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## Editorial note

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This issue of **Synopsis** is a special edition dedicated to the scourge of xenophobia in South Africa. One year after the dramatic events of May 2008, when scores of foreign nationals in South Africa were victims of violent attacks, the Centre for Policy Studies is taking stock of these events by bringing together a number of commentators and scholars to reflect on the underlying causes, effects and consequences, as well some suggested solutions to address xenophobia in South Africa.

The edition contains four articles that investigate different aspects of xenophobia and bring together various perspectives to understand this phenomenon in South Africa. Jean Pierre Masigo's article debunks many of the familiar explanations of xenophobic violence in South Africa, using the findings of a recent research study. The article evaluates some of these common explanations against the findings of an empirical study on the causes of xenophobia which have, hitherto, received little attention but may contribute immensely towards tackling this social problem. Masigo's piece seeks to explain some of the causes of xenophobia, including the rising prices of food and commodities and service delivery failures. However, the article identifies the micro-politics of local communities, particularly the lack of institutional structures and trusted leadership in the affected areas as the fundamental causes of this violence in the residential areas that formed the case studies of his research. The article provides a fascinating analysis of how some community leaders sought to exploit existing tensions for their own (political) gains. In its conclusion, the paper makes a number of recommendations, including, importantly, ensuring the swift prosecution of the perpetrators of violent actions against foreigners.

Maxine Reitzes explores the causes of xenophobia by examining the history of South Africa's immigration policy. Reitzes suggests that this policy is rooted in South Africa's racialised past and the political economy of the country. She traces racial discrimination in South Africa's immigration policy from 1913 through to the passing of the country's Immigration Act in 2002. She argues that South Africa's immigration policy has contributed towards conceptions of South African national identity and the construction of the 'other', comprising migrants who are non-South African, indirectly perpetuating racial exclusionary practices and adding fuel to xenophobic sentiments and violence against foreign nationals.

Baruti Amisi's paper examines the phenomenon of migration closely, bringing theories of migration to bear on the experiences of foreign nationals in South Africa. The paper identifies the types and patterns of migration, distinguishing between voluntary and forced migration and providing an insightful perspective on the strategies utilised by migrants as they make life-enhancing calculations to maximise their opportunities for a better life in their chosen host countries. The paper discusses the circumstances of different types of migrants and the resources (such as access to support networks and finances) that they seek to access and the tradeoffs they make in the context of the ongoing risks (such as violent xenophobic attacks) they face in the countries they move to. Interestingly, Amisi's article seeks to dispel simplistic perceptions about why migrants often make difficult decisions, including the choice to remain in their host countries despite the obvious dangers. This paper is written from the perspective of migrants, and therefore provides a window into the calculations that go into the survival strategies of foreign nationals caught between their desire to escape deplorable political and economic conditions in their countries of origin, and surviving life-threatening xenophobic violence and attacks in their host countries. It makes for compelling reading.

Equally compelling is Annah Moyo's paper, which highlights the impact of the 2008 xenophobic attacks on Zimbabweans. The paper provides a perspective from the survivors of torture. The paper highlights the various human rights conventions that serve as a framework for the protection of the rights of migrants. These include the Universal Declaration of Human Rights and the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families. The author argues that such conventions protect the rights of migrants and foreign nationals only in so far as states uphold them by signing up, ratifying and domesticating these conventions. To illustrate the point, South Africa has signed up to most of the international human rights conventions, standards and protocols that deal with discrimination and xenophobia, and has incorporated these principles into its domestic laws as underpinned by the country's Constitution. Despite this, the country experienced violent xenophobic attacks against foreign nationals across the country in May 2008, and these xenophobic tendencies were repeated recently, in July 2009, just over a year later.

Clearly, strong interventions are needed by the South African government and policy makers to move beyond merely signing up to the various protocols, conventions and declarations relating to the protection of the human rights of foreigners towards effective enforcement and action against the perpetrators who violate the rights of migrants. Moyo's paper calls on the South African Government, among others, to ratify and customise the convention on the Rights of All Migrant Workers and Members of their Families for South Africa, in order to extend the protection of the rights of undocumented migrants. The paper also identified the need for the establishment of an early-warning system to combat xenophobic violence against working migrants, refugees and asylum seekers.

The four papers contained in this edition of **Synopsis** provide insightful and compelling perspectives on different aspects of xenophobia and migration, and therefore bring much-needed attention and contribute to ongoing public policy debates on the challenges faced by foreign nationals in South Africa.



# Xenophobic violence in South Africa: Reflections on causal factors and implications

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## Introduction

Violence against foreign nationals in South Africa did not begin with the May 2008 attacks, nor did it end with the deployment of the army in June 2008. History reminds us that the horrors of xenophobic and anti-'outsider' violence have been a long-standing and increasing feature in post-apartheid South Africa (Harris 2002; Crush 2008; Bekker et al 2008). The May 2008 attacks were, however, extraordinary by their ferocity, intensity, rapid geographic spread, and by the harm they caused. Indeed, in less than a month (mid-May to mid-June), 135 separate violent incidents were reported (see Bekker et al 2008) leaving 62 people (including 21 South Africa citizens) dead; at least 670 wounded; dozens raped; more than 100 000 displaced; and millions of rands worth of property looted, destroyed or appropriated by local residents (CoRMSA 2008).

The May 2008 attacks were also unprecedented in the attention they attracted. Perhaps not surprisingly, they stimulated a range of speculative explanations for the root and immediate causes, as well as recommendations on appropriate strategies for short, medium and long-term interventions. As this paper shows, most of these accounts were based on perceptions and attitudes rather than empirical evidence and do not provide a clear explanation for the emergence and location of the violence. Inaccurate explanations logically led to recommendations that threatened to be either ineffective or worse, to exacerbate rather than address prevailing xenophobia and related violence.

By exploring the specific enabling factors and triggers of the violence, this paper argues that, while there are broad structural, historical and attitudinal explanations that are of critical relevance, the emergence of xenophobic violence is rooted in the micro-politics of the country's townships and informal settlements. It shows that, in almost all cases where violence occurred, it was organised and led by community leaders (official and/or self-appointed) in an effort to claim or consolidate the authority and power needed to further their political and economic interests. It also argues that stopping ongoing and preventing future violence requires more than just condemnation, moral appeals and public awareness campaigns. It requires fundamental political changes and urgent mechanisms to counter the culture of impunity and enhance community-based conflict resolution mechanisms that respect the constitutional principles of universal rights and due process. After a brief overview of the methodology, the paper proceeds in three brief sections. The first section evaluates explanations and common hypotheses provided during and after the violence; the second discusses specific enabling factors and triggers; and the third and concluding section reflects on meanings and implications of the violence and draws some recommendations from the evidence presented.

## Methods

This article specifically draws on four months (August-November 2008) of fieldwork in Gauteng, Western and Eastern Cape Provinces. To understand the triggers of the violence, we selected nine sites where xenophobic violence occurred between January 2007 and June 2008, and two sites where the presence of foreign nationals has not led to significant violence. In each site, we interviewed South African residents, foreign nationals who reside or resided in the same locations, relevant government officials, community leaders, and representatives of different civil society organisations operating in the selected areas. In addition to in-depth interviews, we held at least two focus groups (of 5-10 members) in each of the communities. In total, over 400 people (including the youth, women and the elderly) participated in the study. The study's focus was not so much to explain xenophobic attitudes, that is, why many South Africans dislike or distrust foreigners and other 'outsiders' as to identify immediate triggers and conditions under which these sentiments express themselves in organised and mass violence.

## Considering common hypotheses

The study provides a solid empirical basis for evaluating many of the earlier and common accounts that blamed a third force, poor immigration controls, and economic conditions. The discussion shows that while some of these factors may have contributed to generalised tensions, they cannot explain why these long-standing processes suddenly turned into violent attacks and why violence broke out in some areas and not in others under relatively the same socio-economic and demographic conditions.

