

Access to Justice for Non-Citizens: A Constitutional Analysis

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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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08 November 2013, Stellenbosch

SUMMARY

The rights entrenched in the Bill of Rights in South Africa's final Constitution are, with a few exceptions, guaranteed to citizens and non-citizens alike. South Africa has seen an influx of migrants, asylum seekers and refugees since 1994, and this migratory movement has posed significant challenges to the post-apartheid legal order. This thesis is concerned with the State's implementation of its constitutional obligations to protect and guarantee the constitutional rights of everyone within the borders of South Africa.

It is important that these constitutional obligations do not remain mere aspirations but should translate into reality. Most non-citizens living in South Africa face numerous barriers to accessing justice and the processes that could enable them to realise their rights. The thesis examines the concept of "access to justice" and investigates a number of obstacles encountered by different categories of non-citizens – such as refugees, asylum seekers and documented and undocumented migrants – in trying to access justice and to realise their rights.

Against this background, arrest, detention and deportation under the Immigration Act and Refugees Act are examined because these processes have often been abused by State officials to prevent non-citizens from accessing the rights and protections guaranteed in these Acts and the Constitution, and to frustrate the implementation of court orders vindicating the rights of non-citizens. The application of the Immigration and Refugees Acts is discussed through the lens of sections 12(1), 33, 34 and 35(2) of the Constitution which ensure that arrest, detention and deportation are done in a lawful and procedurally fair manner, as opposed to the arbitrariness that most non-citizens experience on a daily basis.

Secondly, the thesis also examines access to justice for non-citizens in the context of xenophobia and bias based crimes. The State has in the past failed to respond in a coordinated and timely fashion in the face of violent manifestations of xenophobia. Against this background, the State's obligation to protect non-citizens from violence from either public or private sources in terms of section 12(1)(c) of the Constitution is discussed and analysed. The role, accessibility and effectiveness of Equality Courts are also examined in light of the

Promotion of Equality and Prevention of Unfair Discrimination Act and the cases that were brought before them emanating from xenophobic incidents.

The thesis concludes with proposals on areas which require better implementation of existing laws; and areas in which legislative reform is needed.

OPSOMMING

Die regte wat in die Handves van Regte in Suid-Afrika se finale Grondwet veranker is, word op enkele uitsonderings na vir burgers en nie-burgers gewaarborg. Sedert 1994 het Suid-Afrika instroming van migrante, asielsoekers en vlugteling beleef, en hierdie verskuiwing het wesenlike uitdagings aan die post-apartheid regsorde gestel. Hierdie tesis is gemoeid met die Staat se implementering van sy grondwetlike verpligting om die grondwetlike regte van almal wat hul binne Suid-Afrika se landsgrense bevind, te beskerm en te waarborg.

Dit is belangrik dat hierdie grondwetlike verpligtinge nie blote aspirasies bly nie, maar 'n werklikheid word. Die meeste nie-burgers wat in Suid-Afrika woon staan talle hindernisse in die gesig wat dit vir hulle moeilik maak om toegang tot geregtigheid te verkry en om hul regte te verwesenlik. Die tesis ondersoek die begrip “toegang tot geregtigheid” en bekijk aantal struikelblokke in die weg van verskillende kategorieë nie-burgers – soos vlugteling, asielsoekers en gedokumenteerde en nie-gedokumenteerde migrante – wat toegang tot geregtigheid probeer verkry en hul regte probeer verwesenlik.

Teen hierdie agtergrond word arrestasie, aanhouding en deportering ingevolge die Wet op Immigrasie en die Wet op Vlugteling ondersoek, aangesien hierdie prosesse dikwels deur staatsamptenare misbruik word om nie-burgers te verhinder om toegang te verkry tot die regte en beskermings wat in hierdie wetgewing en in die Grondwet gewaarborg word, en om geregtelike bevel wat die regte van nie-burgers afdwing, te veryd. Die toepassing van die Wet op Immigrasie en die Wet op Vlugteling word deur die lens van artikels 12(1), 33, 34 en 35(2) van die Grondwet bespreek, wat probeer verseker dat arrestasie, aanhouding en deportering op regmatige en prosedureel billike manier geskied, in teenstelling met die willekeur wat nie-burgers op daaglikse basis ervaar.

Tweedens ondersoek die tesis toegang tot geregtigheid vir nie-burgers in die konteks van vreemdelingehaat en misdade wat op vooroordeel gebaseer is. Die Staat het in die verlede in gebreke gebly om in die aangesig van gewelddadige manifesteringe van vreemdelingehaat op gekoördineerde en tydige manier te reageer. Die Staat se verpligting om ingevolge artikel 12(1)(c) van die Grondwet nie-burgers teen geweld van hetsy openbare hetsy private oorsprong te beskerm, word bespreek en ontleed. Die rol, toeganklikheid en doeltreffendheid van gelykheidshowe word ook bespreek in die lig van die Promotion of Equality and

Prevention of Unfair Discrimination Act en die sake wat deur hierdie howe beslis is wat uit xenofobiese voorvalle voortspruit.

Die tesis sluit af met voorstelle oor terreine waar beter implementering van bestaande wetgewing benodig word, asook terreine waar wetgewende hervorming verlang word.

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ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACMS	African Centre for Migration and Society
CAP	Community Assessment and Placement
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CoRMSA	Consortium for Refugees and Migrants in South Africa
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs
ECHR	European Court of Human Rights
FIDH	International Federation for Human Rights
FMSP	Forced Migrations Studies Programme
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDC	International Detention Coalition

IOM	International Organisation for Migration
LHR	Lawyers for Human Rights
NGO	Non-Governmental Organisation
OAS	Organisation of American States
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PAJA	Promotion of Administrative Justice Act
RRO	Refugee Reception Office
RSDC	Refugee Status Determination Committee
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAMP	Southern African Migration Project
SANDF	South African National Defence Force
SAPA	South African Press Association
SAPS	South African Police Service
SCRA	Standing Committee on Refugee Affairs
SMG	Soutpansberg Military Grounds
UNCAT	United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

CHAPTER 1: INTRODUCTION

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1.1. Background to the study

Migration into South Africa is not a new phenomenon.¹ It is nevertheless fair to say that post-apartheid South Africa was ill prepared for the influx of migrants, asylum seekers and refugees that it experienced after 1994, and that the migratory movement into South Africa has posed significant challenges to the post-apartheid legal order.

The resulting difficulties have been studied, chronicled and analysed by social scientists and other migration experts,² whose overriding concern has been the reception of migrants by the host country. Instances of xenophobia, where communities have resorted to violence, looting

¹ Jonathan Crush "Cheap Gold: Mine Labour in Southern Africa" in Robin Cohen (ed) *The Cambridge Survey of World Migration* (1995) 172. Formal European migration into South Africa began around 1652 with the arrival of Dutch settlers in the Cape. The migration of African migrants to this country dates back to the early years of the gold and coal mining booms which saw the establishment of a centralised recruiting agency with two branches, namely the Witwatersrand Native Labour Association (WNLA) and the Native Recruiting Corporation (NRC) to recruit African labour from countries around South Africa and beyond. See also Aurelia Segatti (ed) *Contemporary Migration to South Africa: A Regional Development Issue* (2011).

² See for example the FMSP Research Report *Zimbabwean Migration into Southern Africa: New Trends and Responses* (2009) 1-95, available online at <<http://www.migration.org.za/report/kiwanuka-m-monson-t-2009-zimbabwean-migration-southern-africa-new-trends-and-responses-fmsp-r>> accessed 20/06/2011, and CoRMSA Report, *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* (2009) 1-121, available online at <<http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf>> (accessed on 02/05/2011).

and lynching to remove foreign nationals from their midst, as witnessed most vividly in May 2008, have received particular attention.³

While these studies help to inform and frame the present study, the main concern in this thesis is with the State's implementation of its constitutional obligations to protect and guarantee the constitutional rights of everyone within the borders of South Africa. The rights entrenched in the Bill of Rights in South Africa's 1996 Constitution are, with a few exceptions, guaranteed to citizens and non-citizens alike.⁴ This is borne out in several prominent judgments in the Supreme Court of Appeal and the Constitutional Court. It has, for instance, been held that human dignity is "inherent in all people – citizens and non-citizens alike – simply because they are human";⁵ that foreign nationals who are present in the national territory but who have not been granted permission to enter are entitled to the right to freedom and security of the person and the rights of detained persons;⁶ and that permanent residents may not be excluded from certain benefits under the Social Assistance Act.⁷ In terms of section 7(2) of the Constitution, the state must not only respect, but must also protect, promote and fulfil the rights of citizens and non-citizens.

This generous approach to the rights of non-citizens is not borne out by the reality on the ground. Most foreign nationals fear approaching the State institutions that have been set up to assist them to access justice. The two key departments most dreaded by non-citizens are the South African Police Service (SAPS) and the Department of Home Affairs (DHA). It is documented that SAPS is seen by many as a key player in perpetrating discriminatory practices against non-nationals. The common view held by SAPS members seems to be that foreign nationals are responsible for crime.⁸ Coupled with the fear of the SAPS is the

³ See generally the Mail and Guardian newspaper's Special Report on Xenophobia, <http://mg.co.za/specialreport/xenophobia> (accessed on 21 April 2011).

⁴ By contrast, migrants from the former Bantustans and sub-Saharan countries had limited rights and little protection under the laws that were in application at the time. See Jonathan Crush "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa" (2000) 38(6) *International Migration* 103-135 105.

⁵ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA); 2004 (2) BCLR 120 (SCA) para 25.

⁶ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (7) BCLR 775 (CC).

⁷ Social Assistance Act [No. 59 of 1992]. *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

⁸ Themba Masuku "Targeting Foreigners Xenophobia among Johannesburg's Police" (2006) 15 *SA Crime Quarterly* 19-24, <<http://www.iss.co.za/pubs/CrimeQ/No.15/Masuku.html>> (accessed on 22 April 2011). See also Basildon Peta "Minister slams treatment of refugees by cops" *Independent Online (IOL)*

reluctance by non-citizens to make use of the services of the Department of Home Affairs owing to a fear of victimisation and eventual deportation.⁹

This thesis will focus in particular on the extent to which foreign nationals enjoy access to justice.¹⁰ Although the Constitution does not expressly guarantee a “right of access to justice”, a number of rights in the Bill of Rights seek to ensure that individuals are able to challenge the validity of administrative action affecting them, have access to courts, are not detained without trial, and have their freedom and security protected. Access to justice, in the sense used here, is a precondition for the exercise and protection of all other rights. In chapter 3 of the thesis, access to justice will be defined and the impediments to accessing justice will be highlighted with particular reference to non-citizens. Such impediments include: cultural and language barriers; corruption within the system; legal and institutional discrimination; insensitivity of officials to non-citizens’ concerns and non-citizens’ lack of knowledge of local laws.

In this thesis, it will be shown that foreign nationals are particularly vulnerable to the restriction of their access to justice, especially in relation to the following scenarios: First, immigration legislation has often been applied in a manner which allows foreign nationals to be detained for inordinately lengthy periods – often exceeding the 120 days that the courts have held to be the maximum time allowed by the Immigration Act. Non-citizens have also been deported illegally, or extradited under the guise of deportation, thus depriving the affected person of legal remedies provided for in the Immigration Act¹¹ and Extradition Act.¹² An analysis of these laws will illustrate that the Legislature is aware of the potential for abuse of administrative power by officials and has put in place rules and regulations for aggrieved non-citizens to access their rights. However, the implementation of these laws is a problem.

Secondly, the state’s lacklustre and uncoordinated response to the xenophobic attacks of 2008 and subsequent xenophobic manifestations raises questions over its compliance with its

<http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20051006070819415C991259> (accessed on 27 April 2011).

⁹ See for example Bianca Capazorio “Strip club vs. Home Affairs” (20 November 2010) *Independent Online (IOL)* <<http://www.iol.co.za/news/back-page/strip-club-vs-home-affairs-1.865488>> (accessed on 27 April 2011).

¹⁰ The meaning of the term “access to justice” is explored below in chapter 3.

¹¹ Immigration Act [No. 13 of 2002].

¹² Extradition Act [No. 67 of 1962].

constitutional obligation to guarantee the security of all people within the country, irrespective of their nationality. This failure to protect the physical safety of foreign nationals will be shown to have serious consequences for their ability to report wrongdoing and access the courts.

By looking at these two relatively different scenarios (i.e. detention and deportation under the Refugees Act¹³ and Immigration Act¹⁴ on the one hand and the responses by the State to manifestations of xenophobia on the other), this thesis will illustrate the impediments to access to justice experienced by non-citizens and draw attention to the disconnect between constitutional guarantees of their rights and the concrete position in which many non-citizens find themselves.

1.2. Aims

This research aims to analyse the extent to which non-citizens are guaranteed access to justice in terms of the Constitution. Moreover, it will identify and discuss the main legal, socio-political and structural impediments faced by non-citizens to accessing justice, and to show how these factors impact on the rights guaranteed in the Bill of Rights and tend to place the mechanisms designed to ensure access to justice outside the reach of non-citizens. The research will examine the fundamental rights of non-citizens which relate to access to justice within two different contexts: first, the application of the Immigration and Refugees Acts; and secondly, state responses to xenophobia. Drawing upon South African constitutional jurisprudence as well as international and comparative law, the thesis will suggest ways in which the law can guarantee more effective access to justice and vindication of the rights of non-citizens.

1.3. Assumptions

This thesis proceeds on the basis of the following assumptions: firstly, the majority of rights in the Bill of Rights accrue to everyone within the country's national borders.¹⁵ The same

¹³ [No. 130 of 1998].

¹⁴ [No. 13 of 2002].

¹⁵ Constitution of South Africa s 7(1) proclaims that the Bill of Rights "enshrines the rights of all people in our country".

holds true for international human rights that are found in international treaties. Secondly, access to justice by non-citizens is hampered by the State's inadequate response to its constitutional obligations to protect and guarantee the constitutional rights of everyone within the borders of South Africa. Thirdly, the rights of non-citizens are not adequately respected, protected or promoted. The high number of court challenges by non-citizens against the State is evidence enough that there is a breakdown in the implementation of the laws that guarantee their rights. The fourth assumption is that most non-citizens interact with the State either through the Department of Home Affairs (immigration and asylum process) or the South African Police Services. These interactions do not necessarily lead to the protection of their rights. In many cases the opposite is true, leaving non-citizens exposed as the means by which their rights should be protected are being denied to them. Lastly, current legislation in South Africa does not adequately regulate against arbitrary arrests; prolonged detention of non-citizens; irregular and disguised deportations; nor does it provide ways to curb or punish perpetrators of xenophobic violence.

1.4. Questions

In order to adequately examine and research these assumptions, the thesis will investigate what the rights of non-nationals are under the South African Constitution. It will also ask to what extent the State can be held liable for failures to take adequate steps within set legal frameworks to protect non-citizens. The implementation of the provisions of the Immigration Act and Refugees Act will be discussed with the intention of investigating to what extent such implementation respects the personal freedoms of non-citizens as well as their rights contained in section 35(2) of the Constitution; the rights of access to courts and just administrative action. The research will also examine reforms and mechanisms that the State can put in place to ensure that non-citizens' rights are adequately protected. In this regard, it will be asked how the police services, community policing forums and State officials can become more responsive to the rights and needs of non-nationals; especially in circumstances where they wish to enforce their rights in the face of xenophobic violence.

The question of how sections 39(1)(b) and 233 of the Constitution (which give international law a prominent role in the interpretation of the Bill of Rights and legislation respectively),

have been applied in the courts to give effect to the rights of non-citizens will be addressed.¹⁶ Alternative methods of handling undocumented immigrants will be discussed in chapter four of this thesis. These questions will paint a clearer image of non-citizens' interaction with the Constitution.

1.5. Research Methodology

This research will employ the normal legal research methods. Attention will be paid to legislative texts, case law, journal articles and other academic commentary. Owing to the need for empirical evidence to provide a situational background for this research, this research paper will make occasional use of reports that are quasi-legal and social scientific in nature, such as research papers produced by the African Centre for Migration and Society [ACMS] at the University of Witwatersrand – formerly the Forced Migrations Studies Programme (FMSP)¹⁷ – and the Consortium for Refugees and Migrants in South Africa (CoRMSA).¹⁸ These and other organizations have conducted important research and they are well equipped and experienced in this field.¹⁹ These reports will buttress the overarching hypothesis of this thesis that there is a disconnect between the law and what is being practised

¹⁶Internationally there are obligations upon the State to protect all people within its borders, especially minorities and vulnerable groups. The state is obligated not to arrest and detain people arbitrarily or to hold people in custody for long periods without that individual appearing in a court of law. Non-citizens have reported that they have been held for over 120 days in immigration detentions centres. Therefore I want to address the lack of adherence to the international obligations as a denial of justice to affected individuals.

¹⁷The following are examples of reports that will be referred to in this thesis: Roni Amit Forced Migration Studies Programme (FMSP) Report *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (2010) available online at <<http://www.migration.org.za/report/amit-r-2010-lost-vortex-irregularities-detention-and-deportation-non-nationals-south-africa-f>> (accessed on 04/06/2012); Jean-Pierre Misago, Tamlyn Monson, Tara Polzer and Loren Landau Forced Migration Studies Programme (FMSP) and Consortium for Refugees and Migrants in South Africa (CoRMSA) Report *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluating Responses* (2010), available online at <<http://www.cormsa.org.za/wp-content/uploads/2009/05/may-2008-violence-against-foreign-nationals-in-south-africa.pdf>> (accessed on 11/11/2012).

¹⁸CoRMSA Report, *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* (2009) 1-121, available online at <<http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf>> (accessed on 02/05/2011).

¹⁹ See *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at Para 123 where Chaskalson CJ referred to the weight and relevance the Court places on reports of well-respected international agencies that are submitted to indicate a certain state of affairs. He held:

“Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case”.

See also O'Regan J's judgment in the same case at Para 265.

by street level State officials such as police officers and Department of Home Affairs (DHA) officials.

In addition, due to the international nature of human rights, this research will, where appropriate, consider international law with respect to the protection of non-citizens. The relevance of international legal instruments, cases and commentaries to domestic law will be discussed. The emphasis will be on the extent to which these materials can assist in the interpretation of the relevant provisions in the South African Constitution and Bill of Rights. A comparative analysis will be carried out where appropriate such as in chapter 5 when the subject of hate crimes laws will be discussed as a possible solution to the lacuna that exists when dealing with bias and discrimination driven crimes.²⁰

1.6. Overview of Chapters

This thesis comprises six chapters including the introduction and conclusion. The first chapter provides a background and outlines the research problem that gives rise to this thesis. Chapter two is a descriptive chapter that contains definitions of citizenship versus non-citizenship. In this chapter, the various categories of non-citizens, including refugees, asylum seekers, documented migrants and undocumented migrants are defined. This chapter will briefly outline the protection afforded to each category of non-citizens under domestic constitutional law and international law.

In Chapter three, access to justice by non-citizens will be discussed. A definition of what access to justice means for purposes of this thesis will be given. In terms of this definition, access to justice entails more than just the process of seeking redress, as it also includes mechanisms aimed at ensuring that legal and judicial outcomes are themselves just and equitable. Obstacles to accessing justice will be discussed, especially as they relate to non-citizens as a vulnerable group. It will be argued that non-citizens' access to justice hinge in particular on the right to freedom and security of the person;²¹ the right to just administrative action;²² the right to access the courts;²³ and the rights of arrested and detained persons.²⁴ These rights are discussed in this chapter to the extent that they are important to non-citizens

²⁰ See chapter 5.8 (below).

²¹ Constitution of South Africa s 12(1).

²² Constitution of South Africa s 33.

²³ Constitution of South Africa s 34.

²⁴ Constitution of South Africa s 35(2).

when faced with arrest, detention, deportation and xenophobia. The obstacles to accessing these rights, although not unique to non-citizens, are exacerbated by the nationality of the individuals affected.

Drawing upon the foundations laid in chapters two and three, chapter four examines the arrest, detention and deportation of non-citizens. The chapter aims to show in more concrete terms how non-citizens fail to access justice when caught up in any of these processes. State officials at times deliberately flout the rules and procedures laid down in the laws they are charged to administer and thus frustrate non-citizens in their quest for justice and the vindication of their rights. In this chapter, less drastic measures of effecting immigration control will be discussed with the intention of seeing if the safeguards within these processes are accessible to the intended beneficiaries, as required by the Constitution.

Against the above background, chapter five then examines xenophobia as a barrier to non-citizens in their attempts to access justice. In this chapter, various laws that exist to combat and prevent xenophobia and its manifestations will be discussed, including the Immigration Act²⁵ and the Promotion of Equality and Prevention of Unfair Discrimination Act.²⁶ Ways of strengthening the constitutional protections for non-citizens in the event of xenophobic attacks will be addressed with particular attention to the hate crimes legislation that is in place in the United States of America.

Finally, chapter six will conclude by attempting to draw together the discussions and conclusions from the preceding chapters. This chapter will summarise the conclusions arrived at throughout the thesis.

²⁵ [Act No. 13 of 2002].

²⁶ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) [No. 4 of 2000].

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2.1. Introduction

A citizen is a person who has been recognized by a State as having an effective link with it.²⁷ International law generally leaves it to each State to determine who qualifies as a citizen. Ordinarily citizenship can be acquired by being born in a country (known as *jus soli* or the law of the place); being born to a parent who is a citizen of the country (known as *jus sanguinis* or the law of blood); naturalization; or a combination of any of these paths. Persons falling outside of these parameters are normally non-citizens.²⁸ These include people who reside in the country but were not born there and owe no allegiance to it, and also some people who owe allegiance to the country and have been living in it for generations but still find themselves in this category.²⁹ Non-citizens comprise of several distinct categories, including refugees, asylum seekers, documented migrants and undocumented migrants.³⁰ Given important differences in the legal position of these groups, they experience different obstacles in accessing justice. For this reason, it is necessary to define the various categories and to highlight the impediments facing them in relation to the justice system.

²⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR) *The Rights of Non-citizens*(2006) available online at <<http://www.ohchr.org/documents/Publications/noncitizensen.pdf>> (accessed on 20/02/2012) 5.

²⁸ Ibid.

²⁹ For example the Turkish "guest workers" in Germany, many of whom still do not qualify for citizenship. See Patricia Ehrkamp and Helga Leitner "Beyond National Citizenship - Turkish Immigrants and the (Re)Construction of Citizenship in Germany" (2003) 24(2) *Urban Geography*127-146, 127-128

³⁰ OHCHR *The Rights of Non-Citizens*5.

This chapter will introduce the protection afforded to each category of non-citizens under international law, as well as the incorporation of these international law obligations into South African law. The position taken by the South African courts in interpreting the rights of non-citizens will be discussed under each category. It must, however, be recognised that, although both international law and domestic law protect non-citizens from infringements of their human rights and prohibit discrimination against them, there is often a disjuncture between these human rights guarantees and the reality confronting non-citizens.³¹ Some of the main problems relating to the implementation and enforcement of these rights will, accordingly, also be pointed out.

2.2. Asylum Seekers

Generally speaking, an asylum seeker is someone who has left his or her country of origin in order to seek international protection as a refugee.³² The term “asylum seeker” itself is not defined in a single major treaty, thus its definition varies from one jurisdiction to the next.³³ In South Africa, the term is defined in the Refugees Act. According to the Act, an asylum seeker is a person who is seeking recognition as a refugee in the Republic.³⁴ In South Africa, a person becomes an asylum seeker only when he or she states his or her decision to apply for refugee status. The fact that a person is fleeing from his or her home country to seek international protection does not automatically make him/her an asylum seeker. Under South African practice, a person must first make the claim for asylum before he or she can be considered to be an asylum seeker³⁵ or indicate an intention to apply for asylum³⁶ before the law can recognise such a person.³⁷

Although there is a tendency to use the terms “refugee” and “asylum seeker” interchangeably, the difference between the terms is that asylum seekers have not yet been granted protected

³¹ Friends World Committee for Consultation (Quaker United Nations Office), Human Rights Watch, International Catholic Migration Commission, International Commission of Jurists *The Rights of Non-Citizens Joint Statement addressed to the Committee on the Elimination of Racial Discrimination* (2004) available online at <<http://www.quino.org/geneva/pdf/CERDJointStatement.pdf>> (accessed on 20/02/2012).

³² David Weissbrodt *The Human Rights of Non-Citizens*(2008) 110.

³³ Ibid 111.

³⁴ Refugees Act [No. 130 of 1998] s 1(v).

³⁵ Immigration Act [No. 13 of 2002] s 23 as amended by s 15 of the Immigration Amendment Act [No.13 of 2011]

³⁶ Refugee Regulations (Forms and Procedure) GN R 366 in GG 21075 of 06/04/2000 2(2).

³⁷ See generally *Bula & others v Minister of Home Affairs & others* 2012 (4) SA 560 (SCA).

status, whereas a refugee has been granted such status.³⁸ The right to seek asylum is guaranteed in the Universal Declaration of Human Rights³⁹ and in the African Charter on Human and People's Rights (Banjul Charter).⁴⁰

Asylum seekers are protected by the international law principle of *non-refoulement*. According to this principle, which will be discussed in greater detail in chapter 4⁴¹ of this thesis, a State cannot return asylum seekers to the country from which they are fleeing persecution. Yet, numerous cases of asylum seekers under threat of being sent back to the countries from which they are fleeing have come before the South African courts.⁴² It is therefore important to know how and why this principle applies to asylum seekers in South Africa.

When South Africa acceded to the various international treaties on the status of refugees⁴³ after 1994, it committed itself to the principle of *non-refoulement*. This principle finds expression in section 2 of the Refugees Act⁴⁴ which prohibits the return of refugees and asylum seekers to a country from which they are fleeing persecution based on the grounds specified in that provision. This has implications for State action when deporting or extraditing non-citizens. Asylum seekers are in a very precarious position with regards to domestic protections because they are not yet recognised refugees. Most asylum seekers do not enter the country at designated entry points or are reluctant to present themselves to a country's border officials upon arrival. The reason is that asylum seekers fear that they could be denied entry if they present themselves to officials at a port of entry.⁴⁵ As a consequence most seek asylum only after their irregular entry into the country.⁴⁶ In terms of the Immigration Act,⁴⁷ a person who enters and remains in the country must do so within the

³⁸ Weissbrodt *The Human Rights of Non-Citizens* 111.

³⁹ Universal Declaration of Human Rights (1948) UN Doc A/810 Art 14(1).

⁴⁰ African [Banjul] Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/rev 5 Art 12(2).

⁴¹ See chapter 4.5 (below).

⁴² See inter alia *Bula and Others v Minister of Home Affairs and Others, Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA).

⁴³ United Nations Convention Relating to the Status of Refugees (1951) 189 U.N.T.S. 150, entered into force April 22, 1954 Art 33(1). Refoulement is also prohibited by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), and the International Covenant on Civil and Political Rights (Article 7) to which South Africa is a signatory.

⁴⁴ [No. 130 of 1998].

⁴⁵ Weissbrodt *The Human Rights of Non-citizens* 126.

⁴⁶ *Ibid.*

⁴⁷ [No. 13 of 2002].

confines of the law.⁴⁸ A traveller to the country must therefore have the appropriate legal documentation and be granted the relevant visa to enter and remain in the country.

However in terms of South African law, an asylum seeker who presents at a port of entry and declares his intention to seek international protection, must be issued with a temporary five day non-renewable visa in terms of section 23 of the Immigration Act.⁴⁹ An asylum seeker does not need to be in possession of a valid passport or other identity document in order to enter South Africa because more often than not, such documentation is beyond his or her reach due to his or her life circumstances.⁵⁰ This waiver is in keeping with South Africa's obligations to allow asylum seekers safe passage to the nearest refugee reception office to apply for asylum.

The Refugees Act incorporated further international protections⁵¹ into South African law for the protection of asylum seekers who do not enter the country through the designated points and continue to stay without proper documentation.⁵² Asylum seekers who enter the country through irregular means could potentially be regarded by authorities as undocumented migrants, especially if they are not in possession of any other form of documentation. They are usually arrested and detained if found to have no documents or to be in possession of expired asylum seeker permits (issued in terms of the Refugees Act).⁵³

Once inside the country an asylum seeker must immediately apply for international protection at the nearest Refugee Reception Office. When such application has been made, the Refugee Reception Officer will issue the applicant with an asylum seeker permit in the prescribed form.⁵⁴ This permit sets out conditions under which an asylum seeker can remain in the country and the law is clear that that these conditions must be in sync with the Constitution

⁴⁸ Immigration Act ss 9(1), 9(4) and 10(1).

⁴⁹ Immigration Act s 23 - Asylum transit visa.

⁵⁰ Lawyers for Human Rights Situation Report *Refoulement of Undocumented Asylum Seekers at South African Ports of Entry with a Particular Focus on the Situation of Zimbabweans at Beit-bridge* (2011) available online <<http://www.lhr.org.za>> (accessed on 01/02/2012) 6.

⁵¹ UN Convention Relating to the Status of Refugees (1951) Art 31(1) - Refugees Unlawfully in the Country of Refugee.

⁵² Refugees Act s 21(4).

⁵³ See *Mustafa Aman Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA) and the following cases: *Arse v Minister of Home Affairs* 2010 ZASCA 9; *Hassani v Minister of Home Affairs* 01187/10 (SGHC) [unreported]; *Kibanda Hakizimana Amadi v Minister of Home Affairs* 19262/10 (SGHC) [unreported]; and *Jean Paul Ababason Bakamundo v Minister of Home Affairs and 2 Others* 17217/09 (SGHC) [unreported]. In chapter four (below) some of these cases will be discussed.

⁵⁴ Refugees Act s 22(1).

and the country's international obligations.⁵⁵ This permit should be issued to all asylum seekers as soon as they intimate that they intend to apply for asylum.⁵⁶ The purpose of this protection is to avoid *refoulement* of asylum seekers who fall foul of the Immigration Act.

The application for asylum cannot be considered by the Refugee Reception Officer but should be handed over to the Refugee Status Determination Committee (RSDC)⁵⁷ which must process the application in terms of section 24 of the Refugees Act.⁵⁸ There are mechanisms built into this process such as the referral of RSDC decisions to the Standing Committee on Refugee Affairs (SCRA) and to the Director General of Home Affairs⁵⁹ to further protect asylum seekers by ensuring that deserving applicants are not wrongfully turned away.⁶⁰ An appeals process is also in place to ensure that asylum seekers have their claims adjudicated in a just and fair manner.⁶¹ The Refugees Act does not go further than this in protecting asylum seekers. There is no specific section in the Act that deals with the rights and obligations of asylum seekers. This is in sharp contrast with section 27 of the same Act which sets out the rights and obligations that are conferred by refugee status. The drafters of the Refugees Act have clearly overlooked the fact that asylum seekers are essentially left without a safety net similar to the one in section 27.⁶²

At the time of drafting in 1997, the legislature could not have anticipated that in 2012 there would be over five hundred thousand asylum seekers claiming refugee status in South Africa.⁶³ It is at this point that the courts have come in to ensure protection of the rights of asylum seekers from heavy handed State action such as unwarranted arrests and detention.⁶⁴ Under international law, asylum seekers enjoy the right against arbitrary or unnecessary

⁵⁵ Ibid.

⁵⁶ Refugee Regulations (Forms and Procedure) GN R 366 in GG 21075 of 06/04/2000. See also *Bula & others v Minister of Home Affairs & others* Para 75 – 78.

⁵⁷ Note that Refugees Amendment Act No. 12 of 2011 amended the Refugees Act 130 of 1998 to replace the Refugee Status Determination Officer (RSDO) with the Refugee Status Determination Committee (RSDC).

⁵⁸ Refugees Act s 24(3).

⁵⁹ Refugees Act s 25(1).

⁶⁰ *Bula and others v Minister of Home Affairs and Others* Para 68.

⁶¹ Refugees Act s 26.

⁶² *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (1) All SA 21 (SCA) Para 3. See also chapter 2.3 (below) for further discussion on section 27 rights.

⁶³ IRINAfrica "SOUTH AFRICA: "Harsher regime" for asylum seekers" available online at <<http://www.irinnews.org/report.aspx?reportid=94337>> (accessed on 09/02/2012).

⁶⁴ See the following High Court decisions: *AS & 8 others v Minister of Home Affairs* 2010/101 (SGHC) [unreported]; *Mustafa v Minister of Home Affairs and Others* 2010 ZAGPJHC 1 [unreported]; *Kibanda Hakizimana Amadi v Minister of Home Affairs* 19262/10 (SGHC) [unreported]; and *Mustafa Aman Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA).

detention just as all human beings do.⁶⁵ In terms of the UNHCR's Guidelines on the Detention of Asylum Seekers, the practice of detaining asylum seekers is declared to be inherently undesirable.⁶⁶ It goes against the spirit and purport of article 31(2) of the UN Refugee Convention⁶⁷ which obligates States to refrain from this practice. This prohibition is in place because asylum seekers, especially failed asylum seekers, have been known to spend lengthy periods in detention.⁶⁸

South African courts have maintained that the rights in the Bill of Rights apply to all people within South Africa.⁶⁹ The only exceptions are those rights conferred by citizenship.⁷⁰ Section 12(1) and section 35(2) of the Constitution clearly prohibit arbitrary detention or incursions on a person's liberty. The provisions will be discussed in greater detail later in the thesis (chapter 3).⁷¹ In terms of the Refugees Act itself, an asylum seeker may only be detained when his or her asylum seeker permit has been withdrawn by the minister in terms of section 22(6).⁷² This is a protection that is built in to give effect to the international rights that are accorded asylum seekers. These rights will be further discussed in chapter 4.

2.3. Refugees

Refugees command a special place in South African law. For purposes of this thesis, it is important to understand what the exact rights are that refugees are entitled to and how such rights have accrued to refugees in the first instance.⁷³ The discussion below is mainly around the rights of refugees and not the refugee status determination process. The right to seek and to enjoy asylum from persecution in another country is one of the rights enshrined in the Universal Declaration of Human Rights.⁷⁴ It has become a well-established principle of

⁶⁵ Universal Declaration of Human Rights Art 9.

⁶⁶ UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999) (1999) available online at <<http://www.refworld.org/docid/3c2b3f844.html>> (accessed on 13 October 2013) guideline 1.

⁶⁷ UN Convention Relating to the Status of Refugees Art 31(2).

⁶⁸ Weissbrodt *The Human Rights of Non-citizens* 147.

⁶⁹ *Lawyers for Human Rights & another v Minister of Home Affairs* 2004 (4) SA 125 (CC) Para 26. See also *Abdi and another v Minister of Home Affairs* 2011 (3) SA 37 (SCA) Para 20.

⁷⁰ *Lawyers for Human Rights & another v Minister of Home Affairs* Para 27: "When the Constitution intends to confine rights to citizens it says so."

⁷¹ See chapter 3.4.1 and 3.5.2 (below).

⁷² Refugees Act ss 22(6) and 23.

⁷³ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) Para 99: "To understand the special position of refugees, it is important to understand how refugee status is conferred in our law, as well as South Africa's international obligations in respect of refugees."

⁷⁴ Universal Declaration of Human Rights Art 14(1).

international law and also appears in several other international and regional treaties.⁷⁵ South African law places an obligation on the State not to extradite, expel or return a refugee to any country if such action would see the person being subjected to “persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group”⁷⁶ in the other country. This principle is embodied in section 2 of the Refugees Act which ensures that refugees enjoy asylum in South Africa without hindrance. It encompasses both the “seeking” and “enjoyment” of asylum. The right to seek asylum has already been dealt with in the section on asylum seekers (above) and in this section the enjoyment of refuge (sojourn) is the topic of discussion. Once a person’s claim for asylum has been approved, he or she becomes a recognised refugee and the prohibitions on State action outlined in section 2 of the Refugees Act apply. That person should enjoy an undisturbed stay in the country free from the threat of extradition or expulsion to the country from which they have fled or any other country where their life may be threatened.

The question then, is who is a refugee and how does one qualify for such status. The most commonly used definition is to be found in the UN Refugee Convention.⁷⁷ The following criteria are established: (1) such a person should be outside his or her country of nationality and (2) should be unable to return to this country of nationality or unwilling to do so owing to (3) a well-founded fear of persecution for reasons of race, religion, political opinion or membership of a certain social group.⁷⁸ For a stateless person to qualify for international protection under the UN definition, such person needs to be outside his/her country of habitual residence.⁷⁹

Section 3(a)⁸⁰ of the Refugees Act gives effect to this UN Refugee Convention definition of who qualifies as a refugee in South Africa. The Act further recognises the fact that South Africa is signatory to the OAU (AU) Convention Governing the Specific Aspects of Refugee

⁷⁵ Weissbrodt *The Human Rights of Non-Citizens* 153. See the following: Charter of Fundamental Rights of the European Union (2000) OJ C 364/01 Article 18; Organisation of American States (OAS) Cartagena Declaration on Refugees (1984) OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85); OAU (AU) Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 1001 U.N.T.S. 45, entered into force June 20, 1974.

⁷⁶ Refugees Act s 2.

⁷⁷ UN Convention Relating to the Status of Refugees (1951) Art 1A(2).

⁷⁸ Jens Vedsted-Hansen “Refugees, Asylum Seekers and Migrant Workers” in C Krause and M Schenin (eds) *International Protections of Human Rights: A Textbook* (2009) 301- 321 303. See also Weissbrodt *The Human Rights of Non-Citizens* 153.

⁷⁹ Ibid.

⁸⁰ Refugees Act s 3.

Problems in Africa and in section 3(b)⁸¹ includes the definition found in that document.⁸² There is a difference between the two definitions. The AU Convention makes provision for an objective inquiry into conditions prevailing in the applicant's country of origin, thus making it more suitable for cases of forced mass movements of people (e.g. the Great Lakes region), whereas the UN Convention requires a subjective test focusing on the individual applicant.⁸³ There is no need to demonstrate a "well-founded fear of persecution" under the AU Convention; it is sufficient that the country of origin is subjected to foreign aggression, occupation or domination resulting in serious public disorder.⁸⁴ Therefore under the AU Convention, people can be granted asylum in large groups without subjecting them to the individual screening as required by the UN Convention.⁸⁵

Most countries are reluctant to admit refugees into their territories and use the subjective determination found in the UN Convention rather than admit thousands of people into their territories. According to UNHCR planning figures, between 1994 and 2012, South Africa has recognised close to 72,000 refugees from all over the world. It is, moreover, estimated that there are about half a million asylum seekers still awaiting adjudication of their claims.⁸⁶ This shows that the country's refugee population is relatively low in comparison to the asylum seekers and the citizenry in general. The system of refugee status determination in South Africa involves an interview between the claimant and the RSDC.⁸⁷ This is an administrative process and therefore falls under the purview of section 33 of the Constitution which

⁸¹ Refugees Act s 3(b).

⁸² OAU (AU) Convention Governing the Specific Aspects of Refugee Problems in Africa Art 2.

⁸³ Weissbrodt *The Human Rights of Non-Citizens* 161.

⁸⁴ Paul Kuruk "Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees" (1999) 35 *Stan J Int'l L* 313 325.

⁸⁵ Weissbrodt *The Human Rights of Non-Citizens* 161. See also Inter-Parliamentary Union (IPU) *Refugee Protection: A Guide to International Refugee Law* (2001) available online at <http://www.ipu.org/pdf/publications/refugee_en.pdf> (accessed on 09/01/2012) 13.

⁸⁶ United Nations High Commissioner for Refugees (UNHCR) "2012 UNHCR Country Operations Profile - South Africa" (2012) available online at <<http://www.unhcr.org/pages/49e485aa6.html>> (accessed on 09/02/2012). See also Tara Polzer *Population Movements in and to South Africa* (2010) FMSP Migration Fact Sheets available online at

<http://www.migration.org.za/sites/default/files/policy_documents/2010/FMSP_Fact_Sheet_Migration_in_SA_June_2010_doc.pdf> (accessed on 29/01/2012) for 2009 figures in order to have an understanding of the progression of numbers over the last ten years.

⁸⁷ See generally Refugees Act s 24 and particularly s 24(3). See also Refugee Regulations (Forms and Procedure) GN R 366 in GG 21075 of 06/04/2000 – Reg 10:

"10. Hearing Before Refugee Status Determination Officer

1) In complying with the provisions of section 24 of the Act, the Refugee Status Determination Officer will conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented."

guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.⁸⁸ The definition of a refugee found in section 3(a) of the Act is the one that the RSDC relies on in these interviews. The regulations under the Refugees Act call for a case by case individualised determination of each applicant's claim which is in line with the subjective test in section 3(a) of the Refugees Act.⁸⁹ On the other hand, the definition in section 3(b) is the more objective one that relies entirely on external factors that are discernible from events occurring in the asylum seeker's country of origin such as "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country."⁹⁰ The reception and accommodation of asylum seekers who enter the country in these circumstances are provided for in section 35 of the Refugees Act which deals with procedures to be followed in the event of a mass influx.⁹¹ In this case, there are no individual case by case determinations – instead the Minister may declare a group of people either conditionally or unconditionally to be refugees by proclamation in the gazette.⁹²

Once an asylum seeker meets the requirements and satisfies the RSDC that their claim is legitimate as set out in the Refugees Act, that person may be granted refugee status in South Africa and is subject to all the protections that are set out in domestic and international law. This raises the question: what are the rights and obligations of a recognised refugee? In the UN Refugee Convention, there are several rights that are set out that apply to recognised refugees. These rights fall into four groups.⁹³ The first are rights which guarantee refugees the same privileges as nationals of the host country. In this category, the rights include freedom of religion,⁹⁴ access to education,⁹⁵ access to public relief and assistance,⁹⁶ protection provided by social security,⁹⁷ access to courts and legal assistance,⁹⁸ equal taxation,⁹⁹

⁸⁸ Constitution of South Africa s 33. See also Refugees Act s 24(2).

⁸⁹ Refugee Regulations (Forms and Procedure) Reg. 12 –

"Eligibility - Determinations And Service Of Decisions:

1) With exception of cases decided under section 35(1) of the Act, each eligibility determination will be made on a case-by-case basis, taking into account the specific facts of the case and conditions in the country of feared persecution or harm."

See also Weisbrodt *The Rights of Non-citizens* 153.

⁹⁰ See the AU/OAU Refugee Convention Art 1(2).

⁹¹ Ibid.

⁹² Refugees Act s 35(1).

⁹³ Weisbrodt *The Rights of Non-citizens* 161.

⁹⁴ Art 4.

⁹⁵ Art 22(1).

⁹⁶ Art 23.

⁹⁷ Art 24.

protection of literary, artistic and scientific work as well as intellectual property.¹⁰⁰ The second group of rights obligates the State to treat refugees as they do nationals of other countries by providing them with the most favourable treatment accorded to nationals of a foreign country in the same circumstances. This treatment is applicable to the right to join trade unions, to belong to non-political non-profit organisations,¹⁰¹ as well as to engage in wage earning jobs.¹⁰² The third group requires State Parties to “accord to a refugee treatment as favourable as possible as and in any event not less favourable than that accorded to aliens.”¹⁰³ This treatment is with respect to the rights to own property,¹⁰⁴ practise a profession,¹⁰⁵ self-employment,¹⁰⁶ access to housing and access to higher education.¹⁰⁷ The fourth group of rights obligates States to “accord refugees the same treatment as is accorded to aliens generally.”¹⁰⁸ The rights in this category are the rights of refugees to choose their place of residence and to move freely within the country.¹⁰⁹ According to Sachs J, “[i]n totality, these obligations constitute a coherent and enforceable legal regime for refugees that is markedly more favourable than the discretionary regime generally applicable to immigrants.”¹¹⁰

The drafters of the Refugees Act were concerned about the treatment that asylum seekers and refugees would receive under the new legislative framework and this is what informed the decision to incorporate certain rights guaranteed under the 1951 Convention into the Refugees Act.¹¹¹ The right to *non-refoulement* is by and large the most important right for any refugee because this right ensures that he or she remains within the country under its

⁹⁸ Art 16.

⁹⁹ Art 29.

¹⁰⁰ Art 14.

¹⁰¹ Art 15.

¹⁰² Art 17.

¹⁰³ Arts 15 and 17.

¹⁰⁴ Art 13.

¹⁰⁵ Art 19.

¹⁰⁶ Art 18.

¹⁰⁷ Art 22(2).

¹⁰⁸ Weisbrodt *The Rights of Non-citizens* 161, Art 7(1).

¹⁰⁹ Art 26.

¹¹⁰ *Union of Refugee Women and Others v Director, Private Security Industry* Para 135.

