

A synopsis of urban violence in South Africa

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Abstract

On 27 April 1994, all South Africans were permitted to vote for the first time, signalling the birth of a democratic state built on a constitutional democracy. Yet the wrath of gang-related activities in townships and other urban areas was clearly visible, as was the xenophobic violence that shocked the world. Very often the vast majority of victims have been innocent civilians, and especially women and children. This article gives an overview of the various forms of violence in South Africa and also briefly considers the state's responses to them within the various legal frameworks.



Institutional violence in South Africa prior to 1994

Violence in South Africa manifests in different ways. For the purposes of this section, the focus will be placed on political violence as a form of collective violence. The term 'collective violence' has been defined by the World Health Organization (WHO) as

the instrumental use of violence by people who identify themselves as members of a group – whether this group is transitory or has a more permanent identity – against another group or set of individuals, in order to achieve political, economic or social objectives.¹

This definition, according to Duncan, may include physical force or power that may be threatened or actual, and that is exercised with the objective of privileging an in-group at the expense of an out-group.² It is in this context that political violence in South Africa is discussed below. In 1990, at the opening of the South African Parliament, the erstwhile President F. W. de Klerk made a startling announcement that the African National Congress and other liberation movements were to cease to be banned.³ The release of arguably one of the world's most celebrated political prisoners, Mr Nelson Rolihlahla Mandela, was imminent. This radical step by the National Party government meant that South Africa was moving in a direction fundamentally different from its apartheid⁴ laws that it had followed for over seventy years.⁵

The policy of apartheid had vested power and privilege in the white minority for decades. This in turn embodied one of the most damaging contemporary systems of political violence. Racial classification, as formalized by apartheid, split the South African population into four major groups: white, coloured, Indian, and African.⁶ Furthermore, the National Party government, under its policy of separate development, created tribal homelands for each African group, which became the *lex domicilii* for each one.⁷

Jenkins describes apartheid as a system comprising two ideological themes of white supremacy that attempted to guarantee racial peace and maintain a pure white race.⁸ The first theme was segregation as a means of domination.⁹ The second was segregation as trusteeship, which allowed Africans to express themselves

1 Etienne G. Krug, *et al.* (eds.), *World Report on Violence and Health*, WHO, Geneva, 2002, p. 215.

2 Norman Duncan, 'Understanding collective violence in apartheid and post-apartheid South Africa', in *African Safety Promotion: A Journal of Injury and Violence Prevention*, Vol. 3, No. 1, 2005, p. 7. In a South African context, the term 'in-group' refers to the white minority population.

3 Address by State President F. W. de Klerk at the opening of the Second Session of the Ninth Parliament of the Republic of South Africa, 2 February 1990. The liberation movements included the Pan-African Congress and the South African Communist Party.

4 Apartheid was a comprehensive system of racial segregation enforced by the National Party government in South Africa during the period from 1948 to 26 April 1994. This system was used by the white minority to exercise domination over a non-white majority inclusive of Africans, coloureds, and Indians.

5 Although the concept of apartheid was developed and implemented by the ruling National Party after gaining power in 1948, white domination had been a key feature of South Africa since its creation as a state in 1910. White rule and African disenfranchisement thus remained unchanged and were seemingly the pre-conditions for, and not the results of, apartheid. The particular contribution of the Nationalists post-1948 was the formalization, consolidation, and extension of the inconsistent and often *ad hoc* racist laws, customs, and practices that they inherited, and the elevation of white domination to an official ideology.

6 The term 'white' included all persons of Afrikaner or English origin, Germans, and Portuguese. Coloureds were referred to as 'mixed race'. 'Indian' referred to descendants of indentured servants brought from the Indian subcontinent by the British to work in the sugar plantations in Natal. 'African' referred to persons solely of African ancestry. The Africans were later divided into ten ethnically based 'national units': Tswana, North Sotho, Zulu, South Sotho, Swazi, Xhosa (the Xhosa people were divided into two groups), Ndebele, Venda, and Tsonga.

7 Homelands, ten in all, were assigned to each of the tribal groups, namely Lebowa, Qwa-Qwa, Bophuthatswana, KwaZulu, KaNgwane, Gazankulu, Venda, Ciskei, Transkei, and KwaNdebele.

8 Daisy Jenkins, 'From apartheid to majority rule: a glimpse into South Africa's journey towards democracy', in *Arizona Journal of International and Comparative Law*, Vol. 13, No. 3, Fall 1996, p. 471.

9 *Ibid.* Apartheid marginalized Africans, keeping them from participating freely in society.

completely within their own communities.¹⁰ Apartheid may thus be seen as a system of institutionalized violence, in that its success could only be achieved by repressive means of law enforcement.¹¹ Generally speaking, institutional violence stems from the establishment of explicit rules within a particular society where such rules may inculcate a culture of racism and separatism, as was the case in South Africa. During the wrath of apartheid, the distinction between political and criminal conduct was often blurred. ‘Freedom fighters’ justified their conduct as a legitimate weapon against a racist regime. Various laws enacted by the state entrenched political violence across racial barriers.¹²

Early forms of violence prior to 1948 appeared at the mines in Johannesburg during the 1920s.¹³ As a result of the continued influx of African migrant labourers, violence in that region escalated to an unprecedented intensity. The harsh discriminatory laws created by the apartheid government merely intensified and perpetuated the violence. However, the Soweto uprising in 1976 marked an incipient change in the perception by both Africans and whites that Africans were powerless.¹⁴ The year 1983 saw the inception of the tri-cameral parliamentary system.¹⁵ The fact that Africans were excluded from representation in this system spawned further violence, commonly referred to as the ‘African revolt of 1984’. This revolt did not lead to an overthrow of the National Party government, but by the late 1980s many had been persuaded that African power had to be taken seriously and needed to be accommodated.

Duncan states that in 1983 an estimated 3.5 million people had been affected because of forced removals.¹⁶ Many Africans were subjected to widespread malnutrition, poor health and education systems, overcrowded schools, poor social

10 *Ibid.*, p. 472.

11 *Ibid.* The state granted its law enforcement agencies powers that were not subject to the rule of law. The law enforcement agencies also disregarded the procedural directives of the due process of law.

12 Some of those laws were the Population Registration Act of 1950 (which formed the basis for the social, political, and economic repression of all people who were not classified as white); the Reservation of Separate Amenities Act of 1953 (which granted whites exclusive use of the best public amenities); the Group Areas Act No. 41 of 1950 (arguably a form of collective punishment, whereby people were banished from their homes to ghettos and homelands); the Prohibition of Mixed Marriages Act No 55 of 1949; and the Extension of University Education Act No. 45 of 1959 (which prevented Africans from attending national universities).

13 The city of Johannesburg was founded in 1886. It was a thriving mining city that, by 1920, had an estimated 200,000 African migrant workers.

14 African students in Soweto (South Western Townships) protested against the Afrikaans Medium Decree of 1974, which forced all African schools to use Afrikaans and English as a medium of instruction. This form of education was described by many as a kind of ‘gutter education’.

15 This parliamentary system was introduced by the then President P. W. Botha. Through a constitutional amendment, it granted Indians and coloureds a greater level of (powerless) political participation in matters such as education and health; the amendment, however, did not allow for the inclusion of a Bill of Rights. It was argued that such an inclusion would have meant that repressive laws such as the 1972 Internal Security Act had to be revoked. The Internal Security Act gave police powers to detain and arrest people without trial for a renewable period of ninety days. The parliamentary system included the House of Assembly (white representatives), the House of Representatives (coloured representatives), and the House of Delegates (Indian representatives). No representation was available to Africans, as it was argued that Africans already had political rights in their respective homelands (see note 7 above).

16 N. Duncan, above note 2, p. 10.

security, and high levels of unemployment. It is therefore not surprising that apartheid is regarded as the largest contributing factor to the political violence that prevailed in South Africa for decades. The political agenda of the National Party government, as well as the actions of the South African security forces, is often seen as having fostered the creation of an environment conducive to gang activity.

