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Democracy and discrimination: black African migrants in South Africa

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Global Commission on International Migration

In his report on the 'Strengthening of the United Nations: an agenda for further change', UN Secretary-General Kofi Annan identified migration as a priority issue for the international community.

Wishing to provide the framework for the formulation of a coherent, comprehensive and global response to migration issues, and acting on the encouragement of the UN Secretary-General, Sweden and Switzerland, together with the governments of Brazil, Morocco, and the Philippines, decided to establish a Global Commission on International Migration (GCIM). Many additional countries subsequently supported this initiative and an open-ended Core Group of Governments established itself to support and follow the work of the Commission.

The Global Commission on International Migration was launched by the United Nations Secretary-General and a number of governments on December 9, 2003 in Geneva. It is comprised of 19 Commissioners.

The mandate of the Commission is to place the issue of international migration on the global policy agenda, to analyze gaps in current approaches to migration, to examine the inter-linkages between migration and other global issues, and to present appropriate recommendations to the Secretary-General and other stakeholders.

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Introduction

Political debate and policy challenges associated with immigration are leading to a reconsideration of national identities and the criteria for affiliation to national social, economic, and political communities throughout the world. Focusing on the public facet of these debates reveals much about the quality of a country's democracy, but may ignore an additional set of informal reactions and daily practices that marginalize immigrants and other vulnerable groups.[1]

Not only is xenophobic violence and other forms of discrimination significant in their own right, but they also have broader implications for efforts to achieve the kind of public security and administrative rationality necessary for effective democracy. Exploring these practices is particularly important in countries which are themselves going through significant institutional and economic transformation. Indeed, while South Africa celebrates its tenth year of democracy, official and popular responses to immigration are testing its commitment to tolerance and the rule of law.

As politicians and business leaders applaud South Africa's new cosmopolitanism, conflicts over rights to space, services, and livelihoods have surfaced as South Africans and African immigrants converge on the streets of previously 'forbidden' cities. Encouraged by presumed links between a significant foreigner presence and many of the country's social ills - disease, unemployment, and crime - South Africans are increasingly invoking nationalist rhetoric in their efforts to resolve these disputes.[2] As Arendt hints in 'The Origins of Totalitarianism', the implication of such struggles extend beyond migrants' welfare and the definition of social or political membership, to the nature of state sovereignty and South Africa's young democracy.[3]

This paper argues that the new forms of bias, discrimination, and anti-immigrant policing campaigns justified by this nationalism are fuelling and legitimising spatially defined networks of administrative irregularities, corruption, and privatised violence.[4] Within these 'zones of exception,' vigilantism, extortion, illegal arrests and deportations are becoming normalised in ways that will ultimately undermine the promises of universal rights and administrative justice for all of South Africa's residents.

The remainder of this paper is divided into three primary sections. After briefly discussing its methodological and evidentiary foundations, it reviews the inclusionary pan-African promises made at the country's rebirth ten years ago and discusses how South Africa's

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[1] See Castles, S. and M. J. Miller. 2003. "The State and International Migration: The Quest for Control." Pp. 94-121 in *The Age of Migration: International Population Movements in the Modern World*. Houndmills: Palgrave Macmillan.

[2] See Peberdy, S. 2002. "Imagining Immigration: Inclusive Identities and Exclusive Policies in Post-1994 South Africa." *Africa Today*. Vol. 48: 15-34; Crush, J. 2000. "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa." *International Migration* 38(6): 103-131.

[3] See also, Bauman, Z. 2002. *Society Under Siege*. Cambridge: Polity Press.

[4] See O'Donnell, G. 1998. "Polyarchies and the (Un)Rule of Law in Latin America". Paper Presented at the Meeting of the Latin American Studies Association, Chicago (September 1998); Bayart, J.-F., S. Ellis, and B. Hibou. 1999. "From Kleptocracy to the Felonious State." Pp. 1-31 in *The Criminalization of the State in Africa*, *African Issues*, edited by J. Bayart, S. Ellis, and B. Hibou. Oxford: James Currey; and Chabal, P. and J.-P. Daloz. 1999. *Africa Works: Disorder as Political Instrument*. Oxford: International African Institute in Association with James Currey.

political liberation has affected domestic and regional migration patterns. This is followed by an appraisal of South Africans' attitudes towards 'foreign' Africans and the undemocratic and unconstitutional practices they have engendered within those areas most affected by new migration patterns. I pay particular attention to the corruption associated with refugee status determination; the distribution of identity documents; the illegal denial of social services; and irregular policing practices. The paper concludes by reflecting on what these spatially de-limited, and popularly mandated practices mean for South Africa's realisation of promises to its own citizens: the possibility of achieving 'unity in diversity,' and establishing a legitimate state founded on principles of human rights and the rule of law.

Data collection

The paper focuses largely on the rights of refugees and asylum seekers. Although these represent a minority of the country's international immigrants (i.e. black Africans), they are an important test of the country's cosmopolitanism and legal commitments. While there are strong legal and ethical precedents for restricting the movements and rights of labour migrants, the foundations for refusing these to asylum seekers and refugees are much less certain.[5] One may infer that if asylum seekers and refugees—people with legal rights to residence and services—suffer from administrative discrimination, extortion, and xenophobic violence, the experiences of poor immigrants without documents or legal rights are likely to be even less positive.

This paper draws on a combination of secondary source analysis; formal and informal interviews with migrants, service providers, and advocates over a two-year period; and original survey research conducted by Wits University's Forced Migration Studies Programme in collaboration with Tufts University. The survey was administered in February and March 2003 in seven central Johannesburg neighbourhoods with high densities of African immigrants. The sample included 737 people, 53% South Africans and 47% non-nationals.[6]

As planned and spontaneous forms of regional integration continue, South Africa's urban centres—like cities throughout the world—will be those most affected by migration dynamics.[7] Although the paper draws on experiences in Johannesburg, the country's economic and cultural capital, these patterns are indicative of those in South Africa's other major urban centres and provides foresight into the spatialized, criminalized governmental practices that are emerging elsewhere in the country.

