

## **Migrants in a 'State of Exception'**

by Steven L. Gordon

### **Introduction**

The transition from a regime based on racial oppression and authoritarianism to a multiracial democracy has produced a multitude of new democratic and social rights for South Africa's citizens. However, this transition has at the same time created a deep conflict over the realisation of these rights. As the status of citizenship becomes the key to economic and social resources, this status becomes the scene of contestation. The shift in political power and status has produced a range of new discriminatory practices as the struggle to realise social and economic rights becomes more intense. One of the most prominent victims of this struggle is the foreign national, particularly the 'black' African foreign national. Emergent as an especially vulnerable group in post-apartheid society, immigrants have become the target of violence, exploitation and discrimination. As struggles to realise the social and economic promises of the transition have deepened, incidences of anti-immigrant violence have intensified. However, while local individuals and communities are themselves accountable for this trend, this climate of xenophobia has been shaped in large part by South Africa's own immigration policy.

For more than a decade, immigration policy has permeated an internal logic among state officials and law enforcement personnel that foreigners, especially 'black' foreign nationals from Africa, are not subject to the normal protections of constitutional democracy and human rights obligations. Instead, migrants are treated as an exception, and as such, are relegated to a space outside the workings of the law. In effect, the isolation and persecution implemented by the current immigration policy fuels the xenophobia witnessed among the general public. Subsequently, the absence of constituted protection, and the anti-immigrant sentiments of the law and policy provide the opportunity and justification for xenophobic within post-apartheid South Africa.

This state of affairs produces a system that contributes to new economies of corruption and violence existing either entirely outside the realm of state regulation or more alarmingly through legitimate avenues. This study hopes to uncover and discuss the forces shaping the 'state of exception', and to investigate the different ways in which xenophobia has been contextualised and understood in post-apartheid South Africa. The focus is on how migrants exist within legal 'spaces of exception' and how their extortion, exploitation and maltreatment are

propagated by the post-apartheid state. These 'spaces of exception', will be examined through an analysis of the content and construction of relevant immigration legislation, with reference to the logic of both contemporary immigration legislation and the immigration regime by the different actors, notably the Department of Home Affairs and law enforcement agencies. Finally, this 'state of exception' will be discussed in the light of the work of Carl Schmidt and Agamben's analysis of sovereignty centred on the notion of exception.

### **Xenophobia**

The majority of South Africans do not welcome foreigners, especially those from other African countries. Few words are more derogatory in modern South Africa than "amakerre-kwerre", a popular label for unwanted immigrants. Evidence of xenophobia can be seen in the high-profile violent anti-migrant attacks. Although anti-immigrant violence 2008 –which left which left more than sixty dead and saw tens of thousands of migrants were displaced, amid mass looting and destruction of immigrant-owned homes, property and businesses –drew much needed attention to the plight of immigrants in South Africa, international and national interest in South African xenophobic violence waned during the heated election of 2009. However in the run-up to the much celebrated 2010 FIFA World Cup, disturbing trends have re-highlighted the importance of this issue. In December 2009, the UN Commissioner for Human Rights, Navi Pillay, described growing anti-immigrant violence as "gravely alarming" and warned that xenophobic violence was on the rise (Mail&Guardian 2009a). Ongoing outbreaks of xenophobic violence served to underscore this forewarning, and Nde Ndifonka of the IOM (International Organisation for Migration) expressed concern regarding further and more widespread violence during the impending soccer World Cup (Mail&Guardian 2009b). It is evident that xenophobia is a pressing issue of concern for South Africa, and that confronting xenophobia and her underlying causes is a matter of great urgency.

However, while episodes of shocking and widespread violence against the "kwerekwere" continue to be reported in the media, these 'flare-ups' serve to highlight the xenophobic nature of South African society that long pre-dates the May 2008 attacks. Crush (2008:44-55) outlines a comprehensive chronology of anti-immigrant violence for the 1994 to 2008, indicating the persistent and particularly brutal nature of xenophobia in South Africa. In a national surveys conducted by the Southern African Migration Project (SAMP), alarmingly high levels of xenophobia were found at all levels of South African society. For example, in a survey presented by McDonald (2000), almost half (48%) of the respondents felt that migrants were a "criminal threat", while 37% thought that migrants were a threat to jobs and the economy, and

29% thought that migrants were a health threat<sup>1</sup>. In a recent comprehensive analysis of xenophobia in South Africa, Crush (2008) notes that numerous studies have noted hostility, exploitation and maltreatment of foreigners by a variety of institutions and actors, ranging from the police and the Department of Home Affairs to employers and neighbours. Indeed, there can be little doubt that many South Africans harbour negative opinions about foreigners<sup>2</sup>.

Many eminent politicians and academics, especially after the infamous 2008 violence, have attempted to locate this hostility within the context of economic deprivations following the political transition. A study conducted by the Human Science Research Council (2008:6) identified the insufficient pace of service delivery, perceived corruption in government, and poor housing provisions as key reasons for the 2008 outbreak of xenophobic violence. It is not difficult to understand the logic behind this argument. The transition from a society based on the racial division of power and resources towards a democratic order has profoundly changed both the redistribution of political as well as economic power. Although rights of citizenship for the majority of South Africans were obtained during the celebrated 1994 elections, for many the economic and social realities of apartheid still persist. The economic transition has seen unemployment rise dramatically, and almost half the population continues to live below the poverty line (see HSRC 2008).

