

**THE FACE OF VIOLENCE:  
RETHINKING THE CONCEPT OF XENOPHOBIA, IMMIGRATION LAWS  
AND THE RIGHTS OF NON-CITIZENS IN SOUTH AFRICA**

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*Xenophobia, simply put, is the fear or hatred of foreigners or strangers; it is embodied in discriminatory attitudes and behaviors, and often culminates in violence, abuses of all types, and exhibition of hatred. Theoretically, the best and only solution is to remove enemy images; however, it is debatable whether this can be done. In the same breath, protecting migrants' rights may be the best way to enhance state sovereignty in a globalized world. The protection of fundamental human rights and freedoms transcends municipal and international laws. However, it is the state's responsibility to uphold human rights through its laws and enforcement. This work examines the constitutional rights of non-citizens in South Africa within the context of its immigration law and xenophobia. The motives of xenophobia are considered. It will be argued that foreign nationals are particularly vulnerable to the restriction of their access to justice as the immigration laws and policies have not adequately guaranteed foreigners certain inalienable rights. The states uncoordinated attitude towards xenophobic attacks raises doubt as to whether there can be compliance with the sacred constitutional obligation to protect and preserve lives of all people within the country. For on the one hand the law claims to protect non-citizens while on the other, no prosecution has been made against anyone involved in xenophobic attack. The failures of the state will be observed and necessary suggestions will be proffered by this work to aid policy makers.*

*Keywords: xenophobia; attack; policies; prosecution; violence.*

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## Introduction

Violence commonly viewed as xenophobia in nature erupted in South Africa in May 2008 leaving more than 60 people dead and tens of thousands of people displaced in its wake. The outbreak sent shock waves through the country, the continent and across the globe because for almost 15 years, South Africa had enjoyed a reputation as an exemplum of racial reconciliation.<sup>1</sup> Xenophobia can be traced back to pre-1994, when immigrants from elsewhere faced discrimination and even violence in South Africa, even though much of that risk stemmed from and was attributed to the institutionalized racism of the time due to apartheid.<sup>2</sup> After the advent of democracy in 1994, contrary to expectations, the incidence of xenophobia increased.<sup>3</sup> Studies show that between 2000 and March 2008, at least 67 people

<sup>1</sup> *Violence and Xenophobia in South Africa: Developing Consensus, Moving to Action* (A. Hadland (ed.), Pretoria: Human Sciences Research Council, 2008). It is based on a roundtable hosted in June 2008 in Pretoria that was attended by around 50 key stakeholders from government, civil society and from affected communities. It was a result of partnership between the Human Sciences Research Council and the High Commission of the United Kingdom.

<sup>2</sup> *South Africa Xenophobia: Why is There So Much Hatred of Foreigners?*, *The Week*, May 18, 2015 (May 10, 2017), available at <http://www.theweek.co.uk/63378/south-african-xenophobia-why-is-there-so-much-hatred-of-foreigners>.

<sup>3</sup> Olu Ojedokun, *An Ethical Approach to the Xenophobia against Foreigners in South Africa*, 11(1) *OGIRISI: A New Journal of African Studies* 169 (2015).

had died from this attack while in May 2008, a series of riots left 62 people dead; although 21 of those killed were South African citizens.<sup>4</sup> In 2015, another nationwide spike in xenophobic attacks against immigrants in general prompted a number of foreign governments to begin repatriating their citizens.<sup>5</sup>

The history of refugees and asylum seekers in South Africa dates back to the 1980s when the country was home to a number of Mozambican refugees, an estimated 350,000 of whom approximately 20% have since returned home.<sup>6</sup> Under the old Apartheid system South Africa did not recognize refugees until 1993 and when it became a signatory to the United Nations (UN) and Organization of African Unity (OAU, now African Union (AU)) Conventions on Refugees in 1994, the number of refugees and asylum seekers in South Africa had increased.<sup>7</sup> Globalization, political discord, environmental hardships, socio-economic strife and the desire to obtain an improved standard of living will continue to be drivers for human migration.<sup>8</sup> However, one of the post-apartheid shifts is the sheer volume and diversity of human traffic crossing South Africa's borders. It is increasingly host to a truly pan-African and global constituency of legal and undocumented migrants.<sup>9</sup> However, these groups of persons have a right to security, a right to protection from infliction of physical violence against a person.<sup>10</sup> As a result of these realities, it is imperative that the rights to physical security of asylum seekers and refugees are protected by adequate measures. "Physical Security" is clearly fundamental to refugee protection<sup>11</sup> but the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention)<sup>12</sup> does not contain a specific provision on the right to physical security. It is suggested that the rationale for this could be that the drafters of the Convention took it for granted that the physical security of refugees should be protected given

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<sup>4</sup> Michael Neocosmos, *From "Foreign Natives" to "Native Foreigners"* (Dakar: Codesria, 2006).

<sup>5</sup> Robyn Dixon, *Attacks on Foreigners Spread in South Africa; Weekend Violence Feared*, Los Angeles Times, April 17, 2015 (May 10, 2017), available at <http://www.latimes.com/world/africa/la-fg-south-africa-foreigners-20150417-story.html>.

<sup>6</sup> *Xenophobic Violence in Democratic South Africa*, South African History Online (2015) (May 10, 2017), available at <http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa>.

<sup>7</sup> Ojedokun 2015.

<sup>8</sup> *Love thy Neighbours: Exploring and Exposing Xenophobia in Social Spaces in South Africa*, Alternation Special Edition No. 7 (S. Manik & A. Singh (eds.), Durban: CSSALL, 2013).

<sup>9</sup> Ojedokun 2015.

<sup>10</sup> Lara Wallis, *The Right to Physical Security for Refugees: A South African Perspective*, Working Paper Series, Paper 2 of 2013, University of Cape Town: Refugee Rights Unit Paper (May 10, 2017), available at [http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Paper\\_2\\_of\\_2013.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_2_of_2013.pdf).

<sup>11</sup> James C. Hathaway, *The Rights of Refugees under International Law* 448 (Cambridge: Cambridge University Press, 2005).

<sup>12</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, United Nations, Treaty Series, vol. 189, at 137 (Refugee Convention).

that the very nature of refugee law lies in the provision of surrogate protection when protection cannot be secured by an individual's home state.<sup>13</sup> Since the right to physical security cannot be grounded in the 1951 Convention, it is necessary to derive the right from "a crisscross of rules which have some bearing on the subject."<sup>14</sup>

### 1. Racism and (or) Xenophobia in South Africa

Xenophobia is "fear and hatred of strangers or foreigners or of anything that is strange or foreign."<sup>15</sup> It is the deep dislike of non-nationals by nationals of a recipient state. Its manifestation constitutes a violation of human rights.<sup>16</sup> This general definition points to a perception but does not elaborate on the actual manifestation of such fear or hatred of strangers. In the South African context, xenophobia is both a negative attitude towards foreigners and a manifestation in extreme cases of violent attacks against them thereby including terms like racial discrimination.<sup>17</sup> Racial discrimination has been defined by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>18</sup> as meaning "any distinction, exclusion, restriction or preference based on race, color, descent, 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>19</sup> Although, the two phenomena are distinct as some have argued that xenophobia is a black-on-black antagonism and not racism per se as racism refers to discriminatory treatments at the hands of a race (a biological group) different to one's own,<sup>20</sup> they also overlap. Xenophobic attitudes may lead to discriminatory actions against foreigners on the basis of their nationality or

<sup>13</sup> Hathaway 2005, at 449.

<sup>14</sup> M. Othman-Chande, *International Law and Armed Attacks in Refugee Camps*, 59(2) *Nordic Journal of International Law* 153 (1990).

<sup>15</sup> Xenophobia, Merriam-Webster Dictionary (May 10, 2017), available at <http://www.merriam-webster.com/dictionary/xenophobia>. It is also defined as "intense dislike, hatred or fear of others." Francis B. Nyamnjoh, *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa 5* (Dakar: Codesria Books and Zed Books, 2006).

<sup>16</sup> South African Human Rights Commission's Braamfontein Statement on Racism and Xenophobia, October 15, 1998. See also *The Nature of South Africa's Legal Obligations to Combat Xenophobia*, Centre for Human Rights, Faculty of Law, University of Pretoria (2009) (May 10, 2017), available at [http://dspace.africaportal.org/jspui/bitstream/123456789/33851/1/sout\\_africa\\_legal\\_obligations\\_combat\\_xenophobia.pdf](http://dspace.africaportal.org/jspui/bitstream/123456789/33851/1/sout_africa_legal_obligations_combat_xenophobia.pdf).

<sup>17</sup> *Id.*

<sup>18</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, United Nations, Treaty Series, vol. 660, at 195.

<sup>19</sup> Art. 1(1) of the ICERD.

