

# **The nature of South Africa's legal obligations to combat xenophobia**

**Centre for Human Rights, Faculty of Law,  
University of Pretoria**

**2009**

***The nature of South Africa's legal obligations to  
combat xenophobia***

**Published by:**

The Centre for Human Rights  
Faculty of Law  
University of Pretoria

For more information, please see [www.chr.up.ac.za](http://www.chr.up.ac.za)

**Printed and bound by:**

ABC Press  
Cape Town

**To order, contact:**

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ISBN: 978-0-9814124-9-8

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The financial assistance of the Open Society Foundation  
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## ABBREVIATIONS AND ACCRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ANC	African National Congress and Members of their Families
APRM	African Peer Review Mechanism
AU	African Union
CC	Constitutional Court
CDREO	Convention concerning Discrimination in Respect of Employment and Occupation
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Rights of the Child
CRD	Convention on the Rights of the Child
CRMWMF	Convention on the Rights of All Migrant Workers
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenants on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally displaced persons
ILO	International Labour Organisation Convention
OAS	Organisation of American States
OAU	Organisation of African Unity
RDP	Reconstruction and Development Program
RRC	Refugee Reception Centre

SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAMP	Southern African Migration Project
SAPS	South African Police Services
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WCAR	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance
WCRRDXRI	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

## PREFACE

In March 2008, a wave of xenophobic violence swept across many parts of South Africa, including Tshwane. This study aims to provide an analysis of the potential role that law, and particularly human rights law, may play in combatting such violence and its root causes.

The study considers the issue from a multi-disciplinary perspective, by informing itself of the views of both nationals and non-nationals on pertinent issues. To this end, in-depth interviews have been conducted and are reflected here. This presents a tentative step towards socio-legal analysis, and is part of the Centre's broadening of its research focus from strictly legal to more multi-disciplinary. The Centre for Human Rights contracted a senior sociology student, Tau Tawengwa, to conduct this part of the research.

Against this background, an analysis is made of South Africa's legal obligations, deriving from its Constitution as well as United Nations and African Union treaties to which it is a state party. Two doctoral students at the Centre, Tarisai Mutangi and Waruguru Kaguongo, were responsible for this aspect of the research.

Although this publication appears some time after the events have occurred, it aims to be part of an ongoing reflection about ways in which a recurrence of the very unfortunate events of 2008 may be prevented.

The financial assistance of the Open Society Foundation in preparing and publishing the research results is gratefully acknowledged.

The report is also available on the Centre's website, [www.chr.up.ac.za](http://www.chr.up.ac.za).



# **The nature of South Africa's legal obligations to combat xenophobia**

## **Executive summary**

Starting in March 2008, a wave of xenophobic violence swept across many parts of South Africa. This may not have been the first time it had occurred, but it was the fiercest manifestation of xenophobia to date in South Africa.

These events caused serious violations of the human rights of many people living among us, including within Tshwane. The Centre for Human Rights, at the University of Pretoria, undertook a research project on the role of human rights law in addressing xenophobia in South Africa. The research looks into the causes and some pertinent manifestations of human rights violations, and investigates what the role of human rights law has been in addressing xenophobia and how its role could have been more pronounced.

The legal analysis was informed by in-depth interviews of 40 respondents from refugee camps, 'townships' around Pretoria and from the Law Faculty of the University of Pretoria. Arising from these interviews, the South African government's legal obligations are considered. In particular, the study examines the government's obligations to respond to violence, in respect of repatriation, reintegration, access to socio-economic rights and obligations in respect of prevention of future xenophobic attacks.

The study uses the term 'foreign nationals' to broadly include all non-South Africans residents within South Africa. Within this circle, the study identifies documented foreign nationals as those who have been accorded refugee status or who are recognised as asylum seekers, in possession of official documents

testifying to this fact. These categories of persons are legally within South Africa. Undocumented foreign nationals, also often referred to as illegal immigrants, are those residing in the country without official permission. This categorisation is thus dependent on whether the persons in question are officially recognised by immigration authorities or not. Other terms used to describe foreign nationals reflect the reason why they are within the country or why they left their country of origin. Such categories include 'economic refugees', and 'migrant workers', who may be within the borders of South Africa legally or illegally, but are here for economic reasons. 'Internally displaced persons' as a category overlaps with other categories, and refers to those uprooted from their usual place of residence who find themselves within South Africa.

The main sources of South Africa's relevant human rights obligations are found at the international and national level. At the global level, South Africa has ratified the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the ILO's Convention 111 concerning Discrimination in respect of Employment and Occupation. South Africa also committed itself to implementing the programme of action developed during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001.

At the regional level, the African Charter on Human and Peoples' Rights, as well as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, are relevant. Although the SADC framework does not explicitly speak of human rights issues, reference is made to rights and freedoms in the African Charter on Human and Peoples' Rights, the

Universal Declaration of Human Rights and ILO Conventions.

At the national level, the Constitution of South Africa and the Refugees Act are among the most important sources of the state's obligations.

## Summary of findings

### 1 Violence

South Africa has an obligation to respect and protect all persons resident within the country from violations of their right to liberty and security of person. In the context of the xenophobia the state is obliged to protect victims from attacks by non-state actors, that is, the individuals who perpetrated the violence. In 2008, the government failed to discharge this obligation and continues to violate the obligation by failing to provide remedies.

### 2 Repatriation

The principle of *non-refoulement* obliges states not to reject or return refugees, asylum seekers and other immigrants (illegal immigrants included) back to their country of origin or any other country without regard to the persistence of persecution in the territories where they are repatriated. The state has a duty in line with the *non-refoulement* principle not to return refugees and asylum seekers to territories where they might face persecution unless through a normal asylum application process, the applicant has failed to qualify for protection or has exhausted available appeal procedures. In the aftermath of the xenophobic violence, refugees, asylum seeker permit holders and undocumented migrants were directly deported *en masse*. By virtue of deporting refugees and asylum seekers without having established whether indeed they were in the country illegally, because victims had

no official documentation, where the possibility existed that such documentation was destroyed during the violence; and by subjecting victims to unbearable detention conditions, the state constructively *refouled* genuine migrants back to territories where migrants expressed a well-founded fear of persecution on their return.

### **3 Access to socio-economic rights**

The state is obliged to realise the socio-economic rights of all persons within South Africa. No distinction is made in the Constitution between nationals and foreign nationals in relation to socio-economic rights. To the extent that state officials were implicated in their capacity as such, in unlawfully destroying identity and immigration documents and the means of livelihood of foreign nationals, this constituted a breach of the obligation to *respect* the right to access socio-economic rights for foreign nationals. By failing to *prevent* the violence that destroyed the livelihoods of xenophobia victims, the state similarly failed to protect their rights. To the extent that the perception that refugees are not entitled to access social services served as a basis for the violence and the state has not taken action to counter such perceptions, the state is liable for breach of its obligations to *fulfil* access to socio-economic rights by foreign nationals. In addition, by failing to effectively set out a policy on access to socio-economic rights by foreign nationals the state has exacerbated and contributed to the problem of xenophobia.

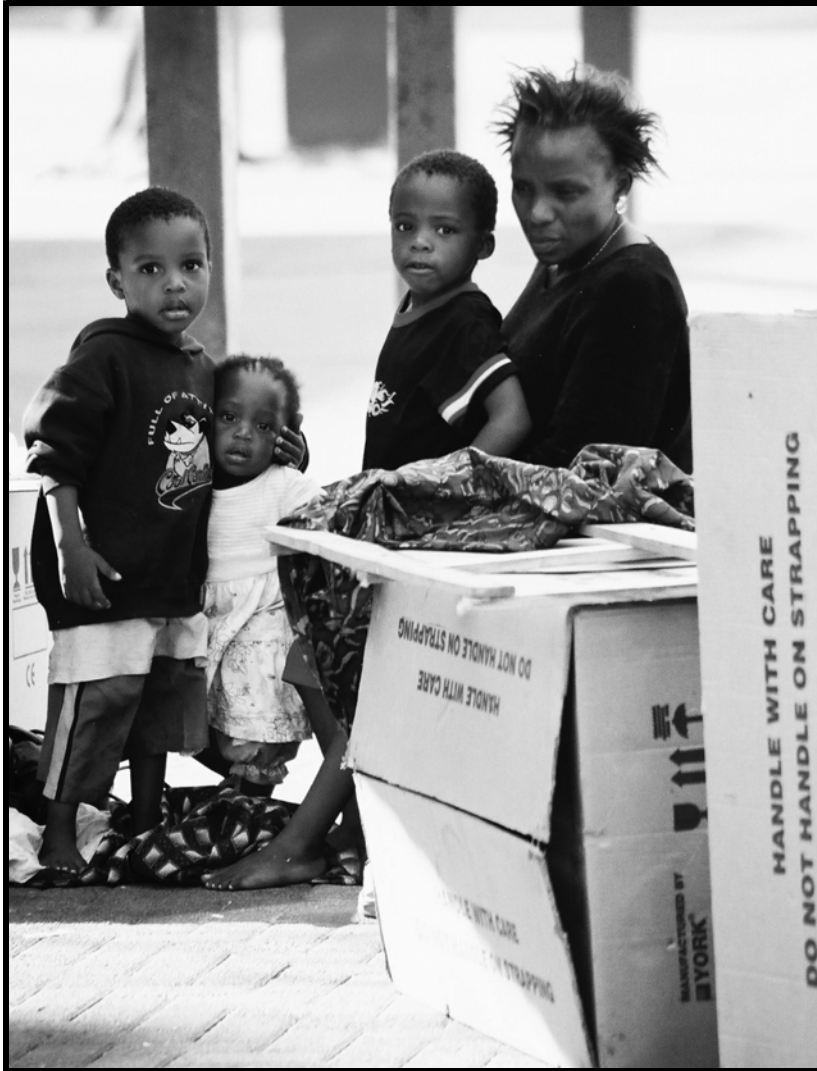
### **4 Re-integration**

There is no international or national refugee law obligation to locally integrate refugees, or displaced foreign nationals, for that matter into communities within the states where they find themselves. To the extent that the government undertook publicly to re-

integrate those displaced, a moral obligation exists to do so. Having decided to act in this manner the government was under an obligation to ensure that its actions accorded with the expected standards that govern re-integration. The government's action fell short of such requirements and it was as such in violation of its obligations.

## **Summary of recommendations**

- South Africa should ratify and domesticate all relevant human rights instruments, including the Convention on the Rights of All Migrant Workers and Members of their Families.
- The process of state reporting, which is a necessary component of ratifying international instruments, should where relevant, include the situation of foreign nationals and the measures taken to ensure that their rights are realised. Measures should be put in place to implement the concluding observations made by treaty bodies on these reports.
- 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 galvanise more action on the realisation of the goals in the Conference Programme of Action.



# 1 Introduction

The year 2008 saw an outburst of xenophobic violence in South Africa. South Africa went through one of its darkest moments when xenophobic violence broke out in townships throughout the country during which foreign nationals were attacked, murdered, stolen from and evicted. Isolated incidents of assaults on foreigners, especially around Tshwane, were publicly reported as early as March of that year. At the end of March, an article in one of the Gauteng newspapers reported: 'Throughout Monday night and into the early hours of Tuesday morning, John<sup>1</sup> was holed up in a shack in Atteridgeville with two fellow Zimbabweans. One of them was 35-year-old Tamunorwa Kufandada. He was about to become a fatal victim of the horrific xenophobia that visited the Tshwane area this week.'<sup>2</sup> Since then, xenophobic attacks spread through the Gauteng region, and to other provinces in South Africa. The violence spread and resulted in internal displacement of the victims of a seemingly systematic and organised violence. The violence led to at least 70 deaths (throughout the country) of both South Africans and non-South Africans, and a bigger number of persons injured.

Working closely with civil society and faith-based organisations, the government of South Africa reacted by formulating and implementing disaster management strategies including setting up refugee camps to facilitate an organised provision of basic amenities to victims of xenophobic attacks. The government faced scathing criticism from the public, especially civil society organisations, regarding the appropriateness and sufficiency of these remedial mechanisms.

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<sup>1</sup> Not his real name.

<sup>2</sup> *The Star* (28 March 2008: 6).

Different spheres of South African society have subsequently voiced their concerns about the violence, and many opinions were expressed attempting to pinpoint the causal factors of this national catastrophe. The events therefore, gave rise to more questions than answers regarding the nature and form assumed by xenophobia in present day South Africa. The violence manifested in a shocking level of brutality such that questions pertaining to whether or not such events could have been prevented; the probability of recurrence; and the role of various stakeholders dominated the discourse in the aftermath of the violence. Various organisations<sup>3</sup> carried out a number of pilot social science research projects. Some scholars and commentators were of the view that weak border control coupled with flawed domestic and foreign policies were the fundamental causes of this xenophobia debacle. Others maintained that a lack of service delivery, domestically, as well as xenophobic political rhetoric, was to blame for the crisis.

With this multi-disciplinary research project entitled *The role of human rights law in addressing xenophobia*, the Centre for Human Rights, Faculty of Law, University of Pretoria attempted to analyse the issue of xenophobia by conducting qualitative research in and around Tshwane; it investigated what non-South Africans and South African nationals perceive the characteristics and causes of the xenophobic violence to be; it analysed how the causes can be addressed or prevented through the legislative process and carried out a legal analysis of South Africa's national and international legal obligations towards foreign nationals' rights during and in the

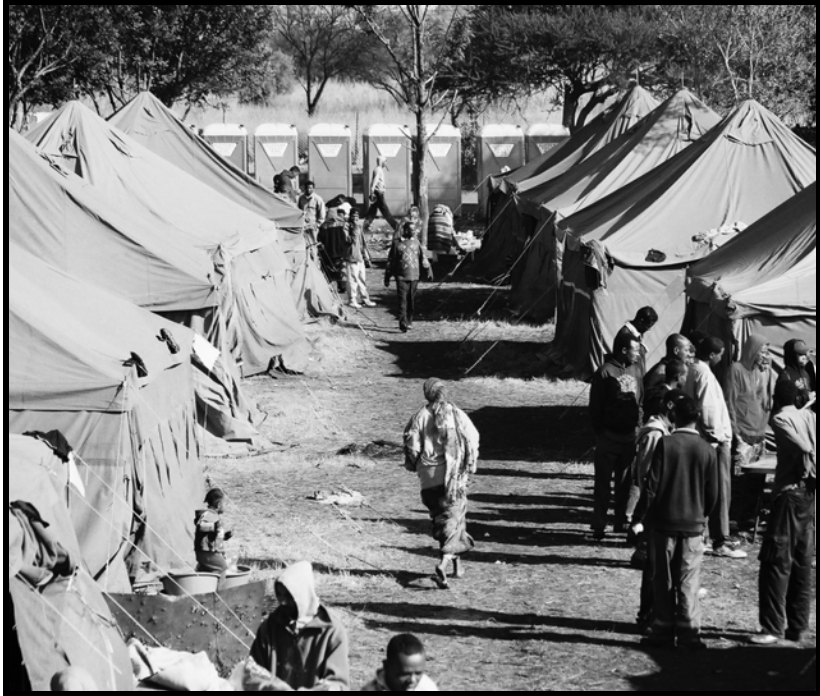
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<sup>3</sup> Forced Migration Studies Programme *Humanitarian assistance to Internally displaced persons in South Africa: Lessons learned following attacks on foreign nationals in May 2008* (January 2009). Human Sciences Research Council *Violence and xenophobia in South Africa: Developing consensus, moving to action* (October 2008).



aftermath of the violence. While the qualitative research was conducted by a social scientist, the legal analysis was undertaken from the perspective of national and international law. The synergy between the social science and legal research approaches is used in an effort to fully appreciate the various manifestations of xenophobia other than violence which dominated the recent events.

Furthermore, researchers of the current project seek to address these questions by looking at xenophobia not as an independent phenomenon, but in the context of international migration calling into question the protection offered to international migrants by the existing international refugee law framework.



## **2 Rationale for the study**

No rationale suits the current study better than the mere fact that the violent manifestation of xenophobia as a phenomenon reflected only one facet of a multi-faceted prism. It is, therefore, necessary to delve not only into the causes, manifestations and consequences of xenophobia, but other superimposed practical issues which have not been addressed sufficiently by earlier research projects. As shall be demonstrated by the literature review, much of the existing literature is descriptive by nature, that is, it recapitulates what happened without delving into the contentious issues such as the link between xenophobia and international migration. The current study seeks to address this content, focusing on the binding legal (human rights) obligations of the South African state.

### 3 Methodology

The current study's social science leg consists of a qualitative data collection by way of standard questionnaires, one for South African citizens and the other for non-South Africans resident in South Africa, which were used for structured face-to-face interviews. These interviews were conducted with some of the refugees from Akasia refugee camp in Tshwane, in 'townships' around Pretoria and on the University of Pretoria main campus. In the 'townships' most of the interviews were conducted in the lower income areas of the Tshwane, namely: Mamelodi, Ga-Rankuwa, Atteridgeville and Soshanguve. Research respondents were asked to sign consent forms, and the interviews were tape-recorded and transcribed.

With regard to the legal analysis, recourse was made to primary sources such as existing literature especially on international refugee law<sup>4</sup> and its interplay with migrant protection regime. This enabled researchers to assess the adequacy of the existing frameworks and conclude whether or not South Africa breached any existing obligations regarding the issues identified in the research questions. The research was conducted over a period of six months from June to December 2008.

#### 3.1 Sampling method

The method used to identify interviewees was non-probability target purposive sampling. This method entails approaching 'people on the street' and asking them if they are willing to be interviewed, as long as they meet the criteria of 'non-South African' or 'South African'. This method allows for respondents to be

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<sup>4</sup> By refugee law we refer to the whole national and international legal framework for the protection of asylum seekers and documented refugees.

selected at the discretion of the interviewer according to predetermined criteria relevant to a particular research question. This means, for example, that in a particular area, the researcher could apply his discretion in deciding to interview a white South African, a black non-South African and a second generation South African Indian.

This method was selected because it was the most feasible way to get non-South Africans and locals of potentially differing class, racial, and educational backgrounds to participate in the study. Ten interviews (five of South Africans, and five of non-South Africans) were conducted at the Law Faculty on the University of Pretoria campus. Ten interviews were conducted with refugees from camps around Pretoria. Twenty interviews were conducted in 'townships' around Tshwane.


### **3.2 Data analysis method**

After collecting the necessary data, written transcripts of the tape-recordings were used to conduct a qualitative thematic analysis and interpretation of the data.

