCHA	United National office for the Coordination of Humanitarian Affairs
PAC	Pan Africanist Congress
PDMC	Provincial Disaster Management Centre
RSA	Republic of South Africa



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RDP	Reconstruction and Development Programme
SACC	South African Council of Churches
SADC	Southern African Development Community.
SAHRC	South African Human Rights Commission.
SAMP	Southern African Migration Project
SANCO	South African National Civic Organization
SAPS	South African Police Service.
SIRA	Security Industry Regulating Authority.
TAC	Treatment Action Campaign
TRC	Truth and Reconciliation Commission
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees.
UNOCHA ROSA	United Nations Office for the Coordination of Humanitarian Affairs Regional Office for Southern Africa
WCAR	The United Nations World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerances



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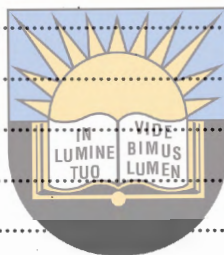
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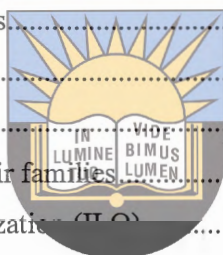
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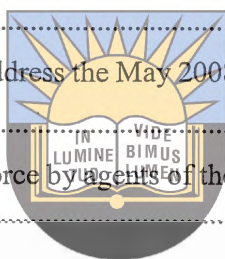
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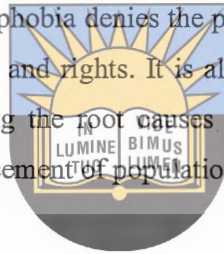
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CHAPTER ONE

GENERAL ORIENTATION

1.1 Background

Xenophobia refers to attitudes, prejudices and behaviors that reject exclude and often demean persons based on the perception that they are outsiders or foreigners to the community, society or national identity.¹ This phenomenon constitutes serious violations of, and is an obstacle to the full enjoyment of, all human rights. Xenophobia denies the patently obvious truth that all human beings are born free and equal in dignity and rights. It is also an obstacle to peaceful relations among people and nations, and is among the root causes of many internal and international conflicts, including the subsequent displacement of populations.²



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Xenophobia and racism are world-wide contemporary phenomena. In March 2009, Githu Muigai, United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance estimated that 250 million people around the world are at risk of violations of civil, political, social, economic and cultural rights. This includes violence, marginalization and discrimination, on the grounds of systems based on inherited status. Included in that list are human rights violations on a wide array of areas, including prohibition or limitations on ability to alter inherited status and socially enforced restrictions on marriage outside the community. Public and private segregation, including in housing and education, and access to public spaces and places of worship and public sources of food and water, limitation of freedom to renounce inherited or degrading occupations or

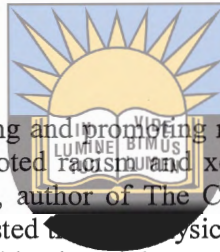
¹ See the “Declaration on Racism, Discrimination, Xenophobia and Related Intolerance against Migrants and Trafficked Persons”. This declaration was made at the Asia-Pacific NGO Meeting for the World Conference against Racism, Discrimination, Xenophobia and Related Intolerance in Teheran, Iran on 18 February 2001. See www.ilo.org/public/english/protection/migrant/download/wcar.pdf – (Last accessed on 22nd July 2009).

² See “World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001” on www.un.org/WCAR/durban.pdf - (Accessed on 22nd July 2010).

hazardous work, as well as subjection to debt and bondage were also noted to be increasing in various nations.³

In 2006 Githu Muigai's predecessor, Doudou Diene, observed that "racism and xenophobia are coming out of the closet, in a sense, and gradually creeping into the policies of mainstream political actors".⁴ His contention that "speeches against immigrants, foreigners and asylum-seekers are becoming popular and intellectual legitimization being granted to those currents"⁵ is particularly worrying.

Doudou Diene added that:



In literature, books were advocating and promoting racism, and in academic and scientific circles theses that promoted racism and xenophobia were on the rise. For example, Samuel Huntington, author of *The Clash of Civilizations*, in his latest work, *Who Are We?*, suggested that the physical presence of Latinos in the United States was threatening the identity of that society. Huntington was not an isolated extremist, Mr. Diene noted, just one of many at an important university, Harvard, was well-respected and had a wide audience. He was part of the phenomenon of the banalization of racism.⁶

As recently as April 2009, the world leaders at the Durban Review Conference in Geneva⁷ expressed concern that challenges and obstacles identified in the Durban Declaration and Programme of Action remain to be addressed and overcome. This would effectively prevent, combat and eradicate racism, racial discrimination, xenophobia and related intolerance and that

³ Durban Review Conference, Geneva, March 2009.

⁴ See United Nations Committee on the Elimination of all Forms of Racial Discrimination 'Special Rapporteur On Racism Tells Committee that Racism and Racial Discrimination Are On the Upswing' See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3208&LangID=E> (Accessed 22 July 2010).

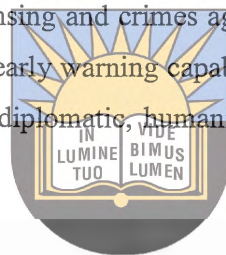
⁵ *Ibid.*

⁶ See UN News Centre 'Racism and Racial Discrimination on Rise Around the World, UN Expert Warns' at <http://www.un.org/apps/news/story.asp?NewsID=17718> (Accessed 22 July 2010).

⁷ The Durban Review Conference took place in Geneva, Switzerland, from 20 to 24 April 2009. One of its objectives was to review progress and assess the implementation of the Durban Declaration and Programme of Action, which had been adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in September 2001.

there are still many areas where achievements have not been gained or further improvements have to be attained.⁸

In the same Review Conference it was recognized that racism, racial discrimination, xenophobia and related intolerance are still among the root causes of armed conflict and very often its consequences and deplores the occurrences of armed conflict as well as ethnic or religious violence, and notes relevant provisions of the 2005 World Summit Outcome⁹, paragraphs 138¹⁰ and 139¹¹; in particular. Paragraph 138¹² is centred on the mandate of all states to protect their populations from war crimes, ethnic cleansing and crimes against humanity. It further obligates states to assist the UN in establishing an early warning capability. On the other hand, Paragraph 139¹³ implores states to use appropriate, diplomatic, humanitarian and other peaceful means to



⁸ Durban Review Conference Outcome Document, paragraph 4. The Durban Review Conference Outcome Document also reaffirms that an atmosphere of racial, ethnic, religious hatred that constitutes incitement to discrimination, hostility or violence, shall be prohibited by law; reaffirms further that all dissemination of ideas based on racial superiority, hatred or incitement to racial discrimination as well as all acts of violence or incitement to such acts shall be declared offences punishable by law, in accordance with the international obligations of States and those prohibitions are consistent with freedom of opinion and expression". See paragraph 14 of Durban Review Conference.

⁹ See UN General Assembly "World Summit Outcome" A/RES/60/1.

¹⁰ Paragraph 138 of the World Summit Outcome reads "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."

¹¹ Paragraph 139 of the World Summit Outcome reads "the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out".

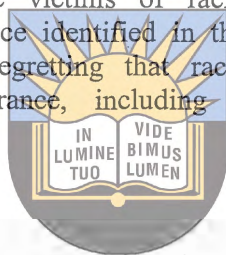
¹² *Op cit* note 11.

¹³ *Op cit* note 12.

protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. A critical analysis of these provisions reveals the urgency in which xenophobia needs to be tackled

Despite the efforts employed to eradicate xenophobia and related intolerances, the following paragraph reveals that a great deal of work still needs to be done:

[The Durban Review Conference] expresses its appreciation for progress made in addressing the situation of the victims of racism, racial discrimination, xenophobia and related intolerance identified in the Durban Declaration and Programme of Action, while regretting that racism, racial discrimination, xenophobia and related intolerance, including contemporary forms and manifestations, still persist.¹⁴



In South Africa, xenophobia, in its different manifestations, is one of the main contemporary causes and manifestations of discrimination and conflict, combating which requires urgent attention and prompt action by states, as well as the international community.¹⁵ Xenophobic behaviour against non-nationals, particularly migrants, refugees and asylum seekers, constitutes one of the main sources of new forms of racism. Human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.¹⁶

In May 2008 the world woke to reports of shocking attacks on foreign nationals of African descent by South African citizens. The violence started in the poor neighbourhoods of Alexandra in Johannesburg¹⁷ and quickly spread to other cities, including Cape Town and Pretoria.¹⁸ By 31

¹⁴ *Ibid* para 16.

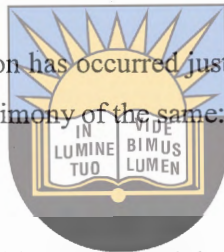
¹⁵ *Ibid*.

¹⁶ *Op cit* note 2.

¹⁷ See BBC. "South African Mob Kills Migrants." 12 May 2008.

¹⁸ See BBC. "South African Mob Burns Mozambican Man." 14 June 2008. This chain of events, that have variously been termed a disaster, a crisis, a national shame and an emergency, commenced with violent attacks on non-nationals in Gauteng (Alexandra) on 11th May 2008. See Igglesden V 'Xenophobic Violence in South Africa in May 2008 : The Humanitarian Response in Gauteng and the Western Cape (a narrative account) 2008 5 University of the Witwatersrand Forced Migration Studies Programme. See

May 2008, the death toll had risen to 62, the vast majority of whom were in Gauteng Province, where the country's economic capital, Johannesburg, and administrative capital, Pretoria, are located.¹⁹ Thousands of migrants and South Africans were the victims of criminal violence; women and children were attacked and raped, and thousands had their houses and belongings looted or destroyed. The most severely affected groups were Africans from neighbouring states, such as Zimbabwe and Mozambique, but migrants from more distant African countries, such as Nigeria and Somalia, as well as a significant number of South Africans, also became victims of the violence.²⁰ Xenophobic attacks also occurred in Kya Sands (Cape Town) in November 2009, where many were displaced and others had to return to their home countries.



A recent example of xenophobic expression has occurred just after South Africa's hosting of the 2010 World Cup. The below extract is testimony of the same:

Last time, they cut his face open with a panga and destroyed his shop, but Ibrahim Mursal said the mood is worse. In South Africa, one of more than 100 displaced foreigners seeking refuge at a camp site outside Wellington, north of Cape Town, following renewed xenophobic violence across the Western Cape. He and his friends said they would rather risk the war at home than the "war" in South Africa - but they can't find a way back... Somalis, Ethiopians and Zimbabweans have been the main targets... The ANC added its voice yesterday. In a strongly worded statement, the party said: "Xenophobia is a crime against humanity and the perpetrators should be isolated." But several foreigners yesterday said the government was failing them on several fronts, including the slow pace of registering asylum seekers and lack of protection.²¹

It is clear that these incidents of xenophobia are not welcomed by some South Africa Africans,²² even though they continue to grow:

<http://cormsa.org.za/wp-content/uploads/Research/Disaster/NarrativeHumanitarianResponse.pdf>. (Accessed 27 April 2010).

¹⁹ See Mail & Guardian. "Toll from xenophobic attacks arises." 31 May 2008.

²⁰ See Mail & Guardian and Sapa "Xenophobia: Mbeki gives nod to army". Johannesburg. 21 May 2008.

²¹ Jordan B 'Xenophobic Violence Is Back' Sunday times. See: <http://www.timeslive.co.za/local/Article547012.ece/Xenophobic-violence-is-back> (Accessed 24 July 2010).

²² "Barely days after playing perfect hosts to the world, the ugly and violent side of South Africa has reared its head, forcing African foreigners living here to flee in fear of their lives. Let's not muck about here: the notion that these attacks were on foreigners is a lie. They are attacks by black South Africans on their fellow African brothers and sisters. These are the same people whose connection to Ghana was so strong

Police arrested 10 men yesterday - including an unnamed community leader - for terrorising and robbing residents of a Johannesburg informal settlement under the guise of xenophobia. This follows a spate of attacks on both foreigners and South Africans in the settlement at Kya Sand on Monday night. Some of the victims were taken to hospital. Shops owned both by South Africans and by foreigners were looted...A biblical quotation written on the wall of another looted shop read "Do not mistreat aliens, for you were also aliens in Egypt."²³

Xenophobic attacks are not new in Cape Town. Similar incidents occurred in the De Doorns area as recently as November 2009. The following extracts taken from Philani Nombembe's report testify to the above:²⁴



This week Muteti, his wife, children and other families who hail from Zimbabwe and Malawi were chased from their homes "like dogs". The uproar came barely a week after an estimated 3000 Zimbabwean men and women were attacked at Stofland informal settlement in De Doorns, also in the Western Cape. Similar attacks took place in Gugulethu and Khayelitsha on the Cape Flats just months ago. Now experts have warned that xenophobic violence could spread possibly sparking a repeat of last year's catastrophe in which thousands of people were displaced and more than 60 killed. Dr Lawrence Mgbangson of the United Nations High Commission for Refugees in the Western Cape said South Africans took out their service delivery and unemployment frustrations on vulnerable foreigners. The Western Cape manager of the South African Human Rights Commission, Leonardo Goosen, said that tensions still existed in communities where refugees were re-integrated after last year's xenophobic attacks.

The recent xenophobic attacks follow a 15 year long pattern of xenophobia in South Africa. Since the 1994 elections, South Africa has seen a rising level of xenophobia. As in many other

just two weeks ago that they hijacked the name Ghana and fused it with Bafana Bafana to come up with BaGhana BaGhana. There were no Nigerians or Zimbabweans or *makwerekwere* – that derogatory term we use for African foreigners... We were all Africans. Now, a week later, we seem to be suffering from amnesia. We have forgotten that we were African"... See Khoabane P "How Soon We Forgot When We Were All Africans" Sunday Times 18 July 2010, page 2.

²³

Ibid.

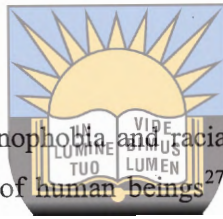
²⁴

See Nombembe P, "We Were Chased Like Dogs" at <http://www.timeslive.co.za> . (Last accessed on the 29th of November 2009.)

countries, immigrants have been blamed for a rise in violent crime, drug dealing, drug abuse, unemployment, and other social ills.²⁵ Immigrants from African countries have been the target of attacks, often because they are perceived as being in direct competition with South Africans for jobs or services. In addition, African immigrants are often the target of random violence and robbery, as criminals perceive them as easy targets because they are unlikely to go to the police.²⁶

1.2 Thesis Statement

1.2.1 Introduction



Preliminary observations indicate that xenophobia and racial discrimination will become more structurally anchored given the mobility of human beings²⁷ in a “new age of migration”. The annual reports of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, show a world-wide trajectory of increased xenophobia and racial discrimination.²⁸ General Excessive studies and hearings in South Africa point to the development of xenophobia into a human rights hotspot in this country. Contrary to the provisions and principles of the “human rights” state, the discriminatory treatment of and attitudes towards non-nationals have become a common feature of the South African social landscape.²⁹ This study concerns itself with this contradiction. It argues that

²⁵ See Human Rights Watch “Xenophobia and Attacks Against Migrants” at: <http://www.hrw.org/reports/98/sareport/Adv5a.htm>. (Accessed 6 August 2010).

²⁶ See Nyamnjoh F. B “*Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa*” 2006 52-56. Available at: http://books.google.co.za/books?id=pas1dhd8KjwC&pg=PA54&lpg=PA54&dq=african+chamber+of+hawkers+and+independent+businessmen&source=bl&ots=Hk6uJaERl4&sig=bHgNE5jwxFEQpuawKqizBNXk6_w&hl=en&ei=4mRcTLu4Ft6qsQaM5O2WBg&sa=X&oi=book_result&ct=result&resnum=5&ved=0CCUQ6AEwBA#v=onepage&q=african%20chamber%20of%20hawkers%20and%20independent%20businessmen&f=false (Accessed 6 August 2010).

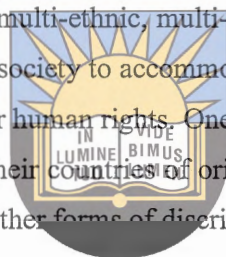
²⁷ See Pennix R, Berger M, Kraal K “*The Dynamics of International Migration and Settlement in Europe*” 2006 IMISCOE Joint Studies, Amsterdam University Press, Amsterdam.

²⁸ See, for example, the Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the situation of Muslim and Arab peoples in various parts of the world E/CN.4/2006/17 at: www.ohchr.org (Accessed 5 March 2011).

²⁹ See SAHRC “*Shadow Report on South Africa’s Compliance with the Provisions of the International Convention Against All Forms of Racial Discrimination*, 2006 at: <http://www.sahrc.org.za/home/21/files/Reports/Compliance%20with%20the%20provision%20of%20the%20international%20conventio.pdf> (Accessed 5 March 2011).

xenophobia in South Africa is a complex phenomenon and questions the legal, social and political responses to this challenge. Further, it speculates that the limited efficacy of the standard reactions to this challenge is linked to an inadequate understanding of this phenomenon. Ultimately, the study aims to present these complexities as the basis for suggesting possible new ways of responding to this challenge.

The twenty-first century promises to be a new age of migration. Intensifying international migration pressures present many societies with major policy dilemmas; most countries of the world are becoming more multi-cultural, multi-ethnic, multi-religious and multi-lingual.³⁰ These changes challenge governments and civil society to accommodate and gain from this diversity in ways which promote peace and respect for human rights. One in every fifty human beings - more than 150 million persons - lives outside their countries of origin as migrants or refugees.³¹ They are highly vulnerable to xenophobia and other forms of discrimination.



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The extent and severity of these phenomena are becoming increasingly evident in the reports of mistreatment and discrimination against migrants, refugees and other non-nationals in South Africa, which are emerging from every region in the world³². The fact that an increasing proportion of international migration today is irregular and unauthorized facilitates abuse and exploitation. But even when their movements are legal and authorized, African non-citizens in South Africa face high levels of discrimination.³³

Currently, there exists a strong xenophobic hostility towards foreigners in South Africa. A year after South Africa found itself in the grip of anti-foreigner violence and tension, there are warning signs that the underlying tensions persist. More than 60 people died from xenophobia in

³⁰ See International Labour Office (ILO), International Organization for Migration (IOM), Office of the United Nations High Commissioner for Human Rights (OHCHR) "*International Migration, Racism, Discrimination and Xenophobia*" 2001 at: <http://www.unesco.org/most/migration/imrdx.pdf> (Accessed 5 March 2011).

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

the year 2008 alone.³⁴ It goes without saying that the hatred of African foreigners in South Africa has taken a turn towards a criminal nature. Furthermore, tens of thousands were displaced as a wave of xenophobic attacks swept through the country. Xenophobia in South Africa manifests itself in a variety of ways and these include discriminatory policies in immigration, employment, access to public services and freedom of movement.

The recent xenophobic violence in South Africa was primarily directed against foreign nationals living in some of the poorest urban areas of the country. However, it has also impacted on those who acquired citizenship by virtue of their specialized skills, such as medical doctors, academics, scientists and engineers. Moreover, it has impacted on those with legitimate work and study permits, such as the tens of thousands of Mozambican mineworkers, mathematics teachers from Zimbabwe and foreign university students.



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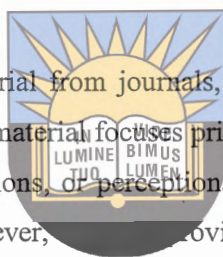
Unfortunately, many South Africans, and not just those living in the poorest areas, are opposed to the presence of a large number of foreigners from other African countries, and they blame foreigners for many of the ills in South Africa, including high unemployment of locals, and crime. The underlying causes of xenophobia in South Africa have been varied and complex. Socio-economic deprivation, lack of proper border control, rising levels of HIV/AIDS infections, corruption, slow economic growth, poor service delivery, a bad foreign policy of quiet diplomacy (especially in the Zimbabwean situation), lack of information on foreigners and their rights, perception that foreigners are an economic threat and creation of 'the other' have all played a role in increasing xenophobic sentiments against foreign nationals. Another justification provided for the xenophobic attacks on non-nationals is the myth that non-nationals 'steal' South African women.

³⁴ See Doctors Without Borders "*The Lives of Survival Migrants and Refugees in South Africa*" at: http://www.doctorswithoutborders.org/publications/Article_print.cfm?id=4465 (Accessed 19 August 2010).

Moreover, a large number of children and young people, particularly girls, are among victims of xenophobia, racial discrimination, and related intolerance in South Africa. A need therefore exists to incorporate special measures, in accordance with the principles of the best interest of the child and respect for their views, in programmes to combat xenophobia, racial discrimination, and related intolerance, in order to give priority attention to the rights and the situation of children and young people who are the victims of these practices.

1.3 Significance of the study

A considerable amount of valuable material from journals, newspapers and other sources has been written on xenophobia. The written material focuses primarily on exposing xenophobia and seeks to confirm that most of the allegations, or perceptions, by South Africans about African migrants are baseless. This material, however, does not provide an in-depth study of the problem from a socio-legal point of view.



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The present study shows that the important values espoused by the South African Constitution and International law have an important role to play in shaping and challenging attitudes and actions of South Africans in their relations with non-nationals. The study also aims to investigate, explain and expose xenophobia in South Africa. The study also educates the public about xenophobia and provides, in a systematic approach, a socio-legal response to the problem. The hope is that this will help in transforming our society, its attitudes and structures.

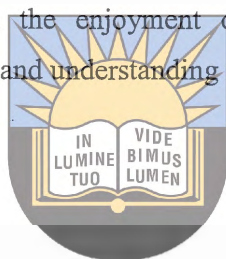
The research is also meant to be a guideline for future legal development in the field of the rights of refugees and foreign nationals. South Africa's proud record as a catalyst in the promotion of unity, peace, security, human rights and development in Africa, which was endorsed in our hosting of the Durban World Conference³⁵, has been severely compromised. This research hopes

³⁵ *Op cit* note 6.

to propose recommendations which will aid South Africa to regain what has been lost. Short term and long term socio-legal solutions have to be found to curtail the scourge of xenophobia.

1.4 Objectives of the study

The objective of the study is to describe the extent and expression of xenophobia, and analyze and assess the efficacy of legislative and other measures aimed at the protection of non-nationals in South Africa. It investigates the role of state organizations, government and civil society and assesses the impact of xenophobia on the enjoyment of human rights by non-nationals. Suggesting alternative ways of explaining and understanding xenophobia, and the responses to it, is a central objective of this study.



1.5 Research Questions

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Main question: What is the extent of xenophobia in South Africa and how and why does it manifest itself?

Sub-questions:

1. What is the socio-legislative framework with regard to the rights of non-nationals and is it sufficient and adequate?
2. How effective is South Africa's response to xenophobia and related discrimination in the country?

Are there alternative ways of understanding and dealing with xenophobia in South Africa?

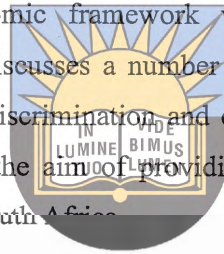
1.6 Chapter Presentations

Chapter 1: General Orientation

Chapter 1 is the introductory chapter. This chapter therefore entails the background to the study; the demarcation of the problem addressed; the overall aim of the study; the research question that directed the research processes; and finally, it provides an outline of chapters.

Chapter 2: The Socio-Economic Framework

This chapter explains the socio-economic framework which provides the backdrop of xenophobia in South Africa. It further discusses a number of theories that seek to clarify the existence of xenophobia, racism, racial discrimination, and other forms of intolerance in South Africa. The theories are analyzed with the aim of providing answers as to why xenophobia expresses itself in such violent ways in South Africa.



Chapter 3: Research Design, Methodologies and Processes
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Chapter 2 incorporates a detailed description of the research methodology, research approach, and research design, sampling, methods of data collection, trustworthiness of the research instrument and ethical considerations pertaining to the research processes.

Chapter 4: Xenophobia in South Africa

This chapter narrates the development of xenophobia in South Africa since 1994. It provides a vivid description of xenophobic manifestations in post Apartheid South Africa, through the advent of the new South African Constitution and explains the socio-political mood leading to the 2008 xenophobic attacks. Chapter 3 further discusses the xenophobic attacks of 2009 in South Africa and concludes by discussing the xenophobic attacks of July 2010.

Chapter 5: The Legislative Framework

Chapter 4 is divided into two parts. The first part provides a critical analysis of various international and national legislative measures which protect the rights of non-nationals who reside in South Africa. It begins with an analysis of international human rights instruments, goes

further by analyzing regional human rights instruments and provides an outline of the South African legislative framework. The second part is an analysis of the international and national jurisprudence; and therefore discusses relevant case law.

Chapter 6: South Africa's Response to Xenophobia

This chapter analyzes the efficacy of legislative and other measures employed by South Africa in curbing xenophobia in South Africa. It explores the role played by government and civil society organizations during and after the May 2008 attacks and exposes the loop holes in various interventions. The Chapter pays particular emphasis to the role played by the Human Rights Commission, an institution mandated to protect the rights of non-nationals in South Africa.

Chapter 7: Recommendations

This chapter draws conclusions and makes recommendations on new ways of understanding xenophobia, and new forms of legal, social and political action to deal with xenophobia at the local and national level. It further recognizes the recommendations provided by the Declaration preceding the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Durban Review Conference.



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CHAPTER 2

THE SOCIO-ECONOMIC FRAMEWORK

2.1 Introduction

This chapter explains the socio-economic framework which, in part, provides the backdrop to xenophobia in South Africa. It further discusses a number of theories that seek to explicate the existence of xenophobia, racism, racial discrimination and other forms of intolerance in South Africa. The theories are used as tools to explain why xenophobia expresses itself in such violent ways in South Africa. To a large extent the chapter gives substance to the overall objectives of a socio-legal analysis. The socio-economic analysis further gives insight into how prejudices arise and enables one to note the root causes of social perceptions and beliefs. As has been stated before, xenophobia needs to be understood from all spheres. The main question that arises is: Why is it that South Africa still experiences xenophobic expressions against non-nationals, even though there are many laws recognizing and protecting non-nationals? The answer lies in the present chapter, which discusses a number of theories that seek to explain the existence of xenophobia, racism, racial discrimination and other forms of intolerance in South Africa. The theories are analyzed with an aim to provide answers as to why xenophobia expresses itself in such violent ways in South Africa. A solid body of research explains that a culture of violence prevails in South Africa, where violence is seen as the legitimate and normal way of solving problems in the country. In this research, violence-theory is utilized to strengthen theories of xenophobia. Xenophobia in the post-apartheid era is understood as a result of historical factors and the new South African nation-building enterprise, an enterprise that is underpinned by a culture of violence and racism, despite the formal transition to equality and democracy. In addition, the other theories explored include relative deprivation theory, social identity theory and organization theory. Moreover, this chapter addresses the view that human rights violations perpetrated against non-nationals are motivated by financial gain and economic exploitation, rather than 'pure xenophobia'. The understanding is that the climate of xenophobia renders non-

nationals more vulnerable to such financial exploitation. An attempt has also been made to assess the reasons for migration into South Africa.

One would wonder at the importance of discussing these theories in this analysis. The answer lies in the appreciation of xenophobia as a sociological phenomenon. Moreover, the identity theories inform one regarding the roots of xenophobia, racism, racial discrimination and other forms of intolerance. An individual's sense of belonging in a certain society or group of people may lead that individual to reject "others" who seem to belong to another category. That form of rejection may take violent forms as has been noted from the xenophobic attacks. At this juncture it is also important to discuss the role of globalization in the rising levels of migration; thus leading to ethnocentrism and xenophobia.



2.2 Globalization and post-apartheid migration in South Africa

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The process of globalization and the inevitable expansion of markets, transportation, communication, capital and skills have challenged the geographic hegemony of national governments.³⁶ South Africa has not been immune to these trends. Geographically, the end of apartheid and international sanctions also led to the termination of South Africa's fortified boundaries.³⁷ In its essential element, globalization refers to the unification and integration of the world market under the hegemony of transnational corporations, the International Financial Institutions such as the International Monetary Fund (IMF), World Bank and the World Trade Organization (WTO) and developed economies.³⁸ What is unique about globalization is the fact that this transfer of wealth from the South to the North is happening in the context of a long-run economic stagnation when there are less economic and employment opportunities in the North.³⁹

³⁶ See Centre for Development Enterprise "People on the Move: A new approach to cross-border migration in South Africa" 1997 17 Johannesburg.

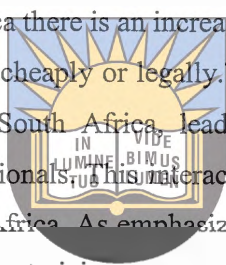
³⁷ *Ibid.*

³⁸ See Hlatshwayo M "Research Report on COSATU's Responses to Xenophobia" 2010 10, University of Johannesburg (The Atlantic Philanthropies).

³⁹ *Ibid.*

Concerning the Southern African region, and indeed Africa as a whole, South Africa plays the role of being the centre.⁴⁰ The policies of the IMF and the World Bank have led to the collapse of African economies through the process of transfer of wealth from these countries to the North. Currently, wealth is also transferred from all economies in the region to South Africa in various ways, such as centralization of Africa's capital market in Johannesburg, South African state corporations' investments in other African countries and the New Partnership for Africa's Development (NEPAD).⁴¹

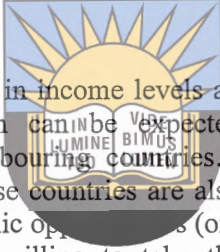
Furthermore, in post-apartheid South Africa there is an increased flow of people, goods and ideas into the country, albeit not always easily, cheaply or legally.⁴² Globalization has therefore led to an increased movement of people into South Africa, leading to increased and unavoidable encounters between nationals and non-nationals. This interaction, howbeit not always welcome, is a major cause of xenophobia in South Africa. As emphasized by Weiner et al, geographic and social mobility are crucial elements characterizing open societies. After decades of isolation, South Africa has become a sought after tourist and immigration destination, in a period when social and political, as well as economic uncertainty and insecurity have become pronounced in South Africa.⁴³ As the new South Africa seeks integration into and greater participation in global world politics, there is a contradictory trend towards exclusivity in respect of its immigration policy.⁴⁴ It has been suggested that in order to become part of the competitive global economy South Africa must give due consideration to the opening of its borders to trade, industry, culture, communications and capital, and the movement of people which must inevitably follow.⁴⁵



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⁴⁰ *Ibid.*
⁴¹ See Hlatshwayo M *op cit.*
⁴² See Klotz A "Migration after Apartheid: Deracialising South African Foreign Policy" 2000 831, Third world Quarterly 21. During the process of proletarianisation, migrant workers found work in South Africa; now the crisis of globalization and the decline in employment makes it difficult for these workers who are coming from struggling economies in the periphery to find jobs in South Africa. This then intensifies the competition for jobs and opportunities in the centre – South Africa. See Hlatshwayo 11 *op cit.*
⁴³ South African Human Rights Commission 'Illegal? Report on the Arrest and Detention of Persons under the Aliens Control Act' 1999 4.
⁴⁴ Klotz A *op cit.*
⁴⁵ Centre for Development Enterprise 1997 23.

Most immigrants come to South Africa to escape the poverty and destitution in their own countries, as well as civil wars and political instability. A key concern is the poverty, violence and underdevelopment that engulf many African countries. According to the World Bank, the countries surrounding South Africa, with the exception of Namibia and Botswana, are among the poorest in the world.⁴⁶ As with the rest of Africa, the artificiality of the international borders, the political instability of several regions and the paucity of administrative resources when compared with the lengths of the borders and the numbers of migrants involved, have contributed to an escalation in the number of undocumented migrants entering South Africa. The reasons for high levels of immigration into South Africa can be summarized in the extract below:



Where there are wide differentials in income levels and economic opportunities, considerable flows of population can be expected to result. Where such differentials occur between neighbouring countries... firm restrictions on the volume of movement between these countries are also likely to be in force. For many, however, the lure of economic opportunities (or their own economic plight) may be such that they may be willing to take the risk of arrest and even imprisonment to avail themselves of these opportunities by illegal means.⁴⁷

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As a result of the first inclusive elections in 1994, South Africa adopted one of the world's finest constitutions and set up a modern and representative system of governance.⁴⁸ However, the euphoria was not sustained. Economic inequality deepens; poverty appears intractable, and an increasingly angry citizenry seems less willing to adhere to the liberal norms of tolerance and respect for difference.⁴⁹ One would therefore argue that the quality of democracy is not measured by its formal institutions as important as they may be. Rather, it is in the interactions between citizens in the public sphere that one would be able to ascertain the extent to which democratic values have become normalized. Viewed from this perspective, it is evident that the legacies of distrust and antagonism continue to shape the possibilities of democratic deliberation in the public sphere.

⁴⁶ See World Bank 'World Development Report' 1999-2000. Washington.

⁴⁷ Parnwell M 'Population Movements and the Third World' 1993 53, Routledge, London.

⁴⁸ See Hassim S "After Apartheid: Consensus, Contention, and Gender in South Africa's Public Sphere" 2009, Political Studies, University of the Witwatersrand, Johannesburg, South Africa.

⁴⁹ See Hassimi *bid*.

Furthermore, in South Africa there has been a xenophobic tendency to stigmatise immigrants, particularly those from other African countries; as criminals, as people who undermine economic development and take jobs from locals. There are many fallacies and false presumptions about undocumented migrants in South Africa because this form of migration is often clandestine or undocumented.⁵⁰ According to Harris,⁵¹ worker migrants are viewed as a people in flight from poverty, and those seeking asylum are all too often regarded as “economic migrants” who are really also fleeing poverty. The burgeoning of refugees from developing countries is a result of current global environmental chaos as triggered by elements such as ecostress, insecurity and poverty.⁵² In fact the majority seeking asylum from developing countries are defined as “economic migrants” and are therefore governed by immigration, not refugee law. Harris⁵³ contends that the persistence of the idea that poverty drives out unskilled migrants from developing to developed countries is extraordinary. They are, it seems, really refugees, expelled by economic processes.⁵⁴ Sassen⁵⁵ has similarly pointed out that economic refugees are driven by larger geopolitical and transnational economic dynamics, which produce conditions under which poverty, or lack of opportunities for advancement can be viewed as migration push factors. Significantly, the Human Rights Watch has recommended to the United Nations Economic and Social Council Commission on Human Rights that the 1951 Refugee Convention should be revised in order to make it “more relevant to modern day migration challenges”.⁵⁶ In light of the xenophobia currently experienced in South Africa, this move may improve numbers of people who receive refugee status, enabling them to receive refugee protection and benefits. This may significantly improve their economic status and reduce their vulnerability to xenophobic attacks. On the contrary, improving legislation and economic policies alone is insufficient in dealing with

⁵⁰ PlenderR “Recent Trends in National Immigration Control” 1986 546, Intern.Compar. Law Quart. 35
⁵¹ 1995 119.

⁵² See Odipo G “Refugees in development of host country, ‘the new world order: A case study of Ethiopian refugees in Kenya’” in ‘The African Population in the 21st Century’ (Vol. 2)1999 559-568, Union for Population Studies, Durban.

⁵³ Harris N ‘The New Untouchables-Immigration and the New World Order’ 1995 189, Penguin, London.

⁵⁴ *Ibid.*

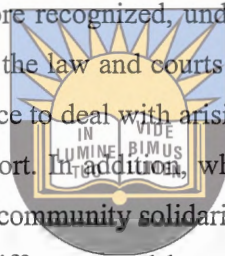
⁵⁵ See Sassen S “From Globalization and its Discontents”.

⁵⁶ United Nations Economic and Social Council Commission on Human Rights, Fifty-Seventh session, Item 14 of the provisional agenda, 18 January 2001 4.

problems of xenophobia. The law alone, as will be noted below, is insufficient to deal with xenophobic perceptions and violence against non-nationals.

2.3 The limits of the law

One would also mention that the law alone cannot uproot xenophobia. The normative basis of law therefore needs to be developed consciously, so that laws have public legitimacy. Instead of the law being imposed on people, the people's own norms, values and beliefs must form the basis of law; hence the law would be more recognized, understood and adhered to. Moreover, society has the power to solve its ills and the law and courts may seem to take that power. This means that society should be given a chance to deal with arising differences in communities, and the law and courts be used as the last resort. In addition, what is important is not who wins or loses a court case, but the preservation of community solidarity. The foundation for peace in any society is hospitality and acceptance of difference and laws must carry such normative values. Consequently, xenophobia may not be uprooted if the focus is only on human rights instruments and other forms of legislation. On that note, it is essential to study how society operates and how group mentality may affect an individual's sense of belonging and subsequent actions. As noted above, the rise in levels of migration also poses social challenges. More so, mobility causes the interaction of diverse communities, an exchange of ideas and improvements in economies. However, this mobility can have negative effects, as witnessed in the xenophobic attacks experienced in South Africa. The arrival of African non-nationals has thus exposed different beliefs, genetic make ups and also brought competition for resources. It is thus important to understand the theories linked to the existence of xenophobia. As a socio- legal analysis, this study also looks at social theories underpinning the existence of beliefs and values in societies. It is hoped that recognition of these theories would improve one's understanding of the origins of "difference". The first theory to be discussed is the social identity theory.

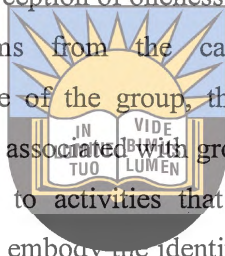


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2.4 Social identity theory and its effects

Identity theory is principally a micro sociological theory that sets out to explain individuals' role-related behaviours. It is argued that:

- a) Social identification is a perception of oneness with a group of persons;⁵⁷
- b) Social identification stems from the categorization of individuals, the distinctiveness and prestige of the group, the salience of out groups and the factors that traditionally are associated with group formation, and
- c) Social identification leads to activities that are congruent with the identity, support for institutions that embody the identity, stereotypical perceptions of self and others, and attitudes that are traditionally associated with group formation, and it reinforces the antecedents of identification. This perspective is applied to organizational socialization, role conflict, and intergroup relations.



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According to social identification theory, people tend to classify themselves and others into various social categories, such as organizational membership, religious affiliation, gender and age cohort.⁵⁸ As these examples suggest, people may be classified in various categories, and different individuals may utilize different categorization schemes.⁵⁹ Categories are defined prototypical characteristics abstracted from the members.⁶⁰ Social classification serves two functions. First, it cognitively segments and orders the social environment, providing the individual with a systematic means of defining others. A person is assigned the prototypical characteristics of the category to which he or she is classified.⁶¹ Secondly, social classification

⁵⁷ See Blake A E and Mael F "Social Identity Theory and the Organisation".

⁵⁸ Turner 1985.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

enables the individual to locate or define himself or herself in the social environment.⁶² According to the social identity theory, the self concept is comprised of a personal identity encompassing idiosyncratic characteristics (for example, bodily attributes, abilities, psychological traits, interests) and a social identity encompassing salient group classifications.⁶³ Social identification therefore is the perception of oneness with or belonging to some human aggregate. For example, a woman may define herself in this manner: I am a Canadian: I am a woman. She perceives the fate of the group(s) as her own. As such, social identification provides a partial answer to the question; “Who am I?”⁶⁴



In the South African context the continuities with authoritarian practices of group profiling are disturbing. In the apartheid era, the state used the “pencil test” to determine whether citizens should be classified as black; in contemporary South Africa, paranoid citizens use the “elbow” to ascertain ethnicity⁶⁵. Despite the Constitution’s attempt to thoughtfully mediate the terrain between unity and cultural particularity, in everyday politics these anxieties are unresolved and frequently expressed in new forms of group closure.⁶⁶

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Perhaps the most subtle form in which closure is signaled lies, ironically, in the ways in which groups are recognized. The speech made in Parliament by Thabo Mbeki, then Deputy President, on the adoption of the new Constitution in May 1996, is emblematic in this regard. Although widely hailed as signaling the multicultural nature of South African society, a closer reading suggests that the speech reflects considerable ambiguity about who is to be included in the phrase “the people”. Ivon Chipkin argues that Mbeki moves between two registers: those who

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Stryker and Serpe 1982.

⁶⁵ Suspected non-nationals are asked the Zulu word for ‘elbow’. If they do not know this word, it is assumed that they are not South African. Pumla Dineo Gqola notes that this is a particularly obscure word that many South Africans who speak Zulu may not know (Gqola P.D “Brutal Inheritances: Echoes, Negrophobia and masculinist violence”. In Hassim et al *Go Home or Die Here: Violence, xenophobia and the reinvention of difference in South Africa* 2008:214; Johannesburg, Wits University Press).

⁶⁶ See Hassim et al *op cit.*

perpetrated apartheid and those who survived it.⁶⁷ Mbeki subtly distinguishes between South Africans and Africans among the latter group. In this narrative, the aspirational identity in a free South Africa is to be African.⁶⁸ The mark of authenticity, Chipkin shows, is the struggle against racism.⁶⁹ Citizenship has to be earned; moreover, significant parts of the population can only gain recognition if they absolve themselves (it is unclear how) of their complicity in apartheid.⁷⁰ This formulation parallels Mbeki's view that South Africa is a country of two nations, one rich and one poor; the implication that rich meant white and poor meant black was not missed on popular commentators.⁷¹ The emphasis in this speech is on the ways in which South Africans are divided rather than the values which may unite them.⁷²



The policies of affirmative action have the perverse consequence that citizens must continue to mark themselves as parts of groups in a hierarchy of privileges. The assertion of many other identities such as Indians, whites, blacks and not least male or female – has ironically become more marked, more possible, and more public than in the apartheid era when difference was actively promoted by the state. These expressions may suggest a flowering of diversity; at times, however, they are invoked in ways that balkanize citizens into closed-off groups that exist in a hierarchy of claims to authenticity. The reality behind this is that African non-nationals arrive in a South Africa that is so clearly divided along various lines and such divisions tend to affect them. They then tend to be vilified as outsiders, adding to the xenophobic and racist tendencies that exist in the country.⁷³

⁶⁷ Chipkin I *'Do South Africans Exist? Nationalism, democracy and the identity of "The People" 2007* 100 Johannesburg: Wits University.

⁶⁸ Chipkin *Ibid.*

⁶⁹ *Ibid.*

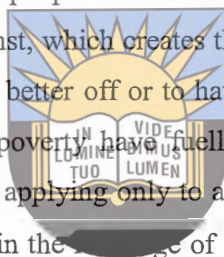
⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Hassim states that mistrust and fear between different races in South Africa does have deep and legitimate roots. Colonial conquest and apartheid institutionalized white disgust for African traditions and customs in the education system and in everyday interactions between whites and other subordinate and racialized groups. The creation of a "group areas" framework for containing movement of South Africans and constraining their residence within legally demarcated boundaries began with an attempt to separate Indians from whites; this was done by stigmatizing Indians as unsanitary and smelly. In relation to indigenous Africans, white settlers systematically sought to root out "unchristian" practices while paradoxically legalizing debased interpretations of customary law and chiefly rule in collaborative institutions in rural areas. Not surprisingly, in contemporary political debate, it is difficult to conduct

There are powerful arguments for thinking about the exclusions from the public sphere as constituted by long-standing material deprivation; Mbeki's "two nations" image captured the reality of deep socio-economic inequalities that were not resolved by political liberalization.⁷⁴ In expanding the social grants system over the past 10 years the democratic state has massively expanded the public sphere in a demonstrable commitment to end poverty as well as to build solidarity. Nevertheless, inequalities have deepened; at 0.73, South Africa's Gini coefficient is amongst the highest in the world.⁷⁵ As Gelb points out, "it is surely not simple that people are poor which leads them to attack other poor people but instead the sense of unfairness engendered by inequality, of being discriminated against, which creates the resentment and hostility towards those perceived, rightly or wrongly, to be better off or to have received preferential treatment". The continued exclusions generated by poverty have fuelled new assertions of identity that interpret the values of the Constitution as applying only to a narrowly defined band of citizens. These assertions are discursively created in the language of authenticity and autochthony rather than the openness and inclusiveness of the Freedom Charter.



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In the xenophobic violence of May 2008, defenders of attacks on supposed non-nationals asserted the privilege of natural rights of those who are "authentically" South African.⁷⁶ Their criteria for access to the rights of the Constitution were recast as those of blood and belonging. In authorizing citizenship as the criterion for access to shelter, the state itself shrinks the entitlements to public resources, now available primarily to those who are constituted by its policies as citizens, limiting the socio-economic rights promised by the Constitution. While the xenophobic attacks seemed to take the middle class by surprise, in everyday interactions in a range of spaces, the boundaries of communities and the criteria for authenticity may be carefully policed.

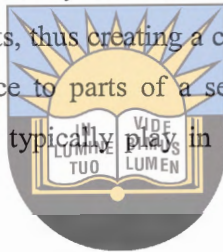
debates about culture across race; participation in these debates, particularly by feminists, is fraught with accusations of cultural imperialism.

⁷⁴ See Gelb S *Behind xenophobia in South Africa-poverty or inequality?* In Hassim et al, "Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa" 2008 Johannesburg: Wits University Press.

⁷⁵ See Gelb S 2008 79-80.

⁷⁶ Hassim et al. 2008.

The language of 'identity' is ubiquitous in contemporary social science, cutting across psychoanalysis, psychology, political science, sociology and history. The common usage of the word identity, however, belies the considerable variability in both its conceptual meaning and its theoretical role. Even when consideration is restricted to sociology and social psychology, variation is still considerable. Three distinct usages exist. Some use identity to refer essentially to the culture of a people; indeed they draw no distinction between identity and; for example, ethnicity. Thus they obscure the theoretical purpose of its introduction. Others use identity to refer to common identification with a collectivity or social category as in social identity theory or in contemporary work or social movements, thus creating a common culture among participants. Finally, some use the term with reference to parts of a self composed set of meanings that persons attach to the multiple roles they typically play in highly differentiated contemporary societies.⁷⁷



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2.5 Social identification and group identification *Together in Excellence*

Social identification appears to be derived from the venerable concept of group identification.⁷⁸ Indeed, social and group identification may be used interchangeably. The literature on group identification suggests four principles that are relevant to this discussion. Firstly, identification is viewed as a perpetual cognitive construct that is not necessarily associated with any specific behaviours or affected states. To identify, an individual need not expend efforts toward the group's goals; rather, an individual need only perceive him or herself as psychologically intertwined with the fate of the group. Behaviour is viewed only as a potential antecedent or consequence.⁷⁹ Secondly, social or group identification is seen as personally experiencing the successes and failures of the group. Often, identification is maintained in situations involving great loss or suffering,⁸⁰ missed potential benefits, task failure⁸¹ and even expected failure.

⁷⁷ See Stryker S "The Past, Present and Future of an Identity Theory" 2000 (63) 284 Indiana University.

⁷⁸ Tolman 1943

⁷⁹ Foote 1951.

⁸⁰ Brown 1986.

Thirdly, although not clear in the literature, social identification is distinguishable from internalization. Whereas identification refers to self in terms of social categories (I am), internalization refers to the incorporation of values, attitudes, and so forth within the self as guiding principles (I believe). Although certain values and attitudes are typically associated with members of a given social category, acceptance of the category does not necessarily mean acceptance of those values and attitudes. An individual may define herself in terms of the organization she works for, yet she can disagree with the prevailing values, strategies, and system of authority, and so on. Finally, identification with a group is similar to identification with a person (for example, one's father), a reciprocal role relationship (for example husband-wife, doctor-patient) in as much as one partly defines oneself in terms of a social referent.



Symbolic racist theories assume that racism and xenophobia are guided by assumptions of what minority ethnic groups deserve and how they should act.⁸² Group threat theory, on the other hand, assumes that conflicts and negative attitudes emerge because groups are competing for new opportunities.⁸³ Disregarding the difference between the two sets of theories, they both assume that racist attitudes explain opposition towards policies regarding ethnicity, e.g. affirmative action. Sawires and Peacock⁸⁴ show that (symbolic) racism is one explanation for why people in California voted to abolish the affirmative action legislation. It is problematic to draw the line between those who should be deprived of certain democratic rights in order to prevent such rights being used to spread derogatory attitudes or to diminish individuals' possibilities due to their group affiliation, which means that one must ask whether such deprivation of rights for other groups also relates negatively to xenophobia.

⁸¹ Turner 1981.

