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PERSPECTIVES

Political analysis and commentary from Southern Africa

MIGRATION AND HUMAN RIGHTS

Dear Reader

In May 2001 the then President Thabo Mbeki declared in the ruling party's weekly newsletter *ANC Today* that SA's relationship with the rest of the continent was illustrated by the significant numbers of fellow Africans wanting to settle in the country since 1994. He went on to assure readers that this trend would not only continue but also promote the richness of the South African society. He was in all aspects of the statement considered, spot on!

Since its first democratic elections, South Africa has become a favoured destination for migrants from throughout the continent. Searching for better lives, pursuing economic opportunities, or fleeing political turmoil, migrants have come to colour and populate many of South Africa's urban centres and settlements.

The growth of South Africa's migrant population (a well documented trend) has stimulated research and policy debates considering Africa's migration flows in general and in the SADC region in particular. While the growing public debates on the matter both raise awareness of challenges pertaining to migration policies as well as advance alternative solutions, their focus is often narrowed down to the migrants' positive or negative contribution to the economy. While this is clearly a paramount aspect from the perspective of a destination country – especially in the context of those challenges South African society already faces – current discourses on migration fail to recognise that the potential matching positive contributions from migrants can only be fully accomplished if respect and fulfilment of universal human rights standards are guaranteed for them as for all members of society.

A consequence of this one-sided analysis is the frustrating results achieved so far and their minor impact on political approaches.

It is against this backdrop that the 6th edition of *Perspectives* discusses current migration dynamics in Southern Africa from a human rights perspective. The publication focuses on some outstanding challenges facing the implementation of human rights standards for migrants in the region.

In the first article Zonke Majodina from the South African Human Rights Commission makes a case for the integration of a rights-based approach when dealing with some of the current immigration flows in South Africa. The article exposes some of the inconsistencies in the current Immigration Act; the weaknesses of the migration management system in dealing with the challenges; and reflects on possible and relevant initiatives and policies to be taken at the various levels of governance.

Human rights abuses of lesbians, gays, bisexuals, and transgender people are widespread in African countries. South Africa became the first country in the world to include, in its post-apartheid constitution, "sexual orientation" as a status protected from discrimination. Based on these facts Wendy Isaack from the Legal Resource Center looks at the situation confronting African Lesbian & Gay Migrants seeking refuge in South Africa and exposes the mismatch of progressive constitutional rights on the one hand and the domestic legislative/administrative practice on the other hand.

In the third article, Kate Lefko-Everett outlines

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both the background as well as the challenges faced by women migrants. Female migration to South Africa is growing both in numeric and relative terms, however it is often an intimidating and unstable destination. In general, women are confronted with high levels of violence, overt hostility, and social exclusion. African migrant women are subject to a double peril linked to their status as black women and as migrants. The article tells the stories of women migrants from their own perspective. Their narratives speak of opportunity and empowerment, but also about hardship, discrimination and abuse encountered while crossing borders.

The criteria that entitle one to basic rights as well as facilitate belonging in contemporary South Africa are paramount factors in this debate and are the subject of Loren Landau's contribution to this Issue. *Rethinking citizenship and belonging in South Africa* argues that the safety of society and its members is only guaranteed if people living within its boundaries have not only a legal identity but access to means to protect it. In addition to the required institutional reforms the article proposes a well-managed public and inclusive debate around those issues in a way that fosters understanding while preventing violence and discrimination.

Successful integration rather than exclusion of immigrants remains an important source for sustained social cohesion. This is the underlying condition for the development and success of young democracies in the region and can only be fostered and enabled if respect for human rights and social justice for all living in the society is guaranteed. Addressing the vulnerability of migrants will require new and innovative solutions. We are hopeful that this issue of *Perspectives* meaningfully contributes to this project.

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Biography

Zonke Majodina

Zonke joined the South African Human Rights Commission in 1999. She obtained her Bsc degree in Psychology from Fort Hare, and a Masters degree in London. Zonke Majodina spent 18 years in Ghana as a Clinical Psychologist at the University of Ghana Medical School, and was later a Visiting Fellow at the Refugee Studies Programme, University of Oxford. She returned to South Africa in 1992 and completed her doctorate with the University of Cape Town in 1999. She is a member of many professional associations, mainly concerning forced migration. Currently she is serving Human Rights. Dr Majodina has published and presented many papers on the effects and problems of war, violence, exile, refugees and repatriation. As an expert member of the UN Human Rights Committee, her special focus in the Commission is the rights of refugees, asylum-seekers, and migration policy.

The long road ahead

Introduction

South Africa has a long history of being a destination country of immigrants from all over the world. Historically, the legislative framework for regulating the movements of people into the country was the Aliens Control Act (ACA), which was repealed post 1994 and replaced by the Immigration Act of 2002. The pull factors that drew immigrants to South Africa go back to the discovery of minerals in the 19th Century, when many people came to work in the mining industry. This gave rise to migratory movements of people in countries of the Southern African Development Corporation (SADC) region becoming one of the central pillars of the political economy of the sub region. Without going into much detail, the legacy of this history is that at the beginning of the 21st century out of the main migratory movements into the country undocumented migration has emerged as one of the most challenging.

The making of a new immigration act

Undocumented migration into South Africa has been on the increase in the recent past, particularly in the last three decades as recruitment into the mines began taking a downturn in the 1970s and numbers of foreign migrant workers were systematically reduced. Undocumented economic migrants survive by exploring perceived or real lucrative opportunities in South Africa. The manufacturing, farming, construction, and service sectors employ a considerable proportion of this form of labour which has spiraled as contract migration has been on the decline. So as the formal floodgates of contract mine migration close, the floodgates of unregulated migration have been opened. Ordinary people struggling for survival disregard national borders and border control procedures.

The repeal of the ACA after 1994 provided South Africa with an opportunity to bring a new law in line with modern trends and developments in and outside the country as well as with our own constitutional democracy. As with any legislation on immigration, an informed approach had to be based on a clear understanding of current migration/immigration trends in the region. In the course of developing policy for the new Immigration Act of 2002, emphasis was placed on preventing illegal immigration by reducing pull factors, securing South Africa's borders, and taking other internal policing actions so as to prevent people entering the country illegally.

The main thrust of the Immigration Act was to deal with immigration by making provision for a number of temporary residence permits to be issued to appropriate foreigners. A glaring policy gap has been to overlook our historical reality and the existence of many migrant workers already active in the country. Rather, priority has been on providing permits to investors, entrepreneurs and people who promote trade and are seen as bringing new knowledge, skills and expertise to the country. None of the permits deal specifically with the position of migrant workers and traders. Unskilled or semi-

skilled workers therefore have no legal access to the South African labour market since they have no hope of legal entry.

A cursory study of migratory movements into SA in the last few years indicates that the massive escalation of the influx of undocumented migrants from Africa has been exacerbated by the Zimbabwe crisis. Given the lack of access to legal entry, many choose to enter South Africa by jumping the border. Available evidence points to the circularity of these movements. Findings from research reveal conclusively that these migrants from neighbouring countries do not intend to settle permanently in the country. By virtue of the nature of their movements in and out of the country, many remain the undocumented or the so-called illegal migrants who have been primary victims of xenophobia.

Central to anti-foreigner sentiments in the country is a set of arguments about the negative impact for SA of their presence: they are responsible for the high crime rate, and they compete for scarce resources such as jobs and social services. On the other hand, not only are these undocumented migrants unprotected by law but are also victimised by the law through arrests, imprisonment and summary deportation. The temporary work they do is hidden, with little monitoring or regulation by employers' organisations, or unions.

Given the recent upsurge in xenophobic attitudes in SA recently, it may indeed be asked whether SA is unwilling or unable to protect migrants through their policy position outlined above. The answer has to be that the SA government has demonstrated its intention to address migration and issues associated with it. There is a firm legal framework in the form of laws and regulations that have been passed.

