

**Report on the SAHRC Investigation
into Issues of Rule of Law, Justice and
Impunity arising out of the 2008 Public
Violence against Non-Nationals**



Abbreviations **and acronyms**

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CBO	Community-Based Organisation
CoRMSA	Consortium for Refugees and Migrants in South Africa
CoSS	Centre of Safe Shelter (Displacement Site)
CPF	Community Policing Forum
CXU	Counter-Xenophobia Unit
DCoGTA	Department of Cooperative Governance and Traditional Affairs
DHA	Department of Home Affairs
DHS	Department of Human Settlements
DMA	Disaster Management Act
DMC	Disaster Management Centre
DOE	Department of Education
DoJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development
FMSP	Forced Migration Studies Programme
ICC	Intelligence Coordinating Committee
ICD	Independent Complaints Directorate
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced Person
IDT	Independent Development Trust
JOC	Joint Operations Committee
LIDP	Local Integrated Development Plan
MEC	Member of the Executive Council (Provincial)
NAP	National Action Plan
NDMC	National Disaster Management Centre
NFAR	National Forum Against Racism
NPA	National Prosecuting Authority
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act
PDMC	Provincial Disaster Management Centre



PWG	Protection Working Group
RDP	Reconstruction and Development Programme
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
SAPS	South African Police Service
UN	United Nations
UNICEF	United Nations Children's Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNHCR	United Nations High Commissioner for Refugees
UNSS	United Nations Security Services

“Solutions will always be a work in progress”

Kemal Omar (City of Cape Town), Stakeholder Meeting, 8 April 2009

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Important Notes

Where photographs were taken of individuals, permission was sought prior to taking the photographs.

The specific documentary sources cited vary and include public documents; documents provided freely and openly to the SAHRC; documents cited for confirmatory purposes; and specific factual quotations or excerpts from communications to the SAHRC. The SAHRC was provided with and in certain instances had sight of records to which formal legal protections governing disclosure apply. These protections have been respected in the compilation of this report. No privileged content has been divulged. Legal protections which apply to specific records therefore continue to apply to them specifically. Such records cannot be accessed from the SAHRC. Similarly, certain primary research data was provided to the SAHRC conditional upon respect for the ethical considerations applicable to such data. The release of such data will be conditional upon approval sought from the individuals or

organisations from which the data was received.

It should be noted that, where information was submitted to the SAHRC or otherwise made available to the SAHRC at a late stage after the dates of submission specified in communications with the relevant parties, such information may not be reflected in the report, or may not be reflected in its entirety. Information subject to a subpoena process will, if acquired in time, be reflected in the report that will be compiled following the public launch of this report.

The SAHRC specifically requests that responses to this investigation be guided not by defence of specific actions or positions but by the spirit in which this investigation was undertaken: to protect and promote the human rights of affected communities through institutional action to combat impunity and promote justice and the rule of law in vulnerable communities in South Africa.

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Foreword

The scale of violence and displacement in May 2008 went far beyond any precedent in South Africa's democratic history. Yet the 2008 mobilisation against non-nationals can only properly be understood within the country's broader history of xenophobia and South Africa's "culture of violence."¹ Despite our formal transition to equality and democracy, violence is often still viewed as a legitimate means of resolving issues.² Non-nationals resident in South Africa are all the more likely to fall prey to violence, as South Africans often blame them for crime and unemployment, and view them as responsible for depriving "more-deserving" citizens of jobs, housing, and other economic goods. Outsiders are, therefore, often subject to intense discrimination and hostility from local communities.³

Elsewhere in the world, xenophobia is seldom separated from the issue of racism, but in South Africa historical racial categories still dominate the public imagination, often obscuring the link between xenophobia and ethnic prejudice. Yet this connection is clearly demonstrated by the victimisation of national minorities and the deaths of over 20 South Africans during the 2008 attacks. As a form of ethnic prejudice, xenophobia often claims justification from immigration laws; hence, stereotypes reduce all members of the ethnically, linguistically or culturally different group to "illegal immigrants" regardless of their actual immigration status. Governments may respond to the fear of "illegal immigrants" through disproportionate emphasis on security measures in immigration management – such as biometric scanners at airports – at the expense of other pressing rights issues, such as that of liberty for recognised refugees detained at the Lindela Repatriation Centre, due to the lack of technology to confirm an immigrant's status without their physical documents.

A common misconception that this investigation and related research has unearthed is the "myth" that immigration status precedes the Constitution in determining the rights of people

living in South Africa. On the contrary, the Preamble to the Constitution of 1996 declares that the country "belongs to all who live in it," not just its citizens. It states that human rights are applicable to "all people" – these include the rights to life, freedom and security of person, freedom from discrimination on any grounds, and freedom from arbitrary eviction or deprivation of property.⁴ As this report demonstrates, the actions of some officials treated the provisions of the Immigration Act 2002 as superseding Constitutional imperatives. Where this occurred, it was a regrettable violation of the principle of equality before the law.

Another important finding emerging out of the investigation is the alarming curtailment of the rule of law in the general governance of informal settlements. Here, poor infrastructure, undercapacitated police and privatised, authoritarian leadership structures may intersect to create conditions where the rule of law barely exists and impunity reigns for rogue leaders and common criminals alike. The effective privatisation of governance is difficult to separate from widespread frustrations about the nature and extent of service delivery, employment and housing, which leaves residents of these areas convinced that they are on their own in dealing with social problems. Issues of the rule of law, justice and impunity in informal settlements must be seen embedded in an holistic context, where interventions in each component of the whole could generate improvements in the rule of law over time – not only as it relates to violence against non-nationals, but also as regards other forms of civil unrest, such as protest-related violence.

Beyond the Constitution, the intrinsic rights of non-nationals are further affirmed in international agreements to which South Africa is party. The Universal Declaration of Human Rights, the African Charter on Human and People's Rights, and the International Covenant on Civil and Political Rights (ICCPR), for example, all commit South Africa to respect and ensure the basic human rights of all individuals within its

1 Harris, B. (2001). "A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition." *Centre for the Study of Violence and Reconciliation Violence and Transition Series 5*. Johannesburg: CSV, p. 6.

2 Harris, 2001, p. 6.

3 Harris, 2001, p. 10.

4 Republic of South Africa. (1996). *The Constitution of the Republic of South Africa*, sections 11, 12, and 25.

territory regardless of “national or social origin.” Such rights include the aforementioned rights to life, liberty, and security of person as well as to equal recognition before the law. The ICCPR, furthermore, charges states with assuring that any person whose rights or freedoms are violated has access to “effective remedy.”⁵

The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, in addition, asks states to “combat manifestations of a generalised rejection of migrants” and to discourage “xenophobic behaviour and negative sentiments towards, or rejection of, migrants.” Recognising the potentially destabilising impact of violence against non-nationals, the declaration also stresses the need for states to “put an end to impunity for violations of the human rights and fundamental freedoms of individuals and groups of individuals who are victimised by xenophobia.”⁶

South Africa’s acceptance of these and other international human rights frameworks presents the government with a legal and moral responsibility to defend the fundamental

rights of non-nationals, to ensure justice for non-nationals and to combat the culture of impunity under which their rights are violated.⁷ A failure to deliver on this responsibility represents a threat to the rule of law and to social stability in the country as a whole. This is the impetus for the SAHRC’s investigation into issues of the rule of law, justice and impunity relating to the 2008 public violence and its aftermath.

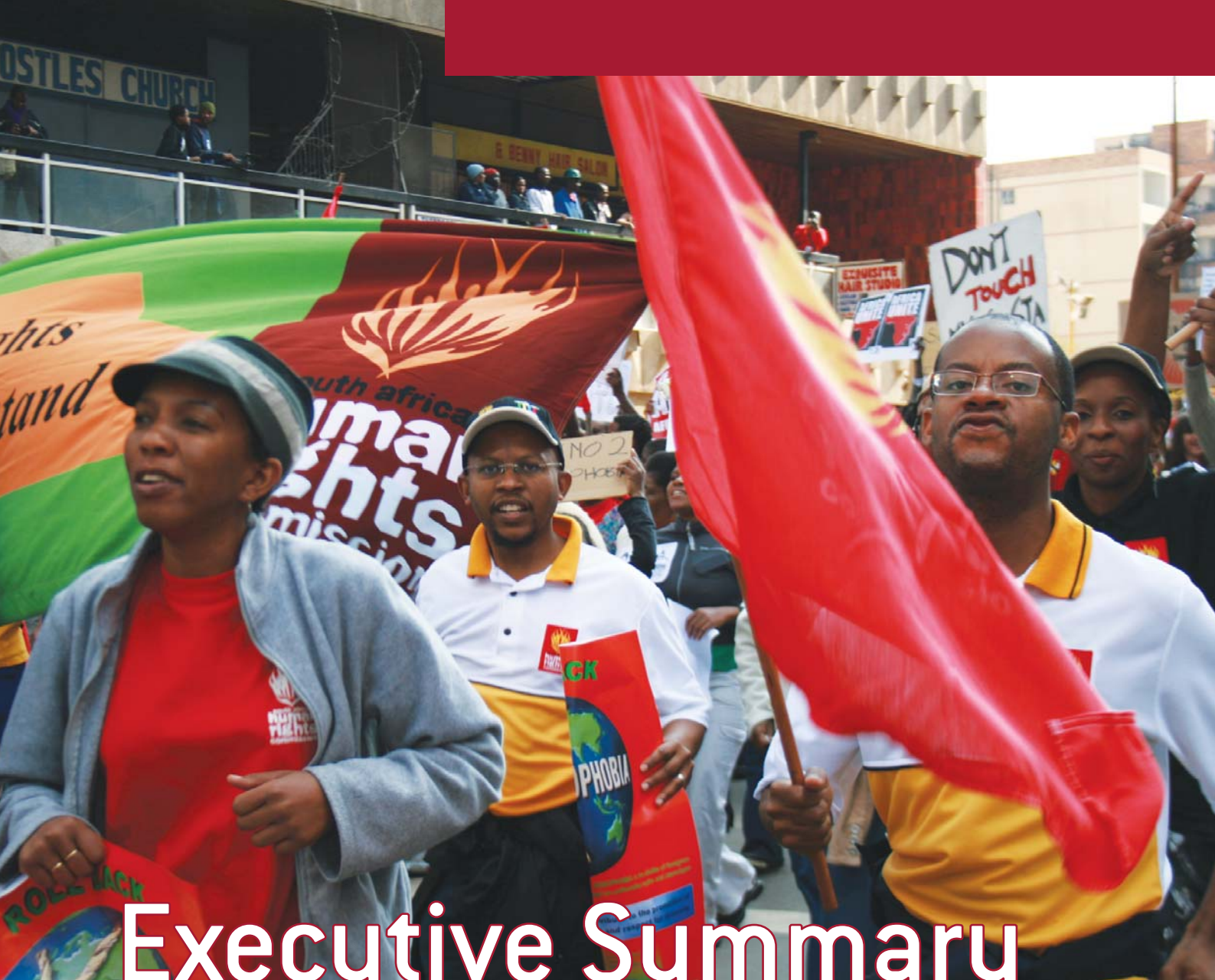
To police officers and community members in the sites visited by the SAHRC, we thank you for your participation and hospitality. We thank all of those who provided background material to support the investigation, and all who provided submissions to the investigation on request. It is regrettable that some departments delayed their cooperation or indeed failed to respond to the SAHRC. Mutual cooperation and an openness to developing a culture of transparent evaluation are crucial steps in moving toward a South Africa where risks to human rights can be effectively managed.

Advocate Mbedle Lawrence Mushwana
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5 United Nations. (1948). *Universal Declaration of Human Rights*; African Union. (1981). *African Charter on Human and Peoples’ Rights*; and United Nations. (1966). *International Covenant on Civil and Political Rights*.

6 United Nations. (2001). *Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*. Durban: UN, 8 and 25.

7 See South African Human Rights Commission. (1997). “Undocumented Immigrants,” *SAHRC Policy Paper No. 3*. Johannesburg: SAHRC, 2. Other relevant international agreements include the 1951 UN Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the 1993 Vienna Declaration, and the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (2005), among others.



Executive Summary

Introduction

Human rights and constitutional principles were violated on a massive scale in May 2008, when non-nationals as well as national and regional minority South Africans were attacked by other South Africans in their communities of residence across the country. In addition to these violations, constitutional protections, which applied to displaced persons in the care of the state after the 2008 attacks, but were not realised in all cases, included:

- Prohibition of unfair discrimination by the state on grounds including social origin and birth (for instance, discrimination against undocumented displaced persons in the issuing of reparation payments – see Chapter 4 of this report, Section 4.2: Reparations). Here it should be remembered that, even where a non-national has no legal status in South Africa, discrimination remains unfair unless it is specifically established that it is fair.
- Equality before the law and the right to equal protection and benefit of the law – for example, inequalities of protection that resulted from inconsistencies across provinces in the application of the Disaster Management Act 2002 (see Chapter 3, Section 3.2.1: Implementation of the Disaster Management Act 2002) and in the establishment of special courts (see Chapter 4, Section 4.4: Judicial Outcomes).
- Protection against arbitrary evictions (for instance, from Glenanda displacement site – see Chapter 4, Section 4.1: Reintegration).
- The right to lawful, reasonable and procedurally fair administrative action (see Chapter 3, Section 3.2: Administrative Justice).

Following the violent evictions of May 2008, in which more than 60 people were killed, the Consortium for Refugees and Migrants in South Africa (CoRMSA) requested an SAHRC investigation into the attacks. The investigation was launched in October 2009 and the report completed in early February 2010. It was designed to focus on the largely overlooked issues of the rule of law, justice and impunity⁸ in relation to the 2008 violence, within a context of national and international law.

8 Justice is defined as fair treatment and due remedy in accordance with the administration and procedure of law. Impunity is understood as failure to bring the perpetrators of violations to account in criminal, civil, administrative or disciplinary proceedings wherein they may be accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims. The rule of law refers to a condition of societal order that is generally consistent with the principles and provisions of national and international law and policy, without which human rights cannot be implemented in any meaningful way.

As such, the report considers the preparedness and response of the organs of state to the 2008 crisis in terms of:

- The prevention of impunity for violators of human rights,
- The securing of justice for victims of rights abuses, and
- Efforts towards the restoration and maintenance of the rule of law, which is a precondition for the realisation of rights.

The scope of the investigation did not allow the SAHRC to include episodes of violence against non-nationals that have taken place since the May 2008 social conflict in South Africa. Therefore, the report focuses on the May 2008 violence and considers responses that had unfolded up until November 2009, when requests for submissions were issued to relevant structures. The report is presented in a periodised manner, covering the situation leading up to the May violence; the period of intensive violence and humanitarian response (May to October 2008); and issues extending beyond that initial reactive phase.

Recommendations are made to strengthen state institutions and responses with a view to preventing future social conflict or mitigating it more effectively where it arises. The SAHRC's findings and the related recommendations are presented in summary form below. The more detailed recommendations contained in the body of the report, as well as the explanations of how the SAHRC arrived at each of its findings, should also be read, as they form an essential context for the summary provided here.

Summary of Findings

The SAHRC presents the following findings and observations in this report. Each corresponds to one section of a chapter within the report, in which it is explained and justified in detail.

- 1) There is little institutional memory of conflicts prior to 2008, and little evidence of sustained commitment to the resolution and management of past conflicts, which could otherwise have informed prevention and mitigation responses in May 2008 (section 2.1).
- 2) Although no early warning system existed for xenophobic incidents prior to 2008, the South African Police Service (SAPS) has, since the 2008 attacks, begun to develop an early warning system for crimes and threats against non-nationals in South Africa (section 2.2).
- 3) After the initial attacks in Alexandra, Diepsloot and Tembisa in the first five days of violence in May 2008, South Africa's security forces were not able to prevent the spread of violence to additional settlements or halt mushrooming attacks before substantial displacements and losses of life and property occurred (section 2.3).

- 4) The marginal position of certain groups of non-nationals in their communities can prevent them from obtaining assistance from police during times of social conflict (section 2.4).
- 5) Common to areas affected by the violence of 2008 is (a) the poor quality of relationships between local residents and key officials involved in the democratic governance of informal settlements, and (b) the related prevalence of indifferent, corrupt and/or authoritarian leaders in the fundamental structures of local democracy (section 2.5).
- 6) Vulnerability to public violence is exacerbated by the lack of interventions to manage and formalise informal settlements which receive large numbers of internal and international migrants (section 2.6).
- 7) Prior awareness-raising and anti-xenophobia campaigns did not prevent hatred and resentment of foreigners from reaching unprecedented levels in 2008 (section 2.7).
- 8) Weaknesses in intergovernmental coordination and institutional processes hindered the response to the 2008 crisis (section 2.8).
- 9) Police were unable to protect displaced persons' property during the May 2008 attacks, leaving many individuals destitute – their homes and belongings appropriated by South Africans (section 3.1).
- 10) 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 (section 3.2.1).
- 11) Abuses of process were evident in the treatment of refugees and asylum seekers who refused to register for temporary immigration status at the Glenanda site in Gauteng (section 3.2.2).
- 12) Other weaknesses in the engagement of the Department of Home Affairs (DHA) with displaced persons may have resulted in administrative injustices against displaced persons (section 3.2.3).
- 13) There were inconsistencies across provinces in the approach taken to “voluntary repatriation,” and little effort by the DHA to curb constructive refoulement (section 3.2.4).
- 14) “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 (section 4.1).
- 15) There was a lack of consistency on the eligibility principles and value of reparations to victims of the 2008 attacks (section 4.2).
- 16) Negative perceptions of and attitudes to justice and the rule of law abound at the level of affected communities, indicating a poor relationship between communities and the police and wider judicial system (section 4.3).
- 17) 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 (section 4.4).
- 18) 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 (section 4.5).
- 19) 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 (section 4.6).
- 20) 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 (section 4.7).
- 21) 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 (section 5.1).

Summary of Recommendations

The SAHRC makes recommendations in relation to the following general principles and specific organs of state (in alphabetical order):

Recommendations to Department of Cooperative Governance and Traditional Affairs (DCoGTA)

Recommendations and/or information pertaining to DCoGTA are found in the following sections of this report: 2.1; 2.5; 2.6; 2.8.

- 1) Through the National Disaster Management Centre (NDMC), develop a national-level evaluation and action plan to address obstacles to local, provincial and national responses to social conflict disasters. This should draw on existing local and provincial evaluations and evaluative reports by civil society organisations, as well as “lessons learned” reports and related action plans to be submitted by municipalities and provinces affected by violence in 2008.
- 2) Through NDMC reviews of existing reports and of the successes and failures of prior reintegration or mediation activities, begin to develop best practice guidelines on reintegration.
- 3) Through NDMC, develop a set of guidelines on response to social conflict disasters to promote consistency in the nature and quality of disaster response.