Amidst this continuing economic malaise, intense internal struggles have emerged among the numerous segments of society over the rights of access and the processes of redistribution to economic resources. It can, therefore, be argued that xenophobia can be explained in terms of limited access to economic resources, coupled with unfulfilled expectations following the political transition. As early 1999, Tshitereke advances the notion that,

"In the post-apartheid epoch, while people's expectations have been heightened, a realisation that delivery is not immediate has meant that discontent and indignation are at their peak. People are more conscious of their deprivation than ever before .... This is the ideal situation for a phenomenon like xenophobia to take root and flourish. South Africa's political transition to democracy has exposed the unequal distribution of resources and wealth in the country (1999: 4)."

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<sup>1</sup> A follow-up study on xenophobia in South Africa found that anti-foreign attitudes were so all-encompassing and extensive that it was practically impossible to identify any kind of typical "xenophobia profile" (Crush & Pendleton 2004). In other words, the poor and the rich, the employed and the unemployed, the male and the female, the black and the white, the conservative and the radical, all conveyed similar attitudes.

<sup>2</sup> Hostility towards foreigners has been identified as one of the most significant features of post-apartheid South African society experienced by resident migrants in several studies. For example, according to a qualitative analysis that included more than seventy African foreign nationals, Sinclair (1999:471) found that xenophobia was the prime concern of all migrants interviewed, "surpassing even issues of legal status, job security and financial difficulty".

In this climate, migrants are cast as an economic threat, viewed as competitors and consumers for sacred resources and opportunities. This sentiment is often evident in the media where the xenophobic rumours that have been fuelled include the notions that foreigners are taking citizens' jobs, are responsible for crime, are the cause of insecurity, accept lower remuneration and thereby depress wages, and bring infectious diseases (including HIV/AIDS) and all manner of other vices to South Africa.

However, this explanation fails to provide clarification on why nationality and not some other form of social or economic difference is the determining feature that generates hostility. Nor does it explain the racial component of xenophobia in South Africa. According to the national surveys conducted by SAMP as well numerous other studies, it is always the 'black' foreigner from Africa that seems to constitute the greatest possible threat (see Crush & Pendleton 2004; Crush 2008; and Landau and Segatti 2009). In a disturbing replay of apartheid style tactics, this racial component has insinuated itself into the identification of migrants by state authorities. Since documents can be forged, the possession of identity books or papers is no longer considered to be a definitive indication of South African nationality. Authorities, instead, rely on biocultural markers of difference, such as physical appearance and the ability to speak one of South Africa's dominant indigenous languages. During the mid 1990s, Minaar and Hough (1996: 166--7) noted that members of the Internal Tracing Units have been known to give suspected 'illegal' migrants accent tests, demanding that the suspect pronounce certain words such as 'indololwane' (the Zulu for 'elbow'), or 'buttonhole' or the name of a meerkat (for more information on the ITUs see Misago et. al. 2009). Reports by the South African news media seem to indicate that these practices have not been abandoned, and similar methods of identification were reportedly used by anti-immigrant mobs during 2008<sup>3</sup>.

Appearance is another criterion used in trying to establish whether a suspect is illegal -- hairstyle, type of clothing worn, as well as actual physical appearance. In this classification, skin-colour has once again been an indication of the stereotypical profiling to capture the 'intruders'. According to Nyamnjoh (2006: 48), "[d]ark skinned refugees and asylum-seekers with distinctive features are especially targeted for abuse" by police and the public alike. This has resulted in situations where South African citizens are mistakenly thought to be foreigners and arrested and targeted by the police. Nyamnjoh further notes that:

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<sup>3</sup> For instance, an article in South Africa's prominent newspaper featured an interview with an anonymous participant in the 2008 anti-immigrant violence who described his method of identifying immigrants: "We just ask them Zulu words that any South African knows. If they get it wrong, we hit them" (Mail&Guardian 2008).

„Individuals are often assumed to be Makwerekwere on the basis that they 'look foreign' or are 'too dark' to be entitled to South Africa [...] black South African citizens are sometimes mistaken for the dark, invading barbarians or stutterers who must be confined to the fringes" (2006: 49)

There is little doubt that the racialised nature of contemporary South African xenophobia and the identification of 'black' foreigners from 'black' Africa (typified as primarily sub-Saharan Africa) is constructed and has been shaped by the former apartheid system with its enormous emphasis on racial discrimination. Despite the 'African Renaissance' ideology of former South African President Thabo Mbeki, the popular image of 'black' Africa and 'black' Africans still follows apartheid stereotypes. 'Black' Africa is depicted stereotypically as the 'wrenched continent', a vague space marked by wars, barbaric violence and poverty. Accordingly, this space is represented as both negative and homogeneous in keeping with the perspective offered by warped apartheid logic, and consequently completely divorced from the space that constitutes South Africa.