However, in implementing these laws, the Department of Home Affairs (DHA) struggles with a number of challenges. The first relates to the historical patterns of administration which are rooted in the old control mentality that does not take the current realities of migration into account. The legacy of this history is a mindset among officials that works against transformation, frustrating the ability of the government to bring its systems in line with the constitution. Added to this are seriously limited financial resources and infrastructure, together with inadequately trained and experienced personnel who themselves are far too few in number.

These weaknesses in the system came to the fore during the outbreak of xenophobic violence in May 2008. Government response was slow, uncoordinated and done without much consultation with civil society. Among the lessons to be learnt from this experience is for government to appreciate the fact that there is a great need to put more effort into changing the mindsets of South Africans towards migrants. Indeed, had it not been for NGOs and CBOs, the crisis could have been far worse, and it would seem at this point that these civil society organizations are the only actors responding to the immediate humanitarian needs of migrants.

To some extent, it can be argued that the work of these non-state actors does influence government. Civil society bodies have to continue doing that, but they also have to challenge government, not just DHA but other government departments, to take issues of migrants more seriously.

The lesson of May 2008 will hopefully lead to a reassessment of the policy position that informed the Immigration Act of 2002, namely that South Africa is not in a position to address or alter conditions in the rest of the continent and therefore we are not in a position to develop a migration policy to deal with migrant workers. It is this sort of policy approach that has encouraged illegal migration and the xenophobia that has gone with it.

It is suggested that the first step towards such a reassessment is to set up a government task team on immigration policy at the highest level to contribute to national discourse on this policy and to examine opportunities and challenges in the face of the flare up of xenophobic violence. Such a task team can be tasked with developing a comprehensive migration integration policy that incorporates migration into the social, economic and political fabric of South African society.

A second objective of the task team should be to contribute to the integration of migrant communities by strengthening the existing communities. This is a two way process that involves interaction between migrant and local communities. A particular focus should be given to the deep and persistent issues of lack of access to services that have exarcebated the reluctance of locals to welcome migrants into their communities. Integration activities should be inclusive of outreach efforts to educate locals about migration in general with emphasis on the human rights implications of migrant movements in the region.

A rights-based approach to migration

Any immigration policy should be informed by a basic respect for human rights and the central notion

that human rights are universal, meaning that they apply to all peoples, in all societies and under all conditions of political, economic, and cultural life. They are also indivisible and inalienable. Despite this, the extension of human rights to migrants and immigrants has been a difficult process. This fundamental principle is in contrast to the belief of many South Africans that the human rights in our constitution should be the prerogative of South Africans only. International Human Rights standards, beginning with the UDHR, accord immigrants and migrants human rights such protections as in Articles 13 and 14; "the right to leave any country and return to that country" and "the right to seek and enjoy in other countries asylum from persecution". Member states of the UN pledge themselves to the Universal Declaration of Human Rights (UDHR) in the interests of achieving cooperation with the UN in the promotion of universal respect for and observance of human rights and fundamental freedoms. The theme of this year's 60th anniversary of the UDHR, "Dignity and Justice for all of us", captures the commitment to the inherent dignity and equality of all human beings implied in all the provisions of the Declaration.

South Africa, as a member of the UN and the AU, is bound by a number of international and regional conventions on human rights that we have signed and ratified; these include the 1951 UN Convention on Refugees; the African Charter on Human and People's Rights; and the OAU Convention on Refugees. What remains is for South Africa and other African countries to sign and ratify the International Convention on the Rights of Migrant Workers and their Families. Under international law, once a state has admitted non-nationals into its territory, it must treat them according to internationally determined standards. International human rights law gives rights to non-nationals who have entered a country lawfully and even those that enter illegally.

Despite these guarantees, it is an undeniable fact that the international standards in international law have not been applied consistently to migrants in South Africa and other countries in the region. The 1951 UN Convention on Refugees for example states that refugees have the right to access economic and social benefits such as education, health care, and social security, rights that in reality are most often out of their reach in all these countries. The fundamental challenge for the extension of human rights to migrants is the framework of control that informs the laws of countries in the region. Defining the migration debate in terms of control, law enforcement and perceptions of national security reflects the interests of governments rather than that of migrants. Such a focus invariably subordinates human rights and humanitarian concerns. Unfortunately, the predominance given to control is the very reason we cannot deal effectively with movements of people in the region. Migration, both regular and irregular has existed and will continue to exist in response to economic imperatives in the globalised economies of today. Of course certain controls may be put in place but cannot be the sole or primary determinants of how to deal with the issue. To be effective over time, migration policy must be built the other way round, based on long-term economic and social development considerations based on respect for human rights norms. Control measures can then function as management mechanisms to achieve long-term goals.

The regional dimension

The vision of the SADC community of countries is balanced economic integration among its member states. In acknowledging that we cannot seal our borders completely, South Africa has been one of the first countries to sign the SADC Protocol on Facilitation of Movement. The 12-member SADC is in its initial stages and still needs to develop appropriate policies of economic cooperation, integration, and population movement. A starting point is that the neighboring states are linked to South Africa by longstanding ties. One of the most important linkages has been the existence of labour flows into the country. Our immigration policy should therefore be sensitised to this history of these longstanding ties to the sub-region.

A strong argument for this model rests on the fact that if undocumented migrants are going to come anyway, surely it is better to regularise and monitor their movements into the country by legalising, and managing their entry. This is consistent with the position that South Africa should adopt a management-oriented approach towards migration. Not only is this position in line with our historical regional obligations, it is also in line with the government's policies on NEPAD. The Maputo Corridor is one example that demonstrates that our development polices can take our regional obligations into account. It also attests to the fact that South Africa can only hope to resolve the problem of xenophobia by taking the rest of the sub-region along.

Biography

Wendy Isaack

Wendy works for the Legal Resources Centre, South Africa's largest public interest law centre, as a Candidate Attorney. Until December 2008, she was based at the NGO 'People Opposing Women Abuse' (POWA) in the Legal Services & Advocacy Programme. Prior to joining POWA, Wendy worked as a Legal Advisor at the 'Lesbian and Gay Equality Project' for a period of 5 years. She has a legal background, B.Proc degree from the University of Durban-Westville and an LLM in International Human Rights Law from the University of Ulster, Northern Ireland.

African lesbian & gay people

Final destination South Africa?

Introduction

On 27 April 1994 South Africa's political landscape changed drastically and permanently with the first democratic elections which ended more than three hundred years of colonial domination, and by extension apartheid. After its formation in 1994, the National Coalition for Gay and Lesbian Equality (NCGLE) lobbied successfully for the retention of sexual orientation as one of the grounds of non-discrimination in the final constitution. The enactment of the 1996 constitution, with an equality clause expressly prohibiting unfair discrimination on the basis of *inter alia* sexual orientation, was a cause for celebration for lesbian and gay people across the African continent. For the first time in history, a country was guaranteeing equality for sexual minorities in its highest law and for the first time in Africa, a country recognised the right to be free from all forms of violence and discrimination on the basis of sexual orientation as a fundamental human right. This legal guarantee is located amidst a collection of enumerated rights and basic constitutional values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.[1]

Over a period of ten years individual lesbian and gay activists and organised civil society successfully engaged in lobbying and challenging sexual orientation discrimination, finally culminating in the legal right to marry or to form civil partnerships in December 2006.[2] Until recently, advocating for legal transformation had consistently been a significant component of the work of lesbian and gay organisations in South Africa. One of the major achievements was the inclusion of lesbian and gay foreign nationals in the Refugees Act 130 of 1998 which provides for the granting of refugee status owing to a well-founded fear of persecution by reason of belonging to a particular social group.[3]

South Africa is the only African country which has enacted refugee legislation recognising persecution on the grounds of sexual orientation and gender identity and legislation permitting immigration on the basis of same-sex life partnerships.[4] There are primarily two ways in which the immigration legislative and policy framework impacts on lesbian and gay people. First, as individuals seeking asylum on the basis of persecution for belonging to a particular social group and secondly as individuals involved in intimate partnerships with South African nationals. The article

1 Constitution Act 108 of 1996 section 9(3) and (4) expressly prohibit private and public unfair discrimination on the basis of sexual orientation: section 9 right to equality; section 10 right to inherent human dignity; section 11 right to life; section 12 guarantee of freedom and security of the person and section 14 right to privacy

2 See for example National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); National Coalition for Gay and Lesbian Equality v Minister of HOME Affairs 2000 (2) SA 1 (CC) and Fourie; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others 2006 (1) SA 524 (CC), Civil Union Act, 2006.