- 4) Ensure that all provincial disaster management structures develop a regularly revised Social Conflict Emergency Plan, incorporating lessons learned within their particular context, and covering humanitarian, judicial and social cohesion outcomes.
- 5) Given the continuing displacements occurring across the country, urgently amend the National Disaster Management Framework to reflect social conflict as a disaster risk and to cover international best practice on complex (as opposed to natural) disasters, and durable solutions following disasters caused by social conflict.
- 6) Ensure that all conflict emergency plans meet the durable solutions indicators referred to above.
- 7) Ensure that the NDMC classifies social conflict disasters immediately according to both their actual and potential magnitude and severity, as required by legislation.
- 8) Ensure that provincial disaster management officials familiarise themselves with the definitions of the Disaster Management Act 2002 and follow the spirit as well as the letter of the law in making recommendations to the NDMC with regard to classification of disasters, and in enacting declarations of disaster.
- 9) Provide further reflection on planning around future social conflict and displacement in annual reporting of the NDMC.
- 10) Rationalise record-keeping to make reports arising from past violence quickly and easily accessible to all staff.
- 11) Train staff in strategic crisis management, including social conflict crises.
- 12) Assist the DHS in formulating a policy on the partial formalisation of informal settlements.
- 13) Through the NDMC, partner in the programme of targeted conflict resolution initiatives to be implemented by a department nominated by government's social cluster.
- 14) Through the NDMC, partner with SAPS and DHA in responding to early warning information or patterns of crimes against non-nationals.
- 15) Report problematic ward councillors to their respective political parties and monitor the response of political parties in such cases. If no action is taken and the matter is clearly rights related, lodge a complaint with the SAHRC.

Recommendations to Department of Education (DoE)

This recommendation is found in section 2.7 of the report.

- 1) Work with DHA and the SAHRC to incorporate issues of migration and xenophobia into the national syllabus.

Recommendations to Department of Home Affairs (DHA)

Recommendations and/or information pertaining to the DHA are found in the following sections of this report (where

sections refer to sub-components of a chapter): 2.1; 2.2; 2.4; 2.6; 2.7; 2.8; 3.2.2; 3.2.3; 3.2.4.

- 1) Conduct a thorough and transparent evaluation of the challenges faced during the 2008 crisis and formulate an action plan for future improvements.
- 2) Provide to the SAHRC an evaluation of the action taken with regard to the Glenanda/R28 group along with a lessons learned document to prevent future administrative injustices.
- 3) Provide to the SAHRC an annual assessment of cases brought against DHA and/or its contractors with respect to status determination, arrest, detention and deportation.
- 4) Ensure that detainees at Lindela Repatriation Centre have access to legal counsel prior to deportation and eliminate undue administrative delays to such consultation.
- 5) Take immediate steps to counter the administrative injustices flowing from inconsistency in information systems across refugee reception offices and Lindela Repatriation Centre.
- 6) Ensure that all relevant officials and contractors adhere to the Immigration Act 2002 and Refugees Act 1998.
- 7) Ensure that all officials and 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.
- 8) Conduct and provide to the SAHRC an annual assessment of DHA progress in actioning its recommendations relating to abuses of process.
- 9) Implement disciplinary procedures against officials who were responsible for departures from legislated administrative procedures or possible *refoulement*.
- 10) Adopt a consistent approach to voluntary repatriation during a displacement of non-nationals.
- 11) In line with section 41 of the Constitution, 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.
- 12) Develop specific guidelines on the DHA's legislated xenophobia prevention and deterrence mandate.
- 13) Be party to the programme of targeted conflict resolution initiatives to be implemented by a department nominated by government's social cluster.
- 14) Partner with the South African Police Service (SAPS) and Disaster Management in responding to early warning information or patterns of crimes against non-nationals.
- 15) Maintain a management approach to immigration, including undocumented immigration into informal settlements.

- 16) Assist the Department of Human Settlements (DHS) in formulating a policy on the partial formalisation of informal settlements.
- 17) Work with the Department of Social Development (DSD) on immigration-related aspects of the Population Policy.
- 18) Through the Counter-Xenophobia Unit (CXU), assist in municipal local integrated development planning for social cohesion.
- 19) Through the CXU, work with the Department of Education (DoE) and SAHRC to incorporate issues of migration and xenophobia into the national syllabus.
- 20) Extend the CXU's counter-xenophobic performances to all schools in and around areas affected by violence against non-nationals.
- 21) Demystify the link between DHA and SAPS databases in the awareness-raising messages of the CXU.

Recommendations to Department of Human Settlements (DHS)

Recommendations and/or information pertaining to the DHS are found in the following sections of this report: 2.6; 3.1.

- 1) Formulate a policy on the partial formalisation of infrastructure, informal dwellings and property in at-risk informal settlements, in consultation with DCoGTA and DHA, and work towards its implementation.
- 2) Adopt a management perspective on the issue of informal settlements and undocumented migration into them.
- 3) Engage with residents of informal and "RDP" settlements in order (a) to raise awareness of existing policies and (b) obtain information about the challenges faced in this regard, with a view to developing appropriate policies to manage the ownership, sale and rental of shacks and RDP houses.

Recommendations to Department of Justice and Constitutional Development (DoJCD)

Recommendations and/or information pertaining to DoJCD are found in the following sections of this report: 2.7; 4.4; 4.6.

- 1) Together with SAPS, compile an evaluation of the 2008 joint agreement on xenophobia-related cases 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.
- 2) Together with SAPS, draw up best practice guidelines to make the most efficient use of resources in the judicial system if faced with a similar scenario in future.
- 3) In opposing bail, draw the attention of any court to the potential for intimidation of witnesses or complainants, and its wider ramifications for justice and the rule of law.

- 4) Where charges relate to public violence, consider making representations to the court in support of community service sentences or formal restorative justice solutions.
- 5) Where appropriate, proactively offer witness protection to complainants and witnesses under the Witness Protection Act 1998.
- 6) 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.
- 7) In monitoring xenophobia-related cases on an ongoing basis, partner with the SAPS desk on crimes against non-nationals to identify areas in which xenophobia-related cases are likely to have arisen.
- 8) Partner with SAPS, Metro Police, the Civilian Secretariat of Police and the Independent Complaints Directorate (ICD) to develop a community-based campaign to promote the justice system.
- 9) 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.
- 10) Advocate for the establishment of a specialised implementation agency in relation to the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. Ensure that the NAP is popularised among residents from at-risk communities.
- 11) Develop hate crimes legislation and support measures to institute it. The Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance Bill, to be submitted before Cabinet in June 2010, may be a first step in this process.

Recommendations to Department of Social Development (DSD)

Recommendations and/or information pertaining to the DSD are found in the following sections of this report: 2.4; 2.5; 2.6; 4.7.

- 1) Through the Social Cohesion Working Group, arrange a workshop between parties to community mediation and proactive reintegration initiatives across the country, with a view to establishing some best practice guidelines.
- 2) Ensure that the Social Cohesion Working Group deliberates on and nominates 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.
- 3) Ensure that the appointed lead department continually monitors all conflict resolution initiatives and evaluates them on a quarterly basis, in consultation with station-level police, community policing forums and community organisations.

- 4) Ensure that the appointed lead department holds an annual indaba to discuss the successes and failures of such initiatives and develop best practice for future initiatives.
- 5) Make provision in DSD recommendations on social cohesion for improved oversight of local institutions, especially in communities at risk.
- 6) Place more emphasis in social cohesion policy on the importance of disciplinary or judicial outcomes where community leaders obstruct social cohesion through negligent indifference, corruption or personal agendas.
- 7) Ensure that social cohesion policy recognises nuances in the concept of “community,” such as the potential for so-called “community leaders” to act against community interests.
- 8) Work with DHA on immigration-related aspects of the Population Policy.
- 9) In nationbuilding policy, acknowledge and mitigate the implicit risk of cementing prejudices against non-nationals.

Recommendations to the Independent Complaints Directorate (ICD)

Recommendations and/or information pertaining to the ICD are found in the following sections of this report: 4.5; 4.6.

- 1) Review record keeping and related information systems and plan improvements.
- 2) Give greater strategic priority to Class 3 (criminal) and Class 4 (misconduct) cases, design feasible measures to improve the monitoring and oversight of such cases, and request the necessary budget for additional human resources.
- 3) Improve measures to publicise complaints procedures and make them more accessible to poor and marginalised persons, including displaced persons.

Recommendations to Local Government

Recommendations and/or information pertaining to municipalities are found in the following sections of this report: 2.4; 2.8; 3.2.1; 4.1; 4.3; 4.7.

- 1) Develop a “lessons learned” report and related action plan for submission to the NDMC.
- 2) Incorporate targeted interventions for at-risk communities into integrated development plans.
- 3) Ensure that participation strategies are informed by an awareness of the risk of anti-democratic, authoritarian or indifferent leadership structures and political representatives.
- 4) Ensure that the Councillors responsible for Ramaphosa and Cato Manor immediately begin to engage with these communities.

- 5) Support provincial governments in meeting the recommendations presented to provinces above, and adhere both (a) to the specific principles expressed with regard to councillors and reintegration/return above, and (b) to the Recommended General Principles outlined below.

Recommendations to Provincial Government

Recommendations and/or information pertaining to provincial government are found in the following sections of this report: 2.1; 2.3; 2.8; 3.2.1; 4.1; 4.4; 4.7.

- 1) Led by the Minister of Cooperative Governance and Traditional Affairs, develop comparable Social Conflict Emergency Plans based on the 2008 experience and focused on humanitarian, judicial and social cohesion outcomes, to be revised on an ongoing basis.
- 2) Develop skeleton plans for safe and sustainable reintegration after social conflict disasters, to be fleshed in a particular disaster context with the collaborative input of both municipalities and civil society.
- 3) Ensure that provincial disaster management officials are familiar with the definitions of the DMA and follow the spirit as well as the letter of the law in making recommendations to the NDMC with regard to classification of disasters, and in enacting declarations of disaster.
- 4) Through Departments of Community Safety, in partnership with station-level police, foster the protection of deserted homes through neighbourhood watch campaigns and hotlines in the wake of any displacement.
- 5) In the initial phase of a social conflict disaster, make displaced persons aware of the skeleton reintegration plan and of the dangers of “self-reintegration,” and keep detailed records of those choosing to “self-integrate” with a view to monitoring their safety.
- 6) Prevent displaced persons from returning to communities that demand the obstruction of justice as a precondition. Instead, make arrangements for the relocation of affected persons to an alternative area in the province.
- 7) Establish and publicise a mechanism for reporting allegations against local officials during the reintegration process. Where a public official fails to explore all possible means of convincing a host community of receiving displaced persons back without any impediment to justice, charge such an official with obstruction of justice.
- 8) Where a councillor fails to participate in reintegration fora, or where other complaints are lodged against them

- (whether formally or informally), report the matter to their respective political parties through provincial DCoGTA structures. If no action is taken and the matter is clearly rights related, lodge a complaint with the SAHRC.
- 9) Ensure that services are not reduced in a manner that encourages the unmanaged departure of displaced persons from protection and communicate transparently to the public if such a reduction is unavoidable.
 - 10) Through Provincial Departments of Community Safety, facilitate non-national participation in community structures and fora, and promote the forging of links between non-nationals and local police stations.
 - 11) Through Provincial Departments of Community Safety, in partnership with SAPS, investigate the circumstances under which Community Policing Forums (CPFs) cease to function in informal settlement areas.
 - 12) Adhere to the Recommended General Principles outlined below.
 - 13) **Gauteng Provincial government:** Notify the SAHRC and all parties to the *Mamba* case of the grounds upon which sites in Gauteng were closed despite an interim Constitutional Court ruling to the contrary. Ensure that the Gauteng DMC proactively plans to holistically reduce the risk of violence against non-nationals rather than plan only to address it when it occurs.
 - 14) **Western Cape Provincial government:** Ensure that the risk posed by irregularities in and lack of meaningful oversight of community-level governance structures is incorporated into the Progression of Vulnerability Model in the existing Proposed Social Conflict Emergency Plan. Ensure that the revised Disaster Preparedness, Response and Relief Plan incorporates reintegration issues, based on the UNOCHA recommendations, and that this new section is referred to in the Integration component of the Proposed Social Conflict Emergency Plan.
- 3) Establish a mechanism for the registration, monitoring and evaluation of counter-xenophobia activities.
 - 4) Monitor the work of the implementation agency to be established in relation to the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.
 - 5) Enter into a memorandum of understanding with a civil society legal service provider to monitor human rights at Lindela until such time as a separate review mechanism for immigration detention is established.
 - 6) Develop additional monitoring capacity to enable the monitoring of possible violations of the human rights of non-nationals at Lindela and elsewhere.
 - 7) During a displacement, raise awareness among affected persons of the process to lodge a complaint with the SAHRC, and establish a regular presence at displacement sites to promote access to the process.
 - 8) Partner with civil society and the South African National Editors' Forum to facilitate a workshop debating ethical issues in the coverage of social conflict disasters.
 - 9) 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.
 - 10) Implement the recommendations of the above guiding document.
 - 11) Engage further with other Chapter 9 institutions on means of better utilising Chapter 9 resources to promote the use of a human rights framework for humanitarian response in case of a future disaster.
 - 12) Develop systematic mechanisms to ensure the ongoing monitoring of recommendations made in this report to various government structures.
 - 13) 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.
 - 14) Make monitoring information accessible to the public and assess key issues arising from the monitoring in annual reporting.
 - 15) 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.
 - 16) In general, 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. Specifically, intensify rights-related training to

Recommendations to South African Human Rights Commission (SAHRC)

Recommendations to or concerning the SAHRC are found in the following sections of this report: 2.1; 2.3; 2.5; 2.7; 3.2.2; 4.1; 4.7; 5.1; 5.2; 5.3.

- 1) Work with the Department of Education and DHA to incorporate issues of migration and xenophobia into the national syllabus.
- 2) Assess the guidelines for cooperative service to be established between SAPS and the South African National Defence Force (SANDF). Subject to approval of the guidelines, support calls for appropriate SANDF deployment immediately should the scale of social conflict require it.

stakeholders identified in conflict resolution initiatives, and carry out a rights education programme aimed specifically at police working with displaced non-nationals to facilitate an introspective process by station-level police in previously affected areas.

- 17) Prioritise the issues of rule of law, justice and impunity in relation to social conflict, in order to secure sufficient resources to meet the above recommendations.

Recommendations to South African National Defence Force (SANDF)

Recommendations and/or information pertaining to the SANDF are found in the following sections of this report: 2.1; 2.3; 3.1; 4.7.

- 1) Compile a documentary record of institutional learning during and after the May 2008 attacks in consultation with deployed members, which will 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 Recommendations to SAPS).
- 2) Together with SAPS, draw up best practice guidelines (as envisioned by the Defence Act 2002) for reference in the event of a future request for cooperative service in conditions of civic violence.

Recommendations to South African Police Service (SAPS)

Recommendations and/or information pertaining to SAPS are found in the following sections of this report: 2.2; 2.3; 2.5; 2.6; 2.7; 3.1; 4.1; 4.3; 4.4; 4.6; 4.7.

- 1) Establish a national task team of police to 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. It should also inform the recommended engagement between SAPS and the SANDF on guidelines for future cooperation in the case of a social conflict disaster (see below).
- 2) 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.
- 3) Together with SANDF, draw up best practice guidelines (as envisioned by the Defence Act 2002) for reference in the event of a future request for cooperative service in conditions of civic violence. Establish an incident profile of the scale and nature of incident that will in future merit a cooperative service response. A recommended

departure point would be for deployment of the SANDF to be immediately requested, and the pre-prepared guidelines activated, where the available resources are inadequate to protect both life and property or where backup to the initially affected area is depleted, for instance by the outbreak of violence in a second locality.

- 4) Boost the visibility of policing following an outbreak of social conflict by immediately and simultaneously deploying all available backup units.
- 5) Require provincial police offices to produce contingency plans for a full range of social conflict scenarios, supported by inter-provincial communication and debate.
- 6) Together with the NPA, compile an evaluation of the 2008 joint agreement on xenophobia-related cases 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.
- 7) Together with 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 in the judicial system.
- 8) In future, reinforce opposition to bail in court with the possibility of intimidation of witnesses and complainants and the threat this poses to the course of justice.
- 9) In relation to the national police desk on crimes against non-nationals, continually review the information collation mechanisms feeding this early warning system, so as to ensure ongoing improvements.
- 10) Partner with DHA and Disaster Management in responding to early warning information or patterns of crimes against non-nationals.
- 11) Ensure that the national police desk on crimes against non-nationals is party to the programme of targeted conflict resolution initiatives to be implemented by a department nominated by the social cluster.
- 12) Ensure that the criteria for reportable instances of xenophobia are standardised, and consider future oversight by the Monitoring and Evaluation Directorate of the Civilian Secretariat of Police.
- 13) If it is necessary to carry out immigration policing in informal settlements, do so sensitively in order not to exacerbate social tensions or alienate non-nationals from the justice system in these areas.
- 14) 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.
- 15) Partner with DoJCD, Metro Police, the Civilian Secretariat of Police and the Independent Complaints Directorate

- (ICD) to develop a community-based campaign to promote the justice system.
- 16) Partner with Provincial Departments of Community Safety to investigate the circumstances under which CPFs cease to function in informal settlement areas.
 - 17) Support the establishment of satellite police stations in informal areas, prioritising areas where these are specifically requested, and areas at risk of public violence.
 - 18) Together with Departments of Community Safety, facilitate neighbourhood watch campaigns and hotlines to local police in order to protect deserted informal homes in the wake of any displacement.
 - 19) Consider ways of using media footage to assist in investigations of social conflicts that are covered by the media.
 - 20) Ensure training in matters pertaining to hate crimes once such legislation is put in place.
 - 21) Review SAPS record keeping and related information systems and plan improvements.

Recommendations to Treasury

Recommendations and/or information pertaining to the Treasury are found in the following sections of this report: 2.1; 4.4.

- 1) Assign additional budget and resources for a community-based campaign to promote the judicial system, including additional support to ICD.
- 2) Recognise the importance of budgets requested for conflict prevention and management.

Recommendations to Other Structures

- 1) **The President of South Africa:** Where a justified request for SANDF deployment is made through the appropriate channels, issue the relevant order with the utmost urgency (section 2.3 of this report).
- 2) **National government:** Adopt the DSD's recommendations for continued monitoring, evaluation and research on social cohesion, and heed its call for demographic information about migration patterns into communities and the compilation of community profiles. Consider the benefits of moving Disaster Management into the Presidency (section 2.4 of this report).
- 3) **Chapter 9 Institutions:** Improve measures to publicise complaints procedures and make them more accessible to poor and marginalised persons, including displaced persons (section 2.3 of this report).
- 4) **National Planning Committee:** take account of the recommendations made in this report in monitoring government's execution of its mandate (section 4.7 of this report).