## Mass influx and inadequate border control

One of most commonly repeated explanations for the May violence was the supposed mass influx of foreigners and general breakdown of border controls. According to this view, violence was triggered by a human 'tsunami': a mass influx of immigrants (particularly from Zimbabwe) during the period (weeks/months) preceding the violence. While it is true that there are strong feelings among certain authorities and residents that the numbers of foreign nationals had significantly increased, this study found no substantive evidence that a mass influx triggered the violence. On the contrary, the study reveals that:

- most of those who were attacked and evicted had lived in their communities for years
- while the numbers of foreigners may have increased, it had been a process of continuous settlement rather than a sudden influx, and there was no suggestion that it had reached some sort of objective 'tipping point'
- the areas most affected in May were not necessarily those hosting the highest numbers of foreigners.

## Rising food and commodity prices

Record increases in the price of food and other basic commodities in the months preceding the attacks led a number of commentators to link the attacks to increased economic hardship within communities. While there were some who felt that foreigners exacerbated the situation because they were 'stealing' South Africans' jobs and businesses, the study



found that most respondents understood that the increases were a result of a global economic crisis and not a result of the presence of foreigners. In addition, most respondents in affected areas reported that foreigners were helping to make life easier during the trying economic times. In Masiphumelele and Du Noon for instance, communities pressured leaders to bring back Somali traders because they were not coping with high prices imposed by local traders. Rising food prices can help explain tensions, but should be understood as a contributing factor that is not on its own sufficient to explain the attacks. After all, rising food prices affected all South African communities, not only those that turned against foreigners and outsiders among them.

## Service delivery failures

It was also claimed that poor service delivery was a factor critical to the emergence of the violence (Joubert 2008). In addition to the fact that service delivery is a problem across impoverished areas in South Africa, our study's comparison of affected versus unaffected areas shows that service delivery may be worse in areas where violence did not break out. An eloquent example is taken from a non-affected area, Sector V of Alexandra (commonly known as Setswetla), which, compared to Sector II, (the most affected area in Alexandra), is worse off in terms of service delivery (no formal housing, no electricity, and most residents still use bucket toilets) and general poverty. Poor service delivery may have played a role in heightening tensions and delegitimising political leadership in many of the affected communities. However, a direct link between poor service delivery — and indeed other factors related to economic conditions — and the outbreak of the xenophobic violence is difficult to pin down. The example given shows that it was not necessarily the most objectively poor or deprived who turned on foreign nationals, and thus confirms Tshitereke's (1999 in Harris 2002) view that violence is not an inevitable outcome of relative deprivation.

## Specific enabling factors and triggers

These factors and triggers are discussed against a background of a wide range of general factors that provide a fertile ground for xenophobic violence. These include:

- an intense xenophobic climate (Crush 2008; HSRC 2008) in the country, which a significant number of analysts (see for example Neocosmos 2008) attribute to the past and current political policies and practices
- a worrying culture of impunity with regard to perpetrators of public violence in general and xenophobic violence in particular (see Bekker et al 2009 for details).

Compared to non-affected areas, the affected sites covered by our study share a number of common characteristics directly linked to the outbreak of the violence. These include elevated crime levels (real or perceived), heightened ethnic divides and tensions, and a pronounced history of organised violence. The most distinguishing feature, however, is the nature of local leadership, characterised by the following features:

### *Absence of institutionalised leadership*

Where the violence occurred, there was an absence of institutionalised and trusted leadership that could represent the full diversity of the community. Such an absence led to the emergence of informal, self-appointed structures that almost completely appropriated the authority constitutionally mandated to local government structures, operating as an 'untouchable' parallel leadership. Even for those commonly known community leadership

structures such as Street Committees, Block Committees, Community Policing Forums (CPF), SANCO, and others, the local government, represented in theory by ward councils, has no say in their membership, the nature of their mandate, or the character of their operational and disciplinary procedures.

Community leadership is an attractive alternative for the largely unemployed residents of the informal settlements. It is a form of paid employment or an income-generating activity where supposedly voluntary leaders often charge for services, levy protection fees, and sell or let land and buildings, and take bribes in exchange for solving problems or influencing tender processes. A local councillor in Tembisa acknowledges when asked how foreigners acquire shacks: "There is no mechanism in place; sometimes they use corrupt committee members who grant space without the knowledge of authorities; foreigners also pay protection fees to those leaders." The profitability of community leadership positions attracts considerable infighting and competition for power and legitimacy among different groups present in affected areas. For some of these local political players, organising attacks on and removing the 'unwanted' foreigners from affected communities has proved to be one of the most successful strategies for earning people's trust while gaining additional legitimacy, clients and revenues. "At times they came and said they helped us to remove foreigners and therefore we must contribute R5," said a respondent in Itireleng, Laudium. There is ample evidence that the xenophobic violence in most affected areas was organised by the parallel structures mentioned earlier, and/or by some self-serving members of formal institutions, who capitalised on residents' feelings, fears and negative attitudes towards non-nationals. Their help in 'resolving' this bitterly felt problem served to demonstrate a superior efficacy in 'crime'-fighting and greater empathy with community concerns, thus consolidating their identity as the only 'true' leaders.

### *Lack of conflict resolution mechanisms*

Without denying that South Africa's townships have a documented history of violence used as a means to solve problems, it appears that communities resort to violence, vigilantism and mob justice only when relevant institutions and existing conflict resolution mechanisms have failed to adequately address issues of concern. The lack of effective conflict resolution mechanisms was particularly evident in local authorities' failure to engage communities during the events that preceded the attacks. In some affected areas, violence was triggered by people's frustrations over the inability or perceived unwillingness of local authorities (police, councillors, etc) to address communities' concerns/complaints (substantiated or not) with regard to the presence of foreign nationals in their communities.

The study reveals that numerous meetings with community leaders and the police were held, in which residents voiced their concerns and asked the police and authorities to address them. There was no effective reaction from local authorities. Instead, these structures either ignored the complaints or quickly dismissed them as baseless accusations, without taking time to engage and reason with communities in an effort to understand the origin of such concerns and provide the kind of feedback that might have changed dangerous misperceptions. In some instances, complainants were told to find ways to solve the problem themselves, as a respondent in Sector II, Alexandra, reports: "There was a police who issued a statement that people must decide on how they deal with someone who has entered their kraal and took their cattle. This statement for me started the violence." The perceived inability or unwillingness of local authorities to address community concerns about the presence of foreigners in their communities led residents to resort to mass violence (attacks on foreigners) in the same manner as they do when dealing with crime if the criminal justice system does not or is perceived not to take appropriate action.



## Conclusions and recommendations

Notwithstanding the critical relevance of broad structural, historical and attitudinal factors, this paper provides evidence that the emergence of xenophobic violence is typically rooted in the micro-politics of township life. It also shows that only a trusted, accountable, and competent leadership committed to universal justice and the rule of law can make a significant difference in terms of preventing social tensions from turning into violence, xenophobic and otherwise.

As much as the May violence targeted foreigners, the attacks were not only about ridding the country of people from beyond the country's borders. It was about sections of the South African citizenry defining who has rights to the cities and the potential wealth and power they contain. Local leaders (official and/or self-appointed) and citizens mobilised discourses of nationality, political affiliation, ethnicity and territorial belonging to claim exclusive control over sub-national space. If not monitored closely, local tensions and competition can easily escalate into violence, whose target will not only be foreign nationals, but anyone who can be labelled an outsider. In a world where violence against unpopular groups makes political and economic sense, everyone is at risk. Stopping ongoing and preventing future violence requires more than just condemnation, moral appeals and public awareness campaigns. It requires fundamental political changes and urgent mechanisms for countering the culture of impunity and enhancing community-based conflict resolution mechanisms that respect the constitutional principles of universal rights and due process. More specifically, the following suggestions need to be urgently considered:

- **Conduct ongoing, systematic inquiries into anti-migrant violence:** Intervention strategies designed without a clear understanding of the violence and the reasons behind it will not only be ineffective but risk doing more harm than good. There is a need for an official Commission of Inquiry to be established. Such an inquiry is necessary for:
  - i) identifying accurate explanations in terms of root and immediate causes of the ongoing violence
  - ii) establishing the reasons behind the inability of the police and relevant authorities to prevent and stop the violence, despite visible warning signs
  - iii) establishing responsibilities, individual and/or collective, in instigating the attacks
  - iv) establishing the reasons for local government's failures, particularly in monitoring and co-ordinating community leadership structures, and in effectively communicating and engaging with communities
  - v) identifying means and incentives for institutionalised xenophobic attitudes and practices.
- **Ensure prosecutions and strengthen justice mechanisms:** It is important to prosecute instigators, perpetrators, and all others involved in the xenophobic violence and to strengthen justice mechanisms to protect the rights of minority and marginalised groups. There is little doubt that the impunity the perpetrators of xenophobic violence have been enjoying will continue to encourage the ill-intentioned to attack foreign nationals for varying motives. Evidence shows that prosecution and retribution act as some deterrents for criminal intent and behaviour.
- **Support initiatives to hold government accountable:** There is a need to support civil society initiatives to hold government accountable for its failures to protect the rights of all South Africa's residents. Such efforts are needed as watchdogs to provide incentives for political leaders and elected officials to meet their obligations to protect foreign nationals and other affected groups. In the case of xenophobic violence, this must be

seen against a background where being seen to assist 'unwanted' non-nationals bears the disincentive potential of undermining leaders' legitimacy and election prospects.

● **Minimise investment in solutions that may be ineffective or risky:** In the context of limited resources, it is crucial to avoid wasting effort and resources on problematic proposed solutions that may be ineffective or dangerous: These include:

- Relying on the people and institutions responsible for the violence: one worrying proposed solution is to empower community leadership structures (street committees and others) to promote re-integration and tolerance. While an effective community leadership will definitely play a crucial role in any way forward, there is a danger that 'unscreened' strengthening may empower unscrupulous leaders (some of whom are responsible for the violence) to do more harm. There is a need to identify reliable community leaders to work with, and for a strong local government that constantly provides guidance, co-ordination and monitoring.
- Closing borders or instituting stricter border controls: Some have proposed that closing the country's borders is the solution. History shows that border controls have never stopped the flow of unwanted people. Stricter border controls will not prevent people from coming into the country. If anything, this will foster additional corruption and illegal immigration, while firmly entrenching the kind of dual labour economy that undermines the rights and welfare of South African workers. Such an intervention would also fortify the kind of 'us versus them' mentality that helped foster the attacks. Efforts should be channelled into managing migration rather than attempting to stop it.

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# Xenophobic triggers situated in the history and legal provisions of domestic and international migration policies in South Africa

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## Introduction

The violent attacks on foreigners in South Africa in May 2008, which resulted in widespread destruction of property and human life, seemed to take South Africans and the world by surprise. However, xenophobia is not a new phenomenon in South Africa, southern Africa or the African continent. South African immigration policy has been actively hostile towards foreign nationals, and explicitly towards particular groups, as will be demonstrated here.

Historically, international and domestic migration policies have been explicitly racially and ethnically exclusionary. In South Africa's legacy of discriminatory policy and practice, race coincides with space; identity with territory. Current immigration policy has not broken with this history. Although the domestic movement of people is no longer legislatively constrained, the movement of people across South Africa's international boundaries continues to be controlled in ways reminiscent of apartheid policies, informed by similar assumptions. Moreover, the ways in which foreign migrants are profiled in legislation and policy has practical implications for the ways in which they are treated and perceived by implementing officials and citizens.

This paper will give a brief historical overview of South African immigration policy, and domestic migration policy, and review issues pertinent to this analysis in current immigration policy. It will reflect on why xenophobic attitudes translate to violent actions, as well as some consequences of this effect.

## A historical overview of South African immigration policy: Rooted in racism

This selective review of the history of immigration policy seeks to assess the extent to which policy has explicitly articulated prejudice against specific groups. Decisions concerning who may enter a country, the criteria upon which such entry is based, who may claim a national identity, and who is named as an 'other' are illustrative of a nation's conception of itself. In this sense immigration policy is an essential constituent part of nation-building. Concomitant to this, the ways in which law, identity, space, and place are configured by policies and public figures often presage who is most likely to be the subject of xenophobia.

Immigration legislation, its interpretation and application, provide the citizenry with a framework for how foreigners ought to be treated; a lens through which to view immigrants

and migrants. Immigration policy which is more benign towards particular groups may not necessarily result in a citizenry with a greater tolerance of foreigners. But policy and practice do set an example.

## Immigration and migration policy in South Africa: 1910-2001

Given South Africa's racialised political, economic and social past, it is not surprising to find a thread of racial discrimination running through its immigration policy from 1913 to 2002. From the declaration of Union in 1910 until 1994, South Africa was considered to be a white state, incorporating independent administrations with jurisdiction over territories that coincided with racial designations. Statements of specific exclusion were removed from the Aliens Control Amendment Act of 1995<sup>1</sup>, in line with the new constitution and bill of rights<sup>2</sup>.

From 1913 to 2002, categories of immigrants were seen as contaminating or diluting national identity, and posing an economic threat. The latter continues to dominate immigration policy discourse. The 1913 Immigration Regulation Act and the 1937 Aliens Act and their amendments Acts excluded Indians and Jews respectively.<sup>3</sup> These two Acts formed the foundation of all subsequent South African immigration legislation until 2002.

The exclusion of Indians was achieved through the selective interpretation of Section 4 (1) (a) of the 1913 Act, which facilitated the exclusion of Indian and other non-white immigrants without explicitly mentioning them, in recognition of the British government's refusal to permit such explicit references. Explicit exclusions undermined its imperial interests and contradicted its philosophy which held that its colonial subjects were equal.<sup>4</sup>

In 1922 a notice from the Minister of the Interior to Principal Immigration Officers outlined the grounds for prohibition of people from Eastern Europe, who were mainly Jewish. The criteria were economic, political (practices of communism), and "standards or habits of life", relating to disease.<sup>5</sup> Unofficially, the Minister of the Interior, Patrick Duncan, made clear his intentions and concerns in a letter to Lady Selborne: "I have been putting in force a clause in the Immigration Act which enables the Minister to bar anyone whom he deems unsuitable...The victims are of course all Jews..."<sup>6</sup>

Section 4 (1) (a) of the 1913 Act also offered an economic explanation for the exclusion of particular groups. Jewish immigrants were largely involved in trade, seen to be outside the 'original' economic home for those of 'original' South African stock, who were largely settler farmers and miners. Another problem was that between 1924 and 1930 South Africa was affected by the evolving recession in Europe and the United States, and changes in the agricultural industry were displacing 'poor whites' from rural to urban areas, where they competed with immigrants.<sup>7</sup> Yet, as is the case today, immigrant traders do not necessarily compete with locals, and tend to create more jobs than they 'steal'.

A clause in the Immigration Quota Act of 1930 stipulated that a prospective immigrant should be "likely to become readily assimilated with inhabitants of the Union and to become a desirable citizen within a reasonable period."<sup>8</sup> The Aliens Act of 1937 contained a clause requiring that permits be issued to an applicant who, "is likely to become readily assimilated with the European inhabitants of the Union ..."<sup>9</sup> At this point, the legislation becomes explicitly racist: any non-European and therefore, non-white cannot, by definition, be an immigrant to South Africa.



Between 1937 and 2002, various amendments to, and consolidations of, the Acts were made, and other legislation was passed. The effect of these acts was to tighten control by the state over immigrants and further erode their rights. Their basic ideological tenets remained unchanged.<sup>10</sup>

There are obvious parallels between legislation controlling the movement of the black South African population within the country and international immigration legislation. The 1913 Immigration Act retained internal boundaries preventing the movement of black South Africans, with the result that they were considered to be 'non-citizens', subject to the same legislation governing entry to the country by non-South Africans.

