**Xenophobia – The roots, institutionalization and effects on the South African Asylum system and Refugees**

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***Abstract***

*After the 2008 xenophobic attacks in South Africa, the subject of xenophobia, its roots, its consequences and its implications for various categories of immigrants became a widely research subject among South African scholars and not only.*

*By reviewing the existent literature and reports, and by analyzing the contents and modification of the existent laws this paper aims to identify what form xenophobia takes in South Africa and to what level xenophobia has been institutionalized, as well as the ways in which integration is hampered by high levels of hatred and discrimination directed towards immigrants.*

*This paper argues that, despite South Africa’s government position that xenophobia is not present among citizens, such feelings have penetrated all levels of society and have resulted in collective violence and institutionalized practices of discrimination. The course of South African legislation regarding immigration and asylum had created, since 1994, a more and more insecure climate for refugees and failed to address the inconsistencies between its international and constitutional commitments to respect the rights of all persons and the de facto practice. From the early political statements that used immigrants as “scapegoats” for government’s failures and to more recent legislative proposals that come in contravention with South Africa’s international obligations, it seems that xenophobia not only has become, but has been institutionalized since the early days of South Africa’s democracy.*

*Also, the institutionalization of xenophobia and the government’s resistance to changing the restrictive legal provisions regarding immigrants, as well as the lack of enforcement of the so many inclusive legal provisions that South Africa has led to the intensification of the general opinion among South Africa’s citizens that migrants need to stop coming to South Africa, thus exacerbating xenophobic sentiments.*

*The xenophobic practices in South Africa are affecting one of the most vulnerable categories of migrants, namely refugees and asylum-seekers and hinder their potential to gain a meaningful livelihood and be actively involved of the South African society as part of their integration process. Thus, concluding that the Government of South Africa is neither ready, nor willing to protect those in need.*

**Keywords:** *xenophobia, institutionalized xenophobia, asylum law, refugees, migrants, collective violence.*

# Introduction

The continent of Africa with emphasis on South Soudan, the Horn of Africa and more recently Central African Republic, but also the newly re-escalated conflict in eastern regions of the Democratic Republic of Congo, continues to be one of the highest refugee productive regions in the world. However, the wealthy African countries that enjoy democratic systems and peace are not regarded as the highest refugee receiving countries in the world. South Africa, as the most developed nation in the sub-Saharan Africa receives a number of refugees quantifying to 4% of its population (as of 2015 the total number of persons of concern to UNHCR in South Africa was 981.000), a number rather low in the context of Middle Eastern Conflicts (Syria, Iraq and Afghanistan) which led to countries in the region such as Jordan and Lebanon offering protection to a high number of refugees. In the case of Jordan, the refugee population has reached roughly 50% of the population of Jordan (UNHCR Country Operation Plan). In 2009 South Africa was regarded as the highest receiving country in terms of refugee population, the numbers remaining high until 2012.

Xenophobia is defined as the hatred of foreigners based on fear. Fear, in this context, is sometimes self generated and sometimes it is generated by restrictive immigration policies, political discourse, or the demonization and dehumanization of the immigrants by the local media. Xenophobia is different from racism that represents the belief that one race[[1]](#footnote-1) is superior to another. However, sometimes xenophobia can be very closely entwined with racism, through the exhibition of fear particularly of those groups that present consistent physical differences from the local population, or discrimination and abuse can be directed towards persons that present particular physical differences.

Xenophobia is not a new phenomenon; some argue that globalization has enhanced the propensity of such behaviours, while others argue that migration and mobility have been a constant in human lives a long time before globalization, xenophobic attitudes being expressed as early as the 15th century. Raymond Taras (2012:72) exemplifies the apparition of the concept of “regulating the immigration” as early as 1431 in Iceland when the parliament decided that the foreigners could not remain in the country during the winter. In 1490, the government reached a decision that foreigners could only spend the winter in Iceland if unable to travel, but were not allowed to work or engage in trading. Therefore, as early as the 15th century the governments were trying to restrict immigration by preventing foreigners to reside on a permanent basis.

Xenophobic behaviours and even violence are phenomena are present in countries with a long history of democracy, in highly egalitarian societies and in which there is a culture of acceptance and tolerance. It has become common knowledge by now that immigration is viewed in negative terms by the public opinion. Most citizens in European countries believe, according to the 2014 Standard Eurobarometer, immigration from to be one of the biggest problem their countries is facing after unemployment and the economic situation. However, according to the same poll, immigration from within the European Union is viewed in substantially better terms than the one from non-EU countries. The Euro barometers and European Commission annual reports on immigration identify high levels of intolerance towards immigration in the European societies. As of 2015, 57% of the Europeans declared that they have a negative feeling regarding immigration from outside the European Union, mobility within EU also representing a problem for as many as 41% of the respondents. The European opinion on immigration has consistently remained below the European Union’s ideals of democracy, tolerance and inclusion (European Commision, 2015).

One of the countries that have been experiencing xenophobic violence during a time period of 21 years since gaining its freedom and having the first free elections that announced the beginning of democracy is South Africa. Human Rights Watch noted as early as 1998 that the South African society “had become increasingly xenophobic” and expressed its concerns towards politicians “scape-goating” the immigrants for the high levels of crime, the spread of diseases or the lack of employment opportunities, also raising concerns towards law enforcement abuses directed towards immigration (especially refugees and asylum-seekers from central Africa) (HRW, 1998).

There is generally a great level of complexity with respect to explaining the occurrence of xenophobic attacks, as those behaviors are not caused by one variable, but by a number of variables that affect each other and that might be different from country to country, however, in the case of South Africa the number of variables that may have worked towards the escalation of xenophobic feelings into violence might be even greater, given the complex stratification of the South African society and the history that had shaped the current layout of the society.

Crush and Pendleton showed in their 2004 paper “Regionalizing Xenophobia?” that xenophobic attitudes in South Africa are spread among all levels of the population from rich to poor, black to white or employed to unemployed. This contravenes the common belief that some segments of a population are more prone to exhibiting xenophobic attitudes than other, and makes it hard to identify how the xenophobic attitudes are correlated with the general economic, political or cultural environment (Crush&Pendleton, 2004:2).

South Africa, a country with probably the most progressive constitution in the world, the rainbow nation, has been experiencing worrying levels of xenophobia that often escalated into xenophobic violence with a systematic recurrence. While xenophobia in represented and constitutes of actions generated from “fear of the other”, it is important to understand who the “other”, the “alien” is and what characteristics are consistent within the perception of otherness in South Africa. However important is understanding the causes that lay behind the xenophobic attacks and their recurrence, it is also important to understand the profile of the victims of the attacks.

On the other hand theories of xenophobia such as “othering” , “scape-goating” and ‘isolation” place xenophobia within the specific of a community and society linking it to poverty, access to services, history, culture and identity, and media & political discourses. These factors have been proven in the profile academia to contribute to high levels of xenophobia within a society, but could integration as a bilateral process tackle the dehumanization process of immigrants which is a constituent of the othering process?

The xenophobic behaviors are also connected to the illegal aspect attributed to immigration in general and asylum seekers in particular, which tends to be especially visible within the context of labor market where asylum seekers tend to be preferred (in low income jobs) to South African nationals as they tend to accept lower wages.

One of the official reasons claimed to have laid behind the 2008 xenophobic attacks in South Africa was the massive influx of immigrants corroborated with rising prices in food and commodities. However, Misago et al., find in their 2009 study “Xenophobic violence in South Africa: Reflections on causal factors and implications” that the numbers of aliens crossing the border into South Africa was not particularly higher in 2008 than in previous years; also, at the same time, persons interviewed with the purpose of the study understood that the rising prices and economic hardships were not due to immigrants “stealing their jobs” but rather a consequence of the global economic crisis, further stating that foreign nationals were helping South Africa through its economic hardships generated by the economic crisis.

