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'Forbidden' Cities**

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Urbanization, Nativism, and the Rule of Law in South Africa's 'Forbidden' Cities¹

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Abstract: South Africa's political liberalization and subsequent regional integration have engendered new patterns of immigration and urbanization resulting in South African migrants and non-nationals converging on the streets of previously 'forbidden' cities. Conflicts over space, services, and livelihoods are emerging as these groups meet and compete. To settle these disputes, South African citizens and politicians have regularly relied on a nativist discourse that makes rights to the city contingent on one's national origins. Efforts to exclude foreigners are in turn encouraging and legitimizing new forms of bias, administrative discrimination, and anti-foreigner policing. Bolstered by official sanction, these are creating urban 'zones of exception,' areas in which the state has authorized its agents to work outside the law. Although popular among South Africans, the extra-legal harassment, detention, and deportation of non-nationals has helped entrench new economies of corruption and violence that jeopardize the rights and welfare of all city residents. While rooted in the dynamics of post-Apartheid South Africa, these findings resonate with global trends in which quests to assert sovereignty through immigration controls are resulting in actions that undermine the legitimacy and founding principles of the liberal states that undertake them.

Keywords: Refugees, violence and rule of law

Introduction

Throughout much of the world, criteria for social, economic, and political membership are being reconsidered in light of new migration and immigration trends (cf. Castles and Miller 2003). Public debates' over citizenship and rights to residence are revealing, but it is often the less visible or informal reactions surrounding migration and urbanization that effectively determine inclusion and the nature of community participation. Assumptions of non-nationals' inherent criminality and growing discourses of autochthony or nativism often serve to legitimize extra-legal xenophobic violence and discrimination by both state agents and others. Such actions not only marginalize foreigners—their intended outcome—but also have broader implications for public security, administrative justice, and the potential for achieving sustainable urban livelihoods. Perhaps more significantly, such practices open space for networks of corruption and extra-legal behaviours that may ultimately undermine the state's ability to retain control over its agents.

Until the early 1990s, South Africa's urban centres, along with their well-serviced suburbs, remained the exclusive reserve of the whites, with the country's Black, Indian, and Coloured populations relegated to poor, densely populated townships on the urban periphery. Paralleling spatialized patterns of exclusion, South Africa, too, was surrounded by countries—many suffering as the apartheid government attempted to suppress communism and the African National Congress (ANC)—whose labourers were needed to maintain South Africa's wealth, but who were denied access to its relative prosperity. With the end of apartheid and the country's formal reintegration into regional politics and trade, these previously 'forbidden' cities have become primary destinations—if not termini—for peoples from throughout South Africa and the African continent. While politicians and business leaders celebrate ten years of democracy in 2004 and the more colourful cosmopolitanism it has allowed, urban residents are increasingly struggling over space, services, and livelihoods. Reflecting global responses to migration and urbanization, South Africans have often appealed to nativist discourses in efforts to resolve these disputes in ways that deny even the right of residence to anyone other than those who can claim and outwardly demonstrate South African origins.

This paper demonstrates how nativist discourses have helped generate 'zones of exception' in which South Africa's normal legal provisions are suspended or circumvented in an effort to regulate and alienate the country's non-national population. Within these zones, vigilantism, extortion, illegal arrests and deportations are becoming normalized as the South African state, acting on behalf of its citizens, has attempted to re-assert its sovereignty by working outside its own commitments to

universal rights and administrative justice. These have in turn generated networks of administrative irregularities, corruption, and privatized violence that threaten to undermine the country's progressive legislation and ability to exercise sovereignty.²

The remainder of this essay has three primary sections. After briefly outlining my research methods, the first section discusses the inclusionary, pan-Africanist promises made at South Africa's rebirth ten years ago, and patterns of domestic and international migration in the post-Apartheid era. The second documents the emergence of a nativist discourse by appraising South Africans' attitudes towards 'foreign' Africans and the undemocratic and unconstitutional practices such sentiments have created 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. I conclude by reflecting on how these 'zones of exception' threaten South Africa's ability to realize promises made to its own citizens: the possibility of achieving 'unity in diversity,' and establishing a legitimate state founded on principles of human rights and law.

Data Collection

This article draws on data collected over a two-year period through a combination of secondary source analysis; formal and informal interviews with migrants, service providers, and advocates; and original survey research by the University of the Witwatersrand (Wits) 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 and included 737 respondents, 53% South Africans and 47% non-nationals.³ Although much of the following discussion centres on Johannesburg, the country's economic and cultural centre, the practices described are indicative of those in South Africa's other major urban centres. Wherever possible, I draw examples from these other locales.

Although asylum seekers and refugees represent a minority of the country's international immigrants—no more than 140,000 out of an estimated 850,000 non-nationals in the country—they are an important test of the country's cosmopolitanism and legal commitments. As such, they serve as this essay's primary focus (Crush and Williams 2001). While there are strong legal and ethical precedents for restricting the movements and rights of labour migrants, the foundations for refusing

² The idea of a 'zones of exception' derives from Giorgio Agamben (2004; 1998). See also Mmembe (2003); O'Donnell (1998); Bayart, *et al* (1999); and Chabal and Daloz (1999). Also Arendt (1958).

³ 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

these to asylum seekers and refugees are much less certain (cf. Gibney 1999; Ruhs and Chang 2004). Moreover, the degree to which asylum seekers and refugees, people with legal rights to residence and services, suffer from administrative discrimination, extortion, and xenophobic violence, is a powerful illustration of the lengths South Africans and the South African state will go to limit access to the country's cities.