Concurrently, the selective immigration of white settlers to South Africa was encouraged, in part to compensate for the demographic imbalances between white and black, and also to attract skills from abroad. To reinforce and underline this policy, the Minister of the Interior explicitly stated that an immigrant to South Africa had to be "readily assimilable by the white inhabitants" and not a threat "to the language, culture or religion of any white ethnic group".<sup>11</sup> Prior to the formal institutionalisation of apartheid in 1948, and parallel to developing immigration legislation, the 1937 Natives (Urban Areas) Amendment Act, and the 1945 Natives (Urban Areas) Consolidation Act and its amendments, controlled African immigration from the region and the movement of black South Africans.<sup>12</sup> The Population Registration Act of 1950 categorised the South African population in terms of white, black, Indian and coloured. Although the primary aim of the Act was to lay the groundwork for apartheid legislation, it also served the purpose of identifying and monitoring the movement of all people in South Africa, citizens and non-citizens. This practice is enshrined in current immigration law and practice.

In spite of this restrictive legislation, black people did immigrate to South Africa, though their presence was hardly noticed. Like black South Africans, these immigrants were not entitled to equal social rights as white South Africans and therefore their presence threatened neither white nor black people who were in the same position. Many migrated to homeland territories, where they fell beyond the ambit of white authorities, and tended to be largely accepted by black South Africans living in these territories.<sup>13</sup> Perceptions and attitudes changed dramatically post-1994.

## Current immigration policy: the more things change...

The White Paper that was translated into the Immigration Act of 2002 made a rather confused attempt to accommodate a rights-based approach to immigration, ultimately concluding that "all people are entitled to equal rights, but some are more entitled than others." It conceded that the state was obliged to afford undocumented migrants ('illegals') a degree of constitutional protection, whether they had entered legally or illegally.<sup>14</sup> It notes that the "task team felt that it was beyond the scope of its work and expertise to draw the precise line which may differentiate the position of [categories of non-citizens] under the Constitution, which task would need to rely on the evolution of constitutional jurisprudence over time."<sup>15</sup> Nevertheless, it defends its criteria for extending and withholding constitutional rights by asserting that "even if there is uncertainty to an extent, there is agreement that alienage is one of the circumstances which triggers the application of the limitation clause...which enables government to legitimately deal with aliens on a different footing than it would with its own citizens."<sup>16</sup> The White Paper recognised in principle aliens' rights to social services, due process and privacy. But in practice these rights were jettisoned by a number of policy proposals that were translated into law.

The Immigration Act of 2002 and its 2004 amendments, although not explicitly racially exclusionary, made a number of assumptions and intentions absolutely clear. These are shared by many citizens, as recorded in opinion surveys, although a direct link between official policy and citizen sentiments is impossible to prove.

1. More highly skilled immigrants are more desirable. An expression of this is the construction of different kinds of work permits: quota work; general work; exceptional skills work; intra-company transfer; corporate permit, and 13 other types, including visitor's, diplomatic, study, and others.<sup>17</sup> There is a coincidence of skill and race within SADC. More qualified people are less likely to be black, skilled people are more likely to be white.<sup>18</sup> Migrants are essentially presented as labour units whose contribution is solely economic.

The 2004 Immigration Amendment Act further reinforced the notion that immigration policy can be used as a tool to regulate the labour market with statements like "the South African economy may have access at all times to the full measure of needed contributions by foreigners".

This statement loudly echoes apartheid policy, where homelands were regarded as labour reserves, territories from which cheap, expendable labour could be drawn subject to the needs of the economy.

2. The preamble to the 2002 Act states that South Africa should be as unattractive as possible to undocumented migrants, thus encouraging them to refrain from entry, to leave voluntarily, or to attempt to legalise their status.<sup>19</sup>
3. Multiple clauses oblige public and private service providers to determine the national and legal status of those seeking services. Undocumented migrants are to be granted services (in keeping with the Bill of Rights), but reported to the authorities.<sup>20</sup> At the same time, both the 2002 Act and 2004 Amendment Act insist on the promotion of a human rights-based culture of enforcement, the prevention and countering of xenophobia, and the education of civil society on the rights of foreigners and refugees.<sup>21</sup>

There seems to be a very obvious contradiction here: South Africans are required to report foreigners to the authorities (and many do not distinguish legal status), yet xenophobia is to be countered and human rights enforced. But this begs the question of whether or not the mere reporting of foreigners to the authorities is not a xenophobic action, and whether, in this sense, the Act is not only encouraging, but compelling, xenophobia.

## Consequences and repercussions of xenophobia

South African immigration policy contains a number of categories of injunctions which can be interpreted as anti-immigrant. There are those which oblige all South Africans to monitor the legal status of foreigners, those that explicitly make foreigners feel unwelcome, those which, when implemented, will effectively exclude foreigners from the guarantee and protection of certain rights, and those that view migrants solely as labour units.

Furthermore, the spirit, tone, and content of immigration policy and its enforcement are, in themselves, indicators to citizens of how they ought to perceive and treat foreigners. If the policy is one of extreme control, then this may project a negative image of migrants to locals. And if enforcement is corrupt and exploitative, then this too sends a particular



message to citizens concerning how migrants can be treated, and the extent to which such treatment is tolerated.

This suggests a complex interplay of messages between policy makers and constituents, in the sense that the former respond to what they read as a xenophobic constituency and attempt to respond accordingly, appearing hard-line or populist, thus reinforcing the constituent's attitudes (or vice versa). This ultimately amounts to disingenuous and irresponsible public leadership, as public figures have access to a major body of respectable research which suggests that migration to South Africa cannot be halted, and that the assumptions informing policy are largely erroneous.

Finally, these directives echo apartheid dynamics. The notion that anyone, including South African citizens, may be required to confirm their legal status, is tantamount to the reintroduction of pass laws, whilst the notion that people report on one another resonates with the past culture of impimpis or informants.

In justification of these requirements, the White Paper that informs them argues that:

...if South Africans wish their government to succeed in this policy, they must make a daily small contribution to this end. However, it is important that a culture of social control should not become entrenched in our country and must be considered an extraordinary feature of our social life.<sup>22</sup>

These prescriptions are likely to have several deleterious consequences. They place a question mark over South Africa's normative commitment to the Bill of Rights. They also discourage foreigners from attempting to access services for fear of being reported, ultimately depriving them of their rights and entitlements. The legislative injunctions may also drive foreigners underground, spawning a subclass of unemployed, uneducated and unhealthy people, placing time-consuming responsibilities on already over-stretched service providers in the public sector, and further undermining already unsatisfactory service provision.

In response, a number of propositions can be advanced which are located within the discourse of South's Africa's own history of violence.

Pre-1994, violence against people who were deemed to be in the wrong space or place was so pervasive that some referred to it as 'state terrorism'. One scholar has noted that "this racialised devaluation of black lives is what we are witnessing in South Africa today in the xenophobic violence against African immigrants perpetrated by fellow Africans whose own lives were devalued during the long horrific days of apartheid. Racialised superiority and inferiority complexes continue to stalk us..." and explain why "shades of blackness have become a shameful basis for distinguishing African immigrants among black South Africans."<sup>23</sup>

This legacy feeds into what has been called 'a culture of violence' in South Africa, defined as a situation where the use of violence has "become normative instead of deviant" and is considered an acceptable response in conflict resolution.<sup>24</sup>

Political violence, as conflict between groups competing for power reached its zenith in the 1980s, resulted in the declaration of a State of Emergency. The transition to democracy saw a decline in political violence, though it has been replaced by an increase in violent crime. Although the form of violence may have changed over time, violence itself persists as the dominant means of problem-solving in South Africa.

Xenophobia has become another avenue for violent expression, continuing the historical narrative of resistance to 'foreign' nations and the construction of a new nation. Where violence was used as a form of political resistance by black South Africans against the historical domination of the white Afrikaner nation, it is now used to forge a new South African nation against the intrusion of foreigners. There are many contributing factors, including: a broad normalisation of violence; the easy availability of weapons; xenophobic group dynamics; prior hostility towards the victims; prior exposure to violence on the part of perpetrators; and incident-specific factors, including whether perpetrators believe they are being obstructed or lied to, language that provokes them, acts of resistance or defiance by the victim.<sup>25</sup>

It is against this background of violence that government-sanctioned exclusion and discrimination discourages foreigners from engaging with the state, thereby leaving them 'uncaptured' and outside formal instruments of management and control. The effect is that planning and management become impossible because it is not known who they are, where they are, what they do, what their needs are. It is impossible to secure their positive and productive engagement with society. When government policy leaves immigrants outside its protections, xenophobic violence gains tacit approval.