⁸² See Kinder, D. R. and Sanders, L. *'Divided by Color: Racial Politics and Democratic Ideals'* 1996, Chicago, IL: University of Chicago Press.

⁸³ See Sidanius, J. and Pratto, F. *'The Inevitability of Oppression and the Dynamics of Social Dominance'* (1993) 173-221, Stanford University Press.

⁸⁴ See Sawires J. N and Peacock M. J "Symbolic Racism and Voting Behaviour on Proposition" 2009.

2.6 Explaining xenophobia

The dictionary defines the term “xenophobia” as a “hatred or fear of foreigners or strangers or of politics or culture”.⁸⁵ More commonly, the term is used to denote a “dislike of foreigners”. However, Kollapen⁸⁶ warns that in South Africa, xenophobia is not just an attitude of dislike but is rather accompanied by violence. Despite the Constitution’s attempt to thoughtfully mediate the terrain between unity and cultural particularity, in everyday politics these anxieties are unresolved and are frequently expressed in new forms of group closure.

2.6.1 *The origins of xenophobia*

Various explanations of xenophobia can be found in literature. Most locate the phenomenon as something new to South Africa, a practice linked to the process of transition. For the purposes of this discussion, these explanations have been grouped into three hypotheses, namely, ‘the scapegoating hypothesis’, ‘the isolation hypothesis’, and ‘the bio-cultural hypothesis’. Each is outlined below.



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2.6.2 *The scapegoating hypothesis*

The scapegoating hypothesis locates xenophobia within the context of social transition and change. Hostility towards non-nationals is explained in relation to limited resources, such as housing, education, health care and employment, coupled with high expectations during transition.⁸⁷ Tshitereke⁸⁸ suggests that in the post Apartheid epoch, while people’s expectations have been heightened, a realization that delivery is not immediate has meant that discontent and indignation are at their peak. People are more conscious of their deprivation than ever before. This is the ideal situation for a phenomenon like xenophobia to take root and flourish.⁸⁹ This hypothesis suggests that South Africa’s political transition to democracy has highlighted the

⁸⁵ See *Collins English Dictionary* (1991) 1775.

⁸⁶ See Kollapen (1999).

⁸⁷ Morris (1998) *op cit.*

⁸⁸ See Tshitereke *op cit.*

⁸⁹ See Harris B “*A Foreign Experience: Violence, Crime and Xenophobia during South Africa’s Transition*” (2001).

unequal distribution of resources and wealth in the country. In this context, Tshitereke⁹⁰ notes, people often have a sense of relative deprivation, frustration and anger. Relative deprivation theory suggests that a key psychological factor in generating social unrest is a sense of relative deprivation.⁹¹ This arises from a subjective feeling of discontent based on the belief that one is getting less than one feels entitled to. When there is a gap between aspirations and reality, social discontent is likely to result.⁹² Tshitereke explains that people often create a ‘frustration scapegoat’, usually non-national minorities, against whom they may direct their anger in a violent form. Similarly, Morris comments that, ‘research and historical events have indicated that if a majority group is in a perilous economic position it is more likely to feel threatened by minorities, especially if they are foreign.’⁹³



The scapegoating hypothesis of xenophobia explains that the “foreigner” represents a scapegoat, someone to blame for social ills and personal frustrations.⁹⁴ However, the hypothesis does not clarify why the “foreigner” and not another social group or individual, comes to signify unemployment, poverty and deprivation. It does not explain why nationality is the determining feature of such scapegoating. In contrast, the isolation hypothesis of xenophobia situates foreignness at the heart of hostility towards foreigners.⁹⁵

2.6.3 The isolation hypothesis

The isolation hypothesis understands xenophobia as a consequence of South Africa’s history of seclusion from the international community. Morris argues that apartheid insulated South African citizens from nationalities beyond Southern Africa. In this hypothesis, non-nationals represent the unknown to South Africans. With the political transition, however, South Africa’s borders have opened up and the country has become integrated into the international community. This has brought South Africans into direct contact with the unknown; with non-nationals. According to the isolation hypothesis, the interface between previously isolated South Africans

⁹⁰ See Tshitereke (1999).
⁹¹ *Ibid.*
⁹² See De Rey (1991) 41.
⁹³ Morris 1125.
⁹⁴ See Harris *op cit.*
⁹⁵ Harris B (2001).

and unknown non-nationals creates a space for hostility to develop. When a group has no history of incorporating strangers it may find it difficult to be welcoming.⁹⁶ Perhaps the words of Victoria Maloka would best explain this hypothesis:

one of the reasons I attribute it to [xenophobia] is that in South Africa we are not exposed as we should, we are still very much isolated, take for example your counterpart in the Congo, you find the person is so well-travelled, the uncle or mother lived there or another part of Europe, as for us, because of apartheid, we were painfully isolated because of the system of government that we had, we are still so much into ourselves such that we do not see the value in what is happening in other parts of the continent.⁹⁷



The isolation hypothesis suggests that suspicion and hostility towards strangers in South Africa exists due to international isolation. The hypothesis also explains contemporary xenophobia by recourse to internal isolation, isolation between South Africans, as a consequence of apartheid. There is little doubt that the brutal environment created by apartheid with its enormous emphasis on boundary maintenance has also impacted on people's ability to be "tolerant" of difference.⁹⁸ As a result of the creation of strict boundaries between South African citizens, as well as between the country and other nations, South Africans in this argument are unable to accommodate, and indeed, be hospitable to difference.⁹⁹ According to the theory of isolation, South Africans find difference threatening and dangerous.¹⁰⁰ In this understanding, xenophobia exists because of the very foreignness of non-nationals. It exists because non-nationals are different and unknown.

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2.6.4 *The bio-cultural hypothesis*

The isolation and scapegoating hypotheses of xenophobia provide a general explanation for the phenomenon. In both theories, however, the 'foreigner' is treated as a homogenous category;

⁹⁶ See Morris (1998).

⁹⁷ Interview with Victoria Maloka (Human Rights Education and Awareness) South African Human Rights Commission Head Quarters, January 2010.

⁹⁸ Morris (1998).

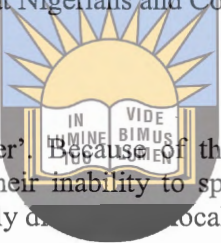
⁹⁹ *Ibid.*

¹⁰⁰ Morris (1998).

there is no scope for differentiation between various types of non-nationals. As the literature indicates, xenophobia in South Africa is not applied equally to all non-nationals. African non-nationals seem to be particularly vulnerable to violence and hostility.¹⁰¹ The bio-cultural hypothesis of xenophobia offers an explanation for the asymmetrical targeting of African non-nationals by South Africans.

The bio-cultural hypothesis locates xenophobia at the level of visible difference, or otherness. That is, in terms of physical biological factors and cultural differences exhibited by African non-nationals. For example, Morris suggests that Nigerians and Congolese:

are easily identifiable as the 'other'. Because of their physical features, their bearing, their clothing style and their inability to speak one of the indigenous languages, they are in general clearly different from local residents and are easily able to pick them out and scapegoat them.



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In this hypothesis, the biological-cultural features of hairstyles, accents, vaccination marks, dress and physical appearance signify difference and point out foreignness in a way that is immediately visible. These features do seem to play a common role in prompting xenophobic actions. For example, a report by the South African Human Rights Commission on the arrest and detention of persons in terms of the former Aliens Control Act observes that “at least ten percent” of the subjects interviewed in the study were apprehended “on the basis of appearance, with nothing more”.

2.6.5 *The rise of xenophobia: A glimpse into the past*

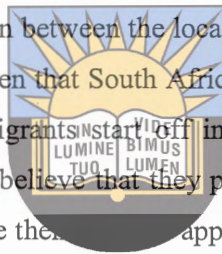
Xenophobia is rife in the townships, where migrants are referred to as *makwerekwere* (a disparaging word for African immigrant). It has been argued that xenophobia thrives where

¹⁰¹ Human Rights Commission (1999).

economic deprivation and hardships are acute. There is also the view that migrants are seen as tempting “scapegoats” for the country’s ills:

With a black government in power and apartheid gone, many black South Africans have realized that they can no longer blame the system. Most are turning on the most visible scapegoat – immigrants. The new government would do well on its promise of a better life for all before discontented South Africans turn on foreigners and blame them for the country’s ills.

An area of direct conflict and confrontation between the locals and non-nationals has been in the informal sector, particularly hawking. Given that South Africa has a high unemployment rate, in addition to their tenuous status, most migrants start off in the informal sector, often selling similar goods as locals. Foreign hawkers believe that they played a key role in developing this sector, and locals were now trying to force them to appropriate the fruits of their labour. A successful Nigerian national (trader) described the situation as follows:



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At first, we were very poor, but then people noticed that we were making money. We were progressing and having cars and such things. The local people started using our techniques, and many people wanted to become traders. We developed this thing, and now the local people want to kick us out. They say that the influx of foreigners is taking their jobs, but we taught them how to do business.¹⁰²

Maharaj B¹⁰³ argues that perception of the failure of the state to stem what he terms “a tide” of migrants has led to the development of organizations such as Micro Business Against Crime and Illegal Foreigners Action Group which have advocated a boycott of foreign street traders as well as firms employing migrants. More disturbingly, an organization called the Unemployed People of South Africa once threatened to take the law into its own hands and physically remove

¹⁰² Human Rights Watch (1998) 2.

¹⁰³ See Maharaj B 'Economic Refugees in post-apartheid South Africa – Assets or liabilities? Implications for progressive migration policies' (2001) 51, Netherlands: Kluwer Academic Publishers.

migrants from South Africa if the government fails to deport them.¹⁰⁴ Since 1994 the African Chamber of Hawkers and Independent Businessmen (ACHIB) has vociferously campaigned for the exclusion of migrant hawkers, and arranged a number of meetings and marches to rouse anti-foreigner sentiment. In the townships of Alexandra, attempts were made by groups of South Africans to evict foreigners who were blamed for increased crime, sexual attacks, economic deprivation, unemployment, and other social ills.¹⁰⁵

Many of these marches turned violent and foreign hawkers were assaulted, and received little or no protection from the police. In Johannesburg and Durban foreign hawkers complained that local authorities tried to exclude them from applying for trader licenses. The situation was aggravated when the Deputy Minister of Home Affairs, Ms. Lindiwe Sisulu, contended that the migrants were trading illegally and that South Africans should receive preference in the allocation of hawking licenses.



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South Africa's immigration policy is premised upon the notion that no immigrant should be employed at the detriment of a South African citizen... As the Department of Home Affairs does not issue immigration or work permits to foreigners permitting them to become informal traders, those foreigners with immigration or work permits issued to them for employment other than hawking have, in fact, illegally entered the hawking business.¹⁰⁶ The response of trade unions to the 'influx' of migrants was ambivalent. In early September 1994 the Congress of South African Trade Unions (COSATU) threatened to hold a one day general strike in Pietermaritzburg over undocumented migrants. Local COSATU Chairperson, Pat Bhengu, stated that the Union would not allow local workers to remain unemployed while "illegal foreigners" took over their jobs. He maintained that employers preferred "aliens" because they were vulnerable, had no rights, could not belong to trade unions, worked longer hours, were not entitled to leave, and could not demand a living wage.

¹⁰⁴ Human Rights Watch 1998 3.

¹⁰⁵ Human Rights (1998) 5.

¹⁰⁶ See Human Rights Watch 1998 4.

Nationally, in spite of the increasing xenophobia and attacks on non-nationals, COSATU argued that no amount of electric fences could prevent people from feeling poverty and starvation, and called for a regional economic development strategy.¹⁰⁷ COSATU argued for severe penalties to be imposed on employers who exploit migrants, and called upon civic organizations to assist their integration into the residential communities in which they lived. It also called for an amnesty which would allow the migrants to regularize their lives, and supported voluntary repatriation.¹⁰⁸

2.7 Conclusion



While the bio-cultural hypothesis explains that xenophobia operates through the level of physical and cultural appearance, it does not explain why certain biological and cultural features come to take on xenophobic significance. Why black Africans are predominantly targeted as victims of xenophobia when their white counterparts also have accents? The most obvious response to this question is racial discrimination. This is a response that seems to be missing from the hypotheses outlined above. Racial discrimination, which in the post-apartheid context, manifests through a variety of both subtle and overt layers of discrimination, appears to play a key role in xenophobic discourse and practice. One way to understand why African hairstyles, accents and vaccination marks take on xenophobic significance is to consider how African non-nationals are represented in society. The generalizations and stereotypes that are commonly voiced regarding Africa and African immigrants offer insight into the hostility that meets this group.

¹⁰⁷ Weekly Mail and Guardian, 28/4/95

¹⁰⁸ Weekly Mail and Guardian, 28/4 95

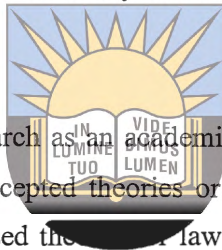
CHAPTER 3

RESEARCH DESIGN

3.1 Introduction

The previous chapter was an analysis of the socio-economic framework of xenophobia in South Africa. It began by explaining the need to analyze xenophobia, not only from a legal perspective, but from a socio-economic perspective as well. Chapter 2 further explored the principle of globalization and the effects of migration in South Africa, especially on the interaction of people from different backgrounds, religions, ways of life and even physical or genetic make ups. A number of theories that seek to explain the existence of xenophobia, racism, racial discrimination and other forms of intolerances in South Africa were also analyzed. The theories were analyzed with an aim to provide answers as to why xenophobia expresses itself in such violent ways in South Africa. Regard was given to social identity theories, violence theories and the scapegoating hypothesis. The theories explain xenophobia as a direct result of how people identify with themselves; in this case, South Africans specifically. Moreover, they prove that people react violently to “others”, who may look different, speak different languages, speak in different accents and even live differently. The “othering” becomes a source of conflict, such as has been experienced during the xenophobic attacks. Furthermore, the “isolation” hypothesis views xenophobia as a direct result of apartheid, where South Africans were grouped into specific areas, with people speaking the same languages. Moreover, apartheid caused South Africa to be isolated from the rest of the continent, making interaction between South Africans and other African countries minimal. The scapegoating hypothesis was also explored; according to which, South Africans are violent towards non-nationals because of poverty. The vulnerable non-nationals are used as “scapegoats” for some South Africans to express their discontent with government. Notably, xenophobia is indeed a complex phenomenon, and needs different approaches to deal with it.

Chapter 1 covered the research problem and the nature of the stated research questions call for a research design that is mixed, innovative and coherent. Xenophobia, as a world-wide phenomenon that is inscribed in the social psychology of communities across the globe, directs us to research that can both capture the legal regime and its shortcomings, as well as the social practices and institutions that need to function in support of the legal framework. Ideally, a full-blown interdisciplinary or transdisciplinary research paradigm would have been most suitable. However, given the constraints of the research process and the focus that needs to be accomplished, this study merges law and social theory into a socio-legal analysis of xenophobia.



As a starting point, this study views research as an academic enquiry aimed at the observation and interpretation of facts, revision of accepted theories or laws in the light of new facts, or practical application of such new or revised theories or laws.¹⁰⁹ Methodology is the system of methods followed by a particular discipline. It refers to the manner in which information is gathered for the purposes of obtaining answers to research questions. The different techniques of research (for instance, interviews, surveys and observations) allow us to understand different phenomena and for different reasons.¹¹⁰ The methodology chosen for any research depends on what one is trying to do rather than a commitment to a particular paradigm.¹¹¹ Consequently, the methodology employed must match the particular phenomena under investigation. Different phenomena may require the use of different methodologies. Falconer and Mackay postulate that by focusing on the phenomena under examination rather than the methodology, researchers can select appropriate methodologies for their enquiries.¹¹² In view of the above, one can state that if a researcher is to achieve the desired results and answers, it is of significance to choose an effective research methodology.

¹⁰⁹ See Merriam-Webster Collegiate Dictionary, Tenth Edition.

¹¹⁰ Deetz S “*Describing Differences in Approaches to Organization Science: Rethinking Burrell and Morgan and their legacy.*” *Organization Science*, 7, 1996 191-207. Cited in Krauss SE “*Research Paradigms and Meaning Making: A Primer*” *The Qualitative Report* Volume 10 Nurebm758-770; 761 at <http://www.nova.edu/ssss/QR/QR10-4/krauss.pdf> (accessed 1 August 2010).

¹¹¹ Cavaye ALM “*Case Study Research: A Multi-Faceted Research Approach for IS*” *Information Systems Journal*, 6, 1996 227-242. Cited Kraus (20 above at 761).

¹¹² See Falconer DJ & Mackay DR “*Ontological Problems of Pluralist Research Methodologies*” (1999) at http://aisel.isworld.org/Article.asp?Subject_ID=31&Publication_ID=2. (Accessed 31 July 2010).

This chapter develops the research design and methodology inclusive of data gathering techniques and analyses. As a socio-legal analysis, a literature review will be central to the research process coupled with additional qualitative research methods.

3.2 Research design

In general terms, research paradigms or research orientations are classified as positivistic, interpretive-hermeneutical, critical or post-structuralist-postmodernist. Although these classifications seem to have lost their usefulness in modern research, this study can be described as critical-interpretive and its design is more or less aligned to such description. Mouton defines research design as the way in which the research is conceived and executed, and how findings are eventually put together.¹¹³ He suggests that there are categories of design to which certain enquiries belong. He argues that



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Research designs are tailored to address different kinds of questions. When we attempt to classify different types of studies, different design types, it is not surprising that we do so according to the type of questions they are able to answer.¹¹⁴

According to Strauss and Cobin,¹¹⁵ the research design is the plan for the study, providing the overall framework for collecting data; outlines the detailed steps in the study and provides guidelines for systematic data gathering. They further state that a research design is “similar to

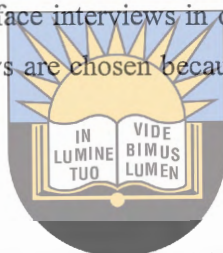
¹¹³ See Mouton J “*How to Succeed in your Masters's and Doctoral Studies: A South African Guide and Resource Book*” 2000 57 (Pretoria).

¹¹⁴ *Ibid.*

¹¹⁵ Strauss S and Cobin RG “Basic Qualitative Research: Techniques and Procedures for Developing Grounded Theory 1990 600 (Thousand Oaks: SAGE) Cited in Golafshani N “Understanding Reliability and Validity in Qualitative Research’ The Qualitative Report Volume 8 Number 4 December at <http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf>> (accessed 30 July 2010).

an architectural “blueprint” which plans on organizing and integrating the results in a particular end product.” Research design provides the glue that holds the research project together.¹¹⁶

The research design is therefore a testimony of how the researcher has conducted his or her research and how he or she has arrived at the conclusions. This research attempts to study the extent of xenophobia in South Africa and how and why it manifests itself. This goal can best be achieved by an in-depth explanation of the xenophobia phenomenon and its various manifestations. Therefore, this study is interpretive and combines an in-depth literature review and analysis with comprehensive face-to-face interviews in order to explore the understandings of the research participants. The interviews are chosen because they offer firsthand information on the experiences of the participants.



Merging the literature and document review with empirical data-collection of a qualitative nature, the study wants to “gain insights through discovering meanings [and exploring] the richness, depth, and complexity of phenomena.”¹¹⁷ The research is also analytical because it provides a critical and reflexive analysis of various kinds of textual and other data. As a socio-legal analysis, in this study the legal research method is teamed with social theoretical perspectives with respect to an analysis of primary sources of law, its application, information about legal matters and reviewing non-legal sources as well as qualitative data associated with the research topic under discussion. Given the interpretive¹¹⁸ and hermeneutical nature of legal research and the endeavour of law in general, it joins well with social research into a scheme that is generally referred to as a socio-legal analysis. Xenophobia is literally a function of human action and behaviour that needs to be critically interpreted whilst the experiences of victims of xenophobia are experiences of human beings that, in turn, need to be regarded as authentic and real. Further, the legal regime with regard to xenophobia is a social construct with intricate

¹¹⁶ *Ibid.*

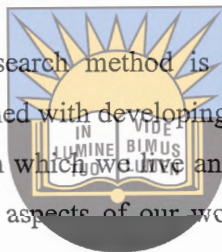
¹¹⁷ See Straus AL, Corbin J ‘*Basics of qualitative research: Grounded theory procedures and techniques*’ 1990, Sage Publications, London.

¹¹⁸ See Dworkin R “*In Praise of Theory*” 1997 at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/arzjl29&div=22&id=&page=> (Accessed 2 September 2010).

meanings and interpretations whilst the studies on xenophobia also focus on interpreting the phenomenon from various angles. “Interpretation” is thus central and researchers “working in this tradition” assume that people’s subjective experiences are real and should be taken seriously (ontology), that we can understand others’ experiences by interacting with them and listening to what they tell us (epistemology), and that qualitative research techniques are best suited to this task (methodology).¹¹⁹

3.2.1 Qualitative research

As mentioned above, the qualitative research method is used in this study. According to Hancock,¹²⁰ qualitative research is concerned with developing explanations of social phenomena; it aims to help us understand the world in which we live and why things are the way they are. More so, it is concerned with the social aspects of our world and seeks to answer questions about:



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- Why people behave the way they do;¹²¹
- How opinions and attitudes are formed;¹²²
- How people are affected by the events that go on around them;¹²³
- How and why cultures have developed in the way they have; and
- The differences between social groups.¹²⁴

Qualitative research is concerned with finding the answers to questions which begin with: why? How? In what way?¹²⁵ Additionally, it seeks to understand a given research problem or topic

¹¹⁹ Terre Blanch M and Durrheim K “*Research in Practice: Applied Methods for the Social Sciences*” 1999 123, Cape Town: UCT Press at psychology.ukzn.ac.za/KevinDurrheim14781.aspx – 9. (Accessed 2 September 2010)

¹²⁰ Hancock B “*An Introduction to Qualitative Research*” 2002 2 (Trent Focus Group.) at http://faculty.uccb.ns.ca/pmacintyre/course_pages/MBA603_FILES/IntroQualitativeResearch.pdf (accessed 31 July 2010).

¹²¹ *Ibid.*

¹²² *Ibid.*

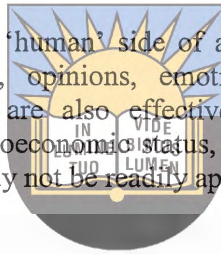
¹²³ *Ibid.*

¹²⁴ *Ibid.*

from the perspective of the local population it involves.¹²⁶ Given that this study seeks to obtain information on the causes, manifestations and consequences of xenophobia in South Africa, the qualitative research method which is an effective tool in “obtaining information about behaviours was chosen”.¹²⁷

Mark *et al* hypothesize that the strength of qualitative research is its ‘ability to provide complex textual descriptions of how people experience a given research issue. They further argue that:

It provides information about the ‘human’ side of an issue – that is, the often contradictory behaviours, beliefs, opinions, emotions, and relationships of individuals. Qualitative methods are also effective in identifying intangible factors, such as social norms, socioeconomic status, gender roles, ethnicity, and religion, whose role in the issue may not be readily apparent.¹²⁸



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The literature review, from a legal research perspective, is central to the research methodology. McMillan and Schumacher describe the literature review as a “critique of the status of knowledge of a carefully defined topic” and as a “narrative interpretive criticism of existing literature”.¹²⁹ In consonance with the centrality of “interpretation” in researching social phenomena, Harcourt¹³⁰ argues that legal research and scholarship has also taken an interpretive turn.

Across a range of theoretic approaches, contemporary legal scholarship has taken an interpretive turn. Legal research focuses increasingly on the social meaning of practices, institutions, and behavior as a way to more fully understand the role of law

¹²⁵ Hancock B (n 26 above).

¹²⁶ See Mack N et al ‘*Qualitative Research Methods: A Data Collector’s Field Guide Family Health International*’ 1. Available at <http://www.fhi.org/NR/rdonlyres/etl7vogszehu5s4stpzb3tyqlpp7rojv4waq37elpbyei3tgmc4ty6dunbccfzxtaj2rvbaubz4/overview1.pdf>. (Accessed 30 August 2010.)

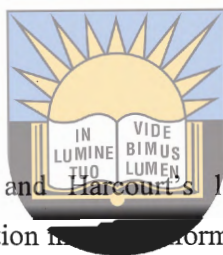
¹²⁷ *Ibid.*

¹²⁸ See Mark et al *op cit* note 49.

¹²⁹ See McMillan and Schumaker ‘*Research in Education: A conceptual Introduction*, 1997 119 Longman Publishers, New York.

¹³⁰ See Harcourt B. E ‘*Measured Interpretation: Introducing the Method of Correspondence Analysis to Legal Analysis*’ 2002 980, University of Illinois Law Reviews.

in society and to evaluate and discuss public policy. The law and society movement was a precursor in this regard, drawing inspiration from the interpretive turn in sociology. Critical legal study was heavily influenced by linguistic structuralism—especially Claude Lévi-Strauss and Jean Piaget—and similarly took the linguistic turn early on. More recently, the law and economics movement has experienced a similar shift—as evidenced by the social norm movement—due in part to the resurgence of interest in expressive theories of law and to a certain disenchantment with strict behaviorism. These developments in legal scholarship reflect the larger linguistic turn in the social sciences and humanities, influenced by the work of Clifford Geertz and Claude Lévi-Strauss in anthropology, Herbert Blumer and Pierre Bourdieu in sociology, Charles Taylor and Richard Rorty in political theory, and many others... While the interpretive turn in the social sciences and law may well date back several decades, the effort to more rigorously measure social meaning is in its relative infancy.



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Merging McMillan and Schumacher’s and Harcourt’s logic, interpretation is central to qualitative research whilst such interpretation must be informed by a thorough literature review, both in social and legal research. Thus the literature review is a central aspect of legal research and is guided by the principles of interpretive analysis. Within the context of a socio-legal analysis, the legal research is integrated with other forms of data gathering that extend the focus of the research to the social, political and cultural aspects of the phenomenon under discussion.

3.2.2 Socio-legal analysis

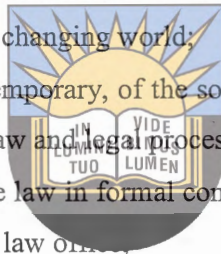
McMillan and Schumacher¹³¹ classify legal research as “analytical” research. The textual data relating to human instruments, laws and jurisprudence, has been augmented by periodicals, yearbooks, reports, etc. of a legal, political, sociological and psycho-social nature. Descriptive, conceptual, interpretive and comparative analyses have also been employed. This integration gives rise to the socio-legal approach of this study.

¹³¹ 1997 463.

Socio-legal research and scholarship has its theoretical and methodological base in the social sciences.¹³² It seeks to understand law as a social phenomenon. Furthermore, it is distinguished from other traditions of legal scholarship and research, such as the “black letter”¹³³ tradition of legal exegesis. The socio-legal research methodology is therefore predominantly empirical and socio-theoretical rather than doctrinal.

In addition, “socio-legal research” encompasses:

- Theoretical and empirical analyses of the nature of law and its relationship to society and the State in the context of a rapidly changing world;
- Analyses, both historical and contemporary, of the social, economic and political factors leading to the development of the law and legal process;
- Examination of the operation of the law in formal contexts; for example, the courts, or in informal contexts, for example, the law of tort;
- Analyses of the process of law enforcement by those responsible for the administration of the law; and
- Analyses of the experience of those affected by the process of law.¹³⁴



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More so, socio-legal scholars undertake library based theoretical work, empirical work which leads to the development of grounded theory, as well as more policy orientated studies which feed directly into the policy making process. What binds the socio-legal community is an approach to the study of legal phenomena which is multi or inter-disciplinary in nature. Our theoretical perspectives and methodologies are informed by research undertaken in many other disciplines. Traditionally socio-legal scholars have bridged the divide between law and

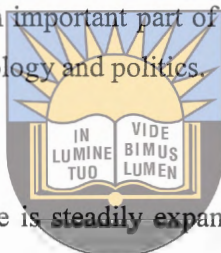
¹³² See Socio-legal Research Centre at: <http://www.griffith.edu.au/law/socio-legal-research-centre> (Accessed 2 September 2010).

¹³³ So-called ‘black-letter’ lawyers stick pretty close to the primary source materials, to the Constitution (where legal systems have one), to legislation (statutes, statutory instruments, and so on) and to the leading case decisions (the precedents). See Brownsword R “*An Introduction to Legal Research*”.

¹³⁴ See Socio-legal Research Centre at <http://www.griffith.edu.au/law/socio-legal-research-centre> (Accessed 2 September 2010).

sociology, social policy, and economics. But there is increasing interest in law and disciplines within the field of humanities.

Similarly, the work of socio-legal scholars covers a vast range of different subject areas and methods. It generally goes beyond what is loosely framed as “law in context” work. Those working within the socio-legal tradition draw from traditions as diverse as the sociology of law, cultural studies of law, studies of law in action, contextual legal studies, law and politics and studies of governance. Furthermore, socio-legal scholarship has both academic and policy relevance. Certainly, law has long been an important part of theories about order and change in society; in philosophy, sociology, anthropology and politics.



Furthermore, at a time when law’s empire is steadily expanding, there is a major crisis in the capacity of socio-legal studies to produce high quality rigorous qualitative and quantitative research in all aspects of the law. More so, Hillyard¹³⁵ suggests that developing a research capacity in empirical socio-legal research is not going to be easy. As an illustration, in 2004 the Nuffield Foundation funded an enquiry to investigate the issue.¹³⁶ The final report of the Inquiry and its recommendations were published in November 2006.¹³⁷ Moreover, the report begins by pointing out the key role that empirical socio-legal studies has played in civic, political, and academic life and ways it has informed a wide range of government and other bodies as to how the law works in practice.¹³⁸ It suggests that law has been invaluable in “revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens”.¹³⁹ In addition, the report anticipates that demand for this type of work is likely to expand as Parliament, government, businesses, and NGOs appreciate the importance of evidence-based research to inform the development of substantive law, the administration of justice, and the

¹³⁵ See Hillyard P “*Law’s Empire: Socio-legal Empirical Research in the Twenty-first Century*” 2007, *Journal of Law and Society*, Volume 34.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

practice of the law.¹⁴⁰ Again, the report recognizes the important role that socio-legal empirical work has played in the theoretical understanding of law as a social and political phenomenon.¹⁴¹

On the contrary, funders report on the lack of interest in tenders for socio-legal research.¹⁴² Furthermore, there appears to be a lack of interest in empirical legal research, in general, within the socio-legal community.¹⁴³ The Socio-Legal Studies Association, which now has about 400 members, produces a directory of members' interests, yet few record an interest in empirical legal research in their profiles. Moreover, the annual conferences of the Association, which provide perhaps the best barometer of the current state of scholarship in socio-legal studies, demonstrate a preponderance of purely theoretical and textual analysis rather than theoretically informed empirical legal research.¹⁴⁴



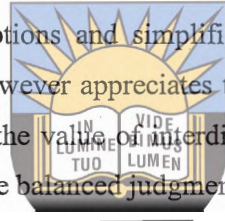
Finally, the challenge of embarking on socio-legal research can be best summarized in the extract below:

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The imperative of all law schools is to produce skilled doctrinal lawyers. The requirements of professional practice place very real constraints on the undergraduate curriculum and the type of staff who can be recruited. The report suggests that there is little or no room for research training courses similar to those in other social sciences and rarely are law graduates required to complete a dissertation. Even if they do one, it is unlikely to involve empirical research. There is, therefore, an absence of scholars who are competent to supervise empirical work and, in any event, law postgraduates, who have been taught little or nothing about empirical research, are naturally drawn to doctrinal work. Hence there is an “almost inevitable pattern of self replication”...within this culture, the dominant emphasis is on ‘doctrine and normative questions in legal scholarship’ and this has directed ‘the energy of many legal academics more towards shaping legal reasoning and rather less towards influencing policy and practice.’¹⁴⁵

140 *Ibid.*
141 *Ibid.*
142 *Ibid.*
143 *Ibid.*
144 *Ibid.*
145 *Ibid.*

The quotation above signifies the general difficulty that interdisciplinary, and thus, socio-legal researchers face. Moreover, the challenge can be the lack of knowledge and skills to fully understand the methodologies of other academic disciplines. Siems¹⁴⁶ suggests that a solution may be to collaborate with researchers from other disciplines.¹⁴⁷ However, Siems acknowledges the difficulty that; many legal academics are happy to identify themselves more with the legal profession than with their colleagues in other departments. The background of this attitude is that, traditionally, law is primarily regarded as a practical and not an academic subject.¹⁴⁸ Further, this can lead to a critical attitude towards the methods of other disciplines. In particular, legal academics may oppose the assumptions and simplifications that economists and other social scientists tend to make.¹⁴⁹ Siems however appreciates that interdisciplinary legal research has a number of advantages. For Siems, the value of interdisciplinary legal research lies in its ability to lead to a more informed and more balanced judgment.¹⁵⁰ Moreover, the legal researcher can gain a deeper understanding than someone only interested in the “law as such”.¹⁵¹ With these views in mind the author of this study embarked on basic interdisciplinary research and went on to collect data, as the following paragraphs illustrate.



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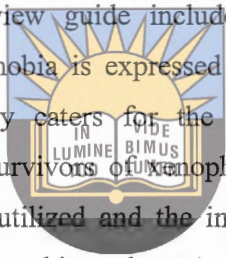
3.2.3 Data Collection

The three most common qualitative methods are participant observation, in-depth interviews, and focus groups.¹⁵² Each method is particularly suited for obtaining a specific type of data. This study makes use of in-depth face-to-face interviews. Consequently, the following section discusses what an in-depth interview is, in addition to its advantages and disadvantages as an instrument of collecting data.

¹⁴⁶ See Siems, Mathias M “The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert” 2009 5-17 *Journal of Commonwealth Law and Legal Education* 7 at : http://pdfserve.informaworld.com/236657_751313789_916761552.pdf (Accessed 1 December 2010).
¹⁴⁷ *Ibid.*
¹⁴⁸ *Ibid.*
¹⁴⁹ *Ibid.*
¹⁵⁰ *Ibid.*
¹⁵¹ *Ibid.*
¹⁵² Mack N *et al* (note 27 above at 2).

3.2.4 Instruments

The researcher employed in-depth face-to-face interviews to elicit information on the research study under investigation. An in-depth interview can be defined as “a technique designed to elicit a vivid picture of the participant’s perspective on the research topic.”¹⁵³ Moreover, an interview guide¹⁵⁴ was used to ensure that there was uniformity in the information from the research participants, and to avoid collecting irrelevant information. In addition, questions included in the interview guide were open-ended, clear and neutral to enable the research participants to easily formulate their responses. As a result, respondents spoke freely, without any interference from the interviewer. Furthermore, the interview guide included questions on the causes of xenophobia in South Africa, why xenophobia is expressed in violent ways in South Africa, whether the legal framework adequately caters for the rights of non-nationals and the experiences of participants in assisting survivors of xenophobia. To capture the information accurately, a digital voice recorder was utilized and the information was transcribed by the researcher. The interview guide is attached to this study as Appendix 1.



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Again, the use of an in-depth interview has a number of advantages over the use of a questionnaire. These include its ability to provide insights and understanding of the context in which behavior occurs and the broader structural determinants (for instance, power relations) of behavior; respondent determination of the salience of topics and themes; greater depth and detail of information; greater opportunity to share and understand the viewpoints of the respondents and how their beliefs and experiences and vocabulary relate to wider issues; and the possibility of discovering the unexpected, which is precluded in a highly structured approach.¹⁵⁵

¹⁵³ *Ibid.*

¹⁵⁴ See Hoepfl MC “*Choosing Qualitative Research: A Primer for Technology Education Researchers*” *Journal of Technology Education* Vol 9 No.1 1997 52 at <http://schoarr.lib.vt.edu/ejournals/JTE/v9n/pdf> (accessed 1 August 2010). Hoepfl defines an interview guide as a list of generated topics in the form of a checklist that the interview wants to explore during each interview.

¹⁵⁵ See Campbell D “*Degrees of Freedom and the Case Study*” *Comparative Political Studies*, 8, 178-185. Cited in Zaidah Z “*Case Study as a Research Method 2007*” at http://eprints.utm.my/8221/1/1/ZZainal2007_Case_study_as_a_Research.pdf (Accessed 30 July 2010).

Although the use of in-depth interviews is advantageous, it has its limitations. The major drawback of in-depth interviews is that they produce a large amount of information for each respondent and methods of recording and analysis are very time consuming.¹⁵⁶ Moreover, some validity studies have proved that when people are interviewed directly concerning behavior about which there is a strong expectation of social approval, and in which there is considerable ego-involvement, respondents tend to err in the direction of idealizing their behavior.¹⁵⁷ The discussion that follows is centred on the sampling method used in this research.

3.2.5 Purposive Sampling

A sample is a finite part of a statistical population whose properties are studied to gain information about the whole. When dealing with people, it can be defined as a set of respondents (people) selected from a larger population for the purpose of the survey. Moreover, sampling involves selecting individual units to measure from a larger population. Likewise, the population refers to the largest body of individuals being researched. In addition, a sample is representative when it allows the results of the sample to be generalized to the population. However, the process of sampling, even when done systematically, can introduce potentially critical bias into a research study.

The *purposive sampling* technique is a type of non-probability sampling that is most effective when one needs to study a certain cultural domain with knowledgeable experts within it.¹⁵⁸ Furthermore, purposive sampling may also be used with both qualitative and quantitative research techniques. The inherent bias of the method contributes to its efficiency, and the method stays robust even when tested against random probability sampling. In addition, choosing the purposive sample is fundamental to the quality of data gathered; thus, reliability and competence of the informant must be ensured. Simply put, the researcher decides what needs to be known

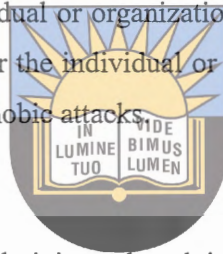
¹⁵⁶ *Ibid.*

¹⁵⁷ See Mc Cord J and Mc Cord W "Cultural Stereotypes and the Validity of Interviews for Research in Child Development" at: <http://www.jstor.org/stable/1126184>. (Accessed 2 December 2010).

¹⁵⁸ See Tongco D. C "Purposive Sampling As A Tool for Informant Selection" at: <http://www.erajournal.org/ojs/index.php/era/Article/viewFile/126/111> (Accessed 9 August 2010).

and sets out to find people who can and are willing to provide the information by virtue of knowledge or expertise.¹⁵⁹

On the same note, to enhance understandings of selected individuals or theories and concepts, this study employed purposive sampling. According to Wilmot, with a purposive non random sample, the number of people interviewed is less important than the criteria used to select them – the characteristics of individuals are used as the basis of selection. Accordingly, the participants in the present research project were purposefully selected to obtain rich data. As a result the criteria used included the role each individual or organization played in protecting the rights of non-nationals in South Africa and whether the individual or organization played any significant role during and after the May 2008 xenophobic attacks.



Open ended questionnaires were thus administered and interviews with the following role-players were conducted; thereafter the data was analysed.

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- Victoria Maloka (Coordinator of the Xenophobia Response Team at the South African Human Rights Commission [SAHRC]);
- Jody Kollapen (Chairperson of the SAHRC);
- Joyce Tlou (ex-employee of the refugee forum/expert on non-nationals at the SAHRC);
- Eddie Makue (Secretary General of the South African Council of Churches);
- Tamlyn Monson (Senior Researcher at SAHRC); and
- Kgamadi Kometsi (National Coordinator for Racism and Non-Discrimination – SAHRC).

3.2.6 Qualitative data analysis

Bogdan and Biklen¹⁶⁰ define qualitative data analysis as “working with data, organizing it, breaking it into manageable units, synthesizing it, searching for patterns, discovering what is important and what is to be learned, and deciding what you will tell others”. According to Strauss, qualitative data analysis involves a number of steps:

- Look at the document, such as field notes, and organize the data;
- Look for indicators of categories in events and behaviour – name them and code them on the document;
- Compare codes to find consistencies and differences;
- Consistencies between codes (similar meanings or pointing to a basic idea) reveal categories. So you need to categorize specific events; and
- Write the research report.



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Moreover, in order to generate findings that transform raw data into new knowledge, a qualitative researcher must engage in active and demanding analytical processes throughout all phases of the research.¹⁶¹ On that note, understanding these processes is therefore an important aspect not only in conducting qualitative research, but also of reading, understanding, and interpreting it.¹⁶²

¹⁶⁰ Bogdan R. C and Biklen S. K. *Qualitative Research for Education: An Introduction to Theories and Method* 4th Ed. 2003; New York: Pearson Education. Available at: <https://apps.lis.illinois.edu/wiki/download/.../Field+notes.pdf?version...>

¹⁶¹ See Thorne S “*Data Analysis in Qualitative Research*” at: <http://ebn.bmj.com>. (Accessed 2 December 2010).

¹⁶² *Ibid.*

2.2.6.1 Qualitative analytic reasoning processes

According to Thorne¹⁶³, what makes a study qualitative is that it usually relies on inductive reasoning processes to interpret and structure the meanings that can be derived from data. Moreover, distinguishing inductive from deductive inquiry processes is an important step in identifying what counts as qualitative research.¹⁶⁴ Generally, inductive reasoning uses the data to generate ideas (hypothesis generating), whereas deductive reasoning begins with the idea (hypothesis testing).¹⁶⁵ In actual practice, however, many quantitative studies involve much inductive reasoning, whereas good qualitative analysis often requires access to a full range of strategies.¹⁶⁶ For instance, a traditional quantitative study in the health sciences typically begins with a theoretical grounding, takes direction from hypotheses or explicit study questions, and uses a predetermined (and auditable) set of steps to confirm or refute the hypotheses.¹⁶⁷ It does this to add evidence to the development of specific, general, and theoretical explanations of phenomena.¹⁶⁸ On the contrary, qualitative research takes the position that an interpretive understanding is only possible by way of uncovering or deconstructing the meanings of phenomenon. Thus, a distinction between explaining how something operates (explanation) and why it operates in the manner that it does (interpretation) may be a more effective way to distinguish quantitative from qualitative analytic processes involved in any particular study.¹⁶⁹

For the reason that data collection and analysis processes tend to be concurrent, with new analytic steps informing the process of additional data collection and new data informing the analytic process, it is important to recognise that qualitative analysis processes are not entirely

¹⁶³ *Ibid.*
¹⁶⁴ *Ibid.*
¹⁶⁵ *Ibid.*
¹⁶⁶ See Thorne *op cit.*
¹⁶⁷ *Ibid.*
¹⁶⁸ *Ibid.*
¹⁶⁹ *Ibid.*

distinguishable from the actual data.¹⁷⁰ This means that the theoretical lens from which the researcher approaches the phenomenon, the strategies that the researcher uses to collect or create data, and the understandings that the researcher has about what might count as appropriate or key data in answering the research question are all analytic processes that influence the data. Moreover, analysis occurs as a clear step in conceptually interpreting the data as a whole, using precise analytic strategies to transform the raw data set as a whole, using specific analytic strategies to transform the raw data into a new and logical depiction of the thing being studied.

In short, the researcher must organize data and make logic out of it. More so, organized, thorough, and auditable analytical processes are among the most important factors distinguishing good from poor quality research. Researchers are therefore encouraged to express their findings in such a manner that the logical processes by which they were developed are accessible to a crucial reader, the relation between the actual data and the conclusion about data is explicit, and the claims made in relation to the data are rendered reliable and believable.¹⁷¹ In this study the researcher transcribed all interviews, sections of which were used in the text of this thesis. A complete document has also been annexed to the back of the dissertation to give the reader a thorough outlook of the research results.

3.2.7 *Ethical considerations*

Ethics can be defined as norms for conduct that distinguish between acceptable and unacceptable behaviour. Moreover, ethical considerations are an important aspect of research, especially social science research. Ethical procedures are established in order to protect the individual's physical and mental integrity, to respect his/her moral and cultural values and religious and philosophical

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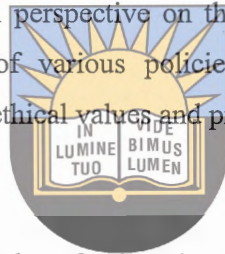
Ibid.

¹⁷¹

Thorne *Op cit.*

convictions, and other fundamental rights including respect for privacy in addition to upholding the highest level of confidentiality.¹⁷²

Another way of defining 'ethics' focuses on the disciplines that study standards of conduct, such as philosophy, theology, law, psychology, or sociology.¹⁷³ For example, a "medical ethicist" is someone who studies ethical standards in medicine.¹⁷⁴ One may also define ethics as a method, procedure, or perspective for deciding how to act and for analyzing complex problems and issues. For instance, in considering a complex issue like global warming, one may take an economic, ecological, political, or ethical perspective on the problem.¹⁷⁵ While an economist might examine the cost and benefits of various policies related to global warming, an environmental ethicist could examine the ethical values and principles at stake.¹⁷⁶



Many different disciplines, institutions, and professions have norms for behavior that suit their particular aims and goals. These norms also help members of the discipline to coordinate their actions or activities and to establish the public's trust of the discipline. For instance, ethical norms govern conduct in medicine, law, engineering, and business. In addition, ethical norms serve the aims or goals of research and apply to people who conduct scientific research or other scholarly or creative activities. For instance, there is a specialized discipline, research ethics, which studies these norms.¹⁷⁷

Furthermore, there are several reasons why it is important to adhere to ethical norms in research. First, norms encourage the aims of research, such as knowledge, truth, and avoidance of error.

¹⁷² See Resnik D. B. *What is Ethics in Research & Why is It Important?* National Institute of Environmental Health Sciences at: <http://www.niehs.nih.gov/research/resources/bioethics/whatis.cfm>. (Accessed 19 November 2010).

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ See Resnik D. B. *What is Ethics in Research & Why is it Important?* National Institute of Environmental Health Sciences at: <http://www.niehs.nih.gov/research/resources/bioethics/whatis.cfm>. (Accessed 19 November 2010).

¹⁷⁷ See Resnick D. B., *op cit.*

For example, prohibitions against fabricating, falsifying, or misrepresenting research data promote the truth and avoid error. Second, since research often involves a great deal of cooperation and coordination among many different people in different disciplines and institutions, ethical standards promote the values that are vital to collaborative work, such as trust, accountability, mutual respect, and fairness. For example, many ethical norms in research, such as guidelines for authorship, copyright and patenting policies, data sharing policies, and confidentiality rules in peer review, are designed to guard intellectual property interests while encouraging collaboration. Most researchers want to receive credit for their contributions and do not want to have their ideas stolen or disclosed prematurely. Third, many of the ethical norms help to ensure that researchers can be held accountable to the public. For instance, federal policies on research misconduct, conflicts of interest, the human subjects' protections, as well as animal care and use are necessary in order to make sure that researchers who are funded by public money can be held accountable to the public. Fourth, ethical norms in research also help to build public support for research. In addition, researchers are more likely to fund a research project if they can trust the quality and integrity of the research. Finally, many of the norms of research promote a variety of other important moral and social values, such as social responsibility, human rights, animal welfare, compliance with the law, and health and safety. Ethical lapses in research can significantly harm human and animal subjects, students, and the public. For example, a researcher who fabricates data in a clinical trial may harm or even kill patients, and a researcher who fails to abide by regulations and guidelines related to radiation or biological safety may jeopardize his health and safety or the health and safety of staff and students. In observations of the ethical constraints underlying the undertaking of the present research project, the following aspects were therefore considered:

3.2.8 *Informed consent*

According to Cortiet *al*¹⁷⁸, research should, as far as possible, be based on participants' free and voluntary informed consent. The authors further state that participants:

¹⁷⁸ See Corti L *et al* 'Confidentiality and Informed Consent: Issues of Consideration in the Preservation of and Provision of Access to Qualitative Data Archives' 2002. See <http://nbn-resolving.de/urn:nbn:de:0114-fqs000372>. (Accessed 30 July 2010).