¹¹¹ Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren “Talking a New Talk: A Legislative History of the Refugees Act 130 of 1998” in Jeff Handmaker, Lee Anne de la Hunt A and Jonathan Klaaren *Advancing Refugee Law in South Africa* (2008) 47 – 86 53. See also TR Smith “*The Making of the South African (1998) Refugees Act: Consultation Compromise and Controversy*” (2003) 5 Wits Forced Migration Working Paper Series, 1 – 37, where the author notes that under the second draft of the Refugees Bill, there was no departure from the way the DHA was operating at that time, e.g. “The Minister was still empowered to impose whatever conditions he saw fit when issuing asylum seekers and refugees with permits.”

protection without fear of being returned, expelled, or extradited.¹¹² Chapter 5 of the Act incorporates the right to freedom of movement, security from expulsion,¹¹³ freedom from arbitrary arrest and detention¹¹⁴ and dignity. Section 27(b) states that refugees enjoy the full legal protection which includes the rights set out in Chapter Two of the Constitution.¹¹⁵ The rights in question are those that apply to “all persons” and not those reserved for just “citizens.”¹¹⁶ Section 27 further entitles refugees to apply for permanent residence, identity documents and South African travel documents, and to seek employment, basic health services and basic primary education.¹¹⁷ Section 28 lays out the rights refugees enjoy should their removal from the country be contemplated, and stipulates that the only grounds for such removal are national security or public order.¹¹⁸ Section 29 restricts the state's powers to detain refugees and subjects any such decision to judicial oversight.¹¹⁹ The rights of unaccompanied children and mentally disabled persons are provided for in section 32 of the Act.¹²⁰

The South African courts have recognised that refugee status is a juridical fact of significance and pursuant to being granted international protection, a panoply of rights accrue to the refugee, some of which have been discussed above.¹²¹ The courts see refugees as a vulnerable group of people in need of compassion and special treatment.¹²² The rights accorded to refugees in the Refugees Act should be seen as South Africa's efforts to meet its international obligations “to receive and treat in its territory refugees in accordance with the standards and principles established in international law.”¹²³ In the *Union of Refugee Women* case the court stressed that wherever there are conflicting interpretations of provisions in the Refugees Act, preference should as far as reasonably possible be given to a meaning which is consistent with South Africa's international obligations.¹²⁴ It relied in this regard on section 233 of the

¹¹² Refugees Act s 2.

¹¹³ S 2.

¹¹⁴ S 29.

¹¹⁵ S 27(b).

¹¹⁶ TR Smith “The Making of the South African (1998) Refugees Act: Consultation Compromise and Controversy” (2003) 5 *Wits Forced Migration Working Paper Series* 1 – 37 15 and 17.

¹¹⁷ Refugees Act s 27.

¹¹⁸ S 28.

¹¹⁹ S 29.

¹²⁰ S 32.

¹²¹ Paul Kuruk (1999) 35 *Stan J Int'l L* 320. See also Consortium for Refugees and Migrants in South Africa (CoRMSA) Briefing Paper *in the Matter Of: Lieutenant-General Faustin Kayumba Nyamwasa's Presence in South Africa* (2010) available online at <www.cormsa.org.za> (accessed on 09/02/2012).

¹²² *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority* Para 28.

¹²³ Refugees Act Preamble.

¹²⁴ *Union of Refugee Women v Director, Private Security Industry* Para 106.

Constitution.¹²⁵ It is apparent from the foregoing that South African authorities must give effect to the rights of refugees as contained in international legal instruments and customary law, in other words there can be no abrogation of the rights without just cause.

The end result however is that the rights that accompany refugee status should be seen as being akin to those granted to citizens or permanent residents.¹²⁶ The minority judgment in the *Union of Refugee Women* case held that refugees are in closer proximity to permanent residents than to any other class of immigrant.¹²⁷ The same minority judgment addressed the issue of negation of these very same rights and held that discrimination on the ground of refugee status violated the dignity of refugees or impaired their rights in a serious manner.¹²⁸ The judgment held that threats to refugee rights include xenophobia, a manifestation of which leads to gross human rights infringements.¹²⁹ However, the majority judgment per Kondile AJ was not so sympathetic. Although the judgment confirmed that refugees are a vulnerable group in South African society, it did not find that excluding them from certain areas of the employment market on the grounds that they were less trustworthy than citizens, constituted an infringement of their rights under section 9(3).¹³⁰ The court also found that the security of the public justified the requirement that foreign nationals who were not permanent residents be treated as being *prima facie* untrustworthy when it came to applying for security jobs.¹³¹ They needed to prove their trustworthiness first before qualifying for jobs.

¹²⁵ Constitution of South Africa s 39 and s 233.

¹²⁶ *Union of Refugee Women and Others v Director, Private Security Industry* Para 99 per Mokgoro and O'Regan JJ:

"Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only. Permanent residents have a right to reside in South Africa and enjoy 'all the rights, privileges, duties and obligations' of citizens save for those which a law or the Constitution explicitly ascribes to citizenship. Recognised refugees also have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act so their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all."

See also P de Vos "CC Drifting to the Right?" *Constitutionally Speaking* available online at <<http://constitutionallyspeaking.co.za/cc-drifting-to-the-right>> (accessed on 15/02/2012).

¹²⁷ Para 99.

¹²⁸ Para 117. However, the majority held that in this case there was not a violation of refugees' dignity, and accordingly s 9(3) of the Constitution had not been infringed.

¹²⁹ Para 143.

¹³⁰ Para 38.

¹³¹ Cathi Albertyn "Beyond Citizenship: Human Rights and Democracy" in Shireen Hassim, Tawana Khupe, and Eric Worby (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* (2008) 175 186.

It is important that the international and domestic legal system that protects refugees and asylum seekers be rigorously and robustly developed and guarded to give full effect to the rights contained therein. The majority judgment could have progressively interpreted the international law provision which provides that refugees should be treated like other non-nationals “in the same circumstances.”¹³² According to the minority judgment, refugees were in the same circumstances as permanent residents and had to be treated as such. The minority judgment disagreed with the majority's view saying one could not generalise by assuming all non-permanent resident foreign nationals were less trustworthy than South Africans since there was no evidence on which to base such an assumption.¹³³ The dissenting judges understood that the Court's equality jurisprudence is based on a substantive notion of equality that looks at the actual impact of the different treatment on the complaining group.¹³⁴ The majority judgment suggests that it is “in access to jobs and resources for the poor that divisions between insider and outsider are more keenly felt.”¹³⁵ In her analysis of the 2008 xenophobic attacks, Cathi Albertyn writes that the contrast between the majority and minority judgments are testimony to the precarious nature of the Constitution's promise of a better society, making it easy to undermine the constitutional vision of a democratic, universalist and egalitarian society. In chapter 5, xenophobia will be discussed in a more detailed fashion, laying out the causes and responses to its manifestations.¹³⁶

2.4. Migrants

In terms of international law, a non-citizen refers to any individual who is not a national of a State in which he or she is present.¹³⁷ Apart from refugees and asylum seekers, non-citizens consist of migrant workers, foreign students, business visitors, tourists and undocumented

¹³² UN Refugee Convention Art 17: Wage-earning employment:

“1. The Contracting State shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”

¹³³ Albertyn “Beyond Citizenship” in *Go Home or Die Here* 186.

¹³⁴ P de Vos “CC Drifting to the Right?” *Constitutionally Speaking* (2006) available online at <<http://constitutionallyspeaking.co.za/cc-drifting-to-the-right>> (accessed on 15/02/2012).

¹³⁵ Albertyn “Beyond Citizenship” in *Go Home or Die Here* 187.

¹³⁶ See chapter 5 (below) for a discussion on xenophobia.

¹³⁷ UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live (1985) G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53.

migrants or “illegal foreigners.”¹³⁸ One of the assumptions of this thesis is that despite the existence of an extensive framework of migrants and non-citizens’ rights, there is a disjuncture between the guaranteed rights and the realities that face non-citizens.¹³⁹ Xenophobia which is discussed in chapter 5 leads to denying non-citizens their rights and access to justice which are guaranteed in domestic and international law.¹⁴⁰ In this section the international and domestic definitions and human rights of migrants other than refugees and asylum seekers will be discussed.

The overarching international instrument for the protection of human rights remains the Universal Declaration of Human Rights¹⁴¹ and the various ancillary treaties protecting specific categories of rights. These include the International Covenant on Civil and Political Rights (ICCPR)¹⁴² and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹⁴³ amongst others.¹⁴⁴ Since these instruments apply to all human beings, they extend across the board to apply to both citizens and non-citizens.¹⁴⁵ The rights in the ICCPR protect *everyone* from arbitrary arrest and detention;¹⁴⁶ arbitrary killing;¹⁴⁷ and torture and inhuman treatment.¹⁴⁸ The UN Human Rights Committee has stated that as a general rule, rights in the ICCPR apply to all citizens and non-citizens alike.¹⁴⁹

¹³⁸ This terminology comes from the Immigration Act s 32. It was contested at the time of drafting by the South African Human Rights Commission who felt it was offensive and objectified the persons concerned - see in this regard South African Human Rights Commission (SAHRC) *Submission on the draft Immigration Bill* (2002) available online at

<<http://www.sahrc.org.za/home/21/files/7%20SAHRC%20Submission%20on%20Immigration%20Bill%20%28P%20%29%20April%202002.pdf>> (accessed on 10/06/2013).

¹³⁹ Weissbrodt *The Human Rights of Non-Citizens* 2.

¹⁴⁰ *Ibid* 3.

¹⁴¹ Universal Declaration of Human Rights (1948).

¹⁴² International Covenant on Civil and Political Rights (1966) UN Doc A/6316; adopted by the UN General Assembly on 16 December 1966 and came into force on 23 March 1976. South Africa ratified the ICCPR in 1994.

¹⁴³ Adopted by the UN General Assembly on 21 December 1965 and came into force on 4 January 1969.

¹⁴⁴ See the following treaties: African Charter on Human and People’s Rights (ACHPR); Convention on the Rights of the Child (CRC) res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc A/44/49 (1989); Convention on the Elimination of all forms of Discrimination against Women (CEDAW) G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46; and the UN Convention against Torture (UNCAT); and the International Covenant on Economic, Social and Cultural Rights (ICESCR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S.3. All these treaties have been ratified by South Africa and contain similar protections applicable to all, including migrants.

¹⁴⁵ Universal Declaration of Human Rights Art 2; International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Art 1.

¹⁴⁶ International Covenant on Civil and Political Rights (ICCPR) Art 9.

¹⁴⁷ Art 6.

¹⁴⁸ Art 7.

¹⁴⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant (1986) available online at <<http://www.refworld.org/docid/45139acfc.html>> (accessed on 13/10/2013), adopted at the Twenty-seventh session of the Human Rights Committee on 11 April 1986 Para 2:

Another international instrument of importance is the United Nations Convention on the Rights of the Child (CRC).¹⁵⁰ The CRC is the most comprehensive existing international legal instrument for the protection of the human rights of children.¹⁵¹ States are obligated to respect and protect these rights without discrimination, irrespective of the child's parents' or legal guardian's race; colour; sex; language; religion; political or other opinion; national, ethnic or social origin; property; disability; birth; or other status.¹⁵² In essence, children entering a country do so cloaked in the rights found in the CRC. The citizenship of the child is therefore irrelevant and the most important determining factors in matters concerning the child are the "best interests of the child."¹⁵³ The rights in this instrument are implicated when dealing with migrant, refugee or asylum seeker children, especially those classified as unaccompanied minors.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the UN's anti-racism convention which provides for the same panoply of rights that are found in the Universal Declaration and ICCPR, although it is specifically targeted at discrimination based upon *inter alia* race and nationality.¹⁵⁴ Although Article 5 of ICERD obligates States to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights,¹⁵⁵ the Committee on the Elimination of Racial

"Thus, the general rule is that each of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant."

¹⁵⁰ UN Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

¹⁵¹ P Ceriani Cernades *The Human Rights of Children in the Context of Migration: Perspectives from the South* (2012) unpublished paper presented at the International Interdisciplinary training programme *Human Rights for Development* hosted by the Flemish Interuniversity Research Network on Law and Development (LAW&DEV) and the Children's Rights Knowledge Centre (KeKi) at the University of Antwerp, 22/08/2013 (copy on file with author).

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination Against Non-Citizens (2002) available online at <<http://www.refworld.org/docid/45139e084.html>> (accessed on 13/10/2013). The committee recommended that State Parties should "ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens."

¹⁵⁵ ICERD Art 5.

Discrimination had issued a general recommendation placing an obligation on States to guarantee equality between citizens and non-citizens in the enjoyment of these rights.¹⁵⁶

A multilateral treaty that deals specifically with the rights of non-citizens is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Migrant Worker Convention [CMW]).¹⁵⁷ This convention provides an internationally approved definition of who constitutes a migrant worker. That definition describes a migrant worker as a person who engages in remunerated work or someone who is to engage in such work in a country other than his or her own.¹⁵⁸ This Convention does not confine itself to labour related matters, but contains general human rights protections that specifically target migrant populations. Importantly, it extends protection to migrant workers *and their families*. The rights covered by this treaty are fundamental human rights that protect the life and dignity of all migrants and *their families* irrespective of immigration status.¹⁵⁹ There are other international treaties that try to address rights of migrant workers but these tend to limit applicability to documented workers only.¹⁶⁰

Although South Africa is not a party to the UN Migrant Worker Convention, it is of importance because this Convention now forms part of international law, provides a definition of migrant workers, and extends protection to family members irrespective of whether they are migrant workers in their own right. In terms of section 39(1)(b) of the

¹⁵⁶ CERD General Recommendation XXX, Para 5.

¹⁵⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), adopted by General Assembly on 18 December 1990 and entered into force 1 July 2003 (hereinafter referred to as UN Migrant Worker Convention or CMW). South Africa is not a party to this Convention.

¹⁵⁸ CMW Art 2.

¹⁵⁹ The UN Migrant Workers Convention extends the following rights, inter alia, to all migrant workers and their families irrespective of legal status in the country: right to life (art 9); freedom from torture and ill treatment (art 10); non-discrimination (art 7); freedom of opinion and expression (art 13); freedom from arbitrary or unlawful interference with privacy, family, home or communications (art 14); liberty and security of the person (art 16); right to be treated with humanity where liberty has been withdrawn (art 17); fair hearing by competent and independent tribunal (art 18); no destruction of travel or identity documents (art 21); right to consular and diplomatic assistance (art 23); recognition of a non-citizen as a person under the law (art 24); and no collective expulsion without fair and due individualised processes (art 22). See also Weissbrodt *The Human Rights of Non-Citizens* 185-186. However, the CMW does reserve some rights specifically for documented migrants so as not to be seen as encouraging irregular migration.

¹⁶⁰ It is not necessary for purposes of this thesis to discuss the two ILO conventions adopted prior to the UN Migrant Workers Convention, namely the Migration of Employment Convention (Revised) (ILO No. 97 of 1949) and the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143 of 1975). Suffice it to mention that there have been numerous attempts to guarantee the rights of migrant workers and their families at an international level. See also Weissbrodt *The Human Rights of Non-Citizens* 184.

Constitution there is a mandate for courts, tribunals or forums to consider international law when interpreting the Bill of Rights. According to Dugard the term “international law” has been interpreted to allow recourse to treaties such as the European Convention on Human Rights to which South Africa is not a party.¹⁶¹ From this interpretation of section 39, it seems that South African judges can draw on the entire field of international human rights law even where South Africa has not signed or ratified a particular treaty. This includes international customary law, other international conventions which establish rules recognized by State Parties and the general principles of law recognized by civilized nations.¹⁶² South Africa may not be a party to the UN Migrant Worker Convention but this interpretation of section 39(1) makes it worth considering whenever rights of non-citizens as contained in the Bill of Rights are implicated. Along this same vein, when interpreting legislative provisions, section 233 of the Constitution requires courts to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”¹⁶³ These constitutional provisions have given prominence to South Africa’s international human rights obligations.

Within South Africa, the first and foremost legal document protecting the human rights of non-citizens is the Bill of Rights in the Constitution.¹⁶⁴ Most of the rights that are found in the international human rights treaties are embedded in the Bill of Rights. These rights include *inter alia* the rights to equality before the law;¹⁶⁵ human dignity;¹⁶⁶ life;¹⁶⁷ freedom and security of the person;¹⁶⁸ privacy of the home, property, communications and security of possessions from seizure;¹⁶⁹ freedom of movement;¹⁷⁰ administrative action that is lawful, reasonable and procedurally fair;¹⁷¹ access to the courts;¹⁷² and due process when detained.¹⁷³

¹⁶¹ John Dugard “International Law and the ‘Final’ Constitution” 1995 (11) *SAJHR*241 242.

¹⁶² DM Davis “Interpretation of the Bill of Rights” in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights*33.1.

¹⁶³ Constitution of South Africa s 233 – Application of international law:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

¹⁶⁴ Constitution of South Africa Chapter 2.

¹⁶⁵ S 9.

¹⁶⁶ S 10.

¹⁶⁷ S 11.

¹⁶⁸ S 12.

¹⁶⁹ S 14.

¹⁷⁰ S 21.

¹⁷¹ S 33.

¹⁷² S 34.

¹⁷³ S 35(2).

The rights included in this list are not reserved merely for citizens but apply to everybody. The influence of the above mentioned international treaties is apparent within the wording of some of the constitutional provisions.¹⁷⁴

Against the backdrop of these constitutional and international law human rights provisions, Parliament enacted the Immigration Act¹⁷⁵ to govern entry and departure from the Republic. A “foreigner” is defined as “. . . an individual who is neither a citizen nor a resident but is not an illegal foreigner.”¹⁷⁶ This definition excludes citizens and permanent residents from being classified as foreigners.¹⁷⁷ The Act recognises two distinct groups of migrants: first, “legal foreigners” who are in the country in terms of the provisions found within the Act, and secondly “illegal” foreigners who are in the country in contravention of the Act.¹⁷⁸ Further to this, legal foreigners are split into various categories based on the reasons for their entry and stay in the country. Upon application, a foreigner may be granted a temporary residence visa for purposes of work,¹⁷⁹ study,¹⁸⁰ visiting,¹⁸¹ uniting with relatives,¹⁸² applying for asylum,¹⁸³ medical treatment,¹⁸⁴ business¹⁸⁵ or diplomatic purposes¹⁸⁶ amongst others. On the other hand, illegal foreigners or undocumented migrants are split into those people that enter and reside in the country in contravention of the Act, and those who are declared prohibited and/or undesirable persons¹⁸⁷ in terms of the Act. The Act therefore contains the most authoritative legal definition of who is a foreigner (whether legal or illegal).

¹⁷⁴ Commentators have said that the international and regional human rights treaties played a large role in developing South Africa’s Bill of Rights, hence the provisions that call for the use of international law in the interpretation of the Bill of Rights and legislation. See Constitution of South Africa s 39(1)(b) and s 233. See Hennie Strydom and Kevin Hopkins "International law and International Agreements" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 1 2009) 30-12 30-14, who discuss the limited effect of non-binding international law sources save as a guideline. See also John Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide*(2004) 35-45.

¹⁷⁵ Immigration Act No. 13 of 2002.

¹⁷⁶ S 1(xvii).

¹⁷⁷ See s 27 of the Immigration Act for qualifications for permanent residence. For the definition of “citizen” see the South African Citizenship Act (No. 88 of 1995).

¹⁷⁸ S 1(xviii) states that “illegal foreigner” means “a foreigner who is in the Republic in contravention of this Act and includes a prohibited person.” See also *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* Para 4.

¹⁷⁹ S 19.

¹⁸⁰ S 13.

¹⁸¹ S 11.

¹⁸² S 18.

¹⁸³ S 23.

¹⁸⁴ S 17.

¹⁸⁵ S 15.

¹⁸⁶ S 12.

¹⁸⁷ S 29 and s 30. See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* Para 4.

The International Federation for Human Rights (FIDH) has identified three categories of “illegal foreigners” (or undocumented migrants) living in South Africa. The first refers to economic migrants who work in the country in an irregular situation;¹⁸⁸ the second to registered refugees who were dispossessed of their refugee certificate or were unable to renew it; and the third to undocumented asylum seekers who have not yet managed to properly register with the reception office and present a refugee claim¹⁸⁹ or whose applications have been rejected.¹⁹⁰ These are distinctly different groups of people but at times they are all just lumped together as “illegal foreigners.”

The Immigration Act, in stark contrast with the Refugees Act,¹⁹¹ does not contain a specific section outlining and detailing the rights of legal foreigners in South Africa. It does, however, contain a section dealing with the rights of permanent residents.¹⁹² The Act envisages certain rights and obligations flowing from the status of temporary residency, although these are not explicitly spelt out.¹⁹³ The Act encourages the promotion of a human rights based culture in respect of immigration control and also encourages the Department of Home Affairs to educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees, and conduct activities to combat xenophobia.¹⁹⁴ The consideration of rights of illegal foreigners in the first place is progressive, although these rights are mostly envisaged in the event of the arrest, detention and deportation of undocumented migrants.¹⁹⁵ The provision in section 44 of the Act that obliges State actors to report undocumented migrants but at the same time not to deny them services can be seen as a limited form of recognition of undocumented migrants’ rights.¹⁹⁶

¹⁸⁸ International Federation for Human Rights (FIDH) Report (2008) *Surplus People? Undocumented and other vulnerable migrants in South Africa* available online at <<http://www.fidh.org/Surplus-People-Undocumented-and>> (accessed on 09/02/2012) 10.

¹⁸⁹ International Federation for Human Rights (FIDH) Report 11.

¹⁹⁰ Weissbrodt *The Human Rights of Non-Citizens* 136.

¹⁹¹ S 27.

¹⁹² Refugees Act s 25 Permanent residence.

¹⁹³ s 1(xxxvii) states that “status” means “the permanent or temporary residence issued to a person in terms of this Act and includes the rights and obligations flowing therefrom, including any term and condition of residence imposed by the Department when issuing any such permits.”

¹⁹⁴ S 2(2)(e).

¹⁹⁵ S 34(1).

¹⁹⁶ S 44.

The Constitution itself declares that the provisions in the Bill of Rights apply to all people in South Africa unless a specific provision says otherwise.¹⁹⁷ The Constitutional Court has treated nationality as one of the analogous grounds of discrimination envisaged in the Constitution's non-discrimination clause, but has held that discrimination against non-citizens is not presumptively unfair. The Court said that discrimination on the grounds of nationality in some instances can be deemed as being unfair especially because citizenship is a status difficult to change.¹⁹⁸ With respect to non-citizen children, the courts have held that the Child Care Act¹⁹⁹ also applies to unaccompanied foreign children and has prohibited the Department of Home Affairs from detaining children in Lindela Holding centre.²⁰⁰ It is clear that at a domestic level the courts have made strategic interventions to extend the constitutional protections to both documented and undocumented migrants. This reflects the courts' recognition of the fact that non-citizens in general are a vulnerable group in need of special protection.²⁰¹

Although it is presumed that once a person is legally in the country, he or she can enjoy the rights conferred upon him or her by their status; this is not the case in practice. The Immigration Act in its current form encourages community enforcement in the policing of illegal entry into the country.²⁰² This means that, in addition to the police and immigration

¹⁹⁷ Constitution s 7(1): "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." See also *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* Paras 26, 27 and 79. See also *Killiko and Others v Minister of Home Affairs and others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

¹⁹⁸ *Larbi-Odam and others v MEC for Education (North-West Province) and another* 1998 (1) SA 745 (CC) Para 19 where the court quoted from the Canadian case of *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1, where it was said: "Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending." This essentially means that the court recognized that non-citizenship is a status affecting a minority of people within the population who, as a result, have no voice within the legal and socio-political system of the host country.

¹⁹⁹ Child Care Act [Act 74 of 1983].

²⁰⁰ *Centre for Child Law and another (Lawyers for Human Rights) v Minister of Home Affairs and Others* 2005 (6) SA 50 (T).

²⁰¹ *Larbi-Odam and Others v MEC for Education (North-West Province) and another*. See also *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* (with regard to refugees in particular).

²⁰² Immigration Act s 2(1):

"In the administration of this Act, the Department shall pursue the following objectives:

...

- b) facilitating and simplifying the issuance of permanent and temporary residences to those who are entitled to them and concentrating resources and efforts in enforcing this Act at community level and discouraging illegal foreigners."

officials,²⁰³ other State organs,²⁰⁴ private businesses,²⁰⁵ learning institutions²⁰⁶ and private individuals amongst others must always ascertain the status of anyone suspected of being a foreigner before engaging in any business with them. Such provisions are very intrusive and could mean that a foreigner does not enjoy a free and undisturbed sojourn within the country. The focus is shifted from border control to control by institutions and members of the community.²⁰⁷ Such an environment encourages vigilantism and this sooner or later degenerates into xenophobic witch-hunts.²⁰⁸ This environment of suspicion and control to ascertain the status or citizenship of the persons creates an unhealthy focus on undocumented migrants who are then constantly under suspicion. Ultimately, the mistreatment of undocumented migrants results in their alienation and criminalisation in the eyes of the community.²⁰⁹ The end result is that all foreigners, even documented migrants, are under constant suspicion and become targets for police harassment and xenophobia.²¹⁰

In essence the rights of non-citizens are infringed by the requirement of constantly having to verify their status at every turn for fear of arrest, detention and deportation. One of the most frustrating aspects for non-citizens is being on the wrong end of the immigration authorities. Enforcement is often done with blatant disregard for the procedural and substantive protections put in place by the Immigration Act.²¹¹ Once detained, very few detainees can afford private counsel, leaving most asylum seekers and other detained migrants with no recourse through which to exercise their basic rights.²¹² This is exacerbated by the fact that immigration detention has fewer safeguards than criminal detention and lacks external oversight and monitoring.²¹³

Mistreatment of foreign nationals has led to their personal security being threatened and violated in xenophobic attacks perpetrated by local communities. This will be discussed in

²⁰³ S 41.

²⁰⁴ S 44.

²⁰⁵ S 42.

²⁰⁶ S 39.

²⁰⁷ International Federation for Human Rights (FIDH) Report 20.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* 20.

²¹⁰ *Ibid.* 21.

²¹¹ Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2010) available online at <<http://www.lhr.org.za>> (accessed on 20/02/2012).

²¹² Lawyers for Human Rights *Monitoring Immigration Detention in South Africa* 3.

²¹³ *Ibid.*

later chapters when the state's role in protecting the rights of non-citizens against such threats and attacks is discussed.

2.5. Conclusion

In conclusion, it is clear from the above discussion that most of the fundamental rights that are guaranteed to South African citizens such as the right to life, human dignity and freedom and security of the person are equally guaranteed to all people within the country regardless of their nationality or legal status in the country. These rights come to South African law from well-established international treaties. Section 39(1) of the Constitution seeks to ensure that the values of the international human rights regime do percolate through the South African legal system, and most of the provisions in the treaties have been included in South African law, mostly through the Bill of Rights and Refugees Act.²¹⁴

Yet, at the same time the implementation of these rights is mostly haphazard and far from ideal. In fact, there seem to be constant violations of the human rights granted to various groups of non-citizens. The Refugees Act²¹⁵ establishes a legal framework parallel to but separate from the Immigration Act. This Act specifically sets out the only available procedures under which refugees and asylum seekers may be detained and/or deported.²¹⁶ The Act expressly states that no proceedings may be instituted or continued against a person who has applied for asylum in respect of his or her unlawful entry or presence in the country.²¹⁷ This is an express exclusion of the provisions of the Immigration Act from applying to asylum seekers. Yet in practice, the Department of Home Affairs routinely applies the Immigration Act to asylum seekers, thus excluding the protections contained in the Refugees Act.²¹⁸

²¹⁴ DM Davis "Interpretation of the Bill of Rights" in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 33.1.

²¹⁵ [No 130 of 1998].

²¹⁶ Refugees Act ss 21(4), 22(5), 22(6), 23 and 29 *inter alia*.

²¹⁷ Refugees Act s 21(4).

²¹⁸ Lawyers for Human Rights Report 29. This report lists several cases that have been brought before the High Court such as *Aruforse v Minister of Home Affairs and Others* 2010(6) SA 579 (GSJ); 2011 (1) SACR 69 (GSJ); *M B v Minister of Home Affairs and 2 Others* 2009/16312 (NGHC) [unreported]; *I M v Minister of Home Affairs and 2 Others* 2009/10697 (NGHC) [unreported]; *K J v Minister of Home Affairs and 2 Others* 2009/10003 (NGHC) [unreported]; *N M v Minister of Home Affairs and 2 Others*, 2009/10008 (SGHC) [unreported]. Some cases have gone as far as the SCA such as *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (1) All SA 21 (SCA).

CHAPTER 3: ACCESS TO JUSTICE FOR NON-CITIZENS LIVING IN SOUTH AFRICA

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3.0. Introduction

In this chapter the concept of access to justice will be briefly explored with particular reference to non-citizens. There are two main approaches to “access to justice”, namely a narrower and a wider perspective. The narrow perspective is concerned mainly with the

means for securing vested rights through the use of courts and tribunals, and thus focuses for the most part on procedural issues. The wider perspective is more focused on ensuring that legal and judicial outcomes are themselves just and equitable. In other words, the procedural rights should produce effective remedies. The research will show that both approaches to “access to justice” are of importance. Non-citizens in South Africa should be able to access justice for wrongs done to them as well as to vindicate other rights that work in their favour. This applies both to the victims of xenophobic crimes and to non-citizens who are subjected to incarceration for long periods of time or to wrongful deportation.

Once the term “access to justice” has been discussed, the obstacles faced by non-citizens in accessing justice will be looked at. The effect of these obstacles on the rights of non-citizens will be explored and analysed.

In the final part of the chapter, certain specific rights will be discussed which have an important bearing on access to justice for non-citizens. This discussion simply aims to introduce the rights that are important for purposes of this thesis, and the application of these rights in specific situations like immigration arrest and detention; deportation; and xenophobic crimes will be explored in greater depth in chapter 4 and 5 of this thesis. The following rights will be touched upon: freedom and security of the person, including freedom from all forms of violence and the right not to be treated or punished in a cruel, inhuman or degrading way;²¹⁹ the right not to be detained without the application of due process;²²⁰ the right to just administrative action;²²¹ and the right of access to courts.²²² It will be argued that these rights are central to the ability of non-citizens to access justice. They gain particular currency when viewed against the background of non-citizens’ struggles to gain the protection of rights that are, on the face of it, guaranteed to everyone, irrespective of nationality or immigration status, but that in practice are routinely denied to certain categories of non-citizens.²²³

²¹⁹ Constitution of South Africa s 12(1).

²²⁰ S 35(2).

²²¹ S 33.

²²² S 34.

²²³ Alice Bloch "The Right to Rights? Undocumented Migrants from Zimbabwe Living in South Africa" (2010) 44 (2) *Sociology* 233–250 233.

3.1. Defining access to justice

Access to justice is a contested concept and there are several definitions. According to one definition, it refers to individuals' access to fair, effective and accountable mechanisms for the protection of rights; control of abuse of power; and resolution of conflict.²²⁴ Others state that access to justice exists if people, including the poor and vulnerable, have the ability to make their grievances heard and to obtain proper remedies from State or non-State actors leading to redress of those injustices.²²⁵ Such redress is based on the rules or principles of state law, religious law or customary law in accordance with the rule of law.²²⁶ Another definition describes access to justice as the means of approaching or nearing justice or the passage through which justice is attained.²²⁷ An international definition comes from the United Nations Development Programme (UNDP), which states that access to justice is “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”²²⁸

These definitions of access to justice are in sync with the development of ways and means of overcoming obstacles faced by certain groups which prevent them from making use of the processes established to provide redress where their rights have been infringed or threatened.²²⁹ In South Africa, section 34 of the Constitution guarantees the right of everyone to have their day in court if they are involved in a dispute that can be resolved by application of law.²³⁰ The existence of courts or similar institutions for adjudication or conciliation is a vital, but by no means the only precondition for access to justice. Accompanying their existence should be enabling environments such as: public funding for legal advice and

²²⁴ World Bank Report *A framework for Strengthening Access to Justice in Indonesia* (2008) available online at <http://www.humansecuritygateway.info/documents/WORLDBANK_Indonesia_strengtheningaccesstojustice.pdf> (accessed on 03/09/2011).

²²⁵ Van Vollenhoven Institute *Access to Justice: The concept* (2010) available online at <<http://law.leiden.edu/organisation/metajuridica/vvi/research/access-to-justice/access-tu-justice/the-concept.html>> (accessed on 10/09/2011).

²²⁶ *Ibid.*

²²⁷ Olopade Olusoga Olopade *Access to Justice – Factors Militating Against and Solutions Thereto* (2004) unpublished paper presented at a conference on *Keeping Justice System Just and Accountable: A Principled Approach in Challenging Times* hosted by the International Society for the Reform of Criminal Law available online at <<http://www.isrcl.org/Papers/2004/Olopade.pdf>> (accessed on 10/09/2011) 1.

²²⁸ United Nation Development Programme (UNDP) *Programming for Justice: Access for All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2003) available online at <<http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/tools/index1.html>> (accessed on 16/03/2012) 5.

²²⁹ Jeremy McBride *Access to Justice for Migrants and Asylum Seekers in Europe* (2009) 6.

²³⁰ Constitution of South Africa s 34.

representation; special provision for class actions and public interest litigation; simplified procedures for small claims; and provision for more informal procedures such as alternate dispute resolution.²³¹

However, even this definition needs to be further supplemented. Some legal commentators claim that “access to justice” is much broader than the purely procedural approach articulated above.²³² Access to justice is seen as focusing on ensuring that legal and judicial outcomes are themselves just and equitable.²³³ The logic behind this reasoning is that mere access to courts and similar tribunals is inadequate if the eventual outcomes from such processes are unjust and inequitable. In terms of this broader approach, access to justice is also concerned with access to socio-economic and environmental rights as this approach is concerned with the substantive aspect of the law.²³⁴ In these instances, the law is used as an effective tool to achieve socio-economic rights through the employment of innovative remedies.²³⁵ South African courts have recognised that where a violation of a protected right is identified, the remedy to this infringement must be an effective one.²³⁶ Courts, tribunals and other similar bodies have an obligation to “forge new tools and shape innovative remedies, if needs be, to achieve this goal.”²³⁷ Access to justice should therefore be seen as the sum total of both the processes that one uses to arrive at effective remedies for infringements of rights as well as the remedies themselves. It can therefore be divided into different stages, commencing when an infringement occurs which causes a dispute to the moment when redress is provided.²³⁸ Only when the process is complete can one say that full access to justice has taken place. In light of this discussion, it is clear that access to justice is a fundamental right, as well as a primary means to defend other rights.²³⁹

²³¹ McBride *Access to Justice* 6.

²³² *Ibid* 7. See also the Access to Justice Round-Table Discussion on Access to Justice within the South African context (2003), hosted by the Human Rights and Governance Programme at the Open Society Foundation for South Africa in Johannesburg, available online at http://www.osf.org.za/File_Uploads/docs/File_Download.asp?ThisFile=Access_to_Justice_Roundtable_July_2003.pdf (accessed on 23/02/2012).

²³³ *Ibid*.

²³⁴ *Ibid*.

²³⁵ *Ibid* 7. See also UNDP *Programming for Justice* 3. The UNDP provides the following examples: “justice mechanisms are at times used as tools to overcome deprivation by ensuring, access to education by girls and minorities, or by developing jurisprudence on access to inter alia food and health.”

²³⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) Para 69.

²³⁷ *Ibid*.

²³⁸ UNDP *Programming for Justice* 6.

²³⁹ *Ibid* 3.

3.2. Obstacles to access to justice

Access to justice is one of the mainstays of the rule of law.²⁴⁰ Without access to justice the rule of law is undermined because only certain groups of people will be able to benefit from a particular law which means other sectors of society will not be equal beneficiaries.²⁴¹ In order to take steps towards universal access to justice, it is important that there be recognition of these disadvantaged and vulnerable sectors of the population.²⁴² It is essential to ask how it is that even where authentic democratically elected governments exist, poor and other marginalised population groups remain on the side-lines and powerless.²⁴³ Generally, the rights themselves are enshrined in international law and are usually incorporated into national laws and constitutions, yet they do not necessarily always benefit the vulnerable and poor sectors of society. South Africa is a classic example of such a State.

Available literature lists the following sectors of society as being the most vulnerable to restricted access to justice: the poor; non-citizens (migrants, refugees, asylum seekers and stateless persons); displaced persons; indigenous and minority groups; women; children; the elderly; the unemployed; and persons with disabilities.²⁴⁴ The reasons for this lack of access are myriad and include: poverty; living in poorly resourced areas; illiteracy; ignorance of existing means to access justice and fear of interacting with public officials.²⁴⁵ The reasons are closely aligned with the population groups listed above in the sense that these people normally exist at the margins of society. Due to their state of poverty, ethnic difference, nationality, disability and other grounds of disadvantage, they are discriminated against by the rest of society.

²⁴⁰ Glenda T Litong *Defining an Alternative Development Paradigm: Reducing Poverty and Ensuring Access to Justice through Legal Empowerment of the Poor* (2007) unpublished paper prepared for Economic, Social and Cultural Rights-Asia (ESCR-ASIA) in cooperation with GOP-United Nations Development Program – Fostering Democratic Governance and the University of the Philippines-National College for Public Administration and Governance (UP-NCPAG) available online at <http://www.scribd.com/doc/48758773/Access-to-Justice-by-Atty-Litong-UP-IHR> > (accessed on 27/10/2013) 8.

²⁴¹ McBride *Access to Justice* 5.

²⁴² *Ibid.*

²⁴³ The International Council on Human Rights Policy *Enhancing Access to Human Rights* (2004) available online at http://www.ichrp.org/files/reports/44/123_report_en.pdf > (accessed on 17/05/2012) 1.

²⁴⁴ *Ibid.* 1. See also *Fose v Minister of Safety and Security, Lawyers for Human Rights and another v Minister of Home Affairs* 2004 (4) SA 125 (CC); *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC); *The Union of Refugee Woman and Others v The Director: the Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC); Jeremy McBride *Access to Justice* (2009); Glenda T Litong *Defining an Alternative Development Paradigm: Reducing Poverty and Ensuring Access to Justice through Legal Empowerment of the Poor* (2007).

²⁴⁵ The International Council on Human Rights Policy *Enhancing Access to Human Rights* (2004) 2.

Disadvantaged people often pursue justice, but poverty and discrimination usually impede their ability to access the available remedies, making them more vulnerable to fundamental rights infringements.²⁴⁶ Their situation is worsened by lack of support from State and non-State actors when seeking redress for grievances.²⁴⁷ In cases where litigants are poverty stricken, costs associated with attending court and securing the services of a lawyer often militate against disadvantaged groups utilising the court system. This situation is exacerbated if the justice system is corrupt and bribes have to be paid to access justice.²⁴⁸ At times, there exists legal and institutional discrimination targeted at vulnerable population groups. A law itself may not necessarily be discriminatory but the over-arching system within which it operates could be prejudiced and biased against a disadvantaged group, thus leading to injustices.²⁴⁹ What also happens with disadvantaged groups is that State officials whose task it is to ensure that they access justice are insensitive to their plight or have no idea how to assist.²⁵⁰ The latter is usually due to officials not being aware of the particular needs of the group in question or being ill equipped to assist. In cases where groups are met with insensitivity, they will be hesitant to make use of such facilities or services in the future.

Another obstacle to accessing justice relates to the vast distance between the formal justice system and the realities faced by disadvantaged groups. Many persons are unaware of their rights or how to go about seeking justice when they are violated. There are several reasons for this. One such reason is that some people are illiterate and cannot comprehend the whole rights regime whilst others are new arrivals in the country.²⁵¹ The bottom line, however, is the failure of the State to conduct effective outreach programmes to inform people of their rights, including ways of receiving redress in cases of infringement. Closely aligned to this obstacle is the fact that in many countries formal systems of justice are rigid and formalised to the extent of being too complicated and unapproachable by ordinary folks. Examples include such formalities as the rules of court; prescription periods for claims; legal timeframes to file

²⁴⁶ *UNDP Programming for Justice* 156.

²⁴⁷ *Ibid.* See also DJ McQuoid-Mason "Access to Justice in South Africa" (1999) 17 *Windsor Yearbook of Access to Justice* 230.

²⁴⁸ *Ibid.* 157.

²⁴⁹ *UNDP Programming for Justice* 157. See also *Bula and others v Minister of Home Affairs and others* with particular reference to the court *a quo's* judgment; *Mustafa v Minister of Home Affairs and Others* 2010 ZAGPJHC 1; *Jeebhai v Minister of Home Affairs and another* 2007 (4) SA 294 (T); *Adela Mbalinga Akwen v The Minister of Home Affairs and another* 46875/07 [unreported case].

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.* See also David Weissbrodt *The Human Rights of Non-Citizens* (2008) 2-5.

documents; as well as complicated language used in formal institutions of justice delivery. These formalities are exacerbated by the physical inaccessibility of the institutions of justice such as court buildings, Chapter 9 institutions and other State watchdog bodies.

In some communities, authority figures are feared. In disadvantaged communities, this fear is accompanied by a lack of trust.²⁵² People not only believe that they are unlikely to receive any form of redress but also fear that their rights could be further violated.²⁵³ There are various reasons for this, including existing or perceived discrimination pervasive within a society or community where disadvantaged or minority groups live. A further obstacle compounding the situation of disadvantaged people is the fear of reprisal should they take on powerful and established institutions or figures which may be responsible for violating their rights.²⁵⁴ An example is where the police force or immigration department is responsible for the infringement. In such a case it becomes difficult to demand redress from the justice system because of the power that these institutions have over them. From the foregoing it is clear that, even though all human beings have inalienable and indivisible rights, disadvantaged and vulnerable groups face formidable obstacles in realising their rights.

3.3. Obstacles to access to justice faced by non-citizens

Non-citizens are generally at a disadvantage in that they do not know their rights and even when they are told about their rights, they do not know how to go about accessing the protection afforded by them.²⁵⁵ Despite the extensive framework of rights vesting in non-citizens (discussed in chapter 2), there exists a disjuncture between supposedly universal rights and the realities that non-citizens face on a daily basis.²⁵⁶ Nation States hold the common belief that national strength is derived from national culture, and that migrants generally challenge the cohesion of a nation.²⁵⁷ South Africa is no different – in times of economic downturn and general deprivation amongst communities, there is a sense that

²⁵² *UNDP Programming for Justice* 158.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Liz Curran and Mary Anne Noone "Access to Justice: A New Approach Using Human Rights Standards" (2008) 15(3) *International Journal of the Legal Profession* 195-229 198 note that "without confidence to exercise these rights and without the capacity or capability to seek or find help it is unlikely that people will realize their rights and accordingly access to justice is placed in question."

²⁵⁶ Weissbrodt *The Human Rights of Non-Citizens* 2-5. See also Bloch (2010) *Sociology* 233–250.

²⁵⁷ *Ibid.*

foreigners come to take away jobs and opportunities from locals. This feeds into anti-migrant sentiments and ratchets up hatred and distrust of foreigners leading to xenophobic tendencies and violence.²⁵⁸ Xenophobia serves to deny non-citizens access to justice and rights because of the negative sentiments that it breeds.

3.3.1. Lack of support from the State

Non-nationals lack support from the State and its organs in accessing justice. South Africa arrests more people for immigration violation than for any other reasons.²⁵⁹ Most of those arrested suffer human rights abuses, including physical torture and denial of access to legal representation, largely as a consequence of their vulnerable legal status in the country.²⁶⁰ Immigrants suspected of being undocumented are typically arrested, detained and deported, almost always without recourse to the procedural remedies contained in the Immigration Act.²⁶¹ Moreover, the South African Human Rights Commission found that a significant number of people arrested for immigration purposes, were not given reasons why they were being apprehended.²⁶² Although that report was released in 1999 under the repealed Aliens Control Act,²⁶³ it is still relevant today because practices have not changed.²⁶⁴ These practices are inconsistent with the duty of the State under the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.²⁶⁵ The State has failed, in this and other respects, to

²⁵⁸ Ibid. Speaking at a breakfast meeting for business leaders, responding to a question on why South Africa has such high levels of xenophobia and xenophobic violence, President Jacob Zuma confirmed these same reasons, although emphasizing that this was flawed reasoning. SABC News 17 May 2012.

²⁵⁹ Martin J Murray "Alien Strangers in Our Midst: The Dreaded Foreign Invasion and 'Fortress South Africa'" (2003) 37 (2/3) *Canadian Journal of African Studies / Revue Canadienne des Études Africaines* 440-466 453. See also South African Human Rights Commission (SAHRC) *Report into the Arrest and Detention of Suspected Undocumented Migrants* (1999) available online at <<http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>> (accessed on 28/05/2012); Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2010) available online at <<http://www.lhr.org.za>> (accessed on 25/05/2011).