The Truth and Reconciliation Commission as a response to institutional violence

Immediately after the 1994 national elections, the post-apartheid Government of National Unity proposed that a mechanism be put in place to address the political violence that had haunted South Africa for so many years, namely a Truth and Reconciliation Commission (TRC)¹⁷ chaired by Archbishop Desmond Tutu. As a form of transitional justice, the TRC was tasked with providing a full picture of the nature, causes, and extent of gross human rights violations committed during apartheid. Between 1960 and 1994, 2,500 people had been hanged for political crimes, while about 80,000 people had been detained without trial.¹⁸ The TRC's mandate was limited to atrocities committed during that period. In this regard, Duncan comments that:

[First,] some of the worst acts of political violence committed by the apartheid state effectively fell beyond the scrutiny of this institution. In the process, therefore, a sufficiently comprehensive examination and analysis of the extent and impact of the various forms of political violence engendered by apartheid, for all intents and purposes, were precluded. ... Secondly ... the narrow definition of gross human rights violations as 'the killing, abduction, torture or severe ill-treatment of any person or any attempt, conspiracy, incitement, instigation, command or procurement to commit an act of killing, abduction, torture or severe ill-treatment', precluded not only the examination of all the variants of political violence spawned by apartheid, but also of the system of apartheid itself as a crime against humanity.¹⁹

Amnesty provisions in terms of transitional justice

It is submitted that true reconciliation was never achieved by the Truth and Reconciliation Commission; rather than being unveiled, the past was buried deeper. The question of criminal accountability was, however, raised during the negotiation process and, while a general amnesty was found to be counter-productive, a

17 The TRC was established by means of the Promotion of National Unity and Reconciliation Act 34 of 1995.

18 *Truth and Reconciliation Commission Report*, Vol. 1, 'Executive Summary', available at: <http://www.justice.gov.za/trc/report/index.htm> (last visited 24 June 2010).

19 N. Duncan, above note 2, p. 16.

concession was made and the final chapter of the Interim Constitution included the following text:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.²⁰

Despite these amnesty provisions, which may conflict with international law, the TRC was not in a position to address the post-1994 political violence; this criticism was echoed around the world. True conciliation can only be achieved by a genuine willingness of South Africans to acknowledge and deal with one of the most violent periods of the country's history.²¹ While in essence the TRC was intended as a vehicle for many South Africans to unravel the past, in reality it fostered an ever-growing amnesia developed by South Africans in order to forget that violent past.

It is submitted that South Africa has a legal obligation, in terms of both national and international law, to continue to prosecute persons who have committed politically motivated gross human rights violations. Bubenzer draws attention to the legal framework for establishing criminal accountability.²² The constitutional law obligations include the obligation of the state to respect, promote, and fulfil the Bill of Rights.²³ Bubenzer affirms that the prosecution authorities' obligations apply to violations of rights that occurred after the Constitution came into force, as well as offences committed beforehand.²⁴ Stating that the National Prosecuting Authority (NPA) had presented only a few cases before the courts between 2003 and 2008, he therefore contends that:

The NPA is, to a certain degree, simply refraining from investigating and prosecuting cases, thereby, to a certain extent, creating a state of de facto indemnity. The government contributes significantly to this state of impunity by not giving the NPA the support it would need to go further. Instead, it has ... attempted to restrict prosecutions from progressing further.²⁵

20 Interim Constitution of the Republic of South Africa, Act 200 of 1993, ch. 15, available at: <http://www.info.gov.za/documents/constitution/93cons.htm#CHAP15> (last visited 24 June 2010).

21 N. Duncan, above note 2, p. 17.

22 Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process*, Nijhoff Publishers, Leiden, 2009, pp. 168ff.

23 Constitution of the Republic of South Africa, Act 108 of 1996, ch. 2, section 7, available at: <http://www.info.gov.za/documents/constitution/1996/index.htm> (last visited 24 June 2010).

24 O. Bubenzer, above note 22, p. 169; see also Constitutional Court of South Africa, *S v. Basson*, Case No. CCT 30/3, 10 March 2004, para. 37.

25 O. Bubenzer, above note 22, p. 169.

As a result of the small in number of prosecutions by the National Prosecuting Authority, gangs have continued to thrive, in the hope that they would benefit from the amnesty provisions, and consequently the violence has continued in all its bloody horror.

Gang violence as a form of urban violence

Historically, South Africa's segregation laws have been instrumental in creating a platform for some of the most violent crimes related to urban gangsterism. Cities such as Johannesburg and Cape Town, in particular, have experienced unprecedented levels of gang-based violence.

Gang violence in Johannesburg and surrounding areas

In Johannesburg and its surrounding areas²⁶ the mining industry required a largely African male labour force. The resulting influx of Africans of various origins led to different ethnic groups being housed together in same-sex barracks on the mine property. Fights between the different ethnic groups became an everyday occurrence. The white authorities at the mines did not intervene, but rather tended to take deaths resulting from the faction fights for granted, as synonymous with the deaths from rock falls underground.²⁷ The mine managers were thus absolved of any responsibility, and it was not considered that supervisory abuse or housing and job allocation policies that encouraged ethnic chauvinism could lead to violence.²⁸

The Ninevites gang

The end of the nineteenth century marked the emergence of probably one of the most notorious gangs in South Africa: the Ninevites, led by Nongozola.²⁹ In her review of van Onselen's book,³⁰ Lucille Davie repeats that Nongozola decided on the name Ninevites because 'I read in the Bible about the great state Nineveh which rebelled against the Lord and I selected that name for my gang as rebels against the government's laws'.³¹

The Zulu-based Ninevites operated in the Witwatersrand and, according to van Onselen, frightened the inhabitants of the urban African locations; yet they

26 The region is collectively referred to as the Witwatersrand.

27 Gary Kynoch, 'Urban violence in colonial Africa: a case for South African exceptionalism', in *Journal of Southern African Studies*, Vol. 34, No. 3, 2008, p. 631.

28 *Ibid.*

29 The leader of the Ninevites was Mzuzephi Mathebula (later also known as Jan Note, or Nongozola).

30 Charles van Onselen, *The Small Matter of a Horse: The Life of 'Nongozola' Mathebula 1867–1948*, Raven Press, Johannesburg, 1985.

31 Lucille Davie, 'Nongozola: king of the Ninevites', January 2008, available at: www.joburg.org.za/content/view/2049/168 (last visited 24 June 2010). The gang was called the Ninevites or 'Umkozi Wezintaba' (Regiment of the Hills).

were also known for administering justice to white employers who had mistreated African workers.³² They were an African criminal organization that operated in prisons and in the community. With the advent of strict British administrative control at the start of the Anglo-Boer War, they sought refuge in mines and prison compounds.³³

At the turn of the twentieth century, South African prisons had a regular influx of predominantly African males, mainly owing to the pass laws enacted by parliament at that time. The criminal justice system, a reflection of racist policies, did very little to separate effectively the tough and often dangerous criminals from first offenders. These factors largely contributed to the successful predominance of the Ninevites' criminal activities in prisons. Kynoch states that the moment the Ninevites targeted white agents of the state, the government attempted to systematically wipe out the gang.³⁴ This marked the end of the Ninevites' gang activity outside prisons.

Gang activity at the mines continued with the presence of another gang, formed as a defence against the existing Ninevites. It was called the Isitshozi, and was initially established to protect the Mpondo mine workers.³⁵ The intensity of the violence at the mines later led to the imprisonment of a large number of Isitshozi members. Instead of being jailed, other Isitshozi members were sent to Pondoland, thus resulting in the infiltration of gangs into urban areas.³⁶

In the 1950s, a gang known as the Tsotsi was formed. They regarded the migrant workers as 'unschooled in the ways of the city' and friction between those workers and the Tsotsi often ensued. The migrant workers would retaliate with indiscriminate attacks on the city youth.³⁷ An array of gangs flourished during this period, whose members mostly had little or no educational background.³⁸ While many of their activities were defensive in nature, the consolidation of some gangs meant that their power increased and they consequently adopted a more aggressive approach. The most common form of violent activity for the Tsotsi was gang warfare, and bigger gangs were often tasked with carrying out ritual violence.³⁹

As violence spread through the townships, the police authorities were slow to respond, and residents in many neighbourhoods therefore grouped together in street patrols and other neighbourhood watch systems. The government's lack of institutional response was tantamount to a *carte blanche* for gangs to pursue their

32 Charles van Onselen, *Studies in the Social and Economic History of the Witwatersrand 1886–1914*, Vol. 2, *New Nineveh*, Raven Press, Johannesburg, 1982, p. 195.

