

of possibly tens of thousands of displaced non-nationals, the informality of affected areas would inevitably have posed an insoluble dilemma. Not all shacks are on declared stands, and there are few records of the ownership of shacks in areas that have not been audited for resettlement to formal housing. In this context, how would an official determine whether the resident of a shack was legitimate? Add to this the proliferation of backyard accommodation and it is clear that there are thousands of shacks for which there is no record of existence, let alone ownership. These challenges were reported to the SAHRC by a ward committee member in Ramaphosa – where shacks were appropriated in the peripheral “Road Reserve” area – and corroborated by disaster management staff in Ekurhuleni.<sup>135</sup>

In some affected areas – such as in Masiphumelele and Cato Manor – police attempted to evacuate both non-nationals and their possessions, in order to provide a measure of protection of their property. In Masiphumelele, the evacuation of *spaza* stock belonging to Somali businesspeople was undertaken proactively through the establishment of an advance plan in consultation with the local business forum, but for those nationalities not visible to police through participation in community structures, there was less protection.<sup>136</sup> In addition, police were constantly faced with the dilemma of responding to more than one incident – having to interrupt loading of stock into a vehicle in order to attend to another incident nearby.<sup>137</sup> While police stated unequivocally that life was prioritised over property, it is evident that the evacuation of goods divided police attention.

In the Masiphumelele case, storage of stock became difficult, and at a certain point stock had to be transferred to a second storage facility that created difficulties when business owners wished to reclaim their stock. Somali shopkeepers told the SAHRC that people stole merchandise as it was dropped off in the field outside the Ocean View Community Hall where it was to be stored.<sup>138</sup> Any plan to evacuate stock would therefore need careful planning and cooperative effort, especially if attacks were to spread, once again, across settlements within a limited spatial area. For instance, how would the evacuation and reclamation of stock have been practically coordinated in an area such as Primrose or Germiston, for instance, where

135 Informal discussion with ward committee member in Ramaphosa, 18 December 2009; meeting with disaster management and Metro police staff, Ekurhuleni, 8 January 2010.

136 Interview at Ocean View Police Station, 9 December 2009.

137 Interview at Ocean View Police Station, 9 December 2009; discussion with Station Commissioner of Ocean View Police Station, 20 January 2010.

138 Focus group with Somali nationals, Baptist Church, Masiphumelele, 8 December 2009.

multiple settlements were affected and thousands of people displaced? Such efforts should probably not be undertaken without dedicated transportation vehicles and loading staff, and even these would require a security escort, bearing in mind that vehicles – including aircraft – have been damaged beyond operation by crowds armed only with stones or other makeshift weapons.<sup>139</sup>

### Steps already taken to address the issue

As part of the disaster response in Ekurhuleni, it is reported that the **Department of Housing (now Human Settlements)** used their existing contractors, the Red Ants, to rebuild a number of shacks in six settlements (Everest, Tsakane, Dikathole, Marathon, Makause and Daveyton) in readiness for reintegrating non-nationals. Where this was done in advance of reintegration, security services were paid to protect the rebuilt shelters until the reintegrating tenants arrived.<sup>140</sup>

Public Order Policing capacity has been under review by **SAPS** since the May 2008 attacks, and the units are all placed in strategic proximity to high-risk areas. Operational membership has also been increased from 2,595 members in 2008 to 3,591 in 2009 with additional provision for 5,661 in 2010. Preparations for the 2010 World Cup have also contributed to this growth in public order policing capacity.

**Station-level police staff** are receiving tactical training in the management of “medium-risk incidents” which include public violence and related situations. Currently, around 5,000 members are being trained.<sup>141</sup>

**Provincial police** have been “sensitised to develop contingency plans in conjunction with the Government Departments and NGOs” with a view to conducting communication forums at provincial level to address prevention of and reaction to attacks on foreign nationals.<sup>142</sup>

### Recommendations

The SAHRC recommends that:

- The **National Commissioner of Police** require of provincial police offices contingency plans for a full range of social conflict scenarios, from minor incidents where a single dwelling may be torched, to a community-scale incident, to an outbreak affecting several communities

139 Interviews at Ocean View Police Station, 9 December 2009; case docket no. 253/05/2008, Reiger Park Police Station.

140 Meeting with disaster management and Metro police staff, Ekurhuleni, 8 January 2010.

141 Assistant Commissioner B. Luke, Submission to the SAHRC, 11 January 2010, p. 2.

142 Assistant Commissioner B. Luke, Submission to the SAHRC, 11 January 2010, p. 2.

in sequence. This process should be supported by inter-provincial communication and debate. The Monitoring and Evaluation Directorate of the Civilian Secretariat of Police, which is currently under development, could play a future role in monitoring and assessing such plans.

- The **National Commissioner of Police** revisit the standing orders and operational protocols currently used in the policing of social conflict in light of the findings of this report and the experience of station- and provincial-level police. Any such review should be undertaken cognizant of the tensions underlying such conflicts and the need to manage these rather than simply suppress them. This recommendation is given additional weight by recent research findings that suggest that measures to suppress protests promote the outbreak of violence.<sup>143</sup>
- The **Department of Human Settlements** work towards the increased formalisation of informal settlements, particularly those at risk of social conflict (see section 2.6).
- **Provincial Departments of Community Safety** promote the establishment of links between local police stations and non-national groups so that plans can be made to protect them in the case of future attacks (see section 2.4).
- Every effort be made to boost the visibility of policing following an outbreak of violence against non-nationals. **SAPS** should immediately deploy all backup forces to areas initially affected and the **SANDF** deployed as soon as violence spreads to a second locality (see section 2.3).
- Given a degree of social cohesion and trust in the judicial process (see sections 2.4 & 4.3), deserted homes in unmanaged informal areas be protected through neighbourhood watch campaigns and hotlines to local police, facilitated by **Departments of Community Safety** and **station-level police**.

## 3.2 Administrative Injustice

### 3.2.1 Implementation of the Disaster Management Act 2002

#### Finding

Documentary evidence shows that the Disaster Management Act 2002 (DMA) was not fully implemented, which most likely exacerbated problems of leadership, coordination and funding that led to lapses in protection and/or service provision to displaced persons.

<sup>143</sup> Sinwell, Luke; Kirshner, Joshua; Khumalo, Kgopotso; Manda, Owen; Pfaffe, Peter; Phokela, Comfort & Runciman, Carin. (2009). *Service Delivery Protests: Findings from Quick Response Research on Four 'Hot-Spots' – Piet Retief, Balfour, Thokoza, Diepsloot*. Centre for Sociological Research, University of Johannesburg, p. 1.

#### Explanation

Submissions to the SAHRC provide evidence that the DMA was not fully or consistently implemented. For instance, the fact that a provincial disaster was not declared in KwaZulu-Natal despite the fact that it qualified as a provincial disaster under the Act suggests that provincial officials used their own discretion to assess the magnitude and severity of the disaster rather than holding to the definitions of the Act. The letter of the DMA suggests that the NDMC's classification of a disaster should precede any official declaration by a municipality or province. This classification designates which of these tiers of government will be responsible for the management of a disaster regardless of whether or not a disaster is in fact declared. Yet it appears that the NDMC failed to immediately classify the disaster according to its actual or potential magnitude and severity, classifying the disasters only after the declaration of disasters by provinces. Until an alternative classification is made, all disasters remain local disasters, which left room for provinces to evade responsibility for disaster management even where by DMA definition the disaster was of a magnitude requiring provincial assistance.<sup>144</sup>

#### Regulatory Framework

The Disaster Management Act 2002.

#### Recommendations

The SAHRC recommends that:

- **Provincial disaster management** officials familiarise themselves with the definitions of the DMA and, having done so, adhere to the spirit as well as the letter of the law in making recommendations to the NDMC with regard to classification, and in enacting declarations of disaster.
- The **NDMC** ensure that it classifies social conflict disasters immediately according to both their actual and potential magnitude and severity, as required by legislation.

### 3.2.2. Abuses of Process

#### Finding

Abuses of process were evident in the treatment of refugees and asylum seekers who refused to register for temporary immigration status at Glenanda site in Gauteng.

<sup>144</sup> Compare, for instance, Proclamation by the Premier (Gauteng). (No. 1, 2008.) DECLARATION OF PROVINCIAL STATE OF DISASTER IN TERMS OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002). Provincial Gazette Extraordinary, 5 June 2008, to Classification of a Disaster: Gauteng Province. (No. 641, 13 June 2008). Staatskoerant, 13 Junie 2008, No. 31130.

## Explanation

The following concerns emerge from submissions and background documents submitted to the SAHRC with regard to the treatment of displaced persons who refused to register in the temporary permit process undertaken at Glenanda (Rifle Range) displacement site:

- Confusing statements made by the DHA suggesting that failure to register for temporary permits could result in the revocation of refugee status.
- Arrest of refugees who refused to register for temporary permits.
- Arrest of refugees stranded without shelter or transport on the R28.
- Use of minor charges to pressure refugees to surrender their refugee status.
- Failure to exhaust internal appeal remedies before deporting asylum seekers rejected during a fast-tracked status determination process.<sup>145</sup>

Further alleged injustices include:

- Confiscation of immigration documents from refugees and asylum seekers at the Lindela Repatriation Centre.
- Detention of refugees at Lindela Repatriation Centre.
- Use of minor charges to revoke refugee status.<sup>146</sup>

The individuals – including individuals holding refugee permits – were taken to Lindela for status determination. Those whose refugee or asylum seeker status was confirmed were not provided with transport to leave the centre and as result a large number of people were stranded on the R28 nearby the repatriation centre. The male displaced persons were then arrested on charges of obstructing traffic. They were asked to sign affidavits relinquishing their refugee status, with the assurance that charges would be dropped for anyone who signed the affidavit, part of which specifies that the decision to relinquish refugee status is made “without any undue force or influence.” The displaced persons received legal advice not to sign the affidavits, and the charges were then withdrawn. However, the men were detained at Lindela and their documents confiscated. The facility imposed obstructive conditions upon the interaction of legal representatives with the group, making consultations difficult. Some of the men were illegally deported from the facility. LHR launched an

145 Snyman, Gina. [2008]. Affidavit sworn under oath, 16 September 2008. *Lawyers for Human rights v Minister of Home Affairs and four other respondents*; Amnesty International. [2008]. ‘Talk for us please’: Limited Options Facing Individuals displaced by Xenophobic violence. Amnesty International AFR 53/012/2008, p. 18-19.

146 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009.

urgent application against the DHA for this practice; however, the department refused to cease deportations of the group until final adjudication of the matter.<sup>147</sup>

The SAHRC questions the legal grounds of the detention of refugees and asylum seekers whose status had been established, and asserts that deportations of refugees and asylum seekers is unlawful except in a very limited range of cases (see Regulatory Framework below). In addition, the lack of goodwill shown by the DHA in the application against deportations runs contrary to the Immigration Act which asserts the priority of managing migration in a manner that upholds a human rights culture.

## Regulatory Framework

South Africa is a signatory to the **1951 UN Refugee Convention** which enshrines the principles of *non-refoulement* (also see section 1.4):

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Article 33:1).

Deviation from the principle of *non-refoulement* can be made only in relation to refugees who constitute “a danger to the security of the country” or who, having been convicted by a final judgement “of a particularly serious crime”, constitute a danger to the community (Article 33:2).

The **1998 Refugees Act’s** provision for the removal of a refugee from the Republic on grounds of national security or public order (s28:1 & 2) is therefore made subject to s2 of the Act, which contains the general prohibition on *refoulement*, and international law. Under this legal regime there is no legal basis for threats to arbitrarily withdraw refugee status, or withdrawal of such status on the grounds of a minor offence.

The Refugees Act allows for the cessation of refugee status where a refugee “voluntarily reavails himself or herself of the protection of the country of his or her nationality” (s5:1a). The *non-refoulement* principle requires that such a process be genuinely voluntary, and subjecting arrested refugees to pressure to voluntarily relinquish their status constitutes an abuse of the provision for cessation under s5:1a.

147 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p. 17-18.

The Refugees Act states that a refugee “enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution” (s27:b). This protects refugees against:

- Arbitrary deprivations of freedom (12:1a); and
- Detention without trial (12:1b).

Finally, the **Constitution** states that “everyone whose rights have been adversely affected by administrative action has the right to be given written reasons” (33:2). It also provides that arrested, detained and accused persons have the right “to choose, and to consult with, a legal practitioner” (35:2b).

### Steps already taken to address the issue

Records of the R28 matter held by the SAHRC include communications from the DHA where the Department refused to respond to questions presented by LHR as the representatives of detained refugees and asylum seekers. LHR instituted a court action against the Minister of Home Affairs, the Director-General of Home Affairs, Bosasa (PTY/LTD) T/A Lindela Holding Facility and the Director of Deportations.

A great deal of litigation has been entered into over continuing allegations of administrative injustices within the immigration management system, including arrest and detention of asylum seekers and refugees, irregular deportations, and xenophobic attitudes within the refugee status determination system.<sup>148</sup> This suggests systemic problems within various structures of the DHA.

### Recommendations

The SAHRC recommends that:

- **DHA** evaluate the action taken with regard to the Glenanda/R28 group and develop a lessons learned document to prevent similar administrative injustices from recurring in the case of a future scenario of a similar type. These documents should be submitted to the SAHRC within a reasonable timeframe and not later than six months after the issuing of this report (ie, by 17 September 2010);
- Beginning in the year 2010/2011, **DHA** compile and produce to the SAHRC an annual assessment of cases brought against it and/or its contractors with respect to the status determination of asylum seekers and the arrest, detention and deportation of immigrants, including:
  - An assessment of the basis of each case;
  - The outcome of each case;

148 LHR has indicated that it holds records of over 20 such cases in the 2009/2010 year. Personal communication from Kaajal Ramjathan-Keogh, 26 January 2010.

- The attribution of responsibility in each case;
- What action the department has taken to rectify any irregularities identified (for instance, through disciplinary action, training or other interventions); and
- What action the department has taken to ensure continued monitoring and follow-up in relation to the identified irregularities.

- **DHA** ensure that detainees at Lindela have access to legal counsel prior to deportation and eliminate undue administrative delays to such consultation.
- **DHA** acknowledge, take responsibility for, and be accountable for the administrative injustices flowing from inconsistency in its information systems. Immediate steps must be taken to counter these. Information systems across the country’s refugee reception offices and the Lindela Repatriation Centre need to be integrated to prevent the detention of refugees and asylum seekers in the absence of their physical documents.
- **DHA** ensure that all immigration, refugee reception and status determination officials, including the staff of its contractors at Lindela, adhere to the Immigration Act 2002 and Refugees Act 1998.
- **DHA** ensure that all officials, including staff of its contractors, work with constitutional principles foremost in their minds and work cooperatively and in good faith with legal service providers to ensure that the right to individual liberty is protected.
- **DHA** produce to the SAHRC an annual assessment of its progress in actioning the above recommendations.
- Given the shortage of SAHRC staff to carry out regular and systematic monitoring of the Lindela facility, the **SAHRC** enter into a memorandum of understanding with a civil society legal service provider to perform this function on its behalf. There are indications that a separate review mechanism that monitors immigration detention activities may be established in the future, but an MoU would provide an interim measure to monitor administrative injustice at the centre. However, there remains a need for the SAHRC to develop its monitoring capacity to enable it to monitor possible violations of the human rights of non-nationals at Lindela and elsewhere.

### 3.2.3. Inadequacies in DHA Processes

#### Finding

Weaknesses in the engagement of DHA with displaced persons may have resulted in administrative injustices against displaced persons.

## Explanation

From submissions of background information and other documentary evidence considered during the SAHRC investigation, the following concerns emerged with regard to DHA processes during the 2008 crisis:

- Displaced persons were not provided with sufficient information with regard to the implications of registration for temporary immigration status for those already in possession of legal status. Nor did displaced persons have information with regard to asylum procedures and the timing of visits by the DHA to displacement sites.<sup>149</sup>
- Insufficient, and in some cases no, interpreters were provided to assist in the accelerated asylum determination process instituted in displacement sites.<sup>150</sup> This runs counter to the provisions of the Refugees Act 1998 in respect of asylum applications.
- There was insufficient DHA capacity to assist all displaced persons who wished to regularise their immigration status after losing documents as a result of their flight from South African communities.<sup>151</sup> The economic and physical vulnerability of displaced persons made it difficult for them to access often distant DHA offices in order to obtain new asylum documents or appeal in the case of rejection of their asylum applications (as provided for by the Refugees Act). The limited access of legal service providers to displacement sites suggests that the right to equality before the law was not realised for some displaced persons who might have been left undocumented and at risk of deportation and possible *refoulement*, especially given the questionable quality of rejection letters in the accelerated process.
- There were clear irregularities in the accelerated refugee status determination process. Certain refugees who already had status received a rejection letter despite the fact that they had not been interviewed during the process. Rejection letters of poor quality, including factual errors, were received by many applicants.<sup>152</sup> The SAHRC notes that under such circumstances the high number of rejections – 98% according to Amnesty International<sup>153</sup> – raises questions of administrative justice.