The distinctly racial component of xenophobic opinions reveals the underlying importance of race within the South African reality. Guy suggests that:

"The foregrounding of race can be extremely dangerous when it interacts with the predicament and the fears of the poor, the insecure, as well as ruthlessly ambitious. As an increasing number of Africans seek opportunities in South Africa so xenophobia becomes more violent and intense, challenging what many see as the defining achievements of the transition from apartheid – the creation of a multi-racial nation out of racial tyranny (2004: 85)."

However, biocultural differences alone do not explain how this difference is reproduced within society. The division between citizen and foreigner is reinforced and constructed through more than mere biocultural factors. Rather, the common ground that is shared by these two groups is overshadowed by forms of legal discrimination that not only serve to highlight differences but also create the particularly intensive vulnerability that leaves migrants open to forms of violence and exploitation.

### **Migration Law**

Since the political transformation, South African economic and political legislation has heralded the free and rapidly increasing unrestricted international flows of goods, capital, and information as hallmarks of the new era of globalisation. However, the increasing movement of people and labour across national borders represents an area that has

not been satisfactorily factored into the South African government's vision of the future. Recent attempts to broaden the debate on immigration legislation, for the possibility of reform, have repeatedly collapsed into the divisive rhetoric that first characterised the debate on the premier legal instrument of immigration control in South Africa, the 2002 Immigration Act. This piece of legislation and its subsequent amendments swing back and forth between the idealism of the post-apartheid 'African Renaissance' and the pervading deep-seated fear of immigrants and immigration. On the one hand, South African immigration policy guarantees the harmonisation of rights between citizens and foreigners, and pledges amity towards migrants from the SADC region. But in the same breath, the policy justifies restricting legal immigration into the country, especially from the SADC region, using the popular lexicon of the xenophobe. Hence, while avowing a strongly anti-xenophobic tone, the current Immigration Act justifies restricting legal immigration by echoing the popular logic that migrants are linked to crime, unemployment, increased pressure on social services, and corruption.

To understand this confusing 'doublespeak', it is necessary to examine the history of South African immigration law, as well as apartheid and post-apartheid migration policy as it applies within the context of the scope of this paper. However, the history of immigration law, regardless of nation, is a history of rather intricate and often miscalculated interventions to deal with the economic value of immigration. Indeed, for De Genova (2002: 425) the history of such law-making is "distinguished above all by the constitutive restlessness and relative incoherence of various strategies, tactics, and compromises that nation-states implement at particular historical moments ...to mediate the contradictions immanent in social crises and political struggles ...around the subordination of labour". From this standpoint, immigration law can be understood as an instrument of control, discipline and coercion through the deployment of these laws as tactics.

The history of immigration law in South Africa is inextricably linked with the prevailing social image or perception of migrants amongst those responsible for framing migration legislation and policy. During the apartheid period, immigration law was a product of the state's obsession with the construction of racial domination. Migration legislation between 1913 and 1986 stipulated that persons that the apartheid government classified as 'black' could only enter South Africa illegally or as contract workers (Maharaj 2004). This racially exclusive immigration legislation was closely related to migration patterns at the regional level. In order to maintain a continuous supply of cheap labour, the apartheid state encouraged the creation of the extensive migration systems of the mining and agricultural sectors, and turned a blind eye towards a certain extent of informal migration (see Maharaj 2004; Jensen and Buur 2007; and Crush and Dobson 2007). This policy was conducted hand in hand, with a determined effort to refuse any form of legitimacy or citizenship rights to these migrants.

In many ways, South Africa's traditionally racially-biased immigration policy has been carried forward to the modern post-apartheid state. For much of the present post-apartheid period, the official government policy towards migrants was embodied in the Alien Controls Act of 1991<sup>4</sup> (hereafter the Act). While the racial requirements were removed from the Act during the early 1990s, the restrictive and draconian nature of the Act remained. This drew wide criticism. In 1998 the Human Rights Watch portrayed the Act as an archaic remnant of the apartheid state that was in opposition to the South African constitution and internationally accepted human rights conventions. Furthermore, Crush (1999:1-2) described the Act as "a piece of legislation premised on principles of control, exclusion and expulsion", and argued that the post-apartheid migration management system was "characterised by corruption, racial double standards, and special privileges for certain employers". Despite these criticisms, the drafting of new legislation to replace the Act was tediously slow and marred by controversy.

The Draft Green Paper on International Migration released in 1997 advanced the idea that South African migration policy should be redesigned to be both cognisant with global realities and in harmony with the constitution. The Green Paper advanced the idea that South African jurisprudence on immigration was underdeveloped, and that the country's blind focus on "arrest, detention, and removals" was a relic of the apartheid era (DHA 1997: paragraph 3.1.2). Furthermore, the Paper recommended that the "problem of unauthorised migration should in part be dealt with by giving bona fide economic migrants from other SADC countries, who have no intention of settling here permanently, increased opportunities for legal participation in our labour market" (DHA 1997:11).

The Paper acknowledged that South Africa would continue to attract large numbers of migrants regardless of legal restrictions, while there were still extensive uneven development patterns of economic growth within the region (DHA 1997: paragraph 1.1.4).