Finally, without discussing a range of possible recommendations, it is necessary to dismiss one of the most pervasive: that of strengthening border control.<sup>26</sup> This recommendation follows the argument that xenophobia is a result of mismanagement of South Africa's borders, and that, by implication, South Africa is being 'swamped' with the poor and needy from other countries. This is neither a recommendation, nor an argument that this paper seeks to make, for a number of reasons. Firstly, in this argument, the relationship between cause and effect is not altogether clear. Why should the presence of foreigners cause them to be attacked? Secondly, to throw more human and financial resources at border control is simply wasteful.

## Conclusion

Migration to South Africa is an inevitable function of the migrant labour system in mining and agriculture. The increasing economic integration of the region, cultural and ethnic affinities which span international borders, the liberalisation of trade and investment opportunities in the region, and the economic inequalities between South Africa and other countries, all complicate border control efforts.

Finally, more and freer movement is inevitable as countries in the region become more co-dependent and integration increases. The SADC protocol on the facilitation of movement of persons, approved in 2005, underscores this point. Calls for a greater fortification of South Africa breeds a siege mentality and exacerbates xenophobia, rather than being a solution to the problem.

### Notes:

<sup>1</sup> Aliens Control Amendment Act, Act 76 of 1995.

<sup>2</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>3</sup> S. Peberdy, *An outline of the history of South Africa's Immigration Legislation*, Department of Geography, Queens University, July 1996, p 1.

<sup>4</sup> S. Peberdy, *Not quite white? Race, nation and immigration legislation in South Africa between 1913 and 1937*, Department of Geography, Queen's University, March 1997, p 5.

<sup>5</sup> S. Peberdy, *Not quite white?* p 9.

<sup>6</sup> *Ibid.* p 10.

<sup>7</sup> *Ibid.* pp 11-13.

<sup>8</sup> *Ibid.* p 14.



- <sup>9</sup> Ibid. p 14.
- <sup>10</sup> For a detailed discussion of South African immigration legislation and other relevant legislation, see S. Peberdy, A Brief History of South African Immigration Policy, Briefing paper for the Green Paper Task Group on International Migration, Pretoria, January, 1997.
- <sup>11</sup> Cited in A Richmond, *Global apartheid : Refugees, Racism, and the New World Order*, Oxford: Oxford University Press, 1994, p 109.
- <sup>12</sup> Peberdy, An outline of the History of South Africa's Immigration legislation, p 1.
- <sup>13</sup> M. Reitzes and S Bam, Citizenship, Immigration and Identity in Winterveld, South Africa, *Canadian Journal of African Studies*, (34(1), p 92.
- <sup>14</sup> White Paper on International Migration, Notice 529 of 1999, s6.1-6.2.6.
- <sup>15</sup> Ibid. s6.2.1.
- <sup>16</sup> Ibid. s6.2.5.
- <sup>17</sup> Immigration Act 2002, s 12-22.
- <sup>18</sup> Ibid. s 10-27.
- <sup>19</sup> Ibid. s 2 (1) (g)
- <sup>20</sup> Immigration Amendment Act, Act 19 of 2004, s44- 45.
- <sup>21</sup> Immigration Amendment Act, 1 (m p)
- <sup>22</sup> White Paper on International Migration, s4.1, p 43.
- <sup>23</sup> Cited in HSRC *Citizenship, Violence and Xenophobia in South Africa*, p 15.
- <sup>24</sup> Simpson, cited in Harris, *A foreign experience*, p 62.
- <sup>25</sup> Centre for the Study of Violence and Reconciliation, Executive Summary: The Violent Nature of Crime in South Africa: A Concept Paper for the Justice, Crime Prevention and Security Cluster, 25 June 2007, pp 7-8.
- <sup>26</sup> The IFP, for example, argues that xenophobia is a result of the ANCE leaving South Africa's borders "wide open". See also HSRC *Citizenship, Violence and Xenophobia in South Africa*.

## Between home's rock and South Africa's hard place: Non-nationals' experiences, livelihood strategies, and choice to remain in post-2008 South Africa

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### Introduction

Xenophobia is a worldwide phenomenon. It takes different forms in different countries depending on the level of deprivation, and perceived and/or real threats caused by non-nationals. Xenophobia is also a result of political manipulation, immigration law, and the negative role played by the media. In fact, these interest groups quote discredited figures for the number of 'illegal aliens' who live in South Africa, and link those figures to several types of crime without any proof (Duncan 1998: 151, cited in SAMP 2008: 16).

Xenophobia is often exacerbated by the negative impact of neoliberal globalisation, which advises Third World governments to privatise state companies, retrench workers, cut down on social spending, and commodify the basic rights of their people, just to list a few. In South Africa, xenophobia is a 'particularly racialised expression' which affects more black African foreigners than any other race groups at all levels (SAHRC 2004: 8, 26).

The May-June 2008 xenophobic attacks killed more than 62 people, including 21 South Africans, wounded 670 people, displaced at least 100 000 others, looted more than 342 homes, and burnt down at least 213 shops. The attacks led to dozens of women being raped (Misago, Landau and Monson 2009: 6; Lefko-Everett 2008: 2). These attacks reminded refugees of what happened in some African countries in the past.

In support of, but not limited to this, a respondent to a SAHRC (2004: 23) study contended six years later that

... this thing of hating foreigners is being done by the authorities. The authorities are the ones who built this bridge between the foreigners and the locals because there is no education of knowing what is happening from these people and there is no one coming to us and telling us why you have to accept these people. That is the thing that we have.

One would have expected to see the victims going back home in May-June 2008 as some Malawians, Mozambicans, and Zimbabweans did. This was not the case. Many forced migrants remained in South Africa, and some of those who left are coming back. This article will explore why many foreign nationals remain in South Africa despite what happened.

The article is organised into five sections. Section 2 explores the differences between voluntary and forced migrations. Section 3 explains why people move and continue to do so, while Section 4 elaborates on why many people stay at home, while few leave. The last section provides the conclusion.

## Voluntary versus forced migration

Voluntary migration refers to people who move from one location to another of their own free will for socio-economic gain. This voluntary migration is by both skilled and unskilled people, and is often understood through the perspective of neoclassical economics. Voluntary migration can also be explained through push and pull factors between the sending and receiving countries. These factors include population growth, failure of the state, economic restructuring and environmental degradation in the sending countries, and migration laws, demand for labour, and high wages in the receiving countries. The pull factors consist of better opportunities in the receiving countries, ie good salaries, respect for rights, and security (Hein 1993: 44, 49-51; Boswell 2002: 7). Forced migration, on the other hand, refers to people who are forced to move by structural factors such as natural disasters, including floods, droughts, volcanic eruptions and landslides, and manmade tragedies, including diverse forms of human rights violations and foreign invasions. The notions of 'refugee' and 'forced migrant' will be used interchangeably in this paper.

However, there is no clear-cut distinction between the economic and political conditions which underlie voluntary and forced migrations, since the conditions which create political refugees can be the consequences of economic collapse and vice versa. Indeed, political conditions may lead to the deterioration of livelihoods that, in turn, may be a cause of social instability and subsequent repression and forced migration (Fagen et al 1968, cited in Hein 1993; Kelly 1977, cited in Hein 1993: 47). Both voluntary and forced migrations occur in various forms and at various periods of time for different reasons as will be explored in the next section.





## Migration theories and strategies

There are three sets of theories which seek to explain international migration. First, there are the historical structural theory and the segmented labour market theory to explain the initiation of migration. The former reveals the existence of core and periphery, and the gap between the two. It argues that the expansion of capitalism maintains and worsens this gap. Underdevelopment is therefore a product of unequal power relations between the core and the periphery. The latter argues that the labour market is divided into two sectors. The primary sector is characterised by better-paid and high-valued jobs. The secondary sector comprises low wages, poor working environment, and a lack of job security. These conditions, coupled with inefficient and corrupt governments, state repression, or foreign invasion, may lay the foundation that initiates migration toward better socio-economic and political opportunities (Fagen et al 1968, cited in Hein 1993, and Kelly 1977, cited in Hein 1993: 47; Boswell 2002: 7).