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# Evacuation

Foreigners moved out of Alexandra **PAGE 3**



**OPEN FIRE.** Metro police officers fire rubber bullets at residents of Alexandra last night. Picture: Petros Rapule

## 4 Research questions

By way of questionnaires used in face-to-face interviews, the sociological segment of this research project was driven by the following research questions which sought to cover issues such as violence against foreign nationals, repatriation and re-integration of victims of the violence, and access to socio-economic rights by foreign nationals:

- (i) What are the characteristics and causes of the recent xenophobic violence around Pretoria?
- (ii) How can these causes be addressed?

In order to prod effectively into the above-mentioned issues from a legal perspective, the following research questions arising from the thematic areas identified in the sociological research outcomes above, informed the legal dimension of the project:

- (a) What are South Africa's legal obligations, if any, regarding **xenophobic violence** against foreign nationals?
- (b) What are South Africa's obligations, if any, regarding the **repatriation** of foreign nationals resident in its territory?
- (c) What are South Africa's obligations, if any, in respect of the **re-integration** of foreign nationals in South African communities as a long term solution to migration?
- (d) What are South Africa's obligations, if any, regarding **access to socio-economic rights** by foreign nationals resident in South Africa?
- (e) What are South Africa's obligations, if any, in respect of **preventing future recurrence** of the xenophobia attacks?

## 5 Ethical considerations

In the process of carrying out the sociological research, a number of ethical issues were taken into account:

- Before interviewing any of the subjects, the respondents were asked to sign a letter of consent, which informed them of the research project.
- The letters of consent submitted to individual respondents guaranteed that the data gathered would be treated as private and confidential.
- The letters of consent submitted to individual respondents guaranteed the anonymity of the respondents in the final report.
- The letters of consent guaranteed the confidentiality of the interviews, meaning that the information provided by the respondents was regarded as privileged and that the identity of the respondents was not to be revealed in any way.
- The letters of consent informed respondents that the data will be archived at the Centre for Human Rights and the data may be used for other studies.



## 6 Literature review

The above research questions directly speak to xenophobia as a concept within the wider framework of international migration. In the view of a number of scholars, xenophobia is not a new phenomenon in South Africa. The majority of South Africans are generally seen to be negative to issues that relate to non-South Africans and xenophobia.<sup>5</sup> A study carried out by the Southern African Migration Project (SAMP) concluded that most South Africans are 'latent xenophobes'.<sup>6</sup> Xenophobic sentiments are not unique to South Africa. Incidents of xenophobia have been experienced all over the world. Xenophobia against migrants is indeed a current issue in Europe.<sup>7</sup> What is unique to South Africa is the extreme and widespread hostility in attitudes and the violence accompanying this intolerance.<sup>8</sup>

Xenophobia has been seen as a consequence of the eradication of the apartheid system in South Africa. One author writes: 'In retrospect, the origins of South Africa's xenophobia can be traced to 1994 with the advent of majority rule, when thousands, even millions, of other Africans entered the country for a share of what the new state offered. However, it first

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<sup>5</sup> See J Crush (ed) 'The perfect storm: The realities of xenophobia in contemporary South Africa' Southern Africa Migration Project Migration Policy Series No 50 (2008); L Landau, K Ramjathan-Keogh *et al* 'Xenophobia in South African and problems related to it' Forced Migration Working Paper Series No 13, Forced Migration Studies Programme University of the Witwatersrand January 2005.

<sup>6</sup> J Crush 'The dark side of democracy: Immigration, xenophobia and human rights in South Africa' (2000) 38 *International migration* 103-133.

<sup>7</sup> European Monitoring Centre on Racism and Xenophobia 'Migrants experiences in racism and xenophobia in 12 EU Member States: Pilot Study' May 2006) [http://raxen.fra.europa.eu/1/webmill.php?id=32835&doc\\_id=57557](http://raxen.fra.europa.eu/1/webmill.php?id=32835&doc_id=57557) (accessed 25 September 2008).

<sup>8</sup> Crush (n 5 above) 1.

appeared as a disgusting force that attracted international attention in 1998 when three non-nationals were attacked and killed by a mob of South Africans for the reason that they were stealing their jobs.<sup>9</sup> Several other studies have investigated the causes of xenophobia with varied reasons emerging. Recurrent themes are those that portray foreign nationals as primarily an economic threat, taking up job opportunities and social services meant for the locals.<sup>10</sup> Other cited causes of xenophobia are the perception of foreigners as a threat to physical security, racism, isolation and nationalism, political scapegoats, a lack of knowledge about foreign nationals and their rights.<sup>11</sup>

Various explanations have been given for the xenophobic attitudes and subsequent actions, ranging from anecdotal to more psychosocial propositions. In the media and in popular discourse, foreign nationals are associated with crime, trafficking, drugs, disease including HIV, and other social ills. The characterisation of foreign nationals as 'illegal' serves to enhance the association with 'unlawfulness' which in turn encourages the dislike and expulsion of foreign nationals from communities. In spite of popular perception, studies show that foreign nationals are more often victims of crime than its perpetrators.<sup>12</sup>

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<sup>9</sup> The Centre for Advanced Studies of African Society (2001) 13.

<sup>10</sup> Report on Open Hearings on Xenophobia and problems related to it hosted by the SAHRC and the Parliamentary Portfolio November 2004; B Harris 'Xenophobia: A new pathology for a new South Africa' in D Hook & G Eagle (eds) *Psychopathology and Social Prejudice* (2002)

<sup>11</sup> Landau *et al* (n 5 above); Report on Open Hearings (n 10 above); Harris (n 10 above).

<sup>12</sup> Media Monitoring Project 'Shades of prejudice: An investigation into the South African media's coverage of racial violence and xenophobia' (2007) 59 available [http://www.mediamonitoring.africa.org/index.php/resources/entry/shades\\_of\\_prejudice/](http://www.mediamonitoring.africa.org/index.php/resources/entry/shades_of_prejudice/) (accessed 3 February 2009).

According to Harris, explanations can be categorised as the scapegoating, isolation and bio-cultural hypotheses.<sup>13</sup> The first hypothesis emphasises the blaming of foreigners as 'scapegoats' for social and economic difficulties experienced. Foreigners are as such seen as the reason why members of the local community do not have adequate jobs, houses, education and so on. The question as to why foreigners bear the brunt and not a different social group or individuals might be explained by the isolation from the international community that South Africa experienced during the apartheid years. Isolation was also experienced within the country as communities were prevented from interacting with one another. Such isolation makes it harder for South Africans to tolerate difference. The bio-cultural hypothesis explains why foreign nationals from particular countries are singled out more often for xenophobic hostility and violence than other foreign nationals. The answer lies in the visible physical differences in terms of biological and cultural factors that distinguish some nationalities.

The South African Human Rights Commission takes the view that many of the xenophobic sentiments are based on a lack of information on foreigners and their rights.<sup>14</sup> Ignorance and unfamiliarity with the different cultures of foreign nationals, root causes of migration promotes the entrenchment of myths and misconceptions that then result in xenophobic attitudes and actions.

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<sup>13</sup> Harris (n 10 above). See also L B Landau *et al* 'Xenophobia in South Africa and problems related to it' Background paper for SAHRC Open hearings on Xenophobia and problems related to it (2004).

<sup>14</sup> South African Human Rights Commission (SAHRC) 'Report of the Open hearings on xenophobia and problems related to it' (2004) available [http://www.sahrc.org.za/sahrc/cms/publish/cat\\_index\\_41.shtml](http://www.sahrc.org.za/sahrc/cms/publish/cat_index_41.shtml) (accessed 27 September 2008).

These perceptions also play out in the media which has often encouraged a 'siege mentality' when reporting on foreign nationals by giving the impression that foreigners were 'taking over' South Africa.<sup>15</sup> The absence of critical discourse around news items involving foreign nationals encourages negative stereotyping of foreigners.<sup>16</sup> The role which the media plays in portraying and fuelling xenophobic sentiment has been investigated with the findings that the media often labels the majority of migrants from Africa as 'illegal immigrants' and continues to ignore the diversity between different categories of migrants.<sup>17</sup> This negative discourse reinforces the notion of 'inherent criminality' of foreign nationals. Although such stereotyping is not actively encouraged within the media, it is perpetuated because the media does not challenge those stereotypes or actively engage in more positive discourse around foreign nationals.<sup>18</sup>

Not all commentators agree that xenophobia is fuelled by the intense competition for limited resources and jobs.<sup>19</sup>

On the other hand, Michael Neocosmos<sup>20</sup> speaks of 'state discourse' as a fundamental cause of

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<sup>15</sup> Crush (n 5 above) 14.

<sup>16</sup> Media Monitoring Project (n 12 above).

<sup>17</sup> Media Monitoring Project 'Shades of prejudice: An investigation into the South African media's coverage of racial violence and xenophobia' (2007) 59 available [http://www.mediamonitoringafrica.org/index.php/resources/entry/shades\\_of\\_prejudice/](http://www.mediamonitoringafrica.org/index.php/resources/entry/shades_of_prejudice/) (accessed 3 February 2009).

<sup>18</sup> As above.

<sup>19</sup> For example, Singer (2000) is of the opinion that xenophobia in South Africa reflects South Africans' growing frustration with the rewards of transformation. He is of the opinion that the great expectations aroused by political transformation in this country have been unmatched by service-delivery, and as a result, South Africans have used foreigners as scapegoats to blame for unfulfilled expectations.

<sup>20</sup> Neocosmos 2006 <http://www.pambazuka.org/en/category/features/48712>.

xenophobia, writing that 'government departments, parliamentarians, the police, the Lindela detention centre, the law itself have all been reinforcing a one-way message since the 1990s: "We are being invaded by illegal immigrants who are a threat to national stability, the RDP [Reconstruction and Development Programme], development, our social services, the very fabric of our society".'<sup>21</sup> Neocosmos highlights that comments made by the former minister of home affairs Mr Mangosotho Buthelezi, referring to Nigerian immigrants as 'criminals and drug traffickers,'<sup>22</sup> are the very examples of political and state discourse which stimulate xenophobia within state institutions, such as the South African Police Service, and in the general public.

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.<sup>23</sup> 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.<sup>24</sup> Some of the responses in the Southern Africa 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'.<sup>25</sup>

Xenophobic sentiments in South Africa are associated with the feeling or perception of the

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<sup>21</sup> As above.

<sup>22</sup> As above.

<sup>23</sup> ILO IOM OHCHR 'International Migration, Racism, Discrimination and Xenophobia' (2001) 2.

<sup>24</sup> Valji (n 15 above).

<sup>25</sup> Crush (n 6 above) 110.

country being overwhelmed by foreign nationals. These perceptions have been documented in various surveys, with a majority of South Africans favouring stronger immigration controls.<sup>26</sup> The SAMP 2006 study published in 2008 shows that increasing numbers of South Africans favour strict limits or a total ban on immigration.<sup>27</sup> Those in favour rose from 65 percent in 1997 to 78 percent in 1999. Seventy-six percent of South Africans in 2006 of the surveyed sample wanted the borders electrified; up from 66 percent in 1999.<sup>28</sup> There is strong support for the deportation of foreign nationals, even those living legally within the country. Refugees find themselves in a similar position, with 47 percent supporting their protection, 30 percent opposed thereto and nearly 20 percent having no opinion on the matter. In 2006 negative attitudes towards foreigner grew worse, with 67 percent of South Africans perceiving foreigners as using up resources, compared with 59 percent in 1999.<sup>29</sup> The ideas that foreign nationals are associated with crime and bring disease respectively were held by 67 percent and 49 percent as opposed to 45 percent and 24 percent respectively in 1999. From the survey it also emerged that xenophobic attitudes vary between race groups, class, income, education level, with slight differences depending on employment status and political party affiliation. Generally xenophobic sentiment and attitudes are more prevalent amongst whites than blacks and amongst the poor and working class and wealthy than the middle class.<sup>30</sup>

In terms of the immigrants who enter the country, commentators generally hold the view that economic and political turmoil, which usually coincide, in their own countries inspire immigrants to relocate to more

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<sup>26</sup> Crush (n 5 above) 1.

<sup>27</sup> As above.

<sup>28</sup> As above.

<sup>29</sup> As above.

<sup>30</sup> Crush (n 5 above) 5.

stable regions such as South Africa. Antoine Bouillon,<sup>31</sup> writing on Francophone African immigrants who travel to South Africa, is of the opinion that 'more often than not South Africa is a second choice for them. Actually, many of them had already been in Europe or America before, or in a foreign African capital — some even came directly from there — and many still idealize getting to Europe or North America or another destination, if only they could. That fact is that the opening up of South Africa's borders coincided with a further tightening up on immigration in Europe, following the signature of the Schengen Convention on 19 June 1990, with visa restrictions, asylum restrictions, naturalization restrictions, expulsion of "clandestine" immigrants, voluntary repatriation schemes, etc., being applied.' It remains then, a possibility that if the same strictness in terms of migration restrictions was to be applied in South Africa, the xenophobic incidence could be averted or decreased.

Solutions to the question of xenophobia include strengthening of integration policy as a possible strategy. It has been suggested that beyond a policy that determines who is allowed into the country, steps should be taken to enhance integration and social cohesion between migrant non-nationals and members of the host society.<sup>32</sup> Examining the crisis resulting from the xenophobic attacks from a disaster management perspective elicited shortcomings in the manner in which relevant actors responded.<sup>33</sup> The immediate, medium-term and long-term measures

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<sup>31</sup> The Centre for Advanced Studies of African Society (1998:11)

<sup>32</sup> IDASA 'Migration and Social Cohesion' available [http://www.idasa.org.za/index.asp?page=output\\_details.asp%3FRID%3D1682%26OTID%3D5%26TID%3D18](http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D1682%26OTID%3D5%26TID%3D18) (accessed 3 February 2009).

<sup>33</sup> Forced Migration Studies Programme *Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008* (January 2009).

taken to respond to the displacement of thousands of victims of xenophobia are an important indicator as to the preparedness of relevant actors in the prevention and the handling of similar emergency situations. In the case of the violence that erupted in May 2008, government, civil society and international institution responses were found to be inadequate, in part because of the lack of clarity regarding the rights of the foreign nationals displaced by the violence, a gap this study fills.<sup>34</sup> The African Peer Review Mechanism (APRM) considered racism and xenophobia as one of the cross-cutting issues that affects the political, economic and corporate governance in South Africa.<sup>35</sup> The APR team recommended that the government reconsider the current handling of undocumented migrants since the procedures did not result in a decline in the number of illegal immigrants entering the country.<sup>36</sup>

As to existing literature on the rights of migrants who fell victim to xenophobic violence, under the discussion on diplomatic protection and state responsibility over 'aliens', Dugard<sup>37</sup> deals with the question of minimum standard of treatment of foreign nationals by host states as a matter of international practice. The author maintains a position well supported by other scholars such as Borchard.<sup>38</sup> The conclusion arrived at by these scholars is that the standard of treatment of foreign nationals has since changed from the international standard to one set by the human rights movement.

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<sup>34</sup> As above.

<sup>35</sup> APRM Country Review Report South Africa (2007) 311 <http://www.aprm.org.za/docs/SACountryReviewReport5.pdf> (accessed 6 April 2009).

<sup>36</sup> As above. The existence of xenophobia in South Africa was disputed by President Thabo Mbeki when the country was peer reviewed by the APR Forum at 377-8.

<sup>37</sup> J Dugard, *International Law-A South African Perspective* (3rd ed) (2005) 281.

<sup>38</sup> E Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1940) 38 *Michigan Law Review* 445.



Having determined the standard of treatment, there is need to review literature that examines the refugee status determination process so that issues such as repatriation, re-integration, access to human rights by foreign nationals are fully discussed. In this area, Goodwin-Gill and J Macadam's *The Refugee in International Law* is arguably one of the leading sources.<sup>39</sup> 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 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. It is within the context of this literature that the current research project was conceived and set. This study fills a gap in which the rights of the different categories of migrants in the context of xenophobia have not been explored.

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<sup>39</sup> GS Goodwin-Gill & J Macadam, *The Refugee in International Law* (2007).



## 7 Terminology

The scope of the current research project makes it mandatory for us to deal with terminology for two reasons. The first is that the current project is a combination of social science and legal research and terms may be ascribed different meanings in the different fields. The other reason is to define the scope and parameters of the project by delineating the subjects of the research. For instance, the word 'migrants' refers to all foreign nationals who entered South Africa through different characterisations of status but are bundled together in this descriptive term simply because they originated from a different country. It is perhaps needless to say that research projects are never meant to cover everything, but to address a particular issue or question of interest to society. However, in order not to cause any unnecessary confusion between this report and other existing literature, terms have been ascribed their ordinary meaning unless it was pressing that a working definition be adopted.

### 7.1 Xenophobia

The Merriam-Webster Dictionary defines 'xenophobia' as 'fear and hatred of strangers or foreigners or of anything that is strange or foreign'.<sup>40</sup> Similarly, according to the South African Human Rights Commission, xenophobia is 'the deep dislike of non-nationals by nationals of a recipient state. Its manifestation constitutes a violation of human rights'.<sup>41</sup> This general definition points to a perception but does not elaborate on the actual manifestation of such fear or hatred of strangers. In

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<sup>40</sup> Merriam Webster Online Dictionary <http://www.merriam-webster.com/dictionary/xenophobia>.

<sup>41</sup> South African Human Rights Commission's Braamfontein Statement on Racism and Xenophobia, 15 October 1998.

the South African context, xenophobia is both a negative attitude towards foreigners and a manifestation in extreme cases of violent attacks against them. In this paper the term 'xenophobia' is used in the broadest possible way to include perceptions, attitudes and manifestations. Such an encompassing definition, it is anticipated, will allow for the formulation of wide-reaching recommendations as to government obligations to prevent xenophobia.

Xenophobia is often referred to in conjunction with other terms such as 'racial discrimination', which is defined by the Convention on the Elimination of all Forms of Racial Discrimination as meaning '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 freedoms in the political, economic, social, cultural or any other field of public life'.<sup>42</sup> The Convention does not, however, apply to distinctions made by states between citizens and non-citizens, and similarly does not affect legal provisions that a state may enact in relation to nationality, citizenship and naturalisation, provided these provisions do not discriminate against any particular nationality.<sup>43</sup>

Although the two phenomena (xenophobia and racial discrimination) are distinct, they also overlap. Xenophobic attitudes may lead to discriminatory actions against foreigners on the basis of their nationality or ethnic origin and thus be linked to racial discrimination.<sup>44</sup> While racism is a distinction based on difference in physical characteristics, xenophobia

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<sup>42</sup> Art 1(1).