149 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p. 6; UNOCHA, 2008, p. 10.

150 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p. 7; Amnesty International. (2008). 'Talk for us please': Limited Options Facing Individuals displaced by Xenophobic violence. Amnesty International AFR 53/012/2008, p.14; UNOCHA, 2008, p. 11.

151 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, pp. 7-8; Amnesty, 2008, p. 15.

152 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p. 7; Amnesty International. (2008). 'Talk for us please': Limited Options Facing Individuals displaced by Xenophobic violence. Amnesty International AFR 53/012/2008, p. 13; 15-16.

153 Amnesty, 2008, p. 13.

- The Refugee Relief Fund contained no monies when approached by legal service providers. The latter were also informed verbally that the DHA had taken a policy decision not to grant such funds to victims of the attacks.<sup>154</sup>

## Regulatory Framework

Administrative justice would require that procedures relating to application for asylum and status determination were carried out in line with the provisions of the *Refugees Act*. It is clear from multiple sources that this did not occur.

## Steps already taken to address the issue

The DHA's submission to the SAHRC investigation did not include any evidence of evaluation or introspection on its approach to asylum applications and status determinations during the 2008 period. It therefore appears that no steps have been taken to better prepare the DHA for the resource requirements of administratively just mass status determinations and application processing.

## Recommendations

The SAHRC recommends that:

- The *DHA* conduct an evaluation of its performance during the 2008 crisis and subsequently draw up an action plan for improving future capacity to manage such a situation.
- The *DHA* implement disciplinary procedures with respect to officials who were responsible for departures from the administrative procedures outlined in relevant legislation or whose actions may have led to *refoulement*.

### 3.2.4. Refoulement

#### Finding

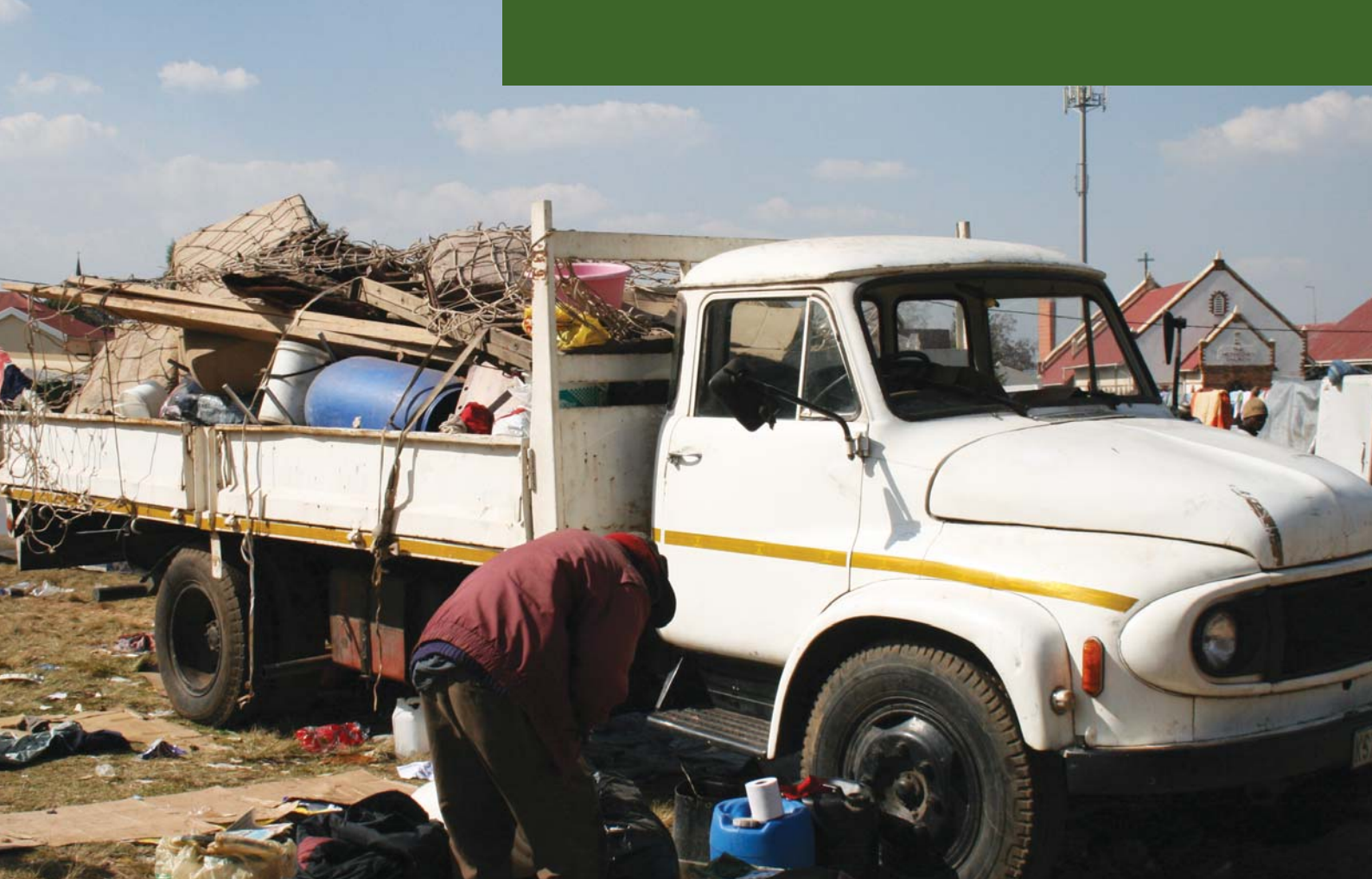
There were inconsistencies across provinces in the approach taken to "voluntary repatriation," and little effort by the DHA to curb constructive *refoulement*.

#### Explanation

A report by the CXU acknowledges the moratorium on deportations during the 2008 crisis. It notes that DHA transport could not be used for individuals opting to repatriate because of the risk that "asylum seekers and refugees who want to go home voluntarily may be subjected to persecution in their countries of origin."<sup>155</sup> Joint Operations Centres (JOCs) were advised to consult the UNHCR in this regard and repatriate people using their own transport.

154 Fakir, Naseema. (2009). Case Report January 2009 – Naseema Fakir. Legal Resource Centre, p.2; discussion with Naseema Fakir, Legal Resources Centre, 14 January 2010.

155 DHA, Report of Xenophobic Attacks, p. 4.



Ekurhuleni disaster management staff told the SAHRC that due to the government's stance against repatriation it did not provide any transport. Instead, NGOs conducted repatriations. On the other hand, disaster management in eThekweni did indeed procure transport for the purpose of voluntary repatriation, and recorded numbers of persons repatriated.<sup>156</sup> The majority repatriated were from Tanzania and Malawi, which are not traditionally "refugee-sending" countries. More problematic, perhaps, was the large number repatriated to Zimbabwe. It is a matter of grave concern that the DHA and the National Immigration Branch are listed as part of the "voluntary repatriation cluster" in documents submitted by eThekweni's city manager.<sup>157</sup> This, along with evidence presented in section 3.2.2 of attempts to pressure asylum seekers and refugees into waiving their status and repatriating, suggests that the attitude taken to possible *refoulement* via voluntary repatriation was not consistent across provinces during the 2008 crisis.

It is worth noting that the DHA's stance against *refoulement* should ideally have extended further, into efforts to guard against conditions that might amount to constructive *refoulement* (where refugees opt to return to danger in their home country rather than enduring the ongoing uncertainty

and indignity of a prolonged and contested displacement). This would have included proactive collaboration with other departments as well as effective and efficient performance of its own responsibilities under the disaster circumstances. Considering the DHA's apparent lack of capacity to contribute to the management of the crisis (see section 2.8 of this report), there was a serious shortfall in the latter respect.

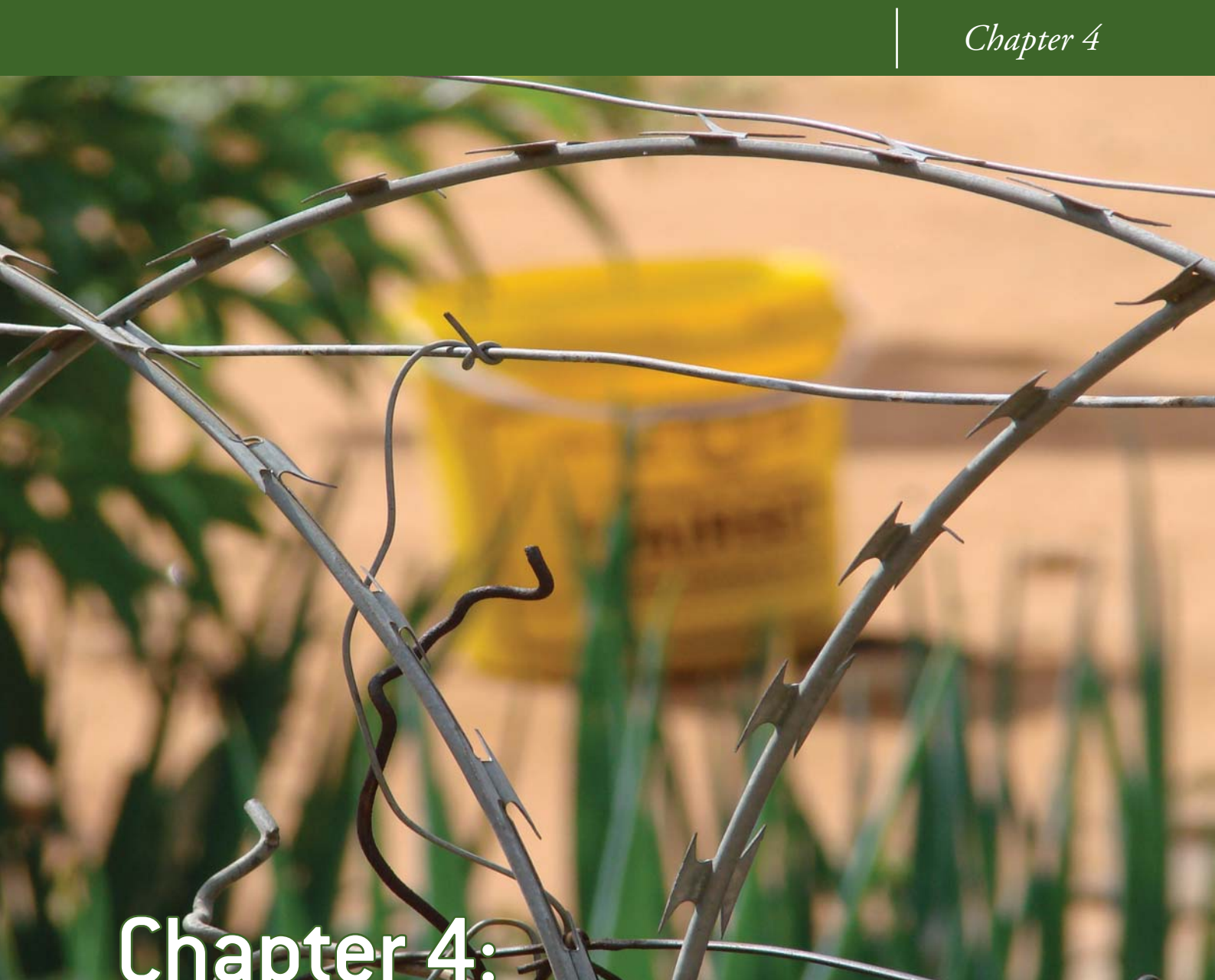
## Recommendations

The SAHRC recommends that, in its thorough and transparent evaluation of the challenges faced during the 2008 crisis and subsequent action plan (see section 2.8):

- The **DHA** formulate and adhere to uniform rules and procedures with regard to voluntary repatriation during a displacement of non-nationals.
- In line with section 41 of the Constitution, the **DHA** develop cooperative relations with key structures of national and provincial government to facilitate a speedy response to displacement and a quest for durable solutions for displaced persons before terminating government shelter and assistance.

156 Submission from Eric Apelgren, International and Governance Relations, eThekweni Municipality, pp. 1-2.

157 Submission from Eric Apelgren, International and Governance Relations, eThekweni Municipality, p.10.



## Chapter 4: After the Crisis

This chapter examines ongoing issues that may have arisen during the crisis but extended into the future from a durable solutions perspective.

## 4.1. Reintegration

### Finding

“Reintegration” of displaced persons into South African society and communities from which they were displaced did not occur in a consistent or sustainable way and is not being adequately monitored.

### Explanation

The term “reintegration” is deceiving, as it presumes that non-nationals who are displaced were previously integrated into South African society, when in fact their displacement suggests very strongly that such integration was never achieved.<sup>158</sup> In this report, the SAHRC uses the term “reintegration” only because this has become the term popularly associated with the return of displaced persons to South African communities.

There are social, economic and in some cases psychological aspects to integration into any community.<sup>159</sup> Oxfam has funded a report on four small-scale reintegration programmes implemented by faith-based and non-governmental organisations, which examines some of the socio-economic components of such programmes. However, the SAHRC focuses in this report primarily on reintegration as it relates to the right to security of person, which can only be realised through justice and the rule of law (which are in turn related to the issues of governance discussed in sections 2.5 and 4.3 of this report). Considering the limitations of the judicial process in respect of the May 2008 attacks, where:

- Far fewer cases were opened than actually occurred,<sup>160</sup>
- Suspects – some of whom were members of informal community governance structures – were released into communities on bail,<sup>161</sup> and
- A substantial number of cases were withdrawn due to difficulty tracing or obtaining cooperation from witnesses and complainants (see section 4.4 of this report),

it is the view of the SAHRC that, where reintegration was not

158 Opferman, Lena. (2009). Recommendations for implementing reintegration projects for displaced foreigners based on a comparative analysis of four pilot projects implemented in Johannesburg, Cape Town and Durban between August 2008 and February 2009. Cape Town, p.4. Retrieved on 25 January 2010 from <http://www.google.co.za/search?hl=en&source=hp&q=Recommendations+for+implementing+reintegration+projects&btnG=Google+Search&meta=cr%3DcountryZA&aq=f&ogq=>

159 Opferman, 2009, p. 3.

160 Interview with Ocean View police officer, Ocean View Police station, 9 December 2009; interview with two police officers, Cato Manor Police station, 11 December 2009.

161 CoJ Migration Mayoral Sub-Committee. (2008). Annexure A3: Performance Highlights, 9 October 2008, p. 30.

carried out in a systematic, proactive manner by government, the right to security of person was put under grave risk.

The following issues came to the attention of the SAHRC. Seen together, they contribute to the SAHRC’s finding on the quality of reintegration in these respects after the 2008 violence:

- ***The deliberate withdrawal of essential services from displacement sites in order to indirectly compel displaced persons out of government protection.***<sup>162</sup>

This concern arises specifically in relation to Gauteng, where site management were instructed to reduce services to a minimum in order to create a push factor out of the sites.<sup>163</sup> The SAHRC is concerned to note in a report submitted by the Gauteng Premier’s Office that “the quality and quantity of resources was intentionally reduced over time, once the immediate crisis was over, to move towards closure and reintegration.” This is listed as something that “worked well” in terms of the Province’s mobilisation of resources.<sup>164</sup> Yet in fact it caused a great deal of “self-reintegration” by displaced persons<sup>165</sup> in a context where the sustainability of peace and the rule of law was tenuous at best. Unmonitored self-reintegration limits the prospects for the monitoring and management of the subsequent safety of displaced persons.

- ***Disputes over the responsibility of different tiers of government for the care and protection of displaced persons may have affected access to essential services within displacement sites, indirectly encouraging unmonitored and unmanaged self-reintegration.***<sup>166</sup> Such disputes arose in Gauteng (for instance between the City of Johannesburg and Gauteng Provincial Government;<sup>167</sup> between Tshwane Municipality and the Gauteng provincial government with regard to the status of the Akasia site),<sup>168</sup> Western Cape (between City of Cape Town municipality and the Western Cape Provincial Government with regard to their respective roles in humanitarian

162 Lawyers for Human Rights Refugee and Migrant Rights Programme. (2009), p. 5.

163 Igglesden et al, 2009, p. 33.

164 Gauteng Department of Local Government, undated, p. 6.

165 Gauteng Department of Local Government, undated, p. 14; Ekurhuleni Metropolitan Municipality. (Undated). Reintegration Plan; Ekurhuleni Metropolitan Municipality. (2008). Final Report on the Xenophobia Outbreak / Provincially Declared Disaster and the Re-Integration [sic] of Victims to their Communities for the Period 23 June 2008 to 3 October 2008: Ekurhuleni Metropolitan Municipality, p. 5.

166 Lawyers for Human Rights Refugee and Migrant Rights Programme. (2009), p. 5.

167 City of Johannesburg Mayoral Sub-Committee. (2008). Comprehensive Report on the Community Conflict (Xenophobia) Reintegration Programme in the City of Johannesburg, 16 October 2008, p. 4.