²⁶⁰ Ibid.

²⁶¹ SAHRC Report (1999).

²⁶² Ibid 23.

²⁶³ Aliens Control Act [No. 96 of 1991].

²⁶⁴ *AS and 8 other v Minister of Home Affairs and 3 Others* 2010/101 (SGHC) [unreported]. After the applicants spent more than 4 months in administrative detention, the High Court declared their detention unlawful because the Department of Home Affairs failed to follow the correct administrative procedures when the family was first detained. The court importantly held that a warrant of detention that was not issued in accordance with procedural requirements of the Immigration Act, in this case within the correct time frame, could not legitimize, after the fact, a detention that was initially unlawful. See also Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2010).

²⁶⁵ Constitution of South Africa s 7(2).

comply both with its positive duty to ensure that arrested non-citizens have access to justice as enunciated in the Constitution and its negative duty not to impede their rights.

3.3.2. Poverty: the cost factor

Poverty has a negative effect on access to justice for non-citizens for obvious reasons associated with costs of access to the courts and other formal justice institutions. Poverty has even been used by the courts to deny justice to indigent non-citizens.²⁶⁶ A non-citizen was deemed too poor to be considered trustworthy and released from detention by the court. Although this line of thinking was subsequently overruled in the Supreme Court of Appeal²⁶⁷ and criticized in another High Court decision,²⁶⁸ the inconvenience of remaining in immigration detention would already have caused undue hardship for the litigant. In other matters, the government has tried to use court rules to deny access to the court by impecunious non-citizens.²⁶⁹ In *J.Alam v Minister of Home Affairs*,²⁷⁰ the State relied on the applicant's lack of money, domicile and asylum seeker status as reasons to ask the court to deny him access due to the fact that he could not raise R250, 000 for security for costs in terms of the High Court Rules. The court was dismissive of the State's case with Pickering J ruling that public interest considerations dictate that the applicant not be denied access to the justice system.²⁷¹ In this case, which was heard together with three other similar applications, the court held that as asylum seekers, the applicants were in a vulnerable position and it would not be "fair and just" not to excuse them from providing security for costs.²⁷²

²⁶⁶ *Mustafa Aman Arse v Minister of Home Affairs and 2 others*, 2009/52898 (SGHC) [unreported]. In this matter, Willis J held that while he "obviously has to have regard to the importance of a person having freedom, the court must also have regard to the practicalities that would arise in ordering the release of a person such as this", which was said in response to the applicant not having R2000 to pay as security to the court for his release, which is not a requirement for any other lawful asylum seeker in South Africa. Despite his lawful status as an asylum seeker, and the length of time already spent in detention, the High Court effectively dismissed his application because he is indigent. See also Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2010).

²⁶⁷ *Arse v Minister of Home Affairs and Others*[2010] 3 All SA 261 (SCA).

²⁶⁸ *Kanyo Aruforse v Minister of Home Affairs and 2 others*2010/01189 (SGHC) [unreported].

²⁶⁹ *J Alam v Minister of Home Affairs*3414/2010 (EHC) [unreported].

²⁷⁰ *Ibid.*

²⁷¹ *Ibid* 11.

²⁷² *Ibid* 11. The ruling also affected the following similar Eastern Cape cases: *Babul v The Minister of Home Affairs* 2704/10 (EHC) [unreported]; *Mohammed v The Minister of Home Affairs* 2781/10 (EHC) [unreported]; and *Nasir v The Minister of Home Affairs*3412/10 (EHC) [unreported].

3.3.3. Corruption within the system

Although the South African judiciary is not corrupt, the road leading up to the courts is littered with allegations of corruption, especially within the police services.²⁷³ The same is true for the Department of Home Affairs which has a negative reputation for corruption.²⁷⁴ The South African Police Services has also developed a similar reputation for corruption.²⁷⁵ Non-citizens (and at times locals who supposedly look foreign) are routinely arrested and money is extorted from them to secure their release. It is important to note that the Immigration Act requires, at the very least, that there must be reason to suspect that the person concerned is an illegal foreigner before arrest.²⁷⁶ In this instance, corruption motivates the arresting officers. In Chapter 4 (below), stopping and arresting non-nationals as a measure to control and enforce immigration laws will be further discussed with particular reference to section 41 of the Immigration Act.²⁷⁷

3.3.4. Legal and institutional discrimination

For most non-citizens, the laws of South Africa, in particular immigration laws promote discrimination and institutionalise this behaviour. Across the globe, States have increasingly opted for “internal” controls, involving the exclusion of undocumented migrants from government services and the arrest of undocumented migrants away from the border. South Africa has adopted a similar approach in its legislation.²⁷⁸ The immigration laws are designed to allow for community enforcement of immigration.²⁷⁹ This system focuses enforcement activities on the places where undocumented migrants work, interact with State organs or seek refuge and other resources necessary for their survival. This method of enforcement is designed to detect cases of non-citizens who encroach upon citizens' entitlements, and to

²⁷³ Themba Masuku "Targeting Foreigners Xenophobia among Johannesburg's Police" (2006) 15 *SA Crime Quarterly* 19-24 23. See also SAHRC Report (1999) 24.

²⁷⁴ SAHRC Report (1999) 24. See also Darshan Vigneswaran, Tesfalem Araia, Colin Hoag and Xolani Tshabalala "Criminality or Monopoly? Informal Immigration Enforcement in South Africa" (2010) 2(1) *Journal of Southern African Studies* 465-481 477-478.

²⁷⁵ SAHRC Report (1999).

²⁷⁶ *Lawyers for Human Rights v Minister of Home Affairs* Para 30.

²⁷⁷ See Chapter 4.2 (below).

²⁷⁸ Immigration Act ss 37 – 45.

²⁷⁹ Darshan Vigneswaran (Forced Migration Studies Programme) "Enduring Territoriality: South African Immigration Control" (2008) 27(7) *Political Geography* 783–801 784.

assist enforcement agencies to sanction and stop this behaviour.²⁸⁰ Ideally this constitutes a shift away from enforcement at places of origin and entry into South Africa, although in practice, resources limit the Department of Home Affairs and SAPS from effectively carrying out this mandate.²⁸¹ However the very existence of these laws has in practice meant that non-citizens, especially undocumented migrants, fear to approach formal establishments for any assistance whatsoever. Research has shown that government officials and civilians from across the South African society and professions who are empowered to restrict access to services and rights overstep the bounds of the law in order to exclude foreign nationals.²⁸² This is seen as constituting a second layer of informal defence behind that which is in place at the borders.²⁸³ One example would be the refusal by some banks to open accounts for non-citizens, including those that are documented.²⁸⁴ Whether this discriminatory behaviour is justifiable when viewed through the prism of the Constitution is neither here nor there because ultimately its effects are what matter. Service providers are disinclined to assist non-citizens without valid identity documents for fear of falling foul of the law.²⁸⁵ The opposite is true with regard to the non-citizens themselves. They will shy away from formal systems of access to justice and service providers.

3.3.5. The insensitivity of officials to the plight of non-citizens and their lack of knowledge on how best to assist them

In South Africa, there exists a general lack of understanding by locals of non-citizens and the converse is true on the part of non-citizens. This leads to generalised antipathy towards non-

²⁸⁰ Ibid 784.

²⁸¹ Ibid.

²⁸² Vigneswaran et al (2010) *Journal of Southern African Studies* 477.

²⁸³ Ibid.

²⁸⁴ International Federation for Human Rights (FIDH) Report *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa* (2008) available online at <<http://www.fidh.org/Surplus-People-Undocumented-and>> (accessed on 09/02/2012) 30. See also Vigneswaran et al (2010) *Journal of Southern African Studies* 478. See further Consortium for Refugees and Migrants in South Africa (CoRMSA) Report, *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* (2009) 1-121, available online at <<http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf>> (accessed on 02/05/2011), 25. See <http://www.capitecbank.co.za/downloads/Fica_brochure.pdf> (accessed on 03/11/2013). The following is an example from Capitec Bank's requirements to open accounts:

"FICA Identification needed to open accounts for Foreign nationals

- Foreign passport (valid, not expired)
- Permanent residence permit (temporary permits only accepted for foreign nationals employed as miners)
- Original salary slip or employment letter (on a company letterhead)
- Proof of residential address."

²⁸⁵ Immigration Act s 42 – Aiding and abetting illegal foreigners.

citizens causing legal and institutional discrimination against them, especially undocumented migrants.²⁸⁶ In many migrant receiving countries, xenophobia is deeply rooted and these feelings pervade throughout the State machinery including the police, legal system and judiciary. The resultant effect is the manifestation of stringent immigration policies or lack of protection for migrants.²⁸⁷ The SAPS has been the subject of research which shows that they view undocumented migrants mostly as being involved in crime.²⁸⁸ These views flow directly from the general xenophobic attitudes that they hold. The downside of holding such preconceived views about migrants is that they become pervasive against all non-citizens regardless of their legal status in the country. This affects professionalism, police conduct, efficiency, respect for the rule of law and the quality of service delivery, leading to increases in incidents of corruption, police criminality and violation of people's constitutional and human rights.

Such attitudes lead to insensitivity to the plight of non-citizens. An example is the *non-refoulement* of asylum seekers at some border posts. Generally border posts are staffed by immigration officials whose task is to administer the provisions of the Immigration Act on behalf of the Minister of Home Affairs. They tend to view all arrivals at the ports of entry through the lens of immigration control which mandates that all entrants into the country should be in possession of a valid travel document. Asylum seekers usually flee their homes with only the clothes they are wearing and therefore travel without the said documents. Most asylum seekers are seen as abusing the asylum system because they are, in the eyes of the DHA, economic migrants who are avoiding the more rigorous immigration system.²⁸⁹ It is for this reason that immigration officers at the ports of entry refuse to issue them with permits under section 23 of the Immigration Act.²⁹⁰ It becomes immaterial therefore that one is indeed a genuine asylum seeker as they are all painted with the same brush. South African courts have been very clear that only Refugee Status Determination Officers (RSDO) can adjudicate claims for asylum in South Africa, thereby expressly excluding immigration

²⁸⁶ UNDP *Programming for Justice* 168.

²⁸⁷ *Ibid.*

²⁸⁸ Masuku (2006) *SA Crime Quarterly* 22.

²⁸⁹ Lawyers for Human Rights Situation Report *Refoulement of Undocumented Asylum Seekers at South African Ports of Entry With a Particular Focus on the Situation of Zimbabweans at Beitbridge* (2011) available online <<http://www.lhr.org.za>> (accessed on 01/02/2012) 5.

²⁹⁰ *Ibid.*

officers and Refugee Reception Officers (RRO) from carrying out this function.²⁹¹ This highlights the general barriers to access to justice by asylum seekers due to the insensitivity of State officials who do not necessarily understand their plight.

Other examples of the insensitivity to the plight of non-citizens include detention of asylum seekers who are themselves fleeing persecution in their own countries. The Refugees Act²⁹² itself empowers the detention of asylum seekers only in certain circumstances.²⁹³ South African courts have discouraged the practice of detaining asylum seekers outside of these parameters.²⁹⁴ Generally if a person is seeking asylum, s/he should not be detained for being an undocumented immigrant. However, as already illustrated with reference to the cases mentioned above, immigration officers have routinely done just that. The Refugees Act sets out its own process of detention of asylum seekers separate from the system set out in the Immigration Act for detention of undocumented migrants. These two laws exist parallel to each other but of growing concern is the lack of distinction between the two by the SAPS and immigration officials, thus making it difficult for them to provide adequate and case sensitive assistance to non-citizens. (This will be further explored in chapter 4 of this thesis). Research has been done which ascribes the lack of knowledge as how best to assist non-citizens to poor and inadequate training of officials, especially during the transition from apartheid to democracy.²⁹⁵ In addition, for almost ten years post-independence, South Africa relied on the apartheid era Aliens Control Act with its exclusionary racial and xenophobic undertones.²⁹⁶ By the time the new Immigration Act (2002) and Refugees Act (1998) were promulgated, the

²⁹¹ *Bula and others v Minister of Home Affairs and others* Para 74. See also Paras 64 - 67, 70, 71 – 73. See further *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) Para 28, where the court said, "Potential asylum seekers and refugees ... are entitled to the assistance of the Department's officials and need show no more than that they are persons who might qualify as refugees or asylum seekers." There is no need therefore for the applicants to show that they *will* qualify for asylum.

²⁹² Refugees Act [No.130 of 1998].

²⁹³ Refugees Act s 22 (6) and s 23.

See also Regulations to the South African Refugees Act, GN R 366 in GG 6779 of 06/04/2000:

- "8(1) Failure to appear as specified in the permit or to otherwise comply with conditions specified in the permit, without *just cause*, may:
- a) constitute grounds for withdrawal pursuant to section 22(6) of the Act;
 - b) if the asylum seeker permit is withdrawn, subject the applicant to detention in terms of section 23 of the Act; and
 - c) subject the applicant to the provisions of section 22(7) of the Act."

²⁹⁴ *Bula and others v Minister of Home Affairs and others, Abdi and Another v Minister of Home Affairs and Others, Kibanda Hakizimani Amadi v Minister of Home Affairs and 2 others* 2010/19262 (SGHC) [unreported].

²⁹⁵ Colin Brewster Hoag Seeing *Like a Magical State Discretion: (De)Stabilization, and the Development of Street-Level Systems of Meaning at the South African Immigration Bureaucracy* MA thesis Witwatersrand (2009) 26.

²⁹⁶ *Ibid* 27.

Aliens Control Act had managed to ingrain a culture of security preservation and sovereignty that lingers on in the department of Home Affairs even up to today.²⁹⁷ In essence, the lack of sensitivity to the plight of non-citizens and the failure by State officials to adequately assist them in their quest to access justice is closely aligned to several factors, including xenophobia and inadequate training.

3.3.6. Non-citizens' lack of knowledge on their rights or the available remedies and processes for redress

Generally non-citizens do not assert their rights for fear of retribution from powerful local actors.²⁹⁸ They possess no political voice and thus cannot guarantee themselves legal protection.²⁹⁹ The resultant effect is a lack of means to challenge infringement of their rights.³⁰⁰ In most cases, non-citizens are new to the country and may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa.³⁰¹ The Constitutional Court in *Lawyers for Human Rights v the Minister of Home Affairs* noted that non-citizens have a very limited understanding of the South African legal system as well as the constitutional rights to which they are entitled.³⁰² The court further noted that they generally have a very remote chance of challenging a violation of their rights, mostly because they do not have the “resources, knowledge, power or will to institute appropriate proceedings.”³⁰³ Although in that case the court was dealing with non-citizens who had only just recently arrived in the country, this phenomenon is pervasive even in the case of those who have been resident in the country for longer periods.

Undocumented migrants in particular are the most vulnerable: their living conditions are substandard, they are constantly raided by authorities, arrested, detained, treated inhumanely once in custody and denied basic rights of detainees or arrested people.³⁰⁴ They generally stay as far away from the law as possible and attempt to become invisible to the State by evading

²⁹⁷ Ibid.

²⁹⁸ Weissbrodt *The Human Rights of Non-Citizens* 3.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ *Lawyers for Human Rights v Minister of Home Affairs* Para 21.

³⁰² Ibid.

³⁰³ Ibid Para 22.

³⁰⁴ Weissbrodt *The Human Rights of Non-Citizens* (2008) 3.

State regulations and circumventing State institutions.³⁰⁵ In cases where their rights are violated, their fear of deportation far outweighs their need to seek redress from the judicial system.³⁰⁶ Indeed the lack of interaction with the authorities often extends to isolation from the general South African population because undocumented migrants want to stay out of the spotlight as much as possible and are afraid that any altercation with citizens can expose them to notice by the SAPS who may arrest and detain them.

3.3.7. Inaccessibility of State justice institutions and actors

State institutions that dispense justice are not easily accessible to the majority of non-citizens. It is not merely the courts, police or immigration officials who are beyond the reach of most non-nationals, but also providers of socio-economic rights like hospitals and schools.³⁰⁷ This thesis is concerned more with civil rights than with socio-economic rights. However, as has already been noted, there is a concerted effort to squeeze out non-citizens from accessing State and other services.³⁰⁸ It should be pointed out that health care and basic education are rights that are without qualification as to citizenship or legal status in the country.³⁰⁹ Admittedly, the fact that one is undocumented does not in and of itself bar one from accessing these services, but the barrier is the list of rules and regulations placed on the service providers to keep records of non-citizens, whether documented or not.³¹⁰ These include the prohibition against the enrolment of undocumented students,³¹¹ as well as the prohibition against aiding and abetting undocumented migrants as defined in the Act.³¹² The resultant effect is that non-citizens begin to see both the State and private institutions as inaccessible. These barriers are not physical or caused by a lack of knowledge of the services to which one is entitled but are created through legislative action and practice.

An important aspect of access to justice is physical access to the justice institutions themselves or to the processes by which one can have a matter adjudicated. In the case of

³⁰⁵ Morten Lyng Madsen "Living for Home: Policing Immorality among Undocumented Migrants in Johannesburg" (2004) 63(2) *African Studies* 173-192 177.

³⁰⁶ Weissbrodt *The Human Rights of Non-Citizens* (2008) 3 - 5.

³⁰⁷ CoRMSA report (2009) 17 -22.

³⁰⁸ Vigneswaran (2008) *Political Geography*. See also Vigneswaran et al (2010) *Journal of Southern African Studies* 477-478.

³⁰⁹ Constitution of South Africa s 27 and s 29(1).

³¹⁰ Immigration Act s 40.

³¹¹ S 35.

³¹² S 42.

non-citizens, this access can take the form of access to the courts, judicial officers, immigration officers and lawyers. When a person is arrested, there are set procedures that must be adhered to in order to safeguard his/her rights. The procedures laid out in the criminal justice system are enshrined in both the Constitution and legislation.³¹³ Over time they have been tried and tested in South African courts and across different legal systems around the world. (In chapter 4 (below), the rights of persons who have been arrested and detained for immigration purposes will be discussed).³¹⁴ In the apartheid era, national security legislation allowed for people to be deprived of freedom without justification. This legislation took precedence over any common law or legislative safe-guards against arbitrary arrest and detention.³¹⁵ The same was true for immigration arrest and detention which under the Aliens Control Act³¹⁶ contained inadequate safeguards against arbitrariness.³¹⁷ The advent of the new Constitutional dispensation has seen more rights being given to arrested and detained persons. However, despite the existence of these rights, the police and immigration officers have often ignored them when arresting and detaining non-citizens for immigration purposes.³¹⁸

The abuse of process stems from the days of the repealed Aliens Control Act³¹⁹ that gave police and immigration officials wide discretionary powers to arrest anyone, anywhere and at any time. If a person was stopped and could not produce identity documents that were satisfactory to the particular officer, the officer could arrest such person as an undocumented migrant.³²⁰ Although that piece of legislation was replaced with one more compliant with the new constitutional order, the practice of arrest and detention continues almost without restriction.³²¹ The laid down procedures are of immense importance to non-citizens who find themselves at the wrong end of the immigration and/or refugee laws. Under the current system, the Constitution, the Promotion of Administrative Justice Act (PAJA)³²² and the Immigration Act provide a legal framework that protects the rights of non-citizens arrested

³¹³ Constitution of South Africa s 35.

³¹⁴ See generally the discussion in chapter 4 (below).

³¹⁵ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) Para 26.

³¹⁶ [No. 96 of 1991].

³¹⁷ SAHRC report (1999) 27.

³¹⁸ *Ibid.* See also Roni Amit (FMSP Report) *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (2010) available online at <<http://www.migration.org.za/report/amit-r-2010-lost-vortex-irregularities-detention-and-deportation-non-nationals-south-africa-f>> (accessed on 04/06/2012) 5.

³¹⁹ [Act 96 of 1991].

³²⁰ SAHRC Report (1999) 27.

³²¹ Amit (FMSP Report) *Lost in the Vortex* 6-7.

³²² [Act No. 3 of 2000].

and detained for immigration purposes.³²³ Most processes under the Immigration Act are of an administrative nature and because they involve deprivation of the liberty of the arrested party, it is imperative that they are not breached but are followed to the letter. It is for this reason that the rights in sections 12, 33, 34 and 35 of the Constitution are implicated in the arrest, detention and deportation of non-citizens.

As noted above, non-citizens are a vulnerable group in need of specialised protection, in particular in situations where citizenship or lack thereof is the reason for their interaction with the authorities. The Constitutional Court has recognised that foreign nationals constitute a disadvantaged group for purposes of the equality clause.³²⁴ Mokgoro J noted that citizenship as a ground for discrimination bears all the hallmarks that are common to disadvantaged groups “which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”³²⁵ She pointed out that non-citizens are a minority in all countries with inconsequential political clout and generally citizenship is an attribute that one has little control over and is difficult to change.³²⁶ The learned judge’s sentiments illustrate the importance of adhering to protections provided in law for non-citizens. Once it is established how vulnerable non-citizens are, then the very act of depriving them of guaranteed fundamental rights raises questions of unconstitutionality, discrimination, lack of access to justice and a breakdown in the rule of law.

It is in fulfilment of these constitutional rights and values that the provisions of the Immigration Act afford an arrested and/or detained person the right to know the reason for a restriction on his/her freedom as well as to provide a way of challenging it.³²⁷ If proper procedures are not followed, it is likely that arrested people may suffer prolonged and indefinite detentions without judicial oversight.³²⁸ It is essential to notify arrested persons and

³²³ Amit (FMSP Report) *Last in the Vortex*5.

³²⁴ *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*1998 (1) SA 745 (CC).

³²⁵ Para 19.

³²⁶ Para 19. The court associated itself with the dictum of Wilson J in the judgment of the Canadian Supreme Court in *Andrews v Law Society of British Columbia*(1989) 56 DLR (4th) 1 at 32 that:

“Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending.”

³²⁷ Immigration Act s 34.

³²⁸ Amit (FMSP Report) *Last in the Vortex*6.

detainees of their legal status and their rights of appeal and review so that they can access mechanisms and procedures which will assist them to access justice. However in a lot of documented cases, detainees have been in immigration detention for periods longer than 30 days without review and have at times exceeded the mandated 120 days without being brought before a court of law, released or deported as the case may be. Recent research carried out at the Lindela holding centre (hereinafter Lindela) shows that despite the fact that it is a Department of Home Affairs facility, many detainees there complain that they have no access to immigration officials while inside Lindela.³²⁹ A similar study conducted at the same place during the days of the Aliens Control Act recorded similar results.³³⁰ Inmates were arrested by police officers and did not have the opportunity to be interviewed by an immigration official before they were transferred from police custody to Lindela. Once in the centre, most detainees have warrants of detention issued and renewed at 30 day intervals as is mandated by law. The problem however is the lack of access to the magistrate who is responsible for issuing and extending the permits.³³¹ The detainees were not notified of the intention to extend their detention or afforded an opportunity to make representations. In most cases the detainees were not aware of the existence of the warrants nor did they receive any reasons for the continued detention.³³² In a sense the administrative procedures for screening, detaining, extending detention and processing releases have not really improved over the past thirteen years.

Access to justice and legal remedies is crucial to the protection of the human rights of non-citizens. However, such access is hindered by several obstacles that are directly or indirectly caused by the State or its organs. There are many different reasons why access to justice continues to elude non-citizens, including the transitory nature of non-citizens' status within the country. As the court observed in the *Lawyers for Human Rights* case, non-citizens "may well have left the country before the constitutional challenge could or would materialise even if it is assumed that they would have the resources, knowledge, power or will to institute

³²⁹ Ibid.

³³⁰ SAHRC report (1999). See also South African Press Association (SAPA) "SAHRC investigates abuse of immigrants" *Independent Online (iol)* (07 June 2012) <<http://www.iol.co.za/news/crime-courts/sahrc-investigates-abuse-of-immigrants-1.1314057#.T9HRAILdySq>> (accessed on 08/06/2012); Chandré Prince and McKeed Kotlolo "Lindela 'Hell' Ignored" *Timeslive* (08 June 2012) <<http://www.timeslive.co.za/thetimes/2012/06/08/lindela-hell-ignored>> (accessed on 08/06/2012).

³³¹ Lawyers for Human Rights (LHR) Report *Monitoring Immigration Detention in South Africa* (2010) 17.

³³² Ibid.

appropriate proceedings.”³³³ Research has shown that non-citizens who choose to reside in the country generally avoid any contact with the authorities and South Africans in general. The new constitutional dispensation has seen the promulgation of new laws which seek to ensure that non-citizens’ rights are protected, and their access to justice and justice institutions are guaranteed. Immigration and refugee laws were crafted so as to ensure procedural fairness and judicial oversight to avoid arbitrariness and a breakdown in the rule of law. The drawback to the current system is clear in the distinct disconnect between these new laws and their implementation by officials whose mind-set and training still reflect the rigidity and exclusionary logic of the apartheid order.

3.3.7.1 Inaccessibility of Refugee Reception Offices (RRO’s)

An on-going issue regarding the inaccessibility of state institutions is the inaccessibility of Refugee Reception Offices (RRO). First is the issue of physical inaccessibility of the RRO by asylum seekers and refugees.³³⁴ The long queues to enter the RRO often see people going unattended for weeks to months until some eventually give up.³³⁵ These long queues were challenged in the *Somali Refugee Forum v Minister of Home Affairs*³³⁶ case where the court issued a structural interdict ordering the department of home affairs to: increase the RRO staff complement; re-open the closed Johannesburg RRO; hire an independent consultant to advise on improving access of asylum seekers to the system as a whole; and file a report with the court outlining the steps taken to improve the access.³³⁷ The *Kiliko v Minister of Home Affairs*³³⁸ case found that by processing only 20 asylum seeker permits per day, the Department of Home Affairs was violating the fundamental rights of asylum seekers.³³⁹ In the similar case of *Tafira v Ngozwana*,³⁴⁰ the practice and policy of scheduling appointments

³³³ Para 22.

³³⁴ Roni Amit “Winning Isn’t Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation” (2011) 27 *SAJHR* 13.

³³⁵ *Ibid.* See also Consortium for Refugees and Migrants in South Africa (CoRMSA) Report *Protecting Refugees & Asylum Seekers in South Africa* (2007) available online at <<http://www.cormsa.org.za/wp-content/uploads/2008/06/crmsa07report.pdf>> (accessed on 18/10/2013)23.

³³⁶ *Somali Refugee Forum v Minister of Home Affairs* 32489/05 (TPD) [unreported] 32489/05 (TPD) [unreported].

³³⁷ *Ibid.*

³³⁸ *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C).

³³⁹ Para 30. See also Para 31:

“The purpose of the structured interdict that I intend making is to ensure that the manner in which the respondents receive and process applications for asylum in the future does not offend against any of the State’s obligations under international law and its obligations under the Constitution as well as the legislation applicable to refugees.”

³⁴⁰ *Tafira and others v Ngozwana and others* 2006 ZAGPHC 136 (TPD).

and the pre-screening of asylum seekers at the Marabastad and Rosettenville Refugee Reception Offices in Gauteng Province were declared unconstitutional and unlawful. These practices were found to limit access of asylum seekers to the RRO.³⁴¹ In these cases, practices existed that, either deliberately or negligently, denied access to a State institution that is crucial to the lives of refugees and asylum seekers in South Africa. A 2012 report by the African Centre for Migration & Society (ACMS) shows that these practices still persist with access to the RRO being restricted for various reasons.³⁴²

The second issue is the more recent practice of closing down RRO's in some of the bigger metropolitan municipalities like Cape Town, Port Elizabeth and Johannesburg. These closures are part of the DHA's plans of opening up new RRO's closer to the land borders.³⁴³ The closure of the office in Cape Town was challenged in the High Court where the court issued an interim order directing the DHA to ensure that a refugee reception office remained "open and fully functional within the Cape Town Metropolitan Municipality, at which new applicants for asylum can make applications for asylum and be issued with section 22 permits".³⁴⁴ On review of that order, the same court declared that the decision, taken by DHA to close the Cape Town Refugee Reception Office to new applicants for asylum after 29 June 2012 was unlawful.³⁴⁵ It directed that a Refugee Reception Office be opened within the municipality that would inter alia accept new applicants for asylum. The DHA appealed this decision to the Supreme Court of Appeal. On appeal, the Supreme Court found that the Department's decision to close the RRO to new asylum seekers was unlawful as it did not engage knowledgeable and concerned parties in a proper consultation. This "failure to hear what they might have to say when deciding whether that office was necessary for fulfilling the purpose of the Act, was not founded on reason and was arbitrary".³⁴⁶ In an additional finding the Court held that the DHA's conduct during the process was "inconsistent with the responsiveness, participation and transparency that must govern public administration."³⁴⁷

³⁴¹ Amit (2011) SAJHR14.

³⁴² Roni Amit African Centre for Migration & Society (ACMS) Report *No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices*(2012) <http://www.migration.org.za/sites/default/files/publications/2012/no_way_in_barriers_to_access_service_and_administrative_justice_final_report.pdf> (accessed 21/10/2013) 38-45.

³⁴³ Ibid 8.

³⁴⁴ *Scalabrini Centre Cape Town v Minister of Home Affairs and Others* 2012 (4) All SA 576 (WCC).

³⁴⁵ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) Para 122.

³⁴⁶ *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 ZASCA 134 Para 70.

³⁴⁷ Para 70 and 72.

The court then made an order that the Director General had to reconsider the closure of the office after consulting with interested parties by 30 November 2013.³⁴⁸

These *Scalabrini* cases together with the cases involving the closure of the Port Elizabeth³⁴⁹ and Johannesburg RRO³⁵⁰ illustrate the shrinking space within which asylum seekers can access the State institutions that are designed to regularise their sojourn in the country. Despite the findings in all these cases that the closure of RRO's was unlawful, no RROs have been maintained or re-opened in any of these municipalities since the judgments.

3.4. Specific rights implicated in the arrest, detention, deportation and extradition of non-citizens

Rights are by their nature interrelated and interdependent and a variety of rights may have a bearing on access to justice. In this thesis, the right to freedom and security of the person;³⁵¹ the right to just administrative action;³⁵² the right to access the courts;³⁵³ and the rights of arrested and detained persons³⁵⁴ will be analysed insofar as they relate to non-citizens.

The links between these rights and access to justice are fairly obvious. A person who is deprived of his or her freedom without just cause; is detained without trial; or while in detention, is denied the right to consult a legal practitioner, cannot be said to have access to justice. The same is true where a person is detained "with just cause" under either the Refugees Act³⁵⁵ or the Immigration Act,³⁵⁶ but is denied the due processes provided for under both these acts. In the previous section on "obstacles to access to justice," instances where such deprivations or denials of rights occurred were discussed with an emphasis on how the deprivation or lack of access was occasioned by the individual's status as a non-citizen.

³⁴⁸ Para 81.

³⁴⁹ *Somali Association for South Africa & Another v Minister of Home Affairs & Others* 2012 (5) SA 634 (ECP).

³⁵⁰ *Consortium for Refugees and Migrants in South African & Others v Minister of Homes Affairs & Others* (SGHC) [unreported].

³⁵¹ Constitution of South Africa s 12(1).

³⁵² Constitution of South Africa s 33.

³⁵³ Constitution of South Africa s 34.

³⁵⁴ Constitution of South Africa s 35(2).

³⁵⁵ [No. 130 of 1998].

³⁵⁶ [No 13 of 2002].

It is the responsibility of the Department of Home Affairs (DHA) to arrest, detain and deport persons who are illegally within the country. It is at this point that the rights contained in sections 12(1), 33, 34 and 35(2) of the Constitution are implicated. The court in the *Lawyers for Human Rights* case³⁵⁷ held that the right to freedom and security of the person in section 12 of the Constitution and the rights of arrested and detained persons in section 35(2) are “integral to the values of our Constitution and to deny them to [illegal] foreigners would be a negation of our Constitution’s underlying values.” From this statement, it is clear that the Constitution holds the State responsible for guaranteeing and enforcing the rights of non-citizens within its custody. Sections 33 and 34 of the Constitution are important tools in helping to realise the rights in sections 12(1) and 35(2).

3.4.1. Section 12: The right to freedom and security of the person

Section 12 of the Constitution protects both the right to freedom and security of the person and the right to bodily and psychological integrity.³⁵⁸ According to Currie and de Waal, the right to freedom and security of the person not only protects against physical restraints like detention or imprisonment, but affords comprehensive protection against a range of abuses.³⁵⁹ Subsection 12(1) safeguards the individual against unwarranted invasions of his/her body by the State,³⁶⁰ and section 12(1)(c) specifically guarantees the right to be free from all forms of violence from either public or private sources. Moreover, section 12(1) provides substantive as well as procedural protection against deprivations of physical freedom.³⁶¹

The rights in section 12(1) have their origins in international human rights instruments such as the Universal Declaration of Human Rights (UDHR),³⁶² the International Covenant on Civil and Political Rights (ICCPR)³⁶³ and the African Charter on Human and Peoples’ Rights (ACHPR).³⁶⁴ The general comments and recommendations of the various international treaty

³⁵⁷ *Lawyers for Human Rights and another v Minister of Home Affairs*.

³⁵⁸ Constitution of South Africa s 12 - Freedom and security of the person.

³⁵⁹ Iain Currie and Johan de Waal “Freedom and Security of the person” in Iain Currie and Johan de Waal (eds) *The Bill of Rights Handbook* 5th ed (2005) 292.

³⁶⁰ Michael Bishop and Stu Woolman “Freedom and Security of the Person” in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2ed (RS 4 2012) 40-1 40-23.

³⁶¹ Bishop and Woolman “Freedom and Security of the Person” in *CLOSA* 40-23. See also *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) Para 147 and *S v Coetzee and Others* 1997 (4) BCLR 437 (CC) Para 18.

³⁶² Universal Declaration of Human Rights (UDHR) Arts 3 and 5.

³⁶³ Arts 7 and 9 (1).

³⁶⁴ Arts 5 and 6.

committees responsible for the interpretation and enforcement of these treaties are also an important source of interpretive guidance for the interpretation of section 12.³⁶⁵

Earlier in this chapter,³⁶⁶ we saw that access to justice consists of both substantive and procedural elements and that both are essential to the effective realisation of rights. Section 12(1) makes it clear that for the realisation of these rights both these components must be adhered to, or fulfilled. This means that the deprivation of liberty must be justified and done in accordance with due process of the law. Where there is a constitutional finding that the reason for which the State has deprived a person of his freedom is acceptable, there must still be an enquiry as to whether the process through which such deprivation was effected was fair or not.³⁶⁷

The Constitution is effectively trying to move away from the culture of impunity that accompanied detention in the apartheid regime. In those days, it was not uncommon for administrative detention to be employed to detain people without trial for purposes of political control.³⁶⁸ The courts have recognised that it is not in the best interest of a constitutional democracy to permit presiding officers who are neither magistrates nor judges to imprison anyone indefinitely and repeatedly. They likened such unbridled power to the apartheid era's practice of detention without trial.³⁶⁹ The courts have held that it is for this reason that section 12(1)(b), with its express prohibition of "detention without trial", exists.³⁷⁰

³⁶⁵ See chapter 2 of this thesis (above) for a discussion of the importance of international law in the interpretation of South Africa's Bill of Rights. See also Weissbrodt *The Human Rights of Non-Citizens* 10. These committees include the Human Rights Committee (HRC); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Rights of the Child (CRC); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Committee Against Torture (CAT); and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW). At a continental level, the African Charter and its Protocol has set up the African Commission on Human and People's Rights and the African Court on Human and People's Rights respectively.

³⁶⁶ See chapter 3.1 (above) for my definition of access to justice: "Access to justice should therefore be seen as the sum total of both the processes that one uses to arrive at effective remedies for infringements of rights as well as the remedies themselves."

³⁶⁷ *Bernstein and Others v Bester NO and Others* Para 159 quoted in Bishop and Woolman "Freedom and Security of the Person" in *CLOSA40-27*.

³⁶⁸ *De Lange v Smuts and Others* 1998(3) SA 785 (CC) Para 26.

³⁶⁹ Bishop and Woolman "Freedom and Security of the Person" in *CLOSA40-25*.

³⁷⁰ *Ibid.* See also *Lawyers for Human Rights* Para 36:

"The rights relied upon have both a procedural and substantive component. The importance of the right to freedom and, in particular, not to be detained without trial can never be over-stated. The right has particular significance in the light of our history during which illegitimate detentions without trial of many effective opponents of the pre-1994 government policy of apartheid abounded. We must never again allow a situation in which that is countenanced."

For non-citizens, this section is of great importance, primarily because it ensures that in the application of the country's immigration and refugee laws, the State adheres to the rule of law. The *Lawyers for Human Rights* case is one of the leading cases on the rights in section 12(1) in so far as non-citizens are concerned. In that case, the court addressed several issues regarding the newly promulgated Immigration Act. The applicants challenged the constitutionality of section 34(8) of the Immigration Act, contending that it offended the rule of law in that it allowed arbitrary detention at the instance of an immigration officer.³⁷¹ The court was not convinced by the court *a quo*'s interpretation of the section which effectively meant that a person could be detained on the mere say-so of an immigration officer.³⁷² The court took the view that only where an immigration officer has a "reasonable suspicion" that a person is illegally in the country can detention of the said individual be legally enforced. This way the requirement in section 12(1)(a) that deprivation of liberty cannot be done in an arbitrary manner is satisfied.³⁷³ The "just cause" requirement is also satisfied by the reasonable suspicion test.³⁷⁴ From an access to justice point of view, it is clear that the procedural leg of accessing the rights in section 12 is of importance and the courts have given it some measure of prominence. Previously in this chapter,³⁷⁵ it was illustrated how immigration and police officers routinely round up non-citizens in raids and road blocks and deprive them of the opportunity to verify their residency status by taking them immediately to the station for detention.³⁷⁶ To arrest and detain someone in these circumstances cannot be said to be with "just cause" or "reasonable suspicion." It is more of a systemic and regularised pattern of policing that is a direct violation of the rights in section 12(1). In fact it

³⁷¹ *Lawyers for Human Rights* Para 32.

³⁷² Bishop and Woolman "Freedom and Security of the Person" in *GLOSA* 40-29

³⁷³ *Lawyers for Human Rights* Para 32: "It is not arbitrary to cause the detention of a person who has just arrived at a port of entry in South Africa, and who is reasonably suspected by an immigration officer on duty at the port of entry to be an illegal foreigner. Indeed, reasonable suspicion by an immigration officer constitutes just cause for the detention."

³⁷⁴ Bishop and Woolman "Freedom and Security of the Person" in *GLOSA* 40-29. See also chapter 4.2 and 4.3 (below).

³⁷⁵ See chapter 3.3.6 (above) and 4.2 (below).

³⁷⁶ See generally the following literature: Vigneswaran et al (2010) *Journal of Southern African Studies* 465-481; Consortium for Refugees and Migrants in South Africa (CoRMSA) Report *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* (2009) 1-121, available online at <<http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf>> (accessed on 02/05/2011); South African Human Rights Commission *Report into the Arrest and Detention of Suspected Undocumented Migrants* (1999) available online at <<http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>> (accessed on 28/05/2012).

has more to do with immigration and border control within the country's territory than anything else.

After dealing with the aspect of arrest, the *Lawyers for Human Rights* court moved on to deal with the question of "detention without trial." The applicants had relied on the part of section 12(1) which guarantees the right to freedom and security of the person and prohibits the detention of any person without trial.³⁷⁷ The court agreed that section 34(8) of the Immigration Act did limit the right in section 12(1)(b) because it allowed detention without trial.³⁷⁸ It then carried out a justification analysis in terms of section 36 of the Constitution.³⁷⁹ In the analysis, section 34(8) was found to be in pursuit of a legitimate government action.³⁸⁰ It concluded that the violation was justifiable only to the extent that it permitted detention for periods not longer than 30 days without the option of judicial confirmation.³⁸¹

The courts have expressly recognised the importance of the section 12(1) rights to non-citizens. They provide procedural and substantive relief when faced with intrusion upon their freedom. The Immigration Act allows the police and immigration officers to arrest and detain suspected undocumented migrants, but this section ensures that it is done with due regard to the rights in the Constitution.

3.4.2. Section 35(2): Arrested, detained and accused persons

Section 35 sets out the rights of the following three categories of people: arrested persons,³⁸² detained persons³⁸³ and accused persons.³⁸⁴ Section 35(4) and section 35(5) apply across the board.³⁸⁵ Section 35(1), which is concerned with the rights of arrested people, is confined to persons that are arrested for "allegedly committing an offence." The rights in this subsection

³⁷⁷ *Lawyers for Human Rights* Para 33.

³⁷⁸ Para 33: "They are right when they contend that section 34(8) limits the right to freedom and the right not to be detained without trial. The person who arrives in the country can be detained once the immigration officer reasonably suspects that that person is an illegal foreigner. The justification analysis is therefore necessary."

³⁷⁹ Para 33.

³⁸⁰ Para 37: "Section 34(8) applies only to people reasonably suspected of being illegal foreigners. The purpose of the provision is plain. It is to prevent people from gaining entry into the country illegally. The importance of the purpose of the provision can also not be gainsaid."

³⁸¹ Paras 43, 45 and 47.

³⁸² Constitution of South Africa s 35(1).

³⁸³ Constitution of South Africa s 35(2).

³⁸⁴ Constitution of South Africa s 35(3).

³⁸⁵ Schwikkard PJ "Arrested, detained and accused persons" in Currie Iain and de Waal Johan (eds) *The Bill of Rights Handbook* 5th ed (2005) 737 741.

therefore apply only to suspected criminals who have been arrested in terms of section 39 of the Criminal Procedure Act.³⁸⁶

The spirit and purport of the Bill of Rights permeates through all legislation which deals with arrest and detention, including for purposes other than the criminal justice system.³⁸⁷ Section 34(1) of the Immigration Act³⁸⁸ provides that “anyone *arrested* and detained is entitled to have his or her detention confirmed by a warrant of a court issued within 48 hours.”³⁸⁹ In terms of section 34(1), the right to a court warrant applies both in respect of those who are detained by an immigration officer and those who have been “caused” by an immigration officer to be detained.³⁹⁰ The question of section 35(1) of the Constitution did not arise in the *Lawyers for Human Rights* case, although some authors³⁹¹ feel that there is scope to extend the coverage from merely “arrest for the alleged commission of an offence” to “arrest for purposes of prosecuting for the alleged commission of an offence.”³⁹² The rationale for this argument is that entering the country without documents entails the “commission of an offence” and being arrested for deportation purposes whilst trying to enter the country illegally means one is being “arrested for alleged commission of an offence.”³⁹³ The flaw in this argument would be that generally speaking, immigration offences occupy a lower rung as compared to criminal offences. The object of immigration detention should be to facilitate removal from the country and has mostly been understood to be a civil sanction, more than a criminal punishment.³⁹⁴ Detention and other forms of custody are constitutionally permissible to prevent individuals from fleeing or endangering public safety.³⁹⁵ In the case of immigration detention it is a matter of securing a person for purposes of removal from the country.

³⁸⁶ Ibid.

³⁸⁷ Constitution of South Africa s 2: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

³⁸⁸ Immigration Act s 34.

³⁸⁹ Compare this section in the Immigration Act with s 35(1)(d) and (e) of the Constitution for similarity.

³⁹⁰ *Lawyers for Human Rights* Para 84 per Madala J. This is a minority judgment, but it is difficult to envisage dissent with this view-point. Please see chapter 4.3 (below) for further discussion on this topic.

³⁹¹ F Snyckers and J Le Roux “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 1 2009) 51-1.

³⁹² Ibid 51-39.

³⁹³ Ibid.

³⁹⁴ Anil Kalhan “Rethinking Immigration Detention (part I)” (2010) 110 (42) *Columbia Law Review – Sidebar* 42-58 44, quoting *Fong Yue Ting v. United States* 149 U.S. 698 728–30 (1893) (observing that deportation proceedings have “all the elements of a civil case” and are “in no proper sense a trial or sentence for a crime or offense”). See also *Zadvydas v Davis* 533 US 678 (2001).

³⁹⁵ Ibid.