However, the progressive nature and ideals advanced by the Green Paper were lost during the next step in the legislation creation process, namely: the establishment of a White Paper commission. According to the White Paper, the intention of immigration policy was to cultivate an "environment which does not offer them [migrants] opportunities of employment and free available public services which they cannot find in their countries of origin" (DHA 1999:31). Subsequently, the White Paper argued that a highly restrictive immigration policy should be adopted in order to reduce the number of people for whom government and the economy needed to 'provide' (DHA 1999: Section 5. 10-11). This further articulated immigrants as a threat through its assumption

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<sup>4</sup> The Aliens Control Act of 1991 was based on a 1913 act that excluded "blacks" and was amended in 1930 and 1937 to exclude Jews. In terms of the Act, it was an offence to "employ, enter into any agreement with, conduct any business with, harbour, or make immovable property available to illegal immigrants" (Maharaj 2004: 16).

that all immigrants are 'parasites' on services and contribute little by way of productive activity and tax revenue. According to Maharaj (2004:19), the White Paper "echoed the popular xenophobic view that migrants were linked to crime, competed with citizens for jobs, increased pressure on social services, and contributed to corruption. It does not provide any evidence to support these claims, and ignored research that suggested that this was not so". In this way, immigration legislation effectively portrays immigration, especially immigration from African countries, as a threat to the economic and social goals of the post-apartheid state.

This "fortress" position taken by the legislators has been criticised by business leaders as economically harmful to the country. During the drafting process, private industry representatives argued for a more open system. The South African trade union movement also voiced strong criticism of the Department of Home Affairs' (DHA) position during the drafting process. COSATU, in a submission on the White Paper on International Migration (2000:3), accused the DHA and its policy proposals of a xenophobic "preoccupation with illegal migration [which] results in a failure to provide a coherent immigration policy and in certain respects the avoidance of issues", and argued that such a preoccupation "further engender[s] paranoia, which will then make it difficult to have a rational and humane approach to illegal migration". This view was corroborated by the Department of Labour (DOL) in a statement in a NEDLAC Report on the White Paper that the notion of illegal immigrants posing a negative impact to the provisions of services and welfare was replete with inappropriate assumptions (NEDLAC 2001). However, the "fortress" position has garnered a great deal of general public support in its campaigns to bar the gates against migrants<sup>5</sup>. Indeed, most researchers do not attribute the country's current restrictionist migration policy to economic logic, but instead to a new 'post-apartheid nationalism' that views foreigners as a 'threat' (see Maharaj 2004; Crush and Dobson 2007; and Crush 2008).

Although considerable resources were invested by the trade union movement and civil society actors in public participation in the drafting

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<sup>5</sup> In fact according to a 2006 study, the public believes that the government is not tough enough on border control with 84% indicating that they thought South Africa is allowing "too many" foreign nationals into the country (Crush 2008:24). The study found wide ranging support for stronger control measures such as requiring that foreigners carry identity documents with them at all times (72% in favour); and 74% supported a policy of deporting immigrants who were not contributing economically to the country (Crush 2008: 25). The study also found that 35% of South African respondents wanted a complete ban on immigration into the country and another 64% were in favour of restricting the ability of immigrants to gain South African citizenship (Crush 2008:25). The study confirmed that there is a general perception amongst citizens in South Africa that the nation is being 'swamped' from 'illegal' migrants.



process, this effort translated into minimal impact<sup>6</sup>. Despite resignations by many discontented participants involved in the process, the provisions of the White Paper were converted into the Immigration Act (No. 13 of 2002), which was then amended by the 2004 Immigration Amendment Act (No. 19 of 2004), before its eventual implementation in 2005. However, it was clear from the outset that there was wide dissatisfaction within government with the new legislation. On assuming office in 2004, Home Affairs Minister Nosiviwe Mapisa-Nqakula stated that there is “a need in the long term for Government to look at a more holistic review of our immigration policy and for a possible rewrite of the Act” (Crush and Dobson 2007:437). However, sweeping reform has proved elusive, despite promises made by Mapisa-Nqakula and her successor Nkosazana Dlamini-Zuma.

### **The Migration Regime in South Africa**

Post-apartheid South African migration policy has been defined by exclusion and restriction. The seeming paradox in this scenario is that while capital has an expanding horizon in Southern Africa, the people of the region and Africans further afield have been caged in narrower and narrower prisons, as their physical and psychological frontiers are being policed ruthlessly by the nation state. In a world where globalisation may be weakening elements of Westphalian sovereignty, contemporary South African policies of migration and border control suggest an almost blatant hostility to these labour migrations and a belief that a strong politic is the path to gaining control of national borders. The main public instrument signifying the government’s dedication to this control and regulation is the Department of Home Affairs (DHA). Despite a pledge to “promote a human-rights based culture in both government and civil society in respect of immigration control” (Section 29(1)(a) of the Immigration Act 2002), the DHA have been accused of human rights infringements, brutality and a laager mentality towards migration. There is a need to examine the role of the DHA in order to answer the charge that department’s efforts to control the flow of labour have constructed and legitimatised the vulnerability of foreign nationals in post-apartheid South Africa.