168 Igglesden et al, 2009, p.27.



assistance and the preferred form of shelter)<sup>169</sup> and in KwaZulu-Natal (where eThekweni municipality argued it had “no authority, resources and capacity to establish and manage refugee centres” but would support “a provincial and national government-led programme”).<sup>170</sup> The SAHRC notes that such disputes may have created conditions that compelled displaced persons to exit government protection in a manner contrary to the United Nations Guiding Principles on Internal Displacement.

- ***In some instances, legal service providers were prevented from accessing displacement sites.*** The SAHRC notes that this problem, brought to its attention by LHR, was particularly severe in Gauteng.<sup>171</sup> Such restrictions of access limit displaced persons’ access to information, thus threatening the realisation of informed and consensual return, reintegration, voluntary repatriation or resettlement as envisioned by the UN Guiding Principles referred to above. Government submissions to the SAHRC do not reflect on this issue, possibly because management of the Gauteng sites was outsourced to contractors.
- ***Gauteng province did not communicate its plans and activities with regard to reintegration, straining the relationship between government and civil society, and preventing Chapter 9 institutions from playing their mandated oversight roles in this process.*** Due to the lack of communication forthcoming from Gauteng Province in particular with regard to reintegration planning, civil society brought a case against the province (see following bullet point). Chapter 9 institutions were also unable to monitor the rights of displaced persons returning to affected communities due to the lack of communication about reintegration activities. For instance, in a media release, the CGE urged government to communicate their plans, observing that “being better informed on what is intended on this issue will enable us to work within an understandable scope.”<sup>172</sup>

A poignant instance of government failures in this area is reported in a civil society evaluation. It cites minutes of a meeting where “the SAHRC and the Parliamentary Task Team probing the attacks on non nationals met to discuss the issue of reintegration,” which “national, provincial and municipal government representatives did not attend.”<sup>173</sup>

- ***Gauteng province closed displacement sites in September 2008 in the absence of a safe and sustainable plan for their return to South African communities, in violation of its constitutional protection obligations and international guidelines, and contrary to the terms of an interim ruling of the Constitutional Court, which had ordered on 21 August that sites must remain open without any reduction in services until the court made a further ruling.*** Having perused the Constitutional Court interim ruling of 21 August 2008, the SAHRC is unable to determine on what legal grounds the Gauteng Provincial Government closed sites as this appears to be in direct contradiction to provisions of the ruling that it would “not forcefully remove any resident from his or her shelter or take down such shelter other than for the purpose of consolidating sites or moving such occupants to facilities pending their repatriation”<sup>174</sup> until the application for leave to appeal was decided.

A report on the Gauteng Provincial Government’s response to the attacks treats the closures as unproblematic, citing in error “the court ruling that shelters will be closed on 30th September.”<sup>175</sup> A report by the Gauteng Provincial Government, provided by the Ministry of Cooperative Governance and Traditional Affairs, also notes the closures unproblematically, claiming that the Constitutional Court “upheld government’s right to close the shelters”<sup>176</sup> – a fallacy that could only result from a reading of one clause of the ruling in isolation from the remainder. On 30 September, when sites were closed, the matter had been postponed until 28 November 2008 and therefore the final determination of the application for leave to appeal was still pending, and the stay on closure therefore still in place.

169 Igglesden et al, 2009, p.45.

170 Forced Migration Studies Programme Database on Responses to May 2008 Xenophobic Attacks in South Africa. Ed. Tamlyn Monson. Ver 1: 9 January 2009, entries 445 and 469; Letter from Eric Apelgren, Head: International and Governance Relations, eThekweni Municipality, to Kathy Govender, SAHRC Commissioner, 1 August 2008.

171 Igglesden et al, 2009, p.141; Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p.8.

172 CGE. (Undated). Media Statement: Gender Commission Calls for Renewed Solutions on Xenophobic Situation, p. 1.

173 Igglesden et al, 2009, p. 34.

174 *Mamba & 5 Others v Minister of Social Development and 7 Others*. Constitutional Court of South Africa, Case No: CCT 65/08.

175 Gauteng Department of Local Government, undated, p. 14.

176 Russell McGregor on behalf of Gauteng Provincial Government. (Undated). Report on the Support by Gauteng Provincial Government to Victims of Xenophobic Attacks – November 2008.



Submissions by Gauteng province and municipalities indicate that efforts were made to engage with communities of return both by the City of Johannesburg and by the Independent Development Trust, which was contracted to undertake long-term community integration initiatives. This is evidence of an attempt at safe and sustainable reintegration. However, the SAHRC notes LHR and media reports of attacks on returning displaced persons. It also notes the Gauteng Provincial government's admission that some community leaders were soliciting payments to allow reintegration and that there was "no clear integration strategy", which created problems in dealing with South Africans who had occupied the deserted homes of displaced persons.<sup>177</sup> From submissions to the SAHRC it appears that this was likely a result of premature closure of the displacement sites: City of Johannesburg records, which indicate substantial research and planning for safe and sustainable reintegration, reiterate "an overwhelming rejection of the notion [of] reintegration by communities" and the urgent need "to exercise caution in the manner in

177 Gauteng Department of Local Government, undated, p. 13.

which this process is undertaken."<sup>178</sup> In the City's ongoing deliberations with community leaders in affected areas during the encamped phase of the displacement, certain communities demanded the dropping of charges against those arrested – a demand that was refused by the City<sup>179</sup> but strongly indicative of a prevailing conviction in some communities that non-nationals should be denied equality before the law.

The SAHRC is extremely concerned that in the wake of site closures, returning displaced persons might indeed have been intimidated into withdrawing charges, further impeding justice outcomes, especially where alleged perpetrators had been released on bail. There is at least one concrete example of arrested street committee members, who had been released with a warning, attempting to impose their influence on a municipal reintegration process.<sup>180</sup> A police official at Ocean View

178 City of Johannesburg, 2008, p.10.

179 CoJ Migration Mayoral Sub-Committee. [2008]. Annexure A3: Performance Highlights, 9 October 2008.

180 CoJ Migration Mayoral Sub-Committee. [2008]. Annexure A3: Performance Highlights, 9 October 2008, p. 30.

told the SAHRC that, although bail had been opposed for all suspects in xenophobia-related cases, it had not been argued on the basis of possible intimidation of witnesses or complainants.<sup>181</sup>

In the Western Cape, it is regrettable that issues of reintegration seem to have focused on the “residual caseload” once most sites had emptied out and been consolidated. Little evidence was provided to the SAHRC of meaningful dialogue or preparation of communities at the time of the October 2008 “push to relocate 2,000 people – some back into affected communities,” although it was acknowledged that this might “push the limits of tolerance once again.”<sup>182</sup> Engagement with SAPS on the “temperature” of communities of return is reported, along with records of areas displaced persons wished to return to and provision for taxi transport in order to lower the visibility of return, but it is uncertain whether monitoring or support of non-nationals’ safety occurred beyond their return to such communities.<sup>183</sup>

Reintegration became an agenda item in City of Cape Town records only in September 2008. This means that thousands of individuals may have integrated without government assistance or oversight in terms of their subsequent safety. However, the city went far further than Gauteng to accommodate the remaining approximately 1,000 displaced persons who were unwilling to self-reintegrate, making every attempt to avoid eviction, including a series of field trips by groups including site managers, IDPs, NGOs and law enforcement officers to determine the safety of affected areas for return (for instance, to Phillipi, Du Noon and Nyanga East),<sup>184</sup> and a settlement offer encompassing financial or practical assistance in partnership with local NGOs.

The Closeout Report on Xenophobia commissioned by the office of the Premier of Gauteng specifically notes the weaknesses of the integration of displaced persons back into eight City of Johannesburg and Ekurhuleni areas, including Alexandra, Makaanse and Ramaphosa, based on post-integration focus groups conducted during December 2008 and January 2009, and proposes a researched, considered and convincing strategy to improve the integration of migrants more generally and to strengthen

scenario planning and the ability of Disaster Management structures to respond to social conflict crises.

- **An evident lack of monitoring of displaced persons’ safety after reintegration and neglect of such safety monitoring activities in the planning of reintegration.**<sup>185</sup>

The SAHRC notes from submissions that certain early warning mechanisms have been established (see section 2.2 of this report). However, there has not been consistent safety monitoring of individuals or groups of returnees, and municipalities and provinces do not have complete records of the communities to which displaced persons returned or resettled. This makes it impossible to monitor the safety of the 2008 victims in a reliable way, or manage the risk of violence in communities of return.

- The City of Johannesburg held multiple community consultations and workshops both before and after the closure of Gauteng sites with the aim of deliberating on reintegration issues. There is, however, no evidence of systematic tracking of safety, particularly moving into 2009.
- In eThekweni, after a series of community dialogues held in affected communities with the purpose of facilitating reintegration after the May 2008 displacement, the offices of the MEC for Community Safety and Liaison have placed informants in at-risk communities to notify the office of threats. These individuals report back periodically but the SAHRC has not yet been provided with evidence of the reporting process.
- The City of Cape Town has documentary evidence of visits to sites in 2009, and stakeholders’ meetings focused on safety conditions in communities of return, where the City received crime intelligence report-backs from SAPS. However, this does not appear to be an ongoing, systematic monitoring initiative.

Records held by the SAHRC show that, of what was estimated at one stage to be a displacement figure of 7,000, there were 279 people reintegrated by the Department of Community Safety and Liaison in KwaZulu-Natal, at least 81 of these through a community dialogue programme.<sup>186</sup> As far as the dialogue programme is concerned, the SAHRC acknowledges the efforts made by the Department of Community Safety and

181 Telephone interview with Ocean View police official, 22 December 2009.

182 Personal communication from disaster management staff, 9 October 2008.

183 Personal communication (email). Received by Kemal Omar on 9 October 2008.

184 City of Cape Town. [2009] Incidents [Tuesday, March 17, 2009].

185 CoRMSA, 2009, p. 5.

186 KwaZulu-Natal MEC for Transport, Safety and Community Liaison, 2009, p. 2; Directorate: Human Rights (Office of the Premier, KwaZulu-Natal). [2009]. Report on Xenophobic Violence on Foreign Nationals. Received 8 December 2009, p. 6.



Liaison to engage with some of the affected communities.<sup>187</sup> Two remaining concerns, however, are that not all affected communities were targeted with the programme, and that the SAHRC has received no records of the planned monitoring of the success of reintegration. Records of the Department of Community Safety and Liaison do not show a provincial awareness of more serious crimes that had been committed, which included rape and attempted murder in areas that were not focused on.<sup>188</sup> There are no records of reintegration to Cato Manor, Chatsworth or Umlazi, which experienced significant displacements and were among the top five stations in terms of cases reported.<sup>189</sup> The lack of safety monitoring in additional areas gains significance when one considers that 119 of those

as yet reintegrated were at the Venture Africa building in Albert Park,<sup>190</sup> where non-nationals were attacked again in January 2009.<sup>191</sup>

### Regulatory framework

Principle 32 of the *Office of the High Commissioner on Human Rights' (OHCHR's) Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* expresses the duty of states to afford victims "protection against intimidation and reprisals" in the course of their pursuit of legal remedies.<sup>192</sup> The state's specific duty to protect displaced persons is articulated under Principle 3 of the *United Nations Guiding Principles on Internal Displacement*. The use of indirect coercive means to remove asylum seekers or refugees from protection threatens to create situations of

187 Inputs for the Technical President's Co-ordinating Council Meeting: 22 August 2008. (2008). Attacks on Foreign Nationals (Safety and Security). Submission to the SAHRC by Luvuyo Goniwe, Chief Director: Monitoring and Evaluation, Office of the MEC for Community Safety and Liaison, KwaZulu-Natal, 11 December 2009.

188 Department of Justice and Constitutional Development. (2009). KwaZulu-Natal [Case List appended to Progress Report Relating to Cases Emanating from the 2008 Xenophobic Attacks: 20/10/2009]

189 Provincial Commissioner, South African Police Service, KwaZulu-Natal. (2009). Information in Respect of Xenophobic violence: KwaZulu Natal (sic), 10 December 2009, pp. 1-2.

190 Directorate: Human Rights, 2009, p. 6.

191 Forced Migration Studies Programme Database on Xenophobic Attacks in South Africa, 2006-2009. Ed. Tamlyn Monson. Ver 2: 20 December 2009, entry 536.

192 OHCHR. (2005). Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1), p. 17.

“constructive *refoulement*.”<sup>193</sup> The SAHRC notes that in cases of evident pressure or coercion by host country authorities, the UNHCR is mandated to intervene.<sup>194</sup>

Neither of the aforementioned instruments is legally binding but both can be interpreted as an elaboration of human and constitutional rights, and specifically the constitutional right to freedom from all forms of violence, including by private sources [12(1)(c)].

The **Witness Protection Act 1998** allows vulnerable witnesses to apply to be placed under protection. It does not appear that this legislation was used to protect victims of the May 2008 attacks, possibly because victims were unaware of the process that must be followed to apply for protection.

### Steps already taken to address the issue

- The **Gauteng Province** funded the Independent Development Trust (IDT) to do long-term work on community integration, awareness and a tolerance campaign,<sup>195</sup> ending around March 2009. The decision in this regard was made on 28 May 2008 and an action plan presented on 12 June 2008.<sup>196</sup>
- The **IDT** has produced a report including an acknowledgement that self-integration was not ideal and that integration “is a composite requiring various steps” including political leadership, assistance, and mediation. The report usefully links reintegration to broader issues of the integration of immigrants into society, and the need to mainstream immigration into national poverty reduction strategies. Unfortunately, the report does not take a consistent attitude toward the quality and effectiveness of reintegration by the province, and fails in some cases to distinguish between proactive reintegration by government and unassisted reintegration.
- **Ekurhuleni municipality** established a reintegration plan and, when Gauteng sites were to close on 15 August, the Mayor’s office requested that they remain open until 30 September in order to allow for meaningful dialogue toward the end of reintegration. Its final report presents a reintegration cost of R892,127,40 to the Council.<sup>197</sup>

193 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p. 5; pp. 11-12.

194 UNHCR. (1996). Handbook on Voluntary Repatriation, pp.29-31. Retrieved on 23 December 2009 from <http://www.sheltercentre.org/sites/default/files/UNHCRvoluntaryRepatriation.pdf>.

195 Gauteng Department of Local Government, undated, p. 18.

196 Independent Development Trust, undated, p. 19.

197 Ekurhuleni Metropolitan Municipality. (Undated). Reintegration Plan; Ekurhuleni Metropolitan Municipality. (2008). Final Report on the Xenophobia Outbreak / Provincially Declared Disaster and the Re-Integration [sic] of Victims to their Communities for the Period 23 June 2008 to 3 October 2008: Ekurhuleni Metropolitan Municipality.

- In endorsing the findings and recommendations of UNOCHA, the **Western Cape Department of Local Government, Environmental Affairs and Development Planning** implicitly acknowledged UNOCHA’s observation that there had been “a need for a comprehensive and resourced integration strategy to have been developed from the very outset of the crisis ... a component of a broader exit strategy, which would have encompassed other durable solutions for meeting the needs of the affected and been based on a realistic timeframe for achieving these.” The same document asserts as a failing the fact that “Government perceived the closures of the camps in and of itself as its integration strategy.”<sup>198</sup> The SAHRC views as evidence of the province’s good faith in acknowledging this critique and striving for a more sustainable exit strategy:
  - Its efforts to assist remaining shelter residents to the end of 2008 and beyond; and
  - Its drafting of a Proposed Social Conflict Emergency Plan which includes risk reduction and recovery elements that bear a relation to integration and reintegration.<sup>199</sup>

### Recommendations

The SAHRC recommends that:

- The **Gauteng Provincial government** notify the SAHRC and all parties to the *Mamba* case of the grounds upon which sites in Gauteng were closed while the related appeal was *sub judice*.
- **Provincial governments** never close shelters for displaced persons before every avenue for safe and sustainable reintegration into South African society has been exhausted, in line with international best practice.<sup>200</sup> The tier of government responsible for a particular social conflict disaster must consult United Nations agencies for advice in this respect.
- **Provincial and municipal government structures** never simply presume that the absence of immediate violence in a community that has suffered a social conflict disaster automatically implies the possibility of safe return.
- **All provincial governments** develop a skeleton plan for safe and sustainable reintegration after social conflict disasters.

198 UNOCHA, undated, p. 11.

199 Western Cape Province. (Undated). Proposed Social Conflict Emergency Plan.

200 Inter-Agency Standing Committee. (2007). *Benchmarks for Durable Solutions for Internally Displaced Persons*. Washington DC: Brookings Institute. Retrieved on 27 January 2010 from [http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-727CX9/\\$file/iasc-idp-mar2007.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-727CX9/$file/iasc-idp-mar2007.pdf?openelement)

The important role of municipalities must be reflected in such plans and both municipalities and civil society should be involved on an ongoing basis in fleshing them out in a particular disaster context. All parties should be prepared to compromise and to seek out the least imperfect solution if a stalemate is to be avoided. The human rights of displaced persons and the ends of justice should remain foremost in the minds of all parties and should be prioritised above other agendas.

