



# **“Protectionism and National Migration Policy in South Africa”**

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**A minor dissertation submitted in *partial fulfillment* of the requirements for  
the award of the degree of Master of International Relations**

**Faculty of the Humanities**

**University of Cape Town**

**2015**

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Signature: Elspeth Boynton Date: 24/11/2015

## **Dedication**

First and foremost, I would like to dedicate this thesis to my mother, Deborah Boynton. I would like to thank her for all of the creativity and passion for education she possesses and has passed on to me over the years, inspiring me to study what interests me most. I would also like to thank the rest of my family and friends for supporting me throughout my studies abroad; especially my father, Tucker Boynton and my dear friend, Tarbi Prinsloo, for reminding me of the importance of continuous learning as well as my partner, Thomas Blamey, for your unwavering encouragement. Thank you also to my supervisor, John Akokpari, for your guidance and academic instruction at the University of Cape Town, I have thoroughly enjoyed this experience and have gained a new perspective on African politics and law.

# Table of Contents

List of Abbreviations and Acronyms.....	vi
<b>1. Introduction.....</b>	<b>1</b>
<b>1.1 Overview of the Literature: Examining Key Concepts.....</b>	<b>2</b>
<b>1.1.1 International Migration and South Africa.....</b>	<b>2</b>
<b>1.1.2 Governing Migration: National Policies.....</b>	<b>3</b>
<b>1.1.3 Protectionism and the Migration Agenda.....</b>	<b>5</b>
<b>1.1.4 South Africa’s Propensity Towards a Protectionist Migration             Agenda.....</b>	<b>5</b>
<b>1.2 Overview of the Literature: Adding Theory.....</b>	<b>7</b>
<b>1.3 Research Aim, Question and Central Argument.....</b>	<b>8</b>
<b>1.3.1 Central Argument.....</b>	<b>8</b>
<b>1.4 Research Design and Methodology.....</b>	<b>8</b>
<b>1.5 Boundaries and Limitations.....</b>	<b>9</b>
<b>1.6 Relevance of Question.....</b>	<b>10</b>
<b>1.7 Outline of Thesis.....</b>	<b>10</b>
<b>2. An Overview of Concepts, Theories and Migration to South Africa.....</b>	<b>12</b>
<b>2.1 Migration Typology and Theories.....</b>	<b>12</b>
<b>2.1.1 Migrant Typology.....</b>	<b>12</b>
<b>2.1.2 Why People Migrate?.....</b>	<b>14</b>
<b>2.2 A Historical Perspective: Migration to South Africa Pre-1994.....</b>	<b>15</b>
<b>2.3 South Africa: The New Migration Hub.....</b>	<b>16</b>
<b>2.4 Migration Patterns and Trends: Migration Since 1994.....</b>	<b>18</b>
<b>2.4.1 General Trends: Increased Migration to South Africa.....</b>	<b>18</b>
<b>2.4.2 Labor Migration.....</b>	<b>20</b>
<b>2.4.3 Refugee and Asylum Seekers.....</b>	<b>22</b>
<b>2.4.4 Permanent Migration .....</b>	<b>23</b>
<b>2.4.5 Illegal and Undocumented Migration.....</b>	<b>24</b>

2.5	<b>Adding Theory: Constructivism and Neoclassical Realism.....</b>	<b>25</b>
2.5.1	<b>Constructivism.....</b>	<b>26</b>
2.5.2	<b>Neoclassical Realism (NCR).....</b>	<b>27</b>
<b>3.</b>	<b>South Africa’s Migration Policies Since 1994.....</b>	<b>30</b>
3.1	<b>Migration Policy Background.....</b>	<b>30</b>
3.1.1	<b>A “Two-Gate” System.....</b>	<b>31</b>
3.2	<b>Slow Progress: Revising the System: 1995-2000.....</b>	<b>33</b>
3.2.1	<b>Aliens Control Amendment Act (No.76) of 1995.....</b>	<b>33</b>
3.2.2	<b>Refugees Act (No. 130) of 1998.....</b>	<b>36</b>
3.2.3	<b>Revising Policy: Green and White Papers on International Migration....</b>	<b>37</b>
3.3	<b>Remaining Issues Surrounding Migration: The End of a Decade.....</b>	<b>39</b>
3.4	<b>The Immigration Act.....</b>	<b>42</b>
3.4.1	<b>The Immigration Act of (No. 13) of 2002.....</b>	<b>42</b>
3.4.2	<b>The Immigration Amendment Act (No. 19) of 2004.....</b>	<b>44</b>
3.5	<b>Recent Migration Policy: The Way Forward, More Control?.....</b>	<b>46</b>
<b>4.</b>	<b>Analysis of South Africa’s Protectionist Migration Policies.....</b>	<b>50</b>
4.1	<b>Major Migration Challenges Persist, Despite Reforms.....</b>	<b>50</b>
4.2	<b>Constructivism and South Africa’s National Migration Policies.....</b>	<b>54</b>
4.2.1	<b>Transitioning from Apartheid: Nation-Building in the New Era.....</b>	<b>55</b>
4.2.2	<b>The “In-migrant” as a Threat to Identity.....</b>	<b>56</b>
4.2.3	<b>National Identity and Migration Policy.....</b>	<b>59</b>
4.3	<b>Neoclassical Realism: A Fuller Explanation.....</b>	<b>61</b>
4.3.1	<b>External Factors.....</b>	<b>62</b>
4.3.2	<b>Individuals’ Perceptions and Policy-Making.....</b>	<b>64</b>
4.3.3	<b>Domestic Factors: State Structure and Strength.....</b>	<b>67</b>
<b>5.</b>	<b>Conclusion.....</b>	<b>71</b>
	<b>Works Cited.....</b>	<b>74</b>

## List of Abbreviations and Acronyms

<b>ACA</b>	<b>Aliens Control Act</b>
<b>ASGISA</b>	<b>Accelerated and Shared Growth Initiative South Africa</b>
<b>ANC</b>	<b>African National Congress</b>
<b>AU</b>	<b>African Union</b>
<b>BLS</b>	<b>Swaziland</b>
<b>CORMSA</b>	<b>Consortium for Refugees and Migrants in South Africa</b>
<b>CSO</b>	<b>Community Service Organisation</b>
<b>DRC</b>	<b>Democratic Republic of Congo</b>
<b>DHA</b>	<b>Department of Home Affairs</b>
<b>EU</b>	<b>European Union</b>
<b>FMSP</b>	<b>Forced Migration Studies Programme</b>
<b>GCIM</b>	<b>Global Commission on International Migration</b>
<b>GDP</b>	<b>Gross Domestic Product</b>
<b>GEAR</b>	<b>Growth, Employment, Redistribution Strategy</b>
<b>HSRC</b>	<b>Human Sciences Resources Council</b>
<b>HRW</b>	<b>Human Rights Watch</b>
<b>IDP</b>	<b>Internally Displaced People</b>
<b>IOM</b>	<b>International Organization for Migration</b>
<b>JIPSA</b>	<b>Joint Initiative on Priority Skills Acquisition</b>
<b>MIDSA</b>	<b>Migration Dialogue for Southern Africa</b>
<b>MOU</b>	<b>Memorandum of Understanding</b>
<b>NEPAD</b>	<b>New Partnership for African Development</b>
<b>NCR</b>	<b>Neoclassical realism</b>
<b>RDP</b>	<b>Reconstruction and Development Programme</b>
<b>RSA</b>	<b>Republic of South Africa</b>
<b>SADC</b>	<b>South African Development Community</b>
<b>SANDF</b>	<b>South African National Defense Force</b>
<b>SAPS</b>	<b>South African Police Service</b>
<b>SAS</b>	<b>South African Survey</b>
<b>SAQA</b>	<b>South African Qualifications Authority</b>
<b>SSA</b>	<b>Statistics South Africa</b>
<b>OUA</b>	<b>Organisation of African Unity</b>
<b>PASSOP</b>	<b>People against Suffering, Oppression and Poverty</b>
<b>TEBA</b>	<b>Employment Bureau of Africa</b>
<b>TRC</b>	<b>Truth and Reconciliation Commission</b>
<b>TRP</b>	<b>Temporary Residence Permit</b>
<b>UN</b>	<b>United Nations</b>
<b>UNDESA</b>	<b>United Nations Department of Economic and Social Affairs</b>
<b>UNHCR</b>	<b>United Nations Human Commissioner for Refugees</b>

# 1. Introduction

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With the end of apartheid, South Africa became preoccupied with fashioning a new identity for itself and promoting its concerns for human rights, international cooperation, equal opportunity and democracy. As part of this vision, South Africa emphasized its solidarity with other African states by endorsing Pan-Africanism, notions of racial and cultural equality and multiculturalism through embracing the “Rainbow Nation”. More specifically, the implementation of South Africa’s Constitution (1996) guaranteed that most rights would apply to “all people”, remedying the prior denial of citizenship to black Africans (Klotz, 2012: 193). As South Africa began democratizing its government apparatus and liberalizing its economy, it was not clear how migration policy would be affected and influenced by the monumental changes occurring in the country.

Simultaneously, South Africa began to dismantle its apartheid border controls and liberalize its economy, instigating migration into South Africa. As South Africa became the regional hegemon and economic center of Southern Africa, the number of migrants coming to the country increased dramatically, leading scholars to declare it the “new migration hub”, drawing thousands of migrants in the past two decades (Segatti, 2011a: 9). Most migrants come to South Africa in search of a better life and employment; however, civil war in Mozambique and political instability in the Democratic Republic of the Congo (DRC) and Zimbabwe have driven increased movement to South Africa. This expansion of migration to South Africa put major pressure on its national government to manage the movement of new and more mobile groups of people, resulting in a number of challenges. Expanded migration to South Africa has exacerbated xenophobic tensions domestically, increased the number of asylum and refugee applicants, and tested the capacity of immigration and political officials. Additionally, large migrant flows into the country have tested South Africa’s ability to uphold its human rights commitment while adequately providing appropriate healthcare, education and protection to the incoming migrants and South African citizens.

Despite South Africa’s commitments to regional cooperation, human rights and African solidarity, the country has also adopted protectionist and nationalistic migration policies, which emphasize border control rather than migration facilitation (Segatti, 2011b: 46). The country has

simultaneously liberalized its economy and political system while implementing strict national migration laws, favoring bilateral labor agreements, and deporting thousands of SADC migrants. Further, these policies *contradict and conflict* with South Africa's commitment to SADC's Protocol on the Facilitation of Movement of Persons (2005) and the AU's Common Position on Migration and Development (2006): both protocols mark migration as a tool for development, greater regional cooperation and call for the protection of migrants' rights. Protectionist laws have also led to the continuation of "human rights abuses and a strong and widespread anti-immigrant sentiment across the country" (Vigneswaran, 2011: 106). National migration policies continue to be founded on controlling and limiting irregular and illegal migration, while national responses focus less on migrants' rights and protection and more on the legal status of migrants.

In light of the growing protectionism of South Africa's migration agenda and focus on migration control rather than facilitation, it is important to understand why the country adopted these policies and responses in the first place. In particular, it is significant to clarify why South Africa simultaneously commends regional economic integration, pan-Africanism and multiculturalism, while also employing restrictive migration policies and even xenophobic responses to migration pressures.

## **1.1 Overview of the Literature: Examining Key Concepts**

### **1.1.1 International Migration and South Africa**

Broadly defined, international migration is the movement of people from one country to another (Castles & Miller, 2009: 2). Within migration, *in-migration* is the movement of foreigners (non-citizens) into a country, temporarily or permanently<sup>1</sup>, and *emigration* is the movement of citizens out of their home country (Akokpari, 1999: 79). While this thesis is more concerned with in-migration to South Africa, it recognizes that in-migration is "rarely a simple movement from an origin to a destination, but a complex system that includes much return movement back to the origin" (Skeldon, 1998: 35). In the past two decades, migration has been marked by a greater degree of intensity and diversification due to the globalization of trade,

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<sup>1</sup> More permanent in-migration will be referred to in this thesis as "immigration", which includes those in-migrants who stay in South Africa for at least five years, either illegally, through renewed permits, or through the accession of permanent residency or citizenship in South Africa.

finance, improved communication and transportation infrastructure and greater trends toward economic integration among nations. Between 1990 and 2013, the number of international migrants worldwide rose from 77 million to 232 million (UNDESA, 2013:1).

Due to the dramatic increase in global migration, the movement of people has become a matter of “high politics” (Vale, 2002:10). National governments must tackle disruptive inflows of refugees, address social welfare provision for migrants and combat threats to their national identity challenged by the growing number of in-migrants. As it is globally, migration is also becoming a highly politicized issue in sub-Saharan Africa due to the rising number of migrants in the region. Following the end of apartheid, in-migration (illegal and legal) increased dramatically from neighboring countries to South Africa, while simultaneously, educated professionals have left the country to work abroad, instigating a “brain drain”. For example, migrants coming to South Africa (from SADC alone) have increased significantly from 5.1 million in 1990 to 9 million in 2008 respectively (Crush & Dodson, 2013: 2). In relation to South Africa, the greatest cross-border movement is between Lesotho and South Africa; however, migration from Zimbabwe to South Africa is becoming more prominent.

### **1.1.2 Governing Migration: National Policies**

While scholars debate which migration policies are most effective, the main focus of this thesis is to understand why countries adopt specific migration policies. National migration policy is defined as a “state’s efforts to regulate and control entry into the national territory and to stipulate conditions of residence of persons seeking permanent settlement, temporary work or political asylum” (Freeman, 1992: 1145). Thus, migration policy governs the state decisions as to “how many immigrants to accept, when, of which type, and of which ethnic origin” (Meyers, 2000: 1246). While there is some convergence in national migration policy globally<sup>2</sup>, migration policy does differ “significantly” between certain nations.

There are a host of theories that try to explain why states adopt certain migration policies. First, domestic politics theory argues that the state serves as the neutral arena for societal

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<sup>2</sup> Skeldon (1998) notes that the “element of control” rather than facilitation emerges at the root of the majority of migration policies around the world. Skeldon, Ronald. “Migration Policies and National Security.” 1998. *Redefining Security: Population Movements and National Security*. Ed. Poku, Nana, and David T. Graham. Westport: Praeger, 1998. P.30

interests and policy making as a result of bargaining and compromising between these interests (Meyers, 2000: 1257). Thus, changes in migration policy are responses to changes in socioeconomic factors, such as economic recessions or a large influx of refugees (Zolberg, 1989; Freeman, 1995). In contrast, Hardcastle et. al. (1994) argue that bureaucratic politics theory best explains migration policy formation, wherein the strength and interest of administrative bodies and bureaucrats in government play the most significant role in shaping policy. Next, marxist theory contends that migration policies serve capitalists who import cheap labor and exploit poor countries' human resources for their own gain (Castles & Kosack, 1973; Portes & Walton, 1981). Finally, scholars have used neoliberal institutionalism to explain why some states are removing obstacles to allow for the freer movement of people, developing regional migration laws that directly influence and change national migration laws; the EU being the most pertinent example (Koslowski, 1998). However, it should be noted that while all these theories provide a foundation for understanding why states adopt certain migration policies, there is no "grand theory" of migration policy formation (Meyers, 2000: 1270).

There is also a growing belief among scholars that migration and development are inextricably connected.<sup>3</sup> Largely informed by neoclassical theory, these scholars argue that migration can play a developmental role through factor price equalization.<sup>4</sup> However, more recently, literature has realized the broader effects of migration on development and poverty reduction. Extending this argument, Keely & Tran (1989) and Kapur (2003) have contended that the rise of remittance sending by migrants has been a more effective instrument for income redistribution, poverty reduction and economic growth than large development programs or foreign aid. Scholars have also examined "brain circulation" or the positive impact international migrants have by serving as conduits between countries: international migrants circulate new ideas, enrich cultural understanding, and take back new skills, experiences and contacts with

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<sup>3</sup> See Sorensen et al. (2003) concerning the migration-development nexus. Sorensen, Ninna Nyberg, Nicholas Van Hear, and Poul Engberg-Pedersen. "Migration, Development and Conflict: State-of-the-Art Overview." 2003. *The Migration and Development Nexus*. Ed. Ninna Nyberg Sorensen and Nicholas Van Hear. Geneva: IOM, 2003. 5-46. *IOM Publications*. Web. 19 Jan. 2015. [http://publications.iom.int/bookstore/free/Migration\\_Dev\\_Nexus.pdf](http://publications.iom.int/bookstore/free/Migration_Dev_Nexus.pdf)

<sup>4</sup> For instance, following neoclassical theory, economic disparities between regions stimulate migration and prompt migrants to move to a place that maximizes their utility. Over the long run, flows help to equalize wages and conditions in underdeveloped regions leading to economic equilibrium between these regions. Moreover, reallocation of labor from rural, agricultural areas to urban, industrial ones (within and across borders) is a prerequisite to economic growth and part of the entire development program.

them (GCIM, 2005; Maimbo & Ratha 2005). Thus, international migration contributes to development by providing labor supply in times of scarcity, essential skills and social and cultural diversity to migrant receiving countries (GCIM, 2005; IOM, 2013). The positive link between migration facilitation and development has been emphasized by organizations such as the United Nations and the World Bank, which have held international conferences to disseminate such ideas (Crush & Frayne, 2010, 2-3).

### 1.1.3 Protectionism and the Migration Agenda

While protectionism is usually used in reference to economic theory and trade policy<sup>5</sup>, this thesis will employ a different understanding of protectionism, applying it to the theme of migration and policy-making. This thesis defines a state's *migration agenda* as all policies and legislation made at a national level (protocols and laws) attributed to migration. However, national responses to migration, such as declarations and speeches made by immigration officials or politicians, will also be examined in Chapter 4 of this thesis. For the purpose of this thesis, the concept of *protectionism* was taken from multiple scholarly sources, including Segatti's (2011) concept of a "securitarian state", Neocosmos's (2008) "discourse of indigeneity" and Klotz's (2012) "rights-markets". As a result, a state possesses a *protectionist migration agenda* if its national policies and responses to migration are:

- 1) **Control-Oriented:** restrictive and exclusionary in nature and language, favoring migration control and policing over facilitation and promotion
- 2) **Non-Rights Based:** fail to protect migrants' rights and their assimilation into the host country
- 3) **Native-Centric:** promote citizenship and nationalism based on indigeneity and nativism rather than promoting multiculturalism and a multiethnic community

Thus, simply put, a state possesses a *protectionist migration agenda* if its national policies and responses to migration are control-oriented, non-rights based and native-centric.

### 1.1.4 South Africa's Propensity Towards a Protectionist Migration Agenda

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<sup>5</sup> Protectionism is usually referred to as an economic policy that is meant to protect a state's domestic goods' market from foreign competition, in the form of tariffs, quotas and other government regulations.