However, these rights find more concrete expression in section 35(2) of the Constitution.³⁹⁶ The rights in this section address several issues peculiar to detainees. These rights govern the placement of individuals under judicial authority.³⁹⁷ They place limits on the police powers to detain without judicial authority, thereby preserving and protecting the freedom and security of the person.³⁹⁸ Arresting officers are required to give reasons for the arrest and detention and continued detention of an individual.³⁹⁹ The scope of the reasons to detain a person is limited so that it is only done for purposes of a trial or other just cause.⁴⁰⁰ In this case other just cause would be detention for purposes of deportation. Furthermore, this section ensures that the detention is carried out in conditions that are consistent with human dignity.⁴⁰¹

In order not to have a situation where the rights in section 12 and those in section 35 are applied interchangeably to similar situations, the Constitutional Court created a “due process wall” between the two.⁴⁰² In summary, the wall protects the following propositions: the enumerated guarantees in s 35 should be confined to arrested, accused and detained persons and should not be extended to cover other situations;⁴⁰³ the general right to fair procedure in section 12 should not influence the determination of section 35 rights; and the “trial” under section 12(1)(b) is distinct from and less onerous than the trial contemplated in section 35.⁴⁰⁴ What comes out of this division is that section 12 deals with the question of how one comes to be detained in the first place whereas section 35 deals with the question of the rights that one possesses once in detention.⁴⁰⁵ This distinction extends to the question of continued detention and the merits thereof which is the province of section 12.⁴⁰⁶

³⁹⁶ Constitution s 35(2).

³⁹⁷ Schwikkard PJ “Arrested, Detained and Accused Persons” in *Bill of Rights Handbook* 767.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² Bishop and Woolman “Freedom and Security of the Person” in *LOSA* 40-31. For a more detailed discussion see Snyckers and Le Roux “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in *LOSA* 51-1.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Snyckers and Le Roux “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in *LOSA* 51-38.

⁴⁰⁶ *Ibid.*

As already noted above, in *Lawyers for Human Rights*, section 35(2) was held to apply to “everyone”, including illegal foreigners.⁴⁰⁷ The majority decision noted: “The fact that the section 35(2) safeguards are available to the person detained on a ship avoids their detention in intolerable or inhumane circumstances.”⁴⁰⁸ In his minority decision Madala J held that the illegal foreigner is not without remedy, because the Immigration Act has built-in safeguards of reasonableness and necessity as well as the precepts of section 35 and the standards of international law.⁴⁰⁹ In a sense, therefore, section 35 sets the tone together with section 12 for all matters regarding the deprivation of liberty of non-citizens. The protections are built in so as not to revert to the arbitrariness and permissiveness of the apartheid era. In chapter 4 the application of section 34 of the Immigration Act will be discussed, including the question of arrest and detention of non-citizens.

3.4.3. The right to just administrative action

The arrest and detention of non-citizens has far reaching consequences: apart from resulting in a loss of liberty, detention and deportation can also adversely affect a person’s immigration status when visiting countries other than South Africa. The same is true when a person applies for refugee status in South Africa and his/her claim is declined. The consequences of such rejection are dire and have far reaching implications for the individual concerned. For most individuals, the question of review of administrative action is of importance in instances where the decisions taken adversely affect their rights. The Constitution recognises this and affords everyone the right to just administrative action that is lawful, reasonable and procedurally fair.⁴¹⁰ Everyone who has been adversely affected by any administrative action (or inaction) is therefore entitled to take such action (or inaction) up on review.⁴¹¹ In accordance to the Constitution, the right in section 33 was given effect and fleshed out through the enactment and promulgation of the Promotion of Administrative Justice Act (PAJA).⁴¹² People seeking recourse to the rights in section 33 have to bring challenges in

⁴⁰⁷ *Lawyers for Human Rights* Para 26.

⁴⁰⁸ Para 42.

⁴⁰⁹ Para 94.

⁴¹⁰ Constitution of South Africa s 33.

⁴¹¹ S 33(2).

⁴¹² [Act 3 of 2000].

terms of this Act and the various substantive and procedural safeguards outlined therein.⁴¹³ Subject to certain exclusions set out in the Act, administrative action for purposes of section 33 includes all action, taken by persons and bodies exercising public power.⁴¹⁴

3.4.3.1. The Koyabe Case

With regards to the rights of foreign nationals to just administrative action, the case of *Koyabe v Minister of Home Affairs*⁴¹⁵ is seminal. In that case the court placed the review and

⁴¹³ Jonathan Klaaren and Glenn Penfold "Just Administrative Action" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2nd ed (RS 4 2012) 63-1 63-5. See also s 1 of the Promotion of Administrative Justice Act.

⁴¹⁴ Ibid 63-17. Klaaren and Penfold define administrative action as comprising "six elements; 1) a decision of an administrative nature; 2) made in terms of an empowering provision; 3) not specifically excluded from the definition; 4) made by an organ of State or by a private person exercising a public power or performing a public function; 5) that adversely affects rights; and 6) that has a direct external effect."

⁴¹⁵ *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC). The facts of the case were as follows: The applicants were Kenyan nationals who had applied for South African identity documents. The respondents (Department of Home Affairs) informed them by letter that an investigation revealed that they had previously obtained South African identity documents by fraudulent means and therefore did not qualify for permanent residence after 1 July 2005. They were informed that in terms of s 29(1)(f) of the Immigration Act they were prohibited persons and did not qualify for visas, admission to South Africa and temporary or permanent residence permits; and that they were to be deported. They were entitled under s 8 of the Act to request the Minister for Home Affairs ("the Minister") to review the decision to deport them. Instead they relied on s 5 of the PAJA to request reasons from the Minister for the decision to withdraw or terminate their residence permits, in order to submit a meaningful request for review. The department replied that they had already been furnished with adequate reasons. In the meantime, the prescribed period within which to apply for actual review from the minister had already lapsed. The applicants applied to the High Court for a review and the setting aside of the Director-General's decision to withdraw their permanent residence permits and status. The High Court held that the applicants had not exhausted their internal remedies as required by s 7(2)(a) of PAJA and concluded that there were no exceptional circumstances that would allow it to exempt the applicants from the obligation to exhaust internal remedies. The court accordingly held that the applicants should first exhaust their internal remedy under s 8 of the Act as required by s 7(2)(b) of PAJA, and dismissed their application.

In the Constitutional Court, the applicants raised questions regarding the ambit of the right to just administrative action, protected under s 33(2) of the Constitution and given effect by s 5 of PAJA. They also raised questions about the interpretation of s 7(2) of PAJA, in the light of the right of access to the courts guaranteed in s 34 of the Constitution. With respect to the interpretation of s 7(2) of PAJA, they contended that they had indeed intended to exhaust their internal remedy as per statutory requirement, but the respondents' refusal to provide them with reasons for withdrawing their residence permits precluded them from meaningfully challenging that decision through internal review. In any case the three day period within which to submit a request for review from the minister, provided for in s 1(b) of the Immigration Act had lapsed. In light of this they contended that the court should hold open the door to judicial review even where internal remedies had not been exhausted because to reach a contrary decision would be tantamount to ousting the court's jurisdiction, in violation of s 34 of the Constitution. The applicants further asserted that even before the review by the minister, they were entitled to be furnished with reasons for the decision in terms of s 8(3) of the Immigration Act. Alternatively they argued that the finding that a person is an illegal

appeal procedures found in section 8 of the Immigration Act firmly in the realm of administrative action, thereby ensuring that it was subject to PAJA.⁴¹⁶ The court also explained the role of internal remedies, illustrating how internal remedies are designed to provide immediate and cost-effective relief.⁴¹⁷ The idea behind them is to afford the executive the opportunity to utilise its own mechanisms to rectify irregularities first, before aggrieved parties resort to judicial review.⁴¹⁸ The court was of the opinion that internal remedies had to be exhausted in order for an individual to get the full benefit of specialist administrative procedures suited to a particular administrative action in order to enhance procedural fairness as enshrined in the Constitution.⁴¹⁹ Only after a thorough examination of facts and procedures at the internal adjudication stage could a full record be compiled, which would then be of benefit to a court during judicial review.⁴²⁰ The court pointed out that the obligation to exhaust internal remedies was not to be rigidly imposed and it could not be employed by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. The court held that section 7(2)(c) of PAJA was testimony to this because where exceptional circumstances existed, a court could condone non-exhaustion of the internal remedies and intervene in the matter.⁴²¹

foreigner was an adverse decision constituting administrative action as defined in s 1 of PAJA in which case, they were entitled to reasons under s 5 of PAJA.

In response, the Department of Home Affairs sought to limit application of PAJA by saying that the legislature could not have intended that all decisions taken under the Immigration Act be subject to PAJA. They contended that recourse to PAJA would severely compromise the speedy procedures designed to ensure that where a person has been found to be an illegal foreigner, clarity be obtained as soon as possible. The department sought to drum up the importance of exhausting the internal remedies found in s 8 of the Immigration Act first before any aggrieved party could rely on judicial review of its actions. This they argued was as per the provisions in s 7(2) of PAJA. The respondents further argued that there was a door still open for the applicants to seek ministerial review in terms of s 8(1) of the Immigration Act if they sought condonation for late application. They also contended that there was nothing in s 8(1) of the Immigration Act that entitled a person affected by an administrative decision to reasons before an appeal. The wording of s 8 of the Act, they argued, did not entail that the PAJA procedure could run concurrently with the exercise of the internal remedy provided for in s 8(1) of the Act. According to respondents it was only after the ministerial review that the Minister was required by PAJA to furnish reasons for an adverse finding and it was also at this point that the procedures in PAJA became applicable. In any case, they argued, the reasons given to applicants were adequate.

⁴¹⁶ Para 50. See also *Lawyers for Human Rights and another v Minister of Home Affairs* Para 30.

⁴¹⁷ Para 35.

⁴¹⁸ Ibid.

⁴¹⁹ Para 36.

⁴²⁰ Para 37.

⁴²¹ Para 38.

The court noted that section 8 of the Immigration Act⁴²² provided for internal administrative review and appeal procedures necessary for adjudicating decisions taken in terms of the Act.⁴²³ Foreign nationals were able to make use of two channels for review available in sections 8(1) and 8(4), depending on the nature of the administrative decision.⁴²⁴ The court emphasized that review under this section should take place within reasonable time frames. The court differentiated between the two channels of review noting that the procedure in section 8(1) was of necessity more urgent than the one in section 8(4). Section 8(1) refers to a situation where an official refuses entry to any person, or finds any person to be an illegal foreigner whereas section 8(4) pertains to decisions other than an immigration officer's refusal of entry into the country or finding of a person to be an illegal foreigner, which materially and adversely affect the rights of that person.⁴²⁵ For obvious reason the effects of the official's actions under section 8(1) are more drastic than under section 8(4). As a consequence of employing the procedure in section 8(1)(b), a non-citizen can stay the deportation process until such time as the judicial review is completed.⁴²⁶

The importance of these internal procedures must of necessity be weighed against the outcomes. On this aspect the court held that a decision to declare someone a "prohibited person" must be reviewed speedily to ensure that it is the correct decision and was taken in a fair manner.⁴²⁷ In other words, the process must be effective and sufficient and provide a substantive outcome. Additionally the process itself must be one that is readily available to the aggrieved party and free from administrative obstruction.⁴²⁸ The court weighed the interests of the aggrieved non-citizen against those of the State in policing its borders and protecting the integrity of its immigration systems. On this aspect, the court held that section 8(1) provided speedy and constitutionally compliant steps to resolve questions about the status of a foreign national within its territory.⁴²⁹

When the applicants raised the right to be furnished with reasons in terms of section 8 of the Immigration Act, the respondents sought to confine this right by saying that, seeing as they had made their decision in terms of section 8(1), the right to written reasons in section 8(3)

⁴²² Immigration Act s 8 - Review and appeal procedures.

⁴²³ *Koyabe v Minister of Home Affairs* Para 50.

⁴²⁴ Para 51.

⁴²⁵ Para 25.

⁴²⁶ Immigration Act s 8(1)(b).

⁴²⁷ *Koyabe v Minister of Home Affairs* Paras 44, 53 and 54.

⁴²⁸ Para 44.

⁴²⁹ Para 55.

did not apply.⁴³⁰ The court disagreed with the Department of Home Affairs' construction of the law, and held that section 5 of PAJA must be interpreted in view of section 33(2) of the Constitution, which establishes a right to written reasons for all administrative actions having an adverse effect on an individual.⁴³¹

In a brief commentary, Mokgoro J pointed out that this case was an important victory for the rights of non-citizens in South Africa.⁴³² The court had provided constitutional cover for non-citizens by holding that public service officials engaged in public administration are enjoined by the principles of *batho pele* and *ubuntu* to treat all people with respect and dignity.⁴³³

In conclusion, the Court in the *Koyabe* case was called upon to decide several issues. The first issue dealt with the interpretation of section 7(2) of PAJA and how, in the light of this provision, section 8(1) of the Immigration Act must be read. The court ruled that there was no question of an ouster of its jurisdiction through the use of the provision that calls for the exhaustion of internal remedies in the present case. It was satisfied that the procedures in section 8(1) of the Immigration Act were indeed constitutional and designed to ensure speedy remedial action for both the State and the aggrieved parties. Secondly, the court was called upon to decide whether in terms of section 8(1) of the Immigration Act, non-citizens were entitled to reasons for adverse decisions. It acknowledged that decisions taken in terms of the Act were indeed administrative actions as contemplated by section 1 of PAJA and therefore subject to constitutional dictates.⁴³⁴ This meant that even where the requirement of reasons was not specifically provided for in an Act, section 33(2) of the Constitution as implemented through section 5 of PAJA required that adequate reasons must be furnished for all administrative decisions. The Court however was able to revisit Yacoob J's observation in the *Lawyers for Human Rights* case where he said, "It will be recalled that section 8 requires the immigration officer to provide information as to the adverse determination and the reasons

⁴³⁰ *Koyabe v Minister of Home Affairs* Paras 59-60.

⁴³¹ *Ibid.*

⁴³² Yvonne Mokgoro "Ubuntu, the Constitution and the Rights of Non-citizens" (2010) 21 *Stell LR* 221 227.

⁴³³ *Ibid.* See also *Koyabe v Minister of Home Affairs* Para 62, footnote 57; *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) Paras 223-225, 263, 307.

⁴³⁴ See also *Lawyers for Human Rights and another v Minister of Home Affairs* Para 30: "A determination that a person is an illegal foreigner adversely affects that person. Section 8 of the Act requires the Department of Home Affairs, and the immigration officer on duty on behalf of the department at the port of entry, to inform the person of the determination and the reasons for doing so."

for it although this is not required to be done in writing.”⁴³⁵ In *Koyabe*, the Court clarified this seeming anomaly by placing section 8 firmly under the ambit of section 33 of the Constitution and PAJA, thereby making written reasons in such circumstances a mandatory requirement.

Unfortunately, the court could not be drawn to decide on the constitutionality of section 8(1) with reference to the rather restrictive three (3) day period within which to lodge an application for review.⁴³⁶ The urgency of such situation (contemplated in section 8(1)) requires that the application for review be done immediately so that the rights and interests of all parties involved are served. It could be that this truncated period could be justified in terms of the limitations clause with reference to the legitimate government purpose it serves but on the other hand, it could be seen as unjustifiable. In general, immigrants are “either unaware of or poorly informed about their legal rights and what they should do in order to enforce [them], and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.”⁴³⁷ So even if this was a moot question in *Koyabe*, some guidance on the restrictive time frame and its application in practice would have been welcome. However, the court did rule that after considering all the arguments before it, there was reason to extend the period in question to allow applicants to exercise their internal remedies under the Immigration Act.⁴³⁸ From this decision, it would seem as restrictive as the 3 day period seems, there is room for extension through either applying to the Minister for condonation for late filing or to the courts for judicial intervention.

The Court was also unwilling to decide on an application by *amicus curiae* which averred that the Department of Home Affairs often used the argument that non-citizens had not exhausted internal remedies before approaching the courts. The amicus argued that this was usually a tactic by the Ministry to limit access to justice and to the courts by aggrieved migrants, especially those in immigration detention.⁴³⁹ This goes to the heart of this thesis because although the Constitution and the statute books contain laws and procedures that

⁴³⁵ *Lawyers for Human Rights and another v Minister of Home Affairs* Para 41.

⁴³⁶ *Koyabe v Minister of Home Affairs* Para 55.

⁴³⁷ *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC); 1997 (1) SA 124 (CC) Para 14. See also *Lawyers for Human Rights and another v Minister of Home Affairs*.

⁴³⁸ *Koyabe* Para 83.

⁴³⁹ Para 77.

seek to provide access to justice and to the courts, the reality on the ground is different especially in relation to non-citizens. The *amicus* made the argument that many detainees do not have access to legal counsel and were unaware of their right to lodge internal applications for review to the Minister.⁴⁴⁰ In general the conditions of detention are not conducive for inmates to seek legal redress.⁴⁴¹ The court took note of the fact that the *amicus* was raising matters of concern regarding the application of section 7(2) of PAJA to vulnerable immigrants in detention, but as this was not in line with the arguments raised by the principal parties before it, it felt the issue needed to come before it in a properly prepared case.⁴⁴²

The right to just administrative action ensures that individuals are able to challenge the validity of arbitrary and unjust exercises of public power on procedural and substantive grounds. Comparatively, the internal remedies that exist within the Immigration Act are not dissimilar to those in the Refugees Act although with the latter, appeals lie to the Refugee Appeal Board⁴⁴³ whereas in the former reviews are directed to the Minister.⁴⁴⁴ The courts however retain the power of judicial review over the carrying out of all administrative action under both acts.⁴⁴⁵

3.4.4. The right to access to courts

Closely tied to the right to just administrative action is the right to access to the courts enshrined in section 34 of the Bill of Rights.⁴⁴⁶ This right has been described as a pre-requisite to the enjoyment of other rights.⁴⁴⁷ It is similar to the right to just administrative action, without which the extensive protections and guarantees in the Constitution would be

⁴⁴⁰ Para 77. See also generally *Lawyers for Human Rights and another v Minister of Home Affairs*, Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2010) 19.

⁴⁴¹ See chapter 4.3 and 4.4 (below) for discussion on restricted access to legal representation in detention.

⁴⁴² *Koyabe v Minister of Home Affairs* Para 81.

⁴⁴³ Refugees Act s 26. See *Sidumo v Rustenburg Platinum Mines* 2007 (12) BCLR 1097 (CC) quoted in Jason Brickhill and Adrian Friedman "Access to Courts" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2ed (RS 4 2012) 59-1 59-4, where the court supported the view that a body like the CCMA's decisions constitute administrative actions for purposes of s 33 of the Constitution and that simultaneously, such body also constitutes "another independent and impartial tribunal or forum" under s 34.

⁴⁴⁴ Immigration Act s 8.

⁴⁴⁵ *Koyabe v Minister of Home Affairs; Lawyers for Human Rights and another v Minister of Home Affairs*. Also, see generally *Fikre v Minister of Home Affairs and Others* 2012 (4) SA 348 (GSJ); *Alam v Minister of Home Affairs* 3414/2010 (EHC) [unreported case]; *Otshudi v Minister of Home Affairs and Others* 05018/2012 (SGHC) [unreported case]; *Ibrahim Ali Abubaker Tantoush v the Refugee Appeal Board* 13182/06 (TPD) [unreported case] for examples of the courts intervening before and after completion of internal processes.

⁴⁴⁶ Constitution of South Africa s 34 - Access to courts.

⁴⁴⁷ Brickhill and Friedman "Access to Courts" in *GLOSA* 59-1.

meaningless.⁴⁴⁸ The right in section 34 should be read with section 1(c)⁴⁴⁹ of the Constitution.⁴⁵⁰ Read together, the two sections impose an obligation on the State to provide the necessary mechanisms for the resolution of legal disputes.⁴⁵¹ The *Modderklip*⁴⁵² court held that, read this way, section 34 demands that the State take reasonable steps to ensure that large scale disruptions in the social fabric do not occur in the wake of the execution of court orders, undermining the rule of law.⁴⁵³ The right in section 34 comprises of four components, namely the right to access the courts; the right to a fair public hearing; the right to have one's dispute resolved in an independent and impartial tribunal or forum; and the right to an effective remedy.⁴⁵⁴ In a sense this right places a duty upon the State to ensure that the doors to the courts as well as to other similar institutions are not closed to anyone, including non-citizens. The State's obligation to ensure that enforcement of unpopular court decisions do not lead to large scale social upheaval would be important to non-citizens, for example in instances where xenophobia has led to their illegal eviction from their homes and businesses by locals and an order is made in court for their safe return and freedom from harm.⁴⁵⁵ Even if the local community is unhappy about such a move, the State is obliged to see through the court's decision and protect the rights of the non-citizens.⁴⁵⁶

The right to an effective remedy is also fundamental to access to justice. In *Modderklip*, the court said this right was a requirement of the rule of law and firmly entrenched in section

⁴⁴⁸ Ibid.

⁴⁴⁹ Constitution South Africa s 1:

"The Republic of South Africa is one, sovereign, democratic State founded on the following values:

- a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b) Non-racialism and non-sexism.
- c) Supremacy of the Constitution and the rule of law.
- d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

⁴⁵⁰ Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-19.

⁴⁵¹ Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-19.

⁴⁵² *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

⁴⁵³ Ibid.

⁴⁵⁴ Brickhill and Friedman "Access to Courts" in *CLOSA* 59-1. See also Currie and de Waal "Access to Courts" in *The Bill of Rights Handbook* 708; and the Constitution of South Africa s 34.

⁴⁵⁵ Lucas Ledwaba "Foreign Shop Owners in SA – Foreigners' Fear and Loathing in Gauteng" *City Press* (5 August 2012) available online <<http://www.citypress.co.za/SouthAfrica/News/Foreign-shop-owners-in-SA-Foreigners'-fear-and-loathing-in-Gauteng>> (accessed on 05/08/2012). See also Aurelia Segatti "Mobilisation against Foreign Traders in South Africa" (2011) *African Centre for Migration and Society (ACMS) Migration Issue Brief 5* available online at <www.migration.org.za> (accessed on 05/08/2012).

⁴⁵⁶ In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*, the matter involved the execution of an eviction order whereby the courts had ordered the removal of squatters from the respondent's farm. The court held that it was the obligation of the State to see through the carrying out of such unpopular decisions, especially where it was the failure of the State to protect the respondents' rights that had given cause to these exceptional circumstances in the first place.

34.⁴⁵⁷ Non-citizens have at times sought relief from the courts only to have the State ignore court orders and continue with the violation of their rights.⁴⁵⁸ In an earlier case, *Fose v Minister of Safety and Security*, Ackermann J held that courts must ensure that the remedies they grant are effective.⁴⁵⁹ The enforcement arm of court decisions is the executive and it is obligated to ensure that there is continued rule of law in the country by carrying out court decisions or seeing that they are carried out. Access to the courts must therefore go together with the right to effective remedies.

Under both the Immigration Act⁴⁶⁰ and Refugee Act,⁴⁶¹ non-citizens have the right to seek redress in the courts in the event of being detained.⁴⁶² In light of these provisions, the argument made by *amicus* in the *Koyabe* case that the people who would theoretically be able to make use of the internal remedies found in the Immigration Act are unable to do so in practice albeit with regard to review proceedings, is of relevance here.⁴⁶³ The court in the *Lawyers for Human Rights* case similarly pointed out that non-citizens may not always be knowledgeable of the laws and regulations in South Africa and that this may render them

⁴⁵⁷ *Modderklip* Para 51. See also Brickhill and Friedman "Access to Courts" in *CLOSA* 59-25.

⁴⁵⁸ See chapter 4.5 (below) for a discussion of the case of *Jean Paul Ababason Bakamundo v Minister of Home Affairs and 2 Others* 17217/09 (SGHC) [unreported]; *A N v Minister of Home Affairs and 2 others* 2009/31418 (SGHC) [unreported].

⁴⁵⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) Para 69 – "courts must ensure that the remedies they grant are effective and approach their task from the perspective that in a country such as South Africa 'where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.' Poor litigants will not be in a position to return to court again and again to have an order implemented."

⁴⁶⁰ Immigration Act s 34.

⁴⁶¹ Refugee Act s 23:

"Detention of asylum seeker –

If the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity."

⁴⁶² See chapter 4.2, 4.3 and 4.4 (below).

⁴⁶³ *Koyabe v Minister of Home Affairs* Para 77:

"The *amicus curiae* submits that many of the people who would theoretically be able to make use of the internal remedies in the Act are unable to do so in practice, and that this is the case for many who are detained at the Lindela Holding Facility. Many detainees do not have access to legal counsel and are unaware of their right to lodge an internal appeal. Even where detainees are aware of their rights, the *amicus curiae* submitted that these rights were routinely disregarded by immigration officials. Detainees have no access to writing materials and often cannot comprehend the relevant procedures. All the prescribed forms are available only in English and there are no interpreters at Lindela. Further, when internal appeals are occasionally launched, the Minister delegates her review authority to the same officials within the detention facility, defeating much of the purpose of an objective review process."

unable to access the courts for relief.⁴⁶⁴ With regards to security of costs being an impediment to access to the courts by non-citizens, the court in *Alam v Minister of Home Affairs* found that although generally asylum seekers' status in South Africa is "precarious and permissive," they are nonetheless legal in the country.⁴⁶⁵ That court acknowledged that asylum seekers were in a vulnerable position and that it would be "fair and just" to excuse them from providing the required security for costs so that they could have their day in court.⁴⁶⁶

In conclusion, the right to access to court is one that is fundamental to the rule of law as envisaged in section 1(c) of the Constitution. The right in section 33 provides for recourse to judicial review for all administrative action, thus bolstering the right in section 34 by guaranteeing a limited right to access to courts in respect of review of administrative action.⁴⁶⁷ Section 34 envisages trials by "another independent and impartial tribunal or forum", yet even the decisions from such a body are subject to judicial review.⁴⁶⁸ The importance of these rights is that they apply to "everyone," including non-citizens.

In chapter 4 (below) the right to access the courts with regards to people in detention for prolonged periods will be discussed with particular reference to their not being able to be physically present in court or not being afforded the opportunity to present written affidavits.⁴⁶⁹ In chapter 5, access to court will be looked at from the point of view of non-

⁴⁶⁴ *Lawyers for Human Rights and another v Minister of Home Affairs* Paras 21 and 22:

"Moreover, many of the people who arrive at a port of entry without being entitled to any of the large variety of residence permits allowed by the Act may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa. Their understanding of the South African legal system, its values, its laws, its lawyers and its non-governmental organisations may be limited indeed. [22] In these circumstances, the possibility that the people affected by these provisions will challenge their constitutionality is remote. They may well have left the country before the constitutional challenge could or would materialise even if it is assumed that they would have the resources, knowledge, power or the will to institute appropriate proceedings."

⁴⁶⁵ *Alam v Minister of Home Affairs* 3414/2010 (EHC) [unreported case]. This decision also applied to the following cases with similar facts where the Home Affairs Department applied to the court for an order that plaintiffs not be allowed to continue with their legal actions unless able to put up R250 000 in security to cover legal fees should they lose: *Babul v The Minister of Home Affairs* 2704/10 (EHC) [unreported case]; *Mohammed v The Minister of Home Affairs* 2781/10 (EHC) [unreported case]; and *Nasir v The Minister of Home Affairs* 3412/10 (EHC) [unreported case].

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Brickhill and Friedman "Access to Courts" in *CLOSA* 59-4.

⁴⁶⁸ *Sidumo v Rustenburg Platinum Mines* 2007 (12) BCLR 1097 (CC).

⁴⁶⁹ See chapters 4.3 and 4.6 (below).

citizens' access to equality courts.⁴⁷⁰ The role of courts to facilitate dialogue and engagement between the State and non-citizens will also be briefly examined in that chapter.⁴⁷¹

3.4.5. Freedom from all forms of violence from either public or private sources

Section 12(1)(c) provides for freedom from all forms of violence from either public or private sources.⁴⁷² This right guarantees security from physical harm from anyone anywhere within the country, including organs of State. When the State turns a blind eye to criminal activity affecting its inhabitants or fails to protect individuals against threats to their personal safety and security, there is an impairment of the victims' rights as well as their access to justice, particularly where they are members of a vulnerable category of persons who are subject to widespread societal prejudice such as women and minorities.⁴⁷³ This provision imposes a positive duty on the State to directly protect the rights of everyone to be free from public, private or domestic violence.⁴⁷⁴ In the case of *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)*,⁴⁷⁵ the court accepted that there exists a "positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."⁴⁷⁶

This section has built-in procedural and substantive safeguards. On the procedural side, the provision calls for the creation and maintenance of a system that provides protection to everyone from violent acts committed either intentionally or negligently.⁴⁷⁷ The substantive aspect of the right is the actual freedom from harm. The courts have been willing to award damages, extra-judicial mechanisms and other remedies in cases where there has been a

⁴⁷⁰ See chapter 5.7 (below).

⁴⁷¹ See chapter 5.9 (below).

⁴⁷² Constitution of South Africa s 12.

⁴⁷³ See Chapter 5 (below) generally for a discussion on the applicability of this right.

⁴⁷⁴ Bishop and Woolman "Freedom and Security of the Person" in *QLOSA* 40-49. See also *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) Para 11.

⁴⁷⁵ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC). This case will be considered in greater detail in Chapter 5 of this thesis.

⁴⁷⁶ Para 45, quoting from *Osman v United Kingdom* 29 EHHR 245 at 305. See also Denis M Davis "Freedom and Security of the person" in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2011) 7.4.

⁴⁷⁷ Davis "Freedom and Security of the Person" in *South African Constitutional Law* 7.4.

failure of the State to fulfil its positive duty to protect.⁴⁷⁸ Part of the essence of this right is that the State must in the first instance prevent violence and not merely justify awarding of damages after the fact.⁴⁷⁹

Xenophobia is deeply rooted in many countries that receive migrants, especially within State institutions like the police, immigration services, the political system and the legal system. This usually manifests itself in stringent immigration policies or lack of protection for migrants.⁴⁸⁰ South Africa is one of the more popular migrant and asylum destinations in Africa and its public, police services, media and political system are not free of xenophobic tendencies.⁴⁸¹ Section 12(1)(c) seeks to address anomalies within the social fabric by providing protection to minorities and the vulnerable. In South Africa, this has seen women benefitting through the protection and enforcement of their rights in the areas of domestic violence⁴⁸² and sexual and gender based violence (SGBV).⁴⁸³ The Domestic Violence Act⁴⁸⁴ ensures that there are both procedural and substantive protections for women. Women's access to justice and to the rights guaranteed to them in the Constitution has improved with the increased State protection provided by this Act.⁴⁸⁵

In chapter 5 of this thesis, the application of section 12(1)(c) will be explored further with particular reference to xenophobia and the violence, property destruction and displacement of people that accompanies it. The application of cases such as *Carmichele, Rail Commuters*⁴⁸⁶ and *Omar v Government of the Republic of South Africa and Others*⁴⁸⁷ will be considered, drawing parallels between the rights of the applicants (disadvantaged people or groups) in

⁴⁷⁸ Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-49-50. See generally the following cases: *Mankayi v AngloGold Ashanti Ltd* 2011 (5) BCLR 453 (CC); *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*; *Minister of Safety and Security v van Duivenboden* 2003 (1) SA 389 (SCA); *Minister of Safety and Security and Another v Hamilton* 2004 (2) SA 416 (SCA); *Jurita Steyn v The Minister of Safety and Security and another* 2013 ZAWCHC 24 [unreported].

⁴⁷⁹ *Ibid* 40-52.

⁴⁸⁰ UNDP *Programming for Justice* 157.

⁴⁸¹ Jonathan Crush "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa" (2000) 38(6) *International Migration* 103-135 105.

⁴⁸² *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC); 2006 (2) BCLR 253 (CC).

⁴⁸³ *Carmichele v Minister of Safety and Security and Another*.

⁴⁸⁴ Domestic Violence Act [No 116 of 1998].

⁴⁸⁵ Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-53.

⁴⁸⁶ *Rail Commuters Action Group and Others v Transnet t/a Metrorail and Others* 2005 (2) SA 359 (CC).

⁴⁸⁷ *Omar v Government of the Republic of South Africa and Others* 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC).

those cases and the rights of non-citizens and their ability to access their rights enshrined in the Constitution.

3.4.6. The right not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way

The prohibition against torture and cruel, inhuman or degrading treatment or punishment is included within the ambit of the right to freedom and security of the person.⁴⁸⁸ This right is in line with South Africa's obligations under the United Nations Convention against Torture and other Inhuman or Degrading Treatment (UNCAT).⁴⁸⁹ The country has gone a long way in outlawing most of the proscribed tactics used by the former regime's security sector which undermined human dignity, the right to life and equality. In the seminal case of *S v Makwanyane*,⁴⁹⁰ the death penalty was seen as constituting cruel, inhuman and degrading punishment.

The UN General Assembly has declared that torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.⁴⁹¹ South African courts have followed suit and placed torture under the heading of "other inhuman or degrading treatment."⁴⁹² For purposes of this thesis, whenever section 12(1)(e) is discussed it should be taken to include torture as contemplated in section 12(1)(d). The mischief that section 12(1)(e) seeks to correct is conduct that is enumerated in six different components, namely cruel treatment, degrading treatment, cruel punishment, inhuman punishment, inhuman treatment and degrading punishment.⁴⁹³ Ostensibly this must include torture as an aggravated form of cruel, inhuman and degrading punishment. The courts have protected individuals, including non-citizens, in cases where they are threatened with forced removal to a country where they can face cruel, inhuman or degrading punishment or treatment.⁴⁹⁴

488 Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-57. See also Constitution of South Africa s 12.

489 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UN Treaty Series 1465/85 adopted and opened for signature, ratification and accession on 10 December 1984, entered into force on 26 June 1987, in accordance with article 27(1); Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-57.

490 *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) Para 78.

491 Bishop and Woolman "Freedom and Security of the Person" in *CLOSA* 40-57 Note 5.

492 *Ibid.*

493 *Ibid* 40-63.

494 See chapter 4.5 (below).

The UN Model Treaty on Extradition⁴⁹⁵ and the UNCAT prohibit extradition where there are substantial grounds for believing that the extradited person will be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting State. If South Africa is to live up to its constitutional obligation in section 39(1)(b) to consider international law, then the courts should be guided by these treaties and the pronouncements by the treaty bodies responsible for their interpretation.

It is clear from South African jurisprudence that the courts play an important role in ensuring the protection of human rights in cases of forced removal, particularly in the context of the on-going fight against terrorism.⁴⁹⁶ They are the vanguard against the removal of both citizens and non-citizens to countries where they face torture, cruel inhuman and degrading punishment. This protection is also found in the Refugees Act,⁴⁹⁷ although tailored to the specific situation of refugees.⁴⁹⁸ The principle of *non-refoulement* requires States not to return asylum seekers and refugees to countries where they face torture.⁴⁹⁹

In Chapter 4 (below) the deportation of non-citizens from the country will be discussed.⁵⁰⁰ The leading cases in this area of the law are *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and another intervening)*⁵⁰¹ and *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and*

⁴⁹⁵ United Nations *Model Treaty on Extradition* General Assembly 68th plenary meeting 14 December 1990.A/RES/45/116.

⁴⁹⁶ Max Du Plessis "Removals, Terrorism and Human Rights – Reflections on Rashid" (2009) 25 *SAJHR*353-377 353.

⁴⁹⁷ [No. 130 of 1998].

⁴⁹⁸ S 2:

"General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances:

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

⁴⁹⁹ Weissbrodt *The Human Rights of Non-Citizens*4, 134-6.

⁵⁰⁰ See Chapter 4.5 of this thesis (below).

⁵⁰¹ *Mohamed and another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and another intervening)*2001 (3) SA 893 (CC).

Others.⁵⁰² In the *Mohamed* case, the court said, "Where the removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated."⁵⁰³ The court consequently found that the South African government could not remove a person to a country where he or she could face the death penalty, as that would be subjecting that person to punishment that would qualify as cruel and unusual in our law.⁵⁰⁴ This would be a breach of the State's constitutional and international law obligations.

3.5. Conclusion

The preceding section of this chapter has dealt with the rights that are most important to non-citizens when faced with arrest, detention, deportation and the manifestation of xenophobia. Section 12(1) of the Constitution provides substantive as well as procedural protection for any deprivation of physical freedom. This happens in the case of arrest, and detention for purposes of enforcing immigration laws. This section has been found to work in tandem with section 35(2) of the Constitution by placing limits on the powers of the police to detain without judicial authority. There must be reasons furnished for arrest and detention, and such arrest and detention must be pursuant to a just cause. Section 12(1) and 35(2) find expression within sections 34 and 41 of the Immigration Act, which curtail the exercise of arrest and detention powers for immigration purposes. The rights in section 12(1)(d) and (e) ensure that the deportation process does not result in the death, torture or cruel and inhuman treatment of a non-citizen upon entry in the receiving country.

Section 33 of the Constitution entitles everyone to the right to just administrative action that is lawful, reasonable and procedurally fair. In the Immigration Act, there are requirements in section 8 for review procedures where an adverse decision has been made. The courts have ensured that this procedure is not denied to applicants for reasons such as failure to adhere to set time limits. Moreover, in the absence of a right to lawful and procedurally fair administrative action, individuals would be unable to challenge the validity of arbitrary and unjust exercises of public power. Section 34 gives non-citizens the right to access the courts when obstacles are being placed in their ways such as requirements for security deposits that

⁵⁰² *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

⁵⁰³ *Mohamed and another v President of the Republic of South Africa and Others* Para 52.

⁵⁰⁴ Davis "Freedom and Security of the Person" in *South African Constitutional Law* 1.6.

they cannot afford. The right also ensures that remedies that come out of court proceedings are fair, equitable and enforceable.

These rights are the tools which non-citizens can use to access justice in cases where their substantive rights have been infringed by either the State or private persons. If non-citizens cannot access these rights, it exacerbates the effects of whatever infringement that has befallen them. The legal system has the potential to provide remedies for a wide range of violations of non-citizens' rights but this potential is not fully realised in practice. The constraints faced by victims include limited access to legal resources. The interpretative power of the courts has the potential to remedy some of these constraints because courts can provide clarity to the law, and hasten the operationalization of speedy and cheap remedial mechanisms, such as the administrative justice review mechanisms found in various Acts like the Immigration Act and Refugees Act.

CHAPTER 4: THE CASE FOR MIGRANTS: ARREST, DETENTION AND DEPORTATION/RENDITION

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4.1. Introduction

Previous chapters have shown that the State’s interaction with non-citizens revolves mostly around the issues of status determination and movement control. This includes denial of entry (or exclusion), arrest, detention, deportation and extradition. There are obviously other normal day to day interactions between the state and non-citizens which are common to all people within the country alike. In this chapter the powers to deny entry to (or exclude), arrest, detain, and deport non-citizens are discussed and analysed from a constitutional point of view. In chapter 3, the impediments to access to justice for non-nationals were discussed as well as the application of certain rights in the Constitution to this same group of persons. In this chapter, the actual processes of arrest, detention and deportation will be examined from that departure point. Note that “detention” in this chapter refers primarily to administrative detention of non-citizens for immigration purposes.

Arrest, detention and deportation are the mainstay of immigration control in South Africa.⁵⁰⁵ These are wholly administrative procedures and governed by the Immigration Act⁵⁰⁶ with its attendant regulations. To a lesser extent the Refugees Act⁵⁰⁷ and its regulations set up rules and procedures for arrest and detention of asylum seekers in specific instances. In chapter 3 of this thesis, it was established that even administrative deprivations of liberty or freedom are not without procedural and constitutional protections and these will be discussed in this chapter in greater detail.

Worldwide, the detention of non-citizens for purposes of immigration control has grown exponentially over the past few decades.⁵⁰⁸ This is true both in developed countries and in the developing world. There is a tendency to hold undocumented migrants and rejected asylum seekers in detention centres for extended periods without strict oversight or legal controls.⁵⁰⁹ In his book, Daniel Wilsher calls this the warehousing of immigrants outside the mainstream of the law, leading to arbitrariness and extra-judicial practices.⁵¹⁰ This chapter intends to show how South Africa has also joined this trend, conveniently carving out a place for immigration control which appears to be outside of the country's constitutional and international law obligations even though the courts are active in checking this behaviour. There has been a trend towards detention of non-citizens without judicial oversight and at times in spite of it.

Several studies by human rights groups have established that there exist extensive substantive irregularities in the arrest, detention and deportation of non-citizens, including asylum seekers. Many basic legal protections have routinely not been upheld during the various stages from denial of entry (or exclusion), to arrest and eventual deportation, allowing for abuses of power and extra-legal activities.⁵¹¹

⁵⁰⁵ Wessel le Roux and Servious Hungwe "In Search of Alternatives to Pre-Emptive Immigration Detention (or not): A Review of Recent South African Case Law" (2011) XLIV *CILSA*139-167 139.

⁵⁰⁶ [No. 13 of 2002].

⁵⁰⁷ [No. 130 of 1998].

⁵⁰⁸ Daniel Wilsher *Immigration Detention Law, History, Politics*(2011) ix.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ Roni Amit (FMSP Report) *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (2010) available online at <<http://www.migration.org.za/report/amit-r-2010-lost-vortex-irregularities-detention-and-deportation-non-nationals-south-africa-f>> (accessed on 04/06/2012).

4.2. Arrest and detention for the purposes of identification

In chapter two the issue of non-citizens who are undocumented or suspected of being undocumented was discussed.⁵¹² Typically they are arrested, detained and deported, almost always with little or no recourse to the legal processes and remedies contained in both the Immigration and Refugees Acts. Reports by the South African Human Rights Commission (SAHRC), Lawyers for Human Rights (LHR), and the University of the Witwatersrand's African Centre for Migration & Society (ACMS) and others (already alluded to in chapter 3) show that there is a flagrant disrespect for the rule of law when it comes to enforcing the abovementioned Acts.⁵¹³ The constitutional framework was fleshed out in chapter 3 (above) in discussions on sections 12(1) and 35(2) of the Constitution.⁵¹⁴ Suffice to say that arbitrary arrest and detention are of major concern to non-citizens.⁵¹⁵ The rights and protections that should be automatically available to them during the process are often flagrantly disregarded by the relevant authorities.

The processes of arrest and the initial detention are important components of the repatriation/deportation process.⁵¹⁶ It is crucial at this initial stage for all safeguards to be thoroughly and justly applied by the arresting officials so that people are not wrongly incarcerated.⁵¹⁷ Section 34 of the Immigration Act makes provision for the “deportation and detention of illegal foreigners”, while section 41 provides for the “identification” of persons of interest to the immigration authorities.⁵¹⁸ Section 41 empowers the immigration or police officers to request any person to identify him or herself as a citizen, permanent resident or foreigner, provided such officer is satisfied on “reasonable grounds” that such person is not

⁵¹² See chapter 2.4 (above).

⁵¹³ Lawyers for Human Rights (LHR) Report *Monitoring Immigration Detention in South Africa* (2010) available online at <<http://www.lhr.org.za>> (accessed on 25/05/2011); Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2012) available online at <<http://www.lhr.org.za>> (accessed on 28/04/2013); South African Human Rights Commission (SAHRC) *Report into the Arrest and Detention of Suspected Undocumented Migrants* (1999) available online at <<http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>> (accessed on 28/05/2012); Amit (FMSP Report) *Lost in the Vortex*.

⁵¹⁴ See Chapter 3.4.1 and 3.4.2 (above).

⁵¹⁵ David Weissbrodt *The Human Rights of Non-Citizens* (2008) 5.

⁵¹⁶ Solidarity Peace Trust and PASSOP *Perils and Pitfalls Migrants and Deportation in South Africa* (2012) available online at <<http://www.solidaritypeacetrust.org/1192/perils-and-pitfalls/>> (accessed on 24/04/2013).

⁵¹⁷ Ibid.

⁵¹⁸ International Federation for Human Rights (FIDH) Report *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa* (2008) available online at <<http://www.fidh.org/Surplus-People-Undocumented-and->> (accessed on 09/02/2012).

entitled to be in the Republic.⁵¹⁹ Before a person can be arrested as an “illegal foreigner” for purposes of the Act, the officials may interview him/her provided that they have reasonable grounds to believe that he or she has no legal right to be in the country.⁵²⁰ Section 41 gives the immigration or police officer powers to arrest a person for purposes of verifying his or her identity. It is at the end of this process that the official may detain the person in terms of section 34 of the Act if he or she has established that the person concerned is an illegal foreigner.⁵²¹

On the face of it, this process would seem simple enough to understand yet, in practice, it is misapplied. In terms of Regulation 32 of the Immigration Regulations, an immigration or police officer, when verifying the identity and status of a person under section 41(1) of the Act, may have regard to all relevant and available documents, contact third parties known to the person and make use of departmental records.⁵²² The Act specifically mandates that an officer must be satisfied on *reasonable grounds* that the said person is not entitled to be in the Republic. These provisions exist so that substantial and procedural justice is done to the affected person. The detention period for purposes of identification in this section must be read with section 34(2) of the Immigration Act which provides that detention must not exceed 48 hours.⁵²³ The Supreme Court of Appeal in *Ulde v Minister of Home Affairs*⁵²⁴ stated that only if the detention is necessary should the officer carry it out.