The UNHCR report *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance through a Strategic Approach* (2009) finds that the protection of persons of concern[[2]](#footnote-2) is affected by dicrimination and related intolerance; such behaviours translating into restricted acces to territory and asylum procedure, the quality of asylum procedure, poor reception conditions, and denial to equal access to public services, further resultin into a lack of integration of benieficiaries of uinternational protection into the host society. Xenophobic behaviors particularly hinder integration in societies that are characterised by high levels of racial and ethnic tensions.

This paper has, by no means, the purpose of arguing, or suggesting that the levels of xenophobia, or the general treatment of foreigners, being them immigrants or asylum-seekers is worse in South Africa than other countries, even European countries, or claim towards being exhaustive; but rather, a first aim is to find the root causes of xenophobic behaviours and violence with the purpose of understanding the nature of the phenomenon in a country that has been founded on the principles of multiculturalism and facilitating the formulation of policies in addressing the issue. A second aim, is to analyze the level at which xenophobia is institutionalised in South Africa. Thirdly, the paper aims at analyzing the impact that xenophobia within the host society has on refugees and asylum seekers and how the xenophobic and racist behaviours influence the access to territory and asylum procedure, the Refugee Status Determination procedure and further the integration of Refugees in the host society. Is the government also contributing to the high levels of xenophobia exhibited by the South African population? Has been xenophobia institutionalized and if it has been, to what level has it penetrated the South African institutions? How are refugees affected and what are is the government doing to make sure South Africa abides by its international commitments?

While the present paper relies heavily on written articles and quantitative research conducted by scholars and organizations in the field of xenophobia, xenophobic practices and perceptions in South Africa, the chapter referring to the asylum procedure in South Africa (3.2.1.) utilizes some of my personal findings gained during the six months I spent working as a legal intern in Cape Town, South Africa. The findings are based on over 100 Refugee Status rejection decisions that I read and appealed for clients. I decided to use some of my findings as they represent a valuable insight in the process of Refugee Status Determination in South Africa on one hand and on the other hand, they are consistent with other research conducted by credible organizations and scholars, but also with the South African jurisprudence.

Xenophobia in South Africa has been almost exclusively directed towards immigrants coming from other African countries and was a constant sentiment since the liberation in 1994. The immigration policy formulated after the end of Apartheid consisted mainly in border control as the ANC did not formulate an immigration agenda initially. However, the international legislation regarding asylum was adopted by South Africa as early as 1994 and by 1998, The Refugee Act was adopted and came into force in 2000, incorportating all the international legal provisions that SA had previously adhered to.

SAMP (Southern African Migration Programme)[[3]](#footnote-3) conducted several studies on xenophobia in South Africa since the late 1990s and until 2010. At the end of the 90s as many as 78% of South Africans favored restrictive measures or a total ban on immigration. By 2006, the outcome of the study had hardly improved, as 84% of South Africans believed that “too many” foreigners are being allowed into the country. The negative feelings that SA nationals have towards immigration in general also impacts the asylum seeker and refugee populations, as the 2008 SAMP study found that 30% of South Africans oppose refugee protection and as many as half favor refugees living in camps near the border.

The xenophobic attacks and overall attitudes of South Africans do not exceed in intensity or frequency the ones that have been occurring in Europe, especially in 2014-2015, when Germany experienced 198, respectively 202 xenophobic attacks on immigrants’ and refugees’ residences, fulminating with the arson of a refugee reception building in 2015. Greece has also experienced xenophobic attacks in the face of the high numbers of refugees arriving by sea. (Faiola, 2015) Therefore, the xenophobic attacks and attitudes occurring in South Africa have not shocked through intensity or frequency, but rather through an element of surprise that led scholars to ponder on what may have led the South African society, which has experienced, through the Apartheid system, one of the purest forms of racism, to fall into the trap of xenophobia, racism and related acts of discrimination.

The xenophobic attitudes that South Africans have been constantly resurfacing in the past 21 years – attitudes that have on more than one occasion fulminated in extreme violence, with the most recent such event occurring in March 2015 – cannot be seen in isolation from the country’s apartheid past and in close connection to the politics and immigration policies developed from 1994 onwards. Institutions may be both the cause and the solution to the rising levels of xenophobic sentiments in South Africa.

After the end of Apartheid, while the asylum laws were quick to get in line with the international commitments – mainly because the new South African democratic government needed to legitimize itself on the international scene and through the incorporation of international institutions within the national legal framework the legitimacy goal could be achieved. The 1998 Refugee Act was and still remains one of the most progressive legislation in the field of refugee protection. The refugee definition is more encompassing by making subject to refugee status persons whose circumstances would make them in Europe only eligible for subsidiary protection. The right of free movement and the right to work granted by the legislation to asylum-seekers is the exception within national legislations around the world. However, the immigration laws were not as quick to make South Africa an open country that offers access to rights and labor market to economic migrants. The immigration legislation of 2002 was focused on border control mechanisms and the limitation of work migrants to specific areas on the labour-market that lacked coverage within the South African work-force. This aspect led to many nationals from neighboring countries, whose economies lagged behind South Africa’s, towards applying for asylum as a last resort in the absence of coherent immigration policy that would allow them to access the South African labour market legally. This matter has, forward hindered the ability of the South African asylum system to protect those in real need by framing the idea that most asylum-seekers are in fact illegal work migrants.

The “illegal migrant/alien”—refugee nexus has led the public opinion into associating migration with illegality and further hindering South Africa’s ability to protect refugees due to rising levels of xenophobia generated by the creation of a collective idea that refugees were there in an illegal attempt to steal the jobs (already scarce) from the South Africans.

Another issue that South Africa was presented with came in 2009 when asylum-seeker numbers rose considerably, and while the constitution and asylum legislation were inclusive and recognized the rights of asylum seekers, the enforcement of the legal mechanisms in place and the prospect for long-term sustainable policies were slim either due to administrative incapacity, or to the indifference of the authorities into, firstly appointing administration staff within the asylum institutions that have a legal background and, therefore the ability to correctly interpret and apply the legal provisions in force, and secondly promoting the education on immigration issues – not only to the South African citizens, but also to medical staff, national bank employees or law enforcement authorities.

# The Apartheid legacy: From nationalism and frustration to xenophobia.

South Africa’s history – the past apartheid with its influence on the transition to democracy and the development of democratic institutions – has its particularities especially in the “us” versus “them” antagonism so central to xenophobic attitudes. The South African history is not one of communities coming together and past their differences to create a unified nation – it is a history of “mutual hatred and polarization between social groups” (Matshine, 2011:61), with the white minority excluding other groups from social participation and state formation, and coloreds formed their own community with their own language and culture, and furthermore, the blacks did not unify to form one big community but rather, further separated on ethnic and tribal lines (Matshine, 2011:61-62).

The isolation theory of xenophobia has been widely explored by scholars such as Harris (2002) and Morris (1998) and argues that xenophobia is the product of the years that South Africa spent in isolation from the rest of the world. Morris argues that it is difficult to be inclusive and tolerant towards foreigners coming into your country when you have not experienced such a movement at any point in the recent history (Morris, 1998:1125).

During the Apartheid period, South Africa was not a signatory of the 1951 Refugee Convention and did not grant refugee status, having strict immigration policies especially towards immigrants from African countries. However, the country was heavily relying on immigrant labor force in order to fulfill the needs of the mining industry – in 1986 there were 378.125 migrant laborers in South Africa. With the end of apartheid, the number of foreigners coming from countries other than those neighboring SA, had increased exponentially. Morris (1998) documented the experiences of Nigerian and Congolese nationals (most of them refugees) in South Africa -- all of them declaring to have had experienced xenophobia and hatred.

South Africa’s black townships were characterized by poverty and crime. In Soweto, at the level of 1997, 70% of the young population between 16 and 25 were neither employed, nor enrolled in any studies, while the medium wage was equivalent to less than 190 pounds (Bozzoli et.al., 1998:26 in Morris, 1998:1124); the environment of general deprivation, corroborated with Apartheid’s emphasis on boundaries and its impact on people’s ability to be tolerant to difference, led to the rising xenophobic sentiments (Morris, 1998).