While South Africa has (to an extent) reformed its national immigration policies since the end of apartheid, the country continues to regard migration as “threat”. Large migration flows are believed to decrease wages and increase unemployment, burden public security, jeopardize national identity and impose severe health risks (Segatti, 2011a: 10). Landau (2006) and Vigneswaran (2011) suggest that South Africa’s migration policy is focused on control-oriented policies, in which the focus is on identity documents, detention and deportation. Landau & Segatti (2009) and Klotz (2012) recognize that the lack of rights secured for migrants in South Africa’s national migration policies, with particular reference to refugees and asylum-seekers. Finally, numerous scholars have noted South Africa’s concept of nation-building and citizenship is one based on exclusion and indigeneity, which is exemplified in South Africa’s national policies and responses to in-migration.<sup>6</sup>

In an attempt to explain why South Africa has adopted a protectionist migration agenda, academics have given numerous reasons. Neocosmos (2008), Ilgit & Klotz (2014) and Pugh (2014) not only argue that xenophobia in South Africa has perpetuated nationalistic migration policies, but also that politicians and immigration officials have institutionalized xenophobia due to protectionist mindsets and attitudes. The perpetuation of apartheid, authoritarian migration policies into the new republic has also been regarded as a reason for South Africa’s continued nationalistic migration regime (Trimikliniotis et al. 2008; Segatti, 2011a). Major concerns over border control due to increased flows of undocumented migrants and threat of diseases spread by migrants are other arguments posed to explain South Africa’s securitized migration regime (Cornelissen, 2009; Veary, 2011). Finally, Segatti & Landau (2009) and Klotz (2013) have recognized the inability of South Africa’s government to provide adequate social provisions to its citizens as another reason for South Africa’s attempts to slowdown migration with protectionist policies.

However, none of the studies mentioned above has been able to systematically organize and incorporate all the different drivers that have influenced South Africa’s policy formation.

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<sup>6</sup> See academic papers including: Peberdy, Sally. “Imagining Immigration: Inclusive Identities and Exclusive Policies in Post-1994 South Africa.” *Africa Today* 48.3 (2001): 15-32. *Project Muse*. Web 7 Mar. 2014. [http://muse.jhu.edu/journals/africa\\_today/v048/48.3peberdy.pdf](http://muse.jhu.edu/journals/africa_today/v048/48.3peberdy.pdf); Vale, Peter. "Migration, Xenophobia and Security-Making in Post-Apartheid South Africa." *Politikon: South African Journal of Political Studies* 29.1 (2002): 7-29. *Taylor and Francis Online*. Web. 11 Dec. 2014. <http://dx.doi.org/10.1080/02589340220149416>; and Neocosmos, Michael. "The Politics of Fear and the Fear of Politics: Reflections on Xenophobic Violence in South Africa." *Journal of Asian and African Studies* 43.6 (2008): 586-94.

Moreover, few of these studies focus *solely* on explaining why South Africa has adopted a nationalistic migration policy in contradiction with its commitment to liberalize its economy and impose a progressive and rights-based government. Peberdy (2001) and Klotz (2012) have attempted to look at this “liberal paradox”; examining South Africa’s simultaneous pledge to promote human rights while it fails to protect refugees and asylum seekers living in the country. But, both of these studies are narrow, either focusing on a specific type of migrant (in the case of Klotz, 2012), or emphasizing a singular cause, xenophobia, for migration protectionism in South Africa (Peberdy, 2001). In contrast, Segatti & Landau (2011) have primarily examined apartheid’s influence on present day migration law. Finally, the previous literature has yet to attempt to organize or comprehend this issue through the lens of international relations theory.

## 1.2 Overview of the Literature: Adding Theory

The formation of migration policy is complex, influenced by many actors as well as domestic and international pressures. Migration policy reflects, “national political coalitions committed to one policy or another” and the “structure of state institutions” in addition to a “host of extra-national factors” including geopolitical obligations, trade agreements and regional development pressures (Freeman, 1992: 1145). Thus, understanding why a state adopts a certain migration policy cannot be fully explained by examining one unit of analysis, but must assess all three units collectively. Moreover, while there is no grand theory to explain migration policy formation, the thesis recognizes the significance of theoretical explanation in grounding the analysis and organizing the disparate social phenomena. Thus, this thesis will employ constructivism and neoclassical realism (NCR) to illustrate why South Africa adopted a protectionist migration agenda. While it is argued that constructivism is more of an approach than a theory<sup>7</sup>, constructivism is helpful in understanding how the formation of South Africa’s national identity post-apartheid has directly influenced the construction of the nation’s migration agenda. More appropriately, due to its systematic approach of domestic and international indicators as well as its focus on material as well as ideational causes for policy action, NCR will also be used to understand South Africa’s migration policy development. While NCR is a theory

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<sup>7</sup> See Hopf’s (1998) explanation of constructivism as a more of an approach rather than a theory of international relations Hopf, Ted. “The Promise of Constructivism in International Relations Theory.” *International Security* 23.1 (1998): 171-200. *JSTOR*. Web. 12 Mar. 2015. <http://www.jstor.org/stable/2539267> P. 196-7

of *foreign policy*, migration and immigration policy can be viewed as a facet of a country's foreign policy; thus, NCR is an applicable theory.<sup>8</sup>

### **1.3 Research Aim, Question and Central Argument**

In light of the previous literature, the thesis will seek to understand what drives South Africa to adopt a protectionist migration agenda post-apartheid. This thesis will strive to contribute to the literature by providing an analysis of all the causes of and reasons for South Africa's decision to implement protectionist migration laws, resulting in a more comprehensive and uniform understanding of this policy outcome. This thesis will employ two different theoretical frameworks to afford a more complex and grounded explanation of South Africa's decision-making process in regards to migration policy. As a result, the thesis will attempt to answer the following research question: following the end of apartheid, why has South Africa adopted a progressively protectionist migration agenda?

#### **1.3.1 Central Argument**

Through the application of constructivism, the thesis argues that the negative political and social discourse surrounding in-migration to South Africa *and* South Africa's commitment to fashioning a new identity (based on nativism post-apartheid) are two of the major causes for South Africa's protectionist migration agenda. However, neoclassical realism provides a more comprehensive and linear explanation for the persistence of these protectionist migration policies into the new millennium. Not only do large in-migration flows to South Africa drive restrictive migration policies, but also how national policy-makers perceive these flows as a substantial threat to social welfare and national security has directly espoused enhanced migration control. Moreover, South Africa's archaic and weak state structure thwart the country's ability to handle mass in-migration and provide adequate social delivery to migrants (let alone its own citizens), preventing the government from implementing more liberal migration policies to date.

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<sup>8</sup> Additionally, despite being a theory foreign policy, Schweller (2004) argues that neoclassical realism can also be useful in explaining certain types of political outcomes, as it will be used in this thesis. Schweller, Randall L. "Unanswered Threats: A Neoclassical Realist Theory of Underbalancing." *International Security* 29.2 (2004): 159-201. *Project Muse*. Web. 30 May. 2015. [http://muse.jhu.edu/journals/international\\_security/v029/29.2schweller.html](http://muse.jhu.edu/journals/international_security/v029/29.2schweller.html)

## 1.4 Research Design and Methodology

Through an explanatory analysis, this research paper seeks to explain the protectionist nature of South Africa's migration agenda. After conducting a thorough investigation of migration patterns to South Africa and its national migration laws, the thesis will use constructivism and neoclassical realist theory in order to help explain why South Africa has adopted protectionist policies over more liberal ones. The thesis will make use of literature that explores the factors that have contributed to the formulation of South Africa's migration policies. Primary sources will be used in order to help examine the protectionist nature of South Africa's migration policies such as speeches and comments made by immigration officials and South African politicians. Migration statistics will also be included to understand migration patterns and trends in regards to South Africa and explain the migration pressures on its government. This thesis also relies on secondary sources in the form of academic journal articles and existing studies and surveys on migrant patterns, public attitudes towards migrants, apartheid migration legislation as well as social and economic factors that influence migration policy.

## 1.5 Boundaries and Limitations

The thesis is restricted to the case study, South Africa, and will not explore migration policies of other nations. The research is limited to the analysis of national migration policies and state policy-makers perceptions of migration rather than local or regional responses to migration due to its limited space. Further, the thesis is concerned more with analyzing why South Africa has adopted protectionist migration policies rather than why people migrate to South Africa. Thus, the thesis will be examining migration more broadly, not limiting the study to one type of migrant movement (refugees v. economic migrants). Despite the fact that the vast majority of migrant movements are *internal* and often mimic "in form and impact" global migration patterns, the research paper will *only* be addressing international migration (Crush & Frayne, 2010: 9). Finally, the thesis will cover the time period between 1994 and 2014, although some brief background on apartheid migration policies will be provided.

It should be noted that migration statistics and data are not always complete and/or accurate in relation to sub-Saharan Africa and South Africa. First, migration data is difficult to collect due to South Africa's shortage of demographers and migration specialists and the

appropriate technology at all border crossings (Landau, 2006: 224). Second, a large portion of cross-border migration goes undocumented due to the rise in irregular migration to South Africa (Crush, 2011: 3). South Africa possesses highly porous borders, through which many migrants avoid legal channels of migration due to fear of discrimination, harassment and deportation. Finally, policy-makers have often exaggerated the number of illegal migrants entering South Africa, using migrants as “political scapegoats” to explain the continuance of South Africa’s crime issues, spread of diseases, rise in unemployment and strained social services (Crush, 1999: 2).

## **1.6 Relevance of Question**

With the erosion of borders due to globalization, economic liberalization and improved technology, expanded migration flows are challenging the state’s traditional right to determine “who and what” is granted legitimate territorial access. As a large and liberalized economy, South Africa is a significant example of a country that has employed protectionist migration policies to better control migration flows. However, the restrictive nature of these laws has led to the mistreatment and neglect of refugee and asylum seekers living in South Africa: they are often denied access to healthcare, jobs, legal representation and social services (Segatti & Landau, 2009). These policies have also contributed to a severe skills shortage in South Africa, impeding the growth of South African economy while thwarting SADC’s ability to govern migration cooperatively in the region, stalling the efficiency and effectiveness of regional governance. Moreover, national migration laws have failed to address societal xenophobia, especially in regards to the recent violent and widespread xenophobic attacks on foreigners in 2008 and more recently in 2015. Immigration lawyers have asserted that the most recent changes to South Africa’s migration policies are “unconstitutional”, “arbitrary” and “far-reaching” and have warned of the detrimental effects the laws could have on South Africa’s economy, regional image, and ability to hire much needed skilled labor (Thelwell, 2014). In light of the move towards further protectionism in 2014, it is important that scholars and world leaders attempt to understand why South Africa has adopted a control-oriented and strict migration agenda so that these implications may be addressed in the future.

## **1.7 Outline of Thesis**

Chapter 2 will commence with a description of the different types of migrants and the drivers of migration referring to basic theories of migration. Additionally, this section will highlight migration patterns to and pressures on South Africa. Chapter 2 will also explain the basic tenets of both constructivism and neoclassical realism, later employed in the analysis section of the thesis. Chapter 3 will examine South Africa's national migration policies, briefly during apartheid and more meticulously post-apartheid. In particular, the thesis will scrutinize the amendments to the Aliens Control Act (1991), the Refugees Act (1998), as well as the Immigration Act (2002) and its amendment in 2004. This Chapter will then assess the most recent changes to South African migration policy, including those implemented in 2014. Thereafter, Chapter 4 will review the numerous negative implications South Africa's restrictive migration regime has had on the country, necessitating an explanation for their adoption. The thesis will thus delve into an explanatory analysis of why South Africa has decided to adopt a protectionist migration agenda, expanding on the previous knowledge by analyzing the issue through the lens of constructivism and NCR. Chapter 5 will conclude the thesis by emphasizing the main arguments from the paper, stressing the central causes for South Africa's protectionist migration policies and how theory was used to ground the analysis.

## **2. An Overview of Concepts, Theories and Migration to South Africa**

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Before examining South Africa's national migration agenda, it is important to understand who migrates and why people migrate. Following a quick examination of the basic theories of migration, this Chapter will explore the migration patterns and trends in Southern Africa. In particular, this overview will focus on migration to South Africa post-1994 in attempts to illuminate the pressures in-migration engenders for the South African government and how it has become a significant issue for the country. The Chapter will conclude with some background on constructivism and neoclassical realism, which will later be employed in Chapter 4 of this thesis.

### **2.1 Migration Typology and Theories**

#### **2.1.1 Migrant Typology**

According to the United Nations, an international migrant is a person who changes his or her country of usual residence for at least a year (UNDESA, 1998: 10). For purposes of this thesis, "international migration" will be defined as the "relocation of people from their country of origin to South Africa" either temporarily or permanently. In contrast, an international visitor or "tourist" refers to a person who travels to a country, which is not their country of residence or citizenship, for less than a year (Documented Immigrants (SSA), 2013: 10). Their intention is not to seek long-term stay or residence in the country they are visiting, and their purpose of visit is mainly leisure, business or to visit friends and family (Ibid: 10). Due to the main focus of this thesis, international visitors and tourists coming to South Africa will not be discussed in detail.

The international migrant population is diverse: migrants come from different origins, encompass many ethnicities, and differ in terms of age, gender, education and skills level.

Akokpari (1999) identifies four migration dichotomies in which he uses to define migration patterns: permanent or temporary migration; skilled/semi-skilled or unskilled migration; forced or voluntary migration; and intra or extra African (Akokpari, 1999: 75). But, for purposes of this thesis, it is easier to examine the issues of migration by dividing migrants into four categories: permanent settlers, laborers (skilled and unskilled), refugees and asylum seekers and clandestine/illegal migrants (Kok et al., 2006: 50). Although this typology is helpful, it should be noted that these categories can be overlapping and are not necessarily mutually exclusive.

First, laborers are defined as those migrants on temporary work contracts (i.e. construction or mining) or those who have secured temporary work permits. These laborers are either “skilled” or “unskilled”. Skilled laborers possess specialized training or a learned skill set, qualifying them for a particular type of work (Mahuron, 2013: 4). Whereas, unskilled laborers do not possess these skills or training and usually have jobs which require manual labor.<sup>9</sup> Second, like laborers, permanent settlers can be either skilled or unskilled. Permanent settlers are migrants who have become permanent residents (through various different avenues) of the country they have immigrated to and/or have naturalized through citizenship. The process of becoming a permanent resident or citizen differs by country and will be examined in regards to South Africa later on in this chapter. Third, refugees (as well as asylum seekers<sup>10</sup>) are defined as “forced migrants” who relocate either proactively or reactively due to conditions beyond their control, such as to “escape persecution or conflict, rather than economic or other benefits” (Castles & Miller, 2009: 188). According to the UN Convention on Refugees (1951), and the UN Protocol of 1967, a refugee is:

“[Any] person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>11</sup>

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<sup>9</sup> However, the line between skilled and unskilled is “hard to draw” as many skilled migrants find themselves working unskilled or lower-skilled jobs. Crush, Jonathan, and Belinda Dodson. “Migration Governance and Migrant Rights in the Southern African Development Community (SADC): Attempts at Harmonization in a Disharmonious Region.” Geneva Conference Proceedings. 14 Jan. 2013. *UNRISD Publications*, 2013. Web. 16 Jan. 2015. <http://www.unrisd.org/80256B3C005BCCF9/search/BDE3BA6C8048188EC1257D380035DB37?OpenDocument> P.3

<sup>10</sup> An asylum-seeker is someone who declares him/herself to be a refugee, but whose official claim has not yet been evaluated through the legal channels.

<sup>11</sup> See United Nations Human Rights Council. *Convention and Protocol Relating to the Status of Refugees*. Geneva: UNHRC, 1967.

However, the UN definition of a refugee has been expanded by the Organization of African Unity (OAU) to include people who “seek sanctuary across their national borders for environmental, economic and political reasons” (Akokpari, 1999: 76). Fourth, illegal immigrants fall into two broad categories, those who enter without proper documentation and those who overstay their legal residency (Adepoju, 2001: 51). Those migrants who enter the country illegally by avoiding legal channels are referred to as “undocumented”. Due to the illegal nature of undocumented migration and its varying temporalities depending on the migrant, it is hard to accurately estimate numbers and trends.

### **2.1.2 Why People Migrate?**

While this thesis is more concerned with the impact of migration on South Africa, rather than the causes of migration, it is worth briefly examining why people migrate. Migration is classified and studied by scholars through different theories of migration that account for the causes of global migration. Until the late 1980s, the scholarly debate was polarized between neoclassical views on migration and “historical structuralist views”<sup>12</sup> (de Haas, 2010: 229). Proponents of neoclassical migration theory, Lewis (1954), Harris & Torado (1970), Borjas (1989), prioritize income maximization as a key driver for migration. They argue that individuals search for a country to reside in that best maximizes their well-being. In contrast, the historical-structural approach views migration as the way rich countries mobilize cheap labor for capital, perpetuating unequal development and exploiting poor countries’ human resources for their own gain (Castles & Kosack, 1973; Portes & Walton, 1981). Thus, international migration is propelled by rich states or urbanizing states which require cheap labor.

More recently, critiques on migration theory have led to a more complex and interdisciplinary approach to understanding migration. Migration systems theory contends that distinct regions are connected, wherein migration movements arise from prior links based on colonization, political influence, trade, investment or cultural ties (Castles & Miller, 2009: 27). Over time, Fawcett (1989) argues that migration flows acquire stability and a distinctive structure, linking the receiving and sending countries. In contrast, migration networks theory,

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<sup>12</sup> Castles & Miller (2009) encompass neo-Marxist, dependency, and world systems theories on migration under the umbrella of “historical structuralist views”. Castles, Stephen, and Mark J. Miller. *The Age of Migration: International Population Movements in the Modern World*. 4th ed. New York: Guilford Press, 2009.

rooted in anthropology and sociology, maintains that migration perpetuates over space and time due to interpersonal ties (kinship or friendship) that connect migrants to residents of their home country (Taylor, 1986). Migrants often keep in touch with family and friends in their native country, revisit their home country and bring new migrants to the destination country (Skeldon, 1998: 33). Due to the large number of different theories on migration, Massey et al. (1993) and de Haas (2010) have tried to synthesize past migration theories and create a comprehensive framework for understanding migration, examining all levels of analysis through an interdisciplinary approach. However, there remains no one coherent or comprehensive theory on international migration. The causes of migration are “multiple, variable, scale-dependent and often country-specific” and therefore, a comprehensive theory of migration may never fully explain all migration patterns (Crush & Frayne, 2010: 4).

## **2.2 A Historical Perspective: Migration to South Africa Pre-1994**

Inter-regional migration was significant long before the 20<sup>th</sup> century. In the early 1900s, contract labor and apartheid law had a major effect on migration movements to South Africa. From 1910 onwards, the number of foreigners living in South Africa (as permanent residents) reached its peak in 1986 at 5.5% of the population and has remained around 3% ever since.<sup>13</sup> Between 1920 and mid-1960, undocumented migration was allowed under certain circumstances.<sup>14</sup> Thus, the number of foreigners actually living in South Africa at any given time was definitely much higher. Simultaneously, it is important to note that pass laws also restricted the internal migration of black Africans, who were made to live in racially allocated areas. Up until 1963, nationals from Lesotho, Botswana and Swaziland could migrate to South Africa freely, but they were also subject to segregationist and apartheid restrictions on movement and settlement once they were inside the country.