- In the initial phase of a social conflict disaster, **provincial government structures** make displaced persons aware of the reintegration plan and of the dangers of “self-reintegration.” Provincial governments must ensure that information is collected from those choosing to “self-integrate” about their destination community and contact details if appropriate so that there is some basis for the monitoring of their safety.
- **Local and provincial government structures** prevent displaced persons from returning to communities that demand the obstruction of justice as a precondition. In such cases, provincial government should make arrangements for the relocation of affected persons to an alternative area in the province.
- Where appropriate, witness protection should be proactively offered to complainants and witnesses under the Witness Protection Act 1998.
- Conflict resolution initiatives should be undertaken in all affected communities prior to the return of displaced persons (the **Social Cohesion Working Group** is to initiate the development of conflict resolution capacity in all provinces – see recommendation in section 2.1.)
- Where a councillor fails to participate in reintegration fora, the offices of the mayor and premier of the respective municipality and province report such a councillor to the relevant political party and to the Public Protector.
- All public officials regardless of rank be required to explore all possible means of convincing a host community of receiving displaced persons back without any impediment to justice. Any official who fails in good faith to make such efforts should be charged with obstruction of justice by the relevant **Province**. In the event of future displacement and reintegration, **provincial governments** should establish and publicise a mechanism for the reporting of related allegations.
- Indirect coercion never be used against displaced persons under state protection. **Municipal or provincial governments** must ensure that services are not reduced in a manner that encourages the unmanaged departure of displaced persons from protection.

- The **Western Cape’s Proposed Social Conflict Emergency Plan**, which is still in draft form, as part of its current review by municipalities and the Provincial Cabinet, ensure that the risk posed by irregularities in and lack of meaningful oversight of community-level governance structures, including councillors, CPFs, street committees and civic organisations, but especially those that are linked into formal government, is incorporated into its Progression of Vulnerability Model, in view of research demonstrating the key role local institutions can play in mitigating or inciting violence.
- The revised **Western Cape Disaster Preparedness, Response and Relief Plan**, which is set to be revised, must incorporate reintegration issues, based on the UNOCHA recommendations.<sup>201</sup> This new section must be referred to in the Integration component of the Proposed Social Conflict Emergency Plan, as the key elements currently cited do not reflect those learnings. This will ensure that planning and budgeting for integration takes a consistent shape and that lessons learned with regard to the shortcomings of prior approaches are retained within institutional memory.
- All **provincial disaster management structures**, and especially those in provinces worst hit by social conflict in 2008, develop a Social Conflict Emergency Plan along the lines of that developed by the Western Cape, incorporating lessons learned within their particular context. This will ensure that evaluations translate into practical improvements in response in the case of future social conflict disasters. Evaluations often cite confusion over leadership and jurisdiction, but do not provide the answers parties involved in the response were seeking. A plan is needed to resolve these issues in advance of a future social conflict disaster.
- All government actors commit to transparency and proactive communication with regard to reintegration plans and activities, in order to quell fears, reduce conflict between government and civil society, and ensure that all available resources are best utilised in the interest of a safe and sustainable return of displaced persons to society.

201 United Nations Office for the Coordination of Humanitarian Affairs Regional Office for Southern Africa (UNOCHA ROSA). 2008. Recommendations stemming from Lessons Observed of the Response to Internal Displacement Resulting from Xenophobic Attacks in South Africa (May - December 2008). [online] Retrieved on 30 December 2009 from: <http://ochaonline.un.org/rosa/HumanitarianSituations/AttacksonForeignersinSA/tabid/4613/ModuleID/11407/ItemID/1270/mct/EventDetails/language/en-US/Default.aspx?selecteddate=3/6/2009>

## 4.2. Reparations

### Finding

There was a lack of consistency on the issue of reparation to victims of the 2008 attacks.

### Explanation

Records submitted to the SAHRC by the City of Johannesburg indicate that around the time that sites were to be closed, all displaced persons within the sites received R100 for transport, R500 for individuals, R800 for couples, and R1,200 for families. The Western Cape records that financial assistance of between R1,500 and R3,000, depending on whether the beneficiary was a single person or a family, was provided to assist in reintegration. Funds were provided by United Nations bodies (UNHCR and UNICEF) and distributed through partner organisations. It remains uncertain why the amounts differed across provinces.

LHR expressed to the SAHRC a concern that payments made to assist the reintegration process were insufficient to restore to displaced persons adequate and sustainable accommodation.<sup>202</sup> This is supported by the claim of Somali shopkeepers in Masiphumelele that they were only able to recover five percent of their merchandise, even with the assistance of police and a Bambanani initiative to identify and retrieve stolen goods.<sup>203</sup> It should be remembered that these shopkeepers returned from the Soetwater displacement site at the invitation of community leadership structures before the reintegration payment initiative began, demonstrating that with the “self-reintegration” of site residents over time, it is very likely that not all victims of the attacks received payments. Indeed LHR noted that the majority of its clients did not receive any government assistance in returning to communities from which they had been displaced.<sup>204</sup> This may explain, in part, the phenomenon of “reintegrated” persons attempting to return to sites in the closing stages of the displacement when “reintegration packages” were being issued.

While government was clearly opposed to this phenomenon, there is no evidence of a clear, principled and justified policy stance on why all displaced persons should not have been entitled to assistance. A clear position on this is required, and while financial assistance may not be necessary or possible for all displaced persons, there should be clear guidelines on reparation measures where financial compensation is not

202 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, pp. 8-9.

203 Focus group with Somali nationals, Masiphumelele, 8 December 2009.

204 Lawyers for Human Rights Refugee and Migrant Rights Programme. [2009], p. 9-10.

possible or appropriate. This could include the rebuilding of shacks; the replacement of tools, equipment or merchandise for entrepreneurs; and measures such as transport and telephone facilities provided from the start of a displacement to ensure that employed non-nationals are able to continue work uninterrupted. All of these measures would likely require effective record-keeping from the very beginning of any displacement and partnerships with appropriate civil society organisations.

There also emerged presumptions that “illegal” foreigners were not entitled to financial assistance, expressed in disaster management meeting minutes in September 2008.<sup>205</sup> It needs to be emphasised to all stakeholders that the Universal Declaration of Human Rights provides that “all are equal before the law” and that “all have the right to an effective and just remedy for acts violating their fundamental rights.”<sup>206</sup> The South African Constitution states that “everyone” has the right to freedom and security of person, which includes the right to be free from all forms of violence, including by private sources, and that no-one may be deprived of property (s25). It does not follow, therefore, that financial assistance to those who have experienced a violation of these rights should be limited on the basis of immigration status. This should always be borne in mind if such a situation should arise in the future, and especially where the donors are organs of the United Nations whose activities should conform with UN rights instruments.

### Regulatory Framework

According to OHCHR’s Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,

“Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation.”<sup>207</sup>

However, the right to reparation covers “all injuries suffered by victims [including] measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.”<sup>208</sup>

The principles note that such reparation may be funded by national or international sources. Thus, the South African

205 Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting (16<sup>th</sup>) Combined with JOC Meeting, 15 September 2008, pp. 3-4.

206 United Nations. [1948]. Universal Declaration of Human Rights. Retrieved on 5 January 2010 from <http://www.un.org/en/documents/udhr/>

207 OHCHR. [2005]. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity [E/CN.4/2005/102/Add.1], p. 16.

208 Ibid, p. 17.

payments could be considered a form of reparation payment. The inconsistencies in provision of these reparations raise questions about equality before the law of all victims.

## Recommendations

The SAHRC recommends that:

- All social conflict disaster plans and reintegration plans include a clear and transparent policy on reparations. This should include the entitlement of all persons to reparation regardless of immigration status, and guidelines to encourage a consistent approach to this issue under a variety of circumstances.
- There be consistency across geographic locations and between claimants with regard to reparation amounts, unless special circumstances substantiate a justifiable exception.

## 4.3. Community Perspectives on Justice and the Rule of Law

### Finding

Poor relationships exist between affected communities and the police and wider judicial system. Such relationships are characterised by negative perceptions of and attitudes to justice and the rule of law.

### Explanation

The general poverty of relationships and links between communities, police, and the judicial system beyond has been touched on by prior research<sup>209</sup> and was clearly evident in all three communities visited by the SAHRC:

- Residents perceive the police to be unresponsive. There were many complaints of police failing to arrive or of long delays in arriving at a crime scene (not surprising given the infrastructural challenges police face – see section 2.6). In Cato Manor, a case was mentioned of police service centre “off-duty” staff refusing to assist an injured complainant until the next shift arrived.<sup>210</sup> In Masiphumelele, non-nationals told the SAHRC that due to the non-responsiveness of police, their approach when a crime happens is to “just let it go.”<sup>211</sup> In some cases police support a complacent attitude by non-nationals, fearing that entering into a judicial process might precipitate further xenophobic attacks.<sup>212</sup>

209 For instance, Misago et al, 2009.

210 Focus group with local residents, Cato Manor, 11 December 2009.

211 Focus group with non-nationals, Baptist Church, Masiphumelele, 7 December 2009.

212 Focus group with Somali shopkeepers, Masiphumelele, 8 December 2009;

- Residents fear that reporting crimes will endanger their lives. Suspects have been known to warn witnesses that they will “get” them later, and when arrested suspects return to the community a day or two after their arrest (possibly on bail), the witness becomes a target. A murder case from Reiger Park supports this, showing how two suspects who were arrested without a warrant were released back into the community because charges were not laid in court within 48 hours of the arrest as the law requires. Following this, the investigating officer records in his notes that no further statement will be obtained from the witnesses as they are afraid of the released perpetrators.<sup>213</sup> In this context it is not surprising to hear police report that some non-nationals chose not to open cases in order to facilitate their return to the Masiphumelele community.<sup>214</sup>
- Residents believe that at least some police officers are corrupt and have relationships with criminals in the community, which creates a perceived conflict of interest that further discourages residents from reporting crimes to the police. In Reiger Park, a police officer is said to be occupying a stand to which another resident holds the original deed (duplicate title deeds resulting from corrupt transactions are an insoluble dilemma for many in the area). Police are also accused of taking money from undocumented immigrants and appropriating looted or stolen goods for private use.<sup>215</sup> In Masiphumelele, some officers are accused of befriending and tipping off drug dealers in the area before raids take place.<sup>216</sup> In Cato Manor, focus group participants claimed that “police are part of crime in the area.”<sup>217</sup>
- Linked to the fear noted above, witnesses and complainants seldom follow a case through to completion and are often unwilling to testify in court. An example of this from the 2008 “xenophobia” trials was given by an investigating officer at Ocean View Police Station, who cited five simple, fully investigated cases where suspects had been arrested and charged, and all statements obtained, which would undoubtedly have resulted in a conviction if the complainant had been willing to cooperate and participate in the court process.<sup>218</sup> The officer noted that this was a phenomenon affecting not

213 Docket no 253/07/2008, Reiger Park Police Station.

214 Interview with police officer at Ocean View Police station, 9 December 2009.

215 Focus groups in Ramaphosa.

216 Focus group with South African women, Salvation Army Hall, Masiphumelele, 7 December 2009.

217 Focus group with local residents, Cato Manor, 11 December 2009.

218 Telephone interview with police officer from Ocean View Police Station, 22 December 2009; discussion with ward committee member, Ramaphosa, 18 December 2009.



just non-national complainants but all residents. “In these communities, people are willing to give information but they don’t want to participate in the court process,” he said. This reinforces the impression of systemic problems in the relationship between informal settlement dwellers and the judicial system.

- Residents complain that the justice system is unable to remove criminals from their communities. It remains uncertain whether this perception stems from the return of criminals to communities via bail, the withdrawal of charges in court, or the withdrawal of charges by complainants. Police officers noted that complainants tended to drop charges or cease pursuing criminal cases if stolen items were returned to them (for example, by the parent of the thief or via the Bambanani initiative in Masiphumelele). Equally, it was acknowledged that complainants could be subject to intimidation by suspects released on bail.<sup>219</sup>

It is clear that a climate of distrust in the police and judicial system perpetuates a vicious cycle that results in impunity for criminals. The cycle also produces a “self-help” orientation with its own risks. This may take a more benign form – such as negotiations with the parents of criminal youths, allowing for the return of stolen goods to victims of theft<sup>220</sup> – or violent forms of popular justice such as beatings of suspected criminals, which had taken place in both Ramaphosa and Masiphumelele.<sup>221</sup>

The theme of popular justice raises the issue of how communities understand and define justice and the rule of law, which does not always coincide with legislation or the constitution.

- Residents of communities sometimes make unreasonable demands during reconciliation processes, and officials sometimes make concessions to such demands that in fact undermine the rule of law. This allegedly happened in Masiphumelele in 2006, where the Western Cape Provincial Premier and MEC for Community Safety, together with the Ocean View police, conceded to community pressure in securing the release of business owners who had been arrested following the violence in that year.<sup>222</sup>

The City of Johannesburg has records of conditions stipulated by the Kanana (Tembisa) community, which require the

dropping of charges against suspects “as a precursor to discussing reintegration.” Some of the same accused, who were street committee members, also demanded as a precondition that they be part of the reintegration meetings.<sup>223</sup> The SAHRC is pleased to note that SAPS affirmed that to include the accused in the engagement would be unlawful. Despite the conditions, the community invited the displaced persons to return,<sup>224</sup> and there is a grave concern that as a result some may have dropped charges of their own accord in order to facilitate self-reintegration. At least 114 people wanted to reintegrate into Kanana despite the meeting.

The Ekurhuleni municipality, in its attempts to proactively reintegrate people into affected communities, faced strong resistance in some communities, including Ramaphosa and Makause. Municipal officials noted that in some areas, local leaders appeared to have been involved in the attacks and that some had benefited financially by renting out displaced persons’ shacks. Nevertheless, they note that, in effecting reintegration, the municipality was only able to speak to local leaders, because community members were too afraid to speak out in case they were targeted or attacked as a result.

- Currently, the Ocean View police face a similar dilemma in terms of the rule of law, where South African owners of shebeens refuse to close at the stipulated time of 8pm (a measure to curb alcohol-related crime) unless Somali shops also close at that time. Police support the closing time for Somali shops as they fear that, if they remain open, shops will be deliberately targeted by disgruntled shebeen owners after the 8pm closing time.

A final observation that emerges from the points above is the question of who represents “the community.” In discussions about the 2006 violence, the business owners seen to be responsible for the attacks are clearly separated from the broader community by focus group participants in Masiphumelele. In more than one area, there is little relationship or trust between members of the community and the structures that exist to foster their participation.<sup>225</sup> The interests of those who are in a position to benefit from displacement should not be mistaken for those of the broader community, and this speaks to the recommendations made in section 2.5 of this report.

219 Telephone interview with police officer from Ocean View Police Station, 22 December 2009; Discussion with Station Commissioner and Branch commander, Reiger Park Police Station, 25 January 2010.

220 Focus group with community leaders, Masiphumelele, 7 December 2009.

221 Discussion with ward committee member, Ramaphosa, 18 December 2009; Focus group with non-nationals, Masiphumelele, 7 December 2009.

222 Misago et al, 2009.

223 CoJ Migration Mayoral Sub-Committee. [2008]. Annexure A3: Performance Highlights, 9 October 2008, pp. 29-31.

224 CoJ Migration Mayoral Sub-Committee. [2008]. Annexure A3: Performance Highlights, 9 October 2008, pp. 29-31.

225 Focus groups in Ramaphosa; focus group with South African residents, Cato Manor, 11 December 2009.

## Regulatory framework

The **Municipal Structures Act 1998** governs the establishment of municipalities and the election of councillors and ward committees. The Act requires that councillors report back at least quarterly on council matters and that they be accountable to local communities. It provides conditions under which a councillor may be investigated, formally warned, fined, suspended or removed from office.

The Act also requires councils to annually review not only their annual performance but also community needs, priorities to meet those needs, processes for involving the community, and mechanisms for meeting community needs.

In terms of community policing structures, the **Policy Framework for Community Policing** attempts to build positive relationships between station-level police and local communities through consultation and partnership. It asserts that CPFs should not be seen as structures to promote personal interests or secondary objectives.

## Recommendations

The SAHRC acknowledges that, as easy as it may be to find fault with the interface between government and affected communities, answers are more difficult. Any interface between formal and informal spaces and governance structures is likely to be blurred. However, this is no excuse to be apathetic. The SAHRC recommends that:

- A workshop be arranged by the **Social Cohesion Working Group** between parties to community mediation and proactive reintegration initiatives across the country, with a view to establishing some best practice guidelines on ensuring the most genuine community engagement possible and to deliberate on solutions to rule-of-law dilemmas that are manifested in certain community demands. Solutions must reinforce the rule of law without compromising the security and protection of victims of violence.
- In opposing bail, the state draw the attention of any court to the potential for intimidation, and the wider ramifications for justice and the rule of law should the viability of a case be compromised through such intimidation.
- Where charges relate to public violence, prosecutors consider making representations to the court for consideration of community service sentences or formal restorative justice solutions.
- Parties to reconciliation, conflict resolution or reintegration initiatives never suggest, advocate or agree to the dropping of charges against accused persons. Formal restorative justice approaches could

be considered and be used as evidence in mitigation for participating accused persons.