<sup>20</sup> Maggie Ibrahim, *The Securitization of Migration: A Racial Discourse*, 43(5) *International Migration* 163, 164 (2005).

ethnic origin and thus be linked to racial discrimination.<sup>21</sup> While racism is a distinction based on difference in physical characteristics, xenophobia stems from a perception that the other is foreign to or originates from outside the community or nation.<sup>22</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>23</sup>

Parallels may be further drawn between these two terms because they share similar outcomes of perceiving the other as a threat; discrimination and exclusion based on the other’s cultural origin; and the tightening of immigration controls. However, by way of a distinction, racism is not merely an ideology but it is structural.<sup>24</sup> Rules, laws, regulations and institutions are formulated and created to reproduce racist ideology but under xenophobia institutions have been used to exclude the other, but these institutions were not deliberately designed to reproduce xenophobic sentiments.<sup>25</sup>

It is based on the discriminatory treatment of the “other,” on the basis of the other’s national origin or ethnicity. This however introduces the concept of *new racism* which is a shift in racism, from notions of biological superiority and instead the focal point is difference.<sup>26</sup> The proponents of new racism claim that they are not being racist or prejudiced, nor are they making any value judgments about the “others,” but simply recognizing that they (the others) are different.<sup>27</sup> This difference forms the basis for “legitimate” and contemporary concerns of issues that are generalized as posing a threat to the values and beliefs that are cherished by the community.<sup>28</sup> Surveys on xenophobia in South Africa provided useful data about citizens’ attitudes towards migrants and refugees.<sup>29</sup>

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<sup>21</sup> Inter-Agency, International Migration, Racism, Discrimination and Xenophobia (August 2001), at 2 (May 10, 2017), available at [http://publications.iom.int/bookstore/free/International\\_Migration\\_Racism.pdf](http://publications.iom.int/bookstore/free/International_Migration_Racism.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> Bronwyn Harris, *Xenophobia: A New Pathology for a New South Africa in Psychopathology and Social Prejudice* (D. Hook & G. Eagle (eds.), Cape Town: University of Cape Town Press, 2002).

<sup>24</sup> Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62(3) *American Sociological Review* 465 (1997).

<sup>25</sup> Carol Adjai & Gabriella Lazaridis, *Migration, Xenophobia and New Racism in Post-Apartheid South Africa*, 1(1) *International Journal of Social Science Studies* 192 (2013).

<sup>26</sup> *Id.* at 192. See also Ibrahim 2005.

<sup>27</sup> Hurriyet Babacan, *Situating Racism: The Local, National and the Global* (Newcastle, England: Cambridge Scholars Publishing, 2009).

<sup>28</sup> Teun A. van Dijk, *New(s) Racism: A Discourse Analytical Approach in Ethnic Minorities and the Media* (S. Cottle (ed.), Milton Keynes: Open University Press, 2000).

<sup>29</sup> Jonathan Crush & Wade Pendleton, *Regionalizing Xenophobia? Citizen Attitudes to Immigration and Refugee Policy in Southern Africa*, Migration policy series no. 30 (Cape Town: Idasa, 2004); Eugene K. Campbell & John O. Oucho, *Changing Attitudes to Immigration and Refugee Policy in Botswana*, Migration policy series no. 28 (Cape Town: Idasa, 2003).

The hardening of anti-migrant views between 2002 and 2008 culminated in the May 2008 violent attacks on foreign African nationals which left many migrants homeless and generally in positions of extreme vulnerability. Foreign migrants are generally identifiable on the basis of bio-cultural factors such as physical appearance and an inability to speak indigenous languages.<sup>30</sup> Reports revealed that several people, mostly migrants were killed in the burning and rampant looting that followed. In 2007, similar attacks on foreign nationals resulted in the deaths of at least 100 Somalis followed by looting and the setting on fire of the businesses and their properties. Likewise in May 2008 several South African cities witnessed large-scale xenophobic attacks that mostly targeted migrants of African origin.<sup>31</sup> This episode marked the latest development in a long series of violent incidents involving the victimization of migrants and refugees in the urban areas of the country. Alexandria township which is located to the north-east of Johannesburg was the site of one of the first waves of violence against foreign nationals, which later spread to other townships across the country in May 2008 and resulted in the deaths of more than 60 people (including South Africans nationals and foreign cross-border traders).<sup>32</sup>

## 2. Theories on Xenophobia

Several theories have been advanced as motives for xenophobia.

### 2.1. Scapegoating

One of the earliest psychological theories explains prejudice and discrimination as a means by which people express hostility arising from frustration. This has been referred to as scapegoating.<sup>33</sup> This implies that people become so frustrated in their

<sup>30</sup> Daniel Tevera, *African Migrants, Xenophobia and Urban Violence in Post-Apartheid South Africa*, *Alternation* Special Edition No. 7 (S. Manik & A. Singh (eds.), Durban: CSSALL, 2013), at 14.

<sup>31</sup> Jonathan Crush & Wade Pendleton, *Mapping Hostilities: The Geography of Xenophobia in Southern Africa*, 89(1) *South African Geographical Journal* 64 (2007).

<sup>32</sup> Jean Pierre Misago et al., *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (Pretoria: IOM Regional Office, 2009) (May 10, 2017), also available at [http://www.observatori.org/paises/pais\\_77/documentos/violence\\_against\\_foreign\\_nationals.pdf](http://www.observatori.org/paises/pais_77/documentos/violence_against_foreign_nationals.pdf). See Janet McKnight, *Through the Fear: A Study of Xenophobia in South Africa's Refugee System*, 2(2) *Journal of Identity and Migration Studies* 18 (2008); Vicki Igglesden et al., *Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008* (Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand, 2009); Oswald Rusinga et al., *Contested Alien Spaces and the Search for National Identity: A Study of Ethnicity in Light of Xenophobic Violence on Migrants in South Africa*, 1(2) *Migration and Development* 206 (2012); Jonathan Crush & Sujata Ramachandran, *Xenophobia, International Migration and Human Development*, *Human Development Research Paper* 2009/47 (September 2009) (May 10, 2017), available at <https://hdl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/46474/132972.pdf?sequence=1>.

<sup>33</sup> Emmerentia Landsberg et al., *Addressing Barriers to Learning: A South African Perspective* (2<sup>nd</sup> ed., Pretoria: Van Schaik Publishers, 2011); Martin N. Marger, *Race and Ethnic Relations: American and Global Perspectives* (2<sup>nd</sup> ed., Belmont, CA: Wadsworth, 1991).

effort to achieve a desired goal that they tend to respond with aggression and the source of the frustration is unknown or too powerful to confront, so a substitute is found to release aggression.<sup>34</sup> This scapegoating theory may on the face of it be convincing because of the “commonness of experience” since individuals experience frustration at some points in their lives particularly when needs or desires are not met.<sup>35</sup> This theory explains that foreigners are blamed for limited resources such as jobs and education as well as for “dashed expectations regarding the transitional process.” The underlying factor, which is poverty and violence, is directed towards foreigners on the pretext that they commit crimes and take away jobs meant for South Africans.<sup>36</sup>

### **2.2. Power Theory**

This is a paradigm that views the relationship between groups as a function of their competitive positions. It suggests that a threat by one particular group to another becomes a source of hate. However, when people feel insecure in the face of threat, they portray resentment and hate but the intensity of the hate does not necessarily depend on real competition in the job market but on the perception of threat which is sufficient to induce animosity.<sup>37</sup>

### **2.3. Power-Conflict Theory**

This theory emerged as a means of neutralizing out-groups that the dominant group perceives as threatening to its position of power and privilege. The aim is to protect and enhance the dominant group’s interest.<sup>38</sup> Prejudice however, becomes a protective mechanism used by the dominant group in a multi-ethnic society in assuring its majority position, hence when the group is challenged, xenophobic tendencies in the form of prejudice are aroused and directed at the group perceived as threatening.<sup>39</sup> The intensity of the threat inevitably is beneficial in some way to the dominant group and is sustained on this basis. These tendencies may also serve as a release of frustration for both the dominant and the minority groups.<sup>40</sup>

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<sup>34</sup> Marger 1991, at 13.

<sup>35</sup> *Id.*

<sup>36</sup> Bronwyn Harris, *A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition*, Violence and Transition series (August 2001) (May 20, 2017), available at <http://www.csvr.org.za/docs/racism/aforeignexperience.pdf>.

<sup>37</sup> Matt Mogekwu, *Xenophobia as Poor Intercultural Communication: Re-Examining Journalism Education Content in Africa as a Viable Strategy* (Mmabatho: North-West University, 2002).

<sup>38</sup> Marger 1991, at 94; Landsberg et al. 2011.

<sup>39</sup> A.I. Alarape, *Xenophobia: Contemporary Issues in Psychology*, 16(2) IFE Psychologia – Special Issue: Xenophobia 72 (2008).

<sup>40</sup> Marger 1991, at 111.

#### **2.4. Normative Theory**

This theory explains xenophobia within the context of social norms. From this perspective, it is believed that people tend to conform to social situations in which they find themselves, hence, when negative thoughts and discriminatory behavior toward a particular group is expected, individuals feel compelled to think and act accordingly, thus the individual's social environment serves as a source for discrimination that leads to xenophobic behavior.<sup>41</sup> This theory concentrates primarily on the transmission of ethnic prejudices through the socialization process and social situations that compel discriminatory behavior.<sup>42</sup>

#### **2.5. Bio-Cultural Approach**

This approach explains that xenophobia operates on the level of physical and cultural appearance, therefore animosity towards the other is not a result of competition for resources but a "product of early political and value socialization."<sup>43</sup> According to this view, cultural differences between people could lead to conflict and hatred, hence the issue that arises is the fear of loss of social status and identity. People prefer to be surrounded by their own kind rather than be exposed to others, consequently, foreigners are deprived of the right to belong. So the inability of minority groups to integrate into the structure and culture of society leads to xenophobic rejection.<sup>44</sup>

#### **2.6. Isolation Hypothesis**

This hypothesis views xenophobia as a consequence of South Africa's history of isolation from the international community prior to the 1994 election. The role of international sanctions and isolation from the rest of the world can also be used to understand xenophobia in South Africa. Prior to 1994, apartheid separated South Africans from other nationalities beyond the borders of South Africa. The waiving of international sanctions opened up South Africa's borders to the rest of Africa. This brought South Africans into contact with many "unknown" people. Strangers of various nationalities were in contact with previously secluded South Africans, which resulted in "bitterness to build up."<sup>45</sup>

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<sup>41</sup> Marger 1991, at 99; Landsberg et al. 2011, at 256.