Promises of Cosmopolitanism and the Rule of Law

On 8 May 1996, then Deputy President Mbeki commemorated South Africa's post-Apartheid Constitution with his eloquent and visionary "I am an African" speech. In doing so, he paid tribute to his ancestors: not only South Africa's aboriginal population, but also migrants from Asia, Europe, and the rest of Africa. In celebrating their contributions, 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" (Mbeki 1996). Indeed, to ensure that no one in the country would again be excluded based on race, religion, class, or background, the Constitution's preamble proudly promises that, "South Africa belongs to all who live in it" with no explicit reference to place of birth or immigration status. With this one speech and the document it celebrates, South Africa proudly pegged its legitimacy on the ability to overcome past patterns of arbitrary violence and exclusion in favour of tolerance, universal rights, and the rule of law.

Bolstering its Constitutional commitments, South Africa's government has affirmed its reverence for tolerance and universal rights by signing an extensive array of international conventions. Particularly relevant for current purposes are its accession to the 1951 United Nations Refugee Convention, the African Union (1969) Refugee Convention, the Convention on the Rights of the Child, and the International Covenant of Civil and Political Rights (ICCPR). Tellingly, South Africa has yet to sign any of the International Labour Organization provisions regarding the rights of migrant workers, although existing legislation does provide minimal, yet significant, protections to foreigners in the country regardless of their legal status.⁴

South Africa's inclusive cosmopolitanism again surfaces in the country's 'New Partnership for African Development' (NEPAD), support for the fledgling African Union (AU) (formerly the Organization of African Unity (OAU)), and its claims to be stirring an 'African Renaissance.'

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 and Landau (2003).

⁴ 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 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).⁴ Those in the country legally are afforded even greater protection.

Support for these initiatives at once extends the country's commitment to universal prosperity, rights, and the rule of law across Africa while situating South Africa at the heart of continental trading, travel, and cultural networks. Sub-nationally, the language of urban development and regeneration strategies explicitly reflect other cosmopolitan aspirations. Cape Town, for example, has positioned itself as a major centre for European, American, and African tourism. Johannesburg, the country's economic and cultural hub, is no less modest with its ambition to become a 'world class, African city.'⁵ Where South Africa was once politically shunned and marginalized, its post-Apartheid integration into the global community has engendered new patterns of cultural exchange, investment, and immigration. Together with shifting patterns of investment and domestic migration, the arrival of non-nationals is transforming all of the country's primary urban centres (Simkins 2004; Ballard 2004; and Machingambi 2004). Despite conscious efforts to overcome past patterns of exclusion based on arbitrary categories linked to progeniture, hostility and patterns of nationalist exclusions by both South African citizens and government agents are threatening to undermine the cosmopolitanism, prosperity, and commitment to the rule of law that have encouraged non-nationals to journey to South Africa. It appears as though many aspire to 'world class, African cities' without many of the Africans.

Migration and Urbanization in Post-Apartheid South Africa

As indicated, the economic liberalization and regional integration following South Africa's democratic transition have added new dimensions to South Africa's long-standing patterns of labour migration (Rogerson 1995). Although the flood of non-nationals has never matched the numbers imagined by most South Africans or the Human Science Research Council's alarmist figures (between 2.5 million and 4 million *illegal* immigrants), the 2001 census indicated that there were 345,161 non-South African Africans in the country, a substantial increase from five years before.⁶ Other estimates put the total number of foreign migrants between 500,000-850,000 (Crush and Williams 2001). In a relatively wealthy country of approximately 45 million people, these are significant, but by no means overwhelming figures.⁷

Although migrant labour continues to make critical contributions in mining and agriculture, post-apartheid mobility is more than an intensification of long-standing migration patterns. Because of these movements, the country's cities have, for the first time, become the primary destinations for people from beyond South Africa's borders. As the heart of southern Africa's economy, Gauteng

⁵ In a press conference held on 2 April 2001, Johannesburg City Manager Pascal Moloï reiterated pledges made in the Joburg 2010 policy agenda: "Determination is absolutely critical if Johannesburg wants to be a world class African city by 2010". Cited in Hamnca (2001).

⁶ Reflecting the growing patterns of regional integration, 320,178 of these were from SADC countries with 24,983 from the rest of the continent.

Province (home to Johannesburg and Pretoria) has been the central node for these flows, making migration (along with HIV/AIDS) one of Johannesburg most prominent demographic features.⁸ Between the last two national censuses in 1996 and 2001, the province's foreign-born population increased from 4.8% of the total population to 5.4%, representing a jump from 66,205 to 102,326 people. These figures both undercount total numbers of non-nationals and fail to capture the dramatic changes in those specific neighbourhoods that have become primary immigrant destinations. A recent survey (n=1,100) in central Johannesburg found, for example, that close to 25% of inner-city residents were foreign born (Leggett 2003). Failing economies and violence in neighbouring countries, together with South Africa's efforts to encourage retail tourism and investment, and the decline of industrial production in the former homelands, auger for growing numbers in the years ahead.⁹

Importantly, foreigners are not the only ones moving to the cities. Leggett's 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 partially explains this, at least 11% of the city's South African residents counted in the 2002 census had been in Johannesburg for less than five years. This translates into an increase of about 300,000 people between 1996 and 2001, a figure that far overshadows the number of immigrants. While figures for the country's other primary cities are less striking, they too have climbed (South African Cities Network 2003:36).