Should be aware of their right to refuse to participate; understand the extent to which confidentiality will be maintained; be aware of the potential uses to which data might be put; and in some cases be reminded of their right to renegotiate consent.¹⁷⁹

Mark *et al* define informed consent as ‘a mechanism for ensuring that people understand what it means to participate in a particular research study so they can decide in a conscious,¹⁸⁰ deliberate way whether they want to participate.’ In a nutshell, informed consent means that participants should not be compelled to participate in a research which they would not have participated in had force not been used. The following extract from the Human Sciences Research Council summarises this principle:



The researcher must respect the autonomy and protect the welfare of all participants, and must therefore obtain the informed consent of the participants. This consent should be given in writing, especially if the research is of a sensitive nature. The researcher should be concerned particularly about the rights and interests of more vulnerable participants, such as children, the aged and the disabled. In general, all research must observe the international norms of avoiding harm, providing benefit wherever possible and acting justly.¹⁸¹

Furthermore, information obtained in the course of research that may reveal the identity of a participant or an institution should be treated as confidential unless the participant or institution agrees to its release.¹⁸² In addition, research findings which relate to specific individuals, institutions and organizations should be reported in a way that protects the personal dignity and right to privacy of the participants. Moreover, whenever methodologically feasible, participating individuals and institutions should be allowed to respond anonymously or under a pseudonym to protect their privacy.¹⁸³ Again, the researcher should be consistently aware that the research may

¹⁷⁹ *Ibid.*

¹⁸⁰ Human rights theorists hold that what counts is respect for individual autonomy, entailing recognition of the right of individuals to make their own choices, to exercise control over their own person, property, and privacy, and to say “yes” or to say “no”. Taking individuals seriously, taking rights seriously, means taking consents and refusals seriously. See Brownword R ‘*An Introduction to Legal Research*’ 17.

¹⁸¹ See Human Sciences Research Council ‘HSRC Code of Research Ethics’ at: www.hsrc.ac.za/Corporate_Information-6.phtml -. (Accessed 9 August 2010).

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

prejudice the position of research participants if measures are not taken to prevent such prejudice.¹⁸⁴

In this study, consent was requested from each research participant through email correspondence. The researcher informed the participants of the purpose of the study, the type of information needed from them and why the information was being sought. The participants responded in writing, thereby giving the researcher the authority to meet them for research interviews and to use the outcome of the interviews for the study. Confidentiality is another essential element of proper empirical research, hence the discussion that follows.



3.2.9 Confidentiality

According to Byrne,¹⁸⁵ a researcher can protect research participants' privacy by ensuring anonymity or confidentiality. Anonymity exists when participants' identities cannot be linked, even by the researcher, to their actual data or responses.¹⁸⁶ Confidentiality is the management of data to prevent participants' identities from being linked to their responses. In addition, preserving the confidentiality of data has recently been the subject of much discussion and controversy. In fact, numerous Articles, both expository and argumentative, have appeared in professional journals as well as the popular press.¹⁸⁷

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To ensure confidentiality, the researcher assured the respondents that once the data was collected, no one would have access to it except the researcher. Furthermore, although the true names of the participants would be mentioned in the study, any information which the participants did not wish to be published would be retained by the researcher. On that note,

¹⁸⁴ *Ibid.*

¹⁸⁵ See Byrne M "The Concept of Informed Consent in Qualitative Research" 2001 AORN Journal at <http://findArticles.com/p/Articles/mi_m0FSL/is_3_74/ai_74/ai_80159526?pg_2/?tag=content;coll1> (Accessed 29 July 2010).

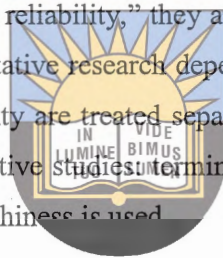
¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

consent to use the research participants' names in the dissertation was obtained. The validity and reliability of all information received was also critically considered.

3.2.10 *Validity and reliability*

There is considerable debate about what constitutes good qualitative research. Patton argues that while the credibility in quantitative research depends on instrument construction, in qualitative research “the researcher is the instrument.”¹⁸⁸ Thus, Golafshani posits that “when quantitative researchers speak of research validity and reliability,” they are usually referring to research that is credible while the credibility of a qualitative research depends on the ability and effort of the researcher. Although reliability and validity are treated separately in quantitative studies, these terms are not viewed separately in qualitative studies. Terminology that encompasses both, such as credibility, transferability, and trustworthiness is used.



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To ensure reliability in qualitative research, examination of trustworthiness is crucial. Seale, while establishing good quality studies through reliability and validity in qualitative research, states that the “trustworthiness of a research report lies at the heart of issues conventionally discussed as validity and reliability”. The idea of discovering truth through measures of reliability and validity is replaced by the idea of trustworthiness which is “defensible” and establishing confidence in the findings. If issues of reliability, validity, trustworthiness, quality and rigor meant differentiating “good” from “bad” research then testing and increasing the reliability, validity, trustworthiness, qualitative and rigor will be important to the research in any paradigm. Essentially important, are the delimitations of any research.

¹⁸⁸ Patton MQ “*Qualitative Evaluation and Research Methods*” (3rd ed.) 2002 14. Thousand Oaks, CA: Sage Publications.

3.2.11 Delimitations

The study is limited to xenophobia in South Africa and focuses primarily on developments over the past 15 years. It limits its analysis to how responses to xenophobia during this period may reveal the complexity of the challenge and how it may suggest alternative ways of responding to it. However, it locates these developments historically with reference to international developments and standards.

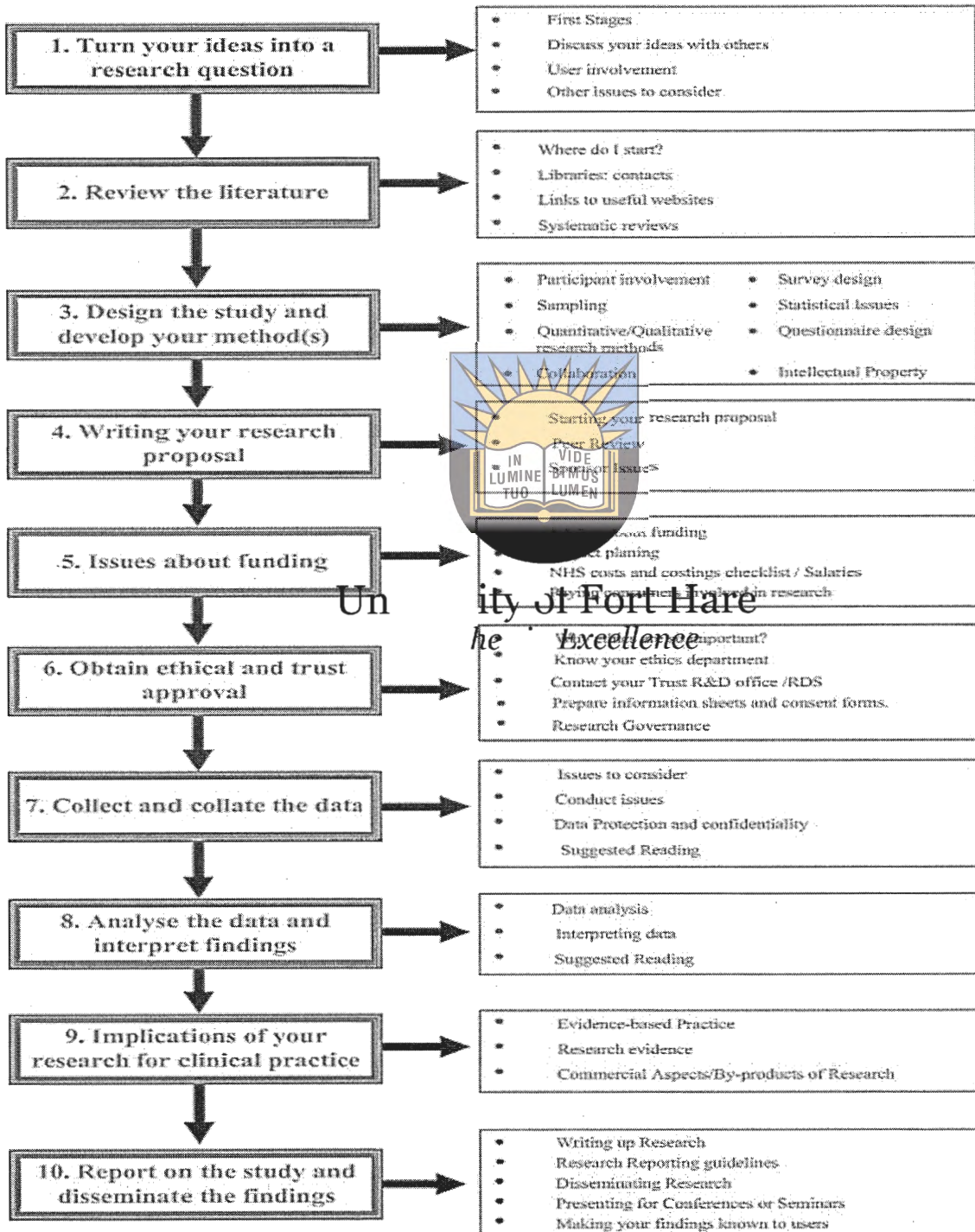
3.3 Conclusion

In conclusion, the literature review has been done through the use of library sources such as international and regional instruments and national legislation. This is because xenophobia is a worldwide phenomenon and the right to freedom from discrimination is an internationally protected human right. The constitution, relevant national legislation, case law, journals, text books, relevant legal Articles and media Articles on legal developments were also consulted. This method was used so as to develop well informed findings on the subject of xenophobia. Journals, text books and other legal Articles were used because they offer updated research findings on the subject of xenophobia. Below is a research flow chart that puts forward a view of all processes in which the researcher engaged in order to complete this study. On a different note, the next chapter is a descriptive analysis of xenophobia in post Apartheid South. It further tracks migration and population movement in Southern Africa and studies the emergence and expression of xenophobia in South Africa since 1994. Following the patterns of xenophobia up to July 2010 and making an effort to identify shifts and complexities as possible indicators for intervention is the principal objective of the next chapter.



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Research Process Flowchart

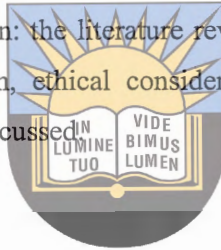


CHAPTER 4

XENOPHOBIA IN SOUTH AFRICA

4.1 Introduction

The previous chapter elaborated upon the processes and methods that can assist the researcher in addressing the research question, as well as the overall design of the research embarked upon. Furthermore, the chosen research design was described as empirical and qualitative. Again, the following qualitative methods and processes were introduced as mechanisms that enabled the researcher to address the research question: the literature review, purposive sampling, in-depth interviews and data analysis. In addition, ethical considerations such as informed consent, confidentiality and reliability were also discussed.



However, providing a descriptive analysis of xenophobia in post-Apartheid South Africa is the focus of the chapter. Through an intensive literature review, it tracks migration and population movement in Southern Africa and studies the emergence and expression of xenophobia in South Africa before and after 1994. Chapter 3 follows the patterns of xenophobia up to July 2010 and makes an effort to identify shifts and complexities as possible indicators for intervention. As a starting point, a discussion of the definitional issues is critical. This discussion would help to clarify the context in which various terms are utilized in the text.

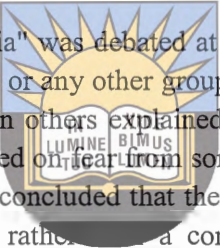
4.2 Context and Definitional Issues

The following analysis deals with the contextual and definitional framework of xenophobia and other related terms. Numerous studies have been conducted on xenophobia, however, with little appreciation of its unique expression and socio-legal impact. As a socio-legal analysis; understanding the social, political and cultural environment within which xenophobia is expressed in South Africa is central to this study. The following paragraphs therefore seek to bring the reader to the writer's main focus and appreciation of the xenophobia expressed in

South Africa. On that note, terms such as “xenophobia”, “racial discrimination” and “human rights” will be interrogated.

4.3 Definitional Framework

The meanings of the term “xenophobia” are highly contested.¹⁸⁹ For example, a report from the European Committee on Crime Problems reflects this contestation in the following way:



The correct meaning of "xenophobia" was debated at length: for some, it should be understood as "fear of foreigners or any other group", for others it is translated as "hatred against foreigners", again others explained it, on the basis of ancient Greek, as the feeling or attitude based on fear from something different than what is usually accepted. The Chairman concluded that the general sense of the group was to interpret it as an attitude rather than a conduct. The French experts repeated their opposition to any definition based on feelings or thoughts: these subjective elements must materialise against someone, otherwise they cannot be prosecuted. The future protocol's definition should therefore be based on that of the CERD, but extended to xenophobia, since this definition is universally accepted and the elements of racism and xenophobia are similar. Applying this concept, the proposed French definitions repeat the CERD elements, but only contain conduct. Several experts supported this position so that the Chairman, when summarising the debate, said that the Group's decision was to deal with conduct, not with feelings/belief/aversion; use existing definitions (UN, EU) as far as possible; and invite the Secretariat to prepare an alternative draft for discussion on that basis.¹⁹⁰

This example is commonplace and there are various schools of thought on this particular subject. Furthermore, and as indicated by the lengthy quotation above, some describe xenophobia as the fear of foreigners or strangers while others define it as an intense and/or irrational dislike and

¹⁸⁹ See European Committee on Crime Problems (CDPC) “Committee of Experts on the Criminalisation Acts Of a Racist or Xenophobic Nature Committed Through Computer Networks”, Summary Report of the First meeting (Strasbourg, 17 - 18 December 2001) at: www.iris.sgdg.org/actions/.../pc.../coe-racism-draft3en-140202.pdf (Accessed on 8 March 2011).

¹⁹⁰ See CDPC *ibid.*

sometimes fear of people from other countries. According to Tshitereke¹⁹¹, this subjective fear and absolute dislike seems to have translated itself into intense tension and violence by South Africans towards immigrants. The word “xenophobia” therefore describes violent actions against foreign nationals as well as negative social representations of immigrants, refugees and migrants in South Africa.¹⁹²For xenophobia there are two main objects of the phobia. The first is a population group present within a society that is not considered part of that society. Often they are recent immigrants, but xenophobia may be directed against a group which has been present for centuries. This form of xenophobia can elicit or facilitate hostile and violent reactions, such as mass expulsion of immigrants or, in the worst case, genocide.



The second form of xenophobia is primarily cultural, and the objects of the phobia are cultural elements which are considered alien. Although cultures are subject to external influences, cultural xenophobia is often narrowly directed, for instance at borrowed words in a national language. In spite of racism and xenophobia manifesting themselves in different regions, communities and social contexts, the major pattern of these phenomena remains the same.¹⁹³ The main manifestation of xenophobia is a collective fear and subsequent aggression by a community against migrants.¹⁹⁴ Moreover, xenophobia can be seen as racial discrimination in its broad meaning and it is driven by the same factors; it eventually results, as in the case of racism, in prejudice, stereotyping, bias and discrimination.¹⁹⁵ This conceptual link between racial discrimination and xenophobia is consistently reflected in international human rights instruments and legal frameworks as discussed in the following paragraphs.

¹⁹¹ See Tshitereke 1999 4. At: <http://www.csvr.org.za/wits/papers/papvtp5.htm#explaining>. (Accessed on 17 June 2009).

¹⁹² See Bronwy H :Xenophobia: A New Pathology for a new South Africa in Hook, D and Eagle , G (eds) “*Psychopathology and Social Prejudice* “2002 169 at: [http://www.csvr.org.za/docs/foreigners/xenophobia .pdf](http://www.csvr.org.za/docs/foreigners/xenophobia.pdf) (Accessed on 18 June 2009).

¹⁹³ J.M Vorster ‘*Racism, Xenophobia and Human Rights*’ 296-312 at: <http://www3.interscience.wiley.com/journal/122278259/abstract>. (Accessed on 13 July 2009).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

Given the insidious nature of discrimination based on “race”, “ethnicity” and other discriminatory categories, the Universal Declaration of Human Rights (1948) already foregrounded this type of human rights violation in 1948. In Article 2, the UDHR states that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.



The UDHR further confirms in Article 7 that all are equal before the law and are entitled without any discrimination to equal protection of the law. Since the inception of the UDHR the discourse of human rights grew into a dominant framework with universal acceptance. Furthermore, the International Bill of Human Rights which consists of the UDHR, the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aims to promote and protect human rights in general and to eliminate discrimination in particular.

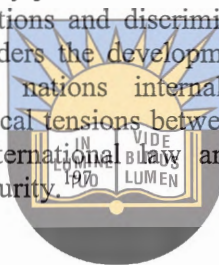
The International Convention on the Elimination of All Forms of Racial Discrimination (1965) defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or

impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms¹⁹⁶

The UNESCO Declaration on Race and Racial Prejudice (1978) goes further and maintains that:

Racism includes racist ideologies, prejudiced attitudes, discriminatory behaviour, structural arrangements and institutionalised practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as anti-social beliefs and acts; it hinders the development of its victims, perverts those who practice it, divides nations internally, impedes international cooperation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security.



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In line with the sentiments of the European Committee on Crime Problems, this study views xenophobia and racial discrimination as interlinked and thus extends the ICERD definition of racial discrimination to xenophobia. This reasoning is also reflected in the WCAR declaration and Programme of Action. As far as regional instruments are concerned the African Charter on Human and People's Rights¹⁹⁸ states in Article 2 that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

¹⁹⁶ See Article 1, International Convention on the Elimination of All Forms of Racial Discrimination, Adopted by the General Assembly of the United Nations, resolution 2106 (XX) 21 December 1965, entry into force: 4 January 1969. For a comprehensive view of this instrument see Melander G and Alfredson G "The Raol Wallenberg Compilation of Human Rights Instruments" 1997 255: Martinus Nijhoff Publishers, London.

¹⁹⁷ See Article 2, Declaration on Race and Racial Prejudice (Adopted and proclaimed by the United Nations Educational, Scientific and Cultural Organization at its twentieth session, on 27 November 1978).

¹⁹⁸ See African Charter on Human and People's Rights (Adopted by the Organization of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981, Nairobi, Kenya, Entry into force: 21 October 1986.

Besides ICERD, the Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa (1974) also elaborates on the problem of xenophobia and racial discrimination on the Continent and; collectively these international and regional human rights instruments gave rise to the post Apartheid constitutional architecture of South Africa. Most notably, section 9 of the 1996 Constitution and the Promotion of Equality and Prevention of Unfair Discrimination¹⁹⁹ articulate this anti-discrimination thrust:

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), gives effect to section 9 of the Constitution by providing for, among others, the equal enjoyment of all rights and freedoms by every person; the promotion of equality; the values of non-racialism and non-sexism contained in section 1 of the Constitution; the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution; and the prohibition of advertisement, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution. The Act also provides for procedures for the determination of circumstances under which discrimination is unfair, for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment and to provide remedies for victims of unfair discrimination.²⁰⁰

However, even though the South African legal framework contains a recognizable number of anti-discrimination provisions, the country still experiences segregation and violent attacks against non-nationals. This only leaves many questions to be answered, and it is hoped that this study will provide those answers and fill the gaps.

The international community has also agreed upon, and entrenched in law, basic standards to protect migrants and refugees. These “human rights” are freedoms established by custom or

¹⁹⁹ Act 4 of 2000.

²⁰⁰ See:
<http://www.doj.gov.za/legislation/acts/Statutes%20administered%20by%20DOJCD%20%5B30%20Mar%202007%5D%20list.pdf> (Accessed on 1 October 2009).

international agreement that impose standards of conduct on all nations.²⁰¹ Furthermore, human rights are distinct from civil liberties, which are freedoms established by the law of a particular state and applied by that state in its own jurisdiction. Human rights also refer to the basic rights and freedoms to which all humans are entitled. Again, human rights are considered as the conditions and expectations to which every person, by virtue of his or her existence as a human being, is entitled.

The basis of these legal rights is the consent of the governed, that is, the consent of the subjects of the rights.²⁰² Examples of rights and freedoms which have come to be commonly thought of as human rights include civil and political rights, such as the right to life and liberty, freedom of expression, and equality before the law; and social, cultural and economic rights, including the right to participate in culture, the right to food, the right to work, and the right to education.²⁰³ Moreover, Article 1 of the Universal Declaration of Human Rights states that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”²⁰⁴

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Human rights are also defined as rights to which people are entitled simply because they are human beings, regardless of their nationality, race, ethnicity, gender, or religion. These human rights are the same for all people everywhere – male and female, young and old, rich and poor, regardless of our background, where we live, what we think or what we believe. This is what makes human rights “universal, inherent and inalienable.”²⁰⁵ On the contrary, inspite of the internationally recognized norms and values, South Africa is experiencing xenophobia in various forms, especially in the lives of non-nationals who fall in the categories below. Defining these

²⁰¹ *Opcit.*

²⁰² Levin L *Human Rights Questions and Answers* (1996).

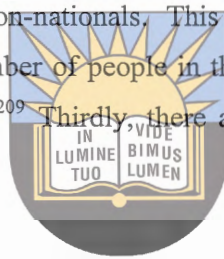
²⁰³ *Ibid.*

²⁰⁴ Universal Declaration of Human Rights adopted by General Assembly resolution 217 A (III) of 10 December 1948 at: <http://www.unhchr.ch/html/menu6/2/fs2.htm>. (Accessed on 3 October 2009).

²⁰⁵ See: Australian Human Rights Commission at: http://www.hreoc.gov.au/info_for_students/index.html. (Accessed on 17 April 2009). Also see *Minister of Home Affairs v Watchenjuka* 2004 4 SA 326 (SCA) where it was pointed out that human dignity has no nationality and that it is inherent in all people, citizens and non-citizens alike, simply because they are human.

categories is of paramount importance, since many xenophobic perceptions and attacks are based on ignorance and misperceptions.

The first categories of non-nationals are *temporary migrants*.²⁰⁶ These include people with work permits, tourists and people under contract labour. Through temporary entry and work permits, non-nationals are able to enter and legally stay in South Africa for economic reasons – to find or take up employment, start a business, or attend a professional meeting. Others are in the country simply for tourism or shopping.²⁰⁷ Secondly, *an undocumented migrant (often termed “illegal immigrants”)* is another category of non-nationals. This group of people has no proper identification.²⁰⁸ Moreover, the exact number of people in this category is constantly changing and is impossible to quantify accurately.²⁰⁹ Thirdly, there are *refugees*. The Refugees Act of 1998 defines a refugee as someone who:



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- (a) Owing to a well-founded fear of being persecuted for reasons of his race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence and is unable, or, owing to such fear, unwilling to return to it; or
 - (b) Owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere, or
 - (C) Is a dependent of a person contemplated in –paragraph (a) or (b).

Although most South Africans generally refer to all (poor) non-nationals as refugees, the above legal meaning is quite narrow and precise. Fourthly, there are *asylum seekers*. Importantly, an

²⁰⁶ See Landau L. B, Keogh R. K and Singh G, “*Xenophobia in South Africa and Problems Related To It*,” 2004 17, Background Paper prepared for Open hearings on “Xenophobia and Problems Related to It”, hosted by the South African Human Rights Commission with the Portfolio Committee of the Departments of Foreign Affairs and Home Affairs, University of the Witwatersrand.

²⁰⁷ See Landau et al 17 *op cit*.

²⁰⁸ *Ibid* 17.

²⁰⁹ *Ibid*.

individual is not considered a refugee until he/she has been recognised as such by South Africa's Department of Home Affairs.²¹⁰ Once granted refugee status or asylum, refugees are entitled to a set of rights and subject to a set of regulations, for the duration of their refugee status. Until such time as an individual's application for asylum is accepted or rejected, they are considered an asylum seeker.²¹¹ The last class of non-nationals is *immigrants or permanent residents*. Unlike migrants whose legal status allows them to remain in the country for finite periods, immigrants are those who enter another country in order to make one's permanent life and home there.²¹² Immigrants fall into two categories: naturalized citizens and permanent residents.²¹³ The former have sworn allegiance to South Africa and become citizens, although they may retain citizenship in their country of origin.²¹⁴ Permanent residents have all of the rights of citizens except for the right to vote.²¹⁵ This status may, however, be revoked if the individual resides outside South Africa for an extended period.²¹⁶ Having defined the various kinds of non-nationals, it is essential to discuss how this group became vulnerable to xenophobic attacks. The following descriptive analysis therefore attempts to trace xenophobia before South Africa's independence; it interrogates its emergence after 1994 and finally discusses the upsurge of xenophobia from 2007 to present day South Africa. It is hoped that the description would expose some variables and thus aid in bringing relevant solutions to eradicating the xenophobia phenomenon.

4.4 Chronology of Xenophobia

4.4.1 Pre 1994 Xenophobia

According to Steenkamp,²¹⁷ the first remarkable feature of violence against African migrants is that it is overwhelmingly perpetrated by black South Africans against black Africans.²¹⁸ The

²¹⁰ *Ibid* 18.

²¹¹ *Ibid*.

²¹² *Ibid*.

²¹³ Landau *etalop cit*.

²¹⁴ *Ibid* 18.

²¹⁵ *Ibid*.

²¹⁶ *Ibid*.

²¹⁷ See Steenkamp C "Xenophobia in South Africa: What Does it Say about Trust?" 2009 Vol. 98 439-447.

second remarkable feature of the current violent xenophobia is that it stands in contrast to the relationship between African migrants and black South Africans during Apartheid when fellow Africans were integrated into black townships, intermarriage was relatively common and they were seen as comrades in the struggle against apartheid.²¹⁹

The dynamics of African migration to South Africa changed as apartheid ended in the early 1990s.²²⁰ During apartheid, the white minority government actively discouraged black immigration. Yet, hundreds of thousands of Africans from South Africa's immediate neighbours entered the country as contract workers to provide cheap, unskilled labour to the mining and farming industries.²²¹ In the 1980s, large numbers of refugees fleeing political turmoil in Mozambique and other neighbouring countries sought refuge in South Africa. Most of the pre-1990 migrants were poor, unskilled and mainly from neighbouring countries and integrated relatively well into the local population.²²² Morris²²³ argues that the local population was then less antagonistic towards migrants, due to the limited number of "illegal immigrants" (they did not see the migrant labourers as a threat to their own employment prospects) and the focus was on opposing apartheid, which was seen as the major obstacle to employment and improved living standards.

4.4.2 *The emergence of xenophobia in democratic South Africa (1995-2006)*

After apartheid, the size of the immigrant population from further north in Africa increased substantially, as did the number of immigrants from neighbouring states,²²⁴ although the exact

442, Routledge, Oxford Brookes University, Oxford, UK.

218 *Ibid* 442.

219 *Ibid*.

220 *Ibid*.

221 *Ibid*.

222 *Ibid*.

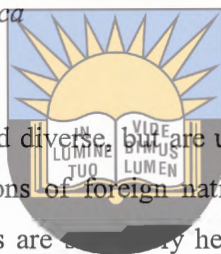
223 Morris A "Our Fellow Africans Make Our Lives Hell": the lives of Congolese and Nigerians living in Johannesburg, *Ethnic and Racial Studies* 1998 (6) 1116-1136.

224 See Morris, 1998 1119.

numbers remain elusive.²²⁵ In addition, African migrants who come to South Africa vary from being highly skilled to being street vendors and small traders. Additionally, post-Apartheid South Africa is particularly attractive to migrants due to its relatively high level of economic development, living standards and political freedom. As the number of migrants increased, so did South Africans' intolerance, against a background of frustrated expectations about the socio-economic dividends of democracy. It is therefore important to note the major causes of the emergence of xenophobia in South Africa.

4.4.2.1 Causes of xenophobia in South Africa

The causes of xenophobia are complex and diverse, but are underpinned by baseless myths and stereotypes which fuel negative perceptions of foreign nationals.²²⁶ There are a number of theories as to why xenophobic sentiments are commonly held in South Africa. The following causes can be noted:



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Firstly, South Africa's history of international isolation facilitates anti-African xenophobia. South Africans still see themselves as apart from the rest of Africa, as exceptional, and therefore struggle to identify with other Africans.²²⁷ Furthermore, South Africa's background of separate development fosters an environment of distrust between various so-called ethnic, tribal and racial groups within South Africa. Moreover, reconciliation between South Africans long divided has posed tremendous challenges.²²⁸ In addition, there are speculations that in unifying a nation of tremendous diversity, a shared, foreign threat can serve a unifying role. As a result, foreign nationals seen as most 'different' in this context are often people who are darker, speak another

²²⁵ See Croucher S "South Africa's Illegal Aliens: Constructing National Boundaries in a Post-Apartheid State", 1998 (4) 639-660, *Ethnic and Racial Studies*.

²²⁶ See International Organization for Migration Regional Office for Southern Africa "Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa" 2009 47.

²²⁷ See Steenkamp *op cit*.

²²⁸ See Williams V "Xenophobia in South Africa, Perspectives, Political Analysis and Commentary from South Africa" 2008 2-6, Cape Town, South Africa: Heinrich Boll Stiftung.

African language, dress differently, are taller, shorter and so forth, would be the likely victims in this situation.²²⁹

Secondly, there is a perception that foreign nationals are an economic threat. Despite democratization and the promises of a better future, the South African “miracle” has not yet dramatically improved the quality of life of many South Africans living in the townships.²³⁰ According to the United Nations Development Programme (UNDP), South Africa ranks tenth out of 126 countries in terms of income inequality.²³¹ By 2008, just before the May 2008 pogroms, the official national murder rate stood at 18,487 and 118,312 cases of robbery with aggravated circumstances were reported, with black townships and the CBD of large cities worst affected.²³² The expanded unemployment figure stood at almost 38% and 41% of the population lived on less than R367 per month during 2007, according to the Presidency of the Republic of South Africa’s Development Indicators Report of 2008. The official HIV infection rate stood at 11% of the population in 2007.²³³ It is therefore from this background of unemployment, crime, lack of formal housing and HIV/AIDS that a “social scapegoat” has been found in the presence of African immigrants.²³⁴ South Africans often argue that migrants cause local unemployment and drive earnings down by accepting low wages, or that they are given preferential treatment in the allocation of housing. According to Steinberg²³⁵, South Africans view the state’s resources as finite and they are concerned about their stake in it, thus viewing foreign nationals as direct competition.²³⁶ Xenophobia is therefore often allied with insecurity and fear that unrestrained migration will adversely impact the division of limited resources and produce unwanted economic competition.²³⁷ Furthermore, one common explanation for xenophobia is that non-nationals are seen as a threat to citizens’ access to jobs, grants and social services. In a country with unemployment at around 40 percent, these fears are heightened as migrants are seen as better educated, more experienced and willing to work for lower earnings.

²²⁹ See Steenkamp *op cit.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² See South African Police Service, 2008.

²³³ See Development Indicators Report, 2008.

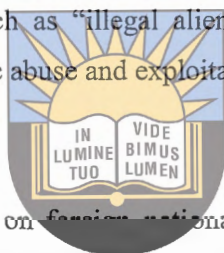
²³⁴ Steenkamp *op cit.*

²³⁵ See Steinberg J “*South Africa’s Xenophobia Eruption*” 2008 169, ISS Paper, Pretoria, South Africa.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

Thirdly, public and official discourse further contributes to xenophobic violence. Rydgren²³⁸ suggests that when individuals face unfamiliar situations, they can either base their response on a priori strategies and categorizations (stereotypes) or, they can trust the information from other sources. In South Africa, official discourse, the media and police attitudes provide citizens with “trustworthy” information about migrants, on which to base their responses. The media and officials perpetuate stereotypes and sweeping generalisations,²³⁹ coupled with the use of derogatory and sensational language, such as “illegal aliens” and “hordes”.²⁴⁰ Officials and politicians also contribute to the systematic abuse and exploitation of non-nationals.²⁴¹



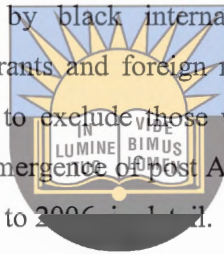
Fourthly, there is a lack of information on foreign nationals and their rights.²⁴² Many South Africans lack both knowledge of and contact with foreign nationals.²⁴³ This is an underlying cause of xenophobia in South Africa. Again, ignorance of the different types of foreign nationals, root causes of migration and unfamiliarity with different cultures has fuelled the development of myths relating to foreign nationals.²⁴⁴ Furthermore, these myths perpetuate xenophobia and further insulation of communities on all sides.²⁴⁵

Fifthly, in most instances South Africans make no distinction between refugees and economic migrants or even the foreign criminals operating within the country.²⁴⁶ More so, the general term for all of these migrants is “refugee”. Furthermore, as expectations of post-apartheid gains are not realized, “refugees” are blamed for the crime, squatting, taking limited jobs and scarce

²³⁸ See Rydgren J “*The Logic of Xenophobia*” 2004 123-148, *Rationality and Society* 16(2).
²³⁹ See McDonald D. A and Jacobs S “(Re)writing Xenophobia: Understanding Press Coverage of Cross Border Migration in Southern Africa” 2005 *Journal of Contemporary African Studies* 23(3).
²⁴⁰ See McDonald D *Ibid.*
²⁴¹ *Ibid.*
²⁴² See Rydgren J *op cit.*
²⁴³ *Ibid.*
²⁴⁴ *Ibid.*
²⁴⁵ *Ibid.*
²⁴⁶ See Rydgren *op cit.*

housing, for consuming scarce resources within hospitals, for not paying taxes and, lastly, for simply being in the way. Unfortunately, the resentment goes beyond mere blame. Actual asylum seekers, documented and undocumented migrants as well as other African foreign nationals suffer many forms of hostility and discrimination.

Sixthly, there are perceptions that foreign nationals are taking over South African cities. Most migrants who come to South Africa choose the cities as their destination. However, during apartheid, cities were exclusively white, but have subsequently been abandoned through “white flight” to the suburbs and reclaimed by black internal migrants.²⁴⁷ Consequently, the convergence of black South African migrants and foreign migrants in densely populated and poor urban areas has given rise to calls to exclude those without South African citizenship. Perhaps, in order to fully understand the emergence of post Apartheid xenophobia it is necessary to critically study the period between 1995 to 2006.



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Xenophobic violence has been an ongoing reality in post-1994 South Africa, and has steadily increased throughout the recent past in townships and informal settlements.²⁴⁸ In 1995, a report by the Southern African Bishop’s Conference concluded: “There is no doubt that there is a very high level of xenophobia in our country... one of the main problems is that a variety of people have been lumped together under the title of “illegal immigrants”, and the whole situation of demonizing immigrants is feeding the xenophobia phenomenon.”²⁴⁹ In 1996, Jonathan Crush identified a “blunt, and increasingly bellicose, mythology targeted at non South Africans living in the country” and its use by politicians and the press to “whip up” anti-immigrant sentiment.²⁵⁰ A year later, a study from the Human Sciences Research Council (HSRC) reported

²⁴⁷ *Ibid.*

²⁴⁸ See International Organization for Migration (IOM) “*Towards Tolerance, Law and Dignity: Addressing Violence Against Foreign Nationals in South Africa*” 2009 22, International Regional Office for Southern Africa No. 01/2009.

²⁴⁹ See Southern African Migration Project “*The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa*” 2008 16, Migration Policy Series, 50, Cape Town, South Africa: Idasa.

²⁵⁰ See Crush J “*A Bad Neighbour Policy? Migrant Labour and the New South Africa*” 1996 3, Southern Africa Report 12(1).

widespread negative attitudes to migrants among South Africans with whites the most negative.²⁵¹

As early as 1994, Home Affairs Minister Buthelezi depicted “illegal aliens” as a direct threat to the success of the Reconstruction and Development Programme (RDP), and to the safety and security of all South Africans.²⁵² In the same speech, Buthelezi drew direct links between migrants and crime, citing “evidence” that “aliens” were responsible for “criminal activities such as drug-trafficking, prostitution and money-laundering in what can only be described as typical Mafia-activity.”²⁵³ Minister Buthelezi also condemned South Africans offering shelter to undocumented migrants, and criticized citizens who employed “illegal aliens”, declaring that he was “thinking of proposing to Cabinet consideration of legislation which will impose severe punishment for people who employ illegal aliens as it is in fact unpatriotic to employ illegal aliens at the expense of our own people.”²⁵⁴ In addition, in his 1997 Budget Speech to Parliament, Buthelezi stated: “With an illegal population estimated at between 2.5 million and 5 million, it is obvious that the socio-economic resources of the country, which are under severe strain as it is, are further being burdened by the presence of illegal aliens.”²⁵⁵

Although Minister Buthelezi was the most vocal politician expounding on the threats of “illegal aliens”, he was not isolated from the bigger political atmosphere in South Africa, which placed high importance on restricting access, together with controlling and limiting immigration.²⁵⁶ To add, the Defense Minister, Joe Modise, publicly blamed migrants for South Africa’s spiraling crime rate: “As for crime, the army is helping the police get rid of crime and violence in the country. However, what can we do? We have one million illegal immigrants in our country who

²⁵¹ See SAMP *op cit.*

²⁵² Budgetary Appropriation 1994: Review of Policy: Introductory Speech By Minister MG Buthelezi, Minister of Home Affairs.

²⁵³ See SAMP *op cit.*

²⁵⁴ See SAMP *op cit.*

²⁵⁵ Minister of Home Affairs, Introductory Speech: Budget Debate, National Assembly, April 17, 1997.

²⁵⁶ See Croucher S “South Africa’s Illegal Aliens: Constructing National Boundaries in a Post-Apartheid State”, 1998 (4) 639-660, Ethnic and Racial Studies.

commit crimes.”²⁵⁷ In 1997 President Mandela made a speech citing “threats posed by illegal immigrants, gun running and drug smuggling.” In 1998, Sheena Duncan of the Black Sash advised that the “xenophobia that is growing so quickly among South Africans is cause for serious concern.” Duncan blamed politicians, bureaucrats and the media for exacerbating the situation: “They repeatedly quote discredited figures for the number of “illegal aliens” said to be in South Africa and then very often go on to link those figures to the crime wave. They are aided and baked by some sections of the media who do not investigate but merely report inaccurate statements.” In another incident of 1998, two Senegalese non-nationals were brutally murdered in a crowded train travelling between Johannesburg and Pretoria.²⁵⁸



Moreover, the idea that South Africa was being “swamped” by Africa’s poor and desperate was given regrettable “scientific legitimacy” by the Human Sciences Research Council which not only erroneously claimed that there were 5-8 million “illegal aliens” in the country but painted a picture of a country inundated by “impoverished “floods” and “hordes” from the rest of Africa.²⁵⁹ Some conservative academics and an uncritical media further intensified the hostile atmosphere. In 1999, SAMP repeated its attitudinal survey, adding an evaluation of South African attitudes to refugees and refugee protection. However, very little had changed in 1999, despite the best efforts of the South African Human Rights Commission and its “Roll Back Xenophobia” campaign. The survey confirmed “high levels of societal intolerance towards non citizens (whether documented or undocumented, immigrants or migrants, refugees or asylum seekers).²⁶⁰ Only 47% felt that refugees in the country should never have the rights to freedom of speech or movement. Less than 20% felt that refugees should always enjoy legal and police protection or access to basic services.²⁶¹

²⁵⁷ See SAMP *op cit*.

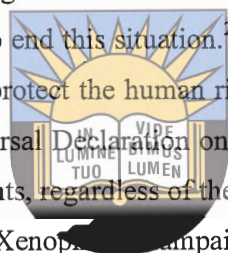
²⁵⁸ See South African Human Rights Commission, “*Report on Open Hearings on Xenophobia and problems Related to it*’ at: www.sahrc.org.za/sahrc_cms/downloads/Xenophobia%20Report.pdf – (Accessed on 17 April 2009).

²⁵⁹ See Smith J. M “*The Right to Respond: A Meta-Review of the Role of the South African Media’s Coverage of Xenophobia and the Xenophobic Violence Prior to and Including May 2008*” 2009 11, The Atlantic Philanthropies, University of Johannesburg.

²⁶⁰ See Crush J “*Immigration, Xenophobia and Human Rights in South Africa*” 2001 27, SAMP Migration Policy Series No. 22, Cape Town (co-published with the South African Human Rights Commission.)

²⁶¹ SAMP *op cit*.

In the years since 1999, a great deal of analysis has been conducted on the causes, consequences and impact of xenophobia by SAMP and others.²⁶² Government did not appear to pay attention to the warnings of the SAHRC and COSATU and certainly did not move to root out xenophobia as both were demanding. These events were followed by the National Conference on Racism held in Johannesburg in 2000 and the United Nations World Conference on racism, racial discrimination, xenophobia and related intolerance and Xenophobia (WCAR) hosted by the South African government in 2001. The conference provided an unprecedented opportunity to take an open and honest look at the scourge of discrimination and intolerance against migrants and refugees and to make commitments to end this situation.²⁶³ In this Conference South Africa and other states pledged to promote and protect the human rights and fundamental freedoms of all migrants in conformity with the Universal Declaration on Human Rights and all obligations under international human rights instruments, regardless of the migrants' immigration status.²⁶⁴ In 2002 the SAHRC rolled up its Roll Back Xenophobia campaign which surely cannot be because they thought the problem was solved. However, some effort was made by the Minister of Home Affairs to deal with xenophobia in her own department but the broader societal initiative called for in the 2002 Immigration Act did not occur.²⁶⁵ Moreover, when the African Union's African Peer Review of South Africa criticized indications of growing xenophobia in South Africa, the South African government took strong exception. The Peer Review Report had noted that "foreigners, mostly of African descent, are being subjected to brutality and detention."²⁶⁶ In response, the government nipped back at the report: "the assertion that illegal immigrants are subject to brutal and inhuman treatment is strongly disputed."²⁶⁷ The government said it did share



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²⁶² For instance, see Harris B "A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition" 2001; Crush J "The Dark Side of Democracy: Immigration, Xenophobia and Human Rights in South Africa" 2000 38 International Migration 103-133 and L Landau, K Ramjathan-Keogh et al "Xenophobia in South Africa and Problems Related to it. Forced Migration Working Paper Series No 13, Forced Migration Studies Programme University of the Witwatersrand January 2005.

²⁶³ Op cit note 3.

²⁶⁴ See 'Parliament of the Republic of South Africa: Background Research Report compiled by the Research Unit for the Task Team of Members of Parliament Probing Violence and Attacks on Foreign Nationals'. Available at http://www.parliament.gov.za/content/BACKGROUND_RESEARCH_REPORT.pdf (Accessed 17 June 2009).

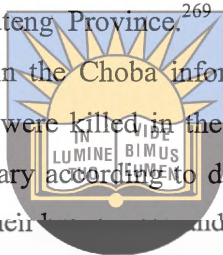
²⁶⁵ See SAMP 20 *op cit*.

²⁶⁶ See African Peer Review Mechanism, South Africa Country Review Report No 5, September 2007, Paragraph 956.

²⁶⁷ Ibid. Appendix 2: Comments of the South African Government on the Report, Paragraphs 103-5.

the sentiments of the Review that “much needs to be done to fight xenophobia” but did not say what it had done to combat a longstanding problem. Furthermore, in November 2004, the Parliamentary Portfolio Committee on Foreign Affairs (Portfolio Committee) together with the South African Human Rights Commission held open hearings on xenophobia and problems related to it as a follow up to the recommendations made at the 2001 UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerances²⁶⁸.

In December 2005, further attacks against migrants and refugees occurred in Olievenhoutbosch, a community near Centurion in the Gauteng Province.²⁶⁹ In that incident, groups of South Africans chased foreign Africans living in the Choba informal settlement from their shacks, shops and businesses and several people were killed in the burning and looting.²⁷⁰ The exact numbers killed, wounded, and disposed vary according to different sources. Throughout 2006, attacks on foreign nationals escalated in their frequency and brutality. As the years progressed, so did the number of xenophobic attacks and utterances. The period between 2007 and the present day (as shall be noted below) has witnessed xenophobia in intense levels.



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4.4.3 *The upsurge of xenophobia (2007 to present day)*

In 2007, in a series of attacks, over 100 Somalis were killed and Somali businesses and properties were looted and torched.²⁷¹ Indeed, there were signs that the violence would increase, as long as sufficient action was not taken. In the weeks and months leading up to the May 2008 outbreak of xenophobic violence, indicators of violent xenophobic sentiment and intent became evident. Eviction notices and threats of violence had been publicly issued, and police and local

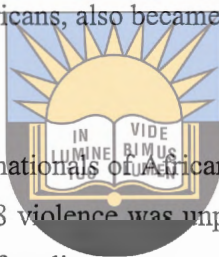
²⁶⁸ This Conference was held in Durban, South Africa, from 31 August to 8 September 2001. The respected United Nations General Assembly authorized the conference in Resolution 52/111 in 1997, aiming to explore effective methods to eradicate racial discrimination and to promote awareness in the global struggle against intolerance. See <http://www.jewishvirtuallibrary.org/jsourc/UN/durban1.html> (Accessed on 11 May 2009).

²⁶⁹ See SAMP 21 *op cit.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

authorities had been notified.²⁷² In May 2008 South Africa made international news as a series of pogroms against foreign Africans occurred nationally.²⁷³ Within weeks at least 62 people were killed and hundreds injured.²⁷⁴ Houses and businesses belonging to migrants were destroyed or looted.²⁷⁵ Around 35 000 people became internally displaced, while thousands more queued at borders to return to their country of origin.²⁷⁶ In addition, thousands of migrants and South Africans were the victims of criminal violence; women and children were attacked and raped, and thousands had their houses and belongings plundered or destroyed. The mostly affected groups were from neighbouring states, such as Zimbabwe and Mozambique, but migrants from more remote African countries, such as Nigeria, Somali, the Democratic Republic of Congo, as well as a considerable number of South Africans, also became victims of the violence.²⁷⁷



While a number of attacks against foreign nationals of African descent have been documented in recent years, the intensity of the May 2008 violence was unprecedented.²⁷⁸ Although the South African Police Service (SAPS) provided a frontline response to the crisis by sheltering victims in police stations and providing assistance, it was incapable of protecting the population or dealing with perpetrators.²⁷⁹ Further, with the violence threatening to spin out of control, South Africa's president at the time called in the army. The violence calmed down relatively quickly, but the humanitarian situation lingered on: camps were characterized by inadequate shelter and outbreaks of disease.²⁸⁰

²⁷² See IOM 22 *op cit*.

²⁷³ See Steenkamp *op cit*; Citizenship Rights in Africa Initiative "Tolerating Intolerance: Xenophobic Violence in South Africa" 2009.

²⁷⁴ See Crush *op cit*.

²⁷⁵ See Smith M J *op cit*

²⁷⁶ See Desai A "Responding to the May 2008 Xenophobic Attacks: A Case Study of the Gift of the Givers" 2009, University of Johannesburg, Centre for Sociological Research. Steenkamp also states that the May 2008 attacks left South Africa facing several challenges, including responding to housing and humanitarian needs, dealing with perpetrators, salvaging its international reputation and reintegrating migrants back into host communities (See Steenkamp above).

²⁷⁷ See CRAI 11 *op cit*.

²⁷⁸ *Ibid*.

²⁷⁹ *Ibid*.

²⁸⁰ See Desai *op cit*.

In August 2008 the number of those displaced in the three provinces stood at 8,556 in 53 sites. Gauteng had 10 sites and 4, 340 people; Western Cape had 40 sites and 3, 958 people; and Kwazulu-Natal had 3 sites and 258 people.²⁸¹ By 30 November all the safe sites were closed. As observed by the Task Team of Members of Parliament, the “impact of the violence and attacks was severe, as many people were gripped by fear and experienced the trauma of being evicted from their homes, being physically assaulted, and in some cases burnt.”²⁸²

Where foreign nationals were organized and/or where local leadership was strong, they were spared the attacks.²⁸³ For instance, in Braamfontein a single Zimbabwean teacher organised a strong force of foreign nationals in the neighborhood and they were not attacked.²⁸⁴ “No one dared attack Hillbrow”, said the Zimbabwean Crisis Network press liaison. The foreign communities in these areas were well organized and they were thus spared the attacks, according to Nixon Nyikadzino. “When we were covering the area in this area we found residents on guard ready to repel any attacks,” he added.