33 The Anglo-Boer War (also known as the Second Boer War and the South African War) was fought from 11 October 1899 to May 1902 between the British Empire and the two independent Boer republics, the South African Republic (Transvaal Republic) and the Orange Free State.

34 G. Kynoch, above note 27.

35 *Ibid.*

36 During the 1930s and 1940s, the Isitshozi gradually started to disband. Yet that particular gang played an important role in the birth of the 'Marashea', which subsequently became the most notorious gang in Johannesburg in the late 1940s.

37 G. Kynoch, above note 27, p. 632.

38 They included the Blue Nines, the Msomi, and the Spoilers.

39 G. Kynoch, above note 27, p. 632.

criminal activity. The state actively supported many of these gangs and thus indirectly encouraged urban violence, so civic organizations were ineffective in their ‘war against gangsterism’. The cities of Cape Town and Durban did not escape the wrath of the various gangs, as shown below.

Gang violence in Durban and Cape Town

Durban and Cape Town lacked the dominance of the mining industry prevalent in the Witwatersrand region, and more particularly Johannesburg, at the turn of the twentieth century. Cape Town, for example, had a large coloured population and this naturally impacted on the dynamics of urban violence in the city.⁴⁰ It is still a city of contrasts and visible social fragmentation built on policies of apartheid. The segregation laws of the 1950s created a largely polarized population, resulting in whites living in the affluent cosmopolitan area at the base of Table Mountain and along the coast, while the non-white population settled in suburban areas, such as District Six, mainly on the back of the Group Areas Act of 1950.

As a result of urban migration and unemployed youth during the 1940s, the notorious suburb of District Six⁴¹ became the birthplace of street gangs.⁴² Its inhabitants responded fiercely with vigilante tactics; the ‘mafias’, as they became known, were in fact family-based groups who fought for the protection of their close friends and family against the ever-growing threat of gangsterism. The gangs’ infiltration of the Cape Flats⁴³ suburb was mainly due to the segregation laws and resettlement schemes of the 1960s. It is interesting to note that not all the Cape Flats inhabitants were in favour of state intervention against gangs in the area. Indeed, the *Mail & Guardian* reported in 1999 that the former Hard Livings gang boss, Rashied Staggy, was seen by many as a hero.⁴⁴

The Hard Livings gang

In 1993 the Hard Livings gang were preparing to become junior partners of organized crime. As Kinnes explains, in that same year South Africa was on the eve of

40 *Ibid.*, p. 364.

41 District Six is so named because in 1867 it became the sixth municipal district of Cape Town. By the turn of the twentieth century, it was a lively community made up of former slaves, artisans, merchants, and other immigrants, as well as Malay people brought to South Africa by the Dutch East India Company during its administration of the Cape Colony. After World War II, District Six was fairly cosmopolitan, comprising coloured Muslims and African Xhosa residents, as well as a small number of Afrikaners and Indians. Under the Group Areas Act 41 of 1950 it was formally declared a whites-only district in 1966. Forced removals started in 1968.

42 G. Kynoch, above note 27.

43 The Cape Flats is so called because of its flat topography and its geographical location south-east of the central business district of Cape Town. The Group Areas Act 41 of 1950 forced the coloured community to move away from the central and western suburbs of Cape Town to the Cape Flats and other districts.

44 André Standing, *The social contradictions of organized crime in the Cape Flats*, Institute for Security Studies, Paper 74, June 2003, p. 6. In 1994, the Hard Livings and the Americans (see also note 48 below) were the two biggest gangs in the Cape Flats, with an estimated membership of between 3,000 and 10,000 respectively.

political transition to democracy.⁴⁵ At the same time, the government and the opposition forces were negotiating amnesty and indemnity from prosecution. The political atmosphere was extremely fragile and killings and upheavals were rife, yet gangs in a rather opportunistic fashion manipulated and interpreted the socio-political uncertainty as an occasion for committing crime in the name of freedom.⁴⁶

Kinnes opines that gang members consciously did not draw a distinction between crimes committed by them and crimes committed by the liberation movements. As a result, the Hard Livings gang demanded that they be included in the amnesty provisions, as well as indemnity from prosecution, because they were supposedly victims of apartheid.⁴⁷ In part, the Hard Livings gang gave strong support to the African National Congress, while at the same time a rival gang operating in the same area, the 'Americans',⁴⁸ supported the ruling National Party. Cape Town, and especially the Cape Flats, were the scene of the most violent gang-related crimes during the run-up to South Africa's first democratic elections.

Between 1990 and 1994, South Africa had experienced quite a lot of low-intensity conflict in African residential areas.⁴⁹ There were numerous media reports on assassinations of influential political figures, bomb blasts, and ruinous battles in the various townships. Political analysts regarded the violence as being 'black on black', and Knox in particular states:

Between February 1990 and April 1994 South Africa roller-coasted between the highs of political agreements to the lows of countless massacres and levels of violence unprecedented in a land already scorched by bloodshed. ... 'the nature of political violence was transformed from a primarily overt conflict between the regime and the forces of liberation, to a more entangled fight among a wide variety of players with disparate motives, tactics and objectives'.⁵⁰

This type of violence thus had hybrid characteristics. On the one hand, it was seen as classic gang violence and, on the other hand, as political violence. Retracing its development, Kynoch writes that:

The urban-led protests of the mid-1980s, combined with the rise of state-sponsored vigilantism and the fighting between ANC and IFP [Inkatha Freedom Party] backed forces, turned many townships into virtual war zones. All the warring parties recruited criminal gangs to some extent, and not

45 Irvine Kinnes, *Structural changes and growth in gang activities*, Monograph No. 48, Institute for Security Studies, June 2000, available at: <http://www.iss.co.za/pubs/MONOGRAPHS/No48/Structure.html> (last visited 24 June 2010).

46 *Ibid.*

47 A. Standing, above note 44. Negotiations on the creation of a Truth and Reconciliation Commission were well under way in 1993, and amnesty and indemnity from prosecution were high on the agenda.

48 This name is not to be confused with the nationals of the United States of America.

49 N. Duncan, above note 2, p. 11. This was particularly the case in the Cape Flats, KwaZulu-Natal, and Gauteng.

50 Colin Knox and Pádraic Quirk, *Peace Building in Northern Ireland, Israel and South Africa: Transition, Transformation and Reconciliation*, Palgrave Macmillan, Basingstoke, 2000, pp. 153–154.

surprisingly were unable to exercise full control over the elements that fought in their name.⁵¹

Whatever the form of violence in the period between 1980 and 1994, its victims always included displaced children and political detainees held without trial, and it always involved deaths and injuries. The wrath of this violence was particularly evident in the province of KwaZulu-Natal.

Violence in KwaZulu-Natal

The suburb that experienced the most political violence during the two decades prior to the 1994 democratic elections was Mpumalanga Township in KwaZulu-Natal, which has always been the province hosting an Inkatha Freedom Party stronghold.⁵² There have been numerous clashes between the followers of the Inkatha Freedom Party, the United Democratic Front, and the African National Congress.⁵³ In 1987 the tensions in Mpumalanga Township intensified, resulting in the creation of ‘closed’ zones for territorial and political supremacy in the region. Regarding the violence in the region, Mosoeta remarks:

The violence was often labelled as ‘black-on-black’ violence with the regime at that time posing as a neutral actor, genuinely concerned about resolving the war. Yet there is well-documented evidence of direct involvement by the South African Police in support of the Inkatha Freedom Party and against those supporting the African National Congress and its allies. At a more passive level, the police did not take up crimes committed against and reported by the United Democratic Front members.⁵⁴

The state’s response to gang violence

Black-on-black violence was largely ignored by the South African police before 1994, mainly because they were concentrating on enforcing pass laws and other repressive legislation enacted by the apartheid government. The lack of police responses to urban violence during this period meant that gangsterism, rape, and murder flourished in the townships. Kynoch states that ‘When protest against the

51 Gary Kynoch, ‘From the Ninevites to the Hard Livings gang: township gangsters and urban violence in twentieth-century South Africa’, in *African Studies*, Vol. 58, No. 1, 1999, p. 70.