As black South Africans claim space in the cities from which they were previously excluded, they are confronting non-nationals also seeking safety or livelihoods in the country's urban centres. The convergence of these groups in an environment of resource scarcity combined with political and economic transition has placed a premium on the rights to residence, employment, and social services. The criteria for exercising these rights—with restrictions enforced by state agents and new immigration legislation—have increasingly made full access to city resources and residences contingent on individuals' South African lineage (cf. Holston and Appadurai 1996; Mbembe and Nuttal 2004). Pressures and efforts to exclude non-indigenous populations in the name of South African sovereignty and South Africans' rights and prosperity have led the government to declare a 'state of exception.' Under these conditions, efforts to alienate and 'liquidate' the cities' non-national populations are, with state sanction, taking places outside of the normal rule of law. The suspension

⁷ Tanzania, a much poorer country of just over thirty million citizens, hosted close to one million refugees at one point in the mid-1990s.

⁸ According to the Gauteng Economic Development Agency, Gauteng generates 10% of the African continent's gross domestic product (GDP) and a third of South Africa's GDP (<http://www.geda.co.za>). In 2003 the South African Department of health estimated that almost 30% of Gauteng residents were HIV positive (<http://www.avert.org/safricastats.htm>).

⁹ For more on the changing rural political economy, see Mosoetsa (2004). For a more explicit discussion of migration and regional integration trends, see Kihato (2003).

of the country's own laws with regard to non-nationals has, in turn, generated a set of officially and socially sanctioned practices that are undermining all urban residents' ability to exercise their civil and political rights.

Alienation of the Other

Before describing the full range of practices taking place within South Africa's new urban zones of exception, it is useful to document key components of the emerging nativist discourse. Importantly, nativist discourses are largely oriented towards those from neighbouring countries; few see ridding the country of its white population as a priority.¹⁰ The barriers of inclusion are instead raised only against those relatively poor African migrants who are seen as economic and physical threats. Moreover, there are reasons to disaggregate South African's attitudes based on ethnicity and economic status, but there can be little doubt of generalized and fervent anti-foreigner sentiments. A 1998 survey conducted by the Southern African Migration Project (SAMP), for example, revealed that 87% of South Africans believed that the country was letting in too many foreigners (cited in Segale 2004: 50). Urban South Africans also clearly link 'the presence of non-nationals with the country's social ills. Among these, crime features most prominently, but also includes HIV/AIDS and unemployment. Nationally, 48% of the South African population felt that foreigners were a criminal threat (Crush and Williams 2003). In Johannesburg, the country's 'crime capital,' Leggett reports that 63% of inner-city Johannesburg residents mentioned 'foreigners' as the group committing most of the crime in their area (Leggett 2003:53).¹¹ Similarly, among the 70% of South African respondents in the Wits survey who thought crime had increased in recent years, almost three-quarters identified immigrants as a primary reason (Landau and Jacobsen 2004: 45). Assumptions of foreigners' inherently criminality have led to support for further restricting immigration or evicting foreigners outright. Indeed, 64.8% of the South Africans in the Wits study thought it would be good if most of the refugees and immigrants left the country and many respondents speak openly of their support for drastic measures to achieve this end.

Such exclusive claims to South Africa's urban centres have emerged in tandem with anti-foreigner statements by politicians and bureaucrats. The famously xenophobic (former) Minister of Home Affairs, Mangosuthu Buthelezi, has led this charge, although his efforts have been complemented by seemingly more progressive actors. In his 'State of the City 2004' address, for example, Johannesburg's Executive Mayor reflected widespread sentiment in arguing that, "While

¹⁰ In the Wits University study, less than 5% of South African respondents thought it would be a 'good' or 'very good' thing if most whites were to leave South Africa. Indeed, three quarters (74.8%) thought it would be 'bad' or 'very bad' if they left.

migrancy contributes to the rich tapestry of the cosmopolitan city, it also places a severe strain on employment levels, housing, and public services.”¹² Regardless of the actual costs—impossible to calculate given the lack of sound data—local authorities have reacted to foreign migrants either by implicitly denying their presence, excluding them from developmental plans, or allowing discrimination throughout the government bureaucracy and police (Vawda 1999).¹³ At times, as the following paragraphs suggest, such passive acceptance has been supplemented by actively endorsing discriminatory, exclusivist, and extra-legal acts.

Zones of Exception and the Price of Exclusion

There is nothing unique in South Africans suspicion of foreigners’ criminality and costs to the taxpayers, although it is ironic that people throughout Southern Africa fear South Africa’s indigenous *tsotsis* and gangsters. For present purposes, what is important is how anti-immigrant sentiments and practices—often justified by promoting physical security and urban regeneration—are behind a set of discriminatory, often extra-legal practices, that threaten efforts to achieve administrative justice, institutionalise the rule of law, and build the cosmopolitan society publicly envisaged by its elected leaders. Far from being anachronistic, Arendt’s commentary on post-World War II Europe that, “the state, insisting on its sovereign right of expulsion, was forced by the illegal nature of statelessness into admittedly illegal acts,” seems only too prescient in describing the ways in which South Africa has responded to the presence of non-nationals in its cities (Arendt 1958: 283-4).

Near universal assumptions of non-nationals’ criminality and threats to jobs and health have generated a series of extra-legal and, often unconstitutional, practices oriented towards their control and eventual removal. Politicians and civil servants (including the police) in both countries have also capitalized on the presence of foreigners and international agencies to promote their own interests and elude blame for their own failings. As noted, the xenophobic Home Affairs Minister, Mangosuthu Buthelezi (1994-2004) has been a leader in this regard. Crush and Williams (2003) quote a 2002 statement from him justifying a moving beyond the law in addressing the threat posed by non-nationals:

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...