- 5) **National Forum Against Racism (NFAR):** Devote additional attention to the issue of xenophobia in monitoring activities (section 2.7 of this report).
- 6) **Political parties:** Take appropriate action with respect to councillors about whom complaints are received (section 2.5 of this report).
- 7) **Community leaders:** In the event of threatened mobilisation against non-nationals or other groups, make a concerted effort to intervene in order to prevent, minimise or end violence (section 2.3 of this report).
- 8) **Civil society:** Advise displaced persons of the channels that exist to hold officials accountable for their actions and assist those who are willing to follow the process to its outcome. Lodge and follow up complaints with the appropriate bodies about any misconduct encountered (section 4.5 of this report).

Recommendations to All Relevant Departments

- 1) Compile a documentary record of institutional learning during and after the May 2008 attacks (section 2.1 of this report).
- 2) Where keeping "early warning" records, (a) be clear about the purpose of the activity – so that efforts are not duplicated or redundant – (b) monitor and evaluate the early warning mechanism as a tool to prevent civic violence, and (c) make all levels of government aware of it (section 2.2 of this report).

Recommended General Principles

Government, its structures and representatives are urged:

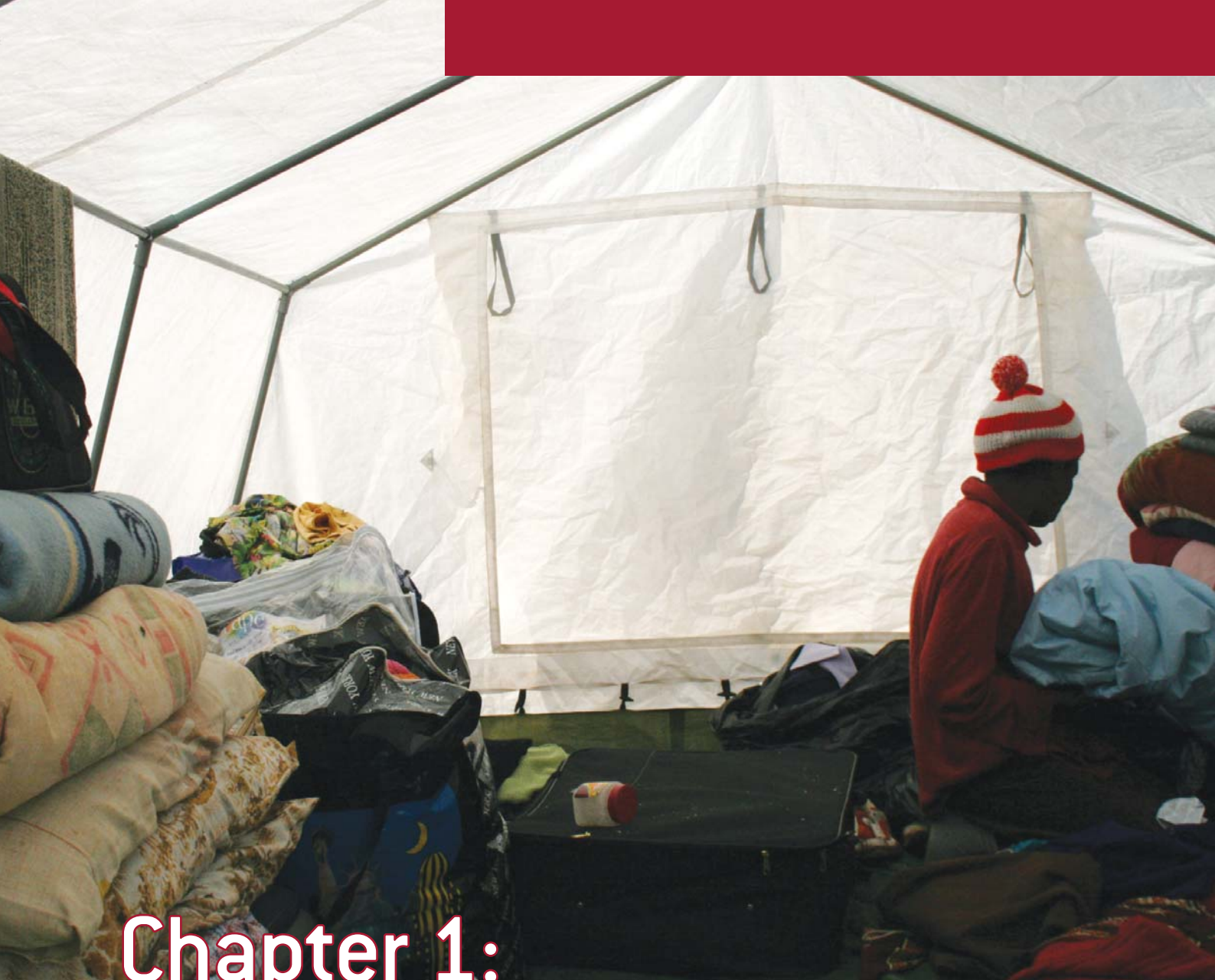
- 1) To ensure that all social conflict disaster plans and reintegration plans include a clear and transparent policy on reparations. This should include the entitlement of all persons to reparation regardless of immigration status, and guidelines to encourage a consistent approach to this issue under a variety of circumstances. There should also be consistency across geographic locations and between claimants with regard to reparation amounts, unless special circumstances substantiate a justifiable exception (section 4.2 of this report).
- 2) To commit to transparency and proactive communication with regard to reintegration plans and activities. This is essential 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 (section 4.1 of this report).
- 3) Not to 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 and in consultation with United Nations agencies (section 4.1 of this report).

- 4) To desist from presumptions that the absence of immediate violence in a community that has suffered a social conflict disaster automatically implies the possibility of safe return (section 4.1 of this report).
- 5) Never to use indirect coercion against displaced persons under state protection (section 4.1 of this report).
- 6) To undertake conflict resolution initiatives in all affected communities prior to the return of displaced persons (section 4.1 of this report).

- 7) Never to suggest, advocate or agree to the dropping of charges against accused persons in the course of reconciliation, conflict resolution or reintegration initiatives. This encourages impunity (section 4.3 of this report).
- 8) To ensure that, where communities of return demand the withdrawal of charges, all displaced persons who laid charges are settled in alternative communities, thus protecting them from victimisation yet still maintaining the integrity of the judicial process (section 4.3 of this report).





Chapter 1: Introduction

1.1. Background: Mobilisation Against Non-Nationals

The May 2008 attacks, which targeted mainly community members originating from African countries, left at least 62 dead, hundreds wounded, and contributed to the displacement of 100,000 people or more.⁹ The brutality and wanton disregard of the perpetrators for both the law and the basic humanity of their victims shocked South Africa and the world at large, both because of their massive scale and breadth, and also because they appeared to be largely hate-driven. For the South African nation, the impact of the attacks rippled beyond its initial targets, striking a blow to the morale of a population that still grapples with inherited social divisions, and generating fears of interethnic conflict.

Yet the targeting of non-nationals is not new to Post-Apartheid South Africa. This is not merely a position held by scholars and advocacy organisations:¹⁰ according to the Department of Home Affairs (DHA), the massive displacements of 2008 merely represented the “climax” of a social problem that has existed “for the past fourteen years,”¹¹ while the Department of Social Development (DSD) noted as early as 1998 “a high degree of xenophobia in South African [sic] with regard to illegal immigrants.”¹² Through the Braamfontein Statement released by the SAHRC in 1998, the subsequent National Plan of Action, and the proceedings of the 2004 Open Hearings on Xenophobia and Problems Related to It, the SAHRC had made a number of recommendations prior to 2008 that, if fully implemented, might have mitigated the May crisis.¹³

Yet, in a 10-year review of its Population Policy, the DSD cites increasing xenophobic tendencies in South Africa, and acknowledges that, while shocking, the 2008 attacks were “probably not completely unexpected.”¹⁴ Indeed, at least nine incidents of public violence against non-nationals preceded the May attacks in 2008 alone.¹⁵

Nor is South Africa alone in facing the social problem of violence targeted at non-nationals. Mobilisation against immigrants (or perceived immigrants) is a human rights issue across the world, and has escalated to genocidal levels in some cases. Recent years have seen arson of foreign-owned businesses, assault, murder and other hate crimes against perceived foreigners in Germany, the United Kingdom, Ireland and the United States, among others.¹⁶

Violence against foreigners in South Africa can be traced back to the months immediately following the country's first democratic elections. In December 1994, news reports detailed the destruction by armed South African youths of foreign-owned property in Alexandra, Johannesburg, and their demands that outsiders be removed from the area. Similar attacks would occur throughout the country over the following decade such that by 2007, the African Peer Review Mechanism's report on South Africa would highlight xenophobia against other Africans as an issue of “serious concern” that needed to be “nipped in the bud.”¹⁷ Of grave concern is the fact that attacks and uprisings against non-nationals continue to take place. In the six months preceding the launch of this report, lootings or displacements have occurred in De Doorns and Riviersonderend, Western Cape; Westernberg, Limpopo; Atteridgeville, Gauteng; and Balfour, Mpumalanga.

Theories as to why, within this ever-volatile climate, mass violence suddenly erupted in mid-2008 have been postulated by a number of observers and studies undertaken subsequent to the attacks.

9 Misago, J-P; Landau, L.B. & Monson, T. (2009). *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa*. Arcadia: International Organization for Migration (IOM); United Nations Office for the Coordination of Humanitarian Affairs Regional Office for Southern Africa (UNOCHA). (2008). *Recommendations stemming from Lessons Observed of the Response to Internal Displacement Resulting from Xenophobic Attacks in South Africa (May - December 2008)*, p. 23. 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>

10 For instance Crush, J. (ed.) (2008). *The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa*. Southern African Migration Project Migration Policy Series No. 50. Cape Town: IDASA & Queen's University, Canada; Misago et al 2009; Williams, Vincent. (2008). “Xenophobia in South Africa: Overview and analysis.” In *Perspectives: Political analysis and Commentary from Southern Africa*, #3.08, pp. 2-6.

11 South African Department of Home Affairs. (Undated). *Activities Undertaken by the Department of Home (sic) to Prevent Future Violence of the Type Seen in 2008*, p. 1.

12 Letter to Adv T Thipanyane from V.P. Madonsela, Director General: Department of Social Development, 10 December 2009, p. 2.

13 This included the need for a coordinated government approach to xenophobia, training and awareness raising, community engagements by local government, and the fostering of partnerships between non-nationals and South African community members, among many others.

14 Roux, Ni I. (2009). *TOWARDS A 10-YEAR REVIEW OF THE POPULATION POLICY IMPLEMENTATION IN SOUTH AFRICA (1998-2008): Migration and Urbanization*. Department of Social Development, p. 47. Retrieved on 6 January 2010 from <http://www.population.gov.za/popdev/index.php/View-document-details/6-Migration-and-urbanization.html>

15 Forced Migration Studies Programme Database on Xenophobic Attacks in South Africa, 2006-2009. Ed. Tamlyn Monson. Ver 2: 20 December 2009, entries p. 27-55.

16 Human Rights first. (2008). *2008 Hate Crime Survey: Racism and Xenophobia*. Retrieved on 28 January 2010 from <http://www.humanrightsfirst.org/discrimination/reports.aspx?s=racism-and-xenophobia&p=index>

17 Misago et al, 2009, 23-24; and African Peer Review Forum (2007). *APRM Country Review Report and the National Programme of Action of the Republic of South Africa*. Midrand: APRF, p. 286.

These point to factors like the violent¹⁸ and xenophobic climate of South Africa,¹⁹ impunity and failure to maintain the rule of law;²⁰ livelihood and resource competition;²¹ relative deprivation;²² stereotypes about foreigners;²³ a lack of knowledge about foreigners' rights;²⁴ weaknesses in the immigration regime;²⁵ and inadequate service delivery in poor communities.²⁶ The SAHRC is aware of the body of literature on causes of the violence, and acknowledges in particular the context of poverty and inequality in which this and other violence – such as protest violence – takes place.

However, as much of this causal context applies across a broad spectrum of South African communities, there is a need to identify what differentiates communities where violence took place from those where it did not. Two studies have attempted such a differentiation and have, through more rigorous methodology, come closer to producing actual facts about the conditions in which violence took place. One found that the violence was rooted in the “micro-politics” of South

Africa's townships and informal settlements, finding that in many cases, violence was spearheaded by local groups and individuals seeking to claim or consolidate power.²⁷ The other study identified a particular ward profile susceptible to violence: those that are “not the poorest of the poor but have accumulated frustrations around informal conditions of housing and high population heterogeneity in terms of origin, language and especially income disparities.”²⁸

Thus, the nature of grassroots leadership, and the diversity and living conditions in informal settlements, can create conditions for deficits in the rule of law as seen in 2008. This can spiral, as opportunistic crime is easy to commit and difficult to control under circumstances of public violence, and in 2008 a large degree of opportunistic looting occurred in what could be considered a “second stage” of the violence.²⁹

1.2. Scope of the Investigation

Democratic society is built upon the uniform application of the law. When state agents or private actors are allowed to violate the law with impunity, the rule of law is truncated; rights become “lifeless paper promises” and the equality and dignity of all – both citizen and immigrant – is at risk.³⁰ The ability of the South African government to prevent the widespread violation of human rights and to bring perpetrators to justice therefore has a bearing on the country's democracy as a whole. A report from the Department of Social Development (DSD) supports this understanding, holding that the violence against non-nationals and the lawless climate in which it transpired “caused serious aspersions on the country's ability to create an open society that is characterised by freedom and tolerance.”³¹ Considering the ongoing challenges South Africa faces in maintaining public order in the face of protest and anti-foreigner violence (as well as, in some cases, ethno-political

- 18 Centre for the Study of Violence and Reconciliation (CSV). (2008.) *Understanding current xenophobic attacks and how South Africa can move forward*. Presentation made at the Parliamentary Seminar on Migration and Xenophobia, 20 June 2008. [online] Available from: http://www.csvr.org.za/index.php?option=com_content&task=view&id=933;
- Glaser, Daryl. (2008.) ‘(Dis)Connections: Elite and Popular ‘Common Sense’ on the Matter of Foreigners.’ In Hassim, S; Kupe, T. & Worby, E. (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*. Johannesburg: Wits University Press: pp. 53-63; Misago et al, 2009; Joubert, P. (2008.) *Xenophobia in South Africa – Causes, Effects and Responses: A Recommendation to the ILD*. Solidarity Research Institute.
- 19 Crush, 2008; Joubert, 2008; Bernstein, Ann. (ed.) August 2008. *Immigrants in Johannesburg: Estimating Numbers and Assessing Impacts*. CDE In Depth No. 9. Johannesburg: Centre for Development and Enterprise; Human Sciences Research Council. 2008. *Citizenship, Violence and Xenophobia in South Africa: Perceptions from South African Communities*. Democracy and Governance Programme.
- 20 Joubert, 2008; Misago et al, 2009; Crush, 2008; Human Rights Watch. 1995. *Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg*.
- 21 HSRC, 2008; Joubert, 2008; IDASA. May 2008. *Background Report on Recent Xenophobic Violence in Gauteng*; Parliamentary Task Team. 2008. *Report of the Task Team of Members of Parliament Probing Violence and Attacks on Foreign Nationals in pursuance of a National Assembly resolution agreed on Tuesday, 13 May 2008*. Parliament of the Republic of South Africa; Silverman, Melinda & Zack, Tanya. 2008. ‘Housing Delivery, the Urban Crisis and Xenophobia.’ In Hassim, S; Kupe, T. & Worby, E. (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*. Johannesburg: Wits University Press: pp. 147-159.
- 22 Pillay, Devan. 2008. ‘Relative Deprivation, Social Instability and Cultures of Entitlement.’ In Hassim, S; Kupe, T. & Worby, E. (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*. Johannesburg: Wits University Press: pp. 93-103; Gelb, Stephen. 2008. ‘Behind Xenophobia in South Africa – Poverty or Inequality?’ In Hassim, S; Kupe, T. & Worby, E. (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*. Johannesburg: Wits University Press: pp. 79-91.
- 23 Misago et al, 2008; HSRC, 2008; Bernstein, 2008; Joubert, 2008.
- 24 Parliamentary Task Team, 2008; Misago et al, 2009.
- 25 IDASA 2008; HSRC 2008; Bernstein 2008; Joubert 2008.
- 26 Joubert, 2008.

- 27 Misago et al, 2009, p. 2.
- 28 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. Submitted on request by SAHRC, 4 December 2009, p. 1.
- 29 IDASA, 2008; Parliamentary Task Team, 2008; HSRC, 2008; Forced Migration Studies Programme (FMSP). (2009). *Understanding May 2008 and Beyond: The Literature on Xenophobia and Violence*. Literature Review provided on Request from the SAHRC.
- 30 Guillermo O'Donnell. (2004) “Why the Rule of Law Matters?” *Journal of Democracy* 15, no. 4, pp. 32-47; and Randall Peerenboom. (2005). “Human Rights and Rule of Law: What's the Relationship?” *University of California, Los Angeles School of Law: Public Law and Legal Theory Research Paper Series, no. 05-31*. Los Angeles: UCLA, p. 4.
- 31 South African Department of Social Development. (2008). *Draft Concept Paper for Exploring the Impact of Xenophobia on the Mandate of the Department of Social Development*. Pretoria: DSD.

violence),³² actions taken with regard to justice, impunity and the rule of law in relation to xenophobic violence promise to build a stronger foundation for dealing with the varied forms of popular violence that continue to afflict South Africa.

The report that follows therefore investigates whether, nearly two years after the most violent and destabilising xenophobic outbreaks in the country's democratic history, South Africa has taken the necessary measures to prevent a reoccurrence or mitigate violence should it recur. For in the end, South Africa is not "in the clear." Despite the efforts of government and civil society to counter xenophobic violence and the conditions fostering it, there is little evidence to suggest that sentiments, living conditions and micro-political structures have changed since 2008. Much work remains to be done.

As indicated above, numerous reports investigate the nature and causes of xenophobia and violence against non-nationals in South Africa. There are also a number of reports that evaluate the South African government's response to the attacks, including its humanitarian response.³³ These reports represent a great deal of work conducted largely by civil society and academic institutions to evaluate and provide recommendations to prevent future attacks or to improve responses in the event of further attacks. Governmental evaluations and plans for future prevention and mitigation of xenophobia and related violence have been less visible, and this appeared to the SAHRC as a gap in existing reflections on the 2008 violence, particularly as state authorities bear the primary duty of disaster management and protection to internally displaced persons (IDPs).³⁴

In the wake of the 2008 crisis, a critical spotlight fell on the quality of South Africa's humanitarian response to the 2008 attacks. Yet justice and the rule of law precede issues of humanitarian assistance. Where justice is realised and impunity prevented, the rule of law is maintained, and conditions of complex humanitarian crisis should not arise. Certainly, rights issues related to the state's provision of shelter, food, services and infrastructure to displaced persons should be attended to. But many of these rights are subject to "progressive realisation" and hinged upon the adequacy of state resources to meet the task. On the other hand, the rights to life, equality and security of person, and the prohibitions of discrimination and arbitrary eviction, are stated unconditionally in the Constitution. Here, violations, where they occur, are more clear-cut.