“The requirement of necessity (and the concomitant element of proportionality) connotes that an immigration officer must consider whether there are sufficient grounds for the detention and also whether there are other less coercive measures to achieve the objective.”⁵²⁵

In the discussion following, it will be demonstrated that this is not always the case and more often than not steps in the process are skipped.

⁵¹⁹ Immigration Act s 41.

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Immigration Regulations, GN R616, GG 27725, 27 June 2005, Reg 32:

“Identification:

An immigration officer or police officer shall take the following steps in order to verify the identity and status of the person contemplated in section 41(1) of the Act:

- a) Access relevant documents that may be readily available in this regard; or
- b) Contact relatives or other persons who could prove such identity and status; and
- c) Access departmental records in this regard.”

⁵²³ Immigration Act ss 34(2) and 41 (1); see also *Lawyers for Human Rights v Minister of Home Affairs* Para 10.

⁵²⁴ *Ulde v Minister of Home Affairs* 2009 (4) SA 522 (SCA); 2009 (8) BCLR 840 (SCA).

⁵²⁵ Para 7 footnote 6.

In its report, the SAHRC found that arrested persons were deliberately prevented from providing accurate documents and that officers sometimes destroy valid identity documents.⁵²⁶ Corrupt officials solicit foreigners for bribes to avoid arrest or to be released without documentation. The commission noted that processes were delayed by inefficient investigation methods and inadequate communication between the relevant departments.⁵²⁷ Evidence collected by the African Centre for Migration & Society from persons incarcerated at the Lindela repatriation centre corroborates the SAHRC's findings, even though these two investigations occurred about a decade apart.⁵²⁸ Recent newspaper reports show that the Minister of Home Affairs has condemned the practice of incomplete investigations under section 41 of the Immigration Act. She said that police and immigration officers need to be adequately and properly trained to be able to double-check immigrants' stories before inconveniencing them by sending them to the Lindela holding facility.⁵²⁹

Section 41 has been criticised since the drafting stages of the Act. The Southern African Migration Project (SAMP) described it as worrisome hankering back to the days of police state powers associated with the apartheid regime or the former Soviet Union.⁵³⁰ They argued that the South African police had not exercised such power since 1986 and it created an atmosphere of fear and suspicion.⁵³¹ These views are echoed by the comments of the South African Human Rights Commission on the same section. The SAHRC has said "identification on demand" is harking back to the days of Apartheid when black South Africans had to constantly assert their right to be in "white" South Africa.⁵³² In the present scenario, such a law gives the authorities the powers to conduct raids in residential areas, thus promoting racism and xenophobia and driving non-citizens further away from any formal contact with state institutions. Its broad powers have seen many non-citizens who are legally

⁵²⁶ South African Human Rights Commission (SAHRC) *Lindela at the Crossroads for Detention and Repatriation an assessment of the conditions of detention*(2000) available online at <<http://www.queensu.ca/samp/migrationresources/xenophobia/reports/sahrc1.pdf>> (accessed on 28/04/2013) 35.

⁵²⁷ Ibid.

⁵²⁸ Amit (FMSP Report) *Lost in the Vortex*.

⁵²⁹ Hopewell Radebe "Pandor in Urgent Bid to Solve 'Unclaimed' Illegal Immigrant Problem" *BDLive* (25 January 2013) www.bdlive.co.za/national/2013/01/25/pandor-in-urgent-bid-to-solve-unclaimed-illegal-immigrant-problem (accessed on 28/04/2013).

⁵³⁰ Southern African Migration Project "The New South African Immigration Bill: A Legal Analysis" in J Crush and V Williams (eds) *Migration Policy Brief No. 2*(2001) 10.

⁵³¹ Ibid.

⁵³² South African Human Rights Commission (SAHRC) *Comments on Draft Immigration Regulations to the Immigration Act No. 13 of 2002* (June 2003) submitted by the SAHRC to the Minister for Home Affairs on 2 June 2003 as per Government Gazette General Notice 1298 of 2003.

in the country being arrested due to their failure to immediately produce the necessary identification documentation.⁵³³

Section 41 works in tandem with the system of in-country controls that call upon all state organs and other private institutions to ascertain the status or citizenship of the persons they are in contact with and to "report to the Director-General any illegal foreigner, or any person whose status or citizenship could not be ascertained."⁵³⁴ In chapter 3 (above) one of the impediments to non-citizens accessing justice and the legal system was identified as legal and institutional discrimination.⁵³⁵ It is submitted that sections 41, 44 and 45 of the Act institutionalise discrimination within government departments and society at large. The Act does not define what is meant by "reasonable grounds" in section 41 and this power is often exercised in a discriminatory fashion, contrary to section 9(3) of the Constitution which prohibits unfair state discrimination.⁵³⁶ However, the judgment in *Jeebhai and Others v Minister of Home Affairs and Another*⁵³⁷ implies that once an officer goes through the procedures in regulation 32 of the Immigration Regulations then the duty to have "reasonable grounds" before action is discharged. While this interpretation seems consistent with the purpose of the Act which is to enforce immigration laws in a procedurally fair manner, it still leaves unanswered the question of the actual identification of people suspected of being undocumented. It also does not address the issues of racial profiling and discrimination in the identification process.⁵³⁸

A similar provision in Arizona State in the United States of America⁵³⁹ has met with much criticism because of the fear amongst academics, lawyers, civil liberty groups and migrants there that such law will encourage law enforcement to racially profile "foreign looking

⁵³³ Ibid.

⁵³⁴ Immigration Act ss 44 and 45. See also International Federation for Human Rights (FIDH) Report *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa* (2008) 20.

⁵³⁵ See chapter 3.3.4 (above).

⁵³⁶ South African Human Rights Commission (SAHRC) *Comments on Draft Immigration Regulations to the Immigration Act No. 13 of 2002*.

⁵³⁷ 2009 (5) SA 54 (SCA) Paras 20 – 24. See also *Ulde v Minister of Home Affairs* 2009 (4) SA 522 (SCA); 2009 (8) BCLR 840 (SCA) Paras 6 - 11; and *Lawyers for Human Rights v Minister of Home Affairs*.

⁵³⁸ The American Civil Liberties Union defines racial profiling in law enforcement in the following manner: "Racial profiling disproportionately targets people of colour for investigation and enforcement, alienating communities from law enforcement, hindering community policing efforts, and causing law enforcement to lose credibility and trust among the people they are sworn to protect and serve."

⁵³⁹ The Support our Law Enforcement and Safe Neighbourhoods Act of Arizona SB 1070 (2010).

people.”⁵⁴⁰ Unlike our own section 41, the equivalent section in the Arizona statute narrows the scope of people who can be stopped by stating that officers, while enforcing other laws, may question the immigration status of those they suspect are in the country illegally. It is not anyone who may be stopped on the street but only those who come into conflict with other laws and are stopped in the process of investigation by the police.⁵⁴¹ The law specifically prohibits racial profiling and discrimination by law enforcement in the carrying out of their mandate.⁵⁴²

4.2.1. Conclusion and proposals

There is a need for the legislature to amend section 41 to expressly prohibit random identity checks and any other discriminatory practices which have been discredited in post-independence South Africa. This is not a panacea that will end discrimination but at the very least it will protect people’s freedom and right to privacy as they go about their daily activities. The introduction of the requirements laid down in the Arizona statute (discussed above) would already be an improvement, even though caution needs to be exercised as the statute has been criticised as draconian. There should be reasonable grounds to stop a person other than the colour of their skin or other physical features. The high numbers of people found in repatriation centres and police holding cells whose cases have not been fully investigated point to lax standards and controls within the South African Police Service

⁵⁴⁰ Jason A Nier, Samuel L Gaertner, Charles L Nier and John F Dovidio "Can Racial Profiling be Avoided under Arizona Immigration Law? Lessons Learned from Subtle Bias Research and Anti-Discrimination Law" (2012) 12 (1) *Analyses of Social Issues and Public Policy* 5-20 6.

⁵⁴¹ Arizona SB 1070 as amended by Arizona House Bill 2162 – s 3:

“Cooperation and assistance in enforcement of immigration laws; indemnification:

B. For any lawful contact Stop, Detention Or Arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town of this State where reasonable suspicion exists that the person is an alien who AND is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have [his or her] immigration status determined before [he or she] is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely consider race, colour or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.”

See also Ed Morrissey "An incomplete win for Obama" *CNN.com* (25 June 2012) <<http://edition.cnn.com/2012/06/25/opinion/morrissey-arizona-immigration/index.html>> (accessed on 29/04/2013).

⁵⁴² Nier *et al*(2012) *Analyses of Social Issues and Public Policy* 6.

(SAPS), South African National Defence Force (SANDF)⁵⁴³ and the Department of Home Affairs (DHA).⁵⁴⁴

4.3. Detention for purposes of deportation

In chapter 2 of this thesis, the international law protections against arbitrary arrest and deprivations of liberty were discussed. These rights have found a place within the South African Constitution.⁵⁴⁵ In chapter 3 (above), it was shown that section 12(1) provides substantive as well as procedural protection for any deprivation of physical freedom.⁵⁴⁶ It was shown that the substantive component requires that when depriving someone of their freedom, the State must have good reasons, whilst procedurally the state must follow the correct and fair proceedings in the deprivation process.⁵⁴⁷ In the same chapter, there was a discussion on how section 35 sets the tone together with section 12 for all matters regarding the deprivation of liberty of non-citizens. These protections exist so as to avoid a reversion to the arbitrariness and permissiveness of the apartheid era.⁵⁴⁸

The section 41 process may only be used in cases involving persons who are suspected of being illegal foreigners. Where an immigration officer has made a factual determination that the person concerned is an illegal foreigner, the officer has discretion on what to do next.⁵⁴⁹ He may either arrest the illegal foreigner without a warrant and then detain him in terms of section 34(1) for deportation or, in terms of section 8(1), inform the foreigner concerned in the prescribed manner that he is entitled to make representations to the Minister within three days to review his determination as an illegal foreigner.⁵⁵⁰ Section 8 is a reflection of the administrative justice principles that have to apply during arrest, detention and deportation proceedings.⁵⁵¹ Earlier in this thesis, the case of *Koyabe v Minister of Home Affairs*⁵⁵² was

⁵⁴³ Defence Act [No. 42 of 2002] s 18 (1)(c) – “Employment of the Defence force to effect national border control; South African National Defence Force soldiers are deployed to defend the integrity of the country’s borders and do arrest non-citizens suspected of being in the country illegally.”

⁵⁴⁴ See the statistics in the South African Human Rights Commission *Report into the Arrest and Detention of Suspected Undocumented Migrants* (1999) and Amit (FMSP Report) *Lost in the Vortex*.

⁵⁴⁵ Chapter 2.2; 2.3 and 2.4 (above).

⁵⁴⁶ See Chapter 3.4.1 (above).

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid chapter 3.4.2 (above).

⁵⁴⁹ *Jeebhai and others v Minister of Home Affairs and Another* Para 25.

⁵⁵⁰ Ibid.

⁵⁵¹ Consortium for Refugees and Migrants in South Africa (CoRMSA) *Handbook for Legal Practitioners: Assisting in Matters of Arrest and Detention* (2009) available online at <www.cormsa.org.za> (accessed on 29/04/2013).

⁵⁵² 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC).

discussed where the Constitutional Court set out the application of section 8 of the Act and how affected parties could go about harnessing and enjoying the protections afforded therein.⁵⁵³

In the situation where the immigration officer elects to arrest the person as an illegal foreigner with the intention to deport the said individual, section 34(1) applies. Section 32 of the Act clearly provides that any illegal foreigner shall depart or shall be deported unless authorised to remain in the country by the Director General.⁵⁵⁴ Once the arrest has been carried out and the illegal foreigner is detained in terms of section 34(1),⁵⁵⁵ then such person must be treated in terms of section 32 and should leave the country, be deported or seek permission to remain. In such a case, however, the protections and safeguards contained in the Act and regulations which guarantee that person's rights immediately come into effect.⁵⁵⁶ People arrested and detained for the purpose of deportation must be notified in writing of the decision to deport them and of their right to appeal. They are entitled to request that their detention be confirmed by an order of court and must be informed of these rights.⁵⁵⁷ If the warrant is not confirmed by the court they must be released immediately.⁵⁵⁸ Section 34 must be read with Regulation 28 of the Immigration Regulations which fleshes out the complete arrest, notification, detention, appeal and deportation processes.⁵⁵⁹ If the immigration department intends to detain an illegal foreigner for longer than 30 days, they must obtain, from a court, a warrant which may on good and reasonable grounds be extended for a period not exceeding 90 days.⁵⁶⁰ In terms of the regulations, an immigration officer intending to apply for the said extension of the detention period should notify the detainee within 20 days after the arrest in the prescribed manner. Thereafter, within 3 days he must afford the detainee the opportunity to make representations before submitting the application (with his reasons) to the clerk of the court within 25 days using the appropriate form.⁵⁶¹ The condition

⁵⁵³ See the discussion on the *Koyabe* case in chapter 3.4.3.1 (above).

⁵⁵⁴ Immigration Act s 32.

⁵⁵⁵ S 34 - Deportation and detention of illegal foreigners.

⁵⁵⁶ *Jeebhai and others v Minister of Home Affairs and Another* Para 26.

⁵⁵⁷ Immigration Act s 34(1)(a), (b) and (c). See also *Lawyers for Human Rights v Minister of Home Affairs* Para 8; *Jeebhai and others v Minister of Home Affairs and Another* Para 27.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Immigration Regulations reg 28: Deportation and Detention of Illegal Foreigners.

⁵⁶⁰ Immigration Act s 34(1)(d).

⁵⁶¹ Immigration Regulations reg 28(4).

imposed by the legislature is that this detention must be in compliance with minimum prescribed standards that protect the detainee's dignity and relevant human rights.⁵⁶²

The importance of these protections and the access that detained persons have to them cannot be gainsaid. In the African Centre for Migration & Society (ACMS)'s field research on irregularities in the detention and deportation processes, key findings pointed to repeated and numerous violations of the prescribed processes.⁵⁶³ The legislature in section 34(3) of the Act was aware that they were dealing with foreign nationals with limited or no knowledge of South African laws, customs, norms and languages, and therefore mandated the immigration officers to inform arrested persons immediately of their rights in a language understandable to them.⁵⁶⁴ From empirical research conducted amongst detainees by the ACMS and the SAHRC, it was found that foreigners who are in great need of these rights and procedural guarantees are unaware of them. The forms prescribed for use in the Immigration Regulations did not appear to be in regular use, and a large number of detainees did not know of their existence.⁵⁶⁵

It should be noted that even with the right to challenge the initial detention under section 34(1)(b) and the right to challenge detention for longer than 30 days, the DHA does not give foreigners the right of appearance in front of a magistrate.⁵⁶⁶ Generally the practice is that an immigration official appears before a magistrate and requests the confirmation of the

⁵⁶² S 34(1)(e).

⁵⁶³ Amit (FMSP Report) *Lost in the Vortex*. The key findings of the report relating to the various deficiencies at different stages of the process can be summarised as follows:

- Failure to inform suspected illegal foreigners of the reason for their arrest;
- Lack of access to phones and refusal to allow detained suspects to contact family or friends;
- Detention of suspected illegal foreigners for more than 48 hours, in violation of the law;
- Irregularities in the classification process, including the failure to notify individuals of their classification as illegal foreigners and of their right to review the decision to classify them as illegal foreigners;
- Failure to classify individuals as illegal foreigners before transporting them to Lindela repatriation centre;
- Detentions without any procedural checks or judicial oversight;
- Detention periods that exceed the legislated 120-day maximum;
- Detention and possible deportation of asylum seekers, in violation of the prohibition against refoulement;
- Improper delegation of immigration services to private security Bosasa staff, who act as buffers between detainees and DHA processes.

⁵⁶⁴ Ibid. See also South African Human Rights Commission (SAHRC) *Lindela at the Crossroads for Detention and Repatriation: An Assessment of the Conditions of Detention* (2000); South African Human Rights Commission (SAHRC) *Report into the Arrest and Detention of Suspected Undocumented Migrants* (1999).

⁵⁶⁵ Ibid.

⁵⁶⁶ Consortium for Refugees and Migrants in South Africa (CoRMSA) *Handbook for Legal Practitioners: Assisting in Matters of Arrest and Detention* (2009) 13.

detention or extension thereof as the case may be.⁵⁶⁷ On the face of it this seems like blocking one's access to justice and should be challengeable in court, given that one party is allowed to be present while the other party is being detained at the discretion of that party. In legal parlance, this is a case where both arms are not equal before the court. In chapter 3, the right to access the courts contained in section 34 of the Constitution was discussed.⁵⁶⁸ In light of that discussion, taken together with the findings of an immigration monitoring report by Lawyers for Human Rights (LHR), this practice by the DHA seems unconstitutional because none of the detainees consulted by the organisation had been informed, or was aware, of any magistrate's warrant extending their detention, nor had they been advised of their right to make written representations to a magistrate.⁵⁶⁹ Of particular interest was the fact that in response to cases highlighting the lapses in procedure, the DHA would produce these warrants of detention in court. They purported to extend the detention in question, but often lacked crucial information, making it difficult to fathom how a magistrate could possibly have found such papers to be in order.⁵⁷⁰ In the case of *Khusru Rahman and 1 Other v Minister of Home Affairs and 2 Others*, these warrants were brought up for substantive review since, throughout the pre-trial stages, there had been no warrants.⁵⁷¹ They were only produced a day before the court hearing. Unfortunately the matter was decided on another issue and not the one of the magistrates' warrants. This case serves as an illustration of how the warrants contemplated in section 34(1) of the Act have been reduced to pro forma forms without any input from the detained persons.

4.3.1. The courts and detention for purposes of deportation

With regards to administrative detention for immigration purposes the courts have pointed out that it has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful.⁵⁷² Thus, once the claimant establishes that interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.⁵⁷³ The Constitutional Court has already pointed out in

⁵⁶⁷ Ibid.

⁵⁶⁸ See chapter 3.4.4 (above).

⁵⁶⁹ Lawyers for Human Rights (LHR) *Report Monitoring Immigration Detention in South Africa* (2010).

⁵⁷⁰ Ibid.

⁵⁷¹ *Khusru Rahman and 1 other v Minister of Home Affairs and 2 others* 6784/10 (SGHC) [unreported].

⁵⁷² *Zealand v Minister of Justice and Constitutional Development & another* 2008 (4) SA 458 (CC) Para 25 citing *Ingram v Minister of Justice* 1962 (3) SA 225 (WLD) at 227; *Jeebhai and others v Minister of Home Affairs and Another* Para 22.

⁵⁷³ Ibid.

Lawyers for Human Rights that although it is not mentioned in the Act or regulations, detained illegal foreigners are beneficiaries of rights under s 12(1) and s 35(2) of the Constitution.⁵⁷⁴ This case dealt mainly with the rights of people detained under section 34(8) and (9) of the Act, but it set the precedent for future cases on administrative detention regarding the correct application of section 34 and 41 of the same Act.

In *Lawyers for Human Rights*, the court held that because the safeguards in section 35(2) of the Constitution apply to persons detained by the master of a ship in terms of section 34(8) of the Immigration Act, it follows that a person so detained avoids detention in intolerable or inhumane circumstances.⁵⁷⁵ Where the circumstances of detention on a ship render it impossible for section 35(2) to be complied with, the immigration officer is forced to cause the detention of the suspected illegal foreigner at a state facility.⁵⁷⁶ The court was unhappy that the safeguards in section 34(1)(d) were not applicable, saying even where a person is detained on a ship, the courts should be brought into the picture if the detention went beyond 30 days. The court read in the following safeguard to be enjoyed by a person detained under section 34(8): “A person detained in terms of this section may not be held in detention for longer than 30 calendar days without an order of a court which may extend the detention for an additional period not exceeding 90 calendar days on reasonable grounds.”⁵⁷⁷

In *Jeebhai* the court confirmed that section 34(1) of the Immigration Act requires immigration officers to exercise their discretion when deciding whether or not to detain an illegal foreigner, saying there is no obligation to do so.⁵⁷⁸ The court ruled that this discretion has to be construed *in favorem libertatis*.⁵⁷⁹ Unlike in section 41(1) of the Act, there is no prerequisite for the detention to be “necessary”, thus relieving the immigration officer of this more onerous justificatory requirement.⁵⁸⁰ The court in the *Ulde* case did not address this particular issue but did plant the seeds of doubt regarding its constitutionality.⁵⁸¹ Le Roux and Hungwe, on the other hand, take the view that the court’s finding that section 34(1) detentions are not subject to a “necessity” requirement is simply wrong because it renders

⁵⁷⁴ *Lawyers for Human Rights v Minister of Home Affairs*; see discussion in chapter 3 (above).

⁵⁷⁵ Para 43.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ Para 47.

⁵⁷⁸ *Jeebhai and others v Minister of Home Affairs and Another* Para 20 – 21.

⁵⁷⁹ Para 25 and *Ulde v Minister of Home Affairs* Para 7.

⁵⁸⁰ *Ulde v Minister of Home Affairs* Para 6 footnote 7.

⁵⁸¹ *Ibid.*

nugatory the presumption against detention.⁵⁸² They argue that the court should not have concluded that an immigration officer need not consider whether there are any less coercive measures available to prevent an “illegal foreigner” from absconding whilst awaiting the outcome of the review process.⁵⁸³ Such measures include those similar to bail conditions afforded to suspects/accused persons in criminal cases.⁵⁸⁴

4.3.2. Prolonged detention

The earliest comprehensive study of immigration detention in the new South Africa was carried out by the SAHRC in 1999⁵⁸⁵ and the commission established that there were repeated violations of section 55 of the Alien Control Act (dealing with length of detention).⁵⁸⁶ Inmates were regularly detained for periods in excess of thirty days without any review of their detention by a judge of the High Court. Several detainees were found to have been in detention for periods of over 5 months (or 150 days), which was in excess of the allowable 120 days during which time their detention had not been subject to judicial review.⁵⁸⁷ Of further concern to the commission was the length of time detainees spent in police custody before being brought to the repatriation centre.⁵⁸⁸ Depending on the distance the police station was from Lindela, it could be days before one was brought to the centre. On arrival there, they would find out that DHA did not maintain records of the length of detention prior to arrival at Lindela.⁵⁸⁹ Due to this, the incidents of detention (without review) in excess of 30 days were numerous as the officials were disinclined to address the issue of the number of days that the detainee spent in police custody.

In 2009, LHR produced a report on immigration detention and although it was compiled almost 10 years since the first SAHRC report, the issues regarding prolonged detention were

⁵⁸² Le Roux and Hungwe (2011) *CILSA*158.

⁵⁸³ *Ibid* 159.

⁵⁸⁴ *Ibid*.

⁵⁸⁵ South African Human Rights Commission (SAHRC) *Report into the Arrest and Detention of Suspected Undocumented Migrants*(1999).

⁵⁸⁶ Aliens Control Act [No. 96 of 1991] - s 55:

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

⁵⁸⁷ SAHRC Report (1999).

⁵⁸⁸ *Ibid*.

⁵⁸⁹ *Ibid*.

still relevant if not to a greater extent.⁵⁹⁰ In the matter of *Aruforse v Minister of Home Affairs*,⁵⁹¹ the applicant challenged his prolonged detention in terms of section 34(1)(d) of the Act, after having been held in Lindela centre for over 6 months.⁵⁹² The court took the view that section 34(1) only permits the extension of the initial 30 day period by a Magistrate's Court for a further 90 calendar days. The court had recourse to the case of *Consortium for Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others*⁵⁹³ where Motloutung J interpreted section 34(1) of the Immigration Act to mean "that the maximum period for which any person can be detained in terms of the Immigration Act is a period of 120 days."⁵⁹⁴ Accordingly the court ruled the detention of the applicant past the statutory 120 days to be unlawful. In *Hassani v Minister of Home Affairs* a similar ruling was handed down based on the excessive length of the applicants' detention.⁵⁹⁵ The matter was finally laid to rest in *Arse v Minister of Home Affairs and Others* where the Supreme Court of Appeal cited the *Aruforse* judgment with approval.⁵⁹⁶ It is important to note that the *Lawyers for Human Rights* court made a similar statement to the effect that detention over 120 days was not lawful.⁵⁹⁷

4.3.3. Conclusion and proposals

The presence of a non-citizen in the detention centre without recourse to legal representation and without an understanding of the South African legal and judicial processes places them at a significant disadvantage. According to the ACMS research, many detainees feared that if they insisted on exercising their rights, they would be victimised and would not have access

⁵⁹⁰ Lawyers for Human Rights (LHR) *Report Monitoring Immigration Detention in South Africa* (2010). See also Amit (FMSP Report) *Lost in the Vortex*.

⁵⁹¹ *Kanyo Aruforse v Minister of Home Affairs; Director-General, Department of Home Affairs and Bosasa (Pty) Ltd* (1189/10) SGHC [unreported].

⁵⁹² Para 12.

⁵⁹³ *Consortium for Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others* 6709/08 (WLD) [unreported].

⁵⁹⁴ *Aruforse v Minister of Home Affairs* Paras 14 – 15.

⁵⁹⁵ *Hassani v Minister of Home Affairs & 2 Others* 01187/10 (SGHC) [unreported]. The court held that no detention beyond 120 days is lawful, and that the appropriate remedy is the applicant's immediate release. See also *AS & 8 others v Minister of Home Affairs & 3 others* 2010/101 (SGHC) [unreported]. After more than 4 months in administrative detention, the High Court declared applicants' detention unlawful because DHA had failed to follow the correct administrative procedures when the family was first detained. The court importantly held that a warrant of detention that was not issued in accordance with procedural requirements of the Immigration Act, in this case within the correct time frame, could not legitimize, after the fact, a detention that was initially unlawful.

⁵⁹⁶ *Arse v Minister of Home Affairs and Others* 2010 (3) All SA 261 (SCA) Para 9.

⁵⁹⁷ *Lawyers for Human Rights v Minister of Home Affairs* Para 45.

to lawyers or would be deported immediately.⁵⁹⁸ The prolonged detention beyond the statutory 120 days is a major concern, as is the failure of the system to adequately inform and protect non-citizens in the enjoyment of their rights. Ignorance and apathy on the part of officials perpetuate practices which are inconsistent with the Constitution and the relevant legislation.

The general set up of Lindela as the main immigration detention centre in South Africa raises a number of questions. The Department has delegated daily operations of the centre to Bosasa, a private contractor that owns the property.⁵⁹⁹ Although this is not the subject matter of this thesis it is relevant to how inmates access justice and the legal process from behind the walls of a private security company. The company has responsibilities for day to day operations at the centre, which includes food, accommodation, and security. The appointment of a contractor to carry out a core government function has blurred important lines of accountability and responsibility at the facility, to the detriment of administrative justice.⁶⁰⁰ ACMS and LHR field researchers at the centre noticed that although DHA officials continued to staff the outer realms of the centre, it appeared to have ceded to Bosasa control of activities within the inner realm, where illegal foreigners are kept.⁶⁰¹ This creates a serious problem of accountability with the DHA often absent from the centre. Interviewed inmates spoke of never having been interviewed by an immigration officer.⁶⁰²

This makes it very important that there be some form of governmental oversight outside of the Department. There is no legal framework for judicial oversight over Lindela as an administrative detention facility as is the case with the Department of Correctional Services.⁶⁰³ Whenever judges go there, it is mostly on an *ad hoc* basis, not scheduled visits.⁶⁰⁴ In its 1999 report, the SAHRC recommended that a permanent Inspectorate be established to visit persons held in terms of the (then) Aliens Control Act in any police prison or other

⁵⁹⁸ Amit (FMSP Report) *Lost in the Vortex* 39 – 47.

⁵⁹⁹ *Ibid* 17.

⁶⁰⁰ *Ibid*.

⁶⁰¹ *Ibid*. See also Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2008) available online at <<http://www.lhr.org.za>> (accessed on 08/04/2013).

⁶⁰² Lawyers for Human Rights (LHR) *Monitoring Immigration Detention in South Africa* (2008).

⁶⁰³ See South African Human Rights Commission (SAHRC) *Lindela at the Crossroads for Detention and Repatriation: An Assessment of the Conditions of Detention* (2000):

“Section 85(1) of the CSA 199861 provides for the establishment of an independent office, called the Judicial Inspectorate, under the control of the Inspecting Judge. The objective of the Judicial Inspectorate is to “facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners and on conditions and any corrupt or dishonest practices in prisons.”

⁶⁰⁴ Lawyers for Human Rights (LHR) *Report Monitoring Immigration Detention in South Africa* (2012).

detention facility in order to monitor compliance with arresting guidelines, the Act, and the constitutional provisions relevant to arrest and detention in terms of the Act.⁶⁰⁵ This recommendation is even more relevant today, in view of the high number of irregularities already identified in this research. The SAHRC's recommendations were guided by the Correctional Services Act⁶⁰⁶ and international standards set by the United Nations. In terms of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the places of detention on imprisonment."⁶⁰⁷ The role of the inspectorate would be to ensure that there is compliance with the Act and regulations. With the high number of cases coming before the court on matters relating to immigration irregularities, a South Gauteng High Court judge did make a visit to Lindela in early 2012 to investigate the reasons for these cases.⁶⁰⁸ A permanent structure similar to the one created under the Correctional Services Act⁶⁰⁹ would be welcome with such an inspectorate carrying out the necessary oversight and inspection functions.

4.4. Detention of asylum seekers

In chapter 2 the international law and UNHCR guidelines on the detention of asylum seekers were discussed.⁶¹⁰ Under international law, asylum seekers enjoy the same right against arbitrary or unnecessary detention as all other persons do and the UNHCR guidelines on the detention of asylum seekers generally declare the practice of detaining asylum seekers to be inherently undesirable.⁶¹¹ The same protections are found in the UN Refugee Convention to which South Africa is a state party.⁶¹² This prohibition has been domesticated in sections 12(1) and 35(2) of the Constitution as well as in the Refugees Act which constricts the

⁶⁰⁵ South African Human Rights Commission (SAHRC) *Report into the Arrest and Detention of Suspected Undocumented Migrants*(1999).

⁶⁰⁶ Correctional Services Act [No. 111 of 1998].

⁶⁰⁷ UN General Assembly *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*(1988) A/RES/43/173, available at: <<http://www.refworld.org/docid/3b00f219c.html>> (accessed on 24 October 2013).

⁶⁰⁸ Lawyers for Human Rights (LHR) *Report Monitoring Immigration Detention in South Africa*(2012).

⁶⁰⁹ Correctional Services Act [No. 111 of 1998] s 93(1).

⁶¹⁰ See chapter 2.2 (above).

⁶¹¹ UN High Commissioner for Refugees (UNHCR) *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*(1999) available online at <<http://www.refworld.org/docid/3c2b3f844.html>> (accessed 13 October 2013), guideline 1.

⁶¹² UN Convention Relating to the Status of Refugees Art 31(2).

grounds upon which an asylum seeker may be detained.⁶¹³ However, in spite of all these provisions, arrests and detention of asylum seekers still occur on a wide scale for various reasons.⁶¹⁴ Section 21(4)(a) of the Refugees Act expressly excludes asylum seekers from having to comply with the requirements of the Immigration Act, yet this is one of the reasons for the arrest of asylum seekers.⁶¹⁵

The overriding concern when dealing with the detention of asylum seekers is the fear of exposing them to *refoulement*. Once the minister has withdrawn the asylum seeker permit in terms of section 22(6), the claimant may be held in detention in accordance with section 29 of the same Act which restricts the period of detention to one that is reasonable and justifiable.⁶¹⁶ If such detention exceeds 30 days, then it must be reviewed immediately by a judge of the High Court. These are the safeguards built into the Refugees Act for protection of asylum seekers. Yet in research conducted by ACMS and LHR, large numbers of asylum seekers were found in the Lindela repatriation centre.⁶¹⁷ None had had their section 23 permits withdrawn nor had anyone of them been notified of proceedings to withdraw his or

⁶¹³ Refugees Act s 22. See also s 23:

“Detention of asylum seeker:

If the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.”

⁶¹⁴ Lawyers for Human Rights (LHR) *Report Monitoring Immigration Detention in South Africa* (2010). According to the report, in most cases the unlawful detention of asylum seekers resulted from the following circumstances:

- Asylum seekers were prevented from renewing their asylum-seeker permits because of long queues outside of the Refugee Reception Offices.
- Asylum seekers were arrested before being able to launch their asylum applications.
- Asylum seekers were accused of renewing their permits with a fraudulently obtained Home Affairs stamp.
- Asylum seekers failed to lodge notices of their intention to appeal against negative status determination decisions within 30 days.
- Asylum seekers did not appear before the Refugee Appeal Board on the date of their scheduled appeal hearing, often because they were either unaware that a hearing had been scheduled, or had been denied entry into the RRO.

⁶¹⁵ Refugees Act s 21(4):

“Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if -

- (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4;
- (b) such person has been granted asylum.”

⁶¹⁶ *Ibid* s 29.

⁶¹⁷ In LHR’s detention report, 200 asylum seekers were found within the centre. In the ACMS report, a total of 257 surveyed detainees (40%) identified themselves as asylum seekers or refugees.

her permit.⁶¹⁸ One of the concerns raised by the researchers was the barrier posed by the BOSASA private security guards at the facility.⁶¹⁹ These guards stood between detainees and the DHA or legal representatives, thus barring the detainees from accessing the legal processes that protect them against continued detention and eventual *refoulement*.⁶²⁰

4.4.1. Judicial responses to the detention of asylum seekers

In the case of *Mustafa Aman Arse v Minister of Home Affairs*⁶²¹ the court *a quo* ruled that when dealing with detained asylum seekers, the relevant legislation to use was section 23(2) of the Immigration Act that made it an offence for a person to allow the asylum transit permit issued in terms of section 23(1) to expire before lodging an asylum claim. Consequently the court found that in the present case, the detention was lawful.⁶²² Secondly the court also found that an asylum seeker permit does not by itself give rise to the right to be released from detention. The term “sojourn” in section 22(1) meant nothing more than the right to remain in South Africa, that is, not to be deported.⁶²³ It did not entail a right to move about freely in the country without any restrictions.⁶²⁴ That the judge in the court *a quo* saw it fit to blame the DHA’s failure to manage illegal migration on indigent and homeless non-citizens is unfortunate and is an irregular reason to rule as he did. (In chapter 3, it was shown how the poverty of non-citizens has even been used by the courts to deny justice to indigent non-citizens in various scenarios.⁶²⁵)

⁶¹⁸ Amit (FMSP Report) *Last in the Vortex* 47; and Lawyers for Human Rights (LHR) *Report Monitoring Immigration Detention in South Africa* (2010) 7.

⁶¹⁹ See chapter 4.3.3 (above).

⁶²⁰ *Ibid* 48.

⁶²¹ *Mustafa v Minister of Home Affairs* [2010] ZAGPJHC 1. The court was seized with the matter of an applicant who had been arrested as an “illegal foreigner” following several unsuccessful attempts to access the RRO in Port Elizabeth. After three months in Lindela, immigration officers assisted him to lodge an asylum application, but he remained in detention. He launched an urgent High Court application for his release. The High Court judge refused to release him without certain preconditions, which the applicant rejected. When the asylum application was filed, the detention warrant required under s 34(1) had expired without being renewed. In a sense, the applicant was actually unlawfully detained at that point and the court should have ordered his immediate release. The judge acknowledged that “freedom of a person is undoubtedly a right of great importance enshrined in the constitution.” He then held, however, that “the courts can take judicial notice of the fact that we have high levels of crime in this country and we have high levels of unemployment and we have high levels of illegal immigration into the country.” The judge concluded that while the court “obviously has to have regard to the importance of a person having freedom, the court must also have regard to the practicalities that would arise in ordering the release of a person such as this.”

⁶²² *Ibid*.

⁶²³ *Mustafa Aman Arse v Minister of Home Affairs* Para 11; Le Roux and Hungwe (2011) *CILSA* 139-167 161.

⁶²⁴ *Ibid*.

⁶²⁵ See chapter 3.3.2 (above).

In the Supreme Court of Appeal,⁶²⁶ the justices upheld the appeal and overturned the entire judgment of the court *a quo*. The SCA held that the case was governed by section 21(4)(a) of the Refugees Act, which protects an asylum seeker from being arrested for her unlawful entry into or presence within the Republic, provided she has applied for asylum in terms of the Act.⁶²⁷ The SCA reaffirmed the procedural safeguards that are available to an asylum seeker in such a scenario, saying until a decision has been made on his or her application and that person has had an opportunity to exhaust his or her rights of review or appeal in terms of the Refugees Act, no proceedings may be instituted or continued against that person in respect of his or her unlawful entry into the country.⁶²⁸ The SCA also addressed the contradiction that seemingly exists between the sanction against being undocumented that is found in section 23(2) of the Immigration Act and the protection from arrest on such a ground that is found in section 22(6)(a) of the Refugees Act. The SCA decided to reconcile these two sections saying “where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another.”⁶²⁹ It looked at the wording and took into account the spirit of the international instruments that the Refugees Act sought to give effect to, and then drew the conclusion that section 23(2) of the Immigration Act ceased to be of application when an asylum seeker permit is granted to an “illegal foreigner.”⁶³⁰

The SCA also disagreed with the court *a quo*'s attempt to balance the appellant's right to freedom with the State's legitimate interest in trying to curb illegal immigration.⁶³¹ The SCA was of the view that there was no need for such balancing, since a court could not impose conditions for the release of a person who is already unlawfully detained.⁶³² The court also held that section 23 of the Refugees Act regulates the detention of asylum seekers and this was only possible if the Minister had withdrawn an asylum seeker permit in terms of section 22(6) of the same Act. The SCA stated that the withdrawal of the asylum seeker permits is a jurisdictional fact, and was a prerequisite for the lawful detention of the asylum seeker. Where such a permit had not been withdrawn, there could be no lawful detention in terms of the Refugees Act.⁶³³

⁶²⁶ *Arse v Minister of Home Affairs* 2010 (3) All SA 261 (SCA).

⁶²⁷ Para 10.

⁶²⁸ Para 19.

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.*

⁶³¹ Para 11.

⁶³² *Ibid.*

⁶³³ Para 22.

Although rejected by the applicant and eventually by the SCA, the judge's order in the court *a quo* for conditional release was not far from the mark in terms of alternatives to detention in other scenarios. Le Roux and Hungwe hold the view that the judge's solution is in line with international best standards as enunciated in the Community Assessment and Placement (CAP) model.⁶³⁴ The CAP model is the brainchild of the International Detention Coalition, which was designed as a non-prescriptive framework to assist governments to explore and develop preventative mechanisms and alternatives to detention.⁶³⁵ Briefly, the CAP model identifies five steps that prevent and reduce the likelihood of unnecessary detention.⁶³⁶ These are to: presume detention is not necessary; screen and assess the individual case; assess the community setting; apply conditions in the community if necessary; and detain only as the last resort in exceptional cases.⁶³⁷ This solution is the lesson that can be taken away from the court *a quo*. The SCA took the view that detention of asylum seekers was not the best approach and that alternatives had to be found. It was of the view that the concerns that the DHA had with regards to illegal migration could have been addressed by the imposition of conditions in terms of section 22 of the Refugees Act and their effective monitoring.

In conclusion, the court took a rather dim view of unlawful detention and stressed the importance of the legal and judicial processes that were put in place as safeguards for the protection of asylum seekers.

4.5. Deportation and the principle of *non-refoulement*

In Chapter 3, the issue of the *refoulement* of some asylum seekers at certain border posts was briefly discussed.⁶³⁸ The discussion in this section will focus on the denial of access to justice and remedies contained in the Refugees and Immigration Acts. Such denial is a daily reality for many asylum seekers who fail to seek adequate redress so that they may realise their procedural and substantive rights.

Section 23 of the Immigration Act makes provision for an asylum transit permit:

⁶³⁴ Le Roux and Hungwe (2011) *CILSA*144. See also International Detention Coalition *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011) available online at <http://massivefishball.com/IDC_Handbook.pdf> (accessed on 15/07/2011).

⁶³⁵ International Detention Coalition (IDC) *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011) 9. See also footnote 13. This system is in use in the United Kingdom, Belgium, and the Netherlands.

⁶³⁶ *Ibid* 4 – 5.

⁶³⁷ *Ibid*. Various countries have been identified as favouring the assumption against detention, including New Zealand, Hong Kong, Argentina and the United Kingdom.

⁶³⁸ See Chapter 3.3.5 (above).

- (1) “The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only.”⁶³⁹

This Act governs the procedure that one must follow in order to gain entry into South Africa and this particular section is directed specifically at asylum seekers. Research conducted by the LHR, and the ACMS (at Witwatersrand University) shows that there has been a systematic refusal of entry (or exclusion) directed to most undocumented Zimbabwean asylum seekers at the Beit Bridge Border post and to some Somalians at the Komatipoort border post with Mozambique.⁶⁴⁰ Over the last ten years there has been a steady increase in the number of mainly Zimbabwean asylum seekers entering the country at the Beit Bridge border. In early 2011 this culminated in the Department of Home Affairs refusing entry to Zimbabweans who were not able to produce a valid travel document. This treatment was meted out to even those persons who identified themselves as asylum seekers to the immigration officers.⁶⁴¹ In some instances asylum seekers were detained in “inadmissible” holding facilities as was the case in *Abdi v Minister of Home Affairs*,⁶⁴² where the applicants were held at the inadmissible facility at OR Tambo Airport in Johannesburg pending deportation. At the Komatipoort border post, it is not rare for asylum seekers to be detained at the police station and sent back to Mozambique or at times transported to the Lindela repatriation centre at Krugersdorp to facilitate deportation.

As already observed in chapter three (above), border posts are staffed by immigration officials whose task is to administer the provisions of the Immigration Act with a strong emphasis on lawfully documented entry and exit to and from the country. They view the asylum system with suspicion as a conduit for economic migrants to avoid the more rigorous immigration system.⁶⁴³ There are no Refugee Reception Officers, Refugee Status Determination Officers (RSDO) or Refugee Status Determination Committees (RSDC) at the border posts, so that the reception of asylum seekers and status determination is done further inland. Effectively denying an asylum seeker entry into the country will affect his or her access to the Refugee Reception Centre and the status determination process. In addition,

⁶³⁹ Immigration Act s 23.

⁶⁴⁰ Lawyers for Human Rights *Situation Report Refoulement of Undocumented Asylum Seekers at South African Ports of Entry With a Particular Focus on the Situation of Zimbabweans at Beitbridge* (2011) available online at <<http://www.lhr.org.za>> (accessed on 01/02/2012). See also Amit (FMSP Report) *Lost in the Vortex*.

⁶⁴¹ Ibid.

⁶⁴² 2011 (3) SA 37 (SCA).

⁶⁴³ Lawyers for Human Rights *Situation Report Refoulement of Undocumented Asylum Seekers at South African Ports of Entry with a Particular Focus on the Situation of Zimbabweans at Beitbridge* (2011).

they may be forced to return to the country from which they are fleeing or to one with equally unacceptable conditions, which effectively amounts to *refoulement*.

The advantage of issuing asylum seekers with the so-called section 23 transit permits is that they can enter the country, and have five days within which to approach a Refugee Reception Office to present their claims for asylum before the competent authorities.⁶⁴⁴ The section 23 permit provides the necessary protections for asylum seekers as well as paving a clear path into the asylum system. Without this piece of paper there are heightened chances of asylum seekers being arrested as undocumented migrants once inside the country.⁶⁴⁵ If asylum seekers are denied entry through the formal border posts they resort to using undesignated entry points, placing themselves outside of the normal state protections that could be afforded to them under international and domestic law. There are several reports of asylum seekers drowning when trying to cross the Limpopo River; being subject to rape and other forms of assault along the way; being victims of theft (in the process losing all identity documents); and falling victim to human traffickers and smugglers.

As a general principle of international law, territorial sovereignty gives the State the power and control over who does and does not enter its territory.⁶⁴⁶ So unless there is a specific treaty or domestic law provision obliging it to do so, the State is not bound to admit any asylum seekers into its territory.⁶⁴⁷ However, in chapter 2 of this thesis, it was established that the right to seek asylum is guaranteed in the Universal Declaration of Human Rights and in the African Charter on Human and People's Rights (Banjul Charter).⁶⁴⁸ In these two instruments, there is provision that gives everyone the right to seek, obtain and enjoy asylum from persecution.⁶⁴⁹ South Africa is a state party to both these instruments as well as to the other treaties that seek to protect the rights of refugees and asylum seekers. In the UN Convention Relating to the Status of Refugees, state parties are prohibited from returning or

⁶⁴⁴ Refugees Act No. 130 of 1998 ss 8, 21 and 22.