¹¹ Reflecting the prevalence of discrimination in urban areas, a national survey showed that ‘only’ 48% of the South African population felt that foreigners were a criminal threat. (Crush and Williams 2003).

¹² 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 and Skinner (2003).

¹³ It should be noted, however, that the Johannesburg metropolitan government has slowly begun to consider migrants as a vulnerable group.

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.

Instead of respecting non-nationals' legally defined rights or following the due process of a criminal investigation, Buthelezi has called for a system of rapid deportation that circumvents existing restriction on state action. This is only one example, but it reveals a widespread, if implicit, calculation that the dangers non-nationals bring to the country are adequately severe to justify partially negating the country's commitment to protecting human rights and maintaining the rule of law.

The threats to South Africa's inclusionary principles have not gone unnoticed—most recently through a parliamentary hearing on the extent and effects of xenophobia—although little has been done to address them. As South Africa celebrated its tenth year of democracy in 2004, the country's acting Human Rights Commissioner, Bertrand Ramcharan (2004), expressed deep concerns about the emergence of the new forms of discrimination:

Refugees, asylum seekers, migrant workers, undocumented immigrants, and other so-called 'non-citizens' are being stigmatised and vilified for 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.¹⁴

There are three key areas in which abuses of 'non-citizens' are especially visible: acquiring identity documents; securing financial services; and in non-nationals' engagement with the South African state's coercive apparatus. These, together with less tangible forms of corruption and discrimination, are generating economies of corruption and violence that exist outside the law, but that often embroil engage public actors—civil servants, the police, and government sub-contractors—in ways that spreads their influence to urban residents. These shadow economies are in turn entrenching interests that will resist reform and expand in ever-larger circles of graft, illegality, and extra-legality. While many South Africans may consider such practices legitimate if perceived as protection against dangerous interlopers, such practices may ultimately undermine the rights, security, and livelihoods of urban South Africans.¹⁵

Identity Documents, Integration, and the Department of Home Affairs

Documentation can not prevent discrimination or ensure social inclusion, but official identity papers are valuable in finding work, accessing social services, and preventing arbitrary arrest and deportation. Conversely, a lack of documentation makes almost any act, from petty-trade to walking

¹⁴ See also Danso and McDonald 2002.

¹⁵ See Bayart's (1999) discussion of the 'rhizome' state and Chabal and Daloz (1999).

in the street, illegal in the state's eyes. There are two key factors working against non-nationals acquiring the documents needed to help regularize their stay in South Africa. The first is the lack of any mechanism through which job seekers can apply for rights to residence in the country. Instead, those coming to the country without a job or study permit must enter on a tourist or study visa or, as tens of thousands have done, apply for asylum once they have entered South Africa.¹⁶ To do so, or to renew any other form of visa, non-nationals must register with the Department of Home Affairs (DHA), the government agency responsible for immigration and for issuing identity documents to both citizens and foreigners.

The second obstacle to acquiring documentation is the DHA itself. One of the most corrupt departments during the Apartheid period, administrative incompetence and irregularities flourished between 1994 and 2004 under Buthelezi. While South Africans regularly (and justifiably) express frustration with the department, its immigrant-related activities go beyond mere administrative incompetence, but often work outside of official mandates and regulations. Even would-be asylum seekers—who have rights to be in South Africa under international and domestic law—must often pay a series of unofficial ‘fees’ simply to file an asylum claim (Segale 2004). For many, the first of these is collected by private security guards hired to keep order and regulate access to the building. These guards often charge for entry and routinely resort to beatings and other violent means to keep people in line (both figuratively and literally). Without legal status in the country, those subject to such tactics are effectively unable to lodge formal complaints. Not surprisingly, few South Africans object to such treatment.

Extortion and exploitation follow asylum seekers into the offices. Here applicants are often obliged to pay for ‘translators’ (even when they speak English) or additional fees simply to file asylum claims, a process that is meant to be without cost. Those unable to cover the costs of the process either drop their claims—usually remaining in the country illegally—or pay ‘in-kind.’ For women, such payments can require considerable sacrifices. Apart from their illegality and threats to human dignity, these practices have generated economies within the DHA in which ‘front-line’ staff jockey and bid for the most profitable posts.

After filing a claim, asylum seekers face further obstacles while their cases are considered. Under the 1998 Refugees Act, the government is expected to adjudicate a claim within six months. Until recently, the initial six-month period was coupled with a prohibition on asylum seekers working

¹⁶ Asylum seekers who identify themselves at the country's land borders are given a temporary visa requiring that they report to one of the five Refugee Reception Offices (Johannesburg, Cape Town, Pretoria, Durban, and Port Elizabeth) ensuring that all asylum seekers at least temporarily settle in the country's primary cities.

or studying.¹⁷ Although these prohibitions have typically been lifted after this initial interval, the adjudication process often takes much longer. During a period that can extend for months or years—in the Wits survey, for example, almost one-third of respondents reported waiting at least eighteen months for a decision—non-nationals remain in a semi-permanent state of limbo during which they may stay in the country, but can access few social services and receive almost no official or private assistance in the form of direct aid or assistance in finding employment. Delays in adjudicating asylum claims have also opened the process to widespread abuse.¹⁸ Without other means to emigrate, and because asylum seekers can legalize (albeit imperfectly) their stay in the country for extended periods, many non-nationals exploit the system's inefficiencies by applying for asylum. By the time their claims are rejected, they will either be ready to return or will have found other means of staying in the country. Such opportunities have led to growing numbers of applicants that have further overloaded an already feeble system, furthering delays, limiting protection for 'legitimate' asylum seekers, and expanding the space for graft and exploitation.¹⁹

Even those able to apply for asylum or lucky enough to be granted refugee status continue to face difficulties in acquiring suitable identity documents. The physical form of asylum seekers' documentation itself contributes to irregular and illegal practices. Asylum seekers, for instance, are issued with a single piece of paper (the "Section 22" permit), often with hand-written amendments and conditions. Few employers or government agents, including the police and many health care workers, recognise this document's legitimacy. Moreover, after a few months in a coat or trouser pocket, the document itself can become worn and illegible. It can also be easily lost or destroyed. Even those granted refugee status continue to face difficulties. A recent national study found that only 11% of those granted asylum have been issued a 'refugee identity documents' (Belvedere 2003: 6). Those granted permanent residency status have also been subject to delays of months or years.