The DHA’s outlook is characterised by what has been described as an intense fear of the emergence of a large-scale permanent immigrant population. The former Home Affairs Minister Buthelezi articulated this

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<sup>6</sup> Vested interests appeared to be active, as the DHA appeared to favour blocking the influence of public participation and especially NEDLAC involvement, by mounting a campaign to marginalise the impact of this participation. In its Labour Submission on the Draft Amendment Bill (2004:1), a disgruntled NEDLAC criticised the process, and called the process of public consultation a “sham”. Pointing a finger at the DHA, NEDLAC claimed that the enactment of the Bill took place through a process that undermined the principle of public participation, the role of NEDLAC as a tripartite institution, and even Parliament itself. Indeed, the widespread public controversy surrounding the Bill discounted its credibility in the eyes of many of the participants (see Crush and Dobson 2007).

position strongly when challenging provisions for a more open immigration policy in the mid-1990s, emphasising the need for controlling international migration to guard against the security and economic threats posed by migration (Crush 2008:16). However, Buthelezi's statements here are not unique and form part of a discourse that emerged in the post-apartheid discussion on immigration policy. Peberdy comments on the language that permeates this discourse, as follows:

'The state's negative attitudes to both immigrants and migrants is most evident ... in the ways it argues non-South Africans threaten the nation by endangering its physical health, its ability to provide resources, employment and levels of crime. The language of the department is replete with images of Africans as carriers of disease(1999: 298).'

Accordingly, the DHA has promoted a policy that sought to de-legitimise historical migration patterns, with the logic that "except for mining industry, there no longer is a need for recruitment" from the SADC countries (quoted in Crush and Williams 2001: 11). In a review of immigration policy for the period 1994 to 2005, Crush and Dobson (2006) conclude that this growing restrictionism has even penetrated the area of temporary migration for the purpose of work, and observe that since 1990 there has been a decline in the issue and re-issue of temporary work permits as well as a decline in the number of people being granted permanent residence. As a consequence, employers have found it increasingly problematic to hire personnel from abroad and that attempts to follow even the limited legal procedures often leaves participants stranded in DHA red tape (see Crush and Dobson 2007; and Human Rights Watch 2006). Conclusions have been drawn that despite frequent appeals from the private sector, the DHA and contemporary immigration policy has closed many legal routes of entry for foreigners who wish to work within her borders.

For many migrants, therefore, entering the formal economy through legal channels is either not possible or prohibitively expensive and bureaucratic. Instead, most migrants enter the informal sector which falls outside the regulative framework of labour legislation and its protective measures. According to various studies, the majority of migrant workers find employment in sectors characterised by low wages, low security, poor working conditions, and a lack of unionisation or labour organisation (see Maharaj 2004; Human Rights Watch 2006; Landau and Segatti 2009; and Misago et. al. 2009). These factors trap many migrants within the periphery of formal employment and their vulnerability to exploitation in this periphery is exacerbated by a lack of government regulation as well as the severely fragmented nature of organised labour in these spaces.

Law enforcement agencies have been unsuccessful in policing the employment of illegal migrant workers within the country (Human

Rights Watch 2006). Historically, contemporary employer penalties in South Africa have been weak, and the apartheid state's preference to deport rather than sanction is a dubious tradition that the post-apartheid state has continued. From only 53,418 in 1991, deportation rates reached astonishingly high proportions of 183,861 by 1999. Although decreasing after 1999, the advent of the economic crisis in Zimbabwe sent deportation rates soaring again, with approximately 151,653 deported in 2003 and more than 266,067 in 2006 (CORMSA 2008). Although no official data has been made available in recent years, there is a wide consensus of opinion that deportation figures have continued to rise substantially and a researcher for CORMSA (2009) has given an approximation of the deported in 2008/9 at more than 300,000<sup>7</sup>.

Both the immigration regime and employees of the DHA have not proved to be impregnable to the human vices of greed. The process of restricting the movements and opportunities of refugees and undocumented migrants has created a fertile area for petty corruption by officials choosing to abuse and exploit those struggling to navigate their way through a complex system. With an enduring legacy as one of most corrupt departments under the apartheid regime, the post-apartheid DHA has been characterised by administrative incompetence and ongoing irregularities<sup>8</sup>. Critics claim that the DHA supports a burgeoning industry of false documentation and bureaucratic fraud that allows economic refugees to circumvent the legal barriers to employment and residence, and that this corruption continues to grow alongside the new laws, to the extent that it has become a burgeoning industry that has allowed illegal migrants to circumvent immigration laws but has also subjugated them to increasing forms of exploitation. In a pertinent example of this, a 2007 report by the Pretoria-based Zimbabwe Exiles Forum (ZEF), on the plight of refugees in the town of Marabastad, found that Zimbabweans immigrants faced exploitation by