Second, the social capital theory and subsequent migrant networks and migrant supporting institutions and the cumulative causation theory explain why migration continues. These theories state that social capital is mainly characterised by its ability to be transformed into diverse forms of capital that refugees and voluntary migrants can use (Haker et al 1990, cited in Massey et al 1998: 42). Social capital and its subsequent networks explain why international migration persists and sustains itself (Massey et al 1998: 34; Wilkinson 1981: vii, cited in Gerke and Evers 1993: 3; Boswell 2002: 7; Lechner 2001). Thirdly, there is an interdisciplinary approach to international migration because the theories which explain the initiation of migration do not explain why migration continues. This approach tries to bridge the gaps between disciplines and thus researchers on international migration (Brettell and Hollifield 2000: 8).

South Africa, as a forced migrants' destination choice, can be viewed through the lens of legal scholars who look at the policies that deal with the arrival of migrants. This is true because refugees are products of human rights violations. South Africa has its own challenges in terms of complying with its own constitution and international treaties. However, compared to many refugee-sending countries, this country is comparatively advanced in this regard. In addition, some forced migrants are in South Africa in transit to greener pastures outside the African continent (Amisi 2005: 111).

Some forced migrants travel in small groups in order to create some back-up support mechanism in case of illness, police arrest, and lack of money to fund the journey. Others travel alone to avoid being noticed. Whereas some refugees can afford a direct trip from home to their destination, others move in several steps through villages, churches, mosques, and the refugee camps because of a lack of information or financial resources. However, different types of refugees moving towards the destination countries utilise various social networks (friends, relatives, smugglers, religious affiliations...) and institutions that support migrants (churches, mosques, any other religious organisations, individuals...). These networks are active before, during, and after the trip and they constitute a safety net. The networks play different roles at different times, according to the constraints and opportunities that network members encounter, and which require particular solutions (Amisi and Ballard 2004: 12-19; Amisi and Ballard 2006: 311; Amisi 2005: 81-85). However, social networks can also be harmful to network members, particularly women, 'the poor', new arrivals and children, because of exploitation and abuse (Amisi 2005: 94-96; Crisp 2002: 16; Hovy 2003: 1).

## Why forced migrants and victims of xenophobia remain in South Africa

The forced migrants leave their countries of origin for several receiving countries, including South Africa, for different and sometimes conflicting reasons. Indeed, some individuals are forced to leave their countries because of socio-economic and political exclusion. Rwanda, Burundi, and Sudan fit into this category. Other individuals are forced to leave because of state failure, foreign invasion, religious and ethnic persecution and political oppression. The DRC and Iraq belong to this second group. In these countries, the state is vehemently trying 'to re-establish order' through punitive measures and systematic violation of human rights. This approach to law enforcement creates economic and political refugees. Other people may leave because of natural conditions such as droughts or floods, volcano eruption, landslides, and so on. These are environmental refugees.

Once the decision to move is made, the next step is to obtain the necessary financial resources to fund the journey. Forced migrants' families, both nucleus and extended, may invest in the journey in order to get some reward in the future. The reward can take form of remittances, supporting the school fees of some of the children who stay behind, funding community projects, assisting other family members to travel, or simply the prestige of having a relative abroad, because sooner or later he/she will financially assist those left behind. Consequently, the forced migrants bear the hope of the whole family, community and country, such as in Somalia, where 40 per cent of the population received remittances as the main source of income in 2006 (Amisi 2008: 5; Lindley 2006: 12), Senegal, which received 7.6 per cent of its GDP in 2006 (Ratha and Xu 2006: 170) and Zimbabwe, which received £3 243 from the 'average' Zimbabwean living in North England in 2007 (Magunha, Bailey and Cliffe, 2009: 8). The citizens of these countries rely mainly on the remittances sent from all over the world to make ends meet. Failure, in other words an inability to send remittances now or in the future, or an unplanned return home is therefore not an option at all costs.

Another option for funding the trip is to sell family property (house, land or farm) with or without the consent of other family members. When the decision to sell family property is taken by all family members, they would usually all expect some reward in return for the trip abroad. Here again, the decision to go back home without having contributed to the well-being of the family and community is a very difficult one. Some refugees, if allowed to do so, would prefer to wait or move to another country than go back empty-handed. In worst-case scenarios, individual forced migrants might sell family property without the consent of other family members and leave the country incognito. When the rest of the family discovers this, they may engage in endless legal battles around ownership. People involved in such deals would be excluded from the family and to some extent from the community. As a result of this, such individuals cannot easily opt to go back to the country of origin where the family would not have a home, land or even hope for a better future. Perpetrators would therefore fear for their lives in any place where the victims know of their presence. This group of people are consequently a lost generation.

Refugees may also remain in their host countries for three other reasons, in addition to economic and financial reasons. Firstly, political refugees fleeing from persecution may choose not to go back for fear of systematic human rights violations. In fact, the forced migrants who come to South Africa for security and protection reasons will assess the risks of being killed by random xenophobic attacks in South Africa, often by individuals that they do not know, and compare these risks to systematic attacks organised and perpetrated by

their governments with little or no media coverage. The assumption is that the xenophobic attacks in South Africa will be covered by the independent and relatively fair media which will report to the rest of the world, as happened in the case of the May to June 2008 xenophobic attacks. The hope is that the international community will condemn these acts and that presumably the xenophobic attacks will stop in future. The decision, sometimes fatal, to stay often outweighs the need to go back home.

Secondly, forced migrant women and unaccompanied minors will be less likely to return home regardless of what happens in the receiving countries. Indeed, refugee women are subject to diverse forms of exploitation and abuse from the time they leave their countries of origin to the time they reach their destinations. Amisi (2005: 96) argues that these violations of human rights and human dignity take several forms, including sexual favours to some male refugees, state officials at the borders, border police, administrators of refugee camps, and informal migration brokers, ie smugglers, passeurs or tindikeurs; child marriage or prostitution; child labour; low and irregular wages; or concubinage (Crisp 2002: 16; Amisi 2005: 96). Women are also subject to human trafficking and sex slavery. Unaccompanied minors and orphans go through the same abuses and child trafficking. The journey is so difficult that this group may not be prepared to try it again.

Third, refugees who reached the receiving countries, and South Africa in particular, may be lucky enough to remain the only members of their families who survived systematic attacks and killing at home, having lost everything. In such cases, going back home is not an option as this inevitably brings back painful memories of past experiences of brutality and torture.

Fourth, other forced migrants often come to stay in South Africa for protection or better economic opportunities, while at the same time preparing for their next journey to greener pastures, ie Europe, America, Asia or Australia. Once there, such migrants may still move on to other countries until their expectations are fulfilled. This group of people will stay in South Africa whatever it takes, provided that they fulfill their objectives.

## Conclusion

This paper sought to understand why refugees and the victims of May-June 2008 xenophobic attacks remain in South Africa. It began by differentiating between voluntary and involuntary migrations before exploring the theories and strategies used by forced migrants. However, the theories which explain the initiation of migration do not explain the continuation of migration. An interdisciplinary approach to migration was therefore utilised in this paper to help bridge this gap between the two sets of theories.

Lastly, the paper revealed that forced migrants move for different and sometimes conflicting reasons. Migration is costly in terms of finance, time, moral obligations to whoever contributed to the journey, abuses and exploitation, and lack of trust. There is no single explanation as to why many refugees decide to stay in the country or in the refugee camps while few go back home. Some refugees usually stay in South Africa for reasons such as that they have either not contributed to their communities back home or sold family property with or without the consent of other family members, whereas others, and particularly women, may find the migration process so humiliating and exploitative that they would prefer to stay rather than repeat the same experience. Other forced migrants may stay simply because they are in transit to their final destination somewhere else.