52 Care must be taken not to classify the violent conflict between the African National Congress (ANC) and the Inkatha Freedom Party (IFP) as an ethnic conflict, despite the fact that the ANC is predominantly Xhosa whereas the IFP has predominantly Zulu followers, although some sporadic clashes between the two parties were ethnic-based, especially fighting on the Reef. Interestingly enough, in May 2009 the ANC chose Jacob Zuma, a Zulu, to be the President of the Republic of South Africa.

53 One of these clashes led to the killing of respected United Democratic Front leader Victoria Mxenge in 1985.

54 Sarah Mosoeta, ‘Compromised communities and re-emerging civic engagement in Mpumalanga Township, Durban, KwaZulu-Natal’, in *Journal of Southern African Studies*, Vol. 31, No. 4, December 2005, p. 860.

apartheid regime gathered momentum in the 1970s and 1980s, police efforts were concentrated on crushing political dissent rather than addressing violence within black communities'.⁵⁵

Many areas in South Africa became ungovernable, owing to lack of effort by the police. It can be argued that the police were not effective enough to combat gangsterism and prevent crime because they were more reactive than proactive. The transition to democracy in 1994 meant that police services necessarily had to change from a repressive policing style to a more community-based service. In order to achieve this, a Commission of Inquiry under the leadership of Judge Goldstone was established.⁵⁶ The objectives of the Commission were to:

- inquire into the phenomenon of public violence and intimidation in the Republic, the nature and causes thereof, and what persons were involved therein;
- inquire into any steps that should be taken in order to prevent public violence and intimidation; and
- make recommendations to the State President in respect of public violence and intimidation.⁵⁷

The Goldstone Commission made quite a number of recommendations to the State President on steps to prevent violence and intimidation. These included:

- deploying an effective police presence in local communities;
- utilizing the new division of Internal Security to counter violence;
- taking urgent steps to prohibit the carrying of weapons in public; and
- improving the relationship between the police and local communities.⁵⁸

The Commission also drew up a number of significant reports, including those on the violence affecting Crossroads⁵⁹ and Nyanga,⁶⁰ and the report on the storming of the Kepton Park World Trade Centre in June 1993.⁶¹

Durington argues that, as a result of the faith lost in the South African police services, private security companies may become the next investment strategy, because it is perceived that the private security companies might perform

55 G. Kynoch, above note 51, p. 75.

56 The Commission of Inquiry regarding the Prevention of Public Violence and Intimidation (commonly known as the Goldstone Commission) was established under the Prevention of Public Violence and Intimidation Act of 1991. The Commission was tasked with investigating and exposing the background and reasons for violence in order to reduce the incidence of violence and intimidation.

57 These recommendations are found in Chapter 6 of the National Peace Accord, available at: <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/sa4.pdf> (last visited 24 June 2010).

58 Bilkis Omar, 'Crowd control: can our public order police still deliver?', in *South African Crime Quarterly*, No. 15, 2006, p. 8.

59 Crossroads is situated near Cape Town International Airport and was affected by numerous violent protests during the apartheid era.

60 Nyanga is one of the oldest townships in Cape Town, originally established as a result of the migrant labour system, and has a very high prevalence of crime.

61 The Kempton Park World Trade Centre was the venue where multi-party negotiations were taking place. The negotiations were strongly opposed by right-wing parties (including the notorious Afrikaner Weerstandsbeweging, commonly known as the AWB).

better than the police currently are.⁶² A short reflection on crime statistics before and after 1994 follows.

Crime statistics before 1994

Statistics on crime in South Africa during the apartheid years may not be either conclusive or accurate. This may be attributed to the fact that crime figures during this period did not include crimes committed and reported in the Bantustans (homelands).⁶³ Louw and Schönsteich state that from 1973 to 1993 recorded crime, measured on a per capita basis, increased by about 35%.⁶⁴ During the mid-1980s violent crimes were often justified by the wrongdoers as a legitimate means of defence against political opponents and enemies. This resulted in an exponential increase in violence during that period.

Crime statistics after 1994

In the first three years after becoming a constitutional democracy, South Africa saw its crime levels stabilize, despite being fairly high.⁶⁵ Statistics obtained from the United Nations Office on Drugs and Crime reveal that the overall crime rate during the 1994/1995 twelve-month period was 5,224 reported incidents per 100,000 of the population.⁶⁶ This figure increased slightly to 5,571 per 100,000 during the 2001/2002 period.⁶⁷

A steady decrease in certain crimes occurred between April 2003 and March 2009. For example, common assault offences declined from 280,942 reported incidents in the April 2003/March 2004 period to 192,838 in the twelve months ending March 2009. Yet over that same time span public violence escalated from 979 reported incidents to 1,500 in March 2009.⁶⁸ An increase in drug-related crime was also recorded.⁶⁹ These statistics show that, despite South Africa's transition into a constitutional state, the rights, freedoms, and privileges of many South

62 Mathew Durlington, 'Suburban fear, media and gated communities in Durban, South Africa', in *Home Cultures*, Vol. 6, No. 1, 2009, p. 77.

63 For the ten homelands created by the apartheid government, see above note 7.

64 Martin Schönsteich and Antoinette Louw, *Crime in South Africa: a country and cities profile*, Occasional Paper No. 49, Crime and Justice Programme, Institute for Security Studies, Pretoria, 2001, available at: <http://www.iss.co.za/pubs/Papers/49/Paper49.html> (last visited 24 June 2010).

65 *Ibid.*

66 Rob Boon, *South Africa: country profile on drugs and crime 2002*, United Nations Office on Drugs and Crime, 2002, p. 55, available at: http://www.unodc.org/pdf/southafrica/country_profile_southafrica.pdf (last visited 24 June 2010).

67 It is interesting to note that the Western Cape and Gauteng had an overall crime rate higher than 8,000 reported incidents per 100,000 during the 2001/2002 period. For a detailed discussion on this, see M. Schönsteich and A. Louw, above note 64.

68 Crime Information Management – South African Police Service, 2009, 'Crime in the RSA from April to March: 2003/2004–2008/2009', available at: <http://www.iss.co.za/uploads/0909crimetotals.pdf> (last visited 24 June 2010).

69 Statistics show 62,689 recorded drug-related incidents in the 2003/2004 period, rising steadily per annum to 117,172 in 2008/2009.

African nationals and foreigners on South African territory are constantly under threat.

Vigilantism as a means of curbing gang-related crime

Vigilante action has proliferated as a result of the government's inability to combat drugs and crime. It became evident in the late 1990s, with the emergence of the People against Gangsterism and Drugs group in 1996. At the time the police welcomed the group, seeing it as a virtual substitute performing their functions, especially since they themselves may have feared for their lives in combating gangsterism. The state was quick to curb the group's actions after it had been linked to a number of terrorist-related activities, including drive-by shootings and petrol bomb and hand-grenade attacks against alleged drug dealers and gangsters, as well as against police stations.⁷⁰ There is little doubt that crime in South Africa is a force to be reckoned with, exacerbated by the fact that the perpetrators of the most violent crimes know no bounds. Law enforcement is thus increasingly strained.

'Shoot-to-kill' policy

In 2008 the Deputy Minister of Security shocked many human rights activists when she stated publicly in response to the high crime statistics that:

You must kill the bastards if they threaten you or the community. You must not worry about the regulations – that is my responsibility. Your responsibility is to serve and protect. I want no warning shots. You have one shot and it must be a kill shot. Criminals are hell-bent on undermining the law and they must now be dealt with. End of story. There are to be no negotiations with criminals.⁷¹

South Africa's National Police Commissioner Bheki Cele reiterated that police officers should use deadly force when faced with armed criminals. The statements made by these high-profile leaders are irresponsible and in violation of international and national laws. According to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, intentional lethal use of firearms may only be made when it is strictly unavoidable in order to protect life.⁷² These principles are guidelines that states need to follow in order to ensure

70 Mike Hough, 'Urban terror in South Africa: a new wave?', in *Terrorism and Political Violence*, Vol. 12, No. 2, 2000, pp. 67–75.

