

The impact of securitisation on South Africa's migration protocols during the Zuma administration (2009-2017)

MN Chuene



orcid.org/0000-0002-9513-5826

Mini dissertation accepted in partial fulfilment of the requirements for the degree *Master of Arts in Security Studies* at the North-West University

Supervisor: Dr BL Prinsloo

Graduation: July/August 2023

Student number: 20432437

DECLARATION

I, Marcellus Chuene hereby declare that “The impact of securitisation on South Africa’s migration protocols during the Zuma administration (2009-2017)” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of a complete reference.

Signature: _____ **Date:** 30/11/2022

DEDICATION

I would like to dedicate this thesis to my parents. I wish to thank my parents for believing in the transformative power of education in spite of them being illiterate and encouraged me to study hard to succeed. I wish to express my sincere gratitude to my late mother who had always inspired me and believed in me throughout in all my endeavours in life. I wish to express my sincere gratitude to my supervisor Dr Barend Prinsloo without whose support this study wouldn't have been possible. He was a pillar of strength, supportive and patient throughout.

ACKNOWLEDGEMENTS

I would like to thank the following people for their unwavering support and encouragement:

- My supervisor, Dr Barend Prinsloo. My sincere gratitude and appreciation for your support and patience. I am very grateful for your guidance and encouragement through trying times during my studies.
- All the lecturers I have interacted with at NWU-Potchefstroom for their passion in education and their vision for a prosperous and peaceful South Africa.
- The library staff at NWU Potchefstroom have also been very helpful and supportive and made this journey enjoyable.
- My late mother, Mrs Evelyn Moyahabo Chuene for the inspiration and giving me support in all my endeavours in life.

ABSTRACT

The post-apartheid government was widely praised for its liberal constitution which was based on the principles of human dignity, equality, and freedom. These principles are in line with those of foundational international agreements on human rights such as the Universal Declaration of Human Rights of 1948, the Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights of 1966. The Zuma administration's national interests focused on national security, local employment, and prosperity for South African citizens at the exclusion of migrants.

In South Africa, human rights for migrants were initially protected through the Constitution 108 of 1996, the Refugee Act 130 of 1998 and the Immigration Act 13 of 2002. Despite these Acts and the explicit human rights assurances afforded to everyone living in the South African Constitution, the Zuma Administration (2009-2017) moved away from the principles and assurances of human dignity in its migration policies and legislation. Through a deliberate securitisation process and as a result of newly enacted immigration legislation, notably the promulgation of the Immigration Amendment Act 13 of 2011 and the Refugee Amendment Act 11 of 2017, the human rights of asylum seekers, refugees and migrants were adversely affected. The securitisation of migration protocols under the Zuma administration peaked with the introduction of the 2017 White Paper on International Migration and the promulgation of the Border management Authority Act 2 of 2020 aimed at militarising border controls to detain and deport migrants as efficiently as possible.

The origins for the securitisation of migration protocols during the Zuma administration emanated from a societal perception that the high number of migrants coming to South Africa during the first decade of democracy came through illegal entry and/or stayed beyond their visas to remain in South Africa. Moreover, the presence of migrants in the South African labour market and informal businesses increased competition for resources and opportunities among people within South Africa. In South Africa, the securitisation of migration has resulted in stricter migration control and an increase in the number of illegal foreigners being detained for deportation. The detention of irregular migrants was often justified with reference to security concerns disguised as the fight against global terrorism. These societal pressures evoked anti-foreigner sentiments culminating in xenophobic violence in 2008, 2012, 2015 and 2016 resulting in the deaths of migrants and locals, and damage to property. In conclusion, governmental sentiments towards migrants deteriorated in South Africa during the Zuma administration which led to the securitisation of migration protocols. This situation can only be rectified by returning South Africa's migration protocols in line with constitutionally obligated human rights for all people living in South Africa.

Key terms

international migration; refugees; asylum seekers; migrants; economic migrants; security; national interests, sovereignty, national security; securitisation theory; securitisation of migration; securitisation of SA migration protocols; human rights, irregular migration; international human rights obligations; international human rights laws; migrants' human rights; anti-immigrant sentiments; xenophobic violence

LIST OF ABBREVIATIONS

ANC	The African National Congress
APCs	Asylum Processing Centres
BMA	Border Management Authority
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Eradication of Racial Discrimination
CHR	Centre for Human Rights
DoL	Department of Labour (RSA)
GDP	Gross Domestic Product
GMG	Global Migration Group
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ILO	International Labour Organisation
IOM	International Organisation for Migration
MMC	Mixed Migration Centre
NGOs	Non-Governmental Organisations
OAU	Organisation for African Unity
OECD	Organisation for Economic Cooperation and Development.
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act 2000 (of RSA)

RAA 2017	Refugee Amendment Act 2017 (of RSA)
RRO	Refugee Reception Office
RSA	Republic of South Africa
SADC	Southern African Development Community
SAHR	South African Human Rights Commission
SAPS	South African Police Service
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations High Commissioner for Refugees
WBG	World Bank Group

TABLE OF CONTENTS

DECLARATION	I
DEDICATION	II
ACKNOWLEDGEMENTS	III
ABSTRACT.....	IV
LIST OF ABBREVIATIONS	VI
TABLE OF CONTENTS	VIII
LIST OF TABLES	XI
LIST OF FIGURES.....	XII
CHAPTER 1: INTRODUCTION.....	1
1.1 Introduction	1
1.2 The process of securitisation and its effects on migration protocols	2
1.3 The securitisation of South African migration protocols under the Zuma administration	3
.....	3
1.3.1 <i>The Immigration Amendment Act 13 of 2011 and the Refugee Amendment Act 11 of 2017</i>	3
1.4 The Constitution's view on human rights of migrants in South Africa	5
1.5 Problem statement	6
1.6 Secondary research questions.....	7
1.7 Research objectives	7
1.8 Central theoretical statement	8
1.9 Methodological framework	9
1.9.1 <i>Methodological approach</i>	9
1.9.2 <i>Data collection instruments</i>	10
1.9.3 <i>Strategy for data analysis</i>	11
1.9.3.1 Content analysis	11
1.9.3.2 Discourse analysis.....	12
1.10 Ethical considerations	13
1.11 Limitations of the study	14
1.12 Significance of the study	14
1.13 Chapter layout	15
CHAPTER 2: THE THEORETICAL CONTEXT OF HUMAN RIGHTS IN THE SA CONSTITUTION	17
2.1 Introduction	17
2.2 The theoretical context of human rights: A general overview	17
2.3 The social contract theory and human rights.....	18
2.3.1 <i>The utilitarian view on human rights</i>	20
2.4 The Universal Declaration of Human Rights of 1948.....	21
2.5 The South African Constitution and human rights	22
2.5.1 <i>The general human rights obligations for governments</i>	22

2.5.2	<i>Human rights of migrants according to the SA Constitution</i>	25
2.5.3	<i>The SA Constitution and international human rights agreements</i>	27
2.6	Conclusion	28
CHAPTER 3: THE IMPACT OF THE SECURITISATION OF SOUTH AFRICAN MIGRATION PROTOCOLS ON SA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS		30
3.1	Introduction	30
3.2	The process of securitisation	30
3.3	Securitisation as a speech act	31
3.4	The political motives for the securitisation of migration	32
3.4.1	<i>The manner in which migration is securitised in South Africa</i>	33
3.5	The factors which motivated the Zuma administration to securitise migration protocols	35
3.5.1	<i>Illegal immigration</i>	35
3.5.2	<i>Political Conservatism and Conservative Nationalism</i>	36
3.5.3	<i>Pressures in the SA labour market</i>	37
3.6	The interrelation between SA migration legislation, the Constitution, as well as regional and international human rights obligations before the advent of the Zuma administration	40
3.6.1	<i>The Refugee Act 130 of 1998</i>	41
3.6.2	<i>The Immigration Act 13 of 2002</i>	43
3.7	The securitisation of migration protocols under the Zuma administration	44
3.8	SA citizenship for migrants' children	48
3.9	The impact of securitisation of migration protocols on SA's international human rights obligations to migrants	48
3.10	Conclusion	51
CHAPTER 4: THE BENEFITS AND DISADVANTAGES OF SECURITIZATION OF SA MIGRATION PROTOCOLS DURING THE ZUMA ADMINISTRATION		53
4.1	Introduction	53
4.2	The benefits and incentives for the securitisation of SA migration protocols during the Zuma administration (2009-2017)	54
4.2.1	<i>The disadvantages of uncontrolled migration</i>	55
4.2.2	<i>Migration challenges during the Zuma administration</i>	56
4.3	Social support for the Zuma administration	57
4.4	Securitisation of migration protocols: migrant labour	58
4.5	Securitisation of migration protocols: the skills shortage in South Africa	59
4.6	Securitisation of migration protocols: migrant entrepreneurship	61
4.7	Summary	61
4.8	Conclusion	62
CHAPTER 5: REALIGNING SA'S MIGRATION PROTOCOLS ACCORDING TO INTERNATIONAL HUMAN RIGHTS OBLIGATIONS		64
5.1	Introduction	64
5.2	Ways in which SA's migration legislation, policies could be optimally aligned with international human rights obligations	65

5.2.1	<i>Voluntary Return Agreements</i>	65
5.2.2	<i>Documentation for migrants</i>	66
5.2.3	<i>The right to gainful employment</i>	66
5.2.4	<i>Permanent residence</i>	67
5.2.5	<i>Naturalisation and SA citizenship for migrants</i>	68
5.2.6	<i>Local integration of migrants</i>	68
5.3	Conclusion	68
CHAPTER 6: THE OVERALL IMPACT OF THE SECURITISATION OF SOUTH AFRICA'S MIGRATION PROTOCOLS ON MIGRANTS' RIGHTS		70
6.1	Introduction	70
6.2	The impact of the securitisation of South African migration protocols and practices on the universal theory of human rights	70
6.2.1	<i>The impact of securitisation of South African migration protocols and practices on SA's international human rights obligations to migrants</i>	73
6.4	Conclusion	76
BIBLIOGRAPHY		78

LIST OF TABLES

Table 6-1: The securitisation of migration protocols and its impact on migrants.....	76
--	----

LIST OF FIGURES

Figure 3-1: Diagram illustrating the manner in which migration is securitized	35
---	----

CHAPTER 1: INTRODUCTION

1.1 Introduction

Khan (2018:4) defines international migration as crossing the boundary of a state and entering the geographical space of another country for a certain period of time. International migration includes the movement of refugees, displaced persons, and uprooted people, as well as economic migrants and those travelling for business and leisure (Khan, 2018:4). Barclay (2010:51) explains that involuntary migrant movements are largely due to forced circumstances such as escape from civil wars, violent political upheavals, political and ethnic persecutions, and human rights violations, as well as environmental degradation and natural disasters. The line between irregular migrants and asylum seekers and refugees has become increasingly blurred in the media and the public mind, as has the distinction between migration control and refugee protection (Koser, 2005:6). The Global Migration Group (GMG) (2017:11) defines and distinguishes an asylum seeker, refugee and migrant as follows:

- *An asylum seeker is an individual who has fled from their home country and is seeking international protection as a refugee in another country but whose claim for refugee status has not yet been determined.*
- *A refugee is someone outside their country who is need of international protection because of a serious threat to their life as result of persecution, armed conflict, or violence in the country of origin.*
- *A migrant is any person who is outside a State of which they are a citizen.*

Irregular migrants or illegal migrants are a people who enter a country in search of employment opportunities without the necessary permits (Khan, 2018:11). Although there is no internationally accepted legal definition of a migrant, it is commonly accepted to be “*people staying outside their country of origin, who are not asylum seekers or refugees*”.

For this study, however, the term ‘migrants’ is used as a collective noun to include all persons who have left their own country and entered South Africa with the intention to remain in the country whether legally or illegally, irrespective of their motivations. It also excludes those who emigrated from South Africa to other countries.

The International Organisation for Migration (IOM) (2018:1) explains that migration is intertwined with geopolitics, trade, and cultural exchange, and provides opportunities for states, businesses, and communities to benefit enormously. Many countries source scarce skills by recruiting highly skilled migrants such as managers, executives, professionals, and technicians (Khan, 2018:11).

The potential positive benefits for destination countries include the mitigation of labour shortages, enrichment of human capital and the innovation and wealth creation that result from migrant entrepreneurial activities (Barclay, 2010:62). Migration can also result in the transfer of skills, knowledge and technology that could have considerable positive effects on productivity and economic growth (IOM, 2018:4). The concept of securitization of migration is discussed below.

1.2 The process of securitisation and its effects on migration protocols

In this study, the term “migration protocols” denotes migration legislation and policies. Securitization is the process by which non-security issues such as immigration are transformed into urgent security concerns as a consequence of securitising speech acts (Messina, 2014:530). The growing mobility of people across borders and the various troubles that emerged in receiving societies has developed into security concerns and paved the way for the securitisation of migration (Citak, 2020:6). Taureck (2006) defines securitisation theory as a speech act of a securitizing actor who states that a particular referent object is threatened in its existence and claim a right to implement extraordinary measures to ensure the referent object's survival. Securitization theory explains how security actors mobilise their audience by leading a security discourse to implement extraordinary means (Lenz-Raymann, 2014:244). The speech act model was based on the idea that securitisation is a sustained strategic practice aimed at convincing a target audience to accept that a specific development is threatening enough to deserve an immediate policy to alleviate it (Balzacq, 2005:173).

Political discourses and the media have portrayed migrants as a threat to societal and economic security which was accompanied by hostile attitudes toward migrants and reinforced the connection between immigration and terrorism (Tallmeister, 2013:4). Bigo (2002:64) argues that politicians fear losing their symbolic control over the territorial boundaries and securitize migrants as a risk to state security. Economic stagnation, recession, institutional constraints, and other social changes occurring after the advent of large-scale immigration are seen as threats that are attributed to migrants' presence (Tallmeister, 2013:3). Governments also view migrants, particularly refugees and asylum seekers as threats to the receiving state's social security and welfare system (Tallmeister, 2013:3). In line with this argument, Khan *et al.* (2018:87) points out that during the Zuma administration, South Africa viewed migration as a security risk and a threat to national security. The securitisation of SA's immigration policies enacted through legislation during the time period 2009-2017 is discussed next.

1.3 The securitisation of South African migration protocols under the Zuma administration

During the Zuma administration (2009-2017), the South African asylum policy changed as the ANC attempted to dissuade asylum seekers from coming to South Africa, by restricting the right to work and proposing encampment over integration (Van Lennep, 2018:2). Beginning in 2011, the South African government and the ruling party increasingly viewed the management of asylum as predominantly a question of security and reoriented the Department of Home Affairs (DHA) as primarily a security department (Polzer, 2013:17). The ANC's perception, and by extension, the South African government's perception, were that South Africa was being flooded with asylum seekers and that the country has been carrying more of the continental or even global burden of refugee protection (Polzer, 2013:18).

Mbiyozo (2018:10) points out that, during the Zuma administration the SA government introduced harsh measures to serve as barriers to entry, including limiting asylum seekers' rights to education and work, reducing access to the asylum system, militarising borders, building asylum processing centres at borders, and establishing provincial level repatriation centres. This was done in line with the provisions of the Refugee Amendment Act of 2017 (Mbiyozo, 2018:10). The new migration protocols were enacted through the Immigration Amendment Act 13 of 2011 and the Refugee Amendment Act 11 of 2017, which will both be discussed next.

1.3.1 The Immigration Amendment Act 13 of 2011 and the Refugee Amendment Act 11 of 2017

The Zuma administration enacted the Immigration Amendment Act 13 of 2011, which introduced far-reaching changes to existing norms, making access to the asylum system more difficult, and provided for a preliminary procedure to be conducted at border posts to determine whether applicants satisfied the criteria to make an application for asylum (Carciotto & Mavura, 2016:33). The 2011 Immigration Amendment Act required a certain amount of investment for the issuance of business permits, shortened the application period for refugee status from two weeks to five days, and abolished the quota system for skilled and professional immigrants (Aminaka, 2012:114). Mthembu-Salter *et al.* (2014:10) posit that, according to Section 15 of the Immigration Amendment Act (Act 13 of 2011), in the event that the applicant's transit visa expired before the applicant has been able to obtain an asylum permit at the Refugee Reception Offices (RRO), the individual's migration status changed from a 'refugee' to an 'illegal foreigner' subject to detention and deportation.

Furthermore, Mfubu (2018:186) asserted that, following the amendments to the 2011 Immigration Amendment Act, foreign nationals who overstayed in South Africa for a period less than 30 days were declared 'undesirable for a period of 12 months,' which could result in immediate arrest and deportation of those migrants. Crush *et al.* (2017:8) point out that asylum-seekers with an expired permit would also be guilty of an offence and liable to a fine and imprisonment of up to five years. According to the Immigration Amendment Act of 2011, foreign nationals must return to their country of origin before the expiration of their permits and only return once the extension of their permits has been approved (Mfubu, 2018:187).

While the Immigration Amendment Act (Act 13 of 2011) was amended, the securitisation of migration deepened through the 2017 Refugee Amendment Act. The key amendments to the Refugee Amendment Act 11 of 2017 include providing specific conditions for exclusions and cessation from refugee status, granting authority to Home Affairs to close or designate a refugee reception office, and restricting the rights of asylum seekers to work, study or be self-employed (Mbiyozo, 2018:4). Furthermore, it requires an asylum seeker to report to an RRO no later than five days after arriving in SA, or else they could be excluded from refugee status (Scalabrini, 2018). Under the Refugees Amendment Act of 2017, an asylum claim would be considered abandoned if the applicant does not report to an RRO in the month after expiry of their asylum permit, unless they have compelling reasons (Scalabrini, 2018).

Through the Refugee Amendment Act of 2017 harsh measures were introduced, set to serve as barriers to entry, including limiting asylum seekers' rights to education and work, reducing access to the asylum system, militarising borders, building asylum processing centres at borders, and establishing provincial level repatriation centres (Mbiyozo, 2018:10). Securitisation of migration protocols resulted in restrictive measures to preclude individuals from accessing the asylum system, such as administrative obstacles and closure of urban RROs (Carciotto & Mavura, 2016:46). The moving of RROs to the borders imposed an unreasonable burden of costs on existing asylum seekers and refugees to complete administrative processes such as permit renewals, status interviews, assistance with lost permits and verification of permits for banking purposes (Polzer, 2013:8). Vigneswaran (2011:113) argues that the conditions at South African borders at the time suggested that immigration control functions were commonly implemented with little reference to centrally mandated law or policy.

As such, there was general non-compliance with respect to procedures for arrest of foreigners, procedural rights, sentencing procedures, the issuance of notice of deportation, extension of detention and provision of interpreters; detention at police stations and at the Lindela Detention Facility (Hiropoulos, 2017:2).

As mentioned above, the DHA became part of the security cluster of departments in South Africa. This happened formally in 2012 when DHA was moved into the 'Justice and Crime Prevention' cluster, increasing its focus on security measures such as limiting access to the asylum system, which became intertwined with national security (Carciotto & Mavura, 2016:45). The implication of such securitization was that the asylum management system had to 'protect' South African security, and this could only be done by limiting access to asylum processes with little protection to asylum seekers (Polzer, 2013:17). The moving of RROs to remote ports of entry was coupled with the detention of asylum seekers (Polzer, 2013:8). The problems associated with detention centres included high human rights violations, financial costs, and a historical failure to sustainably reduce illegal migration or strain on immigration systems (Mbiyozo, 2018:6). It should also be pointed out that the DHA's 2017 White Paper on International Migration established a Border Management Authority (BMA) within DHA which mandated it to screen and conduct risk profiling of asylum seekers at border posts (Van Lennep, 2019:13). Essentially, this highlights that the 2016 Border Management Bill allowed for uncontrolled power to the DHA, and as a result, further securitizes migration by proposing for the establishment of the BMA to oversee the movement of goods and people through the South African borders and to expand the DHA mandate to include policing functions (Van Lennep, 2019:11).

1.4 The Constitution's view on human rights of migrants in South Africa

To provide perspective of human rights within South Africa prior to the Zuma administration, the HRW (1998:7) underscored that South Africa's Constitution draws no distinction between noncitizens and citizens for most of the rights guaranteed in the Bill of Rights (bar its internal limitations). As such, the South African Constitution guarantees and protects most internationally recognised human rights and places upon the state an obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights (HRW, 1998:7). In this respect, Le Roux (2018:195) posits that the duty to do justice to illegal foreigners in accordance with constitutional norms begins with Section 12 (1) of the Bill of Rights, which provides that everyone has the right to freedom and security of person, which includes that the right is not deprived of freedom arbitrarily or without cause. The right to freedom and security of the person is also protected by the Bill of Rights, in particular the right not to be deprived of freedom arbitrarily or without just cause; the right not be detained without trial; the right to be free from all forms of violence from both public and private sources; the right not to be tortured in any way, and the right not be treated or punished in a cruel, inhuman or degrading way (HRW, 1998:7).

Confirming these rights, Khan (2018:21) maintains that while states do have powers to restrict the entry and stay of foreigners, they do not have unfettered discretion to decide on the admission of migrants or non-citizens. To explain, international human rights law recognises the right of

states to control their borders and to restrict entry within their territory, but the mere fact that a person entered a country illegally does not affect his or her rights to life, security of the person, equality before the law or other basic civil, and political rights (HRW, 1998:1). Thus, the competence to regulate admission in domestic legislation has to be exercised in due accordance with the legal norms of international law (Chetail, 2013:246). Human rights theory provides a basis to guide states on how treat foreigners, especially immigrants, and South Africa is no exception to this. The theoretical context for human rights and migration will be elaborated on in section 5 and fully assessed in Chapter 2.

Kneebone (2009:11) posits that the principle of non-refoulement prohibits states from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment, or other serious human rights violations. Kneebone (2011:12) underlines that the principle of non-refoulement applies to all asylum seekers and to persons both documented and undocumented in a state or attempting to enter a state. Article 3(1) of the 1951 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also stipulates that the prohibition on refoulement applies to situations in which there are substantial grounds for believing that a person, whether or not a refugee, would be subjected to torture if returned to his or her country (HRW, 1998:4). In conclusion, the regulation of immigration has to be exercised in full respect for the fundamental human rights and freedoms of foreign nationals, which are granted under a wide range of international human rights instruments and customary international law (Hiropoulos, 2017:15). This leads us to the specific problems relating to the focus of the study, which are outlined next.

1.5 Problem statement

Segatti (2011:32) argues that the South African government under the Zuma administration introduced a narrowly defined state security approach to migration in both legislation and practice. According to Peberdy (2009:139), the SA government took a hard-liner approach to border and heartlands policing, which led to the abuse of the rights of migrants, particularly African migrants who have to bear the brunt of restrictive measures and hostility. Consequently, the DHA's implementation of the country's asylum system moved away from providing protection to individuals fleeing persecution or large-scale instability and focused exclusively on identifying economic migrants for detention and deportation and violated the procedural guarantees laid out in South African and international law (Landau & Amit, 2014:542). Migrants and refugees are perceived as threats to national sovereignty and citizen livelihoods to most post-colonial states (Crush, 2020:4). Seeing them as threats is in line with the process of securitisation which

stretches the ordinary basket of threats to national security to include additional enemies and developing institutions to respond to them (Duncan, 2014:12).

Asylum seekers and refugees were routinely detained as illegal foreigners under the Immigration Act and were subjected to refoulement in contravention of international and domestic refugee law (Landau & Amit, 2014:542). The securitisation of migration protocols may have led to human rights abuses of migrants and may be inconsistent with the views on human rights in the Constitution of South Africa, 1996, and international human rights law. Subsequently, the general research question of the study is: *How did the securitisation of South Africa's migration protocols under the Zuma administration impact on human rights bestowed through the SA Constitution upon migrants in South Africa?* The general research question give rise to several secondary research questions. These questions are listed in the next section.

1.6 Secondary research questions

To answer the general research question, the following secondary questions have to be answered:

- 1) What is the theoretical underpinning for human rights in accordance with the SA Constitution which protects migrants' rights?
- 2) What was the impact of securitisation of South African migration protocols on SA's international human rights obligations to migrants?
- 3) What were the benefits and disadvantages of securitisation of SA migration protocols?
- 4) How can SA's migration legislation, policies and practices be optimally aligned with international human rights obligations?
- 5) What was the overall impact of the securitisation on South Africa's migration protocols?

The objectives of the study are aligned with the research questions and provided next.

1.7 Research objectives

The objectives in pursuit of answers to the questions are:

- 1) To describe and analyse the theoretical context of human rights in line with the SA Constitution which protects migrants' rights;
- 2) To describe and analyse the impact of securitisation of South African migration protocols on SA's international human rights obligations to migrants;

- 3) To analyse and evaluate the benefits and disadvantages of securitisation of SA migration protocols;
- 4) To determine and elucidate how SA migration legislation, policies and practices can be optimally aligned with international human rights obligations; and
- 5) To analyse and evaluate the overall impact of the securitisation on South Africa's migration protocols.

These objectives lead to the discussion on the central theoretical statement of the study.

1.8 Central theoretical statement

There are several theories of human rights which will be discussed in Chapter 2. In summary, it is accepted that human rights exist in order to protect the basic dignity of human life. The Universal Declaration of Human Rights (UDHR) further affirms that all human beings are born free and equal in dignity and rights and that all persons, without exception, are entitled to fundamental human rights, irrespective of whether one is a citizen or a migrant (Khan, 2018:17). While one of the most basic liberal beliefs about human dignity is that all humans are equal, it cannot be regarded as simply a product of morality. Moreover, according to Heard (1997) human rights should include the protection of basic freedom and the wellbeing required and fundamental to being a human. Theories of human rights based on dignity, wellbeing, or development, are all motivated by a desire to protect and cultivate some quality of life; because one is alive, one should lead a life filled with dignity and continuing development (Heard, 1997).

It is thus crucial to clearly investigate and articulate what human rights mean in the context of the South African Constitution to enable a baseline for understanding any deviations and allow for judgement on whether and/or how policies and legislation, imposed during the Zuma administration, may have infringed on human rights of migrants in South Africa. As was stated in the introduction, domestic migration legislation has to be exercised in line with the legal norms of international law (Chetail, 2013:246). Specifically, Le Roux (2018:195) emphasised that the duty to do justice to illegal foreigners begins with Section 12 (1) of the Bill of Rights of the South African Constitution, which provides that everyone has the right to freedom and security of person, and further enshrines the right to not be deprived of freedom arbitrarily or without cause. By extension of this argument, this would mean that in South Africa, migrants in general have the right to freedom and security of person.

Chetail (2013:230) further points out that according to international human rights law, all states are obliged to grant migrants the same benefits in terms of the law, administration, protection, and redress for injury that it gives to its own citizens, on condition that the protection that the

country gives its own citizens conforms to established standards of civilisation. Essentially, refugees have the right to the same treatment as other migrants generally in respect of seeking gainful employment, access to housing or higher education (HRW, 1998:5).