However, this hypothesis does not explain why South Africans exhibit xenophobic attitudes mainly towards immigrants and asylum-seekers coming from other parts of Africa but not equally towards Europeans and Asians. While South Africans consider immigrants to be generally bad for the country, the attitudes exhibited in the press, by high state officials, leaders of communities and citizens alike have been mainly oriented towards nationals of African countries in general and towards Congolese, Nigerian, Somali and Mozambican nationals in particular and in more recent statements.

The rise of xenophobia in South Africa right after the fall of Apartheid and in the wake of the new democracy is a phenomenon that has been occurring on the African continent long before South Africa became a democracy. Franz Fanon (1963) theorizes decolonization, nationalism and the rise of xenophobia in early African democracies by pointing, first of all, to the structure and unpreparedness of the new ruling class that did not have the economic power, or even insight to reform the national economy and industrialize it. Soon after the decolonization, Fanon (1963:151) argues that economies are forced back into artisan production and farming, “since the middle class finds it impossible to set up factories, that would be more profit-earning both for themselves and for the country as a whole”. Further, the national elite will take the place that was formerly occupied by the European colonizers becoming the intermediary between foreign investments and local communities and nationalizing agriculture. The new land owners are becoming exploitative of labour and are not trying to integrate their activities into the national economy and are having no interest in bringing transformation about. Therefore, the ruling class or the “native bourgeoisie”: “will fight to the bitter end against these people ‘who insult our dignity as a nation.’ It waves aloft the notion of the nationalization and Africanization of the ruling classes. The fact is that such action will become more and more tinged by racism; until the bourgeoisie bluntly puts the problem to the government by saying "We must have these posts." The working class of the towns, the masses of unemployed, the small artisans and craftsmen for their part line up behind this nationalist attitude; but in all justice let it be said, they only follow in the steps of their bourgeoisie. If the national bourgeoisie goes into competition with the Europeans, the artisans and craftsmen start a fight against non-national Africans […]. From nationalism we have passed to ultra-nationalism, to chauvinism, and finally to racism. These foreigners are called on to leave; their shops are burned, their street stalls are wrecked” (Fanon, 1963:156).

The post apartheid policy of South Africa was focused on replacing foreign labor with South African labor and substituting migrant labor for urban labor (Neocosmos, 2010:66). In the light of these policy ideals, it is further argued that, while the apartheid brought whites in urban areas and confined blacks in rural areas, after its demise, this dichotomy simply shifted to Africa- South Africa nexus where the African continent was backwards and rural and South Africa was urbanized, industrialized and modern. An important component of the South African nationalism was based precisely on the idea that South Africa resembles more a southern European country than any of its backward, corrupt and primitive neighbors. In relation to this exceptional view that South African citizens, of course propagated through officials’ public discourses, had a desire to “acquire the benefits” of the democracy, but in return, the government failed to deliver at the South Africans’ expectancy rate (Neocosmos, 2010: 4,67).

Poverty and deprivation have been the first theories that scholars used in trying to account for the xenophobic attacks of 2008. Later studies developed into bringing on the table explications that relate to the historic specificity of South Africa, which in turn led to the generation of a strong nationalist sentiment after 1994. However, while poverty and deprivation cannot fully account for xenophobia, they cannot be ignored either especially in transition democracies where people have higher expectations from the new regime and tend to hope that livelihoods will improve a lot faster than the economy may actually be able to provide for (Padayachee and Desai, available at: [http://rozenbergquarterly.com/post-apartheid-south-africa-and-the-crisis-of expectation-dprn-four/](http://rozenbergquarterly.com/post-apartheid-south-africa-and-the-crisis-of%20expectation-dprn-four/)).

South Africa experienced a growth in GDP from 1990 to 2001; however the growth rate was lower than the population growth, resulting in a decrease of the per capita GDP. Also, between 1995 and 2005 the Gini coefficient increased from 0.64 to 0.69 meaning that there was an increase in income inequality. Although SA has managed to reduce income poverty by making basic services more accessible, the level of inequality between the “historically defined population groups” has continued to increase (Van Der Westhuizen, 2012:1-2).

The Apartheid South African state went to great lengths to minimize and regularize migration, not only from outside the country, but also, and more tragically, within the country. The possibility for the mobility of black South Africans was highly restricted by the creation on Bantustans and the requirement of a special pass in order to travel to white inhibited areas (those passes being granted mainly for work purposes).

Also, the Apartheid regime altered profoundly the patterns of distribution in SA and the disparities between whites and other groups is still visible, the south African society remaining one of the most unequal nowadays. Pusch Commey (2008) argues that the history of segregation and the survival of white rule at the cost of the division of “blacks” through the creation of Bantustans based on ethnicity, but also the fact that the black population did not receive proper education and a set of skills are the basis on which violence occurs in nowadays South Africa. Commey goes further to say that “the historical baggage of division, envy and violence is entrenched. Taxi owners settle their differences by slaughtering each other over lucrative routes and pure envy. Passengers get killed in the crossfire and the perpetrators don't care. Domestic violence is a serious problem and often means homicide. An argument among motorists can result in a shootout and death. It is called road rage. Protest marches against anything have resulted in burning, killing and looting” (Commey, 2008:15). On the same note, Chawo (2011) argues that there is a generalized stage for violence in South African townships, quoting citizens that exhibit the same fear as foreigners of being robbed or attacked. Violence is affecting the poor disproportionately and due to the generalized environment of corruption experienced by asylum-seekers, they are reluctant to report violent incidents to the law enforcement officers. One of the theories advanced being that, in the face of generalized violence, and because immigrants in general and asylum seekers in particular live in poverty stricken areas due to the lack of money, they face the same threats as South African citizens advanced violent groups and gangs that flourish in South Africa’s townships. Under these assumptions violent attacks towards immigrants are attributed to the economic specificities of the South African society, where resources remain scarce and competition for local businesses (spaza) remains fierce due to the state’s inability to properly redistribute wealth.

The xenophobic attacks that occurred in 2008 in Alexandra Township are closely linked with a climate of poverty and generalized violence; however theories coming to explain the xenophobic behaviors of South Africans based on poverty and proximity to a violent environment fail to acknowledge that studies performed by SAMP (1997,1998,2008,2010) at regulate intervals show that xenophobia is spread among all social classes and socio-economic strata and that the levels of hatred and willingness to take action against immigrants have been on the rise since 1997 and have not been specific to poor areas. Also, such explications towards the violent attacks against migrants fail to take into consideration the role that the government authorities and state institution play and have played during the time in the inflation of xenophobia through the dissemination of public statements linking foreigners to high crime rates, or to the inability of the government to achieve the goals of the Growth, Employment and Redistribution programme, and how these aspects led to the instutionalization of xenophobia insofar that it has penetrated those institutions that are responsible with upholding and promoting human rights (i.e. asylum institutions).

By minimizing or denying the existence of xenophobia, tactic which has been employed also by the South African government, the creation of policies and the protection of those persons that flee to South Africa from persecution or conflict will be impossible. There is a pressing need for the South African authorities, not to deny the existence of xenophobia and further restrict the immigration policy, and back from their international commitments, but to acknowledge its existence and address the existent issues through coherent policies.

## Xenophobia as collective violence

Collective violence has been defined as the “instrumental use of violence by persons who define themselves as members of a group against another group in order to achieve political, social or economic objectives” (Zwi et al., 2002, in Crush (ed), 2014:12).

Senechal de la Roche identifies collective violence as a form of exercising social control by one group over another; it represents a way in which people respond to deviant behaviour (Senechal de la Roche, 2001:127). In this sense, the violence occuring in South Africa may be a response to the perceived illegality of migrants that has been fueled often times by government officials through allegations portraying migrants as a threat to society. The violent attacks have also been targeting local businesses owned by foreigners that often have been characterised by government or local groups with social authority as „illegal”, failing to pay taxes, or threatening the businesses of the citizens.

