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 disporportionate 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: CSVR, 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 Mabedle 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 impunity[8] 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.

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.
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

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).

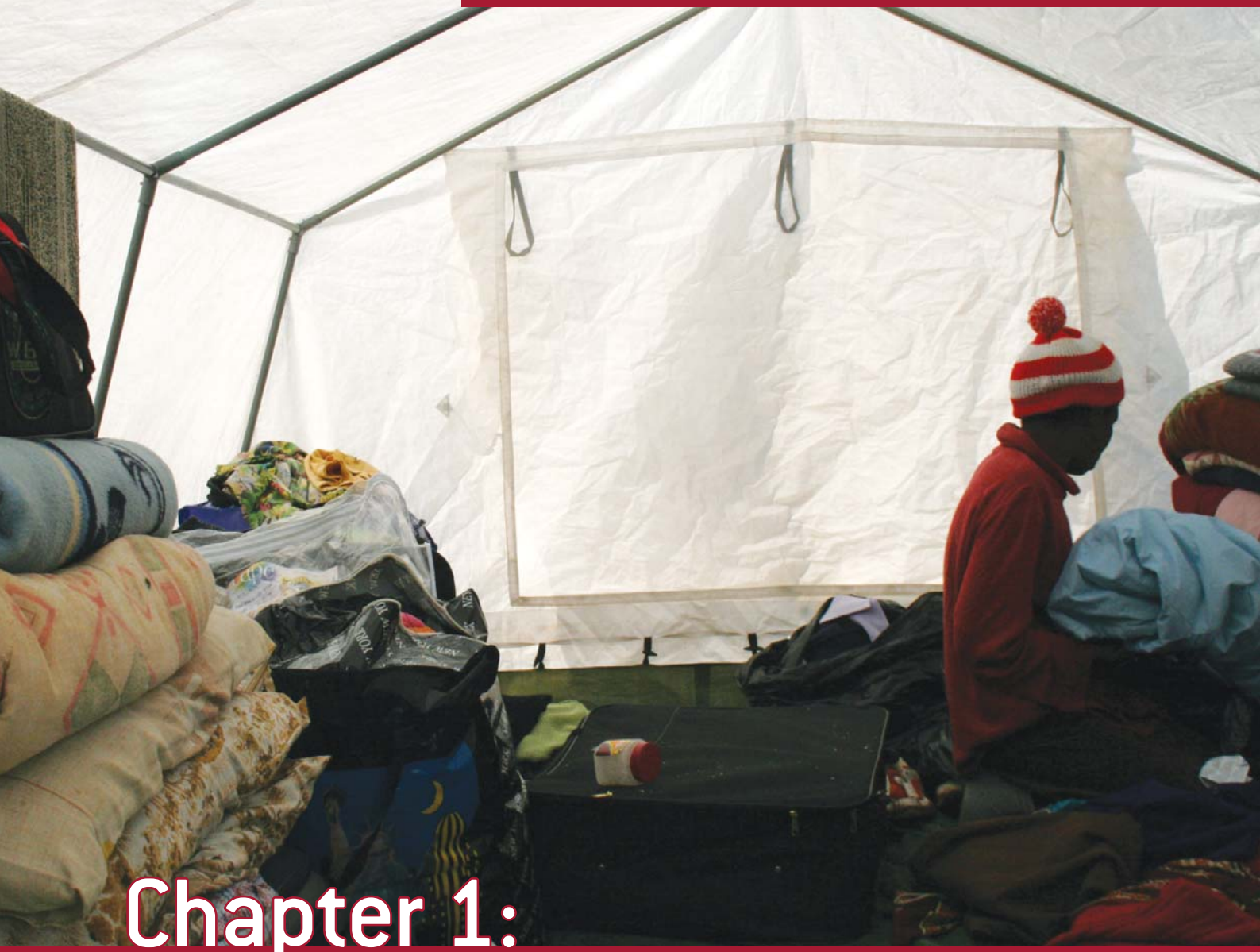
4) To desist from presumptions that the absence of immediate violence in a community that has suffered a social conflict disaster automatically implies the possibility of safe return (section 4.1 of this report).

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/mctl/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, N l. (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/pop_dev/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 violent[18] 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 (CSVR). (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 ILO*. 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]

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 xenophobi 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.

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.

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 for 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 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

36 See sections 11, 12 and 21.

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.

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?
- 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?

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.