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As has been noted, what started as a security problem became a humanitarian catastrophe for the thousands of survivors. In addition to the thousands of foreign nationals evicted from their homes, thousands more fearing for their lives sought shelter in police stations while others were repatriated by their home governments to their counties of origin with nothing more than the clothes they were wearing.²⁸⁵ The following table better lists the occurrences of xenophobia between 2007 and 2008:

281 See CRAI 9 *op cit.*
282 *Ibid.*
283 CRAI *op cit.*
284 *Ibid.*
285 See Desai *op cit.*

Sites of Major Xenophobic Attacks since September 2007²⁸⁶

Delmas, Mpumalanga – September 2007

Mooiplaas, Gauteng – December 2007

Hebron, North West – December 2007

Plastic View, Gauteng – December 2007

Soshanguve, Gauteng – December 2007

Jeffrey's Bay, Eastern Cape – January 2008

Kroonstad, Free State – February 2008

Valhalla Park, Western Cape – February 2008

Itireleng, Gauteng – February 2008

Atteridgeville, Gauteng – March 2008

Klipgat, North West – March 2008

Worcester, Western Cape – March 2008

Mamelodi, Gauteng – April 2008

Alexandra, Gauteng – May 2008

Diepsloot, Gauteng – May 2008

Olifantsfontein, Gauteng – May 2008



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After the wide-spread outbreak of xenophobic violence, which erupted in 2008 (as noted in the table above), refugees and vulnerable migrants have continued to be victims of violence.²⁸⁷ These instances may be on a smaller scale but the consequences are equally severe.²⁸⁸ On November 22, 2009, more than 1,600 people, including 187 children, all Zimbabweans, were chased out by local residents from a different township in the suburb of De Doorns, in the

²⁸⁶ See consortium for Refugees and Migrants in South Africa (CORMSA) Press Release "Attacks 'Not a Crisis', 15 May 2008

²⁸⁷ See Doctors Without Borders "The Lives of Survival Migrants and Refugees in South Africa" at: http://www.doctorswithoutborders.org/publications/Article_print.cfm?id=4465 (Accessed 19 August 2010).

²⁸⁸ *Ibid.*

Western Cape vineyard areas.²⁸⁹ Their shacks were destroyed and looted and most of their belongings destroyed. Locals were saying people from outside the country were taking their jobs by accepting work on farms as low-paid laborers.²⁹⁰ A campsite for the displaced people was set up by local authorities.

Medicines Sans Frontiers (MSF) was present in the campsite for two weeks providing medical care and trauma counseling.²⁹¹ Moreover, the attacks had a significant impact on the mental health of the displaced. More so, stress levels were very high, especially among those who had witnessed other attacks in February 2009 during which seven Zimbabweans burned to death.²⁹² Through individual and group counseling sessions MSF found a high level of anxiety as people did not know if they would be accepted back into the community or relocated. Their major concerns were about safety, security and being able to go to work.



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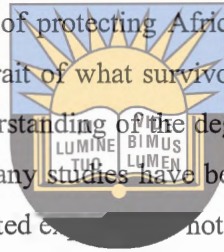
On the night of December 7, 2009, South African Police Service and Polokwane Municipality relocated more than 100 Zimbabweans living in a suburb of Polokwane to a nearby stadium. The relocation followed several hours of violence carried out by South African citizens against non-South Africans living in the community. At the stadium, MSF provided medical assistance to 13 people, including two children under three years old, as well as six people with severe trauma injuries. Many people said they experienced headaches, stomach aches, chest pains, difficulty breathing or nightmares soon after the attacks, all clearly related to the trauma suffered.

As recent as July 2010, immediately after the world cup, non-nationals, especially Zimbabweans, were forced to leave Cape Town, in fear of more xenophobic attacks. The following extract explains the above:

289 *Ibid.*
290 *Ibid.*
291 *Ibid.*
292 *Ibid.*

Migrants living in South Africa are not taking lightly the widespread threats and speculation that millions of foreign nationals would be attacked within hours of the last World Cup whistle being blown at the soccer finals. They recall the 2008 xenophobic violence in which several lives were lost, people injured and shacks burnt down. Now some of them, especially Zimbabweans, are leaving or making hasty arrangements to leave South Africa in droves. South African media reported Zimbabwean nationals to be leaving Cape Town in large numbers, begging lifts from passers-by to Johannesburg so that they could catch connecting buses back to Zimbabwe. The exodus lent weight to speculation that xenophobic violence would flare up after the World Cup final this weekend.²⁹³

The quotation shows, by and large, that considerable action still needs to be taken if South Africa is to achieve its international obligations of protecting African migrants, refugees and asylum seekers. The following narrative is a portrait of what survivors of xenophobia have undergone. The aim is to give the reader a vivid understanding of the degree of intensity of the xenophobia phenomenon in South Africa. Notably, many studies have been done on xenophobia and many stories captured, hence the writer has selected examples noted in different years.



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4.5 Consequences of xenophobia

An attempt has been made to capture the experiences of role players, individuals and organizations which have played a pivotal role in assisting those affected by xenophobia. Even though not all incidents have been captured, it is hoped the given examples will serve the purpose of this study.

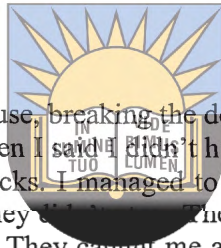
Collin Emanuel, an Angolan refugee in Cape Town relates his story...

I will never forget the day when I returned home sick from work. I got myself into bed and asked the people with whom I was sharing a house to buy some Panado

²⁹³ See Southern Times "Foreigners Flee SA Xenophobia Attacks", 12 July 2010 at: http://www.southerntimesafrica.com/Article.php?title=Foreigners_flee_SA_xenophobia_threats_&id=4398.(Accessed 11 December 2010).

and Medlemon from the shop. I gave the R5 for the medicine but they went and bought poison for me. When I took those tablets I immediately lost consciousness. That was when they threw paraffin on my body and burned me. I woke up weeks later in the hospital's intensive care unit where I was kept alive with the support of oxygen, a life machine, drips and blood. When I finally gained consciousness, the doctors informed me that both my legs had been amputated. This had been the only way to save my life.²⁹⁴

However, Collin is not an isolated case. Medicines Without Borders also captured the story of another man who was a victim of xenophobic attacks:



A group of people burst into the house, breaking the door. They asked me to show them my South African ID, and when I said I didn't have any, they started to beat me with sticks, stones, punches, kicks. I managed to escape from the house and started to run along the road, but they followed me. They started to follow me with the car and let me run for a while. They caught me again and beat me up until I was lying on the ground covered in blood. They left me there because they thought I was dead. After a while I tried to move and with difficulty reached a phone box and called an ambulance. The ambulance didn't arrive. Three people stopped their car when they saw me lying on the ground, carried me into their car and brought me to the hospital.²⁹⁵

One of the observations drawn by Desai²⁹⁶ is that little was done by organizations to support those who had left the camps in the aftermath of the May 2008 xenophobic attacks. In addition, they were limited attempts to get people reintegrated.²⁹⁷ Many in the camps had arrived having lost their documents, homes and livelihoods.²⁹⁸ As the following two testimonies²⁹⁹ indicate, these people left the camps in the same scenario.

²⁹⁴ See Williamson P "Refugees in South Africa, A Lukewarm Welcome" at: <http://www.startts.org.au/default.aspx?id=288&Printpage=true> (Accessed 19 August 2010).

²⁹⁵ See MSF *op cit*.

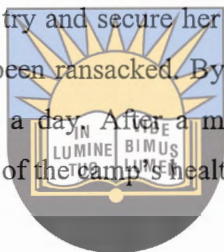
²⁹⁶ Desai 24 *op cit*.

²⁹⁷ *Ibid*.

²⁹⁸ *Ibid*.

²⁹⁹ See Desai 24 *op cit*.

Thembi³⁰⁰ arrived in Johannesburg on the 2nd of May 2007 from Zimbabwe. She made her way to Nigel. Her mother had once lived and worked in the area hence she knew a few people with whom she could get some temporary accommodation. She shared a garage in Duduza Township with two other Zimbabweans and got a job doing hair braiding. She has a young daughter back in Zimbabwe, as well as an elderly mother. Whatever spare cash she had, Thembi sent home. In May 2008 she heard of attacks in nearby Tsakani. All three occupants of the garage decided to flee that night. They went directly to the police station. From there they were taken to the Nigel town hall. That night there were no blankets and nothing to eat. By the morning there were some 300 people in the hall, a mix of Zimbabweans, Mozambicans and a small contingent of Ethiopians. Thembi was anxious to get to try and secure her belongings. However, by the time she got back to the garage the place had been ransacked. By now volunteers from Duduza had helped distribute blankets and food once a day. After a month they were transferred to the Springs camp. There Thembi became head of the camp's health committee.



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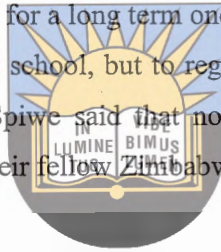
Food was delivered by DHL and they were fed twice a day. But, Thembi claims that often the food was “rotten” and they had to deal with people who got sick as a result. The other problem was that the Ekurhuleni Municipality was practically nonexistent. She was put in charge of getting them to sort out the over-flowing toilets, but there was a complete lack of response. She helped set up a crèche and distributed nappies donated by Gift of the Givers.³⁰¹

However, Thembi’s problems really began once she left the camp. She had lost all her belongings and could not re-start her braiding business. She eventually found a job as a guard in Brakpan. It is guarding repossessed houses, working seven days a week for R850 a month. When she was in the camp they were asked to apply for asylum. Everyone was refused. Her passport that gave her permission to stay in the country for three months had expired. The card that they were given by Home Affairs had also expired. For her to get her passport stamped for a further period, means going back to the border and paying R800. She did not have the money. She

³⁰⁰ A pseudonym.
³⁰¹ See Desai *op cit*.

“lived in pain and fear”. By 2009 she had not seen her daughter who was aged five. On the streets word was out that after the world cup there will be “gnashing of teeth” – meaning that all foreigners will be chased out of South Africa.

Spiwe³⁰², a 24 year old, also found herself in incredible difficulties because of papers. She “jumped the border” in May 2008 to join her husband. Spiwe almost immediately found herself in the Springs camp. She has three children who cannot get birth certificates because Spiwe does not have an I.D. or passport. For her to get a passport, she has to go back to Zimbabwe. For an emergency passport she needs R 2000, and for a long term one she will need to pay an equivalent of R 1500. The eldest child is due to start school, but to register him she needs to have a birth certificate. However, both Thembi and Spiwe said that no organization helped them in that regard. A year after the attacks, many of their fellow Zimbabweans were living in bushes.



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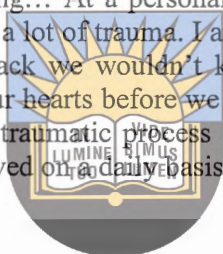
Life in the camps was harsh. Health conditions were terrible. Toilets were overflowing. People avoided the toilets and used the bush, adding to the problems. The children had no nappies. Churches and civil society organizations such as GOG and Trinity Methodist Church supplied nappies. A big tent was set up for children and GOG supplied colouring books and toys. It is alleged that some things donated to the camp were stored by the site manager and sold to local people.³⁰³

However, the survivors of xenophobic attacks did not face challenges alone. The different role players in different civil society organizations, human rights institutions and government departments were challenged on personal and professional levels. An interview with one human rights expert gives evidence:

³⁰² A pseudonym.

³⁰³ See Desai *op cit*.

There are personal challenges and those that I would put within the broader professional framework. At the professional level, coordination was a very big challenge, coordinating the responses, just talking to the UN agencies; for example, it was such a massive challenge, because you wouldn't know exactly whose primary responsibility it was. We had the UN High Commission for Refugees, the High Commissioner for Human Rights whose responsibilities are broadly human rights. We also had OTCHR, IOM, SACC and many more. You would get calls like "we have 200 blankets but we don't know who to give them to, can someone give us direction". So coordination was the biggest challenge. The other challenge was that, just sitting in a meeting was such a shock, because South Africa has never experienced war. Many people who came to our meetings, had never experienced violence at that level, so we tended to talk more about anecdotal things and it was so difficult to pin people down to the strategic issues; how then do we deal with this thing... At a personal level as people who were directly involved, we went through a lot of trauma. I and my colleagues would go to the sites and when we come back we wouldn't know how to de-brief each other. We needed to take care of our hearts before we could extend love and help to other people, it became such a traumatic process for us, and you would just imagine how those who were involved on a daily basis were feeling.³⁰⁴



Various authors³⁰⁵ have also captured the impact of xenophobic attitudes and their social, legal, economic, psychological and physiological impact on the lives of non-nationals and some South African citizens. In addition, the immensity and extent of xenophobic expression in South Africa makes it impossible to capture all incidents. In the following paragraphs the views of different role players will be analyzed, with the view of bringing out different interpretations and understandings of this phenomenon.

³⁰⁴ Interview with Victoria Maloka, South African Human Rights Commission Head of Education and Training Programme, Johannesburg, 21 January 2010.

³⁰⁵ See, for example, McDonald D. A and Jacobs S "(Re)writing Xenophobia: Understanding Press Coverage of Cross Border Migration in Southern Africa" 2005 *Journal of Contemporary African Studies* 23(3); Croucher S "South Africa's Illegal Aliens: Constructing National Boundaries in a Post-Apartheid State", 1998 (4) 639-660, *Ethnic and Racial Studies*; Crush J "A Bad Neighbour Policy? Migrant Labour and the New South Africa" 1996 3, *Southern Africa Report* 12(1); Southern African Migration Project "The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa" 2008 16, *Migration Policy Series*, 50, Cape Town, South Africa: Idasa; Steenkamp C "Xenophobia in South Africa: What Does it Say about Trust?" 2009 Vol. 98 439-447; South African Human Rights Commission, "Report on Open Hearings on Xenophobia and problems Related to it" at: www.sahrc.org.za/sahrc_cms/downloads/Xenophobia%20Report.pdf– (Accessed 17th of April 2009);

4.6 Analysis of interviews on xenophobia

As was stated previously, in-depth face to face interviews with different role players were conducted in order to hear the views of individuals and organizations that have been significantly involved in human rights awareness raising, protection and promotion.

The research questions can be summarized as follows:

- Main question: What is the extent of *xenophobia in South Africa* and how and why is it manifested in the way that it is?
- What is the socio-legislative framework with regard to the rights of non-nationals and is it sufficient and adequate?
- How effective is South Africa's response to *xenophobia* and related discrimination in the country?
- Are there alternative ways of understanding and dealing with *xenophobia* in South Africa?



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In relation to the nature and extent of *xenophobia* in South Africa, the participants had different views. For example, Victoria Maloka³⁰⁶ is of the view that there are two types of *xenophobia* in South Africa:

There are two types of *xenophobia* in my opinion, there is one that is explicit, and that one is demonstrated by the attacks that we see on a regular basis against the Somalis and a lot of other people. There is also a subtle one which finds interpretation in how the police treat non-nationals. They don't look at you and say "foreigner get out of here" but they relate in a different way to how they would relate to me as a South African. It is also in how you get served in a restaurant or Home Affairs. The other way is in how we treat non-nationals in the work place, the same way in which we're dealing with racism in the work place.

³⁰⁶ Interview with Malokaop *cit.*

However, according to Tamlin Monson³⁰⁷ and Kgamadi Kometsi,³⁰⁸ the nature and extent of xenophobia is difficult to state. Nevertheless, they both agree that violent xenophobic expression seems to take place in poorer communities. Moreover, they say that in “affluent spaces” many non-nationals are found to be working there and they seem to be comfortable, although the presence of non-nationals seems to attract negative responses in poorer areas. In answering the same question, Jody Kollapen had this to say:

It's very hard to quantify, in a sense, because I don't think there has been any scientific studies with regard to the nature and extent of xenophobia. We largely use anecdotic evidence so the xenophobic violence of two years ago is the basis to suggest that xenophobia is a serious problem, and of course, that could be correct because that was serious. But one doesn't know, for example, to what extent is the problem in industry, in corporations, institutions of higher learning. We seem to focus on its crude manifestation when people are assaulted. But the anecdotic evidence would suggest that it's a problem beyond... It's a problem in universities; it's a problem in corporations in governments. The kind of distrust, suspicion, hostility towards foreigners, so I think there may be a need to understand it better. There may be a need to assess its prevalence, in more than simply an anecdotic way.

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It is very interesting to note the differences in the responses of these participants. However, in relation to why xenophobia is expressed in violent ways all participants agreed that violence has been part of South Africa's post-apartheid hence post-violence struggles and expectations.³⁰⁹ More so, Maloka had this to say:

³⁰⁷ Tamlin Monson is a Senior Researcher on Xenophobic Attacks of 2008 at SAHRC. An interview with her was conducted on 25 January 2010, SAHRC Head Office, Park Town, Johannesburg.

³⁰⁸ Kgamadi Kometsi is the National Coordinator for Racism and Non-Discrimination at SAHRC. The interviews with Kometsi and Monson were done simultaneously hence at times they gave combined responses.

³⁰⁹ “There is this painful and unfortunate notion in South Africa that the government has to do things for us. The government has to build me a house, the government has to give me a job; such that when I don't have, I look at those who have with envy and ultimately hatred to the point where I actually take up arms against them. The xenophobic tendencies come when I come with a mindset that I can move from my village, I can go into town, look for a job and if I don't find it, somewhere someone has to give me a job. What you don't understand is that, before you get a job, there are lots of other things that should have happened.”

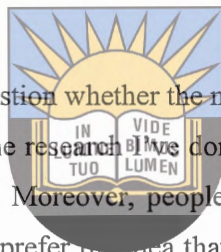
One of the issues that have been heightened to me, or that stands up for me as to why xenophobia is so rife in South Africa is the whole notion that as a country, as a post Apartheid, somehow post violence country, we have not as yet come full circle in understanding, in living, in enjoying our freedom before other people come to join us.

However, Jody Kollapen³¹⁰ added that a community as vulnerable as non-nationals is seen as easy prey, so one would attack them because they would not resist. They are vulnerable, they are weak, and have no political powers or influence in the society. Kollapen further argued that “South Africans have always used violence to resolve their problems; political, tribal, historical, personal and the whole husband and wife rape. So violence has become more of trademark, it’s almost like in the DNA, so in a sense it would be almost an extension of that violence.” According to Kollapen, it is not as if the violence is being reserved for non-nationals. “South Africans are violent towards each other, someone steals a cell phone, and they use violence to steal it; even though violence is not necessary. It has become part of the way in which we operate”. Kometsi also agreed that “there is a theory that we’re a very violent society, mainly because of our history, the way we fought to fight oppression. There is therefore that legacy.” Kometsi further attributed the violence to the nature of inequalities in South Africa’s socio-economic spectrum, stating that “there seems to be too huge a gap.” Monson further added that there are problems related to the kind of policing in poor areas, sometimes because of infrastructural problems. Whenever a violent incident occurs; it is difficult to contain it in these informal settlements.

Another important question which this study sought to answer was whether people have a firm understanding of what xenophobia is as a social phenomenon. The replies to that question varied. Maloka acknowledged that it was a hatred of non-nationals and was also largely related to perceptions. Moreover, according to Maloka, people do not yet have a firm understanding of xenophobia. Kollapen replied as follows:

³¹⁰ Jody Kollapen is the Ex Chairperson of the South African Human Rights Commission. An interview was conducted with this participant on 27 January 2010, at The University of Pretoria.

No, but I think people have different understandings. For example, someone would say “I don’t think we should have so many foreigners in our country and I don’t think I’m xenophobic either.” Because they argue that that’s not being xenophobic, that is simply being patriotic and believing that South Africa belongs, in the first place, to those who are South African. So even in a self-understanding of xenophobia there are different concepts of it. So one person would say “I don’t like foreigners, because they are dishonest, bring crime and disease” and they would say “I don’t have a basis for saying that but I believe it”. So there are different understandings as well of that, and therefore I think it’s also wrong to label South Africans as people often do, because people often hold beliefs that they think are not xenophobic. They think that if you say “we need to have a proper immigration policy, we need to enforce migration laws, then that doesn’t mean I’m xenophobic, but someone else can say that’s being xenophobic.



Monson also added that a lot of people question whether the motivations on attacks on foreigners are really xenophobic attacks. “Through the research that we have done, others feel it’s a crime, that it’s instrumental in a certain way,” she said. Moreover, people often don’t like the idea that the violence is based on hatred; they seem to prefer the idea that it’s just a crime and based on the desire to obtain something. An analysis of the above responses reveals that there is no firm understanding of what xenophobia entails.

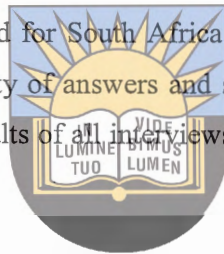
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A crucial question that this study sought to answer was whether South Africa’s legislative framework regarding the rights of non-nationals is adequate. Again, there were diverse responses to that question. Maloka stated that on paper the legislative framework is good. “Our Constitution is one of the best in the world, it is just the interpretation and the realization of what is on those papers that are problematic”, she said. Maloka also proposed that the whole immigration legal dispensation be revisited. A need therefore exists that requires “designing laws that are applicable to the African context, that respond to the African challenge; and that way we will be able to appreciate the Zimbabwean who has to come here, we would be able to appreciate the Congolese who is in the country,” she said. Kometsi added to this in his response:

There is that tension between universal human rights and constitutional rights. In terms of legislative framework, it seems to be better than other countries, if we can legitimize the fact that the state can exclude some other people. On paper

South Africa appears to be more progressive than it is in practice, for example, a piece of legislation like the Equality Act does prohibit discrimination on the basis of nationality. One can look at the Bill of Rights in the Constitution. One would also consider international human rights instruments such as the Universal Declaration of Human Rights. There are a number of other international instruments such as the Durban Declaration and Programme of Action which focus specifically on the needs of non-nationals when they are in a given country. There is also the National Action Plan which also addresses the problem of xenophobia, so we've got the framework that is comprehensive, that is also complemented by international instruments and Conventions which South Africa is party to.

The above responses truly reflect the need for South Africa to put its legislation into practice. The in-depth interviews produced a variety of answers and some could not be included in this chapter. However, the comprehensive results of all interviews are attached to this dissertation as Annexure 1.



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Notably, South Africa is still dealing with intergroup dynamics. Moreover, apartheid was such a successful ideology that more than a decade after it has been dismantled; much still needs to be done to shift the dynamics. At the moment there is a lot of the artificial cosmetic kind of dealing with racism which gets exposed as soon as there is a conflictual moment. One may say that South Africa is a vulnerable society, not being able to handle, even if it is not real but perceived, difference. This is stated mainly because some people who become victims of xenophobia are South Africans themselves. Hence, it is not just a matter of being a non-national but perceptions of being a non-national; maybe because one is dark skinned or maybe because one dresses in a particular way. Nonetheless, there is need to understand South Africa's role in the global renaissance. There is a need to see others, not as threats, but as a source of enrichment.

4.7 Conclusion

The next chapter deals, comprehensively, with the legislative framework. It therefore explores the international legislative framework as the primary reference point. Chapter 4 also explores South Africa's national legislative framework. The goal is to reveal strengths and expose gaps,

where applicable. It would be an injustice not to recognise South Africa's efforts (regardless of their inadequacy) to deal with problems of non-nationals. Through the legislative framework one also gets to understand reasons why xenophobia would be so rife in South Africa. As a complex socio-economic-legal phenomenon, xenophobia needs to be addressed from all angles if valuable solutions are to be realized.



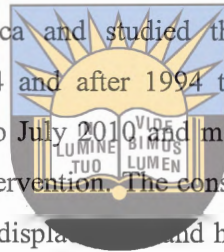
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CHAPTER 5

THE LEGISLATIVE FRAMEWORK

5.1 INTRODUCTION

Chapter 4 provided a descriptive analysis of xenophobia in post Apartheid South Africa. It began with a discussion of the definitional issues. This discussion was helped to clarify the context in which various terms are utilized in the text. Furthermore, Chapter 4 tracked migration and population movement in Southern Africa and studied the emergence and expression of xenophobia in South Africa before 1994 and after 1994 to present day. The chapter also followed the patterns of xenophobia up to July 2010 and made an effort to identify shifts and complexities as possible indicators for intervention. The consequences of xenophobia were also explored, through the use of examples of displacement and hardship. The chapter concluded by analyzing the responses given by participants during in depth interviews.



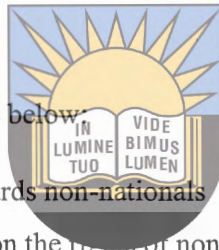
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The present chapter is divided into two components; it covers the rights of non-citizens as stipulated in international law and the expression of those rights in accordance to South African law. Again, the principal objective of this chapter is to highlight international standards protecting the rights of non-citizens as observed in the following quotation:

Considering that the Charter of the United Nations is based on the principle of the dignity and equality inherent in all human beings, and that all Member states have pledged themselves to take joint and separate action, in cooperation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion... considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein,

without any distinction of any kind, in particular as to race, colour or *national origin*(emphasis mine).³¹¹

Consequently, various authorities are reviewed in the first part of this chapter so as to gain a critical understanding of the xenophobia phenomenon thereby ensuring that the analysis is comprehensive, critical and contextualized. The second part deals with jurisprudence from an international, regional and national perspective. More so, an analysis of judicial decisions has been done in order to gain a critical understanding of how xenophobic attitudes influence the application of legal principles.



The analysis therefore follows the structure below:

- South Africa's responsibilities towards non-nationals
- The international legal framework on the rights of non-nationals
- The general principle of equality for non-citizens
- Rights of specific non-citizens facing xenophobia in South Africa
- The South African legislative framework on non-nationals

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5.2 South Africa's responsibilities towards non-nationals

South Africa is obliged to put in place effective legislation to fight against xenophobia, racism and all forms of discrimination against non-nationals as well as effective remedies to obtain compensation for violations of such legislation. Merely mentioning the general principle of non-discrimination in a constitution is not a sufficient response to the equality requirements of the human rights law.³¹²

³¹¹ See International Convention on the Elimination of All Forms of Racial Discrimination, Adopted by the General Assembly of the United Nations, resolution 2106 (XX) 21 December 1965, entry into force: 4 January 1969. For a comprehensive view of this instrument see Melander G and Alfredson G 'The Raol Wallenberg Compilation of Human Rights Instruments 1997 255 :MartinusNijhoff Publishers, London.

³¹² See Committee on the elimination of Racial Discrimination, concluding observations on the 9th, 10th, 11th and 12th Periodic reports of Qatar (A/57/18, paragraph. 191).

Professor Weissbrodt D, the special Rapporteur on the rights of non-citizens, stated in his report³¹³ that all persons should, by virtue of their essential humanity, enjoy all human rights. Exceptional distinctions, for example between citizens and non-citizens, can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective.³¹⁴ Weissbrodt further stated that while in some countries there may be legal guarantees of equal treatment and recognition of the importance of non-citizens in achieving economic prosperity; non-citizens face hostile social and practical realities. Non-citizens experience xenophobia, racism and sexism; language barriers and unfamiliar customs; lack of political representation; difficulty realizing their economic, social and cultural rights – particularly the right to work, the right to education and the right to health care; difficulty obtaining identity documents; and lack of means to challenge violations of their human rights effectively or to have them remedied. According to Weissbrodt some non-citizens are subject to arbitrary and often indefinite detention. They may have been traumatized by experiences of persecution or abuse in their countries of origin, but are confined by conditions in prisons, which are frequently overcrowded, unhygienic and dangerous. An analysis of Weissbrodt's report reveals that xenophobia and other related intolerances are widespread throughout the world and urgent measures have to be employed to curb them. In line with the discussion above, the following analysis deals with the international and national legal instruments protecting the rights of various non-nationals.



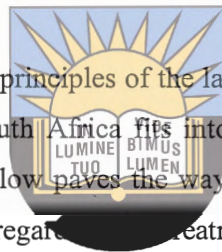
³¹³ See Office of the United Nations High Commissioner For Human Rights *The Rights of Non-citizens* 2006, United Nations, New York and Geneva. This publication was prepared by the Special Rapporteur on the rights of non-citizens, Professor David Weissbrodt, who submitted his final report to the Sub-Commission on the Promotion and Protection of Human Rights in August 2003(E/CN.4/Sub.2/2003/23 and Add.1-3).

³¹⁴ See general recommendation XIV (1993) of the Committee on the Elimination of Racial Discrimination on Article 1, paragraph 1, of the Convention: “the Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4 (relating to special measures), of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon any group distinguished by race, colour, descent, or national or ethnic origin.” In its general comment No. 18 (1989) on discrimination, the Human Rights Committee similarly observed that differences in treatment may be permissible under the Covenant “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. See also Fitzpatrick J, “The human rights of migrants”, Conference on International Legal Norms and Migration (Geneva, 23-25 May 2002. See , e.g. European Court of Human Rights, *Berrehab v. the Netherlands*, No. 10730/84, judgment of 21 June 1988).

5.3 International human rights norms and responsibility over foreign nationals

Human rights norms serve as the ultimate standard in determining the obligations of a state for protecting non-nationals in its territory. This proposition is bolstered by an observation that principal universal and regional international human rights instruments protect the rights and freedoms of *aliens* as well as nationals.³¹⁵ These instruments include the global (UN), and regional human rights systems (the European, Inter-American and the African human rights systems).

Having traced the development of the key principles of the law on responsibility over foreign nationals, it is proper to analyse how South Africa fits into the puzzle as informed by its constitutional framework. The analysis below paves the way for an informed assessment of any existing obligations of South Africa regarding the treatment of foreign nationals in the context of the xenophobic violence. In addition, it has become prominent that the reason why non-nationals find themselves in the territory of a state other than the state of nationality is not relevant to the discussion.



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Therefore, even though refugee law is the proper legal category to deal with the protection of certain categories of migrants, the influence of the human rights movement is difficult to ignore. Again, if international human rights norms could shake the well established foundations of the law on diplomatic protection, there is no reason precluding the same norms from informing the way international refugee law is applied, especially amidst allegations that international refugee law remains one of the most least developed areas of international law. On this strength, it is important to analyze South Africa's legal obligations for the protection of migrant foreign nationals who fell victim to xenophobic violence in line with the international human rights standards as prescribed under the global (United Nations), regional (African Union), sub-regional (SADC) and national human rights and refugee law

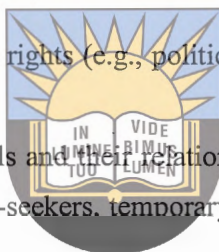
³¹⁵ Cholewinski 47.

frameworks. The following analysis deals with the international principle of equality for non-nationals.

5.3.1 *The general principle of equality for non-nationals*

International human rights law is founded on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights without discrimination.³¹⁶ Any approach to combating xenophobia against non-nationals in South Africa should therefore take into account:

- a) The interest of the State in specific rights (e.g., political rights, right to education, social security, other economic rights);
- b) The resident different non-nationals and their relationship to that State (e.g., permanent residents, migrant workers, asylum-seekers, temporary residents, tourists, undocumented workers), and
- c) Whether the State's interest in or reason for distinguishing between nationals and non-nationals or non-citizens (e.g., reciprocity, promoting development) is legitimate and proportionate.



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³¹⁶ The Universal Declaration of Human Rights recognizes this principle in its Article 2(1): "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This provision applies to "everyone" and thus includes non-citizens. The use of the words "such as" indicates that this is not exhaustive and makes it clear that the operative phrase is: "without distinction of any kind". Although this list omits nationality, according to Professor Lillich, "this omission is not fatal ... because the list clearly is intended to be illustrative and not comprehensive." He also noted that "nationality would appear to fall into the category of "distinction of any kind." Lillich R.B, *The Human Rights of Aliens in Contemporary International Law* 1984 43 Manchester University Press. Similar non-discrimination principles with respect to non-citizens can be found in the Charter of the United Nations; the International Covenant in Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families; the African Charter on Human and People's Rights; the American Convention on Human Rights; the (European) Convention for the Protection of Human Rights and Fundamental Freedoms; the (European) Framework Convention for the Protection of National Minorities; and many other instruments as well as authoritative interpretations of those instruments.

5.3.2 *International Covenant on Civil and Political Rights*

The international Covenant on Civil and Political Rights provides an example of the general principle of equality that underlies international human rights law as it relates to non-nationals, and the narrow nature of exceptions to that principle. According to its Article 2(1), each State party:

Undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.



Furthermore, Article 26 states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour... national or social origin ... or other status.

The Human Rights Committee has explained that:

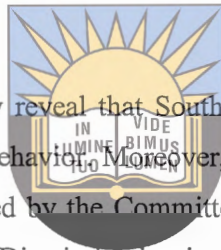
the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”³¹⁷

Furthermore, the Human Rights Committee has observed that the rights of non-nationals may be qualified only by such limitations as may be lawfully imposed under the International Covenant on Civil and political rights. Specifically, the Covenant permits States to draw distinctions

³¹⁷ See general comment No. 15 (1986) of the Human Rights Committee on the position of aliens under the Covenant.

between citizens with respect to two categories of rights: political rights explicitly guaranteed to citizens and freedom of movement. With regard to political rights, Article 25 establishes that “every citizen” shall have the right to participate in public affairs, to vote and hold office, and to have access to public service.

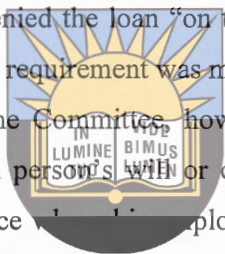
Regarding freedom of movement, Article 12 (1) grants “the right to liberty of movement and freedom to choose (one’s) residence” only to persons who are “lawfully within the territory of a state” – that is, apparently permitting restrictions on undocumented migrants.



The above provisions of international law reveal that South Africa has a duty to protect non-nationals from xenophobic attitudes and behavior. Moreover, general recommendation XXX on discrimination against non-citizens adopted by the Committee on the International Convention on the Elimination of All forms of Racial Discrimination in August 2004 forbids returning non-citizens to a country or territory where they are at risk of being subject to serious human rights abuses (this principle termed ‘non-refoulement’ shall be dealt with at a later stage of this analysis). In line with this thought, one may argue against the stance taken by South Africa to deport undocumented migrants to African nations like Sudan, Nigeria, Ethiopia, Zimbabwe and the Democratic Republic of Congo where there are wars and human rights violations. The general recommendation XXX also states that immigration policies and any measures taken in the struggle against terrorism must not discriminate, in purpose or effect, on grounds of race, colour, descent, or national or ethnic origin. This is indeed contrary to the distinction made by South Africa between African non-citizens and other non-citizens. Such a distinction amounts to xenophobia and racial discrimination.

The Committee on the Elimination of Racial Discrimination has indicated that States may draw distinctions between citizens and non-nationals only if such distinctions do not have the effect of limiting the enjoyment by non-nationals of the rights enshrined in other instruments. For example, in *A (FC) v Secretary of State for Home Department*, nine terrorism suspects

successfully challenged their detention, alleging that the United Kingdom of Great Britain and Northern Ireland had violated Article 5 (the right to liberty and security) of the European Convention on Human Rights.³¹⁸ Moreover, differential treatment based on citizenship or immigration status will constitute forbidden discrimination if the criteria for such differentiation are inconsistent with the objectives and purposes of the International Convention on the Elimination of All Forms of Racial Discrimination; are not proportional to the achievement of those objectives and purposes; or do not fall within the scope of Article 1(4) of the Convention, which relates to special measures.³¹⁹ For example, a Tunisian permanent resident married to a Danish citizen was denied a loan by a Danish bank because he was not a Danish citizen. The Committee noted that the Tunisian was denied the loan “on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person’s will or capacity to reimburse a loan. The applicant’s permanent residence or the place of his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment.”³²⁰ Accordingly, the Committee found that the Tunisian had suffered discrimination.



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5.3.3 *International Covenant on Economic, Social and Cultural Rights*

Like Article 2 (1) of the International Covenant on Civil and Political Rights, Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights declares that States’ parties guarantee the rights enunciated in the Covenant “without discrimination of any kind as to race, colour... national or social origin... or other status.” Article 2(3), however, creates an exception to this rule of equality for developing countries: “Developing countries, with due regard to

³¹⁸ *A. (FC) v Secretary of State for the Home Department* 2004UKHL 56, (2005) 2 W.L.R. 87. The House of Lords also found that indefinite detention constituted a disproportionate derogation under Article 15 from the right to liberty and security of persons in Article 5 of the European Convention on Human Rights.

³¹⁹ According to Article I (4), special measures are “taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms ...” See also general comment No. 18 of the Human Rights Committee, para. 13.

³²⁰ See Decision on communication No. 10/1997, *Ziad Ben Ahmed Habassi v Denmark*, 17 March 1999 (A/54/18,annex III).

human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” As an exception to the rule of equality, Article 2(3) must be narrowly construed, may be relied upon only by developing countries and only with respect to economic rights. The distinction made between citizens and non-citizens in employment matters in South Africa is justified on the above grounds.

5.4 The expression of the rights of non-nationals in Regional Bodies

Regional human rights law is largely consistent with the protections provided by international standards, but reveals numerous important elaborations on those standards as well as particular exceptions to the general principle of equality. Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), for example, reiterates the global principle of liberty and security of person, but elaborates upon that standard by providing that “no one shall be deprived of his liberty” except in specified cases and only “in accordance with a procedure prescribed by law.” The list of exceptions to the right to liberty in Article 5(1) is exhaustive and only a narrow interpretation of those exceptions is consistent with the aim of Article 5, namely to protect the individual from arbitrary detention.³²¹

The European Court of Human Rights has found a distinction between European “citizens” and individuals of non-European nationality with regard to deportation permissible. In *C v Belgium*, a

³²¹ *Conka v Belgium*, No. 51564/99 European Court of Human Rights, judgment of 5 May 2002. Article 5 of the European Convention on Human Rights provides: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a. the lawful detention of a person after conviction by a competent court; b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d. the detention of a minor by lawful order for the (sole) purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f. the lawful arrest or detention of a person to prevent his effecting an authorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

Moroccan citizen who had lived in Belgium for 37 years was ordered to be deported owing to convictions for criminal damage, possession of drugs and conspiracy. He claimed discrimination on the grounds of race and nationality in violation of Article 14 of the European Convention because “his deportation amounted to less favourable treatment than was accorded to criminals who, as nationals of a member State of the European Union, were protected against such a measure in Belgium.” The Court found no violation of Article 14 of the European Convention because such preferential treatment was ‘based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has... established its own citizenship.’³²²



Adopting an approach similar to that of the European Court of Human Rights,³²³ the Inter-American Court of Human Rights found non-discriminatory a proposed amendment to the naturalization rules for nationals of the other Central American countries, Spaniards and Ibero-Americans, because they “share much close historical, cultural and spiritual bonds with the people of Costa Rica” and will be “more easily and more rapidly assimilated within the national community.” The Court explained that “no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things.”³²⁴ It can thus be concluded that the differentiation between citizens and non-citizens does not all amount to xenophobia, what is important is the intention behind such differentiation.

5.4.1 *The African Regional Human Rights System*

While the term ‘human rights’ is of relative recent currency on the continent, people have been struggling for freedom, dignity, equality and social justice for centuries.³²⁵ In Africa, as is the case everywhere, that which is now called human rights finds its foundations in the struggle to

³²² European Court of Human Rights, *C v Belgium*, No. 21794/93, judgment of 7 August 1996, paras. 37-38.

³²³ European Court of Human Rights, Case “*relating to certain aspects of the laws on the use of languages in education in Belgium*” (Belgium Linguistic Case), No. 1474/62 ; judgment of 23 July .

³²⁴ Inter-American Court of Human Rights, Advisory Opinion OC-4/84 on the proposed amendments to the naturalization provision on the Constitution of Costa Rica, 19 January 1984.

³²⁵ See Heyns C and StefinzynaK ‘*Human Rights, Peace and Justice In Africa; A Reader*’ 2006 195; Pretoria University Press.

assert these core values of human existence. Today, the term human rights is used widely in the African context. Moreover, the written constitutions of every country in Africa recognize the concept; the inter-governmental organization of African States, the African Union, regards the realization of human rights as one of its objectives and principles; and the record of ratification of the human rights treaties of the United Nations by African countries is on par with practices around the world. There is wide acceptance that the security and development of Africa – as in the world at large – will have to be based on human rights.

Not surprisingly, given the history of exploitation of Africa, the struggle roots of the concept of human rights are clearly visible in the human rights documents of the continent.³²⁶ Again, the African Charter on Human and People's Rights reflects in many ways a reaction to the continental experience of slavery and colonialism, for example by recognizing a people's right to self-determination. The excesses of some post-independence leaders are reflected in the fact that a significant number of African Constitutions explicitly recognize a direct right, located in the people, to protect constitutional and human rights norms, if need be through political struggle, should they be violated. The Constitutive Act of the African Union uniquely provides for a right of humanitarian intervention in member states by the Union, in cases of grave human rights violations.

As is well known, the struggle for human rights on the African continent is far from over or complete. The continent is plagued by widespread violations of human rights, often on a massive scale. Furthermore, the process to establish effective institutional structures, that will help to consolidate and protect the hard earned gains of the freedom struggles of the past, has become a struggle in its own right. No doubt, the most important task in this regard is to establish legal systems on the national level that protect human rights. At the same time, regional and global attempts to change the human rights practices of the continent, and to create safety nets for those cases not effectively dealt with on the national level, are assuming increased importance.

³²⁶ Heyns 195 *ibid.*

5.4.2 African Human Rights Instruments

The central document of the African regional human rights system, the African Charter on Human and People's Rights (African Charter), was opened for signature in 1981 and entered into force in 1986. It has been ratified by all 53 member states of the OAU/AU. The sole supervisory body of the African Charter currently in existence is the African Commission on Human and People's Rights (African Commission). The African Commission was constituted and met for the first time in 1987. Further, the Commission has adopted its own Rules of Procedure (amended in 1995).



Another instrument, the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights (African Human Rights Court Protocol) was adopted in 1998 and entered into force in January 2004. The African Charter has been supplemented by the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted in 2003, which entered into force in November 2005.

In addition to these instruments the African regional human rights system is comprised of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 which entered into force in 1974 and the African Charter on the Rights and Welfare of the Child (African Children's Charter) of 1990, which came into force in 1999. The relatively unknown Cultural Charter for Africa of 1976 came into force in 1990. Another treaty with relevance for human rights is the Convention on Preventing and Combating Corruption adopted in 2003. This convention has not yet entered into force. Moreover, the Convention for the Elimination of Mercenarism in Africa was adopted in 1977 and entered into force in 1985. The OAU Convention on the Prevention and Combating of Terrorism of 1999 entered into force in 2002.

A unique feature of the African Charter is the inclusion of socio-economic rights in a regional human rights treaty, alongside civil and political rights.³²⁷ The inclusion of socio-economic rights in the Charter is significant, in that it emphasizes the indivisibility of human rights and the importance of developmental issues, which are obviously important matters in the Africa context. At the same time, the fact that only a modest number of socio-economic rights are explicitly included in the Charter should be noted. The Charter only recognizes ‘a right to work under equitable and satisfactory conditions’³²⁸, a right to health³²⁹, and a right to education³³⁰. However, some prominent socio-economic rights are not mentioned by name, such as the right to food, water, social security and housing. Moreover, the socio-economic rights in the Charter have received scant attention from the African Commission, but in one case the Commission has dealt extensively with the issue and has, in effect, held that some internationally recognized socio-economic rights which are not explicitly recognized in the Charter should be regarded as being implicitly included. For example, in *Serac v Nigeria* the decision dealt with the destruction of part of Ogoniland by Shell, acting in collaboration with the government of Nigeria. The Commission held that the presence of an implicit right to ‘housing or shelter’ in the Charter has to be deduced from the explicit provisions on health, property and family life in the Charter. Similarly, a right to food has to be read into the right to dignity and other rights. It was accepted, without argument or reasoning, that the Ogonis constituted a ‘people’.

The approach, of the Commission, to filling in the gaps in the Charter as was done in the *Serac* case could be seen as a creative and bold move on the part of the Commission, but it could also be argued that too wide a divergence between the Commission’s interpretation of the Charter and the Charter itself could compromise legal certainty.

5.5 Rights of groups facing xenophobia in South Africa

³²⁷ Heyns 100 *op cit.*

³²⁸ Article 15.

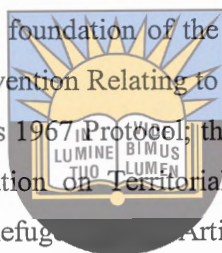
³²⁹ Article 16.

³³⁰ Article 17.

Different categories of undocumented non-citizens, such as stateless persons, refugees and asylum-seekers, undocumented economic migrants, women being trafficked into prostitution, and children, must each be dealt with in a manner appropriate to their particular situation³³¹. The discussion below will focus on those groups which are considered vulnerable to xenophobia in South Africa.

5.5.1 *Refugees and asylum seekers*

Five United Nations instruments form the foundation of the rights of refugees in international human rights law:³³² the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter referred to as the 1951 Convention) and its 1967 Protocol; the Statute of the Office of the High Commissioner for Refugees; the Declaration on Territorial Asylum; and the Handbook on Procedures and Criteria for Determining Refugee Status. Article 1A (2) of the 1951 Convention defines a 'refugee' as any person who:



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As a result of events occurring before January 1, 1951 and owing to well founded fear³³³ of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside

³³¹ European Commission against Racism and Intolerance, second report on Croatia (CRI (2001) 34).

³³² Steinhart, R. G, "The United Nations and refugees: 1945-1988," Human Rights, the United Nations and Amnesty International (New York, Amnesty International, 1988).

³³³ It has been argued that the question of whether fear of persecution is well-founded must be appreciated in the light of the circumstances of each case. Again, it is for the asylum seeker to submit the evidence needed to assess the veracity of the facts and the circumstances put forward. It should be understood that once the credibility of the asylum-seeker's statements has been sufficiently established, it will not be necessary to seek detailed confirmation of the facts put forward and the asylum seeker should, unless there are good reasons, be given the benefit of the doubt. The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relation with his country of origin. Furthermore, the fact that an individual, prior to his departure from his country of origin, was not subject to persecution or indirectly threatened with persecution does not per se mean that he cannot in asylum proceedings claim a well-founded fear of persecution. See Wallace R 'International Human Rights Text and Materials' 1997 314: Sweet & Maxwell, London. One may also argue that if Wallace's explanation of a 'well-founded' fear could be embraced, South Africa would award more protection to non-nationals on the basis of refugee status.

the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

The definition of 'refugee' in Article 1 of the OAU Refugee Convention is broader than in the 1951 Refugee Convention. In addition to 'well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion' the OAU Convention also stipulates that anyone who is compelled to leave his country because of 'external aggression, occupation, foreign domination or events seriously disturbing public order' shall be considered a refugee. A critical analysis of this definition reveals that a great number of Africans residing in South Africa could be eligible for refugee protection if the OAU Convention definition of 'refugee' could be employed by South Africa.



International standards pertaining to refugees and asylum seekers should be applied equally, regardless of the nationality of the asylum-seeker or refugee.³³⁴ Moreover, conditions in refugee shelters and conditions of detention faced by undocumented migrants and asylum seekers should meet international standards.³³⁵ South Africa should therefore ensure that individuals caught in an illegal situation, such as asylum-seekers who are in the country unlawfully and whose claims are not considered valid by the authorities, are not treated as criminals.³³⁶

The 2003 report of the Special Rapporteur on the human rights of migrants focused particularly on the detention of migrants and the conditions of their detention. Concerns included the detention of asylum seekers; prolonged detention periods; the arbitrary nature of detention decisions; detention on the basis of unspecified allegations related to terrorism or national security; detention of trafficking victims; detention of migrant children; absence of legal assistance and judicial review procedures; detention with ordinary criminals; solitary

³³⁴ See Committee on the Elimination of Racial Discrimination, concluding observations on the 9th, 10th and 11th periodic reports of the Sudan.

³³⁵ See Committee on the Elimination of Racial Discrimination, concluding observations on the 14th, 15th, 16th, and 17th periodic reports of Hungary (A/57/18), para. 380.)

³³⁶ See(European Commission against Racism and Intolerance, Second report on Croatia (para. 31) and Second report on Belgium (paras. 11-15) on this principle.

confinement; methods of restraint threatening physical integrity; detention in unsuitable facilities; overcrowding and poor hygienic conditions; lack of medical care; lack of education for young detainees; and other problems.