CoRMSA reports that after the 2008 attacks in Alexandra Township, almost every month there continued to be an attack on foreign groups, individuals or shops (2011:20). Following the 2010 World Cup, foreign shops were looted resulting in the death of at least 20 foreign nationals. In 2011 and 2012 another almost 800 shops were looted or burned, the incidents of 2012 resulting in the displacement of 500 migarnts. In 2013 the attacks on spaza shops in Port Elizabeth escalated with the stoning to death of a Somali shop-keeper, the series of attacks on foreign-owned shops and migrants only increasing in numbers and intensity.

The attacks were often animated by local business competitors such as the locally formed group “Zanokhanyo Retailers” or the regional forum “Greater Gauteng forum”. The groups have been employing intimidation tactics aimed towards foreign business owners closing down their shops, and have started public campaigns to expel migrant businesses from Johannesburg Townships. The attacks have been generally characterized by a collective action employed by groups of people either in the after-math of an anti-government protest, or by organized vigilante groups (Crush, 2014), fueled by business forums such as “Greater Gauteng” that publicly stated on more than one occasion that migrants come to South Africa “to destroy local business” and if nothing will be done about it, “there will be war” (Times Live, 2013).

Senechal de la Roche also shows that collective violence is more likely to occur in societies where there is a strong „partnership”, meaning that a third party will take sides in the conflict. Such partnership generally arises from a third party being socially close to one side involved int he conflict and remote from the other side. Also a third party will tend to support and create partnership with that side of the conflict that enjoys a higher social status. In this respect, South African citizens committing abuses towards migrants and engaging in violence have had, even if indirectly, the support of the government and law enforcement officers.

On one hand, the fact that the government has constantly portrayed migrants as “illegal” and often made statements that foreigners do not belong in South Africa shows that the government is not neutral when addressing the immigration issue. On the other hand, police officers have been directly involved in the conflict, taking the side of the perpetrators either by not enforcing the law to their disadvantage, or by contributing to the conflict through taking bribes or stealing from the foreigner’s shops. This police behavior seems to also be socially acceptable as the South African discourse on migration and especially migrant entrepreneurship has been centered often on the idea that foreigners should not be entitled to police protection.(Crush, 2014)

The violence that is collectively perpetrated against migrants, especially by destroying their businesses, seriously impairs the prospect that those will achieve meaningful livelihood in South Africa and thus hinders the prospect of local integration. The violence corroborated with the general negative, if not xenophobic perceptions that South Africans share on immigration shows that there is no willingness from the community’s part to help migrants become part of the society and play a meaningful role in the community, thus, further hindering the prospect of integration.

The violence oriented at migrants increases their already vulnerable position in the South African society and government’s choice not to address the conflict through policies that would enhance dialogue among the parties, but to promote more and more restrictive policies towards immigration and to indirectly show support and fuel the attacks shows a lack of willingness to integrate migrants as part of the South African society.

Also, the government’s lack of willingness to integrate and make refugees part of the society, corroborated with the restrictive immigration policies shows that South Africa is expecting refugees to be present for a limited amount of time in the country, not taking into consideration that many conflicts in African countries have become protracted, making it impossible to achieve any durable solutions for refugees other than local integration.

# From the ‘illegal migrant- refugee’ dichotomy towards institutionalized xenophobia

Countries receiving asylum-seekers are able to shape the way migrants are treated by disregarding the abuses committed by employers, state officials, and law enforcement officials, or citizens. By adopting very restrictive immigration laws, especially in situations where there are considerable numbers of migrants (refugees or otherwise), states create the sense that a crisis threatening the country is imminent, this way intensifying the existent hostilities (Crush and Ramachandran, 2009:64).

A study by the International Federation of Human Rights shows that a state of insecurity is rather the norm for migrants in South Africa, without benefitting from the protection of law enforcement officers, that further intensify the state of insecurity and vulnerability either by committing abuses against migrants or by closing a blind eye to the discrimination those are encountering (FIDH, 2008).

## Public discourse patterns and the legal framework

South Africa has committed to respect the legal provisions put forward by the 1951 Convention relating to the status of refugees and its 1967 Protocol, which sets the legal grounds for refugee protection and has translated the provisions of the convention into domestic legislation through the 1998 Refugees Act. The country is also a signatory if the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and section 9 of the South African Bill of rights stipulates that: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)[[4]](#footnote-4).” In trying to keep the commitments set out by ICERD and the Bill of Rights, the Equality Act was passed in 2002 and seeks to offer the legal grounds on which non-discrimination will be achieved, by prohibiting unfair discrimination on all grounds mentioned in the Bill of Rights – South African legislation is, therefore, in line with the international provisions.

In spite of South Africa’s commitments to respect the rights of all persons, it was not ready to give up the control over the borders and to open its border and economy to immigration. The Aliens Control Act of 1991 remained the legislation in force regulating the presence of foreigners on the territory of South Africa until 2002. The Act had as main purpose the enforcement of sanctions on any person present illegally in RSA. With this purpose, it gave extensive liberties to any police officer in arresting anyone whom he “suspects on reasonable grounds that is an alien, and he may require such a person to produce to him proof that he is entitled to be in the Republic, and if such person fails to satisfy such officer that he is entitled, such officer may take him into custody without warrant” (Alien’s Act, section 53.1). As restrictive as the Alien’s Act was, the Amendment of 1995 came to provide more control for the government and led to the creation of „much stronger and higher barriers to entry” (Peberdy, 2001:31).

Human Rights Watch (1998) reports on the abuses of undocumented migrants in the period 1996-1997 revealing that such abuses were occuring frequently on the labour market where migrants were often exploited by farmers, sometimes leading to serious human rights abuses. The impunity for such cases was widespread, cases of abuse being only exceptionally prosecuted due to political interference. A law enforcement officer interviewed declared that higher ranking officials feared that if farmers were to be prosecuted, they would turn against the government.

Law enforcement officers involved in the identification and arrest of undocumented migrants were also “assisted” by informal community structures as a result of a speech held by Buthelezi in which he was asking South Africans for their help in diminishing the influx of illegal migrants. Furthermore, the DHA urged South Africans to report Mozambicans to the police, rewarding each report with 50 Rands ($10 at the conversion rate of 1998) (HRW, 1998:69).

As a result of the Department of Home Affairs pressures on local community to assist in the identification and report of the persons that they might have suspicions towards as being illegally in the country, South Africans came to believe that arrests and deportations were the right approach in tackling migration issues.

The SAMP report of 2014 edited by Jonathan Crush shows that the xenophobic attacks that had occurred in 2008 were organized by local groups that were seeking to extend their control and power in the area. The places where the attacks occurred were stricken with high levels of violence and local gang fights over “taxi” routes. This comes in the support of theories that suggest that the attacks were not particularly xenophobic, but rather generated by the high levels of violence and the existence of a “culture of violence in these areas (Crush, 2014:19). However, the study further shows that the support for actions taken against immigrants was widespread in the South African society, with nearly 60% of South Africans not being concerned about the attacks and 28% not feeling any guilt. The general opinion following the rise in xenophobia was that it is present because foreigners take the jobs from South Africans, do not belong there, use services for free, or take the housing away from nationals (*ibid*:20). These opinions corroborated with the culture of impunity for cases of violence especially against immigrants and lack of policies that aim to durably solve the conflicts existent in these areas shows first of all, that the government does not have the intention and willingness to reduce the levels of xenophobia and stop the violence, and second, even though the attacks were not a mass action, they were widely supported by South African citizens.

Moreover, the government’s response in managing the xenophobic violence was not aimed at solving the conflict, promoting toleration and integration, but rather removing the foreigners from the affected areas into camps and encouraging them to leave the country (Crush, 2014:20). While apparent reintegration processes took place, it was based solely on the return of those displaced into the community, but did not involve an appropriate dialogue and the situation of the returnees was not monitored to analyze the evolution of social dynamics (SAHRC, 2010:58-61).

The minister of Home Affairs Mongosotho Buthelezi was the first to set a xenophobic tone in the post-apartheid political discource. As a proeminent South African figure, he used the term „illegal” to decribe any any person on South African territory who is not a citizen and was the first person to publicy inflate the number of „illegal aliens”, first in 1997 by claiming there were between 2.5 and 5 million and a second time in 1999 when according to the minister, the number of „illegals” had already reached 9 million.