3 Refugees Act, 130 of 1998 G 19544 & Refugees Amendment Act, 33 of 2008

4 Immigration Act, 13 of 2002 G 23478

will only address the former category with entry and status determined in terms of the Refugees Act 2008, as amended, which was adopted in light of constitutional and international human rights law commitments.

While the immigration legislative, policy and institutional frameworks are designed for the maximum protection of both documented and undocumented migrants, the numerous challenges that these groups are confronted with demands that we interrogate the extent and accessibility of these protective mechanisms. This article considers the persistently precarious legal, social, and economic situation of both documented and undocumented African lesbian and gay migrants. With the advent of democracy, South Africa has become a destination country for many African people either fleeing from internal conflict and resultant displacement; escaping political persecution; or who are in search of economic opportunities and/or escaping persecution because of who they unchangeably are, i.e. homosexual and consequently criminalised in their countries of origin. This examination is conducted against a backdrop of routine and normalised violence in South Africa, the flagrant impunity enjoyed by rights violators, a refugee application and processing system which has been acknowledged as dysfunctional and a continent which not only has not fully embraced the values and principles of non-discrimination or rights to equality and human dignity for African lesbian and gay people, but further continues to criminalise consensual homosexual conduct.

The Extent of Discrimination in African Countries

In many parts of the world, homosexuality is considered a sin, a social or ideological deviation, or a betrayal of one's culture. The global oppression of lesbian and gay people is justified and defended in the name of culture and religion frequently buttressed by legal provisions. Amnesty International in its 2001 report titled *Crimes of Hate, conspiracy of Silence* recognised that:

> *Lesbian and gay people have been seen as threatening the social order; women seeking to exercise autonomy over their bodies; men seen as traitors to masculine privilege because they are perceived as adopting feminine roles; and transgender people calling into question the traditional assumption that all humankind must fall irrevocably into one of two gender categories. Defiance of the 'heterosexual norm' can provoke moral condemnation, exclusion and violence, including torture on those who fail to conform to traditionally defined gender roles.*[5]

The debate about lesbian and gay identity in Africa's post-colonial context has been framed in a number of ways. One example is with the African tradition, conceived as monolithic and homophobic, positioned against western 'modernity'. In this opposition, homosexuality is represented as a decadent western import and a disavowable excess of the process of economic modernisation that the post-colonial state wishes to achieve. This opposition manifests itself in the rhetoric of political leaders which perpetuates and officially "sponsors" homophobia and fatal attacks against sexual minorities. In a 2003 Human Rights Watch report we find the following statements made by some African leaders:[6]

Zimbabwe: President Robert Mugabe – returning obsessively to the question of 'homosexuals', 'sodomists' and 'perverts' – told reporters "I don't believe they have any rights at all… homosexuality degrades human dignity. What we are being persuaded to accept is sub-animal behaviour and we will never allow it here."

Namibia: Minister of Home Affairs, Jerry Ekandjo – speaking to a group of newly-graduated police officers in 2000 urged them to eliminate gays and lesbians from the face of Namibia, saying that "the constitution does not guarantee rights for gays and lesbians and the police must take measures to combat all such unnatural acts, including murder".

Botswana: Seretse Ian Khama – when asked to clarify the government's position on homosexuality said: "Human rights are not a license to commit unnatural acts which offend the social norms of behavior…."[7]

In addition to this violent rhetoric, we have recently witnessed legislative initiatives in other African states to criminalise homosexual conduct or strengthen existing penal codes to ensure their

5 Amnesty International Report (2001) 'Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment based on Sexual Identity" p4

6 Human Rights Watch & International Gay and Lesbian Human Rights Commission Report (2003) *More than a Name: State Sponsored Homophobia and Its Consequences in Southern Africa*, Human Rights Watch

7 Human Rights Watch Report (n7) *The Spread of Homophobic Rhetoric in Southern Africa* p12-55

enforcement against sexual minorities.[8] On 21 November 2008, the National Assembly of Burundi for the first time in the country's history passed a law making same-sex acts punishable between three months and two years in prison, along with a substantial fine. This is in addition to the enactment of legislation criminalising same-sex marriage.[9] In July 2005 the Ugandan Parliament passed an amendment to the constitution making it only the second country in the world to use its supreme law to outlaw marriage between people of the same sex. In the past five years there have been approximately a dozen arrests of LGBT (Lesbian, Gay, Bisexual, Transgender) people in Uganda. In September 2008, police arrested two high-profile members of the LGBT community and charged them with spreading homosexuality – no such crime exists under Ugandan law.[10] In the Nigerian state of Bauchi, 18 men were arrested on charges relating to homosexuality including: membership in an unlawful society, indecent act,
idle person, criminal conspiracy, vagabondage, which includes a prohibition of cross-dressing. Penalties for these crimes could amount to up to 10 years imprisonment and more than 100 lashes with the more serious charge of sodomy carrying the death penalty.[11]

Of particular concern are the events which unfolded at the NGO Forum preceding the 44th Ordinary Session of the African Commission on Human and People's Rights which was held in Abuja, Nigeria in November 2008. On the last day of the Forum, human rights activists vehemently debated whether or not to adopt a draft resolution on sexual orientation. During the last five sessions of the commission prior to the 44th session, this forum of human rights activists had unanimously adopted resolutions addressing sexual orientation discrimination and the African Charter on Human & Peoples' Rights. Surprisingly, the call to vote on this draft resolution took place while the commission had itemized sexual orientation for discussion in its private session. The question is: to what end was the draft resolution put to vote? Since when do human rights activists vote on human rights violations and whether or not routine torture and persecution is a gross violation of fundamental human rights and freedoms? What is interesting about these proceedings is that the NGO Forum is a political space for human rights activists to articulate human rights violations occurring at domestic level and through adopting draft resolutions ensure that the African Commission urges states to respond to these violations.

South Africa: The Normative Framework

South Africa has one of the most progressive and inclusive constitutions in the world with a bill of rights proclaimed to be the cornerstone of democracy enshrining the rights of all people and affirming the democratic values of human dignity, equality and freedom. Section 7(2) of the constitution provides that the state has obligations to respect, protect, promote and fulfill the rights in the bill of rights. The right to equality enjoins the state firstly to not unfairly discriminate directly or indirectly on any one or more of the enumerated grounds and further to enact legislation which will prevent or prohibit unfair discrimination.[12] The equality clause was included in the constitution text as a response to the colonial and apartheid past and entrenches the principle of substantive equality. For purposes of this discussion, some of the rights relevant to asylum seekers include: the right to non-discrimination; protection of the law and access to legal services; freedom and security of the person; privacy; the right to seek employment; receive basic health services; shelter; access to education; and freedom of movement. Asylum seekers further have the right to just administrative action which ensures that the government's actions, through its agents; are lawful, fair and just.[13]

In 1996 South Africa acceded to and ratified several refugee and human rights treaties, most notably the 1951 UN Refugee Convention and the OAU Refugee Convention. Both these conventions impose certain obligations on host states to protect the rights of refugees and asylum seekers, including with regard to status determination and documentation, and uphold certain social and economic rights of refugees. In this respect, Article 2 of the OAU

8 For a detailed list of African States criminalising homosexuality see www.mask.org.za and www.iglhrc.org which reports that two-thirds of African nations maintain criminal penalties for consensual same-sex behaviour.