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[5] Gibney, M. J. 1999. "Liberal Democratic States and Responsibilities to Refugees" *American Political Science Review*, 93 (1): 169-181; Ruhs, M. and H. J. Chang. 2004. "The Ethics of Labor Immigration Policy," *International Organization*, 58(1): 69-102.

[6] The survey was conducted in Berea, Bertrams, Bezuidenhout Valley, Fordsburg, Mayfair, Rosettenville, and Yeoville. Fourteen percent of the total sample were from the Democratic Republic of Congo; 12% from Angola; 9% from Ethiopia; 8% from Somalia; 2% from the Republic of Congo; and 1% from Burundi. For additional details on the survey and the methods employed, see Jacobsen, K. and L. B. Landau. 2003. "The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration." *Disasters* 27(3): 95-116.

[7] See Sassen, Saskia (ed.). 2002. *Global Networks, Linked Cities*. London: Routledge.

Promises of cosmopolitanism and the rule of law

Delivered to commemorate South Africa's post-Apartheid Constitution, President Mbeki's 'I am an African' speech paid tribute to his ancestors: South Africa's indigenous peoples, but also to migrants from Asia, Europe, and the rest of Africa. In doing so he thanked them for "teaching me that we could both be at home and be foreign" and that, "freedom was a necessary condition for . . . human existence."[8] Indeed, to ensure that no one in the country would again be excluded on the basis of race, religion, class, or background, the Constitution's preamble proudly promises that, "South Africa belongs to all who live in it."

Support for the New Economic Partnership for African Development (NEPAD), the African Union (AU), and the Southern Africa Development Community (SADC) at once extends the country's remarkable commitment to universal prosperity, human rights, and the rule of law across Africa, while situating South Africa at the heart of continental networks of ideas, trade, and travel. South Africa's rhetoric of inclusive cosmopolitanism is visible in other forms and fora. They are, perhaps, most evident in President Mbeki's 'New Partnership for African Development' (NEPAD) and his support for reformulating the Organization of African Unity (OAU) into the African Union (AU). Sub-nationally, desires to realise a regional form of cosmopolitanism are explicitly reflected in Johannesburg's ambition to become a "world class, African City" and the efforts of other urban centres to become primary tourist destinations and business nodes.

Bolstering commitments outlined in the Constitution, the country has also declared its reverence for ideals of law and international responsibility by signing an extensive range of international conventions. Of particular relevance for the current discussion are its ascension to the 1951 United Nations Refugee Convention, the African Union Refugee Convention (1967), the Convention on the Rights of the Child, and the International Covenant of Civil and Political Rights (ICCPR).

The South African Human Rights Commission (1997) argues, for instance, that under the ICCPR, even undocumented migrants (**i.e.** not refugees, asylum seekers, or legal migrants) have: the right to liberty and security (rights against arbitrary arrest or detention) (s5); the right to be treated with humanity and with respect (s9); the right to equality before the courts and tribunals (s10); the right to be recognised everywhere as a person before the law (s14); and the right against arbitrary deportation (s16).[9] Those in the country legally have even greater protection.

The (partial) success of the country's cosmopolitan aspirations is already becoming evident. Once shunned and isolated, the country's post-Apartheid reintegration into the global community has engendered new patterns of migration and immigration which are transforming all of the country's primary urban centres.[10] As discussed in the remainder of

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[8] Mbeki, Thabo. 1996. "Statement of Deputy President Thabo Mbeki on the Occasion of the Adoption of the Constitutional Assembly of "The Republic of South Africa Constitution Bill 1996" (Cape Town, 8 May 1996). Internet resource: http://www.southafrica-newyork.net/consulate/speeches/adoption_of_constitution.htm (Accessed 8 May 2004).

[9] South African Human Rights Commission. 1997. "Undocumented Immigrants" *An SAHRC Policy Paper #3.* Internet resource: http://www.sahrc.org.za/3_undocumented_immigrants.PDF (accessed 12 May 2004).

[10] Ballard, R. 2004. "Preliminary Considerations on the Relationship between Refugees and the City of eThekwini" and Machingambi, N. 2004. "Experiences of Refugees in Cape Town" in L. B. Landau (ed.) *Forced Migrants in the New Johannesburg: Towards a Local Government Response.* Johannesburg: Forced Migration Studies Programme.

this paper, South African responses to these movements are challenging the country's initial commitment to tolerance, cosmopolitanism, and the rule of law.

Migration patterns

Emerging urbanization and immigration trends have added an additional dimension to long-standing labour migration cycles. Although the number of immigrants has never matched the alarmist figures of between 2.5 million and 4 million illegal immigrants, posited by the Human Sciences Research Council's (HSRC) (1995), the 2001 census indicated that there were 345,161 registered non-South African Africans in the country, a significant increase from five years earlier.[11] Other estimates put the number of foreign migrants (legal and illegal) somewhere between 500,000 and 850,000.[12]

Reflecting patterns elsewhere in the world, cities are the primary destination for most international migrants. Throughout the Gauteng Province, home to Johannesburg and Pretoria, there has been an impressive increase in the foreign-born population over the last decade: from 4.8% in 1996 to 5.4% in 2001 according to the most recent national census. As the centre of South Africa's regional trading and cultural networks, population movements are now one of Johannesburg's most prominent demographic characteristics. Census figures indicate that the number of non-South Africans living in the city has climbed from 65,205 in 1996, to 102,326 five years later).