In reality, the research in dissertation shows that the Zuma administration regarded national security and sovereignty as the most important issue when considering the effects of migration (Aminaka, 2013:105). This was in line with the securitisation of migration paradigm, where states are supposed to defend their territorial integrity and political independence and also protect values such as economic independence, cultural identity, and societal identity (Khan *et al.*, 2018:80). The issue of security has become a predominant feature of the post-apartheid migration regime informed by a realist approach in which the state has to maximize power to protect its territory and people and pursue its national interests (Carciotto, 2018:64). Realism is based on assumptions that socially constituted groups have an innate tendency towards conflict as they are driven inherently by self-interest and as a result these groups seek power and control over resources and repress others to maintain that control leading to entrenched inequality (Duncan, 2014:12). Therefore, the views from realism perspective were in direct contrast with the more idyllically views part of human rights theory.

1.9 Methodological framework

Babbie and Mouton (2012:73) describe a research design as a plan or blueprint of how someone intends to conduct research. A research design addresses the planning of scientific inquiry and designing a strategy for finding out something (Babbie & Mouton, 2012:72). Bryman (2012:46) argues that a choice of research design reflects the priority being given to a range of dimensions of the research process to understand behaviour and the meaning of that behaviour in its specific social context and having appreciation of social phenomena and their interconnections. All research commences with the identification and clear formulation of a research problem (Babbie & Mouton, 2012:73), which has been done in section 1.2 above.

1.9.1 Methodological approach

In addressing the problem statement, a qualitative methodological approach was followed. Qualitative research is an approach that aims to explore and understand the meaning individuals or groups ascribe to a social or human problem (Creswell, 2014:4). Qualitative research attempts to study human action from the perspective of the social actors themselves (Babbie & Mouton, 2012:270). Qualitative research gives rich descriptions of people's lived experiences, events or situations and pays attention to rich detail, meaningful social and historical contexts, and experiences (Suter, 2012:344). Qualitative research is especially effective for studying the subtle

nuances of attitudes and behaviours and for examining social processes over time (Babbie & Mouton, 2012:308).

1.9.2 Data collection instruments

The secondary data collection instrument that was used for this study was a literature review. A literature review examines key ideas, key issues, and findings in publications relevant to a specific area of study (Denscombe, 2012:57). This literature review therefore focused on the securitisation of migration protocols during the Zuma administration by analysing the factors that motivated the South African government to securitise its migration protocols and the impact of immigration on public services and challenges such as competition for limited resources such as housing, welfare system and competition between migrants and citizens in the labour market and xenophobia. According to Kumar (2012:48) a literature review serves to enhance and advance the knowledge of the researcher and consolidate the knowledge base of the researcher in the subject area and helps the researcher to examine findings in the context of existing body of knowledge. As such, the literature review also included an analysis of human rights abuses, xenophobic violence, and police brutality as part of securitisation of migration protocols under the Zuma administration. Sources for the literature review included books, documents and statistics from the South African government, non-governmental organisations (NGOs), expert publications, and relevant databases, such as:

- SciELO accredited Journals
- JSTOR
- Researchgate
- SSRN Journals
- IBSS Accredited Journals
- Sage publications
- Published academic research articles

A systematic literature review was used to identify, evaluate, and interpret all available research relevant to the securitisation of migration protocols during the Zuma-administration (2009-2017). The literature review was based on books, journals and articles mentioned above. Documents were also used to identify any gaps in current research in order to suggest areas for further investigation. Document analysis is a process of evaluating documents in such a way that empirical knowledge is produced, and understanding is developed (Bowen, 2009:33). Possible research interests beyond this study were to investigate whether it is possible for migrant sending countries to cooperate with South Africa to manage and control illegal migration. The strategy that was used to analyse the data reviewed in the literature study is now expounded.

1.9.3 Strategy for data analysis

Content analysis and discourse analysis were the main strategies used to analyse documents and texts from journals and articles relevant for the study.

1.9.3.1 Content analysis

In this study, content analysis was employed to determine the presence of certain words or concepts within texts on international migration and securitisation of migration in the South African context. According to Bowen (2009:3) content analysis is the process of organising information into categories related to the central questions of research. Content analysis is used to examine words, phrases within a wide range of texts including books, book chapters, essays as well as informal conversations and headlines (Babbie & Mouton, 2012:491). To conduct a content analysis on any text, the text is coded or broken down into manageable categories on a variety of levels e.g., words, phrase, sentence, or theme and examined using conceptual analysis (Busch et al, 2005:2). Coding systems identify characteristics of the text content such as frequency, direction, intensity, and space (Neuman, 2014:374).

This study was conducted through thematic analysis by selecting words and phrases such as human rights, human dignity, international human rights law, globalization, international migration, illegal immigration, and securitisation of migration. The coded data was analysed to determine which themes occur most frequently and in what contexts and how they are related to each other. Coding involves reading and rereading the text trying to make sense of the patterns and themes that emerge from data (Babbie & Mouton, 2012:493). In thematic analysis, a researcher analyses the presence, meanings and relationships of words and concepts and make inferences about messages within texts (Busch *et al.*, 2005:2). Keywords and key terms that were used included 'refugees', 'asylum seekers', 'economic migrants', 'securitisation of migration', national security, national interests, jobs, labour market, state sovereignty, 'irregular migration', 'human rights', 'xenophobia' and 'xenophobic violence in South Africa. By examining the repetition of certain words and phrases in the texts, the researcher was able to make inferences about the philosophical assumptions of a writer, written piece and even the audience for which the piece was written (Babbie & Mouton, 2012:491).

A simple type of content analysis is sentimental, a technique used to capture people's opinion or attitude toward an object person or phenomenon (Bhattacharjee, 2012:116). Words and phrases such as illegal migrant, unemployment, national security, infectious diseases, crime and drugs, human trafficking associated with migrants implied a hostile attitude towards migrants by politicians, community leaders and South African citizens. Content analysis is able to detect the existence of propaganda, describe attitudes and behavioural responses to communications and

determine psychological or emotional state of persons or groups (Busch *et al.*, 2005:3). Public statements made by politicians and traditional leaders explicitly made negative remarks about migrants and evoked anti-immigrant sentiments among the citizens of South Africa and occasionally incited xenophobic violence.

1.9.3.2 Discourse analysis

Researchers use discourse analysis to understand the world by investigating the underlying meaning of what people say and how they say it, whether in face-to-face conversation, documents, on-verbal interaction, or images (Ho & Limpaecher, 2021). Mogashoa (2014:106) argues that a discourse is not simply a neutral device for imparting meaning, people seek to accomplish things when they talk or when they write. Language is depicted in discourse analysis as producing the social world, not simply a means of understanding the world (Bryman, 2012:528). The speeches of South African politicians during electioneering or service delivery protests were useful in detecting stereotypes and attitudes to determine the politicians' attitudes towards migrants. Language can be used to represent speakers' beliefs, positions, and ideas in terms of spoken texts like conversation, written or oral messages convey meanings if we analyse the underlying meanings of words (Mogashoa, 2014:112). There has been a tendency to scapegoat migrants on the failures of local government to deliver services, poverty, and high unemployment rate in South Africa. Discourse analysis is concerned with the strategies people employ in trying to create different kinds of effect (Bryman, 2012:529). Given the power of the written and spoken word, critical discourse analysis is necessary for describing, interpreting, analysing, and critiquing social life reflected in text (Mogashoa, 2014:105).

The researcher was able to identify anti-foreigner sentiments in newspaper articles and subtle texts in journals and government publications through discourse analysis. Discourse analysis involves the examination of language beyond the sentence to understand how it functions in a social context (Ho & Limpaecher, 2021). Written or oral messages convey meanings if we analyse the underlying meaning of words (Mogashoa, 2014:105). Government policy documents and publications of various state organs such as the department of labour, Department of Health and the Department of Home Affairs shed some light on attitudes towards migrants with useful words such as jobs, drugs, crime, and disease. Discourse analysis aims to systematically explore often opaque relationships between discursive practices, texts and events and wider social and cultural structures (Mogashoa, 2014:107). The statements made in the print media and social media reveal both open and latent attitudes towards migrants and influence public opinion. It is usually those in position of power such as local government and national government who have the influence on discourse analysis.

Validity and reliability in secondary analysis may vary from source to source (Kumar, 2014:197). It is necessary to determine the authenticity, credibility, accuracy, and representativeness of the selected documents (Bowen, 2009:32). *Authenticity* is the extent to which a document is genuine, *credibility* is the extent to which a document is free from errors, *representativeness* is how typical a document is, and *meaning* is the significance of a document's content (Morgan, 2022:71). Documents should not be treated as necessarily precise, accurate or complete readings of events that have occurred (Bowen, 2009:32).

The level of trustworthiness of data is an important factor for researchers who want to reuse research data (Bote & Termens, 2019:333). Trustworthiness refers to whether the process used to create the data is credible, whether the data were consistently generated and whether rigorous analysis methodologies were followed to ensure that the data were credible for reuse (Bote & Termens, 2019:333). The findings from literature review were recorded according to themes and general research questions to enable easy integration when compiling reports. Adherence to ethical conduct was essential in developing the literature study. Ethical considerations are highlighted in the next section.

1.10 Ethical considerations

Ethics approval is required before any academic research project is allowed to go ahead (Denscombe, 2012:135). Assessing whether there are ethical issues involved in studying human beings, has become institutionalised through research ethics committees at most universities (Babbie & Mouton, 2012:528). This study was approved by the North-West University Humanities Research Ethics Committee (NWU-AREC) Ethics as No Risk. Ethics Number: NWU-01045-20S7.

Law (2005:6) pointed out that concerns about the secondary use of data or a literature review generally focus on the potential for harm to the individual subjects of the research and the lack of informed consent. The original researcher may not have obtained the consent of research participants for the analysis of data by others (Bryman, 2012:587). However, this study was restricted to the usage of published literature or secondary data analyses which were already in the public domain and therefore there was no personal data or identifying information on research subjects. Tripathy (2013:1478) made it clear that if the data are freely available on the internet or other public forum, permission for further use and analysis is implied. However, the only research instrument which was used in this mini-dissertation was a literature study and no empirical data was generated.

Babbie & Mouton (2012:526) assert that the fabrication or falsification of data is regarded as one of the most serious transgressions of the scientific code of ethics. Very importantly, contextual understanding on how to identify and counter risks of misinterpretation should form a basis for

planning and reflection in any qualitative secondary analysis (Morrow *et al.*, 2005:18). In this study the challenge of misrepresentation was mitigated through following the research methodological process and further verification from other literature sources. The data were evaluated for certain criteria such as the methodology of data collection, accuracy, period of data collection, purpose for which it was collected and the content of data. As Denscombe (2012:136) explains, the researcher should uphold research integrity through using good quality design and suitable methods. Finally, plagiarism is the use of someone else's work claiming to be yours and is one of the important ethical issues in using data from secondary sources (Kumar, 2014:289). In this study, the ownership of the original data was properly acknowledged and cited.

1.11 Limitations of the study

Asylum seekers and refugees were often conflated with immigrants in general in discussions of labour market competition as a national security threat because they were not captured in national identity and fingerprint databases (Polzer, 2013:17). For this study, illegal and legal migrants, asylum seekers and refugees were collectively referred to as 'migrants' and more specific data pertaining to the legal-technical definitions would be required to address nuances and variations on this concept. This was not in the purview of the study. The use of the collective noun "migrants" also aimed to simplify the arguments in the dissertation even though it may be a too simplistic term for legally different definitions. The main limitation was that this study did not explore the different nuances applicable to migrants, asylum seekers, and refugees, but instead sought to understand migration more in general terms and its securitisation under the Zuma administration. It was also not a comparative study between different South African political administrations. As a literature study, this study was based solely on secondary sources that were interpreted and analysed. There was limited literature available on the securitisation of migration in South Africa during the Zuma-era. Although the study inherently leaned towards a legal, normative, and humanitarian perspective on migration it omitted the 'tension' between the legal prescripts and the practical realities of migration, human nature and government responses which was considered to be outside the parameters of a mini-dissertation emanating from a literature review.

1.12 Significance of the study

The study focused on the impact of securitization of migration protocols since it had an adverse impact on human rights of migrants. The study highlighted the universal nature of human rights and governments obligations to respect and safeguard them irrespective of citizenship or migration status. The study was useful in understanding the theory of human rights as pertaining to the South African migration protocols and how to align South Africa's migration protocols to its international human rights obligations. It was concluded in this study that the restrictiveness of

securitized migration policies in addition to the adverse effects on the human rights of migrants, it also deprived South Africa of much needed skills by barring foreign nationals from working and residing in South Africa. The study exposed the inefficacy of detention and deportation since the number of undocumented migrants kept escalating while government spent huge amounts to control immigration. The study suggests that South Africa should cooperate with SADC member states whose people are migrating to South Africa and the AU to manage migration and implement the SADC protocol on free movement.

1.13 Chapter layout

Chapter 1: The Introduction to international migration, the process of securitisation and the securitisation of South African immigration protocols under the Zuma-administration

The chapter provided background and introduction to the securitization of migration protocols and established the theory of human rights as the central theoretical context. The chapter introduced the Zuma administration's response towards migrants and South African citizens' attitudes towards migrants. Specific migration legislation such as the Immigration Amendment Act 13 of 2011 and the Refugee Amendment Act 11 of 2017 are highlighted as examples of the impact this migration legislation had on migrants' human rights. The chapter also related the South African Constitution view on the human rights of migrants vis-à-vis the securitised migration protocols. This chapter also explained the problem statement, research questions, central theoretical statement, the methodological framework, and the literature review which guided the study.

Chapter 2: The theoretical context of human rights in the SA Constitution

This chapter described and analysed the theoretical context which underpins the protection of migrants' human rights in the South African constitution. The chapter focused more on the theoretical underpinnings of human rights from its theoretical foundations to natural rights theory which postulated that natural rights are absolute and belong to every human being on the basis of their existence and trump any other considerations. This theory was underscored by the argument that natural rights in their modern form as human rights are inalienable, indivisible, and universal.

Chapter 3: The impact of the securitisation of SA migration protocols and practices on SA's international human rights obligations to migrants

The impact of securitisation of SA's migration protocols and practices on SA's international obligations to immigrants were analysed in this chapter. It was illustrated how securitisation of migration protocols curtailed migrants of their human rights by denying them the right to human

dignity, equality, and freedom. This was evidenced by the amendments of migration protocols which allowed for arbitrary detention and deportation of migrants, denying migrants the right to work and access to educational opportunities in South Africa.

Chapter 4: The benefits and disadvantages of the securitization of SA migration protocols during the Zuma-administration (2009-2017)

This chapter analysed and evaluated the benefits and disadvantages of the securitisation of South African migration protocols. The chapter evaluated the benefits vis-à-vis the advantages of securitisation of migration protocols of South Africa. The chapter analysed the benefits of securitisation in view of citizens' support of government migration policies and preserving the labour market for SA citizens. The chapter also analysed the risks associated with illegal immigration such as drug trafficking, terrorism, and human trafficking. The chapter analysed the securitisation of migration policies and the lack of skills shortages in the South African economy and the need to recruit skilled migrants to boost the economy which is hampered by the lack of skills.

Chapter 5: Realigning SA's Migration Protocols According to International Human Rights Obligations

This chapter examined and explained how SA's migration legislation, policies and practices may be optimally aligned with international human rights instruments. Taking the requirements and obligations of human rights into account, specific recommendations are made to realign SA's migration protocols according to the Constitution and international human rights obligations.

Conclusion: The overall impact of the securitisation on South Africa's migration protocols

The chapter answered the general research question *"How did the securitisation of South Africa's migration protocols under Zuma administration impact on human rights bestowed through the SA Constitution upon migrants in South Africa?"* In order to answer the general research question, the chapter drew from the main points and conclusions in chapters 2, 3, 4 and 5. The chapter further explained the impact of securitisation of South African migration protocols and practices had on the universal theory of human rights and how it relates to the South African Constitution.

The chapter explained and analysed the overall impact of the securitisation on South Africa's migration protocols on the universal theory of human rights and analysed the impact of securitisation of SA's migration protocols on SA's international human rights obligations. The chapter also evaluated the benefits and disadvantages of securitisation on South Africa's migration protocols during the Zuma administration.

CHAPTER 2: THE THEORETICAL CONTEXT OF HUMAN RIGHTS IN THE SA CONSTITUTION

2.1 Introduction

The human rights theoretical context of the South African Constitution 1996 is premised on equality, human dignity, and freedom. The idea that human rights are universal and are to be enjoyed without discrimination, seems to require foundational support from some principle of human equality (Nickel & Reidy, 2009:55). According to James Griffin, having human dignity is having the capacity to choose a plan of life for us and to successfully pursue it without interference. Human rights protect human dignity by protecting this capacity, as quoted by Cruft *et al.* (2015:10). The concept of non-discrimination prohibits discrimination on grounds such as race, social origin, sex, age, and birth and is largely modelled the norms of the Universal Declaration of Human Rights (UDHR). The principles of human rights have philosophical underpinnings which will be discussed in the sections 2.2 and 2.3. The philosophical departure point will then be brought into line with the contemporary theoretical views on human rights which will be followed by a discussion on the theoretical context of human rights within the South African Constitution Act 108 of 1996 (the Constitution) as also mandated through international norms, customs, and declarations.

2.2 The theoretical context of human rights: A general overview

According to Donnelly (1982:391) the term human rights is generally taken to mean what John Locke and his successors meant by natural rights, as rights or entitlements held simply by virtue of being a human being. Heywood (2013:342) adds that human rights are a modern and secular version of natural rights to which people are entitled by virtue of being humans. Locke argued that there are certain rights that belong to individuals by virtue of their humanity; these are natural products of man's essential nature and hence inalienable or cannot be renounced; universal meaning that they belong to all people equally (Dupre, 2010:17).

Human rights are equal and inalienable entitlements of all individuals that may be exercised against the state and society; a distinctive way to seek to realise social values such as justice and human flourishing (Donnelly, 2007:284). Nickel & Reidy (2009:41) argue that human rights are rights held by all living human beings regardless of their national, religious, ethnic, gender, racial or other distinguishing identities. Moreover, human rights are said to exist independently from the customs or legal systems of particular countries (Walters, 1995).

2.3 The social contract theory and human rights

According to Thomas Hobbes (cited by Stumpf & Abel, 2002:474), political society arose because the drive for self-preservation caused human beings to leave the perilous state of nature and formed a social contract that transferred their individual rights to a sovereign power that could protect the lives of all. Hobbes (1651:105) believed that men naturally love liberty, and dominion over others and introduced the restraint to live in commonwealths for their own preservation, and a desire to live a contented life by getting themselves out from that miserable condition of war which is a result of the natural passions of men when there is no visible power to keep them in awe that tie them by fear of punishment to the performance of their covenants and the observation of the laws of nature.

According to Hobbes (cited by Laskar, 2013:2), subjects had to surrender all their rights and vest all liberties in the sovereign for the preservation of peace, life and prosperity of the subjects using natural law as a moral guide for the sovereign for preservation of the natural rights of the subjects. Men had to erect a common power to defend themselves from the invasion of foreigners and protect themselves from the injuries of one another by conferring all their power and strength upon one man or upon one assembly of men, that may reduce all their wills and plurality of voices into one will (Hobbes, 1651:107). These multitudes were united in one person called a Commonwealth or *Civitas* or the *Great Leviathan*, or that mortal god to which they owe their peace and defence (Hobbes, 1651:108).

On the contrary, Locke (1690:107) believed the state of nature has a law of nature to govern it, which obliges everyone and reason that teaches all mankind who consult it and all being equal and independent in which no one ought to harm another in his life, health, liberty, or possessions as all men are the workmanship of one omnipotent and infinitely wise Maker. According to John Locke (cited by Haworth, 2004:10), it is the law of nature's foundational principle that we are each bound to recognise others as equals and that we have certain fundamental natural rights, notably a right to life and right to liberty. John Locke (cited by Baradat, 1994:67), believed that people would behave decently when left alone and argued that they would be free to exercise their rights without hindrance or regulation, as long as they did not interfere with the rights of others. Locke (1690:147) argued that a political society is constituted by a consent of any number of freemen who unite and incorporate into a society as the beginning of any lawful government in the world.

According to John Locke (1690:163) the great end of men's entering into society is the enjoyment of their properties in peace and safety dependent on the laws established in that society. Locke (cited by Dunn, 1995:113) argued that governmental power should serve the civil interests of human beings by protecting their lives, liberties, estates, and their rights. Locke (1690:163) believed that the first fundamental positive law is the establishment of the legislative power for

the preservation of the society and every person in it. According to Locke (1690:163) the legislative is the supreme power of the commonwealth, sacred and unalterable in the hands where the community has placed it.

John Locke (cited by Stumpf & Abel, 2002:482) rejected all forms of absolutist rule, arguing that since government has arisen from the consent of the governed, rulers who violate the terms of the contract by failing to promote the common good forfeit their authority. Locke (1690:114) argued that the freedom from absolute, arbitrary power is so necessary and closely joined with a man's preservation that he cannot part with it. Locke believed (cited by Haworth, 2004:100) that we are all fundamentally equal and have certain fundamental rights and natural rights and that no government is legitimate unless it remains in place with consent of the governed, so much so that when that consent is withdrawn, the people have a right to replace it with another. Locke (1690:162) argued that whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated, and known to the people, and not by extemporary decrees to ensure the peace, safety, and public good of the people. Locke (1690:166) argues that it is wrong to think that the supreme or legislative power of any commonwealth can do whatever it wills and dispose of the estates of the subject arbitrarily or take any part of them at pleasure.

Nickel (2019) agrees that under political rights every citizen should have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law of his/her country. In this regard, John Rawls argued that just and decent states have a duty to assist burdened societies unable to fulfil human rights, including basic economic and social rights in becoming well-ordered states within which human rights are fulfilled (Nickel & Reidy, 2009:62). James Griffin (cited by Gunsman, 2015:21), argued that human rights should not only constrain states but also govern behaviour in the personal sphere. Serfontein (2019:10) added that although humans have a natural tendency to follow morally grounded rules of behaviour even in the absence of formal legal principles, it is important to adopt a legal system to assist in giving recognition to rights which can be claimed when humans infringe on the rights of others.

Donnelly (2007:285) argues that the concept of human rights concerns the relationship between the individual and the state and involves the status, claims and duties of the state in the jurisdiction of the latter. According to Weston (1984:263) human rights are qualified by the limitation that the rights of any particular individual or group are restricted as much as it is necessary to secure the comparable rights of others and the aggregate common interest. Nickel & Reidy (2009:59) quotes John Rawls's theory of justice and affirm that fundamental to human rights is the idea that the right (proper) relationship between persons is always one of reciprocity. Serfontein (2019:3)

agrees with this and highlights that human rights do not only provide legitimate claims, but they also oblige all humans to withhold themselves from infringing upon the human rights equally conferred to others, as well as for selfish reasons.

Weston (1984:263) further explains that human rights represent individual, and group demands for the shaping and sharing of power, wealth, enlightenment, and other cherished values in the community process, most fundamentally the value of respect and reciprocal tolerance and mutual forbearance in pursuit of all other values. Donnelly (2007:283) holds that human rights are universal in the sense that they are held universally by all human beings. The fact that these rights are referred to as 'human rights', clarifies that they are general rights equally possessed by all humans (Pennock, 1981:5). Donnelly (2007:283) argues that all societies cross-culturally and historically manifest conceptions of human rights in line with the aforementioned. Taran (2000:16) asserts that human rights are considered to be universal because they apply everywhere and indivisible in the sense that political and civil rights cannot be separated from social and cultural rights; and also, inalienable because they cannot be denied to any human being. Donnelly (2007:287) argues that "*whatever our other religious, moral, legal and political resources, we all need equal and inalienable human rights to protect us from threats emanating from market economies and bureaucratic states*".

2.3.1 The utilitarian view on human rights

According to Roddey *et al.* (1967:196) utilitarianism repudiated the entire natural law and natural rights doctrine, together with the social contract theory of state origin arising from it. (Bentham, 1781:15) defines utility as a property which produces benefit, advantage, pleasure, good or happiness to prevent the happening of mischief, pain, evil or unhappiness to the community or individual. Bentham (1781:61) believed that the business of government is to promote the happiness of the society, by punishing and rewarding. Positivist law resulted from the combination of Bentham's rejection of natural law, his utilitarianism, and his conviction that government should take positive steps to maximise the happiness of the society (Baradat, 1994:99). Bentham (cited by Igwe, 2015:381), argued that law and rights need government in order to exist and that without the government, law and rights are futile. For Jeremy Bentham (cited by Habibi, 2008:4), people's rights have to originate from laws enacted by established governments to speak of legal rights. According to Bentham (cited by Igwe, 2015:381), "*natural rights is simple nonsense, natural and imprescriptible rights, rhetorical nonsense, and nonsense upon stilts because natural rights are incorporeal, anarchical and cannot function as a legal restraint*".

Utilitarians believed that every individual should be left free from state interference, thus allowed to seek his own advantage (Rodee *et al.*, 1967:197). John Stuart Mill (1859:18) argued that silencing the expression of an opinion is diminishing the human race's prosperity. John Stuart Mill (cited by Escamilla, 2008), was concerned by the prospect of one societal class dominating another. Something he especially feared was the tyranny of the majority that results in individual talent losing its identity. According to Mill (1859:7) the 'will of the people' practically means the will of the majority, who may desire to oppress the ideas or opinions of a minority in society.

By extension of the arguments above, international human rights law essentially serve as individual legal entitlements primarily against all states and states entities and allow humans to legitimately claim equal protection of their basic needs, respect for their dignity and the fulfilment of their ideal to live a life worth living (Serfontein, 2019:4). Nickel & Reidy (2009:43) conclude that some human rights purport to be binding whether or not a state recognises them in its domestic laws or through the ratification of human rights treaties, to suggest that some human rights are universal moral rights that bind states and individuals, apart from and prior to domestic or international law. With regards to international conventions, the Universal Declaration of Human Rights will be discussed next.

2.4 The Universal Declaration of Human Rights of 1948

The Universal Declaration of Human Rights (UDHR) has done much to put human rights permanently at the forefront of the political debate following its adoption by the General Assembly of the United Nations on 10 December 1948 (Dupre, 2010:19). Directly motivated by the atrocities of the recently ended Second World War, this formal expression of the primacy of human rights reasserted the commitments contained in the UN's founding Charter and elaborated the theoretical basis for those rights: *"All human beings are born free and equal in dignity and rights and that they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"* (Dupre, 2010:19). In concurrence, Article 2 of the UDHR states that: *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.