9 IGLHRC Update 26 November 2008 http://www.iglhr.org/site/iglhr/section.php?id=5&detail=905

10 IGLHRC19 September 2008 Uganda: Action Alert – Demand An End To Official Harassment of LGBT Activists http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=888

11 IGLHRC Report Dispatch from Nigeria February 2008 available at http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=831

12 Constitution section 9(3) &(4)

13 Constitution Section 33(1) Everyone has the right to administrative action that is lawful, reasonable and fair.

Convention provides as follows:

> *states shall use their best endeavors consistent with their respective obligations to receive refugees and to secure the settlement of those refugees, who for well-founded reasons, are unable or unwilling to return to their country of origin of nationality".*

Additionally, Article 12 of the African Charter on Human and Peoples' Rights guarantees the right of every individual

> *when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."*

Further to its constitutional and international human rights law obligations, South Africa enacted the Refugees Act 130 of 1998, amended by the Refugees Amendment Act of 2008. The Refugees Act for the first time provided for a specific refugee legal framework. Section 3 (a) as amended provides:

> *a person qualifies for refugee status owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or* ***membership of a particular social group****, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her habitual residence is unable or, owing to such fear, unwilling to return to it.* ***[own emphasis added]***

African lesbian and gay migrants have historically successfully utilised the ground of membership of a particular social group to seek asylum in South Africa and to eventually be granted with refugee status.[14] The act and its regulations deal extensively with the all matters relating to applications for asylum. Section 2 of the act incorporates the idea of non-refoulement:

> *a refugee may not be refused entry into the Republic, be expelled, extradited or returned to a country where he or she will be subjected to persecution on the grounds listed above.*

The process should be fairly straightforward and easily accessible. Once an asylum seeker is issued with the 14-day permit, they have to present themselves without delay at a Refugee Reception Office. A Refugee Reception Officer conducts an interview with the asylum seeker to determine whether or not to grant refugee status. Structures such as the Refugee Determination Officers, Standing Committees and Appeals Board have been created to deal with applications and judicial review will be available once administrative remedies have been exhausted.[15] Additionally, jurisprudence of the Constitutional Court has expressly articulated the rights of foreign nationals in South Africa.[16]

In the *Watchenuka* decision, provisions of the Refugees Act that prohibited asylum seekers from employment and study while their application for asylum was being processed were held to be unconstitutional on the basis that they violated the right to inherent human dignity.[17] In 1998 the Constitution Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* declared those provisions of the Sexual Offences Act of 1957 which criminalised homosexual consensual conduct to be unconstitutional and that the common law offence of sodomy was a violation of the right to human dignity and stated as follows:

> *…its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of just being human.*[18]

Despite legislative protection and the favourable decisions of our highest courts, many foreign lesbian and gay people living in this country continue to be caught in the spiral of poverty, powerlessness, routine victimisation and institutional failures exacerbating discrimination on the basis of their real or perceived sexual orientation and/or gender identity. In reality, there are significant disparities between the law as set out in the constitution and various items of progressive legislation and its implementation. Written in the aftermath of the Second World War, Hannah Arendt's essay *The Perplexities of the Rights of Man* unequivocally captures

14 While the Lesbian and Gay Equality Project no longer provides this service, for more than 5 years following the adoption of the Act, countless lesbian and gay migrants were assisted to apply for asylum see: www.equality.org.za

15 For extensive material on freedom of movement and residence, see Ian Currie & Johan De Waal *Bill of Rights Handbook* Fifth Edition 2005 Juta & Co Chapters 20 & 21

16 See for example *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

17 *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 25

18 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (Decriminalisation of Sodomy judgment)

the experiences of the majority of undocumented migrants in South Africa and most likely elsewhere in the world.[19] Arendt illuminated the precarious legal and social situations that stateless persons (read: undocumented migrants) found themselves in with the emergence of the nation-state. The essay contends that the situation of extreme vulnerability and uncertainty, the reality of having lost an attachment to their own governments with only the possibility of relying on minimum rights – with no authority to protect them and no institution left to guarantee these rights – the loss of government protection, national rights and legal status in one's own country implied the loss of human rights.

With the suspension of the provision of legal services in the lesbian and gay sector, there is an absence of data on foreign nationals applying for asylum on the basis of sexual orientation and no empirical evidence setting out the experiences of lesbian and gay migrants within South Africa's immigration system. However, it can be said that foreign nationals fleeing their countries of origin are subjected to the same obstacles and challenges experienced by other asylum seekers in the country. These challenges include:

1. The 14 day permit issued to an asylum seeker at the border often expires long before many asylum seekers have been issued with an asylum seekers permit simply because of the difficulty in gaining access to the Refugee Reception Office;
2. Corruption in the Refugee Reception Office and the failure by officials to restrict activities of "brokers" and unofficial "interpreters" hinder the ability of asylum seekers to gain access to refugee status determination procedures and protection;
3. While domestic and international law is clear on the time frames for determining refugee status, waiting periods can take up to five years.[20]

The UN Committee against Torture in its consideration of South Africa's initial report commended the government for adopting numerous legislative measures designed to entrench, promote and enforce human rights, including the Refugees Act, 1998 and the Immigration Act of 2002.[21] In its conclusions and recommendations, the committee noted the difficulties affecting documented and undocumented non-citizens who are unable to contest the validity of their detention or claim asylum or refugee status as well as the ill-treatment, harassment and extortion of non-citizens by law-enforcement personnel.

While the Refugees Act as amended is a huge improvement over the Aliens Control which previously did not provide a framework for refugee status application, there remain many systemic challenges and obstacles to its implementation. The added dimension of sexual orientation in a society which is largely homophobic most certainly creates an additional dimension of disempowerment and vulnerability. In light of the recent xenophobic violence, it would be interesting to collect data on how many foreign nationals were targeted for attacks simply on the basis of their real or perceived sexual orientation and/or gender identity – noting that this may in itself prove to be difficult considering the criminalised nature of homosexual conduct and that very often migrants may be fleeing their countries of origin for more than one reason.

Concluding Remarks

It must be noted that the South African context is not immune from violent homophobic rhetoric. Shortly after his acquittal by the Johannesburg High Court of the rape charge, Jacob Zuma, President of the African National Congress, made a statement to his followers and the media on homosexuality and Zulu culture stating that in his youth, a homosexual would never stand in front of him. John Qwelane's article published in the Sunday World accompanied by a cartoon communicates to the reader that LGBT people are animals and their sexual orientation is equated to bestiality. The writer supports Robert Mugabe who has described homosexuals as "worse than pigs and dogs" and "a scourge planted by the white man on a pure continent".[22]

The publication of the article and Jacob Zuma's utterances grossly offend our constitutional order in its absolute disregard for equality and human dignity as the foundational values of our democracy. Of particular interest are the recent incidents of homophobic violence which may have resulted since then:

1. In April 2007, a 16-year-old young black lesbian, Madoe Mafubedu, was raped and repeatedly

19 Hannah Arendt The *Origins of Totalitarianism*, Chapter 9 *The Decline of the Nation State and the End of the Rights of Man* p290

20 Human Rights Watch Report *Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg* 2005 http://www.hrw.org/en/reports/2005/11/16/living-margins

21 Report on Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment CAT/C/ZAF/CO/1 7 December 2006

22 Published by Sunday World on 20 July 2008

stabbed to death.