- Where communities demand the withdrawal of charges as a precondition to reintegration, all displaced persons who laid charges should be settled in alternative communities at the government's expense. That these people will not return to the community should be clearly communicated to all community leaders to minimise the leverage wielded, so that it is clear that those returning are the ones who did not press charges. This might help to protect returning persons from victimisation while maintaining the integrity of the judicial process.

## 4.4 Judicial Outcomes

### Finding

Judicial outcomes for cases arising from the 2008 violence have limited the attainment of justice for victims of the attacks and have allowed for significant levels of impunity for perpetrators.

### Explanation

The NPA appears to have taken seriously its role in pursuing justice for victims of the May 2008 attacks. The Department of Justice and Constitutional Development (DoJCD), SAPS and the National Prosecuting Service entered into an agreement under which each committed to the following action:

- SAPS: Expedite investigations against those arrested.
- NPA: Fast-track the prosecution process, and monitor and guide any further investigations required.
- DoJCD: Institute dedicated courts to deal with the matters where required.<sup>226</sup>

However, the DoJCD acknowledges that:

If we bear in mind that it took more than a year to deal with the majority of cases, with a number still to be finalised, it becomes clear that the promises of prioritisation by the roleplayers (SAPS and NPA) could not be sustained in view of capacity and case flow management challenges.<sup>227</sup>

Of 597 cases, only 159 had been finalised with a verdict (98 guilty; 61 not guilty), while 218 had been withdrawn by October 2009.<sup>228</sup>

226 Department of Justice and Constitutional Development (DoJCD). [2009]. Progress Report Relating to Cases emanating from the 2008 Xenophobic Attacks. 20 October 2009, p. 2.

227 DoJCD, 2009, p. 4.

228 DoJCD, 2009, p. 3.

In the SAHRC's interviews with station-level police, evidence emerged that all these agreed principles did materialise to some extent. Stations received ongoing directives from SAPS at national level, pressuring them to finalise related cases. In some cases, provincial police visited stations for sight of the related case files, in order to ensure that the most serious cases received adequate attention.<sup>229</sup> Some challenges, however, included:

- In the first four months, from May to August 2008, there were delays in the finalisation of cases for trial due to (a) delays in obtaining various affidavits, statements, medical, fingerprint and forensic reports, (b) a shortage of SAPS detectives to do the investigations, (c) lack of sufficient capacity at the SAPS forensic laboratories, (d) insufficient court capacity to deal with all the incoming cases (including insufficient numbers of judges, magistrates, prosecutors and legal aid representatives), and (e) limited availability of legal representation.<sup>230</sup>
- Regional Court Presidents were expected to prioritise related matters in case flow management on the rolls of regional courts, but, nevertheless, the management of case flow did not always allow for the timely commencement of trials.<sup>231</sup>
- It is clear from DoJCD records submitted to the SAHRC that difficulties obtaining interpreters delayed a number of trials, especially in the Eastern Cape.

The following concerns regarding judicial outcomes came to the attention of the SAHRC:

- **Lack of consistency across provinces in the establishment of "special courts", leading to delays in the judicial process.** Only the Western Cape requested the establishment by the DoJCD of dedicated courts with additional resources to deal with the "xenophobia-related" cases. These "special courts", as some refer to them, benefit from additional full-time staff dealing with the finalisation of cases. In the Western Cape, this assisted in the speedy finalisation of cases, and the province has therefore finalised more cases than other provinces. However, due to the investigation delays mentioned below, the court was not immediately effective.<sup>232</sup>

229 Interviews with Cato Manor Police Station staff as well as documentary evidence submitted by Cato Manor Police Station, KwaZulu-Natal.

230 DoJCD, 2009, p. 2; personal communication from Pieter du Randt at DoJCD, 26 November 2009.

231 Department of Justice and Constitutional Development. (2009). Progress Report Relating to Cases emanating from the 2008 Xenophobic Attacks. 20 October 2009, p. 2 & p. 3.

232 DoJCD, 2009, p. 3; personal communication from Pieter du Randt at DoJCD, 26 November 2009.

- **The limited number of arrests made.** In expressions of concern solicited for the investigation, CoRMSA noted a concern that actual arrests made during and after the May 2008 attacks constituted only a small percentage of those who participated in mobs. Sections 2.3 and 3.1 shed light on this issue, emphasising the limited resources of police during the public violence of 2008 which would have made in-situ arrests difficult. However, given sufficient resources and planning, the SAHRC recommends that, wherever possible, police make more arrests of perpetrators in situ. Alternatively, more cases should subsequently be opened by police witnesses against identifiable perpetrators who were witnessed committing crimes during public violence. Police witnesses are more likely than civilians to follow the course of a judicial process, resulting in better outcomes, as reported by an officer at Ocean View Police Station.<sup>233</sup>

Beyond in-situ arrests or cases opened by police witnesses, arrests could only flow from cases laid by complainants. There was a surprisingly low number of cases laid by victims of the attacks at the three stations visited by the SAHRC, although the context of mistrust of the police (see section 4.3) and the trauma of violence and displacement helps explain this. This is an area where civil society could play a role in future, advising displaced persons of the role justice plays in maintaining the rule of law and the steps in the judicial process (which will include testifying against the perpetrator). Assistance or simply moral support in laying charges and following the court process could help to overcome the general hesitance to cooperate with police. However, measures would need to be taken to protect the safety of victims through use of witness protection measures and/or denial of bail where the risk of intimidation exists.

It is a matter of concern that although an employee of Reiger Park Police Station reported opening a case in relation to the burning of Ernesto Alfabeto Nhamuave,<sup>234</sup> known to the public as "the burning man," the SAHRC was unable to locate records on the NPA roll or at Reiger Park Police Station of any such case. It is clear that not all serious matters resulted in a case – of at least 62 deaths reported as a result of the May 2008 violence, only 33 cases of murder or attempted murder matters are reflected in the records of the DoJCD.<sup>235</sup>

233 Telephone interview of police officer at Ocean view Police station, 22 December 2009.

234 Interview with police officer at Reiger Park police station, 22 December 2009.

235 DoJCD, 2009, p. 5.

- **Impunity for some perpetrators due to high levels of case withdrawal.** Researchers note that, comparing the level of withdrawals of prioritised xenophobia cases post-May 2008 to (rather dated) figures for violent crime, the withdrawals of xenophobia-related cases is almost four times higher.<sup>236</sup> According to information received from DoJCD, there are five ways that cases can be withdrawn. They can be temporarily withdrawn pending the completion of an incomplete investigation, or charges can be withdrawn against the accused when:

- Complainants withdraw the complaint;
- Complainants or witnesses cannot be traced;
- The allegations are unfounded; or
- There is no prima facie evidence (a lack of sufficient evidence to establish the facts of the case).

In accounts by station-level police, the SAHRC heard that difficulties following up complainants and witnesses was their main challenge. This occurred in a context where:

- The departure of displaced persons to their countries of origin was unmonitored by police, and witnesses or complainants would therefore become untraceable.
- Police did not have contact numbers to reach complainants or witnesses in their countries of origin.
- Police would find that, on contacting a complainant on the number provided by the same, the person who answered would deny being the named complainant and refer the officer on to someone else. This was either because the complainant had given the number of a friend or colleague to police, and due to the displacement was no longer in regular contact with the telephone owner, or because the complainant became afraid of making him or herself visible to police.
- Some complainants would simply refuse to testify. This may have been due to the “reintegration” of such persons back into communities from which they were displaced, where they did not wish to sour relations with locals any further, or where pressure had been exerted on them to drop charges in exchange for the right to reintegrate.

However, the SAHRC also examined dockets provided by the Reiger Park and Cato Manor stations.

236 Monson, Tamlyn & Misago, Jean-Pierre. (2009) Why History has Repeated Itself: The Security Risks of Structural Xenophobia. SA Crime Quarterly 29, p. 30.

- It is clear that some cases that were otherwise fully investigated, with suspects arrested and charged and witness statements and confessions obtained, had charges withdrawn due to the return of complainants to their home countries.<sup>237</sup>
- Police visited complainants’ homes on multiple occasions without success in finding them.<sup>238</sup>
- In some cases, police could not find complainants after organising an identity parade to enable them to identify the perpetrator.<sup>239</sup>
- In some cases, the telephone number of the complainant, or of next of kin in the absence of a telephone number, is not recorded on the docket, which is likely to have created challenges in tracing the complainant.<sup>240</sup>
- In some cases, no communication with the complainant/s is recorded in the docket beyond the initial contact.<sup>241</sup> Regular follow-up with complainants might have ensured that details of their departure from the country and forwarding details were obtained.
- In more than one case it appears that little was done to trace the complainants beyond the initial information received from family, neighbours or community that complainants had left the country.<sup>242</sup> In some cases, charges were withdrawn just days after receipt of this information,<sup>243</sup> which did not allow for the possibility that complainants would return to the country or that members of the community might have means of contacting them or their next of kin. In some case records, it is clear that complainants left the country and then returned still willing to cooperate with police.<sup>244</sup>
- Full records and investigation diaries were kept at the police station in Cato Manor, but not at Reiger Park, making it difficult to follow the process by which certain cases were withdrawn.

- **Limited investigation of the instigation of attacks in certain areas.** CoRMSA requested that the investigation

237 Docket no.190/05/2008, Cato Manor Police station. This is supported by telephonic interview with a police officer at Ocean View police station, 22 December 2009.

238 Docket no. 189/05/2008, Cato Manor Police Station.

239 Docket no. 189/05/2008, Cato Manor Police Station.

240 Docket no. 189/05/2008, Cato Manor Police Station.

241 Docket no.190/05/2008, Cato Manor Police station; docket no. 188/05/2008, Cato Manor Police Station.

242 Docket no.190/05/2008, Cato Manor Police station; docket no. 188/05/2008, Cato Manor Police Station; docket no. 197/05/2008, Reiger Park Police Station.

243 Docket no.190/05/2008, Cato Manor Police station; docket no. 188/05/2008, Cato Manor Police Station; docket no. 187/05/2008, Cato Manor Police station.

244 Docket no. 202/05/2008, Cato Manor Police Station.

examine the manner in which perpetrators were identified and to what extent investigations were conducted to determine who instigated violence in each area,<sup>245</sup> as research has shown that in many communities identifiable individuals or groups had instigated the attacks.<sup>246</sup> In the areas visited by the SAHRC, police had not uncovered any instigators and generally felt that the violence was of a “copycat” variety. It is difficult to assess the quality of their intelligence in this regard. No further evidence of government enquiries or state investigations into the instigation of the attacks was received by the SAHRC, but importantly the Department of State Security did not make a submission and any further information obtained in this regard through a subpoena hearing will be made available by the SAHRC.

### Steps already taken to address the issue

- A positive outcome of the judicial response to the 2008 attacks is that since these attacks, the **NPA** has begun monitoring subsequent xenophobia-related cases also. This new initiative is a positive development in terms of monitoring non-nationals’ access to justice and could be an instrument to assist in preventing impunity going forward. However, it remains uncertain how cases come to be classified as “xenophobia-related.”

### Recommendations

The SAHRC recommends that:

- **SAPS** and the **NPA** compile an evaluation of their joint agreement and the challenges in its implementation, providing concrete recommendations to minimise the weaknesses and promote the strengths of the response in case of a similar situation arising in the future. The DoJCD report does contain some “Next Steps” based on observations of the challenges, but these need to be outlined in sufficient detail to secure them in institutional memory beyond the departure of any of those who experienced the 2008 scenario. Concrete suggestions need to be made with regard to the challenges of dealing with non-national complainants and witnesses during a displacement. These could include:
  - Additional due diligence in recording contact information, which in the case of migrants should include next of kin and contact information in the country of origin.
  - Monitoring of repatriation buses with the explicit purpose of establishing whether those departing

are complainants or witnesses and canvassing their intentions with regard to relevant cases. Where victims wish to drop cases, this would reduce the case load so that resources could be concentrated on those cases with a better chance of prosecution.

- Lobbying against “self-reintegration” into communities affected by violence, where pressures may result in case withdrawals.
- Adoption and communication to displaced persons of an official “amnesty” on immigration policing of non-national witnesses and complainants in relation to the judicial process.
- Establishment of task teams to solicit testimony and lobby for buy-in to the judicial process in the immediate wake of attacks and while the majority of displaced persons remain in shelters.

- Considering the capacity limitations encountered in terms of available investigators, legal practitioners and in case flow, **SAPS** and **DoJCD** draw up a set of best practice guidelines that in the case of a future scenario would make the best and most efficient use of resources. Ideally, this should serve as a directive for the establishment of special courts in all provinces with more than a specified number of cases arising from the disaster event. Leaving this to the discretion of provinces does not seem to have been an effective strategy in the 2008 case.
- In future, opposition to bail be reinforced by the possibility of intimidation of witnesses and complainants and the threat this poses to the course of justice. While bail was generally opposed by the state, at least one police officer noted that the possibility of witness intimidation was not used to support the state’s case.<sup>247</sup>
- There appears to be a strong case for community-based campaigns around the justice system. Some communities are disillusioned with the judicial system to the point where they have no interest in accessing or assisting the system. This is a vicious cycle because where complainants do not follow their cases through or where witnesses do not cooperate, charges will almost inevitably be withdrawn against the accused, reinforcing the perception that the courts do not work. It is important to understand that the more a community withdraws from cooperation with police and with the justice system, the less effective the latter becomes, and the more inclined communities may be to “take the law into their own hands.” In support of a campaign to promote the justice system, additional budget and resources should

245 CoRMSA, 2009, pp. 3-4.

246 See Misago et al, 2009.

247 Telephone interview with police officer at Ocean View Police Station, 22 December 2009.

be assigned by the *Treasury*, and such a team should include representation from *SAPS*, *Metro Police*, *DoJCD*, the *Civilian Secretariat of Police* and the *Independent Complaints Directorate (ICD)*. The ICD will need additional budget to set up a task team to devote special attention to cases arising from areas where these campaigns are taking place, including the apparently lower priority Class 3 and 4 cases. Misconduct cases are generally returned to provincial, and then station, level, where they may be subject to interminable delays and the ICD's recommendations are not necessarily implemented.

- Action be taken on the need for state-employed interpreters. The *DoJCD* should establish a regularly maintained database of interpreters who are willing to place themselves on standby to render translation services in the wake of a crisis. NGOs serving the migrant community may be able to assist in identifying prospective interpreters.
- *SAPS* consider ways of using media footage to assist in investigations. From police station visits by the SAHRC, this does not appear to have been used as a tool in investigating the 2008 attacks.
- Establishment of legislation governing hate or prejudice-related crimes (see recommendations in section 4.6) would assist in strengthening judicial outcomes for xenophobic violence.

## 4.5 Misconduct by Police and Public Officials

### Observation

The SAHRC is concerned that instances of misconduct by public officials and police during the 2008 violence and displacement may not have resulted in disciplinary measures, due to failure to report such incidents.

### Explanation

A number of complaints of police misconduct were relayed to researchers investigating the May 2008 attacks. Narratives of the experiences of victims of the May 2008 violence, collected in and out of shelter settings during 2008, indicate various incidences of criminal acts and misconduct by police:

I went to the police station one day in Primrose, I went there and told them I know who took my things. I went there just to maybe see if I can get something, like my passport or ID, I said that I can go there and take the police to Primrose and show them, maybe you can find something that is mine. They said, no, if you want to take us to your place

you must pay R150. Some people here they paid and went with the police, to get their things back. You go with them just to be safe. To see if there is something left, and then you go back. But you must pay R150. (Mozambican resident of Makause, staying at Rand Airport site)

Other accusations heard by researchers included claims that police used excessive force, were accessories to attacks or looting, that they incited violence through inflammatory statements, or that they stood by while crimes took place.<sup>248</sup>

The SAHRC requested a sample of cases reported to the ICD in relation to ten stations per focal province during the May 2008 period, including stations proximate to the areas where researchers heard reports of misconduct. The records provided by ICD did not reflect sufficient details to identify which cases related to the policing of the 2008 crisis and displacement, and the SAHRC was directed to case files held by SAPS. The SAHRC successfully followed up only class 3 (criminal) and 4 (misconduct-related) cases at four stations: Ocean View and Table View in the Western Cape; Cato Manor in KwaZulu-Natal; and Reiger Park in Gauteng. No ICD cases had been opened at these four stations in relation to the 2008 crisis.

Evaluations of the humanitarian response also noted various instances of negligent behaviour. However, the Public Protector reported to the SAHRC that no cases were opened in relation to the crisis period.