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# The impact of xenophobia on torture survivors from Zimbabwe: SACST'S analysis of the 2008 attacks

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## Introduction

May 2008 saw a showdown between South African citizens and non-nationals, wherein non-nationals were accused of, inter alia, taking up jobs meant for the locals, and being comfortable in a foreign country while citizens lived in poverty. The country sat up and noticed, albeit a bit late to contain the situation; many human rights organisations sprang into action and adopted initiatives to safeguard and protect non-nationals in South Africa. A year later, the need to assess the impact of xenophobia on the lives of torture survivors is pronounced. In this paper, the Southern African Centre for Survivors of Torture (SACST), an organisation providing holistic rehabilitation services to victims of organised violence and torture, analyses the impact of the May 2008 attacks on Zimbabwean torture survivors.

## An overview of the May 2008 xenophobic attacks

The violent attacks started in Alexandra Township, Johannesburg on 11 May, 2008, and spread to cities in other provinces. About 150 000 people, mainly foreign nationals, were displaced countrywide. A total of 62 people lost their lives, most of them black immigrants, and 21 of them were South African nationals who had married non-nationals, refused to participate in the violent orgy, or had the misfortune to belong to minority ethnic groups that were not quite South African enough. About 670 people were wounded, others raped, and some verbally assaulted during the attacks.<sup>1</sup> The scope of damage to property that was looted and destroyed during the attacks remains unclear, but South Africans and immigrants lost millions of rand during those few weeks.<sup>2</sup> The events were grim. The news about the attacks was screened by every broadcaster around the world, showing mass killings, looting and people being burned alive. It was a spectacle of violence and brutality



that resembled the violent township scenes of the '80s and '90s. The most unsettling image was that of 'the burning man', Mr Ernesto Alfabeto Nhamuave, a Mozambican who was killed in the Ramaphosa informal settlement east of Johannesburg.

The South African government lamented about being caught unaware by the violent attacks. The crisis that followed the attacks transformed into a humanitarian emergency, as thousands of foreign nationals were rendered destitute; in their distress they sought refuge at police stations around the country. International and domestic non-governmental organisations worked together with the South African government to establish temporary settlements for the displaced people. In the commotion that followed, most immigrants sought voluntary repatriation and about 30 000 non-citizens were repatriated.<sup>3</sup>

## International Human Rights standards and their effectiveness on racism and xenophobia

International norms and standards exist that outlaw racial and xenophobic tendencies. The Universal Declaration of Human Rights came into force on 10 December 1948, as the first international recognition that all humans have rights and freedoms inherent to them by virtue of their being human. The Declaration guarantees the rights of all individuals, dignity, freedom and equality, including the responsibility to act towards one another in brotherhood,<sup>4</sup> and also prohibits discrimination based on colour, language or national origin. The same provisions are enshrined in the International Covenant on Civil and Political Rights, where each member state has bound itself to respect and ensure that all individuals within its territory have their rights recognised, without distinction based on colour, language and national origin,<sup>5</sup> among other grounds. The International Covenant on Social Economic and Cultural Rights also provided for non-discrimination by state parties to the covenant on the same grounds,<sup>6</sup> including the ground of property.<sup>7</sup> The International Convention on the Elimination of All Forms of Racial Discrimination defines 'racial discrimination' as any distinction on the mentioned grounds, with the purpose of nullifying the 'recognition, enjoyment or exercise' of the same rights on an equal footing in every field of public life.<sup>8</sup>

These international human rights standards do not specifically prohibit xenophobia. However, they infer such a prohibition by including the grounds of distinction, of nationality, colour and language. The Convention Relating to the Status of Refugees also prohibits discrimination against refugees as concerns their country of origin.<sup>9</sup> The International Convention on the Protection of Rights of All Migrant Workers and Members of their Families prohibits distinction of any kind based on several grounds or any status, and also urges state parties to respect the rights of all migrant workers and members of their families within their territories.<sup>10</sup> Regionally, the African Charter on Human and People's Rights provides for non-discrimination of non-nationals.<sup>11</sup> The Convention Governing the Specific Aspects of Refugee Problems in Africa also prohibits discrimination against refugees by host states on grounds of nationality, among others.<sup>12</sup>

At the World Conference Against Xenophobia and Related Intolerance, held in Durban from 31 August to 8 September 2001, government and civil society representatives acknowledged that xenophobia is one of the main contemporary sources and forms of discrimination and conflict, the combating of which requires urgent attention and prompt action by states and the international community.<sup>13</sup> The Durban Declaration has been perhaps the first human rights standard to touch on xenophobia specifically, outside the

confines of discrimination and racial discrimination, although it is non-binding. The Declaration attests that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.<sup>14</sup>

It is impossible not to discuss the effectiveness of the principles on racism and xenophobia. The state needs to sign or ratify the international instruments outlining the same standards and principles, to be bound by them. After ratification, domestication of the instruments and their provisions is required, whereafter parliament must enact legislation enshrining the provisions on racism, racial discrimination and xenophobia. Once domesticated, the international standards and principles can be applied and enforced under national law, and failure to uphold them can result in adjudication. It follows that if a State has only signed<sup>15</sup> but not ratified the international instruments, then the standards and principles on those instruments cannot be legally enforced as the state will not be bound by the provisions flowing from the same instruments. Therefore the effectiveness of the international standards and principles rely mostly on the member state's willingness to set up domestic mechanisms and policies that will ensure that racism, racial discrimination and xenophobia are not tolerated.

## An analysis of South Africa's commitment to International Standards on xenophobia

International law defines the responsibilities that South Africa as a host state has towards migrants. These rights derive from two sets of international instruments: the core human rights treaties and the UN Convention on Migrant Workers, and a variety of regional treaties, under the auspices of the AU. South Africa has signed and ratified most of the international human rights standards that deal with racial discrimination and xenophobia,<sup>16</sup> and is thus bound by the provisions relating to discrimination and racial discrimination enshrined therein. South Africa has further incorporated the same principles into domestic law, and attempts to adhere to them at national level. South Africa has not ratified the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families, an important treaty which explicitly extends rights to migrants without legal status.<sup>17</sup>

South Africa has enshrined the international principles and standards on racism and discrimination in the Constitution.<sup>18</sup> Most rights in the Bill of Rights, except for citizenship rights, are extended to everyone in South Africa, whether nationals or immigrants.<sup>19</sup> Refugee rights are enshrined in the Refugees Act,<sup>20</sup> which captured the provisions of both the UN and AU Conventions on Refugees. The integration approach towards refugees and asylum seekers adopted by South Africa is responsible for refugees, asylum seekers and other migrants co-existing in communities, competing for the same resources that South African nationals are entitled to. This approach was applauded by the government and the international community, until the outbreak of xenophobic attacks in 2008.

## SACST's narrative of the impact of xenophobia on Zimbabwean torture survivors<sup>21</sup>

During the aftermath of the May 2008 xenophobic attacks, civil society intervened by providing and co-ordinating humanitarian aid and psycho-social and legal services to



victims of the attacks. SACST provided emergency psycho-social support in the Gauteng Province in South Africa, in partnership with ActionAid. SACST assisted 130 victims of xenophobia at the River Road and Midrand sites: 106 were Zimbabweans (95 male and 11 female) by giving basic psycho-social support services to victims of the attacks, with the help of eight volunteers drawn from members of the community. SACST also partnered with HIVOS and conducted community dialogues, an initiative which facilitated dialogue among South African citizens about xenophobia and how they felt about co-existing with non-nationals. The dialogues were aimed at challenging stereotypes and educating nationals about human rights and refugee laws in place to protect non-nationals. SACST's clients were traumatised by the attacks: one client was burnt with hot water on her breasts, while another was shot in the shoulder while trying to return to his house in Alexandra. Many lost loved ones,<sup>22</sup> demand for humanitarian assistance increased, and destitution was imminent for most victims of the attacks. The number of clients that SACST received for psycho-social services increased during the attacks, adding to SACST's workload.