<sup>42</sup> *Id.*

<sup>43</sup> Mogekwu 2002, at 1; Landsberg et al. 2011, at 256.

<sup>44</sup> *Id.*

<sup>45</sup> Hilma Shindondola, *Xenophobia in South Africa and Beyond: Some Literature for a Doctoral Research Proposal* (Johannesburg: Rand Afrikaans University, 2003).

### 3. Immigration Law and Xenophobia

South Africa has a deep history and sizeable scholarship on internal and cross-border migration.<sup>46</sup> Regional population and migration dynamics are not new phenomenon: the history of South Africa is effectively a history of migration. However, the precolonial, colonial and post-colonial periods are characterized by continuity and change in population and migration patterns.<sup>47</sup> The principal legal instrument defining refugees is the 1951 Convention and the 1967 Protocol.<sup>48</sup> More than 120 states are party to the Convention and (or) Protocol and South Africa became a party to both in January 1996.<sup>49</sup> According to the Convention as amended by the 1967 Protocol, a refugee is one who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence... is unable or, owing to such fear, is unwilling to return to it."<sup>50</sup> The 1969 Convention adopted by the African Union is broader in the scope of its definition

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<sup>46</sup> Alan H. Jeeves, *Migrant Labour in South Africa's Mining Economy: The Struggle for the Gold Mines' Labour Supply, 1890–1920* (Kingston and Montreal: McGill-Queen's Press, 1995); Christian M. Rogerson, *Forgotten Places, Abandoned Places: Migration Research Issues in South Africa in The Migration Experience in Africa* (J. Baker & T. Aina (eds.), Uppsala: Nordiska Afrikainstitutet, 1995); Jonathan Crush, *Cheap Gold: Mine Labour in Southern Africa in The Cambridge Survey of World Migration* (R. Cohen (ed.), Cambridge: Cambridge University Press, 1995); Jonathan Crush, *Migration Past: An Overview of Cross-Border Migration in Southern Africa in On Borders: Perspectives on International Migration in Southern Africa* (D.A. McDonald (ed.), Cape Town and New York: SAMP and St Martin's Press, 2000); *Transnationalism and New African Immigration to South Africa* (J. Crush & D.A. McDonald (eds.), Cape Town and Kingston, Canada: Southern African Migration Project (SAMP) and Canadian Association of African Studies (CAAS), 2002).

<sup>47</sup> *Migrants, Citizens and the State in Southern Africa* (J. Whitman (ed.), Basingstoke: Macmillan, 2000).

<sup>48</sup> Throughout the 20<sup>th</sup> century, the international community steadily assembled a set of guidelines, laws and conventions to ensure the adequate treatment of refugees and protect their human rights. The process began under the League of Nations in 1921. In July 1951, a diplomatic conference in Geneva adopted the Convention Relating to the Status of Refugees, which was later amended by the 1967 Protocol. These documents clearly spell out who is a refugee and the kind of legal protection, other assistance and social rights a refugee is entitled to receive. It also defines a refugee's obligations to host countries and specifies certain categories of people, such as war criminals, who do not qualify for refugee status. Initially, the 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II, but the 1967 Protocol expanded its scope as the problem of displacement spread around the world. These instruments have also helped inspire important regional instruments such as the 1969 OAU (now AU) Refugee Convention in Africa, the 1984 Cartagena Declaration in Latin America and the development of a common asylum system in the European Union. Today, the 1951 Convention and the 1967 Protocol together remain the cornerstone of refugee protection, and their provisions are as relevant now as when they were drafted.

<sup>49</sup> Israel Chokuwenga, *The Refugee Crisis: A South African Perspective in Migrants, Citizens and the State in Southern Africa* 119 (J. Whitman (ed.), Basingstoke: Macmillan, 2000).

<sup>50</sup> Art. 1(A)(2) of the 1951 Convention.

than the internationally-accepted definition found in the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. It does not include any temporal or geographical limitations, or any reference to earlier categories of refugees. The AU Convention also regulates the question of asylum. In addition, it unanimously stipulates that repatriation must be a voluntary act.<sup>51</sup> To date, 34 African states have ratified this Convention, a few countries having taken the initiative to formulate their own refugee legal instruments to localize the convention to suit their own situation.<sup>52</sup>

Immigration rules establish the basis upon which sovereign states receive immigrants and typically include procedures for the selection, admission and deportation of non-citizens wishing to enter the country<sup>53</sup> as well as rules that control entrants once they are within the territorial confines of the state.<sup>54</sup> Before 1994, foreign workers were recruited under agreement<sup>55</sup> between the employing organization, which in most cases were the big mining conglomerates, and the governments of the supplying countries and most of the neighboring countries were suppliers of labor to South Africa.<sup>56</sup> These workers were undocumented migrants and severely restricted and no doubt a source of cheap labor.<sup>57</sup> With independence, the pattern of migration subsequently changed with the new government lifting most of the restrictions.<sup>58</sup> Since 1994, South Africa has deported 1.7 million undocumented migrants to neighboring states like Mozambique, Zimbabwe, and Lesotho. In 2006 alone, 260,000 migrants were arrested and deported. Human rights groups, including the South African Human Rights Commission (SAHRC), criticized the deportation

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<sup>51</sup> United Nations High Commissioner for Refugees, *The State of the World's Refugees: The Challenge of Protection* (London: Penguin, 1993); Chokuwenga 2000.

<sup>52</sup> *Id.*

<sup>53</sup> Grete Brochmann, *Mechanism of Immigration Control in Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies* (G. Brochmann & T. Hammer (eds.), New York: Berg Editorial Offices, 1999).

<sup>54</sup> Jonathan Crush, *Immigration, Human Rights and the Constitution in Beyond Control: Immigration and Human Right in Democratic South Africa* (J. Crush (ed.), Cape Town: Idasa, 1998).

<sup>55</sup> Jonny Steinberg, *A Mixed Reception: Mozambican and Congolese Refugees in South Africa*, ISS Monograph Series 117 (Pretoria: Institute for Security Studies, 2005); Fatima Khan, *Patterns and Policies of Migration in South Africa: Changing Patterns and the Need for a Comprehensive Approach*, Paper drafted for discussion on Patterns on Policies of Migration in Loreto, Italy, October 3, 2007 (May 20, 2017), available at [http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns\\_policies\\_migration\\_FKhan.doc](http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc).

<sup>56</sup> Hania Zlotnik, *Migrants' Rights, Forced Migration and Migration Policy in Africa*, Paper prepared for Conference on African Migration in Comparative Perspective, Johannesburg, South Africa, June 4–7, 2003 (May 10, 2017), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.586.5923&rep=rep1&type=pdf>.

<sup>57</sup> Steinberg 2005.

<sup>58</sup> Khan, *supra* note 55.

system. Most criticisms focus on the methods of arrest and removal, which these groups say are no different from those deployed to control black South Africans during the apartheid era.<sup>59</sup> Initially the movement of refugees was regulated by the Aliens Control Act<sup>60</sup> of the apartheid era but, in 1998, a new Refugee Act was passed. The 1998 Refugee Act governed the admission of asylum seekers and details their rights and responsibilities. The law came into effect in 2000.<sup>61</sup>

However, pursuant to the domestication of the Conventions and Protocols, the South Africa's Immigration Act of 2002<sup>62</sup> became the main piece of legislation dealing with the admissibility of foreigners into the Republic. In 2004, it was amended (as Immigration Amendment Act No. 19 of 2004) to clarify issues on entry and stay in the country and roles of officials.<sup>63</sup> There was also the Immigration Regulations of June 2005. According to this Act, generally, immigrants who are in a position to contribute to the broadening of South Africa's economic base are welcomed to apply for residence.<sup>64</sup> The Act laid out a more immigration-friendly framework focused on attracting skilled migrants. It also committed the government to rooting out xenophobia in society although it did not specify how this was to be achieved. However, the act also included still more draconian measures to control undocumented migrants through what was euphemistically called "community policing" (that is, expecting South Africans to spy on people and report their suspicions to the authorities).<sup>65</sup> Other amendments have included Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 12 of 2004, Immigration Amendment Act No. 3 of 2007, Immigration Amendment Act No. 13 of 2011, Prevention and Combating of Trafficking in Persons Act No. 7 of 2013 and the Immigration Amendment Act 2016.<sup>66</sup> The result of these changes included visa types, visa processing requirements and travel requirements; new application forms and application fees; and stricter

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<sup>59</sup> Jonathan Crush, *South Africa: Policy in the Face of Xenophobia*, Migration Policy Institute, July 28, 2008 (May 10, 2017), available at <http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia>.