Illegal migration to South Africa was also prevalent due to economic, security and social issues in Southern Africa. Migration to South Africa “was and remains a survival strategy” of neighboring countries coming from poor households or unstable countries in search of a better

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<sup>13</sup> With regards to migration data, the South African government’s statistics referring to foreign immigrants, refers to foreign people living as permanent residents in South Africa. See Statistics South Africa. *South African Survey 2013*. Ed. John Kane-Berman. Pretoria: SSA, 2013. P.90.

<sup>14</sup> For instance, in 1963, the Portuguese East African government (now Mozambique) and the South African government allowed “clandestine” migration until either government decided to prevent it.

life or security (Kok et al., 2006: 40). The rise in illegal migration to South Africa was and still is driven by widespread poverty, macroeconomic instability, environmental degradation, political instability and war within the region and beyond. In the 1980s, economic downturn instigated illegal movement of persons from Malawi, Zimbabwe and Zambia to South Africa. Moreover, ecological, economic and political factors in Lesotho have also motivated illegal migration of economic migrants as well as refugees to South Africa, where porous borders have made it easy to migrate back and forth. Persistent poverty in Mozambique has driven much economic migration to South Africa; an estimated 350,000 left Mozambique to move to South Africa due to persisting civil war and drought in the late 1980s and early 90s (Peberdy, 2012: 4). Despite the lifting the formal ban of black African immigration in 1986, South Africa denied Mozambicans *legal* entry to the country, as they did not formally consider them refugees.<sup>15</sup>

During apartheid, South Africa promoted the extraction of cheap contracted labor from Southern African countries for their own mines. Of the 434,000 black foreigners working in South Africa in 1970, 81% were working in the mines, 9% in agriculture and 4% in manufacturing and construction (Budlender, 2013: 23). Recruitment agencies drew migrants from Botswana, Lesotho, Swaziland (BLS), Malawi, Mozambique and Zimbabwe to come work on the gold mines in South Africa. Mine migration was highly regulated and controlled, mostly through one agency, the Employment Bureau of Africa (TEBA). Contract and seasonal workers also came across the South African border to work on farms. Migration policy during this period tried to ensure that flows of migrants coming from other African countries were “temporary”, with workers required to return to their home countries at least once a year and leave for home permanently once their contract ended (Budlender, 2013: 23). Thus, contractual, temporary labor movements drove migration in the region in a “circular motion”, with multiple visits to the home country and eventual return thereof. Foreign labor was also “traditionally denied permanent rights to work or take up residence in South Africa” regardless of familial ties or length of employment (Kok et al., 2006: 76). In this way, migration did not burden education and health systems at home, but minimized costs and further discouraged permanent black immigration to South Africa.

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<sup>15</sup> In fact, there were no “official” refugees or asylum seekers in South Africa before 2001 because the Refugee Act (passed in 1998) was not yet implemented. Before 2001, South Africa lacked formal relationships with the UNHCR and had been suspended as a member of the UN during apartheid.

## 2.3 South Africa: The New Migration Hub

Between 1990 and 2000, South Africa became the new migration hub of the African continent: hundreds of thousands of migrants from across the continent traveled to the country as well as migrants from China, Eastern Europe and Pakistan. The total number of legal entrants into South Africa increased from 1 million in 1990 to over 11 million in 2010.<sup>16</sup> Moreover, the UN estimated that between 1990 and 2010, the number of international migrants (foreign-born persons living in South Africa) increased from 1.2 to 1.9 respectively (UNDESA, 2009: 283). The end of apartheid was a major pull factor in increasing population movement to the country. The end of an era of control and exclusion produced new opportunities and incentives for international migration. Amnesties were held in 1995, 1996 and 1999/2000 to give undocumented labor migrants and other people from the SADC region an opportunity to gain permanent residence in South Africa. Even migrants from outside the region from Nigeria, DRC, Kenya and Uganda moved to the new republic to benefit from the political transformation happening in the country.

Globalization, the development of new transportation systems, improved communication channels and technology have all impacted South Africa significantly, especially when apartheid ended and South Africa re-entered the global economic and political sphere. Since 1994, South Africa has adopted liberal economic policies, secured large foreign investments and opened up its trade to the global market. As a result, South Africa has become the “unchallenged economic heavy weight of the region”: its GDP stands at 56% of the SADC region, accounting for 59% of the regions imports and 46% of its exports (SADC Report, 2014: 16, 21). South Africa’s cities have grown immensely and its urbanization levels, while stagnate during apartheid, have taken off since 1990. The creation of economic opportunities in South Africa has been a major pull factor in bringing migrants to the country. South Africa’s integration with SADC also brought a major increase of legal and undocumented in-migrant flows to the nation through the country’s ratification of SADC’s Free Trade Protocol (2000) and Protocol on the Facilitation of Movement

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<sup>16</sup> This includes people who come to South Africa for tourism, business, work, contract, and study transit. Assembled from Crush, Jonathan and Vincent Williams. “Complex Movements, Confused Responses: Labour Migration in South Africa” *Migration Policy Briefs* 23 (2011): 1-73. *Southern African Migration Programme*. Web. 20 Nov. 2014. <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief23.pdf> P.6; and Statistics South Africa. *South African Survey 2012*. Ed. John Kane-Berman. Pretoria: SSA, 2012. P.37

of Persons<sup>17</sup> (2005). The number of SADC migrants coming to South Africa since 2000 has clearly increased dramatically. Between 2001 and 2010, the SADC migrant stock living in South Africa rose from roughly 700,000 to almost 2 million (Crush, 2011: 4).

## 2.4 Migration Patterns and Trends: Migration Since 1994

This next section will examine the statistics available on migration to South Africa and what trends these statistics reveal. It should be noted that the annual reports on tourism and migration by the DHA have not recently included statistics and Statistics South Africa (SSA) does not produce a report every year. As a result, statistics have been aggregated from a number of sources in order to create a fuller picture of recent migration to South Africa. Moreover, sources concerning migrant stocks are more focused on legal flows rather than informal ones. Thus, Budlender (2013) recognizes that migrant data undercuts the number of foreigners actually working and living in South Africa.

### 2.4.1 General Trends: Increased Migration to South Africa

Between 2000 and 2010, South Africa ranked 6<sup>th</sup> in the world in regards to annual net in-migration (UNDESA Report, 2013: 13). Despite this large figure, the foreign population of South Africa was only 3% in 2013 compared to countries like Australia, which has a foreign born population of around 28% and Singapore, 43% respectively.<sup>18</sup> Thus, the figures indicate that migration to South Africa is *mostly temporary* and obtaining permanent residence and citizenship is difficult. More specifically, migration to South Africa has been characterized by

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<sup>17</sup> However, attempts to facilitate the free movement of labor within the region have been slow and have met stiff resistance. For more discussion see, Oucho, John O., and Jonathan Crush. "Contra Free Movement: South Africa and the SADC Migration Protocols." *Africa Today* 48.3 (2001): 139-58. *Project MUSE*. Web. 6 Dec. 2014. [http://muse.jhu.edu.ezproxy.uct.ac.za/journals/africa\\_today/v048/48.3oucho.html](http://muse.jhu.edu.ezproxy.uct.ac.za/journals/africa_today/v048/48.3oucho.html); and Cornelissen, Scarlett. "Migration Regimes and the Politics of Difference in Contemporary Southern Africa." *The Round Table* 98.402 (2009): 347-60. *Taylor and Francis Online*. Web. 3 Dec. 2014. [http://www.tandfonline.com.ezproxy.uct.ac.za/doi/full/10.1080/00358530902895501#.VL9k\\_WSUc\\_k](http://www.tandfonline.com.ezproxy.uct.ac.za/doi/full/10.1080/00358530902895501#.VL9k_WSUc_k)

<sup>18</sup> For more countries foreign-born populations see United Nations. Department of Economic and Social Affairs. *International Migration Report 2013*. Research rept. no. ST/ESA/SER.A/346. New York: United Nations, 2013. *United Nations Department of Economic and Social Affairs/Population Division Reports*. Web. 8 Dec. 2014. <http://www.un.org/en/development/desa/population/publications/migration/migration-report-2013.shtml>

three major demographic trends: the rising number of African migrants and the declining number of European ones, increasing feminization and the decreasing age of migrants.

With migration control in Europe increasing and the end of apartheid in South Africa, African migration to South Africa has become more numerically significant than that of Europe. European immigration was large and even promoted by the apartheid government post-1950, when white solidarity became a significant concern to the ruling government. However, post-apartheid, the numbers of Africans moving to South Africa increased dramatically. Eventually, in 1999, the number of immigrants (in this case permanent residents) who moved from Africa to South Africa surpassed that of European immigrants and has been significantly increasing since.<sup>19</sup> Even if you examine temporary stay, since 2004, the number of work permits given to Africans has also exceeded that of Europeans and has been steadily rising.<sup>20</sup> As a result, the growing African migrant presence in South Africa is significant. In 2013, the majority of all temporary residence permits (TRPs)<sup>21</sup> were given to African citizens (55%), while the rest were given to Asian citizens (27%) and Europeans (13%) (Documented Immigrants, 2013: 19).

Migration to South Africa is also currently undergoing a process of feminization. During apartheid, severe restrictions on the migration of women limited the cross-border movement of females, encouraging their illegal migration. However, between 1990 and 2010, the number of foreign female migrants living in South Africa increased considerably, from 457,000 to 795,000 (UNDESA, 2009: 283). While males are still more likely to migrate to South Africa than females, the gender gap is closing.<sup>22</sup> Women migrate to South Africa for social and reproductive factors in addition to economic reasons. They usually move to towns or cities where they can work in the informal sector, mostly in trade, retail or domestic services, but have also

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<sup>19</sup> Regarding the numbers of immigrants and from which countries they came from see Department of Home Affairs. *Annual Reports*. Pretoria, DHA, 1999.

<sup>20</sup> In 2004, the number of Europeans that acquired work permits in South Africa was for the first time surpassed by that of Africans. In that year, 25,000 Europeans secured work permits while Africans secured 29,000. However, this number does *not* include contracted laborers. Statistics South Africa. *Documented Immigrants in South Africa*. Release No. P0351.4. Pretoria: Statistics South Africa, 2012. *Statistical Release South Africa*. Web. 4 Mar. 2015. <http://www.statssa.gov.za/publications/P03514/P035142012.pdf>

<sup>21</sup> Temporary residence permits (TRPs) include visitors' permits, as well as permits for work, relatives, study, business, medical treatment, waiver, retired persons, and corporate/exchange/treaty. TRPs are usually valid for a minimum stay of six months and can last up to five years.

<sup>22</sup> In 2013, 42% of the migrant population was female, while the male population was 58%. International Organization for Migration. *World Migration Report 2013: Migrant Well-Being and Development*. Geneva: IOM, 2013. *IOM's World Migration Reports*. Web. 7 Dec. 2014. [http://publications.iom.int/bookstore/free/WMR2013\\_EN.pdf](http://publications.iom.int/bookstore/free/WMR2013_EN.pdf) P. 7

traditionally worked as seasonal agricultural laborers. Due to the ongoing economic crises across the African continent, more women are moving to South Africa to supplement their husbands' incomes (Kok et al., 2006: 37). Furthermore, increased urbanization and the expansion of employment as well as the increase in the number of educated woman in Southern Africa has also spurred the migration of women to South African cities.

One last general trend to mention is the increasing tendency for children to migrate to South Africa. While not much is known about the migration of children, parents usually choose to leave their children behind when moving across borders. But, children do migrate across borders either alone or to work as child laborers, especially in the agriculture industry. Children, as young as seven, are increasingly migrating alone to South Africa from its neighboring countries because they are either deprived of schooling, lack money or have had a death in their family (Segatti & Landau, 2009: 23). For example, Crush et. al. (2005) recognize the increasing number of Zimbabwean children, who have migrated to South Africa alone looking for work due to the worsening economic crisis and droughts in their home country. More significantly, in 2013, the Southern African region recorded over four million migrants, (excluding illegal migrants) of which 20 per cent were under 19 years of age (IOM Report, 2013: 7). However, the number of children who have migrated alone to South Africa is probably much larger as many of them enter illegally and go undocumented.

#### **2.4.2 Labor Migration**

In the past two decades, the hostility of the international economy and the widening gap between the economies of South Africa and the rest of Africa are major push factors in regards to migration. As globalization has benefited South Africa (for the most part), it has marginalized much of the African countries from the world economies, as these countries continue to produce primary commodities, have received less international aid flows and direct foreign investments, and still suffer to develop after structural adjustment policies. As many countries on the continent struggle to develop, most migrants that come to South Africa are economic migrants, in search of work. Further, unemployment in Southern African countries remains extremely high, especially in South Africa's bordering countries. In 2012, Botswana had an unemployment rate of 17.2%, Lesotho's was at 28.3%, and Namibia's at 37.5% (South African Survey, 2012: 267). While South Africa's unemployment rate that year was also high (24.5%), migrants coming to

South Africa “struggle less” to find jobs in South Africa than low-skilled South African nationals (Crush, 2011: 15). On a “continent of declining economies”, South Africa has been a magnet to migrants, attracting both skilled and unskilled labor to its borders (Akokpari, 1999: 79).

With the liberalization of South Africa’s economy, there has been a massive increase in the number of foreigners coming to work in the country. Between 1994 and 2010, the number of people stated their “purpose of visit” was to work in South Africa, increased from 70,000 in 1994 and peaked in 2010 at 179,000 (SSA, 2004: 39; SSA, 2012: 37). However, Crush et al. (2005) note that the number of entries of people coming for work *or* who are “work-seeking” is not reflected in these numbers and is probably much higher (Crush et al., 2005: 6).<sup>23</sup> The number of work permits issued by the DHA since 1990 has also risen, tripling in number by 2008 (to 32,000 permits issued). The rise in the number of work permits could be explained by preparations for the World Cup (2006-2009). This recent upwards trend is also a result of changes in immigration policy: more people are applying for temporary work permits, as permanent immigration is far more restrictive and expensive.

African and Asian citizens are now obtaining more South African work permits than before apartheid. While overseas applicants receive more temporary *work* permits than Africans in total, the gap is closing. Zimbabwe is the leading recipient of work permits, accounting for 24% of all work permits issued by South Africa (Documented Immigrants, 2013: 26). From the African region, the top recipient countries are Zimbabwe, Cameroon, Ghana and Angola. While two SADC countries are represented here, SADC representation is not higher in regards to work permits because most migrants that come to South Africa from the SADC region are lower skilled, contract workers. For example, while SADC migrants received 34% of all TRPs, they received only 21% of all the temporary *work* permits issued in 2013 (Ibid: 21). In contrast, the number of work permits given to Chinese, Indian and Pakistani migrants was quite significant. China received almost a fifth of all work permits issued by South Africa in the same year. This represents China’s continuously growing influence in Africa, as it constructs numerous projects on the continent bringing with it its giant labor force.

Finally, there has been a notable decrease in contracted labor in South Africa and a significantly less foreign presence. Before 2002, most contract workers entered South Africa

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<sup>23</sup> This is due to the fact that some migrants who come to South Africa do not specify that they are looking for work in country in order to evade refusal of entry or deportation later on.

through bilateral agreements with neighboring states. With the Immigration Act of 2002, employers and mines could also use corporate permits to hire large numbers of foreign workers on contract, to work for a specific amount of time, with the mandate to return to their home country once the contract finished. Despite this other avenue to hire foreign mineworkers, the percentage of foreigners working on South African mines has decreased from 58% to 38% between 1996 and 2006 (Budlender, 2013: 32). Due to more recent downsizing, retrenchment and the new restrictions on recruiting novices on mines, the number of foreign workers on gold mines has also decreased by 10% in the past 6 years (Ibid: 71). Mozambicans and Basotho make up the overwhelming majority of foreigners working on gold mines presently.

### **2.4.3 Refugee and Asylum Seekers**

Continued conflict in sub-Saharan Africa as well as on the rest of the continent is another major push factor in driving migration to South Africa.<sup>24</sup> Civil disorders, political violence, economic crises, environmental factors, human rights issues and religious conflicts have increased the number of refugees and asylum seekers in Africa. Twenty-five percent of the world's refugee population resides in Africa.<sup>25</sup> In the 1990s, many refugees came flooding into South Africa from the DRC and Angola seeking protection from unstable governments. Since 1998, South Africa's national legislation has incorporated refugee protection principles, which include the freedom to move, work and access social services. Currently, there are approximately 65,000 recognized refugees in South Africa<sup>26</sup>: many of them have been there for years (UNHCR, 2014). While South Africa has been the chief destination for refugees and asylum seekers in Africa, the number of applicants each year continues to increase substantially. Between 1998 and 2011, the number of new applications for refugee status increased from 11,000 to over 100,000, peaking at 340,000 applicants in 2009 (DHA Annual Reports, 1990-2004; Budlender, 2013: 41). Recently, most refugees come from the SADC region, but asylum seekers are also migrating

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<sup>24</sup> In fact, "all southern African states", excluding Botswana and Zambia, have generated refugees at one time or another. International Organization for Migration. *World Migration Report 2013: Migrant Well-Being and Development*. Geneva: IOM, 2013. *IOM's World Migration Reports*. Web. 7 Dec. 2014. [http://publications.iom.int/bookstore/free/WMR2013\\_EN.pdf](http://publications.iom.int/bookstore/free/WMR2013_EN.pdf) P. 60

<sup>25</sup> This percentage does not include IDPs, asylum seekers or those who failed to receive refugee status. See IOM, (2013) P.6.

<sup>26</sup> See United Nations Human Rights Council. "2015 UNHCR Country Operations Profile - South Africa." *UNHCR Country Profiles*. UNHCR, 2015. Web. 6 May 2015. <http://www.unhcr.org/pages/49e485aa6.html>

from different parts of Africa as well as south-central Asia (DHA Asylum Statistics, 2013: 3). The number of registered new asylum seekers from South-Central Asia is now almost equal to that of East and West Africa (Ibid: 3-4). During the first decade of the new republic, the DRC accounted for the most applications for asylum in South Africa. More recently, Zimbabwe has produced the most asylum applications in South Africa due to the deepening economic crisis within the country and South Africa's decision to finally allow Zimbabweans to apply for asylum in 2006.

Despite the sizeable number of asylum-seekers in South Africa, very few are actually accepted. In 2013, approximately 68,000 asylum applications were formally registered in South Africa, but only around 7,000 of those claims were granted refugee status (DHA Asylum Statistics, 2013: 8). While South Africa's protectionist stance on immigration (discussed in next chapter) has definitely influenced this outcome, there are other factors that can explain this low acceptance rate. First, South Africa's migration system has been overwhelmed by the number of applicants applying for asylum, which has caused a severe backlog, slowing down the efficiency and accuracy of the process. For instance, in 2011, South Africa "led the world in the number of asylum applications pending" (Segatti, 2011a: 16). At the end of 2013, there were 230,000 asylum-seekers awaiting decisions in South Africa.<sup>27</sup> Second, the South African government is worried about approving a large number of applications because they fear that irregular migrants are abusing the asylum system to secure residence in South Africa (Crush, 2011: 17).