Along with the minister of Home Affairs, the Defence minister as of 1997 blamed, during a newspaper interview, the illegal migrants for the ramapage in crime and violence in South Africa: “As for crime, the army is helping the police get rid of crime and violence in the country. However, what can we do? We have one million illegal immigrants in our country who commit crimes and who are mistaken by some people for South African citizens. That is the real problem. We have adopted a strict policy and have banned illegal immigration in order to combat the criminals coming from neighboring states so that we can round up the criminals residing in South Africa” (South African Defense Minister on Arms Sales, “*London Al-Quds al-Arabi*” in HRW, 1998:185).

It needs to be pointed out that South African’s opinions according to which foreigners are taking their jobs and housing and benefitting from the medical services for free are in line with the position that the government has taken towards immigrants and with the political statements advanced publicly by state officials.

Also, the South African written newspapers have been also contributing to the spread of negative stereotypes and had enforced the declarations of state officials. Mail & Guardian was complaining: "We have people roaming on the streets with degrees, but they do not get jobs because companies have given jobs to foreigners” (Mail and Guardian 1998, in Danso&McDonald, 2001:124). Written media has been portraying immigrants as “illegal” and being involved in drug related crimes, or arms trafficking. A SABC News article brings in discussion the “porous borders of South Africa” as facilitating and contributing to the traffic of arms (SABC News(a), 2015), while another article says: “Ehlanzeni District Director for Home Affairs, Doris Chiloane, says they have cleared more than 80 000 travellers at the border post. She says there are serious problems with undocumented travellers. "So far since the operations, we have managed to deport around 848 to Mozambique, so when we find travellers that do not have documents, we arrest and deport them [...]Meanwhile, President Jacob Zuma's eldest son, Edward, has said he will neither apologise nor withdraw his anti-foreigner statements. He said South Africa is facing a serious problem when it comes to illegal immigrants.” (SABC News(b), 2015). All these statements came after a new wave of xenophobic violence that had occured in March 2015 following the Zulu King Goodwill Zwelithini that immigrants should be deported from South Africa.

The political discourses, as well as the institutional practices, community approaches towards immigrants and media coverage during the early days of South African democracy persistent throughout the years, show that xenophobia has not been a growing sentiment that was slowly built due to the increasing numbers of asylum-seekers fleeing to South Africa, but rather, xenophobic violence and impunity for those committing abuses towards immigrants, was a government approach since the first democratic elections in 1994. Thus, the government is preferring to turn a blind eye to the human rights violations occurring, and at times enforcing and legitimizing abuses on immigrants and refugees and using them as scapegoats for the government’s failure to reduce the crime levels and to respond to the socio-economic expectations that South Africans had from their newly elected democratic government.

In 1999, the White Paper on International Migration was published and, while trying to eliminate the misconception that all immigrants arriving in South Africa are a burden and a security threat, it also argued that „the objectives of Growth, Employoment and Redistribution were achievable by limiting the entry of any migrant other than tourists and business persons, so as to reduce the number of people to whom the government had to supply services and for whom the economy has to provide” (The White Paper on International Migration, 1999: section 5.2).

The White Paper was also pondering in section 6.2 on the applicability of the constitution to people who are neither residents, nor citizens of South Africa; further coming to the conclusion, in section 6.2.1, that even though some provisions of the constitution refer to any person, „one cannot categorically state that all constitutional provisions apply equally to aliens illegally in the country as they do to citizens and residents”. In subsection 2.4., the need for South Africa to determine if the government should provide consitutional rights to aliens non-regarding their status in the RSA is iterated. The negative imapact that illegal aliens have on the South African society and the government’s ability to provide services is also exposed and the issues of aliens competing with poor South Africans for scarce resources and medical services, or perpetratating illegal activities and corrupting state officials were raised.

It seems that the democratic istitutions governing immigration to South Africa have been incipiently built under the conviction that foreigners’ presence in the country will burden the system and render it incapable of offering the same quality services to citizens due to increased numbers of foreigners. Also, the negative language used in connection to immigrants and their association with criminal activities in legal documents as well as public statements could have led to the manipulation of the public opinion into generally believing that immigration equates illegality and that the foreigners are plaguing the South African society by competing for jobs and services.

Before the release of the White Paper on International Migration, The Southern African Migration Programme, conducted a study on people’s opinions towards immigrants and immigration showing that 25% of South Africa’s population endorsed a complete ban on immigration, with 53% (in 1998) expressing their preference towards a more strict limit on the number of foreigners that are allowed in South Africa, and only 6% of the population displaying liberal views towards immigration in 1997 and a mere 2% in 1998. Also, the views of South Africans towards immigration, regarded them as criminals, carriers of diseases and threatening the South African economy. Interestingly, these views were spread out among all demographics and socio-economic strata. These figures come to support the legitimizing statement in the White Paper according to which the restrictive proposals endorsed are the expression of South African public opinion.

Loren Landau has been arguing that South Africa’s general flaws in the asylum system have spurred from the inconsistencies existent between, on one side, the immigration legislation and, on the other side, the asylum legislation. The RSA Government has always, since 1994, tried to restrict immigration on a semi-permanent and permanent basis. Even when the Immigration Act came into force in 2002, the document was focusing on efficient border control mechanisms and the sanctions applied to “illegal foreigners” residing on the territory of South Africa. At the opposite end of the migration policy was the 1998 Refugee Act that offered a wide array of rights, not only to refugees, but also to asylum-seekers.

By giving asylum-seekers the right to work and move freely on the territory of South Africa, the 1998 Refugee Act was setting a strong legal basis for the achievement of durable solutions, particularly local integration. However, in the light of Government’s position it remains questionable if the legal provision granting the right to work to asylum seekers was with the purpose of setting the legal grounds for local integration of refugees, or simply answering the international obligations without having to provide and cater for non-nationals.

However, the South African refugee legislation is proposed for amendments by the newly introduced Draft Refugee Amendment Bill which poses several concerns with respect to South Africa’s intention to protect refugees and abide by the non-refoulment principle.

The new Bill does not limit the rights that refugees enjoy and bring in provisions and introduces in section 6 the need for members of the Refugee Appeal Board and the Standing Committee for Refugee Affairs to have legal qualification in order to perform the requested duties. However, it reduces the rights that asylum-seekers enjoy, increases the possibility of refoulment and imposes serious limitations on family reunification process. It is of concern that SA’s parliament and executive have proceeded, in the light of the most recent xenophobic attacks of March 2015, not to address the increased vulnerability that refugees experience due to xenophobia, but to further limit the prospect of accessing the territory and the asylum procedure.

Also, studies such as “Queue Here for Corruption – Measuring irregularities in South Africa’s Asylum System” by Roni Amit, show that asylum seekers experience corruption at more than one level during the asylum procedure, having to pay either to cross the border, be granted access to the asylum procedure, or renew their asylum-seeker permit (Amit, 2015:3-5); it is especially of concern that in the light of such irregularities in the asylum system, the SA government chose to impose further restrictions on immigration, rather than addressing the existent issues.

In September 2015 another amendment Bill came to modify the asylum law, in the light of recommendations made by the Constitutional Court, to amend article 21(5) as it was deemed unconstitutional by not allowing members of the media or the public to attend hearings of the Refugee Appeal Authority under certain circumstances. The present Amendment Bill, however, brings up for modification the definition of “dependant” in relation to an asylum-seeker or refugee by including an adopted child “ if such child was adopted in the asylum-seeker’s or refugee’s country of origin” without taking into consideration the possibility that an asylum seeker might have been residing in a 3rd country where under the stipulations of article 27 (1) and (2) of the 1998 Refugee Act he can no longer reside and under the stipulations of the same article, he cannot return to his country of origin. Under such circumstances, a child adopted in a 3rd country will not be considered for family reunification which poses serious threat to a refugee’s ability to benefit from durable solutions in South Africa.