Other than the Charter of the United Nations, the UDHR is not a treaty to which states can become party to, but it is instead a statement by the international community of minimum standards of state practice and is also regarded as an articulation of states' human rights obligations as parties to the Charter of the United Nations (HRW, 1998:1). Although not binding on states in the way as signed treaties, the UDHR has guided the political organs of the United Nations in their interpretation and application of the human rights clauses in the Charter (Dugard, 1994:204).

Hannum (1996:289) argues that the UDHR was the foundation of much of the post-1945 codification of human rights, and the international legal system such as global and regional treaties were based on the UDHR. According to Weston (1984:273), rights set out in the UDHR are the sum of all the important traditional political and civil rights of national constitutions and legal systems, including equality before the law; protection against arbitrary arrest; the right to a fair trial; freedom to own property; freedom of thought, conscience, and religion; freedom of opinion and freedom expression; freedom of peaceful assembly and association. Included in the UDHR's protections of civil and political rights are the prohibition of slavery, inhuman treatment, arbitrary arrest, and arbitrary interference with privacy as well as a broad, non-discrimination provision that mandates equality on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, birth, or other status (Hernandez-Truyol, 1997:235).

Dugard (1994:204) argues that the influence of the UDHR has been immense because it inspired the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and several regional human rights conventions and used as a model for most national bills of rights. The International Covenant on Economic, Social and Cultural Rights elaborates upon most of the civil and political rights enumerated in the UDHR, such as the right to work, right to social security, right to health, right to education and rights relating to culture and science (Weston, 1984:275). The ICCPR and its Optional Protocol incorporate almost all rights proclaimed in the UDHR, including the right to non-discrimination (Weston, 1984:274). One of the main reasons of including social rights in human rights documents and treaties was to promote serious efforts to combat poverty, lack of education and unhealthy living conditions in countries all around the world (Nickel, 2019). The contents of the UDHR can be considered as reflecting internationally accepted principles of law, as they are enshrined by the constitutions and domestic legal provisions of many states (Lattmann & Vizi, 2014:25). The general human rights obligations for governments follow next.

2.5 The South African Constitution and human rights

This section starts of and sets the scene by explaining the general human rights obligation for governments throughout the world, followed by a discussion on human rights in the context of the Constitution, continued by a specific focus on the human rights of migrants covered in the South African Constitution.

2.5.1 The general human rights obligations for governments

According to the Global Migration Group (GMG) (2016:5) the obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights and the obligation to protect requires States to protect individuals and groups to ensure their enjoyment

of human rights. The duty to protect enjoins the state to take positive action to protect citizens and other people within its jurisdiction from violations that may be perpetrated by private actors or other states (Chirwa, 2004). Governments must abstain from interfering with the liberty of the individual or refrain from interfering with the individual's fundamental rights and freedoms which serve to protect liberty (Van Kempen, 2013:10). Marks (2016:13) argues that it is the duty of states to promote and protect human rights and fundamental freedoms regardless of national and regional particularities and various historical and religious backgrounds.

According to Montero (2014:152) the general obligation to contribute to the enforcement of human rights worldwide requires that states cooperate in monitoring the compliance of other governments with human rights standards and carry out reasonable actions to protect human beings from atrocities, including military actions and humanitarian interventions. The humanitarian responsibility conception states that statesmen are first and foremost human beings who have a fundamental obligation to respect and defend human rights around the world (Jackson, 1995:117). The international community's appreciation of the unique worth of every human being led not only to a concern for the elimination of elements destructive of the individual, but also to a concern for the creation of conditions which would enable him or her to develop and flourish (Piechowiak, 1999:4).

The general obligation to progressively enhance the capacity of all states to fulfil human rights involves the provision of direct assistance to societies lacking the resources to deliver on human rights (Montero, 2014:152). Governments as intermediary duty-holders should try and intervene to safeguard human rights from actions by their citizens, but those citizens also bear the direct responsibility to respect the human rights of others (Heard, 1997). South Africa is no exception and the articulation of human rights within the SA Constitution will be expounded next.

Kavuro (2019:1526) contends that the primary point of departure is that the South African Constitution (the Constitution) is informed by the natural law theories and thus guarantees certain fundamental rights in the Bill of Rights to all without distinction of any kind. The Constitution affords everyone a broad spectrum of civil-political and socio-cultural rights without distinction based on race, ethnic or social origin, belief, culture, language, and birth (Ntlama, 2018:37). The Constitution protects and safeguards the rights of all people in the country and affirms the democratic values of human dignity, equality, and freedom (Rautenbach & Malherbe, 2004:292). The following rights are protected in the Constitution: the right to life, freedom, and security of the person; the right against slavery, servitude and forced labour; the right to privacy, freedom of religion, belief, expression, opinion, assembly, movement, association, and a range of property and labour rights (Andrews, 2009:488).

Section 1 of the Constitution identifies constitutional supremacy, the rule of law, human rights and freedoms, representative democracy, and good governance as the founding constitutional values (Dube, 2020). Moosa (2017:3) argues that while the Constitution seeks to redress the injustices of apartheid that divided society in SA into disparate classes, it also seeks to nurture SA into becoming a just and equal society for future generations. Cementing its absolute commitment to human rights, the Constitution outlines in the founding provisions the values on which the new democratic South Africa is premised, including human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution, and the rule of law (Andrews, 2009:488). According to Serfontein (2019:7), the 1996 Constitution entailed respecting the equal worth of all humans although they differ regarding their nature, life conditions, social circumstances as well as personal biographies and decisions.

Moosa (2017:4) argues that, under the 1996 Constitution, law is used to enforce respect for and protection, promotion, and fulfilment of rights. Due to South Africa's racial history of past inequalities towards humans and their current diverse population, the right to equality deserved special attention (Serfontein, 2019:7). The Bill of Rights section 9(3) outlaws both direct and indirect discrimination, an approach that reflects a deep appreciation of the invidious manner in which discrimination is manifested (Andrews, 2008:841). The Bill of Rights contains a general commitment to equality before the law, equal protection under the law, and provides several grounds on which the states may not unfairly discriminate, including race, colour, gender, religion, ethnicity, age, disability, and sexual orientation (Andrews, 2008:842).

Section 10 of the Constitution stipulates that everyone has inherent dignity and the right to have their dignity respected and protected (Dugard, 1997b:748). Immanuel Kant (cited by Habibi, 2008:6) described human rights as interpreted to be political specification of the supreme principle of morality that every human being is of infinite worth and dignity and should be treated as an end and never as a means only. According to Bilchitz & Du Toit (2016:3), "*everyone is equal before the law and has the right to equal protection and benefit of the law*" as enshrined in Section 9 of *the SA Constitution*. Section 9 (3) prohibits direct or indirect unfair discrimination on any ground (Rautenbach & Malherbe, 2004:330).

Section 12(1) of the Constitution stipulates that the right to freedom and security of the person is protected by the Bill of Rights, in particular the right not to be deprived of freedom arbitrarily or without just cause, the right not to be detained without trial and right to be free from all forms of violence from both public and private sources, the right not to be tortured in any way and the right to not to be treated or punished in a cruel, inhumane or degrading way (HRW, 1998:7). The Bill of Rights provides safeguards against slavery, servitude or forced labour and protection of privacy of everyone, freedom of expression and the right to demonstrate, picket and present petitions

(Dugard, 1997b:749). The Constitution incorporated a number of justiciable socio-economic rights which give to all South Africans guaranteed rights of access to housing, healthcare, water, food, and social security (Jeffery, 2010:83). The Bill of Rights, enshrined in Chapter 2 of the Constitution, is the cornerstone of South Africa's democracy and affirms the rights and values of dignity, equality and freedom that comprise the foundational constitutional values (Dube, 2020). The Bill of Rights recognises fundamental rights for all persons by enshrining the rights of all people in the country and affirming the democratic values of human dignity, equality, and freedom (Hicks, 1999:405). As will be made clear in the next section, and in line with the international instruments, the Constitution draws no distinction between non-citizens and citizens for most of the rights guaranteed in the Bill of Rights (HRW, 1998:7). The way this relates to the rights of immigrants will be explained next.

2.5.2 Human rights of migrants according to the SA Constitution

Ntlama (2018:37) asserts that the Constitution is the main source for developing the legislative framework to regulate the protection of the rights of immigrants in South Africa. The most important fundamental right is encapsulated in the right to equality in Section 9 of the Constitution, which guarantees legal equality and protection from discrimination (Hicks, 1999:405). Section 9(3) of the Constitution qualifies what kind of discrimination is prohibited; the grounds, involving race, gender, sex, disability, religion, marital status, conscience, belief, culture, language, and birth (Hicks, 1999:405). Section 10 of the SA Constitution stipulates that the right to dignity applies universally, irrespective of whether one is a foreign national or citizen (Ntlama, 2018:43). *"The duty to do justice to illegal foreigners in accordance with constitutional norms, begins with s12(1) of the Bill of Rights"*, contents Le Roux (2018:197). Cote (2018:223) points out, in addition Section 21 of the Constitution provides everyone with freedom of movement and residence within the country. *"Everyone' includes citizens and non-citizens within the Republic to enjoy freedom of movement and residence"* (Mauritz, 2018:167). Moreover, the rights afforded to everyone are granted to individuals whose presence in South Africa is legally or illegally obtained, and whether an individual's stay within the Republic is on a temporary or permanent basis (Mauritz, 2018:167). Rautenbach & Malherbe (2004:54) also confirmed that although foreigners are sometimes treated differently, they are not without rights.

According to Ntlama (2018:48), the element of non-discrimination in immigration law is also linked to the Promotion of Just Administrative Action (PAJA of 2000), as entrenched in Section 33 of the Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and also stipulates that everyone whose rights have been adversely affected by administrative action, has the right to be given written reasons and provide for the review of administrative action by a court or, where appropriate, an independent and

impartial tribunal. Mireku (2002:407) points out that PAJA of 2000 also aims to promote an efficient, accountable, open, and transparent administration, and seeks to achieve these goals and guidelines binding on all public administrators in their decision making. Administrators are required to provide written reasons for their decisions. PAJA also gives members of the public the right to challenge administrative decisions in court (Mireku, 2002:406). The Constitution also incorporates the right of access to information, to due process, the right to a fair trial and access to courts. Section 34 of the Bill of Rights in the SA Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing in a court or where appropriate, or in another independent and impartial forum.

The HRW (1998:8) states that the Constitution guarantees and protects most internationally recognised human rights, and places upon the state an obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights. With a few exceptions, the rights in the Bill of Rights are guaranteed for 'everyone': everyone includes every citizen and every alien in the national territory (Rautenbach & Malherbe, 2004:296). The HRW (1998:8) proposes that the South African Bill of Rights in its Section 34, recognises a number of other rights relevant to the protection of migrants; the right to equality before the law and equal protection and benefit of the law; the right to life; an absolute prohibition on slavery, servitude and forced labour, the right to privacy; freedom of expression; freedom of assembly and peaceful demonstration; freedom of association; the right to access to any information held by the state, and the right not to be deprived of property except in terms of a law of general application.

According to Hicks (1999:406), Section 35 of the Bill of Rights lists multiple protections, including the right to be informed of the basis for detention, to consult with a legal consultant or to challenge the detention before a court and to be detained only in conditions consistent with human dignity. Section 35(2)(e) of the Bill of Rights provides that every detained foreigner has the right to conditions of detention that are consistent with human dignity, including at least exercise, and the provision of state expense, of adequate accommodation, nutrition, reading material and medical treatment (Le Roux, 2018:218). The South African Bill of Rights is considered binding on the legislature, the executive, the judiciary, and all organs of the state and applies to all laws (HRW, 1998:8). In summary, Dugard (1997b:748) asserts that the Bill of Rights enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality, and freedom.

Dugard (1997a:85) argues that the clearest evidence of the desire to achieve harmony between South African and international human rights jurisprudence, is provided by Section 39 (1), which declares that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and

freedom, and has to consider international law or consider foreign law. This requirement and the relationship between the Constitution and other international human rights instruments will be discussed next.

2.5.3 The SA Constitution and international human rights agreements

The HRW (1998:7) notes that, like the international instruments, the Constitution also draws no distinction between non-citizens and citizens for most of the rights in the Bill of Rights. The Constitution accords comprehensive rights and freedoms to ‘everyone’ in South Africa contained in the Bill of Rights, to be interpreted and applied consistently with international law (CHR, 2009:68). Chenwi (2015:354) points out that Section 231 of the Constitution requires the incorporation of treaties into domestic law through national legislation, with the exception of self-executing treaties. Under the Constitution, international law must be considered in the interpretation of the Bill of Rights and other national legislation. International law becomes legally enforceable in South Africa once it has been enacted into domestic law (HRW, 2005:9).

The Constitution’s Bill of Rights was drawn from views contained in several human rights instruments such as the UDHR and the ICCPR, (commonly referred to as the ‘International Bill of Rights’) and incorporated international human rights concepts such as the indivisibility and interdependence of rights (Chenwi, 2015:359). The International Bill of Rights and other core human rights treaties articulate civil, political, economic, social, and cultural rights that are inherent to all human beings in view of the recognition and acceptance of fundamental importance of safeguarding human dignity (IOM, 2018:130). Article 9 of the ICCPR, as read with Article 6 of the African Union Charter and Section 12 of the Constitution, provides for the right to protection and security of the person; in particular Section 12 of the Constitution is comparatively more elaborate than any other instrument and provides as follows: “ *Everyone has the right to freedom and security of the person which includes the right to: be free from all forms of violence from either public or private sources; not to be treated or punished in a cruel, inhuman or degrading way and the right to bodily and psychological integrity which includes the right to security in and control over their body*” (CHR: 2009:72). Article 12 of the ICCPR provides for the right to liberty to enter or leave a country, and the movement within the country (Lattmann & Vizi, 2014:43).

Andrews (2009:488) states that since 1994, the South African government has ratified most of the major international human rights instruments, including the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on All Forms of Discrimination Against Women. South Africa is a party to several international instruments that include the elimination of racial discrimination, slavery and genocide, the suppression of human trafficking and the rights of

women, children, and refugees (Andrews, 2009:488). By becoming parties to international human rights treaties, states assume obligations under international law, and according to the United Nations (2022), “*undertake to put into place domestic measures and legislation compatible with their treaty obligations*”. Lattmann & Vizi (2014:56) explain that states ratifying international human rights conventions have to develop and carry out policies as well as domestic laws and administrative measures for securing these rights and to abolish any laws that constitute otherwise.

States cannot simply ignore a provision in an international legal instrument that they have ratified (Khan, 2018:145). “*It is a trite principle of international law that a state cannot plead ignorance of the provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law*”, exclaims Meyersfeld (2013:412). In fact, according to Chenwi (2015:354), Section 231 of the Constitution requires the incorporation of treaties into domestic law through national legislation, with the exception of self-executing treaties. Stemmet (1999:55) asserts that Section 233 of the SA Constitution provides that, in interpreting any legislation, every court has to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In addition, ‘customary international law’ is binding within South Africa, as long as it is not inconsistent with the Constitution or Act of Parliament (Slye, 2001:68).

Finally, it is worth noting that it was the discriminatory and repressive policies of the erstwhile National Party (the ruling party during the Apartheid government) which were firmly entrenched in the legal order that alienated South Africa from the world for forty years (Dugard, 1997a:84). The 1993 and 1996 Constitutions sought to remedy this by bringing South African law into harmony with international human rights norms (Dugard, 1997a:84). De Wet (2004:1531) pointed out that the strong presence of international human rights law in the interim and final Constitutions further reflects the historical context in which the South African Constitution was adopted, particularly South Africa’s indebtedness to international law.

2.6 Conclusion

The chapter outlined the incorporation of human rights relevant to the Constitution. The chapter examined the human rights of migrants as provided for in the South African Constitution and their implementation in practice. This chapter discussed the natural law theory of human rights as the dominant theoretical context of human rights in the South African Constitution, and its application to the rights of migrants. It was found that the Constitution embraced both the social contract theory of human rights and the utilitarian theory of human rights. Further considering the

international and constitutional obligations on human rights as discussed in this chapter, it is evident that the Constitution subscribes to natural law theory because its fundamental values are predicated on natural rights according to Thomas Hobbes and John Locke's social contract theory (see sections 2.2. and 2.3). This is evidenced when considering the three principal rights argument made by John Locke who stated that are "*life, liberty, and property*", as well as those made by Rautenbach & Malherbe (2004:329) who confirmed "*all people have equal worth since all of them have human dignity and because they are all bearers of all the other rights in the Bill of Rights*" (of the SA Constitution). The theoretical context of human rights in the Constitution is thus reflected specifically in the Bill of Rights.

Analysis of the Constitution and alignment with international human rights agreements followed, as well as the domestication of international human rights instruments into the Constitution, and South Africa's commitment as a party to core international human rights instruments in line with the provisions of the UDHR, ICCPR and the ICESCR (International Covenant on Economic, Social and Cultural Rights). The chapter analysed South Africa's adherence to international human rights and the implementation of international human rights in practice. The chapter analysed the role and influence of the UDHR on the core human rights instruments and the SA Constitution, and the UDHR's pivotal role in providing guiding principles that informed the Constitution, which incorporated almost all the norms of the UDHR. The post-apartheid South Africa has signed and acceded to most international human rights treaties and instruments as a member of the community of nations.

The Constitution integrated measures to safeguard the rights of migrants, such as PAJA to ensure adherence to constitutional provisions and guarantees to all people, regardless of their migration status to ensure equality and non-discrimination before the law. PAJA protects individual human rights against excesses of the government and offer redress to persons whose human rights have been infringed upon by government. The Constitution and the Bill of Rights decisions are binding to all spheres of government since to strengthen the rule of law and democracy. The Constitution is transformative in that it enshrines socio-economic rights to ensure that all people enjoy human rights such as access to water, housing, and a clean environment. The Constitution also guarantees citizens political rights through regular elections and entitles every citizen the right to vote. The separation of power between the executive and legislature is entrenched to ensure the independence of the judiciary to dispense justice equitably.

CHAPTER 3: THE IMPACT OF THE SECURITISATION OF SOUTH AFRICAN MIGRATION PROTOCOLS ON SA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

3.1 Introduction

The chapter describes and analyses the impact of securitisation of SA migration policies and practices on SA's international obligations during the Zuma administration between 2009 and 2017. The chapter addresses the concept of securitisation and outlines the evidence that suggests that South Africa has securitised its migration policies and practices during the Zuma administration. The chapter also analyses factors that prompted the Zuma administration to securitise migration policies.

Socio-economic and political factors that prompted the Zuma administration to securitise migration protocols and practices are investigated in view of the South African state and citizenry having felt that the country was under threat due to the increasing numbers of outsiders, who are in general blamed for most social ills such as crime and unemployment in the country. As will be seen in section 5.2, xenophobic violence stems from political conservatism, which translates into deep-rooted xenophobic sentiments and intolerance towards immigrants among the South African populace. The chapter also analyses the link between xenophobia and migrants as cheap labour in the job market, having the effect of undercutting wages of local workers. The chapter also examines police brutality meted out to immigrants, both documented and undocumented, and political response by government to xenophobic violence. Migration policies prior the advent of the Zuma administration and the securitisation of migration protocols during the Zuma administration, are also analysed.

The chapter further examines the question of SA citizenship to children of migrants born in South Africa, and unabridged birth certificates issued to children subjected to the lack of birth registration. The chapter's summary highlights the main findings and concludes with the main findings of the chapter.

3.2 The process of securitisation

Securitisation theory premises that the word 'security' may be capable of transforming social reality (Balzacq, 2016:2). In this regard, Waever (2007:73) argues that *"by uttering security, a state representative moves a particular development into a specific area and claims a special right to use whatever means necessary to block it"*. A pragmatic view is that securitisation is an argumentative practice used by a securitising agent aimed at convincing an audience according

to the agent's apprehension of what he or she knows about the world that certain developments are so threatening that they warrant extraordinary interventions (Duncan, 2014:13). As such, in security discourse, an issue is dramatized and presented as an as an issue of supreme priority and it should be addressed through extraordinary means (Buzan *et al.*, 1998:26). The point is that once something is defined as a security issue, all means could be used to counter this new security risk, as normal political discourse is suspended (Turner, 2010:7). Williams (2003:516) concludes that any issue is capable of being securitised if it can be intensified to the point where it is presented and accepted as an existential threat. This is more probable to happen when elites and/or the State declare the security threat as existential and a challenge to its sovereignty (Waeber, 2007:74). Generally, the state defends itself against threats to sovereignty and society defends itself against threats to identity (Waeber, 2007:85).

Migration could be an apt example of an issue that could be securitised. According to Abebe (2019:3), the securitisation of migration refers to the framing of migration as a security threat to a state or society, leading governments to limit regular migration pathways as governments respond by instituting more restrictive policies against migrants, such as greater surveillance, detention, and deportation. This is further discussed in section 3.3.

According to Balzacq *et al.* (2016:2) the core concepts of securitisation theory include:

- the securitising actor or an agent who presents an issue as a threat,
- the referent object, the referent subject, or the entity that is threatened,
- the audience or the agreement which is necessary to confer an intersubjective status of the threat, the context, and
- the adoption of distinctive policies.

3.3 Securitisation as a speech act

Balzacq (2005:183) posits that the success of securitization is contingent upon the securitising actor's ability to identify with the audience's feelings, needs and interests. The key idea underlying securitisation is that an issue is given sufficient saliency to win the assent of the audience which enables those who are authorised to handle the issues to use whatever means they deem most appropriate (Balzacq *et al.*, 2016:2). The discourse style of the securitising actor and the preferred reference are very important in conveying the issue to the audience (Citak, 2020:5). Buzan *et al.* (1998:30) also argue that successful securitisation is not decided by the securitiser but by the audience of the security speech. Since securitisation theory is rooted in the speech act theory, the act of securitisation is dependent on the capacity of the securitising actor to establish a socially effective claim about threats, the form in which these claims are made in order to be recognised and accepted as convincing by the relevant audience (Filimon, 2016:59).

The external aspect of a speech act largely depends on the social capital of the speaker, the position of authority of the securitising actor, and the nature of the threat (Buzan *et al.*, 1998:33). Lenz-Raymann (2014:248) confirms that persons with a great deal of influence in society can promote securitising speech acts, such as speeches of politicians and others who have influence on security politics, as well as publications of institutions and scientists. Buzan *et al.* (1998:31) adds that the relationship among subjects is not symmetrical, and successful securitisation will vary dramatically according to the position held by the actor. Claims about security and threats are made politically efficacious through the authoritative declaration of an existential threat to the object concerned by the securitiser and through the acceptance of alleged security issues by the audience (Williams, 2003:514). Aguis (2010:60) concludes that language is not just a communicative instrument used to talk about a real world outside of language; it is a defining force integrating social relations. Security language can therefore create a different picture about a social problem or a source of insecurity.

The different communication mediums such as speech, print and electronic are not neutral in their communicative impact and consideration should be given on the role of contemporary communication media in the representation and conduct of security relations (Williams, 2003:523,525). Therefore, McDonald (2008:568) argues for the securitisation framework to be extended to include images and visual representation through which meaning about security and threats may be communicated. In this regard, Williams (2002:512) submits that the increasing impact of televisual images and the process of securitisation takes forms, dynamics and institutional linkages that cannot be fully assessed by focusing on the speech act alone. McDonald (2008:568) argues that it is not only political leaders who articulate and designate threats because in visual representation the key securitising actors are artists and the media. Images and visual representations can be central to the construction of security or securitisation (McDonald, 2008:568).

3.4 The political motives for the securitisation of migration

In line with the arguments posed above and according to securitisation theory, Bigo (2002:65) posits that securitisation of immigration emerges from the correlation between some successful speech acts of political leaders, the mobilisation against migrants by security professionals such as policemen, intelligence services, military people, and providers of technology of surveillance who unite to enforce securitisation of migration. The number of migrants in the labour market is the central element for linking immigration to an existentially dangerous situation in which 'flood' and 'invasion' are powerful metaphors for securitising migration (Huysmans, 2006:48). The most common arguments used by securitising actors, including states, relate to economic factors, social cohesion, and political stability (MMC, 2017). Securitisation of migration is usually

precipitated by political and social conflicts triggered by competition for employment, housing, welfare between migrants and citizens and the challenges for cultural homogeneity, societal values, and national identity (Messina, 2014:533). Securitisation of migration administers distrust by closing borders, controlling migrants, deterring migrants from entering, expulsing migrants rather than directly intervening in restructuring the labour market and the national economy (Huysmans, 2006:52).

Immigration has been connected with terrorism and increased criminality, resulting in the perception that immigration is a threat to public security (Tallmeister, 2013:5). Bigo (2002:78) posits that while police blame migrants for crime, economists view migrants as a danger and new burden to the welfare state while healthcare specialists accuse migrants of bringing with them new and old viruses. Controlling borders and registering those within a territory are seen by governments as a critical and inherent part of national sovereignty and security (MMC, 2017). Furthermore, politicians do not want to lose the power concerning their right to accept or to refuse the everyday movement of people from other countries (Bigo, 2002:70). The main technique of securitisation is to transform structural difficulties and blaming migrants even before they have done anything simply by categorising them as potential security threats (Bigo, 2002:81). However, there is no doubt that the presence of refugees can place considerable pressure on host communities, especially communities that face economic and social stresses of their own (Nicholson & Kumin, 2017:201).

The societal values and identity of the receiving country becomes the referent object through the threat of migration (Tallmeister, 2013:1). Such societal insecurity purports an opportunity in which the identity of a group is presented as threatened by dynamics as diverse as cultural flows, economic integration, or population movements (Williams, 2003:513). Waever (2007:83) agrees that societal insecurity may occur when groups within a society feel threatened by migrants and that their identity is endangered by immigration and when they ask the state to intervene. In such a situation, securitisation processes may be an attempt to ward off a perceived threat from migrants to the group by building a fence to keep them from entering or fighting a war to defend the group's way of life or identity (Theiler, 2003:264). Huysmans (2006:50) makes it clear that by presenting immigration and asylum applications as a threat to identity is but one strategy for states to mobilise nationalist opinion or support.

3.4.1 The manner in which migration is securitised in South Africa

As noted in section 3.3, securitisation is fundamentally a “speech act” (Waever, 2007:73). In the South African context during the Zuma-administration, the referent subject or (perceived) security threat are migrants. The referent object of security is the Republic of South Africa or the

Government of South Africa. Referent objects are things threatened and have a legitimate claim to survival (Buzan *et al.*, 1998:36). A securitising actor defines something as an existential threat to a referent object and calls for extraordinary means to stop the danger (Lenz-Raymann, 2014:246). In this study, the securitising actors is the South African government and its security professionals. The audience is the citizens of South Africa who should accept the securitising move. The securitising move is always addressed to an audience and the success of the securitising move depends on the support it receives among the audience (Lenz-Raymann, 2014:249). To persuade the audience, the speaker has to tune his language to the audience's experience (Balzacq, 2005:183). Functional actors are actors who affect the dynamics of a sector (Buzan *et al.*, 1998:35). Functional actors are actors who affect the dynamics of a sector without being the referent object or securitising actors but actors who significantly influences decisions in the field of security (Buzan *et al.*, 1998:36). In this study, the functional actors are the South African citizens, civil society, and the human rights NGOs whilst the referent subject of security are migrants (see Figure 3-1).