The scope of this investigation has therefore been limited to address the gap in information on government activities to prevent future attacks and/or mitigate them where they arise. Specifically, the report focuses on:

- The prevention of impunity for violators of these rights,
- The securing of justice for victims of rights abuses, and
- Efforts towards the improvement and maintenance of the rule of law, which is linked to the realisation of such rights.

Justice

Fair treatment and due remedy in accordance with the administration and procedure of law.

Impunity

Failure to bring the perpetrators of violations to account in criminal, civil, administrative or disciplinary proceedings wherein they may be accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.³⁵

The Rule of Law

A condition of societal order that is generally consistent with the principles and provisions of national and international law and policy, without which human rights cannot be implemented in any meaningful way.

32 Such as the alleged ethnic violence seen in Kennedy Road, Durban in 2009 [Tolsi, Niren. (2009). 'Ethnic Tension Boils Over.' Mail & Guardian, 3 October 2009. Retrieved on 28 January 2010 from <http://www.mg.co.za/article/2009-10-03-ethnic-tension-boils-over>

33 UNOCHA, 2008; Igglesden, V; Monson, T.; & Polzer, T. (2009). Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008. Oxfam/ Forced Migration Studies Programme: Johannesburg, University of the Witwatersrand; Amnesty International. (2008). "Talk for us please": Limited Options Facing Individuals Displaced by Xenophobic Violence [12 September 2008]. [online] Available from: <http://www.amnesty.org/en/library/asset/AFR53/012/2008/en/cb3f730e-9617-11dd-a696-b185e906216e/afr530122008eng.pdf>; Opfermann, L.S. (2008.) 'Xenophobia Crisis' in South Africa: An analysis of the humanitarian response to the mass displacement of foreign nationals following the xenophobic attacks in the Western Cape Province in May 2008. NOHA Masters Thesis in International Humanitarian Action: Uppsala University, Sweden.

34 As provided by the Disaster Management Act and the United Nations Guiding Principles on Internal Displacement (cited in Igglesden et al, 2009, p. 111) respectively.

35 Despouy, Leandro. 2009. Seminar on the Prevention of Genocide. Geneva: UN Office of High Commissioner for Human Rights. [online] Available from: <http://www2.ohchr.org/english/events/RuleofLaw/docs/PresentationDespouy.pdf>

The May 2008 violence was distinct in its sheer scale and spread, but significant smaller scale attacks on non-nationals have continued to occur since that date. Unfortunately, the scope of the investigation prevented the SAHRC from considering subsequent episodes of violence against non-nationals. Thus, the report focuses primarily on the May 2008 violence, and considers responses that had unfolded up until November 2009, when requests for submissions were issued to relevant structures.

1.3. Mandate of the South African Human Rights Commission

The legal mandate of the SAHRC derives from section 184 (1) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution). This states that the SAHRC is required to:

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

Section 184 (2) of the Constitution read together with section 9 of the Human Rights Commission Act 1994 (HRC Act) empowers the SAHRC to:

- a) Investigate and to report on the observance of human rights;
- b) Take steps to secure appropriate redress where human rights have been violated;
- c) Carry out research; and
- d) Educate.

The Human Rights Commission Act confers further powers, duties and functions on the SAHRC. These include the power to conduct investigations into alleged violations of human rights, and to call any person to appear before it and produce to it all articles and documents required in terms of the investigation.

1.4 Legal and Policy Framework

International Law and Treaties

The Charter of the United Nations 1945

The Charter of the United Nations addresses political and civil rights and calls for international economic and social

cooperation. Article 55 declares that all human beings are entitled to enjoy human rights without discrimination.

The Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights added colour, political or other opinions, national or social origin, property, birth or other status to the list of unacceptable distinctions in the enjoyment of rights. It also emphasises the equality of all persons before the law and their entitlement to full protection of the law without discrimination.

International Covenant on Civil and Political Rights 1966

This Covenant obliges South Africa as a signatory to provide an effective legal remedy to any violation of the rights it recognises, which include the right to physical integrity, liberty and security of person, procedural fairness, individual liberties, and non-discrimination (including on the basis of race or national origin).

International Covenant on Economic Social and Cultural Rights 1966

This Covenant includes a commitment to guarantee non-discrimination, including discrimination on the basis of race or national origin.

Convention on the Elimination of All Forms of Racial Discrimination 1965

South Africa agrees under this Convention to take all appropriate measures to eliminate discrimination on the basis of race, colour, descent, or national or ethnic origin within its borders. The monitoring body for this Convention – the Committee on the Elimination of Racial Discrimination (CERD) – expressed concern at its 69th session in 2006 about “the frequency of hate crimes and hate speech in [South Africa] and the inefficiency of the measures to prevent such acts [article 4].” In light of its General Recommendation 15 (1993) on organised violence based on ethnic origin, the Committee recommended that South Africa ensure the full and adequate implementation of article 4 of the Convention, and that it adopt “legislation and other effective measures in order to prevent, combat and punish hate crimes and speech.”

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984

This Convention holds states responsible for preventing within their territory acts of cruel, inhuman, or degrading treatment, especially those committed with the consent or acquiescence of public officials.

Convention Relating to the Status of Refugees 1951 and Protocol Relating to the Status of Refugees 1966

These two agreements, acceded to by the Republic, affirm the rights of refugees to status, property, association, access to the courts, employment, and education (among other freedoms). The Convention also protects against *refoulement*, or the return of asylum seekers or refugees to a country where they would face a threat to their lives or freedoms. South Africa's pledges under these instruments are particularly relevant given the substantial number of refugees resident in the country.

Declaration of the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001

The Declaration of this Conference, held in Durban in 2001, commits South Africa to developing both policies and an overarching National Action Plan to combat intolerance based on race and national origin. It furthermore urges party nations to uphold the rule of law and to adopt effective measures to ensure that crimes stemming from such intolerance do not go unpunished. The Declaration, finally, urges states to strengthen National Human Rights Institutions (NHRIs) in regard to racism and xenophobia in particular and to foster greater cooperation between NHRIs and other national institutions.

African Charter on Human and Peoples' Rights 1981

Beyond the human rights expressed in the South African Constitution, South Africa is party to the African Charter on Human and Peoples' Rights, which specifically prohibits the mass expulsion of non-nationals, including expulsions aimed at national groups.

African Commission Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court 2005

In line with the Rome Statute, this resolution urges member states of the African Union to ensure that perpetrators of crimes under international human rights law and international humanitarian law should not benefit from impunity.

Domestic Law

The Constitution

The South African Constitution protects the right to life, freedom and security of person, and freedom of movement for all. The protection of security of person extends to freedom from all forms of public violence.³⁶ Equally, the Constitution prohibits discrimination on grounds including social origin and birth, and

³⁶ See sections 11, 12 and 21.

speech that advocates hatred or incites imminent violence. It also guards against the arbitrary deprivation of property.³⁷

Immigration Act 2002

The Immigration Act 2002 places the following responsibilities upon the Department of Home Affairs (DHA) in relation to the management of immigration and the risk of anti-immigrant sentiment and action:

- Promoting a human-rights based culture in both government and civil society in respect of immigration control.
- Preventing and deterring xenophobia within its own ranks, within the broader state, and at community level.
- Regulating immigration to promote economic growth by, among other things, encouraging training of citizens and residents, and promoting skills transfer from foreigners to citizens and residents, thereby reducing the dependence of South African employers on foreign labour.
- Educating communities and organs of civil society on the rights of foreigners, illegal foreigners, and refugees, and conducting other activities to prevent xenophobia.
- Organising and participating in community fora or other forms of community-based organisation, amongst other things to deter xenophobia and educate the citizenry in migration issues.
- Setting up an internal anti-corruption unit charged with the task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power, xenophobia and dereliction of duty by a person employed in the Department.

Refugees Act 1998

The Refugees Act 1998 establishes that non-nationals may reside legally within South Africa as asylum seekers or recognised refugees. The Act outlines the rights and responsibilities of refugees and asylum seekers, stipulates the administrative regime that governs their status, and provides that no person may be returned to any other country if, as a result, he or she might be subject to persecution, or where his or her life, safety or freedom would be at risk. This is referred to as the principle of *non-refoulement*.

Disaster Management Act 2002 and National Disaster Management Framework 2005

This Act requires all levels of government to prepare disaster management plans for their areas of responsibility, and provides for a coordinated government response to disaster. The Act requires that, to the extent that it has capacity to do so, the Disaster Management structures must guide organs of state to assess, monitor and manage risk. They are also required to

³⁷ See sections 9, 16, 25 and 33.

monitor, measure and evaluate disaster management plans, and prevention, mitigation and response initiatives, whether state or private-run, and whether formal or informal.

- To what extent have these evaluations resulted in plans to prevent or respond better to future attacks on non-nationals or indeed other forms of social conflict?
- What progress has been made in implementing these plans?

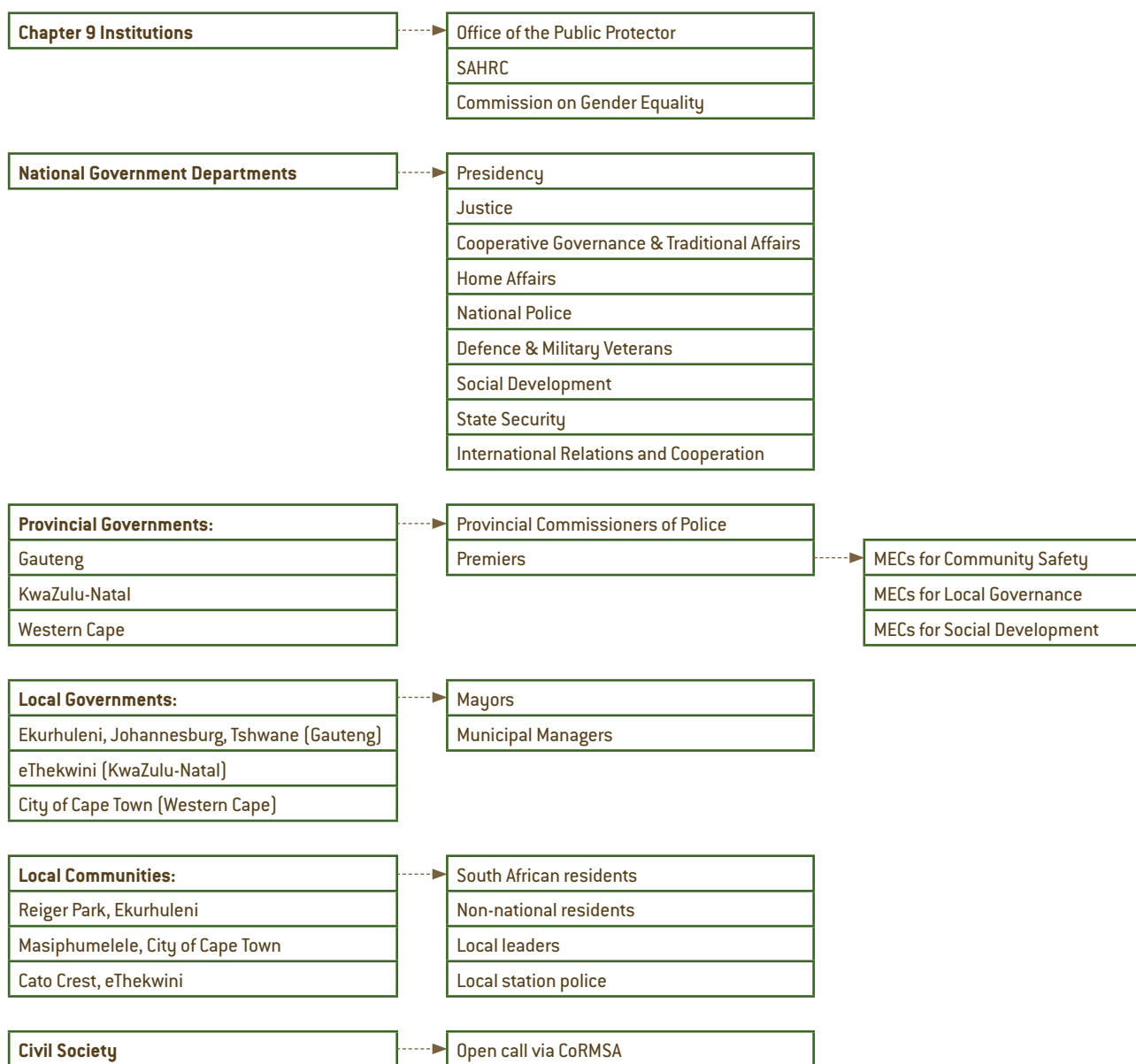
1.5 Process of the Investigation

This investigation aimed to explore the South African government's readiness to face future attacks on non-nationals specifically or social conflict more generally. In doing so, it aimed to answer the following questions:

- To what extent has government conducted evaluations of its role in preventing and responding to issues of justice, impunity and the rule of law arising from the 2008 violence?

Based on the findings in this regard, the SAHRC aimed, where appropriate, to make recommendations to assist government in preventing or dealing with similar violence in the future.

In order to answer the above questions in the most thorough and objective manner possible, the investigation was designed to obtain information from six sources: Chapter 9 Institutions; national, provincial and local government; affected communities; and civil society. These are depicted in the diagram below and elaborated further on the following page.



Sources of Information



Civil Society

Background documents were requested from members of civil society or institutions in the migration sector that wished to register concerns about the response to the May 2008 attacks or to testify to rights violations experienced during the period.

National Government

Submissions were requested from key government departments.

Provincial Government

The three provinces worst affected by the 2008 attacks – Gauteng, Western Cape and KwaZulu-Natal – were selected for inclusion in the investigation. For each province, the SAHRC requested submissions from the Premier, the provincial Police Commissioner, and the MECs presiding over social development, community safety and local government portfolios.

Local Government

The worst affected municipality was selected in each affected province, and the mayor and municipal manager approached for submissions. In Gauteng, which was the worst affected province, two additional municipalities were also asked for submissions. Thus, the focal municipalities were eThekweni in KwaZulu-Natal, City of Cape Town in the Western Cape, and Ekurhuleni in Gauteng, with additional submissions requested from Johannesburg and Tshwane metros.

Affected Communities

In each focal municipality, a single affected community was selected for a field visit by the SAHRC to enable the SAHRC to consider conditions on the ground in the light of government submissions and existing literature. These cases were selected purposively, as follows:

- In Ekurhuleni, Gauteng, the settlement of Ramaphosa was selected due (1) to its visibility as the site of the now infamous case of the public burning of Mozambican Ernesto Nhamuave (who subsequently came to be known as “the burning man”) and (2) to the fact that an early National Prosecution Authority (NPA) case list showed only two public violence cases emanating from the local police station, Reiger Park Police Station, despite the intensity of violence that took place there, which resulted in several murders that were reported in the media.³⁸
- In the Western Cape, Masiphumelele was selected because of the precursor attacks experienced there in 2006. The SAHRC was interested in why attacks recurred despite a prior reconciliation process and the extent to which a precedent assisted police in responding effectively to the 2008 attacks.
- In KwaZulu-Natal, Cato Crest was selected as the first settlement where violence was reported in 2008.³⁹ It was later discovered that this was not the worst-affected area, but due to late government submissions, this information was received too late to change the case selection.

In each affected community, the SAHRC attempted to obtain information from:

- Police at the local station (including at a minimum both detectives and officers in visible policing) and relevant incident reports and dockets.

38 Department of Justice. (2008). *NPA Xenophobia cases 04112008* [sic], pp. 36-37. Data file received from L B Landau, personal communication, 12 August 2009. Note that submissions subsequently received from the Department of Justice and Constitutional Development and the offices of the Gauteng Provincial Commissioner of Police showed that additional cases from Reiger Park had later been placed on the roll.

39 Forced Migration Studies Programme Database on Xenophobic Attacks in South Africa, 2006-2009. Ed. Tamlyn Monson. Ver 2: 20 December 2009, entry 166.

- Community leaders.
- South African residents.
- Non-national residents.

Appendix A contains details of the submissions actually received in relation to the research plan. Appendix B contains details of the focus groups and police interviews conducted in each selected community, and the broader findings from each site. Appendix C contains summary descriptions of the findings at the three sites visited by the SAHRC. Appendix D presents the limitations of the SAHRC's investigation methodology.

1.6 Structure for Analysing Issues

The analysis in this report is periodised, examining issues related to three relatively loosely conceived, overlapping time periods. Chapter 2, titled *Prior to the Crisis*, examines issues that existed prior to the May 2008 crisis, which in one way or another helped to create a context for the challenges government subsequently faced. Chapter 3, *During the Crisis*, examines issues that arose as government's response to the violence and displacement unfolded. This immediate response period was concentrated from the outbreak of attacks in Alexandra on 11 May 2008 until October 2008, after the Gauteng displacement sites were closed. Chapter 4, *After the Crisis*, examines ongoing issues that may have arisen during the crisis but extended into the future from a durable solutions perspective. The final chapter, Chapter 5, Role of the

SAHRC, examines the challenges faced by the SAHRC in 2008, and its role beyond the publication of this report.

Each chapter addresses a range of themes, each of which is analysed according to the following structure:

Findings

- This details the issue of potential concern which has been identified

Explanation

- This details how the information on the findings was gathered

Regulatory framework

- Domestic legal context – reference to specific South African legislation supporting human rights in the specific context
- Norms and standards – reference to international best practice

Steps already taken to address the issue (if applicable)

- This may include outstanding issues yet to be addressed

Recommendations

- This details recommendations made in the context of the investigation and outlines practical next steps



Chapter 2:

Prior to the crisis

This chapter examines issues that existed prior to the May 2008 crisis, which in one way or another helped to create a context for the challenges government subsequently faced.



2.1. Social Conflict, Monitoring and Institutional Memory

Finding

There is little institutional memory of conflicts prior to 2008, and little evidence of sustained commitment to the resolution and management of past conflicts, which could otherwise have informed prevention and mitigation responses in May 2008.

Explanation

There have been a great many previous attacks on non-nationals in South Africa, often entailing the displacement and dispossession of large numbers of people.⁴⁰ However, the only documentary evidence the SAHRC received of government responses to these incidents was of a relatively sustained conflict resolution intervention in a single community in the Western Cape. This reveals that, if any such interventions did in fact place:

- The interventions were not or are no longer monitored;
- Records were not kept, or are no longer accessible; or
- Government departments do not recognise the importance of institutional memory in planning to prevent or mitigate the effects of mobilisation against non-nationals in South African communities.