#### **2.4.4 Permanent Migration**

The number of immigrants (securing permanent residence<sup>28</sup>) coming to South Africa has decreased dramatically in the past two decades. The changes in immigration policy post-1994, which have been restrictive and protectionist, have contributed to the dramatic decrease in the number of permanent residence applications approved in South Africa. In early 1980s, on average, 30,000 foreigners became permanent residents per year. However, since 1994, the number of immigrants who received permanent residence has been around or below 5,000 per

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<sup>27</sup> Ibid.

<sup>28</sup> Permanent resident permits are issued to those people who have lived and possessed a valid work permit in South Africa for five years or those who are dependents on South African citizens or permanent residents. But, foreigners can also receive permanent residence if they are in possession of a permanent work offer, possess exceptional skills, qualify as a refugee, are financially independent, qualify as a retired person, or they are a relative of a South African citizen or PR.

year and in 2012, only 1,000 permits were allotted (DHA Annual Reports 1994-2004; SSA, 2014: 36).<sup>29</sup> The origin of immigrants to South Africa has also diversified in recent years. As the number of European immigrants has declined, the number of African immigrants has increased. Immigrants from Africa make up 67% of all permanent residents recipients in 2013, and 46% are from the SADC region alone. The five countries that receive the most permanent residents permits were Zimbabwe, the DRC, India, Nigeria and China. Like temporary permits, the number of Chinese and Indian immigrants is on the rise as well as immigrants now from Pakistan and Bangladesh. More African immigrants, especially professionals, are coming from countries such as Nigeria, Senegal, Sierra Leone and Kenya to live in South Africa. However, there was a severe dip in the number of professionals migrating into South Africa between 1994 and 2005, so much so that immigration laws had to be amended in order to attract more skilled workers and immigrants. In 2005, out of 5,650 immigrants, only 159 were classified as “professionals” while 5,050 were classified as “not economically active” (SSA, 2009: 40).

While emigration is not a major concern of this thesis, it is worth noting the massive brain drain occurring in South Africa. Between 1993 and 2003, South Africa has witnessed a net loss of people: more people have emigrated than immigrated.<sup>30</sup> Out-migration of skilled professionals began in the 1980s due to economic and political reasons and has continued due to wage differentials, few job opportunities, migrants’ desire for international exposure, a rise in crime in South Africa, and affirmative action policies that have negatively impacted white job prospects. Around three-quarters of the South African diaspora currently live in the global North. While Ellis & Segatti (2011) estimate that only around 2% of the South African population resides abroad; this diaspora has directly contributed to the skills shortage South Africa faces today as this percentage is composed of a “disproportionate number of highly skilled people” (Ellis & Segatti, 2011: 72). The sector most affected by skilled emigration is health, wherein doctors from South Africa are moving to the USA, Canada and Australia for better opportunities

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<sup>29</sup> However, these numbers do not include over 250,000 of permanent residence permits given out in three separate amnesties post apartheid: the 1995 amnesty for mineworkers, the 1996 amnesty for SADC nationals and the 2000 amnesty for Mozambicans. These amnesties tried to make up for apartheid immigration policies that restricted black immigration as well as the lack of refugee legislation in South Africa during the Mozambican civil war. Budlender, Deborah. *Improving the Quality of Available Statistics on Foreign Labour in South Africa: Existing Data Sets*. Rept. no. 2. Johannesburg: University of Witwatersrand, 2013. *MiWORC Reports*. Web. 4 June 2015. <http://www.migration.org.za/uploads/docs/miworc-report--2.pdf> P.30

<sup>30</sup> Since 2004, statistics on self-declared emigrants have not been collected due to the Immigration Act 2002 (No.13), as departure forms are no longer required.

and higher wages. South Africa's ability to reach its growth and redistribution goals and employment targets has been severely hampered by this skills crisis (Crush & Dodson, 2006: 442).

### **2.4.5 Illegal and Undocumented Migration**

While the number of illegal immigrants that reside in South Africa is hotly debated, scholars are in agreement that undocumented migration to South Africa is on the rise. In the 1990s, the number of illegal migrants rose due the lack of formal and legal mechanisms to manage migration in post-apartheid South Africa. However, the exact number is hard to measure. Most estimates given for the number of undocumented migrants before 1994 were around or below 2 million; however, post-1994, the Human Sciences Resource Council (HSRC) estimated upwards of 8 million. Crush (1999) argues that South African government agencies and the police have purposely exaggerated the number of illegal migrants living in South Africa for the purpose of political gain or goals. As a result, South African government officials have used and purported high numbers of undocumented migrants in an attempt to espouse a picture of "floods" and "waves" of illegal "aliens", who threaten the social and economic interests of South Africans (Crush, 1999: 5). Currently, the number of undocumented migrants living in South Africa is probably just below 3 million (Budlender, 2013: 33).

Undocumented migration has persisted and most likely will continue to grow due to a number of factors. Informal movement across borders is part of South Africa's history: colonial boundaries had separated communities, there was not much border policing pre-1960, and the mining system was the only form of formal foreign labor recruitment (encouraging informal movement for the agricultural and services sectors). Moreover, South African employers in the construction and service sectors have had a "distinct preference" for non-South African labor (Crush, 2011: 16). When hiring undocumented migrants, employers are more easily able to subvert labor laws, decrease wages and not pay benefits. Further, geographically, South Africa possesses long (7000 km) borders, which are quite porous. Increasingly, South Africa is making it legally harder to work in the country, which also has contributed to driving migration underground and caused an increase in the deportation of legal and illegal migrants. Finally, due to the wide disparity of income levels between South Africa and its neighbors, economic migration to the country will continue.

## **2.5 Adding Theory: Constructivism and Neoclassical Realism**

To conclude this Chapter, the thesis will now explore and offer some background information concerning constructivism and neoclassical realism in order to provide the foundation for their employment within the analysis section of Chapter 4.

### **2.5.1 Constructivism**

Developed in the 1980s, constructivism offered an alternative understanding of the conventional theories in international relations (IR). While not a specific analytical theory of IR, constructivism is a “theoretically informed approach” to the study international politics (Ruggie, 1998: 879-80). Unlike theories of realism, which emphasize the materialism and anarchy of international system, constructivism purports that reality is socially constructed: “the existence of patterns, cause-and-effect relationships, and even states themselves depend on webs of meaning and the practices that constitute them” (Hurd, 2008: 300). Thus, constructivists challenge the materialist basis of realist approaches by arguing that the very meaning of power and content of interests are a mere function of ideas. Constructivism also contests realism and in particular, neorealism, in that it does not privy any unit of analysis. This is because structures or actors are mutually constituted: reality is constructed through the interactions of actors within a social context, while social practices and institutions also impact the decisions of individual actors and states (Hopf, 1998; Hurd, 2008).

Constructionists recognize the discursive power of ideas through language, speech, culture and knowledge that is reproduced and distributed. Unlike material power, Hopf (1998) argues that discursive power is revealed through the dominant culture of ideas surrounding specific issues, identities and conceptions, which as a result, influence public perception and attitudes, international policy-making and state behavior. Ideas are inter-subjective, organizational and often institutionalized through national practices, policies and rhetoric (Hurd, 2008: 301). Thus, there also exists a “culture of ideas” surrounding migration and migrants in South Africa, which are reflected in its nation’s policies. However, migrants in South Africa are often viewed as criminals, job-stealers and diseased while in-migration a social security threat, not a tool for development (Crush & Frayne, 2010).

Central to constructivism is the concept of interests and norms, which are the result of the social construction and the circulation of ideas. State interests are just ideas about the needs of a state, “[emerging] from an environment in which states operate and are endogenous to states’ interaction with their environment.” (Karacasulu & Uzgoren, 2007: 32). Finnemore (2004) adds that the historical construction of national interests is also noteworthy. Thus, when examining South Africa’s national interest, it is useful to understand its historical construction, how it changed post-apartheid and the degree to which these interests were reflected in the formation of the country’s migration policy. Additionally, global norms, rules and practices also guide state and actor behavior. States thus conform to norms not for utility maximization (as realists might argue), but because it is appropriate and good. Changing norms may result in changes in a state’s interests and create new interests. This is significant in understanding to what extent the rise in international norms, like economic liberalism and regional migration projects, have impacted South Africa’s migration policies.

Constructivists also emphasize identities as playing a constitutive role in global relations and policy formation: norms and ideas help to define identities and proper behavior (Wendt, 1999). These identities are variable and depend on different contexts, including historical, cultural, political and social. States themselves can create and mold their own identities, which directly influences international relations. Anderson (1983) argues that a nation is socially constructed as an “imagined community” to be inherently limited and sovereign and produced by the people who perceive themselves as part of the group (Toplak & Sumi, 2012). The formation of national identity is important for order and structure in the IR system, as a “state understands other states according to the identity it attributes to them” (Hopf, 1998: 175). In reference to the mobility of persons, migration policies are the “central discursive site” for defining the nation and delineating the boundaries of a national community (Croucher, 1998: 655). However, post-apartheid, South Africa’s initiatives to construct its national identity through migration policy have often been “introspective” (based on exclusion and indigeneity), as in-migration has been perceived as challenging the cultural basis of the nascent state’s identity.

## **2.5.2 Neoclassical Realism (NCR)**

Neoclassical realism (NCR) is a strand of the realist theory of international relations. As in traditional realist theory, NCR contends that the scope and ambition of a state’s actions are

driven by the international system and by the state's relative material power capabilities (Rose, 1998; Wolhforth 1999). Like neorealism, NCR argues that the international structure is the most dominant factor in determining patterns of state action. However, unlike realist theory, NCR argues that anarchy is neither Hobbesian nor benign, but rather difficult to perceive and state security is not the *primary* goal of a state. Rose (1998) contends that states "respond to the uncertainties of international anarchy by seeking to control and shape their external environment" using the tools they have at their disposal (Rose, 1998: 152). As a state's relative power rises, they will seek more influence abroad; however, a country's interests, goals and preferences also guide its external behavior.

More significantly, neoclassical realism argues that the impact of a state's power capabilities and how states interpret/respond to the international system is "indirect and complex because systemic pressures must be translated through intervening variables" at lower unit levels (Rose, 1998: 165). Intervening variables include the perceptions of decision/policy makers and the strength and structure of the state apparatus. As a result, neoclassical theory examines all units of analysis (international, state, individual) to explain foreign policy decisions. Thus, NCR also takes on a "social inquiry" design that demands expertise in the history and culture of a country as well as its political institutions in order to make foreign policy predictions.<sup>31</sup> Because the formation of migration policy is complex and especially driven by historical and social factors in South Africa, NCR is helpful in illuminating the domestic context of the country and explaining why it has adopted such protectionist legislation.

First, the perception and misperception of policy-makers strongly impacts the relationship between relative material power and policy outcome (Jervis, 1996). NCR advocates the need to explore how each country's policy makers actually understand international situations, crises or opportunities. Schweller (2004) breaks it down even further, arguing that statecraft is a consequence of the (1) the elites' preferences and perceptions of the external environment, (2) which elites' preferences and perceptions "matter" in the policymaking process, (3) the domestic political risks associated with certain foreign policy choices, and (4) the variable risk-taking propensities of national elites.<sup>32</sup> Once these individual units are established they can

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<sup>31</sup> NCR notes the importance of possessing language skills, historical background and prior knowledge of political institutions (specific to certain countries) for predicting foreign policy outcomes See Rose, Gideon. "Neoclassical Realism and Theories of Foreign Policy." *World Politics* 51.1 (1998): 144-72.

<sup>32</sup> See Schweller (2004) P.171

be understood as state strategies and preferences directly interacting with the systematic level. For purposes of this paper, the thesis will be examining international threat (i.e. migration), which is often a matter of policy-maker perception.<sup>33</sup> In this way, NCR integrates constructivist elements into its theory, by incorporating ideational influences into its analysis as well as an examination of individual agency (Kitchen, 2010). In regards to South Africa, it will be useful to examine how policy-makers have regarded and perceived migration as threat to the country's economy, and social security.

Second, according to neoclassical realists, the ability of the state apparatus to respond to external pressures and exploit national material power is also significant. "Complex domestic political processes act as transmission belts that channel, mediate, and (re)direct policy outputs in response to external forces" (Schweller, 2004: 164). A country may have significant material power, but national leaders may not have access to that power or be able to wield it effectively. Thus, Christensen (1996) develops the concept of *national political power* defined as the "ability of state leaders to mobilize their nation's human and material resources behind security policy initiatives" (Christensen, 1996: 11). Thus, state strength and structure directly affect the degree to which a country can implement certain policies, even if it desires to. National political power will be a concept revisited when examining South Africa's struggles in implementing more liberal migration policies and a motivation for adopting more restrictionist legislation.

In summary, in-migration to South Africa has risen since 1994. Migrants are coming increasingly from Africa and Asia and are moving to South Africa usually for economic reasons and on a temporary basis. Females and younger migrants are also progressively finding their way to South Africa. While legal immigration has decreased in the past two decades, legal temporary and illegal in-migration has increased dramatically. The emigration of highly skilled people and influx of less skilled temporary workers is also noteworthy. Due to the changing political system and evolving migration trends thereafter, South Africa has had to reconstruct its migration and immigration policies. In Chapter 4, the pressures migration has had on the South African government will be revisited and how they have affected migration policy formation will be explained through the lens of constructivism and neoclassical realism.

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<sup>33</sup> Robert Jervis, neoclassical realist scholar quoted in Weiner, Myron. "Security, Stability and International Migration." *International Security* 17.3 (1992-3): 91-126. *JSTOR*. Web. 2 Dec. 2014. <http://www.jstor.org/stable/2539131> P.118.

## **3. South Africa's Migration Policies Since 1994**

In this section, the thesis will examine South Africa's national migration legislation post-apartheid, evaluating how the country's migration agenda has been particularly protectionist and restrictive. Again, protectionist migration policies are those that are control-oriented, non-rights based and primarily emphasize the negative aspects of in-migration rather than taking advantage of the positive impact migration can have on the development of a country. While migration and immigration policy is spread across numerous regulations, statutes, and ordinances, this thesis has narrowed down the discussion to a few pertinent national laws. In particular, this chapter will evaluate South Africa's Aliens Control Act of 1991 (amended 1995), the Refugees Act (1998), the Green and White Paper on International Migration (1997, 1999), and Immigration Act of 2002 (amended 2004). This section will then assess the most recent changes to South African migration policy, later implemented in May 2014.

### **3.1 Migration Policy Background**

The formation of migration policy post-apartheid was a complex and arduous process. When South Africa was rebuilding its government and national image, the nascent republic strove to form laws that would advance human rights and reflect the spirit of South Africa's new Constitution (No.108 of 1996). Academics, NGOs, and activists were pushing South Africa to take into consideration the moral debt the country owed to the rest of the continent, as African countries served as safe havens for political refugees and emigrants during apartheid. Thus, South Africa also had an obligation to formulate a migration policy that reflected a more liberal

and regionally-oriented stance on immigration. In 1994, the DHA was (and still is) primarily involved in revising, drafting and implementing new migration policy, but the Department of Labor also made recommendations. These revisions involved reviewing migration regulation/control and determining the rules and procedures governing the selection and admission of foreigners as well as the restriction of illegal immigrants. This meant developing the rights and conditions guaranteed to in-migrants of South Africa, such as the right to work, housing, welfare and education. But, as this chapter will illuminate, the DHA was much more concerned with the former of the two, emphasizing the detection and deportation of illegal immigrants and border control.

During the 1990s, South Africa's migration policy reformation was slow and primarily geared toward combating illegal migration. During this decade, the Aliens Control Act of 1991 (No. 96) governed migration issues, and while it was amended in 1995, the changes were limited. A complete overhaul of migration legislation took almost ten years to complete: the new immigration legislation was only passed in 2002 and had to be amended in 2004. While the ANC remained divided on migration policy, the DHA was primarily concerned with "retaining a national protectionist and territorial vision" even as the country began to open its economy and politics to the rest of the world (Peberdy, 2012: 6).

### **3.1.1 A "Two-Gate" System**

While South Africa was in the process of drawing up its new legislation, the movement of people into and out of the country was governed by a "two-gate" system.<sup>34</sup> Foreigners seeking to legally enter South Africa were subject to either South Africa's 1) bilateral labor agreements or 2) the ACA (1991). Most bilateral agreements remained unchanged post-1994<sup>35</sup> from their apartheid (and earlier) origins for the purpose of employing unskilled, and cheap foreign labor. These agreements supported migration facilitation on a temporary basis in order to manage contract labor for the mines. First, by favoring bilateral agreements with its neighboring countries, South Africa revealed its preference for temporary migration over permanent migration. Contract laborers were also denied permanent rights to work or take up residence in

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<sup>34</sup> Coined by South Africa's Department of Labour and used by Jonathan Crush and other scholars to describe South Africa's migration regime in the 1990s.

<sup>35</sup> After 1994, the Chamber of Mines, made up of several major mining corporations in South Africa, launched a campaign to maintain their special status and operate outside of the regulations of the new immigration laws.

South Africa, regardless of whether they had family in South Africa or had been working in the country for several years. Second, the continuance of these agreements into the post-apartheid era also highlights South Africa's tendency to favor a nationalist approach. While South Africa joined SADC in 1994, it continued to discuss its labor agreements *bilaterally* with its fellow members rather than to facilitate labor mobility through *regional* cooperation.

The ACA of 1991 was an omnibus bill governing all forms of migration to South Africa (excluding mine labor) until the Immigration Act of 2002 (No.13) replaced it. Foreigners were defined as "aliens" as if they were otherworldly or not human. Any "alien" who was in violation of the ACA was deemed a "prohibited person", usually through Section 32 of the Act. However, once deemed a "prohibited person" such a person possessed no legal standing and was no longer protected by operative legislation during his/her apprehension, detention and deportation (Klaaren & Ramji, 2001: 40). In addition, Section 53.1 of the ACA suggested that all aliens were illegal before they were considered to be legal. This allowed immigration officials to ask for documentation of any person that they merely *believed* to be illegal, and arrest and detain that person without a warrant. These officials have used skin color, height and vaccination marks as indicators of "illegality" (SAHRC, 1999: 48). This is because the ACA allowed the arrest and detainment of suspected illegal aliens on "reasonable grounds" (Section 55), which lacked a clear definition in the law and was subject to racial discrimination. As a result, the ACA continued to be "deeply rooted in racism" (Crush, 1999: 5).

The ACA also resulted in restrictive and control-oriented immigration measures. The ACA conferred extensive discretionary power to the DHA (Sections 3 + 4) and the police, while the Parliamentary Committee and Public Protector offered little oversight. Approval of temporary and permanent residence permits was subject to the sole discretion of the Minister of Home Affairs. While the South African National Defense Force (SANDF) was the major body in charge of border control and policing, SAPS and the DHA were assigned control over arresting, detaining and deporting "prohibited persons" (ACA, 1991: Chapter V/VI). Regulations surrounding work permits are not even mentioned in the text of the Act. To hire a foreign worker, employers had to sufficiently convince the DHA that there was no suitable South African available to do the job. This strict regulation along with the "fruitless bureaucratic application process" and a large application fee made *legally* hiring an unskilled or semi-skilled foreigner unlikely and drove much labor migration underground (Crush, 1999: 6). The lack of

emphasis on hiring foreigners in the ACA only signified the goal of the Act was to deter immigration, not facilitate it.