These are all conservative estimates that fail to capture the more dramatic changes in those neighbourhoods that have become migrants' primary destinations. According to a recent survey (n=1,100), nearly 25% of inner city residents identify themselves as foreign born.[13] Failing economies and violence in neighbouring countries, coupled with South Africa's efforts to encourage retail tourism and investment, will only increase the number of people entering South Africa in the years to come.[14]

Importantly, foreigners are not the only ones moving to the cities. Legget's (2003) study found that 68% of inner-city Johannesburg residents reported moving to their present household in the last five years. Although shifts within the city account for much of this, the 2001 census indicates that at least 11% of the city's South African population has been in Johannesburg for less than five years. This means that between 1996 and 2001, 364,792 South Africans came to Johannesburg from elsewhere in the country; far outstripping the number of immigrants. Figures for the country's other cities are less striking, but they too have climbed.[15]

These mobility patterns are a predictable response to South Africa's post-apartheid freedom and relative prosperity. They also raise the spectre of community disarticulation and inter-

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[11] Reflecting the growing patterns of regional integration, 320,178 of these were from SADC countries with 24,983 from the rest of the continent.

[12] Crush, J. and V. Williams. 2001. "Making up the Numbers: Measuring 'Illegal Immigration' to South Africa." *Migration Policy Brief No. 3.* Cape Town: SAMP. Tellingly, the Department of Home Affairs website continued to cite figures from the HSRC study as fact during former Minister Buthelezi's entire tenure.

[13] In Leggett 2003.

[14] For a more explicit discussion of these trends, see Kihato, Caroline. 2004. "NEPAD, the City, and the Immigrant" *Development Update.* 5(1).

[15] See South African Cities Network. 2004. *State of the Cities Report:* 36.
(http://www.sacities.net/2004/may30_nation.stm).

group conflict. Although more women are moving than in years past,[16] the majority of both domestic and international migrants are men, threatening 'traditional' household structures in both sending and receiving communities. The concentration of single men (South African and foreign) in urban centres is also a contributory factor to the spread of HIV and other communicable diseases, although the nature of its contribution demands further research.[17]

Importantly for current purposes, new movements of people into South Africa's cities raise the potential for ethnic or nationalist conflict. As black South Africans re-claim areas from which they were once excluded by past laws and forced removals, they are confronting foreign-born nationals also seeking fortune or refuge in the country's cities. These interactions are contributing to a nativist discourse and anti-foreigner practices that, as the following pages suggest, are having significant consequences for all urban residents.

Alienation of the other

The elevation of indigenousness as a condition for social, political, and economic inclusion threatens the inclusiveness outlined in Mbeki's 'I Am an African' speech, the Constitution, and commitments delineated by domestic and international law. This territorially exclusive nationalism has been advocated by the famously xenophobic (former) Minister of Home Affairs, Mangosuthu Buthelezi, as well as by more cosmopolitan sources. In his State of the City 2004 address, for example, Johannesburg's Executive Mayor reflected widespread sentiment in arguing that,

> While migration contributes to the rich tapestry of the cosmopolitan city,
> it also places a severe strain on employment levels, housing, and public
> services.[18]

Regardless of the actual financial costs, which are almost impossible to calculate given the lack of sound data, local authorities have reacted to foreign migrants either by denying their presence or by excluding them from developmental plans.[19]

Elected leaders' anxieties about immigration are clearly reflected in broader, popular attitudes. A 1998 survey conducted by the Southern African Migration Project (SAMP), for example, revealed that 87% of South Africans felt that the country was letting in too many

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[16] Posel, D. 2003. "Have Migration Patterns in Post-Apartheid South Africa Changed?" Paper prepared for Conference on African Migration in Comparative Perspective, Johannesburg, South Africa (4-7 June 2003). In the Wits survey, almost 71% of foreign-born respondents in Johannesburg were male, compared to 57.6% of South Africans.

[17] See Lurie, M., B. Williams, K. Zuma, D. Mkaya-Mwamburi, G. P. Garnett, M. D. Sweat, J. Gittelsohn, S. S Abdool Karim. 2003. "Who infects whom? HIV Concordance and Discordance Among Migrant and Non-migrant Couples in South Africa." *AIDS*, Vol. 17: 2245-2252.

[18] That so many international migrants are excluded from social services certainly limits their negative financial impacts. Moreover, many migrants make considerable economic contributions to the city's government and its communities. See Ballard 2004; Machingambi 2004 and Hunter, N. and C. Skinner. 2003. "Foreigners Working on the Streets of Durban: Local Government Policy Challenges." *Urban Forum* 14(4).

[19] Vawda, S. 1999. "Foreign Migrants, Governance, and Local Development Strategies: A Case Study of International African Migrants in Durban" Paper Presented at *fourth International Congress of World Anthropology at the Turn of the Centuries*. (31 August-4 September). Prague.

foreigners.[20] Moreover, just under 64% of the South African respondents in the 2003 Wits University survey found that immigrants were generally untrustworthy[21] and a similar percentage (64.8%) thought it would be 'good' or 'very good' if most of the refugees and immigrants left the country.   Although the data do not distinguish between Africans and other foreigners, there are other indications that South Africans are considerably less concerned with ridding the country of fairer skinned migrants.

South Africans often justify their anti-foreigner sentiments by causally linking their presence to the country's social ills: unemployment, the breakdown of family structures; substance abuse; and crime.   Presuppositions about crime are particularly revealing.   In the Wits survey, 64% of South Africans identified crime as the single most unpleasant thing about the area in which they lived.   For many, this concern shrouds a deeper disquiet with immigration.   Nationally, 48% of the South African population felt that foreigners were a criminal threat.[22]

In Johannesburg, the country's 'crime capital,' Legget reports that 63% of inner-city Johannesburg residents mentioned 'foreigners' as the group committing most of the crime in their area.[23]   Similarly, of the 70% of South African respondents in the Wits survey who thought crime was increasing, almost three-quarters said that immigrants were one of the primary reasons.[24]   When asked a follow-up question about stopping crime, more than 27% of all respondents mentioned that the government should either 'change immigration/asylum policy' or evict foreigners outright.