2. On 7 July 2007 two black lesbians, Sizakele Sigasa and Salome Masooa, wear tortured, raped and brutally murdered in Soweto. Sizakele was found with her hands tied together with her underwear and her ankles tied with shoelaces. She had 3 bullet holes in her head and 3 on her collarbone.
3. On 22 July 2007 Thokozane Qwabe, a 23-year-old black lesbian, was found in a field in Ladysmith, KwaZulu-Natal. She had been brutally raped and stoned to death.
4. Between February 2006 and April 2008 there have been official reports of torture, rape and murder of at least 5 black lesbians.[23]

These stories and many others which are unreported demonstrate the fatal consequences of the violent rhetoric of political leaders and the contestation of and violent resistance to the values and rights entrenched in our constitution. In alliance with West-African feminist and activist, Bisi Adeleye-Fayemi, "We need to understand what it means to be heterosexual as well as homosexual and that our sexualities affect whether we live or die…"

23 Cases reported to 070707 Campaign / joint working group – real names have been used so that we never forget.

Biography

Kate Lefko-Everett

Kate is a Researcher at IDASA. She previously worked for the Southern African Migration Project, and is now based in the Political Information and Monitoring Services (PIMS) programme. She has a Bachelor's degree in Urban Studies from Vassar College in New York, and a Masters degree in Social Research Methods from Trinity College in Dublin. Her current work focuses on budget analysis, social security, and the public service.

'I also wish to go where women go'

Gender and migration in Southern Africa

The last fifty years have seen enormous change in patterns of migration and human mobility worldwide. According to the United Nations, numbers of people living outside their countries of origin have increased exponentially, from about 75 million in 1960 to more than 190 million in 2005.[1]

Beyond sheer numbers, the share of women in overall volumes of migrants has also increased significantly. By 2005, numbers of women migrating worldwide were virtually on a par with men, with women making up 49.6% of migrants globally.[2]

In Africa, percentages of women migrating are somewhat lower than the international average, at 47.4%. However, this nonetheless represents a substantial increase from the 1960s, when women made up only 42.3% of migrants in Africa.

Despite limitations in the migration data available in South Africa, existing figures confirm a similar trend in visitors from other African countries: between January and July of 2008, on average 44.2% of arrivals from elsewhere in Africa were women. Similar figures were recorded in 2007, with women making up 44.5% of travellers from Africa overall, although this proportion peaked at 47.7% in December. Migration data from the late 1970s and early 1980s showed the proportion of women travellers to hover around 40%, before rising in the early 1990s.

The increasing "feminisation" of migration has been recognised in international migration policy debate and discourse. The Global Commission on International Migration (GCIM), for example, has recommended greater attention to the "empowerment and protection of migrant women, as well as ensuring that they are actively involved in the formulation and implementation of integration policies and programmes"[3].

Similarly, the 2004 International Agenda on Migration Management (IAMM) suggests that the "gender dimension of migration requires the particular attention of governments", adding that "policy and legislation in many countries need to be reviewed and updated to take into consideration the increasing feminisation of migration, with gender consideration being systematically included therein to avoid implicit gender discrimination"[4].

However, in spite of this increasing emphasis, in many respects research into the reasons why women migrate, their experiences, and the impacts of migration remains limited and insufficient. This is certainly true in South Africa, although difficult to understand given intense public interest in issues

1 Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat. "Trends in Total Migrant Stock: The 2005 Revision". Available at: http://esa.un.org/migration.

2 *Ibid*.

3 Global Commission on International Migration, 2005. "Migration in an inter-connected world: New directions for action". Global Commission on International Migration, p 49. Available at: http://www.gcim.org/en/finalreport.html

4 International Agenda for Migration Management (IAMM), 2004. Available at: www.old.iom.int/DOCUMENTS/OFFICIALTXT/EN/IAMM_E.pdf

of migration recently, in the context of increasing migration out of Zimbabwe,[5] ongoing hostility and violence directed at migrants, and inertia towards regional integration.

In 2005, I conducted a qualitative study focusing on the experiences of women migrants for the Southern African Migration Project (SAMP).[6] While much more research remains to be done, the study has contributed to a germinating understanding of women's migration in Southern Africa.

The SAMP study was based on in-depth interviews with 54 women migrants from ten African countries, conducted in Johannesburg. This included several South African women who had migrated, and returned home again. Six larger focus groups were also conducted with migrant women in Johannesburg and Makhado, close to the border between Limpopo and Zimbabwe.

The stories that emerged from the SAMP study were often difficult, and coloured by experiences of hardship, exclusion, discrimination and abuse. But they were equally stories of opportunity, empowerment, and to use Alex Perry's words, "the essentially human process of exploration"[7].

Why women migrate in Southern Africa

Migration is fundamentally tied to the pursuit of change and new opportunity, and the search for new livelihoods, social equality, and political freedoms, among a host of reasons as diverse as migrants themselves. Migration is also often in response to unfavourable or untenable circumstances in countries of origin. Increases in the numbers of women migrating worldwide are also linked to improved access to education, and changing productive and reproductive gender roles.

Many women participating in the SAMP study were motivated to migrate by the need for new economic opportunities outside countries of origin, and in response to hardship at home. Migrants from Zimbabwe in particular described food shortages, a lack of jobs, and hyper-inflation as significant migration push factors. Similarly, a woman from Zambia explained, "the main reason for migration was to find a better life because things back home were very ugly. There were no jobs, high inflation, drought, and many other things."

In many cases, women were also the main breadwinners for their families, signifying a departure from traditional gender roles within households. Increased economic and productive responsibilities often resulted from the inability of male partners to find work or to generate sufficient income for a household, or in other cases, relationship breakdowns, abandonment, or unwillingness of male partners to financially support their families. As described by a Mozambican migrant, "my husband left me, he left me with the kids. When a husband leaves you and you don't work … things were bad for me." Consistent with other SAMP research, migration was seen as a primary economic strategy for supporting households, rather than a source of supplementary income.[8]

However, women's decisions to migrate were often proactive, and not passive. Rather than simply seeking proverbial "greener pastures" in South Africa, many viewed migration and the prospect of new economic opportunities as an empowering step away from dependence on male partners. This perspective was voiced by women from across the region: a Malawian migrant explained, "us women, we have to fight because we know what we want, we don't have to depend on men." A second told researchers, "you have to make a plan as a woman", adding that men tend to "forget about their children."

Similarly, a South African migrant echoed that when families are in need, women "must stand up, and they must do something themselves for a change. Gone are the days when you would just sit and expect men to feed you, you have got to do it for yourself sometimes". A migrant from Zimbabwe also told SAMP, "women are the ones who take care of their families most of the time," and "it is important for women to stand up and do things for themselves".

These research findings suggest that many women are active agents in deciding to migrate, and contradict traditional theoretical treatment which, as described by Monica Boyd and Elizabeth Grieco, proffers the "near invisibility of women as migrants,

5 Department of Home Affairs, 2007. "Statement on Zimbabwean Nationals Entering SA", 1 August 2007. Available at: http://www.dha.gov.za/media_releases.asp?id=419

6 Lefko-Everett, K., 2007. "Voices from the Margins: Migrant Women's Experiences in Southern Africa", *Migration Policy Series No 46*, Cape Town, South Africa and Kingston, Canada: IDASA/Southern African Migration Project. Available at: www.queensu.ca/samp

7 Perry, A, 2008. Falling Off the Edge: Globalization, World Peace & Other Lies, London: Macmillan, p 6.

8 Dodson, B., with Simelane, H., Tevera, D., Green, T., Chikanda, A., and de Vletter, F., 2008. "Gender, Migration and Remittances in Southern Africa," *Migration Policy Series No 49*, Cape Town, South Africa, and Queen's University, Canada: IDASA and Southern African Migration Project, p 29. Available at: www.queensu.ca/samp

their presumed passivity in the migration process, and their assumed place in the home"[9].