<sup>43</sup> Art 1(2) & (3).

<sup>44</sup> n 23 above.

stems from a perception that the other is foreign to or originates from outside the community or nation.<sup>45</sup> The perception of 'foreign-ness' may also be informed by physical characteristics that serve to identify the 'other', such as an inability to speak the local language (well or at all), accents, style of dress, and vaccination marks.<sup>46</sup> Because a distinction between the two is important in order to develop strategies that explicitly target xenophobia, this study will endeavour to maintain this distinction to the extent possible.

South African's intolerance towards foreigners is not uniform, applying to all foreigners in the same way and to the same extent.<sup>47</sup> Nationals from countries in Africa bear the brunt of harsher negative attitudes but even within this category there are differences.<sup>48</sup> With the exception of Zimbabweans, who entered South Africa in masses, it is fairly noticeable that foreign nationals from SADC countries are generally more favourably perceived than other Africans. It is not clear why this is the case though.

While most of the violent manifestations of xenophobia have taken place on the horizontal plane between individuals or groups of individuals, xenophobia is also perpetrated along the vertical plane within and by institutions of government.<sup>49</sup> Anti-immigrant sentiments manifest themselves in institutions such the Department of Home Affairs and the South African Police Services (SAPS), exacerbating general levels of xenophobia. Foreign nationals encounter tremendous obstacles in their efforts to acquire legal status and identity documents at the

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<sup>45</sup> n 23 above.

<sup>46</sup> Harris (n 10 above).

<sup>47</sup> Crush (n 5 above) 4.

<sup>48</sup> See Sociological Research findings below.

<sup>49</sup> L B Landau 'The Laws of (in) hospitality: Black Africans in South Africa' Forced Migration Working Paper Series No 7 (May 2004).

Department of Home Affairs, including administrative inefficiency and corruption.<sup>50</sup> Due to the lack of papers, and sometimes despite having identity papers and legal status, foreign nationals are prone to harassment, mistreatment and extortion by law enforcement agencies, sometimes resulting in deportation.

## 7.2 Legal obligations

By 'legal obligations' is meant duties that accrued to South Africa from the international legal regime of law some of which law has adopted a national framework upon being domesticated through legislation or any other channels. These obligations are, therefore, a potpourri of principles and standards by virtue of which South Africa should deal with foreign nationals within its territory, failing which an event (a breach of international law) occurs. In such circumstances, a corollary obligation to compensate or otherwise redress a breach of international law follows as a rule of customary international law.<sup>51</sup>

## 7.3 Foreign nationals

'Foreign nationals' is a descriptive phrase, chosen for its less derogatory effect, used to refer to all nationals of a state other than South Africa who are ordinarily resident in South Africa under various immigration permits or without such permits. As already alluded to, the focus in this report is on a category of foreign nationals called international 'migrants'. Migrants have been loosely defined as people of another state

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<sup>50</sup> Human Rights Watch *Living on the Margins: Inadequate protection for refugees and asylum seekers in Johannesburg* November 2005 Vol 17 No 15(A).

<sup>51</sup> In the domain of protection of foreign nationals within the territory of a state, usually principles dealing with the liability of a state to aliens applies *mutatis mutandis*. A discussion on this concept shall follow when dealing with the first of the research questions.

who have voluntarily or otherwise come to settle temporarily or permanently due to a number of pull and push factors such as war, persecution; economic opportunities abroad and so on. Voluntary migrants usually take the form of migrant workers (those who migrate in order to take up employment opportunities in South Africa) as opposed to those fleeing persecution or natural disasters.

Involuntary migrants would be of much interest in this study as they constitute a different category of people who fell victim to the degrading events of xenophobic violence. This category of migrants contains the most vulnerable groups of people ordinarily protected on temporary or permanent basis by the international refugee law regime.<sup>52</sup> They are vulnerable because they find themselves in unfamiliar territory without a claim to anything and left to the whims and charity of hosts who might not be as charitable as expected. This came out as a result of the xenophobic violence in South Africa.

## **7.4 Asylum seekers**

The most prominent category of involuntary migrants is 'asylum seekers'. As the name suggests, asylum seekers are persons from another country who have involuntarily left (in most cases fled) the country of nationality because that country is unwilling or unable

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<sup>52</sup> The flagship sources of principles and standards on humanitarian law are the UN 1951 Convention on the Status of Refugees and its 1967 Protocol, the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa as well as the Refugee Act 203 of 1998. The Refugee Act was principally adopted in order to domesticate the principles and standards contained in the above international treaties. This objective is very clear in the Preamble and Short Title of the Refugee Act where the above two international conventions are singularly mentioned and provisions taken verbatim or paraphrased in the text of the Refugee Act.

to protect them from persecution on the basis of 'Convention grounds'.<sup>53</sup> Convention grounds refer to the list of factors on the basis of which one might flee a country of origin. These are contained in article 1 of the UN 1951 Convention as well as article of the OAU Convention. The UN 1951 Convention provides for these factors as including 'race, religion, and nationality, membership of particular social group or political opinion'. In addition to the factors as they appear in the UN 1951 Convention, the OAU Convention provides for 'external aggression, occupation, foreign domination and events seriously disturbing public order' in the whole or part of a country.

The usual conditions necessitating flight include political, religious, race, nationality, and affiliation to a particular social group.<sup>54</sup> However, article 1(2) of the OAU Convention expands the criteria used to vet refugees to include 'external aggression, foreign domination, occupation and events seriously disturb public order' in some parts or whole of a country. This expansion was celebrated as a reaction to practical problems facing the developing world, hence assessing the plight of refugees on the basis of a 'de facto' rather than a 'the formal, authority structure within the country of origin'.<sup>55</sup>

Loosely put, asylum seekers are in fact 'refugees'.<sup>56</sup> In that context, a refugee denotes 'someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable'.<sup>57</sup> Because of these conditions, the person in flight will

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<sup>53</sup> Whilst the phrase 'Convention grounds' is not a term coined in this work, but has been widely used to refer to the listed grounds forming the basis of a 'well-founded fear of persecution' in article 1 of the 1951 UN Convention on the Status of Refugees.

<sup>54</sup> Articles 1 of the UN and OAU Conventions refer.

<sup>55</sup> JC Hathaway *The Law of Refugee Status* (1991) 17.

<sup>56</sup> Goodwin-Gill (n 39 above) 15.

<sup>57</sup> As above.



be unable or unwilling to return to the country of nationality. The destination of that person is not relevant to warrant protection, but the perception that such a person is 'worthy' and 'ought' to be 'assisted' or protected from the conditions necessitating the flight calls for the need of intervention.<sup>58</sup>

Be that as it may, an asylum seeker is worthy of temporary protection pending the determination of his application for asylum whereupon he or she becomes a refugee where such application has been granted.<sup>59</sup> In other words, the line is drawn between an asylum seeker and a refugee as a legal characterisation in that the later used to be the former until such a time as his application for protection on the basis of 'well-founded fear of persecution' or any grounds recognised by conventions and national law. It is unnecessary to get into the modalities of how such applications are processed since a full discussion and a drawn out debate will be devoted to this process to unearth loopholes and inadequacies in the process.

## 7.5 Refugees

So, what constitutes a refugee as a legal characterisation? Simply put, a refugee is an asylum seeker who has been formerly offered protection by the host country. The recognition makes him or her entitled to a number of rights and privileges not ordinarily extended to asylum seekers or any other category of involuntary migrants. These include protection, issuing of travel documents, and engaging in employment.<sup>60</sup> Refugees stand a chance of resettlement in a third country that offers such

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<sup>58</sup> As above.

<sup>59</sup> As above.

<sup>60</sup> In terms of the special conditions of the Temporary Asylum Permits issued in SA, an asylum seeker awaiting the outcome of an asylum application is allowed to work or study during that waiting period.

opportunities especially in the developed world.<sup>61</sup> As part of seeking long term solutions for the plight of refugees, re-integration programmes are also provided. The objective of such programmes is to assimilate refugees into the hosting communities to settle there permanently.

The granting of refugee status remains a temporary arrangement. Its continuation entirely depends on the developments in the situation within the sending country. Refugees almost always entertain the belief that one day they will be able to go back home. This sentimental attachment to one's place of origin makes voluntary repatriation a desired option often backed-up with incentives such as free transport and packages designed to assist returnees to integrate and manage a new beginning in their former societies.<sup>62</sup> In some cases, repatriation becomes an option to the host country where refugee status has expired by virtue of the operation of the 'cessation clause' in most national refugee legislation. This follows an agreement between the host authorities, UNHCR and the refugee that the conditions they fled from have ceased to exist and that the sending state is willing and able to provide protection once again.

## 7.6 Migrant workers

'Migrant workers', a generic phrase, provides a unique category of migrants in the sense that the reasons for leaving the country of nationality were never contemplated by the main sources of the refugee

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<sup>61</sup> However, a respectable number of resettlement programmes were undertaken in Africa in countries such as Tanzania, Zambia and Angola to name but a few, such that it would be very untrue to say that no resettlement ever took place in developing states.

<sup>62</sup> Readers should consider the voluntary repatriation of Angolans back to Angola from all over the world especially parts of Southern Africa as a flagship programme of voluntary repatriation as a long term solution.

protection regime.<sup>63</sup> The Convention on the Protection of All Migrant Workers and Members of Their Families<sup>64</sup> defines a 'migrant worker' in article 2(1) as any 'person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.

These migrants may be temporary (short term) or permanent (long term). The latter category usually gets assimilated into the society having been granted permanent residence. This practice is alive in South Africa as much as it is in the developed world where there is almost always shortage of professionals in service provision. However, as long as they have not yet assumed the citizenship of the host country, they are migrants. Although international instruments make a distinction between legal and illegal migrant workers,<sup>65</sup> they both should be protected when it comes to matters related to their employment. It is in fact illegal immigrants whose rights stand a very high risk of violation in the course of their employment and stay. Accordingly, this work covers both legal and illegal migrant workers to the extent that the international legal framework provides for their protection in certain circumstances or for the reason that despite their patent high risk to abuse, the existing legal regime pays no more than a cursory glance to their plight. The most moving reason is that

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<sup>63</sup> Ryszard Cholewinski interchanges 'migrant worker' with 'foreign worker', 'guest worker' and 'immigrant worker' in R Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997) 3.

<sup>64</sup> Adopted by the General Assembly resolution 45/158 on 18 December 1990 and entered into force on 1 July 2003. a copy is available at: [http://209.85.229.132/search?q=cache:53IKI\\_UOj2AJ:www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm+convention+on+migrant+workers&hl=en&ct=clnk&cd=1&gl=za](http://209.85.229.132/search?q=cache:53IKI_UOj2AJ:www.unhchr.ch/html/menu3/b/m_mwctoc.htm+convention+on+migrant+workers&hl=en&ct=clnk&cd=1&gl=za) (Accessed on 10 February 2009).

<sup>65</sup> Cholewinski observes that the only exception among the instruments is the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

both categories are victims of the xenophobic outbursts.

## 7.7 'Economic refugees'

Economic refugees are those migrants that leave countries of nationality to enter the territory of other countries purely to take advantage of available economic opportunities. A quick perusal of the legal regime relating to asylum seekers, IDPs and refugees seems as if it does not contemplate this category of migrants as in need of protection by the refugee law regime. Scholars have out rightly blamed states for discriminating against economic migrants as a way of restricting, as much as possible, the categories of persons over whom to assume responsibility in their territories.<sup>66</sup> The prevailing literature generally holds that neither the UN 1951 Convention and its 1967 Protocol, nor the OAU 1969 Convention with its expanded criteria, seems to encompass economic refugees in its definition of a refugee eligible for protection by these legal regimes. Goodwin-Hill and Macadam had this to say about economic refugees:

The solution to their problem, if any, lies more within the provinces of managed migration and of international aid and development, rather than in the institution of asylum, considered as protection, of whatever duration on the territory of another state.<sup>67</sup>

We are encouraged by the fact that despite this somewhat pessimistic suggestion about dealing with economic refugees, the authors observed that this category of persons has long been 'disfavoured' but is now coming back into discussions thanks to globalisation. Our approach in this work is to thoroughly seek the proper place of economic refugees in international law, and possibly seek their inclusion in the 'institution' of asylum, if they are not already considered as such. This proposition is based

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<sup>66</sup> Goodwin-Hill (n 39 above) 15.

<sup>67</sup> As above.

on the concept of 'expanded criteria' that has been singularly noted in the OAU Convention and the Cartagena Declaration on Refugees of the Organisation of American States (OAS).<sup>68</sup> Thereafter, targeted recommendations would be made depending on the nature assumed by the research outcome.

## 7.8 Internally displaced persons

'Internally displaced persons' (IDPs) form part of the wide category of forced migrants. It has been vehemently argued that IDPs are nothing less than refugees or asylum seekers. The only difference is that, first, there is no refugee or any other well established legal framework that protects this category to an extent similar to the way other migrants enjoy protection. This has been noted as an unnecessary form of discrimination against IDPs. Second, the territoriality principle comes into play in that the mere fact that IDPs by their nature almost always remain in the territory of the country of nationality or residence makes them a concern of the state with effective control over that territory. To that end, they are not expected to cross borders in pursuit of safety. Doing so changes their status to asylum seekers and accordingly subjects them to a more rigorous task of discharging the onus of 'well-founded fear of persecution'.

However, IDPs that form the subject matter of this research have an interesting twist to the conventional understanding of IDPs especially with reference to the territoriality principle. This is so because the IDPs we

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<sup>68</sup> Annual Report of the Inter-American Commission on Human Rights 1984-85, OEA/Ser.L/V/II.66/doc, rev. 1, at 190. This was adopted by the Assembly of the OAS in 1984.

analyse in this work were initially not in that category.<sup>69</sup> Some of them were recognised refugees, some were asylum seekers awaiting the outcome of their applications from the Refugee Reception Centre (RRC), some were still to approach the RRC to initiate the process; some were illegal immigrant workers; some were legal migrant workers and so on. What bound all these categories together during and after the xenophobic violence is that they ended up being displaced from their communities and in need of protection. Some of the questions we shall answer are: What regime would be appropriately suited to address the respective needs of these different groups given their different migrantr status? To what extent does their migrant status before the violence inform the protection regime to be invoked in the circumstances, or should they be simply treated as IDPs?

## 7.9 Illegal immigrants

'Illegal immigrants' is a category of persons to which most foreign nationals belong until their immigrant status is regularised on arrival in the host state. For example: Any person who enters the territory of another state without permission from the immigration authorities demonstrable by way of a visa or immigration permit is an illegal immigrant. It then follows that the reason for fleeing the country of nationality is immaterial at this point. As a temporary

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<sup>69</sup> In a separate but sufficiently relevant project, on 7 March 2009 the Centre for Human Rights participated in the taking of statements from Somali refugees and asylum seekers who were displaced during the xenophobic violence from different parts of South Africa. This group of people is now temporarily accommodated in Randfontein. It came out very clearly from the statements (copies of which are in the possession of the authors) that some of them were fairly integrating in almost all the provinces of South Africa, but mainly Eastern Cape, Gauteng, Mpumalanga, North West, and Limpopo. They were however, displaced and got temporarily sheltered at Akasia camp until the 3<sup>rd</sup> of March 2009 when the shelter was officially closed leaving the people without shelter and displaced again.

characterisation, an illegal immigrant enters the territory of another state whereupon he or she declares the reason for such actions. If the reason is to seek asylum, his status changes as soon as he or she lodges an application for asylum. This is even more so when he or she ultimately becomes a recognised refugee.

We conclude, therefore, that one's immigration status devolves around his position *vis-à-vis* the immigration laws of the host state. Economic refugees may well have proper immigration papers to visit. They remain legal immigrants until they assume employment. Then they render themselves illegal in the sense that they have no such permits as to allow them to engage in employment in the host state. The situation of migrant workers who do not possess proper work or other permits allowing them to take up employment is similar.

The most frequently encountered category of illegal immigrants is that of people who entered South Africa without travelling documents, remained in the territory without seeking asylum or any other status, or who intended to seek asylum but for some reason have not yet done so. They sometimes further complicate their status by taking up employment in order to survive. These people stand a good chance of deportation without further inquiry. However, the circumstances of temporary illegality illustrated above will be further explored in this work in order to establish who really falls into the category of illegal immigrants and reasons behind it.





## 8 Sociological research findings

The findings of the in-depth interviews are grouped into two categories, responses from South African respondents and those from non-South African respondents.

### 8.1 South African respondents

From the South African respondents, eight themes were identified as below:

**(a) *A marked increase in the numbers of non-South African nationals into the country in recent years***

The research confirmed the generality of the perception that a large number of non-South African nationals have entered the country in recent years. Although the respondents acknowledge that non-South Africans have always lived in their communities, they also acknowledged that the high influx of non-nationals, especially from Zimbabwe, has contributed to the frustrations of locals.

**(b) *Lack of service delivery***

South African respondents feel that the government has not fulfilled its promise to provide for the basic socio-economic needs of the poorer segment of South African society. Such socio-economic needs include housing, access to healthcare, access to education and jobs. South African respondents feel that it angers locals when they see non-nationals with access to the aforementioned services, while locals remain unassisted.

**(c) *A general reliance on the government to provide for the poorer segment of the population***

It is evident that most of the South African respondents are frustrated at the government's lack of service delivery. Most South African respondents expressed the sentiment that the government is not doing anything to help them. From this, it can be observed that most local respondents rely on the South African government to cater for their most vital needs.

South African national from Mamelodi Township:

*In my township, there is an area called Lusaka, where there are many shacks. In the same area, many foreigners have RDP houses. A foreigner applies and after two years he gets an RDP while many South Africans are still waiting. This provokes the anger of many people.*

**(d) *A general sentiment that the government should tighten border controls***

Most South African respondents mentioned that they do not mind non-nationals who are in the country legally. However, they expressed frustration at the high numbers of non-nationals living in their communities illegally. In light of this, they mentioned the need for the government to tighten border controls.