5.5.2 Refugees

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol provide that refugees should be entitled to treatment at least as favourable as that accorded to citizens with respect to: religion³³⁷; protection of intellectual property³³⁸; access to courts and legal assistance³³⁹; rationing measures³⁴⁰; elementary education³⁴¹; public relief and assistance³⁴²; labour legislation and social security³⁴³; as well as fiscal charges.³⁴⁴ The Convention and its Protocol also require that States parties accord to refugees treatment no less favourable than that accorded to non-citizens generally with respect to exemption from legislative reciprocity³⁴⁵; acquisition of property³⁴⁶; non-political and non-profit-making associations and trade unions³⁴⁷; wage-earning employment³⁴⁸; self employment³⁴⁹; liberal professions³⁵⁰; housing³⁵¹; post-elementary education³⁵²; and freedom of movement³⁵³. Employment, housing and social assistance should not be denied to recognized refugees, especially on grounds of their ethnicity.³⁵⁴

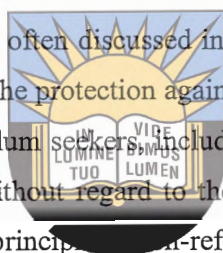
337 Article 4.
338 Article 14.
339 Article 16.
340 Article 20.
341 Article 22 (1).
342 Article 23.
343 Article 24.
344 Article 29.
345 Article 7 (1).
346 Article 13.
347 Article 15.
348 Article 17.
349 Article 18.
350 Article 19.
351 Article 21.
352 Article 22 (2).
353 Article 26.

354 See e.g., European Commission against Racism and Intolerance, Second Report on the Czech Republic (CRI (2000) 4, para. 14.

Moreover, States must ensure a more rigorous supervision of the application of measures aimed at facilitating the integration of refugees, particularly at the local level.³⁵⁵ Some states have made positive efforts to create a comprehensive integration plan for new arrivals and offer them tools they will need for success in the society of the State.³⁵⁶

5.5.2.1 *The principle of non-refoulement*

Repatriation, whatever form it assumes, is often discussed in the context of the legal protection accorded to asylum seekers and refugees; the protection against refoulement. Refoulement refers to the return or rejection of refugees or asylum seekers, including illegal immigrants, back to the country of origin or any other country without regard to the persistence of persecution in the territories where they are repatriated. The principle of non-refoulement was developed in order to curb the practice of returning or rejecting those in flight on the basis that returning them to persecution was contrary to the essence of international law.³⁵⁷



As to the normative basis of non-refoulement, Article 3 of the OAU 1969 Convention and Article 32 of the UN 1951 Convention generally provide for the expulsion of refugees from host countries. Non-refoulement has been interpreted in many other international treaties with declarations being made by various bodies implying that the principle might have attained customary international law status.³⁵⁷ Soft law also abounds with sentiments.³⁵⁸ However,

³⁵⁵ Ibid.

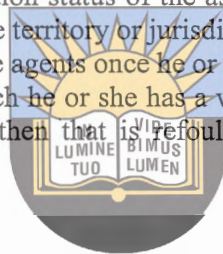
³⁵⁶ See European Commission against Racism and Intolerance, Second report on Austria (paras. 16-21).

³⁵⁷ Art 3 of the UN Convention Against Torture, Art. 7 of the ICCPR wherein the UNHCR IN General Comment No. 31 interpreted the provision to include non-refoulement to cover torture, inhumane or degrading treatment. Art. 45 of the Geneva Convention Relative to the Protection of Persons in Time of War provides non-refoulement by prohibiting the sending of prisoners of war back to the countries or any other territory where they could be killed, tortured or treated inhumanely or degradingly. For commentaries on non-refoulement and customary international law status, see Hailbronner K, *Non-Refoulement and Humanitarian Refugees: Customary International Law of Wishful Legal Thinking* 1986 26 *Virginia Journal of International Law* 857.

³⁵⁸ On Soft law on non-refoulement, see the UNHCR Executive Committee Conclusions available on www.unhcr.org.

Goodwin-Gill and Macadam observed that this proposition is easier said than proven. As to how the principle applies, some supported the view that it applies only at frontiers whilst others said it applied to those refugees already within the territory of a member state. The accepted view supported by state practice is that the principle applies both at borders or frontiers as well as within the territory of the receiving state.³⁵⁹ For this reason the OAU Convention and the American Convention have been commended for being elaborate on the scope of the application of the principle.³⁶⁰ Further to the scope of the application, the authors concluded thus:

Equally irrelevant is the legal or migration status of the asylum seeker. It does not matter how the asylum seeker comes within the territory or jurisdiction of the state; what counts is what results from the actions of the state agents once he or she does. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is refoulement contrary to international law.³⁶¹



The accepted exceptions to the application of non-refoulement are national security in the sense that where a particular person or group of persons poses a threat to national security to the host state, then they could be refouled. State practice has shown that states easily rely on national security hence jurisprudence has been developed to require states claiming national security to demonstrate two things: one, on reasonable grounds that a particular individual poses security concerns; and two, due to the seriousness of the consequences of refoulement, a high threshold for justifying an exception should be established. Due to the fact that people who have been convicted of serious offences are generally regarded as stimulating national security concerns, in the Australian case of *A v Minister of immigration and Multicultural Affairs*,³⁶² it was held that the correct approach is to assess the likelihood of the danger the person poses as opposed to the gravity of his previous convictions.

³⁵⁹ See *European Roma Rights Centre v Immigration Officer at Prague Airport (UNHCR Intervening)* 2 AC 1(2004)UKHL 55 para 26, per Lord Bingham. Cited by Goodwin-Gill 208.

³⁶⁰ Goodwin-Gill 208.

³⁶¹ Goodwin-Gill 233.

³⁶² (1999) FCA 227.

Furthermore, concerns have been raised about voluntary repatriation, including the extent to which return is voluntary and voluntary repatriation in situations where the receiving state is not yet in a position to guarantee the safety of the returnees. There are certain practices which amount to constructive refoulement such as subjecting asylum seekers and refugees in squalid conditions in immigration detention centres or exposing them to violence in order to influence them to leave the territory under the guise of voluntary repatriation.³⁶³

In the case of South Africa and the xenophobic violence, the issues are similar. Whereas in the case of countries with large numbers of refugees, asylum fatigue may be the reason why refugees are encouraged to leave, in South Africa the persistence of xenophobia and xenophobic violence in particular may result in pressure being placed on refugees to return to their countries of origin despite conditions there not being conducive to return. This was reportedly the situation facing certain refugees and asylum seekers who were victims of xenophobia and subsequently experienced mistreatment and injustice at the hands of officials of the Department of Home Affairs.³⁶⁴ The next discussion focuses on the matter of judicial precedent. It analyses decisions of various courts, beginning with international courts and concludes by discussing South African case law. The aim is to verify the applicability of various human rights provisions in the courts.

5.5.3 *Asylum seekers*

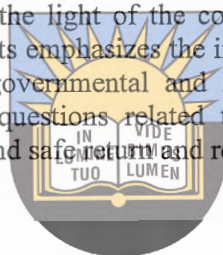
The World Conference on Human Rights (Vienna Declaration of 1993) reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention, its 1967 Protocol and regional instruments. It further expresses its appreciation to States that continue to admit and host large numbers of refugees in their territories, and to the Office of the

³⁶³ See 'The nature of South Africa's legal obligations to combat xenophobia' 89.

³⁶⁴ Lawyers for Human Rights Press Release on an urgent application challenging the unlawful detention and deportation of refugees. Available <http://www.lhr.org.za/news/2008/lhr-urgent-application-challenging-unlawful-detention-and-deportation-refugees>. (Accessed 20th February 2010).

United Nations High Commissioner for Refugees for its dedication to its task. Paragraph 23 of the Vienna Declaration further recognizes that:

gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to the displacement of people. The World Conference on Human Rights recognizes that, in view of the complexities of the global refugee crisis and in accordance with the Charter of the United Nations, relevant international instruments and international solidarity and in the spirit of burden sharing, a comprehensive approach by the international community is needed in co-ordination and co-operation with the countries concerned and relevant organizations, bearing in mind the mandate of the United Nations High Commissioner for Refugees... In the light of the comprehensive approach, the World Conference on Human Rights emphasizes the importance of giving special attention including through intergovernmental and humanitarian organizations and finding lasting solutions to questions related to the internally displaced persons including their voluntary and safe return and rehabilitation.



Consequently, certain rights apply particularly to asylum-seekers. Moreover, eligibility for asylum should not depend on the ethnic or national origin of applicants.³⁶⁵ Further, asylum-seekers should not be left in a destitute condition while awaiting examination of their asylum claims,³⁶⁶ since such poor conditions could reinforce prejudice, stereotypes and hostility towards asylum applicants. One may argue that the xenophobic attitude exhibited by South African nationals against African non-nationals is largely reinforced by the failure of the South African Department of Home Affairs in meeting the needs of asylum seekers. The asylum seekers queue for long hours at the Home Affairs offices and therefore appear to other South Africans as desperate and pitiable people. This undeniably puts South African non-nationals at a very vulnerable position and opens them up to various forms of abuse.³⁶⁷ Moreover, it is stated that the procedure for determining eligibility should not be slow and States should ensure that applicants are given access to sufficient legal assistance.³⁶⁸ On that note, states should also be

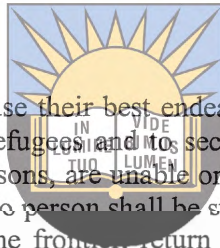
³⁶⁵ See e.g. African Charter on Human and People's Rights, Article 12; Convention Relating to the Status of Refugees, Article 3.

³⁶⁶ European Commission against Racism and Intolerance, Second report on Austria (paras. 16-21).

³⁶⁷ One would recall that the terms "*amakwerekwere*" and "*magrigamba*" all evolved as a result of the appearance of African immigrants in places such as Home Affairs and border posts.

³⁶⁸ See e.g., Human Rights Committee, views on Communication No. 560/1993, A v Australia, 4 April 1995 (a/52/40(vol. II), annex VI).

encouraged to provide free legal advice to applicants.³⁶⁹ Furthermore, time limits for registration to lodge asylum claims should not be short as to deprive persons of the protection to which they are entitled under international law. International human rights law is also relevant in the context of defining adequate reception standards for asylum-seekers.³⁷⁰ Furthermore, asylum-seekers should be granted the right to work.³⁷¹ The human rights of asylum seekers are also protected by regional human rights instruments in Africa,³⁷² Europe,³⁷³ and the Americas³⁷⁴ that apply to all persons residing within the jurisdiction of their respective States parties, regardless of their legal status in the country of asylum. For instance, Article II of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa³⁷⁵ states:



Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality... No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.

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The Declaration of Cartagena on Refugees³⁷⁶ further emphasizes the principles of the OAU Convention in the following paragraph:

³⁶⁹ European Commission against Racism and Intolerance, Second report on Turkey (CRI (2001) 37, para. 44).

³⁷⁰ See, e.g., Office of the United Nations High Commissioner for Refugees, Executive Committee conclusion No. 82 (XLVIII) on safe guarding asylum (17 October 1997).

³⁷¹ See e.g., European Commission against Racism and African Charter on the Rights and welfare of the Child.

³⁷² See African Charter on Human and People's Rights and African Charter on the Rights and welfare of the Child.

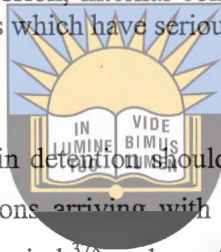
³⁷³ European Convention on Human Rights; Protocols No. 1, 2, 3, 4 and 5; and European Social Charter.

³⁷⁴ American Convention on Human Rights; Convention on Territorial Asylum and Convention on Diplomatic Asylum of the Organization of American States; General Assembly resolution 2312 (XXII) of 14 December 1967 on the Declaration on Territorial Asylum.

³⁷⁵ This Convention was Concluded by the Organization of African Unity at Addis Ababa, Ethiopia on 10 September 1969 and it entered into force on 20 June 1974.

³⁷⁶ This Declaration was adopted by the Colloquium on International Protection of Refugees in Central America, Mexico and Panama at Cartagena, Colombia on 22 November 1984.

Expressing its conviction that many of the legal and humanitarian problems relating to refugees which have arisen in the Central American region, Mexico and Panama can only be tackled in the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts... In view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in light of the situation prevailing in the region, the precedent of the OAU Convention (Article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons which have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.



Moreover, the holding of asylum-seekers in detention should be avoided to the greatest extent possible, particularly in the cases of persons arriving with families.³⁷⁷ Where detention does occur, it should not be for an indefinite period,³⁷⁸ and careful attention should be paid to the accommodation and facilities for the families – particularly the children – of asylum seekers held in detention.³⁷⁹ Asylum seekers and refugees should not be detained alongside convicted criminals,³⁸⁰ nor should they be detained for lack of identity papers or their uncertainty about travel routes into the receiving State.³⁸¹ Wherever possible, asylum-seekers should be guaranteed freedom of movement.³⁸²

5.5.4 *Non-citizen workers and their families*

Everyone (regardless of citizenship) has the right to work and Governments are obliged to take progressive measures to safeguard this right.³⁸³ Non-citizens who are lawfully present in a State are entitled to treatment equal to that enjoyed by citizens in the area of employment and

³⁷⁷ European Commission against Racism and Intolerance, Second report on Malta (paragraphs. 19).
³⁷⁸ See e.g., European Commission against Racism and Intolerance, Second report on the United Kingdom (CRI(2001) 6, paragraph. 63).
³⁷⁹ European Commission against Racism and Intolerance, Second report on Finland (paragraphs. 21, 46-57).
³⁸⁰ See e.g. European Commission against Racism and Intolerance, Second report on the United Kingdom (paragraph 63).
³⁸¹ European Commission against Racism and Intolerance, Second report on Finland (paragraphs. 21, 46-57)
³⁸² European Commission against Racism and Intolerance, Second report on Malta.
³⁸³ International Covenant on Economic, Social and Cultural Rights, Article 6.

work.³⁸⁴ Everyone, including non-citizens, has the right to just and favourable conditions of work,³⁸⁵ and international standards that provide protection in treatment as well as conditions at work in areas such as safety, health, hours of work and remuneration apply to all workers regardless of citizenship or status. For example, Article 8 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live³⁸⁶ provides:

1. Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under Article 4:
 - a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - c) The rights to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfill the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State.

The following discussion, based on the International Labour Organization, also emphasizes the vitality of rights granted to non-nationals. The basis of all ILO Conventions, as shall be noted, is that all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

5.5.5 International Labour Organization (ILO)

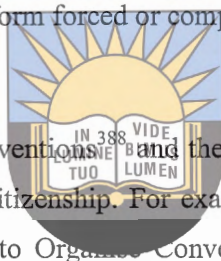
³⁸⁴ See International Labour Office, "The key role of international labour standards in defending rights of non-nationals", statement by Patrick A. Taran to the Expert Meeting on clarifying and expanding the rights of non-nationals organized by the Open Society Justice Initiative (New York, 9-10 November 2003).

³⁸⁵ International Covenant on Economic, Social and Cultural Rights, Article 7.

³⁸⁶ Proclaimed by the General Assembly of the United Nations, resolution 40/144 of 13 December 1985.

International Labour Organization (ILO) conventions and recommendations (for example, on collective bargaining, discrimination, workers' compensation, social security, working conditions and environment, abolition of forced labour and child labour) generally protect the rights of all workers irrespective of citizenship. For instance, Article 8 of the International Covenant on Civil and Political Rights³⁸⁷ states:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. No one shall be required to perform forced or compulsory labour



Certainly, the eight fundamental ILO conventions and the recommendations that accompany them apply to all workers regardless of citizenship. For example, Article 3 of the Freedom of Association and Protection of the Right to Organize Convention³⁸⁹ states that “workers’ and employers’ organizations shall have the right to draw up their own constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.” Additionally, several ILO instruments specifically protect migrant workers and their families. The most significant are: Convention No. 97 concerning migration for employment; Convention No. 143 concerning working conditions and equal treatment of migrant workers; and Convention No. 118 concerning equality of treatment in social security. In many instances, the conventions guarantee certain rights; for example, equal remuneration and minimum wage with respect to past employment and maintenance of social security benefits³⁹⁰ to

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³⁸⁷ This Covenant was adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXI) of 16 December 1966. It entered into force on 23 May 1976.

³⁸⁸ Forced Labour Convention (No. 29), Freedom of Association and Right to Organize Convention (No. 87), Right to Organize and Collective Bargaining Convention (No. 98), Equal Remuneration Convention (No. 100), the Abolition of Forced Labour Convention (No. 105), Discrimination (Employment and Occupation) Convention (No. 111), Convention on Minimum Age (No.138) and Elimination of Worst Forms of Child Labour Convention (No. 182).

³⁸⁹ Adopted on 9 July 1948 by the General Conference of the International Labour Organisation at its thirty-first session, Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 and entered into force on 4 July 1950.

³⁹⁰ Migrant Workers (Supplementary Provisions) Convention (No. 143), Article 9. The European Social Charter is very specific in terms of remuneration to be granted migrant workers. Article 4 of the European Social Charter recognizes the right of workers to remuneration such as will give them and their families a

non-citizens regardless of the legality of the migrant's presence in the territory. Other rights are extended only to those persons lawfully within a territory, for example, rights to equal opportunities and vocational training.³⁹¹

ILO Convention No. 143 provides specific guidance as to the treatment of irregular migrants and those migrants who are employed unlawfully. In laying out the minimum norms applicable to such persons, Article 1, for example, establishes that States parties must "respect the basic human rights of all migrant workers"³⁹² regardless of their migratory status or legal situation. A critical appreciation of the above norm would reveal that South Africa falls short in that regard. Undocumented workers are exploited in the farms and mines and exposed to all forms of verbal and psychological abuse. They are underpaid and at times they are handed to the police just before their pay days. This has been happening for a long period of time and the South African government has turned a blind eye to it.³⁹³ A significant number of such cases are not even reported by the survivors for fear of arrest by the South African Police who also gladly take bribes when "foreigners" bring their grievances. The Committee of Experts on the Application of Conventions and Recommendations has interpreted the rights of migrant workers to be the fundamental rights enshrined in the International Bill of Human Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the ILO Declaration on Fundamental Principles and Rights at Work.³⁹⁴ This is indeed contrary to the xenophobia currently being experienced by Zimbabwean migrants at De Doorn in Cape Town.³⁹⁵

decent standard of living. Article 4(2) also recognizes the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases. (The European Social Charter was adopted by the Council of Europe on 18 October 1961 in Turin and entered into force on 26 February 1965).

³⁹¹ Migrant Workers Recommendation (No. 151), para. 2 (b).

³⁹² Migrant Workers (Supplementary Provisions) Convention (No. 143).

³⁹³ See, 'Xenophobic tension prompts evacuation' at <http://www.timeslive.co.za/news/Article198408.ece>. (Accessed 23 November 2009).

³⁹⁴ According to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, all ILO members Have an obligation arising from the very fact of their membership in the Organisation "to respect, to promote and to "realize... the principles concerning the fundamental rights" set out in its eight fundamental Conventions even if they have not ratified them.

³⁹⁵ South African refugee rights group, PASSOP, has slammed local government officials for their handling of

5.5.6 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*³⁹⁶

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of which ILO Conventions Nos. 97 and 143 formed the basis, protects all migrant workers and their families, but does not generally include international organization employees, foreign development staff, refugees, stateless persons, students and trainees (arts. 1 and 3). With regards to no-discrimination, Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that State Parties must:



undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Concerning religion, Article 12 of the above Convention states that migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right includes freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching. Article 12(2) of the same Convention further states that migrant workers and members of their families shall not be subject to coercion

this week's outbreak of xenophobic violence near Cape Town, which saw more than 3000 foreigners, mainly the Zimbabweans, flee their homes. PASSOP's Braam Hanekom on Friday lashed out at local authorities, accusing them of not doing enough to prevent the attacks. He said the tensions in the local worker communities have been building since last week, tensions he said police and government officials were "more than aware of." Hanekom explained that the government has since been more interested in "hiding how serious this problem is ahead of the World Cup next year than actually dealing with it". Headlines on xenophobia have resurfaced: http://www.news24.com/Content/SouthAfrica/News/1059/d98254c3d5b344dd84ebf1097e04ddef/18-11-2009-10-28/Refugees_to_be_reintegrated. (Accessed on 23 November 2009).

³⁹⁶ A/Res/45/158 adopted December 18, 1990.

that would impair their freedom to have or to adopt a religion or belief of their choice. In addition, States parties must ensure respect for migrants' cultural identity (Art 31.); the right to repatriate earnings, savings and belongings (Art. 32) and information about rights under the Convention (Art. 33) and several more rights and provisions.³⁹⁷

5.5.7 Inter-American Court of Human Rights

The Inter-American Court of Human Rights has confirmed the applicability of international labour standards to non-citizens, and particularly to non-citizens in irregular status. In an opinion issued in September 2003, the Court held that non-discrimination and the right to equality are *juscogens* that are applicable to all residents regardless of immigration status. Hence, Governments cannot use immigration status as a justification for restricting the employment labour rights of unauthorized workers, such as rights to social security. The court found that Governments do have the right to deport individuals and refuse to offer jobs to people who do not possess employment documents, but held that, once an employment relationship had been initiated; all the unauthorized workers become entitled to all the employment and labour rights that are available to authorized workers.³⁹⁸ The Court stated that:

the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour-related nature. When assuming an employment relationship, the migrant acquires rights

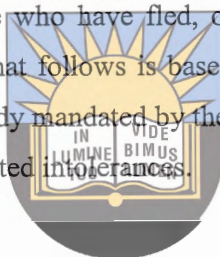
³⁹⁷ Non-discrimination (Art. 7);Freedom for migrants to leave any country and to enter their country of origin (Art. 8);The right to life (Art. 9);Freedom from torture and ill-treatment (Art.10);Freedom from slavery or forced labour (Art. 11);Freedom of thought, conscience and religion (Art. 12); Freedom of opinion and expression (Art. 13); Freedom from arbitrary or unlawful interference with privacy, family, home, correspondence or other communications (Art. 14); Property rights (Art. 15); Liberty and security of person (Art. 16); The right of migrants deprived of their liberty to be treated with humanity (Art. 17); A fair and public hearing by a competent, independent and impartial tribunal (Art. 18); The prohibition of retroactive application of criminal laws (Art. 19); The prohibition of imprisonment for failure to fulfill a contract (Art. 20); The prohibition of the destruction of travel or identity documents (Art. 21); The prohibition of expulsion on a collective basis or without fair procedures (Art. 22); The right to consular or diplomatic assistance (Art. 23); The right to recognition as a person before the law (Art. 24); Equality of treatment between nationals and migrant workers as to work conditions and pay (Art. 25); The right to participate in trade unions (Art. 26); Equal access to social security (Art. 27);

The right to emergency medical care (Art. 28); The right of a child to a name, birth registration and nationality (Art. 29) and Equality of access to public education (Art. 30).

³⁹⁸ Taran, *op cit* note 55.

that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship.³⁹⁹

In summary, Alfredsson *et al*⁴⁰⁰ recall that while from a historical perspective the phenomenon of asylum is not new, codified solutions to challenges posed by influxes of refugees and their rights to protection have entered the sphere of international law only recently. Moreover, it took time to recognise that the protection of refugees is a matter of international concern and that efforts to restore peace are invariably intertwined with arrangements to restore the right of those who have fled, or who were driven out, to return to their homes.⁴⁰¹ The discussion that follows is based on the Committee on the Elimination of Racial Discrimination, a body mandated by the United Nations to monitor and deal with racial discrimination and related intolerances.



5.5.8 *Committee on the Elimination of Racial Discrimination* **University of Fort Hare** *Together in Excellence*

The Committee on the Elimination of Racial Discrimination has frequently expressed concern that non-citizens who serve as domestic workers are subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault.⁴⁰² States are urged to put an end to the practice of employers retaining the passports of their foreign employees, in particular domestic workers.⁴⁰³ Victims of trafficking consist of one category that deserves special attention, hence the analysis that follows.

³⁹⁹ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, 17 September 2003.

⁴⁰⁰ Alfredsson *et al* *International Human Rights Monitoring Mechanisms* 2001 352, Martinus Nijhoff Publishers: The Raoul Wallenberg Institute Human Rights Library.

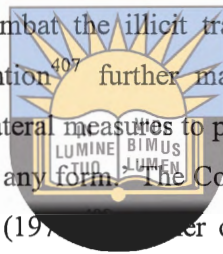
⁴⁰¹ *Ibid.*

⁴⁰² Committee on the Elimination of Racial Discrimination, concluding observations on the 10th, 11th and 12th periodic reports of Kuwait (A/48/18, paragraph 359-381).

⁴⁰³ Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Saudi Arabia.

5.5.9 Victims of trafficking

Non-citizens are often the target of trafficking. Persons who emigrate through irregular channels, such as smuggling and trafficking networks, risk suffocating in containers or drowning when an overloaded ship sinks.⁴⁰⁴ Adequate assistance and support, including formal protection, aid and education, should be provided to victims of trafficking⁴⁰⁵. For example, Principle 9 of the United Nations General Assembly Declaration on the Rights of the Child (1959) declares that “the child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be subject to traffic, in any form... To that end, Article 11 of the Convention on the Rights of the Child⁴⁰⁶ obligates states to “take measures to combat the illicit transfer and non-return of children abroad.” Article 35 of the Child Convention⁴⁰⁷ further mandates States Parties to take all ‘appropriate national, bilateral and multi-lateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.’ The Convention on the Elimination of All forms of Discrimination against Women (1979)⁴⁰⁸ obligates States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of women. The effective suppression of trafficking in women and girls for the sex trade is a matter of pressing international concern.⁴⁰⁹ Implementation of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), as well as other relevant instruments, needs to be reviewed and strengthened. The use of women in international prostitution and trafficking networks has become a major focus of international organized crime.



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5.5.10 Non-citizen Children

⁴⁰⁴ Prevention of Discrimination: examples of practices with regard to non-citizens (E/CN.4/Sub.2/2002/25/Add.3).

⁴⁰⁵ European Commission against Racism and Intolerance, Second report on Turkey (paragraph. 52); see Recommended principles and guidelines on human rights and human trafficking (E/2002/68/Add.1).

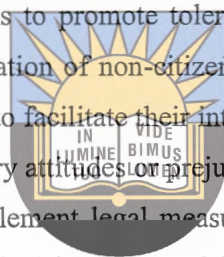
⁴⁰⁶ This Convention was adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ G.A. Res. 34/180, UN Doc A/34/46, 19 I.L.M. 33 (1980).

⁴⁰⁹ Wallace 1997 80.

Article 2 of the Convention on the Rights of the Child provides that States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind". The Committee on the Rights of the Child encourages States to continue and strengthen their efforts to integrate the right to non-discrimination that is enshrined in Article 2 fully in all relevant legislation, and to ensure that this right is effectively applied in all political, judicial and administrative decisions and in projects, programmes and services which have an impact on all children, including non-citizen children and children belonging to minority groups.⁴¹⁰ The Committee recommends that States should develop comprehensive and coordinated policies to address the developing phenomenon of immigration, including public information to campaigns to promote tolerance, monitor and collect data on racially motivated acts; and study the situation of non-citizen children, especially in the school system, and the effectiveness of measures to facilitate their integration.⁴¹¹ States should also take effective measures to address discriminatory attitudes or prejudices,⁴¹² in particular towards non-citizen children, fully and effectively implement legal measures to prevent discrimination that are already adopted, and ensure that their legislation is in full compliance with Article 2 of the Convention on the Rights of the Child.



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Moreover, children of non-citizens have the right to a name and the right to acquire a nationality. Under Article 7 of the Convention on the rights of the Child, a child "shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality... States Parties shall ensure the implementation of these rights... in particular where

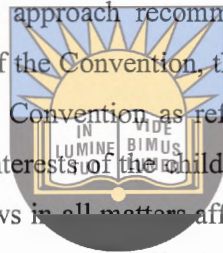
⁴¹⁰ See Committee on the Rights of the Child, concluding observations on the second periodic report of the Czech Republic (CRC/C/15/Add.201, para 29).

⁴¹¹ See Committee on the Rights of the Child, concluding observations on the second periodic report of Iceland (CRC/C/15/Add.203, para. 23).

⁴¹² Article 19 in particular obligates States Parties to: 1. take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore and as appropriate, for judicial involvement.

⁴¹³ See Committee on the Rights of the Child, concluding observations on the second periodic report of Romania (CRC/C/15/Add. 199, para. 26).

the child would otherwise be stateless.” In view of the nearly universal ratification of the Convention, the principle of *jus soli* (citizenship based on the place of birth) has emerged as the overriding international norm governing the nationality of children born to non-citizen parents, in particular if they would otherwise be stateless. The right of parents to transmit their citizenship to their children must be enforced without discrimination as to the sex of the parent. Article 7 of the Convention also requires transmittal of citizenship from a parent to his or her adopted child. Article 7 should be read in conjunction with Article 8 (preservation of identity, including nationality, name and family relations), Article 9 (avoiding separation from parents), Article 10 (family reunification) and Article 20 (continuity of upbringing of children deprived of their family environment). Within the holistic approach recommended by the Committee on the Rights of the Child for the interpretation of the Convention, those Articles should be understood according to the general principles of the Convention as reflected in Articles 2 (right to non-discrimination), 3 (principles of the best interests of the child), 6 (right to life and development) and 12 (right to respect for the child’s views in all matters affecting the child and opportunity to be heard in any judicial or administrative proceedings affecting the child).



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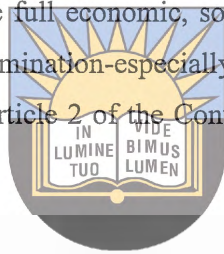
Children of non-citizens are entitled to those measures of protection required by their status as minors.⁴¹⁴ Children of non-citizens without legal status should not be excluded from schools,⁴¹⁵ and schools that allow children of non-citizens to be educated in programmes designed in their country of origin should be encouraged.⁴¹⁶

⁴¹⁴ See general comment No. 15 of the Human Rights Committee.

⁴¹⁵ The Convention on the Rights of the Child calls upon States Parties to “recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular : (a) Make primary education compulsory and available and free to all...” (Art. 28). It further provides that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s... status” (art. 2(1), which would include unlawful status. See also Committee on the Rights of the Child, concluding observations on the initial report of Latvia (paragraph. 23).

⁴¹⁶ Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Saudi Arabia.

With specific regard to asylum-seekers who are children, the Convention on the Rights of the Child provides important guidance for designing and implementing reception policies under the “best interest” principle. States must guarantee: special protection and care to child asylum-seekers with respect to their special needs; avoidance of detention for asylum-seekers under 18 years of age; and access of children to legal and psychological assistance, including by enabling contact with non-governmental organizations offering such assistance.⁴¹⁷ Asylum-seekers and refugees who are children should not be placed in institutions that are not equipped to provide the special care they require.⁴¹⁸ Such children should not be the subject of discrimination in the enjoyment of economic, social and cultural rights such as access to education, healthcare and social services.⁴¹⁹ States should ensure the full economic, social and cultural rights of all non-citizen children in detention without discrimination—especially the right to education and ensure their rights to integration into society.⁴²⁰ Article 2 of the Convention on the Rights of the Child sums it all up in the following paragraph:



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1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members.

⁴¹⁷ See Committee on the Rights of the Child, concluding observations on the second periodic report of the Czech Republic (paragraph. 57) and on the second periodic report of the Netherlands (CRC/C/15/Add.227, paragraphs. 30-31 and 53-54). As a minimum, children of asylum-seekers should not be separated from their parents during detention. See Committee on Rights of the Child, concluding observations on the second periodic report of Lebanon (paragraph. 52).

⁴¹⁸ Committee on the Rights of the Child, concluding observations on the second periodic report of the Czech Republic (paragraph. 56).

⁴¹⁹ See also the Committee on the Rights of the Child, concluding observations on the initial report of Israel (CRC/C/15/Add. 195, paragraph. 26) and on the second periodic report of the United Kingdom of Great Britain and Northern Ireland.

⁴²⁰ Committee on the Rights of the Child, concluding observations on the second periodic report of Italy (CRC/C/Add. 198, paragraph. 21).

5.6 South Africa's obligations under the Southern African Development Community (SADC)

The Southern African Development Community; though promising to be a force to reckon with in dealing with human rights issues, the texts adopted under its auspices do not speak much in relation to the protection of migrants in SADC member states. Reference to human rights instruments such as the African Charter have been made in individual treaties such as the Charter on Fundamental Social Rights in SADC,⁴²¹ wherein reference is only made to rights and freedoms in the African Charter, the UDHR and ILO instruments dealing mainly with the employer-employee relationship such as collective bargaining (freedom of association) and equality of pay and opportunities between men and women.



Another instrument that speaks to migration is the Draft Protocol on the Facilitation of Movement of Persons.⁴²² However, as its current title reveals, it is still only a draft. It makes reference to the treatment of refugees and asylum seekers by use of an existing international framework as provided by international refugee law instruments.⁴²³ No new principles are enacted. It should be expected that in view of the unfolding of the xenophobic violence in South Africa, the final draft of this protocol will certainly have some expressions of policy on addressing xenophobia in SADC member states.

As a sub-regional political organization, the Treaty of SADC⁴²⁴ in Article 4(c) provides for human rights, democracy, and the rule of law as one of the principles to drive the organization. The protocol on the Tribunal and Rules of Procedure thereof establishes the SADC Tribunal to preside over disputes arising from the texts adopted in the SADC.⁴²⁵ This Tribunal has a hazy human rights jurisdiction which it has interpreted to arise from Articles 4 and 15 of the Treaty of

⁴²¹ See: <http://www.sadc.int/index/browse/page/171>. (Accessed 15 April 2010).

⁴²² Available at: <http://www.sadc.int/index/browse/page/149>. (Accessed 16 April 2010).

⁴²³ See Article 28 of the Draft Protocol.

⁴²⁴ Available at: <http://www.sadc.int/index/browse/page/119# Article 4>.

⁴²⁵ SADC Tribunal Protocol available at: <http://www.sadc.int/tribunal/protocol.php>.

SADC.⁴²⁶ It still remains unknown whether it has jurisdiction to deal with disputes between individuals and states on refugee law. The following discussion is on the rights of non-nationals as expressed in the South African legislative framework. The main aim is to compare the international provisions as done above, with the expression of such rights in South African law.

5.7 The South African Legislative Framework

5.7.1 Constitutional Provisions

Chapter 1 of the Constitution⁴²⁷ (in section 1) states that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Furthermore, the Republic of South Africa is also founded on the values of the Supremacy of the Constitution and the rule of law. Section 2 of the same Chapter states: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the conduct imposed by it must be fulfilled.”⁴²⁸ At the core of the Constitution lie the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Moreover, Chapter 2 contains the Bill of Rights which defines the human rights of all the people in South Africa. With regard to the rights of non-nationals, with few exceptions, all the rights, entitlements and obligations apply to everyone. More so, the South African Constitution’s preamble explicitly states that “South Africa belongs to all who live in it,” with no reference to place of birth or citizenship status.

5.7.2 National legislation

There is a considerable body of domestic law relating explicitly and implicitly to the status of non-nationals in the country. Non-nationals are specifically mentioned in legislation on immigration and asylum processes, but are largely neglected in related socio-economic legislation and policy.

⁴²⁶ See Mike Campbell (Pvt) Ltd & 78 Others v the Republic of Zimbabwe Case no. SADC (T) 02 /2007.

⁴²⁷ This chapter consists of the Founding Provisions of the Constitution.

⁴²⁸ See Chapter 1, S2 of the Constitution.

5.7.3 Immigration Act of 2002

An analysis of the relationship between immigration and xenophobia would suffice before one discusses the Immigration Act. One notes that the linkage between xenophobia and immigration is undoubtedly a close one. Immigration policies also have a role to play in the exacerbation of xenophobic sentiments and actions.⁴²⁹ Immigration policy and issues related to nationality and citizenship are within a state's sovereign domain. A distinction needs to be made between immigration policy that is legitimate in its ambit, aimed at managing migration, and one born out of fear and hostility towards foreigners, that approaches migration from a security and control paradigm.⁴³⁰ Some of the responses in the Southern African Migration Project (SAMP) study that portray citizens as willing to take even unconstitutional measures to ensure that foreign nationals are kept out of the country come from a citizenry that feels under siege from the outside.⁴³¹



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It is also settled in international law that a state, may subject to treaty obligations, exercise its sovereign authority to control entry, residence or expulsion of foreign nationals. In terms of Article 13 of the ICCPR, expulsion of foreign nationals is subject to some level of due process rights. The question of expulsions of foreign nationals without affording them an opportunity to be heard has been considered by the African Commission on Human and People's Rights to be a violation of the African Charter.⁴³²

Again, the Immigration Act replaced the Aliens Control Act when it was passed in 2002. This act defines the legal categories of non-nationals and includes temporary migrants, undocumented migrants, asylum seekers, refugees and immigrants. On that note, each one has its own rights and

⁴²⁹ ILO IOM OHCHR 'International Migration, Racism, Discrimination and Xenophobia' (2001) 2.

⁴³⁰ See Crush J (ed.) 'The Perfect Storm: The realities of xenophobia in contemporary South Africa Migration Project Migration Policy Series No 50 (2008); L Landau, K Ramjathan-Keogh et al 'Xenophobia in South Africa and problems related to it. Forced Migration Working Paper Series No 13, Forced Migration Studies Programme University of the Witwatersrand January 2005.

⁴³¹ Crush J "The dark side of democracy: immigration, xenophobia and human rights in South Africa" (2000) 38 International Migration 103-133.

⁴³² *Organization Mondiale Contre la Torture and Ors v Rwanda* (2000) AHRLR 282 (ACHPR 1996).

obligations. The Constitutional Court of South Africa (CC) has also had occasion to decide on the treatment of illegal foreigners in a case⁴³³ that challenged the constitutionality of certain provisions of the Immigration Act. One of the impugned sections was found to be unconstitutional because it did not provide for judicial oversight in the case where persons declared to be illegal foreign nationals were detained on a ship (ship taken broadly to define and include at the very least, all modes of transport by which people may arrive at ports of entry). In the process of deciding this issue, the CC underscored the necessity of affording constitutional safeguards to detained persons including undocumented migrants. No doubt nationals have the same constitutional rights as South African citizens unless the contrary clearly emerges from the Constitution.⁴³⁴



5.7.4 *The Refugees Act*

The Refugees Act⁴³⁵ came into operation in April 2000. International standards relating to the treatment of refugees are fully reflected in the Refugees Act. Refugees are entitled to the same rights as citizens except the right to vote. S27 of the Refugees Act speaks of the full legal protection for refugees including the provisions in Chapter 2 of the Bill of Rights. S27(g) specifies that refugees receive the same basic health care and education as South Africans do. The Refugees Act defines a refugee as someone who:

- (a) Owing to a well-founded fear of being persecuted be it for reasons of his race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence and is unable, or, owing to such fear, unwilling to return to it; or⁴³⁶

⁴³³ Lawyer for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC).

⁴³⁴ *Patel and Another v Minister of Home Affairs and Another* (2000) 4 ALL SA 256 (D).

⁴³⁵ Act 130 of 1998. Note should be taken that the Refugees Act of 1998 functions together with the Refugees Amendment Act 33 of 2008.

⁴³⁶ The Refugees Amendment Act added "gender" after "race" in S 3.

(b) Owing to external aggression, occupation, foreign domination or events seriously disturbing⁴³⁷ public order in either part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere, or

(C) Is a dependent of a person contemplated in –paragraph (a) or (b).⁴³⁸

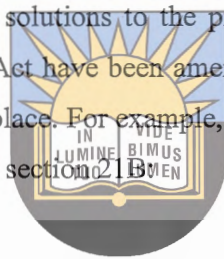
The Act outlines the process of status determination. This process begins with the issuing of a section 23 permit at the border post. Additionally, this 14-day temporary permit allows the applicant time to get to one of the 5 Refugee Reception Offices. At the Refugee Reception Office, an eligibility form is completed and the applicant is given a S 22 asylum seeker permit. After a status Determination Hearing, it is supposed to take 6 months for the claim to be processed. If the application is successful, the asylum seeker is given a refugee permit, a section 24 permit that is valid for two years. The Refugee is entitled to an identity document. Moreover, if the person retains refugee status for a period of 5 years or longer, they are entitled to apply for permanent residence. Further, should their claim be rejected, they may appeal the decision. Unlike many other countries, South Africa has chosen local integration over confinement in camps.

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⁴³⁷ “Or disrupting”, see S 3 *ibid*.

⁴³⁸ This provision is supported by S21B of the Refugee Amendment Act which states that: [21B. (1) A person who applies for refugee status in terms of section 21 and who would like one or more of his or her spouse and dependants to be granted refugee status must, when applying for asylum, include the details of such spouse and dependants in the application.(2) Any refugee whose child is born in the Republic must, within one month of the birth of his or her child, register such a child as a dependant at any Refugee Reception Office.(3) Where a dependant of a recognised refugee is within the Republic in accordance with an asylum seeker permit or has been granted asylum in terms of this Act and ceases to be a dependant by virtue of marriage or cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may apply in the prescribed manner to be permitted to continue to remain within the Republic in accordance with the provisions of this Act.(4) Where a spouse of a recognised refugee is within the Republic in accordance with an asylum seeker permit or has been granted asylum in terms of this Act and ceases to be the spouse as a result of divorce or death of the recognised refugee, as the case may be, he or she may be permitted to continue to remain within the Republic in accordance with the provisions of this Act: Provided that, in the case of divorce, the Director-General is satisfied that a good faith spousal relationship existed between the recognised refugee and such spouse for a period of at least two years after having been granted asylum.(5) Nothing contained in this Act prevents a dependant who has, in terms of subsection (3), been permitted to continue to remain in the Republic from applying for recognition as a refugee in accordance with the provisions of this Act. This provision is a major positive move in the area of refugees, however, the impact of its implementation is still to be seen.

Having determined the standard of treatment, there is a need to review literature that examines the refugee status determination process so that issues such as repatriation, re-integration, and access to human rights by foreign nationals are fully discussed. In this area, Goodwin-Gill and Macadam's 'The Refugee in International Law' is arguably one of the leading sources.⁴³⁹ The authors bring to the attention of the reader all issues ranging from the definition of a refugee or asylum seeker up to the time that his or her refugee status has been determined. There is a consensus that people fleeing political persecution should have access to human rights in the host state, they should not be forcibly repatriated whilst the danger of persecution still persists and, although host states are not legally required to integrate refugees, that possibility should always be entertained as one of the few durable solutions to the problem of international migration. Various provisions of the 1998 Refugees Act have been amended by the Refugees Amendment Act 33 of 2008 and new provisions put in place. For example, spouses and dependants of asylum seekers and refugees are now catered for in section 21B.



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21B. (1) A person who applies for refugee status in terms of section 21 and who would like one or more of his or her spouse and dependants to be granted refugee status must, when applying for asylum, include the details of such spouse and dependants in the application.

(2) Any refugee whose child is born in the Republic must, within one month of the birth of his or her child, register such a child as a dependant at any Refugee Reception Office.

(3) Where a dependant of a recognised refugee is within the Republic in accordance with an asylum seeker permit or has been granted asylum in terms of this Act and ceases to be a dependant by virtue of marriage or cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may apply in the prescribed manner to be permitted to continue to remain within the Republic in accordance with the provisions of this Act.

(4) Where a spouse of a recognised refugee is within the Republic in accordance with an asylum seeker permit or has been granted asylum in terms of this Act and ceases to be the spouse as a result of divorce or death of the recognised refugee, as the case may be he or she may be permitted to continue to remain within the Republic in accordance with the provisions of this Act: Provided that, in the case of divorce, the Director-General is satisfied that a good faith spousal relationship

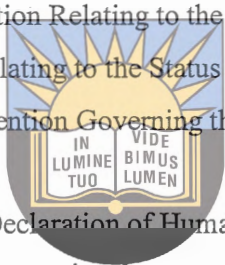
⁴³⁹

Goodwin-Gill GS & Macadam J 'The Refugee in International Law' (2007).

existed between the recognised refugee and such spouse for a period of at least two years after having been granted asylum.

The amendment of the 1998 Refugee Act is perhaps a sign that non-nationals will receive more recognition and be able to access their rights. However, one undesirable characteristic of the Refugee Amendment Bill is that it repealed S6 of the 1998 Refugees Act which demanded that the Refugees Act be interpreted, applied and administered with due regard to international instruments such as:

- Geneva Convention Relating to the Status of Refugees (UN, 1951)
 - The Protocol Relating to the Status of Refugees (UN, 1967),
 - The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969),
 - The Universal Declaration of Human Rights, and
- Any other relevant convention or international agreement to which the republic is or becomes party to.



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Looking at the provisions above, one would appreciate that South Africa had moved closer to realizing the importance of international law in its application of its national legal framework. However, the removal of that important section could allow administrators of refugee laws to desist from paying attention to international norms and values.

5.7.5 *The Promotion of Administrative Justice Act*⁴⁴⁰

The Promotion of Administrative Justice Act sets out the recourse for an applicant experiencing negative administrative action. The act notes that failure to take a decision constitutes negative administration. It allows for reviews and appeals before a magisterial court. A particular challenge in this regard concerns the treatment of non-nationals, specifically undocumented

⁴⁴⁰ Act 3 of 2000.

migrants by the South African Police Services (SAPS). In the study undertaken by the Centre for Human Rights at the University of Pretoria it was noted that the respondents to the questionnaires during interviews with non-South Africans held in and around Pretoria reinforced the allegation that xenophobic perceptions thrive significantly amongst members of law enforcement agencies in South Africa, especially the South Africa Police Service.⁴⁴¹

5.8 Jurisprudence

5.8.1 Comparative Domestic Jurisprudence

In *R v Rogers*⁴⁴² the defendant had been riding a mobility scooter along the pavement. An argument took place as he tried to get past three Spanish women. The defendant pursued them in an aggressive manner into a kebab house where they had taken refuge. He called the women 'bloody foreigners' and told them to 'go back to your own country'. He was convicted of using racially aggravated abusive or insulting words or behaviour with the intent to cause fear or provoke violence contrary to the relevant provision of the Public Order Act 1986. His appeal against conviction was dismissed by the Court of Appeal and he appealed a second time, submitting that hostility towards a racial group within the meaning of the 1998 Act did not encompass hostility toward foreigners as a whole.

The Crime and Disorder Act 1998 created racially or religiously aggravated versions of certain offences. The court had to be satisfied that the basic offence had been committed and then that it was aggravated within the meaning of s 28a of the 1998 Act. Under that section the offence was racially or religiously aggravated if either at the time of committing the offence or immediately before or after doing so the offender demonstrated towards the victim hostility based on the victim's membership, or presumed membership, of a racial or religious group or the offence was motivated, wholly or partly, by hostility towards members of a racial or religious group based on

⁴⁴¹ 'The nature of South Africa's legal obligations' 58 Centre for Human Rights, University of Pretoria.

⁴⁴² *R v Rogers* 2007 2 ALL ER 433.

their membership of that group. Section 28(4) defined 'racial group' as 'a group of persons defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins'.

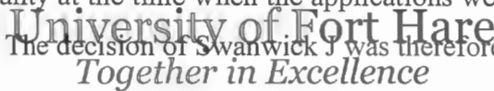
It was therefore held that those who were not of British origin constituted a racial group within s 28(4) of the 1998 Act as did 'foreigners'. The 1998 Act did not require that a group be defined by what it was rather than by what it was not; whether a racial group was defined exclusively by reference to what its members were not or inclusively by reference to what they were, the criterion by which the group was defined was the same. The statute intended a broad non-technical approach as a matter of language and in policy terms. The phenomenon attacked by racially or religiously aggravated versions of basic offences were racism and xenophobia. The offences did not require particular words to be used; the necessary hostility could be demonstrated in other ways although it would normally be proved by the use of some well-known terms of abuse. Making fine distinctions depending upon the particular words used would bring the law into disrepute. Whether the evidence in any particular case, taken as a whole, proved that the offender's conduct demonstrated hostility to a racial group, or was motivated by such hostility, was a question of fact for the decision-makers in each case. The appeal in the case in question would, accordingly, be dismissed.