The installation of a new Director General of Home Affairs in 2003, and a new Minister following the 2004 election, has accelerated the process of issuing identity documents—most refugees now receive their documents within a month—but problems persist. Home Affairs' 2003 *Annual Report* indicates, for example, that 3,264 people were granted refugee status during that year (out of over 15,000 applicants), but that only 1,881 refugee identity documents were issued. Some of the reasons for this are technical or administrative. In Port Elizabeth, for example, dozens of legally recognised refugees went weeks without valid documents in mid-2004 because the office failed to

¹⁷ 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)).

¹⁸ Representatives from the United Nations High Commissioner for Refugees (UNHCR) estimate that less than 20% of applicants are 'genuine' refugees.

¹⁹ The Department of Home Affairs has periodically promised to address the backlog of asylum cases, but there remain close to 100,000 claims that have yet to be processed.

procure the printer cartridge needed to produce identity documents. Other delays result from conscious efforts to slow the process or extract bribes. Apart from a small group of activists, few South Africans protest these delays, leaving tens of thousands of legally recognised refugees without the documents necessary to access employment, social services, or defend themselves against arbitrary arrest, extortion, and deportation.

By allowing the DHA to work outside country's own laws—a condition reached through design and poor oversight—it has become a fertile ground for networks of corruption and extortion and broader patterns of administrative irregularity. Its inability or unwillingness to fulfil its mandated responsibilities has also created a class of people denied the legal protections documentation can provide.

Social and Financial Services

A cocktail of inadequate documentation, ignorance, and outright discrimination, ensures that many of the non-nationals who are legally in South Africa are denied access to critical social services. Section 5(1) of the South African Schools Act 84 of 1996, for example, declares that “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.” Importantly, this provision does not distinguish between citizens and immigrants. Moreover, Article 27 (g) of the Refugees Act (130 of 1998) states that: “Refugees as well as refugee children are entitled to the same basic health services and basic primary education which the inhabitants of the republic receive from time to time.”

Despite these provisions, asylum seekers and refugees face significant obstacles in accessing the educational services to which they are entitled (cited in Stone and Winterstein 2003). Other non-nationals, especially those without documents, face similar or more acute challenges. The *de facto* requirement that migrants pay school fees is the most obvious barrier to education and contradicts a prohibition on refusing admission to public schools based on parents' inability to pay.²⁰ Those without the right or opportunity to work often have difficulty making these payments, denying their children right to education. Costs for transportation, books, and uniforms further exclude the often semi-destitute non-nationals who find their way to South Africa's cities. A 2000 study on the Somali refugee community in Johannesburg, for example, suggested that 70% the Somali refugee children of school-going age are not going to school (Peberdy and Majodina 2000). Although few data exist on other groups, there are reasons to believe that this pattern appears in other national communities. Anecdotal reports also suggest that many migrant children are denied access to school because of

²⁰ Department of Education, Admission Policy for Ordinary Public Schools (October 1998).

outright discrimination, often justified by their age (they may be older than the mean for their grade) or language skills.

While inability to access to education may have delayed effects, denying migrants access to health services, particularly emergency care, has both immediate and long-term consequences. Section 27(1) of The Constitution states that everyone has the right to health care services, including reproductive health care. This clause is followed by s 27(2) binding the state to make reasonable measures towards realising these rights. Under law, refugees are entitled to have access to the same basic health care as South African citizens, although other migrants are required to pay an additional fee of R1,800.²¹ Section 27(3) of the South African Constitution clearly states, however, that no one—regardless of nationality, documentation, or residency status—may be refused emergency medical treatment.

The inability or unwillingness of many hospital staff members to distinguish between different classes of migrants (coupled with xenophobia) often means that migrants, including refugees, are denied access to basic health services or that they are all charged the fees meant for foreigners.²² Non-nationals may not only be refused services outright, but foreigners—even those paying the additional fees—are frequently made to wait longer than South Africans before being seen and are subject to other forms of discrimination from health care workers. While waiting, one refugee overheard nurses talking about “foreigners taking government money and having too many babies” while another reported a hospital staff member describing the hospital as “infested” with foreigners. There are also accounts indicating that non-nationals are often denied full courses of prescribed medicines (Nkosi 2004).

Failure to overcome these obstacles often has dire consequences. A recent national study of refugees and asylum seekers found that 17% of all respondents were denied emergency medical care, often because of improper documentation or ignorance on the part of the admitting nurses (Belvedere, *et al.* 2003). If one could calculate this as a percentage of those that actually sought such care, the figure would be much higher. In one particularly dramatic incident, a pregnant Somali woman was refused service on the grounds that (a) delivery, unless problematic, did not constitute an emergency and (b), she could not pay the additional fee levied on foreigners (which as a refugee she was not required to pay). As a result, she ultimately delivered the child on the pavement outside the hospital, only to have it die a few weeks later. This is an extreme, but not exceptional example. Given their tenuous status in the country—often aggravated by a lack of proper identification—and their relative ignorance of their rights, many foreigners simply accept these violations. Indeed, only 1% of refugees

²¹ Section 27 (g) of the Refugees Act 130 of 1998 (see also s 27 (b)).

who were refused health services lodged a complaint and 24% report doing nothing, largely because they did not know what to do. Only 41% reported trying another facility after being refused service, although it is not clear if all of these were successful in accessing health care (Belvedere, *et al.* 2003).