South African from Mamelodi:

*Those who could are not in a position to help - the government is failing in its duty. The government must implement a system of border control and make sure there is no bribery or corruption in terms of service delivery.*

- (e) ***A general sentiment that the South African government should encourage other African governments to cater for the needs of their populations***

The general sentiment of South African respondents was that non-nationals enter the country because of political or military conflict in their own countries. While some respondents acknowledged that some non-nationals enter South Africa legally to work or study, the general sentiment was that non-nationals enter South Africa for the purposes of escaping conflict zones and improving their condition of life. In light of this, the majority of respondents held the sentiment that the South African government should assist in solving the problems of other countries (especially Zimbabwe) and encourage other African governments to cater for the needs of their people.

South African from Limpopo province:

*The government must communicate with their home countries and encourage the provision of basics in their own countries. They must make some form of agreement to help these people.*

A respondent from Ga-Rankuwa:

*They must get rid of Mugabe that is why all these people are coming to South Africa*

**(f) Access to socio-economic rights for non-nationals**

When South African respondents were asked whether non-nationals should be allowed to work, and access the socio-economic benefits afforded by the government such as RDP (Reconstruction and Development Program) houses and government grants, the respondents expressed mixed sentiments. Some respondents were of the view that non-nationals should be allowed to access governmental grants, RDP houses and anti-retroviral medication as long as they are legally in the country.

These are examples of different opinions that were expressed:

Moses\*, a South African student:

*Some foreigners pay taxes, and they are human beings, so they are entitled to it. They should be allowed these things as long as they are here legally.*

Marx\*, a resident of Mamelodi Township:

*Foreigners should not be allowed to own RDP houses, and should not be allowed to access government social grants. No, people from South Africa are struggling to access these things. If the government is financially stable, they should support South African citizens first.*

**(g) Reintegration**

Among South African respondents, there were mixed perceptions with regard to re-integration. Some respondents were of the opinion that the xenophobic violence was wrong and that non-nationals should be invited back into the community, while others held the view that it was too dangerous for non-nationals to return.

A man from Soshanguve:

*It is not safe in my area. Foreigners are treated badly because of their colour and things that they do, like crime- they do crime using magic and can steal invisibly- so people are very still angry about that.*

**(h) Repatriation**

South African respondents expressed mixed views with regards to repatriation of non-nationals. Some respondents said that illegal immigrants should be sent back to their countries and solve their own national problems, while other respondents expressed the view that many non-nationals come from countries that are experiencing crises of various kinds, and therefore they should be allowed to stay.

## **8.2 Non-South African respondents**

From the interviews with non-South African-nationals, seven prevalent themes were identified:

**(i) Lack of education**

The overwhelming majority of non-South African respondents find South African nationals to be xenophobic. In the general opinion of non-nationals, this xenophobic tendency can be attributed to the government's poor education of its people, especially

on the subject of the history of the country, and a lack of information about the assistance that South Africa received from other African countries during apartheid. Furthermore, non-national respondents are of the opinion that South African nationals need to improve their skills and abilities to employ themselves.

Central African citizen on what government can do to curb xenophobia:

*It's going to be a long journey because in the South African blood it is boiling. They should have started even just after freedom to try teach people, to teach them love, not only to love a South African, but to love any human being. Remembering that man was created in God's image. And what is eating at my brain is that the one called the kwerekwere is the black African. Not the white foreigner.*

#### **(ii) Political agenda**

The majority of non-nationals who were displaced by the 2008 xenophobic violence are of the opinion that the recent attacks on non-nationals were inspired by a political agenda, and that the African National Congress (ANC) mobilised people to perform these attacks.

A non-national on the causes of xenophobic violence:

*I think there is some other hidden agenda. I think there is even some Political reasons also. Because I remember some people just after the Polokwane conference people returning from the conference were telling us that you've got 17 months to get out of this country. Everyone we passed by was saying you've got 17 months to get out of the country.*

**(iii) *Inefficiency of the Department of Home Affairs***

Most of the non-South African nationals who had the status of *asylum-seekers* expressed frustration at the Department of Home Affairs, saying that the government department had not concluded within a reasonable period whether or not they qualified for refugee status. Some respondents expressed that they had visited the Department of Home Affairs monthly for over five years, but they still are considered to be asylum-seekers.

**(iv) *Poor policing***

Almost all of the non-South African respondents expressed the opinion that the South African police are corrupt and extremely xenophobic. The respondents generally described the police as rude, aggressive, corrupt and unhelpful to 'foreigners'. Most of the respondents displaced by the 2008 xenophobic violence mentioned that the police did not come to their assistance during the time of the violence.

**(v) *Repatriation***

In light of the 2008 xenophobic violence, some of the non-South African respondents mentioned that they want to return to their own countries in the near future. However, others (especially respondents from Rwanda, Burundi, Zimbabwe and Somalia) mentioned that they would rather endure the hardships of South Africa than return to the turmoil in their own countries, or be repatriated to a safer country.

Female non-national:

*I can't go back to my country. The South African government and people have shown that they don't want foreigners. They should take us to where we will be respected as human beings. I came here for safety, and found no safety.*

When the researcher tried to track down some of the non-nationals who had been displaced by the xenophobic violence, after the government offered to repatriate non-nationals who wanted to return to their countries, it was discovered that a large number of Zimbabweans, Somalis and Congolese had refused to return home, saying that conditions were worse in their own countries. Instead, they opted to accept the UNHCR cash donations and the temporary permits.

**(vi) Re-integration**

None of the respondents who had been displaced by the 2008 xenophobic violence were willing to be re-integrated into the communities from which they were displaced. Instead, they were all in favour of compensation for their losses and relocation to a safer country. When asked about repatriation, a Central African man, Jason\*, who had been living in Mpumalanga for nine years until he was displaced by the xenophobic violence, remarked as follows:

*Has that community changed? That's my first question. That hatred, does it not exist? Is it finished? No, it's still there. I told you. The hatred has taken root in the South African blood. They're trying to tell me to go back to that community. I'm not ready.*



Most of the displaced non-nationals who did not return to their countries are still staying in the refugee camps, having refused to accept re-integration.

**(vii) Access to socio-economic rights for non-nationals**

All non-nationals are of the view that they should be allowed to work in South Africa. When asked whether or not non-nationals should be allowed to work in South Africa, one European respondent said:

*Yes, because they do it anyway, and because of historical accident: the borders have been artificially drawn.*

A West African non-national, when asked the same question said:

*Of course! Where my husband works, there are thirty-eight vacancies for doctors, and only four doctors work there - there is a shortage of skills.*

When respondents were asked whether or not non-nationals should be allowed to access socio-economic benefits from the South African government, all non-nationals professed the view that they should have access to these benefits, but only after the needs of South African citizens have been met. One non-national respondent from Central Africa expressed the following view:

*If I come to visit at your home, I am not expecting my children to get the same treatment as your children, though my children, as human beings, should be able to get some small things like food and hospital.*

## **9 What are South Africa's legal obligations, if any, regarding xenophobic violence against foreign nationals?**

It must be pointed out from the outset that despite the magnitude of the problem of xenophobia, and unlike the closely related phenomenon of racism, there are no binding instruments at the international level that explicitly address the prohibition of xenophobia. Recourse is therefore had to existing treaties, creating a patchwork of provisions that may be relevant. These provisions will be examined at two levels, the first at a general level of provisions applicable to the rights of individuals generally, and, in the second instance, provisions that relate to individuals who fall into the category of foreign nationals in this study. Before getting into the analysis of legal obligations, it is pertinent to discuss briefly the law relating to treatment of foreign nationals resident in states other than their own. This discussion will set the tone, scope and context of the analysis into South Africa's legal obligations with respect to xenophobic violence.

### **9.1 The general responsibility of states over foreign nationals**

The responsibility of states over foreign nationals is a principle of public international law closely related to the law on diplomatic protection. It then follows that it is no new concept brought into discourse by modern international law. As a brief recap, the law on diplomatic protection, a rule of customary international law, was developed at a time when individuals were unknown to be bearers of rights in international law. Only states were duty and right bearers, exclusively enjoying the right to invoke proceedings against other states for breach of general international or treaty law, including violation of rights of nationals (protracted detention or expropriation

without compensation) of the complainant state resident in a foreign state.<sup>70</sup> Violation by a state of rights of individuals of another state would lead to 'indirect state responsibility' in the sense that since individuals were not subjects of international law, states owed duties amongst themselves.<sup>71</sup> Consequently, a state would vindicate its nationals rights 'on their behalf' through a claim for reparations paid to the complainant state and not to the injured individuals.<sup>72</sup>

### ***Standard of treatment***

Whereas the principle that states have responsibility over foreign nationals resident in their territories is barely controversial, the standard of treatment of foreign nationals by host states sparked a debate leading to the conceptualisation of two theories, namely, the 'international minimum standard' and the 'national treatment'. Vehemently supported by the famed Argentinean jurist Calvo, the 'national treatment' theory provides that states ought to treat foreign nationals in the same way they do their own

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<sup>70</sup> The violation of rights such as property rights of foreign nationals resident in another state by the host state amounted to violation of international law by the host state against the sending state. It was never interpreted as violation of rights in a way akin to one introduced by the human rights movement where individuals now claim reparations in their stead.

<sup>71</sup> Dugard (n 37 above).

<sup>72</sup> In the *Mavrommatis Palestine Concession Case*, the Permanent International Court of Justice (PICJ) held that 'by taking up a case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure in the person of its subjects respect of rules of international law'. Cited by Dugard (n 37 above) 282.

nationals.<sup>73</sup> On the other hand, the 'international minimum standard' approach hypothesized that 'there are fundamental international standards of justice by which municipal law is to be measured'.<sup>74</sup> Put differently, the notion is that there exist certain international standards of treatment of foreign nationals to which all states should conform.

The constitutive elements of this approach are both substantive and procedural. As Borchard postulated in 1940,<sup>75</sup> the substantive dimension of it comprises the recognition of 'certain elementary privileges of human existence' such as right to life and other rights connected with the 'earning of a living'.<sup>76</sup> As to the procedural, due process should always be guaranteed when dealing with foreign nationals. This analysis clearly shows that the international minimum standard carries with it a human rights flavour. There has also been a scholarly suggestion that the international minimum standard approach has already acquired customary international law status by virtue of its inclusion in commercial contracts, treaties, navigation treaties and judicial decisions.<sup>77</sup> Both approaches received strong criticism.

The major shortcoming of the national treatment theory was the undesirability of having variable standards forming the basis on which foreign nationals should be treated in different countries,<sup>78</sup>

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<sup>73</sup> This doctrine was widely accepted to the extent that it was adopted by the First International Conference of American States in Washington in 1899-1900. It was also drafted into article 9 of the Convention on Rights and Duties of States, Seventh Conference in Montevideo in 1933. As cited by Cholewinski (n 63 above) 43.

<sup>74</sup> Cholewinski (n 63 above) 44.

<sup>75</sup> Borchard (n 38 above).

<sup>76</sup> As above.

<sup>77</sup> As above.

<sup>78</sup> See R B Lillich, *International Law of State Responsibility for Injuries to Aliens* (1983) 17, as cited by Cholewinski (n 63 above) 43.

especially with the increase in totalitarian and tyrannical regimes in world politics. It was, therefore, desirable to have a minimum standard of an international nature so as to derive legitimacy from consensus upon which compliance with international law is generally based.

Despite Borchard's attempt to dissect and analyse what lies at the core of the international minimum standard approach, critics persisted that the main weakness of this approach is the inability to draw its parameters. However, for purposes of this research, Borchard's approach to the international minimum standard is sufficiently informative making it possible to compare the two approaches.

With regards to state practice in relation to the two approaches, Dugard observed that for reasons virtually unknown, states have naturally fallen into two divides, with the developing world supporting the equal treatment approach, while the developed world associated with the international minimum standard approval.<sup>79</sup> All in all, when comparing the two approaches back-to-back, the 'minimum standard offers aliens the possibility of an objective and

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<sup>79</sup> Dugard (n 37 above) 297. Our assessment of the debate strongly suggests that the reason could be economic and political as much as they could be anything else. If Borchard's approach is to be taken, the minimum standard approach is closely linked to the respect for human rights and more so, fair trial guarantees associated with procedural remedies to human rights protection. Running the risk of generalizing, developing states have always been found wanting when it comes to establishment of working institutions to consolidate democracy; hence they would rather support the equal treatment approach which gives them deference to apply any existing standards at national level. Developed states on the other hand have always taken the lead in providing protection of fundamental rights at domestic level, have pioneered regional human rights protection hence they are comfortable with associating themselves with a standard of treatment of aliens of an international character.

guaranteed level of protection potentially superior to that afforded by inadequate national laws'.<sup>80</sup>

## **9.2 International human rights norms and responsibility over foreign nationals**

The advent of the human rights movement after World War II did not only threaten the legitimacy of the above theories, but shook the foundations upon which they are established to the extent of making the debate 'defunct'.<sup>81</sup> This state of affairs was acknowledged as early as the 1950s when the United Nations Special Rapporteur to the International Law Commission on State Responsibility observed as follows:<sup>82</sup>

The conflict and antagonism formerly existing between the 'international standard' and the principle of equality of nationals and aliens have become obsolete in consequence of the political and juridical phenomenon in the post war world of the recognition of fundamental human rights, and hence it would be useless to continue to hope that either the 'international standard' or the principle of equality will prevail.

The new understanding of the relationship between nationals and foreign nationals was that the latter should enjoy similar civil rights and guarantees as nationals as long as this protection did not fall below the human rights standard. Cholewinski in fact further suggests that despite the relativity of the international minimum standard to fundamental rights, the human rights protection regime has elevated the standards of protection of both nationals and foreign nationals to an extent that the international minimum standard can no longer stand as a 'yardstick by which abuses are to

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<sup>80</sup> Lillich (n 78 above).

<sup>81</sup> Cholewinski (n 63 above) 46.

<sup>82</sup> G Amador, 'Third Report' in Yearbook of International Law Commission, 1958, Vol. II, UN Doc. A/CN.4/111, para 8 cited by Cholewinski (n 63 above) 46.

be measured'.<sup>83</sup> In fact human rights norms now serve as the ultimate standard in determining the obligations of states for protection foreign 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'.<sup>84</sup> 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 now proper to analyse how South Africa fits in the puzzle as informed by its constitutional framework. The analysis above paves the way for an informed examination of any existing obligations of South Africa regarding the treatment of foreign nationals in the context of the xenophobic violence. In the above scrutiny of the law on treatment of foreign nationals, it has come out clearly that such analysis can only be carried out successfully in the context of the human rights norms dictating the standard expected of states in this regard. It has also come out prominently that the reason why foreign nationals find themselves in the territory of a states other than the state of nationality is not relevant to the discussion.

Therefore, even though refugee law is the appropriate legal category to deal with the protection of certain categories of migrants, the influence of the human rights movement is difficult to ignore. We will hasten to suggest that if international human rights

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<sup>83</sup> As above. The author cautions against discarding the traditional approaches to diplomatic protection on the basis that the human rights movement, despite its undisputed efforts to revolutionize protection of aliens, has not really sucked in some powerful states such as the US, which is not part of many a international human rights protection mechanisms. The practice of such powerful states almost always dictates the pace at which international law develops.

<sup>84</sup> Cholewinski (n 63 above) 47.

norms could shake the well established foundations of the law on diplomatic protection, there is no reason precluding the same norms to inform 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, we will analyse South Africa's legal obligations for the protection of migrant foreign nationals who fell victims to xenophobic violence in tandem 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 frameworks.

### **9.3 South Africa's general obligations over foreign nationals**

#### ***9.3.1 The United Nations framework***

Within the global arena, South Africa has ratified several instruments that provide protection against discrimination and the violent manifestations that have characterised expressions of xenophobia in the recent past. Any response to xenophobia must be understood from the perspective that regardless of their status, foreign nationals can never be denied fundamental human rights.<sup>85</sup> These fundamental rights are enshrined in the Universal Declaration of Human Rights (UDHR) and the two International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR). South Africa has not ratified the latter Covenant, but has signed it, demonstrating an intention to abide by the principles enshrined therein.<sup>86</sup> In any case, the Constitution of South Africa assures socio-economic

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<sup>85</sup> ILO IOM OHCHR (n 23 above) 20.

<sup>86</sup> Vienna Convention on the Law of Treaties art 18.



rights to 'everyone' in the Bill of Rights, drawing no distinctions between categories of individuals.<sup>87</sup>

Consistent with the international human rights norms as the standard for the treatment of foreign nationals, some of the fundamental rights that foreign nationals are entitled to at the very minimum are the rights to life,<sup>88</sup> liberty and security of the person,<sup>89</sup> freedom from torture,<sup>90</sup> the prohibition of arbitrary arrest or detention,<sup>91</sup> fair trial rights,<sup>92</sup> freedom of movement and residence and exit,<sup>93</sup> right to asylum,<sup>94</sup> freedoms of thought, conscience, and religion,<sup>95</sup> opinion and expression,<sup>96</sup> assembly<sup>97</sup> and association.<sup>98</sup> Unlike the right to vote or the right to participate in the government of one's country which are predicated on nationality or citizenship, the foregoing rights accrue to 'everyone'. The obligations engendered by these rights are particularly important given the xenophobia in the context of South Africa that manifests as more than an attitude or perception. The social research that was carried out concurrently with the legal analysis confirmed the findings of other research projects by other organisations, which concluded that many South Africans are not keen to extend basic rights to foreign nationals and particularly not to undocumented migrants.<sup>99</sup> The vulnerability of foreign nationals is multiplied when these views are held by law enforcement officials or other state officials charged with the responsibility of

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<sup>87</sup> See issue (d) below.

<sup>88</sup> UDHR art 3; ICCPR art 6.

<sup>89</sup> UDHR art 3; ICCPR art 9.

<sup>90</sup> UDHR art 5; ICCPR art 7.

<sup>91</sup> UDHR art 9; ICCPR art 9.

<sup>92</sup> UDHR art 10; ICCPR art 14.

<sup>93</sup> UDHR art 13; ICCPR art 12.

<sup>94</sup> UDHR art 14.

<sup>95</sup> UDHR art 18; ICCPR art 18.

<sup>96</sup> UDHR art 19; ICCPR art 19.

<sup>97</sup> UDHR art 20; ICCPR art 21.

<sup>98</sup> UDHR art 20; ICCPR art 22.