<sup>60</sup> The Aliens Control Act No. 96 of 1991, October 1, 1991 (May 10, 2017), available at <http://www.refworld.org/cgi-bin/txis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52c148c94>.

<sup>61</sup> Republic of South Africa Immigration Bill. See Compendium of Migrant Integration Policies and Practices, at 183 (May 10, 2017), available at [http://rosanjose.iom.int/site/sites/default/files/Compendium\\_of\\_Migrant\\_integration.pdf](http://rosanjose.iom.int/site/sites/default/files/Compendium_of_Migrant_integration.pdf).

<sup>62</sup> The Immigration Act No. 13 of 2002, Government Gazette No. 23478, Notice No. 766, May 31, 2002. After eight years of negotiation, it repeals the Aliens Control Act of 1991 and the Aliens Control Amendment Act No. 76 of 1995.

<sup>63</sup> Khan, *supra* note 55.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> The Immigration Amendment Act No. 8 of 2016, Government Gazette No. 40302, Notice No. 615, September 27, 2016.

penalties for non-compliance. It is believed that these changes are critical to beef-up national security and ensure economic interests in fulfilment of international obligations and a review of the approach to migration.<sup>67</sup> It remains to be seen whether the changes to South Africa's immigration law have even begun to give effect to these objectives. For instance the recently passed Immigration Amendment Act of 2016 which seeks to amend the 2002 Act, 2004 and 2011 Acts, has been met with severe criticism in view of the sweeping changes made to the Act.<sup>68</sup> The visa application system has been made more complicated for professionals to conduct business in the country and partners of South African citizens to remain together. Also, by the provision of the 2002 Act, spouses whether married or in common law relationships will have to prove a two year relationship before application for permanent residency.<sup>69</sup> This provision it is suggested contravenes international obligations as it becomes tasking for newly married to apply for permanent residency. The boiling point of the Immigration Amendment Act is the change of fines for foreigners who overstay their temporary visa. The import of the provision is that persons leaving the country without a valid permit or visa in their passports will no longer be fined, but will instead summarily be declared as "undesirables for between 12 months and five years."<sup>70</sup> This is so irrespective of whether they simply overstayed or correctly and timeously applied for an extension of their status but it had not yet been processed by the Department of Home Affairs (DHA). Furthermore, the duration for or to amend a visa is 60 days before it expires.<sup>71</sup> Failure to do so will result in a person being declared illegal in a specific country. This new legislation is considered unconstitutional as benchmarked against the South African Constitution. Also the impact of the immigration rules on the business community is to the effect that foreigners looking to set up businesses in South Africa have to ensure that 60% of their workforce comprises South Africans. The Department of Trade and Industry and Department of Labor will be involved in every application for foreign

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<sup>67</sup> According to the Department of Home Affairs in South Africa (May 10, 2017), available at <http://www.caveatlegal.com/unravelling-south-african-immigration-law/#sthash.x8TeeJqF.dpuf>.

<sup>68</sup> The essence of the Act is couched thus "To amend the Immigration Act, 2002, so as to provide for an adequate sanction for foreigners who have overstayed in the Republic beyond the expiry date on their visa; and to provide for matters connected therewith." Amendment of sec. 32 of Act No. 13 of 2002, as amended by sec. 33 of Act No. 19 of 2004; amendment of sec. 50 of Act No. 13 of 2002, as amended by secs. 46 and 47 of Act No. 19 of 2004 and sec. 25 of Act No. 13 of 2011.

<sup>69</sup> Sec. 26 of the Immigration Act No. 13 of 2002.

<sup>70</sup> Nina Oosthuizen, *Immigration Law Change Met with Stern Criticism*, SABC, May 29, 2014 (May 10, 2017), available at <http://www.sabc.co.za/news/a/227dde80442cb97aabbfff9a75bb7e80/Immigration-law-change-metwith-stern-criticism-20142905>.

<sup>71</sup> South Africa Immigration (May 10, 2017), available at <http://southafricanimmigration.org/extensions/2304/>. See Department of Home Affairs – New Immigration Regulation, South Africa (May 10, 2017), available at <http://www.intergate-immigration.com/blog/new-immigration-regulations-visa-application-south-africa/>.

businesses to set up in South Africa while the provisions for local procurement will offer employment to South Africans.<sup>72</sup> It has been suggested that though the 60% requirement is commendable, as a panacea to the country's high unemployment rate. It is however argued that the burden on applicants, lack of training of staff at regional offices of Home Affairs on the new regulation, slow processing of applications, compulsory overseas filings and a generally unfriendly set of rules, may discourage investors and affect the level of investment the country sees. This piece of legislation and its subsequent amendments swing back and forth between the idealism of the post-apartheid "African Renaissance" and the pervading deep-seated fear of immigrants and immigration.<sup>73</sup> For on the one hand, the immigration policy guarantees the harmonization of rights between citizens and foreigners and pledges amity towards migrants from the South African Development Community (SADC) region while on the other, the policy justifies restricting legal immigration into the country, especially from the SADC region, using the popular lexicon of the xenophobe.<sup>74</sup> While avowing a strongly anti-xenophobic tone, the Act justifies restricting legal immigration by echoing the popular logic that migrants are linked to crime, unemployment, increased pressure on social services and corruption.<sup>75</sup> From this standpoint, the history of this legislation is "distinguished above all by the constitutive restlessness and relative incoherence of various strategies, tactics and compromises that nation-states implement at particular historical moments... to mediate the contradictions immanent in social crisis and political struggles... around the subordination of labour."<sup>76</sup> From this perspective, the immigration law can be perceived as an instrument of control, discipline and coercion through the deployment of these laws as tactics.<sup>77</sup> In many ways, this racially-biased immigration policy has been carried forward to the modern post-apartheid state for some of these policies towards migrants are embedded in the Aliens Control Act of 1991.<sup>78</sup>

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<sup>72</sup> Ray Mahlaka, *New Immigration Rules Effective under a Cloud of Criticism*, Moneyweb, May 29, 2014 (May 20, 2017), available at <https://www.moneyweb.co.za/archive/new-immigration-rules-effective-under-a-cloud-of-c/>.

<sup>73</sup> Steven L. Gordon, *Migrants in a "State of Exception,"* 1(1) *Transcience Journal* 1 (2010).

<sup>74</sup> *Id.* at 8.

<sup>75</sup> *Id.*

<sup>76</sup> Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 *Annual Review of Anthropology* 419 (2002).

<sup>77</sup> Gordon 2010.

<sup>78</sup> The Aliens Control Act was based on the 1913 Act that excluded "blacks" and was amended in 1930 and 1937 to exclude Jews. In terms of the Act, it was an offence to "employ, enter into any agreement with, conduct any business with, harbor, or make immovable property available to illegal immigrants." Brij Maharaj, *Immigration to Post-Apartheid South Africa*, *Global Migration Perspective No. 1*, *Global Commission on International Migration* (June 2004) (May 20, 2017), available at <http://www.refworld.org/pdfid/42ce45074.pdf>.

Although the racial requirements were removed from the Aliens Control Act during the early 1990s, the restrictive and draconian nature of the Act remained.<sup>79</sup> The Act was criticized as being premised on the principles of control, exclusion and expulsion and that the post-apartheid migration management system was characterized by corruption, racial double standards and special privileges for certain employers.<sup>80</sup>

#### 4. Immigration Policy and Developments in South Africa

International population movements are complex to measure, as they are influenced by a variety of socio-economic, political, environmental and other factors. There are no official figures available on the total number of foreign residents in South Africa other than projections based on census data.<sup>81</sup> The global movement of people, information, technology and capital across the globe provides huge opportunity and at the same time immense risk.<sup>82</sup> There is a cross-border connection and integration of societies, economies and culture<sup>83</sup> and South Africa has been a migrant-receiving country for many decades.<sup>84</sup> Much of the immigration policy paradigm in South Africa in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries was dominated by the discourse of recruiting “desirable” whites and excluding migrants from Asia and India in particular but with regard to African migrants, domestic and foreign, the primary concern of apartheid and pre-1948 South African governments was to ensure colonial domination and an abundant supply of cheap migrant labor.<sup>85</sup> The challenges of managing migration in South Africa became more complex by the fact that the end of apartheid opened up the country to new forms of global, continental

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<sup>79</sup> Gordon 2010.

<sup>80</sup> Jonathan Crush, *Fortress South Africa and the Deconstruction of Apartheid's Migration Regime*, 30(1) *Geoforum* 1 (1999).

<sup>81</sup> Figures from the 2011 Census suggest that 3.3% or about 1.7 million of the country's 51.7 million population are foreign born. According to AfricaCheck, data collated by the World Bank and the UN, suggests a migrant population of about 1.86 million people. The IOM estimates that the total migrant population rose from 2% of population in 2000 to over 5.5% in 2015, which aligns with the census projections. See Green Paper on International Migration, Department of Home Affairs, June 24, 2016 (May 20, 2017), available at [http://webcache.googleusercontent.com/search?q=cache:W7e3\\_epdeRgJ:www.gov.za/sites/www.gov.za/files/40088\\_gon738.pdf+&cd=1&hl=ru&ct=clnk&gl=ru](http://webcache.googleusercontent.com/search?q=cache:W7e3_epdeRgJ:www.gov.za/sites/www.gov.za/files/40088_gon738.pdf+&cd=1&hl=ru&ct=clnk&gl=ru).