The Masiphumelele community in the Western Cape was chosen as a case study within the research design specifically

40 Crush, 2008, pp. 44-54; Misago et al, 2009, pp. 23-24; Bekker, S; Eigelaar-Meets, I.; Eva, G. & Poole, C. (2008). *Xenophobia and Violence in South Africa: A Desktop Study of the Trends and a Scan of Explanations Offered*. University of Stellenbosch, pp. 18-20.

because the SAHRC was aware that there had been similar conflict in 2006, which had resulted in a government-led conflict resolution initiative. The submission from the Western Cape referred to above related to this very incident.⁴¹ In August 2006, approximately 50 Somali nationals were evacuated from Masiphumelele after a group of primarily young people began attacking, looting and destroying Somali-owned shops. The incident was linked to ongoing dissatisfaction among South African business owners about the greater viability of Somali-owned business and a consequent desire to place restrictions upon their operations.

A community dialogue process was initiated by the Western Cape Directorate of Social Dialogue and Human Rights within the department of the Premier, which allowed facilitated meetings between the affected parties, and from which a set of recommendations was drawn up and a related report discussed in the provincial cabinet. The Directorate of Social Dialogue and Human Rights then identified two organisations to help implement the recommendations of the report.⁴² The organisations continued the intervention further than originally anticipated when a new conflict was anticipated in 2007 as a result of new Somali nationals entering the business arena in the community. The evaluation report produced in relation to this intervention provided recommendations, but where implemented at all these were addressed in

41 Department of the Premier: Provincial Government of the Western Cape. (2007). *Documenting and Evaluation Report: Masiphumelele Conflict Intervention August 2006 – March 2007*. Submission by Sifiso Mbuyisa, Director: Social Dialogue, Provincial Government of the Western Cape, to to the South African Human Rights Commission for the Investigation into the 2008 Xenophobic Violence, 26 November 2009.

42 Department of the Premier: Provincial Government of the Western Cape, 2007.

an ad-hoc manner and not systematically monitored. The report's recommendation for the establishment of a coherent provincial community conflict strategy and institutionalised peace-monitoring team had not materialised prior to the 2008 attacks and remains unimplemented. However, the SAHRC was told that a community structure had been formed in Masiphumelele and some of its members trained in mediation and communication skills prior to the 2008 attacks. The activities of the structure are not actively monitored by government, but many of these trained leaders reportedly led the 2008 reconciliation initiative in Masiphumelele.⁴³ Although this is a positive reflection on the intervention, it remains clear that even where conflict management capacity is built, local interventions may continue to occur on an ad-hoc and intermittent basis.

Interviews revealed that in Masiphumelele, the response of government institutions to the 2008 displacement was not guided by the 2006 experience. One long-serving police officer at the nearby Ocean View Police Station had no recollection of the 2006 incident, and another noted that the responses to the two incidents were the same.⁴⁴ Considering that more than one member stationed at Ocean View highlighted the need for an integrated plan for such occurrences,⁴⁵ it is clear that institutional memory of the 2006 incident was not utilised to plan an improved response for future incidents.

The DHA has submitted no evidence of the implementation of its mandate to prevent and deter xenophobia prior to May 2008. In the Masiphumelele case, there was no response to recommendations appealing for intervention by the DHA prior to 2008, and there remains uncertainty over the nature of the DHA's mandate in this regard.⁴⁶ Nevertheless, the report on the Masiphumelele initiative specifically notes in its recommendations that "The absence of the Department of Home Affairs in the disadvantaged communities where strife is experienced due to an influx of refugees further complicates and exacerbates the conflict issues."⁴⁷

The National Disaster Management Centre (NDMC) also provided no evidence of monitoring disaster prevention initiatives in relation to civic violence. Again, some activities

43 Discussion with Sifiso Mbuyisa, Director: Social Dialogue, Provincial Government of the Western Cape, 2 February 2010.

44 Designated police officer (DPO) and Crime Information (CI) member at Ocean view Police Station, both interviewed 9 December 2009.

45 Operational Commander for 2008 violence at Ocean View Police station, interviewed 9 December 2009; Station Commissioner at Ocean View Police Station, telephone conversation 20 January 2010.

46 Discussion with Sifiso Mbuyisa, Director: Social Dialogue, Provincial Government of the Western Cape, 2 February 2010.

47 Department of the Premier: Provincial Government of the Western Cape, 2007, 43.

may have taken place but the apparent absence of monitoring and evaluation suggests a failure to recognise the importance of these activities in managing future risk. It is likely that in the absence of leadership by these departments, those government conflict resolution efforts that have occurred:

- Have taken place in an ad-hoc rather than standardised manner;
- Have occurred in institutional silos, preventing inter-departmental learning; and
- Have not been subject to oversight and quality control.

With the invisibility of conflict resolution activities prior to May 2008, there can be no certainty about the effectiveness and appropriacy of prior initiatives, and the opportunity for shared learning about best practice in responding to such incidents appears to have been missed.

Regulatory framework

In terms of the *Disaster Management Act 2002*, the *NDMC* must monitor "formal and informal prevention, mitigation and response initiatives by organs of state, the private sector, non-governmental organisations and communities" and from time to time "measure performance and evaluate such progress and initiatives" (s21). However, the 2006 incident was not classified as a disaster and may have been invisible to disaster management structures. It remains uncertain under what circumstances social conflict situations are dealt with as disasters and how this impacts upon the management of risk in communities where they are not dealt with as such.

The *DHA* also bears responsibilities in terms of the *Immigration Act 2002*, which confers upon the Department a responsibility to prevent and deter xenophobia at community level, and to organise and participate in community fora or other forms of community-based organisation to deter xenophobia. These responsibilities of the department are relatively generally stated and do not impose specific monitoring, evaluation or coordination responsibilities upon the Department

Steps already taken to address the issue

- The SAHRC received evidence of a few conflict resolution initiatives instituted after the May 2008 attacks, but did not receive evidence that these were being monitored or evaluated.
- It remains of great concern that there is so little evidence of targeted interventions in communities affected by violence against non-nationals. It does not appear that the underlying conflict in affected areas has been dealt with

and is being managed on an ongoing basis. This in turn casts doubt on the prospect of peaceful “reintegration” being sustained over time, and indeed attacks have recurred in a number of South African communities that suffered violence in May 2008, including Diepsloot and Atteridgeville.

- National and provincial police submissions suggest that there is no single written evaluation of the security response to the May 2008 attacks. The Gauteng Provincial Commissioner of Police noted that he had no document recording police learning and introspection during or after the 2008 attacks. This bodes poorly for institutional memory should future attacks occur. It also provides no formal basis for related training, which a number of police officers interviewed by the SAHRC team specifically requested.
- The South African National Defence Force (SANDF) notes that it has not conducted an evaluation of its role during the 2008 security response, as it was deployed only to assist the police.
- The SAHRC received no records or documents relating to the NDMC’s management of risk in areas that have experienced mobilisation against non-nationals in the past.

A discussion of issues relating to the preservation and use of institutional memory after the May crisis can be found in section 4.7 – a sub-section of Chapter 4 of this report.

Recommendations

The SAHRC recommends that:

- **All departments** who were party to the response to the May 2008 attacks or who have legislated responsibilities in terms of the prevention and deterrence of xenophobia and disaster risk compile a documentary record of institutional learning during and after the May 2008 attacks.
- All **affected provinces** develop Conflict Emergency Plans to ensure that prior experience with violence and displacement is utilised to assist in improving the speed and quality of future responses. These should focus not only on humanitarian outcomes but also on promoting judicial outcomes and social cohesion through sustained, integrated institutional response. The Minister of Cooperative Governance and Traditional Affairs should lead this process and ensure that planning is comparable across all provinces, thus promoting a desirable level of consistency in the event of a future social conflict disaster. Conflict Emergency Plans should be subject to ongoing revision.
- The **DHA** develop a set of guidelines to complement the general mandate imposed on it by the Immigration Act 2002 with regard to the prevention and deterrence of xenophobia. The guidelines should impose more specific requirements, including monitoring and evaluation requirements.
- The **Department of Cooperative Governance and Traditional Affairs** (DCoGTA) ensure that relevant staff are trained in strategic crisis management and that social conflict crises are covered in the training material.
- 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.
- Targeted conflict resolution initiatives be initiated in all communities affected by violence against non-nationals in 2008. The **social cluster** must appoint a **lead department** for this programme and designate appropriate structures in provincial and local government to implement the initiatives. The **DHA, NDMC** and **national police desk on crimes against non-nationals** must be party to the activities of the programme.
- All conflict resolution initiatives be continually monitored and evaluated on a quarterly basis by the **nominated lead department** in consultation with station-level police, community policing forums and community organisations.
- The **SAHRC** intensify rights-related training to all stakeholders in such initiatives as requested in evaluations by the **nominated lead department**.
- An annual indaba be held by the **nominated lead department** to discuss the successes and failures of such initiatives and develop best practice for future initiatives.
- The **National Treasury** must recognise the importance of budgets requested for the purpose of managing conflict that could otherwise impede the rule of law.
- The **National Disaster Management Framework** should be amended to reflect social conflict as a disaster risk in order to heighten awareness of the need for disaster management structures to plan for the risk of civic violence including that motivated by anti-foreigner sentiment. There is also an urgent need to incorporate into the framework international best practice covering complex (as opposed to natural) disasters more generally, as well as durable solutions following disasters and displacement caused by social conflict – this remains a challenge as South Africa continues to experience displacements of

non-nationals in various provinces.⁴⁸ Once objectives relating to durable solutions have been incorporated, all parties should assess their conflict emergency plans against the indicators set out.

2.2. Intelligence and Early Warning

Finding

The SAHRC is pleased to note that, although no early warning system existed for xenophobic incidents prior to 2008, the South African Police Service (SAPS) has, since the 2008 attacks, begun to develop an early warning system for crimes and threats against non-nationals in South Africa.

Explanation

Despite the many prior displacements of non-nationals that occurred before May 2008, SAPS did not have in place a mechanism to monitor the “xenophobic” climate of South African communities. Naturally, this meant that police could not consistently seek out patterns of behaviour that might indicate a risk of similar attacks recurring.

There is no evidence from other submissions that provincial police or disaster management structures received notification of the risk of xenophobia via the National Intelligence Agency (NIA), which through the National Intelligence Coordinating Committee (Nicoc) reports risks to Cabinet and to the President. The SAHRC is not able to further reflect in this report on the role of the National Intelligence Agency (NIA) in providing intelligence to Cabinet and mitigating the risk of mobilisation against non-nationals, because at the time of writing the Ministry of State Security and NIA had not made a submission to the SAHRC. It is of grave concern that an important government department in the state’s management of risk failed to comply with a request for information by the SAHRC. A subpoena process has been initiated and any further information flowing from information obtained will, if received in time, be issued in a separate document that will be made available after the launch of this report.

Regulatory framework

There is no legislated relationship between Nicoc and the DHA or Disaster Management Structures. However, where necessary Nicoc is mandated by the **National Strategic Intelligence Act 1994** to supply intelligence relating to any

48 Such a framework could draw on 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)

such threat to SAPS. The same act makes Nicoc responsible for early warning in relation to domestic security, and for the tracking or monitoring of threats identified in order to enhance investigation and prosecution by providing tactical information and intelligence to enforcement and prosecution institutions.⁴⁹

Steps already taken to address the issue

The SAHRC is encouraged to note the formation of a desk devoted to crimes against non-nationals within the offices of the **National Commissioner of Police**. The SAHRC has had sight of the substantial records of crimes, attacks and threats against non-nationals kept by the desk, and received information that these records are intended to form the basis for early deployment of additional forces to communities seen to be at risk of violence. At least one successful deployment flowing from the desk was reported to the SAHRC,⁵⁰ but the link between information and intervention is said to need further development.⁵¹ Information from police staff at Ocean View Police Station in the Western Cape appears to corroborate the utilisation of this mechanism as an early warning system.⁵² However, it is uncertain whether all relevant stakeholders are aware of its existence. For instance, Ekurhuleni Metro Police staff interviewed by the SAHRC were surprised to learn of it,⁵³ and no other submissions to the investigation made specific mention of this early warning system. This needs to be improved, because the risk of mobilisation against non-nationals is one that may be moderated not only by supplementary police presence but also by other kinds of interventions. The system could be used to mobilise social cohesion interventions in at-risk communities.

SAPS also reports that there are now regular security assessments by Crime Intelligence with regard to xenophobia, and that, where appropriate, the provinces in question are notified to ensure proactive rather than reactive interventions.⁵⁴ The Director who oversees the desk on crimes against non-nationals participates in the Protection Working Group (PWG), a forum spearheaded by UN agencies

49 Ministerial Review Commission on Intelligence. (Undated). Intelligence Structure in South Africa. Retrieved on 29 December 2009 from <http://www.intelligence.gov.za/commission/Mandate%20and%20Functions.htm>

50 Meeting with Director Chipu: Visible Policing, Offices of the National Commissioner of Police, Pretoria, 15 December 2009.

51 Personal communication with Tara Polzer, Forced Migration Studies Programme, 25 January 2010.

52 Telephone conversation with Station Commissioner, Ocean View, 20 January 2010.

53 Meeting with senior disaster management staff and two Metro police representatives, Ekurhuleni, 8 January 2010.

54 Snr Supt S.D. Khumalo. (2009). Information Note. Received by SAHRC 8 December 2009, 1.

and focused on the protection of non-nationals, in which both international organisations and local stakeholders participate. Certain stakeholders have been provided with the Director's cellular telephone number so that any incidents they may become aware of are fast-tracked into the police response mechanisms.⁵⁵ However, some members of the PWG are uncertain of the precise mandate of the desk and emphasise that this is a process still under development.⁵⁶ Community Policing Forums are also being involved in issues of xenophobia, although SAPS has not specified what form this involvement is taking.⁵⁷

It is also encouraging to note that the *Gauteng Department of Community Safety* records incidents of violence against non-nationals in early warning reports that are shared with SAPS, particularly around times when service delivery protests are anticipated or elections are to be held.⁵⁸

Recommendations

The SAHRC recommends that:

- All organs of state that are keeping “early warning” records (a) be clear about the purpose of the activity – so that efforts are not duplicated or redundant – (b) monitor and evaluate the early warning mechanism as a tool to prevent civic violence, and (c) make all levels of government aware of it.
- A partnership be formed between *SAPS, DHA* and *Disaster Management* structures with regard to responses to early warning information or patterns of crimes against non-nationals detected in specific communities.
- *SAPS* ensure that the criteria for reportable instances of xenophobia are standardised across provinces, stations and community policing structures to ensure that all provinces benefit from similar levels of civilian oversight and hence from similar efforts to uphold the rule of law. The Monitoring and Evaluation Directorate of the Civilian Secretariat of Police, which is in its formative phases, should play an oversight role.
- There be continual *SAPS* reviews of information collation mechanisms feeding the early warning system, leading to regular amendments of these tools to improve the quality of information collected and the speed and appropriacy of response.

55 Interview with Director P.P. Chipu, 15 December 2009.

56 Personal communication with Joyce Tlou (SAHRC) and Duncan Breen (CoRMSA), members of the PWG.

57 Snr Supt S.D. Khumalo. [2009]. Information Note. Received by SAHRC 8 December 2009, p. 2.

58 Gauteng Provincial Government [Department of Community Safety]. [2009]. Reports on Service Delivery Protests/Xenophobic Violence in Gauteng Province, 25 November 2009.

2.3. Mitigation

Finding

After the initial attacks in Alexandra, Diepsloot and Tembisa in the first five days of violence in May 2008, South Africa's security forces were not able to prevent the spread of violence to additional settlements, nor were they able to halt mushrooming attacks before substantial displacements and losses of life and property occurred.

Explanation

It has been reported that, in certain areas, community leaders prevented violent mobilisation in May 2008 or assisted in halting it.⁵⁹ However, this occurred in only a few settlements. Research conducted in five affected sites after the May 2008 attacks revealed that “attacks stopped only after all foreign nationals had left the areas and there were no more businesses to loot”.⁶⁰ In Cato Manor and Ramaphosa, focus group participants believed that calm returned to the area not because the rule of law had been restored but because the source of conflict (that is, resident non-nationals) had been removed (through flight and evacuation)⁶¹ and the intention to rid the area of non-nationals thus indirectly realised. Thus, the return to apparently peaceful conditions in some communities did not necessarily indicate a successful intervention by the security cluster.

Station-level police highlighted in interviews with the SAHRC that they have insufficient human resources to protect both life and property in the event of such large-scale public violence. Two of the stations did not have access to public order policing equipment such as rubber bullets, and were not necessarily equipped to face volatile crowds armed with makeshift weapons and in some cases firearms until they received backup assistance from appropriately equipped officers.⁶² This may help to explain the complaints expressed to researchers by residents of certain affected communities of delays in the police reaction to attacks.⁶³ These probably reflect delays in obtaining backup deployments to assist with public

59 Misago et al, 2009; IDASA. [2008]. Background Report on Recent Xenophobic Violence in Gauteng.

60 Misago, Jean-Pierre; Landau, Loren B & Monson, Tamlyn. [2009]. Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa. Johannesburg: IOM, p. 48.

61 Focus Group with South African residents and community development workers, Ramaphosa, 11 November 2009.

62 According to a Crime Prevention officer interviewed, police facing public violence in Cato Manor did not have helmets, only bullet proof vests. In Reiger Park, station-level police did not have rubber bullets or helmets, and not all officers on duty had bullet-proof vests, possibly because staff who usually worked only at the station were required to put on uniforms and assist.

63 Misago et al, 2009, p. 47.



order policing, because residents in some cases also pointed out that it was once “police from other areas”⁶⁴ arrived that a restoration of the rule of law became perceptible. The physical character and lack of road and electricity infrastructure was another barrier to police efforts (see section 2.6).

The SAHRC received information that although in at least one province, back-up mobilisation included Crime Combating Unit (CCU) and National Intervention Unit members and maximum deployment of Metro Police to affected areas, not all units were deployed simultaneously. The fact that the complement of backup units had to be flexibly redeployed as attacks spread, leads to the clear conclusion that, as a period of social conflict escalates spatially, the total pool of backup units becomes more and more thinly spread. Thus, in the first ten days of violence in Gauteng, where at least 44 different areas were affected,⁶⁵ police resources can only have been tightly stretched.

It is not surprising, then, that several SAHRC focus group participants and police officers interviewed felt that early deployment of the SANDF could have helped restore the rule of law more quickly and effectively.⁶⁶ The deployment of the army to assist police had been proposed as early as 14 May 2008 and reiterated over days that followed, but it was only on 21 May 2008 that then-President Mbeki approved army intervention in Gauteng.⁶⁷ In Reiger Park, focus group participants noted that the SANDF arrived too late to be of

assistance and were not present during the boiling point of the violence.

There have been a number of claims from both police and community members in affected areas that perpetrators of opportunistic crimes during the 2008 violence were inspired by media coverage of attacks elsewhere.⁶⁸ It is likely that media images and reporting made visible the level of impunity enjoyed by many perpetrators, reducing the disincentive to committing crimes publicly.