<sup>99</sup> Crush (n 5 above) 27-28.

respecting and protecting the rights of foreign nationals.<sup>100</sup>

Article 13 of the ICCPR protects the rights of 'aliens' 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 collective or mass expulsions from a state, as each case requires to be processed on its own merit.<sup>101</sup>

In order to give effect to the rights in the ICCPR, states are required to adopt legislative, judicial, administrative, educative and other appropriate measures.<sup>102</sup> Though the obligations engendered by international instruments are binding on states and do not have horizontal effect, the state has the obligation to protect individuals 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'.<sup>103</sup>

Discrimination on the basis of nationality or social or ethnic origin is prohibited in both the instruments that set out the general fundamental rights of the individual,<sup>104</sup> but also in specialised instruments such as the Convention on the Elimination of all forms of Racial Discrimination (CERD),<sup>105</sup> Convention on the

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<sup>100</sup> Respondents to questionnaires during interviews with non-South Africans held in and around Pretoria reinforced the allegation that xenophobic perceptions thrive significantly in amongst members of law enforcement agencies in South Africa, especially the South Africa Police Service (SAPS).

<sup>101</sup> Human Rights Committee General Comment No 15 paras 9 & 10.

<sup>102</sup> Human Rights Committee General Comment No 31 para 7.

<sup>103</sup> Human Rights Committee General Comment para 8.

<sup>104</sup> UDHR art 2; ICCPR art 2.

<sup>105</sup> CERD art 5.

Rights of the Child (CRC),<sup>106</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>107</sup> Similarly in the field of employment, the ILO's Convention 111 concerning Discrimination in respect of Employment and Occupation prohibits discrimination based on national extraction or social origin.<sup>108</sup> Having ratified these instruments, South Africa is obliged to take all appropriate measures to ensure that there is equality of treatment for all individuals irrespective of their nationality.

The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in 2001 in Durban, South Africa, developed a programme of action in which states are urged to combat manifestations of generalised rejection of migrants including xenophobia.<sup>109</sup> The general applicability of human rights instruments regardless of the status of the migrant is reiterated.<sup>110</sup> Further, states are urged to take legislative, administrative and educative measures in relation to immigration, employment and a host of other areas in which migrants are likely to experience discrimination, racism and xenophobia.<sup>111</sup> The Durban Review Conference, a follow-up to the WCAR was held on 20-24 April 2009 in Geneva, Switzerland. The Review Conference assessed the progress that has been made since the WCAR and encouraged more action towards the fulfilment of the goals set in 2001.<sup>112</sup>

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<sup>106</sup> CRC art 2.

<sup>107</sup> CEDAW art 1.

<sup>108</sup> ILO C 111 arts 1 & 2.

<sup>109</sup> UN World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance Programme of Action (2001) para 24 available <http://www.unhcr.ch/pdf/Durban.pdf> (accessed 3 October 2008).

<sup>110</sup> As above.

<sup>111</sup> As above.

<sup>112</sup> See Durban Review Conference website <http://www.un.org/durbanreview2009/index.shtml> (accessed 25 February 2009).



□ A man wielding a butcher knife (circled) joins a gang of locals to go in search of foreigners in Reiger Park.

PICTURE: SHAYNE ROBINSON

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) recognises the susceptibility of migrant workers and their families to discrimination and deprivation of fundamental rights.<sup>113</sup> The protection it offers is particularly relevant to the present situation where migrant workers bear the brunt of xenophobic attitudes. States are obliged to respect and ensure the rights of all migrant workers and their families without discrimination. The state is required to ensure migrant workers rights including the right to equal protection of the law, to liberty and security of person, dignity, access to justice and due process, emergency medical treatment, access to basic education, protection against unauthorised confiscation or destruction of identity documents, and protection against collective expulsion. South Africa, which has not yet done so, should therefore ratify this instrument.

At the level of obligations owed specifically to foreign nationals, the CERD Committee has elaborated on how it understands the Convention applying to non-nationals.<sup>114</sup> States are obliged to include within their state reports on legislation that affects non-nationals including its implementation.<sup>115</sup> In addition, article 1 of the CERD which permits differentiation between citizens and non-citizens, it does not in any

way affect the rights of foreign nationals recognised in the International Bill of Rights.<sup>116</sup> As a general principle, any measures that differentiate on the basis of nationality should in the light of the objectives and purposes of the Convention be applied pursuant to a legitimate aim and proportional to achieving such an aim in order not to be considered discriminatory.<sup>117</sup>

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<sup>113</sup> CMW art 7.

<sup>114</sup> CERD Committee General Recommendation Nos 11 & 30.

<sup>115</sup> CERD Committee General Recommendation No 11 para 2; no 30 para 5.

<sup>116</sup> CERD Committee General Recommendation No 30 paras 1 & 2.

<sup>117</sup> (n 116 above) para 4.

Immigration policies should not be discriminatory in effect against persons on the basis of nationality or ethnic origin.<sup>118</sup>

States are encouraged to address xenophobic attitudes and behaviour towards non-nationals, in particular hate speech and racial violence and to take

resolute action to counter any tendency to target, stigmatize, stereotype or profile on the basis of race, ... national or ethnic origin, members of 'non-citizen' population groups, especially by politicians, officials, educators and the media, on the internet and other electronic communications networks and in society at large.<sup>119</sup>

The right to equal protection under the law and recognition before the law enables victims gain access to redress mechanisms against perpetrators of xenophobic violence and obliges states to take action against these perpetrators, and victims require just and adequate reparation for any damage suffered as a result of such violence.<sup>120</sup>

The prevalence of xenophobia evoked concern by the CERD Committee in its concluding observations to South Africa's state report in October 2006. The Committee as a result recommended *inter alia* that South Africa

... strengthen its existing measures to prevent and combat xenophobia and prejudices which lead to racial discrimination, and provide information on the measures adopted with regard to promoting tolerance, in particular in the field of education and through awareness-raising campaigns, including in the media.<sup>121</sup>

The CERD Committee also noted with concern the substantial back-log that exists in the determination of asylum applications, and the ill-treatment, including

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<sup>118</sup> (n 116 above) para 9.

<sup>119</sup> (n 116 above) paras 11 & 12.

<sup>120</sup> (n 116 above) paras 18.

<sup>121</sup> CERD Committee Concluding Observations South Africa CERD/C/ZAF/CO/3 19 October 2006 para 27.

extortion of documented and undocumented foreign nationals and the lack of investigation of these cases. The Committee recommended that South Africa hasten the application processing to reduce the backlog and also take appropriate measures to eradicate all forms of ill-treatment, including investigation, prosecution and punishment of offenders; provision of information to non-citizens about their rights and avenues of redress; education and training of law enforcement officials on human rights generally and Covenant provisions.<sup>122</sup>

The Convention against Torture (CAT) prohibits the deportation or other expulsion, *refoulement* or extradition of individuals to countries where there is substantial grounds for believing that such individuals would be in danger of being subjected to torture.<sup>123</sup> The definition of torture under the CAT is very specific and thus may only apply to a small category of foreign nationals within South Africa, since the vast numbers of foreign nationals enter the country in search of better economic opportunities.

The Convention Relating to the Status of Refugees provides for the rights and duties of refugees identifies several rights and benefits that are of particular importance to refugees such as non-discrimination, freedom of religion, right of association, access to courts, right to engage in employment amongst others.

### ***9.3.2 South Africa's obligations under the African Union regime***

The AU legal framework provides for both international human rights and humanitarian norms that are of relevance to the current discussion although they do not expressly address the phenomenon of xenophobia. During its 43rd Session

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<sup>122</sup> (n 121 above) paras 21 & 23.

<sup>123</sup> CAT art 3.

in Ezulwini in, Swaziland, the African Commission on Human and Peoples' Rights (African Commission) adopted a Resolution on the Situation of Migrants in South Africa.<sup>124</sup> Although it does not mention any specific obligations related to xenophobia, the Resolution makes a case that the human rights of migrants are 'covered under general regional and international human rights instruments, unless they qualify for protection under national, regional and international refugee laws and instruments'.<sup>125</sup> The remedial action urged in the Resolution was to 'investigate and prosecute those responsible for the attacks, and to institute further measures to ensure the protection of foreign migrants in South Africa, and their property'. It is, therefore, clear that the discourse on obligations of states over xenophobia hinges on the human rights allegedly infringed as opposed to suggesting the existence of specific rights.

As to African regional human rights norms, the African Charter on Human and Peoples' Rights (African Charter) stands out as the standard setting instrument for the protection of human rights on the continent. On the other hand, the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) spearheads the campaign for the protection of persons that cross national boundaries on the basis of well-founded fear of persecution on the grounds specified in article 1 of the OAU Refugee Convention.

What does it mean to say South Africa's obligations regarding the hate of foreign nationals and anything foreign as manifested through violence, perceptions and attitudes? We have already, in the definitional segment of this work, indicated that the focus of this work is on categories of migrants which include asylum seekers, refugees and undocumented

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<sup>124</sup> Resolution ACHPR/Res.131 (XXXXIII). Available at: [www.achpr.org](http://www.achpr.org).

<sup>125</sup> Para 3 of the Resolution.



migrants. As already stated above, the UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted by the General Assembly in 1985, provides a wide range of rights and freedoms extended to foreign nationals.<sup>126</sup> However, as it should, the debate on whether all the rights and freedoms contained therein constitute the standard of treatment is still raging.<sup>127</sup> A proposal that only those rights and liberties that have acquired customary international law status in the UDHR are part of the standard of treatment seems to have attracted scholarly support.<sup>128</sup> These rights and liberties include non discrimination on the grounds of race, right to a fair trial,<sup>129</sup> freedom from torture, inhumane and degrading treatment.

At the basic minimum level, South Africa is required by its own Constitution<sup>130</sup> and the African Charter to protect rights and freedoms (civil and political) such as the right to life, human dignity (integrity) which knows 'no nationality' but is 'inherent in all people-citizens and not (*sic*) citizens alike-simply

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<sup>126</sup> The majority of these rights are, however, civil and political rights with little reference to socio-economic rights directly related to the survival of a human being such as food, shelter, work etc.

<sup>127</sup> Dugard (n 37 above) 298.

<sup>128</sup> As above.

<sup>129</sup> Besides the usual judicial guarantees, with reference to foreign nationals the right anticipates consular visits before trial (see the *Chevreau Claim (France v UK)* (1931) 2 *RIAA* 1113, 1123 cited by Dugard (n above). For the codification of the rule see article 36(1) of the Vienna Convention on Consular Relations of 1963.

<sup>130</sup> Although it does not have extra-territorial application, the South African Constitution (1996) applies to all persons residing within South Africa including foreign nationals unless the exclusion of a category of persons is expressly provided. This is demonstrated by the use of phrase such as 'No one', 'Everyone' etc. Cholewinski suggested that these are the indicators of universal application and inclusion for protection of foreign nationals in principal universal and regional human rights instruments such as the UDHR, ICCPR etc.

because they are human',<sup>131</sup> non-discrimination on the basis of race, social origin, ethnicity and analogous grounds,<sup>132</sup> freedom of expression,<sup>133</sup> right to a fair trial with all its guarantees,<sup>134</sup> right to property.<sup>135</sup> Foreign nationals are also expected to have access to socio-economic rights such as education, health and social amenities.

As to the refugee legal framework, although the African Commission indicated that migrants are sheltered under the human rights framework unless they qualify for protection under refugee law, there is nothing to suggest that refugee law provides for any other possibility of protection other than the one offered by the human rights framework. The 1969 Convention is the first port of call when studying aspects of movement and protection of migrants in Africa. South Africa ratified the 1969 Convention on 15 December 1995.<sup>136</sup>

### ***9.3.3 South Africa's obligations under SADC***

The Southern African Development Community (SADC), 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.

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<sup>131</sup> Per Nugent JA in *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) 339 para 25. Article 4 of the African Charter

<sup>132</sup> See article 2 of the African Charter. The concept of analogous grounds in constitutional law was developed in accordance with the presumption in law that the legislature cannot contemplate every situation to which law should apply in future. It provides for the possibility of adding certain criteria to a statutory list on the basis that the criterion that is sought to be included has the same effect just like one or more of the criterion already included in a statutory provision.

<sup>133</sup> Article 9 of the African Charter.

<sup>134</sup> Article 7 of the African Charter.

<sup>135</sup> Article 14 of the African Charter.

<sup>136</sup> Ratification status available at: <http://www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf>.

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,<sup>137</sup> 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.<sup>138</sup> 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 existing international framework as provided by international refugee law instruments.<sup>139</sup> 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 organisation, the Treaty of SADC<sup>140</sup> in article 4(c) provides for 'human rights, democracy, and the rule of law' as one of the principles to drive the organisation. 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.<sup>141</sup> This Tribunal has a hazy human rights jurisdiction which it has interpreted to arise from articles 4 and 15 of the Treaty of SADC.<sup>142</sup> It still remains unknown whether it

<sup>137</sup> Available at: <http://www.sadc.int/index/browse/page/171>.

<sup>138</sup> Available at: <http://www.sadc.int/index/browse/page/149>.

<sup>139</sup> See article 28 of the Draft Protocol.

<sup>140</sup> Available at: [http://www.sadc.int/index/browse/page/119#article 4](http://www.sadc.int/index/browse/page/119#article%204).

<sup>141</sup> SADC Tribunal Protocol available at: <http://www.sadc.int/tribunal/protocol.php>.

<sup>142</sup> *Mike Campbell (Pvt) Ltd & 78 Others v the Republic of Zimbabwe* Case no. SADC (T) 02/2007.

has jurisdiction to deal with disputes between individuals and states on refugee law.

### ***9.3.4 South Africa's obligations under the national framework***

At the national level, South Africa possesses a rich constitutional jurisprudence on state obligations in relation to citizens and foreign nationals within its territory. It is beyond dispute that the Constitution, unless expressly provided differently, accords comprehensive rights and freedoms to 'everyone' in South Africa contained in the Bill of Rights to be interpreted and applied consistently with international law.<sup>143</sup> The synergy between the constitutional framework and refugee law will inform the discussions to follow.

With regard to refugee law, South Africa attracted obligations and rights confirmed by domesticating, among other similar treaties, the 1969 Convention when it adopted the Refugees Act 130 of 1998 (Refugees Act). Confirming that the Refugees Act was adopted to domesticate international treaties, the Preamble to the Refugees Act provides as follows:<sup>144</sup>

*Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.*

Despite the noble decision to domesticate the major refugee law instruments, a perusal of the Refugees Act provides no tangible reprieve for the plight of xenophobia victims. In our view, the protection contemplated by the humanitarian regime is in the first instance, protection from the conditions in the

<sup>143</sup> See section 39 of the South African Constitution, 1996.

<sup>144</sup> Emphasis added.

country of nationality that form the basis of a 'well-founded fear of persecution'. Any other form of protection whilst the asylum seeker or refugee is in the country of protection becomes intermingled in the principles governing the treatment of foreign nationals. Our conclusion is that the required standard of treatment remains that provided for under international human rights law.



## **10 South Africa's obligations in respect of xenophobic violence**

### **10.1 The factual background**

The interviews contacted by the social researcher in this project made both specific and general, but relevant conclusions. Some respondents were very convinced that after careful planning by perpetrators, xenophobia manifested in violence in and around Pretoria and throughout the country. Since the violence was authored and executed by fellow members of the community, it involved not only death and serious bodily harm, but arson and theft of victims' personal property. In fact theft and looting was one of the items on the agenda of the perpetrators. There was no distinction between documented and undocumented migrants or distinction based on the place of origin of the foreign nationals. The target description was 'foreigners'. It is pertinent to note that the violence also took an ethnic dimension with some South Africans from other parts of the country being classified as 'foreigners' for purposes of perpetrating violence on their persons.

### **10.2 The legal framework in relation to violence**

In its ordinary meaning, the word 'violence' according to the *Oxford Concise English Dictionary*,<sup>145</sup> has four possible definitions. First, it is the 'quality of being violent'. Second, it refers to 'violent conduct or treatment; outrage, injury'. Third, taking a legal dimension, it depicts 'the unlawful exercise of physical force'. Fourth, still in the legal realm, it also includes 'intimidation by the exhibition of this'. In this case 'this' refers to 'violence'. Since the first and second

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<sup>145</sup> *The Concise Oxford Dictionary of current English* (1995) 1564.

definitions resorted to the use of the word 'violent', it is necessary to find out the meaning of 'violent' since defining a word by itself or by its variant is usually very unhelpful. 'Violent' means 'using or tending to use aggressive physical force'.<sup>146</sup> From all these expressions; what comes out prominently is that violence involves the use of unlawful physical force or the threat of resorting to such, sometimes involving injury.

Article 9 of the ICCPR as read with article 6 of the African Charter and section 12 of the Constitution, provides for the right to protection and security of the person. In particular, section 12 of the Constitution is comparatively more elaborate than the other instruments. It provides as follows:

***Freedom and security of the person***

12(1) Everyone has the right to freedom and security of the person which includes the right to:

- (a) ...
- (c) to be free from all forms of violence from either public or private sources;
- (d) ...
- (e) not to be treated or punished in a cruel, inhuman or degrading way
- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
  - (a) ...
  - (b) to security in and control over their body;
  - (c) ...

Perhaps presenting a clear departure from the erstwhile constitutional order of South Africa before the adoption of the 1996 Constitution, the provision quoted above stands out prominently from the normative international human rights instruments, which concentrates on elaborating on the rights and guarantees of an arrested person. The Constitution elaborates on the elements of the right to the security

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<sup>146</sup> As above.



of the person. We will not venture into interpreting the quoted provision or any of the referred international instruments as respective judicial and quasi-judicial bodies established to monitor their implementation have already done so.

In *Chongwe v Zambia*,<sup>147</sup> the author of the complaint alleged that he was shot at and wounded by Zambian security forces. The state ignored calls to launch an investigation. The investigation carried out by the police was not made public. Dealing with the merits of the complaint, the UN Human Rights Committee (UNHRC) confirmed its previous jurisprudence holding that article 9(1) of the ICCPR protects the right to the security of a person 'also outside the context of formal deprivation of liberty'.<sup>148</sup> Furthermore, it was held that a state party cannot 'ignore threats to the personal security of non-detained persons subject to its jurisdiction'.<sup>149</sup> The UNHRC accordingly found Zambia in violation of, among other provisions, article 9(1) of the ICCPR and recommended the launching of effective investigations in order, if necessary, to hold perpetrators accountable and possible payment of damages to the author in the event that investigations and prosecutions finds government agents responsible for the shooting incident.<sup>150</sup>

It was in fact in *Paez v Colombia*<sup>151</sup> where the UNHRC had to resort to the *travaux préparatoires* of the ICCPR to decipher the intention of the drafters of the text in relation to the context of the right to security of the person. It was concluded that although the right to security of the person was drafted into provisions relating to detained persons, 'there is no

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<sup>147</sup> (2001) AHRLR 42 (HRC 2000).