71 Ian Evans, 'Shoot the bastards ... and shoot to kill: South African minister tells police to show criminals no mercy', in *Mail Online*, 11 April 2008, available at: <http://www.dailymail.co.uk/news/article-558689/Shoot-bastards-shoot-kill-South-African-minister-tells-police-criminals-mercy.html> (last visited 24 June 2010).

72 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, September 1990. See in particular Principles 9 and 10.

that their police officials perform their duties in accordance with internationally recognized standards, and with due regard to basic human rights. The principles thus clearly guard against arbitrary killing of criminal suspects. The South African ‘shoot-to-kill’ policy has therefore come under the spotlight and will be briefly discussed here.

Section 49 of the 1977 Criminal Procedure Act⁷³ has been the centre of attention for a number of years. The section originally applied to situations in which it was deemed justifiable for the police or any arresting authority to use lethal force. This section was amended in 1998, primarily to conform to the Constitution. The amendment only came into effect in 2003, one year after the Constitutional Court ruled that section 49, prior to the amendment, was unconstitutional.⁷⁴ The 2003 amendment has not yet been challenged, although it arguably allows for lethal force only when the arrester’s own life or the lives of others are in danger.

It is submitted in hindsight that the criteria set in the *Walters* case should apply, and not the 2003 amendment, as those criteria provide better legal certainty.⁷⁵ It thus becomes clear that the South African ‘shoot-to-kill’ policy is not in accordance with international and national law. Since April 2010, a new Bill has been tabled before parliament, and it is hoped that the proposed Bill, when enacted into law, will provide legal certainty in line with the *Walters* decision.⁷⁶

73 Act 51 of 1977 as amended.

74 See Constitutional Court of South Africa, *Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another*, Case No. CCT 28/01, 21 May 2002.

75 Judge Kriegler summarized the main points as: (a) the purpose of arrest is to bring before court for trial persons suspected of having committed offences; (b) arrest is not always the only means of achieving this purpose, nor always the best; (c) arrest may never be used to punish a suspect; (d) where arrest is called for, force may be used only where it is necessary to carry out the arrest; (e) where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used; (f) in deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed – the force being proportional in all these circumstances; (g) shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only; (h) ordinarily shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later; (i) these limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of another person. See p. 643 of the judgment.

76 The parts highlighted in italics below are the proposed amendments to the current section 49. The proposal is that those highlighted parts be removed from the current section 49.

49. (1) For the purposes of this section: (a) ‘arrestor’ means any person authorized under this Act to arrest or to assist in arresting a suspect; *and* (b) ‘suspect’ means any person in respect of whom an arrestor has *or had* a reasonable suspicion that such person is committing or has committed an offence; and (c) ‘deadly force’ means force that is intended or likely to cause death or serious bodily harm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists ... and the suspect cannot be arrested without the use of force, the arrestor may ... use such force as may be reasonably necessary and proportional in the circumstances ... Provided that the arrestor is justified ... in using deadly force *that is intended or is likely to cause death or grievous bodily harm to a suspect*, only if he or she believes on reasonable grounds—(a) that the force is *immediately*

'Taxi wars' as a form of urban violence in South Africa

In order to understand the manifestation of taxi violence in South Africa, it is necessary to consider the history of the taxi industry dating back to 1977. Before 1977, the Motor Carrier Transportation Act of 1930 prohibited the transportation of goods or passengers by road for profit without permission from the South African Local Road Transportation Board. In essence, the transport industry was monopolized by the South African Transport Service. Thus any taxi owner who conducted business outside the jurisdiction of the Local Transport Board was doing so illegally. African transport owners found it near impossible to meet all the requirements of the regulations laid down by the Motor Carrier Transportation Act.⁷⁷ Taxi operators who were operating illegally formed various informal associations, and these associations regulated loading practices and prices.

The legislation permitted those Africans who qualified for a taxi permit to use small vehicles able to transport only four passengers at a time. Buses and trains in the 1970s were inadequate and expensive, and the demand for taxis therefore grew rapidly. The National Party government realized in the late 1970s that participation in the transport industry was becoming less viable and highly politicized. In 1977 the Van Breda Commission of Inquiry was established and recommended deregulation of the taxi industry in terms of legislation.⁷⁸ A myriad of taxi associations emerged in the wake of an absence of official control, resulting in large-scale corruption and consequential violence among the competing associations.⁷⁹ Sekhonyane and Dugard comment that:

contrary to many expectations, the cycles of taxi violence fomented during the late apartheid period did not end with the demise of apartheid. Indeed, unlike other forms of political violence that diminished and disappeared after 1994, taxi violence actually escalated in the immediate post-1994 period.⁸⁰

necessary ... or (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or that the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

77 Makubetse Sekhonyane and Jackie Dugard, 'A violent legacy: the taxi industry and government at loggerheads', in *South African Crime Quarterly*, No 10, December 2004, p. 14.

78 *Ibid.*

79 The two predominant associations emerging at the time were the South African Long Distance Taxi Association (SALDTA) and the South African Black Taxi Association (SABTA). Affiliations to these associations also spawned later associations. Examples of such affiliations are ATA (the Alex Taxi Association, affiliated to SABTA) and ARMSTA (the Alex-Randburg-Midrand-Sandton Taxi Association, affiliated to SALDTA). A classic example of a taxi war between two rival organizations, ATA and ARMSTA, lasted from 1987 to 1994 and caused many deaths and injuries.

80 M. Sekhonyane and J. Dugard, above note 77, p. 15.

The state's response to the taxi violence

From the above it is clear that taxi violence became increasingly widespread and less manageable by the authorities. Attempts to restructure the taxi industry were slow. In 1995 the government established the National Taxi Task Team to inquire into the causes of, and possible solutions to, the prevailing violence.⁸¹ The National Taxi Task Team presented its findings and recommendations to the Minister of Transport the following year. The most significant recommendation was that the taxi industry be deregulated.⁸² Strong opposition came from a number of taxi associations and resulted in an upsurge of taxi violence between 1998 and 1999.⁸³ The National Land Transport Act of 2000⁸⁴ was the government's attempt to help formalize and re-regulate the taxi industry. Part of the process of re-regulation included a four-year recapitalization scheme.⁸⁵ Delays in this process arose from the taxi industry's inability to form a cohesive association representing all the taxi owners, as well as disagreement between taxi owners as to the nature of the proposed recapitalization scheme.⁸⁶ The recapitalization programme has had a number of shortcomings, including the lack of financial assistance from banks, which have led to its fairly slow implementation.

In 2007 the Department of Public Transport announced that a fast, comfortable, and low-cost urban transport system called the Bus Rapid Transit System (BRTS) was being planned for the host cities of the 2010 FIFA World Cup.⁸⁷ It is envisaged that the BRTS will play a leading role in the transformation of public transport within cities. However, taxi associations remain resistant to government interference in the taxi industry, since the BRTS is seen as a threat to the livelihood of many taxi operators. Evidence of this resistance surfaced in May 2010: there were two shooting incidents in Soweto, one resulting in the death of a commuter on the Rea Vaya Bus Rapid Transit route from Soweto to Central Johannesburg.⁸⁸

The BRTS should not be viewed as the final solution to public transport in South Africa, but as the government's attempt to minimize conflict in the taxi industry, provided that existing taxi operators 'buy into the system'.⁸⁹ It remains to be seen whether this will ultimately be achieved.

81 *Ibid.*, p. 16.

82 The National Taxi Task Team was disbanded in 1998.

83 M. Sekhonyane and J. Dugard, above note 77, p. 16.

84 Act No. 22 of 2000.

85 The purpose of the scheme was to replace the fifteen-seater minibuses with eighteen- and thirty-five-seater minibuses.

86 The Taxi Recapitalization Programme (TRP) was an intervention by the South African government to bring about safe, effective, reliable, affordable, and accessible taxi operations by introducing new taxi vehicles designed to undertake public transport functions in the taxi industry.

87 Untitled article written by David Masengo and Themba Gadebe, 13 July 2007, available at: <http://www.sa2010.gov.za/node/861> (last visited 24 June 2010).

88 South African Press Association, 'BRT shooting victim dies', 3 May 2010, available at: <http://www.news24.com/SouthAfrica/News/BRT-shooting-victim-dies-20100503> (last visited 24 June 2010).