Probably the most significant issue with retaining the ACA post-apartheid was its inherent lack of protection of basic human rights, especially once detained. The ACA denied the normal legal review and appeal opportunities, thus doing away with right to an appeal. Section 55 reads,

“*no court of law* shall have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any act, order or warrant of the Minister, an immigration officer or master of a ship performed or issued under this Act and which relates to the restriction or detention, or the removal from the Republic, of a person who is being dealt with as a prohibited person.”<sup>36</sup>

While judicial review by the Supreme Court existed, financial restrictions and time constraints for detainees negated their ability to access this resource. The Act did not specify any time limitation on detention, only that it could last no longer than what was deemed “reasonable and necessary”. Because detention and deportation was left “almost entirely” to the discretion of the immigration officers and the police, many human rights violations<sup>37</sup> occurred as the process lacked transparency and accountability (Segatti, 2011b: 38). Refugees and asylum seekers were not formally recognized in the ACA, not even appearing in the text once. While refugee policy was being formalized through discussions with the UNHCR (beginning in 1991), refugees and asylum seekers were treated as prohibited persons under the ACA until the implementation of the Refugees Act in 2000. This was in direct violation of international laws and regional conventions that South Africa had recently signed.

## **3.2 Slow Progress: Revising the System: 1995-2000**

### **3.2.1 Aliens Control Amendment Act (No.76) of 1995**

The ACA also needed to be changed in order to make it more in line with the recent Constitution. The Bill of Rights<sup>38</sup> within the new Constitution gave non-citizens significant,

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<sup>36</sup> Emphasis added. Government of South Africa. *Aliens Controls Act [no.96]*. Pretoria, 1991. Chapter VII, Section 55.

<sup>37</sup> This issue will be discussed later on in the Chapter when examining the implications of a protectionist migration policy.

<sup>38</sup> The Bill of Rights is contained in Chapter 2 of the South African Constitution (No. 108) 1996, which guarantees basic rights to equality, life, security as well as affording rights to those arrested, accused or detained.

basic rights, apart from those limited to citizenship, including freedom of trade, occupation, profession and residence (Klaaren, 1998: 68). In particular, the right to equality has been used in court cases<sup>39</sup> to argue for the provision and maintenance of fundamental rights to foreigners living in South Africa. Additionally, the ACA needed to be changed to become more relevant in handling new immigration challenges and issues of an increasingly connective and globalized world. The Aliens Control Amendment Act (No.76) of 1995 did mark some progressive changes to the ACA. The Amendment excised Section 55 and added Section 54.6, which provided for the protection of fundamental human rights, including the right to freedom, security and personal privacy for migrants during an immigration search. The Amendment also significantly limited the power and discretion of individual officials in enforcing immigration laws. Section 55.5 was also amended to limit detention to 30 days, with a *mandatory* review by a judge of the Supreme Court. Despite these changes, the Amendment Act was meant to only be a “temporary solution” to the overhaul of immigration policy and the legislation remained protectionist and even strengthened some of its previous control measures.

During a keynote address at a migration conference in 1997, past Minister of Home Affairs, Mangosuthu Buthelezi, emphasized South Africa’s decision to tighten its immigration control and reiterated the new amendment’s focus on “[apprehending] and [removing] illegals from South Africa” (Buthelezi, 1997). The policing, detention and removal sections of the Act remained in place and were the primary focus of the new document. Regulations were built in that included higher barriers to entry for those moving to South Africa. Section 26 of the amended ACA mandated that visitors could no longer change their purpose of visit after entering the country, but had to apply for work permits and other temporary permits from their home country. This clause was implemented to thwart visitors from being able to look for work as the DHA claimed that foreign migrants “abuse their visitor visas to illegally take up employment in the RSA” (Buthelezi, 1998). Major fees were also imposed that were non-refundable when applying for visas to further reduce the number of applicants. Internal monitoring was strengthened as the Amendment gave the DHA new authorities to regulate migration and

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<sup>39</sup> These cases employed Section 8 of the interim Constitution, which was later superseded by Section 9 of the 1996 Constitution. See Klaaren, Jonathan. "Immigration and the South African Constitution." 1998. *Beyond Control: Immigration and Human Rights in Democratic South Africa*. Ed. Jonathan Crush. Cape Town: SAMP, 1998. P.69, footnote 66.

increased the powers of the Minister of Home Affairs.<sup>40</sup> The amended ACA also perpetuated a negative view of migrants similar to its predecessor. The amendment retained the term “aliens” to describe all non-South African citizens. This diction also carried the assumption that all migrants are the same, whether they are refugees, asylum seekers, permanent residents, or temporary laborers: they are all foreign aliens. The DHA’s belief that in-migration (in particular illegal) was impeding South Africa’s development only prevented the inclusion of a skills importation section in the legislation. Again, immigration of skills remained limited to those who were “not likely” to pursue an occupation in which there were already a sufficient number of South Africans available to do the job.<sup>41</sup>

While the Amendment Act allotted some basic rights to immigrants and migrants, the law retained its former nature. The issues of refugees and asylum seekers were not addressed or even mentioned in the Amendment. While some clauses required a warrant for the police search of a suspected “prohibited person”, there remained loopholes for immigration officials to walk inside a private residence without one.<sup>42</sup> Further, although a limit was introduced on detention time, Section 55.1 increased the detention time without trial to 48 hours and made it renewable up to 30 days. The legislation also did not address any conditions that a detainee might encounter, such as health issues, sanitation problems, or physical abuse or harassment while detained. Even though the Amendment called for judicial review after 30 days of detainment (Section 55.5), most courts reported that no matters had been referred to them for review two years after the legislation had been implemented. In 1997, 27 detainees at Lindela Repatriation Center had been detained over their 30-day session without receiving review (Klaaren & Ramji, 2001: 38).

Because of the failings of the ACA Amendment as well as pressure from CSOs, lawyers, NGOs and the parliamentary oversight committee, a total overhaul of immigration policy began to occur in the late 1990s. Immigration policies were still rooted in the past, a massive skills shortage had to be addressed, and South Africa had recently committed to the legislative protection and fair treatment of refugees and asylum seekers through the signing of the UN and OAU Conventions on refugees. There was also major internal and external pressure (from world

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<sup>40</sup> Republic of South Africa. *Aliens Controls Amendment Act [no.76]*. Pretoria, 1995. See preamble and all relevant substituted sections.

<sup>41</sup> *Ibid*, Section 25.3

<sup>42</sup> *Ibid*, Section 54.8.

media, the UNHCR and Human Rights Watch) on South Africa to revise and reform its migration policies. Unlike the ACA Amendment, the following documents, the Refugees Act, and the Green Paper and White Papers on International Migration, were reviewed and influenced through a consultative process of private and public actors in order to produce a more appropriate policy. The following sections discuss the slow process of revising migration policy in South Africa (in the late 1990s).

### **3.2.2 Refugees Act (No. 130) of 1998**

Implementing specific refugee and asylum seeker law began with informal discussions with the UNHCR in 1991 to repatriate apartheid exiles back to South Africa. In 1993, South Africa passed a “basic agreement” with the UNHCR setting the foundation of refugee law in the country. Legislation was increasingly important as a large influx of refugees and asylum seekers were making their way to South Africa from Angola, the DRC and Somalia. Draft bills were submitted for circulation and various rights advocates, the UNHCR, lawyers, academics, and civil society were involved in reviewing them and giving their comments. The White Paper on Refugees was compiled by a task team, including members from the National Committee for Refugee Affairs also making it possible to engage a larger and more sympathetic body of input during the policy-making process (Handmaker, 2001: 96). Once all appropriate amendments were made, the Refugees Act (1998) was implemented in 2000.

The Refugees Act marked a significant and progressive change in South African migration policy. The Act established formal asylum procedures and policies, brought South Africa’s national policies in line with its international legal obligations and offered an array of new protections<sup>43</sup> for refugees. These protections included the right to seek employment, travel outside of South Africa, and benefits including medical, educational, and the right to apply for an immigration permit after five years of continuous residence in South Africa. The Act also provided extra safeguards for the refugee application process: it afforded an opportunity for a hearing if asylum applicants were denied refugee status (Section 12-14), an independent standing

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<sup>43</sup> Republic of South Africa. *Refugees Act [no.130]*. Pretoria, 1998. *Southern African Legal Information Institute*. Web. 6 May 2015. [http://www.saflii.org/za/legis/consol\\_act/ra199899/](http://www.saflii.org/za/legis/consol_act/ra199899/) See Section 27 and 28.

committee for additional oversight (Section 25) and extra training for refugee reception officers (Section 8.3). Section 29 also limited detention to 30 days, unless approved by the High Court.

While the Refugees Act was a major step forward for migration policy in South Africa in regards to rights provisions, there were still aspects of the Act that remained centered around the protection of South Africa's national sovereignty. First, notable terms such as "abusive application for asylum", "fraudulent application for asylum" and "manifestly unfounded application" are defined in the introduction and used throughout the document, only conflating the negative image of asylum seekers as economic migrants, not deserving of protection. Second, legislation also borrowed the UN's narrower definition of a refugee<sup>44</sup> instead of the broader one employed by the OAU, which also protects individuals from environmental threats and social unrest in their home countries.<sup>45</sup> This limited the number of asylum seekers applicable for refugee status. Third, the Bill required asylum seekers to apply *in person* at a refugee reception office in South Africa, instead of allowing them to make claims from other countries in which they temporarily resided in; again, restricting the number of potential applicants (Section 4.d). Even after receiving an asylum permit, these migrants were not permitted to work or go to school under the Refugees Act. Thus, while the Act supported temporary protection, it did not *promote the assimilation* of asylum seekers. As a result, the drafters of the Bill were "unable to move away from a paradigm based on outdated notions of sovereignty, within which any immigration is seen as a threat to state security" (Klaaren, 1998: 128).

### **3.2.3 Revising Policy: Green and White Papers on International Migration**

The Green Paper on International Migration (1997) was drafted by an independent task team to completely reform migration policy and make recommendations to the DHA. This document provided a liberal perspective on immigration, promoting the facilitation of skills recruitment, a positive view on migration and a more rights-based emphasis. The Green Paper argued that previous migration policy had been "focused primarily on control and expulsion" and needed to be "refocused as an issue of growth and development" (Green Paper, 1997: 13).

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<sup>44</sup> Ibid, Section 3.

<sup>45</sup> The OAU Convention for the Specific Aspects of Refugee Problems (1969) regionally governs issues pertaining to refugees in Africa. The 1969 Convention includes two definitions of refugees, including the 1951 UN Convention as well as a broader and unique one to enhance the protection of refugees on the continent. Thus, a refugee also includes "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order" flees their home country seeking asylum.

Recognizing the severity of the brain drain<sup>46</sup> in South Africa, the document called for the relaxation of controls over temporary and permanent migration, proposing a points system for importing skilled labor as a “positive economic asset to the country” (Green Paper, 1997: 20-21). Additionally, the document recognized that the majority of migrants only wished to stay in South Africa on a temporary basis, contributing to an increase in short-term illegal movements. As a result, the legislation called for a reduction in policing and the removal of temporary migrants and insisted on expanding legal access to the South African job market for SADC workers.<sup>47</sup> The Green Paper even dedicated a whole chapter to refugees and their protection, as well as chapter on “rights-based enforcement” to establish a new migration policy in-line with South Africa’s Constitution. Finally, there was a clear emphasis on increasing regional cooperation, promoting South Africa’s economic growth via collaboration with SADC countries in regards to migration.

While the Green Paper was novel in its attempts to protect migrant rights and establish migration facilitation as a “national interest” of the country<sup>48</sup>, the White Paper on International Migration (1999), which followed, was very different and reversed many of the significant attributes of the Green Paper. Instituted by the DHA and Minister Buthelezi, the White Paper did recognize the priorities of importing skills and combating xenophobia<sup>49</sup>, but was mostly focused on immigration control. Within the section termed “Identified Problems”<sup>50</sup>, the number one focus of the White Paper was combating illegal immigration. Section 6.3.1 of the paper stressed the negative impact illegal immigrants have on South African society including how immigrants take jobs from citizens, abuse scarce resources and are involved in criminal activities. The term alien is still used to define a person who is not a South African citizen, carrying the archaic tradition of the ACA. Immigration was also deemed as an impediment to the development objectives of the GEAR<sup>51</sup>, which could “best be achieved by maximum possible limitation on the entry of any migrant” (White Paper, 1999: 9). Thus, the Paper recognized the important role of deportation and detention in the migration system. It also advocated a “community based enforcement

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<sup>46</sup> Department of Home Affairs. *Draft Green Paper on International Migration*. Pretoria, 1997. See Section 2.3.5 – 2.3.7.

<sup>47</sup> Ibid, Section 3.3.

<sup>48</sup> Ibid, Section 1.1.1

<sup>49</sup> Department of Home Affairs. *Draft White Paper on International Migration*. Pretoria, 1999. See Section 6.5.

<sup>50</sup> Ibid, Section 6.3

<sup>51</sup> Growth, Employment and Redistribution Strategy (GEAR) was implemented in 1996 to accelerate the growth of South Africa by addressing macroeconomic issues such as debt, government consumption and inflation as well as supplementing goals of the Reconstruction and Development Programme (RDP).

approach” with the aid of a designated Immigration Service for identifying illegals. The document also emphasized the protection of its own citizens over non-citizens, highlighting the rights provided by the Constitution are geared towards South Africans, not foreigners.<sup>52</sup> Rights of asylum seekers and refugees were completely excluded from the White Paper and a section on “Rights-based Enforcement” in the Green Paper was replaced by an “Enforcement” one. The issue of regional cooperation was skimmed over, as the document made clear that South Africa’s policies must reflect the priority of its citizens.<sup>53</sup>

Before discussing more recent changes in migration policy, it is worth describing some of the implications of South Africa’s protectionist policy, which governed South Africa’s migration system between 1994 and 2002 before the Immigration Act (2002) was implemented. During the reformation/consultative process, the country’s migration policy was run by DHA under the ACA and Refugees Act (1998) and was headed by Minister Buthelezi, who also purported a control-oriented and nationalistic migration stance. As a result, the DHA was committed to implementing migration policy through border control, detention and deportation, resulting in some significant consequences.

### **3.3 Remaining Issues Surrounding Migration: The End of a Decade**

Due the protectionist laws and rising number of in-migrants to South Africa, the DHA improved its control and policing measures. South Africa introduced a Computerized National Movement Control System to implement tougher control measures and update its surveillance technology.<sup>54</sup> The DHA also introduced stricter application procedures and hiked fees at South African embassies and consulates outside of the country, in order to limit the number of temporary permits allotted. Peberdy (2001) argues that these regulations were imposed to restrict Mozambican and Zimbabwean migrants, but may have actually contributed to the increase in illegal border hopping and undocumented migration flows (Peberdy, 2001: 18). Heartland

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<sup>52</sup> Department of Home Affairs. *Draft White Paper on International Migration*. Pretoria, 1999. See Section 6.2.4-6.2.5.

<sup>53</sup> *Ibid*, Section 4.4

<sup>54</sup> However, few immigration officials knew how to use this technology and could not adequately carry out identification checks.

policing measures were put into place, including increasing the number of “internal tracing units” (ITUs) in order to identify illegal migrants in major cities and on the South African borders. SAPS involvement in immigration policing continued to grow while SANDF increased their monitoring activities through patrols and roadblocks. One study found that, on average, Gauteng police spent a quarter of their time searching for, arresting and deporting illegal migrants (Vigneswaran, 2011: 111). Mass policing missions, such as Operation Crackdown in 2000, were carried out by the DHA along with the SANDF and SAPS, to focus on policing areas where African immigrants were rumored to live.

The emphasis on strict policing and deportations contributed to the racial profiling, human rights neglect and physical abuse of migrants. Crush (1999) argues that the police and immigration officials enforced the ACA with the “same vigor and disregard for basic human rights as they used to enforce the pass laws” targeting migrants by skin color, hairstyle, physical appearance and speech.<sup>55</sup> Through mass raids of immigration areas, little distinction was made between refugees, asylum seekers and other migrants, as valid documentation was often disregarded or even destroyed in order to make an arrest (Crush & Dodson, 2006). The DHA also sponsored the “community based enforcement approach” to combating illegal migration through initiatives described in the White Paper. The department encouraged citizens to reach out to the government and SAPS to report any “suspected” illegal migrants, establishing a toll free number and even handing out rewards for finding illegal migrants. In this way, the department fueled discrimination and racial profiling. The SAHRC and the HRW documented the harsh intimidation tactics and assault that were becoming commonplace during arrests of suspected illegal migrants. One SAHRC report<sup>56</sup> goes on to describe the awful abuses at Lindela Detention Centre through interviewing detainees. The Centre, where undocumented migrants in South Africa have been held since 1996, was opened due to the limited capacity of SAPS’ holding cells and the country’s prisons and the increasing number of migrants arrested post-

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<sup>55</sup> For some migrants’ testimonies of being arrested, assaulted and bribed by immigration officials and the police during the 1990s in South Africa see Crush, Johnathan. "Fortress South Africa and the Deconstruction of Apartheid's Migration Regime." *Geoforum* 30 (1999): 1-11. *ScienceDirect*. Web. 16 Nov. 2014. <http://www.sciencedirect.com/science/article/pii/S0016718598000293> P.7

<sup>56</sup> See South African Human Rights Commission *Report into the Arrest and Detention of Suspected Undocumented Migrants*. Johannesburg: SAHRC, 1999. *SAHRC Reports*. Web. 4 May 2015. <http://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>

apartheid. Unfortunately, the SAHRC report revealed that the Centre lacked adequate food and healthcare, and there were numerous reports of bribery and extortion of detainees, many whom were held for periods longer than allowed by law.

Due to the rising illegal in-migration to South Africa and the country's protectionist policies, the government focused on deportation. Between 1990 and 2002, the South African government deported over 1.7 million in-migrants; 1.5 million of those were post-apartheid (DHA Annual Reports, 1990-2002). South Africa's deportation system was focused more generally on SADC migrants, but in particular, Mozambicans and Zimbabweans. Facing large numbers of illegal immigrants post-apartheid, two separate amnesties were held, one for mine workers (1995) and another for SADC nationals (1996). These amnesties tried to make up for apartheid immigration policies that restricted black immigration. However, despite these amnesties, only about 200,000 applicants received permanent residency in South Africa. Moreover, in 1997, around 150,000 Mozambicans alone and 20,000 Zimbabweans were deported from South Africa.<sup>57</sup> Unfortunately, due to exclusionary immigration laws and lack of more liberal alternative policies, deportation remained the main approach in dealing with illegal immigration.