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<sup>7</sup> Zimbabwean migrants make up an increasing high percentage of those deported, increasing from approximately 17,000 (2001) to 74,765 (2004) and nearly 100,000 (2005) (Human Rights Watch 2006). Although the Department of Home Affairs has not made recent deportation figures available, according to reports from the International Organisation for Migration (IOM) 17000 Zimbabweans are deported every month from detention centres such as Lindela (which means "wait here" in Zulu and Xhosa) and Musina (IRIN 2009). As the crisis in Zimbabwe deepened, the deportation rates continue to rise. In the first seven months of 2007, for instance, the Reception and Support Centre of the International Organisation for Migration (IOM) processed 117,737 people repatriated from South Africa at its Beitbridge centre on the Zimbabwean border (IRIN 2007a). However, a 2009 moratorium issued by the DHA has halted the deportation of Zimbabweans, police brutality and the deportation of Zimbabweans (albeit on a lower scale) persists according to Human Rights Watch officials (Mail&Guardian 2009c).

<sup>8</sup> An interesting anecdote that could be cited here involves a report from Human Rights Watch (1998) that noted that a significant number of those being held in Lindela were not foreign nationals but South Africans who were arrested on suspicion of being illegal migrants because either they did not have proper identity documents or had simply not been given the opportunity to produce them.

police and Home Affairs officials. The report, sourced in an IRIN (2007b) article, alleged that "[b]ribe costs range from R300 (US\$41) to R1,500 (\$205) to obtain immigration papers, which may in the end be counterfeit, and the same amounts are also demanded by corrupt police officers, should illegal immigrants seek to avoid arrest and deportation"<sup>9</sup>. The consensus is that this culture of corruption creates an environment in which the exploitation of illegal migrant labour thrives. The endemic problem of bribery and extortion forces many migrants into an underground economy characterised by exploitation, fear and vulnerability.

### **Policing Migrants within Post-Apartheid South Africa**

The emerging discourse evokes a scenario in which the foreigner is depicted as illegitimate at best and criminal at worst, and in which the notion of unsanctioned migration (whereby individuals change their economic and social status through cross-border movement) endangers the nation's sovereign control over individuals or groups associated with economic and social development (Jensen and Buur 2007). In other words, unsanctioned migration is at odds with the predominant nationalistic notions of how the beneficiaries of national development are defined and becomes a threat to sovereign control over economic and social reconstruction. Peberdy links this notion of economic sovereignty to a threatened nation state, as follows:

"The focus of the state on what it sees as the parasitical relationship of non-South Africans to the nation's resources, and the way that the state criminalizes them, suggests that the state sees immigrants, and particularly undocumented migrants, as a threat to the nation and the post-1994 nation building process (1999: 296)."

By envisioning South Africa as being 'threatened' by parasitical foreigners, the authorities are able to invoke notions of 'a state of siege'. Such a threatened position necessitates and justifies the suspension of aspects of the constitution to protect against this threat.

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<sup>9</sup> According to Waller (2006), it has become increasingly evident that a deep 'culture' of corruption in DHA has marred attempts by refugees and asylum seekers to follow legitimate channels to legal entry into South Africa. Indeed, unofficial reports indicate that unless an individual is prepared to pay bribes or other unofficial 'fees', they may be deprived of the right to even file an asylum claim. Indeed, a noteworthy criticism of contemporary migration policy is that it does not differentiate refugee protection and migration control. According to Maharaj (2004:2), this has resulted in the post-apartheid South African government making little attempt to discriminate between refugees and those it classifies as "illegal migrants". In addition, similar corruption is evident among members of the South African Police Services (SAPS) and the South African Defence Force (SADP). A recent Human Rights Watch (2008) report has noted that bribery is extremely common when police demand remuneration in exchange for protection or release from custody.

In other words, to guarantee the political and economic posterity sought by migrants, such migrants must be exempt from constitutional norms that were designed to protect individual liberties. However, this necessity to exempt is not a source of law, nor does it properly suspend the law. It merely releases a particular case from the literal application of the norm. This juridical phenomenon is defined by Carl Schmitt as a 'state of exception' (see Agamben 1998). In other words, the 'state of exception' is seen as the exercise of a state's right to its own defence<sup>10</sup>. The voluntary creation of a permanent state of emergency (though not declared in the technical sense) has become one of the essential features of the contemporary South African migration regime.

Despite the nature of the DHA's migration regime and immigration legalisation, large numbers of foreign nationals cross the South African border every year without legal sanction. Once migrants cross the borders that demarcate their legality as citizens without sanction, they become 'stateless' people who by abandoning their legal status are often termed 'illegal'. Because they are not regarded as having legal status, they are less protected by law and this allows them to become vulnerable to exploitation and violence. The question of legality is crucial and defining. The concept "illegal migrant" would be inconceivable were it not for the legislation restrictions that separate them from citizens. In this sense, "illegality" entails a social relation that is theoretically akin to citizenship (see Harris 1995; De Genova 2002; Jensen and Buur 2007). As with citizenship, "illegality" is a juridical status that involves a social relation to the state, with the result that migrant "illegality" can be defined as a political identity<sup>11</sup>. According to De Genova (2002), this spatialised condition of illegality leads to the reproduction of the physical borders of the nation-state, and in effect offers a device for ensuring and cementing the illegal migrants' vulnerability and tractability status.