89 The negotiations between the South African National Taxi Association Council (SANTACO) and the government are ongoing. SANTACO (founded in September 2001) remains adamant that the taxi industry is to own the BRTS. This is not what the government has envisaged.

Xenophobic violence as a form of urban violence in South Africa

The Compact Oxford English Dictionary defines xenophobia as ‘intense or irrational dislike or fear of people from other countries’.⁹⁰ Xenophobia can thus be seen as unreasonable distrust, fear, or hatred of strangers or foreigners, or anything foreign or different. Brutal assaults, police victimization, and ethnic cleansing and mass expulsion are some of the forms that xenophobia may take in any particular country.

South Africa experienced a series of xenophobic attacks in May 2008, directed primarily at foreigners in poor settlements. Those attacked included foreigners who had acquired citizenship because of their specialized skills,⁹¹ as well as persons with legal work and study permits.⁹² An outline of xenophobic violence in South Africa is given below, followed by a discussion of the May 2008 and subsequent attacks.

Legal framework of laws relating to the protection of migrants

There are several international human rights instruments to promote the human rights of all migrants. It is a principle of international law that governments have wide sovereign discretion to determine nationality. However, when a foreign national is found on its territory, the government has to ensure that the foreign national’s human rights are respected. The rights contained in those international legal instruments are thus guaranteed to all persons present in a particular state, including nationals and non-nationals irrespective of their legal status, their gender, or their age.

Various human rights treaties specifically highlight the prohibition against discrimination. These treaties include the International Covenant on Civil and Political Rights (ICCPR),⁹³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁹⁵ Refugee protection laws include

90 *Compact Oxford Dictionary of Current English*, 3rd edition, June 2008, available at: http://www.askoxford.com/dictionaries/compact_oed/?view=uk (last visited 24 June 2010).

91 The types of skills include those of medical doctors, scientists, engineers, and academics.

92 This category of persons includes Mozambican mineworkers, Zimbabwean mathematicians, and thousands of foreign university students.

93 Adopted by the United Nations General Assembly on 16 December 1966, entered into force on 23 March 1976. At October 2009, the ICCPR had 72 signatories and 165 states parties.

94 Adopted by the United Nations General Assembly on 16 December 1966, entered into force on 3 January 1976. At December 2008, the ICESCR had 160 states parties.

95 Adopted by the United Nations General Assembly on 21 December 1965, entered into force on 4 January 1969. At October 2009, the ICERD had 85 signatories and 173 states parties.

the 1951 Convention relating to the Status of Refugees⁹⁶ and the 1967 Protocol relating to the Status of Refugees.⁹⁷

South Africa acceded to the 1951 Refugee Convention and the 1967 Protocol on 12 January 1996. In order to give effect to its international obligations, principles, and standards relating to refugees in terms of these two international instruments, South Africa promulgated the South African Refugees Act 130 of 1998.⁹⁸ The Act provides for the reception into South Africa of asylum seekers and regulates applications for and recognition of refugee status. In addition it provides for the rights and obligations flowing from such status, and other related matters. South Africa further sought to control illegal immigration by promulgating the Immigration Act 13 of 2002.⁹⁹ Although the country was thus bound by instruments of national and international law, since its first manifestation xenophobic violence has become a 'household brand'.

History of xenophobic violence in South Africa since 1995

May 2008 was not the first time South Africa experienced xenophobic violence. Indeed, looking no further back than 1995, there are numerous shocking accounts of such attacks.¹⁰⁰ According to a Human Rights Watch report, immigrants from Malawi, Mozambique, and Zimbabwe living in Alexandra Township were physically assaulted in 1995.¹⁰¹ The report states that armed gangs identified suspected undocumented migrants and marched them to the police station in an attempt to 'clean' the township of the foreigners.¹⁰² The campaign accused the foreign nationals of being responsible for the high crime and unemployment rates, as well as the increase in sexual violence, particularly against women. Nahla Valji writes that:

In September 1998 two Senegalese and a Mozambican were thrown from a train by a group of individuals returning from a rally organised by a group

96 Approved at a special United Nations conference on 28 July 1951, entered into force on 22 April 1954. At 1 October 2008, the Convention had 144 states parties. A detailed analysis of its geographical scope of application goes beyond the ambit of this article.

97 Adopted by the United Nations General Assembly on 16 December 1966, entered into force on 4 October 1967. At 1 October 2008, the Protocol had 144 states parties.

98 The Refugees Act came into effect on 1 April 2000.

99 The Immigration Act came into effect in 2003. However, immigration regulations were not published until 2004.

100 Xenophobic violence prior to 1995 will not be discussed in this article.

101 Human Rights Watch, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa*, New York etc., March 1998, part VI: 'Xenophobia and attacks against migrants', available at: <http://www.hrw.org/legacy/reports98/sareport/> (last visited 24 June 2010).

102 *Ibid.*

blaming foreigners for the levels of unemployment, crime, and even the spread of AIDS.¹⁰³

Very often the victims of these attacks are foreign hawkers seeking refuge in South Africa. Some South Africans argue that, by taking up employment in South Africa, foreigners are largely responsible for depriving South African nationals of job opportunities. Poverty and poor service delivery are two further causal factors for xenophobic attacks.¹⁰⁴ In South Africa the gap between rich and poor is wide and deep, and various forms of violence, including xenophobic violence, have consequently become prevalent.

In September 2000, seven foreigners were killed in the Cape Flats district.¹⁰⁵ These xenophobic murders, as described by the police, were allegedly motivated by fear that foreigners would claim the property belonging to South African nationals.¹⁰⁶ In October 2001, residents of the Zandspruit informal settlement targeted Zimbabweans, believing that they were responsible for the local inhabitants being without jobs. The *Independent Online Newspaper* reported that:

The violence in Zandspruit squatter settlement outside Honeydew, west of Johannesburg, erupted when the Zimbabweans failed to leave the area after being given a 10-day ultimatum ... to leave the area or face the wrath of the locals. The ultimatum was allegedly brokered in a meeting held at the local police station.¹⁰⁷

In 2006 Somali refugees sought intervention from the South African Human Rights Commission with regard to a number of attacks on Somali traders.¹⁰⁸ The media reported that about twenty-six Somali traders had been killed in 2006.¹⁰⁹ The South African police were quick to dismiss the reasons for the deaths as being linked to xenophobic attacks. This recurring 'blind-eye' attitude of the police service seemed to reflect a more general attitude of the state towards foreign nationals.¹¹⁰

103 Nahla Valji, 'Creating the nation: the rise of violent xenophobia in the new South Africa', unpublished Master's Thesis, York University, July 2003, available at: <http://www.csvr.org.za/docs/foreigners/riseofviolent.pdf> (last visited 24 June 2010).

104 South Africa has a huge income disparity in both social and economic terms. According to the UN Development Programme in 2009, South Africa was ranked 129 out of 194 countries in terms of the Gross National Income coefficient, which is a measure of income inequality. See updated report available at: <http://hdrstats.undp.org/eng/indicators/147.html> (last visited 19 July 2010).

105 'Xenophobic attacks: seven die in one month', in *Independent Online News*, 2 August 2000, available at: http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=ct20000802102508479X510381 (last visited 24 June 2010).

106 *Ibid.*

107 Baldwin Ndaba, 'Raging mob evicts Zimbabweans, burns home', in *Independent Online News*, 21 October 2001, available at: http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=ct200110212058176Z5321926 (last visited 24 June 2010).

108 Sivuyile Mangxamba, 'Somalis turn to HRC as murder toll soars', in *Independent Online News*, 25 August 2006, available at: http://www.iol.co.za/index.php?sf=18&set_id=1&click_id=13&art_id=vn20060825131506666C924904 (last visited 24 June 2010).

109 *Ibid.*

110 See below for a discussion of this point.

Several attacks on Somalis, Pakistanis, and Zimbabweans occurred in various townships during 2007 and 2008, where some of the shops and shacks¹¹¹ were set alight.¹¹² Despite major public outcries from large sectors of the South African population and international human rights organizations, foreign nationals continued to be targeted and, in May 2008, South Africa and the world witnessed yet another series of xenophobic attacks.