Challenges for female migrants

Although many women participating in the SAMP study anticipated the prospects for opportunity and change brought about by migration, they also faced formidable difficulties in travelling through the region.

Common difficulties included the high costs of travel, as well as the need to find safe and affordable transport and accommodation. Most women had valid travel documents and wanted to migrate through legal channels, but for Zimbabweans in particular – who face far more costly and onerous visa requirements than citizens of other SADC countries – obtaining a visa presented a significant challenge.

The experiences of women who travelled through irregular or illegal means were also categorically different from those who travelled through legal channels.

Women who used legal border crossing points had relatively few complaints, aside from long queues, discomfort, and poor service from officials in some cases. Most study participants travelled legally in this way.

Women who "jumped the fence", on the other hand, told of arduous journeys which included crossing rivers and difficult terrain, and encounters with wild animals. Many were exploited and assaulted during the course of crossing the border, at the hands of both paid "guides" and smugglers, and border and security officials.

Often, irregular migrants would travel to the border area, and then look for "boys who live in the bush, who help you to cross the border." Smugglers, migrants said, may "rape you or take all your belongings", or "sometimes they shoot you if you don't want them to rape you".

Encounters with border officials, security guards and police officers also presented similar threats, including abuse and the solicitation of bribes and sex. One woman told of how women migrants are coerced into sex with police officers to avoid arrest. She explained that that police officers have "sex with the girls as a form of payment for being illegal." Another described being caught crossing the border into South Africa at night: "we found soldiers who wanted money. If we did not have money they demanded sex. I slept with the soldiers because I didn't even have a single cent, then I crossed to the farms next to the Limpopo to work there."

Living as a migrant in South Africa

This year's violent attacks on migrants across the country have highlighted how difficult it is to be a migrant in South Africa.

Many women migrants felt they had virtually no chance of social integration in South Africa, unless they were able to assimilate through strategies such as learning local languages and styles of dress. Women were accustomed to regular harassment and name-calling in interactions with citizens: telling evidence of the existence xenophobic tensions several years ago. One Zimbabwean woman told of how South Africans in her community "said they want to remove us, they want to go house-to-house looking, and if there's a Zimbabwean they must deport them because they don't want foreigners."

Women also often encountered stereotypes, including the perception that all migrants are "desperate and poor", and were responsible for crime, stealing husbands, and taking jobs from South Africans.

Beyond everyday encounters with citizens, anti-foreigner sentiment was alarmingly evident in interactions with public service providers. Many women had been victims of crime, including domestic abuse, sexual assault and rape, robbery, and the solicitation of bribes by law enforcement officials. However, they often felt unable to rely on the police for assistance, and several said they had been refused police assistance when attempting to lay charges.

It was even more common amongst migrant women to report problems in accessing basic healthcare services, even in emergencies. One recalled visiting a clinic, where she was told that the available medicine was "for South Africans only". A second was refused treatment by nurses at a clinic, who would not speak to her in English and insisted, "this is South Africa, speak our language."

Refusal of medical treatment, distressingly, often came up in the context of migrant women seeking reproductive healthcare. A Mozambican woman about to give birth arrived at a hospital

9 Boyd, M. and Grieco, E., 2003. "Women and Migration: Incorporating Gender into International Migration Theory". Migration Information Source, Migration Policy Institute, Washington. Available at: www.migrationinformation.org

and was chided, "You came to South Africa and left Mozambican nurses sleeping back home, and you chose to come and bother us here?" Nurses told her she would have to take care of herself. Another arrived while in labour, where staff refused to attend to her. She told researchers that she had given birth in a car outside the hospital.

These stories are generally consistent with other research findings: a 2003 study conducted by the Community Agency for Social Enquiry (CASE) found that 17% of refugees and asylum-seekers interviewed had been denied emergency medical care, although access is a constitutionally-guaranteed right for everyone in South Africa.[10]

Similarly, a 2008 report by the Consortium for Refugees and Migrants in South Africa (CoRMSA) found that "many refugees and asylum seekers report being refused access to treatment at public clinics and hospitals", and that "international migrants also face discrimination and ignorance of their rights when they attempt to access medical services". CoRMSA also documents difficulties in HIV-positive migrants accessing Anti-Retroviral Therapy (ART) from the public sector, and that despite directives from the national Department of Health, there are concerns that "public institutions are determining their own policies"[11].

Migration and change

Given the gravity of the abuse, discrimination and exclusion that migrant women face, it was amazing to find that many women participating in the SAMP study still felt their lives had improved after migrating.

Often this improvement was measured by economic opportunity, generally related to the ability to support families through buying food and other basic necessities, and paying school fees. Women migrants, as the GCIM suggests, were able to "work, to earn their own money and to exercise greater decision-making power in their daily lives".[12] One woman stated, "I am able to have my own money and I am able to support my own kids." Another commented, "I changed a lot, because I know how to support my mother and my younger sisters and brothers. They can go to school now because I send the money there."

Subsequent SAMP research also confirms that remittances from women migrants in South Africa are a "demonstrably important source of both income and material goods" for households in countries of origin, which contributes significantly to wellbeing and livelihoods.[13]

But the benefits of migration were not only limited to economic improvements, and many women felt they had undergone significant personal growth and change.

One woman told researchers, "I've experienced a lot in travelling from one country to another, I know so many things." She added, "if I weren't enjoying it, I wouldn't be here now. I'm very free…even though I did it to earn money… if I skip a month without coming here, I feel like there is something incomplete in me." Another said that after migrating, "you just kind of glow and life is brilliant…there's always so much to learn." A third described some of the benefits of exposure to new people and cultures, saying that in South Africa, "I discovered that there are lots of women that work and sell things when they knock off work. So I learned that I could work and sell too, at the same time."

Benefits of regional migration

The many benefits of international migration have been increasingly recognised worldwide. For women participating in the SAMP study, these included greater independence and personal development, and the shedding of traditional gender roles. Women using migration as an economic strategy, generating remittances that contributed to the wellbeing of households through greater food security, provision for basic needs, and investment in education.

To some extent, the benefits of international migration have also been acknowledged at the level of regional policy. In the mid 1990s, a regional Protocol on the Free Movement of Persons was developed, which envisaged the elimination of border controls between states and the ability of citizens of SADC countries to more easily take up residence in other member states, but this was ultimately shelved to due resistance from some member states.

A newer version, referred to as the Protocol on

10 Community Agency for Social Enquiry (CASE), 2003. "National Refugee Baseline Survey: Final Report, Researched for the Japan International Cooperation Agency (JICA) & United Nations High Commissioner for Refugees (UNHCR)". Pretoria: JICA and UNHCR, p 143.

11 Consortium for Refugees and Migrants in South Africa (CORMSA), 2008. "Protecting Refugees and Asylum-Seekers in South Africa, 2008", Johannesburg: CORMSA, p 41. Available at: http://www.cormsa.org.za/wp-content/uploads/2008/06/cormsa08-final.pdf

12 GCIM, 2005: 49.

13 Dodson et al, 2008: 31.

the Facilitation of Movement of Persons in SADC, emerged in 2005. This version of the protocol is somewhat more restrictive, but still allows citizens of SADC Members to enter other states without a visa for up to 90 days per year, and facilitates temporary and permanent residence, work, and establishment in other countries.

The re-introduction of the protocol to some extent demonstrates increasing recognition of the economic value of migration, as well as the growing need for the SADC region to assert itself in the globalising economy. Other complimentary developments include instruments related to substantial reductions in regional tariffs, as well as the formation of a customs union, common market, and monetary union in the next few years.