More than one source observed that the use of police station premises to shelter the displaced had a negative impact on police operations, including those required to maintain public order and arrest perpetrators of violence. It was therefore remiss that a provincial disaster was declared in Gauteng only on 28 May 2008,⁶⁹ delaying relocation of displaced persons until 1 June 2008. This occurred in a context where the City of Johannesburg had mobilised a crisis response oversight team on 13 May 2008, almost immediately after the initial outbreak, and the crisis had affected a second municipality (Ekurhuleni) from 15 May 2008 – a circumstance enabling the declaration of a provincial disaster.⁷⁰ Similarly problematic was the failure of the KwaZulu-Natal provincial government to declare a provincial disaster despite the fact that displacement had

64 Misago et al, 2009, p. 47.

65 Bekker et al, 2008, p.33.

66 For instance, two police officers at Ocean View Police Station; an Ekurhuleni metro police employee; participants in the focus group held at Reiger Park.

67 Forced Migration Studies Programme Database on Responses to May 2008 Xenophobic Attacks in South Africa. Ed. Tamlyn Monson. Ver 1: 9 January 2009, entries 32; 104; 157.

68 Interview with police officers at Cato Manor Police station, 11 December 2009; transcripts of interviews by FMSP researchers with South African community members in Diepsloot, Tembisa and Du Noon. Submitted on request of the SAHRC.

69 EKURHULENI METROPOLITAN MUNICIPALITY. (2008). PROGRESS REPORT AS FROM 27 MAY 2008 TO 22 JUNE 2008 ON THE PROVINCIAL DECLARED XENOPHOBIA DISASTER: EKURHULENI METROPOLITAN MUNICIPALITY, p. 2.

70 City of Johannesburg Mayoral Sub-Committee. (2008). Comprehensive Report on the Community Conflict (Xenophobia) in Johannesburg, 19 May 2008 [sic], p. 1; City of Johannesburg, 2008, p.2.

occurred in at least five municipalities apart from eThekweni.⁷¹ In addition, eThekweni reported a lack of authority, resources and capacity to assist displaced persons⁷² – a fact that would support, and should accelerate, the declaration of a provincial disaster (see Regulatory Framework below).

Regulatory framework

The *Disaster Management Act 2002* makes the NDMC responsible for classifying an actual or potential disaster in terms of its actual or potential magnitude and severity as a local, provincial or national disaster [23(1)]. The Act defines a local disaster as one that affects a single municipality and can be effectively dealt with by that municipality [23(4)]. It defines a provincial disaster as one that affects either a cross-boundary municipality, a single municipality that cannot effectively deal with the disaster, or more than one municipality in the same province. The latter must be able to deal effectively with the disaster [23(5)]. Finally, a national disaster is defined as one which affects more than one province or a single province that is unable to deal with it effectively [23(6)].

In line with section 201 (2)(a) of the Constitution, the *Defence Act 2002* allows the deployment of the SANDF in cooperation with SAPS, “in the prevention and combating of crime and maintenance and preservation of law and order within the Republic” (s19). It is apparent from this section of the Act that, however painfully reminiscent of Apartheid-era policing it may be, the role of the SANDF in preserving the rule of law is both constitutional and legislated for. Such deployment requires an order of the President at the request of the Ministers of Defence and of Safety and Security (the names of these ministries have since changed). The deployment is undertaken in accordance with a code of conduct and operational procedures approved by the Minister [19(c)(i)]. In addition, guidelines are required on the nature of the cooperation as well as the coordination of command and control of members of the SANDF and SAPS, to be agreed by the Chief of the Defence Force and the National Commissioner of Police [19(c)(ii)].

Steps already taken to address the issue

On a national level, *SAPS* reports that it is strengthening its crowd management capacity, and has encouraged provincial-level police to develop contingency plans to deal with any mass mobilisation against foreign nationals (see section 3.1).⁷³

71 KwaZulu-Natal MEC for Transport, Safety and Community Liaison, 2009, p. 4.

72 Letter from Eric Apelgren, Head: International and Governance Relations, eThekweni Municipality, to Kathy Govender, SAHRC Commissioner, 1 August 2008.

73 Snr Supt S.D. Khumalo. [2009]. Information Note. Received by SAHRC 8 December 2009, p. 1.

Gauteng Provincial Disaster Management Centre has developed an action plan for the swift establishment of displacement sites in the event of a future mobilisation against non-nationals, with a stated objective of mitigating mass movements into police stations.⁷⁴

The *Ministry of Defence and Military Veterans* has not documented or evaluated its response. Nor did the SAHRC receive any other evidence of introspection on the nature and timing of the SANDF deployment in May 2008. It is of concern that the relevant structures have not recognised the need for such an evaluation. There also seems to be a lack of introspection by the *NDMC* on the nature of disasters declared in 2008 and whether, for instance, a provincial disaster should have been declared in KwaZulu-Natal (see section 3.2.1).

Recommendations

The SAHRC recommends that:

- In the event of threatened mobilisation against non-nationals or other groups, *community leaders*, whether traditional or political, formal or informal, make a concerted effort to intervene in order to prevent or end violence. Their absence or silence can be perceived as assent by community members.
- The *National Commissioner of Police* and *Chief of the Defence Force*, in light of the May 2008 experience, draw up best practice guidelines for reference in the event of a future request for cooperative service in conditions of civic violence. These guidelines would aim to minimise the risks of deploying the army to a civilian area while maximising the opportunity to increase visible policing and convey a message of national determination to uphold the rule of law. All parties should be aware that human rights risks cannot be weighed against risks of lesser orders, such as the risk to national morale or international repute.
- The *National Commissioner of Police* establish an incident profile of the scale and nature of incident that will in future merit a cooperative service response – for instance, where more than a certain number of persons are displaced, where there is sustained media coverage, or where violence “spreads” to a second locality (see below).
- The *National Commissioner of Police* immediately and simultaneously deploy all available backup units in the event of attacks on non-nationals with a view to protecting both life and property.
- If the available resources are inadequate to protect both life and property in the affected area, or where civic violence

74 National Disaster Management Centre. [Undated]. Report on the 2008 Xenophobic Attacks, p. 7.



in one locality “spreads” to a second locality, requiring a depletion in the SAPS backup available to the initially affected area, the **National Commissioner of Police** immediately request the deployment of the **SANDF** and, together with the Chief of the Defence Force, activate the pre-prepared guidelines required by the Defence Act 2002.

- Subject to approval of the pre-prepared guidelines, the **SAHRC** support calls for appropriate SANDF deployment immediately should social conflict begin in a second locality before conflict in the initial locality has been entirely defused and police backup recalled.
- Where a justified request for SANDF deployment is made through the appropriate channels, the **President of South Africa** issue the relevant order with the utmost urgency.
- The **SAHRC** partner with civil society and the **South African National Editors’ Forum** to facilitate a workshop debating ethical issues in the coverage of social conflict disasters and constructive measures that were or could be taken in the coverage of such events to balance its potential to aggravate the spread of public violence.

2.4 Participation in Community Structures

Finding

The marginal position of certain groups of non-nationals in their communities can prevent them from obtaining assistance from police during times of social conflict.

Explanation

Fieldwork by the SAHRC in Masiphumelele, including community focus groups and interviews with staff of the nearby Ocean View Police Station, established that Somali traders, who participate in the local business forum which meets regularly with the police, were able in collaboration with the police to develop an evacuation plan in advance of attacks in the community. Police evacuated Somalis along with their stock. However, other non-national groups, who were less visible to the police, were not included in this plan except where their names were reflected on a list of non-nationals and their addresses, which was provided by the Somali traders to the police.⁷⁵

Members of other nationalities complained of their exclusion from community structures such as the Community Policing Forum (CPF).⁷⁶ Although community development workers in the area claimed that when invited to participate, non-nationals seldom did, foreigners said that they feel unwelcome at such meetings.⁷⁷ They also noted that they often could not understand community announcements, as these were made in languages they were not adept in. Similar complaints were made by South African and non-national respondents with regard to community meetings in Itireleng, Gauteng, and Du Noon, Western Cape.⁷⁸

Regulatory Framework

Chapter 7 of the **Police Service Act 1995** sets out the objects and procedural requirements for CPFs, which aim to promote partnership and communication between the police service and “the community.” No conditions are placed upon membership in a CPF, so there is no legal impediment to the

⁷⁵ Interview with Inspector Ronald Greef at Ocean View Police Station, 9 December 2009.

⁷⁶ Focus groups with non-nationals, Baptist Church, Masiphumelele, 8 December 2009.

⁷⁷ This may be in part because, while non-nationals find the word “kwerekwere” offensive and hurtful, South Africans argue that it is not an insult and simply a description of those who speak languages that are not understood. It was suggested by focus group participants that South African speakers of regional language minorities might also be described in this way.

⁷⁸ Transcriptions of interviews conducted during 2008 by the Forced Migration Studies Programme in Itireleng, and summary report of interviews conducted by the same in Du Noon. Submitted at the request of the SAHRC investigation team.

representation of non-nationals on CPFs where they form part of the broader community.

Steps Already Taken to Address the Issue

On policy level at least, the DSD's Concept Paper on Social Cohesion/Inclusion in Local Integrated Development Plans (LIDPs) was adopted in August 2009, and municipalities are expected to incorporate aspects of social cohesion in future integrated development plans. The Concept Paper includes a component on how social cohesion relates to the situation of foreigners, noting the importance for "foreigners as well as SA citizens" of developing social capital and successfully integrating foreigners in a way that strengthens social cohesion.⁷⁹ However, it is important to note that the issue of non-national participation cannot be addressed in isolation from issues of governance and social cohesion addressed in sections 2.5 and 4.3 of this report.

At least in the communities visited by the SAHRC, there was no hard evidence of efforts by government or by marginal non-nationals to organise representation for "invisible" non-national groups in community structures. However, the Consortium for Refugees and Migrants in South Africa (CoRMSA) and the Gauteng Department of Community Safety are beginning an initiative to incorporate non-nationals into CPFs and business fora through community-based organisations whose membership includes non-nationals.

Recommendations

The SAHRC recommends that:

- **All municipalities that have experienced mobilisation against non-nationals in the past** incorporate targeted interventions for at-risk communities into their LIDPs, bearing in mind the barriers of language and apathetic withdrawal that will need to be overcome among non-national populations, and the possible challenges that could result from indifferent, corrupt or authoritarian leadership structures in such areas (see section 2.5 of this report).
- In line with the recommendation by the Independent Development Trust in a report compiled for the Gauteng provincial government, "foreign nationals should be incorporated into local structures in the communities in which they live."⁸⁰ **Provincial Departments of Community Safety** should follow Gauteng's lead in facilitating this process. Here, it is not enough simply to invite non-nationals to community fora; they must be actively

79 Cloete, Peter & Kotze, Frans. (2009). Concept Paper on Social Cohesion/Inclusion in Local Integrated Development Plans: Final Draft, p. 38.

80 Independent Development Trust. (Undated) Close Out Report on Xenophobia, p. 49.

encouraged and welcomed by all parties. An alternative may be to initiate non-national interest groups who can provide feedback to existing structures until such time as they become comfortable with community participation.

- Participation strategies undertaken by **local government** in fulfilment of social cohesion LIDP goals be informed by an awareness of the risk of anti-democratic leadership structures and political representatives, and the fact that where community members are intimidated by rogue leaders or indifferent councillors – or are deliberately left in the dark about the existence of a consultation – consultative forums may not elicit key information about the status of community leadership in an area that might affect the prospects of meaningful realisation of social cohesion goals.
- The **DSD** ensure that when nationbuilding policy is advocated, the risks of nationbuilding in terms of cementing prejudices against non-nationals should be pointed out and ways of mitigating this risk outlined.⁸¹
- National government adopt the DSD's recommendations for continued monitoring, evaluation and research on social cohesion, and especially the call for demographic information about the migration patterns of international migrants into communities and the compilation of community profiles in order to understand community dynamics.⁸²
- The **DHA** continue to develop a migration-management approach to immigration, which can be expected to have impacts upon social cohesion. As the DSD asserts: "Mobility and its effect on population dynamics needs to be understood and planned for so that migrants are integrated into society appropriately. If this is not done this will result in societies that are not socially cohesive, thus making way for another wave of possible violent attacks."⁸³

2.5 The Quality of Grassroots Democratic Governance

Finding

Common to areas affected by the violence of 2008 is (a) the poor quality of relationships between local residents and key officials involved in the democratic governance of informal settlements, and (b) the related prevalence of indifferent,

81 As in the concept paper by Cloete & Kotze, 2009.

82 Roux, Ni I. (2009). TOWARDS A 10-YEAR REVIEW OF THE POPULATION POLICY IMPLEMENTATION IN SOUTH AFRICA (1998-2008): Migration and urbanization. Department of Social Development, pp. 56-58.

83 DSD. (2009). Draft Report: Social Cohesion & Xenophobia 11-12 November 2009 Social Cohesion & Xenophobia Workshop / 13 November 2009: Internal DSD Social Cohesion & Xenophobia Workshop, p. 7.

corrupt and/or authoritarian leaders in the fundamental structures of local democracy.

Explanation

Government, civil society, academic sources and local residents of sites visited by the SAHRC asserted the role of non-responsive and non-democratic leadership in creating the conditions for violent conflict. Transcriptions of interviews by the Forced Migration Studies Programme (FMSP) reveal a widespread sense of disenfranchisement. A report issued by the International Organisation for Migration on the causes of the 2008 violence illustrates how communities with properly functioning structures were able to prevent or mitigate violence, while in other communities the absence of structures, their dysfunctionality, or the activities of self-appointed leadership groups facilitated or even directly incited violence.⁸⁴ A report submitted by the Gauteng provincial government notes that a “disconnection between local political leadership with their constituency” creates a perception that government is not concerned about local issues, claiming that the consequent political marginalisation and dissatisfaction create “fertile grounds for xenophobia.”⁸⁵

Focus group respondents in Ramaphosa and Masiphumelele told the SAHRC that their lack of confidence in the police was so great that they felt they were forced to resort to their own devices in dealing with security in the area. Participants in Ramaphosa told the SAHRC that the ward committee at the time of the attacks had been ineffective and corrupt, and that there had not been an operational CPF. They indicated that attacks on foreigners in the settlement began as a consequence of the failure of police to disperse or arrest a crowd of non-nationals who gathered at the entranceway to the settlement, holding makeshift weapons.⁸⁶ A lack of trust in government institutions, together with an absence of functioning communication channels and legitimate representation in the area meant that the potential conflict was not resolved in time to prevent a popular justice response (see site report in Appendix C). It is important to note here that Ramaphosa was among the areas to which Ekurhuleni Metro deployed members in anticipation of violence – having received intelligence of the potential for

84 Misago et al, 2009.

85 Independent Development Trust, undated, p. 49.

86 Respondents noted that the group were singing “Frelimo; Renamo!” (names of Mozambican liberation movements) and threatening the community. This was corroborated by police who stated that the group had gathered in anticipation of attacks following those elsewhere in Gauteng, saying that their motive was not to attack but to defend themselves should the need arise. Needless to say, this was not clear to inhabitants of Ramaphosa, who attributed several murders to this group and in the absence of any perceptible protection by police met and decided to drive the non-nationals out.

attacks. This illustrates the holistic approach that is needed in social conflict risk scenarios: the prevention of attacks through communication and mediation might have prevented the need for a reactive force that in the event did not have the resources to halt popular violence once it started (see section 2.3 of this report).

Councillors can also hinder risk management and response. The failure of councillors to participate in reintegration is noted in records of the Johannesburg municipality’s attempts to proactively reintegrate people from the Corlett Drive displacement site.⁸⁷ In Cato Manor, focus group participants highlighted a problematic local councillor who they claim has disabled the community policing forum, which they felt was functioning effectively prior to his term of office. Staff of the KwaZulu-Natal MEC for Community Safety and Liaison confirmed that the councillor has attempted (without success) to officially dissolve the CPF.⁸⁸ Participants noted that the same councillor is completely indifferent to issues raised by constituents. In a context of such evident dysfunction of participative mechanisms, there is clearly little or no room for conflict resolution. Given the risks posed by ineffective structures and representatives, it is a matter of particular concern to the SAHRC that Ramaphosa currently has a councillor who has shown no interest in assisting the new ward committee despite a service delivery march and memorandum handover to the council in mid-2009.

Thus, the SAHRC’s field visits revealed in all three areas, to different degrees, a deep distrust, suspicion and disillusionment with government, embracing:

- A conviction that government – especially at the municipal level – does not care about community problems.
- A conviction that local structures – including the local police, councillors, and ward committee members – cannot be trusted due to their indifference,⁸⁹ authoritarianism,⁹⁰

87 CoJ Migration Mayoral Sub-Committee. [2008]. Annexure A3: Performance Highlights, 9 October 2008, p. 39.

88 Discussion with Luvuyo Goniwe, General Manager: Monitoring and Evaluation Department of Community Safety and Liaison, Pietermaritzburg, 11 December 2009.

89 For instance, in Ramaphosa, the apparent indifference of the local councillor and the municipality to attempts at engagement and peaceful protest in 2009. In Cato Manor, the failure of police to attend to their duties with due care and diligence, for instance in failing for several hours to transport a child to hospital after a road accident, resulting in the child’s death several hours later still lying in the road while police remained in their vehicle nearby.

90 For instance, in Cato Manor a local HIV counselling and testing site must rely on its own funds to assist people affected by HIV/AIDS; in Masiphumelele the CPF chooses not to deal with certain crimes through the police; and in Ramaphosa popular justice still occurs.

overriding political agendas⁹¹ or the involvement of some members in corrupt transactions.⁹²

- A sense that the community must rely on its own devices to care for and protect itself.

The same findings emerged from a review of interview transcriptions from violence-affected communities, conducted by FMSP during 2008. In these communities, the overwhelming impression is that community involvement remains at the self-help, community-control level rather than through partnership or meaningful consultation.⁹³ These issues ultimately have an effect on justice and the rule of law, as community members often believed either that reporting to the police would have no effect, or that reporting incidents to the police could result in retribution from the perpetrator if bail was granted or charges dropped.

The cumulative effect of distrust culminates in withdrawal from the official justice system: focus group participants in all areas visited by the SAHRC expressed disdain for or disillusionment in the justice system, which is seen to be entirely ineffective in removing criminals from the communities in question. Police officers are in turn frustrated by complainants' and witnesses' disinterest in following the judicial process to resolution – a tendency that stems to some degree from that very disillusionment, and creates a vicious cycle for both policing and judicial outcomes.

Lawyers for Human Rights drew the SAHRC's attention to continued "harassment targeted by SAPS and Metro police at foreign nationals,"⁹⁴ and focus groups suggest this has to at least some extent been the case in Ramaphosa and Masiphumelele. It should be remembered that any such harassment will further undermine relationships between non-national residents and local police, encourage withdrawal from the judicial process, and thus encourage impunity. In addition, it might in the long term create vengeful feelings toward police on the part of non-nationals, generating new security risks.

91 For instance, in Cato Manor, the local councillor's apparent refusal to consider community-based care workers' call for an abandoned clinic in the area to be made available for various community services, his failure to report back to the community, and his apparent political agenda in attempting to disband the CPF.