⁶⁴⁵ See the following reports: Lawyers for Human Rights *Situation Report Refoulement of Undocumented Asylum seekers at South African Ports of Entry With a particular focus on the situation of Zimbabweans at Beitbridge* (2011); Amit (FMSP Report) *Lost in the Vortex; South African Human Rights Commission (SAHRC) Report into the Arrest and Detention of Suspected Undocumented Migrants* (1999) available online at <<http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>> (accessed on 28/05/2012); Lawyers for Human Rights Report *Monitoring Immigration Detention in South Africa* (2010).

⁶⁴⁶ Paul Kuruk "Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees" (1999) 35 *Stan J Int'l L* 313.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ See Chapter 2.2 (above).

⁶⁴⁹ Universal Declaration of Human Rights (1948) Art 14 and the African [Banjul] Charter on Human and Peoples' Rights (1981) Art 12.

expelling (*refouler*) refugees to the territory where their lives or freedom could be threatened on account of any of the listed grounds in the convention.⁶⁵⁰ The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) makes similar provision against expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.⁶⁵¹ Similarly, the African Union's Convention Governing the Specific Aspects of Refugee Problems in Africa, holds that no person shall be rejected at the border of a member state or returned or expelled, thus compelling him or her to return to or remain in a territory where he or she is being persecuted.⁶⁵²

In light of these international law treaties and principles, South Africa enacted its own Refugees Act,⁶⁵³ to give effect to these same treaties as well as to provide for reception and treatment of refugees and asylum seekers.⁶⁵⁴ Section 6 of the Act⁶⁵⁵ stipulates that it must be interpreted in line with the UN Refugees Convention, the AU Refugees Convention and any other relevant human rights instruments that South Africa is party to now or in the future.⁶⁵⁶

With regards to *refoulement* of asylum seekers and refugees in South African domestic law, the Refugees Act expressly provides that no person may be refused entry at the borders, expelled or extradited to another country if such action will result in such person being subjected to persecution or being subject to threats to their physical safety or freedom on the grounds contained in the Act.⁶⁵⁷ The practice of turning people away at the border who express a wish to apply for asylum is prohibited both at international and national level. If South Africa is to meet its obligations under international and domestic law, it will be required to grant individuals seeking international protection access to its territory and to fair asylum procedures.⁶⁵⁸

⁶⁵⁰ UN Convention Relating to the Status of Refugees (1951) Art 33.

⁶⁵¹ UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Art 3.

⁶⁵² African Union's Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) Art 2.3.

⁶⁵³ [Act No. 130 of 1998].

⁶⁵⁴ John Dugard *International Law: A South African Perspective* 4th ed (2011) 359.

⁶⁵⁵ Refugees Act s 6(1).

⁶⁵⁶ The inclusion of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art 3) and International Covenant on Civil and Political Rights (1966) ICCPR (Art 7) is relevant here.

⁶⁵⁷ Refugees Act s 2; Dugard *International Law: A South African Perspective* 359.

⁶⁵⁸ Lawyers for Human Rights *Situation Report Refoulement of Undocumented Asylum seekers at South African Ports of Entry With a Particular Focus on the Situation of Zimbabweans at Beitbridge* (2011)

In Chapter 2 (above),⁶⁵⁹ an overview of the refugee status application process was provided; therefore there is no need to repeat it in this current chapter. Suffice to say that the Refugees Act makes express provision that the Refugee Status Determination Committee (RSDC) is the only competent arbiter in refugee claims.⁶⁶⁰ Appeals from any determination of the RSDC lie with the Refugee Appeals Authority.⁶⁶¹ An immigration officer may not assume the role of a RSDC and is not competent to refuse entry to an asylum seeker. The refusal of entry after only a preliminary interview with the asylum claimant is as good as blocking access to an RSDC and to making a decision to reject a claimant's application for asylum outside of the legal channels.⁶⁶² In the case of *Bula and Others v Minister of Home Affairs and Others*,⁶⁶³ the court stated *obiter* that "as can be seen from the provisions of section 24(3) ... it is for the RSDO [RSDC] and the RSDO [RSDC] alone to grant or reject an application for asylum."⁶⁶⁴ If anything the *Bula* case served to buttress the principle that where a foreigner demonstrates a desire to apply for asylum, then he or she must be afforded an opportunity to make the necessary application, must be released from detention and is entitled to an asylum seeker permit pending the outcome of the application.⁶⁶⁵

In the case of *Abdi v Minister of Home Affairs*,⁶⁶⁶ the protection offered by the principle of *non-refoulement* was reinforced.⁶⁶⁷ In this case South Africa was a party to sending the appellants back to Somalia, a country from which they had fled. The RSDC had in the case of one appellant previously granted him refugee status. The court dismissed out of hand the

⁶⁵⁹ See Chapter 2.2 (above).

⁶⁶⁰ Refugees Act ss 21, 22, 24.

⁶⁶¹ *Ibid* ss 8A-8J and 24B.

⁶⁶² Lawyers for Human Rights *Situation Report Refoulement of Undocumented Asylum Seekers at South African Ports of Entry With a Particular Focus on the Situation of Zimbabweans at Beitbridge* (2011).

⁶⁶³ 2012 (4) SA 560 (SCA).

⁶⁶⁴ Para 74.

⁶⁶⁵ Paras 74 and 80. See also *Iqbal v Minister of Home Affairs and Others* 2013 (2) All SA 455 (GSJ).

⁶⁶⁶ 2011 (3) SA 37 (SCA).

⁶⁶⁷ *Ibid*. In the *Abdi* case, the appellants were being held at the inadmissible facility at OR Tambo airport in the process of being deported from Namibia as illegal aliens. They were transiting through South Africa enroute to Somalia, a country from which they had fled originally. One of the appellants was a recognised refugee in South Africa and the other an asylum seeker awaiting the outcome of his case. They had left South Africa for Namibia because of their fears of xenophobia. Eventually the Namibian authorities deported them, which is how they came to be in South Africa. The Appellants sought the protection of the Refugees Act upon entering South Africa. The Respondents were adamant that they were not responsible for the appellants as they were being deported by another country. They argued that the appellants, while being detained at the inadmissible facility, were not in law in South Africa and the South African authorities and courts had no jurisdiction over them. In their view, South African courts had no jurisdiction to consider or interfere with the execution of a deportation order issued by another country. As deportees of another country, the appellants had no right to invoke the protection of the Act. And finally, the appellants had waived any claim to recognition of their respective status by reason of the fact that they had left the country without the Minister's or any other authority's consent.

argument that individuals who are held in an inadmissible facility at a port of entry into the Republic are beyond the court's jurisdiction. It pointed out that the matter had been settled in the *Lawyers for Human Rights*⁶⁶⁸ case which held that:

“The denial of ... rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution.”⁶⁶⁹

From this, it is clear that the Constitution offers protection to asylum seekers at the borders, although the court in *Lawyers for Human Rights* did point out that it was not referring to all non-citizens who presented at South Africa's borders but only those that were travelling by ship (in the broad sense of the word) and found themselves physically within the country.⁶⁷⁰ Those asylum seekers at the border who did not arrive within South Africa's borders should for all intents and purposes be seen to be covered by this protection since section 2 of the Refugees Act prohibits their *refoulement* by way of refusal of entry.⁶⁷¹

If non-citizens presenting at the borders of South Africa find themselves in distressed circumstances owing to the conditions enumerated in sections 2 and 3 of the Refugees Act, they should be admitted into the country if they request asylum.⁶⁷² The court in *Abdi v Minister of Home Affairs* found the State to be out of sync with the provisions of the 1951 UN Refugees Convention and its Protocol as well as the AU Refugees Convention, but also with the provisions of section 6 of the Act which provides for the Act to be interpreted with due regard to the provisions of these international treaties.⁶⁷³ The relevant provision in

⁶⁶⁸ 2004 (4) SA 125 (CC). See Chapter 2.2 (above).

⁶⁶⁹ *Abdi v Minister of Home Affairs* Para 20, citing *Lawyers for Human Rights & another v Minister of Home Affairs & another* Para 27.

⁶⁷⁰ *Lawyers for Human Rights & another v Minister of Home Affairs* Para 26.

⁶⁷¹ Refugees Act No. 130 of 1998 s 2:

“General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances:

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to another country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

- a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.”

⁶⁷² *Abdi v Minister of Home Affairs* Para 21.

⁶⁷³ Para 22.

section 2 of the Act is a reflection of the *non-refoulement* provisions found in the international treaties (already discussed above in this chapter). The court also carried out a constitutional analysis of the violations that could arise due to South Africa being party to sending the appellants to Somalia where they would face a real risk of suffering physical harm. The court cited the Constitutional Court judgment of *Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa & another intervening)*,⁶⁷⁴ pointing out that "[d]eportation to another state that would result in the imposition of a cruel, unusual or degrading punishment is in conflict with the fundamental values of the Constitution."⁶⁷⁵ It is also important that South Africa's commitments under the UN Convention against Torture are respected. In chapter 3, the rights in section 12(1)(e) of the Constitution were shown to be a reflection of the provisions in UN Convention against Torture.⁶⁷⁶

When the State argued that they were merely facilitating the deportation order of the Namibian High Court, the *Abdi* court replied that that would still amount to *refoulement* as South Africa was one of the protagonists.⁶⁷⁷ If a person meets the criteria for a refugee/asylum seeker as set out in the Act and the international treaties, then "it is unlawful to refuse them entry if they are *bona fide* in seeking refuge."⁶⁷⁸ In *Bula and Others v Minister of Home Affairs and Others*,⁶⁷⁹ the court clarified this statement, explaining that what the *Abdi* court meant by referring to *bona fides* of an asylum seeker should only be read with reference to the exclusions contained in section 4 of the Refugees Act.⁶⁸⁰ This should be interpreted to mean that anyone who fell into the enumerated categories of section 4 of the Act would therefore not qualify as a *bona fide* asylum seeker.

⁶⁷⁴ 2001 (3) SA 893 (CC). See chapter 4.5 (below).

⁶⁷⁵ *Abdi v Minister of Home Affairs* Para 26.

⁶⁷⁶ See chapter 3.4.6 (above).

⁶⁷⁷ *Abdi v Minister of Home Affairs* Paras 28 and 29.

⁶⁷⁸ Para 26.

⁶⁷⁹ 2012 (4) SA 560 (SCA) Paras 75 – 80.

⁶⁸⁰ Refugees Act s 4:

"Exclusion from refugee status

- 1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –
 - a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
 - b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or
 - c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or
 - d) enjoys the protection of any other country in which he or she has taken residence."

With respect to the actual *bona fides* of the asylum claim itself, the court said the doctrine of legality requires that organs of State and their officials must comply with the law, including the Constitution and they can only exercise the powers and functions that are specifically allotted to them by law.⁶⁸¹ In applying the doctrine of legality the SCA held that Home Affairs officials were obliged to comply with the requirements of section 21(2) of the Refugees Act⁶⁸² and Regulation 2(2) of the Regulations.⁶⁸³ The importance of this ruling is that once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play. Applicants cannot be excluded from the country, or be arrested or detained as undocumented migrants. Officials at the DHA must allow and facilitate their access to these provisions of the Act and the legal protections contained therein.

If the non-citizens concerned were ordinary travellers (i.e. not seeking asylum), then section 8(1) of the Immigration Act would become relevant if the immigration officer refused them entry. *Koyabe's* case,⁶⁸⁴ discussed above in chapter 3, placed the review and appeal procedures found in section 8 of the Immigration Act firmly in the realm of administrative law, thereby ensuring that it was subject to the Promotion of Administrative Justice Act.⁶⁸⁵ Although the review process in section 8(1) was found to be time sensitive owing to the circumstances of the non-citizens involved, the *Koyabe* court had not been called upon to decide on the matter of a person denied entry at the border post.

4.5.1. Conclusion and proposals

Asylum seekers have a myriad of rights and protections both at domestic and international law. The protections are found within the South African Constitution, the Refugees Act, Immigration Act and international treaties. The drawback as can be seen from the empirical research and situational reports discussed in this section is that officials on the ground and at border posts work at cross purposes to these laws. Court cases show that there are legal

⁶⁸¹ *Bula and Others v Minister of Home Affairs and Others* Para 79.

⁶⁸² Refugees Act s 21(2): "The Refugee Status Determination Officer must, upon receipt of the application contemplated in subsection (1), deal with such application in terms of section 24."

⁶⁸³ Refugee Regulations (Forms and Procedure) GN R 366 in GG 21075 of 06/04/2000 – Reg 2(2):

"Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

⁶⁸⁴ *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC).

⁶⁸⁵ See Chapter 3.4.3.1 (above).

challenges in situations where the right to asylum has been violated leading to detention or deportation. However, challenges in situations where asylum seekers are turned away from the borders have as yet not been reported. The courts in the *Koyabe*, *Lawyers for Human Rights* and *Abdi* cases have pointed out that all public power must be exercised in a manner that is consistent with the constitution and PAJA.⁶⁸⁶ So the refusal by an immigration officer to grant entry to an asylum seeker should in theory be reviewable. This is an important principle but unfortunately, in practical terms it only applies to those asylum seekers who are physically within South African territory because they can take advantage of the legal procedures provided to appeal or review decisions made by public officials. In chapter 3 (above), the following obstacles to access to justice were discussed: legal and institutional discrimination; the insensitivity of officials to the plight of non-citizens or lack of knowledge as to how to assist; non-citizens' lack of knowledge of rights and the available remedies; and the inaccessibility of state justice institutions and actors.⁶⁸⁷ All these obstacles are clear to see in the case of the *refoulement* of asylum seekers or their exclusion (refusal of entry). They effectively block the possible routes to access the protections available or prevent the beneficiaries from accessing them. A possible solution is to train immigration officers on the Refugees Act or, alternatively, to place Refugee Reception Officers at border posts and to empower them to issue the requisite permits. With their training, they should show more empathy towards asylum seekers.

4.6. Deportation

In the case of *Jeebhai*, the court defined deportation as a unilateral act of the deporting state to remove a foreigner, who has no right or entitlement to be in its territory. Its purpose is achieved when the foreigner leaves the deporting state's territory.⁶⁸⁸ The process of deportation concerns that person's livelihood, security, freedom and, sometimes, his or her very survival.⁶⁸⁹ The court pointed out that immigration laws are harsh and severe in their operation, but contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights. Accordingly,

⁶⁸⁶ *Abdi v Minister of Home Affairs* Para 22. See also *Lawyers for Human Rights & another v Minister of Home Affairs* Para 57 per Madala J (minority judgment).

⁶⁸⁷ See Chapter 3.3.4 – 3.3.7 (above).

⁶⁸⁸ *Jeebhai and others v Minister of Home Affairs and Another* Para 20.

⁶⁸⁹ Para 21.

enforcement officials have a duty of observing strictly and punctiliously the safeguards created by the Act.⁶⁹⁰ In terms of the Immigration Regulations, in order to effect deportation, the immigration officer should issue the illegal foreigner with a notification of the deportation contemplated in section 34(1)(a).⁶⁹¹ This notice spells out that the recipient of the form has the right to appeal such decision in terms of section 8 of the Act within 11 calendar days and may at any time request any officer attending to have the detention confirmed by a warrant of court.⁶⁹² The actual removal of a person via deportation is governed by section 37⁶⁹³ read with regulation 28(9) through the issue of a warrant, corresponding to Form 35 of the Immigration Regulations. The form makes provision for thumb prints of the deportee as well as the name of the designated port of exit so that a record of this act exists and can be referred to in future.⁶⁹⁴ The other safeguards are discussed in this chapter under the sub-heading “Detention for purposes of deportation.”⁶⁹⁵

Du Plessis says that if the courts find that the executive arm of government in arresting and deporting or extraditing a non-citizen has acted outside of the strictures of the Constitution, they have a democratic duty to declare that conduct to be invalid and unconstitutional.⁶⁹⁶ South Africa's foreign relations cannot be used to trump the role of the courts in this instance. Reflecting on the forced removal of non-citizens from the country, he states that the government has abused or bypassed set procedures in certain cases. One of the hallmarks of any deportation process is that it must not fall foul of the *non-refoulement* principle. It is for this and other reasons that the legislature has put in place processes to be followed when deporting a non-citizen.

An example of the failure of the State to adhere to the legal process when deporting someone was the case of *Jean Paul Ababason Bakamundo v Minister of Home Affairs*.⁶⁹⁷ This case

⁶⁹⁰ Para 21.

⁶⁹¹ Immigration Regulations Reg 28(2).

⁶⁹² Ibid.

⁶⁹³ Immigration Act s 34(7):

“On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.”

⁶⁹⁴ Immigration Regulations Reg 28(9). See also *Jeebhaj and others v Minister of Home Affairs and Another* Paras 36, 61 and 62.

⁶⁹⁵ See chapter 4.3.

⁶⁹⁶ Max Du Plessis "Removals, Terrorism and Human Rights – Reflections on Rashid" (2009) 25 *South African Journal on Human Rights* 353-377, 359.

⁶⁹⁷ *Jean Paul Ababason Bakamundo v Minister of Home Affairs and 2 Others* 17217/09 (SGHC) [unreported case]. This case involved a Congolese asylum seeker who, after having failed to access the refugee reception

illustrated the importance of judicial oversight over the implementation of laid out procedures. The fact that the applicant was returned to a country from which he had successfully fled in flagrant disregard of due process was deemed by the court to constitute constructive contempt of the court process.⁶⁹⁸ Due to these kinds of lax controls and little or no oversight over the deportation process, states have generally resorted to what is known as disguised extraditions. Instead of carrying out the process of extradition which is far more onerous and subject to numerous checks and balances, states sometimes deport or expel the requested person under the guise that the person is in violation of the immigration laws.⁶⁹⁹

Although this thesis is not concerned with extradition, the government's use of flawed deportation processes to deprive foreigners of their due process rights under the Extradition Act will be discussed briefly.⁷⁰⁰ The extradition process is a rigorous one with built in safeguards. The first of these is the constitutional right to due process for all accused persons. Secondly, there has to be an enquiry into the alleged crime and the proposed punishment upon conviction. Thirdly, there must be a comparative analysis to ensure that a crime in the requesting state is also a crime in the requested state and is similarly punishable. Fourthly, the process of removal must be the appropriate one and not an extradition disguised as a deportation nor must it be an extraordinary rendition.⁷⁰¹ Internationally, it has been established law that the deportation or extradition of an individual can constitute inhuman treatment if there are substantial grounds to fear that such a move may expose the person to torture or inhuman or degrading punishment in the requesting or receiving state.⁷⁰² It has become common practice in this modern era of human rights awareness for extradition agreements to exclude extradition where the crime in respect of which extradition is sought is punishable by death in the requesting state but not the requested state. The proviso is that the

office in Johannesburg, was arrested because of his expired permit and sent to Lindela. The applicant launched an urgent application seeking his release and a stay of his deportation until his asylum claim was definitively determined. The DHA opposed the application but simultaneously initiated settlement negotiations with applicant's lawyers who agreed to withdraw the case once the DHA provided proof of the applicant's release with the proper documentation, which they failed to provide. On the appointed court date, the applicants arrived at court only to discover that the applicant had been deported two days earlier, despite the pending court hearing and the active settlement negotiations. Displaying a worrying disregard for the rule of law, the Department had circumvented the court process during a pending court application.

⁶⁹⁸ Ibid.

⁶⁹⁹ Du Plessis (2009) *South African Journal on Human Rights* 360.

⁷⁰⁰ Ibid.

⁷⁰¹ Extradition Act [No. 67 of 1962]. See generally Du Plessis (2009) *South African Journal on Human Rights* 353-377.

⁷⁰² Dennis Davis "Freedom and Security of the Person" in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2011) 7.6 available online at Lexis Nexus Butterworth Intranet Resources.

requesting state should give a satisfactory assurance that the death penalty will not be imposed or if imposed will not be executed.⁷⁰³

Deportation is essentially an administrative process completely within the discretion of the country's immigration authorities. There is no need for a request from another country for a person to be deported as is the case with extradition. In essence, deportation is not predicated upon the person being accused of a serious crime and is not subject to the formalities of extradition.⁷⁰⁴ Persons can be deported in instances where they have contradicted the Immigration Act or have to be removed from the country on grounds of national security or public order as provided for in section 28 of the Refugees Act.⁷⁰⁵ Where another country requests a person to answer charges in criminal court, deportation is not a competent procedure.

From this analysis it is clear that the deportation process is much simpler and would be attractive to the authorities due to its administrative nature. In chapter 3, sections 12(1)(d) and (e) of the Constitution were briefly discussed with reference to the UN Convention against Torture and other Inhuman or Degrading Treatment (UNCAT). The prohibition against torture, cruel, inhuman or degrading treatment or punishment applies within South Africa and protects those whom the South African state would send to another country, whether by deportation or extradition.⁷⁰⁶

In *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & another intervening)* the court said "where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated."⁷⁰⁷ The court went on to discuss sections 12(1)(d) and (e) of the Constitution and held that, due to the reasons already given in the *Makwanyane* case,⁷⁰⁸ South African law considered a sentence of death to be cruel, inhuman and degrading punishment. The *Mohamed* court took the approach that when South African authorities handed someone over to another country to stand trial on a charge which, to their knowledge, could lead to the

⁷⁰³ Dugard *International Law: A South African Perspective* 228.

⁷⁰⁴ Du Plessis (2009) *South African Journal on Human Rights* 360

⁷⁰⁵ Refugees Act s 28.

⁷⁰⁶ See chapter 3.4.6 (above).

⁷⁰⁷ *Mohamed & another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & another intervening)* 2001 (3) SA 893 (CC) Para 53.

⁷⁰⁸ *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) Para 78.

imposition and execution of the death penalty on such person should he be found guilty, the authorities were in turn facilitating the imposition of the death penalty and that was a breach of their obligations contained in section 7(2) of the Constitution.⁷⁰⁹

Mohamed was accused of crimes against the United States and the authorities there intended for him to stand trial in New York.⁷¹⁰ He was arrested by South African authorities in conjunction with FBI officials from the USA. Within 48 hours of his arrest he was deported via a special USA plane.⁷¹¹ Throughout this time he was denied his rights to legal representation or any of the processes set out in the Aliens Control Act such as "the bar placed on removal from South Africa within 72 hours of a deportee's arrest."⁷¹² The Department of Home Affairs asserted that Mohamed had been deported for genuine contravention of immigration laws.⁷¹³ The court accepted that contention to be true but held that it was not the whole reason for his removal from the country.⁷¹⁴ The court found that he had been handed over to the USA by the South African authorities for the purpose of being taken to New York to be put on trial.⁷¹⁵ This did not fall under any of the grounds for which the processes of deportation or exclusion from the country were designed. This was in essence an extradition disguised as a deportation for purposes of avoiding the rigorous extradition processes. The State acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice.⁷¹⁶ The position taken by the court in *Mohamed* was reaffirmed in the case of *Minister of Home Affairs and Others v Tsebe and Others*.⁷¹⁷

The *Jeebhai* case, also known as the *Rashid* case (because the subject of the case was a certain Mr Mahmoud Rashid Khalid who was deported to Pakistan in terms of section 34 of the Immigration Act, on 6 November 2005), is another example of the State by-passing due

⁷⁰⁹ *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 (CC) Paras 25 – 26, *Mohamed & another v President of the Republic of South Africa* Paras 58 -69.

⁷¹⁰ Para 22.

⁷¹¹ Para 26.

⁷¹² Para 18.

⁷¹³ Du Plessis (2009) *South African Journal on Human Rights* 362.

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.*

⁷¹⁶ *Mohamed & another v President of the Republic of South Africa* Para 69.

⁷¹⁷ 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

process procedures for the sake of expediency.⁷¹⁸ From the court record, nearly all procedures in the Act and regulations were disregarded.⁷¹⁹ The court held that once the appellant placed the lawfulness of the detention and deportation in issue, the respondents were required to prove that every procedural requirement, including the issue of the necessary warrants, had been complied with.⁷²⁰ On the evidence before it, the court found that the conduct of the state officials in whose charge Rashid found himself was unlawful and consequently his detention and subsequent deportation were also unlawful.⁷²¹

In conclusion, it would seem that the actual process of deportation, although seemingly a simple procedure, is one that must be carried out with strict regard to rules and regulations. The Regulation 28 safeguards must be seen to exist and should be applied not just for the benefit of the illegal foreigner, but also to protect the respondents against unjustified and unwarranted claims flowing from detention or deportation or both.⁷²² Deportation cannot be abused by the state to disguise an extradition or to perform an extra-ordinary rendition. At all times the state, whether dealing with asylum seekers or ordinary migrants, must ensure that it stays true to the rights contained in the Constitution and international treaties that prohibit torture, cruel and unusual treatment or punishment.

4.7. Chapter conclusion and proposals

This chapter set out to show how South Africa has joined the trend of countries that have "warehoused" immigrants outside the mainstream of the law, leading to arbitrariness and

⁷¹⁸ Mr Rashid appears to have been subject to a disguised extradition or extraordinary rendition to Pakistan owing to the manner of his removal from the country as well as the response of Pakistani officials in a statement that suggested collusion between them and the South Africans; see further Du Plessis (2009) *South African Journal on Human Rights* 368.

⁷¹⁹ *Jeebhai v Minister of Home Affairs and another* Para 37.

"In respect of the other formalities prescribed by the Act the facts show a lamentable disregard for them. On the respondents' own showing:

- Rashid was detained without a warrant;
- Form 29 was given to him almost two days after his arrest – not promptly as s 34(1) requires; and the respondents provide no explanation for the delay. ...
- No warrant was obtained for his removal from the Cullinan Police Station for the purposes of his deportation; and
- He was not deported from a port of entry that the Minister had designated for this purpose in terms of s 1 of the Act. I should point out that the full court accepted the respondents' denial that Waterkloof Air Base was not a designated port of entry. But it erred in this regard. The respondents were required to prove that the Airbase was a designated port of entry as contemplated in s 1 of the Act. They failed to do so."

⁷²⁰ Para 39.

⁷²¹ Para 63.

⁷²² *Ibid.*

extra-judicial practices. The processes of exclusion, arrest, detention and deportation were explored with the intention of seeing if the safeguards within these processes are accessible to the intended beneficiaries, as required by the Constitution.

With regards to arrest and detention for the purposes of identification, it was shown that arrested persons are deliberately prevented from providing accurate documents and those with valid identity documents are victims of officers destroying them. A system of bribery and corruption exists which has resulted in an increase in the numbers of arrests as well as criminal activity as officers either solicit for or are offered bribes. The open-ended nature of the power of arrest needs to be reconsidered so that it meets the legitimate interest of the state to curb illegal migration as well as respect the rights of non-citizens.

Once in detention, detainees are often not aware of their rights. The provisions of section 34(1) of the Immigration Act and regulation 28 are far removed from them. The forms prescribed for use in the Immigration Regulations do not appear to be in regular use, and a large number of detainees do not know of their existence. It should be noted that even with the right to challenge the initial detention under section 34(1)(b) and the right to challenge detention for longer than 30 days, the DHA does not give foreigners the right of appearance in front of a magistrate. The process is similar to an unopposed application for the continued detention of the illegal foreigner. This is a clear violation of the right to access the courts and to have the dispute settled by an impartial court or arbiter.

The necessity of an independent inspectorate was briefly discussed. Such a body would be able to interact with detainees in complete privacy and without interference from the Department of Home Affairs. Detainees are afraid to approach authorities in detention centres to access their rights under the Immigration Act, the Refugees Acts or the Constitution. Research shows that currently there is an accountability gap whereby the State arrests, detains and departs “illegal foreigners” but once they are in detention, it has little or no interaction with them. It abdicates its statutory duties of accounting for legal compliance to a private security company.⁷²³

Several empirical studies and court judgments have shown that the treatment of asylum seekers falls far short of the requirements of the Constitution and legislation. Asylum seekers struggle to gain entry into the country due to impediments put up at border posts by

⁷²³ See Chapter 4.3 (above).

immigration officials. Once inside, they struggle to access the Refugees Reception Offices. Immigration and police officers routinely arrest asylum seekers even after they have applied for asylum or before they can do so. The courts have been unrelenting in their insistence that the provisions in the Refugees Act and its regulations must be fully complied with. It was suggested above that there is a need to improve the training of immigration officers or, alternatively, to place Refugee Reception Officers at the border posts.

On the subject of deportation, the courts have reiterated that the process is very drastic but contains safeguards to ensure that people who are accused of being “illegal foreigners” are dealt with properly and in a manner that protects their human rights. Our courts have been quick to condemn the abuse of the deportation system to by-pass the more rigorous process of extradition. Where this was done, the state was found to have violated the rights of the deported person. When deporting a person the State is obliged to stick to its constitutional obligations such as sections 7(2), 10, 11 and 12(1) as well as its international law obligations such as the UN and AU Refugee Conventions; and the UNCAT.

The practice of detaining asylum seekers has been frowned upon by the courts in South Africa. Despite the Refugees Act protecting asylum seekers from being prosecuted for illegal entry into the country, one of the common reasons for their arrest and eventually detention is that they are not legally in the country. The danger posed by detaining asylum seekers is that once they are in immigration detention they are subject to deportation and this could expose them to *refoulement* to the countries from which they fled initially. The courts have held that sojourning within South Africa as contemplated by the Act did not necessarily include being held in detention.

The practice of administrative detention is seen as regressive in many countries. The International Detention Coalition (IDC) advised governments to seek alternatives to administrative detention. Along those lines, the SCA in the *Arse* case was of the view that the concerns that the DHA had with regards to illegal migration could have been addressed by the imposition of conditions in terms of section 22 of the Refugees Act and their effective monitoring. The implication here is that better monitoring of asylum seekers is preferable to holding them in detention.

CHAPTER 5: XENOPHOBIA AND ITS MANIFESTATIONS**Table of Contents**

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5.1. Introduction

In this chapter, the phenomenon of xenophobia in South Africa will be examined with particular reference to xenophobic crimes and the state's response thereto. Non-citizens are often denied justice even in circumstances where they are victims of bias based crimes. This was the case especially after the 2008 xenophobic and various other subsequent incidents which will be discussed below. In keeping with the overarching theme of this thesis, laws protecting non-citizens in such cases will be examined. The inadequacies of the laws as well as the processes that non-citizens can utilise to seek redress will be explored. The most important right in this regard is the right to freedom and security of the person, which includes freedom from all forms of violence. The emphasis will be on the role of the State to protect the people within its borders regardless of national origin by enforcing its laws without discrimination.

5.2. Xenophobia and its origins

One of the most chilling aspects of modern South Africa is the phenomenon of xenophobic violence. To most people in South Africa, the word xenophobia entered their daily lexicon during the months of May to July 2008. During that time mostly township dwellers turned on non-citizens living in their midst, killing, robbing, maiming and driving them out of their homes. Understanding the underlying reasons for this widespread xenophobia is important for the country for several reasons: on a micro-level it would help prevent future attacks, whilst on a macro-level, the country would be able to meet the basic tenets of regional cooperation such as tolerance and acceptance of non-citizens.⁷²⁴ According to Sachs J's minority judgment in the *Union of Refugee Women*⁷²⁵ case,

“[x]enophobia is the deep dislike of non-nationals by nationals of a recipient State. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances.”⁷²⁶

He cautioned that the very manifestation of this phenomenon struck at the heart of the Bill of Rights, warning that it could subconsciously sip into the mainstream of life through biased interpretations and applications of laws.⁷²⁷ Further on in this chapter, this rebuke will be shown to be a reflection of the way that State officials, institutions and law enforcement authorities deal with non-nationals.

There have been several attempts to explain why xenophobia exists so strongly amongst South Africans. Blame has been placed on the country's immigration laws that are seen as exclusionary.⁷²⁸ The current Immigration Act⁷²⁹ is structured in such a way as to rope in the

⁷²⁴ Nina Hopstock and Nicola de Jager "Locals Only: Understanding Xenophobia in South Africa" (2011) 33 (1) *Strategic Review for Southern Africa* 120 121.

⁷²⁵ *The Union of Refugee Woman and Others v the Director: the Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC).

⁷²⁶ Para 143.

⁷²⁷ Ibid.

⁷²⁸ Hopstock and de Jager (2011) *Strategic Review for Southern Africa* 127. The delay in implementing a new immigration system meant that the Aliens Control Act (No. 96 of 1991), with its emphasis on security, sovereignty and exclusion continued in force until 2002. See also Michael Neocosmos "From 'Foreign Natives' to 'Native Foreigners'" (2010) available online at <<http://www.codesria.org/IMG/pdf/neocosmos-3.pdf>>

citizenry, businesses, schools, tertiary institutions, hospitals, hotels and other local entities to identify and report undocumented migrants.⁷³⁰ The Act requires that non-citizens should prove their lawful status in the country at all times, even to non-state actors such as landlords, businesses, schools, hospitals, banks and colleges.⁷³¹ Such laws have an added effect of painting all non-citizens as “others” who, in accessing public and private services, must continually prove and justify the legality of their presence in the country. These xenophobic attitudes and practices by institutions of the State dehumanise foreign nationals in the country, rendering them easy and soft targets for non-state actors.⁷³²

Michael Neocosmos argues that xenophobia should be understood as a political discourse, which is the result of political ideologies and consciousness which have arisen as a result of a politics of fear prevalent within both State and society.⁷³³ This politics of fear comprises of three major components: a State discourse of xenophobia; a discourse of South African *exceptionalism*; and a conception of citizenship founded exclusively on *indigeneity*.⁷³⁴ Central to the problem of xenophobia is the notion of exclusive citizenship that has been created by the post-apartheid political dispensation, as opposed to the earlier anti-apartheid hope of an inclusive citizenship.⁷³⁵ With the advent of the new democratic dispensation there was a movement within the State to utilise the South African labour force as opposed to migrant labour.⁷³⁶ This meant that there was an increased competition for jobs and the State’s interest in reserving them for citizens meant the further exclusion of non-citizens and the disappearance of their protection as non-citizens. Non-citizens found themselves with

(accessed on 23/10/2012) 91 -95. In 1997, the Department of Home Affairs led by Chief Mangosuthu Buthelezi (IFP) specifically rejected a Draft Green Paper on International Migration that was produced by an independent task team which called for a rights-based approach to immigration.

⁷²⁹ [Act No. 13 of 2002].

⁷³⁰ Immigration Act [No. 13 of 2002] ss 38 to 45. See also Darshan Vigneswaran Forced Migration Studies Programme (FMSP) "Enduring Territoriality: South African Immigration Control" (2008) 27(7) *Political Geography* 783–801.

⁷³¹ See Chapter 3.3.1 of this thesis above under the heading “Legal and institutional discrimination.”

⁷³² Jean-Pierre Misago, Tamlyn Monson, Tara Polzer and Loren Landau Forced Migration Studies Programme (FMSP) and Consortium for Refugees and Migrants in South Africa (CoRMSA) Report *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluating Responses* (2010) available online at <<http://www.cormsa.org.za/wp-content/uploads/2009/05/may-2008-violence-against-foreign-nationals-in-south-africa.pdf>> (accessed on 11/11/2012) 11.

⁷³³ Michael Neocosmos *The Politics of Fear and the Fear of Politics (Essay on the pogroms)* (2008) available online at <www.abahlali.org/node/3616> (last accessed on 07/11/2012).

⁷³⁴ Ibid.

⁷³⁵ Ibid.

⁷³⁶ Tristan Gevers "A Review of Michael Neocosmos' "From 'Foreign Natives' to 'Native Foreigners'" (2011) available online at <<http://thinkingafricarhodesuniversity.blogspot.com/2011/09/review-of-michael-neocosmos-from.html>> (accessed on 05/09/2011).

only very limited access to basic rights and at the same time faced a new challenge, xenophobia, which further contributed to their marginalisation.

Another theory explaining xenophobia is the “relative deprivation” theory which holds that hostility towards foreigners should be seen in relation to limited resources such as housing, education and employment, tied together with high expectations resulting from the political transition.⁷³⁷ This theory holds that a key psychological factor in generating social unrest is a sense of relative deprivation. Essentially a person develops a subjective feeling of discontent based on the belief that he or she is getting less than he or she feels entitled to.⁷³⁸ Generally relative deprivation leads to civil unrest which is often tainted by violence.

The exclusion of non-citizens from participation in political life even at a municipal level is undesirable and can explain why community meetings held to discuss them normally degenerate into violent protests.⁷³⁹ Unfortunately the Constitution⁷⁴⁰ expressly reserves the right to political participation for citizens and this position is supported by international human rights treaties.⁷⁴¹ This exclusion has unintended consequences as non-citizens (used as they are to being excluded from society) tend to be excluded or exclude themselves from local community policing forums and similar structures where it would be desirable to have their input in order to counteract xenophobic tendencies and prejudgments.⁷⁴² Decisions are taken regarding non-citizens that have negative impacts on their lives without their participation. The court tried to reverse that trend in the case of *Mamba v. Minister of Social Development*,⁷⁴³ by requiring the parties to engage with each other. The parties were internally displaced non-nationals who were being evicted from temporary camps set up after the 2008 xenophobia attacks, on the one hand, and the State which was evicting them, on the other. The court ordered the parties to

⁷³⁷ Hopstock and de Jager (2011) *Strategic Review for Southern Africa* 125.

⁷³⁸ Ibid 126.

⁷³⁹ See the facts in the case of *Osman v Minister of Safety & Security* [2011] JOL 27143 (WCC).

⁷⁴⁰ Constitution of South Africa s 19.

⁷⁴¹ Jean Pierre Misago, Loren Landau & Tamlyn Monson International Organization for Migration (IOM) Report *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009) available online at

<http://www.migration.org.za/sites/default/files/reports/2009/Addressing_Violence_against_Foreign_Nationals_IOM.pdf> (accessed on 23/11/2012).

⁷⁴² In any case, Chapter 7 of the South African Police Service Act [No 68 of 1995] which sets out the objects and procedural requirements for Community Policing Forums (CPF), places no conditions on membership in a CPF, thus there should be no legal impediment to representation of non-nationals.

⁷⁴³ *Mamba v Minister of Social Development* 2008 Case No. CCT 65/08 (CC).

“engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters.”⁷⁴⁴

This order was ultimately unsuccessful for a myriad of reasons, one of which could have been the relative weakness of non-citizens as a group in comparison to the State. Another reason could have been the fact that the negotiating positions were skewed in favour of the State. Nothing the court did later could save the negotiations and ultimately the matter was withdrawn from the roll. This is an illustration that, although the courts may at times order it, the State is generally reluctant to engage with non-citizens, who are deprived of the vote and wield no political power.⁷⁴⁵ This also goes some way towards explaining why the State tends to repeat the same negative behaviour against non-citizens and ignores court orders, effectively running roughshod over their rights.⁷⁴⁶

Wessel le Roux agrees with the International Organisation for Migration’s report⁷⁴⁷ that attributes the outbreak of violence to the “breakdown of democratic governance, the rule of law and participatory democracy at local government level.”⁷⁴⁸ He discusses Seyla Benhabib’s theory of disaggregation of citizenship, which means the legal integration of migrants by giving them rights previously reserved for citizens only. This theory calls for expanding the current rights available to non-citizens (which consist for the most part of civil and socio-economic rights) to include political rights.⁷⁴⁹ It argues that there is already “urban

⁷⁴⁴ Brian Ray “Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy” (2010) 9 (3) *Wash U Glob Stud L Rev* 399 406, quoting *Mamba v Minister of Social Development* 2008.

⁷⁴⁵ See generally Misago et al *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009).

⁷⁴⁶ In this regard see Roni Amit “Winning Isn’t Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation” (2011) 27 *SAJHR* 8.

⁷⁴⁷ Misago et al *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009).

⁷⁴⁸ W le Roux “Economic Migration, Disaggregated Citizenship and the Right to Vote in Post-Apartheid South Africa” in R Danisch (ed) *Citizens of the World: Pluralism, Migration and Practices of Citizenship* (2011) 119. See Chapter 2.4 footnote 172 (above). The court in *Larbi-Odam and others v MEC for Education (North-West Province) and another* 1998 (1) SA 745 (CC) Para 19 quoted from the Canadian case of *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 recognising that non-citizens have no voice within the legal and socio-political system of the host country.

⁷⁴⁹ Ibid 121. See also Wessel le Roux *Migration, Disaggregated Citizenship and Voting Rights* (2009) unpublished paper presented at *FMSP’s Migration and Society Seminar Series* hosted by the Forced Migration Studies Programme at the University of Witwatersrand September (29/09/2009) available online at <<http://www.migration.org.za/presentation/le-roux-w-2009-migration-disaggregated-citizenship-and-voting->

activism” on the part of non-nationals living in multi-cultural and ethnic inner-city neighbourhoods. Non-citizens in this case interact with citizens in whose communities they live, and organise around issues of common interest such as environmental concerns, representation on school boards and labour relations.⁷⁵⁰ Le Roux calls this street democracy and is in favour of a residence-based understanding of political rights. Taking issue with the expatriate voting rights lobby, which has interpreted the judgment in *Richter v Minister for Home Affairs and Others*⁷⁵¹ to mean that voting rights are based on “a de-territorialised notion of national identity and patriotism”,⁷⁵² he argues that democratic citizenship must be tied to the locality of one’s place of ordinary residence. This would allow for an extension of voting rights at the local government level to resident non-citizens, which would give non-citizens a greater political stake within their areas of residence and help integrate them into the life of the community.

In summary, there can be no single correct explanation for the causes of xenophobia, as is evidenced by the myriad theories trying to come to terms with it. For present purposes, it suffices to say that the problem in South Africa is the result of a variety of socio-economic, cultural and political reasons.

5.3. Responses to xenophobia

In this section, the effects of and responses to xenophobia will be examined with particular attention to the May 2008 attacks. The role of the State in guaranteeing the rights of non-citizens by protecting them from xenophobic attacks, including through the prosecution of perpetrators to deter future occurrences, is discussed.

5.3.1 The 2008 Attacks

The month of May 2008 marked the zenith of a five month period of attacks against non-citizens within South Africa’s mainly black and coloured townships. Between 11 and 26 May

rights-29-sept-2009-fmsp-> (accessed on 21/10/2013); Seyla Benhabib “Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times” in Thomas Faist and Peter Kivitso (eds) *Dual Citizenship in Global Perspective*(2007) 247.

⁷⁵⁰ Ibid 122.

⁷⁵¹ *Richter v Minister for Home Affairs and Others (with the Democratic Alliance and Others intervening and with Afriforum and Another as Amici Curiae)*2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC).

⁷⁵² Le Roux *Migration, Disaggregated Citizenship and Voting Rights*5.

2008, foreign nationals (and some South Africans suspected of being foreign nationals) were attacked in at least 135 locations in various parts of South Africa.⁷⁵³ The attacks took place in almost every province and major town or city in South Africa destroying homes, properties and livelihoods. There were at least sixty-two (62) reported deaths, over a hundred thousand (100,000) displaced people, and millions of Rands worth of property loss and damage.⁷⁵⁴

The State's response to the ensuing humanitarian crisis is not of primary concern in this thesis. Suffice to say that several studies have found the response to be inadequate.⁷⁵⁵ This thesis is primarily concerned with the breakdown of the crime prevention, internal security and criminal justice systems, all of which exist to guarantee the rights to life and freedom and security of the person.⁷⁵⁶

Judicial outcomes for cases arising from the 2008 violence have provided very limited justice for the victims of the attacks. If anything, they have allowed for significant levels of impunity for perpetrators.⁷⁵⁷ Of 597 cases, only 159 had been finalised with a verdict (98 guilty; 61 not guilty), while 218 had been withdrawn by October 2009.⁷⁵⁸ Problems characteristic of the criminal justice system, such as delays in obtaining various affidavits, statements, medical, fingerprint and forensic reports, shortages of detectives to carry out investigations; and insufficient court capacity to deal with all the incoming cases (including numbers of judges, magistrates, prosecutors and legal aid representatives) led to ineffective prosecutions.⁷⁵⁹ Specialised courts were only established in the Western Cape and it was there that more cases were finalised than elsewhere in the country.⁷⁶⁰ These dedicated courts benefited from

⁷⁵³ Ibid.

⁷⁵⁴ Ibid.