### Recommendations

The SAHRC recommends that:

- During a displacement, the *ICD*, *Public Protector* and *SAHRC* raise awareness among affected persons of the processes to lodge a complaint, and establish a regular presence at displacement sites, where they exist, to raise awareness and assist those that wish to lay complaints.
- During a displacement, *researchers* and *civil society organisations* advise displaced persons of the channels that exist to hold public servants and police accountable for their actions and assist those who are willing to follow the process to its outcome.
- Where *civil society organisations* encounter misconduct, they lodge complaints with the appropriate bodies in addition to any statements or media releases issued to publicise the matter in question.

248 Lawyers for Human Rights Refugee and Migrant Rights Programme, 2009, p. 4; Transcriptions of interviews conducted by researchers from the Forced Migration Studies Programme in affected communities and at displacement shelters. Submitted on request of the SAHRC; Commission on Gender Equality (CGE). [Undated]. Xenophobia Attack – Malvern Area (Cleveland), p. 2.

## 4.6 Effective Remedy

### Finding

The right to effective remedy is being undermined by problems of capacity within the institutions that exist to provide access to an effective remedy and promote access to justice.

### Explanation

The shortcomings of the judicial response to the 2008 attacks is covered in detail in section 4.4. It must be pointed out that poor judicial outcomes occurred even in the context of increased focus, planning, partnership and oversight. On the one hand, some station-level police complained about the pressure placed upon them by provincial and national government; on the other, some fondly remembered the increased support by the NPA. They also observed that in day-to-day judicial processes, support to police is far poorer.<sup>249</sup> Thus, there are real concerns about access to an effective remedy when prejudice-related crimes take place under normal conditions and do not benefit from the political prominence afforded by a large-scale displacement. The same concern exists with respect to the right to an effective remedy for victims of crime in general.

The SAHRC saw evidence of the guidance provided to police by NPA representatives with regard to additional supporting documentation that would be required for subsequent hearings of each case. The need for this guidance, and the gratitude with which it was received by police, indicates a general need for improvement in the coordination of police and NPA work on cases. Furthermore, training of station-level police in the qualities of a successful case for prosecution is needed.

Also of concern was the nature and quality of recordkeeping for SAPS and ICD cases. The difficulty – in some cases, the virtual impossibility – of locating a particular case file is likely to hinder oversight mechanisms and transparency with regard to the quality of remedy secured for an individual case. In addition, a number of ICD case records do not match the same case records on the SAPS side, which casts doubt on the fate of the original ICD complaint.

Class 3 cases – criminal cases against the police that do not involve a death – and class 4 cases, which involve police negligence and misconduct, are not pursued by the ICD further than the issuing of recommendations, which SAPS is not obliged to follow. Such cases return to SAPS and, due to

<sup>249</sup> Police officer at Cato Manor Police station; Police officer at Reiger Park Police station.

capacity constraints, they are not proactively followed up by the ICD in terms of their progress and outcome. Therefore, there is no efficient way to monitor access to an effective remedy for complaints against the police. Neither does there exist an effective automated means to search for cases of a particular nature (such as xenophobic treatment) in order to monitor the outcomes of such cases (which are also not recorded in any detail in ICD records). Taken together, these elements form a context in which the right to an effective remedy is not being adequately protected. A further consideration is the apparent lack of public awareness of mechanisms such as ICD and the Public Protector.

### Steps Already Taken to Address the Issue

The *DoJCD* reports that it is continuing to monitor xenophobic crimes as they occur. However, from its case list it is uncertain on what basis cases are considered “xenophobic.” For instance, although cases issuing from the Balfour public violence of July 2009 are listed in the records attached to the *DoJCD*’s October 2009 report, cases relating to incidents in Albert Park (KwaZulu-Natal), Du Noon and Franschoek (Western Cape), for instance,<sup>250</sup> which occurred in the same year, are not reflected.

*ICD* has begun to upgrade its information systems to make them more flexible and information more accessible.

### Recommendations

The SAHRC recommends that:

- The *DoJCD* partner with the SAPS desk on crimes against non-nationals in identifying areas in which xenophobia-related cases are likely to have arisen.
- *SAPS* and the *DoJCD* ensure that sporadic prejudice-related crimes against non-national individuals, and opportunistic crimes exploiting the marginal position occupied by non-nationals, receive adequate focus and judicial response. Impunity for such crimes is likely to promote continued violations of non-nationals’ rights. Patterns of such isolated incidents may very well be a marker of risk in particular communities.
- The *DoJCD* support measures to institute hate crimes legislation.
- *SAPS* and *ICD* review their record keeping and related information systems and plan improvements.
- The *ICD* give greater strategic priority to Class 3 and 4 cases. The *ICD* should design feasible measures to improve the monitoring and oversight of such cases, and request the necessary budget for additional human resources.

<sup>250</sup> Forced Migration Studies Programme Database on Xenophobic Attacks in South Africa, 2006-2009. Ed. Tamlyn Monson. Ver 2: 20 December 2009, entries 536; 542; 588.



- The *ICD* and *Chapter 9 institutions* improve measures to publicise their complaints procedures and make them more accessible to poor and marginalised persons.

## 4.7. Institutional Memory and Planning for the Future

### Finding

The SAHRC is pleased to note that progress has been made in some areas in acknowledging and preparing for the contingency of future xenophobic attacks. However, further effort will be required to maintain this progress.

### Explanation

The NDMC has in an undated report acknowledged that despite a degree of capacity and resources to deal with human-induced disasters, neither Safety and Security nor Disaster Management Structures were adequately prepared to deal with “a complex emergency such as xenophobia,” and that relevant contingency plans were either not in place or could not be operationalised due to the “perceived low probability of large-scale xenophobic attacks taking place in South Africa.”<sup>251</sup>

<sup>251</sup> National Disaster Management Centre. [Undated]. Report on the 2008 Xenophobic Attacks, p. 4.

However, it appears that the same level of ill-preparation would not be repeated were future attacks to break out, at least in Gauteng. After the May attacks, Gauteng developed a contingency plan for similar incidents.<sup>252</sup> In mid 2009, in view of the series of service delivery protests that had occurred, the Gauteng Provincial Disaster Management Centre (PDMC), based on information from NIA and the Head of Crime Prevention at SAPS Provincial Headquarters, “convened an urgent meeting to formulate a rapid response plan in the event of a sudden-onset xenophobic attack as was the case in May 2008.”<sup>253</sup> The meeting included the national, provincial, and six municipal disaster management centres, NIA, the United Nations High Commissioner for Refugees (UNHCR), UNOCHA, and the United Nations Security Services (UNSS). A threat analysis was conducted based on information provided by SAPS and NIA and a plan made for:

- The participation of the Gauteng PDMC in Intelligence Coordinating Committee (ICC) meetings.
- The identification of sufficient land for the establishment of Centres of Safe Shelter (CoSS).
- The establishment of Municipal Disaster Management Centre (DMC) plans for the establishment of CoSS.

<sup>252</sup> NDMC, Report on the 2008 Xenophobic Attacks, p. 9.

<sup>253</sup> NDMC, Report on the 2008 Xenophobic attacks, p. 7.



- The assistance of a UN site designer in identifying and designing sites.
- The rapid implementation of sites as soon as a major outbreak is detected, in order to prevent uncontrolled movement and occupation of police stations and community centres.

The related action plan comprises many of the recommendations made in post-crisis evaluations issued by non-governmental actors, although issues surrounding a coherent exit strategy and safe reintegration need to receive more attention.

The SAHRC is also pleased to note that the Provincial Government of the Western Cape (Department of Local Government and Housing) has since the May 2008 attacks compiled a Proposed Social Conflict Emergency Plan which has undergone several revisions after review by a variety of government stakeholders. This is a useful initiative in capturing institutional learning from the 2008 experience and ensuring that it is preserved. The Plan aims among other things to ensure coordination between safety and security actors and social support actors. However, there is a noteworthy absence of recognition of the DHA's responsibility in preventing and deterring xenophobia. The Plan envisions provincial government as constitutionally mandated to play the role of developing "a specific programme aimed at reducing the risk of violence motivated by xenophobia."

Although there is no formal police evaluation of the 2008 response (see *Steps Still to Be Taken to Address the Issue*), the emergence of a desk monitoring crimes against non-nationals illustrates a new awareness of national origin as a possible risk factor for crime. In the eyes of the SAHRC, this is an important development. Also worth noting is the fact that, from a review of submissions and interviews with station-level police, it is clear that awareness has changed since the 2008 attacks. Station-level police see xenophobia as an issue of concern and something about which they would like to receive training. Although police remain cautious to simplistically attribute opportunistic crime to xenophobia, this is a move away from the former trend of denying an element of prejudice to certain crimes.

### Steps Still to Be Taken to Address the Issue

The SAHRC is aware of or has had sight of records of several workshops and indabas following the 2008 crisis, where experiences were shared and recommendations or possible responses discussed. These are valuable exercises, but there is a need to move toward more systematic and sustained knowledge sharing that leads to continued improvement and progress toward consensual best practice.

The issue of reintegration needs to be addressed in more detail in existing provincial plans.

Although there are indications that lessons have been drawn from the 2008 experience by national-level police, no systematic evaluation or written report on lessons learned from the 2008 violence has been produced as far as submissions to the SAHRC indicate. It is essential that the national police ensure that the policing experiences of national, provincial and station-level SAPS members, as well as their Metro police counterparts, are recorded in institutional memory. This should be achieved through the drafting of a report and subsequent guidelines for addressing the displacement of non-nationals, and/or training that incorporates key stumbling blocks during such a displacement and suggests means of minimising their effects. If one examines station-level reflections on the crisis, it is clear that certain issues faced on the ground have not been addressed by any provincial or national level police plan. Station-level police pointed out the following challenges that they faced in responding to the attacks, which need to be taken into account in any police evaluation and planning process:

- **Fear for their lives** in the face of stone-throwing, weapon wielding crowds, and a sense that they were not equipped to face a mob without regard for their personal safety. It is worth noting the anecdote told by a police interviewee at Ocean View, who recalled the time a police truck was written off after schoolchildren stoned it during a protest. Police are all too aware of the danger posed by a stone-throwing crowd.
- **Extreme fatigue:** Police were often on call 24-hours a day and due to the trauma of witnessing certain events, such as in Ramaphosa, they were unable to sleep even when they had the opportunity. The atmosphere of permanent crisis created by encampment of displaced persons at stations also reduced the opportunities for rest.
- **Physical and mental health:** Sanitary conditions during the encampment of displaced persons at Cato Manor led to an officer becoming ill. At Reiger Park, an office-based police officer deployed during the attacks, who witnessed the burning body of Ernesto Nhamuave, and attempted to assist, has had difficulties coming to terms with what she encountered. Counselling was not offered to officers who, according to another officer whom the SAHRC spoke to informally, dismissed such ideas, saying "This is police work; get used to it."
- **Inability to trace witnesses and complainants,** caused in part by the unmonitored departure of displaced non-nationals in voluntary repatriation buses, difficulties



tracing persons once they were moved to secondary shelters, and failure to ensure that next-of-kin and contact numbers abroad were provided to assist where victims returned to their own countries. With hindsight and planning, problems like these could be addressed should a repeat displacement occur.

- **Unwillingness of complainants to proceed with cases**, possibly caused by direct or indirect pressure to facilitate reintegration into communities by adopting a conciliatory stance toward perpetrators, concern over their visibility for those without legal status, or a general wariness of the judicial system, which police report to be generally prevalent in communities they serve.
- **Humanitarian and goodwill work outside their mandate** necessitated by the failure of other departments to meet their obligations.

Although the idea of prejudice against non-nationals looms much larger in the minds of station-level police than in the past, police are still grappling with the question of what constitutes a xenophobic crime. This is understandable, as no specific criminal category exists for prejudice-related crimes, limiting the ability of the judicial system to distinguish xenophobia-, homophobia- or racism-related offences from general categories of crime. Carefully conceived legislation is needed to address this area, followed by initiatives to

support appropriate policing of hate crimes, whose impact on the victim and on social cohesion more generally is distinct from the effect of other types of crime.<sup>254</sup> This would not only assist in the identification of genuine xenophobic crimes but would also assist in securing appropriate sentencing for such crimes. An initial step in this direction may be the Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance Bill, which will be submitted to Cabinet in June 2010.

A further concern is the absence of an evaluation by the SANDF, and the absence of evidence of a consultative evaluation between SAPS and SANDF on the pros and cons of the army deployment and possible means of better utilising the army to restore the rule of law during popular violence of the scale seen in 2008. This kind of introspective process would be reassuring to those who were initially opposed to an army deployment, and might provide a measure of confidence in the appropriacy of such a deployment for any future crisis, increasing the buy-in of government and civil society earlier in the process.

Similarly, the SAHRC has seen no evidence of introspection by the Presidency of the timing or overall effectiveness or appropriacy of the executive decision to deploy the army. Nor was evidence submitted of the monitoring of progress made in implementing the recommendations of the inter-departmental parliamentary task team report. It is therefore uncertain whether any or all of the team's recommendations have been implemented, and whether, as recommended, parliamentary committees are exercising "oversight over programmes of government and non-governmental organisations related to the reintegration of foreign nationals into communities."

### Regulatory Framework

Article 4 of the *Convention on the Elimination of Racial Discrimination*, to which South Africa is a signatory, requires the introduction of measures to address hate crimes.

The *Immigration Act 2002* imposes on the DHA responsibilities for curbing negative sentiments against non-nationals.

The *Disaster Management Act 2002* obliges disaster management structures to proactively manage risk and undertake prevention activities where possible.

The *Defence Act 2002* provides for the establishment of guidelines for cooperative service by SAPS and the defence

<sup>254</sup> Personal communication with Danzel van Zyl, SAHRC, 27 January 2010; 'Hate Crimes in South Africa: A Background Paper for the Hate Crimes Working Group,' obtained by personal communication from Duncan Breen, CoRMSA, 26 January 2010.

force in the event of SANDF deployment being necessary to uphold the rule of law.

## Recommendations

The SAHRC recommends that:

- The **Gauteng DMC** take the position of the Western Cape in proactively planning to holistically reduce the risk of violence against non-nationals rather than plan only to address it when it occurs.
- The **NDMC** ensures that all provinces have in place similar action plans in case of outbreaks of xenophobia or other social conflict that might induce displacement.
- The **Social Cohesion Working Group**, convened by the DSD, deliberate on and nominate a lead department to develop provincial conflict resolution capacity for the purpose of developing, restoring and maintaining social cohesion in areas affected by social conflict.
- Through reviews of existing reports and the successes and failures of prior reintegration or mediation activities, the **NDMC** begins to develop best practice guidelines on reintegration.
- The **Ministry of Cooperative Governance and Traditional Affairs** should ensure that the new NDMC head has easy access to the reports arising from the 2008 violence, and that there is further reflection on planning around future social conflict and displacement in its annual report. As far as the SAHRC is aware, the 2008-09 annual report, which was still being drafted during the investigation period, does not mention the 2008 violence. This is a lost opportunity to raise awareness of the work that the Western Cape and Gauteng PDMCs have done to address the possibility of future attacks.
- The **Western Cape PDMC** should ensure that the Ministry of Cooperative Governance and Traditional Affairs is apprised of its progress in planning for the possibility of future attacks, as the Ministry provided records only of Gauteng activities to the SAHRC.
- A **national task team of police** compile a documentary record of institutional learning during and after the May 2008 attacks in consultation with affected stations and provincial offices. This should form the basis of relevant training or guidelines, which should be rolled out to all affected stations, prioritising those stations which have experienced violence against non-nationals on more than one occasion.
- The **SANDF** compiles a documentary record of institutional learning during and after the May 2008 attacks in consultation with deployed members. This, together with the SAPS evaluation recommended above, should form the basis of an engagement between SAPS and the SANDF on guidelines for future cooperation in the case of a social conflict disaster [see section 2.3].
- The **SAHRC** carry out a rights education programme aimed specifically at police working with displaced non-nationals, including their motivation for being in South Africa, the effect of immigration policing on access to police protection, the obstacles to justice should displaced persons leave the country, and related issues. Such training should aim to facilitate an introspective process by station-level police, capacitating them to think reflectively about measures to promote justice for non-nationals and the rule of law for communities. It should be rolled out to all stations in previously affected areas.
- The **DoJCD** develop specific, carefully-conceived legislation addressing prejudice-related crime. This would assist in the identification of genuine xenophobic crimes and help secure appropriate sentencing for such crimes.
- **SAPS** be trained in matters pertaining to hate crimes once such legislation is put in place.
- The **National Planning Committee** take account of the recommendations made in this report in its monitoring of government's execution of its mandate.



# Chapter 5: Role of the SAHRC

This chapter examines the challenges faced by the SAHRC during the 2008 crisis, and its role beyond the publication of this report.

## 5.1. The SAHRC in the 2008 Disaster

### Observation

The SAHRC encountered difficulty in responding within the boundaries of its mandate and on the scale required during the 2008 disaster. Continued commitment is needed to ensure that it is better able to respond in the event of a recurrence.