Freer movement in SADC would likely bring a number of benefits for women migrants. Critically, reducing or eliminating visa requirements would remove some of the impetus to make dangerous, irregular border crossings. It would also allow women to cross borders more frequently without having to re-apply for visas, in order to visit family and conduct trade. In fact, large numbers of women participating in the SAMP study called for the "scrapping" of visas.

However, imminent implementation of the protocol seems unlikely, particularly given slow progress so far. Implementation will likely be further complicated by instability in some SADC countries, including the current political impasse in Zimbabwe, and the recent flare-up of violence in the Democratic Republic of Congo. Attitudes within South Africa will also remain an obstacle to support for the protocol: a 2006 SAMP survey found that 84% of respondents feel "too many" foreigners are allowed into the country.[14]

Therefore, a number of more immediate interventions are needed. First, given the range of human rights abuses women migrants face, as well as this year's xenophobic attacks, there is a crucial need for public education and awareness, leading to far broader recognition of the rights of migrants in South Africa. This is an evident need for all citizens. However, it is also crucially important in the context of public service delivery to ensure that migrants can, for example, access critical basic services without fear of discrimination or exclusion

It is also important for South Africa to consider a domestic migration policy more consistent with the spirit of regional integration, oriented towards migration management over migration control, and fundamentally protective of the human rights of migrants. Home Affairs Minister Nosiviwe Mapisa-Nqakula has suggested that in the long term, government should consider a "holistic review of our immigration policy", as well as a possibly re-writing the 2004 Immigration Amendment Act. She has also recommended that South Africa "put in place a process that can effectively facilitate the immigration and emigration of people through our borders, encourage the attraction of foreign skills, boost tourism and stimulate foreign direct investment".[15]

Within the framework of a new policy approach, a number of interventions could support women migrants. For example, a specific visa authorising cross-border trade and small-scale entrepreneurial activities would consolidate the anti-poverty and developmental benefits of women's remittances, and reduce the scope for arrest, deportation and harassment by police officers.

Women participating in the SAMP study also suggested that migrants need some sort of recognised identification documents aside from passports, which would potentially facilitate better access to healthcare, schools, and other public services, as well as bank accounts, credit, lease agreements, and property purchases.

However, none of these interventions will be meaningful without serious commitment from government to uphold and protect the rights of migrants, create channels of recourse for rights violations, and penalise anyone violating these rights.

14 Southern African Migration Project, 2008. "The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa", *Migration Policy Series No 50*, Cape Town, South Africa, and Queen's University, Canada: IDASA and Southern African Migration Project. Available at: www.queensu.ca/samp

15 Michaels, J. "Buthelezi's brainchild to be restricted", *The Mercury*, 3 March 2005, p 2. Available at: http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20050303081720734C383219

Biography

Loren Landau

Loren has been with the 'Forced Migration Studies Project' (WITS University) since 2002. His research explores sovereignty; migration and urban transformation; and state-society relations, and he has published extensively on these issues. Loren holds a PhD and an MA in Political Science from the University of California, Berkeley, an MSc in Development Studies from London School of Economics and Political Science, an a BA in Political Science from the University of Washington, Seattle. He has received a number of research awards and fellowships including the Vice Chancellor's Award for Academic Citizenship (University of the Witwatersrand), the Lisa Gilad Prize for most innovative and thoughtful contribution to the advancement of refugee studies (International Association for the Study of Forced Migration), and the Robert Dahl Award for Outstanding Graduate in Political Science (University of Washington).

Loving the Alien within

Rethinking citzenship and belonging in South Africa

On 11 May 2008, foreigners and other 'outsiders' were systematically attacked in Alexandra, a few kilometres from Southern Africa's financial centre and some of the continent's most exclusive homes. Within days, violence and fear spread across the country. During the two terrible weeks that followed, at least 62 people died. Another 670 people were wounded, dozens raped, and thousands verbally assaulted. By the end of the melee, a hundred and fifty thousand or more were displaced, tens of thousands fleeing to Mozambique or other neighbouring countries. Most were from elsewhere in Africa, others were South Africans who married foreigners, resisted the violent orgy, or belonged to minorities that are not quite South African enough. In the process, perpetrators destroyed or redistributed millions of rand worth of goods and hundreds of shacks and houses.

If fortune smiles, South Africa will never again see the kind of violence it saw in May 2008, but this means overcoming a difficult history that has generated hated enemies within: segments of the population that are institutionally and socially excluded from legal protection. For the aliens among us, rights to space and life are not delimited by constitutional principles. Rather, they live stripped of their inalienable human rights, subject to the states' unbridled and potentially arbitrary power. Without these protections, their livelihoods and lives depend on the whim of their neighbours and those charged with upholding the law. A secure future means ensuring all within the country have a legal identity and access to the means to protect it.

However six months after the attacks, there are few reasons to think that they will not happen again. Protecting foreigners' rights, dignity, and welfare ranks near the bottom on the country's list of political priorities, far below debates over our future president and if the national rugby team's mascot will be a flower or an antelope. If the citizenry were only half as impassioned about combating discrimination and violence, we would all be living safer and more dignified lives. Although many fail to realise it, the issues at stake are fundamentally the same: who owns South African history and the rights to its land, wealth, and symbols.

This does not mean we should stop talking or stop trying to ensure the safety of the most vulnerable among us. Doing so not only surrenders our hopes for South Africa, but also poses acute dangers to our neighbours and ourselves. In moving forward, we must first understand the violence and what was behind it. Intervention without understanding will only open up a world of hurt; strategies that risk doing more harm than good.

Since the attacks, South Africa has been awash with explanations ranging from the vague and compelling to the absurd: the failures of global capitalism, cultures of violence, frustrated masculinities, and a desperate need to overcome past traumas. Every

organisation worth its salt got into the game. Not surprisingly, the explanations often came with offers to help fix the problem for a price. Self-interest aside, a plurality of perspectives is generally a good thing, but many of the suggestions are either unhelpful or dangerous. Many help explain South Africa's social ills, but few can explain the nature, timing, or target of the May attacks.

A number of commentators have rooted the violence in self-hatred among the country's black population, a lingering legacy of colonialism and apartheid. For others, the attacks betrayed a dream of racial solidarity. Without denying the possibility that afrophobia exists or the potential benefits of black consciousness, how do such perspectives explain the attacks on Chinese, Bangladeshis, Pakistanis, and others? Beyond their empirical failings, we must ask whose interests these explanations ultimately serve, assessments that remove almost all responsibility from current leadership and actors. Moreover, if the solution is to promote self-love over self-hate, where will we end up drawing the boundaries of our community? Who is this 'self' meant to be? Such analyses only help naturalise notions of nation, race, and indigeneity, divides that will heighten mistrust, animosity, and violence within South Africa's great diversity.

Almost everyone, including the Institute for Race Relations and the Human Science Research Council (HSRC), partially rooted the problem in poor border control.[1] Infusing these accounts were wistful, if fancifully reminiscent of a past era when border control really earned its name. But history and example show us that border controls never stopped the flow of unwanted people then. Nor can they now. What they will do is put more cash in the pockets of smugglers and corrupt border guards. Rather than protecting citizens, driving immigration further underground will further entrench a dual labour economy that undermines the rights and welfare of South African workers. New ramparts will also fortify the 'us versus them' mentality that helped foster the attacks. Better border management is needed, but this must begin with a pragmatic reform of the country's immigration laws. Severe controls are not the answer.

The HSRC report commits two additional sins. First, it argues that the solution is to address people's frustrations rather than the triggers of the violence. Responding to their demands will not only mean restricting the border, but also access to housing, jobs, services, and almost everything else. As we can do little to stop migration – nor can we do without the skills it provides – such exclusion will only create a foreign underclass with all the problems that entails including less healthy and less productive cities. Keeping foreigners out of education and other services may save a few bucks in the short term, but in the end, we will all pay. This is certainly not the way to generate the jobs and houses people want and need.