In the case of *London Borough of Ealing v Race Relations Board*⁴⁴³ the council, which was the local housing authority, maintained a register of all applications for housing accommodation and a list of persons transferred from this register to the housing waiting list. The council adopted rules for the transfer from the register to the list. Rule 3(1) stipulated that an applicant must be a British subject within the meaning of the British Nationality Act 1948. In 1966 and 1968 Z, who was then a Polish national, submitted a housing application to the council, which declined to put him on the waiting list because he was not a British subject as required by r 3(1). A complaint was made to the Race Relations Board on behalf of Z. The board formed the opinion that the council had unlawfully discriminated against Z on the ground of his 'national origins' under

⁴⁴³ *London Borough of Ealing v Race Relations Board* 1972 1 ALL ER 105.

ss 1(1) a and 5(c) of the Race Relations Act 1968. In June 1969 the board notified the council of their opinion and sought to secure a settlement between the parties and an assurance that the council's action would not be repeated. The council, after rejecting two requests by the board, issued a summons claiming declarations against the board and Z that they were entitled to decline to place Z on the housing list on the grounds that he was not, at the material time, a British subject.

It was held that the council were entitled to a declaration that by declining to place Z on the housing list on account of his not then being a British subject the council did not commit a breach of s 5 (c) of the 1968 Act; the expression 'national origins' in s 1(1) of the Act indicated a person's connection by birth with a particular group of people who could be described as a 'nation' and did not mean the same thing as 'nationality' in the sense of citizenship of a particular state; by refusing to place Z on the housing list the council had discriminated against him on the ground of his nationality at the time when the applications were made and not on the ground of his 'national origins'. The decision of Swanwick J was therefore⁴⁴⁴ reversed.



5.8.2 National Jurisprudence

In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*⁴⁴⁵ the applicants were the Union of Refugee Women, a voluntary association, and twelve refugees who had either had their registrations as security service providers withdrawn or had been refused registration as security service providers after applying for such to the Private Security Industry Regulatory Authority ("the Authority"). Respondents were the Director of the Private Security Industry Regulatory Authority, the Chairperson of the Private Security Industry Appeal Committee, and the Chairperson of the Council for the Private Security Industry Regulatory.

⁴⁴⁴ 1971] 1 All ER 424.

⁴⁴⁵ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 BCLR 339 CC.

The Private Security Industry Regulation Act 56 of 2001 requires security service providers to register with the Private Security Industry Regulatory Authority. Section 23(1) (a) of the Act makes South African citizenship or permanent residence in the Republic of South Africa a requirement for registration. Section 23(6), however, provides that “(d)espite the provisions of subsections (1) . . . the Authority may on good cause shown and on grounds which are not in conflict with the purpose of this Act and the objects of the Authority, register any applicant as a security service provider”. Applicants challenged the provisions of section 23(1) (a) on the basis that they constituted a violation of the right to equality, and discriminated against persons who were not citizens or permanent residents of the Republic of South Africa. Respondents opposed the application.



A majority of the Court (per Kondile AJ, Moseneke DCJ, Madala, Nkabinde, Sachs and Yacoob JJ concurring) held that the challenge to the constitutionality of section 23(1) (a) of the Private Security Industry Regulation Act 56 of 2001 fell to be dismissed. An order was made, however, that the individual applicants be given an opportunity to apply for exemption in terms of section 23(6) of the Private Security Industry Regulation Act 56 of 2001. Respondents were to ensure that all applicants and potential applicants for exemption as security service providers were made aware of the nature of the information that had to be furnished in their applications for exemption in terms of section 23(6) of the Act. All such applications for exemption had to be considered in light of the majority judgment. Respondents were ordered to pay the applicants’ costs jointly and severally.

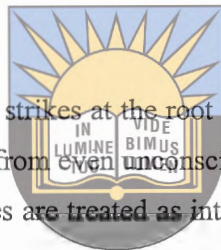
The judgment of Kondile AJ acknowledged that refugees were a vulnerable group in South Africa and stressed that foreign nationals, including refugees, were not inherently less trustworthy than South Africans. The reality of the situation was that citizens and permanent residents would be more easily able to prove their trustworthiness in terms of the Security Act. Section 27(f) of the Refugees Act granted refugees the right to seek employment. Section 23(1)(a) of the Security Act limited the refugees’ right to choose employment only to the extent that they could not work in the private security industry. They were not prevented from seeking

employment in other industries. Furthermore, they could work in the private security industry if they successfully invoked the provisions of section 23(6) of the Act or if they acquired permanent resident status. While refugees were fully entitled to work in South Africa, the guarantee contained in section 22 of the Constitution of the right freely to choose a trade, occupation or profession was restricted to “citizens”.

The impugned provisions did not violate the right to equality. The regulatory scheme did not constitute a blanket ban on the registration of refugees as private security service providers; it merely served the purpose of screening entrants to the private security industry. However, the lack of assistance provided to refugees by the Authority was a matter for concern. The Authority ought, at the very least, to provide refugee applicants with information on the possibility of exemption in terms of section 23(6) of the Security Act, and also on how to apply for such exemption. An application for exemption to the Authority was an internal remedy which remained available to the applicants. It would be fair now that the applicants were aware of what was expected regarding an application for exemption, and the Authority would have the guidance contained in the judgment when considering exemption applications, that the applicants be given an opportunity to apply for exemption. As regards costs, Applicants had raised important constitutional issues of practical relevance to the functioning of an industry that was becoming increasingly important in the South Africa. They were compelled to resort to constitutional litigation to clarify practical aspects of the operation of the regulatory scheme because of the lack of information and guidance provided by Respondents. Accordingly, Respondents were ordered to pay Applicants’ costs. Mokgoro J and O’Regan J wrote a joint dissenting judgment (concurring by Langa CJ and Van der Westhuizen J) holding that section 23(1)(a) of the Act discriminated unfairly on the basis of refugee status.

Indeed excluding refugees from the right to work as private security providers simply because they are refugees will inevitably foster a climate of xenophobia which will be harmful to refugees and inconsistent with the overall vision of our Constitution. As a group that is by definition vulnerable, the impact of discrimination of this sort can be damaging in a significant

way. In reaching this conclusion it is important to bear in mind that it is not only the social stigma which may result from such discrimination, but also the material impact that it may have on refugees. As noted above, refugees will ordinarily be reliant on finding work to provide themselves with the means to maintain themselves and their families. It is true, as Kondile AJ pointed out, that refugees are permitted to work in other industries in South Africa, but nevertheless there is evidence to suggest that the relatively low-skilled work available in the private security industry is a significant source of employment for many refugees. Their exclusion from this form of employment is therefore not negligible and may well have a severe impact on the ability of refugees to earn a livelihood in South Africa.



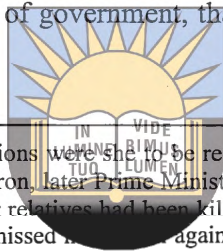
This prejudice is strong in South Africa. It strikes at the root of our Bill of Rights. Accordingly, special care needs to be taken to prevent it from even unconsciously tainting the manner in which laws are interpreted and applied. If refugees are treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined. As the then Deputy Minister of Home Affairs pointed out at a conference on forced migration, because of the historic isolation of South Africa, our people's perceptions are unfortunately insular, thus making them very susceptible to xenophobia. She observed that this situation is further exacerbated by the fact that there is often a problematic confusion in the minds of people between foreigners who are here illegally and refugees. This confusion is created because these two groups often occupy the lowest economic stratum in our society. She observed that they are invariably black and do not speak any local languages.

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The constitutional response to xenophobia need not, of course, involve exaggerated xenophilia. Just as refugees should be protected from irrational prejudice, so too should they not be able to lay claim to irrational privilege.⁴⁴⁶ The law – in this case section 23(6) – must be applied in a

⁴⁴⁶ See *Helow v Secretary of the State for Home Department* in line with this argument. In this case H was a Palestinian who formerly lived in Lebanon; she arrived in the United Kingdom and claimed asylum. Her case, in seeking asylum, included her political involvement with the Palestine Liberation Organisation (the PLO) and past actions which, she contended, would render her at risk from Israeli, Lebanese and Syrian

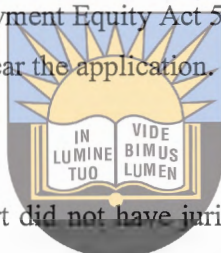
manner that is fair, objective, appropriately focused and in keeping with the letter and the spirit of our international and national legal obligations.⁴⁴⁷ Exercises of power that purport to have a neutral foundation but track stereotypes are often seen as flowing from and reinforcing negative presuppositions. Indeed, the routinised way in which power is exercised can readily become entangled in the public mind with existing prejudicial assumptions, reinforcing prejudice and establishing a downward spiral of disempowerment. One of the purposes of refugee law is precisely to overcome the experience of trauma and displacement and make the refugee feel at home and welcome. Disproportionate and uncalled-for adverse treatment would defeat that objective and induce an unacceptable and avoidable experience of alienation and helplessness. It would be most unfortunate if the left hand of government, that supervises the security industry,



authorities as well as various political factions were she to be required to return to Lebanon. In particular she had maintained publicly that Ariel Sharon, later Prime Minister of Israel, was implicated in a massacre at a refugee camp in which numbers of her relatives had been killed. Her claim for asylum was refused by the Secretary of State; the adjudicator dismissed her appeal against the notice of decision to remove her to Lebanon. The Immigration Appeal Tribunal refused her permission to appeal against that dismissal. She then sought a review of that refusal by the Court of Session. The judge affirmed the decision to refuse permission to appeal. H petitioned the Court of Session to set aside the judge's decision on the ground that it was vitiated for apparent bias and was of objective impartiality. The basis for that contention was that the judge was a member of the International Association of Jewish Lawyers and Jurists (the association) and was a founder member of a Scottish branch of the association. The Court of Session refused H's petition and she appealed to the House of Lords. She contended that the association was, inter alia, 'anti-Palestinian ... anti-Moslem ... anti-pathetic to the PLO ... supportive of Israel'. She referred, inter alia, to speeches of the president of the association and other material which she contended showed that the association, which had the express aim of pursuing human rights, had acquired an unbalanced character. She argued that the judge's membership of the association gave rise to a real possibility of bias because a fair-minded observer would think that the views put forward by the association represented views which the judge shared as a member or that the fair-minded observer would think that the judge could have been influenced by the views expressed by the association of which she was a member. It was held that a fair-minded and informed observer, having considered the relevant facts, would not conclude that there was a real possibility that the judge had been biased by reason of her membership of the association. There was nothing save membership of the association to link the judge and the president of the association. Apart from her membership, the judge was in no different position to any judge who might or might not have private views about issues which came before the court but who was expected to put them aside and decide the case according to the law. It was no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and dissociate themselves by resignation if they did not approve or wish to be thought to approve of them, but the material in the instant case fell far short of involving such circumstances. The suggestion that mere membership in an association gave rise in the eyes of a fair-minded observer to a real possibility of unconscious influence, through a form of osmosis, by materials in the relevant association's periodical which would be available to be read by the member was to be rejected. Accordingly, the appeal would be dismissed. *Helow v Secretary of State for the Home Department* 2009 2 ALL ER 1031.

took away what the right hand of government, that accords to accredited refugees a special status, gives.

One would also state, as was done in *Chizunza*,⁴⁴⁸ that where the law seeks to correct the wrongs done by non-nationals, the latter must not conclude that such actions are xenophobic. In this case the applicant alleged that his dismissal for fraud and abuse of company resources was in fact based on unfair discrimination (because he was Zimbabwean and black), and so fell to be adjudicated by the Labour Court within the ambit of section 187(1)(f) of the Labour Relations Act 66 of 199 and section 10 of the Employment Equity Act 55 of 1998. The respondent claimed that the court did not have jurisdiction to hear the application.



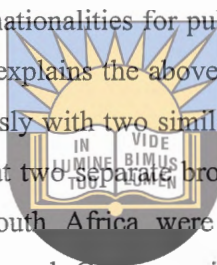
It was therefore held that the Labour Court did not have jurisdiction in respect of disputes that should have been referred to the CCMA. The Labour Court had to determine the true nature of the dispute irrespective of the characterization of the dispute by the applicant. The court was bound to follow the "substantive school of thought" in terms of which the court only provisionally assumed jurisdiction until it made a finding as to the true reason for the dismissal. If the reason for the dismissal was the same as the one alleged by the employee, the court would adjudicate the dispute on the merits. However, if the reason for the dismissal was not the one alleged by the employee but a reason that fell under section 191(5) (a) of the LRA, then the court would refuse to adjudicate the dispute and let it be referred to arbitration.

Although the existence of a differentiation was a precondition for discrimination, the mere fact of differentiation or an arbitrary treatment of an individual did not equate discrimination. Discrimination had a decidedly negative or pejorative connotation. A differentiation only became discrimination once a differentiation took place for an unacceptable reason, as listed in section 6(1) of the EEA. Only once a link was shown between differentiation and one or more of the listed grounds, would discrimination be established. If differentiation was alleged on an unlisted

⁴⁴⁸ See *Chizunza v MTN (Pty) Ltd* 2008 JOL 2208 (LC).

ground, the employee would bear the onus of proving that the differentiation amounted to discrimination. Where more than one reason was alleged for dismissal, the court would have to examine whether an automatically unfair reason was the dominant reason for the dismissal.

The applicant had not placed any evidence before the court, to substantiate a claim that the dismissal of the applicant was discriminatory or that a discriminatory motive had played a role in his dismissal. The application was therefore refused and the matter referred to the CCMA for arbitration. With regard to crime, it is essential that a balance be struck between labeling non-nationals as criminals and using people's nationalities for public interest. The case of *Bidmos v SABC News and 702 Talk Radio*⁴⁴⁹ better explains the above view. In *Bidmos* the Broadcasting Complaints Commission dealt simultaneously with two similar complaints against two different broadcasters. The complainants alleged that two separate broadcasts in which the focus was on foreign crime syndicates operating in South Africa were discriminatory. The complainant objected to the discussions on Nigerian and Chinese crime syndicates, alleging that this displayed xenophobia.



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It was held that the issue before the tribunal was whether the references to crime groups from outside South Africa amounted to a contravention of clause 35 of the Broadcasting Code. The said clause allows broadcasters to offer honest comment on matters of public importance. It was a known fact that certain crimes were perpetrated by foreign elements within the country. The broadcasts in question were merely commenting on this and the code had not been violated thereby. The complaints were dismissed.

Similar complaints about alleged xenophobia were received against the SABC and Radio 702. The Registrar received a complaint from Dr. Mubarak Bidmos dated 05 December 2004, regarding a broadcast on Radio 702 on 24 November 2004, whereby the presenter, Tim Modise,

⁴⁴⁹ *Bidmos v SABC News and 702 Talk Radio* 2005 JOL 14280 (BCTSA).

interviewed Superintendent Andre Neethling, regarding the cracking of an alleged child prostitution ring in KwaZulu-Natal. Dr. Bidmos's complaint is that the discussion, in his view, amounted to "blatant xenophobia and by extension racism".

Dr. Bidmos was also offended by a broadcast on 29 November 2004 whereby the presenter, Tim Modise, discussed with an international crime expert, Peter Gastro, foreign nationality crime syndicates and a discussion ensued on *inter alia* Nigerian and Chinese Nationals and he was particularly offended by the use of the word "mafia", in reference to the Chinese. Dr. Bidmos further questioned why it is important to reveal the perpetrator's nationalities and by extension their race, and he came to the conclusion that it is the news media "who deliberately target only one particular group and stir up xenophobia".



Radio 702 argued that the broadcasts were not xenophobic at all, but were simply providing a platform for the discussion of issues of the day, as is the function of a talk radio station; to get society talking about issues that are of importance to them, like crime syndicates. The brief of the Tim Modise Network, the programme on which the issues complained of were discussed, was to discuss in-depth or at length, issues of the day, which involve various guests who are invited onto the programme and the discussion thereof by listeners to give several viewpoints on those issues. The talk-show discusses both public issues and personal experiences. It was in this context that Superintendent Neethling was invited onto the programme, to discuss in-depth, amongst other things, the *modus operandi* used by alleged pimps in an effort to alert society as to the scourge of drug usage and what it leads to. One of the many angles to the discussion was also to applaud the police in their work, since it is often the stories on police inefficiency that make the headlines.

The international crime expert Peter Gastro said in the interview with the presenter on 29 November 2004, that the reference to the nationality of criminal groups will always be a controversial issue, but since it is important for the routing out of the crime syndicates, the police

ought to know who they are, where they are and how they operate. It is also in society's interest to give them that information to ensure that they do not fall victim to such crimes. That other people use the information to label certain nationalities as all being criminals, is both unfortunate and an unintended consequence, according to Radio 702. The presenter discussed this issue with both Supt. Neethling and Peter Gastro, and they both agreed.

Clause 35 of the Broadcasting Code reads as follows:

35.1 Licensees shall be entitled to broadcast comment on and criticism of any actions or events of public importance.

35.2 Comment shall be an honest expression of opinion and shall be presented in such manner that it appears clearly to be comment, and shall be made on facts truly stated or fairly indicated and referred to.

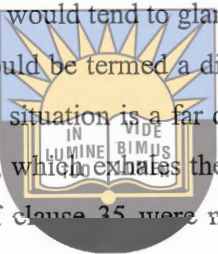


It was held that it is a known fact that certain crimes are perpetrated by foreigners in this country. It is in the public interest, that such trends be highlighted. The police also often refer to the nationality of arrestees, especially where crime syndicates or rings are involved, without being prompted by the media. Therefore, although an accused or convicted person's nationality is not always referred to, however, where there has been a trend or prevalence for the commission of certain crimes by certain nationalities or groups of people, then their nationality has been reported on. Often the mentioning of the accused's nationality also serves to illustrate certain important societal imperatives, for example, that crime affects every part of society and therefore people need to be cautious all the time. But, as Peter Gastro said, the majority of crimes in South Africa are perpetrated by South African nationals and Radio 702 reports on that on a regular basis.

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The Tribunal was of the view that it is justifiable for a broadcaster, within the parameters of freedom of expression, to authorize a debate to include critical references to foreign nationals. A reasonable listener is not likely to believe that all Nigerians are criminals when interviewees and even presenters articulate views on crime syndicates. The Tribunal agreed with the complainant

that it would be highly irresponsible to simply categorize a foreign group as criminals. In the Tribunal's view, this is not what the programmes referred to did. They simply formed part of a debate that is highly appropriate. The debate does not promote xenophobia but raises issues that are particularly relevant for listeners. Freedom of expression, which is a precious Constitutional asset, could lead to listeners taking offense. But the Constitutional Court has held that freedom of expression will, at times, offend. When that offense is also reasonable in terms of section 36 of the Constitution, it would be unacceptable also in terms of the Broadcasting Code. Before the Tribunal found this to have been the case, the unfairness had to be unequivocally obvious. If this approach is not applied, debate would become a cloistered virtue, in which people who express views which are offensive or highly critical, would tend to glance over their shoulders at the long shadow of what, in those circumstances, could be termed a dictatorial state reminiscent of Nazi Germany and Apartheid South Africa. This situation is a far cry from the ideals that are strived for daily within a constitutional framework, which exhales the pure freedom. The Tribunal was, accordingly, of the view that the limits of clause 35 were not transgressed by the broadcasts referred to by the complainant.



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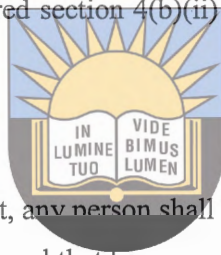
Whilst the sensitivity of the complainant to the issue of xenophobia was admirable, the Tribunal did not believe that clause 35 had been contravened in the broadcast complained about. It was a mistake not to have referred to an "allegation" or "alleged", but in the circumstances sketched by the SABC, it could be excused. The Tribunal agreed that it amounts to reckless broadcasting to classify certain groups where it is not in the public interest to do so. South Africans should be made aware of lurking dangers and it is not irresponsible to identify those groups. The Tribunal did not get the impression that there was any malice in the mentioning of the nationalities (allegedly) involved. The complaints were therefore not upheld.

Perhaps one case that has created a major stride in the legal realm regarding the rights of non-nationals is that of *Khosa*.⁴⁵⁰ In this case two separate matters ("the *Khosa* matter and "the

⁴⁵⁰ *Khosa and others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2(6) BCLR (CC).

Mahlaule matter) involving a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 were consolidated for hearing. Both matters had been referred to the Constitutional Court for the confirmation of orders of constitutional invalidity. The applicants in both matters were Mozambican citizens who had acquired permanent residence status in the Republic of South Africa in terms of exemptions granted to them under the former Aliens Control Act 96 of 1991. They were thus permanent residents of the Republic of South Africa but not citizens.

In the *Khosa* matter, the High Court declared section 4(b)(ii) of the Social Assistance Act to be invalid. This section of the Act states:



“subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he –

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- (a) is an aged or disabled person of a war veteran;
- (b) is resident in the Republic at the time of the application in question;
- (c) is a **South African citizen**; and
- (d) complies with the prescribed conditions. (my emphasis)

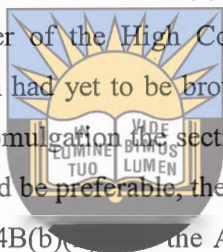
In the *Mahlaule* matter, the High Court declared subsection 3(c) of the Social Assistance Act to be invalid. Section 4 of the Act governs child-support grants and states:

“Subject to the provisions of this Act, any person shall be entitled to a child-support grant if that person satisfies the Director-General that –

- (a) he or she is the primary care-giver of a child; and
- (b) he or she and that child
 - (i) are resident in the Republic at the time of the application for the grant in question;
 - (ii) are **South African citizens**; and
 - (iii) comply with the prescribed conditions.” (my emphasis)

The effect of these orders was to oblige the State to provide social assistance under the Act to all “residents” who qualified for such assistance, irrespective of their citizenship. Unless “resident in the Republic” was construed narrowly to cover only permanent residents this implied an obligation on the State to provide assistance to both permanent and temporary residents.

Mokgoro J (writing the judgment for the majority) pointed out that because the Mahlaule applicants challenged the constitutionality of section 4B (b)(ii) of the Act as amended by the Welfare Laws Amendment Act, the order of the High Court was directed at that section. Technically, however, because that section had yet to be brought into force, it was incorrect to refer to the provision in that way. Until promulgation the section was situated in section 3 of the Welfare Laws Amendment Act and it would be preferable, therefore, to refer to it as “that part of section 3 which was to introduce section 4B(b)(ii) of the Act”. For the sake of convenience, however, the judgment would refer to the impugned section as section 4B) (b)(ii), as it appeared in section 3 of the Welfare Laws Amendment Act.



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Respondents (the Minister of Social Development, the Director-General of Social Development and the Member of the Executive Committee for Health and Welfare in the Northern Province) conceded that, as a matter of law, children who were South African citizens should not be denied access to child-support grants and that a provision in legislation which denied such children access because their primary caregiver or their parents were not South African citizens would be unconstitutional. Accordingly, they did not oppose the confirmation of the order in the *Mahlaule* matter in so far as it declared section 4(b) (ii) of the Act as amended and section 4(B) (b)(ii) as it appeared in section 3 of the Welfare Laws Amendment Act to be inconsistent with the Constitution to the extent that they excluded children who were South African citizens from social assistance. They contended, however, that such an order of invalidity should be suspended for 18 months to enable Parliament to amend the legislation. As to the *Khosa* matter and subsection 3(c) of the Act, Second Respondent informed the Court that, acknowledging the plight of the applicants who were destitute and in need of care, First Respondent had been

urgently requested to consider extending the definition of a “South African citizen” in the Act to accommodate the present applicants and former refugees from Mozambique who were granted exemptions under the Aliens Control Act. Respondents contended that these concessions would settle the dispute between the parties and that there was therefore no need for the court to confirm the order of invalidity in respect of subsection 3(c) of the Act.

Mokgoro J pointed out that this tender by the government parties did not resolve the questions before the court in the confirmation proceedings. An offer to settle a dispute made by one litigant to the other in such a case, even if accepted, could not cure the ensuing legal uncertainty or dispose of the confirmation proceedings. Even if the applicants had accepted the offer, it would have settled the dispute only between the litigants involved *in casu*. The settlement would not resolve the unconstitutionality of the impugned provisions, and the impact that those provisions had on the broader group of permanent residents who qualified in all other respects for social grants. An important purpose of confirmation proceedings was to ensure legal certainty. If parties were permitted to reach agreements that would remove the Constitutional Court’s power to hear confirmation proceedings in relation to an order of invalidity, the purpose of ensuring legal certainty would be defeated.

On the merits of the matters, Applicants had contended that the exclusion of all non-citizens from the scheme was inconsistent with the State’s obligations under section 27(1) (c) of the Constitution to provide access to social security to “everyone”. The relevant parts of section 27 (dealing with “health care, food, water and social security”) provided:

- (1) Everyone has the right to have access to –
...
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.”

Applicants also argued that the exclusion limited their right to equality, was unfair under section of the Constitution, and that the limitation was unjustifiable under section 36 of the Constitution. Their right to life under section 11 of the Constitution and their right to dignity under section 10 were infringed without justification. In so far as the grants in favour of children were concerned, Applicants contended that the exclusion also infringed the rights that children had under section 28 of the Constitution.

Respondents contended that there were reasons that justified the decision to exclude all non-citizens, including permanent residents. Citizenship, they argued, was a requirement for social benefits in “almost all developed countries”. Immigrants, before entering the Republic of South Africa, were required to show self sufficiency in order to qualify for permanent residence status. They were restricted from accessing the right to social security only for a temporary period of five years, after which they could apply for citizenship by way of naturalization. On receipt of citizenship, they would have a right to social security. Accordingly, so the argument went, any infringement of the right was only of a temporary nature. The State had an obligation towards its own citizens first. Reserving welfare grants for citizens only created an incentive for permanent residents to naturalize. There was a concern that non-citizens might become a financial burden on the South Africa. An intolerable financial burden would be imposed on the State. The Immigration policy of the State sought to exclude persons who might become a burden on the State. The Immigration policy aimed to encourage self-sufficiency among foreign nationals. Respondents pointed to a decision of a United States appellate court which held that certain legislative provisions which disqualified non-citizens who were legal permanent residents from participation in a benefit scheme were not inconsistent with the equal protection clause of the United States Constitution.

Mokgoro J set out the approach to claims for socio-economic rights and the ambit of the right of access to social security in terms of section 27(1)(c). What distinguished the instant case from other socio-economic rights cases that had previously been considered by the Constitutional

Court was that, in addition to the rights to life and dignity, the social security scheme put in place by the State to meet its obligations under section 27 of the Constitution raised the question of the prohibition of unfair discrimination. Where the government might be able to justify not paying benefits to everyone who was entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which the payment of those benefits could be limited (*in casu* citizenship) had to be consistent with the Bill of Rights as a whole. If the means chosen by the legislature to give effect to the positive obligation under section 27 unreasonably limited other constitutional rights, that also had to be taken into account.

Mokgoro J then turned to considering the reasonableness of the legislative scheme. Considering the reasonableness of legislative or other measures taken by the State courts would not enquire into whether other more desirable or favourable measures could be adopted, or whether public resources could have been spent. A wide range of possible measures could be adopted of which many might meet the requirement of reasonableness. Once it was shown that the measures did so, this requirement would be met. Reasonableness had to be assessed in light of the context. Of importance *in casu* was the right to social security and the exclusion from the scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion was reasonable, it was relevant to consider the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It was also necessary to consider the impact that this had on other intersecting rights. *In casu* where the right to social assistance was conferred by the Constitution on “everyone” and permanent residents were denied access to this right, the equality guarantee entrenched in section 9 was directly engaged.

Mokgoro J also considered the purpose of providing access to social security to those in need. A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right to access to social security, including social assistance, for those unable to support themselves and

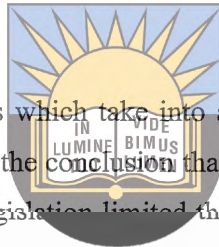
their dependants was entrenched because society in the Republic of South Africa valued human beings and wanted to ensure that people were afforded their basic needs. The Judge also considered the reasonableness of citizenship as a criterion of differentiation in the context of the impugned legislation. It was necessary to differentiate between people and groups of people in society by classification in order for the State to allocate rights, duties, immunities, privileges, benefits, and so forth, and to provide efficient and effective delivery of social services. Those classifications nevertheless had to satisfy the constitutional requirement of “reasonableness” in section 27(2). The differentiation, to pass constitutional muster, could not be arbitrary or irrational nor could it manifest a naked preference. There had to be a rational connection between the differentiating law and the legitimate government purpose it was designed to achieve. A differentiating law which did not meet these standards would be in violation of section 9(1) and section 27(2) of the Constitution.



Mokgoro J then considered the arguments raised by Respondents as justification for the limitation. Even assuming that there was a rational connection between the exclusion based on non-citizenship provisions of the Act and the immigration policy it was said to support, rationality alone was not the test for determining constitutionality under the South African Constitution. Section 27(2) set the standard of reasonableness. This was a higher standard than rationality. The fact that the differentiation between citizens and non-citizens might have a rational basis did not mean that it was not an unfairly discriminatory criterion to use in the allocation of benefits. Differentiation on the grounds of citizenship, while not a listed in section 9(3) of the Constitution was clearly a ground analogous to those listed. It therefore amounted to discrimination. It then became necessary to determine whether that discrimination was unfair.

Applicants were part of a vulnerable group in society and, in the circumstances *in casu*, were worthy of constitutional protection. The discrimination in question was unequal treatment of part of the South African community. Both permanent residents and citizens contributed to the welfare system through the payment of taxes. Because of that fact, the lack of congruence between benefits and burdens created by a law that denied benefits to permanent residents almost

inevitably created the impression that permanent residents were in some way inferior to citizens and less worthy of social assistance. The exclusion of permanent residents in need of social-security programmes forced them into relationships of dependency upon families, friends and the community in which they lived, none of whom might have agreed to sponsor the immigration of such persons to the Republic of South Africa. This cast such permanent residents in the role of supplicants. This had a serious impact on their dignity. Denying them their right under section 27(1) therefore affected them in a most fundamental way. This denial was unfair. In the case of section 4(b)(ii) of the Act, dealing with child-support grants, the denial of support to children in need also entrenched upon their rights under section 28(1)(c) of the Constitution.



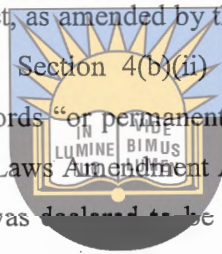
Weighing up the competing considerations which take into account the intersecting rights that were involved, the majority were driven to the conclusion that by excluding permanent residents from the scheme for social security, the legislation limited their rights in a manner that affected their dignity and equality in material respects. Dignity and equality were founding values of the Constitution and lay at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents had not been established. It followed that the exclusion of permanent residents was therefore inconsistent with section 27 of the Constitution.

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In respect of the *Khosa* matter, the court set aside the order of invalidity made by the High Court striking down section 3(c) of the Social Assistance Act 59 of 1992, prior to its amendment by the Welfare Laws Amendment Act 106 of 1997. It replaced the High Court's order with an order declaring the omission of the words "or permanent resident" after the word "citizen" from section 3(c) of the Social Assistance Act 59 of 1992, prior to amendment by the Welfare Laws Amendment Act 106 of 1997, to be inconsistent with the Constitution. The omission of the words "or permanent resident" after the word "citizen" from that part of section 3 of the Welfare Laws Amendment Act 106 of 1997 which was to amend section 3(c) of the Social Assistance Act 59 of 1992 was also declared inconsistent with the Constitution. In order to remedy the defect, section 3(c) of the Social Assistance Act of 1992 prior to its amendment by the Welfare Laws Amendment Act was to be read as though the words "or permanent resident" appear after

the word “citizen”. That part of section 3 of the Welfare Laws Amendment Act which was to amend section 3(c) of the Social Assistance Act was to be read as though the words “or permanent resident” appeared after the word “citizen”.

In respect of the *Mahlaule* matter, the Court set aside the order of invalidity made by the High Court striking down of section 4(b)(ii) of the Social Assistance Act 59 of 1992 as amended by the Welfare Laws Amendment Act 106 of 1997. It replaced the High Court’s order with an order declaring the omission of the words “or permanent resident” after the word “citizen” from section 4(b)(ii) of the Social Assistance Act, as amended by the Welfare Laws Amendment Act, to be inconsistent with the Constitution. Section 4(b)(ii) of the Social Assistance Act, as amended, was to be read as though the words “or permanent resident” after the word “citizen” from that part of section 3 of the Welfare Laws Amendment Act which was to introduce section 4B(b)(ii) into the Social Assistance Act was declared to be inconsistent with the Constitution. That part of section 3 of the Welfare Laws Amendment Act 106 of 1997 which was to introduce section 4B(b)(ii) into the Social Assistance Act 59 of 1992 is to be read as though the words “or permanent residents” appear after the word “citizens”.



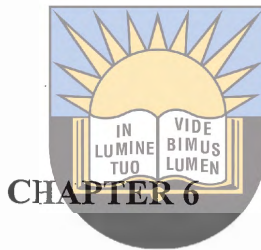
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The First and Second Respondents were ordered to pay the costs of the proceedings.

5.9 Conclusion

In conclusion, it is important to ensure the legal protection and interests of vulnerable non-nationals, who are consistently victims of violent xenophobic attacks and other prejudices. This duty lies not only with government, but civil society and other role players. It has also been noted that there are numerous legal provisions that protect non-nationals, both within the broader international framework and within South Africa’s legal dispensation. Moreover, it has been identified that gaps still exist in the national framework. Again, it is of paramount importance to ensure the proper recognition and application of existing laws; if non-nationals are to be protected from xenophobic perceptions. Subsequent to the legislative analysis, the next chapter is an analysis of South Africa’s legislative and other responses to xenophobia. Although South

Africa's responses are discussed within the 1994-2010 period, particular emphasis has been paid to the 2007-2010 period, largely because of the impact of xenophobic attacks which were experienced within this period. More so, the May 2008 attacks left 62 people dead, thousands lost their properties and homes, many lost their identification documents and the response from government, civil society organizations, human rights institutions, churches and other institutions deserves to be noted. Chapter 6 is therefore devoted to an analysis of South Africa's response to xenophobia.



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6.1 Introduction

The previous chapter dealt with the legislative framework of the study. It discussed the international legal framework, the national legal dispensation and the cases that dealt with discrimination of non-nationals. The previous chapter therefore exposed the existence of xenophobia in a country based on values of democracy, human rights and equality. This chapter, Chapter 6, analyzes the efficacy of legislative and other measures employed by South Africa in curbing xenophobia in the country. It explores the role played by government and civil society organizations during and after the May 2008 attacks and exposes the loopholes in various interventions. The Chapter places a particular emphasis on the role played by the South African Human Rights Commission, an institution mandated to protect the rights of non-nationals in South Africa. Examining the challenges faced by various role players during and after the May 2008 xenophobic attacks is another core aim of this chapter. This chapter is therefore dedicated to an analysis of South Africa's legislative and other responses to all these incidents. However,

special emphasis has been placed on the May 2008 attacks, largely because of their impact on African non-nationals, and the special role played by all those involved in offering them support before, during and after the attacks.

6.2 Responses to the violence

Regardless of the causes, the violence that took place was both vicious and widespread. It left thousands displaced, unable to return home for fear of their lives. Government response was disorganized and lacking in leadership.⁴⁵¹ Right from the beginning, it was slow in declaring the violence a crisis: although the attacks began on 11 May 2008, the government's decisive action to stop the violence came more than ten days later on 22 May 2008.⁴⁵² Four days into the violence, the Democratic Alliance (DA), the official opposition political party, called for the deployment of the army to help the overstretched police and stop the violence. "The army should be used in a civilian context only in an emergency. I believe we might have reached that stage," said party spokesman John Mowden.⁴⁵³ By the time the army was deployed in the Gauteng region, more than forty people had died, hundreds had been injured, and thousands

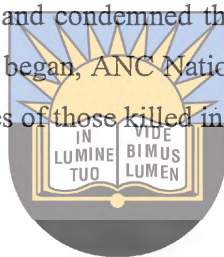
⁴⁵¹ While the national government's response was initially slow, members of the public, humanitarian and UN agencies, local charities and civil society organizations provided immediate assistance to those displaced and sheltered at police stations, community halls, churches, mosques and other temporary shelters. Provincial and city governments mobilized the Disaster Management services to co-ordinate the humanitarian response. The situation was formally declared a "disaster" in Gauteng and Western Cape provinces, eventually leading to the establishment of official sites in both provinces to provide protection and safety for displaced individuals. Some of the officially-identified sites were unsuitable, such as the intended site near Wadeville in Gauteng and Soetwater on the Cape Peninsula. There was a need for training on standards and principles for the establishment of Displaced Persons' camps, and development of a budget from the humanitarian community, but there was also political pressure to act quickly. In the Western Cape, there was also a difference of opinion for a period of time between the leadership of the Cape Town city government and the Office of the Premier which affected the delivery of essential services and other decision making. The South African state, with the advice and support, including financial, of UN agencies, humanitarian and charitable organizations and a wide range of other civil society organizations, largely funded the response to this emergency. See Amnesty International 'Amnesty Report' September 2008 2.

⁴⁵² In common with many other disasters, the wide-scale displacement in May 2008 was met with an initially chaotic response. See Igglesden V 'Xenophobic Violence in South Africa in May 2008: The Humanitarian Response in Gauteng and the Western Cape (a narrative account) 2008 5 University of the Witwatersrand Forced Migration Studies Programme. See <http://cormsa.org.za/wp-content/uploads/Research/Disaster/NarrativeHumanitarianResponse.pdf>. (Accessed 27 April 2010).

⁴⁵³ See NkululekoNcana and Thabo Mkhize "Politicians dither as the violence spreads." The Times. 15 May 2008.

more displaced. Although criticized by some Civil Society Organisations, political parties all hailed this action and it turned out to effectively stop the violence.⁴⁵⁴

However, the government was not alone in providing limited leadership. According to Tim Wilson “we have good laws; we have responding institutions too but these are mismatched, lacking in leadership.”⁴⁵⁵ “Churches that fought against apartheid are no longer actively involved in empowering the public”, adds Bishop Paul Verryn.⁴⁵⁶ “The complaining groups, the victims of xenophobia and all South Africans are yearning to be led”, concludes Tim Wilson. For instance, when political leaders came out in unison and condemned the violence, even criminals heeded their calls.⁴⁵⁷ Three days after the violence began, ANC National Executive Committee member Winnie-Madikizela Mandela visited families of those killed in xenophobic violence in Alexandra and apologized to the non-nationals.



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The overall lesson learned in this analysis is the danger of absent leadership in public affairs. While not implicating the government directly, many have complained about government actions and reactions to the entire process before, during and after the violence. These actions directly

⁴⁵⁴ In a statement quoted by the Mail & Guardian, Lawyers for Human Rights (LHR) expressed concern that “such use of the military creates a situation similar to apartheid period before 1994. In any event, investigation of crime, public safety and prosecution of crime committed against foreign nationals require members who are trained in those areas. The military is not equipped to bring to book perpetrators of crimes against xenophobia victims” See the Mail & Guardian and Sapa “Xenophobia: Mbeki gives nod to army”. Johannesburg; 21 May 2008.

⁴⁵⁵ CRAI interview with Tim Wilson, Coordinator of CSO activities on Xenophobia in Johannesburg on the 6th of August 2008. Amnesty International is also concerned that since July 2008 certain trends have begun to emerge in the government’s response to the crisis which are threatening to or have violated the rights of affected individuals, including refugees and others in need of international protection. The trends, particularly in Gauteng province, include: 1. The implementation of accelerated asylum procedures without sufficient procedural safeguards and consequently creating the possibility of forcible return to countries where the person may be at risk of persecution (refoulement) ; 2.The misuse of criminal charges, unlawful detention and threats to deport individuals who failed to co-operate with administrative procedures at the camps; 3.Obstruction from time to time of access by humanitarian, legal and other support organizations; 4.The reduction in the level of essential services, including access to food. See Amnesty Report 2008 2.

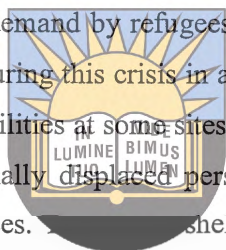
⁴⁵⁶ CRAI interview with Bishop Paul Verryn of the Methodist Church on 6 August 2008 at the Church offices in Johannesburg.

⁴⁵⁷ “Mandela calls for ‘social cohesion’ The Times. 17 June 2008. “Beware holocaust mentality: Tutu” The Times. 20 June 2008.

and indirectly contributed to the rise of an unhealthy environment between local citizens and non-nationals.

6.3 Responses to humanitarian needs

During the attacks and in the immediate aftermath, frightened non-nationals sought refuge in police stations and other local government structures.⁴⁵⁸ It fell on these structures, therefore, to provide an immediate response. The United Nations High Commissioner for Refugees (UNHCR), for its part, saw an increased demand by refugees for third country resettlement. In addition, UNHCR played a key function during this crisis in advising the government, including providing materials for setting up camp facilities at some sites. At the height of the displacement in May, there were nearly 40, 000 internally displaced persons at 140 sites in the Gauteng, Kwazulu-Natal and Western Cape provinces. Shelters or camps were then set up in various locations across South Africa to provide protection and safety for displaced individuals.



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Few Civil Society Organisations (CSOs) took interest in promoting integration processes or addressed xenophobia before the violence broke out. In the wake of the recent crisis, however, many CSOs,⁴⁵⁹ along with many in the business community and faith based organizations (FBOs) lent a hand at a cost to their regular programmes. While CSOs were involved in the humanitarian efforts, their contribution to the government's re-integration programme was minimal.⁴⁶⁰ This was partly due to a lack of comprehensive planning and limited information and consultation. As with the initial response to the violence, the government's response to the

⁴⁵⁸ See Hlatswayo M "Research Report on Cosatu's Responses to Xenophobia" 2010, The Atlantic Philanthropies, University of Johannesburg.

⁴⁵⁹ In Gauteng the following institutions were key in offering humanitarian support: Centre for Study of Violence and Reconciliations (CSVR), Disaster Management Centre (DMC), Faith Based Organisations (FBO), Foundation for Professional Development (FDP), Jesuit Refugee Services (JRS), Medecins Sans Frontiers (MSF), and provincial Disaster Management Centre (PDMC). In Western Cape the following cluster were key institutions involved in offering humanitarian support: Albert Park Outreach Network (APON), Action Against Xenophobia (AAX), Centers of Safe Shelter (CoSS), CSVR, DMC, FBO, FDP, Mennonite Central Committee (MCC), Medicines Sans Frontiers (MSF), UNHCR, United Nations Office of Coordinating Humanitarian Affairs Regional (OCHA).

⁴⁶⁰ See Desai A "Responding to the May 2008 Xenophobic Attacks: A Case Study of the Gift of the Givers" 2009, (The Atlantic Philanthropies), University of Johannesburg, Centre for Sociological Research.

humanitarian emergency that subsequently developed was slow. For instance, in the Western Cape it took three weeks from when camps were set up on 22 May to define which authority was responsible for maintaining them, with disputes between the city and provincial government about who should be responsible for the camps. Once the situation was declared a national disaster this was resolved in part through the creation of a Joint Task force. Even after this method was created, however, the management of efforts was slow.

By the time the CRAI team visited Gauteng, several camps had been closed down and people moved to different sites. At the time of the mission, the remaining camps in Gauteng were located at Rand Airport, Rifle Range, SAPS Reiger Park, River Road (Alex), Wadeville and DBSA (Olifantsfontein) and housed a population of more than 7,373 people⁴⁶¹ while in the Western Cape there were five major camps and about 79 state and non-state shelters with an approximate population of 10, 000 people.⁴⁶² The resulting crisis tested South Africa's competence in crisis management. A number of CSOs, FBOs, and members of the business community responded quickly to the humanitarian crisis. For example, Standard Bank⁴⁶³ together with the Nelson Mandela Foundation (NMF) and its affiliates were among the many institutions that donated funds. UNHCR provided 2,000 tents, 7,000 blankets and 2,000 sleeping mats.⁴⁶⁴ A number of organizations provided humanitarian assistance such as portable water and blankets at different camp sites. While some provided food, others such as Medicines Sans Frontiers provided medical clinics. A number of religious institutions of different denominations housed and provided for victims.

In a presentation made at the Parliamentary Seminar on Migration and Xenophobia, CSVR reported that in Kwazulu Natal "CSOs were the only ones responding to the needs of the displaced people".⁴⁶⁵ On some cases where the government responded without sufficient

⁴⁶¹ See CSVR "Abbreviated Site Report" June 2008.

⁴⁶² See Fatima Hassan "*Report on Xenophobic Attack in the Western Cape.*" June 2008.

⁴⁶³ Standard Bank. "Standard Bank to Donate R3m to the Victims of Xenophobia" 2 June 2008.

⁴⁶⁴ UNHCR "South Africa: UNHCR aid provided to displaced," 30 May 2008.

⁴⁶⁵ See CSVR "Understanding Current Xenophobic Attacks and How South Africa Moves forward." June 2008.

consultation, this resulted in problems. For instance, in the selection of Vickers Road as a site in Johannesburg, the lack of consultation meant that the authorities were unaware of the fact that the George Goch hostel, which was next to the site, has a history of violence.⁴⁶⁶ The location of a camp there was only prevented as a result of a successful challenge by CSOs. A second example was the establishment of a site in Wadeville, where there were concerns about toxicity levels in the soil, which were later confirmed and resulted in the forced removal of sheltering migrants. At City Deep, another site in a dusty old mine dump, MSF medical practitioners complained that the environment aggravated patients with respiratory infections. The camp was also closed down. A number of CSOs responded to this crisis at a significant cost to their regular programming.



For government, humanitarian activities and disaster management following the violence fell, at the provincial level, under the purview of disaster management. Generally, disaster management involves responses to natural disasters such as floods and virus outbreaks. However, the humanitarian problems following the violence placed significant strain on the arrangement. Their management was unprecedented. In addition to humanitarian issues, there were security concerns and issues of documentation. Placing the response to the crisis only under this heading constrained the ability of the government to respond speedily and effectively to the problem.

6.3.1 Access to services in camps

The official safety sites for displaced persons, which were set up after the May 2008 violence, provided adequate shelter in most cases and access to essential services. NGOs also played a vital role in the provision of food and other basic assistance as well as psycho-social support. In addition, particularly in the Western Cape, NGOs monitored the conditions in the various camps and pressed for improvements where necessary.⁴⁶⁷ In the Gauteng province, authorities decided to close the camps in August, by force if necessary.⁴⁶⁸ A legal challenge prevented provincial authorities from carrying out these closures as planned.

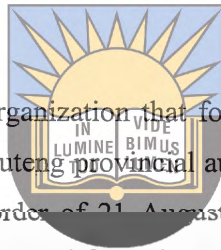
⁴⁶⁶ See CSVR Report 2008 *op cit.*

⁴⁶⁷ See Desai *op cit.*

⁴⁶⁸ *Ibid.*

6.3.2 Access to food

In the initial period following the setting-up of the camps, residents predominantly received three meals a day. By August 2008 when Amnesty International visited camps in Gauteng province, residents of several camps reported that meals had been reduced to two and in some cases ceased, or only irregularly provided by virtue of donations from private individuals or charities. In some camps, for example, Wits Road, DBSA and Akasia, the provision of milk for infants was discontinued around August.



In Akasia camp, residents informed the organization that food assistance had ceased as of 15 August, which is the date on which the Gauteng provincial authorities had intended to close the camps prior to the Constitutional Court order of 21 August that temporarily interdicted their closure.⁴⁶⁹ This absence of food assistance lasted for at least a week. During this time, residents told Amnesty International that they had mixed sugar and water together to try and sustain themselves. Some residents also sold their clothes in a local township to obtain money to purchase food. A local faith-based charity was able to provide some food on several occasions at the end of August. The provision of essential services for Akasia camp were being affected by continuing disputes regarding responsibility for the camp between the Gauteng provincial government and Tshwane (Pretoria) municipal authorities.⁴⁷⁰ Amnesty International was told by the Member of the Executive Committee (MEC) for Local Government for the Gauteng province on 3 September that the provincial government did not accept that the displacement site at Akasia was their responsibility.⁴⁷¹ The MEC told Amnesty International: “We did not want to deal with them”. In early September the UN-coordinated protection working group began to develop a plan for addressing immediate humanitarian needs, as well as a staged process for the humane closure of the camp.⁴⁷²

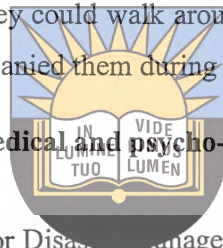
⁴⁶⁹ See CSVR Report *op cit.*

⁴⁷⁰ See Amnesty International 2008 7

⁴⁷¹ *Ibid.*

⁴⁷² See Amnesty International 2008 7.