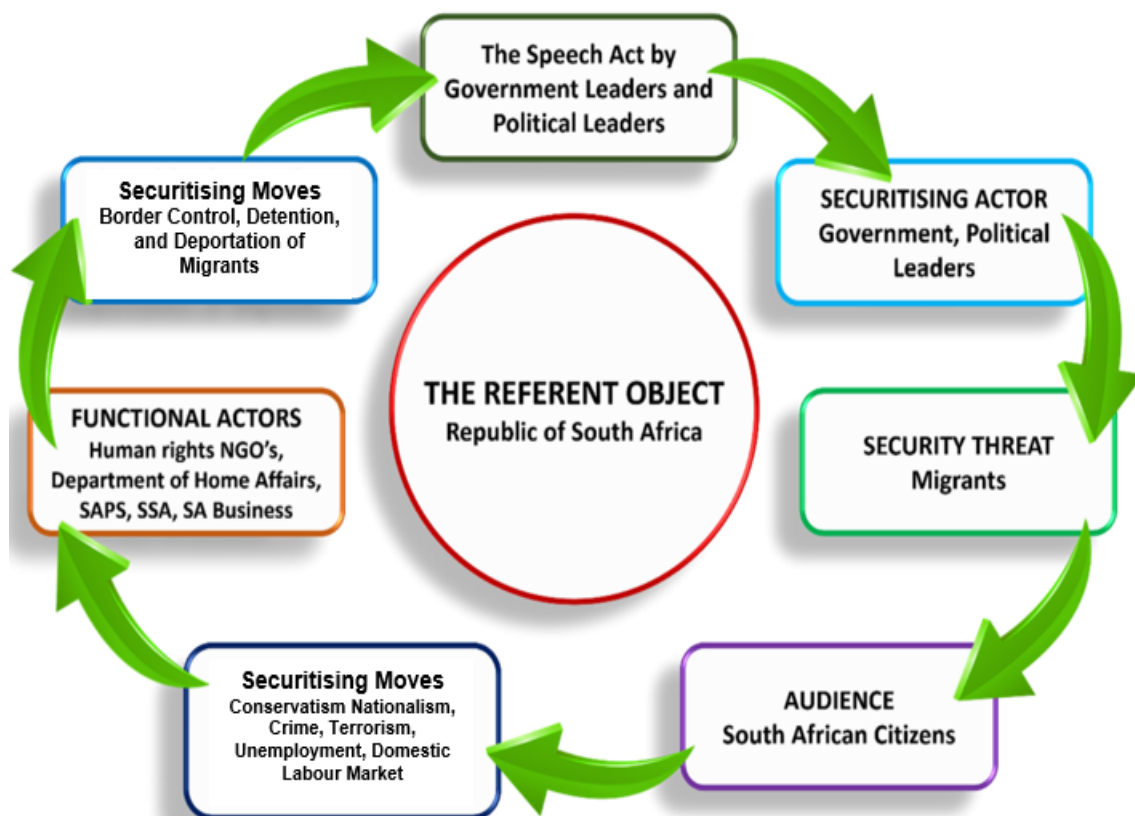


Figure 3-1: Diagram illustrating the manner in which migration is securitised

Factors which motivated the Zuma administration to securitise migration protocols will be discussed next.

3.5 The factors which motivated the Zuma administration to securitise migration protocols

The main points for discussion under this section are illegal immigration, the labour market and competition for limited resources between locals and migrants. Political conservatism will be discussed as one major factor that seeks to exclude migrants to ensure that locals are given preference in terms of resources and jobs allocation.

South Africa hosts the largest number of migrants on the African continent due to its middle-income status and status as an industrialised economy (Moyo, 2021). Many migrants from Mozambique and Zimbabwe entered the country without proper documentation whereas migrants from Nigeria, Sierra Leone, Ethiopia, and Zambia overstay their legal residency (Adepoju, 2010:20). Despite constant deportations, the number of undocumented foreigners living in the country continued to increase (Mthembu-Salter, 2014:17). According to Stats-SA (2021:10) the international net-migration assumptions for the period 1985-2021 in South Africa was 3,479,878 migrants. In 2020, UNDESA estimated that South Africa hosted 4.2 million foreign nationals from several African countries including Lesotho, Zimbabwe, Swaziland, Democratic Republic of Congo (DRC), Mozambique and Botswana (Khan & Rayner, 2020:17). The UNHCR Global trends (2019) recorded 89 285 active refugees and 188 296 active asylum seekers in South Africa (Khan & Rayner, 2020:17). The High Commissioner for Refugees (UNHCR) Refugee Data Finder 2020 has reported that there were 250200 refugees in South Africa with the majority hailing from Ethiopia at 63700 and the DRC at 57 600 respectively (Moyo, 2021).

3.5.1 Illegal immigration

Irregular migration is defined as the movement of labour between countries without valid travel permits or remaining without valid travel permits or remaining in the country beyond the expiration of a visitor or residence visa (Campbell, 2010:170). South Africa's long and porous borders and the economic disparity between South Africa and its neighbours was a major pull factor for undocumented immigration to South Africa (Hammerstad, 2012:14). Some migrants have adopted a variety of methods to cross borders such as crossing on legal permits and either overstaying or returning home regularly to renew them and falsely claiming asylum on entry without a legitimate case as a means of staying and working until claims are assessed (Mbiyozo, 2018:10).

There is no reliable data on the number of undocumented migrants in South Africa, but the official estimates vary from 500,000 to over 2.2 million people (Maunganidze, 2021:8). Campbell (2010:178) argues that Zimbabweans and Mozambicans are the majority of irregular migrants in

South Africa due to political and economic factors in their home countries. Irregular migration has become an issue of concern in South Africa and accompanied by a growing public opinion of a situation that is reaching unmanageable levels (Tati, 2008:437). Economic migrants from the SADC region have low to middle levels of skills and often compete directly with unemployed South Africans (DHA, 2017:55). Some employers prefer to hire illegal migrants because they provide cheap labour and constitute a convenient source for profit maximisation (Campbell, 2006:12). From a geopolitical perspective, South Africa provides space to some underground activities involving both locally and internationally based drug and human traffickers (Tati, 2008:437).

3.5.2 Political Conservatism and Conservative Nationalism

Political conservatism is concerned with preserving the national community and its way of life and is opposed to hasty or extreme changes in political institutions or procedures and reject major alterations in the texture or colour of the social fabric (Rodee *et al.*, 1967:181). Heywood (2013:118) argues that conservative nationalism is concerned less with the principled nationalism of universal self-determination, but more with the promise of social cohesion and public order embodied in the sentiment of national patriotism. Patriotic loyalty and a consciousness of nationhood is rooted largely in the idea of a shared past, turning nationalism into a defence of values and institutions that have been endorsed by history (Heywood, 2013:119). The national identity approach focuses on the unique history and traditions of each country and utilises a historical approach while downplaying the importance of external and situational factors (Meyers, 2000:1251).

During the Zuma administration, asylum policy was changed as the ANC attempted to dissuade asylum seekers from coming to South Africa by restricting the right to work and proposing encampment over integration (Van Lennep, 2018:2). The South African government held a strong belief that most persons entering the asylum system are economic migrants abusing the asylum system (Polzer, 2013:18). Asylum was securitised by the repeated characterisation of refugees as fraudsters, criminals, or even terrorists (Van Lennep, 2018:2), for instance:

- The South African state argued that migrants take jobs and undercut the wages of South Africans, and that migrants are unskilled workers who are prepared to work for lower wages than South African citizens (Peberdy, 2009:161).
- The persistence of unemployment, poverty, crime, and poor material conditions ensured the blame fell on foreign black Africans (Morris & Bouillon, 2001:77).
- There was a growing perception that migrants are also competing unfairly for public services (Carciotto, 2018:67). Allegations that some migrants undeservedly benefit from public services were sometimes justified alongside corrupt practices (Tati, 2008:437).

- The news media in South Africa portrayed irregular migrants as responsible for the high crime rate and violence such as gun running, drug trafficking and armed robbery (Campbell, 2010:192).

Peoples & Vaughan-Williams (2010:170) argue that competition for jobs, housing and other welfare resources between migrants and citizens of a host state for jobs can lead to animosity, social violence and social instability often fuelled by the media and political groups. In South Africa, the securitisation of migration was underpinned by the argument that illegal migration led to societal tensions, cross border crime and that migrants are taking jobs meant for South Africans (Mlambo & Adetiba, 2020:100).

In contrast with the above, Klotz (2012:220) argues that the new South Africa was premised on being a 'redistributive state' that redefines nationalism in economic rather than ethnic or racial terms. In situations of transition and insecurity, it is not exceptional for outsiders to be excluded if they are perceived to be in competition with insiders for resources (Polzer, 2005:89). Ntlama (2018:38) argues that ideological hostility towards migrants arose in the context of emerging discourses relating to nation building and constructing a distinctive post-apartheid national identity. The new nationalism focuses on internal othering and excludes social groups within the society and their access to state resources (Kersting, 2009:17). As struggles to realise the social and economic promises of the transition have deepened, incidences of anti-immigrant violence have intensified (Gordon, 2010:3). Xenophobia can be explained in terms of limited access to economic resources, coupled with unfulfilled expectations following the political transition (Gordon, 2010:5). Klotz (2012:7) argues that xenophobia thrives in the climate of widely embraced economic nationalism. In relatively new democracies such as South Africa, sociotropic concerns about the functioning of the political system may have a great influence on public opinion towards immigration (Gordon, 2016:5). When resources are limited, people are going to fight for resources and are going to use their identities to include themselves and exclude others (Zanker & Moyo, 2020:34). *By targeting and dehumanising migrants, attackers were asserting a particular claim about themselves as South African citizens who have rights and entitlements and can make legitimate claims on the state* (Marais, 2011:422).

3.5.3 Pressures in the SA labour market

South Africa, as the economic hegemony in Africa, has a long tradition of attracting the African labour force, e.g., the South African mining sector and agricultural sector relied on international migrants (Kersting, 2009:11). However, in the post-apartheid South Africa, foreign workers are no longer in high demand on the mines as the country has to tackle its own growing unemployment (Tati, 2008:425). Migrants are commonly employed in construction, security, and hospitality

sectors as well as in private households as domestic workers or gardeners as cheap labour (Crush & Dodson, 2015:5). These sectors include vulnerable migrant workers such as domestic workers, construction workers, workers with irregular status, and trafficked persons (Ngandwe, 2013:435). The Department of Labour (DoL) was concerned with ensuring South African placement in the labour market and targeting and monitoring employers that illegally hire migrant workers (Parshotam & Ncube, 2017:23). Mbiyozo (2018:29) argues that punitive campaigns should target unscrupulous employers rather than migrant workers because it is their hiring practices that act as a pull factor for irregular migration.

The Employment Services Act of 2014 states that an employer may not employ a foreign national within the territory of the Republic of South Africa prior to such a foreigner producing an applicable and valid work permit issued in terms of the Immigration Act (Carciotto & Mavura, 2016:47). The DoL specifically requires evidence of a diligent search when recruiting foreign nationals if a job vacancy cannot be filled by a South African citizen before being filled by a foreigner (Parshotam & Ncube, 2017:23). A prospective employee cannot apply for a general work visa unless he has already received an offer of employment (Khan & Hurt, 2018:103). The employer's offer must be scrutinised by the Department of labour and if the Department of labour finds that the employer has not attempted to find a qualified South African, it issues a negative report and the Director-General will refuse the application for a general work visa (Khan & Hurt, 2018:103).

The South Africa First Employment Policy reflected a politically motivated intention to protect local labourers despite the declared objective of matching skills and labour market needs (Carciotto, 2018:63). Carciotto (2018:63) argues that many ANC senior leaders hold a view deriving from the party's nationalist history that jobs should be provided in the first instance to South Africans. Asylum seekers and refugees were often conflated with migrants in general discussions of labour market competition as a national security threat, or persons who may be a threat to security because they are not captured in national identity and fingerprints databases (Polzer, 2013:17). In summary, the perception was created that undocumented migrants compete with locals for jobs and are perceived as frustrating state efforts to regulate health, education, and housing sectors (Vigneswaran, 2008:135). Migrants are blamed for social ills such as crime, poverty and unemployment and are seen to be usurping the rights of citizens and detracting from the state's ability to realise the promise of citizenship in the new South Africa (Mosselson, 2010:645). It can be argued that xenophobia can be explained in terms of limited access to economic resources, coupled with unfulfilled expectations following the political transition (Gordon, 2010:5).

According to Crush *et al.* (2015:26), the growing presence of migrants in the informal sector has created tension in various quarters in South Africa, including government circles, ignoring the fact that in the free market economy of South Africa, migrants and refugees like citizens and

commercial enterprises ought to enjoy the freedom to establish, operate and expand their businesses. The South African competitors in the Spaza sector have increasingly adopted a violent entrepreneurship that uses violence to intimidate and drive migrant entrepreneurs out of the areas (Crush *et al.*, 2015:28). Many South Africans believe spaza shops¹ have restricted opportunities for South Africans by saturating the Spaza market and maintain that this lessened South Africa's chances of initiating small grocery businesses to their economic detriment (Gastrow, 2018:12).

Xenophobic attacks and looting of migrant-owned small businesses had become a daily occurrence in South Africa (Crush *et al.*, 2015:1). Crush *et al.* (2017:42) argue that the fact that migrant entrepreneurs are able to provide goods, including food, at competitive prices and offer credit to consumers was clearly insufficient to insulate them. Crush & Ramachandran (2015:46) point out that collective violence against migrant businesses not only shattered the livelihoods of targeted migrant shops but also impacted on the South African citizens and business. Other losers are the poor local consumers who are who are forced to buy more expensive goods from larger stores or face the inconvenience of travelling longer distances to purchase necessities (Crush & Ramachandran, 2015:46).

Governance actors do not necessarily have spaza shops in mind when calling for stricter regulation of these businesses but are concerned about the volatile support of their key political constituencies and how this backing can be undermined or generated by the symbolic gesture of regulating the foreign spaza shops (Gastrow, 2018:29). Misago *et al.* (2015:28) argues that violence against outsiders is just politics by other means, and its instrumental motives are located in local political economy and micro-political processes. Violent outbursts by local residents communicate discontent and anger to political leaders to urge them to address township residents' economic plight (Gastrow, 2018:26). Moreover, participation in xenophobic violence is a means of venting anger at government over poor social conditions and taking advantage of the opportunity of accessing free goods from foreign-owned businesses (Gastrow, 2018:26). In all provinces, xenophobic violence occurs mostly in poor and economically marginalised informal settlements where citizens, many of whom are themselves internal migrants, and migrants meet amidst poor living conditions and a general scarcity of public services, employment, and business opportunities (Misago *et al.*, 2015:26).

¹ Spaza shops are informal grocery shops that operate in most of South African low-cost income neighbourhoods and provide food and other common household items (Gastrow, 2018:1).

The relationship between the SA migration legislation, the SA Constitution, regional and international human rights in migration control in South Africa before the advent of the Zuma administration are discussed next.

3.6 The interrelation between SA migration legislation, the Constitution, as well as regional and international human rights obligations before the advent of the Zuma administration

Liebenberg (2000) posits that human rights developments under the new democratic government in South Africa (in 1994) can only be understood and appreciated against the background of colonialism and apartheid. Apartheid institutionalised unjust discrimination and created a deeply divided society with vastly unequal citizenship with segregated property, political and socioeconomic rights generating gross violations of human rights and a legacy of hatred, guilt, and fear (Moosa, 2017:2). Moosa (2017:4) argues that during apartheid, law was used to enforce repression, coercion, and discrimination. The system of apartheid violated the most basic tenets of international human rights law and policy, embodying a harsh combination of state-sponsored authoritarianism, militarism, race and gender discrimination and economic exploitation (Andrews, 2009:481). Freedom of movement and residence were violated by laws restricting the settlement of Black people in urban areas, as well as maintaining racially segregated residential areas through legislation, such as the Group Areas Act, 1966 (Liebenberg, 2000). The Population Registration Act 1950 was the lynchpin of apartheid that separated the South African population into different racial categories (Andrews, 2009:482). This statute allowed for the segregation of South Africa's population and an attendant hierarchy of racial benefits and privileges (Andrews, 2009:482).

Apartheid left a deeply polarised society in its wake that continues to suffer from deep disparities in wealth as well as various social and economic ills (Moosa, 2017:3). A democratic South Africa incorporated the most comprehensive range of human rights policies in its founding documents, the Constitution, and the Bill of Rights (Andrews, 2009:486). The adoption of the new Constitution represented a milestone in the history of human rights in South Africa (Liebenberg, 2000). The South African Constitution is regarded as a transformational document aiming at replacing the previous apartheid regime due to colonisation riddled with racism and the unequal treatment of humans based on their individual characteristics (Serfontein, 2019:7).

The Bill of Rights provides several grounds on which states may not unfairly discriminate, directly or indirectly, including race, colour, gender, religion, ethnicity, disability, and sexual orientation (Andrews, 2009:488). In particular the following rights are protected: the right to life, freedom, and security of persons; the right against slavery, servitude and forced labour; the right to privacy;

freedom of religion, expression, opinion, assembly, movement, association, and a range of property and labour rights (Andrews, 2009:488). Moosa (2017:3) holds the view that the spirit of transformation pervades the constitutional project that entails a lengthy process of transition from a diverse society based on inequality, division, injustice, and exclusion from the democratic process to one respecting the dignity of all and placing a premium on human rights and freedoms and embracing a representative participatory process of governance.

Ntlama (2018:55) posits that the Constitution represents a means to locate South Africa within a family of nations, while holding the government accountable for setting a certain standard regarding the protection and affirmation of the rights of citizens and immigrants alike. Unlike most Constitutions, the preamble of the SA Constitution declares that: 'South Africa belongs to all who live in it, united in our diversity' (Dube, 2020). The next sections discuss the Refugee Act 130 of 1998, the Immigration Act 13 of 2002 and the 2017 White Paper on International Migration and analyses the impact of securitization on each legislation during the Zuma administration.

3.6.1 The Refugee Act 130 of 1998

The Refugees Act 130 of 1998 governs and regulates the immigration status of refugees and asylum seekers (Khan & Hurt, 2017:109). *The Refugee Act aims to provide protection and safety to those seeking asylum from persecution in their country of origin* (Kleinsmidt & Manicom, 2010:176). *The Refugee Act* section 3(a) provides that a person qualifies for refugee status if that person: 'owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or not having a nationality and being outside the country of his former habitual residence or owing to that fear unwilling to return to it' (Mireku, 2002:402).

According to Kleinsmidt & Manicom (2010:173), *the 1998 Refugee Act* section 3(a) stipulates that no person may be refused entry into the country if he or she may be subjected to persecution based on their race, religion, nationality, political opinion, or membership of a particular social group, or feel that their safety is threatened by external aggression or foreign domination of their country of origin. Cote (2018:233) argues that the central tenet of international refugee is the principle of non-refoulement, which states that refugees must not be returned to a place where they may face persecution due to their race, religion, nationality, political opinion, or membership of a particular social group. According to this binding principle of international law, no refugee should be returned to a state in which he or she is likely to face persecution (Mireku, 2002:405).

Landau & Amit (2014:540) point out that the 1998 Refugee Act draws largely on the 1951 International Refugee Convention and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, and includes an expansive refugee definition that adds tribe to the traditional grounds of persecution, includes gender and sexual orientation in the definition of social group, and expands the individual persecution standard to protect large groups fleeing general conditions of instability. Mireku (2002:410) argues that, depending on the reason for a rejection, the asylum seeker may resort to available redress mechanisms and lodge an appeal with the Appeal Board. Only when an asylum seeker's application for asylum has finally been rejected, including exhausting all appeals, can be treated as an illegal foreigner under the Immigration Act (Cote, 2018:225). Cote (2018:225) argues that no proceedings can be initiated against an asylum seeker under the Immigration Act or the Criminal Procedure Act for having irregularly entered South Africa, or for overstaying a visa or permit. Deporting or refusing service provision to undocumented migrants pending status determination is a clear violation of the obligation not to repress migrants unless following a failed asylum application process (CHR, 2009:104).

Exclusion from refugee status applies to a person seeking refugee status who has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments (ICJ, 2014:66). A refugee removed for criminality may only be removed after being convicted by a final judgment of a particularly serious crime (Cote, 2018:233). According to Section 33 of the SA Constitution, everyone is guaranteed the right to administrative action that is lawful, reasonable, and procedurally fair, and a person whose rights have been adversely affected by an administrative action or decision is entitled to reasons that can provide a plausible justification for the decision (Mireku, 2002:406).

The Refugee Act, Section 17 stipulates that a refugee is entitled to a formal written recognition of refugee status in the prescribed form and enjoys full legal protection, including the right to residence and the enjoyment of the entrenched constitutional rights in the Bill of Rights (Mireku, 2002:410). According to Khan & Hurt (2017:110), the Refugee Act 130 of 1998 stipulates that once an asylum seeker has been granted refugee status in South Africa, he or she is entitled to all the rights in the Bill of Rights of the Constitution, except those reserved for citizens, such as the right to vote. The 1998 Refugee Act established a policy of urban integration which allows asylum seekers and refugees freedom to live anywhere in the country and to engage in work and study (Landau & Amit, 2014:539). The freedom of movement mirrors Article 26 of the Convention Relating to the Status of Refugees of 1951, according to which *"each contracting state shall accord to refugees lawfully in its territory to choose their place of residence, to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances"*

(UNHCR, 2022). As was explained in section 2.2, international human rights law essentially serves as individual legal entitlements.

3.6.2 The Immigration Act 13 of 2002

According to Amit (2010:6), the Immigration Act authorises the Department of Home Affairs to identify, detain and deport illegal foreigners. A foreign national who is in South Africa in contravention of the Immigration Act is described as an illegal foreigner who has to depart voluntarily or be deported (Le Roux, 2018:195). Ntlama (2018:40) argues that even individuals unlawfully in the country may not be denied due process, but upon detention are subject to a due process of administrative justice. The Constitution, the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), and the Immigration Act provide a legal framework to ensure that the fundamental rights of illegal foreigners are not violated during arrest, detention, and deportation processes (Amit, 2010:6).

Section 34 of the Immigration Act states that detainees must be provided with confirmation that they have been issued with warrant from court, and if not provided within 48 hours, detainees have to be released immediately (Hiropoulos, 2017:6). In the same vein, the ICCPR provides that anyone who is deprived of his liberty by arrest or detention, shall be entitled to take proceedings before a court so that the court may decide without delay on the lawfulness of his detention, and order his release without delay on the lawfulness of his detention, and order his release if detention is not lawful (Aleinikoff, 2002:43). The Immigration Act 2002, as amended by Act 19 of 2004, condemns xenophobia both by government and within civil society, further illustrating the constitutional equality and universality of human rights (Ntlama, 2018:40).

According to Ntlama (2018:47), the element of non-discrimination in immigration law is also linked to just administrative action, as entrenched in Section 33 of the Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable, procedurally fair, and that everyone whose rights have been adversely affected by administrative action, has the right to be given written reasons, provide for the review of administrative action by a court or where appropriate an independent and impartial tribunal. As these administrative rights apply to 'everyone, the South African state must respect these rights in the administration of its migration control and asylum determination systems' (HRW, 1998:8). Article 3 of the UDHR protects everyone from discrimination, whereas article 7 provides for the right to equality before the law (Flowers, 1998). Section 34(1)(a) of the Immigration Act stipulates those individuals declared 'illegal foreigners', have to be given written notice of the decision to deport them, and of their right to appeal the decision (Amit, 2010:17). The way that securitisation of migration protocols took place and the institution of new legislation under the Zuma administration will be discussed next.

3.7 The securitisation of migration protocols under the Zuma administration

The Immigration Amendment Act of 2011 introduced pre-screening of asylum seekers at the point of entry through border officials, giving these officials the right to refuse entry of an asylum seeker if they deemed proper (Carciotto, 2021:161). The Immigration Amendment Act reduced the time that asylum seekers have to lodge an application with home affairs from 14 to 5 days after entry (Carciotto, 2021:161). Boynton (2015:49) argues that the reduction of the asylum transit visa from 14 to 5 days was intended to make migrants more vulnerable to arrest and deportation. Some RROs refused to allow individuals to apply for asylum if they were not in possession of an asylum transit permit obtained at the border (Amit & Kriger, 2014:279). Rejected asylum seekers would face arrest, detention, and deportation, with few alternatives available to them, and left in limbo with little access to services and protection (Ekambaran, 2019:225).

Crush et al. (2017:8) argue that the associated administrative requirement that asylum seekers must renew their permits every one to six months at the RRO where they obtained their permit rather than at an ordinary Home Affairs office, imposed considerable financial and other hardships. Many asylum seekers were later arrested while making their way to a refugee reception office (RRO), particularly those who bypassed the border RRO in Musina to apply in an urban area (Amit & Kriger, 2014:278). Musina is a border town between South Africa and Zimbabwe which receives most migrants from African and Asian countries. These restrictive measures have been implemented to curb the perceived tide of undocumented migrants from accessing legal status in the country under the auspices of national security (Carciotto & Mavura, 2016:46).

The 2011 Immigration Amendment Act introduced harsher measures for those who had overstayed in the country for a stipulated number of times, by declaring them undesirable persons (Mfubu, 2018:185). Boynton (2015:47) points out that under the new regulation 27(3) of the Amended Immigration Act 2011, foreigners who overstayed their visas would no longer be fined but declared undesirable and could be restricted from entering South Africa for up to five years. According to Section 30(1) of the 2011 Immigration Amendment Act, read together with regulation 27(3), a foreigner whose visa has expired will be declared an undesirable person and be subject to deportation (Mfubu, 2018:187). Foreigners on visitors' visas can no longer change their status while in the country in an effort to prevent these from overstaying or from applying for work (Boynton, 2015:48). Foreign nationals had to return to their country of origin before the expiration of their permits, and only return once the extension of their permits has been approved (Mfubu, 2018:187).

The Immigration Amendment Act 2011 repealed the quota and exceptional skills work permits and replaced them with a single critical skills visa, thereby creating an exclusionary immigration regime which fails to address the reality of the many low-skilled migrants entering the country (Zanker & Moyo, 2020:11). Section 22(8) of the RAA 2017 states explicitly that the right to work may not be endorsed for applicants who can sustain themselves, are offered shelter by the UNHCR, or seek to extend the right to work, having failed to produce a letter of employment within 14 days of getting a job in South Africa (Carciotto *et al.*, 2018:16). The asylum seeker was prohibited from working while government assumes no responsibility for their care and protection (Crush *et al.*, 2017:9). Many asylum seekers were unable to support themselves and left destitute, though they have the legal right to work and study (Kleinsmidt & Manicom, 2010:179). South Africa is an expensive country where neither government nor intergovernmental organisations such as the UNCHR provide material assistance, and resources of local NGOs are severely limited (Musalo *et al.*, 2011:153).