More immediately worryingly, the HSRC calls on us to empower local leaders to promote reintegration and tolerance. While local leaders must be part of any way forward, we should be careful in just who we call on to lead our march. When asked what these leaders had done to stop the violence, an Alex resident laughed at a Wits colleague of mine, Jean Pierre Misago: "You've got it all wrong…" he replied, "They were with us all the way."

Indeed, Forced Migration Studies Programme (FMSP) research from across the country clearly shows that it was local authorities – elected ward councillors, self-appointed street committees, and leaders of various other stripes – who mobilised the violence for their own economic and political benefit. In places, these campaigns build on existing, if unconstitutional, limitations – forcefully backed up by police and gangsters – limiting the number of shops owned by Somalis or other groups. I shudder to think what will happen when Jeff, the self-appointed leader of 'Jeffville', a semi-autonomous section of Atteridgeville, is empowered to ensure our communities' security and welfare.

If our scholarly and NGO colleagues have let us down, we must be equally suspect of the Government's response. The City of Tshwane and Gauteng Province fought a long and acrimonious battle over who was not responsible for the last camps outside of Pretoria. Even the Constitutional Court effectively turned a blind eye while the province forced fearful migrants back into communities with little or no assistance. Gauteng justified its actions by claiming conditions were right for reintegration and all was going smoothly, this as leaders in Ramaphosa informal settlement spoke openly of their intention to kill foreigners who returned. Thanks to a strong

1 Human Sciences Research Council (Adrian Hadland, Ed.). 2008. *Violence and Xenophobia in South Africa: Developing Consensus, Moving to Action*. Pretoria: Human Sciences Research Council (http://www.hsrc.ac.za/Document-2994.phtml). See also, "Statement by the South African Institute of Race Relations on causal factors behind the violent unrest in and around Johannesburg" (20th May 2008). (http://www.sairr.org.za/press-office/archive/statement-by-the-south-african-institute-of-race-relations-on-causal-factors-behind-the-violent-unrest-in-and-around-johannesburg-20-may-2008.html)

civil society campaign in Cape Town, the Western Cape government was more reasonable in their approach. But they have clearly not done enough. Across the Cape provinces, Gauteng, and elsewhere in the country, foreigners continue to be murdered. One day it's a Somali woman killed with her children. Elsewhere someone is stabbed dozens of times and left with money in his pocket. In Masiphumelele, an Ethiopian lured back by promises of safety was shot on the same day community leaders were to be commended for their reconciliation efforts.[2] The question is not if the attacks will happen again: they have never stopped.

Despite these threats, the special panel of experts promised by the president is missing in action. People caught red handed have been released and investigations stalled or suspended. All of the mea culpas and browbeating have now faded or been forgotten. This may be politically expedient, but the long terms risks are greater than we are ready to acknowledge.

Does this mean we have no way to move forward? As long as this debate continues to be about protecting vulnerable foreigners, we are dead in the water. There are no short-term political points to be won by 'outing' the perpetrators. Standing up against the gangsters behind the violence can mean both a political and physical death sentence. Despite the initial outpouring of support from civil society, foreigners remain deeply unpopular and largely without voice.

Instead, we must remember what the violence was really about: South African citizens taking it on themselves to decide who has a right to the cities and the potential wealth and power within them. The May 2008 events were not only about ridding the country of people from beyond the Limpopo River or Lebombo Mountains. They were a result of part of the population mobilising to cleanse their cities of 'outsiders,' a group with no fixed definition. In the words of former American Senator, Robert F. Kennedy, we have learned to "to look at our brothers as aliens, men with whom we share a city, but not a community; men bound to us in common dwelling, but not in common effort. We learn to share only a common fear, only a common desire to retreat from each other, only a common impulse to meet disagreement with force."

And this force knows no boundaries. A third of the people killed in May were South Africans and the cries of 'Shangaans go home, Pedis go home, and Vendas go home' were almost as loud as those aimed at Zimbabweans, Somalis, and Mozambicans. It is likely that the additional demands that Pakistanis or Chinese leave will soon transform to move to 'Indians go home, whites go home, and Zulus go home.' The country's micro-politics provide the incentives for them to do so.

Already we see people in Gugulethu angered that Khayelitsha residents have jobs in a local construction project while they remain without work. These are co-ethnics who, if they support a political party, almost certainly back the ANC or its upstart offspring, yet they are prepared to organise to keep outsiders from benefiting from what their communities have to offer. These outsiders are not from across the border, but from a settlement just a few kilometres away. With the forthcoming election, the most competitive since 1994, leaders will need to mobilise support. With these divisions out there, the dangers are very real.

What we need now is to realise that our future cannot be built on the misfortune and exclusion of others. We must recognise that our own lives will neither be ennobled or enriched by hatred and violence. We must do more to ensure that everyone – regardless of race, gender, or nationality – can live safely and contribute to the communities where they reside. The first step in achieving this is to revisit our migration policy, not to close the borders but to start findings ways to promote safe and legal migration into the country. In doing so, we will be helping ourselves. No longer will we pay to deport hundreds of thousands of people. Nor will our police officers be preoccupied with rounding up foreigners when they should be fighting crime. If nothing else, we can begin by identifying the community leaders responsible for the attacks. Our researchers found them in a few days of poking around so we have little reason to believe that trained investigators still do not know who was behind the violence. I would like to think that it was only police incompetence behind the lack of prosecutions. I suspect the main reason is that no one cares enough to investigate.

Beyond addressing immediate policy concerns, we should turn our attention to a question that we should

(http://www.sairr.org.za/press-office/archive/statement-by-the-south-african-institute-of-race-relations-on-causal-factors-behind-the-violent-unrest-in-and-around-johannesburg-20-may-2008.html)

2 See, Gareth Wilson. 2008. 'J-Bay Somalis terrified as furious looters run amok,' Herald Reporter. (22 October 2008). http://www.theherald.co.za/herald/2008/10/08/news/n01_08102008.htm). Also, Voice of the Cape Online, 'Refugee deaths mean all not fine- activist' (11 October 2008) (http://www.vocfm.co.za/public/articles.php?Articleid=42569.)

have raised more than a decade ago: "what does it mean to be from and in South Africa?" This is not just about who gets what or remedying past injustice, it is about how we define future rights to jobs, space, and speech. What obligations do we owe our neighbours and how far do we go to accommodate others' views and aspirations and on what basis can we build a collective future?

More than just asking, we must press for institutional reforms that enable South Africa's full diversity to help reach an answer. Much of the past year's violence is rooted in the effective disenfranchisement of the country's poor. While committed to social transformation, the ruling party has consistently ignored the voices of those it purports to benefit. Frustrated citizens without means of influencing formal political processes will acquiesce for only so long before turning to other means. This does not mean we should pander to every demand, but rather recognise the need to hear and address them. As we learn to listen, we must also attend to non-nationals' attitudes and aspirations. Unless South Africa surrenders its wealth or rebuilds the apartheid era barricades, foreigners will always be among us. Ignoring their experiences will only further divide our fragmented society.

This will be an uncomfortable and potentially dangerous discussion. If managed poorly, it may well foster further intolerance, mistrust, and resentment. Ministerial indabas and imbizos are a start, but they risk excluding the poor and marginalised, the very groups behind the attacks. Debates must occur in churches, mosques, synagogues and community halls; in our schools and offices; and on farms and factory floors. Wherever possible, polemics and myth must give way to reason and pragmatism. If civil society and our elected officials will not lead these debates, the answers will come from the streets. As we saw in May – and before, and after – we know only too well where that will lead us.

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