### Explanation

The SAHRC was relatively slow to respond to the violence of 2008, being uncertain of what role to play in an unprecedented set of circumstances. Once its response began in earnest, all ordinary operations were put in abeyance. This allowed the SAHRC to better fulfil demands for information, input and assistance; community engagement; monitoring; and participation in or facilitation of forums, task teams and committees.

In Gauteng, attempts at coordination had limited effect due to attrition in attendance of the meetings as stakeholders became overrun by the practical demands of the crisis. The SAHRC had not monitored a large-scale disaster before and had to navigate disagreement over what standards should be used. Eventually, distinct SAHRC guidelines were developed from existing instruments. The Gauteng office was criticised for failing to release its monitoring reports, whereas the Western Cape Office released several. Monitoring was conducted on a less formal basis in KwaZulu-Natal due to its involvement in relief activities. In Gauteng, questions were raised around the SAHRC's role and whether it was one of assistance to government or monitoring of government. In the Western Cape, the SAHRC office adhered to its core human rights mandate. The lack of consistency and the evident uncertainty with regard to the SAHRC's mandate and priorities under such circumstances is an important concern for the future.

With regard to reintegration initiatives, the SAHRC was party to numerous meetings and forums, and worked to facilitate dialogue between parties to the *Mamba* case (which attempted to prevent the closure of displacement sites in Gauteng). The latter proved fruitless, as government parties to the matter did not attend. It is regrettable that the SAHRC did not take a stronger position on the closure of displacement sites by the Gauteng Province in violation of an interim ruling by the Constitutional Court.

Another key challenge faced by the SAHRC was the failure of certain government stakeholders to apply specific recommendations that it continually reiterated.<sup>255</sup>

255 SAHRC. (2009). Putting out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence. 31 March 2009.

### Regulatory Framework

The Human Rights Commission Act 1994 sets out the role and powers of the SAHRC but does not prescribe the approach to be taken by the SAHRC during a complex disaster such as that of 2008.

### Steps already taken to address the issue

In the light of the 2008 experience, the SAHRC conducted an evaluation of its response<sup>256</sup> and developed a policy paper<sup>257</sup> on the role of national human rights institutions (NHRIs) in a disaster, drawing on international disaster response guidelines, the Paris Principles concerning the mandate of NHRIs, South Africa's Constitution and the human rights enshrined in the Bill of Rights. It identifies roles for an NHRI during and after disasters, as well as roles to be played on an ongoing basis. It also clarifies the mandate of the SAHRC to exclude humanitarian assistance. Adherence to this policy is likely to improve the consistency of the SAHRC's approach to complex disasters and rationalise the deployment of resources to best fulfill the SAHRC's mandate.

What has perhaps not been adequately addressed is the need for the SAHRC to take a stronger leadership role as an independent body, and particularly a leadership role among Chapter 9 institutions in the context of a disaster response. Further consideration and engagement is needed on an optimal division of labour between Chapter 9s in order to monitor and protect rights in the case of a future disaster of a similar nature. The SAHRC also needs to ensure an appropriate balance between promoting cooperative relationships with government and the need for a clear and independent stance to ensure accountability for human rights violations.

Finally, little will be achieved through the SAHRC's activities if government does not accord due respect to the weight of the SAHRC's recommendations and the legal obligation to comply with its requests.

### Recommendations

The SAHRC recommends that it:

- Compile the recommendations of its response evaluation report and its 2009 Policy Paper into a single, easily accessible document to guide future response to a complex disaster.

256 SAHRC. (2009). Putting out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence. 31 March 2009.

257 SAHRC (2009). SAHRC POLICY PAPER: A NATIONAL HUMAN RIGHTS INSTITUTION'S RESPONSE TO A DISASTER: LESSONS FROM THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION. March 2009.

- Implement the recommendations of the above guiding document.
- Engage further with other Chapter 9 institutions on means of better utilising Chapter 9 resources to promote the use of a human rights framework by those stakeholders engaged in humanitarian responses.
- Consider its role in leading other Chapter 9 institutions during a disaster and consult with other chapter 9s to develop consensus in this regard.

## 5.2. The Mandate of the SAHRC in Respect of Issues of Rule of Law, Justice and Impunity Emerging from Social Conflict

It is clear from this investigation that much work remains to be done by government to support justice and the rule of law and to combat impunity in relation to violence against non-nationals. However, the SAHRC also has work to do if it is to fulfil its own obligations in this regard.

Drawing from the Constitution and the HRC Act 1994, the SAHRC's responsibilities are to:

- Promote respect for human rights and a culture of human rights;
- Promote the protection, development and attainment of human rights; and
- Monitor and assess the observance of human rights in the Republic of South Africa.

It is not enough, therefore, for the SAHRC to investigate and report on the observance of human rights, as it does in this report. It also has monitoring and assessment responsibilities. Effective monitoring and evaluation must be regular and systematic if it is to have a meaningful impact on the protection, development and attainment of human rights.

## 5.3. Recommendations to the SAHRC

As such, the SAHRC makes the following recommendations to ensure that its mandate is fulfilled in respect of the findings and recommendations stemming from this investigation. These are in addition to the specific recommendations made for the SAHRC in the body of this report. The SAHRC recommends that it:

- Develop systematic mechanisms to ensure the ongoing monitoring of recommendations made in this report to various government structures.
- Develop systematic mechanisms to monitor community-based conflict resolution, reintegration and social cohesion initiatives conducted by government and civil society in respect of communities affected by public violence related to social conflict.
- Make monitoring information accessible to the public and assess key issues arising from the monitoring in its annual reporting.
- Improve the quality and speed of complaints investigations to promote the redress of human rights violations with regard to prejudice-related crimes and incidents with a bearing on social cohesion or conflict.
- Intensify and systematise training on human rights, xenophobia and non-discrimination to local police, leadership structures and communities in areas previously affected by or at risk of social conflict.

The SAHRC does not currently have the capacity to carry out these activities. In order to secure the additional resources needed to fulfil its mandate in this respect, it is therefore imperative that, in light of the scale and gravity of its potential impact on human rights, the SAHRC prioritise the issues of rule of law, justice and impunity in relation to social conflict.



# Appendices

## Appendix A: Submissions Received

CIVIL SOCIETY BACKGROUND DOCUMENTS	
	<b>Consortium for Refugees and Migrants in South Africa</b>
1	Consortium for Refugees and Migrants in South Africa. CoRMSA Submission to the South African Human Rights Commission for the Investigation into the 2008 Xenophobic Violence. 30 November 2009.
	<b>Forced Migration Studies Programme</b>
2	Transcriptions of interviews with victims of xenophobic attacks, conducted in and out of shelter settings ("Narratives Project").
3	Coded Xenophobia Interviews Final [Excel data file].
4	Transcriptions of interviews with South Africans, non-nationals, and key informants in 11 communities ("Causes Project").
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7	Wa Kabwe-Segatti, A. & Fauvelle-Aymar, C. (2009). Draft Book Chapter: People, Space and Politics: An Exploration of Factors Explaining the 2008 Anti-Foreigner Violence in South Africa.
8	Wa Kabwe-Segatti, A. & Landau, L.B. (eds). Migration in Post-Apartheid South Africa: Challenges and Questions to Policy-Makers. Research Department: Agence Française Développement.
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10	Refugee and Migrant Rights Programme. Lawyers for Human Rights Submission to the South African Human Rights Commission Investigation into Xenophobia Following the Continuing Attacks on Foreign Nationals. 20 November 2009.
	<b>Legal Resource Centre</b>
11	Naseema Fakir. Case Report: Victims of Xenophobia. January 2009.
	<b>United Nations High Commissioner for Refugees</b>
12	United Nations High Commissioner for Refugees. Ad Hoc Inquiry Panel Report into UNHCR's Response to the 2008 Xenophobic Crisis in the Republic of South Africa. 2009.
	<b>Wits Law Clinic</b>
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14	Nkea, E. & Linder, M. MRMP Access to Justice Project Field Report for 18 May to July 22 2009.
15	REPORT ON THE INTER-MINISTERIAL COMMITTEE DEALING WITH XENOPHOBIC ATTACKS IN GAUTENG. (Undated)
16	Jonathan Klaaren with Roni Amit, Melissa Linder, Emmanuel Nkea, Tara Polzer & Rebecca Sutton. Responses of the Justice System to Xenophobic Violence. 10 November 2009, version 1.
17	Rebecca Sutton. Background Research on the May 2008 Xenophobic Attacks in South Africa: A report on findings and suggestions for further investigation. 2009.
18	Suspected Xenophobic Deaths: Forensic Pathology Service, Johannesburg.
19	Annexure 1: List of Court Cases.
20	Proclamation by the Premier (Gauteng). (No. 1, 2008.) DECLARATION OF PROVINCIAL STATE OF DISASTER IN TERMS OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002). Provincial Gazette Extraordinary, 5 June 2008.
21	Proclamation by the Premier (Gauteng). (No. 2, 2008.) EXTENSION OF DECLARATION OF PROVINCIAL STATE OF DISASTER IN TERMS OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002). Provincial Gazette Extraordinary, 5 September 2008.
22	Classification of a Disaster: Gauteng Province. (No. 641, 13 June 2008). Staatskoerant, 13 Junie 2008, No. 31130.
23	Classification of a Disaster: Western Cape Province. (No. 640, 13 June 2008). Staatskoerant, 13 Junie 2008, No. 31130.
24	Local Authority Notice 2009. City of Tshwane: Disaster Risk Management Policy Framework. Provincial Gazette No. 239, 3 September 2008.



GOVERNMENT SUBMISSIONS	
	<b>City of Cape Town</b>
25	Provincial Government of the Western Cape: Department of Local Government and Housing. Western Cape Province Proposed Social Conflict Emergency Plan. 28 October 2009.
26	Provincial Government of the Western Cape and City of Cape Town. Planning Meeting Minutes: Displaced Foreign Nationals. 18 June 2008.
27	City of Cape Town: Sport, Recreation and Amenities. Safety Zone Accommodation Update. 17-20 June 2008.
28	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 18 August 2008.
29	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 25 August 2008.
30	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 28 August 2008.
31	Minutes: Provincial/City Disaster Management: Core Group Meeting. 29 August 2008.
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33	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 5 September 2008.
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36	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 30 September 2008.
37	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 3 November 2008.
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39	Western Cape Department of the Premier: Provincial Facilitation Office. Movement Plan. In e-mail sent 9 October 2008 from Ghalib Galant, Project Leader, Provincial Facilitation Office.
40	City of Cape Town: Executive Director: Housing. Memorandum: Xenophobia Update and a Way Forward. 12 November 2008.
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44	Western Cape High Court, Cape Town. Settlement Offer in City of Cape Town vs. Residents of Bluewaters Sites B and C. August 2009.
45	Cape Town Stakeholder Meeting. Notes: Meeting on Reintegration and Protection Convened and Hosted by UNHCR Cape Town. 24 February 2009.
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56	Mayoral Sub-Committee Report. 19 May 2008.
57	City of Johannesburg. Draft Discussion Document: Re-Integration and Harmonisation Strategy for Persons Displaced by Xenophobic Community Conflict. June 2008.

58	Mayoral Committee. Comprehensive Report on the Community Conflict (Xenophobia) Reintegration Programme in the City of Johannesburg. 9 October 2008.
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62	Mayoral Committee. Terms of Reference for the Migration Mayoral Sub-Committee. 4 June 2008.
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64	Community Development: Migrant Help-Desk. Report on the Challenges of Migration in Local Government: City-to-City Sharing Session. Hosted by the City of Joburg and SALGA Gauteng. 25-26 May 2009.
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78	Ekurhuleni Metropolitan Municipality. Reintegration Plan. 2008.
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81	Resources List: Cluster and Contact Details. 2008.
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82	Gauteng Department of Local Government. Assessment of Support Given by Gauteng Provincial Government to the Victims of the Xenophobic Attacks. 2008.
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95	SAHRC 1 (Excel Data File).
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97	Annual Report 2008/2009.
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103	Comprehensive Report on Displaced Foreign Nationals. 8 June 2008.
104	Internal Memorandum: Progress Report on Foreign Nationals Living in the Methodist and N.G. Kerk Churches in Pinetown. 10 June 2008.
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106	Report on Community in Dialogue Programme: Addressing Xenophobia and Displaced Foreigners. 8 June 2008.
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181	Case 197/05/2008

## Appendix B: Interviews, Focus Groups and Meetings Held

Site	Focus Group	Date	Place	# Participants	
<b>Masiphumelele</b>	South African women and community development workers	7 December 2009	Salvation Army Hall, Masiphumelele	6	
	CPF, street committee and Bambanani members	7 December 2009	Salvation Army Hall, Masiphumelele	6	
	Somali residents (men)	8 December 2009	Baptist Church offices, Masiphumelele	6	
	Other non-national residents (men)	8 December 2009	Baptist Church offices, Masiphumelele	8	
	Informal discussion				
	Zimbabwean residents (women)	8 December 2009	Street	3	
	South African child	8 December 2009	Baptist Church offices, Masiphumelele		
	Police interviews – single/group				
	Captain Windwaai	9 December 2009	Ocean View Police station	1	
	Inspector Greef	9 December 2009	Ocean View Police station	1	
	Inspector Magman	9 December 2009	Ocean View Police station	1	
	Inspector Alexander	22 December 2009	Telephone interview	1	
	Superintendent Mouton	20 January 2010	Telephone discussion	1	
	Documents				
	Incident reports				
	Focus Group				
Date					
Place					
# Participants					
<b>Cato Manor</b>	South African women, clergy and health worker	11 December 2009	Cato Manor Masibambisane	9	
	South African residents (translation by Pastor John Mkhize)	12 December 2009	Cato Manor Masibambisane	1 (participants did not arrive)	
	Non-national residents	12 December 2009	Cato Manor Masibambisane	0 (participants did not arrive)	
	Informal discussion				
	Mozambican residents (men) (translation by Pastor John Mkhize)	12 December 2009	Street	2	
	Police interviews – single/group				
	Captain Chetty & Inspector Sithole	11 December 2009	Cato Manor Police Station	2	
	Inspector Shusanker	11 December 2009	Cato Manor Police Station	1	
	Inspector Dhlomo & Inspector Mkhize	11 December 2009	Cato Manor Police Station	2	
	Sergeant Govender	11 December 2009	Cato Manor Police Station	1	
	Superintendent Mdlalose	12 December 2009	Cato Manor Police Station	1	
	Documents				
	Correspondence from crisis period				
Case dockets					
<b>Ramaphosa</b>	Focus Group				
	Date				
	Place				
# Participants					
South African residents and community leaders – Reiger Park	11 November 2009	Harambe Centre, Reiger Park	9		
South African community workers and ward committee members	11 November 2009	Them bani Home-Based Care, Ramaphosa	9		

Site	Focus Group	Date	Place	# Participants
Ramaphosa	Non-nationals (men) (translation by Philip Molekoa)	18 December 2009	Thembani Home-Based Care, Ramaphosa	0 (Participants did not arrive)
	Non-nationals (men) (translation by Philip Molekoa)	25 January 2010	Thembani Home-Based Care, Ramaphosa	11
	Informal discussion			
	Patrick Maswanganye	11 November 2009	Community School, Ramaphosa	
	Ward Committee members	18 December 2009	Road Reserve, Ramaphosa	2
	Police constable	22 December 2009	Reiger Park Police Station	1
	Station Commissioner and Branch Commander	25 December 2009	Reiger Park Police Station	
	Police interviews – single/group			
	Inspector Ndubane & Constable Seroke	17 December 2009	Reiger Park Police Station	2
	Superintendent Matebula	22 December 2009	Reiger Park Police Station	1
	Captain Dladla	22 December 2009	Reiger Park Police Station	1
	Inspector Kunene	22 December 2009	Reiger Park Police Station	1
	Documents			
	Case docket			

## Other Meetings & Interviews

Meeting	Date	Place
Gauteng Provincial Commissioner of Police and Staff	12 December 2009	Provincial Commissioner's Boardroom, Johannesburg
Director Chipu, National Police	15 December 2009	Dir Chipu's Office, Pretoria
ICD Research Staff	23 November 2009	ICD Offices, Pretoria
Luvuyo Goniwe, Department of Community Safety & Liaison, KwaZulu-Natal	11 December 2009	Department of Community Safety & Liaison, Pietermaritzburg
Disaster Management and Metro Police Staff, Ekurhuleni	8 January 2009	Ekurhuleni Municipal Offices, Bedfordview
<b>Discussion</b>		
George Killian, NDMC	2 December 2009	Telephone discussion
Ponatshego Mogaladi, Public Protector	6 January 2010	Telephone discussion
Senior Supt Mnganga, Station Commissioner, Cato Manor (ICD cases)	20 January 2010	Telephone discussion
Ms Morrison, Table View Police Station (ICD cases)	22 January 2010	Telephone discussion
Mrs Thiart, Table View Police Station (ICD cases)	22 January 2010	Telephone discussion
Constable Jungli, Reiger Park Police Station (ICD cases)	22 January 2010	Telephone discussion
Naseema Fakir, Legal Resource Centre	14 January 2010	Telephone discussion
Sharon Pillay, ProBono.org	4 December 2009	Telephone discussion



## Appendix C: Site Reports

### 1. “Defending Ourselves”: Ramaphosa, Ekurhuleni Municipality, Gauteng

#### 2008 Violence

Focus groups with South African residents and station-level police revealed that South African and non-national community members in Ramaphosa lived side by side peaceably prior to May 2008, and that there was a time when they used to play soccer together. There is a sense of bewilderment about the 2008 attacks, which several sources confirm was preceded by a gathering of men armed with spades and makeshift weapons and singing Mozambican liberation songs at the entrance to the settlement.