<sup>82</sup> *Id.*

<sup>83</sup> Ian Goldin, *Globalization and Risk for Business: Implications of an Increasingly Interconnected World*, Lloyd's 360 Risk Insight (May 20, 2017), available at [https://www.lloyds.com/~/\\_media/lloyds/reports/360/360-globalisation/lloyds\\_360\\_globalisation.pdf](https://www.lloyds.com/~/_media/lloyds/reports/360/360-globalisation/lloyds_360_globalisation.pdf).

<sup>84</sup> Guy Standing et al., *Restructuring the Labour Market: The South African Challenge* 61–62 (Geneva: ILO, 1996).

<sup>85</sup> *Id.*

and regional migration.<sup>86</sup> The ensuing integration of South Africa with the SADC region brought a major increase in legal and undocumented cross-border flows and new forms of mobility and the region's reconnection with the global economy opened it up to forms of migration commonly associated with globalization.<sup>87</sup> This process generated a number of social, economic and political challenges, and necessitated bold new policies. This necessity was for regional economic integration to proceed<sup>88</sup> hence migration can be considered an instrument of development, which has the potential to facilitate economic, social and political freedom. It may also hinder economic activities, and create social instability and anarchy.<sup>89</sup> According to international studies, immigrants are said to contribute to economic development of host countries. For instance, in South Africa, there is improvement or indirect impact on the economy especially in the informal and formal businesses such as supermarkets, crafts, taxis and upholstery. They contribute via purchasing of goods and subsistence and other living expenses.<sup>90</sup> Hence it is often argued that South Africa is stereotyped into thinking that foreigners, whether legal or illegal are a threat to the economy and security of the South Africans.<sup>91</sup>

South Africa has undergone a protracted process of developing policy and legislation on migration and refugees since 1994.<sup>92</sup> This process has included the drafting of a Green Paper on International Migration in 1997, a Refugee White Paper on International Migration accompanied by a Draft Immigration Bill and the adoption of the first comprehensive Immigration Act in 2002, which was subsequently amended.<sup>93</sup>

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<sup>86</sup> Jonathan Crush & Vincent Williams, *International Migration and Development: Dynamics and Challenges in South and Southern Africa*, United Nations Expert Group Meeting on International Migration and Development, United Nations Secretariat, New York, July 6–8, 2005 (May 20, 2017), available at [http://www.un.org/esa/population/meetings/ittmigdev2005/P05\\_Crush&Williams.pdf](http://www.un.org/esa/population/meetings/ittmigdev2005/P05_Crush&Williams.pdf).

<sup>87</sup> Brian Williams et al., *Spaces of Vulnerability: Migration and HIV/AIDS in South Africa*, Migration policy series no. 24 (Cape Town: Idasa, 2000); *Mobile Populations and HIV/AIDS in the Southern African Region* (Pretoria: IOM and UNAIDS, 2003).

<sup>88</sup> Sandy Johnson & Antony Altbeker, *South Africa's Migration Policies: A Regional Perspective*, CDE Workshop no. 8 (February 2011) (May 20, 2017), available at <http://www.cde.org.za/wp-content/uploads/2012/12/South%20African%20Migration%20policies%20A%20Regional%20perspective%20Full%20Report.pdf>.

<sup>89</sup> Census 2011: Migration Dynamics in South Africa, Statistics South Africa, Report No. 03-01-79 (May 20, 2017), available at <http://www.statssa.gov.za/publications/Report>.

<sup>90</sup> David A. McDonald et al., *The Lives and Times of African Migrants & Immigrants in Post-Apartheid South Africa*, Migration policy series no. 13 (Cape Town: Idasa, 1999). See Maharaj, *supra* note 78.

<sup>91</sup> *Id.* See also Daniel Tevera & Lovemore Zinyama, *Zimbabweans Who Move: Perspectives on International Migration in Zimbabwe*, Migration policy series no. 25 (Cape Town: Idasa, 2002).

<sup>92</sup> Towards a White Paper on International Migration in South Africa, Guidelines for Public Consultation, June 15, 2016 (May 20, 2017), available at [http://www.home-affairs.gov.za/files/Guidelines\\_for\\_Consultation-GreenPaper.pdf](http://www.home-affairs.gov.za/files/Guidelines_for_Consultation-GreenPaper.pdf).

<sup>93</sup> Green Paper on International Migration, *supra* note 81.

The Refugee White Paper was developed in 1998 as a first step towards developing a system of protection for refugees and asylum-seekers, following South Africa's ratification of the 1951 Convention and its 1967 Protocol and the 1996 OAU (now AU) Convention Governing the Specific Aspects of Refugee Problems in Africa. The White Paper also included a Draft Refugee Bill which, following amendments was adopted and legislated as the Refugees Act.<sup>94</sup> The White Paper outlined a number of principles guiding the treatment of refugees in South Africa, including: the international principle of non-refoulement: non-prosecution on the basis of illegal entry into the country; non-deportation, except where there is a threat to national security or the public order; basic security rights; basic human dignity rights and basic self-sufficiency rights, including the rights to work and education.<sup>95</sup> The shortcoming of this White Paper is that it is not holistic because it does not deal with emigration and it adopts an approach that does not align with South Africa's historical and geographical realities or to using international migration strategically to achieve development goals. It also assumes immigration as a routine function that falls mainly under the Home Affairs rather than adopting a "whole of the state and society" approach.<sup>96</sup> The White Paper did advocate establishing an immigration service and the Immigration Services (IMS) branch of the Department of Home Office which was established but was poorly funded.<sup>97</sup> However, the 2016 Green Paper on International Migration<sup>98</sup> addressed the question of how to engage with South African emigrant communities abroad and provided a holistic approach towards international migration in view of the various interconnectivity which manifests in concrete processes and in the lives of people. For example, providing protection to refugees and asylum seekers falls in the human rights domain; but it also carries security risk for the host country that must manage it using the same security systems that cover immigration.<sup>99</sup>

At the level of policy, legislation, strategy and systems, the asylum seeker and refugee regime that was established through the White Paper Refugees Act has serious gaps that have only been partially addressed through amendments.<sup>100</sup> This was caused by the assumption that numbers of asylum seekers would be low, given the relative stability of SADC and the distance from refugee sending countries. Also, the high level of activity of human smugglers and traffickers who bring in people under the guise of being asylum seekers from as far as Asia and North East Africa was also

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<sup>94</sup> The Refugees Act No. 130 of 1998, Government Gazette No. 19544, Notice No. 402, December 2, 1998.

<sup>95</sup> Green Paper on International Migration, *supra* note 81.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

a factor.<sup>101</sup> There was also no provision made for indigent asylum seekers with basic food and accommodation, leading to the courts obliging the Department of Home Affairs to consider issuing deserving cases with permits allowing them to work or study. This further burdened the asylum system, leading to many adjudication cases being delayed for years.<sup>102</sup> The Department of Home Affairs amended the Immigration and Refugee Acts and implemented strategies to address gaps in legislation.<sup>103</sup> What is required, however, is a comprehensive review of the policy framework that can inform systematic reform of the legislation and administration of immigration. There was a comprehensive national discussion on the international migration policy prior to the publication of the White Paper on International Migration in 1999. Since then, South Africa and the world have undergone profound changes and there is a better understanding of the way in which international migration should be managed by states, regions and internationally.<sup>104</sup> However, within South Africa, the thinking and attitudes to international migration are currently influenced by an unproductive debate between those who call for stricter immigration controls and those who call for controls to be relaxed. The discourse is in general characterized by strong emotions, stereotypes and contested statistics.<sup>105</sup> The overall contention of the Green Paper is that it is neither desirable nor possible to stop or slow down international migration. In general international migration is beneficial if it is managed in a way that is efficient, secure and respectful of human rights. Managing international migration in the interest of the states is not a new idea. As states develop with rules, they are codified into laws which concern the rights and duties of citizens.<sup>106</sup>

## 5. Access to Justice for Non-Citizens in South Africa

The rights entrenched in the Bill of Rights in South Africa's final Constitution are, with a few exceptions, guaranteed to citizens and non-citizens alike. Ordinarily, citizenship can be acquired by being born in a country (*jus soli* or the law of the

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<sup>101</sup> Green Paper on International Migration, *supra* note 81.

<sup>102</sup> Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (May 15, 2017), available at [http://www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf).

<sup>103</sup> Overview of the New Immigration Laws and Regulations and Their Implications, by Home Affairs Director-General Mkuseli Apleni, Department of Home Affairs, April 24, 2015 (May 15, 2017), available at <http://www.dha.gov.za/index.php/statements-speeches/600-overview-of-the-new-immigration-laws-and-regulations-and-their-implications-by-home-affairs-director-general-mkuseli-apleni>.

<sup>104</sup> Guidelines for Public Consultation, *supra* note 92.

<sup>105</sup> Louise Flanagan, *Home Affairs Looking at Refugees in a New Light*, Daily News, July 4, 2016 (May 15, 2017), available at <http://www.iol.co.za/dailynews/opinion/home-affairs-looking-at-refugees-in-a-new-light-2041493>.