Finally, South Africa's growing skills deficit and lack of regional cooperation for sharing skills was also becoming a major issue. One academic study found that while emigration from South Africa dates back to the 1960s, the volume of the brain drain has increased dramatically post-1994, with around 6,000 professionals leaving the country between 1994-7.<sup>58</sup> Simultaneously, the supply of skilled workers coming out of the education system was insufficient for further development. However, restrictionist migration policy and the DHA's negative views of migration prevented the supplementation of skills through immigration, as companies in South Africa found it very difficult to hire skilled foreign labor.<sup>59</sup> Another major concern was how to obtain skills from the region and facilitate multilateral cooperation in migration management. In the 1990s, South Africa's national policies exhibited migration control and nationalistic tendencies rather than cooperation, which in turn thwarted regional

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<sup>57</sup> In comparison, only 4,000 Basotho, 2,000 Malawians and only a couple hundred from other SADC countries were deported in the same year. Crush (1999) P.4

<sup>58</sup> For more specifics concerning South Africa's brain drain in the 1990s see Rogerson, C. M., and J. M. Rogerson. "Dealing in Scarce Skills: Employer Responses to the Brain Drain in South Africa." 2002. *Destinations Unknown*. Ed. David A. McDonald and Jonathan Crush. Pretoria: Africa Institute of South Africa, 2002. 73-98.

<sup>59</sup> *Ibid*, P.92-5.

integration efforts. For instance, South Africa rejected SADC's Protocol on the Free Movement of Persons (1995) because of the country's desire to control the "already unmanageable flows" of foreign work-seekers, believing that free movement would legitimize and regularize illegal immigration (HSRC, 1995: 7).

## **3.4 The Immigration Act**

### **3.4.1 The Immigration Act (No. 13) of 2002**

Begun in 1995, the reformation of migration policy was finally completed with the Immigration Act (No.13) of 2002 after businessmen, labor supporters, human right groups and academics had firmly rejected the White Paper. The ANC cabinet devised a US-style immigration policy framework and the new act was put through the process of public hearings and departmental meetings. The Act established the parameters of applying for permanent residency as well as different types of temporary permits<sup>60</sup>, including five that allowed a foreigner to work full-time on a temporary basis in South Africa. The Immigration Act (2002) attempted to address the negative perception of immigrants as well as promote a more rights-based and less control-oriented policy. The document finally substituted the word "alien" for "foreigner" marking a major distinction from past legislation. The first objective of the new act was to promote a "human-rights based culture in both government and civil society", echoing an earlier statement in the preamble (Immigration Act 2002, No.13: 12). The Act also proclaimed South Africa's commitment to combat xenophobia within the government and civil society, including "[educating] communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees" (Ibid: 16). The Act set up internal monitoring controls to combat corruption and xenophobia<sup>61</sup> and devoted an entire subsection to asylum permits. The Immigration Act was also less nationalistic, calling for cooperation with foreign states to address "push factors" of illegal migration and to facilitate the movement of SADC students and

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<sup>60</sup> Temporary permits described in this Act include, diplomatic, treaty, student, visitors, business, crew, medical, relatives, work permit, retired person, asylum seeking, corporate and exchange.

<sup>61</sup> Republic of South Africa. *Immigration Act [no.13]*. Pretoria, 2002. *Southern African Legal Information Institute*. Web. 6 May 2015. [http://www.saflii.org/za/legis/consol\\_act/ia2002138/](http://www.saflii.org/za/legis/consol_act/ia2002138/) See "Miscellaneous" Section P.66

academic staffers. Moreover, the Act marked a significant distinction from past migration legislation, promoting the positive impact (selective) in-migration can have on South Africa. The document stated that the “South African economy [must] have access at all times to the full measure of needed contributions by foreigners” and that the regulation of foreign immigration must occur in order to “promote economic growth by ensuring that businesses in the Republic [can] employ foreigners who are needed” and “by enabling exceptionally skilled or qualified people to sojourn in the Republic.”<sup>62</sup>

Despite these notable advances, the Immigration Act of 2002 was still very protectionist, not allowing for much legal labor immigration. The numerous types of temporary permits just served to increase the DHA’s control over the application process and decreased the flexibility of the job market open to foreigners. Burdensome and lengthy requirements and certifications made it difficult for employers to hire foreigners on work permits. Moreover, less than half of the temporary permits allowed a foreigner to work: even those who applied as relatives of South African citizens did not have the right to employment. Notwithstanding the calls for promoting skilled immigration of foreigners in the Preamble, the same section also asked that “the contribution of foreigners in the South African labour market [did] not adversely impact on existing labour standards and the rights and expectations of South African workers.”<sup>63</sup> Again, like the ACA, an employer could only hire a foreigner under a general work permit once she/he had completed a “diligent search” and was “unable to employ a person in the Republic with qualifications equivalent to those of the applicant” (Immigration Act, 2002: 34). Additionally, attempts for unskilled and semi-skilled laborers to find work in South Africa remained restricted. Only under corporate permits could employers hire non-skilled labor, and corporate permits were reserved and granted almost exclusively to mining companies.

Further, the main focus of the preamble of the Immigration Act was to reiterate South Africa’s control over migration. The Preamble declared South Africa’s goal to “retain control over the immigration of foreigners”, reduce the “pull factors of illegal immigration” and strengthen “border monitoring...to ensure borders of the Republic do not remain porous” so that “illegal immigration may be effectively deterred.”<sup>64</sup> Many other provisions of the Act

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<sup>62</sup> Ibid, “Preamble” P.3 and “Objectives” P.14

<sup>63</sup> Ibid, “Preamble” P.4

<sup>64</sup> Ibid

highlighted the goal of deterring, detaining and deporting illegals, and enhanced the already pervasive policing powers of immigration officials.<sup>65</sup> Like the ACA, the new Act allowed immigration officers to enter a premise “without need of a warrant” on “reasonable grounds” that an illegal migrant resided there “and then make an arrest and/or detain him or her” (Section 34.1). However, “reasonable grounds” were not defined in the Act, and as a result, allowed for the continuance of discriminatory action by police officers and immigration officials. The control-orientation of the Immigration Act was noted by one ANC representative, Mr. Mkhaliphi, who deemed the document the “pass laws in disguise”.<sup>66</sup> While this may be a more radical opinion, the reference to foreigners as “aliens” during the same briefing only reiterated the fact that immigrants were still seen as outsiders.

Additionally, while the Act made some progressive steps in advocating rights promotion, there still remained many holes in the new legislation. Comments submitted by the SAHRC documented the flaws of the new Act in regards to a human rights perspective (SAHRC Report, 2003). The pitfalls mentioned included the lack of discussion concerning unaccompanied minors (who wanted to immigrate or seek asylum), the lack of required monitoring of the Lindela Centre and the failure to assign powers and functions for the new anti-corruption unit established in Section 47 of the Act. The SAHRC argued that the “Bill promotes and institutionalizes xenophobia and racism by paying lip service to these issues” as there was no reference in the text about implementing anti-xenophobic campaigns (SAHRC Comments, 2003: 6). Punishments for employing and housing illegal immigrants remained high, in effect, encouraging the reporting of illegals to the DHA and driving xenophobia at community level.

### **3.4.2 The Immigration Amendment Act (No. 19) of 2004**

Due to complaints about the Act’s inability to attract foreign skills and support the country’s commitment to human rights, the Immigration Act was amended in 2004 with additional regulations. The economy’s need for skilled labor in the technology, finance and engineering fields as well as widespread criticism of the Bill (from the government, private

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<sup>65</sup> Ibid, “Enforcement and Monitoring” P.48-56

<sup>66</sup> See NCOP Social Services Committee. “International Migration White Paper & Immigration Bill: Briefing.” Briefing of the Social Services Select Committee. 5 June 2001. *PMG Committee Hearings*. Parliamentary Monitoring Group (PMG), 2001. Web. 5 May 2014. <https://pmg.org.za/committee-meeting/557/>

sector and NGOs) contributed to reform. The preamble was replaced with a much more liberal opening, one that emphasized South Africa's need to attract scarce skills, to "facilitate" rather than "control" entry and exit, and recognized South Africa's role on the continent. The revised preamble declared South Africa's commitment to "economic growth...promoted through the employment of needed foreign labour", "foreign investment" and the "entry of exceptionally skilled or qualified people."<sup>67</sup> Thus, regulations and legal certifications were relaxed for foreigners seeking work permits<sup>68</sup> and the Bill allowed for foreigners on temporary residence permits to change their status while still in the country. Ancillary regulations to the Bill also created a formal Counter Corruption Unit and Counter Xenophobia Unit.

However, these changes "hardly offered an overhaul" of the Immigration Act (2002) (Klotz, 2012: 201). The Amendment retained the original Act's focus on control and protectionism. The new Act maintained the DHA's powers to identify, detain and deport illegal foreigners. The "Regulations" Section<sup>69</sup> of the Amendment was expanded, proscribing powers to the Director-General of the DHA, such as declaring his/her ability to initiate procedures that "facilitate the tracing and identification of illegal foreigners in, and their removal from the Republic" and make enquiries concerning those "suspected of being prohibited persons."<sup>70</sup> Moreover, "Enforcement and Monitoring" sections had little to no changes, except for the fact that the "Director-General" of the DHA replaced the "Department" in duties and oversight. The "Offenses" section of the old Act was extended, increasing the number of ways in which employers and persons living in South Africa could be punished for harboring, assisting, transporting or employing undocumented and illegal migrants. Further, the Amendment still failed to address the migration of unaccompanied minors to South Africa and made it harder for asylum seekers to remain in the country. The provision for an asylum transit permit (Section 23) was amended to allow asylum seekers only 14 days to access *one of five* refugee reception offices before their permit expired: this was a harsh condition considering time constraints, migrants limited access to travel funds and the slow bureaucratic channels of Home Affairs.

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<sup>67</sup> Republic of South Africa. *Immigration Amendment Act [no.19]*. Pretoria, 2004. *Southern African Legal Information Institute*. Web. 6 May 2015. [http://www.saflii.org/za/legis/num\\_act/iaa2004218.pdf](http://www.saflii.org/za/legis/num_act/iaa2004218.pdf) See Preamble (d)

<sup>68</sup> Ibid, Omission of Section 19.2(b) deleted

<sup>69</sup> See Immigration Act 2002 (No.13), Section 7

<sup>70</sup> See Immigration Amendment Act, 2004 (No.19), Section 8

While the Amendment Act may have more clearly emphasized the need for foreign skills, the new legislation also “perpetuated the view that foreigners displace South Africans from jobs” (Klotz, 2012: 201). Protectionist provisions still remained in the revised preamble, such that foreign workers must not adversely impact existing labor rights of South Africans. General work permits still required employers to make “diligent searches” of the local labor market in order to employ citizens over foreigners (Immigration Amendment Act, 2004: 32). Devised in the Immigration Act (2002) and continued under the 2004 Amendment Act, exceptional skills permits were devised to provide work for foreigners who possessed exceptional skills or qualifications. In 2006, the DHA composed a list of all critical and scarce skills that South Africa required for economic development. Despite these moves towards facilitating high-skilled immigration, the list remained extremely restrictive and those applying for these permits had to have their qualifications checked by the South African Qualifications Authority (SAQA). But, the application process for such a permit had major delays, inflexible restrictions and expenses. In 2008, the DHA only issued around 1,010 work permits under scarce and critical skills (Rasool, Botha & Bisschoff, 2012: 4). Foreigners wanting to start small businesses were also thwarted by the large capital investment requirements (R2.5 million) as well as the requirement that they must hire at least five South Africans.<sup>71</sup> As a result, the Amendment Act represented a confusion of policy aims, divided between protectionism and liberal economic provisions.

### **3.5 Recent Migration Policy: The Way Forward, More Control?**

Since 2004, there have been a few notable amendments to migration policy. First, recognizing the need to further the protection of refugees and asylum seekers, the Refugees Act was amended in 2008 (No.33) and again in 2011 (No.12). The former of these amendments expanded the definition of a refugee to persons who feared prosecution by “gender”. A provision was added for asylum seekers protecting them from unlawful arrest and detainment, and provided them with more Constitutional rights (those which were “applicable”).<sup>72</sup> Moreover, rights were extended to spouses and dependents of refugees and asylum seekers<sup>73</sup> while other

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<sup>71</sup> Not stated directly in Immigration Act or its Amendment, but in the accompanying regulations.

<sup>72</sup> Republic of South Africa. *Refugees Amendment Act [no.33]*. Pretoria, 2008. *Southern African Legal Information Institute*. Web. 6 May 2015. [http://www.saflii.org/za/legis/num\\_act/raa2008179.pdf](http://www.saflii.org/za/legis/num_act/raa2008179.pdf) See Section 27.1

<sup>73</sup> *Ibid*, Sections 21.a and b

protections were offered to unaccompanied minors. The 2008 Amendment also established an independent Refugee's Appeals Authority, to protect all decisions from being biased by an individual immigration officer. In contrast, the 2011 Amendment was far less reformatory, as the Department (at the time) was more concerned with the upsurge of "economic migrants", especially Zimbabweans, who were "abusing" the asylum system to gain access to jobs in South Africa. The Amendment did attempt to increase the efficiency of the processing of permits and allowed children born of asylum seekers to be registered in terms of the South African Births and Deaths Registration Act.<sup>74</sup>

The Immigration Act of 2002 was also amended another two times, once in 2007 and again in 2011. The Immigration Amendment Act (No.3) 2007 sought more control over migration while also calling for the protection of migrants; again leaving a very contradictory overall tone. It made only minor changes, clarifying procedures and permits. The Immigration Amendment Act (No. 13) 2011, on the other hand, made many major changes concerning short and long-term visas. The reasons for this amendment were twofold: to facilitate the migration and processing of high skilled people coming into South Africa to address the skills crisis, while also exerting more control over immigration. Unfortunately, the amendments and regulations have moved South Africa toward more protectionism, control and rights abuse sparking widespread criticism and have been condemned for "ripping apart families, dissuading investors and leading to the suspension and even cancellation of multi-million rand firm and tourism ventures."<sup>75</sup> The new Immigration Regulations (2014) came into effect in May, 2014, which included the Immigration Amendment Acts of 2007, 2011 and their accompanying regulations.

While the DHA purported better migration facilitation, with the Preamble of the Amendment Act (2011) substituting words such as "control" with "management"; overall, the policy remained control-oriented. Section 49 of the 2011 Amendment increased penalties from months to years, for crimes such as illegal movement or assisting illegal immigrants. Under the new regulations (No.27), foreigners who overstayed their visas were no longer fined but declared "undesirable" and could be restricted from entering South Africa for up to five years. Critics have complained that hundreds of foreigners were forced to leave the country, and even

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<sup>74</sup> This only applies to parents who registered within one month of their child's birth at a Refugee Reception Office.

<sup>75</sup> See "New SA Visa Force 250,000 Zimbabweans to Decide on Returning Home." *Times Live* [Johannesburg] 10 July 2014: n. pag. *Times Live Online*. Web. 5 May 2015. <http://www.timeslive.co.za/africa/2014/07/10/new-sa-visa-rules-force-250000-zimbabweans-to-decide-on-returning-home>

declared undesirable unlawfully, as the department did not have the capacity to grant them extensions in time (Eliason, 2014). Additionally, every child (South African citizen or not) under the age of 18 must now travel with an unabridged birth certificate. While this provision is supposed to help combat child trafficking, no other country in the world has implemented such a severe requirement, which could very negatively impact tourism as well as South African travel (De Vries, 2014). Foreigners on visitors visas can no longer change their status while in the country (except in exceptional circumstances), in an effort to prevent these persons from overstaying or from applying for work. Stricter regulations have also been imposed on spousal and life partner visas, again revealing the DHA's opinion that immigrants abuse the migration system, in this case through false marriages and relationships.<sup>76</sup>

The new regulations also made attempts at streamlining and facilitating skills acquisition; however, the changes may actually contribute to thwarting such migration. First, the Department has added a "critical skills work visa", replacing the outdated and complicated quota and exceptional skills permits. Despite these changes, all persons applying for any type of work permit<sup>77</sup> have to apply from outside of the Republic, making it more challenging to hire foreigners due to logistics and wait times. Moreover, there is the concern that the DHA will not adequately update its critical skills list, as the department in the past has failed to publish the list on time. The current list does not possess a sufficient number of categories and persons who apply must have at least five years experience and register with an accredited professional body/council/board that is recognized by SAQA, which is quite an arduous process.<sup>78</sup> Second, to combat corruption and backlogs of previous years, the DHA privatized its visa processing system through VFS Global. However, as a result, persons applying for temporary and permanent residence permits in the Republic must pay an expensive additional handling fee of R1350 and all temporary and permanent residence visas applied for in the Republic also have to be made at *one of only nine* VFS centers in the country. Third, persons applying for business visas must also

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<sup>76</sup> This provision may be in contradiction to South African's constitutional right to dignity due to the fact that it can prohibit or impair the ability of spouses to live together. See Eliason, Amy. "Welcome to the South Africa...I Think." *Without Prejudice* 14.7 (2014): 32-33. *Sabinet Online*. Web. 5 May 2015.

[http://reference.sabinet.co.za/webx/access/electronic\\_journals/jb\\_prej/jb\\_prej\\_v14\\_n7\\_a14.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/jb_prej/jb_prej_v14_n7_a14.pdf) P.33

<sup>77</sup> This only applies to those persons who are applying for a permit for the first time and are not on some other sort of permit, i.e. study permit.

<sup>78</sup> See Pokroy (2014) concerning the process of applying for a critical skills visa in South Africa. Pokroy, Julian. "Is This Innovation? Critical Skills Visas in Terms of the Immigration Act." *HR Future* 11 (2014): 44-45. *Sabinet Online*. Web. 2 May 2015.

[http://reference.sabinet.co.za/webx/access/electronic\\_journals/om\\_hrf/om\\_hrf\\_nov\\_2014\\_a23.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/om_hrf/om_hrf_nov_2014_a23.pdf)

prove that their businesses will contribute to the “national interest” of South Africa. This provision is up for discretion and there is no accompanying definition of South Africa’s national interest in the regulations.

Finally, the regulations lack any major contribution to rights provisions. CORMSA and PASSOP have both commented on the failure of the new regulations to extend any protections to refugees or asylum seekers.<sup>79</sup> South Africa still refuses to recognize Zimbabweans as “refugees” due to the limiting definition of the Refugees Act and prefers to view them as “economic migrants” (Idemudia et al., 2013: 19). Introducing new regulations could have been a good time to instigate some real change. However, South Africa has preferred to deal with issues in an ad hoc and isolated manner. More significantly, Section 15 of the 2011 Amendment reduced the asylum transit visa from 14 to 5 days, making asylum seekers more vulnerable to arrest and deportation. The DHA continues to believe that “immigration legislation has been abused in a great number of times” necessitating stricter laws on asylum. (Gigaba, 2014). Unfortunately, none of the new regulations or amendments dealt with improving the alienation of foreigners or hinted at addressing long term responses for the xenophobic attacks that had occurred in 2008, later discussed in Chapter 4.

This chapter has evaluated South Africa’s national migration legislation post-apartheid. The analysis has revealed that while the country has adopted more liberal and progressive legislation since the ACA (1991), much of the country’s policies remain protectionist, control-oriented, and non-rights based. While the advances in refugee law are commendable and the Immigration Act and the following amendments have improved human rights recognition, implementation is still problematic. Moreover, there have been gradual moves towards acquiring more high skilled immigration while preventing unskilled and illegal migration to South Africa. However, these attempts have not adequately addressed the skills shortage in the country, hampering development and investment, while also relying on an ineffective and aggressive detention and deportation system. The recent regulations and amendments have only demonstrated South Africa’s commitment to a restrictionist and nationalist migration agenda.