Article 4 (1) of the present Bill regarding the exclusion from refugee status is modified by the introduction of letters from (e) to (i). A first important note on such modifications is that the exclusion clauses of the 1951 Refugee Convention are deemed by UNHCR as exhaustive; diminishing the level of protection offered by a signatory state under the threshold set by the 1951 Convention would result in a contradiction between the international standards that SA had adhered to and its national legislation.

Letter (f) of the above-mentioned article provides that a person will not qualify for refugee status “if the Refugee Status Determination Officer (RSDO) has reason to believe that such person has committed an offence in relation to the Immigration Act, the Identification Act, 1997 (Act No. 68 of 1997) or the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994)” therefore posing serious questions regarding South Africa’s committment to the 1951 Refugee Convention which stipulates that an asylum-seeker has the right not to be punished for illegal entry into the territory of a contracting state. The afore-mentioned provision is seriously threatened by the Refugee Amendment Bill, as illegal entry consists a contravention under the Immigration Act, therefore exposing a person that has illegally crossed the border into South Africa in order to seek asylum to be denied refugee status solely on that basis and further risking refoulment.

Furthermore, letter (h) provides that a person will not qualify for refugee status if they are a “fugitive from justice in another country where the rule of law is upheld by a recognised judiciary”. This is especially troublesome since a refugee has a “well-founded fear of persecution” which at times may arise from the prospect of unlawful imprisonment, or legal charges not consistent with a crime perpetrated. Moreover, several countries on the African continent criminalize homosexuality; therefore a person fleeing persecution for reasons of membership to a particular social group (i.e. LGBTI) may also be a fugitive from justice. Of course persecution needs to be distinguished from prosecution – a person cannot seek asylum in order to escape justice; however the language used is very important in formulating legal provisions. The expression used by the 1951 Convention is “has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”, hereby crime referring to a grave punishable act or capital crime (UNHCR Handbook, 2011:30) and consistent with available jurisprudence – as opposed to justice which is a vague term that might lead to improper interpretations.

Taking into consideration the findings of Roni Amit in “Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions” which show that on more than one occasion RSDOs have rejected asylum applications (some of them making reference to countries of origin that exhibit long-term instability and civil war such as DRC, or Burundi) as unfounded with the argument that „ there are no reasons indicating that the state was failing or unwilling to offer protection”, corroborated with the stipulations of article 4(f) of the present Bill there are serious concerns as to what the RSDOs may consider „a country where the rule of law is upheld by a recognised judiciary”.

Moreover, the right to work becomes restricted if the Draft Refugee Amendment, 2015 will come into force in 2016. In the 1998 Refugee Act (republished as of 27 September 2015)[[5]](#footnote-5) the right of an asylum-seeker to work or study was identical with that of any South African citizen. The present Draft Bill sets limitations to such rights in that, if an asylum seeker has the means to support himself and his dependants, or receives accommodation from UNHCR, the right to work will not be endorsed on the visa (currently reffered to as section 22 asylum-seeker permit according to the legislation in force). Also, the right to work or study can be revoked if a person cannot prove that they are enrolled in an education unit, or have legal employment after 6 months from the endorsement of such rights on the visa.

It remains to be seen if this new Draft Amendment Bill will come into force, or which of the current provisions will be retained after the comments from international organizations and civil society representatives are reviewed, however, the government’s intention to limit the rights of asylum-seekers to an extent that comes in contravention with the international commitments poses a serious question regarding the levels at which xenophobia is institutionalised in South Africa.

Through these highly restrictive legal measures the Government is trying to address the on-going unrest and xenophobic attacks not through adequate policies that aim to educate the receiving population and promote integration, but rather by seeking to legitimise the current high rejection rates and to offer further, more coherent grounds for the rejection of asylum applications.

This kind of policy addresses immigration issues on a short-term basis without acknowledging that migration has become a constant of a more and more globalizing world. Especially, in the current context of the African continent and more prominently the Great Lakes region where conflict has escalated in Burundi and the volatile situation in the Democratic Republic of Congo has once again resulted in armed conflict, persons fleeing persecution and conflict will remain constant.

UN Agencies, however, seem to have reached a consensus with respect to South Africa’s asylum legislation – it is exemplary; and by all means, granting refugees such a wide array of rights is an example of good practice, but ultimately the government of RSA fails to protect, firstly because of the country’s highly flawed and corrupted asylum system and secondly, by not being able to provide durable solutions for refugees, mainly integration opportunities.

Integration, as a bilateral process, entails accommodation on both sides – migrants and the receiving community – with new cultures, languages, social systems or values. Integration of refugees should be supported by any government that took upon itself the responsibility to protect refugees. The absence of integration policies corroborated with a weak, apparently “un-enforceable” asylum system lead to the creation of and deepening of differences that cumulate to the formation of the “us” versus “them” antagonism.

The course of South African legislation regarding immigration and asylum had created, since 1994, a more and more insecure climate for refugees and failed to address the inconsistencies between its international and constitutional commitments to respect the rights of all persons and the de facto practice. From the early political statements that used immigrants as “scapegoats” for government’s failures and to more recent legislative proposals that come in contravention with South Africa’s international obligations, it seems that xenophobia not only has become, but has been institutionalized since the early days of South Africa’s democracy.

## Corruption and Reduced protection for Refugees

The institutionalization of xenophobia and the government’s resistance to changing the restrictive legal provisions regarding immigrants, as well as the lack of enforcement of the so many inclusive legal provisions that South Africa has led to the intensification of the general opinion among South Africa’s citizens that migrants need to stop coming to South Africa, thus exacerbating xenophobic sentiments. Another effect that government discourses had, along with the reluctance to address the systemic misconceptions about migrants, was to contribute to the idea that all persons coming to South Africa were there somehow, to take advantage of South Africa’s economy and employment opportunities to the disadvantage of citizens.

These feelings, exacerbated by Zimbabwe’s economic struggle that pushed people into South Africa in the search for jobs and some economic, but also physical security, corroborated with the restrictive immigration policy that led many Zimbabwean economic migrants to apply for asylum in order to be able to regularize their stay in South Africa, negatively impacting the asylum system, hindering the objectivity of RSDOs – that sometimes reject an asylum application under the assumption that the asylum-seeker is in fact an economic migrant.

### The Asylum Procedure. From access to procedure to refugee status.

At the moment one individual has expreses his/her intention to apply for asylum the state is obliged through the international legislation ratified and incorporated into domestic legisltion to grant the person in cause access to the asylum procedure. Studies show that even at this early stage there are signs of corruption and misconduct in the asylum system. The „Queue here for Corruption” study indicates that 13% of the persons interviewed were asked for money by a border official with 12% saying they had paid money in order to cross the border (Amit,2015:24).

Once an individual has reached South African terrirory and wishes to apply for asylum, they must present themselves to a Refugee Reception Office and submit an application which will be followed by an individual interview with an RSDO that will further reach a decision in terms of granting refugee status, rejecting as unfounded, as manifeslty unfounded, or abusive.

The asylum system of South Africa was designed in order to protect those individuals that flee serious human rights violations in their country of origin. The fact that a system does not, or is not able to protect such individuals in accordance with the legislation, may first of all, result in the violation of the principle of non-refoulment. Second issue is that the asylum system is governed by the Promotion of Administrative Justice Act (PAJA) which “regulates the interaction between state institutions and their clients on a transparent and accountable basis” (Amit, 2010:7); the failure of the Department of Home Affairs to fulfill its commitments to protect the refugees in accordance to the domestic and international law, erodes the judiciary system of South Africa and also its legitimacy.

The asylum system in South Africa is also flawed at levels that are preceding the refugee status determination process and that sometimes hinder the asylum seeker’s ability to reach a Refugee Reception Office. There have been many cases in which the legal specifications regarding refugees entering South Africa have not been followed by officers at entry ports by not allowing asylum seekers to enter RSA, thus violating the basic human right stipulated in the Universal Declaration of Human Rights “to seek and enjoy in other countries asylum from persecution” as well as section 2 of the 1998 Refugee Act. Also, the refusal of entry to asylum seekers represents a violation of the principle of non-refoulment which “encompasses the obligation not to reject asylum seekers at frontiers” (UNHCR, 2001).