According to Landau *et al* (2018:79) those asylum seekers who could not get assistance from NGOs or could not sustain themselves, were given the right to work, provided that they produce a letter from the employer within six months, stating that they were employed. Section 22(10) of the Refuge Amendment Act (RAA 2017) stipulates that, should an employer or educational institution fail to furnish the DHA with a letter within the allotted period, they are guilty of an offence and liable upon conviction for a fine of up to ZAR20,000.00 (Carciotto *et al.*, 2018:16). Carciotto & Mavura (2016:48) contend that the limitation of the right to work for asylum-seekers appears to be part of a protectionist strategy aimed at preserving jobs, informal work, and trade for South African citizens only in response to the perception that migrants are taking jobs that South Africans ought to have.

The SAPS is required to uphold and safeguard the fundamental rights of every person as guaranteed in the Constitution, including the right to equality and freedom from discrimination on grounds that include, inter alia, race, ethnic origin, culture, and birth (Edwards & Freeman 2021:3). However, migrants have been discriminated against and abused by the SAPS. Reports of excessive violence, extortion and theft are commonplace, and police have even been known to ignore or even destroy legal identity or refugee documents (Gordon, 2010:17). Demands for bribes from migrants and refugees were commonplace especially when police threatened to arrest and detain migrants at Lindela Holding Centre and summary deportation (Crush *et al.*, 2017:61). Some migrants even reported having their identity papers confiscated or destroyed in order to justify an arrest (Landau, 2008:191). Police officers routinely engaged in intimidation and extortion and simple theft from Zimbabweans (Vigneswaran, 2011:116). *“Migrants are routinely rounded up and shaken down for bribes that supplemented the earnings of grasping public*

servants in police stations, Home Affairs offices and beyond" (Marais, 2011:422). In South Africa, the xenophobic discourse and brutal police conduct against migrants created a permissive environment within which poor South Africans could vent their anger, resentment, frustration, and fear on migrants who are more vulnerable than itself (Hammerstad, 2012:17).

The Immigration Act gives the SAPS the power to enforce immigration law which includes the power to make arrests if there are reasonable grounds to believe that a person is not lawfully residing in the country. However, the SAPS in Gauteng regularly circumvents the procedures and protections afforded to non-nationals under the Immigration Act by conducting 'sweeps and raids' in line with their powers to conduct crime prevention operations under section 13(7) of the SAPS Act. (Edwards & Freeman, 2021:13). There has been reports of a large number of overnight areas sweeps and arrests of foreigners in Gauteng during the first half of 2017 (Hiropolous, 2017:5). Ten percent of detainees reported that they were arrested without being told reasons and a further 10% were injured by the SAPS (Amit, 2010:23). Operation Fiela, launched in 2015 was described by the SAPS as an 'anti-xenophobia initiative' aimed at crime and intended to provide protection for non-nationals. Instead, it became an enforcement operation against migrants, with large-scale roundups and rushed deportations. Over 80% of people arrested in the operation's first week were migrants (Edwards & Freeman, 2021:14).

The South African Constitution provides that the right to freedom and security of a person applies to everyone within South Africa regardless of their nationality or immigration status (GDP, 2021:11). States have entered into treaties and agreements and agreed to customary international law that restrict their authority to regulate migration as an exercise of their sovereignty (IOM, 2018:129). South Africa has ratified the international covenants on the rights of non-nationals including the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the status of Refugees (Jeffery, 2010:377). In terms of the Refugee Act of 1998 refugees have the same rights as citizens except the right to vote (Jeffery, 2010:377). The South African government's failure to protect the constitutional rights of migrants also frequently violates the government's obligations under the International Covenant on Civil and Political Rights (ICCPR) which South Africa has ratified based on the Universal Declaration of Human Rights (Kleinsmidt & Manicom, 2010:175).

The RAA 2017 stipulates that failure to renew an asylum seeker permit within one month of expiry will lead to automatic revocation of status, forfeiture of the right to renewal, and treatment as an illegal foreigner in terms of the Immigration Act (Crush *et al.*, 2017:8). According to the RAA 2017 an asylum seeker with an expired permit would also be guilty of an offence and liable to a fine and imprisonment of up to five years or both (Crush *et al.*, 2017:8). The 2017 Refugees Amendment Act has increased the amount of time required by refugees before being allowed to

apply for permanent residence from the current five years to 10 years, which contradicts the 2017 White Paper which sought to put an end to any form of permanent migration for refugees (Carciotto, 2021:128). The 2017 White Paper also broadened the reasons for denying asylum to include applicants who have not applied for asylum in safe countries on their way to South Africa through the safe 'third country' which is not recognised in SA law (Amnesty International, 2019:10).

The White Paper on International migration for South Africa (DHA, 2017:42) states that the process of granting residence and citizenship status should allow strategic and security considerations, and the national priorities of South Africa should be considered, not the number of years. The White Paper proposes to do away with the category of permanent residence altogether, and replace it with a long-term, renewable residence visa for which refugees would be eligible after 10 years (Crush *et al.*, 2017:9). The White Paper 2017 revealed that SA was planning to build Asylum Processing Centres (APCs) near its borders with Zimbabwe and Mozambique that will be used to profile and accommodate asylum-seekers during their status determination process (Ziegler, 2020:96). The shift was intended to reduce pull factors by limiting the right to work and study for asylum seekers and to increase efficiency through the creation of asylum processing centres (APCs) at the country's borders where applicants will undergo a risk-based assessment and be detained during adjudication (Carciotto *et al.*, 2018:15). Carciotto *et al.* (2018:31) argue that the risk and human rights abuses in proposed APCs is high, considering past and current practices by the DHA. Many human rights abuses have been documented at Lindela Repatriation centre which includes routine violence, insufficient medical care, prolonged and indefinite detentions without judicial oversight, overcrowding and suspicious deaths (Carciotto *et al.*, 2018:31). Asylum seekers would be deprived of the right to access employment and education, since their needs will be catered for in the processing centres (Ziegler, 2020:96). The most important characteristics of the camp are segregation from the host population; shared facilities, lack of privacy and overcrowding and restricted area within which the whole compass of daily life is to be conducted (Ekambaran, 2019:227).

The Border Management Act 2 of 2020 established the Border Management Authority (BMA) which has a wide discretion to detain persons for illegal entry or deny entry without referring to the possibility of refugee protection (Khan & Rayner, 2020:20). There are risks that accelerated border processes envisaged by the Border Management Act are likely to violate the principle of non-refoulement in terms of the Refugees Act by denying asylum seekers entry of asylum at the border (Khan & Rayner, 2020:20). Borders constitute important elements in the representation of national sovereignty and are still perceived as symbolic checkpoints (Wihtol de Wenden, 2007:56).

3.8 SA citizenship for migrants' children

The Births and Deaths Registration Act 1992 provides for birth registration of all children born on the SA territory, whether to South African or foreign parents (George & Elphick, 2014:35). Children born to foreign nationals do have the right to be issued with birth certificates, as required by Section 28 of the Constitution, which protects the right of every child to a name and nationality from birth (Amnesty International, 2019:28). The South African Citizenship Act provides that any person born on the territory who is stateless, is entitled to South African citizenship by birth, provided the birth is registered in accordance with South African law (George & Elphick, 2014:22). Children who are born to foreigners who do not qualify for citizenship are entitled to a birth certificate according to the Births and Deaths Registration Act (DDRA), but those children are issued with birth certificates without an ID number and not entered into the National Population Register (Scalabrini, 2019:2).

The new regulation called for the discontinuation of the issuing of birth certificates to foreign children (Scalabrini, 2019:4). According to Muller (2018:61), birth registration is a crucial step in preventing statelessness, as most states require proof of place of birth and identity of parents to establish nationality. Without a birth certificate, a child has no documentary link to the parent and therefore no claim to the nationality of the parent (Amnesty International, 2019:29). Being stateless means that a person's legal identity is compromised, which causes barriers to many other human rights, such as the right to education, healthcare, and public services, as well as the right to vote and the right to freedom of movement (Muller, 2018:57). The CRC provides that children's rights have to be protected without discrimination of any kind, including discrimination due to their nationality, immigration status or statelessness (ICJ, 2014:92).

3.9 The impact of securitisation of migration protocols on SA's international human rights obligations to migrants

The Organisation for Economic Cooperation and Development and the International Labour Organisation (OECD/ILO) (2018:59) has noted that deportation has increasingly been seen as a policy instrument to entrench the idea that government is not passive on irregular migration and acts effectively to protect the South African unemployed. Many migrants who were detained were sent to the Lindela Detention Centre, pending deportation where they are summarily deported without any opportunity to access the asylum system (Amit & Kriger, 2014:278). The prohibition against refoulement applies to all asylum seekers, regardless of the validity of their documents (Amit, 2010:49). Article 33 of the Refugee Convention provides that no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or

freedom would be threatened on account of his/her race, religion, and nationality, membership of a particular social group or political opinion (Kneebone, 2009:11).

Asylum seekers and refugees were routinely detained as illegal foreigners under the Immigration Act and are subject to refoulement in violation of international and domestic refugee law (Landau & Amit, 2014:542). The DHA failure to follow proper procedures has also resulted in prolonged and indefinite detentions without judicial oversight, meaning that many detentions and deportations are occurring illegally (Amit, 2010:7). The South African government's failure to protect the constitutional rights of migrants also frequently violates the government's obligations under the ICCPR, which South Africa has signed and ratified and is based on the Universal Declaration of Human Rights (Kleinsmidt & Manicom, 2010:175). The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes that states have obligations to take effective measures to prevent acts of torture and of cruel, inhuman, or degrading treatment or punishment (ICJ, 2014:53).

The right to be free from persecution is implicit in the UN Refugee Convention as reinforced by the UDHR Article 5, which states that no one shall be subject to torture or to cruel, inhuman or degrading treatment (Kneebone, 2009:9). The ICCPR of 1966, guarantees migrants a number of basic rights, including the right to life, not to be subject to torture or cruel inhuman or degrading treatment or punishment; to the liberty and security of person; to liberty of movement; to the freedom to choose one's residence for those lawfully within the territory of a state, and the right to protection from arbitrary or unlawful interference with their right to privacy (Solomon & Kosaka, 2013:16).

The Refugee Amendment Act 2017 (RAA) has curtailed the right of migrants to work. It is the provision of the ICESCR that every person, irrespective of their country of origin, should be guaranteed of their rights to work, positive working environments, reasonable living conditions, decent health services, schooling, and other economic, societal, and cultural rights (Odunayo *et al.*, 2017:91). According to Article 2(3) of the ICESCR, developing countries with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals (Chetail, 2012:248).

Crush *et al.* (2017:5) argue that international praise for South Africa's liberal approach to migration was eroded by chronic processing delays, poor and ill-informed adjudication, and endemic corruption in the asylum process. Widespread detentions have also given rise to a culture of corruption, as many individuals, even those illegally detained, have no recourse other than to pay a bribe in order to be released and avoid deportation (Amit, 2013:33). Amit (2013:32) argues that South Africa's detention practices illustrate how rhetoric around securitisation of migration was

essential for upholding the integrity of the state. They could legitimise a range of illegal practices and give rise to many drawbacks that include unlawful detentions and deportations, rights violations, financial costs, increased opportunities for corruption, and threats to the rule of law. The ICCPR to which South Africa is a party, also protects refugees and asylum seekers from arbitrary detention (HRW, 2005:8). South Africa ratified the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) of 1984 on 10 December 1998, and signed the Optional Protocol on 20 September 2006, but is yet to ratify it (Chenwi, 2015:342).

Polzer (2013:29) argues that allowing state officials to exercise ad hoc authority outside their mandated powers erodes the rule of law and public confidence that government institutions are accountable to those they serve. The 1969 OAU Convention provides that no person shall be subject by a member state to measures such as rejection at the frontier, return or expulsion which would compel him to return to, or remain in a territory where his or her life, physical integrity or liberty would be threatened (HRW, 1998:4). Article 33(1) of the 1951 UN Convention spells out 'the principle of non-refoulement' and states that no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened (HRW, 1998:4). Denial of entry constitutes refoulement and is therefore in contravention of South Africa's international legal commitments and violates the individual rights to apply for asylum under the Refugee Act (Polzer, 2013:28).

The principles of non-refoulement applies to all asylum seekers, irrespective of their immigration status, and also apply to persons both lawfully and unlawfully in a state or attempting to enter a state (Kneebone, 2009:12). The right to seek asylum and the right against refoulement are described as twin precepts of refuge protection (Kneebone, 2009). The principle of non-refoulement also applies to extradition procedures and has to be observed in all situations of large-scale influx (ICJ, 2014:110). Refoulement is permitted under the Convention if there are reasonable grounds to believe that a person presents a danger to the security of the country or its community because of a conviction for a particularly serious crime (IOM, 2018:130).

The central right of a refugee is not to be returned to a country in which he or she would be in danger on account of one of the grounds such as race, religion, nationality, social group, or political opinion (HRW, 1998:4). When countries accede to the Convention or 1967 Protocol, they agree to protect refugees on their territory and under their jurisdiction in accordance with the terms of these instruments (Nicholson & Kumin, 2017:34). Even states that are not parties to the Convention or Protocol are bound by the principle of non-refoulement, which is considered a norm of customary international law and as such is binding to all states (Nicholson & Kumin, 2017:34).

The principle of non-discrimination is among the fundamental rights that impose obligations on states, but the principle doesn't mean all distinctions between citizens and migrants are prohibited (IOM, 2018:130). This principle seems to have been contravened through the securitisation of migration protocols which, according to Ekambaran (2019:230), allowed for the arrest and detention of undocumented migrants for up to 30 days without access to any form of judicial oversight. This also contravened other international obligations. South Africa is a party to the 1966 ICCPR, the ICESCR, the 1948 UDHR, and other core human rights treaties which articulate civil, political, economic, social, and cultural rights that are inherent to all human beings in view of the recognition and acceptance of fundamental importance of safeguarding human dignity (IOM, 2018:130). These international human rights instruments are collectively known as the International Bill of Rights.

3.10 Conclusion

The evidence that South Africa has securitized its migration policies is manifested in the new amendments on migration policies, such as the 2011 Immigration Amendment Act 2011, which introduced pre-screening at the port of entry and became more restrictive by reducing the time for asylum seekers to obtain visas at the port of entry from 14 days to 5 days. Asylum seekers who do not enter through a port of entry are unable to obtain a visa. This measure is more restrictive because it is not feasible to register a large number of asylum seekers due to the lack of capacity at the refugee reception offices (RROs). As a result, most asylum seekers remain undocumented and risk refoulement. The Immigration Amendment Act 2011 also repealed the quota system and introduced the critical skills visa, which effectively bars low-skilled migrant labourers. The 2017 Refugee Amendment Act introduced restrictive measures to make it difficult for asylum seekers to work and study in South Africa.

Evidence that South Africa has securitised its migration was also revealed in the South African 2017 White Paper on international migration, which seeks to remove the provision for permanent residence for immigrants in South Africa, regardless the length of stay. The 2017 White Paper also seeks to introduce APCs to accommodate asylum seekers while their refugee applications are being adjudicated. The APCs would be built at the South African and Zimbabwean border, and the Mozambican borders. These APCs would be de facto detention centres. The Department of Home Affairs also closed some RROs in Johannesburg, Port Elizabeth, Durban, and Cape Town, which placed hardships on refugees who wished to renew their permits due to long distances to travel to RROs in Pretoria or Musina. The Johannesburg and Port Elizabeth RROs were only opened in 2019. Cape Town refugee reception centre remains closed for new asylum applications.

Most asylum seekers who could not renew their permits, which resulted in the expiration of these permits which renders them illegal, risk detention and deportation. The Border Management Act 2 of 2020 introduced the Border Management Authority to police and patrol the border in order to prevent illegal immigrants crossing into South Africa. As a signatory to international human rights law, South Africa is obliged to observe and adhere to human rights instruments and safeguard human rights of migrants. Migrants are subject to xenophobic violence, which is a direct violation of the UDHR, ICCPR, the UN Refugee Convention and the Banjul Charter 1981, as well as all core human rights instruments. The outcomes of securitisation were the following:

- Migrants couldn't obtain visas due to time constraints; time to obtain visas reduced from 14 to 5 days.
- Migrants remained undocumented and risked refoulement.
- Refugees could not renew their permits and risked detention and deportation.
- Migrants were subject to procedural detention and deportation.
- Refugees and asylum seekers couldn't work or study.

Securitisation of migration protocols was part of the strategy to ensure that migrants and refugees do not reside or work in South Africa. Xenophobia was also a securitising move because immigrants were subject to violence to constructively expel them from South Africa. Xenophobia is commonly a direct result of uncontrolled migration whereby nationals feel threatened by the large presence of migrants in the country. Competition for jobs and limited resources are the main triggers of xenophobic violence in South Africa.

Immigration discourses by the ANC and the South African government evoke issues central to South Africa's transformation, nation building, definition of insiders and outsiders in a new nation, the distribution of rights to resources and the national identity. If not managed properly, irregular migration could be a powder keg for social unrest and political conflict, having the potential to undermine democracy. The labour market could be protected but skills transfer from migrant workers could benefit the South African economy tremendously. Every state is obliged to implement its international obligations in good faith, which often means incorporating international treaties into domestic law and setting up appropriate mechanisms so that those who should benefit are identified and treated accordingly. These obligations have practical consequences for municipal authorities and local governments that may be required by domestic law to uphold them.

CHAPTER 4: THE BENEFITS AND DISADVANTAGES OF SECURITIZATION OF SA MIGRATION PROTOCOLS DURING THE ZUMA ADMINISTRATION

4.1 Introduction

The goal of this chapter was to answer the general research question: *What were the benefits and disadvantages of securitisation of migration protocols?* The chapter analyses how the securitization of SA migration protocols benefitted or disadvantaged South Africa in view of the concept of state sovereignty, globalisation and the risks associated with uncontrolled migration. The chapter argued that there were few benefits but more disadvantages from the securitisation of migration protocols for migrants and the South African population. The chapter posited that securitisation of migration has exposed migrants to human rights violations and denied South African economy much needed skills from migrant workers. The chapter argued that the state benefitted from securitisation of migration, as it found resonance and support from the majority of South African citizens, especially the poor and the unemployed.

The chapter outlined rights of migrants and illustrates how securitisation of SA migration protocols enhanced or curtailed them during the time period 2009-2017. The chapter examined the negative impact of the Immigration Amendment Act 2011 on the rights of migrants and skills shortage in the South African economy. The chapter outlined the benefits of migrant labour and skills in the South African labour market, and the benefits and disadvantages of migrant workers on the South African economy. The chapter analysed how the Refugee Amendment Act 2017 curtailed migrants' human rights and contravened most of the international human rights instruments. The chapter analysed the implications of the White Paper 2017 on migrants' human rights and the BMA which was conceptualised during the Zuma administration.

The chapter focused on the implications of securitization of migration protocols in view of migrants' rights enshrined in the Constitution Bill of Rights and international human rights instruments, such as the UDHR of 1966, ICCPR of 1966, and the ICESCR of 1966. The points above have been used to provide a discussion on the benefits and disadvantages of securitization of migration protocols in South Africa. The chapter concludes with a summary of the main points in the chapter followed by a final conclusion.

4.2 The benefits and incentives for the securitisation of SA migration protocols during the Zuma administration (2009-2017)

The main objective of the securitisation of migration protocols during the Zuma administration was to secure the sovereignty and territorial integrity of the Republic of South Africa. The 2017 White Paper on International Migration for South Africa (DHA, 2017:40) states that the importance of adequately applying a risk-based methodology is to ensure that persons travelling to the country are being risk profiled well in advance, testing the credibility of travel documentation, personal identity and running background checks on the possible listings against international warning lists which enhance security and reduce irregular migration. The 2017 White Paper further stated that immigration that was not managed through a risk-based approach was inefficient and giving rise to systematic corruption as well as exposing all who live in the country to serious risks such as terrorism and drug smuggling (Khan *et al.*, 2018:87). South African passports were being used by terrorist operatives on the African continent and abroad due to corruption at the Department of Home Affairs (Chelin & Buchanan-Clarke, 2018:240). The money paid by criminal organisations to public officials undermine the efforts of the entire system of law enforcement in the fight against illegal migration (Tarnu, 2015:74). There was evidence that suggested that transnational terrorist organisations such as Al-Qaida, Al-Shaabab and ISIS have used South Africa as a financial and logistical hub for these networks (Chelin & Buchanan-Clarke., 2018:239).

According to the White Paper (2017:56) national security and public safety depend on knowing the identity and civil status of every person in the county. Subsequently, the DHA introduced more secure passports and electronic accounting system to combat corruption (Duncan, 2014:67). The 2017 White Paper made it clear that it is in the interests of national security that migration was secured as it posed a threat to social, economic and cultural development (Khan *et al.*, 2018:88). A terrorist attack in South Africa by a violent Islamic organisation could spark widespread xenophobic and anti-immigrant sentiments that could trigger increased violence and instability (Chelin & Buchanan-Clarke, 2018:243).

The critical skills visa and the business visa made provisions to ensure the contribution to South Africa's national interests. The government introduced the critical skills visa to persons who can prove that they have skills or competences falling within a list of occupations prescribed to be critical skill by the Minister of Home Affairs qualifies for a critical skills visa (Khan & Hurt, 2018:103). The purpose of recruiting migrants with critical skills from abroad was to close gaps in the domestic labour market and required a mechanism for the transfer of skills to locals (DHA, 2017:47). The South African government also introduced the business visa for foreign investors who wished to establish a business or invest in a business that has not been established in South Africa (Khan & Hurt, 2018:106). Migrants with needed skills, investment and business interests

would be allowed to hold long term visa that will allow easy access to citizenship in which a special visa that must enable applicants and their immediate families to apply as one unit (DHA, 2017:46). The professionalisation of documentation, visa issuance turnover and reinforcement of immigration services capacity would benefit the entire immigration process (OECD/ILO, 2018:64).

The securitisation of migration protocols was aimed at protecting South African job seekers in the labour market by eliminating the competition with low skilled migrants. The White Paper on International Migration for South Africa (2017:57) called for stronger enforcement of labour and migration laws to ensure that citizens are not disadvantaged by employers paying economic migrants lower wages. The inflows of unskilled migrants could make matters worse as they are likely to compete with those at the lower end of the local labour force (Weiner, 1996:180). The presence of illegal migrants who are not known to the state put pressure on resources and increased the risk of social conflicts (DHA, 2017:56). Most migrants reside in informal settlements where they face hardships with local residents due to high rates of unemployment, poor service delivery, poverty, high crime drug and alcohol abuse (WBG, 2018:23). Informal settlements are fertile grounds for xenophobic violence and anti-immigrant sentiment due to widespread poverty.

Maunganidze (2012:15) posits that the establishment of the BMA was a positive step toward ensuring effective and coherent management of borders and ports of entry. Due to porous borders and a large number of illegal crossing of people and other forms of crime, South Africa had to reinforce its borders (Mlambo & Adetiba, 2020:98). The rationale for BMA establishment was to create an operational balance between security, trade facilitation, tourism promotion and socio-economic development within South Africa and the SADC region (DHA, 2017:40). The establishment of a risk targeting centre is an important aspect of the BMA where all departmental systems would be jointly used to assess risk levels of conveyances of persons and goods (DHA, 2017:40). The disadvantages of uncontrolled migration are discussed next.

4.2.1 The disadvantages of uncontrolled migration

Koser (2005:11) migration in general can threaten economic stability by increasing employment competition, undermining social stability when it is combined with the rise of xenophobia and lack of integration, and be associated with multiple challenges associated with increasing religious, cultural and ethnic heterogeneity. The emergence of organised criminal networks around illegal migration can also pose a significant challenge to state authority and control (Adamson, 2006:178). Moyo (2018:101) posits that open door migration adds pressure to state provision of welfare and employment prospects. Apart from taking jobs of native workers, migrants are also frequently accused of coming to a richer country to simply sponge off the state by receiving benefits like healthcare, social security, and education; far more valuable than what they

contribute to taxes (Stalker, 2001:82). Ghosh (2007:94) argues that massive inflows of foreigners could place a heavy strain on the receiving country's physical infrastructure and public services such as housing facilities, transport system, schools, and medical services.

Barclay (2010:62) points out that adverse impacts of migration include the potential of undermining local wages, loss of jobs to migrants, and deterioration of working conditions. Weiner (1996:180) argues that employers tend to overlook local workers and often prefer foreign workers who are pliable and unlikely to join trade unions, willing to work long hours, tolerate bad work conditions that local labour finds unacceptable, and can be readily dismissed when they are no longer needed. For a country to have a good refugee policy it has to be able to prevent large numbers of migrants from entering and remaining on the basis of unjustifiable claims (Weiner, 1996:191). Barclay (2010:62) summarises that *"effective migration management is necessary, just as the development process itself requires effective management"*.

4.2.2 Migration challenges during the Zuma administration

Tati (2008:426) argues that the problem faced by South Africa is the mixed nature of the relationship between economically motivated irregular migration and the movement of refugees who deserve protection under the UN convention. The main migration challenge during the Zuma administration was increasing xenophobic violence. The attitude of the South African government regards migrants as a threat and a burden, and as an extra constituency, adding pressure to services and economic needs for which the government had to provide (Ntlama, 2018:39). The influx of migrants leads to the increase of population which generates an increased consumption and creates a crisis when government is unable to provide housing, services, rising unemployment and generate hostile reactions from local population such as xenophobia (Tarnu, 2015:74). ANC leaders agreed that migrants compete for scarce resources and perpetuated a discourse that portrays foreigners as a threat (Klotz, 2012:225). *"Unsanctioned migration is at odds with the predominant nationalistic notions of how the beneficiaries of national development are defined and becomes a threat to sovereign control over economic and social construction"* (Gordon, 2010:14). Illegal migration is affront to sovereignty because it is evidence that a nation is not in control of its borders (Dauvergne, 2004:598).

South Africa's border management has been described by security commentators as chaotic resulting in failure to prevent cross border crime as well as illegal immigration (Duncan, 2014:67). The risks of irregular migration to national security include cross-border crime, organised crime, and terrorism (Tarnu, 2015:75). Furthermore, Irregular migration enabled black market smuggling and occupation, encouraging money changers and labour brokers instead of channelling benefits

into communities and allowing government to accurately measure and track labour and migration data (Mbiyozo, 2018:29).