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<sup>79</sup> Department of Home Affairs, “Immigration Amendment Bill [B32-2010]: Public Hearings (Day 1).” Public Hearing of the DHA. 24 Jan. 2011. *PMG Committee Hearings*. Parliamentary Monitoring Group (PMG), 2011. Web. 5 May. 2014. <https://pmg.org.za/committee-meeting/12457/>

## 4. Analysis of South Africa's Protectionist Migration Policies

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Since highlighting the protectionist nature of South Africa's migration laws, it becomes important to understand why South Africa has adopted such laws, especially because these laws do not seem to be in line with the new Constitution or South Africa's desire to establish a liberal democracy. In the past, the country's migration laws have been mostly resistant to the new government's goals of diversity, inclusivity, and human rights. Constructivism and neoclassical realism will be used to understand this discrepancy; however, the latter provides a much fuller explanation of this policy outcome. Before applying the theories above, it is important to understand the most recent, negative implications of South Africa's protectionist migration policies and how these policies have affected migration policing, migration flows, and xenophobia in addition to the treatment of migrants and asylum-seekers.

### 4.1 Major Migration Challenges Persist, Despite Reforms

As the Immigration Act and its amendments have maintained provisions of control and restriction, combating illegal immigration through deportations and detention have remained a priority as it was in the 1990s. Joint operations between the DHA and SAPS as well as street level policing by SAPS, which include crime prevention, border security and specialized interventions, has continued as the backbone of immigration enforcement. Due to the framing of migration as a "security issue" the wide-ranging practice of detention continued (Amit, 2013: 32). A strong focus on detention as a policy option has led to human rights violations, financial costs and unlawful deportations. One FMSP Report, in 2010, found that adverse conditions at the Lindela Detention Centre had not been improved since the late 1990s, corruption was still a "common theme".<sup>80</sup> Detainees were not informed of their legal rights (including repeal and

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<sup>80</sup> See Forced Migration Studies Programme (FMSP). *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa*. Johannesburg: FSMP, 2010. *CORMSA Research*. Web. 5 May 2015.

review), were exposed to violent treatment, and were not provided with basic necessities. Further, the DHA's central focus on control and exclusion is demonstrated by the fact that almost one-third of the DHA's budget (or R199.8) was spent on deportations alone in 2012/3 (Mthembu-Salter et al., 2014: 11). Between 2003 and 2009, the South African government has deported around 200,000 illegal immigrants per year (SAS, 2013: 90). Most of South Africa's deportees were from the SADC region; the overwhelming majority has been Zimbabwean.<sup>81</sup> Despite these efforts to control immigration, illegal migration has "undoubtedly increased" (Crush & Williams, 2011: 19). As a result, South Africa has deported more foreigners than most countries in the world (Ibid).

Under the Immigration Act and its amendments, the DHA has committed to combatting xenophobia in civil society and government; but, despite their efforts, xenophobic attacks have remained a major concern for South Africa. The Counter Xenophobia Unit has established partnerships with the Department of Justice and the police, holding workshops and public awareness campaigns. However, there has been an increasing frequency of xenophobic attacks in South Africa since 2002 (IOM, 2009; Adjai & Lazaradis, 2013). In May 2008, South Africa witnessed one of the most horrific and violent attacks against foreign nationals: 60 people died, dozens were raped, 700 were wounded and 100,000 were displaced (Pugh, 2014: 27). With no national plan in place, provincial and municipal governments, and CSOs had to provide most of the aid. The fact that there were no strong responses in government to revise migration legislation or immediately initiate official investigations only attests to the fact that xenophobia was not taken seriously by policy-makers. Even after the attacks, there was no renewed engagement or significant change in migration policy. Inappropriately, protectionist immigration policy (as discussed earlier) has depicted illegal immigrants as unwanted, criminals and asylum seekers as abusers of South African laws, focusing less on assimilation and more on control. This not only implies that migration must be dealt with through military and police action, but also implies that foreign nationals are "undesirables" occupying a "lower, subsidiary position within the social structure" (Ngandwe, 2013: 4). DA representative, M. Mngasela, called out the DHA for not revising migration policy sooner, demanding changes so that "foreign nationals [are] not

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[http://www.cormsa.org.za/wpcontent/uploads/2009/05/lost\\_in\\_the\\_vortex\\_irregularities\\_in\\_the\\_detention\\_and\\_deportation\\_of\\_non-nationals\\_in\\_south\\_africa.pdf](http://www.cormsa.org.za/wpcontent/uploads/2009/05/lost_in_the_vortex_irregularities_in_the_detention_and_deportation_of_non-nationals_in_south_africa.pdf)

<sup>81</sup> In 2008, South Africa deported 170,000 Zimbabweans alone (Budlender, 2013: 33).

seen as ‘aliens’ or referred to as ‘others’ and alienated from South African community” as “it was this alienation that led to the 2008 xenophobic violence (DHA Public Hearing, 2011).

Between 1998 and 2009, there has been a dramatic increase in refugee applications, from a mere 10,000 to around 220,000 (Crush, 2011: 17). The worsening crisis in Zimbabwe has contributed to these growing numbers as well as South Africa’s restrictive immigration policies, wherein migrants must find other avenues to obtain work. Unfortunately, the DHA’s prevailing belief is that most refugees are not genuine, which has resulted in the majority of these applications being rejected<sup>82</sup> (Mthembu-Salter et al., 2014: 6). A majority of these applicants are Zimbabwean, who the DHA has deemed “economic migrants”, not refugees. South Africa’s outright refusal to recognize the Zimbabwean crisis<sup>83</sup> as a humanitarian crisis has led to the deportation of thousands of Zimbabweans. In 2009, the government finally accepted a moratorium of their deportation for two years and instigated a special permit for work and stay in South Africa under the Zimbabwean Special Disposition Programme. However, this ad hoc crisis management and the failure to address “mixed migration” (political and economic) continues to have negative consequences for the protection of migrants’ rights.

While the asylum and refugee legislation has made significant progress, implementation of these policies has been lacking. Even though the Refugees Act protects asylum seekers from being detained and deported, the DHA’s focus on combating illegal immigration has resulted in unlawful detainment and deportation of asylum seekers and the prohibition of their entry at the border. As hundreds of asylum-seekers are deported from South Africa every year, they can no longer legally apply for refugee status, and many re-enter the country illegally or clandestinely, only further contributing to the problems the DHA was trying to prevent. Additionally, Landau & Segatti (2009) note that the massive backlog of asylum claims since the 1990s has only expanded to over 100,000, and many wait “years” for a decision to come through. The lasting

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<sup>82</sup> In 2009, around 45,000 of the 220,000 applications were rejected and only 4,500 accepted. Crush, Jonathan. “Complex Movements, Confused Responses: Labour Migration in South Africa” *Migration Policy Briefs* 25 (2011): 1-27. *Southern African Migration Programme*. Web. 20 Nov. 2014. <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief25.pdf> P.18.

<sup>83</sup> Since 2000, the Zimbabwean economic and political crisis has caused a decrease in access to food, healthcare and jobs for Zimbabweans. As the situation deteriorated, an estimated 3.4 million Zimbabweans left the country, a majority of them coming to South Africa. For more information see Idemudia, et al. "Migration Challenges among Zimbabwean Refugees Before, During and Post Arrival in South Africa." *Journal of Injury and Violence Research* 5.1 (2013): 17-27. *NCBI*. Web. 5 May 2015. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3591728/>

consequence is that the asylum system has been “delegitimized: refugees are often denied access to basic health services, housing, and schooling (Segatti & Landau, 2009; Veary, 2011; Klotz, 2013). Even if accepted as a refugee in South Africa, the continuance of an uneducated, intolerant and discriminative civil society has led to the harassment and mistreatment of asylum seekers and refugees living in South Africa.

Changes to the immigration laws have not addressed the growing skills shortage in South Africa. While the situation has improved since 2002, the country faces a severe skills shortage primarily due to its dysfunctional education system, under-investment in the labor market and the emigration of highly skilled individuals. While national programs, such as ASGISA and JIPSA, have been developed to combat South Africa’s brain drain and skills-gap since 2006, this crisis has persisted to the present day (Crush, 2011; Rasool, Botha & Bisschoff, 2012). Despite the Immigration Act’s commitment to recruit skilled foreigners, the laws have not gone far enough to facilitate such immigration. The total number of work permits approved each year is far below quotas. In 2011, only 1,020 exceptional skills and 1, 876 work quota permits were approved (Budlender, 2013: 44). Bureaucratic incapacity has also slowed down the skilled immigration process as the restrictive nature of the laws has thwarted the ability of South Africa to hire engineers, which are desperately needed for infrastructural growth, the mining industry and companies like Eskom (Rasool et. al., 2012: 407).

Further, while South Africa had signed SADC’s Facilitation on the Movement of Persons (2005) to promote better migration management and skills transference within the region, nationalistic laws get in the way of skills mobility and general migration. Even though SADC’s Facilitation of Movement of Persons was a watered down version of the original document, it called for the gradual elimination of obstacles of movement in order to “promote sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation.”<sup>84</sup> Moreover, the creation of the Migration Dialogue for Southern Africa (MIDSA) has helped to coordinate the efforts of southern African states linking migration to development and incorporating poverty reduction strategies into national migration legislation. These regional initiatives show a commitment to migration facilitation as a tool for development. Despite these

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<sup>84</sup> Southern African Development Community. *Protocol on Facilitation of Movement of Persons*. Gaborone: SADC, 2005. *SADC Documents and Publications*. Web. 22 Nov. 2014. <http://www.sadc.int/documentspublications/show/800>. See Article 5(1).

efforts, South Africa's protectionist laws and restrictionist attitude towards migration have resulted in less cooperation among SADC countries. Entry to work in South Africa or gain permanent residence is still subject to national legislation, in part, due to South Africa's refusal to implement a "Schengen-like" migration agreement. SADC countries' national migration policies are "generally disconnected from development planning" as migrants are viewed as threats to the national economy and citizens' rights and welfare (Crush & Frayne, 2010: 2). South Africa also continues to favor bilateral labor agreements under MOUs, which are unilateral and biased towards South Africa's needs (Nshimbi & Fioramonti, 2014: 61). Most of the migrants deported from South Africa are indeed citizens of other SADC countries.<sup>85</sup>

Despite the countless negative implications of South Africa's protectionist migration agenda, the lack of consistency of these policies with the new Constitution and their impediment to development initiatives in Southern Africa, it becomes necessary to ask why the country has adopted these policies? Not proactively accepting international migrants has led to irregular policing, the insecurity of migrants, decreased regional investment, job creation and less accountable institutions (Crush & Frayne, 2010). Additionally, research finds that migrants make minimal demands on public services, generate a consumer market for goods and services, expand transportation growth, and are much more often victims of crime and police corruption rather than criminals themselves (Reitzes, 1999: 13). Since highlighting the theories of constructivism and neoclassical realism in Chapter 2 of this thesis, it becomes pertinent to use these theories to understand why these policies were adopted and why protectionism continues in South Africa.

## **4.2 Constructivism and South Africa's National Migration Policies**

During apartheid, every person was assigned an ethnic or racial label and identity. This long history of racial politics and stratification had a significant effect on South Africa's population. The Group Areas Act (1950) socially and physically isolated individuals by racial indicators, dictating exclusive rights by these groupings, and highly limiting and regulating movement. Homelands were developed as separate and sovereign states in attempts to separate the black, African majority from the white minority, while at the same time denying this majority citizenship. This discrimination and restrictive definition of citizenship, and the rights attached to

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<sup>85</sup> Refer back to Chapter 2 of this thesis, section titled "Remaining Issues Surrounding Migration: The End of a Decade".

it, influenced the definition of a post-apartheid citizen. South Africa began to form its national identity not based on ethnic, primordial, racial, or religious criteria, but on the difference between South Africans and other nations, reconstructing the non-native as the non-citizen. Citizenship has, in effect, become the center of nationhood, wherein access to social protection, buying property, and the job market are limited to South African citizens. Nativism and indigeneity have become the only way to access these resources and are “politically defined” concepts emphasized by the state (Neocosmos, 2008: 591).

#### **4.2.1 Transitioning from Apartheid: Nation-Building in the New Era**

South Africa’s national building process was highly influenced by the effects of apartheid, wherein, the state played a crucial role in perpetuating and transforming nationalism as it had pre-1994. South Africa had to become a recognized political community with a fair rule of law and established shared commitments and goals. Moreover, addressing economic inequality among citizens also needed to be attended to by the new government in order to facilitate nation-building. In 1994, an HSRC report entitled, “Democratic Nation-Building in South Africa”, defined the country’s goal of developing a “sense of common political identity and loyalty to the symbolic community defined by the founding ideology of such a state.”<sup>86</sup> The report reiterated the issues of South Africa’s future struggles of defining a non-racial and non-ethnic centric nationalism, the socio-political conditions of nation-building, and what the constitutional basis of democratic government would look like. Moreover, to deal with reconciliation and the humanitarian crimes committed during the apartheid era, the Truth and Reconciliation Commission (TRC) was created in order to unearth what had happened during the apartheid years, staging testimonies of victims and surviving family members of victims, and granting amnesty to perpetrators, in hopes of offering some form of reparation to victims. Operating between 1996 and 1998, the TRC emphasized restorative justice over punitive justice and facilitated community dialogue as part of the nation-building process.

As part of South Africa’s nation-building process, transition to democracy, and reemergence on the world stage, the state played a large role in fashioning the country’s new

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<sup>86</sup> Definition taken from Gagiano quoted in Human Sciences Research Council. *Democratic Nation-Building in South Africa*. Pretoria: HSRC, 1994. P.11

national identity. Transitioning to a shared national loyalty from a racially divided past, South Africa had to define its national identity by other means. As noted in Chapter 2, constructivists have emphasized the significant role the state plays in forming national identity, which is essential for maintaining law and order in the IR system and establishing a sovereign state (Anderson 1983; Hopf, 1998). Through political and social campaigns, South Africa emphasized a “rainbow nation”, united in diversity, and committed to inclusion and *ubuntu*, “humanity towards others”. Constructing national identity involved evoking national symbolism, such as the adoption of the new South African flag, and the events that celebrated a newfound nationalism, like the Rugby World Cup (1995) and the South African Music Awards (1997) (Baines; 1998: 1).

#### **4.2.2 The “In-migrant” as a Threat to Identity**

Constructivism also notes that ideas are “social constructed” through policy, people’s interaction, and media attention. Thus, ideas surrounding migration are no different. As constructivists argue, migration inflows can be perceived as a threat to the host country’s national identity while also viewed as compromising cultural and social institutions (Weiner, 1992-3<sup>87</sup>; Jepperson et al, 1996). Croucher (1998) notes that too much diversity can threaten the stability and the unity of a new state, causing social uproar and conflict. In the case of South Africa, in-migration has been viewed as a threat to national identity and social cohesion. Negative language used by government officials and politicians, journalists and community leaders to describe newly arriving in-migrants has been carried over from the previous era (Croucher, 1998; Fine & Bird, 2006; Dodson, 2012; Peberdy, 2012). This discourse, whether empirically true or not, surrounding migration and the social construction of these claims has resulted in instigating further xenophobia among the general public.

First, government officials, especially DHA employees, during the early years of democracy, have reiterated and constructed in-migrants as threats to South Africa’s society, contributing to the us v. them discourse. Post-apartheid, policy-makers have often referred to migrants as “unskilled”, “criminals”, “undeserving”, “illegals” and “aliens” (Peberdy, 2012). Minister Buthelezi set the tone of migration politics and instituted a political discourse of fear

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<sup>87</sup> See Weiner’s (1992-3) constructivist argument connecting security, migration and perception of threat.

and threat surrounding the in-flows of migrants. He often referred to foreigners as aliens, diction he perpetuated throughout the decade in keynote addresses, budget meetings and parliamentary committee briefings. He even argued that “employing illegal immigrants [was] unpatriotic”, reiterating the role immigration policy plays in defining national identity (Buthelezi, 1998). However, there has been significant and progressive change related to the political diction that surrounds migration. For instance, during the most recent xenophobic attacks, which occurred in and around Durban and Johannesburg in April 2015, President Jacob Zuma was ardent in restating the protection of foreign nationals in South Africa as well as the inclusion of in-migrants within South African society. He encouraged all citizens to treat foreigners in his country “with respect and *ubuntu*” (Xinhua News, 2015). However, in the same address, he also reiterated the tightening of borders and the operation of illegal shops by “illegal” foreigners. Unfortunately, the reiteration of foreigners as “illegal” has led to the “criminalization of foreigners...[legitimizing] police abuses and community justice” (IOM, 2009: 17). Moreover, xenophobic diction still exists amongst parliamentary members, wherein at one parliamentary hearing in 2013, migrants were referred to as “criminals”, “job stealers” and even “bottom-feeders” (Pugh, 2014: 233).

Second, news articles and the media have contributed to the notion of migrants as a threat to the nation’s identity. During the 1990s, the media built up a migration threat through promulgations that in-migrants were “aliens”, “flooding” South Africa’s borders, in “herds”, as if the migration crisis were akin to a national security or military threat (Crush 1999; Crush & Dodson, 2006). Calls to limit immigration and increase migration control have even continued into the new millennium despite policy reforms: “with the high number of hungry and unemployed citizens, drastic measures should apply to limit the flow of refugees” (Marumo, 2009). One study by the Media Monitoring Project found that the South African media supports and contributes to the negative public perceptions of migrants by covering xenophobia in a “simplistic, non-analytical fashion, without due recognition of the complexities and diversities inherent in unpacking these complex phenomena” (Fine & Bird, 2005: 4). The media continued to stereotype all migrants as criminals and continuously referring to them as “illegal” and “alien”. As a result, the media tends to treat all in-migrants (whether they are economic migrants

or refugees) as illegal (Ibid). Academic critiques of how the media coverage depicts and constructs migrants as different, illegal, or “other” are numerous.<sup>88</sup>

Third, the drastic increase in verbal abuse and physical attacks on migrants post-1994 can partly be explained by the continuing xenophobic comments at a state level and in the media.<sup>89</sup> The negative depictions of migrants in the media in conjunction with the political culture surrounding migration issues provides an accessible set of stereotypes for disgruntled South African citizens to identify with and justify their negative attitudes towards foreigners. SAMP survey data from the 1990s reveals that an overwhelming majority of South Africans believed that there were too many foreign citizens living in the country and the government should implement a more restrictive policy towards immigration (Crush, 2001). South Africa has been ranked as one of the “most unfriendly towards foreigners” countries in the world. Anti-foreigner sentiments amongst South African citizens have remained high in the last decade (Crush & Ramachandran, 2013). In 2009, the IOM conducted a study/survey on xenophobia in South Africa, which revealed the public’s negative feelings towards in-migrants. Respondents argued that “[immigrants] come here to destroy...they also have illegal guns”, and that they “want to rule us” (IOM, 2009: 17-18). South Africans have also argued that immigrants steal South African jobs, illegally own property, abuse their social services and do not take part in local practices and community meetings (Ibid). The acquisition of rights and benefits has been jealously guarded by the new citizens of South Africa, who believe that in-migrants and refugees are threats to these new rights. Thus, Mosselson (2010) argues that the 2008 attacks on immigrants in South Africa was a result of “citizens reaffirming their status as citizens” (Mosselson, 2010: 649). With community leaders perpetuating these ideas, South African citizens have used immigrants as scapegoats for their own social ills and have viewed them as a threat to their national identity, depicting them as “others”.