On 11 May 2008 Alexandra, a township north of Johannesburg, was flooded with police after the township's local residents violently attacked foreign nationals, killing and injuring migrants from Mozambique, Zimbabwe, and Malawi.¹¹³ Shortly after these attacks, violence spread to other settlements in the Gauteng Province, as well as the coastal cities of Durban and Cape Town. In 2009, 3,000 foreigners in the De Doorns Township in Cape Town, including refugees and asylum seekers from Zimbabwe, were driven from their shacks.¹¹⁴ The UN High Commissioner for Refugees welcomed the rapid response of the local authorities in Cape Town and of the South African Red Cross Society in providing communal tents, water, public toilets, and mobile medical facilities.¹¹⁵ These attacks, as well as those prior to 2008, stemmed from the increasingly xenophobic climate that has been spreading throughout South Africa for a number of years.

The paradoxical reality is that many of the victims were immigrants from neighbouring countries who had initially integrated quite easily with the local African population during the apartheid era, with little or no violent xenophobic disruption. To unravel this paradox, some understanding is required of why these attacks occurred in the first place.

Factors that may have triggered the xenophobic attacks in May 2008

The existence of various factors conducive to xenophobic violence was mentioned above. They include poverty informed by a disparity in income between rich and poor, poor service delivery, overcrowding in squatter camps, lack of housing, and widespread unemployment. Arguably, some South Africans also exude a feeling of superiority towards other Africans.¹¹⁶ South African youth has been on the receiving end because of the socio-political defects embedded in daily South African life. Many African young people have, for various reasons, dropped out of school and subsequently been unable to find employment.¹¹⁷ This has resulted in

111 'Shack' is the term used to denote an informal dwelling in the townships.

112 'Xenophobic attacks special report', in *Sowetan Online*, available at: <http://www.sowetan.co.za/News/Article.aspx?id=%769120> (last visited 24 June 2010). These attacks left thousands homeless.

113 'South African mob kills migrants', in *BBC News Online*, 12 May 2008, available at: <http://news.bbc.co.uk/2/hi/africa/7396868.stm> (last visited 24 June 2010).

114 Andrej Mahecic, *UNHCR condemns xenophobic violence in Western Cape*, Briefing Notes, UNHCR, Geneva, 20 November 2009, available at: <http://www.unhcr.org/4b06744f9.html> (last visited 24 June 2010).

115 *Ibid.*

116 This has also been referred to as South African exceptionalism.

117 Siphamandla Zondi, 'Xenophobic attacks: towards an understanding of violence against African immigrants in South Africa', in *Africa Insight*, Vol. 38, No. 2, September 2008, p. 29.

youth being drawn into various forms of crime and violent behaviour,¹¹⁸ and thus to an ever greater extent into sub-cultures involving gangs and drugs. Zondi states that:

Low educational qualification, high unemployment and the weakening of social organizations, especially at the family and community level, seem to have combined to breed a significant sense of alienation, marginalization and neglect. This expresses itself in anger against the establishment and violence against various targets from time to time. This then also manifests in the spate of violent crime, disorderly protests and senseless attacks on 'others'.¹¹⁹

It is thus clear that poverty and unemployment are key factors to consider when addressing xenophobic violence in contemporary South Africa. This begs the question whether South Africa is effectively responding to the security risks of structural xenophobia.

The state's response to the xenophobic violence

In a public statement issued by the South African Human Rights Commission, various stakeholders emphatically called for an end to the violence that has erupted throughout South Africa.¹²⁰ The Commission very strongly urged the South African government to impose a moratorium on the arrest and deportation, despite their legal status, of victims of violence. It also called upon the Department of Justice and Constitutional Development to ensure that special and extraordinary courts be set up in order to ensure that those arrested might be brought to trial expediently,¹²¹ and urged civil society organizations to act with compassion in rendering humanitarian aid to the victims. Replying to criticism that the Commission had been slow to respond to the xenophobic attacks, its Chairperson, Lawrence Mushwana, pointed out that the Human Rights Act of 1994 does not have any prescribed methods for dealing with a complex disaster such as the xenophobic attacks that occurred on 11 May 2008.

Shortly after the attacks, state and civil society organizations established temporary camps, including police stations and community halls, for the victims of the attacks. The South African government at first thought that the refugees held there should be reintegrated into the communities from which they had originally fled. This view was rapidly dispelled as more draconian recommendations on migrants were developed by the South African Human Sciences Research Council

118 *Ibid.*

119 *Ibid.*

120 The South African Human Rights Commission (SAHRC) was inaugurated in October 1995 as an independent national institution. It draws its mandate from the South African Constitution through the South African Human Rights Commission Act of 1994. The SAHRC is tasked with monitoring violations of human rights and seeks to redress such violations, both proactively and via complaints brought before it. The public statement is available at: <http://www.info.gov.za/speeches/2008/08052910451010.htm> (last visited 24 June 2010).

121 *Ibid.*

and seemingly entertained by the government.¹²² Some of the recommendations in the Council's report are proposals that the government should legalize immigrants and refugees already in South Africa, after which the South African borders should be closed and patrolled by the South African National Defence Force.

This measure was intended to ensure that additional foreigners were not allowed to 'come and go as they please'.¹²³ The Council further recommended that foreigners be barred from certain types of employment and that a new system of minimum wages be developed in certain sectors so as to prevent immigrants from working for lower wages.¹²⁴ Sharp, in a response to South African migration policies, says:

How is it that they, like many other South Africans, have forgotten so quickly that a great deal of the country's present wealth and development was built, over the entire course of the twentieth century, on the backs of foreign African migrant workers?¹²⁵

The South African immigration policy was initially designed to deter illegal migration into South Africa by encouraging foreign nationals to apply for different permits to legalize their stay in the country. It further aimed to attract scarce skills required by the economy, in accordance with the government's Vision 2014 strategy.¹²⁶ The policy also states that a human-rights-based culture of enforcement should be encouraged. Despite this, there has been a slow and inadequate response from the South African government, which has been severely criticized. Monson and Misago argue that the state's reluctance to protect and assist foreigners perpetuates violence, social instability, and injustice for nationals and non-nationals alike.¹²⁷ They put forward the following five reasons why the state failed to address the attacks effectively.

Failure to prevent violence and protect victims

On the point that South Africa failed to prevent violence and protect the victims of the attacks, Monson and Misago comment:

That many attacks recurred in places that had experienced similar breakdowns in order in the recent past is strongly suggestive of a failure to manage risk in

122 See e.g. the recommendations made by the Human Sciences Research Council (HSRC) in its report *Citizenship, violence and xenophobia in South Africa: perceptions from South African communities*, June 2008, available at: <http://www.hsrc.ac.za/Document-2807.phtml> (last visited 24 June 2010). It is a state-sponsored body that was given two weeks to study the causes of xenophobic violence and to then make its recommendations.

123 John Sharp, "'Fortress SA': xenophobic violence in South Africa', in *Anthropology Today*, Vol. 2, No. 4, August 2008, p. 1.

124 *Ibid.*

125 *Ibid.*

126 Vision 2014 is aimed at eradicating poverty and underdevelopment.

127 Tamlyn Monson and Jean-Pierre Misago, 'Why history has repeated itself: the security risks of structural xenophobia', in *South African Crime Quarterly*, Vol. 29, September 2009, p. 25.

these areas. This prompts the question, if citizens had been the victims of the attacks, would risk management have been equally poor?¹²⁸

In a research interview between Monson and a senior police official in Alexandra, where the attacks occurred, the police official indicated that, before some of the attacks, meetings were held by communities to discuss *vigilante* action. According to Monson, the police were aware of this but took no responsive action.¹²⁹

Deportation of victims to their countries of origin

In its early responses to the xenophobic attacks, the South African Department of Home Affairs authorized immigration officers to arrest victims who did not have any documents. These persons were destined for deportation to their countries of origin. Yet later reports indicated that the Minister of Home Affairs had subsequently made an announcement that no victim of the xenophobic attacks was to be deported.¹³⁰ As a result of this incoherent governmental reaction, the state, according to Monson and Misago, 'supported the intention of the perpetrators to remove foreigners from communities, contributed to stalling judicial measures against perpetrators of violence, and, where deportation was involuntary, criminalized undocumented victims rather than their assailants'.¹³¹

Failure to prioritize prosecutions

Monson and Misago suggest that the state failed to prioritize prosecution of the perpetrators. It is argued that, when the state had the opportunity in 1994 and from then on to prosecute perpetrators, it had not done so, and this reluctance may have increased the risk of future violence. Often non-nationals are treated as outsiders, mainly because of their non-citizenship status, and therefore do not benefit from the protection of government agencies, except in limited circumstances under the authority of the Department of Home Affairs.¹³²

The Consortium for Refugees and Migrants in South Africa¹³³ reported in its newsletter in March 2009 that the office of the National Prosecuting Authority of South Africa had revealed statistics on the number of persons prosecuted since

128 *Ibid.*, p. 26.