⁷⁵⁵ Misago et al *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009). See also Misago Forced Migration Studies Programme (FMSP) and Consortium for Refugees and Migrants in South Africa (CoRMSA) Report *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluating Responses* (2010) F available online at <<http://www.cormsa.org.za/wp-content/uploads/2009/05/may-2008-violence-against-foreign-nationals-in-south-africa.pdf>> (accessed on 11/11/2012).

⁷⁵⁶ Ben Khumalo *Xenophobia Timeline* (2008) available online at <<http://www.benkhumalo-seegelken.de/dokumente/Xenophobia-Timeline.pdf>> (last accessed on 07/11/2012). During a period of ten days from the first attack, the police admitted to being overwhelmed by the situation which was rapidly spiralling out of control and the President deployed the army to assist. Two weeks into the attacks the President, pursuant to international and domestic pressure, spoke out for the first time, calling for an end to the violence.

⁷⁵⁷ South African Human Rights Commission *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity Arising out of the 2008 Public Violence against Non-Nationals*, (2010) 68.

⁷⁵⁸ Ibid 68.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid 69.

additional full-time staff dealing with the finalisation of cases.⁷⁶¹ This inconsistency led to skewed judicial outcomes when comparing the Western Cape to other provinces.⁷⁶²

The Consortium for Refugees and Migrants in South Africa (CoRMSA) observed that there was a widespread perception of impunity in cases of violence against foreign nationals.⁷⁶³ In subsequent investigations into the May 2008 attacks, it was found that victims of violence were often afraid or unwilling to approach police or other State agents for assistance.⁷⁶⁴ Reasons for failure to report included a lack of legal status within the country, the perceived bias of State officials against non-citizens and the perception on the part of victims that reporting the crime would not necessarily lead to action by police or prosecutors. This resulted in the under-reporting of xenophobic crimes with perpetrators seemingly cloaked in impunity.⁷⁶⁵

The police lacked the appropriate resources to monitor the xenophobic climate in South African communities.⁷⁶⁶ Prior to 2008, there had been numerous incidents of xenophobic violence, displacement and dispossession of property and yet, there was no government institutional memory detailing these events.⁷⁶⁷ As a result of this lack of hindsight, the security forces in May 2008 were not prepared for the onslaught and failed to prevent the spread of violence to additional settlements, nor were they able to halt mushrooming attacks starting up across the country after the initial attacks in Gauteng.⁷⁶⁸

Within the settlements themselves, there were other reasons for the failure of the authorities to protect foreign nationals. A study by the International Organisation for Migration (IOM) found that local leaders and police were typically reluctant to intervene on behalf of victims since they held similar hostile attitudes towards foreign nationals or they feared losing

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ Christina Gossmann "Perception of "Impunity" in Cases of Xenophobic Violence" *Mail and Guardian Online* (27 July 2010) available online at <<http://mg.co.za/article/2010-07-27-perception-of-impunity-in-cases-xenophobic-violence>> (accessed on 05/08/2012).

⁷⁶⁴ Human Rights First Report *Combating Xenophobic Violence: Framework for Action*(2011) available online at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/UNHCR_Blueprint.pdf> (accessed on 26/03/2013).

⁷⁶⁵ Ibid.

⁷⁶⁶ South African Human Rights Commission *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals*(2010) 33.

⁷⁶⁷ Ibid.

⁷⁶⁸ Ibid.

legitimacy and political clout by being seen as defending non-citizens.⁷⁶⁹ The police themselves pointed to limited numbers of officers on the ground and to a lack of access to public-order policing equipment such as rubber bullets as impediments to providing adequate protection.⁷⁷⁰ The same studies also found a culture of impunity with regard to public violence in general and xenophobic violence in particular, that encouraged perpetrators and potential perpetrators to commit violence without fear of any sanctions.

5.3.2. Other incidents post-2008

A key indicator that there has been no tangible State intervention to create a safe environment for non-citizens, is the growing number of reports of xenophobic attacks in South Africa since 2008. There have been reports in the media and studies have been conducted by the UN and NGOs on events that lead to violence against non-citizens. The examples below illustrate that the problem remains the same as in 2008 and that the responses are mostly inadequate.

The situation of Somali traders in the Western Cape has of late been a source of concern, as their spaza shops (which are usually their only source of livelihood) have suffered disproportionately from crime including robberies, looting, orchestrated arson attacks and murders organised by competing South African traders.⁷⁷¹ A report by the African Centre for Migration & Society shows that the Somali traders can access neither the formal nor informal justice systems.⁷⁷² The informal systems in this regard are the community structures used to mediate conflict and punish crime. With regards to the formal systems of justice, the traders are hampered by a lack of faith in the police and courts that is exacerbated by language barriers and a lack of understanding of how the justice system works.⁷⁷³ The result is that Somali traders living in these communities are left exposed and without recourse to the courts or police where they can go to vindicate their rights.

⁷⁶⁹ Misago et al *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009). See also Misago et al *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluating Responses* (2010).

⁷⁷⁰ South African Human Rights Commission *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals* (2010).

⁷⁷¹ Vanya Gastrow and Roni Amit African Centre for Migration & Society (ACMS) Report *Elusive Justice: Somali Traders' Access to Formal and Informal Justice Mechanisms in the Western Cape* (2012) available online at <<http://www.migration.org.za/report/elusive-justice-somali-traders-access-formal-and-informal-justice-mechanisms-western-cape>> (accessed on 14/11/2012).

⁷⁷² Ibid.

⁷⁷³ Ibid. In chapter 3 (above) these barriers to accessing justice were discussed with an emphasis on how being a non-citizen exacerbated one's sense of exclusion from the formal systems.

South African law allows asylum seekers to work and study during their sojourn and refugees to enjoy rights similar to permanent residents including carrying on businesses yet, according to the United Nations High Commissioner for Refugees (UNHCR), police in Limpopo province regularly target hundreds of shops run by refugees and asylum seekers during operations to enforce trading laws.⁷⁷⁴ UN officials report that the operations exclusively target non-citizens' shops, consequently creating a discriminatory application of the law.⁷⁷⁵ Such discriminatory practices against non-nationals by State agents tend to signal that private actors can get away with similar behaviour.⁷⁷⁶

In summary, the on-going xenophobic attacks reveal an underlying culture of impunity within which State agents or private actors are allowed to violate the law without consequence. The lacklustre response of the police to the attacks, intimidation and property deprivation reveals a level of ambiguity within their ranks. At times the police are seen to actively arrest, contain and monitor the violence but in other reports certain individuals within SAPS deny the existence of xenophobia and simply ascribe the violence to ordinary criminality. This has had a detrimental effect on the rule of law, as the rights of non-citizens became meaningless, putting at risk their rights to equality and dignity. Reports and studies by both State and non-State organs have found that the violence against non-citizens and the lawless climate in which it took place, cast serious aspersions on the country's ability to guarantee the rights of non-citizens and to create an open society, in which "South Africa belongs to all who live in it, united in our diversity."⁷⁷⁷ When a crime goes unpunished, either because the perpetrator is not arrested or because if arrested he or she is released without charge, then a culture of

⁷⁷⁴ IRIN "South Africa: Police Target Foreign Traders in Limpopo" (17 August 2012) (*IRIN*) *Humanitarian News and Analysis* <<http://www.irinnews.org/report/96130/SOUTH-AFRICA-Police-target-foreign-traders-in-Limpopo>> (accessed on 12/11/2012).

⁷⁷⁵ *Ibid.*

⁷⁷⁶ IRIN "South Africa: Foreign Traders Face Threats, Intimidation" (20 May 2011) (*IRIN*) *Humanitarian news and analysis* <www.irinnews.org/Report/92772/SOUTH-AFRICA-Foreign-traders-face-threats-intimidation> (accessed on 12/11/2012). In May 2013, the same group called on the government to place non-citizens in camps. According to their spokesperson, they did not want foreign nationals in the townships. See the full report by Siphso Masombuka and Aarti J Narsee "Send Foreigners to Camps" *Timeslive* (28 May, 2013) <<http://www.timeslive.co.za/thetimes/2013/05/28/send-foreigners-to-camps>> (accessed on 28/05/2013). Another example was recorded in the city of Johannesburg where in 2011, a group calling themselves the Greater Gauteng Business Forum (GGBF) distributed letters to immigrant shopkeepers in at least nine townships, giving them seven days to pack up and leave. Police responses to the threats were reportedly inadequate: in some townships the police turned a blind eye to the unlawful actions of the GGBF and may even have assisted them in their intimidation campaign.

⁷⁷⁷ Constitution of South Africa - Preamble.

impunity ensues. Essentially, the integrity of the justice system comes under threat from both the reality and perception of ineffectualness.⁷⁷⁸

5.4. International law obligations

5.4.1. State responsibility and diplomatic protection

In this section, the international law obligations that enjoin South Africa to treat non-citizens in a humane manner will be discussed with emphasis on the equality between the treatment of non-citizens and that of citizens.

In international law, the doctrine of diplomatic protection establishes host State (indirect) responsibility over the sending State's nationals.⁷⁷⁹ Diplomatic protection is significant because it lays down the minimum standards of how a State Party should treat non-citizens and establishes responsibility for the ill treatment of non-citizens. It is only problematic in so far as it assumes that the sending State has an interest in protecting its nationals from being ill-treated in another country.⁷⁸⁰ This doctrine was developed at a time when the State and not the individual was the rights holder. In its orthodox formulation the doctrine holds that violation of a non-national's rights through xenophobic violence in the host State would lead to that State incurring "indirect State responsibility" since States owe obligations to and amongst each other. The breach envisaged by the doctrine of State responsibility may come from the injurious actions of the State agents or indirectly from the failure of the State to perform its international duty to take all reasonable and adequate measures to prevent private wrongs.⁷⁸¹ This includes the duty on the State to arrest and bring to book perpetrators of these wrongs.⁷⁸² The lack of due diligence of State organs, when for example the State "has failed to take such measures as in the circumstances should normally have been taken to prevent, redress or inflict punishment for acts causing harm," will render the State responsible for private wrongs.⁷⁸³ The State's failure to exercise due diligence could be seen as condoning the wrongful act.⁷⁸⁴

⁷⁷⁸ Brian Forst *Errors of Justice: Nature, Sources and Remedies (Cambridge Studies in Criminology)* (2004).

⁷⁷⁹ Dugard *International Law: A South African Perspective* 4th ed (2011) 271.

⁷⁸⁰ *Ibid* 281.

⁷⁸¹ Dinah Shelton *Remedies in International Law* 2nd ed (2005) 59.

⁷⁸² *Ibid*.

⁷⁸³ *Ibid*.

⁷⁸⁴ *Ibid* 60.

In practice, in applying the doctrine of diplomatic protection in cases of xenophobia, a powerful country such as Nigeria could make representations to South Africa where its nationals are ill-treated and South Africa could respond positively.⁷⁸⁵ Other less powerful states like Mozambique and Zimbabwe which lack political or economic clout in similar instances would send buses and trucks to repatriate their nationals who have been victims of xenophobia, rather than engage with South Africa on the treatment of their nationals.⁷⁸⁶ Despite the doctrine of diplomatic protection, the push and pull factors that lead to migration into South Africa still persist and these countries generally cannot create enough jobs within their borders for their citizens, hence the skewed relationship in favour of South Africa.⁷⁸⁷ This illustrates the important role played by international politics in the relationships between states: since South Africa is a migrant receiving country, its position within the region tends to be dominant. The accepted argument is that “any intervention, including negotiation, at inter-State level on behalf of a national *vis-à-vis* a foreign State should be classified as diplomatic protection.”⁷⁸⁸ Effectively, if negotiations between State Parties yield limited or no visible relief, the doctrine is rendered ineffective in so far as the protection of ordinary people is concerned. There are thus clear limits to the capacity of this doctrine to afford relief to the victims of xenophobic violence.

However, owing to developments in human rights law and foreign investment law in modern times, individuals have increasingly been able to approach international tribunals themselves for relief without resorting to the diplomatic protection route.⁷⁸⁹ In the following sections, international human rights instruments like the ICCPR and the ICERD will be discussed. These treaties contain provisions that oblige State Parties not to discriminate on the grounds of national origin or citizenship status, amongst others.

⁷⁸⁵ South African Press Association (SAPA) “Nigeria Lashes out at SA “Xenophobia”” *News24*(7 March 2012) <<http://www.news24.com/SouthAfrica/News/Nigeria-lashes-out-at-SA-xenophobia-20120306>> (accessed on 12/12/12).

⁷⁸⁶ Voice of America “Harare Sends Buses to South Africa to Bring Xenophobia Victims Home” *VOA*, 1 November 2009 <<http://www.voanews.com/content/a-13-2008-05-30-voa60/335004.html>> (accessed on 23/01/2013). See also Citizenship Rights in Africa Initiative (CRAI) Report *Tolerating Intolerance: Xenophobic Violence in South Africa*(2009) available online at <<http://www.citizenshiprightsinafrica.org/Publications/2009/CRAISARreport.July2009.pdf>> (accessed on 23/01/2013) 30.

⁷⁸⁷ *Ibid* 31.

⁷⁸⁸ John Dugard *Seventh Report on Diplomatic Protection*(2006) International Law Commission Special rapporteur/UNA/CN.4/567, available online at <http://untreaty.un.org/ilc/documentation/english/a_cn4_567.pdf> (accessed on 31/01/2013).

⁷⁸⁹ Dugard *International Law: A South African Perspective*282.

5.4.2 Obligations under international human rights treaties

In international law, the rights of non-citizens as a general population group are not specifically protected. Despite its prevalence in many countries, there are no binding international human rights instruments that specifically address xenophobia and how States should deal with it.⁷⁹⁰ Recourse must be had to existing legal instruments even though most have limited application when dealing specifically with non-citizens.⁷⁹¹ Of course this is not to say that there are no specific protections for non-citizens to be found in international law treaties. The International Covenant on Economic, Social and Cultural Rights⁷⁹² establishes in general that States shall protect the rights of all individuals regardless of citizenship to enjoy the rights contained therein.⁷⁹³ The African Charter on Human and People's Rights provides for similar protections against discrimination, equality before the law as well as equal protection of the law.⁷⁹⁴ Similarly, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) protect individuals against discrimination on the basis of nationality or social or ethnic origin.⁷⁹⁵ More specifically, the UN Convention and Protocol Relating to the Status of Refugees as well as the AU Convention Governing the Specific Aspects of Refugee Problems in Africa deal with refugees, while the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)⁷⁹⁶ specifically targets

⁷⁹⁰ Centre for Human Rights, University of Pretoria *The Nature of South Africa's Legal Obligations to Combat Xenophobia* (2009) 50.

⁷⁹¹ Ibid. James C Hathaway *The Rights of Refugees under International Law* (2005) 121. One example of these limitations is found in the International Covenant on Civil and Political Rights (ICCPR). Admittedly, most rights in the ICCPR have universal application in that they apply to everyone, and article 2(1) states that the rights in the Covenant are protected without distinction of any kind, including nationality. Art 13 also deals specifically with the expulsion of "aliens", stating that such expulsion can only be done in accordance with due process. And yet, it would not be unfair to state that the ICCPR was designed first and foremost with the rights of citizens in mind. The treaty was not drawn up to address specific issues relating to migrants or refugees such as the recognition of personal status, access to naturalization, immunity from illegal entry and need for documentation. More specifically, while it guarantees the fairness of judicial proceedings, it fails to address the specific obstacles (discussed in chapter 3 above) experienced by non-citizens in accessing and securing redress from the justice system.

⁷⁹² International Covenant on Economic, Social and Cultural Rights (ICESCR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S.3.

⁷⁹³ David Weissbrodt *The Human Rights of Non-Citizens* (2008) 35.

⁷⁹⁴ African (Banjul) Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc CAB /LEG/67/3rev.5 (1982) ILM 58 entered into force 21 October 1986, Arts 2 and 3.

⁷⁹⁵ Convention on the Rights of the Child, (CRC) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (Art 2 and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 Art 1.

⁷⁹⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990).

migrant workers.⁷⁹⁷ These instruments were created for particular subsets of non-citizens and do not specifically address xenophobia as a phenomenon that non-citizens need protection from.

Regrettably South Africa is not a State Party to the CMW, which recognises the susceptibility of migrant workers and their families to discrimination and deprivation of fundamental rights.⁷⁹⁸ Article 1 of the CMW states that it is applicable to all migrant workers and members of their families without any distinction and it contains a list of enumerated prohibited grounds of distinction that is broader than those found in other human rights treaties such as ICESCR or the International Covenant on Civil and Political Rights (ICCPR).⁷⁹⁹ The protection offered by this treaty is of particular relevance to the present situation where migrant workers bear the brunt of xenophobic attitudes.⁸⁰⁰

The principle of non-discrimination runs like a common thread throughout the important international human rights treaties.⁸⁰¹ As will be discussed later on in this chapter, it has found expression in the South African Constitution and several pieces of legislation. The right which guarantees non-discrimination is contained in article 26 of the ICCPR.⁸⁰² Hathaway writes that this duty of non-discrimination is the most important protection for non-citizens in international human rights law as it specifically provides for equal protection of non-citizens. The Human Rights Committee (HRC), which monitors compliance with the ICCPR, in its General Comment 15 stated that when it comes to interpreting the provisions of

⁷⁹⁷ South Africa is not party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) and it is difficult to foresee a time when it will join as a full member owing to being a migrant receiving nation. Most of the countries that have ratified the CMW are migrant sending nations. Interestingly it does provide a modicum of protection from attacks and abuse.

⁷⁹⁸ Centre for Human Rights, University of Pretoria *The Nature of South Africa's Legal Obligations to Combat Xenophobia* (2009) 61.

⁷⁹⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR) "The International Convention on Migrant Workers and its Committee" (2005) 24 (1) *Human Rights Fact Sheet* 5. See also CMW Art 1, in terms of which the CMW

"is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

⁸⁰⁰ Centre for Human Rights *The Nature of South Africa's Legal Obligations to Combat Xenophobia* (2009) 61.

⁸⁰¹ In the International Covenant on Civil and Political Rights (ICCPR) it is found in articles 2.1, 4, 20, 24.1 and 26. The entire International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1969) 660 UNTS 195 is dedicated to anti-discrimination.

⁸⁰² International Covenant on Civil and Political Rights (ICCPR Art) 26:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

the ICCPR “the general rule is that each one of the rights in the covenant must be guaranteed without discrimination between citizens and aliens.”⁸⁰³ The right against non-discrimination is of singular importance because it is not limited in scope to only those rights found in the ICCPR but prohibits discrimination “in law or in fact, in any field regulated or protected by public authorities.”⁸⁰⁴ Relating specifically to violence, the HRC has also made it clear that states have a positive obligation to prevent and punish human rights abuses by private actors as well as State agents.⁸⁰⁵ Effectively there can be no discrimination in the enforcement of rights under any of the international treaties or any domestic legislation. In the present case dealing with xenophobia and xenophobic violence, the relevant provisions implicated are the rights to life⁸⁰⁶ and security of the person.⁸⁰⁷ South Africa has an obligation to guarantee these rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁸⁰⁸

In its Comment 15, the HRC reminded State Parties of the interrelationship between the positive obligations imposed under article 2 of the ICCPR and the need to provide effective remedies in the event of breach under article 2(3) of the ICCPR. Effectively this correlates to

⁸⁰³ Weissbrodt *The Human Rights of Non-Citizens* 11.

⁸⁰⁴ Hathaway *The Rights of Refugees under International Law* 125. See also UN Human Rights Committee, General Comment No. 18: Non-discrimination (1989), UN Doc HRI/GEN/1/Rev. 7 May 12, 2004.

⁸⁰⁵ UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.13 (2004) Para 8:

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.”

See also Human Rights Watch (HRW) Report *Hate on the Streets: Xenophobic Violence in Greece* (2012) available online at <<http://www.hrw.org/sites/default/files/reports/greece0712ForUpload.pdf>> (accessed on 12/12/2012).

⁸⁰⁶ ICCPR Art 6.

⁸⁰⁷ ICCPR Art 9.

⁸⁰⁸ ICCPR Art 2.

the right to effective remedies in South African law found in section 34 of the Constitution and developed by the court in cases like *Modderklip Boerdery*.⁸⁰⁹ The drawbacks that non-citizens experience in approaching the courts and accessing effective relief have already been discussed in chapter 3 of this thesis.⁸¹⁰

South Africa is also a State Party to the International Convention on the Elimination of Racial Discrimination (ICERD).⁸¹¹ In its General Recommendation XXX, the Committee on the Elimination of Racial Discrimination (CERD) incorporated the principle that was agreed to in Durban which held that:

“Xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, constitutes one of the main sources of contemporary racism and ... human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practice.”

In essence, the committee classified xenophobia as a form of racism to be prohibited everywhere that it occurred in whatever shape or form. Further to this in its 30th General Recommendation, the committee clarified the responsibilities of States Parties to the Convention with regard to non-citizens.⁸¹² The principle of non-discrimination was extended from merely covering race, colour, sex, language, religion, political or other opinion, national or social origin to cover the distinction between citizen and non-citizen as well.⁸¹³ In this recommendation, the committee imposed an additional obligation on State Parties to protect non-citizens from xenophobic attitudes and behaviour.⁸¹⁴ Just like the ICCPR,⁸¹⁵ this treaty (ICERD) mandates State Parties to guarantee everyone “without distinction as to race, colour, or national or ethnic origin...security of person and protection by the State against violence

⁸⁰⁹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) and chapter 3.4.4 (above).

⁸¹⁰ See Chapter 3.4.4 (above).

⁸¹¹ International Convention on the Elimination of Racial Discrimination (ICERD), adopted and opened for signature and ratification by the General Assembly resolution 2106 (XX) of 21 December 1965, entered into force January 4, 1969, South Africa ratified ICERD on 10 December 1998. In 2002 South Africa hosted the World Conference against Racism and Racial Discrimination in Durban.

⁸¹² UN Committee on the Elimination of Racial Discrimination (CERD) *General Recommendation XXX on Discrimination against Non-Citizens* (2002) available online at <<http://www.refworld.org/docid/45139e084.html>> (accessed on 13 October 2013).

⁸¹³ *Ibid.*

⁸¹⁴ Committee on the Elimination of Racial Discrimination *General Recommendation XXX*.

⁸¹⁵ ICCPR Art 9.

or bodily harm, whether inflicted by government officials or by any individual, group or institution.”⁸¹⁶

International treaties also call upon States to guarantee the independence of the courts and to establish and develop appropriate national institutions which will be entrusted with the promotion and protection of the rights and freedoms of all.⁸¹⁷ Although this thesis is concerned more with the laws which are in place than with the actual policing and prosecution practices in South Africa, the laws that are discussed herein should be seen to be observed and enforced. It is for this reason that these international law obligations that call for effective courts, policing and prosecutorial services are mentioned here.

5.5. The Constitution: Freedom from all forms of violence from either public or private sources

When it comes to dealing with xenophobia, the most important right is section 12(1)(c) of the Constitution which provides for freedom from all forms of violence from either public or private sources.⁸¹⁸ This right was introduced in chapter 3 of this thesis.⁸¹⁹ In this section the applicability of the right is discussed with particular reference to the role of the State in protecting vulnerable categories of persons such as non-citizens.

In the case of *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)*,⁸²⁰ the court was seized with the delictual liability of the State for the negligent acts of its agents (the police and prosecution services) acting within the scope of their duties.⁸²¹ More specifically, the question was whether the courts *a quo*⁸²² ought to have

⁸¹⁶ ICERD Article 5(b).

⁸¹⁷ African Charter on Human and Peoples’ Rights Art 26; International Convention on the Elimination of Racial Discrimination (ICERD) Art 5(a), (b) and 6; ICCPR Art 26.

⁸¹⁸ Constitution of South Africa s 12 - Freedom and security of the person.

⁸¹⁹ See chapter 3.4.5 (above).

⁸²⁰ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

⁸²¹ The facts of the *Carmichele* case were that the applicant sued the two Ministers concerned for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail. In the High Court the applicant alleged that this had been an omission by the police and the prosecutor. She also relied on the duties imposed on the police by the interim Constitution and on the State under the rights to life, equality, dignity, freedom and security of the person and privacy. The High Court dismissed the claim at the close of the applicant’s case, finding that she had not established that the police or the prosecutor had wrongfully failed to fulfil a legal duty owed specifically to her. The applicant appealed to the Supreme Court of Appeal (SCA), which held that the police and prosecution had no legal duty of care towards the applicant and could not as a matter of law be liable for damages to her.

⁸²² *Carmichele v Minister of Safety and Security & another* 2001 (1) SA 489 (SCA).

broadened the wrongfulness element of delictual liability for an omission in the law of delict in the light of the State's constitutional duty to safeguard the rights of women.⁸²³ The court considered foreign case law from the USA where the Supreme Court had declined to hold a government authority liable for a failure to take positive action to prevent harm, saying there was an absence of positive rights in the US Constitution.⁸²⁴ The Constitutional Court was of the view that unlike the US Constitution, the South African Constitution *did* impose positive obligations. The Court considered international law in the form of the European Convention on Human Rights ("the Convention"), saying that the right to life in section 11 of the Constitution corresponded with article 2(1) of the Convention which provides that "Everyone's right to life shall be protected by law."⁸²⁵ Following the reasoning of the European Court of Human Rights, the Court accepted that there exists a "positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."⁸²⁶ The Court affirmed the position that under the South African Constitution, the State has a positive duty to act to prevent harm.

In this instance the court reiterated its section 39(2) constitutional responsibility that states that when developing the common law, it must promote the spirit, purport and objects of the Bill of Rights.⁸²⁷ It found that the High Court and the Supreme Court of Appeal had assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied, and in so doing had overlooked the demands of section 39(2).⁸²⁸ The Court then directed the lower courts to reconsider their judgment, taking into consideration the rights enshrined in the Constitution when developing the common law of delictual liability.⁸²⁹

⁸²³ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (10) BCLR 995 (CC) Paras 37, 38 and 58.

⁸²⁴ Para 45 - Ackermann and Goldstone JJ quoting from the United States case of *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1988).

⁸²⁵ *Ibid.*

⁸²⁶ Para 45, quoting from *Osman v United Kingdom* 29 EHRR 245 at 305. See also Dennis Davis "Freedom and Security of the Person" in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2011) 7.4.

⁸²⁷ Constitution of South Africa s 39(2):

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

⁸²⁸ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 (10) BCLR 995 (CC) Para 37, See also the subsequent case of *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (C).

⁸²⁹ Iain Currie and Johan de Waal (eds) *The Bill of Rights Handbook* 5th ed (2005) 305. For a more critical analysis of this case see Johan Van Der Walt "Horizontal Application of Fundamental Rights and the Threshold

The *Carmichele* court held that the State's duty was broad and encompassed the putting in place of criminal sanctions to deter commission of crimes, backed up by effective law-enforcement machinery.⁸³⁰ The importance of the *Carmichele* judgment is that the State can be held liable for the negligent acts of its agents which in turn lead to violations of the constitutional rights of the public.⁸³¹ The Court was of the view that the common law of delict needed to be developed to recognise that the State had a "duty of care" to protect individuals from unlawful life-threatening attacks by private persons.⁸³² Where the State has been made aware of a threat, then it has a duty of care to take reasonable steps to protect the public from the said threat.⁸³³ When the case reverted to the High Court⁸³⁴ and the Supreme Court of Appeal,⁸³⁵ it resulted in the development of the law of delict to encompass State liability in circumstances where State actors knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and where they failed to take reasonable measures within the scope of their powers which might have been expected to avoid that risk.⁸³⁶

At all levels of the court where the case of *Carmichele* was heard, the special constitutional duty of the State to protect women against violent crime in general and sexual abuse in

of the Law in View of the *Carmichele* Saga" (2003) 19 *SAJHR* 517; and Anton Fagan "Reconsidering *Carmichele*" (2008) 125 *SALJ* 659.

⁸³⁰ The Constitutional Court considered the views of these following cases: *Barrett v Enfield London Borough Council* [1999] 3 All ER 193; *Z & Others v United Kingdom* Application no. 29392/95 [unreported]; and *Osman v United Kingdom*.

⁸³¹ Centre for Human Rights *The Nature of South Africa's Legal Obligations to Combat Xenophobia* (2009) 75.

⁸³² Currie and de Waal *The Bill of Rights Handbook* 5th ed (2005) 285 footnote 29.

⁸³³ *Ibid.*

⁸³⁴ *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (C).

⁸³⁵ *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA).

⁸³⁶ Para 33. See also Iain Currie and Johan de Waal *The Bill of Rights Handbook* 285 - 305. Other cases further extended the State's ability to prevent violence in terms of s 12(1)(c). In *Omar v Government of the Republic of South Africa & Other (Commission for Gender Equality Amicus Curiae)* 2006 (2) SA 289 (CC), the Court held that the State was obliged to take active steps to prevent domestic violence and to encourage victims to report any instances of it. In *Railway Commuters Action Groups & Other v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), the court emphasised that the State should be compelled to prevent violence from occurring in the first place and could not just be seen to wait to mop up after the fact. In *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA), the SCA held that the police have a duty to exercise reasonable care in considering, investigating and recommending applications for firearm licenses. The SCA extended liability for damages in that case, saying the police were liable for a shooting by an unfit person to whom they had issued a licence.

particular was emphasised.⁸³⁷ It was held that in addressing obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.⁸³⁸ The court acknowledged South Africa's international law obligations towards women and the police's role in protecting women from violent crime.⁸³⁹ In the Supreme Court of Appeal case the court held that the State owed a duty to the plaintiff who was not simply a member of the public whom the State had a duty to protect but was in fact a member of a class of people whom the State would have foreseen as being potential victims of an attack by the accused in that case.⁸⁴⁰ There was according to the court, a general norm of accountability that says that the State is liable for the failure to perform the duties imposed upon it by the Constitution, unless it can be shown that there is compelling reason to deviate from that norm.⁸⁴¹

The *Carmichele* court made it clear that section 12(1) read with section 7(2) require the State not only to refrain from conduct that infringes the rights in the Bill of Rights, but also to take positive action to protect, promote and fulfil the rights entrenched in the Bill of Rights.⁸⁴² In other words, the State must also enforce the laws as well as take proactive steps to prevent the violence prohibited in section 12(1).⁸⁴³ The Constitution makes no distinctions between citizens and non-citizens in the application of the rights to life, dignity and freedom from all forms of violence. It follows therefore that the judgments in *Carmichele* and other similar cases should apply to non-citizens, just as they do to other similarly placed vulnerable groups and the public at large. There is a duty placed on the State to protect the rights of non-citizens and on State agents to take an active role in rolling back xenophobia and its manifestations.

⁸³⁷ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (10) BCLR 995 (CC) Para 29 and 62; *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (C) Para 30 and *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) Para 42.

⁸³⁸ *Carmichele v Minister of Safety and Security and Another* (CC) Para 62.

⁸³⁹ *Ibid*: "South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime."

⁸⁴⁰ *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) Para 43 and 44.

⁸⁴¹ *Ibid* Para 43.

⁸⁴² Lourens du Plessis "Interpretation" in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2ed (RS 4 2012) 32-121.

⁸⁴³ *Ibid*. This was the Court's position in *S v Baloyi (Minister of Justice Intervening)* 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) Para 11, where it concluded that the State is obliged to protect the right of everyone to be free from private or domestic violence, even if it meant preventative and pre-emptive State intrusion into private family life. The importance of this position is that it mandates preventative and pre-emptive State action as opposed to a simply reactive approach to crimes, although this latter aspect too is of great importance.

In conclusion, the *Carmichele* case established a “duty of reasonable care” to be exercised by police in carrying out their duties to protect and serve the public. The thrust of that duty is that police officers are liable for their failure to perform their statutory and constitutional duties in cases where they should reasonably have foreseen the danger complained about. The argument made in the equality court case of *Said and others v the Minister of Safety and Security*⁸⁴⁴ (discussed below), was that the police had discriminated against the victims of the xenophobic attacks on the basis of their nationality. The complainants argued that as a vulnerable group the police owed a statutory and constitutional “duty of care” to the individuals and had those individuals not been foreigners the police would have exercised their function differently.⁸⁴⁵ One of the remedies sought by the complainant was “a structural interdict requiring the police to establish a training program aimed at instructing police officers throughout the Western Cape on providing services to refugees in a sensitive manner.”⁸⁴⁶ The complainant sought to extend the duty of care established in the *Carmichele* line of cases to cover the systemic failures of the police to carry out their work without favour or discrimination. This case is an example of how *Carmichele* can be extended in application from an individual to a group of people.

5.6. Xenophobia in the Immigration Act

South Africa does not have a specific law that deals with xenophobia and its manifestations. The Immigration Act in its preamble⁸⁴⁷ states that xenophobia needs to be contested, although the Act does not lay out any specific measures as how best to implement this. An earlier version of the Act mentioned xenophobia in at least four provisions before these specific

⁸⁴⁴ *Said and others v the Minister of Safety and Security*(EC13/08) [unreported]. This case is discussed in chapter 5.7 (below).

⁸⁴⁵ Justin de Jager “Addressing Xenophobia in the Equality Courts of South Africa” (2011) (28) (2) *Refugee*107-116 109.

⁸⁴⁶ *Ibid* 111.

⁸⁴⁷ Immigration Act [No. 13 Of 2002] Preamble:

“In providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that-

....

(l) Immigration control is performed within the highest applicable standards of human rights protection;

(m) xenophobia is prevented and countered;

(n) a human rights based culture of enforcement is promoted;

(o) the international obligations of the Republic are complied with; and

(p) civil society is educated on the rights of foreigners and refugees.”

provisions were repealed in 2004 and replaced by paragraph (m) of the current Preamble.⁸⁴⁸ The SAHRC's submissions on the Immigration White Paper and the draft Immigration Bill dealt at length with the concerns that the Bill promoted and institutionalized xenophobia and racism by paying lip service to these issues.⁸⁴⁹

In chapters 3 and 4 (above)⁸⁵⁰ the issue of community enforcement in immigration control and enforcement was discussed. The SAHRC in its submission took the view that the provisions in sections 38 - 45 that encouraged community participation in immigration enforcement could be used by people to further their xenophobic agendas.⁸⁵¹ The commission felt that the migrants who would bear the brunt of these provisions would be the poor and indigent since it was unlikely that hotels would demand proof of status from paying guests.⁸⁵² Such a provision will most likely be enforced in a discriminatory fashion. Further to this, the public and private institutions that the Act envisages as partners in immigration enforcement do not have the necessary training to distinguish between various visas and the validity thereof. They have no obligation to carry out such functions in a manner that protects the human rights of non-citizens. There is a self-preservation duty to avoid falling foul of the law.⁸⁵³ In addition, the reverse onus⁸⁵⁴ placed on persons accused of knowingly aiding and

⁸⁴⁸ The specific provisions were repealed by Act 19 of 2004. It is important to mention the repealed provisions because of their specificity in tackling xenophobia in the DHA in particular, the government in general, and South African society at large. The repealed section 2(1)(e) called for the prevention and deterring of xenophobia within the DHA, government, State organs and at community level. In order to achieve this objective, the department was mandated to educate communities and organs of civil society on the rights of all foreigners and refugees as well as conduct activities to prevent xenophobia. Section 3(1)(f) conferred powers on the department to organise and participate in community fora and other similar organisations for purposes of deterring xenophobia through education of the citizenry on issues of migration. In an effort to curb corruption, abuse of power and xenophobia, the Act set up an internal anti-corruption unit charged with preventing, deterring, detecting and exposing these vices. Very little literature exists in the public domain dealing with the repeal and/or substitution of the sections containing these provisions (i.e. the preamble, sections 2, 3 and 47). In its 2004/2005 annual report, the department reported that the amendments sought to address a number of defects in the Immigration Act caused by that Act's hurried passage through parliament in 2003. The reasons behind the repeal and substitution of the provisions which dealt with xenophobia and how to best to combat it are not included in the annual report.

⁸⁴⁹ South African Human Rights Commission (SAHRC) *Submission on the Draft Immigration Bill*(2002) available online at <http://www.sahrc.org.za/home/21/files/7%20SAHRC%20Submission%20on%20Immigration%20Bill%20%28Part%29%20April%202002.pdf> (accessed on 10/06/2013).

⁸⁵⁰ See chapters 3.3.4 and 4.2 (above).

⁸⁵¹ SAHRC *Submission on the draft Immigration Bill*(2002).

⁸⁵² Ibid.

⁸⁵³ Ibid.

⁸⁵⁴ Immigration Act s 39(2):

"If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such premises, unless prima facie evidence to the contrary is adduced."

abetting an "illegal foreigner", or providing employment, accommodation or a learning place puts an onerous duty on the public to always ascertain the status of a non-citizen. This in itself is a driver of paranoia when dealing with non-citizens, thereby leading to xenophobia at times.⁸⁵⁵

The fact that the eradication of xenophobia is envisaged in the preamble to the Immigration Act is testimony to South Africa's commitment to its constitutional and international obligations.⁸⁵⁶ However, the problem with the Act as it stands is that the responsibilities of the DHA are too vaguely defined and do not impose specific monitoring, evaluation or coordination responsibilities upon the Department.⁸⁵⁷ Most of the State's responses thus far have been on an *ad hoc* basis as opposed to systemic statutory mechanisms.⁸⁵⁸ The various sections in the Immigration Act, which would have mandated the State to set up permanent mechanisms to deal with xenophobia, were repealed in 2004.⁸⁵⁹ The lack of an anti-corruption unit within the DHA's Immigration Department as had been mandated by the repealed section 47 was a matter of concern to the South African Human Rights Commission.⁸⁶⁰ The SAHRC felt that corruption and bribery were endemic to the department's dealings with non-citizens.⁸⁶¹

This Act may not necessarily be the most appropriate vehicle to fight xenophobic violence but what it should do is to address the scourge of xenophobia prevalent amongst immigration

S 42(2):

"In any criminal proceedings arising out of this section, it is no defence to aver that the status of the foreigner concerned, or whether he or she was an illegal foreigner, was unknown to the accused if it is proved that the accused ought reasonably to have known the status of the foreigner, or whether he or she was an illegal foreigner."

⁸⁵⁵ SAHRC *Submission on the draft Immigration Bill*(2002). See also *S v Manamela* 2000 (3) SA 1 (CC). It is possible that if this particular provision were to come before a court, it would not pass constitutional muster since it can be recast to use less restrictive means of identifying "illegal foreigners".

⁸⁵⁶ See chapter 5.4 and 5.5 (above).

⁸⁵⁷ South African Human Rights Commission *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity Arising out of the 2008 Public Violence against Non-Nationals*(2010) 31.

⁸⁵⁸ Defence Web "Anti-Xenophobia Committee Finalising Post Cup Plans " *DefenceWeb*(01 July 2010) available online at

<http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=8728:zz&catid=3:Civil%20Security&Itemid=113> (accessed on 12/12/2012).

⁸⁵⁹ [Act 19 of 2004].

⁸⁶⁰ South African Human Rights Commission (SAHRC) *Comments on Draft Immigration Regulations to the Immigration Act No. 13 of 2002*(June 2003) Submitted by the SAHRC to the Minister for Home Affairs on 2 June 2003 as per Government Gazette General Notice 1298 of 2003.

⁸⁶¹ See Chapter 3.3.3 (above), where corruption is discussed as an obstacle to "access to justice" for non-citizens.

and law enforcement officials.⁸⁶² They are at the forefront of immigration control and enforcement and should be seen to carry out their roles in a manner that is empathetic and sensitive to xenophobia. The Act must encourage meaningful engagement between non-citizens and the enforcement authorities to avoid blanket raids, mass deportations and foster more humane systems of enforcement. It should be noted that pursuant to the Immigration Act, DHA has since established a counter-xenophobia unit and a communications programme in an effort to strengthen its policies and actions taken to prevent xenophobia.⁸⁶³ This is encouraging as the State is taking proactive steps within its structures to pre-empt xenophobic attitudes within its ranks and in the public.

5.7. Xenophobia in the Promotion of Equality and Prevention of Unfair Discrimination Act

Parliament passed the Promotion of Equality and Prevention of Unfair Discrimination Act (“Equality Act” or “the Act”),⁸⁶⁴ pursuant to the country’s obligations under the Constitution⁸⁶⁵ and ICERD.⁸⁶⁶ This Act seeks inter alia to domesticate South Africa’s international law obligations under article 4 of ICERD that requires the State to take positive legislative and other measures to eradicate all incitement and discrimination. It has an ambitious objective for changing social relations in South Africa; for instance, people who render services to the public have obligations imposed upon them to promote equality and to abjure all forms of discrimination.⁸⁶⁷ Section 26 of the Act outlines this duty by providing that any person directly or indirectly contracting with the State or exercising public power must promote equality by adopting appropriate equality plans, enforcing and monitoring these plans, and making regular reports to monitoring authorities.⁸⁶⁸ The Act calls for a social commitment from all persons, non-governmental organisations, community-based organisations and traditional institutions to promote equality in their relationships with other

⁸⁶² Themba Masuku "Targeting Foreigners Xenophobia among Johannesburg's Police" (2006) 15 *SA Crime Quarterly* 19- 24.

⁸⁶³ Naledi Pandor *Home Affairs Budget Speech before the National Council of Provinces*, (May 2013) available online at <<http://www.lhr.org.za/news/2013/home-affairs-budget-speech-may-2013>> (accessed on 10 June 2013).

⁸⁶⁴ Promotion of Equality and Prevention of Unfair Discrimination Act [No. 4 of 2000] (PEPUDA).

⁸⁶⁵ Constitution of South Africa ss 9(2) and (4).

⁸⁶⁶ ICERD Art 4.

⁸⁶⁷ Barney Pityana "Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" (2002) XLIV (1) *Codicillus* 2 – 9 7.

⁸⁶⁸ PEPUDA s 26.

bodies and in their public activities.⁸⁶⁹ This Act envisages a role for everyone within the country to promote equality and eschew discrimination of any kind.

The Act in its definitions clause enumerates a number of grounds of discrimination.⁸⁷⁰ However, paragraph (b) provides for the inclusion of any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms.⁸⁷¹

Nationality as a ground of unfair discrimination was established in South African law under the interim Constitution. Courts should generally speaking not encounter barriers when dealing with discrimination on this ground even though it is not enumerated in the Equality Act. In *Larbi-Odam and others v MEC for Education (North-West Province) and another*,⁸⁷² the court applied the discrimination test developed in the case of *Harksen v Lane NO and Others*,⁸⁷³ holding that

“[b]ecause citizenship is an unspecified ground, the first leg of the enquiry requires considering whether differentiation on that ground constitutes discrimination. This involves an inquiry as to whether ... “objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”.”⁸⁷⁴

The court concluded that the ground of citizenship/nationality does just that, in view of the fact that foreign citizens are a minority who have little political muscle and that citizenship is a personal attribute which is difficult to change.⁸⁷⁵ Once discrimination has been established, the next stage is to inquire whether the discrimination was unfair. This unfairness enquiry stage is concerned with the impact of the impugned measures on the aggrieved party.⁸⁷⁶ If

⁸⁶⁹ PEPUDA s 27(1).

⁸⁷⁰ PEPUDA s 1 paragraph (a):

“‘prohibited grounds’ are—

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

⁸⁷¹ PEPUDA s 1 paragraph (b).

⁸⁷² 1998 (1) SA 745 (CC).

⁸⁷³ *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC). See also *President of the Republic of South Africa and Another v Hugo* 1997(4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

⁸⁷⁴ *Larbi-Odam and others v MEC for Education (North-West Province) and another* Para 19.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ Para 17.

discrimination is held to be unfair, then the third and final stage is to question whether the unfair discrimination is nevertheless justified in terms of the justification clause in section 36 of the Constitution

In light of the Court's interpretation of section 9, it is clear that under the Equality Act, discrimination on an unlisted ground could come within the purview of paragraph (b) of the definition. Paragraph (b) states that prohibited grounds include "any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."⁸⁷⁷ In the present case, discrimination on the unlisted ground of nationality will in some instances fall foul of the Act. The fact that nationality is not a listed ground in the Equality Act does however create a more onerous burden of proof for a complainant than if it were one of the listed grounds.⁸⁷⁸ Considering the scale of xenophobia driven crime in South Africa it is rather unfortunate that there has not been action by the legislature to amend the Act to include "nationality" as an enumerated ground as envisaged by section 34(1) of the same Act.⁸⁷⁹

The Equality Court⁸⁸⁰ has however already accepted that "ethnic or social origin" should be read and interpreted together with the section 1 definition of "nationality" which encompasses:

"Ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature, but does not include rights and obligations normally associated with citizenship."⁸⁸¹

Read this way, the legislature managed to cover its bases and gave the court useful interpretive tools where it had failed to enumerate the ground.