Corruption in the asylum system is an important factor that leads to the reduced protection that South Africa is offering to persons seeking asylum; it also shows that there are growing inconsistencies between the protection that refugees and asylum seekers are granted through international treaties and domestic legislation and the practices at border-crossing points and in the refugee reception offices.

Corruption and general inadequacy of the asylum system have been reported since the early years of South African democracy. A study conducted by Human Rights Watch in 1998 shows that asylum-seekers and refugees were asked for bribes “almost without fail” when approaching the Department of Home Affairs in order to obtain the legal documents necessary for their stay (HRW, 1998:164). The persons interviewed with the purpose of the report declared on all occasions that they payed a sum of money in order to obtain, or to extend their legal documents, bribes rising to as much as $100 (*ibid*:165-167).

Moreover, the report documents several inconsistencies occurring during the Refugee Status Determination procedure such as claims being rejected because the standing committee argued that the countries of origin in question were stable and could offer protection to their citizens. At that time the reasons for rejection were not communicated to the asylum-seeker, and deportations without granting access to asylum procedure were occurring often (HRW, 1998).

It might be argued that during the period of time that the Human Rights Watch report is focusing on, the international legal provisions governing the status and protection of refugees had not yet been translated into domestic legislation, hence, the asylum procedure could have been hampered by misinterpretations of international legal provisions, or by not being governed by clear guidelines in the process of decision making. However, flawed asylum decisions that present inconsistencies with the international legal instruments and domestic legislation have remained constant in the South African asylum system.

Once an asylum seeker reaches a Refugee Reception Office, further issues arise. The high level of corruption in the South African administration system is translated in public workers perceiving illegal taxes for processing the refugees, thus hindering the access a fair determination procedure.

Another problem is the refugee status determination process in itself. Many of the times the decisions issued by the RSDOs are flawed by not applying the law correctly, not following the provisions of the UNHCR Handbook and Guidelines for on Procedures and Criteria for Determining Refugee Status, by failing to take into consideration non-political persecution or non-state agent persecution, by utilizing inadequate data about the asylum seeker’s country of origin, by sometimes taking into consideration past persecution as the only factor in determining the refugee status, by considering relocation in country of origin in the case of asylum-seekers that apply for refugee status under the section 3(b) of the Refugee Act, by rejecting an application on account that an asylum seeker did not try first to resolve his problems while in the country or most severely by not understanding, or refusing to apply the definition of persecution correctly. Roni Amit also finds that some RSDOs consider that an asylum-seeker „must exhaust all internal remedies before fleeing the country” (Amit, 2012:67). However, the UNHCR Handbook clearly states that international law does not requrie asylun-seeker to exhaust all options in their country of origin before fleeing (UNHCR, 2011:106).

The Refugee Status Determination Officer has to determine during the interview the subjective as well as objective reasons for an asylum seeker’s well founded fear of persecution. In analizing the objective element, the case officer has to rely on information regarding the situation in the country of origin which has to come from credible sources. Studies show that case officers are often „uninformed about country conditions in even the most well-known refugee-producing countries “(Amit, 2012:63)

Many rejection decisions state in the reason for decision that “nothing happened to you while in your country” in cases of unlawful imprisonments, gross violations of rights to expression or assembly, politically-motivated assaults or rapes. Moreover, the RSDOs failed on most occasions to correctly interpret and apply the concept of “well-founded fear of persecution”, as an asylum seeker must not have suffered gross human rights violations before deciding to leave the country in order to be considered as refugee, but also can flee the country of origin in order to avoid “a situation entailing the risk of persecution” (UNHCR,2011). Roni Amit documents cases where asylum-seekers, victims of gender-based violence, thus being encompassed under the umbrella of persecution for reasons of membership to a particular social group were rejected on the ground that nothing had happened to the applicant while in the country of origin. (Amit, 2012:83).

In the cases of asylum-seekers from the Democratic Republic of Congo applying for refugee status under the article 3(b) of the Refugee Act and therefore fleeing their country due to “external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality”, the claim was rejected most of the times on 3 accounts: First, that the claimant is able to relocate in other regions of the country, while the UNHCR Handbook clearly states that “ a person will not be excluded from refugee status merely because he could have sought refuge in another part of the country” (UNHCR, 2011:19); second, that the current data on the country shows that the situation has stabilized, while all the Country Reports issued by legitimate agencies such as Human Rights Watch, Amnesty International or the UNHCR document the contrary. A thorough documentation about the situation in Eastern provinces of DRC can prove that there is a case of protracted conflict, which even if is momentarily frozen, might escalate once again due to the on-going presence of rebel groups in the area; third, the state of DRC can protect its own citizens, which fails to take into consideration the high levels of corruption, cases of impunity, unlawful imprisonments and the protracted conflicts in the eastern provinces.

The flawed decisions that seem to be rather the norm of the South African asylum system are not necesarily an expresion of xenophobia by themselves, as given the backlog created by the massive influx of refugees in 2009, RSDOs had been taking a decision on asylum applications even in the same day that the interview took place, copy-pasting arguments from other decisions, thus resulting in decisions being wrongly taken (Amit, 2012). However, the fact that these issues have been present and represent the norm and not the exception, shows that the South African Government is at best indifferent towards persons in need of international protection.

Sometimes, an individual has to make several visits to an RRO for the same problem that has not been resolved on any of the previous visits. Such inneficacity of the sistem makes refugees and asylum-seekers grow more and more desperate and, in turn become susceptible to the existent corruption. The corrupt practices within DHA, especially for asylum-seekers and refugees that have to obtain or renew their permits, is especially concerning. Many DHA employees request money for the issuance of the the asylum-seeker permit and for the renwals as well (Amit, 2015) and if refugees do not have the money it result in them becoming illegal on the terriory of South Africa and hence, face deportation. As previously explored, the problem of law enforcement officers acting against the immigrants in South Africa is a common practice, and, as will be discussed in the next chapter, the absence of documents often times makes persons illegal in the face of law.

The practices of corruption within the Refugee Reception Offices have been, partly the result of the government’s inaction to reduce such practice and hold accountable those case officers that resort to corruption. Also, the inadequate training that case officers received before and during their occupancy of the function, has led to severely flawed decisions that considerably reduced the protection South Africa is capable to offer to asylum-seekers.

Although not a direct expression of xenophobia, the persistence of corruption and flawed decisions occurring frequently in the asylum system show that the government is not prepared, nor willing to protect. These aspects corroborated with the strict immigration laws show that foreigners, even those in urgent need for international protection are not part of the government agenda in terms of increasing the de facto protection that those are receiving.

### Reception conditions and the prospect for integration

Local integration alongside voluntary repatriation and resettlement are the three durable solutions that UNHCR advocates for refugees. Given that approximately 1% of the refugee population is resettled in a 3rd country from their first country of asylum and voluntary repatriation can only take place if the fear of persecution or other aspects on which the refugee status was granted cease to apply and the refugees can return home in conditions of safety and dignity, local integration in the first country of asylum remains, for most refugees and host-countries the best approach towards achieving durable solutions.

Local integration in achieved by building on its three pillars: offering refugees a wider range of rights, helping them achieve sustainable livelihoods and a “standard of living comparable to the host community”, and by creating a cultural environment where refugees are accepted and offered the opportunity to contribute to the social and economic life without discrimination.

As previously shown, the South African asylum law offers not only refugees, but asylum seekers as well a wide range of rights and the national constitution protects all persons from discrimination. However, often times, the law is not easily enforced, the rights that one enjoys on the paper, may differ from the de facto situation.

Landau and Duponchel (2011) have conducted a survey showing that while the acquisition of legal status improves the access to the labor market, thus enabling refugees to benefit from durable solutions (i.e. local integration), it is not a determinant factor for a person’s welfare. The main factors contributing to a refugee’s welfare are the social networks and the level of group membership. The study also finds that refugees who join relatives or acquaintances are more likely to secure economic and physical protection, mainly because an early financial assistance can help them secure a place to live and start looking for employment (Landau&Duponchel, 2011:5).