92 For instance, in Ramaphosa, the issuing of fraudulent title deeds resulting in apparent dual ownership of stands; the disappearance of government-provided building materials prior to receipt by the intended beneficiary; and in Masiphumelele the alleged tipping off of drug dealers prior to police raids.

93 Refer to the model provided in Cloete & Kotze, 2009, p.51.

94 Lawyers for Human Rights Refugee and Migrant Rights Programme. (2009). Lawyers for Human Rights Submission to the South Africa Human Rights Commission Investigation into Xenophobia Following the Continuing Attacks on Foreign Nationals, November 2009, p. 2 and pp. 12-13 respectively.

Steps already taken to address the issue

The **DSD** has developed a concept paper exploring the impact of xenophobia on its mandate,⁹⁵ which acknowledges the important contribution community trust in government makes to building up social cohesion. However, it remains to be seen how issues of trust will be addressed through the social cohesion component that applies to local integrated development plans (LIDPs) by way of the DSD Concept Paper adopted in August 2009 for future LIDP development.

Recommendations

The SAHRC recommends that:

- **Councillors** responsible for Ramaphosa and Cato Manor immediately take action to engage meaningfully with residents, ward committee members and community-based organisations in these areas.
- **Provincial DCoGTA** report problematic councillors to their respective political parties and monitor the response of political parties in such cases. If no action is taken and the matter is clearly rights related, a complaint should be lodged with the SAHRC.
- The relevant **political parties** take appropriate action with respect to unsatisfactory councillors, and especially those that interfere with elected representatives of community policing structures in the manner described above.
- **Provincial Departments of Community Safety** take action to incorporate non-national community members into community structures and fora.
- **DSD's** policymakers recognise the potential role of local institutions, including participatory bodies such as CPFs,⁹⁶ in mitigating or inciting violence, and make provision in their recommendations on social cohesion for improved oversight of such bodies, especially in communities at risk.
- The **DSD** ensure that social cohesion policy recognises nuances in the concept of "community" in view of the established fact that so-called "community leaders" of areas affected by the 2008 violence often pursued anti-democratic and personal financial agendas to the detriment of migrant rights and community safety more generally.⁹⁷
- The **DSD** place more emphasis on the importance of meaningful disciplinary or judicial outcomes where community leaders obstruct social cohesion through

95 DSD. (Undated). DRAFT Concept Paper for Exploring the Impact of Xenophobia on the Mandate of the Department of Social Development.

96 Misago et al, 2009; Transcriptions of interviews conducted during 2008 by the Forced Migration Studies Programme in Alexandra, Itireleng, Ramaphosa and Madelakufa. Submitted at the request of the SAHRC investigation team.

97 Misago et al 2009; Gauteng Department of Local Government, undated, p. 13.

negligent indifference, corruption or personal agendas. This would give more weight to its recommendation to ensure functional monitoring and evaluation mechanisms.

- **SAPS** ensure that immigration policing is carried out in a manner that does not exacerbate social tensions or encourage the withdrawal of non-nationals from the justice system.
- **Provincial Departments of Community Safety**, in partnership with **SAPS**, investigate the circumstances under which CPFs cease to function in informal settlement areas.

2.6 Management of Migration and Human Settlement in Urban Peripheries

Finding

Vulnerability to public violence is exacerbated by the lack of interventions to manage and formalise informal settlements which receive large numbers of internal and international migrants.

Explanation

In its 2009 review of the Population Policy, which focuses on population concerns in relation to development, the DSD notes that the scale of migration (both internal and international) is resulting in urban settlement patterns that are unsustainable “from a personal as well as a service-delivery point of view”, and calls for much more to be done by government.⁹⁸ Visits by the SAHRC to areas affected by the 2008 violence revealed that lack of road infrastructure, street names, street lights, and shack numbers, among other things, hindered policing of the public violence. For instance:

- Police struggled or were not able to drive in the settlement without a 4x4 vehicle after heavy rain.⁹⁹
- Police were not able to drive to the scene of crimes along narrow footpaths among dense shack yards. This poses challenges in everyday policing and will have presented a serious problem in the dangerous context of public violence.¹⁰⁰
- Police were not able to do U-turns along existing dirt roads that were only one lane wide, so that if they took



the wrong turn time was wasted driving the entire length of the track and then circling the block, or attempting to reverse, which would not have been feasible in a public violence context.¹⁰¹ Patrolling by foot or on horseback would have been foolhardy during an outbreak of public violence, and the SAHRC was told that stations did not have sufficient manpower for foot patrols.¹⁰²

- Unlit informal areas were commonly reported.¹⁰³ This made it difficult or impossible for police to locate a shack without assistance, which meant requesting the complainant to meet police at a lit area and guide them to the scene. This in turn placed the complainant in danger and caused a delay in responding.

The lack of shack numbers and of records of their owners or inhabitants also pre-empted efforts to protect or restore victims' shacks.¹⁰⁴ With no record of the legitimate “owner” of a shack in an informal area, there can have been no legal basis

98 Roux, Ni I. (2009). TOWARDS A 10-YEAR REVIEW OF THE POPULATION POLICY IMPLEMENTATION IN SOUTH AFRICA (1998-2008): Migration and urbanization. Department of Social Development.

99 Interview with police officer at Reiger Park Police Station, 22 December 2009; interview with police officer at Cato Crest Police Station, 11 December 2009.

100 Informal discussion with ward committee member, Ramaphosa, 18 December 2009.

101 Interview with police officer at Reiger Park Police Station, 22 December 2009.

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

103 Interview at Ocean View Police Station, 9 December 2009; interview at Reiger Park Police Station, 22 December 2009.

104 Informal discussion with Ramaphosa Ward Committee Member, 18 December 2009; meeting with Disaster Management and Metro police staff, Ekurhuleni, 8 January 2010.

for cases to be opened against those who occupied the shacks of displaced non-nationals, and no way for police to identify a legitimate claimant. In the absence of shack numbers, it would also have been difficult for police to locate a shack and attempt to secure it, even if human resources had allowed for this.

Reiger Park Police Station was responsible for the policing of five informal settlements, multiplying the challenges to policing – Ramaphosa is one of three of these settlements within its jurisdiction that were affected by violence in 2008. Both in Ramaphosa and Masiphumelele, focus group participants pleaded for a satellite police station in the settlement.

Steps already taken to address the issue

The role of human settlement challenges in undermining the rule of law was an unexpected one, and the SAHRC had not requested a submission from the **Department of Human Settlements**.

Recommendations

The SAHRC recommends that:

- The **Department of Human Settlements (DHS)** formulate a policy on the partial formalisation of infrastructure (including street lighting and road infrastructure), informal dwellings (including the layout of shelters and shack numbering) and property tenure (including record-keeping with regard to both owners and renters) in informal settlements in at-risk areas. This should be



done in consultation with *DCoGTA*, in order to deal with measures to be taken where formal and informal leaders or structures obstruct implementation of the policy. The *DHA* should also be brought into discussions on the policy, in order to integrate the policy into efforts to manage migration.

- The *DHS* engage with residents of informal and RDP settlements in order (a) to raise awareness of their existing policies and (b) obtain information about the challenges faced in this regard. Based on such engagement, the *DHS* should develop appropriate policies to manage the ownership, sale and rental of shacks and RDP houses.
- The *DHS* and *DHA* adopt a management perspective on the issues of informal settlements and undocumented migration into them. The “eradication” of informal settlements and combating of undocumented migration should be treated as separate, longer term goals, with their management in the short to medium-term viewed as essential to ensuring the human security of nationals and non-nationals alike in South Africa.
- The *DSD* and *DHA* work together on immigration-related aspects of the Population Policy.
- *SAPS* support the establishment of satellite police stations in informal areas, prioritising areas where these are specifically requested, and areas at risk of public violence.

2.7 Awareness Raising and Anti-Xenophobia Campaigns

Observation

Prior awareness-raising and anti-xenophobia campaigns did not prevent hatred and resentment of foreigners from reaching unprecedented levels in 2008.

Explanation

The apparent failure of previous measures to combat xenophobia is self-evident from the events of 2008. The Roll Back Xenophobia Campaign, which was launched in December 1998 as a partnership between the SAHRC, the National Consortium on Refugee Affairs (now CoRMSA) and the United Nations High Commissioner for Refugees (UNHCR), worked with a range of targeted stakeholders to raise awareness on issues relating to non-nationals from a rights-based perspective.¹⁰⁵ In 2004, in partnership with the Parliamentary Portfolio Committee on Foreign Affairs, the SAHRC presented a report on the Open Hearings on Xenophobia and Problems Related to It. The report included recommendations for a host

of role-players including Government, the *DHA*, the Lindela Repatriation Centre, the SAHRC, civil society and the private sector. In 2008, the implementation of these recommendations had not been systematically monitored and it is uncertain to what extent the recommended actions had in fact been taken. This relates once again to institutional memory (see section 2.1 of this report), specifically in that it becomes difficult to assess the failings or gaps of existing measures if there is no systematic record of their activities.

As part of the *DHA* turnaround strategy, the Counter Xenophobia Unit (CXU) was set up after the 2004 Open Hearings.¹⁰⁶ This unit has attempted to intervene in past instances of violence, as reported by CoRMSA, but it is said to have faced challenges to the scope of its mandate (for instance, whether its mandate extends beyond addressing government attitudes) and to have struggled with a limited staff.¹⁰⁷ Its lack of visibility was evident in its absence from the research report issued by the parliamentary task team mandated to investigate the 2008 attacks.¹⁰⁸ The SAHRC is not aware of any evaluations of the work of the Roll-Back Xenophobia Campaign, of which it was itself a part, or of the work of the CXU.

According to the *DSD*, “myth busting” is important in promoting community cohesion, because behaviour is often based on perceptions or hearsay.¹⁰⁹ Fieldwork by the SAHRC and transcriptions from 11 sites where research was conducted by the FMSP during 2008 reveal a dangerous, and incorrect, assumption by South Africans that the fingerprints taken by the *DHA* in the issuing of a South African identity document

106 ADDRESS BY HON NN MAPISA-NQAKULA, MINISTER OF HOME AFFAIRS, TO THE PORTFOLIO COMMITTEE ON FOREIGN AFFAIRS AND SAHRC PUBLIC HEARINGS ON XENOPHOBIA (2004). Retrieved on 7 January 2009 from [http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fd ata%2Fstatic%2Finfo%2Fspeeches%2F2004%2F04110508451002. htm%40Gov&q=\[+\(\[mapisa-nqakula\)%3CIN%3ETitle\]++%3CAND%3E\[+C ategory%3Cmatches%3Es+\)&t=N+Mapisa-Nqakula%3A+SAHRC+hearings+on+Xenophobia](http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fd ata%2Fstatic%2Finfo%2Fspeeches%2F2004%2F04110508451002. htm%40Gov&q=[+([mapisa-nqakula)%3CIN%3ETitle]++%3CAND%3E[+C ategory%3Cmatches%3Es+)&t=N+Mapisa-Nqakula%3A+SAHRC+hearings+on+Xenophobia)

107 CoRMSA. (2007). CoRMSA Newsletter # 2 – 1st November 2007. Retrieved on 7 January 2010 from <http://www.cormsa.org.za/wp-content/uploads/2009/05/CoRMSA-NEWSLETTER-2.pdf> ; CoRMSA. (2008). CoRMSA Newsletter Edition 6 – 22nd January 2008. Retrieved on 7 January 2010 from <http://www.cormsa.org.za/wp-content/uploads/2009/05/CoRMSA-NEWSLETTER-6.pdf> ; CoRMSA/LHR. (2009). Submission by the Consortium for Refugees and Migrants in South Africa (CoRMSA) and Lawyers for Human Rights (LHR) to the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants at the 45th Ordinary Session of the African Commission on Human and People’s Rights, p. 5. Retrieved on 7 January 2010 from <http://www.cormsa.org.za/wp-content/uploads/submissions/CoRMSA%20and%20LHR%20Submission%20to%20Special%20Rapporteur%20-%20May%202009.pdf>

108 Parliament of the Republic of South Africa. [Undated]. BACKGROUND RESEARCH REPORT COMPILED BY THE RESEARCH UNIT FOR THE TASK TEAM OF MEMBERS OF PARLIAMENT PROBING VIOLENCE AND ATTACKS ON FOREIGN NATIONALS. Retrieved on 7 January 2010 from http://www.parliament.gov.za/content/BACKGROUND_RESEARCH_REPORT.pdf

109 Cloete & Kotze, 2009, pp. 21 & 23.

105 Personal communication from Joyce Tlou, 26 January 2010.

are available to police investigators. This belief results in the fallacy that, if police cannot trace a criminal, it is because the criminal is an illegal immigrant whose details are not known to the DHA:

These people records are not in Pretoria, they have no fingerprints, and they steal cables and so on and no can say it is them. There is no evidence because their details are not recorded in Pretoria. [interview with respondent in Itireleng]

Hence, those without an ID book are seen to be a security threat to their communities. However, contrary to this popular belief, the SAPS biometric database contains only the prints of people who have been arrested in the past. SAPS does not have access to the biometric information recorded by the DHA, and therefore could not trace a first-time criminal in this way. This myth needs to be addressed and the actual resources of police investigators demystified.

Steps already taken to address the issue

The Roll-Back Xenophobia Campaign no longer exists, and although the SAHRC is aware of civil society organisations working on counter-xenophobia campaigns or activities, there is no centralised oversight mechanism to monitor and evaluate these. Thus, there is no movement toward best practice and no way of knowing what works and what does not. There is no pivot point around which communities in most need of particular messages are prioritised for intervention. Nor is there a central mechanism to track which communities have received counter-xenophobia messages and which have not. Finally, we remain uncertain of what types of messages are effective and indeed whether it is useful to focus on messages of tolerance in isolation from the holistic context that leads to social conflict.

In the 2009/2010 year, the **CXU** reported a number of activities that give its work a more proactive flavour. These include, among other things:

- Piloting of an awareness campaign named “Operation Ubumbano” (Togetherness), using drama and performance, supplemented by gifts of comics, T-shirts and pens bearing positive messages, in 19 schools in Gauteng, with a focus on schools in areas affected by xenophobic violence in the past. The stage component covers themes such as stereotypes, manifestations of xenophobia in society, its negative consequences, benefits of international migration, the rights and responsibilities of South Africans and foreign nationals, asylum seekers and refugees, permits available to non-nationals, and the need for

reconciliation between locals and foreign nationals. The performance has prompted some schools to commit to incorporating the issues into their teaching.

- Contracting of CoRMSA to train community development workers and local councillors on xenophobia, the laws governing immigration and refugees, human and constitutional rights, and the Promotion of Administrative Justice Act (PAJA).
- Information gathering and mediation in eight areas where there was a risk or outbreak of conflict.
- Training of 121 immigration officers across seven provinces in national and international law, human and constitutional rights, and issues around institutionalised xenophobia (undertaken by CoRMSA).

South Africa is also drafting a National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, which recommends laudable measures for combating xenophobia. These are:

- a) Training public officials (including deepening public awareness) and putting mechanisms in place to ensure that non-nationals receive the services to which they are legally/ constitutionally entitled;
- b) Undertaking pragmatic reforms of immigration policy and practice with a view to ensuring more efficiency;
- c) Fighting corruption in the management of migrants and refugees, and facilitating better access to justice by non-nationals;
- d) Dealing effectively with the culture of impunity regarding violence in general and xenophobic violence in particular – and involving all stakeholders in the process;
- e) Effectively regulating industries in which non-nationals are a significant part of the labour force to enforce basic conditions of labour and punish employers for illegal labour practices; and
- f) Promoting positive reforms to build inclusive local governance structures, to create an inclusive environment for non-nationals.¹¹⁰

Commendable as these measures are, they will be of little use if they are not followed through with concrete, coordinated implementation plans.

Recommendations

The SAHRC recommends that:

- The **SAHRC** establish a mechanism for the registration,

¹¹⁰ Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, personal communication from Kgamadi Kometsi, 23 November 2009, p. 19.

monitoring and evaluation of counter-xenophobia activities, as an oversight tool, a well of institutional memory, and the basis for the development of best practice.

- The **CXU** take progressive action to liaise with municipalities in the development of their local integrated development programmes (LIDPs) in order to ensure that school-based and any other training is integrated into LIDPs as part of the new focus on community cohesion [see section 2.4 of this report].
- The **Department of Education, DHA** and **SAHRC** work together to incorporate issues of migration and xenophobia into the national syllabus, in order to ensure a more sustainable and consistent approach. This could draw on the existing materials being used in the awareness campaign.
- The **CXU** extend its performances to all schools in and around affected areas – including Primrose, Germiston, Boksburg and Reiger Park. The Unit should consult with researchers who have compiled information on the affected areas¹¹¹ to ensure that its assessment of the worst affected areas is accurate, because the information received by the SAHRC from the Unit does not accurately reflect the extent and nature of the violence.
- **DoJCD** advocate for the establishment of a specialised implementation agency in relation to the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.
- The issue of xenophobia receive additional attention in the monitoring work of the **National Forum Against Racism (NFAR)**.
- The **SAHRC** increase its capacity in order to monitor the work of the NAP implementation agency once it has been established.
- Efforts to popularise the NAP target residents from at-risk communities to ensure that they receive the awareness-raising content of the NAP relating to xenophobia.
- Messages demystifying the link between DHA and SAPS databases be incorporated into awareness-raising messages including the work of the **CXU**.

2.8 Institutional Preparedness

Finding

Weaknesses in intergovernmental coordination and institutional processes hindered the response to the 2008 crisis.

¹¹¹ Bekker et al, 2008; Misago et al, 2009; Wa Kabwe Segatti & Fauvelle-Aymar, 2010.

Explanation

Reports from both government and non-government sources have highlighted deficits experienced in terms of institutional preparedness for a disaster of the magnitude and nature of 2008. The Disaster Management Framework does not make specific provision for disasters related to social conflict,¹¹² which resulted in a lack of preparedness on the part of disaster management and other structures for the kind of situation the May 2008 attacks generated, as pointed out in an NDMC Report on the 2008 Xenophobic Attacks.¹¹³ Lack of planning for incidents of this nature and scale meant that disaster management lacked existing resources to manage donations and stock or support communication management,¹¹⁴ and that funding mechanisms were inflexible and unsuited to the needs of provincial and municipal officials in the context.¹¹⁵

It is clear from municipal submissions that procedures and policies both internally and in the broader government environment were not equal to the task of managing a complex humanitarian disaster, and that a thorough review of disaster management policies and procedures was, and still is, required.

According to additional assessments and research reports, the challenges included the need for “a clearer understanding of the roles and responsibilities of various Government departments in addressing displacement resulting from social conflict”,¹¹⁶ and in particular the definition of the national department responsible for taking the lead in future situations of social conflict.¹¹⁷ Here, it should be added that government structures did not consistently recognise disaster management, which

¹¹² Igglesden et al, 2009, p. 8.