Xenophobic attacks added to the multiple trauma that Zimbabwean torture survivors suffered in their quest for survival. Due to the political turmoil and instability since 2000 in Zimbabwe, many Zimbabweans have been tortured, beaten up, and forced to witness loved ones disappear. The persecution in Zimbabwe has forced many to flee to South Africa, embarking on a journey fraught with traumatic experiences. Asylum seekers face robberies, rapes, muggings and assaults by the *Magumagumas*<sup>23</sup> as they cross the border illegally into South Africa. The traumas they encounter en route to South Africa are only the beginning, compared to what awaits them in the streets of Musina, Johannesburg, Cape Town and Durban, where they assimilate into South African society.

SACST conducted a mission to Musina in January 2009, to assess the human rights situation in that border town, and witnessed first-hand the suffering that many Zimbabwean torture survivors experience in South Africa. They lived in the Musina showgrounds; an open field where they had to brave the harsh weather. About 5000 asylum seekers stayed there at the time, and 80 per cent of them were Zimbabweans. The showgrounds area was littered with people's belongings; those who were able to do washing put their clothes on the fence, and then had to guard them to ensure that no one stole them. Women resorted to prostitution as a means of survival. Abortions were also done in the mobile toilets that were provided by the UNHCR. There was a high prevalence of unaccompanied minors whose parents had either died of politically motivated killings or HIV/AIDS in Zimbabwe. Reports of rape among asylum seekers were rife.<sup>24</sup>

In Johannesburg, Cape Town and Durban, Zimbabwean torture survivors have in the past encountered difficulties accessing the Refugee Reception Offices in order to access permits that will allow them to stay in the country legally. Long queues, exploitation, and corruption were reported by genuine torture survivors in the different offices within South Africa. Some corrupt officials were reportedly asking for exorbitant bribes of up to ZAR1000 rand in order to process an asylum seeker's permit. Corrupt police officers also capitalised on the suffering of many refugees and asylum seekers within South Africa's borders who face arrests daily and have to pay bribes as security for their release, irrespective of whether they have permits or not.

The xenophobic attacks of May 2008 recalled previous traumatic experiences for torture survivors, and added to the ongoing trauma that Zimbabweans have suffered in Zimbabwe and continue to suffer in South Africa. Torture survivors had started on the road to healing and recovery of their dignity, human rights and humanity. The xenophobic attacks crashed the aspirations and the hopes that torture survivors had of rebuilding their



lives and starting over. Some torture survivors had managed to find jobs in South Africa, and had even begun buying household furniture and appliances, which were looted during the attacks.

The impact of the attacks on torture survivors from Zimbabwe has been profound, and from SACST's analysis and experience with their narratives, the xenophobic attacks brought back the memories of Operation Murambatsvina (Operation Clean Up) of 2005 in Zimbabwe, where people's houses, property and other belongings were demolished and burnt down, leaving most citizens in the urban areas homeless. The burning alive of the Mozambican man, and the violence that erupted being perpetrated by South African men, women and the youth wielding machetes, knobkerries, sticks, ropes and other weapons, replicated the violence and the suffering that most torture survivors from Zimbabwe had experienced in the hands of ZANU PF youths, war veterans and other forces in Zimbabwe; the similarities between these incidents forced many who were recovering from their horrific torture experiences to relapse. It could be said that most Zimbabweans jumped from the frying pan into the fire.

## Conclusion

To date, South African activists and renowned leaders, such as Emeritus Archbishop Desmond Tutu, are still apologising to the world and to Africa for the xenophobic attacks in 2008.<sup>25</sup> Bronwyn Harris<sup>26</sup> captures the impact of xenophobia on foreign nations: "Through xenophobia, foreigners feel foreign. This effect, in turn, alienates and excludes foreigners further from South African society."

Xenophobia can be avoided, and combated, in the South African context. The South African government has a duty to acknowledge procedural and policy failures which actively encouraged the attacks, in order to prevent a recurrence of violence. In theory, South Africa has excelled in acceding to international standards and principles combating racism, racial discrimination and xenophobia, to the extent of domesticating and putting policies in place to guard against such violent attacks. However, there has been a gap between theory and practice. In practice, the government has failed to protect non-nationals, and to extend the rights and freedoms enshrined in the South African Constitution to them, without discrimination.

South Africa is party to the Convention on the Elimination of All Forms of Racial Discrimination, and under the same treaty, has a responsibility not to allow the rights of non-nationals within its borders to be violated. Xenophobia is a hate crime, as it is motivated by hatred. South Africa has no legislation defining hate crimes or xenophobia specifically. The committee established under the Convention on the Elimination of All Forms of Racial Discrimination recommended that South Africa pass legislation which would criminalise hate crimes and hate speech by August 2007,<sup>27</sup> but this has not yet been done. It is recommended that the South African government declares xenophobia a hate crime; also to ratify and domesticate the Convention on the Protection of Rights of All Migrant Workers and the Members of their Families, in order to extend protection of rights to those migrants that are undocumented in the Republic. The Chapter 9 institutions<sup>28</sup> should, by law, protect the rights and dignity of non-nationals, by investigating reports of victimisation, discrimination and racism against non-nationals. The South African government is further urged to heed the early warning alarms raised by civil society organisations working with migrants, refugees and asylum seekers, if it is to combat xenophobic violence in the country.



### Notes:

- <sup>1</sup> CoRMSA Newsletter, Ed 14 -8th April 2009.
- <sup>2</sup> CoRMSA 'Protecting Refugees, Asylum Seekers and Immigrants in South Africa' 18 June 2008, p 28.
- <sup>3</sup> Fn 2 above.
- <sup>4</sup> Art 1 of the Universal Declaration of Human Rights of 1948.
- <sup>5</sup> Art 2 of the Universal Declaration of Human Rights.
- <sup>6</sup> Art 2 of the International Covenant on Civil and Political Rights, which came into force on 23 March 1976.
- <sup>7</sup> Art 2 of the International Covenant on Social Economic and Cultural Rights (ICESCR).
- <sup>8</sup> Art 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.
- <sup>9</sup> Art 3 of the Convention Relating to the Status of Refugees, which came into force on 22 April 1954.
- <sup>10</sup> Art 7 of the International Convention on the Protection of the Rights of the Migrant Workers and Members of their Families.
- <sup>11</sup> Art 2 of the African Charter on Human and People's Rights, which also states the grounds of colour, language and national origin, amongst other grounds.
- <sup>12</sup> Art 4 of the Convention Governing the Specific Aspects of Refugee Problems in Africa.
- <sup>13</sup> Preamble of the Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance.
- <sup>14</sup> Art 16 of the Durban Declaration.
- <sup>15</sup> Signing of international instruments by states only indicates political goodwill, yet the state remains not bound by the provisions of the same instruments.
- <sup>16</sup> South Africa ratified ICCPR and CERD on 10 December 1998, ICESCR on 3 October 1994.
- <sup>17</sup> Art 5(b) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 2003.
- <sup>18</sup> The Final Constitution of South Africa, 1996.
- <sup>19</sup> Chapter 2 of the Final Constitution of South Africa.
- <sup>20</sup> Act 130 of 1998.
- <sup>21</sup> The information provided herein is extracted from internal reports on SACST's work.
- <sup>22</sup> Some of SACST's clients lost family members through death and displacements, and in one case, a client was forced to drink liquid poison and he collapsed. He reported the incident at a police station in East London and died afterwards.
- <sup>23</sup> These are thugs patrolling 'no man's land' between Musina and Beit Bridge.
- <sup>24</sup> The information is extracted from SACST's internal report on the SACST Musina Mission.
- <sup>25</sup> 'Xenophobic attacks: Tutu apologises to Nigerians' Pan-African News Wire.  
@<http://panafricannews.blogspot.com/2009/06/xenophobic-attacks-tutu> accessed 17/06/2009.
- <sup>26</sup> Bronwyn Harris, Xenophobia: A new pathology for a new South Africa?
- <sup>27</sup> See fn 2 above at 25.
- <sup>28</sup> Chapter 9 of the Constitution of South Africa institutions, including the South African Human Rights Commission.



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