<sup>148</sup> As above, para 5.3.

<sup>149</sup> As above.

<sup>150</sup> As above, para 7.

<sup>151</sup> Case No. 195/1985 CCPR/C/39/D/195/1985, Decision of 12 July 1990.

evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty'.<sup>152</sup> It was held further that state parties should take appropriate and reasonable steps to protect people whose person is threatened even though they fall out of the detained category. Ignoring such threats would render the protection ineffective.<sup>153</sup> This jurisprudence was followed in *Dias v Angola*,<sup>154</sup> and now in the *Chongwe* case.

The Constitutional Court of South Africa (CC) dealt with the liability of the state in delict for the negligent acts of its agents acting in the scope and manner of their employment, namely, the police and prosecutors. In *Carmichele v Minister of Safety and Security & Others*,<sup>155</sup> the applicant sued the respondents in the Cape High Court for damages arising out of injury sustained at the hands of an accused person on bail. The claim was based on allegations of negligent acts of the police (the investigating officer) and the prosecutor handling the case, who, despite having evidence indicating that the accused person was not a proper candidate for release on bail, failed to present such information before the magistrate presiding over the accused person's bail application. The accused person had previous criminal records of violent crime. Despite this fact being known to the investigating officer and prosecutor, he was released on bail where after he attacked the applicant.

In summary, the applicant's argument both in the High Court and Supreme Court of Appeal (SCA), where both decisions were an absolution from the instance, was that the common law applicable to South Africa should be developed to recognise the liability of the state where agents fail to protect a citizen's right to

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<sup>152</sup> As above, para 5.5.

<sup>153</sup> As above.

<sup>154</sup> Communication No. 711/1996 CCPR/68/D/711/1996, Decision of 18 April 2000.

<sup>155</sup> (2001) AHRLR 208 (SACC).

security among other rights, which duty is sanctioned by the Constitution. Expressing its opinion that the facts establish an arguable case against both the police and prosecutors, the CC referred to the finding of the House of Lords in *Barrett v Enfield London Borough Council*<sup>156</sup> as well as the European Court for Human Rights in *Osman v The United Kingdom*.<sup>157</sup> And furthermore, the unfavourable decision of the House of Lords in *X & Others v Bedfordshire County Council*<sup>158</sup> led to litigation before the European Court in *Z & Others v United Kingdom*.<sup>159</sup>

Put across in general terms, the *ratio decidendi* in all these cases was that a state or a local authority should be held liable in delict or tort for negligent acts of its agents involving injury to the rights of the public protected in the bill of rights and international human rights instruments in view of the immunity to liability ordinarily enjoyed by a state or local authority. The message sent out by the different courts and tribunals mentioned above is that indeed states have a case to answer to claims based on negligent acts of their agents. The principles of causation, foreseeability and nexus are sufficient to shield the state in the event of frivolous and vexatious claims for damages.<sup>160</sup> Holding otherwise would effectively preclude plaintiffs

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<sup>156</sup> [1999] 3 All ER 193.

<sup>157</sup> 29 EHHR 245.

<sup>158</sup> [1995] 2 AC 633 (HL). In this case the House of Lords followed its previous track of jurisprudence in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) to the effect that the police should be shielded from tortious claims on the basis that allowing such claims would 'divert' the police from their main duty to suppress crime by exposing it to liability, which approach is against the common interest of the community as a whole. The *Osman* and *Z* cases represent European Court jurisprudence which is in stark contrast to the reasoning of the House of Lords. The *Barrett* case demonstrates the harmony that now exists between the House of Lords and European Court jurisprudence on this issue.

<sup>159</sup> European Court of Human Rights judgment of 10 May 2001.

<sup>160</sup> See the *Carmichele* judgment, para 49.

from having available to them an appropriate means to challenge state conduct.<sup>161</sup>

Whereas the above South African and English national cases represent the principles relating to the delictual liability of states for the acts of its agents at domestic level, the Inter-American Court for Human Rights (Inter-American Court) case of *Velasquez v Honduras*<sup>162</sup> elaborated on state responsibility over the acts of its agents or private parties as follows:<sup>163</sup>

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

As to preventive and other measures a state is required to put in place measures to guarantee protection of rights, the *Osman* case was right on the point:<sup>164</sup>

It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

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<sup>161</sup> The *Bedfordshire* judgment, para 111.

<sup>162</sup> Available at: <http://www.corteidh.or.cr/casos.cfm> (Accessed on 24 October 2008).

<sup>163</sup> As above, para 172.

<sup>164</sup> *Osman* (n 157 above) para 115.

### 10.3 The liability analysis

Whilst the recount of facts relating to what transpired during the xenophobic violence could be controversial, the findings of the interviews carried out shortly before this legal analysis confirms certain critical facts consistent with the state's responsibility for injuries sustained by the victims at the hands of private individuals. We now proceed to briefly marry the facts to the law in the analysis that follows.

First, in its concluding observations on South Africa's state report in 2006,<sup>165</sup> the CERD Committee urged South Africa to 'strengthen existing measures' in order to combat xenophobia, and all forms of ill-treatment of non-citizens. Despite this warning, there is no evidence to show that there existed any 'existing measures' that could be exploited in order to deal directly with the problem of xenophobia in South Africa. In addition, the CAT Committee also recommended the investigation of ill-treatment of foreigners and effective monitoring of the repatriation centres to ensure their compliance with human rights standards.<sup>166</sup> The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism expressed surprise at the prevailing perception even within government that despite the clarity of the Constitution, illegal immigrants would not enjoy rights in South Africa.<sup>167</sup>

Second, in view of the absence of existing measures strengthen or exploit, one would have expected the state to adopt the recommendations of

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<sup>165</sup> CERD Concluding Observations South Africa CERD/C/ZAF/CO/3 19 October 2006 para 27.

<sup>166</sup> CAT Concluding Observations South Africa CAT/C/ZAF/CO/1 7 December 2006 para 16.

<sup>167</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms Mission to South Africa A/HRC/6/17/Add.2 7 November 2007 para 38.

the *Osman* judgment cited above, namely, putting in place legislative provisions 'backed up by law enforcement' with a criminal sanction in order to prevent and suppress violation of rights through acts such as xenophobic violence. While it might be argued that the existing criminal law framework could have been used to curb xenophobic violence, our view is that the parameters of the phenomenon of xenophobia are generally unknown in order to assist law enforcement agencies in knowing what exactly they are enforcing the law against. Even if they could, their personal circumstances in some instances made it impossible to achieve the objective. Interviews conducted concluded that many police agents exhibit very high levels of xenophobic attitudes, which obviously interfered with their objective assessment of the situation and, therefore, the manner of intervention. The state has failed in its duty to provide such legislative and other policing measures to curb the spread of xenophobia.

Third, some respondents assumed that rumours of xenophobic violence started spreading soon after the African National Congress (ANC) conference held in Polokwane in December 2007. While this statement may be the subject of heated debate, it is generally accepted that speeches with xenophobia overtones began well before May 2008, but only culminated into acts of violence as witnessed across the country. Despite this clear evidence of brewing intolerance of foreign nationals, no investigation was launched in order to initiate preventive interventions. Whether such failure could be attributed to incapacities in the force due to lack of expertise or simply failure by government to make and implement a policy would not help the situation as that amounts to gross negligence motivating for liability more than it excuses the state.

Fourth, the manner in which the violence was managed by law enforcement agents received scathing

public criticism. Notwithstanding the obvious fact that the police was ultimately overwhelmed by the rowdy crowds beating up foreign nationals, calls for military personnel intervention reached deaf ears. The unfortunate fact is that the more the state was in denial of the extent of the violence the more casualties the violence produced in the process. In our view there is no better case that could be made to find the state in violation of its duty to protect its citizens and foreign nationals under its jurisdiction than a case such as the current one where people continued to be killed whilst the state refused to deploy more effective protective measures within its capacity to do. The law relating to the right to security of person has already been enunciated above. It includes the duty to protect individuals from threats of violence to violence itself as well as liability arising out of omission to act, both of which are constitutionally prohibited.<sup>168</sup>

Fifth, the aftermath of the violence witnessed further dereliction of the duty owed by the state to victims of xenophobic violence. The remedial measures arising out of events that attracted international attention when they occurred should have been of a similar magnitude in sending a message that although South Africa was not astute in preventing the violence, its commitment to redressing the adverse consequences are loud and clear through effective investigations, arrest, and punishment of perpetrators of such violence. However, investigating the violence might be sufficient reparation to victims, other forms of reparations should have been adopted to compensate for loss of life, property and the inhuman and degrading treatment suffered by victims. As it stands, the state has either failed to investigate or make public the outcome of that investigation thereby losing an opportunity to initiate the dialogue of tolerance of foreign nationals among local

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<sup>168</sup> See the UNHRC jurisprudence on right to security of the person in the *Chongwe* case above.

populations whilst the events and international condemnation of such events is still fresh in people's minds. This is exactly what the *Chongwe, Paez and Dias* jurisprudence urged and concluded.

On the basis of the analysis above, we hereby conclude that the state was in violation of the right to the security of person of the survivors of and victims who died during the 2008 xenophobic violence that took place in South Africa. In particular that is a violation of section 12 of the Constitution, articles 9(1) and 6 of the ICCPR and the African Charter. The victims ought to be offered reparations taking both pecuniary (monetary compensation) and non-pecuniary (such as investigations, prosecution and punishment of perpetrators) nature depending on the circumstances of each case.

#### **10.4 Preliminary conclusion**

In conclusion, a number of observations have been made regarding South Africa's legal obligations over foreign nationals in respect of xenophobia and its manifestation through violence.

First, there are no specific instruments that address the issue of xenophobia. To that end, recourse should be had to the human rights framework as providing the standard for such protection.

Second, states have a general obligation to treat foreign nationals in a civilised way, which standard is no longer the national treatment or the international minimum, but the standard consistent or better than the one sanctioned by international human rights norms.

Third, there are national and supranational human rights instruments that protect individuals from xenophobic violence.



Fourth, both the universal and regional human rights protection system backed up by the South African Constitutional framework provide for more or less similar rights and liberties of both nationals and foreign nationals.

Fifth, the sound humanitarian legal regime applicable to and in South Africa does not contemplate addressing the plight of migrants within the context of xenophobia.

Sixth, based on the above analysis, South Africa has human rights obligations over foreign nationals in respect of the manifestations of xenophobia through violence, perceptions and attitudes, which obligations were violated and continue to be violated by failing to provide remedies.



**BLOODLUST:** A mob from the Ramaphosa informal settlement marches down a road in Reiger Park.

PICTURE: STEVE LAWRENCE

## 30 000 foreigners displaced and thousands flee South Africa



**IN THE LINE OF FIRE:** A soldier keeps watch as the South African National Defence Force and the police conduct a joint operation aimed at quelling xenophobic violence at a hostel in Actonville, east of Johannesburg, on Friday night. This is the first time the army has been deployed on the streets since the state of emergency of 1994/95.

Picture: SIMPSONE NEWELL

## **11 What are South Africa's obligations, if any, regarding the repatriation of foreign nationals resident in its territory?**

### **11.1 The factual background**

In the aftermath of the xenophobic violence, various solutions were proposed to address the plight of the displaced victims of violence. In the first instance refugee camps were set up to accommodate the victims and provide them, in the short term, with material necessities such as shelter, food and water. It was always understood that these camps were temporary and therefore more permanent solutions were being sought. With the imminent closure of camps and increasing doubts by the victims as to the feasibility of return and re-integration into the communities within which the violence had taken place, certain of the victims opted to return to their countries of origin.<sup>169</sup> It was also reported that hundreds of other foreign nationals affected by the violence were rounded up in the camps, taken to Lindela Detention Facility and deported (some despite their refugee or asylum seeker status) without consideration for their safety in their countries of origin and in disregard of a court order prohibiting the deportations.<sup>170</sup>

At the same time, hundreds of people were reported to have 'voluntarily' repatriated while the

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<sup>169</sup> P Rulashe 'UNHCR begins repatriating victims of xenophobic violence' UNHCR 27 August 2008 available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7HWMZF?OpenDocument> (accessed 28 October 2008).

<sup>170</sup> Lawyers for Human Rights Press Release on an urgent application challenging the unlawful detention and deportation of refugees 14 October 2008 available <http://www.lhr.org.za/news/2008/lhr-urgent-application-challenging-unlawful-detention-and-deportation-refugees> (accessed 29 October 2008).

xenophobic violence was going on, raising questions as to whether this was genuine voluntary repatriation notwithstanding any information regarding the conditions they fled from when they came to settle in South Africa. Despite their inclination to despotic leadership, governments of some countries like Zimbabwe further complicated the situation by providing free transport to Zimbabwean exiles who intended to go back home. This, in our view, was not a demonstration of the willingness and ability of Zimbabwe to provide protection to its nationals as contemplated by international refugee law. It was a desperate political gimmick aimed at portraying to the international community a false atmosphere that there is tranquillity and peace in Zimbabwe, and that there is no crisis. In actual fact this was a lip-serviced care for citizens whom the government drove out of the country through political persecution in the aftermath of the Zimbabwe African National Unity-Patriotic Front (ZANU-PF)-stolen presidential elections held in Zimbabwe during early 2008.

Another good and clear example of involuntary repatriation is that of the Somalis refugees and asylum seekers referred to earlier in this report. After the closure and destruction of the Akasia Camp in March 2009, this group of people requested to be taken to Lindela Detention Centre to be kept there awaiting repatriation. This was not because repatriation was their choice, but because they felt so unsafe in South Africa such that it was 'better off' to be taken back to Somalia. Fortunately, they were not admitted to the Lindela Detention Centre on account of the fact that they were documented immigrants.<sup>171</sup> As will be demonstrated below, all these facts depict a gloomy picture of inability of states to live up to the

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<sup>171</sup> These facts are based on the interviews carried out by the Centre for Human Rights and its partners on 7 March 2009 in Randfontein where the respondents currently reside.

expectations of their international obligations arising out of international refugee law.

## 11.2 The legal framework with regard to repatriation

Repatriation is often used to depict the voluntary return of former refugees to the territory of origin following the cessation of international protection in relation to them. In this study, 'repatriation' is used to mean returning an individual to their homeland, voluntarily or otherwise. Repatriation takes on different connotations depending on the different contexts in which it is applied. For instance, repatriation may be voluntary as is applied by the UNHCR in the context of durable solutions for the management of refugee situations.<sup>172</sup> The promotion and facilitation of voluntary repatriation is the sole responsibility of the UNHCR.<sup>173</sup> Voluntary repatriation is applied in the context of refugees because the grant of refugee status may depend on a subjective fear of persecution in their country of origin. At any rate, the objective test applied in the case of mass influxes of asylum seekers due to *inter alia* events seriously disturbing public order<sup>174</sup> recognises that individuals flee because of very real threats to their lives.

In their order of preference, repatriation ranks top of the list of 'durable solutions' to the problem of refugees alongside settlement or assimilation (integration) as well as resettlement in a third country. This is based on the notion that despite being in the process of fleeing adverse conditions from country of origin, a refugee always entertains a wish that one day they will be able to return to the country of origin. To bolster this expectation, returning to country of origin has always been treated as a right of refugees with a corresponding duty on the sending state to receive

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<sup>172</sup> See Art. 5 of the OAU 1969 Convention.

<sup>173</sup> Goodwin-Gill (n 39 above) 492.

<sup>174</sup> OAU Refugee Convention art 1(2).

such returnees unconditionally.<sup>175</sup> In stark contrast, the granting of asylum is an absolute privilege. This, in our view, has led international refugee law to develop in a way consistent with treating international protection of refugees as a temporary arrangement – the default approach.

The 1951 Refugee Convention does not explicitly address the issue of voluntary repatriation. However, refugee status ceases if a refugee voluntarily returns and re-settles in the country of origin.<sup>176</sup> Similarly, the OAU Refugee Convention describes the cessation of refugee status as occurring when a refugee ‘has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution’ or ‘can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality’.<sup>177</sup>

### 11.3 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 refugee law.

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<sup>175</sup> Goodwin-Gill (n 39 above) 489.

<sup>176</sup> UN Refugee Convention art 1C(1) & (4).

<sup>177</sup> OAU Refugee Convention art 1(4) (d) & (e).

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.<sup>178</sup> Soft law also abounds with similar sentiments.<sup>179</sup> However, Goodwin-Gill and Macadam observed that this proposition is easier said than proven.<sup>180</sup> 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.<sup>181</sup> For this reason the OAU 1969 Convention

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<sup>178</sup> Art 3 of the UN Convention Against Torture, art 7 of the ICCPR wherein the UNHRC in General Comment No. 31 interpreted the provision to include *non-refoulement* to cover torture, inhuman 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 inhumanly or degradingly. See also art 22(8) of the American Convention on Human Rights, Art. 12(3) of the African Charter, art 3 of the European Convention on Human Rights wherein the European Court of Human Rights interpreted art 3 in *Soering v UK* (1989) 11 EHRR 1 as being violated when state extradites a person to a country where he could be tortured or treated inhumanly or degradingly. For commentaries on *non-refoulement* and customary international law status, see K Hailbronner, 'Non-Refoulement and Humanitarian Refugees: Customary International Law of Wishful Legal Thinking', (1986) 26 *Virginia Journal of International Law* 857.

<sup>179</sup> On soft law on *non-refoulement*, see the UNHCR Executive Committee Conclusions available on [www.unhcr.org](http://www.unhcr.org).

<sup>180</sup> As above.

<sup>181</sup> *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 Goodwin-Gill (n 39 above) 208.

and the American Convention have been commented for being elaborate on the scope of application of the principle.<sup>182</sup> Further to the scope of application, the authors concluded thus:<sup>183</sup>

Equally irrelevant is the legal or migration status of the 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.

The accepted exceptions to the application of *non-refoulement* are national security in the sense that where a particular person or group of persons pose a 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 & Multicultural Affairs*,<sup>184</sup> 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.

Concerns have been raised about voluntary repatriation, including the extent to which return is voluntary, and the voluntary repatriation in situations where the receiving state is not yet in a position to guarantee the safety of returnees. There are certain

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<sup>182</sup> Goodwin-Gill (n 39 above) 208.

<sup>183</sup> As above, 233.