In 2002, a township outside Cape Town went so far as to pass a resolution expelling all foreigners and prohibiting them from returning.   As discussed presently, the conflation of crime and immigration control already, if somewhat paradoxically, serves to legitimise a set of extra-judicial practices that threaten the country's efforts to promote administrative justice and institutionalise the rule of law.

The price of exclusion

While definitively accounting for South Africans' anti-immigrant sentiments is impossible, the consequences of their attitudes are both evident and troubling.   As many of the country's political leaders proclaim a new era of regional integration, tolerance, and cosmopolitanism, the country's acting Human Rights Commissioner, Bertrand Ramcharan, expressed deep concerns about an emerging reality dominated by newer, more subtle forms of racial discrimination and xenophobia:

> Refugees, asylum seekers, migrant workers, undocumented immigrants,
> and other so-called 'non-citizens' are being stigmatised and vilified for

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[20] Cited in Segale, T. 2004 . "Forced Migrants and Social Exclusion in Johannesburg" in L. B. Landau (ed.) *Forced Migrants in the New Johannesburg: Towards a Local Government Response.* Johannesburg: Forced Migration Studies Programme.

[21] The question asked respondents if they agreed with the following statement: "in general, one can trust immigrants or migrants living in South Africa."

[22] Crush, J. & Williams V. 2003. "Criminal Tendencies: Immigrants and Illegality in South Africa." *Migration Policy Brief No. 10.* Cape Town: SAMP.

[22] Private Communication: 7 May 2004.

[23] Leggett 2003:52.

[24] Landau and Jacobsen 2004:45.

seeking a better life. They are made scapegoats for all kinds of social ills, subjected to harassment and abuses by political parties, the media, and society at large.[25]

The following subsections outline four areas in which anti-immigrant sentiments are having significant practical consequences: accessing Department of Home Affairs buildings; acquiring adequate identity documents; securing financial services; and migrants' engagement with the state's coercive apparatus.

The forms of exclusion resulting from these interactions—tendencies supported by ignorance, lack of administrative capacity, and discrimination—have both immediate effects on non-South Africans' livelihoods (and sometimes their lives), while also undermining the country's constitutional principles. More importantly, they contribute to new economies of corruption and violence existing either entirely outside the realm of state regulation or, more disturbingly, engaging public actors: civil servants, the police, and government sub-contractors.

These economies create interests that will resist reform and may expand in ever-larger circles of graft and illegality.[26] While many South Africans may consider such practices legitimate—especially if they are seen as protecting citizens from dangerous interlopers—they stand in opposition to the principles envisioned by the country's constitution.[27] The following discussion illustrates how.

Identity documents and the Department of Home Affairs

While no form of documentation guarantees social inclusion, identity papers can facilitate integration by engendering a sense of belonging while assisting holders to find work and avoid arrest and/or deportation. Conversely, inadequate documentation makes almost any act, from employment to walking in the street, illegal in the state's eyes. The vulnerability associated with living illegally also opens opportunities for exploitation, corruption, and criminality.

The first interaction many immigrants have in South Africa is with the Department of Home Affairs, the department responsible for determining migrants' immigration status and assigning identity documents to both citizens and foreigners. One of the most corrupt departments during the Apartheid period, administrative incompetence and irregularities flourished between 1994 and 2004 under Home Affairs Minister Mangosuthu Buthelezi. While South Africans regularly (and justifiably) express frustration with the department, the immigrant-related activities taking place under its auspices go beyond mere administrative incompetence with spin-off practices that provide fertile ground for networks of corruption and extortion.

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[25] Ramcharan, Bertrand. 2004. "Message of the Acting High Commissioner for Human Rights on the International Day for Elimination of Racial Discrimination" (Pretoria, 21 March 2004). See also Danso, R. and D. A. McDonald. 2002. "Writing Xenophobia: Immigration and the Print Media in Post-apartheid South Africa. *Africa Today.* Vol. 48: 115-137.
[26] See Bayart's (1999) discussion of the 'rhizome' state.
[27] For comparative perspective, see Chabal and Deloz 1999.

Asylum seekers and refugees' efforts to attain legal status and identity documents illustrate these trends. Reports from throughout the country indicate that unless would-be asylum seekers—who have the right to be in South Africa under international and national law—are willing to pay unofficial 'fees', they are being denied the right to even file an asylum claim.[28] These initial fees are extracted by private security guards hired to keep order and regulate access to the building. Not only do they regularly extract bribes just to allow entry, but these guards frequently resort to beatings and other violent means to keep people in line in both a figurative and literal sense.

The inappropriate use of force by those working for a government committed to democratic ideals is troubling. The involvement of private sub-contractors who are not held to the official standards of accountability is also worrying and points to broader dangers of privatizing the state's coercive mandate. Furthermore, without regularised legal status in the country, those subject to such tactics are unlikely to lodge formal complaints.

Extortion and exploitation follows asylum seekers past the guards and into the offices. Here applicants must often pay to file their claims, despite regulations stating that there are no fees for doing so.[29] If they are unable to pay these fees, many would-be asylum seekers simply fail to pursue their claims—and remain in the country illegally—or pay 'in-kind'. For women applicants, such payments can require considerable sacrifices. Apart from the immediate effects, within Home Affairs there are now informal economies in which 'front-line' staff members actively position themselves in the most profitable posts.

Once a claim is filed, asylum seekers face further obstacles while their cases are considered. Under the Refugees Act (1998), the expected period of adjudication is six months. Until recently, the initial six-month waiting period was coupled with a prohibition on working and studying (see below).[30] While work prohibitions have typically been lifted after six months, the adjudication process often takes much longer. In the Wits survey, almost one third of respondents reported waiting at least eighteen months for a decision.