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<sup>10</sup> Indeed, Agamben (1998:81) advances the notion that there is a need to stop treating the legislation of rights as declarations of "eternal, metajuridical values binding the legislator" but rather to investigate them as part of their "real historical function in the modern nation-state". Indeed, Arendt (1979: 294) claims that "[t]he conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships -- except that they were still human". Indeed, without the political borders that act to delineate separate sovereign states and hence attempt to assign all individuals to one such state, the problem of illegal migration would not exist.

<sup>11</sup> There has recently been a general call for an end to the usage of the term 'illegal' migration or 'illegal' migrant on the basis of it contributing to a xenophobic mindset. However, Malkki (1995: 496) has argued that the term is acceptable because it provides "a broad legal or descriptive rubric" that includes within it "an incredible heterogeneity", offering an insight into a widespread social trend closely associated with globalisation, despite the clearly controversial nature of this terminology. Indeed, Constable (1993) defines migrant illegality in terms of their spatialised social condition that is recurrently vital to the meticulous methods in which migrants are classified as illegal aliens within nation-state spaces.

The history of post-apartheid immigration legislation and policy has been characterised by a heavy emphasis on controlling "illegal immigration", and this emphasis has shaped the conduct of those 'policing' migration in South Africa. Based on the assumption that South Africa is plagued by an immigration 'problem' and that resources must be directed at detecting, apprehending and deporting 'illegal aliens' who have 'a negative impact on the provision of services and on our society' (DHA 1999: Section 6, paragraph 3.1, 16), Peberdy suggests that

"the depiction of African migrants as 'illegals', 'illegal aliens', and 'illegal immigrants' implies both criminality and difference. The persistent use of 'illegals' to describe undocumented migrants suggests a close connection with crime and criminal acts. The SAPS [South African Police Service] also provide the number of 'illegal aliens' arrested in crime swoops, or stop and search operations. Although these figures may improve the arrest rates of the SAPS, the conflation of arrested criminals and arrested undocumented migrants creates spurious links between crime and undocumented migrants (1999: 296)".

In other words, immigrants pose a supposed challenge to the unity and realisation of the post-apartheid project through their "criminality". Through the image of the 'illegal', Peberdy advances the notion that the migrant is depicted as a criminal, a threat to the body politic. In this lexicon, the foreigner becomes –in the words of Giorgio Agamben –'homo sacer'<sup>12</sup>, a figure who threatens the body politic and has therefore forfeited her constitutional rights.

The ambiguities and contradictions that imbue the Immigration Act have spawned a legal vacuum regarding immigrants. The regulation of migrants rests less with the law and lawmakers than with law enforcers. Central figures in the implementation of immigration law are the legal authorities charged with its execution, including police, border units, ad hoc special units, commandos and even vigilante-style organisation<sup>13</sup>. The Immigration Act effectively justifies equipping many of these law enforcement agencies with arbitrary powers to arrest, search, detain

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<sup>12</sup> Under ancient Roman Law, *homo sacer* or 'naked life' was a person who could be killed without repercussions and whose death could not be ritualised (Agamben 1998).

<sup>13</sup> The result has often been violence against and harassment of foreigners, as local communities take the "law into their own hands" to enforce what they see as proper immigration policy. Landau and Segatti (2009:44) have argued that anti-migrant vigilantism is not uncommon in South Africa, and since 1994 South Africans have often taken the "law into their own hands". For instance, 'Operation Buyelekhaya' (Operation Go Back Home) was organised by Alexandra township residents soon after 1994 to expel foreigners and prohibit them from returning; and in 2002, Du Noon township outside Cape Town began organising similar anti-immigrant themes. Although in both cases violence was directed at immigrants, Landau and Segatti (2009:45) note that no "effective steps have been taken by any of the government departments to address these conflicts".

and deport suspected 'illegal' migrants without reference to normal constitutional or legal protection<sup>14</sup>. The often contested legality of these migrants locates them in 'spaces of exception' that exist outside the law. Misago et. al. (2009:15), in their study of xenophobia immediately following the anti-immigrant violence in 2008, note that 'foreignness' has come to be "seen as a crime in itself" by many local communities, "a perception that is not discouraged by the constant scapegoating of foreign nationals in political rhetoric and the careless use of the label 'illegal immigrant' in the media".

Agamben (1998:110) argues that within these spaces, 'human beings ... have been so completely deprived of their rights and prerogatives to the point that committing any act against them would no longer appear as a crime'. However, the 'state of exception' logic of contemporary legislation is nowhere more evident than in the very principle of the national deportation system. Agamben (1998) argues that the so-called 'sacred and inalienable rights of man' prove to be completely unprotected at the very moment it is no longer possible to characterise them as rights of the citizens of a state. Detention and deportation is classified as a preventative measure that allows individuals to be taken into custody on the basis that their mere presence serves as a danger to the security and integrity of the state. This can be witnessed in the series of anti-immigrant police campaigns that have been launched in the first half of 2008. Landau and Segatti (2009:45), in their UNDP research paper on the human development impacts of migration in South Africa, noted that the "heavy handed way in which police have conducted immigration raids [particularly in recent years] has [...] led to a perception by perpetrators of violence that they are assisting in removing 'illegals' from the country". Reports of excessive violence, sexual abuse, extortion and theft are commonplace, and police have even been known to ignore or even destroy legal identity or refugee documents.