Mthembu-Salter *et al.* (2014:6) argues that deportation was not an effective strategy for controlling immigration because the rising number of people sent home showed no correlation with the total number of migrants in the country. In the absence of legal pathways, many low skilled migrants from the rest of Africa enter the country unlawfully or without sufficient documentation, or violate their visas, or by overstaying, including migrants from within the subregion as well as from outside, most notably from the horn of Africa (Maunganidze, 2021:8). Reasons for South African citizens' support for Zuma administration migration policies will be expounded next.

4.3 Social support for the Zuma administration

According to Crush & Ramachandran (2014:14) national opinion surveys and interviews with groups of South Africans and migrants conducted over the last two decades, lead to a conclusion that xenophobic attitudes are highly prevalent in South Africa among all social, economic, racial and class groups. The 2017 Human Sciences Research Council's Social attitudes (HSRC) found that 71 percent of the South African public identified the threat posed by immigrants as the main explanation for anti-migrant violence (Maunganidze, 2021:10). Resentment has also been fed by misperception that South Africa was being overrun by foreigners and a view that foreigners were a burden on social services and that foreigners were an economic threat exacerbated by South Africa's high unemployment rate (Jeffery, 2010:377). Du Toit & Kotze (2011:163) assert that hostile disposition towards foreigners is adequately present in areas with a concentration of poverty, which made conditions conducive to violent actions against foreigners who live there. Misago *et al.* (2021:5) argue that governance deficit plays a big role in the occurrences of xenophobic violence by providing a favourable political opportunity. Xenophobic violence mostly occurs in areas where local government is absent or weak and unable to address socio-economic hardships communities face (Misago *et al.*, (2021:5).

Kersting (2009:11) argues that citizenship is seen as a key factor, as rights to social welfare, to employment and to land are increasingly denied to newcomers and immigrants. As struggles to realise the social and economic promises of the transition have deepened, incidences of anti-immigrant violence have intensified (Gordon, 2010:3). South Africa is one of the most unequal societies in the world, which helps to understand the political importance of the scapegoating in relation to limited resources (Moyo & Zanker, 2020:34). According to Moyo & Zanker (2020:34) politicians use the anger amongst community members to their own benefit by blaming foreign migrants and as such, there is interplay between the sentiments of the poor and marginalized communities and populist politicians. Scapegoating migrants as the source of socio-economic

challenges allows politicians to direct attention away from their own failures, including mismanagement, corruption, or failure to address issues such as unemployment or access to services (Maunganidze & Formica, 2018:10). In the context of South Africa's commitment to human rights and return to the Southern African Development Community (SADC), the South African government had to find a balance between internal pressure to protect employment and external pressure to treat all migrants, including irregular migrants decently.

4.4 Securitisation of migration protocols: migrant labour

According to Carciotto (2018:71), the protectionist view of the labour market coupled with security and political concerns over unemployment, poverty, and social tensions, indicate that for the South African government the most favourable and viable option would be to govern labour migration through a quota regime, based on bilateral agreements and regularisation programmes for low and semi-skilled migrants from SADC. The Employment Services Act of 2014 stipulates that an employer may not employ a foreign national within a territory of the Republic of South Africa prior to such a foreign national producing an applicable and valid work permit issued in terms of the Immigration Act (Carciotto & Mavura, 2016:47).

There is a considerable variety in the skills levels and earnings of African migrants in South Africa, with only a quarter of migrants in unskilled occupations (Crush *et al.*, 2011:643). Countries of destination also benefit from the influx of foreign agricultural workers, entrepreneurs, medical professionals, teachers, and other skilled and semi-skilled workers through intra-regional migration (Barclay, 2010:62). South African companies employed Congolese to help open up new markets for South African products in French speaking Africa (Kadima, 2001:100). Immigration generates favourable economic effects in South Africa. Migrant workers have an upward effect on income per capita and a positive net fiscal contribution, while in general they do not displace native-born workers (OECD/ILO, 2018:33). Evidence has suggested that skilled migrants not only contribute to economic growth but also create jobs and reduce the costs of worker training (Rasool *et al.*, 2012:402). The World Bank Group (2018:4) points out that the estimated effects of migrant growth in local employment are positive and indicated that one migrant worker generates two jobs for locals.

According to Cohen & Sirkeci (2011:69) migrants have a positive effect as they encourage economic expansion to meet their needs and their tax payments, whether through sales tax, or retirement programs filling a receiving country's national accounts. Migrants bring capital to host countries in the form of their savings, value of skills they acquired through education or training in their home countries (Kantor, 2017:129). Asylum Access (2014:14) argues that the fear that migrants will displace nationals in the labour market is overstated because when governments

allow migrants to work, they become self-sufficient taxpayers who bring new skills and demand for goods and services to host countries, diversifying markets and stimulating economic growth. Migrants have a positive effect on the labour market by increasing labour supply in sectors and occupations suffering from shortage of workers as well as helping to address mismatches in the job market (IOM, 2018:4). Owusu-Sekyere *et al.* (2019:28) confirm that migrants bring new skills and abilities and supplement the stock of human capital of the host country. Immigration enhances local skills development and transfer of experience and expertise (Owusu-Sekyere *et al.*, 2019:28).

The Post-Apartheid Labour Market Series (PALMS) have found that immigration has a positive impact on local employment, labour earnings and wages (WBG, 2018:4). As migrants participate in destination countries' economy, they create additional demands for goods and services that must be met (Cohen & Sirkeci, 2011:69). Migrants pay rent and utilities, cover transportation and buy food (Cohen & Sirkeci, 2011:79). Carens (2008:175) argues that the most important point here is that irregular migrants live within the society, they pay taxes, and participate in community life. The decisive consideration is that migrants are members of the domestic workforce (Carens, 2008:175).

4.5 Securitisation of migration protocols: the skills shortage in South Africa

While the official government position has been that efforts should be placed in attracting and retaining skills in South Africa, policy implementation has often been lacking (OECD/ILO, 2018:62). There was political reluctance to recruit highly skilled Africans from outside South Africa (Ellis & Segatti, 2011:67). In South Africa, the demand driven system for the recruitment of highly skilled individuals was based on a labour market test contingent upon a job offer and on a specific entry list of critical skills (Carciotto, 2018:63). The doors have been opened slightly wider for the highly skilled but remain firmly closed to semi-skilled and unskilled potential immigrants (Peberdy, 2013:151). South Africa shunned temporary work programmes, and political authorities have not facilitated the entry of low-skilled workers outside outdated bilateral agreements (Carciotto, 2021:141). The central problem appears to be a restrictive immigration policy that imposes penalties and impediments on employers who source skilled foreigners (Botha & Rasool, 2014:68). Mthembu-Salter *et al.* (2014:6) posits that deportation strategy, together with broader bureaucratic delays and ineptitude, and exclusionary legal frameworks, appeared to discourage moderately and highly skilled migrants. Ellis & Segatti (2011:67) argue that the national's skills shortage may account for South Africa's failure to reach its target economic growth rate of 6 per cent per year. In 2012, the skills shortage in the South African private sector was estimated at 890000 vacancies, indicating the need for government to enact adequate immigration policies to attract the best and the brightest (Carciotto, 2018:62).

Kantor (2017:148) argues that South African economic policy and administration discourage the entry of skilled workers and professionals from outside its borders through regulatory burdens. However, a large number of relatively unskilled migrants from other countries in Africa have been able to enter South Africa and succeeded in finding employment (Kantor, 2017:148). According to Botha & Rasool (2014:68), the immigration policy was highly restrictive, bureaucratic, user-unfriendly, and costly to administer. Moreover, it serves as an impediment for business and industry to recruit skilled foreign labour into the country as a result of excessive and unnecessary regulations and procedures (Botha & Rasool, 2014:68). The Department of Home Affairs managed to issue only 2896 scarce skills permits, contrary to its target objective to realise a positive skill migration trend of around 50000 migrants annually (Carciotto, 2018:63). Moreover, when labour migrants intend to change employers, they need to return to their country of origin and reapply to obtain work visas, bearing considerable costs and lacking any guarantee to pass a new labour market test (Carciotto, 2018:63).

Crush (2002:166) argues that developing countries such as South Africa face a considerable dilemma, as the country is a prime target for skills raiders from Europe, North America, and Australasia. Brain drain has proven to be a major impediment to economic growth, social stability, and job creation in South Africa (Botha & Rasool, 2014:63). Brain drain is the emigration of highly skilled professionals from poor countries to rich countries (Adepoju, 2010:12). South Africa has exported skilled migrants, especially doctors, nurses and engineers to Europe, North America, and Australia, leading to skill shortages (Adepoju, 2010:20). The most acute shortages such as engineers, artisans, and town planners, are not given priority by the Department of Labour or the Department of Home Affairs (Ellis & Segatti, 2011:70). Although many skilled South Africans were leaving, the impact of their departure has been partly dissipated by the fact that many foreign professionals from Eastern Europe, Asia and Africa have chosen to emigrate to South Africa (Kadima, 2001:106). The first wave of Congolese migrants had a significant proportion of skilled professionals such as medical doctors, nurses, laboratory technicians, engineers, computer scientists and academics supplying critical skills in an economy which is short of certain kinds of trained manpower (Kadima, 2001:106).

Ramphela (2008:189) was of the opinion that South Africa was experiencing a severe shortage of well-qualified artisans. South Africa produced only 5000 artisans in 2006 while research suggested that 12 500 were needed each year for the next four years from 2006 (Ramphela, 2008:189). Home Affairs' list of skills that could be acquired from abroad does not provide for managers or lower-level skilled operators and effectively create a barrier to the sourcing of lower-level artisan skills from elsewhere (Ramphela, 2008:189). Problems in retaining skilled mining staff, combined with insufficient new graduates and an ageing workforce, are affecting the South

African industry (Rasool *et al.*, 2012:407). In addition, companies like ESKOM (The South African Electricity Supply Commission) are not only experiencing power generation problems, but a dearth of engineering skills has also contributed to the power crisis (Rasool *et al.*, 2012:408).

4.6 Securitisation of migration protocols: migrant entrepreneurship

Crush *et al.* (2015:26) argue that the growing presence of migrants in the informal sector has created noticeable tension in various quarters in South Africa, including government circles, ignoring the fact that in the free market economy of South Africa, immigrants and refugees like citizens and commercial enterprises ought to enjoy the freedom to establish, operate and expand their businesses. Entrepreneurship plays a major role in reforming and revitalising economies because it establishes new businesses and helps existing ones (Kalitanyi & Visser, 2010:379). Immigrants have an above average degree of enterprise and risk tolerance (Kantor, 2017:129). Migrants are more likely to appear in entrepreneurial roles than locals suggesting that their actions are likely to promote economic growth by enhancing the supply of small retail establishments (WBG, 2018:43).

Migrants' small businesses support formal sector businesses and employment generation through purchase of products for resale from wholesalers and retailers (Crush *et al.*, 2017:25). Entrepreneurship is important to business because it adds value and produce wealth including job creation (Kalitanyi & Visser, 2010:379). Another aspect of the contribution of migrant entrepreneurs is the payment of rentals to South African's landlords (Crush *et al.*, 2015:11). According to Peberdy (2016:31) migrants' source goods from wholesalers, factories, supermarkets, and retailers, thus contributing to the profitability of the South African formal sector enterprises and indirectly contributing to job creation in the formal sector. Multiple purchases made by migrant entrepreneurs through the formal economy are subject to value-added tax (VAT) and only a small minority actually claim the VAT they have paid (Crush *et al.*, 2011:12). Migrant entrepreneurs also create direct job opportunities for South African nationals (Peberdy, 2016:33). Crush *et al.*, (2011:11) assert that key beneficiaries of migrants' businesses are the poor consumers who access cheap goods in appropriate quantities at places and times of the day that are convenient in areas serviced by the formal economy. Implications for South Africa to meet international human rights obligations under the Zuma administration will be explained next.

4.7 Summary

Nation states are entitled to secure their borders but beefing up security at borders through military and security strategies is not the answer. South African economy requires skills to grow and always relied on migrant labour for almost a century. An effective response lies in a regional approach to the management of migration and its root causes. While cross-border crime has

serious socio-economic repercussions, the fragmentation of South Africa's border policies has given way to the inability of the country to respond to this perceived growing threat. In Southern Africa, inequality, poverty, porous borders, economic opportunities and opening up new market factors, drive migration and border crime. A regional cooperative framework is required to address these issues rather than border unilateralism. By restricting access to the asylum system and by denying asylum-seekers substantive rights they currently enjoy, the Immigration Amendment Act 2011, 2016 Immigration Amendment Act, and RAA (2017), violate their constitutional rights to just administrative action, freedom and security of the person, freedom of movement and residence, education, social security, freedom of expression, picket, association, as well as equality and human dignity.

4.8 Conclusion

Securitisation of migration protocols has negative impacts on the wellbeing of migrants since it violates their basic human rights in terms of human dignity, equality, and freedom. The 2017 White Paper on international migration focuses on safeguarding the security and national interests of South Africa at the expense of asylum and refugee rights. The White Paper has introduced the APCs to detain asylum seekers and other migrants as they await the adjudications of their applications, which is a far cry from the non-encampment policy South Africa has been internationally renowned for. These detention centres could lead to widespread violations of human rights.

The White Paper 2017 severely restricts rights of migrants and asylum seekers as a way of discouraging them from migrating to South Africa. According to the White Paper 2017, South Africa profiles asylum seekers and migrants and violate the principle of non-discrimination enshrined in international human rights law. South Africa has always sought to attract and welcome skilled and wealthy migrants at the expense of unskilled migrants, who are always victims of detention and deportation as a weak constituency.

The DHA has enjoyed bureaucratic autonomy and violated asylum and international refugee rights. The intransigence of the DHA has seen it detaining and deporting asylum seekers and refugees without consideration of due process and in breach of international refugee law; they effectively breached the international law principle of non-refoulement. The DHA has closed RROS in urban centres and moved them to the borders between Zimbabwe and Mozambique at great financial costs to refugees and asylum seekers due to travelling costs, which could result in some asylum seekers and refugees failing to renew their permits and effectively become illegal migrants. Those refugees who fail to renew their permits and visas become illegal and subject to summary detention and deportation. The BMA has become operational to patrol and guard South African borders to keep migrants at bay, which could lead to human rights violations of asylum

seekers and other migrants, irrespective of their legal status. The securitisation of migration policies and legislative frameworks has been fashioned in such a way that deters asylum seekers and migrants from accessing protection in South Africa.

CHAPTER 5: REALIGNING SA'S MIGRATION PROTOCOLS ACCORDING TO INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

5.1 Introduction

The chapter focuses on the ways in which South Africa's migration legislation, policies and practices can be optimally aligned with international human rights obligations. The violation of migrants' human rights through arbitrary detentions, deportation and xenophobia have dented the reputation of South Africa. The realignment of SA's migration protocols is key to restore and project South Africa's global image as a country that subscribes to the ethos of human rights culture and the rule of law. South Africa is a party to international human rights instruments and is obliged to observe and comply with these human rights instruments. The chapter analyses migration protocols such as the Immigration Amendment Act 2011 which introduced harsher treatment of migrants such as the reporting requirement of 5 days instead of 14 days to make it difficult for migrants to access documentation and the Refugee Amendment Act 130 of 2017 which has imposed more restrictions on migrant's right to work and study.

The chapter analyses migration control practices that were introduced such as the pre-screening of asylum seekers at border posts and the refoulement of migrants without following due process. The chapter critique the closures of inland refugee's reception centres which created serious financial and emotional costs for migrants to travel to RROS in other provinces and denied them access to regularisation through documentation. Migrants without documentation have been arrested and detained for the lack of permits on account of the DHA lack of capacity and intransigent bureaucratic autonomy.

The chapter proposes strategies for South Africa to align its migration protocols to international human rights obligations such as voluntary return for migrants who wish to return to their home countries and documentation for migrants to regularise their stay in SA. The chapter recommends that South Africa secures migrants' right to gainful employment and education to restore their human dignity and realise their human potential. The chapter argues that SA grants permanent residence for long term migrants as another viable approach to alleviate the uncertainty and temporariness status of migrants in South Africa. The chapter also focuses on the naturalisation and SA citizenship for migrants as the most durable solution for qualifying long-term migrants. The chapter introduces location integration as the most humane approach that fosters good social relations between locals and migrants and promotes social cohesion and minimise xenophobia.

5.2 Ways in which SA's migration legislation, policies could be optimally aligned with international human rights obligations

Pre-screening of asylum seekers at ports of entry exposes asylum seekers to the risk of refoulement due to the lack of capacity and inexperienced DHA officials. The South African government is advised to put an end to hasty deportation done at borders or within the country without adequate verification of the legal status of those arrested, which may contravene South Africa's obligation of non-refoulement (FIHD, 2008:42). To continue with the above argument, Ntlama (2018:40) argues that even individuals unlawfully in the country may not be denied due process, but even upon detention are subject to a due process of administrative justice. To align optimally with international obligations, the DHA must provide access to the asylum system, conduct the status determination interview, and provide documentation for refugees to legally sojourn in South Africa (Khan & Rayner, 2020:28). The South African government should review the Immigration Amendment Act 13 2011 which stipulates that migrants who overstay would be declared undesirable and declared undesirable for 12 months to five years. According to the Refugee Act, asylum seekers and refugees are protected from deportation, and generally detention should be employed only as a matter of last resort (Johnson, 2015:202).

The principle of non-refoulement provides a secure protection to asylum seekers faced with rejection at the point of entry into the country in which they seek asylum (Tshosa, 2018:53). IOM (2018:130) noted that refoulement is only permitted under the UN Refugee Convention if there are reasonable grounds to believe that a person presents a danger to the security of the country or its community because of a conviction of a serious crime. Even states that are not party to the UN Convention or Protocol on refugees are bound by the principle of non-refoulement, which is considered a norm of customary international law and as such is binding to all states (Nicholson & Kumin, 2017:34). Chetail (2012:229) argues that aliens must be treated on an equal footing with nationals, with the obvious exception of political rights. The UN Convention Against Torture stipulates that when irregular migrants are apprehended by the authorities, they must not be subjected to physical or psychological treatment amounting to torture or other cruel, inhuman, or degrading treatment, including the use of excessive and inappropriate body searches or compulsory medical testing, and their rights to health and adequate food while in detention have to be guaranteed (ICJ, 2014:53).

5.2.1 Voluntary Return Agreements

A voluntary return process affords failed asylum seekers an opportunity to be repatriated to their country of origin without being detained or deported and cost-effective to the responsible state (Johnson, 2015:215). Voluntary repatriation entails safety and dignity, which require the full

commitment of the country of origin to integrate its own people and to ensure that national protection is effectively reinstated to them (Nicholson & Kumin, 2017:230). Governments of sending countries must accept the return of their citizens who fail to secure employment in the receiving country or who are expelled for reasons laid out in the domestic law of the host country (Ugur, 2007:85). States should create standards based on law and policy for the return, readmission, and reintegration of excludable migrants, in line with relevant international human rights instruments (AU, 2018:59). States and the international community have an interest in ensuring that repatriation is both voluntary and carried out in safety and dignity, with sufficient protection and assistance provided during the repatriation process and after return (Nicholson & Kumin, 2017:230). The emerging consensus is that some combination of deportation and assisted voluntary return is the most effective way to achieve the return of irregular migrants (Koser, 2005:23).

In South Africa, alternative immigration options with relaxed conditions for low-skilled migrants may reduce the burden on the asylum system, resulting in a more manageable caseload (Johnson, 2015:219). Return, both voluntary and by deportation, has a far better chance of success where there is genuine dialogue and working partnerships between countries of destination, origin, and transit countries (Koser, 2005:23).

5.2.2 Documentation for migrants

Kleinsmidt & Manicom (2010:179) argues that obtaining official documents remains difficult for asylum seekers, as temporary documents received at border crossings which bring legality to a person planning to apply for an asylum seeker permit, often expire weeks or months before the person can receive their asylum seeker permit. Issuing identity documentation to refugees, certifying their status, enables them to access other services and rights and can help protect them from harassment and refoulement (Nicholson & Kumin, 2017:188). Every refugee is entitled to the same basic health services and basic primary education available to all other inhabitants of the country (Mireku, 2002:411). Documentation would empower non-citizens, enabling them to remain legally in the country and to access other benefits such as access to education and work (Amit & Kriger, 2014:273). Documentation and the registration of refugees may be important components of local integration (Khan, 2020:279).

5.2.3 The right to gainful employment

The government could use the most effective way of alleviating skills shortage by recruiting aggressively foreign skills to come and help South Africans build a great country (Ellis & Segatti, 2011:69). The Immigration Amendment Act 2011 abolished the exceptional skills permit and replaced it by a single category called critical skills work visa, which was likely to imply higher

standards for qualification (Carciotto, 2021:160). There is a backlog in issuing business permits, police clearance, intra-company transfer and permanent residence permit applications (Rasool et al., 2012:406). Foreign executives working under intercompany work permits have been refused extensions to their two-year documentation (Ellis & Segatti, 2011:69). Between the repeal of the quota permit in 2011 and the adoption of the list of critical skills in demand in the 2014 Immigration Regulations, the question was left at the discretion of officials processing critical skills applications (OECD/ILO, 2018:63). The immigration policy is blamed for unworkable and irrelevant quota systems (Botha & Rasool, 2014:65).

Article 6 of the ICESCR recognises the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts (Asylum Access, 2014:13). This right applies to everyone, including non-nationals such as refugees, asylum seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation (Asylum Access, 2014:13). According to Article 2(3) of the ICESCR, developing countries with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals (Chetail, 2012:248). For differential treatment to be permissible, it must be reasonable and objective, and the overall aim must be to achieve a purpose which is legitimate under human rights law (IOM, 2018:130). Khan (2018:19) argues that a general prohibition of the right to work imposed on non-citizens, would not be justified if no welfare assistance is instead provided to them.

5.2.4 Permanent residence

Migrants qualify for permanent residence after a continuous residence in South Africa following some form of temporary residence or a spousal or kinship relationship with a South African citizen or holder of a permanent residence permit (Khan, 2018:114). Apart from those rights, privileges, and duties which a law or the Constitution explicitly ascribe to citizenship, the holder of a permanent residence permit is entitled to all the rights, privileges, duties, and obligations of a citizen (Mireku, 2002:411). A secure residency status is also one of the most effective measures states adopt to facilitate refugees' integration, their prospects of establishing a definitive and permanent homeland assuming their role as full and equal members of the society (Nicholson & Kumin, 2017:188). However, South African 2017 White Paper on International migration has proposed delinking citizenship and refugee status to prevent refugees from gaining citizenship due to stricter tests for citizenship, which make it difficult for refugees to qualify for citizenship (Khan, 2019:92).

5.2.5 Naturalisation and SA citizenship for migrants

The UN Refugee Convention states that it is essential that the law in the country should give refugees, especially those who have been in the country for a considerable period of time, the option of assimilation and naturalisation, and third country resettlement for refugees who are unable to assimilate (Tshosa, 2018:53). Naturalisation guarantees nationality and membership of a political or national community and is accompanied by various rights and state obligations (Khan, 2019:71). While a general right to seek naturalisation may not be feasible in countries such as South Africa, this solution should not be completely ruled out, and as it may be a durable solution feasible to them (Klaaren & Rutinwa, 2004:102).

5.2.6 Local integration of migrants

Many migrants, despite remaining in South Africa for up to 15 years struggle to integrate (Khan & Rayner, 2020:25). The UNHCR encourages governments to accede to, and respect international refugee law and human rights instruments, and to adopt and implement appropriate domestic legislation which will allow for meaningful integration of migrants (Khan, 2020:270). Local integration requires commitment by both receiving communities and naturalising refugee population and should be carried out in a manner that sustains the viability of local communities, lest there is excessive burden on such communities (CHR, 2009:109). Not only must the host government determine the status of refugees, but it must also reach out to the refugees and citizens; ensure security of refugees and promote livelihoods and self-reliance; ensure access to healthcare and other services, and allow freedom of movement (Khan, 2020:271). Government ought to involve as many stakeholders as possible, acknowledging its limitations and recognising the expertise of certain organisations working in the area of refugee management in creating a conducive environment for successful local integration (CHR, 2009:110). According to Nicholson & Kumin (2017:243), the culmination of integration comes when refugees are able to acquire the nationality of their new country of asylum.

5.3 Conclusion

South Africa should realign its migration protocols which are inconsistent with the Constitution and its international obligations. South Africa has several options and strategies to align its migration protocols and strategies that can promote human rights protections of migrants such as repealing restrictive provisions of the Immigration Amendment Act 13 of 2011 and the Refugee Amendment Act of 2017. The South African government can expedite access to documentation and the right to work and access to education for migrants. South Africa should grant permanent residence to long term migrants and even consider naturalisation or citizenship for qualifying migrants. Naturalisation is another pathway for long term documented migrants to obtain

citizenship in South Africa according to the South African Citizenship Act of 2013. The Immigration Act, although restrictive, makes provision for all migrants, including asylum seekers and refugees to apply for permanent residence after a period of five years. Permanent residence also covers migrants with critical skills, and business investors are eligible to apply for permanent residence.

A voluntary return process is available for failed asylum seekers and other undocumented migrants in South Africa to return to their home countries. The voluntary return process is less costly than deportation of migrants. This process also respects the human rights of migrants by collaborating with them and the sending countries. Local integration is a win-win situation as government benefits from human capital and migrants are able to access benefits such as jobs and public services.

CHAPTER 6: THE OVERALL IMPACT OF THE SECURITISATION OF SOUTH AFRICA'S MIGRATION PROTOCOLS ON MIGRANTS' RIGHTS

6.1 Introduction

The aim of this chapter is to answer the primary research question of the study: *"How did the securitisation of South Africa's migration protocols under Zuma administration impact on human rights bestowed through the SA Constitution upon migrants in South Africa?"* In order to answer the primary research question, this concluding chapter will follow the following structure:

- An explanation of the impact which the securitisation of South African migration protocols and practices had on the universal theory of human rights to which South Africa also subscribes as discussed in Chapter 2, and
- An analysis of Chapter 3 on the impact of securitisation of South African migration protocols and practices on SA's international human rights obligations to migrants.

The above points are used to provide a discussion on the overall impact of the securitisation on South Africa's migration protocols. The chapter concludes with a summary of the main findings and answer the general research questions.

6.2 The impact of the securitisation of South African migration protocols and practices on the universal theory of human rights

Le Roux (2018:220) argues that the DHA's position has been that illegal foreigners have forfeited all rights to personal freedom and that all illegal foreigners would be detained with impunity. However, migrants also have human rights. Nickel & Reidy (2009:41) held that essentially, human rights are rights held by all living human beings irrespective of their national, religious, ethnic, gender, racial or other distinguishing identities. Walters (1995) argued that human rights must be observed and respected by all states with regard persons including citizens and non-citizens because human rights exist regardless of customs and legal systems of any particular country.