During this time, migrants have had a right to residence, but were excluded from social benefits and receive no assistance in finding employment. More importantly for current purposes, they were issued with a single piece of paper (the "Section 22" permit), often with hand-written amendments, to serve as their identity document. Few employers or government agents, including the police, recognize this document. Consequently, those relying on it face added difficulties in finding employment and are subject to an increased risk of exploitation, extortion, arrest, and deportation.

Perhaps more importantly, delays in adjudicating asylum claims have opened the process to abuse. Because applicants are able to stay in the country for much longer than they could on tourist visas, many would-be immigrants simply take the chance and apply for asylum. UNHCR representatives estimate that less than 20% of applicants are 'genuine' refugees. The remainder are people taking advantage of delays in the system to at least partially legalize their stay in the country. This has not only undermined the legitimacy of the asylum adjudication process, but also the law more generally by providing protection (however

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[28] Segale 2004 and private communication.
[29] Illustrating the absurdity of the system, one asylum seeker, despite speaking English fluently, reports being told (in English) that he must hire a private French interpreter, simply because he was from Ivory Coast.
[30] This regulation was recently overturned by a case in the Cape Town High Court (Watchenuka v Minister of Home Affairs 2003 (1) SA 619 (C)).

nominally) to people who have come to South Africa in contravention of the country's asylum and immigration laws.

The recently overturned prohibition on work or study during asylum seekers' first six months in the country has not only been a source of inconvenience, but has, de facto, created a criminal class. Without entitlements to social services or assistance from the government or international and private organizations, asylum seekers must effectively break the law to survive. Many simply work illegally, while others resort to fabricating identity documents. This not only bolsters popular suspicions that migrants are lawbreakers, but also opens considerable opportunities for police extortion: anyone discovered working without permission can be deported upon arrest or, at the very least, have their asylum claim dismissed. To avoid such outcomes, foreigners will often pay bribes or provide other services to police agents.

Even successful asylum claims do not end migrants' difficulties with Home Affairs. A recent study sponsored by the United Nations High Commissioner for Refugees (UNHCR) found that only 11% of those granted asylum were issued a 'refugee identity documents'.[31] The installation of a new Director General of Home Affairs in 2003, and a new Minister following the 2004 election, has accelerated the process for new applicants—most now receive their documents within a month of a positive asylum decision—but problems persist. The Home Affairs Department 2003 Annual Report indicates, for example, that 3,264 asylum applications were finalised during that year (out of over 15,000 applicants), but that it issued only 1,881 identity documents to refugees.

In Port Elizabeth, one of the five South African cities with a refugee reception office, dozens of legally recognized refugees recently went weeks without valid documents because the office failed to procure the printer cartridge needed to produce identity documents. Country-wide there are tens of thousands of legally recognized refugees, like the ones in Port Elizabeth, being refused employment and access to social services—and subject to arrest, extortion, and deportation—because of delays at the Home Affairs Office in issuing proper documentation.

Social and financial services

Legal immigrants, refugees, and asylum seekers—many with rights to social services - are often denied access to critical social services. For example, even though international and domestic law guarantees places in South Africa's primary schools for all students regardless of their nationality, a study in Johannesburg found that 70% of Somali refugee children of school-going age were not enrolled.[32] While some had not enrolled by choice, many more were unable to overcome structural and social barriers. Similarly, refugees are legally entitled to access the same basic health care as South African citizens and all people—regardless of legal status—have a right to emergency health care. A recent national study of

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[31] Belvedere, F., *et al*. 2003. *National Refugee Baseline Survey: Final Report*. Johannesburg: Community Agency for Social Enquiry (CASE), Japan International Cooperation, and United Nations High Commissioner for Refugees: 6.

[32] Cited in Stone, L. and S. Winterstein. 2003. *A Right or a Privilege? Access to Basic Education for Refugee and Asylum Seeker Children in South Africa.* Pretoria: National Consortium of Refugee Affairs.

refugees and asylum seekers found, however, that 17% of respondents had been denied emergency medical care while in South Africa.[33]

If one were to calculate this as a percentage of those that actually sought such care, the figure would undoubtedly be much higher. Apart from increasing risks of anti-social behavior and public-health crises, denying access to such services is a powerful indicator of how anti-immigrant sentiments translate into practical threats to South Africa's progressive legislation and inclusionary values.

Patterns of exclusion are also evident in private sector industries where one would expect the profit motive to trump other considerations. Even non-nationals with the right to live in the country are often unable to access the most rudimentary banking services; let alone loans or other forms of credit.[34] Although current banking legislation technically prevents anyone except permanent residents and citizens from opening bank accounts, this policy is often waived with people in the country on temporary work permits. Under pressure from lobbying groups, some banks have now begun extending services to refugees, but are still unwilling to open accounts for most other African immigrants who are unlikely to have the requisite thirteen digit ID number, foreign passport, and a written employment contract.

Whatever the specific reasons, migrants' inability to access secure banking has manifold consequences that extend beyond those denied service. Perhaps most obviously, it means migrants are less likely to start businesses or create jobs (although they still create South Africans jobs faster than South Africans).[35] It also limits migrants' ability to invest in the city; contributing to infrastructural decay and community fragmentation.

Perhaps more importantly, keeping migrants and those they hire from moving into in the formal economy also denies government revenues (from taxes and licensing fees) and means that much of the business that takes place is, to a greater or less degree, illegal. The growth of urban economies beyond effective state regulation weakens the law's legitimacy and power.

There are others ways in which the inability to access banking contributes, both directly and indirectly, to practices challenging the rule of law. For one, immigrants' reliance on loan sharks and other forms of lending contributes to unregulated and potentially dangerous forms of monetary exchange. More immediately, without savings accounts, migrants must carry cash or hide it in what are often insecure dwellings. This contributes, inter alia, to migrants' disproportionately high rates of victimization.[36] Migrants are also easy targets for police

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[33] Belvedere, *et al*, 2003.