<sup>184</sup> [1999] FCA 227



practices which amount to 'constructive *refoulement*' such as subjecting asylum seeker and refugees in squalid conditions in immigration detention centres or expose them to violence in order to influence them to leave the territory under the guise of voluntary repatriation.<sup>185</sup>

In the case of South Africa and the xenophobic violence this is similarly an issue. 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 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.<sup>186</sup>

#### **11.4 Deportation of refugees and asylum seekers is contrary to international law principles and contrary to South Africa's Refugee Act**

It is settled in international law that a state may, subject to treaty obligations, exercise its sovereign

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<sup>185</sup> See the Somali refugees case discussed above. The authors take the view that such was a clear case of constructive *refoulement* where the refugees were forced to reintegrate in communities where integration was patently impossible. As a result, the group sought to be 'voluntarily repatriated' to Somalia, a place where no authority exists to assume responsibility over these people. There is no better case of constructive *refoulement* of recognised refugees as this.

<sup>186</sup> Lawyers for Human Rights Press Release on an urgent application challenging the unlawful detention and deportation of refugees 14 October 2008 available <http://www.lhr.org.za/news/2008/lhr-urgent-application-challenging-unlawful-detention-and-deportation-refugees> (accessed 29 October 2008).

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 Peoples' Rights to be a violation of the African Charter.<sup>187</sup>

The Constitutional Court of South Africa (CC) has also had occasion to decide on the treatment of illegal foreigners in a case<sup>188</sup> 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 foreigners 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).<sup>189</sup> In the process of deciding this issue, the CC underscored the necessity of affording constitutional safeguards to detained persons including illegal foreigners.<sup>190</sup> Foreign nationals have the same constitutional rights as South African citizens unless the contrary clearly emerges from the Constitution.<sup>191</sup>

### 11.5 Liability analysis

While the details of what may have happened in relation to the repatriation of foreign nationals following the xenophobic violence are somewhat sketchy in this study, it became clear that soon after

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<sup>187</sup> *Organisation Mondiale Contre la Torture and Ors v Rwanda* (2000) AHRLR 282 (ACHPR 1996).

<sup>188</sup> *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* Case CCT 18/03 2004 (4) SA 125 (CC).

<sup>189</sup> Paras 42-43.

<sup>190</sup> Para 42.

<sup>191</sup> *Patel & Another v Minister of Home Affairs & Another* [2000] 4 All SA 256 (D).

the violence ceased, the group of victims was made up of at least three distinct elements. First, there was the category of officially recognised refugees, some of whom still yielded their refugee identity documents and some who lost them during violence. Second, there were the asylum seekers, who held temporary permits, some of whom lost the permits and those who still had them. Third, there were 'economic migrants' and other migrants, who had not yet approached authorities to apply for asylum and also those who simply did not intend to do so. The third component could be collectively referred to as 'illegal immigrants'. However, for the reason that both formally recognised refugees and asylum permit holders who no longer possessed immigration papers had become indistinguishable, the whole group could easily be incorrectly deemed to be made up of 'illegal immigrants'.

Having regard to the composition of the above group, our position is that all of them were eligible for protection under the principle of *non-refoulement*. It has been settled that *non-refoulement* applies to asylum seekers at frontiers as well as to those already in the territory of the host state, with their illegal immigrant status being irrelevant. Refugees and asylum seekers are entitled to exercise a voluntary option to return to their countries of origin, and upon return their status expires. There are reports that confirm that despite the government's commitment not to repatriate victims of xenophobic violence, some were ferried from the camps to Lindela Detention Facility and eventually deported.<sup>192</sup> Our position is that the state should have allowed the victims a temporary reprieve to enable them to have their

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<sup>192</sup> Remarks made by a Lawyers for Human Rights official during a meeting with one of the researchers in this project in February 2009 amid a discussion on some litigation going on in the Pretoria High Court involving asylum seekers whose permits have expired and the government is refusing or delaying to renew them.

refugee status restored, or temporary asylum permits re-issued or the application for asylum by first-timers. Mass deportation of such individuals was a clear violation of international refugee law. *Non-refoulement*, although it sounds like automatic admission to asylum, serves to oblige the host state to admit asylum seekers while a solution is being sought. One of the solutions is to determine whether such people are indeed in need of protection. If so, then refugee status is conferred. If not, the state has a sovereign right to deport them having been convinced through the asylum application process that it is not returning them to face possible persecution.

Furthermore, under the circumstances in which certain victims of xenophobia opted for repatriation seemingly of their own volition, it is doubtful whether their decision could be termed as truly voluntary. We have already mentioned the practice by some states of constructive *refoulement*. We reiterate our position that there was a clear case of constructive *refoulement* when migrants opted to return to their countries during the currency of the violence simply because they did not receive the requisite protection by the state from violence and bodily harm. In the first issue, we assessed the conduct of the state regarding the inadequacies of intervention strategies that we concluded to have been negligent and incongruent to the magnitude of the violence. Flowing from that failure to protect victims from violence we have concluded that the exposure to violence left victims without a choice but to unwillingly leave the territory in circumstances replicating 'constructive repatriation'.

There were mixed signals from the Department of Home Affairs as to whether those foreign nationals in the country illegally, and who had fallen victim to the

xenophobic violence would be deported or not.<sup>193</sup> The fact that the illegal status of these foreign nationals came to light in the context of the xenophobic violence and the accompanying destruction of personal property including identity documentation, should be cause for the exercise of caution during the deportation process. In this situation, the failure to produce identity documents or immigration permits would not necessarily mean that the affected individual was in the country illegally. The procedure adopted to replace lost documents<sup>194</sup> would appear to have been the correct approach to deal with the problem. Where the possibility of deportation arose, such eventuality should only have been taken once the individual had gone through the full asylum process and the state had scrupulously respected the various legal provisions in place to safeguard the rights of foreign nationals, primarily due process rights.

The arbitrary arrest and subsequent deportation of refugees and asylum seekers was contrary to international and national law. The deportation of other foreign nationals on the basis of being in the country illegally, contrary to declarations by the Minister of Home Affairs that no-one affected by the xenophobic violence would be subjected to deportation, is not only morally reprehensible, but also illegal.<sup>195</sup> This is much more so where the foreign nationals were subjected to mistreatment at the hands of government officials. Therefore, three conclusions come out clearly in this analysis; first, it is clear that the state has a duty by virtue of the *non-refoulement*

<sup>193</sup> 'Govt: Victims of xenophobia won't be deported' *Mail and Guardian online* 20 June 2008 <http://www.mg.co.za/article/2008-06-20-govt-victims-of-xenophobia-wont-be-deported> (accessed 31 October 2008).

<sup>194</sup> As above.

<sup>195</sup> 'Amnesty International calls on government to protect those at risk of "xenophobic" attack' Amnesty International Public Statement 23 May 2008 [http://www.amnesty.org.za/portal/index.php?option=com\\_content&task=view&id=16&Itemid=1](http://www.amnesty.org.za/portal/index.php?option=com_content&task=view&id=16&Itemid=1) (accessed 31 October 2008).

principle not to return refugees and asylum seekers to territories where they might face persecution unless through a normal asylum application process, the applicant has failed to qualify for protection and has exhausted available appeal procedures. Second, in the aftermath of the xenophobic violence, refugees, asylum seeker permit holders and undocumented migrants were directly mass deported. Third, by virtue of negligence in dealing with the violence and subjecting victims to unbearable detention conditions, the state constructively refouled genuine asylum seekers and recognised refugees back to territories where they expressed a well-founded fear of persecution on their return.

## **12 What are South Africa's obligations, if any, regarding access to socio-economic rights by foreign nationals resident in South Africa?**

### **12.1 The factual background**

Although xenophobic sentiment is relatively high within South Africa, the violence experienced in May 2008 and on previous occasions has the distinct characteristic of being localised within informal settlements with high levels of poverty. Socio-economic factors have been identified as a cause of the conflict, with allegations being made that foreign nationals took up job opportunities that rightfully belonged to South Africans, and also that they benefited from public services at the expense of nationals. In fact, a report released by the Human Sciences Research Council identified the occupation of state-provided housing by non-South Africans as one of the most important triggers of xenophobic violence.<sup>196</sup> Foreign nationals reportedly gained access to Reconstruction and Development Program (RDP) houses through a variety of means including from government officials through corruption, or sale or rent by South African owners, a fact which was also referred to by respondents in this study.<sup>197</sup>

### **12.2 The legal framework in relation to access to socio-economic rights**

Neither the Refugees Act nor the UN 1951 Convention provides for the rights of asylum seekers pending the recognition for protection as refugees. As already discussed regarding treatment of foreign nationals,

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<sup>196</sup> Human Sciences Research Council (HRSC) 'Violence and xenophobia in South Africa: Developing consensus, moving to action' (2008) 26.

<sup>197</sup> See sociological research findings above.

the UNHCR adopted a document entitled 'Reception of Asylum Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems',<sup>198</sup> in which the right of asylum seekers to basic human rights is asserted.<sup>199</sup> In order to alleviate the difficulty of determining what rights asylum seekers are entitled to, the Executive Committee Conclusion No. 93 provides that asylum seekers should be entitled to food, clothing, accommodation, medical care, educational and recreational facilities for children, and post-trauma specific needs for victims of sexual assault and so on.<sup>200</sup>

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the primary instrument that elaborates on socio-economic rights. Other instruments containing socio-economic rights are more specialised and focus on the rights of vulnerable groups such as women, children, refugees, migrant workers and persons with disabilities. The majority of these instruments depart from the premise that state parties are to enable access to socio-economic rights to all those within their jurisdiction, albeit perhaps at differing levels such as the case of refugees. In addition, the ICESCR provides that developing countries 'with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised by the ... Convention to non-nationals'.<sup>201</sup> South Africa has not ratified the ICESCR and is therefore not strictly

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<sup>198</sup> Global Consultations on International Protection, UN doc. EC/GC/01/17 (4 September 2001) para 3.

<sup>199</sup> The notion of 'basic rights' is always difficult to interpret. One wonders if it refers to civil and political rights or socio-economic rights. An interpretation could be preferred which favour those rights that are central to the livelihood of human beings, which might include some civil and political rights such as right to life, dignity, security of the person, right to property; socio-economic rights such as the right to work, food, health, shelter etc.

<sup>200</sup> Executive Committee Conclusion No. 93 (available at <http://www.unhcr.org>).

<sup>201</sup> ICESCR art 2(3).



legally bound by its provisions. However, most of these obligations arise from the South African Constitution, which makes socio-economic rights justiciable.

The standard of treatment to be afforded to foreign nationals has been discussed in earlier sections of this study, whether the minimum standard or the equal treatment standard. This debate goes further when one considers the status of different migrants, whether they are legal or illegal. There exists a tension in human rights law in general, between the principles of state sovereignty and the rights of individuals. This tension is evident in migration matters because states have the prerogative of allowing foreign nationals into their territory, and at the same time an obligation to respect and fulfil individual human rights of those within the territory. Where states have exercised their prerogative to regulate entry and have granted entry and stay to migrants and thus legitimising their being within the territory, it is easier for states to then provide access to a wide range of rights including socio-economic rights.

In the case of *Minister of Home Affairs v Watchenuka*, the Supreme Court of Appeals grappled with just such a tension, where an asylum seeker was prevented from taking up employment and her son from studying by a general prohibition against such rights for asylum seekers.<sup>202</sup> The Court found that such a general prohibition could not stand because in some cases the right to work and education were very closely affiliated to the human dignity of the asylum seekers. Any limitations to their rights would require to be justified with this in mind.

Foreign nationals irregularly within a state are distinguished by two factors, their irregular entry or

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<sup>202</sup> *Minister of Home Affairs & Others v Watchenuka & Others* 2004 (4) SA 326 (SCA) paras 32-34.

stay and their consequent vulnerability. These two factors impinge directly on the causes for tension between state sovereignty and individual human rights. States are, on the one hand reluctant to grant access to rights for this group of migrants so as not to be construed as acquiescing to the migrants' irregular entry and stay, particularly because owing to the circumstances of entry of the migrants, the state was not given the opportunity to exercise a sovereign decision to allow entry or otherwise. On the other hand, irregular migrants as human beings are entitled to certain human rights guarantees accruing to all and distinct from entitlements attached to citizenship.<sup>203</sup>

The vulnerability of undocumented migrants stems from the persistent apprehension that they would be arrested and deported. This fear is justified because foreign nationals are under obligations to comply with the laws and regulations of the states in which they find themselves.<sup>204</sup> Thus illegal entry and stay attracts sanction by the state. The effective take up of social services by illegal foreign nationals, to realise rights or legal services in order to vindicate rights is, as a consequence, doubtful. Often these services will require the disclosure in some way of ones' status within the country, perhaps by the production of identity documents, and the lack of valid documents may result in immigration officials being alerted to the situation. In a country like South Africa, where xenophobic sentiment is high, such an eventuality is not unforeseeable.<sup>205</sup>

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<sup>203</sup> Debates around these tensions were evident during the drafting of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW). See generally LS Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737-770.

<sup>204</sup> See for example 1951 Refugee Convention art 2; CMW art 34.

<sup>205</sup> See Crush (n 5 above) where a survey shows that high percentages of South Africans would take various sorts of actions against foreign nationals living in their communities.

At the national level, a further dimension is added to the debates involving non-nationals, that of trying to achieve greater equality between nationals and non-nationals and the need to respond to social tensions, particularly in times of economic hardship where non-nationals are perceived to have access to social goods at the expense of nationals.<sup>206</sup> Bearing this in mind, it is noteworthy that the Constitution of South Africa does not, in terms of socio-economic rights, make a distinction between nationals and non-nationals. The rights of access to housing, healthcare, food, water social security and education are guaranteed to 'everyone'.<sup>207</sup> The Refugee Act provides that refugees are entitled to the rights contained in the Bill of Rights in the Constitution.

In *Khosa v Minister of Social Development*,<sup>208</sup> it was held as follows in relation to access to socio-economic rights:<sup>209</sup>

The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom. Yacoob J observed in *Government of the Republic of South Africa and Others v Grootboom and Others* that the proposition that rights are interrelated and are all equally important, has immense human and practical significance in a society founded on these values.

And further that

Equality in respect of access to socio-economic rights is implicit in the reference to 'everyone' being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.<sup>210</sup>

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<sup>206</sup> S Da Lomba 'Fundamental social rights for irregular migrants: The right to health care in France and England' in B Bogusz *et al* (Eds) *Irregular migration and human rights: theoretical, European and international perspectives* (2004) 363-386 364.

<sup>207</sup> Constitution of South Africa secs 26, 27 & 29.

<sup>208</sup> 2004 (6) SA 505 (CC).

<sup>209</sup> Para 40 of the *Khosa* Judgment.

<sup>210</sup> Para 42 of the *Khosa* Judgment.

Elaborating on the ambit of 'everyone' as provided for in section 27 of the Constitution, the CC adopted a consistent practice of interpreting the Constitution purposively and held that in the absence of a clear intention to limit the benefit of social security to citizens in section 27, the provision admitted the inclusion of the categories of people other than citizens.<sup>211</sup> Furthermore, the CC recalled that section 7(1) of the Constitution protects the rights and freedoms of 'all people in our country'. On this basis, the CC was convinced that 'everyone' includes categories of people other than citizens.<sup>212</sup>

Further expounding on whether the Constitution applied to permanent residents in the *Khosa* case, the CC formally recognised permanent residents as a 'vulnerable' group of people, therefore, in need of constitutional protection.<sup>213</sup> In testing the reasonableness of the measures, the CC held that the context was important.<sup>214</sup> The mere fact that permanent residents were denied social security which they otherwise would have gotten had it not been for lack of citizenship was deemed to directly 'engage' equality under section 9 of the Constitution.

However, the CC had an occasion to mention in passing the obligations of the state in relation to 'illegal immigrants'. The Court held thus:<sup>215</sup>

It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent

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<sup>211</sup> Similarly, in *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D), it was held that the default interpretation of the Constitution is that the Bill of Rights similarly applies to both citizens and foreign nationals unless the contrary emerges from the Constitution itself.

<sup>212</sup> Paras 46 & 47 of the *Khosa* judgment.

<sup>213</sup> As above.

<sup>214</sup> Para 49 of the *Khosa* judgment.

<sup>215</sup> Para 59 of the *Khosa* judgment.

residents is, however, quite different to that of temporary or illegal residents.

The above remarks complicate the position of refugees, asylum seekers and other migrants. It seems that the CC places due weight on one's immigration status when it comes to access to social security or assistance. We would hasten to distinguish an approach whereby those under or in need of international protection (foreign nationals) under the refugee law seek inclusion in a social security scheme from another where such people clamour for access to socio-economic rights. If such an approach is accepted, it means that whereas the *Khosa* case sounds to be focused on social security, the rest of the judicial observations in relation to access to socio-economic rights as part and parcel of the right to dignity are directly applicable to the case of refugees, asylum seekers and undocumented migrants. Accordingly the CC held as below:<sup>216</sup>

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.

We contend that while the right of access to socio-economic rights by refugees, asylum seekers and undocumented migrants is not similar to claiming admission to the social security scheme, such access falls within the ambit of social assistance as contemplated by section 27(2) of the Constitution. Read together with the proposition of the CC that socio-economic rights engage the pillars of the Bill of Rights (human dignity, equality and freedom), the human rights standard of treatment of foreign nationals, which included rights such as human dignity, would require the state to facilitate as far as

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<sup>216</sup> Para 52 of the *Khosa* judgment.

possible, access to socio-economic rights by foreign nationals in order to protect their right to dignity.

### **12.3 Liability analysis**

Several issues arise when one considers the issue of accessibility and entitlement to socio-economic rights in relation to foreign nationals. As we have done before in previous sections, we will consider the issues in the context of the broad categories of refugees and asylum seekers and illegal migrants. The questions revolve around the nexus between socio-economic rights and non-nationals at two levels. The first is at the level of government obligations to counter perceptions that contribute to xenophobia and violence, the sentiments that blame foreign nationals for the failures in service delivery and poverty. At the second level is government's obligation to address the rights of foreign nationals within the territory, particularly addressing their situation, made increasingly vulnerable as a consequence of the xenophobic violence.

State obligations towards the realisation of rights are also cast in a widely accepted typology, that is, the duties to respect, protect and fulfil human rights. The duty to respect is not widely implicated to the extent that the manifestation of xenophobic violence was exhibited by members of the communities in which the foreign nationals lived. However, to the extent that state functionaries such as members of the police force, acting in their capacity as such, are alleged to unlawfully destroy identity and immigration documentation that allows migrants to live in South Africa, this constitutes a breach of the duty to respect socio-economic rights. Without these documents foreign nationals will be unable to access social services, to work and generally make a living.