Chapter 9 Institutions	Office of the Public Protector	
	SAHRC	
	Commission on Gender Equality	
National Government Departments	Presidency	
	Justice	
	Cooperative Governance & Traditional Affairs	
	Home Affairs	
	National Police	
	Defence & Military Veterans	
	Social Development	
	State Security	
	International Relations and Cooperation	
Provincial Governments:	Provincial Commissioners of Police	
Gauteng	Premiers	MECs for Community Safety
KwaZulu-Natal		MECs for Local Governance
Western Cape		MECs for Social Development
Local Governments:	Mayors	
Ekurhuleni, Johannesburg, Tshwane (Gauteng)	Municipal Managers	
eThekwini (KwaZulu-Natal)		
City of Cape Town (Western Cape)		
Local Communities:	South African residents	
Reiger Park, Ekurhuleni	Non-national residents	
Masiphumelele, City of Cape Town	Local leaders	
Cato Crest, eThekwini	Local station police	
Civil Society	Open call via CoRMSA	

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 eThekwini 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 Xenophibia 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:

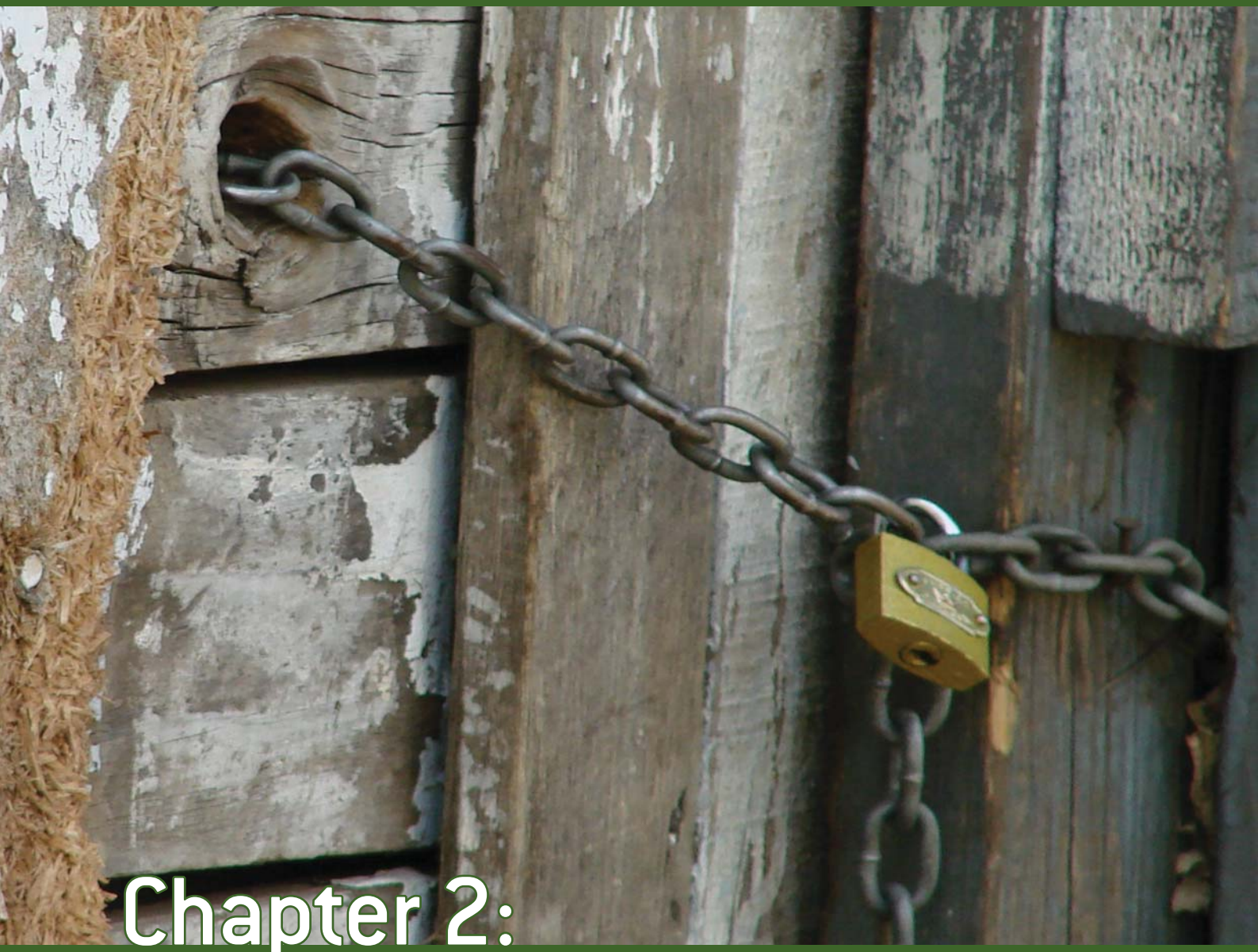
Findings
- This details the issue of potential concern which has been identified

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 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

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.

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 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

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.

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 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

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

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 eThekwini.[71] In addition, eThekwini reported a lack of authority, resources and capacity to assist displaced persons[72] – 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]

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

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

72 Letter from Eric Apelgren, Head: International and Governance Relations, eThekwini 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.

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 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,

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.

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

82 Roux, N l. (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 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]

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.

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 agendas[91] 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, N l. (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

105 Personal communication from Joyce Tlou, 26 January 2010.

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=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2004%2F04110508451002.htm%40Gov&q=[+((mapisa-nqakula)%3CIN%3ETitle)+)+%3CAND%3E(+Category%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.

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 areas[111] 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 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.

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.
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 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.

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.

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.)