The Amnesty International report⁴⁷³ also states that humanitarians and organizations providing legal advice and other forms of support were prevented on a number of occasions from entering the camps in Gauteng province. This occurred particularly when the Department of Home Affairs officials, with police support, were visiting the sites. At Wits Road camp, for instance, residents told Amnesty International that the camp management did not allow journalists and some NGOs to visit the camp and that on 25 August, the camp manager had ordered for the camp committee, made up of camp residents, to be disbanded.⁴⁷⁴ They reported that the camp manager threatened them with arrest if they talked to NGOs. It is worth noting that Amnesty International delegates met camp residents outside the camp and that when they asked to visit the camp, the camp manager told them that they could walk around the camp but not interview any of the residents. Security personnel accompanied them during their presence in the camp.



6.3.3 Adequate shelter and access to medical and psycho-social support

While most camps had UNHCR, military or Disaster Management tents, the situation differed in some locations. For instance, the camp in Albert Park, Durban, when visited by Amnesty International consisted of two large tents on the main camp area where the displaced people had been moved by police. While there were initially 186 people in the camp, by the end of August this number was down to 97, including 42 children under the age of 18. Camp residents did not initially have tents and slept in the open. A tent was set up by a private individual but she was pressured to take it down after ten days. Two tents were then set up by a local organization, but camp residents reported to Amnesty International that the organization was being pressurised by local authorities to take the tent down. The tents as well as the nearby portable toilets were removed on the morning of 8 September.

In Akasia, a camp near Pretoria that in early September had about 900 residents, it was found that most displaced persons were housed in army-provided tents that appeared adequate. Somali refugees and asylum seekers, however, were housed in a smaller part of the camp, separated from the main camp by a small empty plot of land. They predominantly had makeshift tents,

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

made of primarily plastic sheets and blankets set up on thin pieces of wood. Overcrowding in the tents increased after the authorities took down a large tent that was used as both shelter and as a mosque; 40 people who slept in this tent had to relocate to the smaller, overcrowded tents in the camps. Camp residents reported that the authorities had told them that they had to take the tent down as the lease on the tent had expired.

There is a clear need for psycho-social support for those displaced by the May violence, both inside and outside the camps. The displaced were affected in different ways by the attacks: some were direct victims, having been physically assaulted; others have lost friends or family and many have lost property. The common element to all is that their sense of safety and security has been severely affected.⁴⁷⁵ It is crucial to recognize that many of these displaced persons have come to South Africa having fled wars, violence and persecution in their own countries and that the xenophobic violence may have aggravated their sense of vulnerability and their need for safe accommodation and psycho-social support.⁴⁷⁶ Issues identified by mental health professionals as affecting the displaced included a sense of deprivation, feelings of exclusion and lack of care, stress related illness and suicidal thoughts, as well as fears for safety and vulnerability to crime arising from the May violence.⁴⁷⁷ Amnesty International delegates were told by camp residents of Akasia that one Somali man who had struggled with depression died after he walked into traffic in July, in an apparent suicide.⁴⁷⁸

6.3.4 Access to legal protection

The Department of Home Affairs (DHA), the primary agency responsible for migration policy, issues registration documents to migrants to protect them from deportation. The department, however, has been accused of ineffective registration of many immigrants (mostly Zimbabweans) who were left without documentation and information gathering. This need was also recognized by many NGOs. However, many of the non-nationals affected by the violence expressed concern that registration would facilitate their deportation.

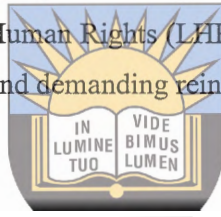
⁴⁷⁵ See Amnesty 2008 9.

⁴⁷⁶ See Amnesty 2008 9.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

In addition, the South African Police Service (SAPS), whose role in border control and crime prevention had previously been found wanting in relation to non-nationals, in particular through allegations of unnecessary arrests and extortion of migrants, refugees and asylum seekers, played a positive role in responding to the attacks, increasing police presence in areas affected by violence, and keeping victims safe in their stations. It was clear, however, that they were simply inadequately equipped to respond to the scale of the violence and unable to protect the population as a whole. Furthermore, many of the displaced required legal assistance in order to reclaim their property and rights. Some CSOs provided legal representation, including the Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR), among others, on issues such as victims without ID cards, relocation cases and demanding reintegration plans.



At the time the CRAI team was in South Africa, camps in Gauteng and Cape Town were scheduled to close on 15 August 2008, and in September 2008 respectively.⁴⁷⁹ This forced a number of CSOs to seek a court injunction to stop the camp closures. For the victims, however, the crisis extended from the initial violence into the camps and shelters to which they had fled to escape the violence.

6.3.5 Monitoring and coordination

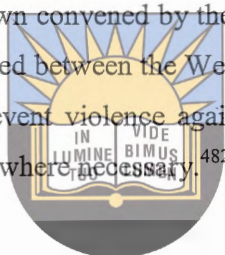
The South African Human Rights Commission (SAHRC) and UNHCR since 1998 have played a useful but quiet role in the “Roll Back Xenophobia Campaign”. The campaign aimed to conduct public education and awareness programmes on asylum seekers, refugees and migrants with a view to reducing negative perceptions of, and hostility towards, foreign nationals. As part of its mandate,⁴⁸⁰ the SAHRC advises the South African government and monitors the human rights of

⁴⁷⁹ See UNOCHA “Violence Against Foreign Nationals in South Africa” Centre for Safe Shelter and Displaced Population Totals By Province as of 12 August 2008.

⁴⁸⁰ The legal mandate of the SAHRC derives from section 184(1) of the Constitution of the Republic of South Africa. This section states that the SAHRC is required to: a) promote respect for human rights and a culture

people residing in South Africa, including migrants and refugees. Following the attacks, the SAHRC worked to mobilize the CSOs to monitor events on the ground.

As in many situations of humanitarian crisis, coordination of applicable actors was vital. For example, in the initial stages SAHRC coordinated and visited victims in police stations. However, on May 19, they convened a meeting of Chapter 9 institutions,⁴⁸¹ CSOs and FBOs to discuss their response to the xenophobic violence. The meeting mandated CSVR to coordinate CSO efforts on behalf of the displaced. On 20 May 2008 a similar meeting of over 20 civil society organizations was held in Cape Town convened by the Treatment Action Campaign and AIDS Law Project. A Task Force was formed between the Western Cape provincial government, the national government and CSOs to prevent violence against non-nationals, and to provide humanitarian and other forms of assistance where necessary.⁴⁸²



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6.3.6 Media coverage of the violence

Although, as previously noted, insensitive reporting of immigration issues might have contributed to the violence, it should also be noted that in the crisis period nearly all media came

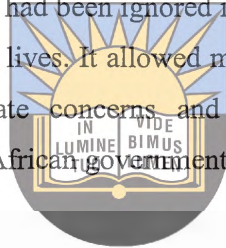
Of human rights. b) promote the protection, development and attainment of human rights; and c) monitor and assess the observance of human rights in the Republic of South Africa. Section 184(2) of the Constitution read together with section 9 of the Human Rights Act 1994 empowers the SAHRC to a) investigate and to report on the observance of human rights; b) take steps to secure appropriate redress where human rights have been violated; c) carry out research and d) educate. The role played by the SAHRC during the 2008 attacks will be explored later. This analysis will also address the problems faced by this institution in trying to “put out the fires”.

⁴⁸¹ The Chapter 9 institutions are established by Chapter 9 of the South African Constitution. These independent organizations have as their general mandate the strengthening of constitutional democracy in South Africa. They are subject only to the Constitution and the Law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. The Chapter 9 institutions are: the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality and the Electoral Commission.

⁴⁸² The Task Team is comprised of representatives from the AIDS Law Project, the Treatment Action Campaign, Black Sash, People Against Suffering, Suppression, Oppression and Poverty (PASSOP), the Congress of South African Trade Unions (COSATU), the Commission for Gender Equality, Sonke Justice Network, UCT Centre for Refugees, the SAHRC, AIDS Rights Alliance for Southern Africa, and the Mitchells Plain Traders Association. As in Gauteng, a civil society task team has been established and it is made up of trade unions, faith based organizations, legal and human rights organizations, humanitarian agencies and refugee organizations. The purpose of the Task Team is to work with the Western Cape provincial government and with national government to prevent violence against non-nationals and to provide humanitarian and other forms of assistance where necessary.

out to condemn the killings and other violence. This was not true of all outlets. In the immediate aftermath of the outbreak of violence in May, however, the nature of reporting may have increased panic. According to the deputy director of the regional office of the UNHCR, “watching a victim burning alive on television might have sent a chilling message to foreigners and many may have panicked and ran from their homes.”

Furthermore, as the violence occurred, the media was under obligation to provide information to the public. Indeed, although some commentators criticized the fact that the reporting focused on the current attacks (whereas similar attacks had been ignored in the past), the timely and detailed reporting on this occasion may have saved lives. It allowed migrants to take the necessary steps to guarantee their safety amid legitimate concerns and brought the plight of targeted communities to the attention of the South African government, civil society and the international community.



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At this juncture it is important to analyze the role played by the institution mandated by the Constitution to protect the human rights of people in South Africa. The Human Rights Commission Act of 1994 sets out the role and powers of the SAHRC but does not prescribe the approach to be taken by the SAHRC during a complex disaster such as that of 2008. The discussion below focuses on the role played by the SAHRC. It also appreciates the challenges faced by the SAHRC in attempting to fulfill its constitutional obligations.

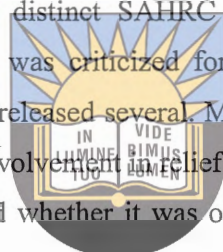
6.4 The SAHRC in the 2008 disaster

The SAHRC encountered difficulty in responding within the boundaries of its mandate and on the scale required during the 2008 disaster.⁴⁸³ The SAHRC was therefore relatively slow to respond to the violence of 2008, being uncertain of what role to play in an unprecedented set of

⁴⁸³ See SAHRC “*Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals*” 2010 79. This report has been used to analyse the SAHRC response because of its detailed construction and because it is recent.

circumstances.⁴⁸⁴ Once its response began in earnest, all ordinary operations were put in abeyance. This allowed the SAHRC to better fulfill demands for information, input and assistance; community engagement; monitoring; and participation in or facilitation of forums, task teams and committees.⁴⁸⁵

In Gauteng, attempts at coordination had a limited effect due to attrition in attendance of the meetings as stakeholders became overrun by the practical demands of the crisis. The SAHRC had not monitored a large-scale disaster before and had to navigate disagreement over what standards should be used.⁴⁸⁶ Eventually, distinct SAHRC guidelines were developed from existing instruments. The Gauteng office was criticized for failing to release its monitoring reports, whereas the Western Cape Office released several. Monitoring was conducted on a less formal basis in Kwazulu-Natal due to its involvement in relief activities.⁴⁸⁷ In Gauteng, questions were raised around the SAHRC's role and whether it was one of assistance to government or monitoring of government. In the Western Cape, the SAHRC office adhered to its core human rights mandate.⁴⁸⁸ The lack of consistency and the evident uncertainty with regard to the SAHRC's mandate under such circumstances is an important concern for the future.



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With regard to reintegration initiatives, the SAHRC was party to numerous meetings and forums, and worked to facilitate dialogue between parties to the *Mamba* case (which attempted to prevent the closure of displacement sites in Gauteng). The latter proved fruitless, as government parties to the matter did not attend. It is regrettable that the SAHRC did not take a stronger position on the closure of displacement sites by the Gauteng Province in violation of an interim ruling by the Constitutional Court. Another key challenge faced by the SAHRC was the failure of certain government stakeholders to apply specific recommendations that it continually reiterated.⁴⁸⁹

484 *Ibid.*

485 *Ibid.*

486 *Ibid.*

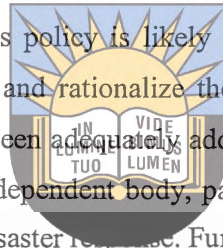
487 *Ibid.*

488 *Ibid.*

489 SAHRC 'Putting out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence.' 31 March 2009.

6.4.1 Steps taken by SAHRC to address the May 2008 attacks

In light of the 2008 experience, the SAHRC conducted an evaluation of its response⁴⁹⁰ and developed a policy paper⁴⁹¹ on the role of national human rights institutions (NHRIs) in a disaster, drawing on international disaster response guidelines, the Paris Principles concerning the mandate of NHRIs, South Africa's Constitution and the human rights enshrined in the Bill of Rights. It identifies roles for an NHRI during and after disasters, as well as roles to be played on an ongoing basis. The policy paper also clarifies the mandate of the SAHRC to exclude humanitarian assistance. Adherence to this policy is likely to improve the consistency of the SAHRC's approach to complex disasters and rationalize the deployment of resources to best fulfill its mandate. What has perhaps not been adequately addressed is the need for the SAHRC to take a stronger leadership role as an independent body, particularly a leadership role among Chapter 9 institutions in the context of a disaster response. Further consideration and engagement is needed on an optimal division of labour between public and private organizations, cooperative relationships with government and the need for a clear and consistent stance to ensure accountability for human rights violations.



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6.5 The role of the Police

While the local police claim that their response was prompt and effective in dealing with the crisis, most respondents report that local police intervention was too late and not effective at all.⁴⁹² They report that in some areas, such as Alexandra, the police took more than 24 hours to react and believe that a strong police intervention could have stopped the violence. Further, most respondents are convinced that some police officers supported or at least passively tolerated the

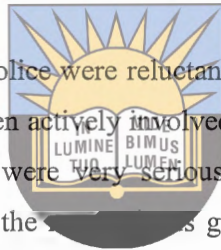
⁴⁹⁰ SAHRC 'Putting out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence.' 31 March 2009.

⁴⁹¹ See SAHRC Policy Paper "A National Human Rights Institution's Response to a Disaster: Lessons from the South African Human Rights Commission" March 2009.

⁴⁹² See International Organization for Migration Regional Office for Southern Africa 'Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa' 2009 47.

violence due to their own anti-foreigner sentiments.⁴⁹³ The Friends for Life social worker reports:

Police responded to the attacks, but were very frustrated because they can't shoot; it looked like the perpetrators had more power than the police. Interventions were limited. They knew that they were at risk, so they left the community to do what they did. The police are caught in the middle because they are members of the community themselves and fear being victimized. They did not show energy, nor will because foreigners put their work at risk because they have a lot of pending dockets, [...] they can't catch criminals as they keep changing names.⁴⁹⁴



Respondents further report that the local police were reluctant to intervene and that it was only the police from other stations who were seen actively involved in attempts to quell the violence. “The police that came from other areas were very serious and people respected them and everything stopped,” says one member of the [redacted] group. Incidents of police officers being involved in looting were reported by respondents in De Noen.⁴⁹⁵ In interviews, local police were adamant that they did an exemplary job under the circumstances. In Masiphumelele, for instance, the Ocean View SAPS representative said “we were able to handle the situation because we were prepared.” In Alexandra, the police dismissed the allegations that local police were reluctant to intervene; their representative says:

That's a very wrong perception. As the police we put our personal feelings aside and perform our duties. We took control of the situation as local police; we did not want to take sides, not for foreigners, not for the community. With limited resources, we did a very good job. We involved everyone to alleviate the stress from the police.

Despite these claims, it is evident that the police in all affected areas were not able to stop the violence or protect foreign nationals and their property. “Not wanting to take sides” in a context in which one “side” consisted of victims and the other perpetrators also suggests a failure in the

⁴⁹³ *Ibid.*
⁴⁹⁴ See IOM 2009 47.
⁴⁹⁵ *Ibid.*

will to provide adequate protection to foreign nationals. The attacks stopped only after all foreign nationals had left the areas and there were no more businesses to loot. The role of the police seems to have been limited to escorting non-nationals to police stations and other places of safety rather than protecting them and their property. However, the conviction that the police did a “good” job and their interventions were effective is an issue of concern, as it does not encourage efforts to design new and more effective intervention strategies.⁴⁹⁶

6.5.1 *Harassment and misuse of force by agents of the state following the May 2008 displacement*



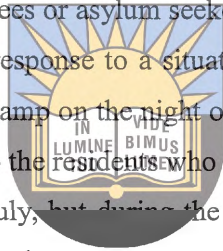
Amnesty International received reports of several incidents of misuse of force by law enforcement officials. On 30 August Amnesty International delegates interviewed a number of individuals displaced by the violence in Durban and sheltered at Albert Park. The group, originally about 186 adults and children, had initially been sheltered at a local church for about four weeks. When the church could no longer assist them, they sought assistance from the Durban municipality on 25 June. The municipal authorities arranged for their transfer to another shelter and paid for their accommodation for five days. After 15 days the manager asked them to leave as the situation was financially unsustainable. On 10 July the group went to Durban’s City Hall and was able to speak briefly to a manager from Disaster Management, but he could not assist them.⁴⁹⁷ The group stayed near the City Hall area overnight. On 11 July members of the Durban metro police and security guards forced the group into police vans. Film footage of the incident showed security personnel repeatedly pushing a pregnant woman from the group, throwing her to the ground and at one point slapping her in the face. Amnesty international delegates interviewed her, several days after she had been discharged from hospital. She was seven months pregnant, and was still experiencing bleeding in the nose and mouth area from the assault. Amnesty international has been informed by medical experts that the results of the medico-legal examination were consistent with the alleged assault. Another woman, G, from the Democratic Republic of Congo, told Amnesty International that during the incident on 11 July she had fallen to the ground and the security personnel had deliberately stamped on her hands

⁴⁹⁶ IOM 48.

⁴⁹⁷ See Amnesty 2008 5.

and kicked her in the chest and that police used pepper spray on her eyes. Her medical records indicated soft tissue injuries and treatment to reduce swelling in her hands and wrists.⁴⁹⁸

In July 2008, Amnesty International had expressed concern to the government at the forcible removal of more than 700 people, including refugees and asylum-seekers, from the Glenanda (Rifle Range Road) camp to the Lindela Repatriation Centre. The removals happened after officials began to implement the camp registration and temporary resident permit system. Those removed from the camp on 22 July had failed or refused to register, apparently out of fear that to do so would jeopardize their rights as refugees or asylum seekers. Five days previously the South African Police Service had intervened in response to a situation where the camp residents had surrounded five men who had entered the camp on the night of 16 July and prevented them from leaving. Only one of the men was known to the residents who were suspicious of their intentions. The men were released unharmed on 17 July, but during the tense situation police fired rubber bullets, injuring 23 people who were shot at close range.



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6.6 Local leaders and authorities

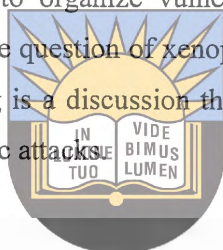
According to the findings, the community leaders and the local government did nothing to prevent or stop the violence. As discussed above, some were involved in or supported the violence. Even those who were not supportive did not want to be seen helping the unwanted foreign nationals for fear of losing legitimacy or positions in the 2009 elections.⁴⁹⁹ A number of government officials and political leaders attempted to address and engage with people in affected areas. Some of these meetings, however, were abruptly interrupted. People left even angrier because they were told what they did not want to hear. The Alex employee confirmed:

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

MEC of Gauteng came to address and calm people but the meeting was called off; people left fuming; they wanted to hear what local people were going to do to get rid of foreigners and not being told to stop the violence.

It is important to recognize the role of the Congress of South African Trade Unions (COSATU) prior to and after the May 2008 xenophobic attacks. COSATU is an essential part of South African civil society because it has the largest representation of organized workers and also a history of struggle against apartheid in the workplace and in the townships.⁵⁰⁰ The democratic dispensation and post-apartheid era pose political and organizational challenges for COSATU and its affiliates.⁵⁰¹ Besides a necessity to *organize vulnerable* workers in the formal and informal economy, it also has to address the question of xenophobia and issues pertaining to the rights of migrant workers.⁵⁰² The following is a discussion that summarizes COSATU's role to assist those affected by the 2008 xenophobic attacks.



6.7 COSATU's response to the May 2008 attacks

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The research findings demonstrate that certain COSATU provincial structures, through defending the rights of migrants, played an important role in providing humanitarian aid to victims of xenophobia in May 2008.⁵⁰³ However, the challenge is that COSATU and its affiliates did not have a coordinated intervention during the xenophobic attacks. This would have assisted in pushing back the frontiers of xenophobia.⁵⁰⁴ With all its limitations, the federation and its affiliates also appealed to its members and the society at large to defend the rights of migrants. In summary, COSATU played a role by providing humanitarian aid to victims of xenophobia, providing popular education against xenophobia, pre-emptive measures, forming coalitions,

⁵⁰⁰ See Hlatshwayo M “*Research Report on COSATU's Response to Xenophobia*” 2010 1, The Atlantic Philanthropies) University of Johannesburg.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

interventions at the National Economic Development and Labour Council (NEDLAC), engaging the state and organising migrants.⁵⁰⁵

6.8 Conclusion

The response to the May 2008 attacks was extraordinary, involving a massive protest by civil society and the use of the military to help control the attacks. However, the challenge for South Africa is to transform a racially-motivated immigration or migration system into a non-racial and rational policy responsive to the objective needs of the country. Moreover, the basic rights of migrants without identity papers must still be respected.⁵⁰⁶ Again, the immediate and long-term responses to the May 2008 attacks deserve far more attention and are thus beyond the scope of this study. Furthermore, the xenophobic attacks were a countrywide phenomenon and involved various role players and interventions. It would be impossible to discuss all the responses. However, it is hoped that the discussion above would give a significant insight into the role played by civil society organizations, faith based organizations, human rights institutions and other role players. In recognition of the discussion thus far, the next chapter draws conclusions and makes recommendations on new ways for understanding xenophobia, and new forms of legal, social and political action to deal with xenophobia at the local and national level. It further recognizes the recommendations provided by the Declaration preceding the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Durban Review Conference.



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⁵⁰⁵ See Hlatshwayo 2010 12 *ibid*.

⁵⁰⁶ See Report by Mr. GleleAhanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, submitted pursuant to the Human Rights Commission on Human Rights Resolution 1998/266; Mission to South Africa (24 February to 5 March 1998).

CHAPTER 7

RECOMMENDATIONS

7.1 Introduction

The previous chapter dealt with South Africa's response to xenophobia, with particular emphasis on the response during and after the May 2008 attacks. More so, the role played by various government departments, civil society organizations, faith based organizations and other institutions was analyzed. The previous discussion shows that South Africa was not prepared for the disaster that occurred and the interventions employed were thus weakened by the lack of preparation. Furthermore, there was lack of coordination between various role players, leading to confusion and more human suffering. Nonetheless, most of South Africa condemned the xenophobic attacks and the interventions and support granted by South Africa deserve to be noted. Moreover, the discussion thus far has proved that anti-outsider violence is deeply rooted in South Africa's historical legacies and contemporary institutional configuration⁵⁰⁷. As has previously been noted, xenophobia is a complex phenomenon, and therefore needs various intelligible measures to be combated. Government, civil society, and international organizations must work together to find ways of replacing vigilantism with vigilance and power vacuums with a leadership committed to inclusive, equitable, law abiding communities.⁵⁰⁸ It is not only non-nationals' welfare that depends on the success of these efforts. Without mechanisms to address conflict and exclusion, the nation risks the security and dignity of all South Africans living in the country's townships and informal settlements.⁵⁰⁹ The challenge therefore is for South Africa to

⁵⁰⁷ International Organisation for Migration *'Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa ; 2009 4.* For the reasons set out in previous sections, this study finds South Africa in violation of its legal obligations in relation to the treatment of migrants. Settled jurisprudence requires the state to deploy both corrective and preventive measures to remedy the situation. In this regard, the European human rights system developed a remedial system that distinguishes individual measures from general measures. The former was designed to correct the personal circumstances of the victim of the unlawful state conduct whilst the latter caters for the larger picture by attempting, as far as possible, to put in place measures that prevent recurrence of the same problem to any other person. South Africa's response failed both in a general sense and on an individual basis. See Centre for Human Rights, Faculty of Law, University of Pretoria *'The Nature of South Africa's Obligations to Combat Xenophobia 2009 114.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ See IOM *op cit.*

formulate policy that takes advantage of the positive aspects of globalization, including the unprecedented movement of people with skills, expertise, resources, entrepreneurship and capital, which will support the country's efforts at construction.⁵¹⁰ Moreover, understanding the experiences of non-nationals living in South Africa—and the challenges - and contributions their presence promises-is the first step towards overcoming xenophobia.⁵¹¹ Furthermore, it is imperative to reflect on building a human rights culture in which diversity is embraced.⁵¹²

This chapter is dedicated to suggesting new ways for understanding xenophobia, and new forms of legal, social and political action to deal with xenophobia at the local and national level. It also proposes adoptable legislative, judicial, administrative, educative and other appropriate measures.⁵¹³ Chapter 7 further recognizes the recommendations provided by the Declaration preceding the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance⁵¹⁴. One may state that, if supported by political will and resources, the



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⁵¹⁰ Republic of South Africa, White Paper on International Migration 1996.

⁵¹¹ See Landau et al, 'Xenophobia in South Africa and Problems Related To It,' Background Paper prepared for 'Open hearings on Xenophobia and Problems Related to It', hosted by the South African Human Rights Commission with the Portfolio Committee of the Departments of Foreign Affairs and Home Affairs 2004.

⁵¹² The WCAR Declaration also recognizes that inequitable political, economic, cultural and social conditions can breed and foster racism, racial discrimination, xenophobia and related intolerance, which in turn exacerbate the inequity. "We believe that genuine equality of opportunity for all, in all spheres, including that for development, is fundamental for the eradication of racism, racial discrimination, xenophobia and related intolerance." See WCAR Declaration, para 76. Paragraph 78 affirms the above statement, stating "we affirm the solemn commitment of all States to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance."

⁵¹³ Human Rights Committee General Comment No 31 para 7. A summary of the generic recommendations from the Council of Europe, ODIHR and the EUMC indicate that further action is needed. See also, International Organisation for Migration 'Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa' 2009 4. The Office of The United Nations High Commissioner For Human Rights (OUNHCHR) also acknowledges that almost all advocacy for non-citizens has focused on the rights of discrete groups, such as asylum seekers, refugees, stateless persons, trafficked persons, etc. Unfortunately, however, little has been done to identify the common plights, needs and approaches for redress of the various non-citizen groups. Indeed, diverse groups of non-citizens – and their respective advocacy and interest groups – have traditionally seen themselves as separate and their problems as unique, despite similar goals and common circumstances. In addition, international law and mechanisms relating to non-citizens have, until recently, focused on non-citizen subgroups while neglecting broader protections for non-citizens as a whole. For example, various United Nations institutions have designated special rapporteurs on such themes as trafficking, migrants, indigenous people, refugees, and racial discrimination and xenophobia. Similarly, several treaties have been designed to protect trafficked persons, migrant workers, indigenous and tribal peoples, refugees, and stateless persons. See OUNHCR 'The Rights of Non-citizens' 2006 35 New York and Geneva.

⁵¹⁴ The Conference took place in Durban from 31 August to 8 September 2001. A number of recommendations

following recommendations may help to counter xenophobic tendencies and reduce the risk of future violence.

The legal framework that regulates the treatment of foreign nationals in South Africa consists of various instruments at the national and international level. In order to provide adequate protection for the rights of foreign nationals, South Africa should ratify all relevant instruments, including the Convention on the Rights of All Migrant Workers and Members of Their Families.⁵¹⁵ It would also be prudent for South Africa to subsequently domesticate the provisions of this instrument. Moreover, the process of state reporting should, as a necessary component of ratifying international instruments, and under the Universal Periodic Review, where relevant include the situation of foreign nationals and the measures taken to ensure that their rights are realized. Measures should be put in place to implement the concluding observations made by treaty bodies on these reports.⁵¹⁶ The government should also make a concerted effort, for example, through education and awareness raising, to eradicate stereotyping, targeting, stigmatizing and profiling on the basis of national origin by politicians, officials, educators and the media, in all communication networks including the internet and in society at large.⁵¹⁷

South Africa, as the site where the negative events related to xenophobia took place, as well as the host nation for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, should inspire and galvanize more action on the realization of the goals in the Conference Programme of Action.⁵¹⁸ South Africa is also obligated by the CERD Committee to review and revise legislation, as appropriate, in order to guarantee that such legislation is in compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in Article 5, without discrimination.⁵¹⁹ It must also be ensured that legislative guarantees against racial discrimination apply to non-citizens regardless of their

were proposed and included in the Durban Declaration.

⁵¹⁵ See IOM *op cit*.

⁵¹⁶ *Ibid*.

⁵¹⁷ *Ibid*.

⁵¹⁸ *Ibid*.

⁵¹⁹ See Article 2(6) of the General Recommendation XXX (2004) of the CERD Committee.

immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.⁵²⁰ Greater attention to the issue of multiple discrimination faced by non-nationals, regardless of their immigration status must be paid. Furthermore, the implementation of legislation should not have a discriminatory effect on non-nationals. South Africa is also mandated to ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin. Moreover, any measures taken in the fight against terrorism should not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and non-citizens should not be subjected to racial or ethnic profiling or stereotyping.

7.2 Specific recommendations



7.2.1 *Effective Law Enforcement Response*

Law enforcement officers are the primary and initial point of contact for many victims of xenophobic crimes. Being on the front lines, it is the police officer who responds to, and interacts with, the victim first. In terms of recording hate crimes, it is critical for police officers to:

- Understand how xenophobia-related crimes differ from similar crimes that are not motivated by bias and to take such reports seriously; and to
- Understand how police or victim interaction can influence whether victims report hate crimes or not (due to fear of police, embarrassment, or concern that the incident will not be taken seriously).

An example to affirm the above can be taken from some OSCE participating States. In these states, hate-motivated violence and vandalism is not properly investigated and often, due to a lack of knowledge and experience in the investigation of hate crimes, law enforcement authorities often identify such acts as “hooliganism”. Inadequate response on the part of law-enforcement agencies may create an atmosphere of impunity and thus “encourage” more hate-

⁵²⁰ See Article 2(7) of above.

motivated crimes.⁵²¹ As concluded in the ODIHR's report titled: *Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives*, training for law enforcement officials and clear guidelines regarding the most effective and appropriate way to respond to bias-motivated crime can greatly increase positive interaction between police and victims and encourage reporting by victims of hate crime.⁵²² Suggestions for improved reporting include training for front-line officers, the implementation of outreach programmes to improve police-community relations, and training in providing referrals for victim assistance and protection. It is also important to note specific challenges encountered by non-nationals in their relations with the police in South Africa. In recent years there has been an increased number of reports that, in addition to usual unwarranted stops and searches of persons perceived to be African non-nationals, police use unnecessary force and even resort to practices that in many occasions were qualified as inhumane and degrading, and even torturous.

7.2.2 Develop interventions to promote accountability and counter a culture of impunity

There is little hope of reforming corrupt and potentially violent leadership structures if guilty parties continue to reap rewards for their misdeeds.⁵²³ The Department of Justice together with the Department of Provincial and Local Government (DPLG), and the national Prosecuting Authority (NPA) should lead an initiative to prosecute community leaders and others involved in the xenophobic violence and to strengthen justice mechanisms to protect the rights of minority and marginalized groups.⁵²⁴ Such an initiative should begin with an official Commission of inquiry – potentially by the South African Human Rights Commission or another constitutionally mandated body – to identify guilty parties and unacceptable practices. Further efforts will lay criminal charges against official and unofficial leaders who use their authority to promote violence and illegal activities, and employ crime prevention and conflict resolution mechanisms

⁵²¹ In response to increased racist violence in the Russian Federation, President Putin stated at a meeting of Top Interior Ministry officials on 17 February 2006 that a lack of effective police response had encouraged Extremist groups to grow bolder and criticized law enforcement structures for “failing to take efficient and Systematic efforts” to deal with a surge in racist attacks. See ‘Challenges and Responses to Hate-Motivated Incidents In The OSCE Region’ for the period January-June 2006. This Article was issued at the Human Dimension Implementation Meeting in Warsaw, 12 October 2006.

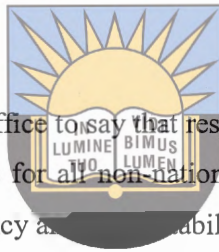
⁵²² In line with this view, the South African Human Rights Commission has recommended that South Africa should develop and promulgate Hate Crimes legislation in line with its international obligations. See SAHRC ‘Putting Out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence.’ March 2009.

⁵²³ See IOM 4 *op cit*.

⁵²⁴ *Ibid*.

that respect the rights of all community residents.⁵²⁵ The world leaders also voiced the same sentiments in the Durban Declaration:

We recognize that democracy, transparent, responsible, accountable and participatory governance responsive to the needs and aspirations of the people, and respect for human rights, fundamental freedoms and the rule of law are essential for the effective prevention and elimination of racism, racial discrimination, xenophobia and related intolerance. We reaffirm that any form of impunity for crimes motivated by racist and xenophobic attitudes plays a role in weakening the rule of law and democracy and tends to encourage the recurrence of such acts.⁵²⁶



With the same insights in mind it would suffice to say that responsive government is a necessary aspect in the achievement of human rights for all non-nationals who find themselves in South Africa.⁵²⁷ Moreover, democracy, transparency and accountability ensure that the rights of various people are respected and recognized.

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7.2.3 *Documentation, refugee status determination, and legal protection of undocumented non-nationals targeted and displaced by violence.*

In the absence of a clear migration policy and with a high number of undocumented migrants living in informal townships and settlements (who might again be displaced by targeted violence in the event of a social conflict scenario), the Government should review the legal options provided to those undocumented non-nationals affected by the violence, with the aim of ensuring

⁵²⁵ See International Organisation for Migration “*Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa*” 2009 4.

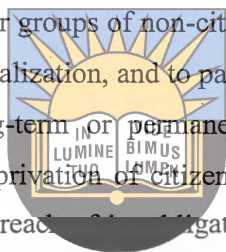
⁵²⁶ Durban Declaration para 81.

⁵²⁷ Paragraph 85 of the WCAR Declaration supports the above view, stating that “we condemn political platforms and organizations based on racism, xenophobia or doctrines of racial superiority and related intolerance, as incompatible with democracy and transparent and accountable governance. We reaffirm that racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights and may endanger friendly relations among peoples, cooperation among nations and international peace and security.”

a more human rights based and humane response.⁵²⁸ The Government should also consider opening up more channels for legal migration.⁵²⁹ Such an approach would not only encourage legal migration and help reverse clandestine migration; it could also help reduce the “us versus them” mentality that contributes to the xenophobic attacks. Furthermore, it could contribute towards reducing corruption, lessening labour exploitation and other practices that undermine the rights and welfare of both South African and foreign nationals.⁵³⁰

7.2.4 Access to citizenship

South Africa may also ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents. The South African government should also recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of international obligations to ensure non-discriminatory



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⁵²⁸ See United Nations Office for the Coordination of Humanitarian Affairs, Regional Office for Southern Africa (UNOCHA ROSA) *Recommendations stemming from Lessons Observed of the Response to Internal Displacement Resulting from Xenophobic Attacks in Southern Africa* 2008 10. A primary objective of any national effort to protect the rights of non-citizens begins by demonstrating (as has been demonstrated by this study) that without clear, comprehensive standards governing the rights of non-citizens, their implementation by South Africa and more effective compliance, the discriminatory treatment of non-citizens in contravention of relevant international human rights instruments will continue.

⁵²⁹ See International Organisation for Migration *Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa* 2009 5. Article 13 of the ICCPR protects the rights of non-nationals in situations where they are to be removed from a state. The Article protects only those foreign nationals lawfully within the state by providing some due process guarantees. This provision does not sanction collection or mass expulsions from a state, as each case requires to be processed on its own merit. See Human Rights Committee General Comment No 15 paras 9&10. Though the obligations engendered by international instruments are binding on states and do not have horizontal effect, the state has the obligation to protect against acts by other individuals or private entities that infringe on their rights. States may thus violate Covenant rights by permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. Human Rights Committee General Comment para 8.

⁵³⁰ Legislation against racism and discrimination is in effect in various ways and to varying degrees around the world. Legislation can include laws against agitation and persecution directed at people because of their ethnic affiliation, the banning of Nazi political parties and symbols, anti-discriminatory hiring regulations, falsification of history, and so on. During the past several years there has been an ongoing debate in Sweden concerning how far the legislation against overtly political parties, symbols and such should extend considering, among other things, the widespread publication of racist music in the country. An obvious dilemma for the proponents of strengthened legislation against overtly racist actions, racist political parties and such is the classical problem of liberal democracy, that is, how to legitimate intolerance towards intolerant individuals. See Hjerm M *What the future May Bring: Xenophobia among Swedish Adolescents* 2005 on www.sagepub.com.

enjoyment of the right to nationality.⁵³¹ Consideration must also be taken that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantages for them in access to employment and social benefits. This further violates CERD's anti-discrimination principles. Statelessness, in particular among children, may be reduced by encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children.⁵³²

7.2.5 Reintegration

Although no obligation exists to integrate or reintegrate foreign nationals violently uprooted from communities during xenophobic violence, it is an option to be explored if locals and foreign nationals are to co-exist peacefully. The government should develop and implement a clear policy on when and how such integration should take place, including clear responsibilities and relevant actors. Adequate measures should then be taken to ensure that in situations where integration will take place both the foreign nationals and the receiving communities are sufficiently prepared to accommodate each other economically and socio-culturally. A look at the Durban Declaration justifies the above view:

We recognize the necessity for special measures or positive actions for the victims of racism, racial discrimination, xenophobia and related intolerance in order to promote their full integration into society. Those measures for effective action, including social measures, should aim at correcting the conditions that impair the enjoyment of rights and the introduction of special measures to encourage equal participation of all racial and cultural, linguistic and religious groups in all sectors of society and to bring all onto an equal footing. Those measures should include measures to achieve appropriate representation in educational institutions, housing, political parties, parliaments and employment, especially in the judiciary, police, army and other civil services, which in some cases might involve electoral reforms, land reforms and campaigns for equal participation.⁵³³

⁵³¹ See Art 4(14) of General Recommendation XXX.

⁵³² See Art 4(16), see also IOM *op cit*.

⁵³³ Durban Declaration para 108. The international commitment towards fighting against xenophobic tendencies is evident. While hate-motivated incidents and crimes continue to pose a challenge to human security and dignity, the Office for Democratic Institutions and Human Rights (ODIHR) observed positive developments in some participating states' efforts to combat these phenomena. Progress was particularly notable in the areas of strengthening law enforcement authorities to hate crimes, addressing negative

The United Nations Office for the Coordination of Humanitarian Affairs Regional Office for Southern Africa (UNOCHA ROSA)⁵³⁴ report states the need for a comprehensive and resourced integration strategy to have been developed from the very outset of the crisis. It further highlights the need for an integration strategy which is a component of a broader exit strategy, which would have encompassed other durable solutions for meeting the needs of the affected and been based on a realistic timeframe for achieving these.⁵³⁵ In 2009, the Government perceived the closures of the camps in and of itself as its integration strategy, while the United Nations failed to effectively lead partners at an early enough stage⁵³⁶ to coherently and effectively advocate for a more humane and principled strategy, as well as to support the Government in developing such strategy.



The UNOCHA ROSA report suggests that an effective integration should follow the following discourse:

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- Resource equality for all beneficiaries.
 The 2008 integration mechanisms saw some victims receiving cash grants and food parcels, which were of varying amounts. Others received ad hoc contributions from faith-based and civil society organizations; while others received no assistance. Any future integration plan should therefore correct the above wrongs.⁵³⁷
- Adequate integration assistance, which should include appropriate protection measures on the way home and material assistance for livelihood support and basic shelter. A more open dialogue is still

discourse in the media, strengthening educational programmes to combat anti-Semitism, and the role played by specialized bodies. See ODIHR 'Challenges and Responses to Hate-Motivated Incidents in the OSCE Region 2006.

⁵³⁴ See UNOCHA ROSA "Recommendations Stemming from Lessons Observed of the Response to internal Displacement Resulting from Xenophobic Attacks in South Africa" 11 (May – December 2008.)

⁵³⁵ *Ibid.*

⁵³⁶ UNDP made a significant contribution in leading the development of both principles and a plan for Integration but this was undertaken too late in the response to bear impact.

⁵³⁷ See UNOCHA ROSA *op cit.*

required to further define an appropriate integration package in the context of the generalized levels of poverty in South Africa, which does not exacerbate existing community tensions.⁵³⁸

- Full consultation with South African communities in potential areas of return, including confidence-building meetings between IDP leaders and the host communities, as well as facilitated visits of IDPs to potential areas of return to enable them to do their own self-assessment of suitable conditions for return.⁵³⁹

- More active identification of potential safe areas of return, and for this information to be made readily available to the affected.⁵⁴⁰



- Participation of volunteers from the affected communities in conflict mediation and service delivery. As it was in 2008, the mediation and response efforts were led primarily by actors who did not originate from the affected communities. Had the former been more involved, better progress would have been made earlier towards reconciliation and durable solutions.⁵⁴¹

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7.2.6 Education

The WACR Declaration affirms that education at all levels and all ages, including within the family, in particular human rights education is a key to changing attitudes and behavior based on racism, racial discrimination, xenophobia and related intolerance and

⁵³⁸ See UNOCHA ROSA *op cit*.

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

to promoting tolerance and respect for diversity in societies.⁵⁴² It is therefore of paramount importance to teach the facts and history of human kind from antiquity to the recent past, as well as of teaching about the facts and truth of the history, causes, nature and consequences of racism, racial discrimination, xenophobia and related intolerance, with a view to achieving a comprehensive and objective cognizance of the tragedies of the past.⁵⁴³ In this regard, South Africa must not only engage in human rights education but should also embark on education which is sensitive to and respects cultural diversity, especially amongst children and young people, in the prevention and eradication of all forms of intolerance and discrimination.⁵⁴⁴

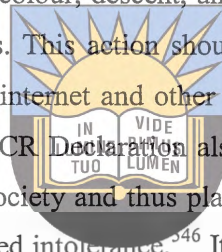
⁵⁴² See WCARpara 95. The risk of xenophobia diminishes with decreasing levels of knowledge, which implies that not only is the teaching of democratic values of importance but also the educational system's main task of teaching basic skills to its pupils. This is not to suggest that xenophobia will disappear with better dispersion of knowledge, only that the power of common knowledge should not be underestimated in fighting racism and xenophobia. The educational system has an important role in that not only does one expect it to teach the values of the liberal democracy and the multicultural society; it is also required by law to do so in South Africa. See Hjerem M 'What the Future May Bring: Xenophobia among Swedish Adolescents' (2005), Umea University, Sweden. This Article may be accessed from <http://asj.sagepub.com> (Accessed 27 May 2010). As part of human rights treaties, state and non-state actors are obliged to respect, protect and fulfill the rights of non-nationals. Thus there is a need to design concrete strategies to keep both parties informed about rights and obligations. Duty bearers in many instances take advantage of the ignorance of rights-holders to abuse them. How do you advocate for a right that you do not know you have? Despite this, there are a few instances where duty bearers have been punished for violating human rights. This of course happens when the rights holder has the courage to claim his or her rights. Thus there is a need to design concrete strategies to keep both parties informed about rights and obligations. A good standing point could be the insertion of human rights in the school curricula and also for human rights courses to be taught in all professional schools. A momentum of awareness will certainly be created. The South African government should therefore create a robust legal and institutional framework to enable the implementation of international instruments. At a minimum, national laws must not weaken or contradict international instruments.

⁵⁴³ Eddie Makue, the Secretary General of the South African Council of Churches (SACC) is of the view that Social training in non-violence could help South Africans, the same way it helped apartheid exiles overcome violence. He is also of the view that people need to be given liberative education. (Interview with Eddie Makue, Secretary General (SACC) 20 January 2010; SACC Offices: Kotso House, Johannesburg). Hlatswayo *op citis* also of the view that a sustainable education programme on xenophobia targeting the membership and leadership of COSATU needs to be developed.

⁵⁴⁴ On this note, one may draw inspiration from the "Life, Knowledge, Action/Grounding Programme" (commonly known as the "LKA") at the University of Fort Hare. This is a trans-disciplinary Programme aimed at providing students with a critical framework in which to see and understand the world, the continent and themselves. This Programme also aims to provide a rigorous, responsible and compassionate basis for gaining and applying their knowledge and energies to the world, with a deep understanding of the principles of Ubuntu, democracy and liberation. Furthermore, the LKA aims to provide students with a road map detailing how to use their university experience to become a socially engaged citizen. The LKA also seeks to provide Fort Hare students with the confidence to engage in lives of authenticity and dignity linked to the creation of dignified lives for others. It goes without saying that if South Africa could implement such programmes in institutions of learning it would enhance the respect and acceptance of divergent cultures, backgrounds and views. With such programmes in place nation-wide, racism, racial discrimination, xenophobia and related intolerance would soon be a thing of the past. see

7.2.7 Addressing negative media and political discourse

Positive political leadership and media responsibility should be observed in countering xenophobia.⁵⁴⁵ The Committee on the Elimination of Racial Discrimination, general recommendation XXX (2004) on discrimination against non-citizens recommends that states must take steps to address xenophobic attitudes and behavior towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens. South Africa must therefore take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of non-citizen population groups. This action should be taken by politicians, officials, educators and the media, on the internet and other electronic communications networks and in society at large. The WACR Declaration also states that media should represent the diversity of a multicultural society and thus play a role in fighting racism, racial discrimination, xenophobia and related intolerance.⁵⁴⁶ It has been noted with regret that certain media, by promoting false images and negative stereotypes of vulnerable individuals or groups of individuals, particularly of migrants and refugees, have contributed to the spread of xenophobic and racist sentiments among the public and in some cases have encouraged violence by racist individuals and groups. It is important also to note the positive role that may be played by the media. The exercise of the right to freedom of expression, particularly by the media and new technologies, including the internet, and full respect for the freedom to seek, receive and impart information can



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⁵⁴⁵ http://www.mandelainstitute.org.za/programmes/entry/The_Grounding_Programme_at_the_University_of_Fort_Hare/. (Accessed 22 April 2010).

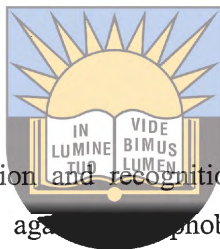
In some instances anti-foreigner sentiment has been attributed to negative reporting in the print media (Dolan et al, 1996). The dominant view in the South African Press portrays immigration from an anti-foreigner perspective and calls for stringent and immediate controls, even an outright banning of immigrants. This media coverage also tends to be unanalytical; reproducing problematic research and anti-immigrant terminology...the media certainly have a right, even a responsibility, to report on xenophobic attitudes and action in South Africa... But the print media also have a responsibility, to make sure that they are not contributing unduly to the problem of xenophobia by internalizing xenophobic language, uncritically reproducing anti-immigrant stories and research, or giving unrestricted freedoms to xenophobic reporters (Daanso et al 2000, 8-9). The press has to focus on the human rights of migrants, as well as the regional development implications of cross-border movements. Instead of drawing attention to the ostensible negative aspects of migrants, there is also a need for the media to focus on their contributions to the economy that would help dispel some myths (Dolan et al, 1996).

⁵⁴⁶ See WCAR Declaration, para 88.

make a positive contribution towards the fight against racism, racial discrimination, xenophobia and related intolerance. There is thus a need to respect the editorial independence and autonomy of the media in this regard.

South Africa may discourage the use of new technologies, such as the internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including the propagation of racism, racial hatred, xenophobia, racial discrimination and related intolerance. It should be noted that children and youth who have access to this material could be negatively influenced by it.