5.7.1 Cases under the Promotion of Equality and Prevention of Unfair Discrimination Act

⁸⁷⁷ PEPUDA s 1(xxii) (b).

⁸⁷⁸ PEPUDA s 13.

⁸⁷⁹ Pityana (2002) *Codicillus*5. Section 34(1) provides that special consideration should be given to the inclusion of the following grounds: HIV/AIDS status, socio-economic status, nationality, family responsibility and family status. However, this has not been done yet.

⁸⁸⁰ *Osman v Minister of Safety & Security* 2011 JOL 27143 (WCC).

⁸⁸¹ PEPUDA s 1(xvii).

The centrality of equality to South Africa's constitutional value system and its enforceability was emphasised by the Constitutional Court in *Minister of Finance and Another v Van Heerden*,⁸⁸² which said that the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights, but also a core and fundamental value.⁸⁸³ It is a standard that must inform all law and against which all law must be tested for constitutional conformity.⁸⁸⁴ This must be seen to go hand in hand with section 34 of the Constitution.⁸⁸⁵ In order to achieve this, the legislature designated all Magistrate's Courts and High Courts as Equality Courts for their areas of jurisdiction.⁸⁸⁶ These courts therefore provide a forum for ordinary people to have access to justice as well as effective and enforceable remedies.⁸⁸⁷ They are specialist courts established within the existing court structures with specific powers and jurisdiction to hear complaints arising out of the Equality Act.⁸⁸⁸ Section 21(2) lays out a wide range of remedies that the court may order including, *inter alia*, declaratory orders; orders for payment of damages; restraining orders against future discriminatory behaviour and orders for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question.⁸⁸⁹

Two cases were brought before the Equality Courts on the grounds of unfair discrimination due to xenophobic attitudes on the part of the police services. These cases were *Said and others v the Minister of Safety and Security*⁸⁹⁰ and *Osman v Minister of Safety & Security*.⁸⁹¹ In the *Said* matter,⁸⁹² the complainants argued that they belonged to a vulnerable category of persons in South African society and as such warranted a higher degree of care. The failure

⁸⁸² *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC).

⁸⁸³ Justin de Jager "Litigating the Rights of Refugees in the Equality Courts" (2011) (3) *University of Cape Town: Refugee Rights Unit Working Paper Series* 4, quoting *Minister of Finance and Another v Van Heerden* Para 22.

⁸⁸⁴ *Ibid.*

⁸⁸⁵ See Chapter 3.4.4 (above).

⁸⁸⁶ PEPUDA s 16(1).

⁸⁸⁷ de Jager (2011) *Refugee Rights Unit Working Paper Series* 5.

⁸⁸⁸ *Ibid* 6.

⁸⁸⁹ PEPUDA s 21(2).

⁸⁹⁰ *Said and others v the Minister of Safety and Security* (EC13/08) [unreported].

⁸⁹¹ *Osman v Minister of Safety & Security*.

⁸⁹² *Said and others v The Minister of Safety and Security and others* (EC13/08) [unreported]. The case arose out of uprisings by residents of the informal settlement of Zwelethemba, near Worcester in the Western Cape which took place on 7 and 8 March 2008. The shops and livelihood of refugees from Somalia, Ethiopia and the Democratic Republic of Congo were looted, and in most cases completely gutted. The looters chanted xenophobic slogans as they marched and ran through the streets looting. Police from within the informal settlement and surrounding towns were present throughout the incidents. The argument of the complainants was that the police had actively refused to provide them with assistance, and thereby discriminated against them whilst providing this service to the South African owned shops. They claimed that police had stood by while they were being attacked and their shops looted, and had even laughed and encouraged the looting of immigrants' businesses while protecting local enterprises.

by the State to meet this standard amounted to “adverse effect” discrimination, which occurred irrespective of the intention of the police. The police argued that they were not given orders to guard either foreign or South African owned shops. Their decision was motivated primarily by lack of resources and the primary goal of saving lives, and not by discriminatory intent.⁸⁹³ Although the court noted that discrimination on the basis of ethnic and social origins were within the scope of the right to equality, such discrimination had not been established in this case. The complainants sought to take full advantage of the wide ranging remedies in section 21(2) of the Act by seeking orders for: damages; an unconditional apology and public admission of acts of unfair discrimination; and a structural interdict requiring the police to establish a training program aimed at instructing police officers throughout the Western Cape on providing services to refugees in a sensitive manner. The court dismissed the application but not before exercising its power under section 21(4) of the Act to order the South African Human Rights Commission (SAHRC) to draw up a report and make recommendations on the provision of training and sensitisation to relevant stakeholders, including the monitoring and assessment of observance of these same recommendations.⁸⁹⁴ This exercise of judicial authority by the court could be seen as an effective way to address the systemic institutional xenophobia within the police services.

In the *Osman* case,⁸⁹⁵ the complainant was required to show in terms of section 13 of the Act that he had been *prima facie* subjected to treatment from the police which discriminated against him on the grounds of ethnicity or social origin.⁸⁹⁶ Essentially this meant that “the treatment that he received had been based on xenophobic considerations; that is

⁸⁹³ Para 45.

⁸⁹⁴ de Jager (2011) *Refugee* 107 111: “The report, which was prepared by the Human Rights Commission in terms of the interim order of the court, recommended that the police make adequate resources available to the Zwelethemba police station, provide personnel with sensitivity training and the implementation of effective monitoring of human rights violations and xenophobic incidents.”

⁸⁹⁵ *Osman v Minister of Safety & Security*. This case arose out of the May 2008 xenophobic attacks, resulting in the looting of the Complainant’s shop in the informal settlement of Dunoon, near Milnerton in the Western Cape. The complainant testified that he drove to the shop to find three police vans standing nearby, whilst the looters were still carrying goods out of his shop. He testified that he approached one of the police officers for assistance in removing the remaining goods from his shop. The police officer responded that they would only assist him if his employees were still in the shop, but they would not assist simply to remove goods. The complainant’s story had some discrepancies about exactly where he had been at what time and when the looting occurred. The Police testified that a good relationship had existed between the police and the foreign community in the area and that it had never received any complaints from foreigners in the area about police officers acting in a discriminatory nature. On the day in question, the main instruction given to the police was to remove all foreigners out of any harm and to ensure that they were taken to a place of safety. The principal priority was to save lives. Later that evening, when large SAPS and other trucks arrived on the scene, they did try to save some of the goods from the various foreign owned shops, which was a slow and onerous task owing to the number of items needing to be removed.

⁸⁹⁶ *Ibid.*

discrimination because he was a Somali national and was not a South African."⁸⁹⁷ Once such a case was *prima facie* established, the respondent then had to show that no discrimination, as alleged, had taken place.⁸⁹⁸ Davis J pointed out that at this stage, the court must then evaluate the weight of the *prima facie* case against that of the evidence produced by the respondent in order to arrive at a conclusion as to whether there has been discrimination or not.⁸⁹⁹ The court, having had recourse to all the facts at hand, then weighed the evidence and found that the failure by the police to protect the complainant was due to their being overwhelmed in their efforts to protect human life before property. Davis J noted that at best the loss suffered by the complainant may have been due to the negligence of police officers who were in the vicinity of the complainant's shop, but that it did not result from discrimination.⁹⁰⁰

These cases illustrate the problems that the victims of xenophobia face when approaching the Equality Courts. There is a twofold problem, the first being the actual xenophobic violence, looting and displacement and secondly the failure of the State apparatus to keep them safe or prevent future attacks. From a procedural angle, the State came prepared with the services of both senior and junior counsel and although the complainants had the pro bono services of the University of Cape Town (UCT) Refugee Law Clinic, this will not always be the case for future indigent litigants. The complexities of the legal issues under consideration were such that legal representation was a necessity and coming unprepared for that would be a losing formula.⁹⁰¹ Also in both cases the ad hoc nature of the administration of the Equality Court with an under-resourced clerk's office made litigation difficult, resulting in numerous delays and untold inconvenience to litigants.⁹⁰² The problems in the Western Cape courts are apparently not limited to that division but spread out through the country.⁹⁰³

With regard to substantive matters, the remedies contained in section 21(2) give wide powers to the court to address both individual and systemic forms of inequality. If it can be proved that the failure of the police to exercise the duty of care (that was established in *Carmichele*) is due to systemic discrimination, then the court can impose a structural interdict remedy to correct the defect within the police. The *Osman* case exemplifies the stringent onus placed on

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid.

⁸⁹⁹ Ibid.

⁹⁰⁰ Ibid.

⁹⁰¹ de Jager (2011) *Refugee Rights Unit Working Paper Series* 14.

⁹⁰² Ibid.

⁹⁰³ Pierre de Vos "Why are Equality Courts Closing Down?" *Constitutionally Speaking* (09 July 2008) available online at <<http://constitutionallyspeaking.co.za/why-are-equality-courts-closing-down/>> (accessed on 15/04/2013).

claimants to prove a *prima facie* case of discrimination in equality claims because until this point has been reached, the presumption is that there has not been a rights violation.⁹⁰⁴ From the *Osman* case, it would seem that even though the complainant managed to establish a *prima facie* case, the overall actions of the police in bringing law and order to the area rendered his evidence unconvincing to the court. To further compound the problem, discrimination itself is notoriously difficult to prove, particularly in situations where there is “no express discrimination but rather a more insidious attitude” on the part of the perpetrators.⁹⁰⁵ From the cases discussed above, it is not clear how the systemic indifference of police to xenophobic crimes can be addressed by the courts. At best there can only be a case by case examination and remedies.

In conclusion, this Act is a far cry from the envisaged protections that should be afforded to people who face discrimination, including but not limited to foreign nationals. This does fall short of the criminal sanctions anticipated by ICERD for racial discrimination.⁹⁰⁶ In its current form, the Act does not criminalise unfair discrimination *per se*, save that section 10 provides that offences relating to “hate speech” can be referred for prosecution by having recourse to the common law.⁹⁰⁷ It is perhaps understandable in the South African climate that criminalizing discriminatory behaviour would not achieve the lofty goals of reconciliation in a democratic society, united in its diversity, which this Act seeks to promote, but the Act’s lack of “teeth” is worrying nonetheless.

5.8. Hate crimes laws

The inadequacy of the Immigration Act and the Promotion of Equality and Prevention of Unfair Discrimination Act to address xenophobia inspired crimes is a matter of concern. Even more worrying is the endemic, systemic and institutionalised xenophobia within the State and its apparatus starting from the political leadership going down to the street level functionaries. The political leadership’s xenophobic views regarding non-citizens are well documented and set the general tone for public discourse.⁹⁰⁸ What is needed is a tool with which those whose rights have been violated due to these xenophobic sentiments can seek and find redress or justice. The high crime rate in South Africa compels policy makers and

⁹⁰⁴ de Jager (2011) *Refugee* 111.

⁹⁰⁵ de Jager (2011) *Refugee Rights Unit Working Paper Series 27*.

⁹⁰⁶ Pityana (2002) *Codicillus* 8.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ See chapter 5.2 and 5.3 (above).

the police to attribute race-related killings; so-called “corrective rape” of black lesbians; incidents of xenophobic violence; and occasional reports of religious intolerance to common criminal behaviour.⁹⁰⁹ Crimes motivated by prejudice (hate crimes) are not recognised as a separate category of crime in the legislation currently on the books.

Hate crimes laws could be an important vehicle for the vindication of the violated rights of non-citizens and other vulnerable groups. Although the scope of this thesis does not allow for a full scale discussion of the topic, a few observations will be made about the need to introduce such legislation. This will be done with reference to the law of some foreign jurisdictions, especially the United States of America.

In its jurisprudence, the European Court of Human Rights (ECHR) established the duty of States to investigate whether a criminal offense was motivated by racist *animus*.⁹¹⁰ The seminal case in this regard was the *Nachova and Others v. Bulgaria* judgment. In that matter, the ECHR held:

“When investigating violent incidents ... State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have helped play a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that do not have racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁹¹¹

Building on this, the European Union in its Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law,⁹¹² mandated member States to ensure that racism and xenophobia are punishable by “effective, proportionate and dissuasive criminal penalties.”⁹¹³ This framework decision establishes an obligation to ensure that “racist and xenophobic motivation” is established under national law

⁹⁰⁹ Ibid.

⁹¹⁰ Human Rights Watch (HRW) Report *Hate on the Streets: Xenophobic Violence in Greece*(2012) 71.

⁹¹¹ Ibid. See European Court of Human Rights [Grand Chamber] *Nachova and Others v Bulgaria*, judgment of July 6, 2005 Paras 156-159.

⁹¹² EU Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law 2008/913/JHA.

⁹¹³ Ibid Art 3(1). See also Human Rights Watch (HRW) Report *Hate on the Streets Xenophobic Violence in Greece*(2012) available online at <http://www.hrw.org/sites/default/files/reports/greece0712ForUpload_0.pdf> (accessed on 12/12/2012).

as an aggravating circumstance in the commission of crimes or subject to penalty enhancement.⁹¹⁴

In the Americas, the Inter-American Court for Human Rights (Inter-American Court) in the *Velasquez v Honduras* case⁹¹⁵ emphasized a duty on the State to investigate thoroughly every situation involving a violation of the rights protected by the American Convention on Human Rights. The court there held that:

“If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”⁹¹⁶

Similar cases in Europe have reiterated the State’s positive obligation to investigate possible racist motivations in violent attacks on people.⁹¹⁷ In a sense these cases move beyond the development of the principles of delictual liability of the State that were developed in *Carmichele* and similar cases.⁹¹⁸ It buttresses the idea that the State must exercise due diligence when investigating, prosecuting and punishing perpetrators of hate crimes.

The USA has arguably the most developed and documented system of laws dealing with bias crimes. The country has a slew of hate crimes laws at both the federal and State level. Hate crimes laws in the USA are a work in progress, being the culmination of various rights movements in the history of America. These are the civil rights movement, the women’s movement, the gay and lesbian movements, and the crime victims’ movement.⁹¹⁹ In 1981, the Anti-Defamation League (ADL) drew up draft model legislation on hate crimes which proposed that five areas should be covered in any hate crimes law.⁹²⁰ These areas were: vandalism directed at religious institutions; intimidation; a civil action for both types of crime; data collection; and police training. Since then States and the federal government have

⁹¹⁴ Ibid Art 4(1).

⁹¹⁵ *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

⁹¹⁶ Para 176.

⁹¹⁷ Human Rights Watch (HRW) Report *Hate on the Streets: Xenophobic Violence in Greece*(2012) 71.

⁹¹⁸ Centre for Human Rights *The Nature of South Africa’s Legal Obligations to Combat Xenophobia*(2009).

⁹¹⁹ William J Krouse (Congressional Research Service) *Hate Crime Legislation*(2010) available online at <http://digitalcommons.ilr.cornell.edu/key_workplace/796> accessed on (24/05/2013) 7.

⁹²⁰ Ibid.

enacted hate crime laws based on the ADL model.⁹²¹ At least forty-five of the fifty States plus the District of Columbia have enacted hate crime penalty-enhancement laws.⁹²²

These laws have given definition to bias related or motivated crimes. A hate crime is defined as “any crime against either person or property in which the offender intentionally selects the victim because of the victim’s actual or perceived race, colour, religion, national origin, ethnicity, gender, disability, or sexual orientation.”⁹²³ They are “traditional crimes, during which the offender is motivated by one or more biases that are considered to be particularly reprehensible and damaging to society as a whole.”⁹²⁴ Proponents of hate crimes legislation contend that hate crimes are often perpetrated to send a message of threat and intimidation to a wider group. The effects are often far reaching and extend beyond the particular victim to reflect a more pervasive pattern of discrimination on the basis of a perceived or actual difference.⁹²⁵ Hate crime laws effectively impose severe penalties if the State can demonstrate that the victim was targeted on the basis of his or her personal characteristics because of the perpetrator’s bias against the victim.⁹²⁶ These laws have grown in effectiveness over the years with the introduction of new measures and amendments to old legislation.⁹²⁷ The laws target the investigation, prosecution and punishment phases of hate crimes. Admittedly there was strong debate in the various State Capitols as well as the US Congress leading up to the passing of these statutes, but at the end of the day they did manage to ensure protection for persons most likely to be discriminated against.

⁹²¹ Ibid 8.

⁹²² Anti-Defamation League *Hate Crime Laws — the ADL Approach*(2012) available online at <<http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law-The-ADL-Approach.pdf>> (accessed on 24/05/2013).

⁹²³ Krouse (Congressional Research Service) *Hate crime legislation*(2010) 1.

⁹²⁴ Ibid.

⁹²⁵ Ibid 5.

⁹²⁶ Ibid.

⁹²⁷ Troy A Scotting "Hate Crimes and the Need for Stronger Federal Legislation" (2001) *Akron law Review*853. At a federal level, the Federal Hate Crimes Sentencing Act 18 USC § 249 was passed in 1993 as part of the Violent Crime Control and Enforcement Act of 1994 (Codified as part of 28 USC § 994 (1994)). This Act had the effect of amending the US Sentencing Guidelines to provide for harsher sentences where a victim of a federal crime is targeted because of race, colour, religion, national origin, ethnicity, gender, disability or sexual orientation. The Federal Hate Crime Statistics Act 28 USC § 534 (1994) prescribes the collection of data on the incidence of hate or bias crimes from local law enforcement agencies which must be included in the FBI’s Uniform Crime Reporting Programme. This particular Act monitors any fluctuations in the incidence of hate crimes; assesses the effectiveness of current legislation; increases public awareness of hate crimes; and assists law enforcement officials to determine when and where racial tension is reaching critical levels that may require intervention. Act 18 USC § 245 is an act that applies to crimes motivated by bias, or hate based on race, colour, religion, and or national origin. This Act was amended by the Matthew Shepard and James Byrd, Jr. Prevention Act 18 U.S.C. § 249 (2009) to extend the grounds covered to include sexual orientation, gender, gender identity or disability. The Matthew Shepard Act also extended the powers of federal agencies to investigate some of these crimes in States with inadequate legislation.

The South African Constitution in section 39 mandates the courts and other similar forums to consider international law when interpreting the rights in the Bill of Rights.⁹²⁸ The same section also advises courts that where applicable they may look at foreign law in interpreting the Bill of Rights. South African courts would be best placed to follow the example set by the European Court of Human Rights, Inter-American Court and US courts amongst others when dealing with violence against non-nationals. South African courts have in the past treated “racist motive” as an aggravating factor in the sentencing phase.⁹²⁹ In *S v Salzwedel and others*, the court pointed out that committing an offence under the influence of racism subverts the fundamental premises of a human rights culture which should permeate throughout the judicial processes of interpretation and sentencing.⁹³⁰ The SCA felt compelled as the highest court of the country on non-constitutional matters, to project the message “clearly and vigorously” that:

“the courts will not tolerate the commission of serious crimes in this country perpetrated in consequence of racist and intolerant values inconsistent with the ethos to which our Constitution commits our nation and that courts will deal severely with offenders guilty of such conduct.”⁹³¹

Judges should therefore be trained or sensitised to the need to take such motives into account from the outset, but especially as an aggravating factor. In order to ensure the successful prosecution of hate crimes, the investigation and prosecution stages of the judicial process must be improved so as not to extend the trauma of the victim and the community from which the victim hails.⁹³² However the courts are not the legislature and only Parliament can pass effective measures to protect the rights of non-citizens and other vulnerable groups. Hate crimes need to become a recognised category of crime in the country. This way they can be recorded at a law enforcement level just as has been done in the USA under the Federal Hate Crime Statistics Act.⁹³³ A register of these crimes will assist in monitoring any fluctuations in

⁹²⁸ Constitution of South Africa s 39(1).

⁹²⁹ *S v Salzwedel and others* 2000 (1) SA 786 (SCA); *S v De Kock* 1997 (2) SACR 171(T); and *S v Matela* 1994 (1) SACR 236 (A). See also Namibian case *S v van Wyk* 1992 (1) SACR 147 (NmS) at 173 f, which influenced the South African courts on the view that a “racial motive which influenced the appellant to commit a serious crime must ... be considered as an aggravating factor.”

⁹³⁰ *S v Salzwedel* Para 13.

⁹³¹ Para 18.

⁹³² Consortium for Refugees and Migrants in South Africa (CoRMSA) *Hate Crimes in South Africa: A background Paper for the Hate Crimes Working Group* (2009) available online at <<http://www.cormsa.org.za>> (accessed on 24/05/2013).

⁹³³ Federal Hate Crime Statistics Act 28 USC § 534 (1994).

the incidence of hate crimes; assessing the effectiveness of current legislation; increasing public awareness of hate crimes; and assisting law enforcement officials to determine when and where hate and bias are reaching critical levels that may require intervention.⁹³⁴ Where a case is suspected of having been motivated by prejudice its investigation must be prioritized because such cases have a high likelihood of tearing at the very fabric of social cohesion and often lead to civil unrest.⁹³⁵

Although the process is already underway to draw up hate crimes legislation in South Africa,⁹³⁶ at present these crimes are not recognised in South Africa. The Department of Justice is in the process of finalizing a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance as well as a Policy Framework on Hate Crimes that will lay the basis for legislation criminalizing hate speech and related crimes.⁹³⁷

In conclusion, hate crimes legislation will by no means be the panacea to all of South Africa's prejudice driven crimes and this legislation should operate in tandem with other laws such as the Immigration Act and the Promotion of Equality and Prevention of Unfair Discrimination Act. These other Acts have a role to play in addressing prejudicial attitudes amongst the general public and within the State apparatus. The Constitution envisages and aims to create a society based on "democratic values, social justice and fundamental human rights" and it is under this constitutional umbrella that all the protections, aspirations and rights contained in these Acts should operate.

5.9. Chapter conclusion and proposals

The aim of this chapter was to discuss the effect of xenophobia on the realisation of the rights of non-nationals. It has been established that the Constitution, domestic legislation and international law contain numerous rights and protections for non-citizens. However,

⁹³⁴ Scotting (2001) *Akron Law Review*.

⁹³⁵ CoRMSA *Hate Crimes in South Africa: A Background Paper for the Hate Crimes Working Group (2009)*.

⁹³⁶ UN Human Rights Council *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante - Mission to South Africa* (2011) A/HRC/17/33/Add.4.

⁹³⁷ SANGONeT "DoJ & CD Requests the SAHRC to Investigate Reports of Unfair Discrimination by the Create Training Centre in Bloemfontein" *SANGONeT* (22 January 2013) <<http://www.ngopulse.org/press-release/doj-cd-requests-sahrc-investigate-reports-of-unfair-discrimination-by-the-create-training-centre-in-bloemfontein>> (accessed on 24/05/2013). At the National Conference on Racism (held at Sandton, Gauteng Province on 30 August – 2 September 2000) the SAHRC was mandated to develop and adopt a comprehensive national action plan and strategy to combat racism.

xenophobia itself is an impediment to the effective enforcement of rights because research shows that the police have xenophobic attitudes towards non-citizens. It has also been shown that xenophobia is a driver of violent attacks, displacement and hate speech against non-citizens.

The responses to the May 2008 attacks against non-nationals and subsequent incidents were hampered by negative attitudes within the political leadership, poorly resourced police, overwhelmed prosecution services and understaffed courts as well as serious intimidation of witnesses by the perpetrators or their friends. The positive aspects of the response were mostly felt in the Western Cape where dedicated courts were set up to handle xenophobia related cases. Further on, the responses by the police and other government officials to subsequent xenophobic incidents have been *ad hoc* rather than systemic.

The development of international human rights law has endowed individuals with rights that must be respected irrespective of national origin. South Africa has domesticated most international human rights by placing them in the Bill of Rights. The rights which are not associated with citizenship should apply to everyone and the State should enforce them without discrimination. Obstacles should not be placed in the way of non-citizens in their quest to realise these rights. The State has an obligation to ensure that non-citizens are treated equally and that xenophobia and its manifestations are eradicated.

The Immigration Act is one of the tools at the State's disposal to fight xenophobia, although it does not provide specific protection to non-citizens who may fall prey to xenophobia. However, its application has been documented as encouraging vigilantism with regards to enforcement of the immigration laws. Public and private actors and institutions are roped in to enforce immigration laws or face being charged with an offence if they inadvertently aid and abet an undocumented migrant. In spite of this, the Department of Home Affairs has made some positive strides by creating an internal anti-xenophobia unit to counter this scourge. This could be seen as being in response to the wording in the Act's Preamble that calls for the countering of xenophobia.

This research has shown that although the Promotion of Equality and Prevention of Unfair Discrimination Act⁹³⁸ can and has been used to obtain justice for victims of xenophobia, it is still not the most effective tool to address criminality. The Equality Courts have no power

⁹³⁸ [Act 4 of 2000].

over criminal acts arising from manifestations of xenophobia; their powers are limited to civil remedies. The remedies in section 21 of the Act allow for complainants to seek relief from the court which has the effect of changing the culture or operations of an institution or organisation that is being accused of discriminatory behaviour. Such interdicts have in the past been ordered against the police.⁹³⁹

The lack of political power of non-citizens is a serious factor in how they are treated by the State and by the general public. As a non-voting bloc their impact within the political sphere is minimal, and even court orders in their favour are ignored.⁹⁴⁰ This research has shown that there is need for more participation by non-citizens within the communities that they live. The engagement that was envisaged in the *Mamba*⁹⁴¹ case between non-citizens and the State is an illustration of how this could work within a constitutional framework.

Finally, this research has shown that there is a need for laws to govern hate crimes in South Africa. It is incumbent on government not to treat xenophobic crimes as ordinary crimes. Hate crimes laws will go a long way towards legislating the Supreme Court's ruling that held that bias should be treated as an aggravating factor in the sentencing phase of a trial.⁹⁴² At all times throughout the investigation and prosecution stages of the crime the State must be mindful of the aggravating factor of bias.

⁹³⁹ See Chapter 5.7.1 (above) with regard to the *Said and others v The Minister of Safety and Security and others* case.

⁹⁴⁰ See generally Roni Amit "Winning Isn't Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation" (2011) 27 *SAJHR* 8.

⁹⁴¹ *Mamba v. Minister of Social Development* 2008 Case No. CCT 65/08 (CC).

⁹⁴² See Chapter 5.8 (above) with regards to *S v Salzwedel*.

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This thesis examines the assumption that access to justice by non-citizens is hampered by the State's inadequate response to its constitutional obligations to protect and guarantee the constitutional rights of everyone within the borders of South Africa. In the preceding chapters, it was shown that legislation that was promulgated to give effect to the human rights in the Constitution and provide access to justice to non-citizens was not wholly implemented by State officials. One example that was discussed in chapter four⁹⁴³ was that although the Immigration Act⁹⁴⁴ specifically provides that a court order be sought confirming deportations, more often than not, only the DHA officials appeared before the magistrate. The whole process is treated as a formality instead of an assertion of rights by the foreign national.

The thesis also examines the assumption that the current legislation in South Africa does not adequately regulate arbitrary arrests and prolonged detention of non-citizens; irregular and disguised deportations; and xenophobic violence. For instance, the immigration laws make it possible for non-citizens to be arrested and kept in detention pending deportation, even in circumstances where they could be legally within the country.⁹⁴⁵ On the subject of xenophobia, the victims of violent attacks have had to resort to using the the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).⁹⁴⁶ In chapter five, the limitations of this Act were discussed in so far as victims did not receive any justice for wrongs committed against them.⁹⁴⁷

It is within these processes that non-citizens generally interact with the South African authorities and citizenry. In this thesis it was therefore important to critically examine these

⁹⁴³ See chapter 4.3.2 (above).

⁹⁴⁴ Immigration Act [No.13 of 2002] s 34(1)(b).

⁹⁴⁵ See chapter 4.2 (above).

⁹⁴⁶ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) [No. 4 of 2000].

⁹⁴⁷ See chapter 5.7 (above).

scenarios in order to establish whether due process and protection of rights are being upheld for the benefit of non-citizens.

In chapter two of the thesis, the different categories of non-citizens and the various rights that accrue to each were examined. It was pointed out that certain basic constitutional rights are guaranteed to all non-citizens upon entry into South African territory. This is the case irrespective of whether they are asylum seekers, refugees, documented or undocumented migrants or permanent residents. These rights include the right to life, human dignity and freedom and security of the person and they are equally guaranteed to all people within the country regardless of their nationality or legal status in the country. The Constitution does, however, expressly reserve some rights for citizens such as citizenship rights, political rights and freedom of trade, occupation and profession.

Generally the rights in the Constitution are derived from international human rights laws and treaties, to most of which South Africa is a State Party. The interpretation of these rights in international law serves as an interpretive guide to South African jurists, as mandated by sections 39 and 233 of the Constitution. Two important Acts of Parliament, namely the Refugees Act⁹⁴⁸ and the Immigration Act,⁹⁴⁹ contain several rights and protections for non-citizens regarding issues such as admittance to, detention and removal from the Republic as well as ensuring that xenophobia is prevented and countered. Already in chapter 2 of this thesis, cracks were established within this wall of rights and protections guaranteed to non-citizens. Processes that are provided for in the Constitution and the legislation were shown to be constant grounds for legal challenges in the courts.

Having briefly outlined the rights and protections to which non-citizens are entitled under international and domestic law, this thesis then examined the causes (in broad terms) for the non-citizens' failure to access these rights in particular and justice in general. Access to justice is a complex concept which was discussed in chapter 3 with reference to the rights of non-citizens and their failure to access these rights or the protective procedures contained in the legislation. Access to justice is crucial to the protection of the human rights of non-citizens, and can be defined to refer to the sum total of the processes that one uses to arrive at effective remedies for infringements of rights as well as the remedies themselves.⁹⁵⁰ It thus entails different stages, from the moment that an infringement causing a dispute occurs to the

⁹⁴⁸ [No. 130 of 1998].

⁹⁴⁹ [No. 13 of 2002].

⁹⁵⁰ See chapter 3.2 (above).

moment when redress is provided. In order for non-citizens to benefit from the post-apartheid constitutional order it is necessary that their rights are clearly defined and that they have access to these rights and the remedies and protections that they offer.

The new constitutional dispensation has seen the promulgation of new laws which seek to ensure that non-citizens' rights are protected, and their access to justice and justice institutions are guaranteed. Procedural fairness and judicial oversight are established to avoid arbitrariness and a breakdown in the rule of law.

In chapter three the right to freedom and security of the person, the rights of arrested, detained and accused persons, the right to just administrative action, the right to access to courts and to receive effective remedies, the rights to freedom from all forms of violence from either public or private sources, the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way were discussed. All these rights are crucial and contain mechanisms and procedures that, if meticulously adhered to, will effectively vindicate them for the benefit of non-citizens.

Access to justice as defined in this thesis is hindered by several obstacles that are directly or indirectly caused by the State and its organs. These obstacles include: the lack of support for non-nationals from the State; the extreme poverty that is experienced by the majority of non-citizens; corruption within the administrative systems governing refugees, asylum seekers and migrants; legal and institutional discrimination against non-citizens; the insensitivity of officialdom to the plight of non-citizens and the lack of knowledge as to how best to be of assistance to them; non-citizens' lack of knowledge of their rights and available remedies; and the inaccessibility of State justice institutions and actors. There are various reasons as to why these obstacles exist and why accessing justice still continues to be elusive to non-citizens.

The most important of the obstacles is the very fact of being a non-citizen, which paints a person as an "other" within the country. This is also coupled with the transitory status of most non-citizens within the country. The temporary nature of their sojourn in the country often makes them soft targets for abuse with the perpetrators often getting off without reproach or reprimand. In the *Lawyers for Human Rights & another v Minister of Home Affairs*⁹⁵¹ case, the court observed that non-citizens "may well have left the country before the constitutional

⁹⁵¹ *Lawyers for Human Rights & another v Minister of Home Affairs* 2004 (4) SA 125 (CC).

challenge could or would materialise even if it is assumed that they would have the resources, knowledge, power or will to institute appropriate proceedings”.⁹⁵² This thesis has shown that non-citizens who choose to remain in South Africa generally avoid any contact with the authorities and citizens in general. When all these factors are taken together, they create a picture that portrays a distinct disconnect between the new post-apartheid laws and their implementation by officials whose mind-set and training still reflect the rigidity and exclusionary logic of the apartheid order.

The discussion in chapter four is based on the assumption that the State, in its efforts to control migration into the country, is almost deliberately taking advantage of the obstacles faced by non-citizens to block their access to justice and their rights. This occurs during the processes of arrest, detention, exclusion from the country and deportation. The Constitution as well as the Immigration and Refugees Acts make provision for the arrest, detention and deportation of non-citizens in specific circumstances. What is clear from the research undertaken in this thesis is that there have been attempts by the State to restrict the application of the constitutional provisions that protect against arbitrary arrest, detention and deportation. Applications by the DHA for orders seeking the extension of detention pending deportation are almost always brought before the magistrate’s court without representation from the detained party. This is a flagrant violation of the constitutional right to access to the courts as well as to receive effective remedies since there is no room for the subject to seek such relief. All this is indicative of the failure by the State to provide adequate processes for accessing justice by non-citizens who find themselves in violation of the immigration laws.

During the course of this research, the detention, deportation and exclusion of asylum seekers at border posts have been shown to be prevalent. Rights and protections for asylum seekers provided for in the Refugees Act are often ignored by enforcement officials, for instance when asylum seekers are denied the opportunity to apply for asylum, or are arrested as undocumented migrants despite manifesting an intention to apply for asylum. However, the courts have been unrelenting in their insistence that the provisions in the Refugees Act and its regulations must be fully complied with and have constantly removed asylum seekers from detention. This research is mostly on matters that have made it to court or have been reported by organisations that make regular visits to detention centres. By extrapolation, the numbers of those who do not receive legal representation to take their matters to court could be higher.

⁹⁵² Para 22.

This research also found that the process of deportation, which is a competent measure to curb illegal migration, was at times used to deny non-citizens the rights and protections contained in the extradition process. The reason for this is that it is relatively simpler to deport persons than to extradite them. This is known as a disguised deportation and the courts have been quick to condemn this abuse of the deportation system. Where this was done, the State was found to have violated the rights of the deported person. Since deportation is only done with respect to non-citizens, they are the ones who are also the subject of disguised deportations. In conclusion, due to their status as non-citizens, which comes encumbered with several obstacles to accessing justice, the rights of non-citizens are often not enforced or are ignored during these processes by State actors.

Finally, this chapter recommends reconsideration of the broad power of the State to arrest non-citizens for immigration purposes without encumbering the legitimate interest of the State to curb illegal migration. This power should be exercised in a manner that respects the rights of non-citizens to move freely within the country without fear of unlawful stops and searches. A further recommendation is that magistrates should be encouraged not to entertain applications in terms of section 34(1) of the Immigration Act that are presented without any meaningful representation from the subject of the detention order. Alternatively, the DHA should refrain from this practice. On the subject of asylum seekers being excluded from entering the country at border posts, the recommendation of this thesis is that there is a need to improve the training of immigration officers or, alternatively, to place Refugee Reception Officers at the border posts.

The discussion in chapter five is based on the assumption that xenophobia is a further barrier to non-citizens' access to justice. Victims of xenophobia encounter all the obstacles discussed earlier in this thesis,⁹⁵³ and their access to justice is further impeded by the State's weak and uncoordinated responses to xenophobic attacks. This is in line with the main hypothesis of this thesis, namely that access to justice by non-citizens is hampered by the State's response to its constitutional obligation to protect and guarantee the constitutional rights of everyone.

The courts have established that the manifestation of xenophobia is a violation of human rights,⁹⁵⁴ as was expressed by Sachs J in his judgment in the *Union of Refugee Women*⁹⁵⁵

⁹⁵³ See chapter 3 generally.

⁹⁵⁴ See chapter 5.2 (above).

⁹⁵⁵ *The Union of Refugee Women and Others v The Director: the Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC).

case. Yet, despite this non-citizens are often denied justice even in circumstances where they are victims of hate crimes.

A further conclusion that emerged from this research is that the Constitution, domestic legislation and international law contain numerous rights and protections for non-citizens. However, xenophobia remains an impediment to the effective enforcement of these rights as it has been shown that the police have xenophobic attitudes towards non-citizens.⁹⁵⁶ It has also been shown that the xenophobic attitudes of immigration officials do not fit with the legislative mandate in the Immigration Act that calls on the department to prevent and counter xenophobia. Xenophobia is the main cause behind the violent attacks on, displacement of and hate speech against non-citizens. Xenophobia feeds off itself, resulting in it being both a cause of and an impediment to accessing justice.

South Africa is a signatory to several international treaties which proscribe discrimination, guarantee the rights of all individuals regardless of citizenship and enjoin State parties to pass laws to ensure that this is the case. Pursuant to the country's obligations under the Constitution⁹⁵⁷ and ICERD,⁹⁵⁸ Parliament passed the Promotion of Equality and Prevention of Unfair Discrimination Act.⁹⁵⁹ This Act illustrates the State's commitment to equality and although it has been used to remedy some of the effects of xenophobic manifestations, it is not the most effective tool to address the criminal activities such as violence and looting that arise in the process. Those who are responsible for inciting the violence and perpetrating the actual violence should be arrested, charged and sentenced for hate crimes as discussed and proposed in chapter 5.⁹⁶⁰ It has been argued that the Equality Act does not make it easy for a complainant to prove institutional discrimination, as was shown in the *Osman* case.⁹⁶¹ Also on the subject of xenophobia, another area of concern highlighted in this research is that the enforcement provisions in the Immigration Act encourage a form of vigilantism that overshadows the positive efforts to fight xenophobia within the department and society in general which are mandated by the same Act.⁹⁶²

⁹⁵⁶ See chapter 5.6 (above).

⁹⁵⁷ Constitution of South Africa ss 9(2) and (4).

⁹⁵⁸ ICERD Art 4.

⁹⁵⁹ (PEPUDA) [No. 4 of 2000].

⁹⁶⁰ See chapter 5.8.

⁹⁶¹ *Osman v Minister of Safety & Security* 2011 JOL 27143 (WCC).

⁹⁶² See chapter 5.6 (above).

Overall, in order to afford non-citizens real access to justice and the right to effective legal remedies in response to xenophobic violence, there is a need for tougher legislation to deal with bias related crimes. The discrimination and bias that motivate the commission of hate crimes must be viewed as an aggravating factor in the sentencing stages of the case. In addition, the State must, throughout the investigation and prosecution stages of the crime, be mindful of the aggravating factor of discrimination and hate.

In order to draw things together, the following observations will paint a clearer picture of some of the conclusions and proposals that emerged from this research.

6.1. Areas which require better implementation of existing laws

The preceding research indicates that there is a need for better implementation of laws in the areas of immigration arrest, detention and deportation of non-citizens. The obstacles that are discussed in chapter three above lead to the lacklustre and haphazard implementation of the laws found in the country's Constitution, Refugees Act and Immigration Act.

South Africa's international and domestic obligations mandate the country to grant entry to anyone who presents at its borders seeking asylum and to facilitate such person's application for refugee status.⁹⁶³ It has been shown that this is not always the case and that many asylum seekers are either denied entry into the country or arrested within the borders as undocumented migrants.

Research has further shown that there are high numbers of detained non-citizens in immigration detentions centre who have not had the benefit of legal representation and at the same time do not understand South Africa's legal and judicial processes. This means they cannot engage effectively with judicial processes to vindicate their rights.⁹⁶⁴ In practice, immigration officers normally appear before the magistrates without the detained individual being present. This is an area where the basic right to access the courts is not being facilitated by authorities, in flagrant disregard of the Constitution and the relevant legislation

Tied to this is the prolonged detention of non-citizens purportedly for deportation purposes, in contravention of legislation which expressly provides for a one hundred and twenty (120)

⁹⁶³ See chapters 4.2 and 4.4 (above).

⁹⁶⁴ See chapter 4.3.3 (above).

days limitation on such detentions.⁹⁶⁵ This is evidence of either ignorance of the law by officials or a total disregard of it. This is another area of existing law that is in need of better implementation and stricter compliance on the part of the State.

6.2. Areas in which legislative reform is required

The problems associated with the processes of arrest, detention and deportation under the Immigration Act are myriad and were discussed in chapter four of this thesis. One of the important omissions in the Immigration Act is the lack of a permanent Inspectorate that would visit immigration detainees both at immigration detention centres and in police holding cells.⁹⁶⁶ The functions of such a body would be to ensure that there is adherence to the Constitution, Immigration Act and judicial orders in the carrying out of arrests, detention and deportation under the Act. This Inspectorate was originally suggested by the SAHRC in its 1999 report into the arrest and detention of suspected undocumented migrants.⁹⁶⁷

There is a need for the legislature to amend section 41 of the Immigration Act⁹⁶⁸ to expressly prohibit random identity checks which could lead to racial profiling of non-citizens. Such reforms would be in keeping with South Africa's commitments to a non-racial society free of discriminatory practices. As was discussed in chapter four, there must be a reason to stop a person other than his or her physical attributes since that would be a step back into the apartheid era.⁹⁶⁹ Legislation should be amended to ensure that police and immigration officials do not abuse the Immigration Act to target foreign looking people for arbitrary stopping and arrest as they go about their daily activities.

This thesis has discussed in some detail the practice of community enforcement of immigration laws whereby in addition to the police and immigration officials; private businesses, learning institutions and private individuals are called upon to verify the legal status of non-citizens as and when they seek services from them.⁹⁷⁰ Section 42(2) of the Immigration Act places an undue burden on citizens, businesses and other institutions to

⁹⁶⁵ Ibid.

⁹⁶⁶ See chapter 4.3.3 (above).

⁹⁶⁷ South African Human Rights Commission Report into the Arrest and Detention of Suspected Undocumented Migrants (1999) available online at <http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf> (accessed on 28/05/2012).

⁹⁶⁸ [No. 13 of 2002].

⁹⁶⁹ See chapter 4.2 (above).

⁹⁷⁰ See chapters 2.4 and 3.3.4 (above).

prove the legal status of suspected non-citizens at all times by taking away the defence of not knowing whether someone is an illegal foreigner. In light of the xenophobic sentiments which exist within the South African community, it would be advisable for the legislature to review sections 39, 40, 42, 44 and 45 of the Immigration Act to limit the role of non-law or immigration enforcement personnel in enforcing immigration laws.

On the subject of immigration detention, critics and human rights advocates such as the International Detention Coalition (IDC) have proposed the Community Assessment and Placement (CAP) model,⁹⁷¹ as an alternative to detaining undocumented migrants. This is an area where the State can reform existing laws by using less drastic means of effecting deportation. This model which is discussed briefly in chapter four effectively does away with the need to detain undocumented migrants prior to them being deported if there are other means to secure their attendance.⁹⁷²

6.3. Areas in need of reform that lie largely outside the scope of the thesis

This thesis highlights the need for South Africa to re-evaluate its constitutional relationship with non-citizens. However this needs to take place in a much more accepting and open political arena. Although this thesis is not primarily concerned with this, South Africa needs to grant non-citizens an increased role in the political sphere, starting at the local level. This is highlighted in chapter five where the exclusion of non-citizens from participation within the political discourse was shown to be undesirable.⁹⁷³ The facts of the *Osman v Minister of Safety & Security*⁹⁷⁴ case illustrate what happens when community meetings held to discuss integration issues degenerate into violent protests due to the exclusion of non-citizens at such meetings.⁹⁷⁵ Even court mandated consultations between the State and non-citizens have proved difficult.⁹⁷⁶ The increased participation of non-citizens residing in municipalities and other localities has been encouraged by several authors who view the political integration of migrants as essential to democratic accountability.⁹⁷⁷ Increased participation by non-citizens

⁹⁷¹ Wessel Le Roux and Servious Hungwe "In Search of Alternatives to Pre-Emptive Immigration Detention (or not): A Review of Recent South African Case Law" (2011) XLIV *CILSA* 139-167 144. See also International Detention Coalition *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011) available online at <http://massivefishball.com/IDC_Handbook.pdf> (accessed on 15/07/2011).

⁹⁷² See chapter 4.4.1 (above).

⁹⁷³ See chapter 5.2 (above).

⁹⁷⁴ See the facts in the case of *Osman v Minister of Safety & Security*[2011] JOL 27143 (WCC).

⁹⁷⁵ *Ibid.*

⁹⁷⁶ *Mamba v. Minister of Soc. Dev.* 2008, Case No. CCT 65/08 (CC).

⁹⁷⁷ See Chapter 5.2 (above).

in decision making processes is likely to promote their integration into the communities in which they live and to help facilitate their access to other, non-political rights.

Finally, the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)⁹⁷⁸ by South Africa would demonstrate the country's commitment to upholding migrant rights.

⁹⁷⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) adopted by General Assembly resolution 45/158 of 18 December 1990 and entered into force 1 July 2003.

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