Police claim the men had gathered to defend themselves in case South Africans in Ramaphosa followed the example of other Gauteng settlements and mobilised to attack foreigners. Police remained present at the scene, but did not disperse the group. In the absence of communication between the “Mozambican” group, the police, and other community members, South African residents saw the group as a threat and linked it – rightly or wrongly – to several murders that took place over the following two days. On the third day, the community began a general offensive on foreign nationals, believing that the police were not protecting them:

Before Sunday, they were supposed to do something. That thing [the gathering of armed non-nationals and subsequent murders] happened from Friday, Saturday, up to Sunday, but no action. (Focus group, Ramaphosa, 11 November 2009)

Later, when consulted by government, residents refused to accept foreigners back into the community – a fact that is

not surprising considering their perception that non-nationals were the first to mobilise for violent purposes. It appears that some displaced persons returned to Reiger Park but not to Ramaphosa itself. However, they have since accepted some non-nationals back, and claim to be living freely with this much smaller population of non-nationals. They note that non-nationals are still fearful and that it is difficult to enlist their participation in community meetings. Generally, although there are concerns about the involvement of non-nationals in crime and the difficulties managing this problem in an informal setting, there was very little sense of an overarching hatred or dislike of non-nationals.

#### Economic and Social Conditions

This place is independent. The people here are independent; they have turned into another government. (Focus group, Ramaphosa, 11 November 2009)

The statement above reflects the profound impact of a prolonged disconnection between the local community and the structures of government. The settlement has reportedly existed for 15 years, and in that time no public school or clinic has been established in the area. The school and clinic that exist are run by community members. Areas designated as public space have somehow been allocated for private use. The ward committee has not received support from the local councillor or municipality despite a peaceful march and petition relating to various community issues, including issues around the need to formalise the “Road Reserve” or informal settlement that surrounds the formal settlement, which does not have streets, lighting or shack numbers. Community activists are fighting for action to be taken on these issues, but in the absence of support are unable to solve the problems of the community, which include the problem of duplicate title deeds on stands in the formal area.



## Policing and Justice

They say we've got justice. That justice is not working. That justice is serving other people. (Focus group, Ramaphosa, 11 November 2009)

Community members expressed disillusionment with the justice system and doubts about the integrity of certain police officers and their role in reinforcing social problems in the area (although these doubts were balanced by an awareness of the challenges police face).

Concerns pre-dating the 2008 attacks included police extortion of bribes from non-nationals, and apparent conflicts of interest where police were given gifts of furniture and appliances that residents are convinced were in fact stolen goods. Community members also claimed that police appropriated confiscated goods for their own use and that during the May 2008 crisis officers also appropriated goods from deserted homes for their personal use.

It appears that there was no CPF in operation in 2008, and that after the 2008 attacks community patrols were undertaken without police backup. In November 2009 when the SAHRC visited the community, the CPF had only recently been reconstituted. This may be linked to the arrival of new senior staff members at the Reiger Park Police Station. They are working to improve the relationship between the station and the community and provide police support to local initiatives, and to some extent this was acknowledged by community members.

The cynical attitude that has developed in Ramaphosa in relation to the judicial system poses challenges for police work and judicial outcomes. Understanding of the processes and logic of the judicial system appears limited, and residents are not prepared to risk opening cases against individuals who are likely to return to the community and target the witnesses or complainant:

The community are tired. Today you got him [the perpetrator of a crime], tomorrow he says "You think you're clever; I'm going to kill you." He comes from the police station. The poor police have done the work, the magistrate or whatever, says, "Oh, we don't find him guilty. Prove it."

The informality of the area – which lacks road infrastructure, lighting and shack numbers – makes it extremely difficult for police to respond quickly to complaints, especially at night. Police often ask the person calling in a complaint to meet them at a recognisable point and guide them to the scene of the crime, which results both in delays and risk to the

caller. Human resource issues at Reiger Park Police Station sometimes mean that only one or two vehicles are on the road at a given time – policing five informal settlements – and this results in further delays.

Informal dwelling also creates dilemmas over ownership that inhibit the ability of police to pursue cases such as those of shacks appropriated in the Road Reserve area. There is a need to systematically manage and monitor ownership and occupancy in the informal area, possibly through the establishment of a tenants' and/or landlords' association that can partner with police and the Department of Human Settlements to formalise the informal settlement in a manner that will promote human security and access to justice.

## 2. "The Police Don't Matter": Masiphumelele, City of Cape Town, Western Cape

### 2008 Violence

Masiphumelele has experienced attacks on non-nationals before, in 2006. This was followed by a government intervention that included the training of local leaders in mediation and communication skills. In 2006, South African business owners were implicated in the attacks, but it does not appear that this was the case again in 2008.

There is a general understanding that the May 2008 violence in Masiphumelele was based on a "skollie element", or the involvement of opportunistic individuals attacking a vulnerable group in a context of national instability. The motivation appears here to be personal gain, and in line with this understanding, the violence was focused on looting and destruction of property. However, the targeting of foreigners – and their heightened vulnerability to street crime in general (see *Policing and Justice* below) – is a symptom of an underlying general marginalisation and social inequality. In other words, despite its criminal manifestation, the violence occurred in a context of systemic discrimination against non-nationals.

Masiphumelele stands out as a community that was proactive in its efforts to assist and reintegrate displaced persons. The Ocean View Police, working with the local business association, arranged to proactively evacuate Somali shop-owners' stock in the event of violence spreading to the area. Community leaders visited the displacement site where displaced persons were staying, apologised for the public violence, and invited them to return, promising them protection. A partnership between Bambanani, the CPF and the Ocean View Police Station saw a restorative justice approach where the community was given

a grace period in which to return stolen goods, after which Bambanani proactively identified stolen goods and reported such cases to police for investigation. However, only a limited amount of stolen goods could be recovered, and it appears that not all non-nationals were aware of the opportunity to reclaim stolen goods that were being kept in police storage.

Despite goodwill emanating from some quarters of the community, underlying tensions remain. Non-nationals report that, since the 2008 attacks, there has been (1) a letter circulated commanding foreigners to leave and (2) an attack on a non-national suspected of murdering a South African child. It was later found that the man was not in fact linked to the crime. Shops run by non-nationals are subject to more robberies than South African-run shops, and non-nationals complain that they are subject to street crime such as cellphone theft and sexual harassment more often than South Africans. Finally, South African shebeen owners continue to insist that the opening hours imposed on them by police must also be applied to Somali-run grocery stores.

Perceptions that non-nationals are involved in crime persist among community leaders, and women dating foreigners are harassed by South African men who call them derogatory names.

### **Economic and Social Conditions**

The main complaints in Masiphumelele revolved around drugs and the sale of drugs to children in the community. There is a clear generation gap, where young people in the community are seen as a threat through their drug dependence and related crime.

For non-nationals, street crime is a common problem, as are serious alleged irregularities in the issuing and renewal of asylum documentation at the Cape Town refugee reception office (RRO). An asylum seeker claimed that the RRO is charging R1,000 for an asylum seeker permit, which is supposed to be issued free of charge.

There is also a problem of social cohesion arising from the fact that only Somali nationals have found a means of organising themselves and participating in community structures. Other groups of non-nationals remain marginalised and feel isolated and threatened by the community they live in.

### **Policing and Justice**

Cooperation between Ocean View police, the CPF and Bambanani during the 2008 crisis was reportedly good. It is reported that the structures worked effectively as a team. But from focus groups it appears that this was an exception to the

rule, and that the community often felt the need to take the law into its own hands.

It's better to work with the law, but the law must work with communities. (Focus group with community leaders, Masiphumelele, 7 December 2009.)

South African respondents lacked trust in the police, complaining of their inadequate resources to police the community, the long delays in receiving assistance, and the lack of follow-up after cases are reported. Street committee, Bambanani and CPF members claimed that police sometimes tip off drug dealers before a raid takes place.

Police reportedly discourage non-nationals from pursuing cases against those who commit crimes against them, for fear that this will prompt further anti-foreigner mobilisation. This has led to the attitude among non-nationals that if a crime has happened, one should just "let it go."

Finally, community-based structures struggle with the conflict between different rights. They are extremely concerned about human security for the law-abiding members of the community, and in the interest of protecting this right would like to curtail certain freedoms, such as the ability of young people to linger in the streets late at night. They are also frustrated at social workers' actions in discouraging the detention of drug dealers under the age of 18.

From a policing perspective, Ocean view police note the general reluctance of Masiphumelele residents to engage with the judicial process and to pursue cases after restoration of their property. This in turn is a source of great frustration when all that is required to secure a conviction on a fully investigated case is the cooperation of the complainant.

## **3. "They Took the Fire Away": Cato Crest, eThekweni, KwaZulu-Natal**

### **2008 Violence**

There is general agreement that it was primarily criminals who perpetrated the May attacks in Cato Crest, an informal settlement in Cato Manor, and that they did so after seeing events in the rest of the country broadcast in the media. There does not seem to be a widespread hatred or dislike of foreign nationals, but nevertheless, few South Africans are acquainted with a foreigner in the area. Landlords depend on foreign clients for rentals and were thus negatively affected by the displacement.

Although a large number of people were displaced in Cato Manor, attacks in the informal settlement of Cato Crest seem to have been of a more manageable order than in the other two sites visited. Police said that perpetrators tended to disperse when they arrived or at the very least would not commit a crime in front of police. Apparently, police did not need to use rubber bullets during the May violence.

Police evacuated non-nationals' property as far as possible, and the two non-nationals the SAHRC was able to speak to during the visit (after none of the invited non-nationals arrived for the focus group) were in agreement that the police response was good. They felt that they were as safe as other community members, and police also observed that non-nationals are not targeted by criminals to a greater degree than South Africans.

South African residents questioned whether evacuation of non-nationals was an appropriate response, as they claimed this simply "took the fire away" rather than properly resolving the issue. Community members complained that despite being approached, the ward councillor did nothing to address the issue of mobilisation against non-nationals with the community.

### Economic and Social Conditions

Domestic abuse was the main social issue emerging from engagement with community members, who were mainly women. A local faith-based organisation reported that it struggles to assist abused women and children or to successfully carry out other community interventions because of the indifference of the ward councillor. An abandoned clinic along a main road in the area remains disused despite efforts to turn it into a community resource and shelter for victims of domestic and sexual abuse. Participants claimed the councillor had never reported back to the community and that he had never responded to the complaints brought to his attention. Frustrations in this regard led in November 2009 to a protest and public violence including the burning of the councillor's office.

### Policing and Justice

South African community members are thoroughly disillusioned with the police and cited numerous cases of alleged police negligence, including the refusal of service centre officers to assist complainants, failure of police to wear uniforms or identify themselves to community members, failure to contact emergency services on behalf of injured victims, soliciting of bribes from non-nationals and even consorting with criminals in the area. Linked to the social issue of domestic abuse, participants expressed frustration with the issuing of interdicts against violent partners who may return to murder the women who laid complaints against them.

In Cato Manor, focus group participants highlighted the problem of impunity for individuals who commit crimes over and over again but keep returning to the community. This was linked to a fear that if a resident lays a charge against the perpetrator, the same person will return to attack him or her in revenge.

The police, in turn, expressed their own frustrations, for instance with the failure of victims to cooperate with police and pursue cases to their conclusion (which was a major problem reported during investigations into the 2008 attacks on non-nationals in the area). A police officer expressed the opinion that the justice system was "a joke", claiming that dockets are lost and organised criminals such as drug dealers are given bail at inconsequential sums and can then disappear. The problem of mud on the dirt roads in Cato Crest and the lack of lighting in the informal settlement were cited as challenges to policing, although patrols take place at night despite the absence of light.

The ward councillor has, according to local residents and staff of the Department of Community Safety and Liaison, attempted to dissolve the CPF in Cato Manor. Although police assert that there is still a CPF operating in the area, community members were not aware of it and alleged that it had ceased to exist after the end of the previous ward councillor's term of office.



## Appendix D: Limitations

The methodology for the investigation is laid out in the introduction to this report, but the SAHRC wishes to acknowledge the limitations of the research project in terms of both design and problems encountered as the investigation unfolded.

### Project timeline

The SAHRC agreed in principle to conduct an investigation into the 2008 attacks, following a request from CoRMSA in late 2008. The investigation got underway in October 2009. This was due to delays in obtaining funding from an external donor, channelling it through Treasury, and acquiring a suitable person to lead the research process. Some parties will consider the investigation to be overdue. However, it must be borne in mind that the delay has provided the opportunity to review responses over a longer period, covering not just government's unbudgeted work of the 2008/09 financial year, but also some of the subsequent 2009/10 financial year for which government structures had the opportunity to budget and plan in light of the 2008 events.

The timeline of the investigation was also constrained in terms of budget, as the funding obtained supported a salary for only six months, and the timeframes applicable for layout, printing and production of the report prior to the launch date reduced the actual investigation time to approximately three months.

### Focus on government

The SAHRC is well aware of the significant role played by civil society during the 2008 crisis, including the advantages and disadvantages this presented for the state's overall response. However, the state bears the primary responsibility for the protection of displaced persons, as noted in the introduction to the report. Therefore, given the limited resources available for the investigation, government was selected as the focus of the investigation.

### Limitations of Submissions

The response to the SAHRC's call for submissions from government departments met with a poor response, and a substantial amount of time was spent repeatedly following up the call with numerous departments and public officials. It was apparent that many government structures are unaware that a call for submissions from the SAHRC imposes an obligation on the recipient and that legal remedies may be pursued if the call is not complied with. However, the project's timeline made it impractical to subpoena all parties that failed to respond, as this in itself is a time-consuming process. In the

end, certain gaps were filled through personal communication with key actors in various departments and spheres of government. This was not ideal, as such submissions cannot necessarily be considered exhaustive representations of the work of a particular department or office. An independent investigation demands the efficient and effective use of formal communication channels.

Another challenge related to submissions was the fact that, by the time certain information was obtained, it was in many cases at a stage of the project where fieldwork or report writing had to be prioritised and it was therefore (1) too late to issue further requests if the information submitted was not of a suitable quality; (2) too late to contact relevant contact persons with additional questions for clarification; and/or (3) too late to follow up the information presented in the submission with community members in the sampled sites, or with other relevant government structures. However, the SAHRC's commitment to monitoring the recommendations presented in this report provides the opportunity for further engagement with stakeholders in the future.

Finally, in relation to submissions from police and the ICD, specifically regarding case records, the information systems in use were inflexible and, it seemed, completely unsuited to the purposes of research. The quality of information was also poor. For instance, several case numbers associated with ICD cases turned out, on follow-up with police, to be normal criminal matters, making it impossible to follow up the relevant ICD charges, because it is reportedly impossible to search for cases other than by case number. Archival data was not well maintained by stations, so that certain cases listed on the NPA or provincial police case lists could not be found by station-level staff. This meant that the SAHRC did not have all the relevant information at its fingertips during the analysis and report writing.

### Limitations of Site Visits

For all sites visited, the planned focus groups with South Africans, non-nationals and community leaders were arranged beforehand with community-based organisations (CBOs) who were willing to assist. Site visits to provinces other than Gauteng were scheduled for three days and had to incorporate both focus groups and police interviews at the local police station.

In Cato Manor, non-nationals did not arrive for the scheduled focus group, and there was not sufficient time to attempt to arrange another group. Instead, the SAHRC sought out non-nationals working in the area and informally interviewed them

using the focus group schedule. In Ramaphosa, numerous attempts were made to contact non-nationals through a civil society organisation working with migrants in the area, without success. An initial focus group for non-nationals was not attended by the invited participants. A second focus group was arranged, but through a misunderstanding with the CBO concerned, only one of those who arrived for the group claimed non-national ancestry. Most were migrants, however; two were Shangaan speakers, and one noted that she had been subject to verbal abuse during the 2008 attacks. Thus, the SAHRC spoke to only one Mozambican who had been displaced from the area, who attended the Reiger Park focus group. While this is a significant limitation, linked in part to the fact that some of the

fieldwork took place in December, it also reflects the fact that few non-nationals have returned to Ramaphosa.

Equally, arrangements were made in advance to visit all three police stations to interview staff, obtain docket and view incident reports or observation books relating to the May 2008 period. However, in all three cases, internal communication failures within SAPS structures, as well as issues of authority and protocol, caused delays – often on the very day visits were to take place. These issues also led to inconsistencies in the documentation obtained across stations and occurred at a stage when there was not enough time to negotiate bottlenecks in the process.