129 *Ibid.* The South African armed forces were deployed to address the disorder, but by then twenty-four people had already been killed and 24,000 were reported to have been displaced.

130 *Ibid.*

131 *Ibid.*, p. 29.

132 *Ibid.*

133 The Consortium for Refugees and Migrants in South Africa (CorMSA) was formally known as the National Consortium for Refugees. It is a non-profit organization mandated to promote and protect refugee and migrant rights. This involves strengthening the partnerships between refugee and migrant service providers to provide improved co-ordination of activities, including the development of working relationships with other concerned organizations to provide an effective forum for advocacy and action. The Consortium liaises with government and other stakeholders to keep them informed of the views of its members. Its membership includes Lawyers for Human Rights, Amnesty International, and the South African Red Cross Society.

the attacks in May 2008.¹³⁴ The Consortium had asked the National Prosecuting Authority for statistics on the subject and subsequently reported that:

The NPA has responded and clarified that 1,627 people were originally arrested in connection with the violence. 105 cases out of a total of 469 have now been finalized with 70 returning a guilty vote. 208 cases have been withdrawn so far with reasons including the complainant no longer being interested in the case, the complainant not being traced, remand being refused by the magistrate and the inability to locate an interpreter. Three special courts were set up in the Western Cape and prosecutors in the other provinces were instructed to prioritize xenophobia-related cases.¹³⁵

Some of the reasons for the withdrawal of the 208 cases are without justification. It can be inferred from this that the state is unwilling to prioritize matters relating to foreign nationals, primarily because these foreign nationals are non-citizens.

While criminal prosecutions slowly proceeded, Lawyers for Human Rights in South Africa successfully challenged the legality and conditions of the Soutpansberg Military Grounds detention centre before the North Gauteng High Court.¹³⁶ They argued that the conditions at the centre were in violation of the Constitution, the Immigration Act, and international law,¹³⁷ and that the persons detained at the centre had never been charged with or convicted of a criminal offence. The detention of children at the centre was also severely criticized. The court ruled that the centre had not been set up in accordance with the Immigration Act, and that the conditions of detention at the centre were unlawful and unconstitutional.¹³⁸

Reluctance to render humanitarian assistance

The South African Constitution¹³⁹ specifically prohibits forms of prejudice such as racism and sexism.¹⁴⁰ Equality, in the form of non-discrimination, and human

134 See CorMSA newsletter, Edition 13, 24 March 2009, available at: <http://www.cormsa.org.za/news> (last visited 24 June 2010). The Consortium has also been instrumental in setting up paralegal advice centres in the regions most affected by the attacks.

135 *Ibid.*

136 See Lawyers for Human Rights (LHR), *LHR challenges unlawful detention in Musina*, media release, 9 February 2009, available at: <http://www.lhr.org.za/news/2009/lhr-challenges-unlawful-detention-in-musina> (last visited 24 June 2010); see also North Gauteng High Court, *Lawyers for Human Rights v. Minister of Safety and Security and 17 other Respondents*, Case No. 5824/2009, Judgment, 15 May 2009, available at: <http://www.saflii.org/za/cases/ZAGPPHC/2009/57.html> (last visited 24 June 2010).

137 LHR, above note 136.

138 *Ibid.*

139 Constitution of the Republic of South Africa, Act 108 of 1996. The Constitution, which was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997, is the supreme law of the land, and no other law or government action can supersede its provisions. South Africa's Constitution is one of the most progressive in the world and enjoys high acclaim internationally.

140 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 also prohibits forms of racism and sexism in South Africa.

dignity are the cornerstone of a constitutional and democratic state such as South Africa. Many state organs looked to the Department of Home Affairs to render humanitarian aid within the framework of its immigration management functions.¹⁴¹ Local municipalities 'passed the buck' to provincial municipalities and, in the absence of aid from the provincial municipalities, the local municipalities were reluctant to respond.¹⁴²

No commitment to the reintegration process

Reintegration has been defined as the return of a person to a community and their acceptance by it as a participant member; the definition therefore includes the re-entry of formally displaced people into the social, economic, cultural, and political fabric of their original community.¹⁴³ Monson and Misago crucially distinguish the term 'reintegration' from 'return' and 'resettlement' and correctly submit that:

According to the UNHCR, reintegration, as it refers to returning refugees, requires access to reasonable resources, opportunities and basic services to establish a self-sustained livelihood in conditions of equal rights with other residents and citizens. Reintegration should therefore be distinguished from *return* (the process of going back to one's place of original residence) or *resettlement*, which refers to the process of starting a new life in another part of the country.¹⁴⁴

It is clear from the above that, as a result of poor disaster management programmes in place, many local and provincial state departments were quick to adopt a policy of returning foreign nationals to their places of origin rather than reintegrating them. The lack of effective reintegration policies is not a justification for state departments to engage in a mass exodus of foreign nationals, and it is submitted that this practice is at variance with international laws relating to migrants.

The five reasons put forward by Monson and Misago and cited above are a clear indication that South Africa rapidly needs to engage in revising its existing policies on migration in order to prevent xenophobic attacks in the future. It is highly undesirable for any state to develop migration policies that are in stark contrast to its international obligations vis-à-vis migrants, and in this regard South Africa has 'failed the test'.

141 T. Monson and J.-P. Misago, above note 127, p. 30.

142 The city of Durban, for example, stated clearly that it was not the city's responsibility to render the humanitarian assistance – provincial government had to declare a provincial disaster, and this declaration was not forthcoming.

143 T. Monson and J.-P. Misago, above note 127, p. 31.

144 *Ibid.*, emphasis added.

Conclusion

South Africa has a long and gruesome history of violence in all its different forms. The international community placed overwhelming expectations on the country in 1994 when it became a constitutional democracy. Change was inevitable. The only lingering question was whether the new South Africa could meet the challenges it had inherited from its oppressive predecessors. One of these challenges relates to violence. This article has considered the various forms, ranging from political to xenophobic violence, that have manifested in South Africa. The work of the Truth and Reconciliation Commission raised the hopes of many, but it failed to effectively address violence in South Africa after 1994, during a period when it reached an unprecedented peak. The taxi industry in South Africa cannot be ended overnight; continued meaningful dialogue between all stakeholders is required. Government may have to provide adequate investment in its recapitalization programme, which may lead to a reduction in the taxi violence.

A review of gang and xenophobic violence in various cities and townships in South Africa has been undertaken. South Africa's townships were the battlefields of apartheid in the 1980s and the 1990s, and gangsterism thrived during that period. It is clear that South Africa's law enforcement bodies seriously need to reform their attitude towards law enforcement in a manner which may restore dignity and, in a sense, humanity to all people living within its territorial borders. The brutal xenophobic attacks on foreign nationals in the recent past are indicative of flawed government responses, as well as poor leadership at all levels of government.

South Africa is a signatory to most international human rights instruments and consequently has an obligation to ensure that justice there must not simply be done, but must also be seen to be done. The country has a vibrant civil society, a fairly advanced infrastructure, and a free press, and enjoys global support. Although these attributes imply that South Africa should be able to take its place in the international community with pride, the high rate of ongoing violence means that this goal may not be readily attained. As Desmond Tutu has so wisely said, 'Stability and peace in our land will not come from the barrel of a gun, because peace without justice is an impossibility'.¹⁴⁵

145 Archbishop Desmond Tutu is a Nobel Peace Prize laureate. This quotation is available at: <http://www.spiritualityandpractice.com/teachers/teachers.php?id=239&g=1> (last visited 24 June 2010).