In terms of the duties to protect, the state is required to ensure that individuals are not prevented

from securing their socio-economic rights, either by the state or by other individuals. As such, the state was under an obligation to prevent the violence, the looting and destruction of the livelihoods of xenophobia victims as this interfered with their ability to access socio-economic rights.

The duty to fulfil is undoubtedly the most onerous one on the state when it comes to socio-economic rights and is now discussed. While the case of refugees appears to be cut and dried in the sense that international and national law protects the socio-economic rights of refugees in the country of refuge, the position of undocumented migrants poses a precarious state of affairs. If recourse is had to the application of the *non-refoulement* principle, the state is obliged to afford undocumented migrants temporary reprieve until such a time as a solution is found.<sup>217</sup> We have already concluded that one of the solutions is to ensure that all undocumented migrants who wish to apply for asylum should be accorded a chance to do so. Once this is concluded, the state is left with two categories of persons; those that qualify for protection (refugees) and those that do not and are consequently eligible for deportation. However, until such a time that these people have been deported, the state has responsibility over them. This should include access to socio-economic amenities, not to mention relevant civil and political rights already discussed in the preceding portions of this research.

To the extent that the perception exists that refugees are not entitled to access social services and such perception serves as the basis of xenophobic sentiment and action, the state would be responsible for not having done more to correct such a misconception. Studies have shown that in relative terms, foreign nationals perceived to be in the country

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<sup>217</sup> See discussion on the principle of *non-refoulement* sec. 11.3 above.

illegally bear the brunt of intensive dislike in comparison with refugees and asylum seekers. The illegality of entry and sojourn in the country is extrapolated into other spheres of illegality such as crime. There have, however, been incidents where refugees were attacked, indicating that the distinction is not always the guiding principle in determining the targets for xenophobic acts.

Similarly, refugees' access to social services should not be in question. The uncertainty may lie in what standard of treatment refugees should receive. Based on constitutional provisions and the Refugees Act,<sup>218</sup> it can be deduced that refugees are entitled to the same standard of treatment as nationals. This view is buttressed by the strong adherence to the notions of equality and human dignity that underlie the Constitution and the South African state. We submit that when one determines whether or not a foreign national is entitled to socio-economic rights contained in the Bill of Rights, they are required to consider international law in applying the Bill of Rights. Consequently, international law (refugee law) provides that a state has responsibility over foreign nationals in its territory who have not yet gone through the asylum application process until such a time that they have and have not been successful.

Deporting or refusing service provision to undocumented migrants pending status determination is a clear violation of the obligation not to *refoule* migrants unless following a failed asylum application process. This is more so because at times, while there is no right to remain in a foreign territory for socio-economic reasons, *refoulement* of people to places where socio-economic conditions amount to inhuman or degrading treatment is a violation of

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<sup>218</sup> Sec 27.



international refugee law.<sup>219</sup> However, the standard of proof is relatively high where the applicant is expected to demonstrate circumstances posing a particular risk as opposed to mere recital of lack of proper medical care, employment or any other socio-economic opportunity.<sup>220</sup>

By virtue of the increased hostility towards illegal foreign nationals, it follows that even more needs to be done by government to dispel notions by nationals that foreign nationals are the reason why social services are not delivered and that foreign nationals are responsible for increased unemployment. The government has failed to effectively regulate access to housing and employment practices and this has led to foreign nationals acquiring houses, and also accepting jobs at lower wages, thus undercutting the expectations of unionised labour.

The question of what foreign nationals are entitled to in terms of access to socio-economic rights is one that needs to be determined by the state, since there is no internationally agreed-upon position. The lack of a policy that balances the state's legitimate power to regulate its borders with the rights of individuals regardless of their status once in the country is largely responsible for creating the space within which hostility towards illegal non-nationals grows. Importantly, the policy would have to grapple with how to make the protection of the rights of illegal foreign nationals a reality if the threat of arrest and deportation confronts those who would claim such rights.

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<sup>219</sup> This follows the European human rights jurisprudence on Art. 3 of the European Convention as interpreted by the European Court of Human Rights in *D v UK* (1997) 24 EHRR 423. The House of Lords followed the same line in *N v Secretary of State for the Home Department* [2005] UKHL 31. See also A Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-economic Conditions?' (1991) 2 *European Journal of International Law* 141.

<sup>220</sup> As above.

## **13 What are South Africa's legal obligations, if any, in respect of re-integrating victims of xenophobic violence?**

### **13.1 Factual background**

After the onset of xenophobic violence against foreign nationals in May 2008, the South African government was faced with a situation in which it did not appear to have a clearly co-ordinated response towards the problems faced by victims of violence. Immediately after the violence, the priority was to remove the victims to places of safety, which was done by placing them in camps. The intention was that these camps serve as temporary shelters for foreign nationals, more so because the living conditions in the camps did not meet acceptable standards. Following mounting pressure to close the camps, the options apparently available to government were to reintegrate the foreign nationals, deport those in the country illegally and assist those who volunteered to return to their countries of origin.

The solution contemplated, that of reintegrating foreign nationals into communities from which they had fled, proved problematic in that while it was desirable that foreign nationals go back to the communities where they had already established roots, and continue their lives where they had left off, they had been violently expelled from these communities and were therefore justifiably afraid of going back.<sup>221</sup> In addition, it was not clear how much had been done to address the grievances underlying the violence in order to guarantee the communities'

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<sup>221</sup> 'No "forced reintegration" for immigrants' *The Times* 10 June 2008 <<http://www.thetimes.co.za/SpecialReports/Xenophobia/Article.aspx?id=781999>> (accessed 20 November 2008).

openness to accepting back the foreign nationals.<sup>222</sup> The drive towards reintegration was said to be government's priority in order to avoid creating special living areas for displaced foreign nationals.<sup>223</sup> Government had already stated that foreign nationals would not be deported, but if they chose to repatriate they would be assisted in this endeavour.<sup>224</sup> The pertinent question is therefore whether there was any obligation on government to reintegrate foreign nationals into communities, whether this obligation was legal or otherwise, and what was required of government to fulfil this obligation, if it existed.

### 13.2 Legal framework and liability analysis

It should be stated from the outset that there exists no international refugee law obligation on states to locally integrate refugees under their responsibility. As is the case with third country resettlement, local integration is 'a sovereign decision' falling within the unassailable prerogative of the host state.<sup>225</sup> In fact it is the state receiving repatriating refugees that bears an obligation to receive such people in peace and dignity given that by taking flight, refugees do not relinquish their right to return to territories of origin. Perhaps this explains why, despite the desirability of local integration being a legal obligation, virtually all international treaties on refugee law do not create an obligation on states to integrate locally despite states being urged to consider it as a durable solution to the problem of refugees.

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<sup>222</sup> 'Reintegration conditions "good"' *News24* 25 July 2008 [http://www.news24.com/News24/South\\_Africa/Xenophobia/0,,2-7-2382\\_2364203,00.html](http://www.news24.com/News24/South_Africa/Xenophobia/0,,2-7-2382_2364203,00.html) (accessed 20 November 2008).

<sup>223</sup> 'Reintegration the priority - government' *IOL* 4 June 2008 <[http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=nw20080604125107561C769068](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20080604125107561C769068)> (accessed 20 November 2008).

<sup>224</sup> As above.

<sup>225</sup> Goodwin-Gill (n 39 above) 489.

Soft law on local integration abounds. Without purporting to create an obligation to integrate, the UNHCR's Executive Committee Conclusion of 2005 (2005 Conclusion) presents the most detailed status of local integration as a durable solution to refugee problems in international refugee law.<sup>226</sup> The Executive Committee made a number of observations relating to the debate on whether or not states yield any obligation to local integration. It is widely acknowledged that there is no obligation on states to facilitate local integration.<sup>227</sup> Remarkably, despite the general silence of international instruments on this issue, the OAU 1969 Convention has been commended as coming close to establishing an obligation to integrate locally in article 2(1) and (5).<sup>228</sup> Apparently, one needs to employ a very benevolent interpretation to arrive at that conclusion. Perhaps the provision needs to be taken as strongly recommending and exhorting African states to consider 'settlement' (local integration) as a durable solution to refugee problems. A proposition suggesting the existence of an obligation on African states to integrate refugees is not free from legal difficulty.

In paragraph 22 of its Conclusion in 2005, the Executive Committee came up with a somewhat detailed, but tautologously phrased, guide to states when considering local integration as an option. Perhaps the most fundamental observation made was that voluntary return of refugees remains the top priority when ranking durable solutions to refugee problems.<sup>229</sup> Integration requires commitment by both receiving communities and naturalising refugee population, and should be carried out in 'a manner that sustains the viability of local communities' lest

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<sup>226</sup> Available at: <http://www.unhcr.org/excom/EXCOM/434d119f2.pdf>, (para 22). Accessed on 19 November 2008.

<sup>227</sup> Goodwin-Gill (n 39 above) 492.

<sup>228</sup> As above.

<sup>229</sup> Goodwin-Gill (n 39 above) 489.

there is excessive burden on such communities.<sup>230</sup> Owing to the complexity of integration, there is need of appropriate 'counselling and advice' in order for refugees to appreciate the three-prong dimension of integration; namely, legal, socio-economic and cultural aspects.<sup>231</sup> The legal dimension, noted to be of 'particular importance', was expatiated by the Executive Committee to include the provision by government to refugees with proper documentation reflecting the current legal status in society. This status goes well beyond the refugee status already yielded by the refugees who are being integrated, to initialisation of the process of acquiring a 'wide range of rights and entitlements' available to citizens of the host state with a view to achieving naturalisation as the ultimate goal.<sup>232</sup>

As to the socio-economic dimension, emphasis should be placed on assisting refugees to become self-reliant thereby relieving the state of the indefinite duty to provide for refugees. The Executive Committee recommended two approaches in assisting refugees to become self-reliant, legally and formally participating in the employment of the host state. These are: first, by recognising the professional or vocational qualifications some refugees acquired prior to entry into the state of refuge and second, providing training programmes for skill development, and also provision of rural agricultural land to those with land tillage experience. These two would satisfy the socio-economic dimension of integration.

The third leg is the socio-cultural dimension, which needs not be underestimated. The adaptation of refugees to existing socio-cultural fabric of the host communities requires 'awareness raising activities' in order to eliminate 'institutionalised discrimination'. Awareness campaigns and governmental policies,

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<sup>230</sup> Para 22 of the Executive Committee 2005 Conclusion.

<sup>231</sup> Para 22 (k) of the 2005 Executive Committee Conclusion.

<sup>232</sup> As above.

public statements and appropriate legislation aimed at promoting tolerance of refugee population and combat xenophobia and racism. This should precede any local reintegration programmes. Analogously taken as preparing the ground for rain, these promotional activities prepare the host communities for percolation of the refugee population into an otherwise indifferent or xenophobic community. In all this, governments ought to involve as many stakeholders as possible acknowledging its limitations and recognising the expertise of certain organisations working in the area of refugee management in creating a conducive environment for successful local integration.<sup>233</sup>

The mere fact that very little or no information exists on national websites or other databases regarding the nature and scope of the government's self-proclaimed reintegration process bolsters the allegations that the process was more of lip service and damage control than a genuine local integration programme sanctioned by international refugee law guidelines outlined above. As already outlined, allowing victims of xenophobia to relocate from temporary refugee camps into societies, including those where they came from, does not to us amount to a genuine integration programme as contemplated by international law on the subject. An extremely *ad hoc* programme that does not accord public scrutiny and assessment is as good as non-existent to say the least.

Therefore, if government insists that a local integration programme took place, then we are fortified in asserting that, notwithstanding the absence of a legal obligation to integrate, the process fell short of the minimum standards outlined in paragraph 22 of the Executive Committee Conclusion of 2005. This soft law framework was dedicated to enunciating principles governing legitimate local

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<sup>233</sup> As above.

integration programmes. This is so more particularly in that there was no recourse to the three-pronged approach to integration, that is, the legal, socio-economic and cultural dimensions. No status further than refugee status was conferred to those being integrated; no skill development programmes were introduced. Refugees were left to rely entirely on their acquired qualifications with the vast majority relying on availability of menial work in the construction and related industries.

One legal question remains to be determined before one could judge the performance of the state in this regard. The question is: Given the well accepted fact that states have no obligation to integrate foreign nationals, on what basis then should the government be judged? Our position emanates from a well established principle of law that where there is no legal obligation to act, one attracts no liability by failing to act. However, notwithstanding the non-existence of a legal obligation to act, if one decides to act, they should be careful to ensure that their actions are in conformity to the expected standards of conduct otherwise they attract liability in the process.

Without the sanction of a legal obligation to integrate, South Africa decided to do so but failed to comply with the minimum standards expected in local integration. Had it not been that government's conduct did not result in any proven injury or damages to refugees and or foreign nationals who attempted to integrate at the government's instance, government could have been found liable for such consequential injury and damages. In the absence of a legal but moral obligation to comply with international law, and unless injury or damages could be established pertaining to government's negligent conduct, we have no basis to find South Africa in breach of any obligations *vis-à-vis* the purported integration programme.

## 14 What are South Africa's obligations, if any, in respect of preventing future recurrence of xenophobia violence?

In this last issue of the analysis, we explore what the government has done and should do in order to prevent recurrence of violence triggered by xenophobic tendencies in host communities. As in many other issues discussed above, very little data exists to show what really transpired within government structures in order to guarantee non-occurrence. Efforts were pretty much reactionary, in the sense that they were channelled towards damage control and limitation. Both oral and written statements denouncing the violence were issued by various government departments including the Presidency. With similar vigour, institutions established to consolidate democracy in South Africa, commonly known as Chapter 9 Institutions, such as the South African Human Rights Commission, also issued public statements condemning the violence and lack of tolerance amongst host communities and have undertaken to investigate the causes of the wave of xenophobic attacks.<sup>234</sup>

The condemnation was not restricted to the borders of the South Africa. International human rights oversight bodies such as the African Commission went to the extent of adopting a resolution on the condition of migrants in South Africa.<sup>235</sup> The UNHCR, media and the civil society in general went all out in frenzy criticising the government for failing to prevent the occurrence of the violence on allegations that such intelligence had been given to it. However, as already stated, the cumulative efforts of these stakeholders was directed

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<sup>234</sup> Available at: <http://www.legalbrief.co.za/article.php?story=20090119155721923> (Accessed on 10 February 2009).

<sup>235</sup> As above.



towards taking care of the dead, injured and internally displaced migrants some of whom were abruptly leaving the country, taking refuge in police stations and places of worship.<sup>236</sup> Consequently, the establishment of the controversial refugee camps to shelter IDPs and issuing of temporary residence permits were just but ways to manage the emergency that caught the country flat-footed. There is no basis to suggest they were meant to be guarantees of non-recurrence.

In the issues discussed above, we went at length to show South Africa's obligations. It should be noted that the very essence of remedial measures adopted by a state following breach of its international law obligations is two-fold, namely, guarantee of non-occurrence and reparations to those who suffered adverse consequences of the state's actions. Therefore, these two objectives are what the recommendations that follow seek to achieve.

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<sup>236</sup> The unfolding of the events during and immediately following the violence assimilated the 1994 Rwanda Genocide such that articles appeared in the press comparing the May 2008 xenophobic violence to the Rwanda Genocide. In his well written article entitled 'It feels like Rwanda all over again' published in the *Pretoria News* on 9 June 2008, Norman Taku, the Deputy Director of the Centre for Human Rights, University of Pretoria, the writer scrutinized the violence from probable causes to the manner it was perpetrated and its adverse consequences and concluded that there were more similarities than differences between the xenophobic violence and the 1994 Rwanda Genocide.

## 15 Recommendations

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.

### 15.1 General recommendations

- 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 Worker and Members of their Families. It would also be prudent for the South Africa to subsequently domesticate the provisions of this instrument.
- The process of state reporting, which is a necessary component of ratifying international instruments, and under the APRM and Universal Periodic Review, should where relevant include the situation of foreign nationals and the measures taken to ensure that their rights are realised. Measures should be put in place to implement the

concluding observations made by treaty bodies on these reports.

- The government should make a concerted effort, for example through education and awareness-raising, to eliminate stereotyping, targeting, stigmatising and profiling on the basis of national origin by politicians, officials educators and the media, in all communication networks including internet and in society at large.
- 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 galvanise more action on the realisation of the goals in the Conference programme of action.

## **15.2 Immigration**

- The vulnerability of foreign nationals is exacerbated by the lack of identification for purposes of documentation. The process of determining asylum applications should be expedited. Allegations of ill-treatment and extortion of refugees, asylum seekers, and undocumented migrants should be investigated and action taken against those found to be complicit.

## **15.3 Violence**

- In view of the xenophobic violence that took place in May 2008, the state is under an obligation to take appropriate measures to investigate and punish the perpetrators of the violence, and provide redress to the victims. Such measures would additionally act as a deterrent to prevent future violent manifestations of xenophobia.
- Ignorance as to how xenophobia manifests in violence as distinct from other forms of violence

may diminish the impact of law enforcement capacities in dealing with this phenomenon. A specific legal regime or policy that defines the parameters of xenophobic violence and imposes criminal sanction over and above the existing framework should be implemented, including the role of law enforcement officials within this context.

#### **15.4 Repatriation**

- Repatriation and deportation procedures should scrupulously adhere to due process standards and be carried out in a transparent manner to preclude the possibility of *refoulement* (including constructive *refoulement*) of refugees and asylum seekers.

#### **15.5 Access to socio-economic rights**

- Access by foreign nationals to socio-economic rights such as housing was a contributing factor to the eruption of xenophobic violence. The government should develop a clear policy in line with its constitutional obligations on the entitlements of foreign nationals to socio-economic rights and social services in particular. Such a policy should be widely disseminated and should be the basis of dialogue in communities that have experienced or are likely to experience xenophobia and society as a whole in order to clarify misconceptions about access to services and service delivery that lead to xenophobic sentiment and violence.
- The provision of humanitarian support in the aftermath of the violence left much to be desired, as is evident in a report by the Forced Migration

Studies Programme at the University of the Witwatersrand.<sup>237</sup> The recommendations of this and other relevant reports should be implemented as soon as possible in order to enhance the level of preparedness in the event of a reoccurrence of similar events.

## 15.6 Reintegration

- Although no obligation exists to integrate or re-integrate 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 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.

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<sup>237</sup> Forced Migration Studies Programme (n 33 above).