More significantly for current purposes, patterns of exclusion are also evident in private sector industries where one would expect to see profit motives trumping discriminatory tendencies with foreigners—even those with rights to live in the country—often unable to access even the most rudimentary banking services (Jacobsen and Bailey 2004). Although current banking legislation technically prevents anyone except permanent residents and citizens from opening bank accounts, this policy may be waived on a discretionary level as often done with people in the country on temporary contracts (Bhamjee and Klaaren 2004). 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 identity number, foreign passport, or a formal employment contract.

Whatever the specific reasons, migrants' inability to access secure banking has manifold consequences that extend beyond those excluded from service. Perhaps most obviously, a lack of access to financial services (particularly credit), limits the ability of migrants to invest in the city; contributing further to infrastructural decay and a fragmented community (Leggett 2004; Jacobsen and Bailey 2004). Lack of investment also means migrants are less likely to start formal businesses or create South African jobs (although they still create jobs faster than South Africans).²³ Keeping migrants and those they hire from moving into in the informal economy also denies the government a source of direct revenues (from taxes and licensing fees) and means that much of the business that takes place is, to a greater or lesser degree, illegal, weakening the law's (and the state's) legitimacy and regulatory power. Non-nationals' inability to access to financial services also means that they become primary targets for petty criminals and police extortion. The following section discusses this and other forms of irregular policing and law enforcement that are further signs of the urban 'zones of exception' that are entrenching practices that may ultimately outstrip the state's ability to restore the rule of law.

²² In terms of s 27(g) of the Refugees Act, refugees have a legal right not to be charged health care rates applicable to foreigners.

²³ In the Wits survey, 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. It is also worth drawing attention to a recent study of street vendors in Durban illustrates this by showing that South African traders favour non-nationals' involvement because it brings new products and new business into the market. See also Hunter and Skinner (2003).

Policing and the Criminalization of the South African State

The previous section outlines a number of ways in which discrimination against foreigners has begun eroding the strength of the country's progressive laws and its cosmopolitan principles. Lack of access to identity documents and financial services have made immigrants particularly vulnerable to abuse at the hands of thieves and the police. Officials' implicit, and at times explicit, endorsement of such policies and actions has created 'zones of exception' in which the country's laws have been effectively suspended as they apply to a particular, non-national sub-population (cf. Arendt 1958).

Although such zones appear elsewhere when refugees are isolated in camps or settlements,²⁵ the proximity and effective inseparability of citizens and non-nationals also raises dangers for South Africans. Within these urban zones of exception, the institutions officially charged with maintaining order, protecting rights, and ensuring compliance with legal decisions are themselves becoming criminalized or irrelevant. In their stead, responsibility for designating criminality, deviance, and punishments are being assigned to *ad hoc* agglutinations of individuals, private security guards, and networks of police corruption in ways that contravene South Africa's Constitution and criminal code but continue with either implicit or explicit state support.

Investigations, Detention, and Arrests

As police seek to overcome their apartheid-era stigma and supplement their meagre incomes, they are exploiting poor oversight, xenophobic discourses, and immigrants' vulnerabilities to legitimise a set of illegal or extra-legal practices (see Shaw 2002; Bruce 2003). At the most basic level, targeting non-nationals, 'the usual suspects' (refugees, asylum seekers, and other immigrant groups unlikely to have proper identification documents), police are able to meet periodic arrest targets.²⁶ Non-South Africans living or working in Johannesburg, for example, consequently report having been stopped by the police far more frequently than South Africans (71% versus 47% in the Wits University survey) despite having generally lived in the city for a shorter period. Although legally mandated to respect non-nationals' rights, police often refuse to recognise work permits or refugee identity cards. Some respondents even report having their identity papers confiscated or destroyed in order justify an arrest (cf. SAHRC 1999). Furthermore, there have been numerous assertions that police elicit bribes from

²⁵ Dadaab and Kakuma refugee camps in Northern Kenya are powerful illustrations of the way in which non-nationals are often isolated in such zones. In both instances, the Kenyan government has effectively ceded sovereignty over the space the camps occupy to the UNHCR, an organization not suited to the task. The camps have, consequently, become the centre of massive networks of corruption, violence, and illegal trade.

apprehended persons (documented and undocumented) in exchange for freedom. A Sierra Leonean man recounts his experience:

The police asked me for my refugee paper, which had not yet expired. They say, ‘f-k you’ and they just tear the paper and seize my money and cell-phone . . . So then, what they do is take me to the police station. I was shouting... [and] one of them just removed something like a little shocker. He was shocking me... say that I was to shut up and if I wasn’t shut up, he was going to shock me until I die (quoted in Palmary *et al.* 2003: 113).

The South African Human Rights Commission (1999:3-4) suggests that this is not an isolated incident:

In the majority of cases there were no reasonable grounds for an apprehending officer to suspect that a person was a non-national. A significant number of persons interviewed had identification documents which were either destroyed or ignored or which they were prevented from fetching from home. Apprehended persons were often not told or did not understand the reason for their arrest. Extortion and bribery are practices extremely widespread among apprehending officers.