[34] Jacobsen, K. and S. K. Bailey. 2004. "Micro-Credit and Banking for Refugees in Johannesburg" in L. B. Landau (ed.) *Forced Migrants in the New Johannesburg: Towards a Local Government Response.* Johannesburg: Forced Migration Studies Programme.

[35] Wits survey data shows that only 20% of South Africans reported having paid someone to do work for them in the past year. Despite the various obstacles they face, 34% of the migrants in the sample report that they had. Even more significantly, 67% of the people hired by the forced migrants were South Africans. A recent study of street vendors in Durban also reports that South African traders favour non-nationals' involvement in the market because it brings in new products and new customers (Hunter & Skinner 2001).

[36] The Wits survey found that 72% of migrants reported that they or someone they lived with had been a victim of crime in South Africa (despite their recent arrival in the country) compared to 56% of South Africans (who have lived in the country all of their lives). See also Leggett, T. 2003. *Rainbow Tenement: Crime and Policing in Inner Johannesburg*. Monograph No. 78. Pretoria: Institute for Security Studies (April 2003). Leggett argues that, at least in Johannesburg, that "foreign nationals are more likely than average to experience victimization in every crime category, especially robbery" (52-53). They are also much less likely to feel

extortion. Their often-tenuous legal status and/or inadequate identity documents, coupled with a need to carry cash, has led a significant number of inner-city police officers to see migrants as 'mobile-ATMs.'[37] As one Eritrean student reported,

> As foreign students we are not required to pay taxes to the government.
> But when we walk down these streets, we pay.

Whether these 'levies' end up in the pockets of police, moneylenders, or petty-criminals, they provide few reasons to be sanguine about the rule of law in areas with significant migrant populations. This redistribution of resources, moreover, creates incentives to maintain the status quo. The following section outlines additional examples of illegalities and explores the implications of irregular, unaccountable, and corrupt policing and administrative practices for the rule of law and the nature of the new South African state in the country's inner cities.

Policing, vigilantism, and criminalization

The previous section outlines a number of ways in which discrimination against foreigners—based on either xenophobia, opportunism, or administrative incompetence—is eroding law and the cosmopolitan principles implicit in the country's constitution and regional policy. None of these is as critical as policing practices (the exercise of the State's coercive mandate) for structuring emerging links between the South African state and the people they are intended to serve.

Channelling increased numbers of 'criminal' cases through courts or other officially mandated judiciary sites could contribute to the general standardization of regulatory practices and the extension of legal ideals and norms to new arenas and people. Such legalization, characterized by increasing concordance in principle and practice, is key to establishing an effective, rights-based police force and legal system.[38]

As police attempt to shed their apartheid-era stigma,[39] they are exploiting poor oversight and xenophobic discourses to legitimise a set of sub-national practices that may ultimately undermine their ability to protect the rights of all the country's residents. The result is a process of deformalization and criminalization in those neighbourhoods occupied by significant migrant populations.

These areas are becoming sites in which those institutions officially charged with maintaining order, protecting rights, and ensuring compliance with legal decisions may themselves become delegitimized, criminalized, or effectively discarded. In their stead, responsibility for designating criminality, deviance, and punishments are being assigned to ad hoc networks of police corruption, vigilantism and private security guards in ways that contravene South

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secure on the streets: 81% of foreigners felt a bit or very unsafe walking on the street during the day, compared to 38% of the population as a whole (Leggett 2003:54). See also Crush and Williams 2003.

[37] Private Communication: 7 May 2004.

[38] See Foucault, M. 1979. *Discipline and Punish: The Birth of the Prison.* New York: Vintage Books; S. Falk-Moore. 1986. *Social Facts and Fabrications: 'Customary' Law on Kilimanjaro, 1880-1980.* Cambridge: Cambridge University Press.

[39] See Shaw, M. 2002. *Crime and Policing in Post-Apartheid South Africa: Transforming Under Fire.* Bloomington: Indiana University Press.

Africa's Constitution and criminal code. The following paragraphs provide examples of these processes.[40]

Investigations, detention, and arrests

From a police perspective, arresting foreigners serves multiple purposes. Most obviously, it helps to meet weekly or periodic arrest targets. Police officers privately admit that they round up 'the usual suspects'—refugees, asylum seekers, and other immigrants without proper identification papers—precisely for this purpose.[41] Quantitative data provide further evidence of such profiling. In the Wits survey, non-South Africans reported being stopped by the police—mainly for document checks—more frequently than South Africans (71% against 47%). During these stops, police will often refuse to recognize work permits or refugee identity cards and fail to offer suspects legally mandated opportunities to produce them.

Others confiscate or destroy identity papers on the spot. Immigrants—even those with papers—are consequently vulnerable to arbitrary arrest and detention. Although many of these cases are dismissed for lack of evidence, the arrest statistics stand. Given that so few forced migrants have proper documentation—and so many carry significant amounts of cash—each of these encounters also provide police opportunities for extortion. Poorly paid and unsupervised beat officers with little chance of promotion have few incentives for promoting abstract principles of justice. Under such conditions, many seize the opportunity for immediate gains by exploiting vulnerable migrants.

Apart from immediate material gains, arresting migrants is an important way of increasing legitimacy among the South African citizenry. Since most South Africans see foreigners as one a (if not the) primary source of crime, police who arrest (or even harass) migrants can demonstrate their concern for eliminating the city's 'crime and grime.' As moves to ensure civilian oversight continue, part of the National Crime Prevention Strategy begun in 1996, the police are ever more likely to respond to popular pressure.[42]

In as much as migrants are widely linked to what are perceived to be the source of much urban crime—and are generally excluded from community policing forums and oversight committees—they are therefore ever more likely to find themselves subject to police detainment and deportation. At the very least, assumptions of foreigners' guilt forestall popular protests of police harassment.