The fact that South Africa, by granting asylum seekers the right to work, does not offer any financial or housing assistance to new-comers, leaves those persons not having family or friends in South Africa with a diminished level of protection. Given that the most successful refugees are the ones that already have a network in SA, the need for better channels of information that can substitute the social networks is imperative in order to offer efficient protection for refugees and asylum-seekers (Landau&Duponchel, 2011).

During the reception period, UNHCR (2009) identifies as benefic for the process of integration in the host society that asylum-seekers are not isolated from the society and that opportunities to develop skills (vocational, language) are offered. UNHCR also stresses the need for asylum-seekers to be able to gain opportunities for self-reliance as soon as possible and to benefit from counseling and proper information regarding the host country and the asylum procedure.

While Landau and Duponchel (2011) argue that there is no need for specific policies targeting refugees with the purpose of integration, but rather the South African government needs to develop de quality of housing and services, and reduce poverty overall in areas that receive asylum-seekers and refugees, UNHCR (2009:9) argues that persons of concern have particular needs and face specific challenges in the process of integration “due to past experiences of persecution, flight and exile.”

South Africa, through its legislation is offering asylum-seekers the opportunity of self-reliance and is including them in the local community by not confining refugees into camps. However, it is important to ponder also on the difficulties that a refugee may encounter in the absence of proper reception conditions, taking into consideration that he or she may not speak the local language.

In South Africa, job-seekers cannot apply for formal residence in the country unless they have a job offer previous to their arrival in the country. As a result, one can apply either for a tourist visa, a student visa, or enter South Africa in an irregular manner. These barriers make most migrants very vulnerable in the face of law, but also expose them to all sorts of exploitative situations.

Even though asylum-seekers and refugees have the right to work, the constant corruption within the Department of Home Affairs leads to the inability to be in the possession of proper documentation. Although documentation does not help improve the levels of discrimination and xenophobia asylum-seekers and refugees encounter, without it, they cannot apply for jobs in the formal sector, attend school, or benefit from emergency medical care. Without documentation, owning an informal business is against the law; even “petty-trade or walking in the street becomes illegal in the state’s eyes without required papers” (Landau, 2005:6).

Even when in the possession of adequate documentation, migrants in South Africa face discrimination and abuses on the labor market. The International Federation for Human Rights (FIDH) has conducted a study that shows the levels of exploitation migrants are subject to. As a result, it was found that migrant teachers were paid between 600 and 800 Rands ($60-80) and sometimes as little as 350 Rands ($ 35) per month. The lack of papers often results in migrants and asylum-seekers working in the lowest income jobs such as construction, mining, or agriculture and due to the “illegality” of their stay, most times they will not seek to claim their rights, or report abuses to the police. Moreover, some employers actually seek for undocumented migrants as they are more “docile” and “hard-working” (FIDH, 2008).

One Zimbabwean migrant teacher states that: “I am working now as a teacher in a private school since February 2007. (…) The work conditions are bad. They pay me 350 Rand per month. No other allowances whatsoever. Because they say for the first two weeks of the months I was on probation and they do not pay for probation. They did not commit themselves to pay increase in coming months. I did not sign any contract. The working hours is 8 am to 2:30pm. But they only pay up to 1:30pm. I think the 3000 Zimbabwean dollars were far better than the 350 Rand I am getting now” (FIDH, 2008:14).

With respect to the access to education, the Constitution of South Africa guarantees the right to basic education. The government has the obligation to ensure that this right is accessed by all children and shall not impede the access to education. Also, the 1998 Refugees Act provides the legal basis on which “refugees as well as refugee children are entitled to the same basic health services and basic primary education which the inhabitants of the republic receive from time to time (Refugees Act, 1998:27(g)). However, the Immigration Act of 2002 contravenes the purposes of International treaties and the constitution, stating that the DHA should “inspect institutions of learning and ensure that illegal foreigners are not enrolled therein” while section 39 (1) states that “no learning institution shall knowingly provide training or instruction to (a) an illegal foreigner; (b) foreigner whose status does not authorize him or her to receive such training.”

The Children’s act of 2010 does not make any reference to the rights that foreign children have in the RSA, especially refugee and asylum-seeker children since their rights are not properly addressed in the Refugees Act. However, the Department of Home Affairs said it is an improvement in the legislation since it refers to all children irrespective of their status in the republic (Crush and Tamodzera, 2013).

As shown previously, there are conflicting aspects between the inclusiveness of most South African legislation and the Immigration Act that sets restrictions for immigrants in a wide array of situations. As a result, Crush and Tamodzera (2013) show that migrant children, irrespective of their status in the republic face discrimination and xenophobia in schools from enrollment, as the South African law stipulates that enrolment is done subject to the presentation of a birth certificate or a copy issued by DHA, to class room.

It is worth mentioning that many asylum-seekers and refugees are not in the possession of documents, also some countries, especially those producing refugees that don’t have stable governments or proper institutions, sometimes do not issue birth certificates; thus, it becomes very hard for refugee children to enroll into South African Schools.

Thus, although the South African legislation provides for equal rights, protects against discrimination and grants asylum-seekers and refugees a wide array of rights, the enforcement of the legislation into practice remains problematic. In the absence of government promoted action aimed at educating the employees in the public sector, such as schools, hospitals and banks, with respect to the rights that refugees and asylum-seekers are entitled to, the prospect of those benefiting from an actual integration in the South African society remains low.

# Conclusion

The xenophobic attacks that became central to the academic research after 2008 have not been a new, increasing phenomenon in South Africa, but rather have been a presence since early 1994. The collective nature of this violence has been also increased by the government actions – through official statements and restrictive immigration policy that have in turn created the general idea, among South Africans that immigration is indeed negatively impacting the transition to democracy and the building of services and institutions meant to alleviate the poverty and inequality among South African citizens.

The violence that is collectively perpetrated against migrants, especially by destroying their businesses, seriously impairs the prospect that those will achieve meaningful livelihood in South Africa and thus hinders the prospect of local integration. The violence corroborated with the general negative, if not xenophobic perceptions that South Africans share on immigration shows that there is no willingness from the community’s part to help migrants become part of the society and play a meaningful role in the community, thus, further hindering the prospect of integration.

The violence oriented at migrants increases their already vulnerable position in the South African society and government’s choice not to address the conflict through policies that would enhance dialogue among the parties, but to promote more and more restrictive policies towards immigration and to indirectly show support and fuel the attacks shows a lack of willingness to integrate migrants as part of the South African society.

Although the levels of corruption existent in the Department of Home Affairs are not a direct expression of xenophobia, the Government’s inaction towards tackling the corruption cases and training the case officers so that they can understand and correctly apply the international legislation is showing that the government of South Africa is not yet ready and not willing to commit to its responsibility to protect.

In turn, the rising trends in hatred towards the foreigners present in South Africa, corroborated with the Government’s inaction have seriously impacted South Africa’s ability to protect those in need. Although the South African legislation is in line with the international standards for the protection of refugees, the discrepancies between the asylum law and the immigration law leads to the creation of confusions among the public service employees and law enforcement bodies.

Because there are no clear specifications on how the Immigration Act should be applied in relation to the Refugees Act, many schools and hospitals do not understand the difference between a migrant whose rights are specified under the Immigration Act and a refugee whose rights are specified under the Refugee Act.

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1. This paper uses the term “race” in the absence of a better term that underlines the physical differences between individuals coming from different regions around the globe. It is not intended to imply that individuals are biologically, intelectually or in terms of rights they posess any different based on the physical appearence [↑](#footnote-ref-1)
2. Asylum seekers, refugees, beneficiaries of international protection (subsidiary protection, temporary humanitarian protection, tolerated) and stateless persons. [↑](#footnote-ref-2)
3. All SAMP Migration Policy Papers are available for download at: <http://www.queensu.ca/samp/sampresources/samppublications/> [↑](#footnote-ref-3)
4. race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth [↑](#footnote-ref-4)
5. [↑](#footnote-ref-5)