Indeed, targeting foreigners is also a relatively easy, and socially acceptable, means of supplementing officers’ admittedly meagre income. Denied access to almost all formal banking service, poor immigrants must either stash cash in their residences or carry it on their bodies (Jacobsen and Bailey 2004). Combined with their tenuous legal status, (often) poor documentation, and tendency to trade on the street (hawking or informal business), some police officers have come to see foreigners as ‘mobile-ATMs’ (Private Communication: 7 May 2004). In the words of one Eritrean living in Johannesburg, “as foreign students we are not required to pay taxes to the government. But when we walk down these streets, we pay.”

A study conducted in late 2000 indicates that asylum seekers are reportedly arrested and detained for failure to carry identity documents; on the basis of a particular physical appearance; for the inability to speak any of the main national languages; or simply for fitting an undocumented migrant ‘profile’ (Algotsson 2000). In practice, the burden of proof is on asylum seekers to establish their legal status in the country. There have been allegations that neither the police nor the DHA affords arrestees the opportunity to retrieve identification documents or to make free phone calls to contact friends or family. Asylum seekers, refugees and South African citizens may, consequently, be detained for days while their right to remain in the country is confirmed.

There are additional deviations from the law oriented at regulating or extracting resources from non-nationals.’ The 2002 Immigration Act, for example, effectively authorizes the DHA to conduct searches, arrests, and deportations without reference to other constitutional or legal

protections.²⁷ Without muscle of their own, immigration officers rely on the South African Police Services (SAPS) and, occasionally, the National Defence Forces (SANDF), to make arrests. More importantly, SAPS has exploited this law to legalize what would otherwise be illegal raids on buildings inhabited by suspected criminals and, potentially, illegal immigrants. Often conducted at night and away from oversight, police officers force entry, demand identity documents, and arrest both non-nationals and South Africans without respect for normal legal provisions.

Illustrating the practices legitimized by such extra-constitutional legislation, a joint operation launched by the City of Johannesburg and the Department of Home Affairs in September 2003 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, Yakoob Makda, the Director of Johannesburg’s ‘Region Eight’ (i.e., the inner city) proudly reported their anti-crime cum anti-immigrant achievements to a public meeting called to help combat social exclusion.²⁸ This is not the only effort to rid the city of foreigners. Soon after South Africa’s first democratic election, Alexandra Township north of the city centre organized a campaign entitled ‘Operation Buyelekhaya’, or Operation Go Back Home in an effort to rid the township of all foreigners (Palmary, *et al* 2003: 112). Nor are these efforts limited to Johannesburg. In 2002, Du Noon Township outside Cape Town also passed a resolution expelling all foreigners and prohibiting them from returning (Southwell 2002).

Lindela and Deportation

The extra-legality of South Africa’s new zones of exception are most visible in the privatized realm of law enforcement specially created to house and deport detained non-nationals. Existing largely outside of government regulation and public observation, escape from this world requires an outside advocate prepared to offer time, energy, and money to pay the requisite bribes. Migrants report that each of Johannesburg’s police stations has its own price and can draw out a rate schedule for what one must pay to be released from them. This, of course, depends on someone knowing that you have been taken. Many simply disappear.

Those who have not bought their way out of police custody are remanded to Lindela Repatriation Centre in Krugersdorp, 30 km from Johannesburg. This privately run detention and deportation facility—owned and administered by the Dyambu Trust, an organization set up by

²⁷ See Section 3 (Powers of *Department*) in the Immigration Act (2002).

members of the ANC women's league in 1996—is only the most visible sign of how anti-immigrant attitudes are legitimising extra-legal methods of 'law-enforcement.' (Although privately owned, it is under the administered authority of and is funded by the Department of Home Affairs.) When built, the facility could hold between 1,200 and 1,800 people awaiting repatriation. Capacity has since been expanded to hold close to 4,000, although efforts to cut costs mean that many of the residents are still housed in only a portion of the building. According to the Joint Budget Committee, the cost of running the centre is R52 million (USD 8.7m) annually.

Lindela serves as the coordination centre for detention and deportation of undocumented and illegal immigrants from throughout South Africa. Whereas those arrested in Gauteng are taken relatively quickly to Lindela, people arrested in Cape Town, Durban and other centres are frequently detained for long periods at prisons in those cities before being sent to Lindela. Reports of sexual abuse, violence, and bribery within Lindela are common while extortion is a normal part of journeys to and from the centre. Even when friends or relatives have produced proper documents, there is also evidence that Lindela's operators unduly extend inmates stay in order to maximize the R50/night (USD 8) they receive from the government for every person they house.

Under the Refugees Act, a judge of the High Court must review any detention over 30 days.²⁹ However, this provision is rarely followed in practice, despite a court order obtained by the Law Clinic of the University of the Witwatersrand and the South African Human Rights Commission in November 1999, challenging the Department's repeated failure to provide such review to detainees at the Lindela Detention Centre and statistics (October 2004) demonstrating that the average period of detention is 46 days. Some people have been detained for more than 120 days.³⁰ Lawyers for Human Rights found that from February 2001- January 2002, 1,674 people were unlawfully detained in excess of 30 days without judicial consent. In the aforementioned case, the court required that Lindela officials report the names of detainees to the SAHRC each month for compliance monitoring, but Lindela and the DHA has failed to provide such reports. Such deportation, usually without court hearings are among the most visible sign of South Africa's compulsion to rid the territory of its 'surplus people.'

It is also worth referring to the "apathy" towards the rights of children found in *The Centre for Child Law v. The Minister of Home Affairs* (15 September 2004). In her judgment, Judge Annemarie de Vos noted that South Africa has recently celebrated the tenth anniversary of the first

²⁸ 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.