<sup>106</sup> Green Paper on International Migration, *supra* note 81.

place); being born to a parent who is a citizen of the country (*jus sanguinis* or the law of blood); naturalization; or a combination of any of these paths. Persons falling outside of these borders are non-citizens.<sup>107</sup> These include people who reside in the country but were not born there and owe no allegiance to it, and also some people who owe allegiance to the country and have been living in it for generations but still find themselves in this category.<sup>108</sup> Non-citizens however, include refugees, asylum seekers, documented migrants and undocumented migrants.<sup>109</sup>

### **5.1. Asylum Seekers and Refugees**

An asylum seeker is one who has left his or her own country of origin in order to seek international protection as a refugee.<sup>110</sup> In South Africa, a person becomes an asylum seeker when he or she states his or her decision to apply for refugee status. The fact that a person is fleeing from his or her home country to seek international protection does not automatically make him or her an asylum seeker. Under the South African Law, such a person must first make the claim for asylum before he or she can be considered an asylum seeker.<sup>111</sup> The difference between an “asylum seeker” and a “refugee” though sometimes used interchangeably is that an asylum seeker has not yet been granted protection status whereas a refugee has been granted such status<sup>112</sup> and the right to seek asylum is provided for under the Universal Declaration of Human Rights (UDHR)<sup>113</sup> and the African Charter on Human and Peoples’ Rights.<sup>114</sup>

Subsequent to its accession to various international treaties on the status of refugees,<sup>115</sup> South Africa committed itself to the principle of non-refoulement. This principle finds expression in sec. 2 of the Refugees Act which prohibits the return of refugees and asylum seekers to a country from which they are fleeing persecution based on the grounds specified in it. Most asylum seekers do not enter the country through

<sup>107</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *The Rights of Non-Citizens*, 2006, HR/PUB/06/11 (May 15, 2017), available at <http://www.ohchr.org/documents/publications/noncitizensen.pdf>.

<sup>108</sup> Patricia Ehrkamp & Helga Leitner, *Beyond National Citizenship: Turkish Immigrants and the (RE) Construction of Citizenship in Germany*, 24(2) *Urban Geography* 127, 127–128 (2003).

<sup>109</sup> *The Rights of Non-Citizens*, *supra* note 107.

<sup>110</sup> David Weissbrodt, *The Human Rights of Non-Citizens* 110 (Oxford: Oxford University Press, 2008).

<sup>111</sup> Sec. 23 of the Immigration Act No. 13 of 2002 as amended by sec. 15 of the Immigration Amendment Act No. 13 of 2011.

<sup>112</sup> Weissbrodt 2008.

<sup>113</sup> UDHR (1948) UN Doc A/810 Art 14(1).

<sup>114</sup> OAU, African Charter on Human and Peoples’ Rights (“Banjul Charter”), June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>115</sup> Art. 33(1) of the 1951 Convention. Refoulement is also prohibited by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 3), and the International Covenant on Civil and Political Rights (Art. 7) to which South Africa is a signatory.

the designated entry point for fear that they would be denied the right of entry if they present themselves at the port of entry.<sup>116</sup> Consequently, they only seek asylum after their irregular entry into the country.<sup>117</sup> And by the provisions of the Immigration law, a person who enters and remains in the country must do so within the confines of the law<sup>118</sup> because an asylum seeker who enters the country through irregular means could potentially be regarded by authorities as undocumented migrants, especially if they are not in possession of any other form of documentation. They are usually arrested and detained if found to have no document or to be in possession of expired asylum seeker permits.<sup>119</sup> However, where an asylum seeker declares his intention to seek international protection, he must be issued with a temporary visa<sup>120</sup> because by virtue of his status other documents like a valid passport or other identity document is beyond his reach.<sup>121</sup> The temporary visa is to enable him to have access to a Refugee Reception Office where he is issued with a permit in the prescribed form setting out the conditions for stay in the country in line with the constitution and international obligations.<sup>122</sup> Refugees are also entitled to certain rights and protection under the South African law.<sup>123</sup> In view of the well-founded principles of international law, South Africa has an obligation not to extradite, expel or return a refugee to any country if such action would see the person being subjected to “persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group” in the other country.<sup>124</sup>

<sup>116</sup> Weissbrodt 2008.

<sup>117</sup> *Id.*

<sup>118</sup> Secs. 9(1),(4) and 10(1) of the Immigration Act No. 13 of 2002.

<sup>119</sup> *Arse v. Minister of Home Affairs and Others*, (25/2010) [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) (March 12, 2010); *Hassani v. Minister of Home Affairs*, (01187/10) SGHC (February 5, 2010) (unreported); *Kibanda Hakizimana Amadi v. Minister of Home Affairs*, (19262/10) SGHC (June 1, 2010) (unreported); *Jean Paul Ababason Bakamundo v. Minister of Home Affairs and 2 Others*, (17217/09) SGHC (May 12, 2009).

<sup>120</sup> In terms of sec. 23 of the Immigration Act No. 13 of 2002.

<sup>121</sup> Lawyers for Human Rights Situation Report: Refoulement of Undocumented Asylum-Seekers at South African Ports of Entry, With a Particular Focus on the Situation of Zimbabweans at Beitbridge (September 2011) (May 15, 2017), available at <http://www.lhr.org.za>.

<sup>122</sup> Sec. 22(1) of the Refugees Act.

<sup>123</sup> *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*, (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC) (December 12, 2006), para. 99: “To understand the special position of refugees, it is important to understand how refugee status is conferred in our law, as well as South Africa’s international obligations in respect of refugees.”

<sup>124</sup> Weissbrodt 2008, at 153. See the following: European Union, Charter of Fundamental Rights of the European Union, October 26, 2012, 2012/C 326/02, Art. 18; Cartagena Declaration on Refugees, November 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85); Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”), September 10, 1969, 1001 U.N.T.S. 45. See sec. 2 of the Refugee Act, which ensures that refugees enjoy asylum in South Africa without hindrance. It encompasses both the “seeking” and “enjoyment” of asylum.

The United Nation Refugee Convention<sup>125</sup> sets out the criteria that qualifies a person for the status of refugee as follows: (1) such a person should be outside his or her country of nationality and (2) should be unable to return to his country of nationality or unwilling to do so owing to; (3) a well-founded fear of persecution for reasons of race, religion, political opinion or membership of a certain social group<sup>126</sup> while for a stateless person to qualify for international protection under this definition, such a person needs to be outside his/her country of habitual residence.<sup>127</sup> The Refugees Act<sup>128</sup> accentuates the UN Refugee Convention on the definition of Refugee in South Africa and also acknowledges the fact that South Africa is a signatory to the AU Convention Governing the Specific Aspects of Refugee Problems in Africa and sec. 3(b) of the Act includes the definition found in the AU document. There are however disparities between the definition of the AU Convention on Refugees and that of the 1951 Convention for while the AU Convention makes provision for an objective inquiry into conditions prevailing in the applicant's country of origin, thus making it more suitable for cases of forced mass movements of people,<sup>129</sup> the 1951 Convention requires a subjective test focusing on the individual applicant.<sup>130</sup> Under the requirement of the AU Convention, there is no need to demonstrate a "well-founded fear of persecution," it is sufficient that the country of origin is subjected to foreign aggression, occupation or domination resulting in serious public disorder, consequently, the grant of asylum to larger groups is easier under the AU Convention unlike the 1951 Convention that requires individual screening.<sup>131</sup> The system of refugee determination in South Africa involves an interview between

<sup>125</sup> Art. 1(A)(2) of the 1951 Convention.

<sup>126</sup> Jens Vedsted-Hansen, *Refugees, Asylum Seekers and Migrant Workers in International Protections of Human Rights: A Textbook* 303 (C. Krause & M. Scheinin (eds.), Turku: Abo Akademi University, 2009). See also Weissbrodt 2008, at 153.

<sup>127</sup> *Id.*

<sup>128</sup> Sec. 3(a).

<sup>129</sup> Example, the Great Lakes Region: the Great Lakes is one of the regions in Africa that has been affected by a high number of refugee-related problems. Conflicts, famine and violence have pushed millions of people away from their places of origin. For several decades, the region has been engulfed in violent intrastate and proxy interstate conflicts. The Rwandan genocide in 1994, the Burundi and South Sudan civil wars, and the conflict in the Democratic Republic of the Congo (DRC) are still ongoing deadly conflicts that have caused an irregular migration of refugees and internally displaced persons (IDPs) in the region. Scholars have identified the Great Lakes Region as consisting of not only the DRC, Uganda, Burundi, Rwanda, Kenya and Tanzania, but also including South Sudan, Somalia, Sudan, Angola, Ethiopia, Eritrea all of which share the ravages and fallout of these intractable conflicts. See *Conflict and Peacebuilding in the African Great Lakes Region* 3 (K. Omeje & T.R. Hepner (eds.), Bloomington: Indiana University Press, 2013).

<sup>130</sup> Weissbrodt 2008, at 153.

<sup>131</sup> Paul Kuruk, *Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees*, 35 *Stanford Journal of International Law* 313, 325 (1999). See also Weissbrodt 2008, at 161; Jastram & Achiron, *supra* note 102.

the claimant and the Refugee Status Determination Committee (RSDC) which is an administrative process provided for under the South African Constitution which guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.