Migrants do not have access to legal rights in detention and individuals may be illegally deported without any review or appeal procedures and at great risk to their safety (Amit, 2013:33). However, Section 12(1) of the SA Constitution, stipulates that the right to freedom and security of the person is protected in the Bill of Rights, in particular the right not to be deprived of freedom arbitrarily or without just cause, the right not to be detained without trial and right to be free from all forms of violence from both public and private sources, the right not to be tortured in any way and the right to not to be treated or punished in a cruel, inhumane or degrading way (HRW,

1998:7). The SA Constitution protects and safeguards the rights of all people in the country and affirms the democratic values of human dignity, equality, and freedom (Rautenbach & Malherbe, 2004:292).

Hammerstad (2012:16) observed that securitisation of migration in South Africa entailed treating migrants as criminals and a xenophobic discourse that entailed arresting and deporting anyone without papers. However, section 10 of the SA Constitution stipulates that the right to dignity applies universally, irrespective of whether one is a foreign national or citizen (Ntlama, 2018:43). The prohibition against refoulement applies to all asylum seekers, regardless of the validity of their documents (Amit, 2010:49). Article 33 of the Refugee Convention provides that no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his/her race, religion, and nationality, membership of a particular social group or political opinion (Kneebone, 2009:11).

Carciotto *et al.* (2018:18) note that a key change introduced by the 2017 Refugee Amendment Act (RAA) was the limitation of asylum seekers' right to work in South Africa. The new scheme imposes extremely harsh procedural conditions on employing asylum-seekers since they are denied the right to work whilst the initial assessment takes place (Ziegler, 2020:99). Carciotto *et al.* (2018:21) argue that asylum seekers face immense financial hardships in South Africa and a number of barriers they encounter in accessing wage-earning jobs in the country. Polzer (2013:27) argues that preventing asylum seekers from accessing protection in South Africa is a violation of the fundamental human right to seek and enjoy in other countries asylum from persecution and a violation of the 1998 Refugee Act's access guarantees.

Crush & Ramachandran (2014:7) confirmed that the policies and practices of state institutions reinforced extreme xenophobia by undermining migrants' rights and aggravating their insecurity. The DHA's failure to follow proper procedures has also resulted in prolonged and indefinite detentions without judicial oversight, meaning that many detentions and deportations are occurring illegally (Amit, 2010:7). Article 33 of the Refugee Convention provides that no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his/her race, religion, and nationality, membership of a particular social group or political opinion (Kneebone, 2009:11).

During the Zuma administration, South African national interests included the eradication of poverty and underdevelopment, the creation of wealth, job creation, economic development, state security and entrenching democracy (Landsberg, 2010:207). The Zuma administration considered the increasing number of migrants as a threat to the nation and its national interests (Aminaka, 2013:105). Kegley & Wittkopt (1993:537) define national interest as the way in which

the state should promote its internal welfare, protect itself from external attack and preserve its values and the way of life. This is consistent with the argument that states have a sovereign right to prohibit the entry or exit of non-nationals into or from their territories (Hollifield, 2006:257). The realist assumes that the government is a social planner who maximises national interests and that its action is derived from popular consent and justified to restrict immigration if it perceived to be posing a threat to the national interests (Ugur, 2007:64). Popular sovereignty implies that states are under obligation to prioritise the interest of their political community vis-à-vis other persons or migrants (Ugur, 2007:66). None of these views espoused under the Zuma-administration were therefore in accordance with human rights theory.

From the realist perspective, states have the primary responsibility for maintaining security as reflected in the notion of national security (Heywood, 2013:409). Threats to national security can be defined as any activities that can threaten, impinge on the existence, well-being, peace, or stability of a state (Khan *et al.*, 2018:77). Fear of migrants as a threat to security or fear of other cultures can be an important underlying reason when defining security problems that affect the state and other agents (Aguis, 2010:55). Realists argue that since human relations are inherently conflictual, the state monopoly on the legitimate use of violence is needed to keep society in equilibrium (Duncan, 2014:13). According to Kegley & Wittkopf (1993:23) the purpose of statecraft is national survival in a hostile environment and self-help is the most important principle.

Seen from the perspective of Realism theory, Adamson (2006:176) argues that states have interests in controlling their territorial borders in order to maintain control over their populations, limit access to labour markets and public goods and maintain internal security. This is exactly what the Zuma-administration aimed to do. During the Zuma-era, state sovereignty became the cornerstone of international law giving heads of state the freedom and responsibility to do whatever is necessary to serve state's interests and survival (Kegley & Wittkopft, 1993:23). As a direct result, the securitisation of migration introduced stricter immigration control and therefore an increase in the number of illegal foreigners being detained pending deportation (Mauritz, 2018:220). The South African government during the Zuma-administration adopted nothing less than an anti-immigration stance towards foreigners and tightened the processes for acquiring legal documents in South Africa for those who do not fall within the critical skills category (Landau *et al.*, 2018:43). Some immigration officers refused to provide asylum seekers with transit permits at the port of entry putting them at risk of immediate arrest or deportation (Hiropolous, 2017:4). Denial of entry constitutes refoulement and is therefore in contravention of South Africa's international legal commitments and violates the individual rights to apply for asylum under the Refugee Act (Polzer, 2013:28).

International law and other legal obligations are founded on the goals of human rights and through the prism of realism, the South Africa failed to uphold these goals or embrace them in legislations pertaining to migration. This will be discussed next.

6.2.1 The impact of securitisation of South African migration protocols and practices on SA's international human rights obligations to migrants

As was concluded in Chapter 3, the securitisation of South African migration protocols and practices during the Zuma administration had an adverse impact on SA's international human rights obligations related to migrants. The main principle which was contravened was that even irregular migrants are human beings and entitled to human rights guarantees, accruing to all and distinct from entitlements attached to citizenship (CHR, 2009:98). It should be noted that South Africa is a party to the 1966 ICCPR, the ICESCR, the 1948 UDHR, and other core human rights treaties articulating civil, political, economic, social, and cultural rights that are inherent to all human beings in view of the recognition and acceptance of fundamental importance of safeguarding human dignity (IOM, 2018:130).

Fundamentally, human rights aim to protect the basic dignity of human life and the UDHR embodies this goal by declaring that human rights flow from the inherent dignity of the human person (Heard, 1997). Marks (2016:3) argues that the ethical principles of human rights include concepts such as human flourishing, dignity, duties to family and society, natural rights, individual freedom, and social justice, all against any exploitation based on sex, class, or caste. Included in the UDHR's protections of civil and political rights are the prohibition of slavery, inhuman treatment, arbitrary arrest, and arbitrary interference with privacy as well as a broad, non-discrimination provision that mandates equality on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, birth, or other status (Hernandez-Truyol, 1997:235).

Some of the basic principles of the UDHR such as non-discrimination, the right to a fair trial, and the prohibition on torture and cruel, inhuman, or degrading treatment undoubtedly belong to the corpus of customary law today, despite the fact that they may not always be observed (Hannum, 1996:289). The ICESCR elaborates upon most of the civil and political rights enumerated in the UDHR, such as the right to work, right to social security, right to health, right to education and rights relating to culture and science (Weston, 1984:275).

The deportation of migrants without applying due process was in breach of international human rights law. The most important international legal instruments affecting the situation and rights of refugees are the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees (Goodwin-Gill, 1989:536). The first consideration of the Geneva Convention 1951 and

its 1967 Optional Protocol is the principle of non-refoulement, the cornerstone of international refugee law which safeguards individuals against being returned to a country where they have a reason to fear persecution or harm, as stated in Article 31 of the 1951 Convention (Johnson, 2015:205). The principle of non-refoulement applies to all asylum seekers, irrespective of their immigration status, and applies to persons both lawfully and unlawfully in a state or attempting to enter a state (Kneebone, 2011:12).

Brown (2016:49) maintains that migrants who move across state boundaries must retain their universal human rights, should be treated accordingly, and enjoy a right to security in transit, including freedom from forced or coerced movement, and a right to a fair and responsible process at borders. According to Nickel (2019), human rights are norms that aspire to protect all people everywhere from severe political, legal, and social abuses.

Chetail (2012:244) reiterates the rights contained in the ICCPR such as an inherent right to life, and no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. The State is required to ensure migrant workers' rights, including the right to equal protection of the law, to liberty and security of person, dignity, access to justice and due process, emergency medical treatment, access to basic education, protection against unauthorised confiscation or destruction of identity documents and protection against collective expulsion (CHR, 2009:61). Nickel & Reidy (2009:43) add that some human rights purport to be binding whether or not a state recognises them in its domestic laws or through the ratification of human rights treaties, to suggest that some human rights are universal moral rights that bind states and individuals, apart from and prior to domestic or international law.

In an effort to manage the high numbers of asylum seekers, DHA bureaucrats classified most foreign migrants who seek asylum as economic migrants, which changes their status as asylum seekers to being illegal and subject to deportation (Amit & Kriger, 2014:274). Another point for illustration involves the Immigration Act No.11 2002 and its accompanying regulations, which established a restrictive immigration regime that facilitated immigration for highly skilled immigrants but offered few options for low-skilled workers (Johnson, 2015:203). The lack of legal options under the Immigration Act led migrants to lodge asylum claims to legalise their sojourn temporarily (Johnson, 2015:203). Landau *et al.* (2018:37) argue that, without sustained political will and administrative capacity to properly interpret, implement, and enforce existing legal and policy frameworks, migrants' protection will always be compromised.

Table 6-1: The securitisation of migration protocols and its impact on migrants

SECURITISATION MEASURE	IMPACT ON MIGRANTS	APPLICABLE LEGISLATION
Pre-screening of asylum seekers at ports of entry	DHA officials vested with powers to refuse asylum seekers entry. Rejected asylum seekers would face arrest, detention, and deportation	The Immigration Amendment Act 13 2011
Reduced the time for asylum seekers to lodge applications from 14 days to 5 days	To ensure deterrence for asylum seekers to apply, due to time constraints. Many asylum seekers were arrested and deported due to the lack of documentation	Immigration Amendment Act 13 2011
Introduction of harsh measures for migrants who overstay and them being undesirable	Those who overstay for more than 30 days declared undesirable for 12 months. Those who overstay for more than 30 days declared undesirable for five years	Immigration Amendment Act 13 2011
Repeal of the quota and exceptional skills work permit; replaced it with a single critical skills permit	Created an exclusionary immigration regime to deny many low-skilled migrants from entering the country	Immigration Amendment Act 13 2011
Foreign nationals had to return to their home countries of origin before the expiration of their permits and return once the extension of their permits has been approved	Migrants who fail to depart from SA fined, or imprisonment not exceeding two years	Immigration Amendment Act 13 2011 read with regulation 27(3)
The right to work may not be endorsed for applicants who can sustain themselves or are offered shelter by the UNHCR	Asylum seekers prohibited to work becoming destitute	The Refugee Amendment Act 11 2017
Employers or educational institution fail to furnish DHA with a letter within a specified time guilty of an offence and liable for a fine of up to R20000	Asylum seekers fail to secure employment and admission at educational institutions	The Refugee Amendment Act 11 2017

SECURITISATION MEASURE	IMPACT ON MIGRANTS	APPLICABLE LEGISLATION
Failure to renew asylum seekers' permits within one month of expiry lead to automatic revocation of status	Asylum seeker with an expired permit guilty of an offence and imprisonment of up to 5 years	The Refugee Amendment Act 11 2017
To do away with permanent residence and replace it with a long-term renewable residence visa	Refugees would only be eligible for permanent residence after 10 years	The SA 2017 White Paper on International migration
Building Asylum Processing Centres (APCS) to accommodate and profile asylum seekers during status determination process	Asylum seekers would be deprived of access to employment and education since their needs will be catered for at the processing centres	The 2017 White Paper

6.4 Conclusion

The securitisation of migration policies during the Zuma administration amended migration protocols such as the Refugee Act 130 of 1998 and the Immigration Act 13 of 2002 which became inconsistent with the human rights theory and the Constitution. The impact of securitisation of migration policies resulted in the violation of migrants regarding personal security, equality, human dignity, and freedom. The securitisation of migration protocols also breached the South African Constitution's Bill of Rights, which accords everyone equal protection of human rights, irrespective of their nationality or migration status. Human rights are so fundamental to human existence that they should trump any other consideration, which means that citizenship status does matter in so far as the protection of human rights is concerned. Human rights are universal and are not bound to race, nationality, or social origin, and apply equally to everyone in the world.

The impact of securitisation of migration protocols also entailed the deportation of migrants who deserved protection under international human rights instruments. The securitisation of migration policies also entailed denying most unskilled migrants the right to work. The 2017 White Paper on International Migration also delinked the length of stay and qualification for permanent residence status or naturalisation, to deny migrants the right to permanent residence and naturalisation. The White Paper 2017 also introduced APCs and replaced the erstwhile non-encampment policy. These asylum processing centres would become de facto detention centres, whereby migrants would not be able to seek work, self-employment, or access to education.

The pre-screening of migrants at border posts made it difficult to deserving asylum seekers due to the challenges of capacity in the DHA. Migration protocols such as the Immigration Amendment Act 2011 should be amended by repealing the single critical skills permit to allow migrants with other skills to work in South Africa. The deportation of migrants who overstay their visas and work permits should be replaced with other sanctions instead of deportation as it breaks up families and costly to persons with businesses in South Africa. The Refugee Amendment Act 2017 should allow for sufficient time for migrants to apply for permits instead of 5 days.

The leads to answering to the primary research question: *“How did the securitisation of South Africa’s migration protocols under the Zuma administration affected human rights bestowed through the South African Constitution upon migrants in South Africa?”* It is concluded that the effect of securitisation of South Africa’s migration protocols resulted in the violation of basic human rights of migrants through detention and deportation, denying migrants the rights to personal security and human dignity. The impact of securitisation denied migrants the rights to social security such as the right to work, access to water and housing, because it was evidently discriminatory against migrants. The securitisation of migration protocols also violated migrants’ rights to equality and human dignity. Fundamentally, the securitisation of migration protocols contravened the Constitution and international human rights obligations.

BIBLIOGRAPHY

Abebe, T.T. 2019. Securitization of migration in Africa: The case of Agadez in Niger. Africa report 20. The Institute for Security Studies (ISS).

Adamson, F.B. 2006. Crossing borders: International Migration and National Security. *International Security*, 31(1):163-199.

Adepoju, A. (ed.) 2010. International Migration within, to and from Africa in a globalised world. Network of Migration Research on Africa. Sub-Saharan Publishers: Accra.

Aguis, C. 2010. Social constructivism (In: Collins, A. (ed.) Contemporary Security Studies. 2nd edition. pp.58-102. Oxford University Press).

Aleinikoff, T.A. 2002. International legal norms and migration: An analysis. Migration and research programme. International Organisation for Migration (IOM). Geneva.

Aminaka, A. 2013. Transition in immigration policy: Inclusion and exclusion in the South African state after democratizations. (In: Makino, K. & Sato, C. (eds.) Public policy and transformation in South Africa after democratization. *IDE Spot Survey* 33. Institute of Developing Economies and Japan External Trade Organisation (IDE-JETRO) pp.103-121).

Amit, R. 2010. Lost in vortex: Irregularities in detention and deportation of non-nationals in South Africa. FMSP Research Report, University of the Witwatersrand.
<https://ssrn.com/abstract=3274019> Date of access: 12 Feb. 2019.

Amit, R. 2013. Security rhetoric and detention in South Africa. African centre for migration and society (ACMS). www.migration.org.za. Date of access: 20 Mar. 2020.

Amit, R. & Kriger, N. 2014. Making migrants illegible: the policies and practices. *Kronos (online)*, 40(1):269-290. Date of access: 2 Nov. 2020.

Amnesty International. 2019. Living in limbo. Rights of asylum seekers denied. Amnesty International. <https://www.amnesty.org/en/documents/afr53/0983/2019/en/>. Date of access: 5 Feb. 2019.

Andrews, P. 2008. Incorporating international human rights law in national constitution: The South African experience. (In: Miller, R & Bratspies, R, eds., Progress in international law. pp.835-854). <https://ssrn.com/abstract=1159119>. Date of access: 5 Feb. 2019.

- Andrews, A. 2009. South Africa in encyclopaedia of human rights.
https://digitalcommons.nylls.edu/fac_articles_chapters/1322. Date of access: 20 Oct. 2020.
- Asylum Access. 2014. Global refugee work rights report. Taking the movement from theory to practice. *A report by Asylum Access and the Refugee Work Rights Coalition*. Asylum Access: Oakland.
- AU (African Union). 2018. Migration policy Framework for Africa and plan of action (2018-2030). African Union Commission. Addis Ababa.
- Babbie, E. & Mouton, J. 2012. The practice of social research. 4th ed. Oxford University Press. Cape Town.
- Balzacq, T. 2005. The three faces of securitization: Political Agency, Audience and Context. *The European Journal of International Relations*, 11(2):171-201.
- Balzacq, T., Leonard, S., & Ruzicka, J. 2016. Securitization revisited: Theory and cases. *International Relations*, 30(4):494-531.
- Baradat, L.P. 1994. Political ideologies: Their origins and impact. 5th ed. Prentice Hall. New Jersey.
- Barclay, A. 2010. Regional Economic Commissions and Intra-regional Migration Potential in Africa. Taking Stock. (In: Adepoju, A. (ed.) International Migration within, to and from Africa in a Globalised World. Network of Migration Research on Africa. Sub-Saharan Publishers: Accra. pp.46-91).
- Bentham, J. 1781. An introduction to the principles of morals and legislation. Batoche Books.
- Bhattacharjee, A. 2012. Social Science Research: Principles, methods, and practices. 2nd ed. Tampa. University of South Florida. <http://scholarcommons.usf.edu/oa/textbooks/3> Date of access: 27 Aug. 2019.
- Bigo, D. 2002. Security and immigration: Toward a critique of the governmentality of unease. *Alternatives*, 27(1):63-92.
- Bilchitz, D. & Du Toit, L. 2016. Assessing the performance of South Africa's Constitution. Fundamental rights in South Africa's Constitution. International Institute for Democracy and Electoral Assistance (IDEA). University of Johannesburg.

Bote, J. & Termens, M. 2019. Reusing data: Technical and ethical challenges. *DESIDOC Journal of Library & Information Technology*, 39(6):329-337.

Botha, C.J. & Rasool, F. 2014. Developing a conceptual framework of skills immigration in South Africa. *Mediterranean Journal of Social Sciences*, 5(20). DOI: 105901/mjss.v5n20p62. Date of access: 17 Jun. 2021.

Bowen, G.A. 2009. Document analysis as a qualitative research method. *Qualitative research journal*, 9(2):27-40.

Boynton, E. 2015. *Protectionism and national migration policy in South Africa*. Cape Town: University of Cape Town (Thesis-Masters).

Brown, G., ed. 2016. The Universal Declaration of Human Rights in the 21st century: A living document in a changing world. A Report by the Global Citizenship Commission. Open Book Publishers. Cambridge. <https://dx.doi.org/10.11647/OPBP.0091>

Bryman, A. 2012. Social Research methods 4th ed. Oxford University Press: New York.

Busch, C., De Maret, P.S., Flynn, T., Kellum, R., Le, S., Meyers, B., Saunders, M., Palmquist, M., 2005. Content analysis. <https://writing.colostate.edu/guides/guide.cfm?guideid=61> Date of access: 13 Mar. 2022.

Buzan, B., Weaver, O., & De Wilde, J. 1998. Security: A new framework for analysis. Boulder, London.

Campbell, E.K. 2006. Reflections on illegal immigration in Botswana and South Africa. *African Population Studies*, 21(2):23-44.

Campbell, E.K. 2010. Irregular Migration within and to South Africa and from the African continent to the European Union: Tapping the Latent Energy of the Youth (In: Adepoju, A. (ed.) International migration within, to and from Africa in a globalised world. Sub-Saharan publishers. pp.170-197).

Carciotto, S. 2018. International migration and development in South Africa. (In: Khan, F. (ed.) Immigration Law in South Africa. Claremont. Juta. pp.57-73).

Carciotto, S. 2021. The restrictiveness of migration policies in South Africa. *African Journal of governance and development*, 10(1):118-163.

Carciotto, S. & Mavura, M. 2016. The evolution of migration policy in post-apartheid South Africa: Emerging themes and new challenges. The Scalabrini Institute for Human Mobility in Africa: Cape Town.

Carciotto, S., Gastrow, V. & Johnson, C. eds. 2018. Manufacturing illegality: The impact of curtailing asylum seekers' right to work in South Africa. The Scalabrini Institute for Human Mobility in Africa (SIHMA): Cape Town.

Carens, J.H. 2008. The rights of irregular migrants. *Ethics and international affairs*, 22(2):163-186.

CHR (The Centre for Human Rights). 2009. The nature of South Africa's legal obligations to combat xenophobia. University of Pretoria. Pretoria.

Chenwi, L. 2011. Using international human rights law to promote constitutionalism: The potential role of the South African parliament. *Law, democracy and development*, 15(1). DOI:10.4314/1dd.v15i1.8

Chenwi, L. 2015. International human rights in South Africa. (In: De Wet, E., Hestemeyer, H. & Wolfrum, R, eds. The implementation of international law in Germany and South Africa. Pretoria University Law Press. p.339-373).

Chelin, R. & Buchanan-Clarke, S. 2018. The evolving threat of violent extremism and terrorism in the SADC region (In: Tschudin, A., Buchanan-Clarke, S., Coutts, L., Russel, S., Tyala, M. (eds.) Jacana Media: Auckland Park. pp. 227-257).

Chirwa, D.M. 2004. The doctrine of state responsibility as a potential means of holding private actors accountable for human rights. *Melbourne Journal of International Law*, 5(1):1-36.

Chetail, V. 2013. The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights. *Georgetown Immigration Law Journal*, 28(1):225-255.

Cilliers, J. 2017. Fate of the nation: 3 scenarios for South Africa's future. Jonathan Ball Publishers: Johannesburg.

Citak, E. 2020. Migration and securitization: An assessment in the context of human security. *Journal of Management and Economic Research*, 18(3):1-24.

Cote, D. 2018. Deportation (In: Khan, F. (ed.) Immigration law in South Africa. Juta: Claremont. pp. 222-233).

Cohen, J.H. & Sirkeci, I. 2011. *Cultures of Migration: The global nature of contemporary mobility*. Austin: University of Texas Press.

Constitution of the Republic of South Africa 1996.

Creswell, J.W. 2007. *Qualitative inquiry and research design: Choosing among five approaches*. Thousand Oaks: Sage.

Creswell, J.W. 2014. *Research design*. 4th edition. Sage.

Cruft, R., Liao, S.M., & Renzo, M. 2015. The philosophical foundation of human rights: An overview (In: Cruft, R., Liao, S.M., & Renzo, M. (eds.) *Philosophical foundations of human rights*. Philosophical foundations of law. Oxford University Press. p.1-4).
<https://doi.org/10.1093/acprof:oso/97801996886223.003.0001>

Crush, J. 2011. Diasporas of the South: Situating the African diaspora in Africa. (In: Plaza, S and Ratha, D. (eds.) *Diaspora for development in Africa*. World Bank: Washington DC).

Crush, J. 2014. Southern hub: the globalisation of migration to South Africa (In: Lucas, R.E. (ed.) *International handbook on migration and economic development*. Edward Elgar Publishing. pp. 211-240. <https://doi-org/10-4337/97875415072>)

Crush, J. & Dodson, B. 2015. Migration governance and migrant rights in the Southern African Development Community. Attempts at harmonization in a disharmonious region. Research Paper No.3. United Nations Research Institute for Social Development (UNRISD).

Crush, J., & Ramachandran, S. 2014. Xenophobic violence in South Africa: Denialism, minimalism, realism. *The South African Migration Programme (SAMP) Migration Policy Series No. 66*.

Crush, J., & Ramachandran, S. 2015. Doing business with xenophobia (In: Crush, J., Chikanda, A., & Skinner, C. (eds.) *Mean streets: migration, xenophobia and informality in South Africa*. pp-25-61).

Crush, J., Skinner, C., & Stulgaitis, M. 2017. *Rendering South Africa Undesirable: A critique of Refugee and Informal Sector Policy*. SAMP Migration Policy Series No.79.

Crush, J., Tawodzera, G., Chikanda, A., Ramachandran, S., & Tevera, D. 2017. *South Africa case study: The Double crisis-Mass Migration from Zimbabwe and xenophobic violence in South Africa*. Vienna: International Centre for Migration Policy Development and Waterloo: Southern Africa Migration Programme (SAMP). pp.1-64.

Crush, J., Dodson, B., Williams, V. & Tevara, D. 2017. Harnessing migration for inclusive growth and development in Southern Africa. Vienna: International centre for migration policy development and Waterloo, ON: Southern African Migration Programme (SAMP).

Crush, J. 2020. Deadly denial: Xenophobia governance and the global compact for migration in South Africa. SAMP Migration Policy Series No. 82.

Dauvergne, C. 2004. Sovereignty, migration and rule of law in global times. *The Modern Law Review*, 67(4):588-615.

Denscombe, M. 2002. Ground Rules for Good Research: A 10-point guide for social researchers. Open University Press: Buckingham.

Department of Home Affairs (South Africa). 2017. The 2017 White Paper on international migration for South Africa. <https://www.gov.za/sites/default/files41009-gon750.pdf> . Date of access: 8 Aug. 2019.

De Wet, E. 2004. The friendly but cautious reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks. *Fordham International Law Journal*, 28(6)1:1529-1565.

Dodson, B. & Crush, J. 2015. Migration governance and migrant rights in the Southern African Development Community (SADC). Attempts at harmonizing in a disharmonious region. Research Paper 3. United Nations Research Institute for Social Development (UNRISD). Date of access: 23 Sep. 2020.

Donnelly, J. 1982. Human rights as Natural rights. *Human Rights Quarterly*, 4(3): 391-405.

Donnelly, J. 2007. The relative universality of human rights. *Human Rights Quarterly*, 29(2): 281-306.

Du Toit, P. & Kotze, H. 2011. Liberal democracy and peace in South Africa. Palgrave Macmillan: New York.

Dube, F. 2020. The South African Constitution as an instrument of doing what is just, right and fair. *In die Skriflig/In Luce Verbi* 54(1). DOI: 10.4102/ids.v54i1.2601.

Dugard, J. 1994. International law: A South African perspective. Juta & Co.: Kenwyn.

Dugard, J. 1997a. International law and the South African Constitution. *European Journal of International Law*, 8(1):77-92.