²⁹ Refugees Act Section 29(1) (1998).

³⁰ See *The South African Human Rights Commission and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd.*, case no. 28367/99, Witwatersrand High Court (South Africa).

democratic elections but that the lofty ideals set out in our constitution and government policy become “hypocritical nonsense” if they are not translated into action by the people who have been appointed and paid by the government to make them a reality. Illustrating the absurdity of this Kafkaesque world, there are reports that detainees must even pay to be deported; which they do simply to escape Lindela.³¹

Most of those who have been scheduled for deportation—including some with legal status to remain in the country and the occasional South African—are loaded onto trains that make weekly trips from Johannesburg to the border with Zimbabwe or Mozambique. Those claiming more distant origins are returned, albeit less frequently, by airplane. Despite its expense and the fact that many of the deportations take place without mandatory hearings, deportations show no sign of abating: in 1988, 44,225 people were deported; by 1993, that number had climbed to 96,515 (Maharaj 2004). The Department of Home Affairs’ Annual Report for 2003 indicates that 151,653 non-citizens were ‘removed’ during 2002. In the first nine-months of 2003, 41,207 Zimbabweans alone were repatriated (17,000 were deported in all of 2001: Innocenti 2004). When these deportations are of legally recognised refugees, such acts violate the internationally recognised principle of *non-refoulement*—entrenched in the 1951 UN Refugee Convention—where a person may not be returned to a place where their life would be in danger or they would be at risk of persecution.

Although many South Africans undoubtedly support these operations, they have been largely ineffective in establishing order or security. Not only does the obsession with immigrants distract police from where they are needed (Palmary 2002), their general ineffectiveness is leading citizens to accept criminal activity as part of their social landscape in which they must seek alternative means to manage crime. 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 largely outside the law, but regularly draw on police information and backup.³² 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” (Mbembe 2002: 58). These linkages ‘delegalize’ the criminal justice system, robbing the state of one of its most primitive functions and placing all of South Africa’s urbanites at risk.

Much like the arbitrary arrests of migrants, attempts to control crime through deportation are doing little to make cities safer. This is in large part due to the specious logic behind the deportations: foreigners are disproportionately the victims, not the perpetrators, of crime. Similarly, neither Lindela

³¹ “When people want to go home, they don’t let you be deported until you pay them money. Home Affairs wants you to pay 100 to 400 Rands, whatever you’ve got. Otherwise, you just stay here [in detention]. They let people go without ID, just give them some money.” Quoted in Human Rights Watch (1998: 59).

³² Interview with Cecil van Schalwyk, Director of Midrand office of *Mapogo a Mathamaga*, 25 July 2003.

nor the notorious trains have gone far in curbing immigration; those intent on staying in South Africa can capitalise 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 for as little as R 50 (app. USD 8).

As a sovereign state, South African has the right to detain and deport those who violate its immigration laws. Rather than acting as space for the extension of the rule of law, however, Lindela, together with broader patterns of irregular policing, contribute to a corrupt and largely ineffective ‘criminal justice’ systems—involving border guards, police, private security firms, and vigilante groups—that increasingly exist outside of formal regulation and oversight and in violation of the country’s liberal, rights based constitution. Although anti-immigrant attitudes have fostered their emergence, the ‘zones of exception’ in which these corrupt systems exist are occupied by both citizens and non-nationals (Human Rights Watch 1998). The consequences are immediately visible: decreased security infrastructural decay in city centres, and the denial of rights to both citizens and non-nationals. Indeed, the police’s inability to distinguish between non-nationals and citizens—due to either poor documentation or an unwillingness to recognise documentation—has also meant that everyone within the inner city has become a suspect. Darker skinned South Africans or those who can not speak Zulu or Sotho are particularly vulnerable. Many South Africans are consequently arrested on immigration offences or targeted for harassment or extortion. In 1998, for example, Human Rights Watch found that that 20% of those held in Lindela were in fact South Africans. Police deny the numbers remain that high, but admit that South Africans are regularly detained within the facility.³³

Conclusions: Legitimacy and Safety in a State of Permanent Exception

Migration—domestic and international—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. Spontaneous and predictable population movements have already become a feature of the country’s social and political landscape. While many South Africans support deportation and border closures, such options are not tenable even in countries protected by mountains, rivers, and oceans (Cornelius 2001). Without such barriers, South Africa must accept that non-nationals will continue to enter the country. 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 in a weak economic or ethical position to implement strict border control or immigration measures.

Instead of effectively addressing and managing the challenges migration brings, attempts at protecting South Africans' security and economic interests by targeting immigrants are likely to do neither. Such efforts are instead creating zones of exceptions in which South Africans and non-nationals are denied the protections legally guaranteed to them. The normalization and acceptance of such zones not only limits South Africa's ability to capitalise on foreigners' needed skills, but also prevents foreign investment, and distracts the police from where they are needed. Once established, those benefiting from these practices will resist reform and may ultimately spread their influence into yet unaffected institutions and spaces. As Mbembe writes in describing similar processes elsewhere, "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" (Mbembe 2002: 78). The emergence of these zones will ultimately affect not only those from outside of South Africa, but the citizens the new South Africa was mandated to protect: what were once forbidden cities may simply become forbidding.

³³ Police deny the numbers remain that high, but admit that South Africans are regularly detained within the facility (Louw, Danie. 2003. Interview, conducted by Loren Landau, with Director, Hillbrow Police Station, Johannesburg, South Africa (18 July 2003)).

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