### **5.2. Migrants**

Apart from refugees and asylum seekers, non-citizens consist of migrant workers, foreign students, business visitors, tourists and undocumented migrants or “illegal foreigners.”<sup>132</sup> There is a disjuncture between the guaranteed rights and the realities that face non-citizens.<sup>133</sup> Xenophobia leads to denying non-citizens their rights and access to justice which are guaranteed in domestic and international law.<sup>134</sup> The overarching international instrument for the protection of human rights remains the UDHR with its ancillary treaties like the International Covenant on Civil and Political Rights (ICCPR)<sup>135</sup> and the ICERD among others.<sup>136</sup> Since these instruments apply to all human beings, they apply to both citizens and non-citizens<sup>137</sup> alike irrespective of where one comes from and they safeguard everyone from arbitrary arrest and detention,<sup>138</sup> arbitrary killing,<sup>139</sup> torture and inhuman treatment.<sup>140</sup>

Against the backdrop of these constitutional and human rights provisions, Parliament enacted the Immigration Act which has been subject to several amendment to govern entry and departure from the Republic. The Act recognizes two groups of migrants: “Legal foreigners” who are in the country in terms of the provisions found within the Act and “Illegal foreigners” who are in the country in

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<sup>132</sup> This terminology comes from sec. 32 of the Immigration Act No. 13 of 2002. It was contested at the time of drafting by the SAHRC who felt it was offensive and objectified the persons concerned – see in SAHRC Submission on Immigration Bill (2002) (May 15, 2017), available at <https://www.sahrc.org.za/home/21/files/7%20SAHRC%20Submission%20on%20Immigration%20Bill%20%28Parl.%29%20April%202002.pdf>.

<sup>133</sup> Weissbrodt 2008, at 2.

<sup>134</sup> *Id.* at 3.

<sup>135</sup> UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations, Treaty Series, vol. 999, at 171.

<sup>136</sup> See the following treaties: African Charter on Human and Peoples’ Rights; UN General Assembly, Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, at 3; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, United Nations, Treaty Series, vol. 1249, at 13. All these treaties have been ratified by South Africa and contain similar protections applicable to all, including migrants.

<sup>137</sup> Art 2 of the UDHR; Art 1 of the ICERD.

<sup>138</sup> Art. 9 of the ICCPR.

<sup>139</sup> Art. 6 of the ICCPR.

<sup>140</sup> Art. 7 of the ICCPR.

contravention of the Act<sup>141</sup> hence legal foreigners can be defined based on the reasons for their entry and stay in the country such as a grant of temporary residence visa upon application for the purposes of work,<sup>142</sup> study,<sup>143</sup> visiting,<sup>144</sup> uniting with relatives,<sup>145</sup> applying for asylum,<sup>146</sup> medical treatment,<sup>147</sup> etc. On the other hand illegal foreigners or undocumented migrants are those who are declared prohibited and (or) undesirable persons in terms of the Act.<sup>148</sup> The Immigration Act, in stark contrast with the Refugees Act,<sup>149</sup> does not contain a specific section outlining and detailing the rights of legal foreigners in South Africa. It, however, contains provisions dealing with the right of permanent residents.<sup>150</sup> The Act encourages the promotion of human rights based culture in respect of immigration control and also encourages the Department of Home Affairs to educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees and conduct activities to combat xenophobia.<sup>151</sup> The consideration of rights of illegal foreigners in the first place is progressive, although these rights are mostly envisaged in the event of the arrest, detention and deportation of undocumented migrants.<sup>152</sup> However, the provision in sec. 44 of the Act that obliges State actors to report undocumented migrants but at the same time not to deny them services can be seen as a limited form of recognition of undocumented migrants' rights.<sup>153</sup> Although it is presumed that once a person is legally in the country, he can enjoy the rights conferred upon him or her by their status; this is not the case in practice. The Immigration Act in its current form encourages community enforcement in the policing of illegal

<sup>141</sup> Sec. 1 (xviii) states that "illegal foreigners" means "a foreigner who is in the Republic in contravention of this Act and includes a prohibited person." See also *Lawyers for Human Rights and Other v. Minister of Home Affairs and Other*, (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (March 9, 2004), para. 4.

<sup>142</sup> Sec. 19.

<sup>143</sup> Sec. 13.

<sup>144</sup> Sec. 11.

<sup>145</sup> Sec. 18.

<sup>146</sup> Sec. 23.

<sup>147</sup> Sec. 17.

<sup>148</sup> Secs. 29 and 30. See *Lawyers for Human Rights and Other v. Minister of Home Affairs and Other*, *supra* note 141, para. 4.

<sup>149</sup> Sec. 27.

<sup>150</sup> Sec. 1 (xxxvii) states that "status" means "the permanent or temporary residence issued to a person in terms of this Act and includes the rights and obligations flowing therefrom, including any term and condition of residence imposed by the Department when issuing any such permit."

<sup>151</sup> Sec. 2(2)(e).

<sup>152</sup> Sec. 34(1).

<sup>153</sup> Sec. 44.

entry into the country.<sup>154</sup> This means that in addition to the police and immigration officials,<sup>155</sup> other state organizations,<sup>156</sup> private businesses,<sup>157</sup> learning institutions<sup>158</sup> and private individuals among others must always ascertain the status of anyone suspected of being a foreigner before engaging in any business with them. Such provisions are very intrusive and could mean that a foreigner does not enjoy a free and undisturbed sojourn within the country. Consequently, the focus is shifted from border control to control by institutions and members of the community.<sup>159</sup> Such an environment encourages vigilantism and may degenerate into xenophobic witch-hunts. Ultimately, the mistreatment of undocumented migrants results in their alienation and criminalization in the eyes of the community.<sup>160</sup> The result is that all foreigners, even documented migrants are under constant suspicion and becomes targets for police harassment and xenophobia.<sup>161</sup> In essence, the rights of non-citizens are infringed by the requirements of constantly having to verify their status at every turn for fear of arrest, detention and deportation. One of the frustrating aspects for non-citizen is being on the wrong end of the immigration authorities. Enforcement is often done with blatant disregard for the procedural and substantive protections put in place by the Immigration Act.<sup>162</sup> Once detained, very few detainees can afford private counsel, leaving most asylum seekers and other detained migrants with no recourse through which to exercise their basic rights.<sup>163</sup> This is exacerbated by the fact that immigration detention has fewer safeguards than criminal detention and it lacks external oversight and monitoring.<sup>164</sup> A study of immigration detention carried out by the SAHRC in 1999<sup>165</sup> established that

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<sup>154</sup> Sec. 2(1) of the Immigration Act No. 13 of 2002.

<sup>155</sup> Sec. 41.

<sup>156</sup> Sec. 44.

<sup>157</sup> Sec. 42.

<sup>158</sup> Sec. 39.

<sup>159</sup> Surplus People? Undocumented and Other Vulnerable Migrants in South Africa, Report, International Federation for Human Rights (FIDH), February 1, 2008 (May 15, 2017), available at <http://www.fidh.org/surplus-people-Undocumented-and>.

<sup>160</sup> *Id.* at 20.

<sup>161</sup> *Id.*

<sup>162</sup> Lawyers for Human Rights Report: Monitoring Immigration Detention in South Africa (September 2010) (May 15, 2017), available at <http://www.lhr.org.za>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> SAHRC Report into the Arrest and Detention of Suspected Undocumented Migrants, Launched in Parktown, Johannesburg, March 19, 1999 (May 15, 2017), available at <https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>.

there were repeated violations of the Aliens Control Act.<sup>166</sup> Several detainees are incarcerated for periods of over 5 months (or 150 days), which was in excess of the allowable 120 days during which time their detention had not been subject to judicial review.<sup>167</sup> In the case of *Aruforse v. Minister of Home Affairs*<sup>168</sup> the applicant challenged his prolonged detention in terms of sec. 34(1)(d) of the Act, after having been held in Lindela center for over 6 months.<sup>169</sup> The court took the view that sec. 34(1) only permits the extension of the initial 30 day period by a magistrate's Court for a further 90 calendar days. The court had recourse to the case of *Consortium for Refugees and Migrants in South Africa and Others v. Minister of Home Affairs and Others*<sup>170</sup> where Motloung J interpreted sec. 34(1) of the Immigration Act to mean "that the maximum period for which any person can be detained in terms of the Immigration Act is a period of 120 days."<sup>171</sup> Accordingly the court held that for the detention of the applicant to be unlawful, it must be beyond the statutory period of 120 days. In *Hassani v. Minister of Home Affairs*, a similar ruling was handed down based on the excessive length of the applicants' detention.

## 6. The Role of Law in Xenophobia in South Africa

Understanding the reason and the role of law in curbing this violence is important for the country for several reasons: on a micro-level it would help prevent future attacks, while on a macro-level, the country would be able to meet the basic tenets of

<sup>166</sup> Sec. 55 of the Aliens Control Act:

(5) such a detention shall not be for a longer period than is under the circumstances reasonable and necessary, and (that) any detention exceeding 30 days shall be reviewed immediately, by a judge of the Supreme Court of the provincial division in whose area of the jurisdiction, the person is detained, designated by the Judge, President of that division for the purpose, and provided that such detention shall be reviewed in this manner after the expiry of every subsequent period of 90 days.

<sup>167</sup> SAHRC Report, *supra* note 165.