¹¹³ National disaster Management Centre (NDMC). (2008). Report on the 2008 Xenophobic Attacks, p. 4.

¹¹⁴ Gauteng Department of Local Government, undated, p. 10.

¹¹⁵ Igglesden et al, 2009, pp. 116-117.

¹¹⁶ United Nations Office for the Coordination of Humanitarian Affairs Regional Office for Southern Africa (UNOCHA). (2008). Recommendations stemming from Lessons Observed of the Response to Internal Displacement Resulting from Xenophobic Attacks in South Africa (May - December 2008), p. 4. Retrieved on 30 December 2009 from: <http://ochaonline.un.org/rosa/HumanitarianSituations/AttacksonForeignersinSA/tabid/4613/ModuleID/11407/ItemID/1270/mctl/EventDetails/language/en-US/Default.aspx?selecteddate=3/6/2009>; Opfermann, L.S. (2008.) ‘Xenophobia Crisis’ in South Africa: An analysis of the humanitarian response to the mass displacement of foreign nationals following the xenophobic attacks in the Western Cape Province in May 2008. NOHA Masters Thesis in International Humanitarian Action: Uppsala University, Sweden; Igglesden, V; Monson, T.; & Polzer, T. (2009). Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008. Oxfam/ Forced Migration Studies Programme: Johannesburg, University of the Witwatersrand; Gauteng Department of Local Government. (Undated). Assessment of support Given by Gauteng Provincial Government to the Victims of Xenophobic Attacks.

¹¹⁷ UNOCHA, 2008, p. 4; Gauteng Department of Local Government, undated, p. 4.



falls under the DCoGTA,¹¹⁸ and that considering the cross-departmental nature of a large scale social conflict crisis, and the need for a decisive, swift and consistent response, it is necessary to nest Disaster Management within an organ of state whose authority is uniformly recognised.

Most of the relevant reports also note severe communication bottlenecks that affected the ability of roleplayers to respond quickly and effectively,¹¹⁹ including the virtual inability of certain municipalities to obtain necessary information from the corresponding province. In past personal communication, CoRMSA confirmed that while the City was responsive in its dealings with the Consortium, it was unable to obtain any information from the province, which eventually led to litigation relating to the planned closure of the sites. The SAHRC is pleased to note that, in reports submitted by the Gauteng Premier's office, weaknesses in coordination between provincial and local government are acknowledged as a problem, along with lack of team work and a "turf mentality", "particularly between Province and the metros."¹²⁰

The DHA emerges from the submissions of other organs of government as a department that did not have the capacity

118 Igglesden et al, 2009, p. 116.

119 UNOCHA 2008; Igglesden et al 2009.

120 Gauteng Department of Local Government, undated, p. 4; p. 12.

to deal with the crisis. The Gauteng Department of Local Government, for instance, records that in its experience during the disaster, the DHA took strategic decisions for which there was no implementing mechanism.¹²¹ Minutes of disaster management meetings in the Western Cape cite DHA's attendance at shelters as "poor."¹²² The DHA's own submission records as early as the initial Alexandra displacement that the Department faced challenges in terms of the verification of lost documents, the renewal of asylum permits, and providing assistance to South Africans who had lost their documents in the public violence.¹²³ For instance, the verification of immigration status at Alexandra police station used forms that did not provide dates of birth, passport numbers or identity numbers, and therefore individuals' status could not be verified through the DHA system. As a result, out of 544 people to be verified, under 30 seem to have been completed.¹²⁴ The justice implications of the DHA's limitations relate to both administrative justice and judicial outcomes, as registration records could have been used to assist police in locating victims and witnesses.

121 Gauteng Department of Local Government, undated, p. 5.

122 Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting (15th) Combined with JOC Meeting. 12 and 15 September 2008, p. 3.

123 DHA. (Undated). Report of Xenophobic attacks around Gauteng of 11 May 2008 – to date, p. 2.

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

Chapter 9 institutions were also found wanting in terms of their capacity to respond to a complex disaster of the 2008 scale. The SAHRC formed part of the legal assistance task team established by a Chapter 9 umbrella with the intention of supporting the conviction of perpetrators and investigating any police abuses. The SAHRC took over the coordination function of the body at a point – it was originally chaired by the Commission on Gender Equality (CGE) – but its coordination function was not sustained.¹²⁵ The SAHRC's monitoring reports were not made publicly available and could therefore not be easily utilised by other institutions. The CGE, too, struggled in terms of capacity, acknowledging that its involvement in the Western Cape was “minimal due to the issues pertaining to capacity”.

Despite the clear challenges experienced by government actors during the 2008 crisis, the SAHRC is unconvinced by the claims of a few individuals that management of the 2008 crisis would have been improved had disasters not been declared.¹²⁶ Weaknesses in the disaster response were most likely due to lack of prior experience of such a disaster. If nothing else, the 2008 crisis has provided a valuable learning opportunity that, if exploited, will improve any future response of the same type. Claims to the contrary should be treated with scepticism until a full report detailing the support for this contention is issued by those who support them.

Steps already taken to address the issue

The SAHRC has had sight of response evaluations by **provincial and local disaster management structures** and other structures involved in the disaster response.¹²⁷ Some are more reflexive than others in engaging with true evaluation rather than simply description. However, these need to be reviewed and consolidated into a national level evaluation and action plan from the NDMC, as work needs to be done

125 Discussion with Sharon Pillay, ProBono.org, 4 December 2009; SAHRC. (2009). Putting out the Fires: The South African Human Rights Commission Response to the May 2008 Xenophobic Violence, p. 10.

126 Gauteng Department of Local Government, undated, p. 5.

127 Department of Local Government and Traditional Affairs, KwaZulu-Natal Provincial Government. (Undated). Foreign Nationals Attack in KwaZulu-Natal Province Report (sic); Gauteng Department of Local Government. (Undated). Assessment of Support Given by Gauteng Provincial Government to the victims of Xenophobic Attacks; Independent Development Trust. (Undated) Close Out Report on Xenophobia; Ekurhuleni Metropolitan Municipality. (2008). Final Report on the Xenophobic Outbreak/Provincially Declared Disaster and the Re-Integration of Victims to Their Communities for the Period 23 June 2008 to 3 October 2008; MEC for Transport, Community Safety, and Liaison, Province of KwaZulu-Natal. (2009). Submission to the South African Human Rights Commission Re: The Investigation into the 2008 Xenophobic Violence; Ministry of Local Government, Environmental Affairs and Development Planning, Western Cape. (Undated). Xenophobia Attacks and Response – Report Template; Disaster Management, Western Cape. (Undated). Internally Displaced Persons (IDP): Western Cape Province; City of Johannesburg Mayoral Sub-Committee. (2008). Comprehensive Report on the Community Conflict (Xenophobia) in Johannesburg.

through all levels of government in a coordinated fashion in order to address obstacles posed by the “broader government operating environment” in responding to a crisis such as that of 2008. An issue that has not received enough attention is the question of urgency in the declaration of a disaster – of why provincial disasters were not declared earlier or consistently across provinces, and how response time in this respect could be optimised in the future (see section 3.2.1 of this report).

The **Western Cape province** has drafted a Proposed Social Conflict Emergency Plan that cites the limitations of its existing Western Cape Disaster Preparedness, Response and Relief Plan – a plan which focuses largely on human-induced and natural disasters. The province notes that this “will be revised to include activities relating to social conflict situations.”¹²⁸

The **Gauteng Provincial government** submitted two substantial assessment reports to the SAHRC, one by the Department of Local Government and one by the Independent Development Trust. It remains to be seen how these are implemented and whether buy-in can be obtained from the various spheres and organs of government who worked side by side, although not necessarily for consistent purposes, during the disaster.¹²⁹ Finally, the **Western Cape MEC for Local Government, Environmental Affairs and Development Planning**, has endorsed the findings and recommendations of the evaluation conducted by the United Nations Office for the Coordination of Humanitarian Affairs.¹³⁰

Recommendations

The SAHRC recommends that:

- **National government** consider the benefits of moving Disaster Management into the Presidency and take steps to improve the capacity of this structure and enable it to exercise an appropriate level of authority in the management of disasters.
- **NDMC** develop a national-level evaluation and action plan to address obstacles to local, provincial and national responses to social conflict disasters, drawing on existing local and provincial evaluations and evaluative reports by civil society organisations. This should include a review of funding mechanisms.

128 Western Cape Province. (Undated). Proposed Social Emergency Plan, p. 21.

129 Gauteng Department of Local Government, undated; Independent Development Trust. (Undated) Close Out Report on Xenophobia.

130 Letter to Adv T Thipanyane from Minister A Bredell, 13 November 2009, referring to United Nations Office for the Coordination of Humanitarian Affairs Regional Office for Southern Africa (UNOCHA ROSA). (Undated). Recommendations Stemming from Lessons Observed of the Response to Internal Displacement Resulting from Xenophobic Attacks in South Africa May-December 2008: Final Version.

- **NDMC** develop a set of guidelines on response to social conflict disasters to promote consistency in the nature and quality of disaster response across municipalities and provinces, including issues around the urgency of disaster declarations.
- **Municipalities and provinces affected by violence in 2008**, where they have not yet done so, develop a “lessons learned” report for submission to the NDMC in its compilation of a consolidated report and action plan.
- **Municipalities and provinces affected by violence in 2008** develop an action plan to overcome institutional obstacles to responses to social conflict disasters, for submission to the NDMC in its compilation of a consolidated report and action plan.
- The **DHA** conduct a thorough and transparent evaluation of the challenges faced during the 2008 crisis and formulate an action plan to ensure that it is better capacitated for future contingencies.





Chapter 3:

During the Crisis

This chapter examines issues that arose as government's response to the violence and displacement unfolded during the most intense phase of the crisis (May to October 2008.)

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.¹³⁵

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹

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.¹⁴⁰

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.¹⁴¹

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.¹⁴²

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.¹⁴³
- 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.

¹⁴³ 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.¹⁴⁴

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.

¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶

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.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹
- Insufficient, and in some cases no, interpreters were provided to assist in the accelerated asylum determination process instituted in displacement sites.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² The SAHRC notes that under such circumstances the high number of rejections – 98% according to Amnesty International¹⁵³ – 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.¹⁵⁴

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

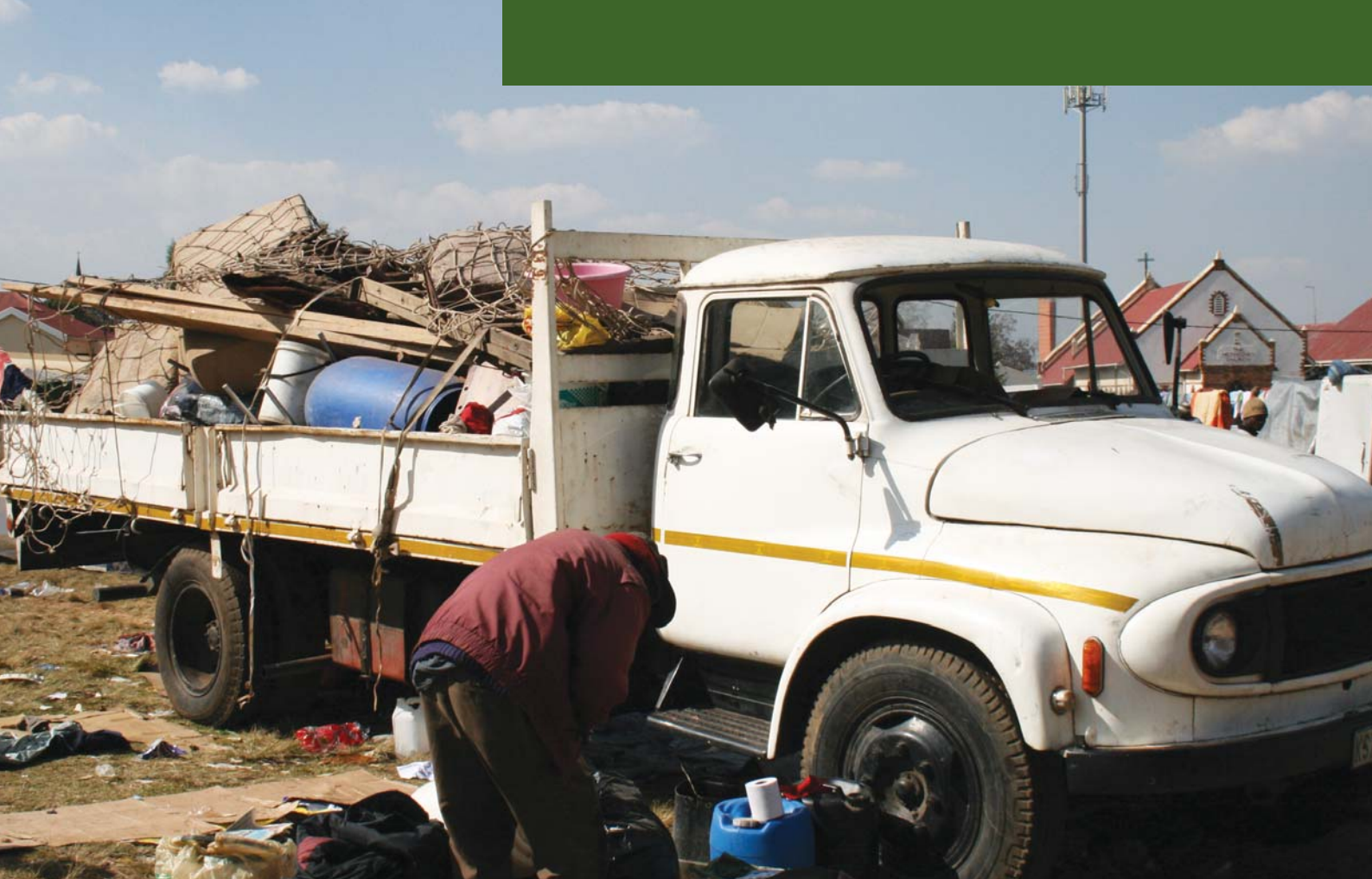
There were inconsistencies across provinces in the approach taken to "voluntary repatriation," and little effort by the DHA to curb constructive *refoulement*.

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."¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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,¹⁶⁰
- Suspects – some of whom were members of informal community governance structures – were released into communities on bail,¹⁶¹ 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.***¹⁶²

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.¹⁶³ 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.¹⁶⁴ Yet in fact it caused a great deal of “self-reintegration” by displaced persons¹⁶⁵ 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.***¹⁶⁶ Such disputes arose in Gauteng (for instance between the City of Johannesburg and Gauteng Provincial Government;¹⁶⁷ between Tshwane Municipality and the Gauteng provincial government with regard to the status of the Akasia site),¹⁶⁸ 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)¹⁶⁹ 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”).¹⁷⁰ 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.¹⁷¹ 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.”¹⁷²

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.”¹⁷³

- ***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”¹⁷⁴ 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.”¹⁷⁵ 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”¹⁷⁶ – 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.¹⁷⁷ 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."¹⁷⁸ 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 City¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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.”¹⁸² 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.¹⁸³

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),¹⁸⁴ 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.**¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ 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,¹⁹⁰ where non-nationals were attacked again in January 2009.¹⁹¹

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.¹⁹² 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*.”¹⁹³ The SAHRC notes that in cases of evident pressure or coercion by host country authorities, the UNHCR is mandated to intervene.¹⁹⁴

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,¹⁹⁵ ending around March 2009. The decision in this regard was made on 28 May 2008 and an action plan presented on 12 June 2008.¹⁹⁶
- 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.¹⁹⁷

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.”¹⁹⁸ 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.¹⁹⁹

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.²⁰⁰ 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.²⁰¹ 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.²⁰² 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.²⁰³ 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.²⁰⁴ 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 2008.²⁰⁵ 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.”²⁰⁶ 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.”²⁰⁷

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

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 (16th) 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 research²⁰⁹ 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.²¹⁰ 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.”²¹¹ In some cases police support a complacent attitude by non-nationals, fearing that entering into a judicial process might precipitate further xenophobic attacks.²¹²

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.²¹³ 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.²¹⁴
- 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.²¹⁵ In Masiphumelele, some officers are accused of befriending and tipping off drug dealers in the area before raids take place.²¹⁶ In Cato Manor, focus group participants claimed that “police are part of crime in the area.”²¹⁷
- 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.²¹⁸ 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.²¹⁹

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 theft²²⁰ – or violent forms of popular justice such as beatings of suspected criminals, which had taken place in both Ramaphosa and Masiphumelele.²²¹

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.²²²

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.²²³ 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,²²⁴ 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.²²⁵ 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.²²⁶

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.²²⁷

Of 597 cases, only 159 had been finalised with a verdict (98 guilty; 61 not guilty), while 218 had been withdrawn by October 2009.²²⁸

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.²²⁹ 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.²³⁰
- 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.²³¹
- 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.²³²

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.²³³

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,²³⁴ 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.²³⁵

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.²³⁶ 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.²³⁷
- Police visited complainants’ homes on multiple occasions without success in finding them.²³⁸
- In some cases, police could not find complainants after organising an identity parade to enable them to identify the perpetrator.²³⁹
- 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.²⁴⁰
- In some cases, no communication with the complainant/s is recorded in the docket beyond the initial contact.²⁴¹ 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.²⁴² In some cases, charges were withdrawn just days after receipt of this information,²⁴³ 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.²⁴⁴
- 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,²⁴⁵ as research has shown that in many communities identifiable individuals or groups had instigated the attacks.²⁴⁶ 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.²⁴⁷
- 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.²⁴⁸

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.²⁴⁹ 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

²⁴⁹ 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,²⁵⁰ 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.

²⁵⁰ 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.”²⁵¹

²⁵¹ 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.²⁵² 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.”²⁵³ 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.

²⁵² NDMC, Report on the 2008 Xenophobic Attacks, p. 9.

²⁵³ 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.²⁵⁴ 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

²⁵⁴ 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.²⁵⁵

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 response²⁵⁶ and developed a policy paper²⁵⁷ 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	
	Consortium for Refugees and Migrants in South Africa
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25	Provincial Government of the Western Cape: Department of Local Government and Housing. Western Cape Province Proposed Social Conflict Emergency Plan. 28 October 2009.
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27	City of Cape Town: Sport, Recreation and Amenities. Safety Zone Accommodation Update. 17-20 June 2008.
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29	Minutes: Provincial/City Disaster Management Meeting: Core Group Meeting. 25 August 2008.
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95	SAHRC 1 (Excel Data File).
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	Ocean View Police Station
177	Western Cape Provincial Command Centre. Xenophobic Incidents 2008-05-01 Till 2009-12-08. 8 December 2009.
	Reiger Park Police Station
178	Case 249/05/2008
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180	Case 253/05/2008
181	Case 197/05/2008

Appendix B: Interviews, Focus Groups and Meetings Held

Site	Focus Group	Date	Place	# Participants
Masiphumelele	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
Cato Manor	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				
	Focus Group	Date	Place	# Participants
Ramaphosa	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
Discussion		
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.