- Dugard, J. 1997b. South Africa: International law provisions of 1996 Constitution. *International legal materials*, 36(3):744-758.
- Duncan, J. 2014. The rise of the securocrats: The case of South Africa. Jacana Media: Auckland Park.
- Dunn, J. 1995. John Locke: The politics of trust. (In: Plato to NATO: Studies in political thought. Penguin Books. London. pp.108-119).
- Dupre, B. 2011. 50 political ideas you really need to know. Quercus Publishing Plc: London.
- Edwards, L. & Freeman, L. 2021. Policing and non-nationals. Analysis of police prevention, detection and investigation of xenophobic violence in South Africa. African policing Civilian oversight forum (APCOF).
- Ekambaran, S.S. 2019. Foreign nationals are the non-white of the democratic dispensation (In: Satgar, V. (ed.) Racism after apartheid. pp. 217-237. Wits University Press).
- Ellis, S. & Segatti, C. 2011. The role of skilled labour (In: Segatti & Landau, L. (eds.) Contemporary migration to South Africa. A Regional Development Issue. The World Bank).
- Escamilla, M. 2008. Rights and Utilitarianism: John Stuart Mill's role in its history. <https://doi.org/10.4000/etudes-benthamiennes-192>
- FIDH (International Federation for Human Rights). 2008. Surplus People? Undocumented and other vulnerable migrants in South Africa. N°486/2. <http://.refworld.org/docid/47eDea1512.html> Date of access: 20 Feb. 2019.
- Filimon, L.M. 2016. An overview of the Copenhagen school's approach to security studies: Constructing security. *The Romanian journal for Baltic and Nordic studies*, 8(2): 47-72.
- Flowers, N. (ed.) 1998. Human Rights Here and Now. Celebrating the Universal Declaration of Human Rights. Amnesty International. Human Rights Resource Center. Minneapolis humanrts@tc.umn.edu Date of access: 17 Oct. 2021.
- Gastrow, V. 2018. Problematizing the foreign shop: Justifications for restricting the migrant Spaza sector in South Africa. Southern African Migration Programme (SAMP).
- George, P.G. & Elphick, R. 2014. Promoting citizenship and preventing statelessness in South Africa. A practitioner's guide. Pretoria University Law Press: Pretoria.

GDP (Global Detention Project). 2021. Country Report. Immigration detention in South Africa: Stricter control of administrative detention, increasing criminal enforcement of migration. www.globaldetentionproject.org. Date of access: 21 Apr. 2022.

Ghosh, B. 2007. Managing migration: Towards the missing regime? (In: Pecoud, A and De Guchteneire, P. (eds.) *Migration without borders: Essays on the free movement of people*. UNESCO and Berghahn Books, New York. pp.102-124).

GMG (Global Migration Group) 2017. *Principles and guidelines, supported by practical guidance on the human rights protection of migrants in vulnerable situations within large and or mixed movements*: New York. Date of access: 23 Aug. 2020.

Goodwill-Gill, G.S. 1989. International law and Human rights: Trends concerning international migrants and refugees. Special Silver Anniversary issue. *The International Migration Review*, 23 (3):526-546.

Gordon, S.L. 2010. Migrants in a 'State of Exception'. *Transience Journal*, 1(1):3-19.

Gordon, S.L. 2016. Shutting the gates in South Africa: National identification and popular attitudes towards closing borders to migration. *Democracy Governance & Service Delivery research programme*, Human Science Research Council (HSRC). Royal Dutch Geographical Society (KNAG).

Gunsman, J. 2015. *The concept of human rights: Political and moral approaches*. Nijmegen: Radboud University (Thesis-MA). <https://theses.uibn.ru.ru.nl/handle/123456789/1160> Date of access: 12 Feb. 2021.

Habibi, D.A. 2008. Two utilitarian approaches to human rights. ISUS-X, Tenth conference of the international society for utilitarian studies. <https://escholarship.org/uc/item/7pp5z07p>. Date of access: 24 Apr. 2020.

Hammerstad, A. 2012. Securitisation from below: The relationship between immigration and foreign policy in South Africa's approach to the Zimbabwean crisis. *Conflict, Security and Development*, 12(1):1-30. DOI.10.1080/14678802.2012.667659

Haworth, A. 2004. *Understanding the political philosophers: From ancient to modern times*. Routledge, London.

Heard, A. 1997. Human rights: Chimeras in sheep's clothing? An introduction to human rights theory. <https://www.stu.ca/heardintro> Date of access: 20 Jun. 2021.

Heywood, A. 2013. Politics. 4th ed. Palgrave Macmillan: Hampshire.

Hicks, T.F. 1999. The Constitution, Aliens Control Act and xenophobia: The struggle to protect South Africa's pariah-the undocumented immigrant. *Indiana journal of global legal studies*, 7(1): 393–417.

Hiropoulos, A. 2017. Migration and Detention in South Africa. A review of the applicability and impact of legislative framework on foreign nationals. African Policing Civilian Oversight Forum (APCOF). Policy Paper No.18.

Ho, L. & Limpaecher, A. 2021. *What is discourse analysis?* Essential guide to coding data. <https://delvetool.com/blog/discourseanalysis>. Date of access: 30 Apr. 2022.

Hobbes, T. 1651. Leviathan or Matter, Forme & Power of a Common-Wealth, Ecclesiastical and Civile. McMaster University Archive of Economic Thought. <http://socserv.mcmaster.ca/econ/ugmcm/3113/hobbes/leviathan.pdf> Date of access: 20 Jan. 2021.

Hollifield, J.F. 2006. Trade, migration, and economic development: risks and rewards of openness. Proceedings: Federal bank of Dallas. <https://ideas.repec.org/afip/feddpr/y2006p249-284.html> Date of access: 20 Jan. 2021.

HRW (Human Rights Watch). 1998. South Africa's obligations under International and Domestic Law. <https://www.hrw.org/legacy/reports-98.1Appla.htm> Date of access: 23 Aug. 2019.

HRW (Human Rights Watch). 2005. Living on the margins: Inadequate protection for refugees and asylum seekers in Johannesburg. <https://www.hrw.org/report/2005/11/16/living-margins/inadequate-protection-refugees-and-asylum-seekers-johannesburg> Date of access: 23 Aug. 2019.

Huysmans, J. 2006. The politics of insecurity (In: Buzan, B. & Little, R. (eds.) *Fear, migration and asylum in EU*. New International Relations. Routledge: Milton Park).

ICJ (International Commission of Jurists). 2014. Migration and International Human Rights Law. Practitioner's guide. No.4. Geneva.

Igwe, E.D. 2015. Natural rights as nonsense upon stilts: Assessing Bentham. *International journal of arts and sciences*, 8(3):379-386.

IOM (International Migration Organisation). 2018. Existing architecture and recent developments Global migration governance. Geneva.

- Jackson, R.H. 1995. The political theory of International Society (In: Booth, K. & Smith, S. (eds.) *International Relations Theory Today*. Polity Press: Cambridge. pp.110-128).
- Jeffery, A. 2010. Chasing the rainbow. South Africa's move from Mandela to Zuma. South African Institute of Race Relations, Johannesburg.
- Johnson, C. 2015. Failed asylum seekers in South Africa: Policy and practice. *The African Human Mobility Review*, 1(2).
- Kadima, D. 2001. Motivations for emigration and character of the economic contribution of Congolese emigrants in South Africa (In: Morris, A and Bouillon, A. (eds.) African immigration to South Africa: Francophone migrants of the 1990s. Protea and IFAS, Pretoria. pp.90-111).
- Kalitanyi, V. & Visser, K. 2010. African immigrants in South Africa: Job takers or job creators? *SAJEMS*, 13(4).
- Kantor, B. 2017. Get South Africa growing. Jonathan Ball Publishers: Johannesburg.
- Kavuro, C. 2019. The value of human dignity in the refugee protection. *African Mobility Review*, 5(1):1511-1533.
- Kegley, C.W (Jr) & Wittkopt, E.R. 1993. World Politics: Trends and Transformation. 4th ed. Martin's Press: New York.
- Kersting, N. 2009. New nationalism and xenophobia in Africa: New inclination? *Africa Spectrum*, 44(1):7-18.
- Khan, F. (ed.) 2018. Immigration Law in South Africa. Juta: Claremont.
- Khan, F., Louw, K., & Willie, N. 2018. Securitization of migration. (In: Khan, F. (ed.) Immigration Law in South Africa. Juta: Claremont. pp.74-89).
- Khan, F. & Hurt, S. 2018. Temporary residence (In: Khan, F. (ed.) Immigration Law in South Africa. Juta: Claremont. pp.93-112).
- Khan, F. 2019. Has South Africa committed in good faith to Article 34 of the UN Refugee Convention which calls for the naturalisation of refugees? *Law, Democracy and Development*, 23:68-99.
- Khan, F. 2020. Does the right to dignity extend equally to refugees in South Africa? *African Human Rights Law Journal*, 20(1):261-284.

- Khan, F. & Rayner, N. 2020. Country Fiche: South Africa. ASILE: Global asylum governance and European Union's rule. University of Cape Town.
- Klaaren, J. 2010. Constitutional citizenship in South Africa. *International journal of constitutional law*, 8(1):94-110. DOI:10.1093/icon/mop/033
- Klaaren, J. & Rutinwa, B. 2004. Towards the harmonization of immigration and refugee law in SADC. MIDSA report No.1. IDASA.
- Kleinsmidt, V. & Manicom, D. 2010. A policy analysis of the Refugee Act 130 of 1998. Africa Institute of South Africa. *Africa Insight*, 39(4).
- Klotz, A. 2000. Migration after apartheid: Deracialising South African foreign policy. *Third World Quarterly*, 21(3):831-847.
- Klotz, A. 2012. South Africa as an immigration state. *Politikon Journal of South African Association of Political Studies*, 39(2):189-205.
- Kneebone, S. (ed.) 2009. Refugees, asylum seekers and the rule of law. Comparative Perspectives. Cambridge University Press.
- Koser, K. 2005. Irregular migration, state security and human security: A paper prepared for the policy analysis and research programme of the global Commission on International Migration. University College London.
- Kumar, R. 2014. Research Methodology; a step-by-step guide for beginners. 4th ed. Sage.
- Landau, L.B. & Amit, R. 2014. Wither policy? Southern Perspectives on Understanding law, Refugee, Policy and Protection. *Journal of refugee studies*, 27(4):534-552.
- Landsberg, C. 2010. The diplomacy of transformation: South African foreign policy and statecraft. Macmillan. Johannesburg.
- Landau, L.B., Misago, J.P., Sarkar, A., Mathebula, J., Murahwa, B., & Freemantle, I. 2018. Free and safe movement in Southern Africa. A report by the African Centre for Migration and Society (ACMS), University of the Witwatersrand. African Minds. Cape Town.
- Laskar, M.E. 2013. Summary of social contract theory by Hobbes, Locke and Rousseau. <http://dx.org/10.2139/ssrn.2410525>

Lattmann, T. & Vizi, B. (eds.) 2014. International protection of human rights. National University of public service. Budapest.

Law, M. 2006. Reduce, reuse, and recycle: Issues in the Secondary Use of Research Data. *IASSIST Quarterly Spring*, 29(1): 5-10. <https://doi.org/10291731iq599>

Le Roux, W. 2018. Immigration detention. (In: Khan, F. (ed.) *Immigration Law in South Africa*. Juta: Claremont. pp. 195-2021).

Lenz-Raymann, K. 2014. 10. Securitization Theory: Legitimacy in Security Politics. *Securitization of Islam: A Vicious Circle: Counter-Terrorism and Freedom of Religion in Central Asia*. Bielefeld: transcript Verlag, pp. 243-256.
<https://doi.org/10.1515/transcript.9783839429044.243>

Locke, J. 1690. Two treatises of government. McMaster University Archive of History of Economic Thought. <http://socserv.mcmaster.ca/econ/ugcm/3113/locke/government.pdf>. Date of access: 23 Jul. 2021.

Marks, S.P. 2016. Human rights: A brief introduction. Working paper. School of Public Health. Harvard University. <http://nrs.harvard.edu/urn-3:HUL.instRepos-23586712>. Date of access: 23 Jul. 2021.

Maunganidze, O.A. & Formica, J. 2018. Freedom of movement in Southern Africa. A SADC (pipe) dream? Southern Africa report No. 17. Institute for Security Studies (ISS).

Maunganidze, O.A. 2021. Migration policy in South Africa: Lessons from Africa's migration magnet for European policy makers (DGAP Report, 17).

Mauritz, N. 2017. Admission and departure procedures (In: Khan, F. (ed.) *Immigration Law in South Africa*. Juta: Claremont. pp.164-177).

Marais, H. 2011. South Africa pushed to the limit. The political economy of change. CT Press: Claremont.

Mbiyozo, A.N. 2018. Aligning South Africa's migration policies with its African vision. Pretoria. Institute for Security Studies (ISS). Policy brief no.117.

McDonald, M. 2008. Securitisation and the construction of security. *European Journal of International Relations*, 14(4):563-586 <http://ejt.sagepub.com/content/14/4/563.refs.html> Date of access: 15 Feb. 2019.

- Messina, A.M. 2014. Securitising immigration in the age of terror. *World Politics*, 66(3):530-559
DOI: 10.1017/S0043887114000148
- Meyersfeld, B. 2013. Domesticating International Standards: The Direction of International Human Rights law in South Africa. The Southern African Legal Information Institute (SAFLI). *Constitutional Court Review*, 5:399-416.
- Meyers, E.2000.Theories of international immigration policy-A comparative analysis. *The international migration review*, 34 (4):1245-1282.
- Mfubu, P. 2018. Prohibited and undesirable persons (In: Khan, F. (ed.) Immigration law in South Africa. Juta: Claremont. pp.178-191).
- Mill, J.S. 1859. On liberty. 5th ed. Batoche Books Ltd: Kitchener.
- Mireku, O. 2002. South African Refugee Protection System: An analysis of refugee status, rights and duties. *Verfassung und Recht in Ubersee: Law and Politics in Africa, Asia and Latin America*, 35(3):399-413.
- Misago, P.M., Freemantle, I., & Landau, L.B. 2015. UN High Commissioner for Refugees (UNHCR) protection from xenophobia: an evaluation of UNHCR's regional office for Southern Africa's xenophobia related programmes. UN High Commissioner for Refugees (UNCHR). <https://www.refworld.org/docid/55de1be4.html> Date of access: 19 Feb. 2019.
- Misago, P.M. Bule, K & Mlilo, S. 2021. Xenophobic violence in South Africa: An analysis and trends, causal factors and responses. A Xenowatch-Quinquennial report.
- MMC (Mixed Migration Centre). 2019. The ever-rising securitisation of mixed migration. www.mixedmigration.org Date of access: 16 Sep. 2020.
- Mlambo, V.H.& Adetiba, T.C.2020.Illegal migration and cross border crimes: Reflecting on the challenges of South African border. *Loyola Journal of social sciences* 24(2):93-115.
<https://www.researchgate.net/publication/349210970> Date of access 19 Jun. 2022.
- Mogashoa, T.2014.Understanding critical discourse analysis in qualitative research. *International journal of humanities, social sciences and education (IJHSSE)*.1(7):104-113.
- Montero, J.C. 2014. Human rights, international human rights and sovereign political authority: A draft model for understanding contemporary human rights. *Ethics & Global Politics*, 7:143-462.

- Moosa, F. 2017. Understanding the Spirit, Purpose and Objects of South Africa's Bill of Rights. *Journal of Forensic, Legal and Investigative Sciences*, 4(22).
- Morgan, H. 2022. Conducting a qualitative document analysis. *The Qualitative report* 27(1):64-77.
- Morris, A. & Bouillon, A. 2001. Immigration to South Africa; Francophone migration of 1990s. Protea Book House, Menlo Park.
- Morrow, V., Boddy, J., & Lamb, R. 2014. The ethics of secondary data analysis: Learning from the experience of sharing qualitative data from young people and their families in an international study of childhood poverty. Thomas Coram Research Unit (TCRU): University of London.
- Mosselson, A. 2010. There is no difference between citizens and non-citizens anymore: Violent xenophobia, citizenship and the politics of belonging in Post-Apartheid South Africa. *Journal of Southern African Studies*, 36(3): 641-655.
- Mouton, J. 2013. How to succeed in your Master's & Doctoral studies. A South African Guide and Resource Book. Van Schaik Publishers, Pretoria.
- Moyo, D. 2018. Edge of chaos: Why democracy is failing to deliver economic growth and how to fix it. Little Brown. London.
- Moyo, K. & Zanker, F. 2020. Political contestations within South African migration governance. Arnold Bergstraesser-Institut-German. Foundation for Peace Research.
- Moyo, K. 2021. South Africa reckons with its status as a top immigration destination, apartheid history and economic challenges. Migration Policy Institute (MPI). Washington, DC.
- Mthembu-Salter, G., Amit, R., Gould, C., & Landau, L.B. 2014. Migrating out of poverty. Counting the cost of securitizing South Africa's Immigration Regime. <http://migratingoutofpoverty.org> Date of access: 13 Apr. 2021.
- Muller, L.H. 2018. Legal identity for all-ending statelessness in SADC (In: Ramjathan-Keogh, K. (ed.) Protection framework for refugees and migrants in Southern Africa) Southern Africa Litigation Centre (SALC). pp.57-71).
- Musalo, K., Moore, J., & Boswell, R.A. 2007. Refugee Law and Policy. A comparative and international approach. 3rd Edition. Carolina Academic Press: Durham.

Neuman, W.L. 2014. Social research methods: Qualitative and quantitative approaches. 7th ed. Pearson Education Limited: Essex.

Ngandwe, P.J. 2013. The paradox of migration and the interests of the atomistic nation-states: The South African perspective. *Potchefstroom electronic law journal*. 16 (1)13:1-26
<https://dx.doi.org/10.4314/pelj>

Nicholson, F. & Kumin, J. 2017. A guide to international refugee protection and building state asylum systems. A handbook for parliamentarians No.27. Inter-Parliamentary Union and the United Nations High Commissioner for Refugees (UNHCR).

Nickel, J.W. & Reidy, D.A. 2009. Philosophical foundations of human rights.
<http://dx.doi.org/10.2139/ssrn.1432868> Date of Access: 17 Oct. 2021.

Nickel, J. 2019. Human Rights (In: Zalta, E.N. (ed.) *The Stanford Encyclopaedia of philosophy*).
<https://plato.stanford.edu/archives/sum2019/emtries/rights-human/> Date of access: 3 Apr. 2020.

Ntlama, N. 2018. The South African Constitution and immigration law. (In Khan, F. (ed.) Immigration law in South Africa. Juta: Claremont. pp.35-73).

Odunayo, M.A., Asuelime, L.E., & Okem, A.E. 2017. South African policy on migration and its alignment with the UNO Charter on Refugee and asylum seekers. *Journal of African Union Studies*, 6(1):81-96.

OECD/ILO. 2018. The Organisation for Economic Cooperation and Development and the International Labour Organisation. How immigrants contribute to South Africa's economy, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264085398-en>

Owusu-Sekyere, E., Wenzel, M. Viljoen, J., Kanyane, B., & Pophiwa, N. 2019. Voices of critical skilled migrants in South Africa: A case study of Gauteng Province. *African Journal of public affairs*. 11 (3), 22-40. <http://hdl.handle-net/20.500.119/o/15042>. Date of access: 18 Mar. 2020.

Parshotam, A. & Ncube, C. 2017. Managing economic migration in South Africa. Occasional Paper No.265. South African Institute of International Affairs.

Peberdy, S. 2009. National identity and South Africa's immigration policies. 1910-2008. Wits University Press, Johannesburg.

Peberdy, S. 2016. International migrants in Johannesburg's informal economy. Southern African Migration Programme (SAMP) <https://doi.org/10.2307/j.ctvh8qz8j> Date of access: 8 Sep. 2021.

- Pennock, J.R. 1981. Rights, natural rights and human rights - A general view. *Nomos*, 23:1-28.
- Peoples, C. & Vaughan-Williams, N. 2010. Migration and border security. Critical Security Studies. Routledge: London.
- Piechowiak, M. 1999. What are human rights? The concept of human rights and their extra-legal justification (In: Hanski, R. & Suksi, M. (eds.) An introduction to the international protection of human rights. 2nd ed. Institute for Human Rights. Abo Akademi University).
- Polzer, T. 2013. Policy shifts in the South African Asylum System: Evidence and Implications. ACMS. University of the Witwatersrand.
- Ramphele, M. 2008. Laying the ghosts to rest. Dilemmas of the transformation in South Africa. Tafelberg: Cape Town.
- Rasool, F., Botha, C., & Bisschoff, C. 2012. The effectiveness of South Africa's immigration policy for addressing skills shortages. Managing 2004. *Global Transitions*, 10(4):399-418.
- Rautenbach, I.M. & Malherbe, E.F.J. 2004. Constitutional law. 4th ed. LexisNexis: Sandton.
- Rodee, C.C., Anderson, T.J., & Christol, C.Q. 1967. Introduction to political science. McGraw-Hill Inc.: New York.
- Scalabrini Centre of Cape Town. 2018. Teach Yourself: The Refugees Amendment Act explained. <https://Scalabrini.org.za> Date of access: 8 Aug. 2019.
- Scalabrini Centre of Cape Town. 2019. Birth Registration in South Africa. <https://www.scalabrini.org.za>. Date of access: 8 Aug. 2019.
- Serfontein, E. 2019. Humans: the biggest barrier to realising human rights-A South African perspective. IntechOpen. Creative Commons. <https://creativecommons.org/licences/by/3.0>) Date of access 13 Mar. 2021.
- Slye, R.C. 2001. International law, human rights beneficiaries, and South Africa: Some thoughts on the utility of international human rights law. *Chicago Journal of International Law*, 2(1):5:59-79.
- Solomon, H. & Kosaka, H. 2013. Xenophobia in South Africa: Reflections, Narratives and Recommendations. *Southern African Peace and Security Studies*, 2(2):5-30.

Stalker, P. 2001. The No-nonsense guide to international migration. New Internationalist Publications Ltd.: Cornwall, UK.

StatsSA (Statistics South Africa). 2021. *Mid-year population estimates 2021. Statistical release P0302*. <https://www.statssa.gov.za> Date of access: 13 Mar. 2022.

Stemmet, A. 1999. The influence of recent constitutional developments in South Africa on the relationship between international and municipal law. *The International Lawyer*, 33(1):47-74.

Stumpf, S.E. & Abel, C.A. 2002. Elements of philosophy: An introduction. 4th ed. McGraw Hill. Boston.

Suter, N.W. 2012. Introduction to educational research: A critical thinking approach. 2nd ed. Sage: Thousand Oaks.

Tallmeister, J. 2013. Is immigration a threat to security?
<https://www.e.irinfo/2013/08/24/isimmigration-a-threat-to-security/> E-International Relations.
Date of Access: 31 Aug. 2020.

Taran, P.A. 2000. Human rights of migrants. (In: Appleyard, R. (ed.) Challenges of the new decade). *International migration* 38(6)3. International organisation for Migration (IOM) and the United Nations. pp.7-46.

Tarnu, L.I. 2015. Threats and risks generated by illegal migration flows and their controls. De Gruyter Open. Scientific bulletin. XX/2(40):70-79.

Tati, G. 2008. The Immigration issues in the post-apartheid South Africa: Discourses, Policies, and Social Repercussions. *Espace Populations Societes* 2008/3:423-440.
DOI:10.4000/eps.3496

Taureck, R. 2006. Securitization theory and securitization studies. *Journal of international relations and development*.9:53-61. Date of access: 23 Sep. 2019.

The Refugee Amendment Act 11 of 2017. Republic of South Africa.

Theiler, B. 2003. Societal security and social psychology. *Review of International Studies*, 29(2): 249-268.

Tripathy, J.P. 2013. Secondary data analysis: Ethical issues and challenges. *Iranian Journal of Public Health*, 42(12):1478-1479.

- Tshosa, B.M. 2018. The protection of the human rights of refugees in international law. (In: Ramjathan-Keogh, K. (ed.) Protection Framework for Refugees and migrants in Southern Africa. Southern Africa Litigation Centre (SALC). pp.49-55).
- Turner, S. 2010. Diasporas, conflict, security (In: Knott, K and Mcloughlin, S. (eds.) Diasporas, concepts, intersections, identities. Zed Books: London. pp.97-101).
- Ugur, M. 2007. The ethics, economies and governance of free movement. (In: Pecoud & Guchteneire. (ed.) Migration without border. UNESCO and Berghahn Books. New York. pp.71-100).
- UN (United Nations). 2022. The Foundation of International Human Rights Law. <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> Date of access: 30 Oct. 2022.
- UNHCR (United Nations Refugee Agency) 2022. The Refugee Convention, 1951. <https://www.unhcr.org/4ca34be29> Date of access: 30 Oct. 2022.
- Van Kempen, P.H. 2013. Four concepts of security: A human rights perspective. *Human Rights Law Review* 3(1):1-23. <http://hrlr.oxfordjournals.org> Date of access: 18 Jun. 2020.
- Van Lennep, T. 2018. The state of the South African refugee protection regime: Helen Suzman Foundation. <https://hsf.org.za> Date of access: 17 Aug. 2020.
- Van Lennep, T. 2019. Migration II: The South African migration policy landscape. Helen Suzman Foundation. <https://hsf.org.za> Date of access: 12 Aug. 2021.
- Verdirame, G. 2014. Human rights in political and legal theory. King's college London Dickson Poon School of law. Legal studies research paper series no.31. <http://ssrn.com/abstract+2297751> Date of access: 25 Oct. 2020.
- Vigneswaran, D. 2008. Undocumented migration: risks and myths (1998-2005). (In: WA Kabwe-Segatti, A. (ed.) Migration in post-apartheid South Africa: challenges and questions to policy makers. pp.135-162).
- Vigneswaran, D. 2011. Migration control, documentation and state transformation (In: Segatti, A. and Landau, L.B. (eds.) Contemporary migration to South Africa. World Bank. pp.105-118).
- Waeber, O. 2007. Securitization and desecuritisation (In: Buzan, B. & Hansen, L. (eds.) *International security: Widening security*, 3(4): 66-99).

- Walters, G.J. 1995. Human rights in theory and practice. A selected and annotated Bibliography with an historical introduction. Scarecrow Press: London.
- Weiner, M. 1996. Ethics, national sovereignty and control of immigration. *The International Migration Review*, 30(1):171-197.
- Weston, B.H. 1984. Human Rights. *Human Rights Quarterly*, 6(3):257-283.
- Wihtol de Wenden, C. 2007. The frontier of mobility (In: Pecoud, A. & Guchteneire. (eds.) *Migration without borders*. UNESCO/ Berghahn Books: New York. pp.51-68).
- Williams, M.C. 2003. Words, images, enemies: Securitization and international politics. *International studies quarterly*, 47 (4):511-531.
- WBG (World Bank Group). 2018. *Mixed migration forced displacement and job outcomes in South Africa*. World Bank.
- Ziegler, R. 2020. Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications? *Constitutional Court Review*, 10: 65-106. Creative Commons. <https://doi.org/10.2989/CCR.2020.004>