The legitimatization of 'illegal' anti-foreigner policing is not limited to beat officers, but has been endorsed by the overtly anti-foreigner 2002 Immigration Act. While the Constitution and subsidiary legislation limit the scope of police conduct by demanding search-warrants and requiring probable cause before entering a private property, the Immigration Act

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[40] See Schönteich, M., A. Minaar, D. Mistry, and K. C. Goyer. 2004. *Private Muscle: Outsourcing the Provision of Criminal Justice Services*. Monograph No. 93, Pretoria: Institute of Security Studies (January 2003).

[41] Private Communication: 7 May 2004.

[42] Landau and Jacobsen 2004; Leggett 2003. For more on efforts to promote civilian accountability, see Bruce, D. 2003. "Civilian Review: A Proposed Role for Civilian Oversight Committees in Promoting Accountability in Municipal Police Departments". Research Paper written for the Centre for the Study of Violence and Reconciliation. Internet Resource: www.csvr.org.za/papers/papbruc6.htm (accessed 5 May 2004)

effectively authorises Home Affairs agents to conduct searches, arrests, and deportations without reference to other constitutional or legal protection.[43]

Although granted extra-Constitutional powers, immigration agents operating under the Home Affairs Office authority must rely on the South African Police Services (SAPS) or national defence forces (SANDF) to make arrests. Exploiting this relationship, SAPS has called on immigration officers to legalize what would otherwise be illegal raids on tenements and other dwellings inhabited by suspected criminals and, potentially, illegal migrants. Often conducted at night and away from supervision, police officers force entry, demand identity documents, and make arrests of both foreigners and South Africans without respect to normal legal provisions.

In September 2003, a joint operation launched by the City of Johannesburg and the Department of Home Affairs deployed helicopters and almost 1,000 private security officers in a thinly disguised effort to rid the city of unwanted foreigners in the name of crime prevention and urban renewal. After sealing a Hillbrow apartment block, officials managed to confiscate four illegal firearms—modest by Johannesburg standards—and arrest 198 illegal immigrants. As unpalatable as these operations may seem, faith in their popular legitimacy is sufficiently high that Yakoob Makda, Director of Johannesburg's Region Eight (the inner city), proudly reported their achievement in crime fighting-cum-removing aliens to a city-council meeting called to develop a strategy on combating social exclusion.[44]

Although many South Africans undoubtedly support these operations, the police are predictably not helping to establish order or security. Not only does the obsession with immigrants distract police from where they are really needed,[45] their general ineffectiveness is leading citizens to accept criminal activity as part of their social landscape or seek alternative means to address it. In many cases, this means turning to groups like Mapogo A Mathamaga, a national investigation and 'goods recovery' company, or other vigilante groups, that work outside the law, but draw on police information and muscle in conducting their extra-judicially defined missions. As Mbembe writes,

> Helped by the prevailing lack of discipline, bridges have been built between the soldiery [and police] and the worlds of crime and fraud.[46]

Accepting criminality or resorting to unauthorised private security bodies effectively 'delegalizes' the criminal justice system and robs the state of one of its most primitive functions.[47]

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[43] See Section 3 (Powers of *Department*) in the Immigration Act (2002). I thank Vincent Williams for alerting me to this provision which bears remarkable similarity to provisions within the United States' *Patriot Act*.

[44] This statement was made during a poverty alleviation work Workshop Organised by the Joburg Development Agency (JDA): "Poverty and Exclusion in the Inner City" Held in Johannesburg, 14 May 2003

[45] Palmary, I. 2002. *Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government*. Johannesburg: Centre for the Study of Violence and Reconciliation.

[46] Mbembe, A. 2001. *On the Post Colony*. Berkeley: University of California Press: 58.

[47] See Tilly, C. 1985. "War Making and State Making as Organized Crime" in Peter Evans, Dietrich Rueschemeyer and Theda Skocpol (Eds.) *Bringing the State Back In.* New York: Cambridge University Press.

Deportation as a durable solution

There is no area in which these worlds of crime and fraud are more visible than in South Africa's efforts to detain and deport its 'illegal immigrants.' In discussing immigrants and illegality in South Africa, Crush and Williams (2003) quote a 2002 statement from the former Minister of Home Affairs in which he spuriously argues that:

> Approximately 90% of foreign persons who are in RSA with fraudulent documents, i.e., either citizenship or migration documents, are involved in other crimes as well…it is quicker to charge these criminals for their false documentation and then to deport them than to pursue the long route in respect of the other crimes that are committed.

Evidence suggests that this sentiment has had far reaching effects on policing practice in South Africa. In addition to regular harassment and extra-legal policing, migrants in South Africa face the spectre of the Lindela Repatriation Centre. This privately run facility, situated in the West Rand outside of Johannesburg,[48] is perhaps the most visible and disturbing sign of the ways in which popular and government attitudes towards migrants are legitimising extra-legal methods of 'law-enforcement.'

Reports of sexual abuse, violence, and extortion are common within Lindela, although they are hard to verify since the facility's management limits access to outside observers. Moreover, Lindela's operators often try to maximise the R 50/night they receive per inmate by detaining people for extended periods either before releasing them—often on condition of paying a bribe—or deporting them.

In addition to the trouble within the facility, there are systematic incidents of corruption both to and from the centre. Indeed, many arrested immigrants never make it to Lindela, having been offered chances to buy their way out from almost the moment of their arrest. A significant number of South Africans do, however, make it into the facility. Indeed, Human Rights Watch reported in 1998 that 20% of those held in Lindela were South Africans.[49] Although the police deny that the number remains that high—or that they ever were—they admit that South Africans are regularly arrested and detained.

From Lindela, thousands of foreigners are loaded on daily trains from Johannesburg to the Musina-Beitbridge border with Zimbabwe and the Komatipoort-Ressano Garcia border with Mozambique.[50] There are recent reports from South African advocacy groups that, due to an unwillingness or inability to pay their way off the trains, even those with proper documentation (and occasionally South Africans) are being deported.[51] Such forms of deportation, usually without court hearing, are among the most visible signs of South Africa's almost pathological compulsion to rid the territory of its "surplus people."