Perhaps most disturbing is that these notions of 'exceptionism' have justified shifting from externalising immigration control and prevention towards internal immigration control with monitoring at the community level. The Immigration Act allows for the transferring "administrative and policy emphasis ...from border control to community and workplace inspection with the participation of communities and the cooperation of other branches and spheres of government" (DHA 1999:1). In other words, detection of illegal migrants will take the form of community participation in residential areas, workplaces, educational institutions and other places where migrants access services. In this new system, the DHA's responsibility for immigration law enforcement has been

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<sup>14</sup> These arbitrary powers are not unique to the Immigration Act, but rather form part of a systematic tradition in post-apartheid immigration law. The Aliens Control Act gave law enforcement officers the right to declare anyone suspected of being an illegal immigrant a "*prohibited person*", and therefore subject to removal. This "*prohibited person*" had no right to contest this and no right to appeal (see Human Rights Watch 1998).

partly devolved, not only to other law enforcement agencies but to civilians within the community. Such a strategy relies heavily the co-operation of the public, leading some researchers to argue that this strategy condones xenophobic practices among participant communities (see Crush and Williams 2001; Crush and Dobson 2007; Misago et. al. 2009; and HSRC 2009). This 'state of exception' allows a culture of impunity to exist with Landau and Segatti (2009:45) noting that "previous responses to xenophobic violence include arresting and deporting the undocumented non-national victims of violence who had sought refuge at police stations". Hence, this 'state of exception' has been viewed as providing a tacit condoning of anti-immigrant violence in that government action was/has assisted xenophobic citizens to forcibly remove 'illegal' immigrants. This system potentially contributes to new economies of corruption and violence existing either within or entirely outside the realm of state regulation. New forms discrimination and anti-immigrant policing fuel and legitimise the creation of spatially defined zones of exception. Within these zones, extortion, corruption, and violence are becoming normalised in ways that ultimately undermine the concept of universal rights articulated in South Africa's commitment to constitutional, regional and international conventions

## **Conclusion**

In South Africa, the transition from a society based on a racial division of resources towards a post-colonial order has profoundly changed the redistribution of power, both economic and political. This redistribution of power has had a deep impact on the redistribution of access to resources and occupations. The much celebrated South African constitution held out the promise of key economic and social resources to a population previously subjected to a marginalised inferiority within the national framework. The constitution envisioned a post-apartheid project that is empowered by a discourse of unity, reconstruction, development and upliftment.

However these promises were not for all those living in South Africa. Those defined as "outsiders" were excluded and only those who met the narrow definition of citizen ("insider") could become beneficiaries. South African citizenship was consummated in the traditional "state-nation-territory" discourse that rooted the nature of national identity in territorial notions of historical origin. These nationalist narratives are ambiguous and imply the dilemma of deciding who belongs to the citizen group. Within the South African context, this has manifested itself as a fear that the foreigner is threatening the access of citizens to resources and occupations. In other words, the nationalistic discourse of immigration policy depicts foreigners as a threat to social and economic rights of citizens.

This paper has established the existence of an image of immigrants as prototypes of marginality, confined to the worst jobs and excluded from social membership by virtue of their questioned legality if not by their



status as immigrants. As Marianne Constable (1993: 260) observes, "The 'unlawfulness' or 'illegality' of the 'alien' is such that the alien individual seems not quite an autonomous legal subject, being neither legally-recognized citizen nor legally recognized stranger". In this way, Constable (1993: 260) contends that "[t]hey come to resemble under law . . . the regulatable resources of the territory more than its self-determining subjects". As the title of Ngai's (2004) book suggests, when a migrant legality is in doubt, immigrants can become in many ways: "Impossible Subjects". This paper has shown that forms of legalised exception are created to resolve this impossibility. Indeed, the 'state of exception' exists to hide and regulate the legal contradictions created by the existence of these "Impossible Subjects".

The government has made significant progressive strides since 1994 in building a non-racial, democratic, human rights-orientated culture in South Africa. In 2009, the DHA and the South African government have taken the bold step of introducing "special dispensation permits" to decriminalise the stay of hundreds of thousands of Zimbabweans in South Africa. The "special dispensation permits" extend work rights and access to basic social services (such as health care and education), and their introduction was accompanied by a moratorium on the deportation of Zimbabweans from South Africa. But if such "special dispensations" are to rescind the 'state of exception' that has been shown to persist in South Africa, there are considerable obstacles to be overcome. A significant paradigm shift needs to take place within government and immigration policy before the South African citizens will be prepared to embrace the notion of equal treatment for foreign nationals and to ensure that migrants (whatever their legal status) realise their basic human rights and protections, simply by virtue of being on South African soil. Political will and leadership at the highest levels is needed to rewrite the 'state of exception' logic of current immigration policy in order to nullify the impending dangers threatened by xenophobia and xenophobic violence.

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