<sup>168</sup> *Aruforse v. Minister of Home Affairs and Others*, (2010/1189) [2010] ZAGPJHC 59; 2010 (6) SA 579 (GSJ); 2011 (1) SACR 69 (GSJ) (January 25, 2010). The court held that no detention beyond 120 days is lawful and that the appropriate remedy is the applicant's immediate release. *See also AS & 8 Others v. Minister of Home Affairs & 3 Others*, 2010/101 (SGHC) (unreported). After more than 4 months in administrative detention, the High Court declared applicants' detention unlawful because DHA had failed to follow the correct administrative procedures when the family was first detained. The court importantly held that a warrant of detention that was not issued in accordance with procedural requirements of the Immigration Act, in this case within the correct time frame, could not legitimize, after the fact, a detention that was initially unlawful.

<sup>169</sup> *Id.* para. 2.

<sup>170</sup> *Consortium for Refugees and Migrants in South Africa and Others v. Minister of Home Affairs and Others*, WLD, July 7, 2008, Case No. 6709/08 (unreported).

<sup>171</sup> *Aruforse v. Minister of Home Affairs and Others*, *supra* note 168, paras. 14, 15.

regional cooperation such as tolerance and acceptance of non-citizens.<sup>172</sup> According to Sachs J minority judgment in *the Union of Refugee Women*<sup>173</sup> case

xenophobia is the deep dislike of non-nationals by nationals of a recipient State. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances.<sup>174</sup>

He cautioned however, that the manifestation of this phenomenon struck at the heart of the Bill of Rights, warning that it could subconsciously sip into the mainstream of life through biased interpretation and application of laws.<sup>175</sup> In an attempt to explain why xenophobia exists in South Africa, blame has been placed on the country's immigration laws which are perceived as exclusionary in context and operation.<sup>176</sup> The immigration law<sup>177</sup> is structured in such a way as to rope in the citizenry, businesses, schools, tertiary institutions, hospitals, hotels and other local entities to identify and report undocumented migrants.<sup>178</sup> The Act requires that non-citizens should prove their lawful status in the country at all times, even to non-state actors such as landlords, businesses, schools, hospitals, banks and colleges.<sup>179</sup> The effect of this law is that it paints all non-citizens as "others" who, in accessing public and private services, must continually prove and justify the legality of their presence in the country. These xenophobic attitudes and practices by institutions of the state dehumanize foreign nationals in the country, rendering them easy and soft targets for non-state actors.<sup>180</sup>

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<sup>172</sup> Nina Hopstock & Nicola de Jager, *Locals Only: Understanding Xenophobia in South Africa*, 33(1) Strategic Review for Southern Africa 120, 121 (2011).

<sup>173</sup> *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*, *supra* note 123.

<sup>174</sup> Para. 143.

<sup>175</sup> *Id.*

<sup>176</sup> Hopstock & de Jager 2011, at 127. The delay in implementing a new immigration system meant that the Aliens Control Act with its emphasis on security, sovereignty and exclusion continued in force until 2002. *See also* Neocosmos 2006. In 1997, the Department of Home Affairs led by Chief Mangosuthu Buthelezi (IFP) specifically rejected a Draft Green Paper on International Migration that was produced by an independent task team which called for a right-based approach to immigration.

<sup>177</sup> The Immigration Act No. 13 of 2002.

<sup>178</sup> Secs. 38 to 45 of the Immigration Act No. 13 of 2002. *See also* Darshan Vigneswaran, *Enduring Territoriality: South African Immigration Control*, 27(7) Political Geography 783 (2008).

<sup>179</sup> Vigneswaran 2008.

<sup>180</sup> Jean-Pierre Misago et al., *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluation Responses*, Forced Migration Studies Programme (FMSP), University of the Witwatersrand and Consortium for Refugees and Migrants in South Africa (CoRMSA) (April 2010) (May 15, 2017), available at [www.migration.org.za/uploads/docs/report-27.pdf](http://www.migration.org.za/uploads/docs/report-27.pdf).

Constitutionally, both citizens and non-citizens have equal right to political participation which is also supported by international human right treaties<sup>181</sup> but the exclusion of non-citizens from participation in political life even at a municipal level explains why community meetings held to discuss them normally degenerate into violent protests.<sup>182</sup> This exclusion has unintended consequences as non-citizens exclude themselves from local community policing forums and similar structures where it would have been desirable to have their input in order to counteract xenophobic tendencies and prejudice.<sup>183</sup> Decisions with negative impact on the lives of non-citizens are consequently taken without their participation. The court tried to reverse this trend in the case of *Mamba v. Minister of Social Development*<sup>184</sup> by requiring the parties to engage with each other. The parties were internally displaced non-nationals who were being evicted from temporary camps set up after the 2008 xenophobia attacks, on the one hand, and on the other hand were being evicted by the State. The court ordered parties to

engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters.<sup>185</sup>

This order was unsuccessful because of the relative weakness of non-citizens as a group in comparison to the state and because the negotiating positions were skewed in favor of the state. Nothing the court did could save the negotiations which further emphasize the fact that although the court may make an order, the state is often reluctant to engage with non-citizens who are deprived of vote and political power.<sup>186</sup> This further explains why states often repeat the same negative behavior against non-citizens, ignoring court orders and effectively running roughshod over their rights.<sup>187</sup>

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<sup>181</sup> Sec. 19 of the Constitution of South Africa. Misago et al. 2009.

<sup>182</sup> See *Osman v. Minister of Safety & Security & Others*, [2011] JOL 27143 (WCC).

<sup>183</sup> In any case, chapter 7 of the South African Police Service Act No. 68 of 1995 which sets out the objects and procedural requirements for Community Policing Forum (CPF) places no conditions on membership in the CPF, thus there should be no legal impediment to representation of non-nationals.

<sup>184</sup> *Mamba v. Minister of Social Development*, CCT 65/08 (August 2008).

<sup>185</sup> Brian Ray, *Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy*, 9 Washington University Global Studies Law Review 399 (2010), quoting *Mamba v. Minister of Social Development*.

<sup>186</sup> Misago et al. 2009.

<sup>187</sup> Roni Amit, *Winning Isn't Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation*, 27 South African Journal on Human Rights 8 (2011).

W. le Roux agrees with the International Organization for Migration Report<sup>188</sup> that attributes the outbreak of violence to the “breakdown of democratic governance, the rule of law and participatory democracy at local government level.”<sup>189</sup> He discussed the theory of disaggregation of citizenship<sup>190</sup> which theory means the legal integration of migrants by giving them rights previously preserved for citizens only. This theory calls for the expansion of the current rights available to non-citizens (which consists for the most part of civil and socio-economic rights).<sup>191</sup> It argues that there is already “urban activism” on the part of non-nationals living in multi-cultural and ethnic inner-city neighborhoods. Non-citizens in this case interact with citizens in whose communities they live and organize around issues of common interest such as environmental concerns, representation on school boards and labor relations.<sup>192</sup> Le Roux<sup>193</sup> calls this “street democracy” and it is in favor of a residence-based understanding of political rights. Taking issue with the expatriate voting rights lobby, which has interpreted the judgment in *Richter v. Minister for Home Affairs and Others*<sup>194</sup> to mean that voting rights are based on “a de-territorialized notion of national identity and patriotism” he argues that democratic citizenship must be tied to the locality of one’s place of ordinary residence. This would allow for an extension of voting rights at the local government level to resident non-citizens, which would give non-citizens a greater political stake within their residence and help integrate them into the life of the community.

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<sup>188</sup> Misago et al. 2009.

<sup>189</sup> Wessel le Roux, *Economic Migration, Disaggregate Citizenship and the Right to Vote in Post-Apartheid South Africa in Citizens of the World: Pluralism, Migration and Practices of Citizenship* 119 (R. Danisch (ed.), Amsterdam, New York: Rodopi Press, 2011). The court in *Larbi-Odam and Others v. Member of the Executive Council for Education (North-West Province) and Another*, (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (November 26, 1997), para. 19, quoted from the Canadian case of *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, recognizing that non-citizens have no voice within the legal and sociopolitical system of the host country.

<sup>190</sup> Propounded by S. Benhabib. See Seyla Benhabib & Judith Resnik, *Citizenship and Migration Theory Engendered* (May 20, 2017), available at [http://www.nyupress.org/webchapters/benhabib\\_intro.pdf](http://www.nyupress.org/webchapters/benhabib_intro.pdf).

<sup>191</sup> Wessel le Roux, *Migration, Disaggregation Citizenship and Voting Rights*, unpublished paper presented at FMSP’s Migration and Society Seminar Series hosted by the Forced Migration Studies Programme at the University of Witwatersrand September 29, 2009 (May 10, 2017), available at <http://www.migration.org.za/presentation/le-roux-w-2009-migration-disaggregated-citizenship-and-voting-StellenboschUniversity>. See Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times in Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* 247 (T. Faist & P. Kivitsso (eds.), Hampshire, UK: Palgrave Macmillan, 2007).

<sup>192</sup> *Id.*

<sup>193</sup> Le Roux, *supra* note 191.

<sup>194</sup> *Richter v. Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)*, (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (March 12, 2009).

## Conclusion

This work has examined the “violent face” of xenophobia in the face of “the rule of law” in South Africa. It is observed that the plight of foreigners is exacerbated by ineffective legal and governmental institutions. The complex immigration laws and onerous policies defeats the concept of inalienability of rights which deserves protection in line with the provisions of international instruments of which South Africa is a party. Xenophobia poisons social interactions between locals and migrant groups and at the same time undermines the positive effects of migration on human development and international relations.

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