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[48] Ironically, this formerly mine-dependent area once thrived on foreign migrant labour.
[49] Human Rights Watch. 1998. *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa.* New York: Human Rights Watch.
[50] Ramjathan, K. 2003. "Deportation as a Durable Solution." Public Seminar hosted by the Forced Migration Studies Programme. Johannesburg: University of the Witwatersrand (28 August 2003). Regardless of their country of origin, many migrants will claim to be from Mozambique or Zimbabwe so their eventual deportation will leave them in a good position to re-enter South Africa.
[51] Segale 2004.

Although both Lindela and deportation are expensive options for the South African government, the Home Affairs Office says that 41,207 Zimbabweans alone were repatriated in the first nine months of 2003, up from 17,000 for all of 2001.[52] The Department of Home Affairs' Annual Report 2003 indicates that 151,653 non-citizens were 'removed' during the previous year. Despite protests from human rights groups, there are few signs that these numbers are likely to decrease in the near future. Indeed, a presentation made by Home Affairs officials on World Refugee Day 2004 drew attention to the government's success in boosting the number of people it had removed from South African territory.

Much like the arbitrary arrests of migrants, attempts to control crime through deportation are doing little to make cities safer for South Africans largely because foreigners are disproportionately the victims, not the perpetrators, of crime. Similarly, neither Lindela nor the notorious trains are doing much to curb immigration. Those intent on staying in South Africa can capitalize on opportunities to buy their way out of police stations, detention facilities, and the trains meant to be taking them 'home.'

Even those who have been deported—especially those with cash—can easily find their way back into South Africa. Recent discussions with migrants indicate that the price for crossing the Mozambique-South Africa border at Komatipoort is between fifty and a hundred Rands. In a public seminar held in 2003, Ramjathan spoke about 'Thulani', a twenty year old Zimbabwean who, at that time, was in detention at Lindela. He had been in South Africa for four years, had been deported six times, and expected to be back in the country shortly after his imminent deportation.

Without disputing the South African government's sovereign right to detain and deport those who violate immigration laws, the brutality and irregularities associated with Lindela and the deportation process illustrates the immediate dangers of privatising security and policing services and of a citizenry willing to sacrifice the rights of a category of people (migrants) based on specious assumptions of their inherent criminality.[53]

Rather than acting as nodes in which the state systematically extends the rule of law, Lindela, together with broader patterns of irregular policing, are creating corrupt and largely ineffective 'criminal justice' systems—involving border guards, police, private security firms, and vigilante groups—that increasingly exist beyond formal regulation and surveillance and in violation of the country's liberal, rights-based constitution.

Conclusion

Migration into South Africa's major cities is neither a temporary outcome of the transition to democracy, or a fading legacy of the migrant labour system of the old mining economy. Population movements—some predictable, some spontaneous—have already become a perennial feature of the country's social and political landscape.

While many South Africans argue in favour of deportation or closing borders, such options are not tenable even in those states protected from their neighbours by mountains, rivers, and

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[52] Cited in Innocenti, N. D. 2004. "A Magnet for the Rest of the Continent" *Financial Times*. 13 April 2004:A5.
[53] See also, Schönteich, *et al* 2004.

oceans.[54] Moreover, as a liberal democratic country fostering the New Economic Partnership for African Development (NEPAD), the Southern African Development Community (SADC), and the African Union (AU), South Africa is hardly in an ethical or economic position to close its borders.

From one perspective, migration is a sign of South Africa's emergence as the continent's pre-eminent economic, educational, and cultural centre: the promises of freedom and prosperity are resonating beyond the country's borders.   Indeed, official documents have already begun to outline strategies for recruiting and incorporating highly skilled migrants and foreign capital into the cities' socio-economic networks.   However, it also increasingly evident that leaders and citizens feel overwhelmed—if not threatened by —migration generally and, especially, by the immigration of people from elsewhere on the African continent.

Proclamations from South Africa's previous Minister of Home Affairs and other politicians, coupled with media reporting on drug syndicates, prostitution, and human trafficking, all feed, and in turn feed off, a popular perception that migrants are bad for South Africa's society and economy because they 'steal South African jobs', 'bring crime', 'speed up the spread of AIDS' and create or contribute to a range of other social and economic ills.   In response to perceived threats, a nativist discourse has emerged among urban South Africans that is encouraging and legitimizing administrative irregularities and discrimination within those areas most affected by immigration.

Within these new 'zones of exception,' practices are becoming normalised that threaten the country's constitution and, indeed, the population's physical security.   Once established, those benefiting from these practices will fight against reform and regulation and may ultimately spread their influence into yet unaffected institutions.   As Mbembe writes in describing similar processes elsewhere on the continent,

> New organizational solutions are being tried.   Not all tend toward the consolidation of the state as a general mechanism for domination and the production of order, toward institution of a market economy…or toward collapse into never-ending chaos.[55]

For a country that ten years ago became a regional beacon of hope, freedom, and tolerance, it is disturbing that that those whose have come to South Africa from outside the country face such hostility on their arrival.   The continued use of arbitrary and illegal means to exclude migrants from the country's social, economic, and political processes will, moreover, have lasting implications that will ultimately affect not only those from outside South Africa, but the citizens the new South Africa was mandated to protect. What, after all, will become of the African Renaissance if attitudes towards African foreigners legitimize forms of corruption, discrimination, and displacement that so powerfully evoke the past?

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[54] Cornelius, W. 2001. "Death at the Border: the Efficacy and 'Unintended' Consequences of US Immigration Control Police, 1993-2000." Working Paper No. 27.   The Centre for Comparative Immigration Studies. University of California, San Diego (December 2001).

[55] Mbembe 2001: 78.