7.2.8 Administration of justice



Non-nationals should enjoy equal protection and recognition before the law. In this context, South Africa has to take action against xenophobic and racially motivated violence and ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence. The security of non-citizens must be ensured, in particular regard to arbitrary detention; in addition, it must be ensure that conditions in centres for refugees and asylum-seekers meet international standards. Although refugee and asylum centres are nonexistent in South Africa, the above norm must be employed if they happen to exist in the future. South Africa must also combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-nationals receive special training, including training in human rights.⁵⁴⁷

South Africa may also introduce in criminal law the provision that committing an offence with xenophobic motivation constitutes aggravating circumstances allowing for a more severe punishment. On that note, claims of xenophobic or racial discrimination brought

⁵⁴⁷ On that note, it would be beneficial to train the Department of Home Affairs staff on human rights matters. See also Article 5(18) of Recommendation XXX.

by non-nationals must be thoroughly investigated. Claims made against officials, notably those concerning discriminatory or xenophobic behavior must be subjected to effective and independent scrutiny. South Africa may also regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment.⁵⁴⁸

7.2.9 *Expulsion and deportation of non-citizens*

South Africa should also ensure that laws concerning deportation or other forms of removal of non-citizens from its jurisdiction do not discriminate in purpose or effect against non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies. Moreover, non-nationals should not be subjected to collective expulsion in particular in situations where there are sufficient guarantees that the personal circumstances of each of the persons concerned have not been taken into account. On that note, South Africa must ensure that African non-nationals are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhumane or degrading treatment or punishment.⁵⁴⁹ Finally, expulsions of non-citizens, especially permanent residents that would result in disproportionate interference with the right to family life must be avoided.

7.2.10 *Economic, social and cultural rights*

South Africa must ensure the removal of obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in areas of education,

⁵⁴⁸ See Article 5(24) of General Recommendation XXX.

⁵⁴⁹ See Article 6(26) of General Recommendation XXX.

housing, employment and health. Public educational institutions must be open to non-citizens and children of undocumented migrants residing in South Africa. It is imperative that the application of segregated schooling for and different standards of treatment of non-citizens be avoided. South Africa must also guarantee the equal enjoyment of the right to adequate housing for nationals and non-nationals, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory purposes or effects.⁵⁵⁰ Effective measures must be put in place to prevent and redress the serious problems commonly faced by non-citizen workers, by non-citizen domestic workers in particular, including debt bondage, passport retention, illegal confinement, rape and physical assault.



Recommendation XXX recognizes that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.⁵⁵¹ South Africa may therefore take measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture. To conclude the above, rights of non-citizens must be ensured, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, cafes, theatres and parks.

7.2.11 *The need for new thinking and new research*⁵⁵²

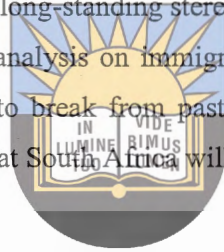
Accepting that migration and economic integration are linked, the promotion of NEPAD and similar regional projects will likely increase the numbers of non-nationals living in

⁵⁵⁰ See Article 7(32) of General Recommendation XXX.

⁵⁵¹ See Article 7(35) of General Recommendation XXX.

⁵⁵² See Landau et al *op cit*.

South Africa (and the number of South Africans living outside the country).⁵⁵³ This will require a harmonization of immigrant procedures, and ease the movement of people across borders. Yet, while political leaders trumpet the movements of capital, information, culture and highly skilled migrants, little is said about the other forms of movement that will necessarily take place - however unpredictable these flows may be. Coming to grips with these challenges will require new ways of thinking about public policy. This will be felt most immediately amongst those responsible for urban and immigration management, but will almost certainly call for greater collaboration among local, provincial, and national spheres of government.⁵⁵⁴ As these deliberations take place, there will be a need to move beyond long-standing stereotypes, but consider, and if necessary, commission new research and analysis on immigration related issues. There must also be a conscious shift, an effort to break from past governmental logistics of control and regulation intended to assure that South Africa will, indeed, belong to all who live in it.⁵⁵⁵



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7.3 Conclusion

The research done in this study has revealed a weak link between law, human action and human behaviours. It was also found that xenophobia in South Africa is largely a result of lack of education and public awareness on refugees, asylum seekers and economic migrants. Furthermore, South Africa seems to have developed into a conflictual and violent society, largely because of the struggle against apartheid. In conclusion, the self-making of democracy through the creation of the “conditions for engaged conversation,” negotiation, and ways of finding the middle ground are important for the above stated recommendations to find meaning. There are no guarantees that the mechanisms outlined above will prevent future attacks targeted at foreign nationals or other minority groups. However, in the absence of such measures, South Africa may witness further social fragmentation, disrespect for human rights and the law, resulting in further violence.

⁵⁵³ *Ibid.*
⁵⁵⁴ *Ibid.*
⁵⁵⁵ *Ibid.*

Moreover, the abandonment and discouragement of the use of words such as “alien”, or “foreigner” or *makwerekwere* is very important if xenophobia is to be a thing of the past. To conclude this discussion, it has been noted that xenophobia is a complex phenomenon, and overcoming it needs various measures that are socially sensitive, institutionally appropriate and human rights centered.



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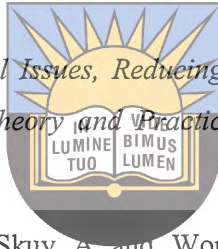
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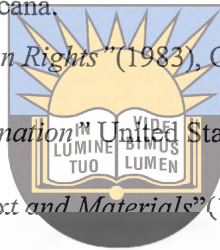
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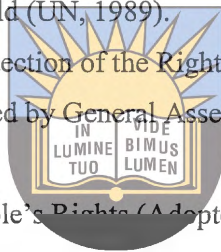
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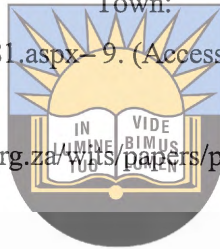
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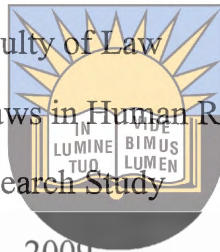
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ANNEXURE 1



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Faculty of Law
Master of Laws in Human Rights
Research Study

2009

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Open-ended Questionnaire:

A Socio-legal analysis of Xenophobia in South Africa

With the aim of hearing from all interested persons and/or organizations about their experiences, concerns and thoughts on the nature and extent of the xenophobia exhibited against non-citizens, Samukeliso Sibanda seeks and would welcome your co-operation by responding to this questionnaire as fully as possible. The focal point of the dissertation and, as such, of the proposed questionnaire is African non-citizens who are living in South Africa, irrespective of their age. It includes migrants, refugees, asylum seekers, permanent residents and others.

NB: *This questionnaire is meant for data collection to be used in academic research. All information collected for this study will be kept completely confidential.

Introduction

Preliminary observations indicate that xenophobia and racial discrimination will become more structurally anchored given the mobility of human beings in a “new age of migration”. The annual reports of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance show a world-wide trajectory of increased xenophobia and racial discrimination. As a subtext to this trend, studies and hearings in South Africa point to the development of xenophobia into a human rights hotspot in this country. Contrary to the provisions and principles of the “human rights” state, the discriminatory treatment of and attitudes towards non-nationals have become a common feature on the South African social landscape. This study concerns itself with this contradiction. It argues that xenophobia in South Africa is a complex phenomenon and questions the legal, social and political responses to this challenge. Further, it speculates that the limited efficacy of the standard reactions to this challenge is linked to an inadequate understanding of this phenomenon. Ultimately, the study aims to present these complexities as the basis for suggesting possible new ways of responding to this challenge.



Objectives of the study

The primary objective of the study is to describe the extent and expression of xenophobia, and analyze and assess the efficacy of legislative and other measures aimed to protect non-nationals in South Africa. It will investigate the role of state organizations, government and civil society and assess the impact of xenophobia on the enjoyment of human rights of non-nationals. Suggesting alternative ways of explaining and understanding xenophobia and the responses to it is a central objective of this study.

Research Questions

Main question: What is the extent of xenophobia in South Africa and how and why is it manifest

- in the way that it is?

Sub-questions:

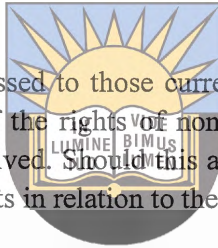
- What is the socio-legislative framework with regard to the rights of non-nationals and is it sufficient and adequate?
- How effective is South Africa’s response to xenophobia and related discrimination in the country?
- Are there alternative ways of understanding and dealing with xenophobia in South Africa?

Questionnaire

Note: Each section opens with a short clarification of its aim, with each precise question that follows addressing a specific issue of importance.

Should one question not apply to your area of expertise please simply pass on to the next question.

Whilst the questionnaire is formally addressed to those currently involved in the protection of human rights; and hence the protection of the rights of non-nationals; the issues it raises are equally applicable to those previously involved. Should this apply to you, please do not hesitate to share with us your thoughts and comments in relation to the questions raised here.



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General Information

This section aims to source knowledge about the understanding of the socio-legal characteristics of xenophobia in South Africa.

1. Name of the respondent (Please specify organisation's name if you are representing it for the purpose of this questionnaire).
2. Please tell us the nature and extent of your involvement in issues concerning the rights of African non-citizens in South Africa.
3. In your understanding, what is the nature and extent of xenophobia in South Africa. Please explain?

4. Do you think we have a firm grasp on understanding xenophobia as a social phenomenon? What is missing from our understanding? Please elaborate.

5. Why is xenophobia expressed in such violent forms in South Africa?

6. Do you think xenophobia has any relation to pre-apartheid South Africa? Please explain.

7. Are xenophobia and racial discrimination relatively similar? Please explain.

8. Was your organization involved in any way in the May 2008 and other attacks against African non-nationals?



9. If your answer to Question 8 is yes, how effective has your organization been in the response to the xenophobic attacks of May 2008? What challenges did you face? Kindly elaborate.

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10. Do you think that the response to xenophobia and related discrimination from state departments and agencies, protection agencies and civil society was appropriate and sufficient? Please elaborate.

11. Why is xenophobia so difficult to deal with? What makes it such a complex phenomenon? Why does it rear its head so frequently?

12. What suggestions do you have for responding to and eradicating xenophobia? Are there alternative ways of dealing with xenophobia in South Africa?

This part aims to contribute to an understanding of the needs and challenges faced by African migrants, refugees, permanent residents and asylum seekers in exercising their rights.

13. Do you think African non-nationals are free to exercise socio-cultural rights in South Africa? Please explain.

14. From your experience, please identify specific barriers faced by African non-nationals in their exercise of fundamental rights and freedoms.

15. What steps have you or your organization, and others that you are working with, taken to address those barriers?

16. What constraints have your organization faced in addressing the barriers mentioned above?



The socio-legislative framework

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This section focuses on the collation of information on legal instruments

17. In your opinion, do you think the law adequately covers the rights of non-nationals in South Africa? Please explain.

18. What legal gaps have you or your organization experienced over the past 5 years?

19. Please explain the psycho-social factors and gaps with regard to xenophobia in SA. What can be done?

Additional Information

20. Please identify and, where possible, provide copies of any study, document and/or Article that supports your answers to this questionnaire and/or provides additional detail and analysis of xenophobia, racial discrimination and related intolerances in South Africa.

Please, feel free to add any comments, observations and/or reflections that you consider necessary for the purpose of this Research.

Samukeliso Sibanda extends her grateful thanks to all who took the time to respond to this questionnaire.



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ANNEXURE 2

INTERVIEWS ON “XENOPHOBIA IN SOUTH AFRICA: A SOCIO-LEGAL ANALYSIS”

As part of my LLM Human Rights dissertation I have conducted interviews with personnel mandated to protect the rights of non-nationals in South Africa. The following are the results of those interviews:

1. Interview with Victoria Maloka

(Head of Education and Training Programme)

South African Human Rights Commission, Johannesburg.

21 January 2010

1500hrs - 1506hrs



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What exactly do you do here?

I am the Head of Programme for the Education and Training Programme. Part of my responsibilities is managing the facilitation by staff members in the education of human rights interventions in communities, managing the interventions on non discrimination, which includes work with non-nationals and things around anti-xenophobia.

What is the nature and extent of your involvement in issues concerning non-nationals?

For us it's mostly awareness raising. We work with nationals and non-nationals. So for non-nationals it's mostly on helping them understand the legal framework and instilling a sense of confidence and appreciation of themselves as people and as non-nationals in a foreign country. One of the things that we often try to get across is the contribution which non-nationals make in the South African economy. The whole intervention is geared at intervening, not only at a personal level or building their capacity at a social level, but also helping them to understand the legal framework in South Africa and beyond. We also work with nationals, helping them to appreciate the role played by non-nationals and helping them to realize that what is happening in

Zimbabwe is as important as what is happening in Port Elizabeth. We also help them understand that the violations that are taking place in the DRC are just as important as what is happening in Mafikeng. The whole idea of African integration starts at that level. We raise awareness at a knowledge level and also shift attitudes because the kinds of xenophobic tendencies we have are based on perceptions, are based on wrong ideas on what non-nationals are here for. We get to ask questions like ‘by the way, during apartheid, why were we in Nigeria? What were we doing in Tanzania?’ So the same things, not only hospitality in terms of them making us feel good about ourselves, the Tanzanian government had to put in policies, the Nigerian government had to develop structures to ensure that South Africans who were there got support that ultimately led to the downfall of apartheid are the kinds of things we have to put in place.

What is the nature and extent of xenophobia in South Africa?

You know, there are two types of xenophobia in my opinion, there is one that is explicit and that one is demonstrated by the attacks that we see on a regular basis against the Somalia and a lot of other people. There is also a subtle one which finds interpretation in how the police treat non-nationals. They don’t look at you and say this signer get out of here and they relate in a different way to how they would relate to me as a South African. It is also in how you get served in a restaurant, Home Affairs. The other way is in how we treat non-nationals in the work place, the same way in which we’re dealing with racism in the work place.

One of the reasons I would attribute this to is that as South Africa we are still not as exposed as we should be, we are still very much isolated, get to speak to, say, your African counterpart in the Congo, you’ll see that the person is so well travelled, they have been to Europe once or twice because an uncle worked there, the mother worked in this or that part of Europe and so on, but for us, because of apartheid, we are still kind of painfully isolated because of the system of government we had, but even after apartheid, we are still so much into ourselves, we don’t know what’s happening in other parts of the continent, that’s why there are so many perceptions about non South Africans or non-nationals.

Do you think we have a firm understanding of what xenophobia is as a social phenomenon? What is missing from that understanding?

Some say it's hatred of non-nationals, people can say that I don't hate people from Zimbabwe or people from Nigeria, for me it goes beyond that. It's also about your own perceptions. At a micro level, I don't think we have a firm understanding of what xenophobia entails, it's only at the macro level, where we say yah well, its hatred of people from other continents, but at the macro level there isn't that kind of interpretation.

Why is xenophobia expressed in such violent ways in South Africa?

There are different views surrounding that. One of the issues that have been heightened to me, or that stands up for me as to why xenophobia is so rife in South Africa is the whole notion that as a country, as a post Apartheid, somehow post violence country, we have not as yet come full circle in understanding, in living, in enjoying our freedom before other people come to join us.

If you take the perspective of someone who came from Lusikisiki to go to Cape Town because they were told that "no, no, come to Cape Town," when they get there they're expecting a house, free education, they are expecting all kinds of things, they don't get those things they end up building a shack in Gugs, there is no employment and all kinds of things, and this is where the whole perception comes in. Like I said, it is a bit of a problem, I don't fully subscribe to it though. You see a Somali at the corner, and you ask yourself, how did that Somali get that Shop? You see, so in their world it makes a lot of sense that "oh, I actually gave up my home in Lusikisiki and there is somebody who has put a shop at a corner and in fact he is selling these things at a cheap price, when u *Baba* (father) Dlamini *lana* (here) sells a packet of salt at R20. How is he managing? Now, like I said, so it depends on where you're sitting in the social hierarchy.

There is this painful and unfortunate notion in South Africa that the government has to do things for us. The government has to build me a house, the government has to give me a job; such that when I don't have, I look at those who have with envy and ultimately hatred to the point where I actually take up arms against them. The xenophobic tendencies come when I come with a mindset that I can move from my village, I can go into town, look for a job and if I don't find it, somewhere someone has to give me a job. What you don't understand is that, before you get a job, there are lots of other things that should have happened. Anyway, just to make a point, I'm here, and I'm looking for a job and I'm looking for a house and I don't find it, and there is a

Nigerian, very soon he is setting up a makeshift tent, with something, with boxes, and very soon he is cutting hair at the street corner. Because he isn't waiting for anyone to give him a job, he knows he needs to go somewhere and fend for himself, the difference is in attitudes. Because this guy doesn't have this sense of entitlement, he knows he needs to go out there and fend for himself, and that's why he gets surprised when he is attacked, he doesn't understand why anybody would attack me after working so hard to get it. Maybe it's in the attitude in which we are socialized or politicized.

It would be very interesting for one to know how non-nationals were treated even before apartheid and post Apartheid because there seems to be a major difference between the two.

Do you think there is any relationship between xenophobia and racial discrimination?

Yes there is, the attacks on the Somalis for example, the attacks on the Bangladeshis, do you hear the same thing about the Germans, the French or the English? Xenophobia definitely does have racial connotations, so it's probably the darker skinned ones that get attacked and it almost goes to the level of darkness, the darker you are, the more prone you are, of course the Bangladeshis are attacked also, but It's not at the same level at which the African migrants are attacked. Actually half of the Western Cape is owned by Europeans. I don't hear South Africans complaining that they want to *toyitoyi* (picket) in front of shops owned by Europeans. There are definitely very serious racial connotations in all these xenophobic attacks.

Did your organization play any role during the May 2008 xenophobic attacks against African non-nationals?

We were so inundated with complaints that the Commission decided to come together with some civil society organizations and Chapter 9 institutions to try to form some kind of coordinating structure, we were getting help from all over the place, but the biggest complaint was that there wasn't any coordinating structure, just coordinating relief and assistance in that regard. Joyce and I were fortunate to have been the coordinators or the managers of that responsibility on behalf of the Commission and its partners, one dealt with legal issues that were just coming into the Commission and other partners of the Commission, we also had a structure that dealt with awareness raising and community outreach and a number of interventions in the hot spots, in the areas where the attacks had taken place, kind of diffusing the attacks and so on.

We worked throughout the conflict, we were meeting on a daily basis, we also visited a lot of sites before we had camps, and we went two police stations, conducting lots of sites visits, and coordinating information.

We were also actively involved in pushing government to come to a decision on what to do. While we appreciated the fact that South Africa does not want to establish refugee camps, we were so very actively involved in formulating and in kind of shifting the attitude of government in agreeing to at least form temporary shelter.

What kind of challenges did you face in trying to help the 2008 xenophobia victims/survivors?

There are personal challenges and those that I would put within the broader professional framework. At the professional level, coordination was a very big challenge, coordinating the responses, just talking to the UN agencies; for example, it was such a massive challenge, because you wouldn't know exactly whose primary responsibility it was. We had the UN High Commission for Refugees, the High Commissioner for Human Rights whose responsibility are broadly human rights. We also had OCHR, IOM, SACC and many more. You would get calls like "we have 200 blankets but we don't know who to give them to, can someone give us direction". So coordination was the biggest challenge. One of the challenges that we also encountered at that time was the engagement with government. There were many government agencies that were involved, all of them were relevant, but unfortunately there was no single coordinating government body. There was Foreign Affairs, Social Development, there were the police there, but there was nobody taking full responsibility for anything at all. Through many engagements there was that parliamentary body that was established to carry an investigation. The other challenge was that, just sitting in a meeting was such a shock, because South Africa has never experienced war. Many people who came to our meetings, had never experienced violence at that level, so we tended to talk more about anecdotal things and it was so difficult to pin people down to the strategic issues; how then do we deal with this thing.

We also tried to deal with the police in terms of the suffering that the non-nationals were facing; trying to sensitize them. We still had to instill human rights and constitutional values in them to be able to respond to the situation. The other professional challenge that we had was that, for many institutions outside, they did not understand what the SAHRC was doing in engaging in

humanitarian efforts related to xenophobia. “Do you have a mandate? And does your mandate allow you to do this sort of thing?” There were different interpretations on how we should view our mandate. Even within the organization we had issues about what we can do and what we cannot do. In my own personal understanding, which I would like to stand by, is that human rights cannot be interpreted, understood and enjoyed in a vacuum. We must understand the trans-disciplinary nature of human rights because; I’m sitting here and I get a call from a non-national who has just been attacked and whose house has been destroyed, I need to act. We should understand that the human rights education that we teach to people is not only based on legalistic matters, but we also take into account the other fields that impact on human rights. As I receive a complaint from a learner in a particular school I should not only look at the formal legalistic approaches and ignoring other dispute resolution mechanisms that will allow me to look beyond law; to go into peace building, to go into social work and to all other areas. I should not shy away from bringing in a scientist, or an anthropologist who will look at human rights from a particular perspective. I should not shy away from inviting an economist who will look at human rights in relation to the economy, so it’s that kind of trans-disciplinary approach that we are yet to appreciate and that’s why government was saying “why is the Human Rights Commission suddenly taking the work of the other agencies.” That person who was burnt, his right to life was affected; that person whose house was burnt; that is a right to housing that was diminished. The dignity of the man who had to run in their knickers was violated, the dignity of the woman who had to run naked and run somewhere; everything that happened had to do with human rights; but that was not appreciated, so that is also one of the challenges.

At a personal level as people who were directly involved, we went through a lot of trauma. I and my colleagues would go to the sites and when we come back we wouldn’t know how to debrief each other. We needed to take care of our hearts before we could extend love and help to other people, it became such a traumatic process for us, and you would just imagine how those who were involved on a daily basis were feeling. It was very traumatic for people who were going out on a daily basis and so on.

In your own assessment, do you think the response from government, civil society organizations and other role players was sufficient?

No. I don't think it was sufficient. First of all, the government took quite a while to respond. Secondly, I don't know if the government now has a strategy to deal with xenophobia. The government could have responded much quicker, but they did not. Government departments, police, Home Affairs, Social Development, it took quite a few weeks to get them walking and they started running when the whole Gauteng Province was on fire. The response wasn't as satisfactory as it should have been.

What, in your own understanding, makes xenophobia such a complex phenomenon? Why is it so difficult to understand?

You see, xenophobia is also in the head, it's more like a social construct (if I may put it that way), but it also impacts on a lot of other aspects of life. When you analyze any kind of xenophobic tendencies or situation you see that there are some political connotations attached to it, there are economic issues, there are obviously social issues around it. It turns to touch on various areas of life, so while you address the economic issues somebody would say 'what about this and that?' It also impacts on the legal framework as well, you can't look at xenophobia at a specific angle, it cuts across various areas which need to be looked at, economic, socially and cultural as well. When we look at perhaps, reconstructing our understanding of xenophobia, we can have something that gives meaning to all these various aspects. The responses must then come from all these various angles.

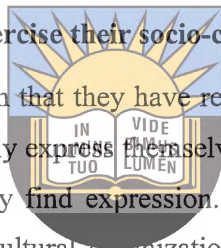
Do you think there are any suggestions to eradicating xenophobia?

At a very primary level, education is very important because it heightens your outlook on life, it makes you appreciate what would under normal circumstances become threatening to you. It helps you create an environment that will allow you to have the same kind of opportunities that are created by non-nationals, so that you don't feel threatened by whatever they have. We need to embark on serious education, not only of non-nationals, but of us South Africans. There is a bit that government has to do as well, we need to look at our immigration laws very broadly. We need to come to an understanding of what it is that we want to achieve as a country. How do we want to see the country looking like in five or ten years time? Certain things that we tend to employ are the kinds of things that we see in developed countries. Others don't quite respond to our African context, like you go Tanzania and you hear people say that "Oh, you South Africans

are so rude, even long before we saw this violence”. It’s because of the laws we have. Now we are talking about continental integration. How do we integrate when at the national level there are still so many boundaries? I need a Visa to go to Nigeria; I need a Visa to go to Ghana and other places. So why should it be that way? So government has to look at those kinds of things so that we can make those desires and dreams a reality. That would also limit xenophobia because free movement overtime there would be such a good mix, overtime you wouldn’t know how a Tswana person should look. Perhaps with free movement of people and the kind of integration that would come up with that. We wouldn’t be cocooned in the small clusters of Xhosa, Tswana, Kikuyu, Ibo, Yoruba and those kinds of things.

Do you think non-nationals are free to exercise their socio-cultural rights in South Africa?

Not entirely, I think, based on the reception that they have received, there is also reluctance on their part to kind of freely and independently express themselves. There are some pockets where opportunities are created for them to really find expression. I don’t know if the environment completely allows them. We have some cultural organizations on non-nationals but I am not fully convinced that there is space for them to exercise and fully enjoy their cultural, social and other rights.



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Can you identify specific barriers that make non-nationals not to exercise their fundamental rights and freedoms?

One barrier would be lack of tolerance, or preferably; lack of respect. For example, if I say ‘Nigerian food smells terrible’ then that means I’m no longer interested in where you’re coming from. It’s those kinds of attitudes that create barriers at a communication level. Other barriers relate to employment. Access to basic services and so on. We hear of non-nationals who are turned away from hospitals because they are simply not South African. Two years ago we dealt with the case of a school that refused admission to two children because they were not South African.

What has the organization done to address these barriers?

Apart from the awareness raising interventions we have also established a very specific portfolio that addresses issues of non-nationals.

What kinds of constraints have you faced in trying to address those barriers?

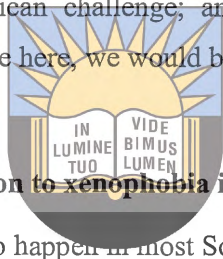
We have lacked an adequate budget to address because of many duties but with limited capacity.

Do you think the law adequately covers the rights of non-nationals?

On paper it looks really good. Our Constitution is one of the best in the world, it is just the interpretation and the realization of what is on those papers that are problematic, but also I think that, in relation to immigration; just the whole immigration legal dispensation needs to be re-visited; the whole idea of the management of movement but without compromising any international standard. We need to design laws that are applicable to the African context, that respond to the African problem, the African challenge; and that way we will be able to appreciate the Zimbabwean who has to come here, we would be able to appreciate the Congolese who is in the country.

Explain the psycho-social factors in relation to xenophobia in South Africa

There is still an attitudinal shift which has to happen in most South Africans. There is some work that needs to be done on non-nationals. For South Africans, we still have to work on living with people who we still regard as 'the other'. We will be able to look at them as some of us or one of us.



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2. Interview with Tamlin Monson: Senior Researcher on Xenophobic Attacks of 2008 and Kgamadi Kometsi: National Coordinator for Racism and Non-Discrimination.

South African Human Rights Commission

25 January 2010

10:00am – 10:30am

What is the nature and extent of xenophobia in South Africa?

Tamlin: It is difficult to say because most research has focused on particular poorer communities where xenophobia has been experienced. The violent expression seems to take place in poorer communities.

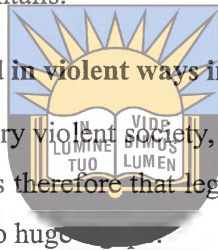
Kgamadi: In affluent spaces there are many non-nationals working there and they seem to be comfortable, however in poorer areas the presence of non-nationals seems to attract negative responses.

Do you think people have a firm understanding of xenophobia as a social phenomenon?

Tamlin: No. A lot of people question whether the motivations on attacks on foreigners are really xenophobic attacks. Through the research I've done, others feel it's a crime, that it's instrumental in a certain way. People often don't like the idea that the violence is based on hatred, they seem to prefer the idea that it's just a crime and based on the desire to obtain something. There is therefore no firm understanding of what it entails.

Why do you think xenophobia is expressed in violent ways in SA?

Kgamadi: There is a theory that we're a very violent society, mainly because of our history, the way we fought to fight oppression. There is therefore that legacy. The nature of the inequalities has also played a role. There seems to be too huge



Tamlin: What's come out of the work that I've been doing is that there are problems on the kind of policing in poor areas, sometimes because of infrastructural problems. Whenever a violent incident occurs it is difficult to contain it in these informal settlements. Even if it is just one incident, it becomes huge.

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Are xenophobia and racial discrimination relatively similar?

Tamlin: I think the sentiments are relatively similar, but I think racial discrimination seems to be the legitimate one in the eyes of most people.

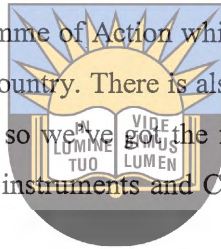
Do you think non-nationals are free to exercise their socio-cultural rights in South Africa?

Tamlin: I would say it depends on that particular environment in which they live. Definitely I've had a lot of reports of people not being able to answer their phones in taxis. There are certain spaces in which one can say non-nationals are free to express their socio-cultural rights, for example the Masiphumelele project. The taxis are a hot spot, however, different people come and it's not clear where they come from. The taxis seem very high risk to people.

Legislative Framework

Do you think the law adequately caters for the rights of non-nationals?

Kgamadi: There is that tension between universal human rights and constitutional rights. In terms of legislative framework, it seems to be better than other countries, if we can legitimize the fact that the state can exclude some other people. On paper South Africa appears to be more progressive than it is in practice, for example, a piece of legislation like the Equality Act does prohibit discrimination on the basis of nationality. One can look at the bill of rights in the Constitution. One would also consider international human rights instruments such as the Universal Declaration of Human Rights. There are a number of other international instruments such as the Durban Declaration and Programme of Action which focus specifically on the needs of non-nationals when they are in a given country. There is also the National Action Plan which also addresses the problem of xenophobia, so we've got the framework that is comprehensive, that is also complemented by international instruments and Conventions which South Africa is party to.



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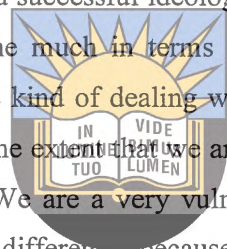
Can you suggest any recommendations on how xenophobia can be curbed?

Kgamadi – To a certain extent, xenophobia seems to be fueled by perceptions of illegitimacy, that in our society there are people who are who are not supposed to be here; and that seem to enable that expression of violence. Firstly, Home Affairs and whoever is dealing with the borders and the immigration system: if they could get it right that people who are here are here legitimately. That won't remove the violence but it would lessen those perceptions of illegitimacy. The second thing is, if whoever is entrusted with providing services, especially to poor communities and the society in general, if they could start doing their work and being honest with where the short comings are. There are certain instances where attacks on non-nationals become a mode of expression of the frustration, and therefore if you're frustrated you tend to attack the one target that will offer the least resistance by it's being a non-national. So if we could try and attend to the services that people need, the need to vent towards perceived outsiders. That would go a long way in lessening xenophobia. Education is also important. People need to be educated that everyone who is in South Africa is not necessarily illegitimate.

Tamlin: For me it's about policing and about proper governance of these areas that are prone to attacks because it seems to me that the idea that foreign nationals are criminals seems like a good justifying narrative to using violence against them, where you don't trust that the police are able to deal with the problem. Popular justice often occurs where people feel they don't have recourse to justice and that justice is mostly violent. So I think that strengthening trust between people and the police and also educating people is very important.

Do you have any reflections or insights on what could be beneficial to this research?

Kgamadi: South Africa is still dealing with intergroup dynamics. We haven't gotten that right yet as South Africans. Apartheid was such a successful ideology that more than a decade after it has been dismantled; we still haven't done much in terms of shifting the dynamics. At the moment there is a lot of artificial cosmetic kind of dealing with racism which gets exposed as soon as there is a conflictual moment. To the extent that we are ourselves as South Africans we are still dealing with our own problems. We are a very vulnerable society, not being able to handle; even if it's not real; but perceived difference, because some of the people that become victims of xenophobia are South Africans themselves. To this extent it is a fact of being a non-national but perceptions of being a non-national; maybe because you're too dark or maybe you're dressed in a particular way, or maybe because you're not known in that vicinity. We are still learning to handle difference; we are still learning to live together as South Africans.



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Tamlin: The Department of Social Development has a policy paper in Integrated Development Plans (IDPs) where the issue of social cohesion needs to be included into IDPs. And I think to get non-national groups in the community leadership structures because in Masiphumelele the Somali shopkeepers were part of some kind of business.

1. Interview with Jody Kollapen (Ex Chairperson of the South African Human Rights Commission)

27 January 2010

University of Pretoria

2:30 pm – 3:15 pm

What is the nature of your involvement in issues concerning the rights of non-citizens in South Africa?

When I started working at the Human Rights Commission, when I was an ordinary Commissioner, one of my areas of responsibility was the area of non-nationals. At that stage I became involved with civil society in the National Consortium on Refugee Affairs; it was a partnership of government, civil society and nongovernmental organizations. Joyce Tlou was in fact the Secretary of the Consortium and I was in fact the first Chair for the first two years. That was the first attempt to get people to talk in a single forum. Government, Home Affairs and the Police attended these meetings and the idea was to identify the problems being experienced by refugees and migrants and how we were to face it as a Chapter 9 Institution, as government departments and as civil society. My work inside the Commission also began to focus on these particular issues. One of the first things we did was to launch the Roll Back Xenophobia Campaign in the late 90s, if you can recall; three people were killed in a train from Pretoria.

After that we issued the ‘Braamfontein Statement’. While I held this portfolio we also produced two important reports on arrest and detention of migrants, one was done together with Wits University and the other was done independently. One is called “At the Cross Roads: Lindela.” We were also involved in litigation. We brought against government successfully to prevent them from holding detainees beyond the period required by law. By law they could only hold them for thirty days at Lindela, after that they had to get a court order. And we found that there was a practice at Lindela that they would not get court orders.

In your own understanding, what do you think is the nature and extent of xenophobia in South Africa?

It’s very hard to quantify, in a sense, because I don’t think there has been any scientific studies with regard to the nature and extent of xenophobia. We largely use anecdotic evidence so the

xenophobic violence of two years ago is the basis to suggest that xenophobia is a serious problem, and of course, that could be correct because that was serious. But one doesn't know, for example, to what extent is the problem in industry, in corporations, institutions of higher learning. We seem to focus on its crude manifestation when people are assaulted. But the anecdotic evidence would suggest that it's a problem beyond. It's a problem in universities; it's a problem in corporations, in governments. The kind of distrust, suspicion, hostility towards foreigners, so I think there may be a need to understand it better. There may be a need to assess its prevalence, in more than simply an anecdotic way.

Do you think people have a firm understanding of what xenophobia is as social phenomena? What is lacking from that understanding?

No, but I think people have different understandings. For example, someone would say "I don't think we should have so many foreigners in our country and I don't think I'm xenophobic either", because they argue that that's not being xenophobic, that is simply being patriotic and believing that South Africa belongs, in the first place, to those who are South African. So even in a self-understanding of xenophobia there are different concepts of it. So one person would say "I don't like foreigners, because they are dishonest, bring crime and disease" and they would say "I don't have a basis for saying that but I believe". So there are different understandings as well of what, and therefore I think it's also to label South Africans as people often do. Because people often hold beliefs that they think are not xenophobic. They think that if you say "we need to have a proper immigration policy, we need to enforce migration laws", then that doesn't mean I'm xenophobic, but someone else can say that's being xenophobic.

Why do you think xenophobia is expressed in such violent ways in South Africa, like we saw in 2008?

Well, I don't know if anybody knows the answer to that, but maybe historically, South Africans have always used violence to resolve their problems; political, tribal, historical, personal and the whole husband and wife, rape. So violence has become more trademark, it's almost like in the DNA, so in a sense it would be almost an extension of that violence. It's not as if the violence is being reserved for non-nationals. South Africans are violent towards each other, someone steals a cell phone, and they use violence to steal it; even though violence is not necessary. So violence

has become part of the way in which we operate. But there is an additional factor I think. Sometimes a community as vulnerable is seen as easy prey, so you would attack them because they would not resist. They are vulnerable, they are weak, and have no political powers or influence in the society.

Do you think the xenophobia we are experiencing in South Africa has any relation to pre-apartheid South Africa?

Yes, in many ways. At the one level, many South Africans were cut off from the rest of the continent. They did not know what it was to be African, but they knew what it was to be African. The Africans who were in the country were like, by and large, migrant workers from Mozambique, Zambia and to some extent Zimbabwe, who worked in mines, who lived in hostels, who were not part of communities. So, yes, apartheid contributed towards, in a sense, to our isolation from the rest of Africa.



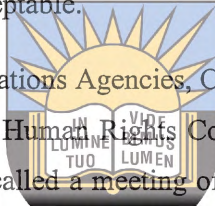
Secondly, I suppose it's relevant because in post-apartheid South Africa there is the argument that we should be grateful to other Africans who contributed towards our liberation. The counter argument would be well "they have contributed towards our liberation, but they are now reaping the benefits of our liberation, should they not also allow us to experience those benefits?"

Do you think there is a relationship between xenophobia and racial discrimination?

Yes, definitely. It goes into the kinds of stereotypes we have. There is hardly any significance of the xenophobia directed towards those who are not African. There are large numbers of Pakistanians, Bangladeshis, Chinese, Bulgarians, but you don't see xenophobia directed towards them. You also don't see state action directed against them. I mean, the police would do a raid in Hillbrow, but they say in communities where large Chinese live there, or Indians, or Bulgarians, they don't raid those areas. So I think it's steeped in this whole thing that "Europeans bring investment, bring money, they bring good things. Africans bring drugs, they bring violence, they bring crime, they bring diseases, and they come to take." Those are the stereotypes. In many ways we are conditioned by that kind of racism.

How were you involved in helping the non-nationals who were attacked during the May 2008 attacks?

In various ways. One, as the Human Rights Commission we immediately sent our people out to centers like in Alexandra etc. to ensure that in a humanitarian point of view things were done as best as they could. There were attempts, for example; to separate families and we strongly urged against that. We said you shouldn't separate families. People have been through trauma as it is and now; and imagine the added trauma of the wife being at one place, the child somewhere and the husband living elsewhere and them not knowing if each other is safe. But also when the government was identifying sites we went around with them, we raised objections if sites were inappropriate for human habitation, for example, very close to a hostel. It was also believed that some of the people in the hostel were part of the violence, obviously, you can't go and establish a shelter there, and we said that; that is unacceptable.



We also worked very closely with United Nations Agencies, OTCR, UNHCR, HCHR, in terms of coordinating responses. We also, as the Human Rights Commission, coordinated responses. One of the things I did, as Chair; is that I called a meeting of all the Chapter 9 Institutions etc, and the idea was that, certainly in Gauteng, we were coordinating the capacity versus the need, so some areas needed people to do things, sometimes it was legal advice and legal services. But sometimes at 11 o'clock at night people needed sleeping material. It was not part of one's work as the Human Rights Commission but as a human being. So a lot of what we did was beyond your mandate, it was simply human beings responding to other human beings. We would visit centers, monitor conditions and in the Western Cape we did the same thing, quite extensively, work was done in terms of monitoring, looking at conditions, looking at whether it was appropriate to dismantle settlements in communities. There was a dispute around that. Many people felt they didn't want to leave the shelters, but government also felt at some point people had to integrate. So that was the role of the Commission, to ensure that in this humanitarian crisis there was respect for human rights norms and standards.

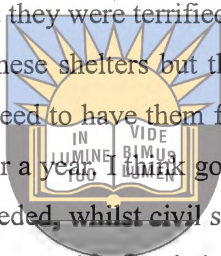
How effective was your response?

It's hard to answer, but I think on the one hand government was appreciate of the role we were playing and listened to the advice that we gave them. Secondly, I think in civil society and NGOs there was an access point to government. So the Commission was used as an access point and as an access point. So I would like to think that we were relatively successful, if you could call that

success. In an operation like this, it's hard to have a successful outcome. It was to ensure that the kind of interventions were appropriate.

Do you think the response from civil society, government and other agencies was sufficient and appropriate at that time?

No, but I think in fairness as well, we were never prepared for something on this scale. You know having thousands of people being displaced, there wasn't an emergency plan to deal with it. So government and civil society were caught 'napping' in a sense. They were caught off guard. But once it was clear on the kinds of responses required I think there were differences. Government wanted to establish shelters but they were terrified of having permanent shelters. So their point of view was that we can have these shelters but the sooner we dismantle them, the better. Civil society took the view that we need to have them for as long as we need them, if we need them for a year, we must have them for a year. I think government was taking a minimalist approach to provide what was minimally needed, whilst civil society was saying "hold on, we're dealing with traumatized people, we need to provide for their physical and non physical needs. Overall, I think there isn't a proper emergency response plan to respond to humanitarian situations.



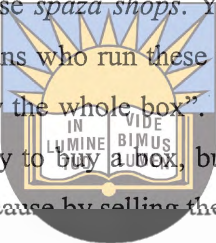
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Why do you think xenophobia is such a complex phenomenon? Why is it rearing its head so frequently?

On one hand it's simple to say that as South Africans we don't seem to like foreigners. On the other hand, it may be more complex than that, in a sense that people may genuinely see foreigners as a threat, a threat to their employment, a threat to their housing, an economic threat. Many people who come from outside of South Africa come with good skills, they are well qualified, they have a good command of the language, they have entrepreneurial skills, and they have learnt to survive. But South Africans are often stuck with the babies of apartheid, so you would find, very often, that foreigners would make better employees, because they are more motivated and they are more skilled so they represent an economic threat and I think that must be factored.

I often speak of this example. The café I go to there is a Zimbabwean woman who works there as a shop keeper. I think she was a teacher in Zimbabwe, but she is very intelligent. She can talk to

me about anything that is happening in the world when I go and buy my milk and bread. She knows what's happening because she reads papers, she follows the TV, and she has a good rapport with customers. They like her. For the owner of that business, if he has the choice of employing her at R3000 a month but the South African will just do his job. He will employ the Zimbabwean. So, in that sense, she is seen as competition. It's the same in the domestic workers sector. Many domestic workers are sought after because; apart from their skills at home, they have a good knowledge of education, they could help the children with their homework, whatever, so to a prospective employer. So I think that is also a factor, the perceived competition. And then, the entrepreneurial spirit that many of them have. I'm told that in many townships Ethiopians and Somalis have these *spaza shops*. You can buy one tea bag, you can buy one cup of sugar. And the South Africans who run these things have a one track approach: "a tea bag comes in a box, so you must buy the whole box". These guys are smart, they know people are poor, they might not have money to buy a box, but they only need two tea bags or one, and they actually make more profit, because by selling them individually you actually make more money. So within a short space of time, they actually make more money because they are providing the service which most people need.

The logo of the University of Fort Hare, featuring a sun rising over an open book with the motto 'IN LUMINE VERITAS' and 'BIMUS'.
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They work in cartels. They can go and buy goods in bulk. They can buy 100 000 boxes of tea bags, they buy it cheaper and they can sell it cheaper. So within a short space of time within a township, local people know if you go to the Ethiopians or the Somalis, the prices are better. South Africans then lose their business, sooner or later they have to close down. That brings resentment because South Africans feel "we've been here for years and these people have come now and they're taking our business, now I've lost my business, I can't provide for my wife and for my children". So it's complex in that way. People go to hospitals and they say "but there are so many foreigners here, we are waiting so long for medical treatment because all these foreigners who are illegal in our country are now taking away our hospital beds, schools". And also, in that sense, it is complex.

Do you think there are any alternative ways to responding to xenophobia?

I think there are. One of the big issues is ignorance. People are not aware of the positive contribution that foreigners make. All the millions of foreigners, if there are millions of foreigners in South Africa, are all contributing to the economy, they are paying rent to

somebody, they are buying clothes, using transport, and they are buying food and cell phones. All of that is considerable revenue which is coming into the South African economy. In that way, in our education institutions they are contributing levels of knowledge to education. So I think that nothing is being done to educate the broader public, that, hold on, we're living in a global world, you can't isolate yourself, secondly, people who come don't always come on negativity. They bring positive things into the country.

And also I think very often haven't had contact and experience with foreigners. You hear someone say "I hate foreigners", and you say "but do you know that the lady at the café is a foreigner?" "Oh really, she is a nice lady", "but do you know she is actually a foreigner? "I didn't know, I still don't like foreigners, but this one I like her."

You asked somebody else, like where I live, you ask, "Who does your clothes? And you're told "his name is Rashid" and you ask "where is he from?" and then you're told "I don't know but I think he is from Malawi." And you ask "so he is a foreigner"? And you hear "yes he is, his prices are cheap, he does a good job, and he is a good foreigner!"



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You see, you must begin to challenge ~~Together in Excellence~~ must come out of their own experiences. Sometimes people are not resentful, but when something sparks, it attracts this mob psychology.

Do you think African non-nationals are free to exercise their socio-cultural rights in South Africa?

Yes I do, I think there has been no attempt to stifle that. You have Somalis having their associations. I think we also have 60 NGOs operating in this country. So I think at that level no one has interfered with them exercising their cultural rights.

Can you identify other barriers that have inhibited African non-nationals from exercising other fundamental rights and freedoms?

Sometimes they have a hard time accessing educational rights because people have put artificial barriers. Sometimes a school will not register a child unless that child has a refugee certificate.

That means the child's right to education is affected. To some extent, South Africa has had to provide for its own people first. At the moment, there are many who qualify for state housing but due the backlog, they are not able to get that housing. Foreigners normally hire houses from South Africans. For example, a South African guy who lives in a shack gets a state house, then he rents the house to a Zimbabwean and gets the money. It happened in one community, people had hired houses to foreigners, and the other community complained that the State had given houses to foreigners. There was fighting and we went to investigate, only to find that locals had hired those houses out to foreigners. So yes, I think there are barriers, some of them attitudinal, some of them economic and some social.

Have you played a pivotal role in addressing those barriers?

Yes. We've dealt with educational issues, for example. In the Roll Back Xenophobia Campaign we ran quite effective public campaigns to educate and inform South Africans. What we did is that we ran two interesting projects, one was a radio project and one was a photography one. We gave some people tape recorders to go and interview, for example, people from Somalia. We told them to ask how those people made it to South Africa and how they had to trek coming to South Africa. And for those who recorded, we agreed with SABC, that they would play those as one/two minute clips. It really had a great impact in changing attitudes because a South African would then see a Somali and say "But hey, this guy was living peacefully in his country, he had to run away from his own country, he lost his wife, he lost his livelihood, and he lost his children," so we did that and also the photography project; where we gave people disposable cameras so they could take pictures of refugees and use them for an exhibition.

What kinds of challenges have you faced in addressing those barriers?

One is sustainability and resources. As the Human Rights Commission we have only one person dealing with non-nationals, and that is Joyce. I mean there are so many interest groups; people with disabilities, older people, people, people with HIV, women and children.

In your opinion, do you think the law adequately covers the rights of non-nationals?

I think there is quite a progressive Constitution we have and the Refugee Act. I don't think the law is problematic; it's the enforcement of the law and how the law is internalized, by officials and by citizens.

Have you experienced any legal gaps over the last five years?

Yes, for example, whether foreigners must qualify for housing. I think that's an incurrent legal gap.

What are the psycho-social factors with regards to xenophobia?

I think I touched on some of them, but one of them is that as South Africans we're isolated, we feel we're 'God's chosen children' and therefore we have this superiority complex *vis a vis* other Africans. There is a sense that South Africa is the most successful country in the African continent, so what can we learn from other Africans? What can they bring? Whereas Europeans can bring more. I think there is a sense of real competition and perceived threats, and this is not idle. I will give you an example. A South African and a Zimbabwean live side by side. A Zimbabwean guy doesn't have access to social security, he won't get a grant from government, so he is on his own. He knows that "if I don't make it, I'm dead", so he has a drive to work hard, to succeed. The South African is in a different situation. His government will look after him if he can't get a job. He is less hungry, so the two of them start work in the same company, within 6 months time, the Zimbabwean is doing much better. He is working hard, he has bought a TV, and the South African says "he must have stolen that TV. We started working together, earning the same money, how come he got a TV?"

Once, a South African asked me, a woman in Cape Town. She says "yah, we are xenophobic" and I asked "what do you mean?" She says "you see, if Friday night you have a choice to go out with your South African boyfriend, then he gets drunk, after he gets drunk, he hits you or, you can go out with your boyfriend from Ethiopia. He takes you out for a nice supper and after supper he says, "My dear do you want to watch a movie?" After a movie he doesn't expect anything in return. Then he asks me, "Kollapen, if you were a woman, who would you choose".

Do you have any reflections or insights?

As South Africans, we often say that we are part of this global renaissance. What we need to do is to learn to live and let live. We mustn't see others as a threat but as a source of enrichment.



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