Not only is the foreigner a threat, but also inferior to a South African. Apartheid was built on the notion of white superiority and the African black as the inferior ‘other’; whereas, the new

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<sup>88</sup> Klotz, Audie. *Migration and National Identity in South Africa*. Cambridge: Cambridge University, 2013 P. 206, footnote number 108.

<sup>89</sup> Documented in the Human Rights Watch. *Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa*. New York: Human Rights Watch (HRW), 1998. Web. 4 Mar. 2015. <http://www.hrw.org/legacy/reports98/sareport/>. For specific attacks, see Tables 1 and 2 in Adjai, Carol, and Gabriella Lazaridis. "People, State and Civic Responses to Immigration, Xenophobia and Racism in the New South Africa." *Journal of International Migration & Integration* 15.2 (2014): 237-255. *Springer Online*. Web. 6 May 2015. <http://link.springer.com/article/10.1007%2Fs12134-013-0277-5> P.243-4.

South African nation was built on the premise of South Africa's superiority over the rest of Africa. As a result, foreigners (in particular black, African foreigners) have become the post-apartheid *swart gevaar*<sup>90</sup> or the new other (Desai, 1998: 13). Through the New Partnership for African Development (NEPAD) and efforts to reconstruct the African Union (AU), South Africa has built up an image as the European/American heart of Africa, at the center of ideas, trade and travel (Landau, Ramjathan-Keogh & Singh, 2005:10). Thus, Neocosmos (2008) has noted South Africa's hegemonic notion of exceptionalism and superiority over other African countries: as advanced, democratic, intellectual and industrialized.

### 4.2.3 National Identity and Migration Policy

The formation of national identity in the new South Africa has been based on the two factors described above: the legacies of apartheid nation-building and the presumptions concerning the negative impact foreigners have on South Africa's identity and their inherent "otherness". Continuous negative language surrounding in-migration, persisting from the apartheid era, has been an incremental part of the state's construction of South African nationality by defining South Africans from non-South Africans (Klotz, 2013). Targeting foreigners has essentially become part of South Africa's nation-building process, unifying South African citizens through social scapegoating and perception of threat. In fact, symbols such as the "rainbow nation" and *ubuntu* have actually been employed as "tools of exclusion" rather than inclusion (Peberdy, 2001; Stuit, 2010). The rainbow nation only includes South African citizens, whereas non-natives are excluded from the country's nation.

Due to this new definition of national identity, migration laws and protocols were and have remained protectionist, playing a large role in the forming of the country's new national identity. Migration policy directly deals with the construction of national self-image: the selection of suitable and non-suitable immigrants, foreigner workers, and refugees has a notable impact on national identity construction (Meyers, 2000). While the country underwent an "introspective nation-building process", immigration legislation became a tool to define the national identity through the exclusion of foreigners (Crush & Dodson, 2006). As a result, becoming a permanent resident or citizen of South Africa is a difficult and long process,

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<sup>90</sup> Translated as "Black peril" in Afrikaans

requiring significant funds and usually through access to work in the country, which is highly restricted. Migration laws have limited access to legal temporary work and even skilled laborers have found it difficult to move to South Africa. As a result, ideas such as inclusivity and pro-rights were not extended towards foreigners migrating to South Africa and took a long time to be implemented into national migration policy.

The constructivist argument above does provide a significant explanation for South Africa's adoption of protectionist migration policies. However, there are some limitations. For instance, why didn't South Africa's new identity (based on truth, reconciliation and democratic principles) not prevail in terms of migration? In other words, why have migration policies remained impervious to the country's new political identity and commitment to inclusivity, human rights, diversity, equality, and Pan-Africanism? While there was a political need to conceive autonomy during the founding of the new nation, defining South Africa from other states, why was the construction of the "other" framed through an oppressive and negative discourse *instead of* a workable and negotiable one (Stuit: 2010: 96)? Thus, why construct a negative/inferior other? For example, there have been instances where social conflicts and debates over national identity have not led to restrictions on in-migration.<sup>91</sup> To cite one example, in the 1990s, Rwanda underwent a severe genocide in which the state sanctioned the killing of thousands on the grounds of ethnicity. However, today the country has rebuilt its own image through inclusion, providing one of the most liberal migration regimes on the continent, while also defining itself as a sovereign nation. Why did South Africa not do the same?

Additionally, there was external pressure on the new South African government to lead the region, pay debts (moral) it owed as a result of apartheid, and build a positive and accepting image globally. However, despite this pressure to conform to international norms and the international criticism surrounding the country's protectionist migration laws, why did South Africa implement a control-oriented migration agenda? As discussed in Chapter 2, constructivists argue that global norms, rules and practices guide state and actor behavior; thus, why wasn't South Africa willing to regionally manage migration, employ more rights for

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<sup>91</sup> See Meyers, Etyan. "Theories of International Immigration Policy – A Comparative Analysis." *International Migration Review* 34.4 (2000): 1245-1282. *JSTOR*. Web. 17 Nov. 2014. <http://www.jstor.org/stable/2675981> P.1256-7

migrants or allow skills importation in the first decade of the Republic in line with the global norms of the era? South Africa has continued to construct protectionist policies, marring its international reputation in the process (Ngandwe, 2013: 442). Moreover, why have these protectionist laws persisted more than twenty years after the founding of the new nation? Is the construction of South Africa's national identity still taking place, or has the country entered a "post post-apartheid era" as it could be argued?<sup>92</sup> And, if South Africa has entered a post post-apartheid era, why does migration policy remain based on prior construction of national identity. Given the limits of the constructivist argument in answering these questions, a more appropriate explanation for the persistence of South Africa's protectionist migration laws is required.

### **4.3 Neoclassical Realism: A Fuller Explanation**

Neoclassical realism is a better theory to explain why South Africa continues to perpetuate protectionist migration laws and helps to address the questions posed in the above section. First, both constructivism and neoclassical realism account for all units of analysis as fundamental in international relations. However, constructivism struggles to analytically separate actors, practices and structures as distinct entities, which can be problematic and confusing when explaining policy outcomes (Hurd, 2008: 306). In contrast, NCR begins by examining the external environment first and then proceeds to look at intervening variables (state structure and the individual perceptions), acknowledging the interconnectedness and interaction among all levels of analysis as well as providing a more theoretical structure<sup>93</sup> to its predictions. This results in a more linear and richer explanation for political outcomes (Kitchen, 2010: 140).

Second, because constructivism emphasizes identities, norms and rules as "endogenous" to the system structure, the "distribution of material capabilities is regarded as an essentially exogenous factor" (Kitchen, 2010: 123). As a result, national "interests are reduced to ideas" underestimating material factors (Ibid). Thus, while constructivism does help to explain why South Africa underwent a particular nation building process, the theory fails to explain the

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<sup>92</sup> With the beginning of Zuma's presidency, South Africa may have entered a new stage of its national identity formation, which emphasizes more globalization, regionalization and liberalization that is less focused on "nation-building" in the post-apartheid sense.

<sup>93</sup> While NCR has been criticized for being akin to "thick historical description", Rose (1998) (quoting Christensen) argues that NCR is indeed a theory because it "clearly links specified independent, intervening and dependent variables in a direct causal chain." (Rose, 1998: 167). It should be noted, that this thesis is more concerned with the explanatory rather than the predictive power of neoclassical realism.

discrepancy between South Africa's desire to produce a pro-rights/inclusive/Pan-African identity, while simultaneously employing a migration system that contradicts it. As constructivists argue, global norms, rules and practices also guide and influence state behavior (Finnemore, 1996; Hopf, 1998). However, despite the global norms surrounding refugee protection, labor liberalization and regional cooperation, South Africa has been resistant to conform to and enforce them. This is where neoclassical realism, which incorporates and notes the significance of *both material as well as ideational causes* for policy outcomes, can help in understanding this discrepancy.

Third, both constructivism and neoclassical realism require an in depth and rich understanding of the domestic culture and history of the units in question. However, constructivism often stresses the importance of *socially constructed* political cultures that guide national interests (Rathbun, 2008: 300). The theory underemphasizes *national political power*: the ability of a state to reallocate resources (regardless of its social political ideas) towards its national interests. NCR's emphasis on the changes in relative power vis-à-vis society and how that affects state action is particularly pertinent for and helpful in explaining South Africa's formation of migration policy.

### **4.3.1 External Factors**

As in traditional realist theory, NCR argues that the scope and ambition of a state's actions are first driven by the uncertainties of the international system and relative power distribution. The scale of illegal and undocumented migration globally has reached such a level that it is considered a major national security threat by governments (Skeldon 1998; Andreas, 2003; Castles & Miller, 2009). Large flows of in-migrants directly affect a country's national security and sovereignty as borders are the "linchpin of modern political territoriality" (Vigneswaran, 2008: 785). Unregulated in-migration can threaten national interests such as controlling territorial borders, maintaining internal security, protecting labor markets and thwarting transnational crime and epidemics. "Control over the movement of people into and out of national territory is integral to the exercise and maintenance of state power" (Peberdy, 2001: 16). Thus, despite liberals' and globalists' call for the end of territoriality with the rise of supranational entities and economic liberalism, realists have argued that new security threats (like mass migration) are actually reinforcing territorial borders, expanding border controls and

policing powers.<sup>94</sup> As a result, perhaps one of the most important drivers for restrictive migration policies is the increasing numbers of undocumented and illegal migrants that have continued to come to South Africa post-apartheid.

Due to the regional economic inequalities, relaxation of apartheid policies, increasing globalization and high levels of conflict on the continent, migration to South Africa has risen. More significantly, it doesn't seem as if population movements to South Africa will plateau any time soon, as reports have indicated, migration to the country will only increase over the next twenty years (UNDESA, 2013; IOM, 2014). Improved telecommunications and infrastructure on the continent will ease the ability of people to move to South Africa from farther north, which has been reflected in the recent rise of immigrants originating from the Horn of Africa. With the largest economy in the region and a relatively more stable government in comparison to bordering countries, South Africa will remain a prime destination for all types of migrants. Moreover, transnational organized crime, influenced by the geopolitical and economic environment in Southern Africa, has expanded and continues to threaten internal security and development of individual states.<sup>95</sup> This has resulted in one scholar deeming illegal migration as South Africa's most significant threat (Solomon, 2005: 92). As NCR argues that states seek to control and respond to their external environment by using the tools they have at their disposal, immigration policy is certainly the most obvious tool with which to restrict unwanted migration. Deportations, policing and detentions are other avenues for migration control. As a result, South Africa, as a nascent nation, has been trying to protect its newfound sovereignty, attempting to control immigration through restrictive policies and policing.

However, just understanding the international structure and threats to South Africa's power does not fully explain why South Africa has adopted and maintains such a protectionist migration agenda. There certainly were/are other external pressures, such as international and regional, on the country to relax its border controls and coordinate migration policy with

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<sup>94</sup> For discussion on realism, security and redefining security in terms on migration see Poku, Nana and David T. Graham. "Redefining Security for a New Millennium." 1998. *Redefining Security: Population Movements and National Security*. Ed. Poku, Nana, and David T. Graham. Westport: Praeger, 1998. 1-14

<sup>95</sup> See Hubschle, Annette, comp. *Organised Crime in Southern Africa First Annual Review*. Pretoria: ISS Africa, 2010. *Institute for Security Studies Publications*. Web. 30 May 2015.  
<http://www.issafrica.org/uploads/OrgCrimeReviewDec2010.pdf>

neighboring countries.<sup>96</sup> However, these pressures as well as the nation's interest in promoting a more liberal, pro-rights and Pan-African identity, has had less of an effect on migration policy formation compared to other domestic factors, which need to be examined. Additionally, considering South Africa's failure to acquire and retain skilled workers, protect human rights, reduce xenophobia, and police its borders, it remains to be explained why South Africa maintains such policies if they have such negative effects. Thus, why have the policies not changed? Finally, research finds that migrants have a positive impact on the development of a country. In-migrants make minimal demands on public services, constitute a considerable consumer market for goods and services through VAT, and help to circulate new skills, ideas and understanding (GCIM, 2005; Maimbo & Ratha 2005). Additionally, migrants are often victims of crimes and police corruption, rather than criminals, due to the vulnerability of their immigration status.<sup>97</sup> As many migrants do not have ready access to healthcare and are often refused healthcare due to their status as immigrant (whether illegal or not), public health risks are actually increased due to control-oriented migration policies (Kok et. al, 2005; Veary, 2014). Thus, why does South Africa continue to view in-migration as a threat to economic and social security rather than a development tool? Recalling Christensen (1996), NCR contends that systematic pressures are manipulated by domestic constraints and understood through individuals' perceptions. Thus, to understand this political outcome, the individual and state levels must also be investigated.

### **4.3.2 Individuals' Perceptions and Policy-Making**

The first intervening variable NCR introduces is the policy-decision makers' perceptions of the external environment. States interests and actions are tied to policy-makers' assessments, beliefs and perceptions of the international realm. As discussed earlier, South African

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<sup>96</sup> To an extent South Africa has in the last decade become more regionally focused on migration cooperation and facilitation through SADC and MDSA.

<sup>97</sup> To learn more about the positive impacts migrants have on the social and economic development of a nation see Crush, Jonathan, and Belinda Dodson. "Another Lost Decade: The Failures of South Africa's Post-Apartheid Migration Policy." *Tijdschrift voor economische en sociale geografie* 98.4 (2006): 436-54. *Wiley Online*. Web. 14 Nov. 2014. <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9663.2007.00413.x/abstract>; Klotz, Audie. "South Africa as an Immigration State." *Politikon: South African Journal of Political Studies* 39.2 (2012): 189-208. *Taylor and Francis Online*. Web. 20 Nov. 2014. <http://dx.doi.org/10.1080/02589346.2012.683939>; and Amit, Roni. "Security Rhetoric and Detention in South Africa." *Forced Migration Review* 44 (2013): 32-33. *Academic Search Premier*. Web. 6 May 2015. [http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=2&sid=8e5995e925b34554-ab14e9123706bf67%40sess\\_ionmgr4004&hid=4109](http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=2&sid=8e5995e925b34554-ab14e9123706bf67%40sess_ionmgr4004&hid=4109)

government officials and DHA representatives have viewed migration as a threat to *national identity*.<sup>98</sup> However, South African officials have also perceived the inflows of migrants as a significant threat to *social and national security*.<sup>99</sup> Government officials have stated publically, that illegal immigration has posed a major threat to South Africa's "housing, education, welfare, health facilities and the job market" (Buthelezi, 1998). Most outspoken was Buthelezi, who declared on numerous occasions that "aliens" pouring into South Africa would thwart the development of the country and, in particular, the efforts of the Reconstruction and Development Programme (RDP) (HRW, 1998: 20). Policy-makers have also described migrants as criminals, inherent threats to South Africa's territorial borders and human security. In 1997, South Africa's Defense Minister stated that South Africa has "one million illegal immigrants in our country who commit crimes" and "are often mistaken by some people for South African citizens" (Ibid: 2). More recently, there have been more tolerant DHA representatives (such as Mapisa-Nqakula); however, the legacy of top-level opinions is hard to replace as it has been institutionalized in state rhetoric. In 2011, the Minister of Home Affairs, Dlamini-Zuma, confirmed that the department "would like to be firm and very strict with those who are abusing the asylum system *knowing very well* that they are not refugees."<sup>100</sup> Moreover, she supported the most recent protectionist amendments to the Immigration Act (2002) stating that:

"Whilst we have this movement of people between ourselves and the world, we must also look at our national security and national interest generally...but we will be putting in place checks and balances against criminals and those who want to abuse our system"<sup>101</sup>

Even members of parliament, as recently as 2013, have mentioned foreigners in the context of crime, corruption and burdens to RDP's housing goals (Pugh, 2014: 232). Thus, in-migration is still viewed as a threat to South Africa's national and social security, which has resulted in the continuation of protectionist migration policies.

Post-1994, the lack of political allies that emerged to counter-balance protectionism and xenophobia (prevalent in government) directly restricted the boundaries to which migration

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<sup>98</sup> Refer back to Chapter 4.2.2 of this thesis, "The In-Migrant as a Threat to Identity".

<sup>99</sup> Refer back to Chapter 4.3.1 of this thesis, "External Factors".

<sup>100</sup> Emphasis added, Quoted in "Refugee Amendment Bill Passes Another Hurdle." *Mail & Guardian* [Johannesburg] 29 Mar. 2011: n. pag. *Mail & Guardian Online*. Web. 5 May 2015. <http://mg.co.za/article/2011-03-29-refugees-amendment-bill-passes-another-hurdle>

<sup>101</sup> See Dlamini-Zuma, Nkosazana. "Briefing by the Minister of Home Affairs, Regarding Amendments to the Immigration Bill and the New Regime." 2 Feb. 2011. Department of Home Affairs. Pretoria. *Polity Speeches*. Polity, Web. 5 May 2015. <http://www.polity.org.za/article/sa-dlamini-zuma-briefing-by-the-minister-of-home-affairs-regarding-amendments-to-the-immigration-bill-and-new-regime-pretoria-08022011-2011-02-08>

policy could liberalize (Klotz, 2012: 199). As Schweller (2004) argues, policy-makers who are directly in charge of forming and implementing legislation and state action will have more impact on the legislative outcome than others. As head of the frontline department directly in contact with immigrants, Buthelezi was influential in setting the tone of the debate surrounding migration in the new Republic and contributed to conjuring a negative image of immigrants (Adjai & Lazaradis, 2014: 239). His long tenure (1994-2004) contributed to the consistency of apartheid-like, control-oriented policies into the new millennium. While there was substantial changes made since Buthelezi left the department, the “politics of the exclusion of others had [become] a standard practice”, becoming institutionalized in the South African DHA.<sup>102</sup> More significantly, the absence of a liberal coalition in government, which supports the liberalization and reform of migration policy, has directly contributed to protectionism of migration policy.

The domestic political risks politicians faced in supporting a more liberal migration agenda have also contributed to the perpetuation of protectionist policies. As discussed earlier, xenophobia and resentment of foreigners was and remains widespread among the general public in South Africa, in particular, those who live in informal settlements where social delivery is at its poorest. There has been significant political pressure to appeal to South Africa’s poorest constituents, resulting in politicians using migrants as scapegoats for the social ills of South Africa, depicting immigrant’s negative impact on their country in an effort to win more votes. In an “unlikely show of alliance” most political parties in 1999 “raised the spectre of the negative impact that foreigners are assumed to have on South Africa’s economy and society” advocating stricter immigration laws (Reitzes, 1999: 13). But, since about 2006, politicians have paid much more attention to speaking about foreigners in a politically correct manner and consciously condemning xenophobia (Pugh, 2014). However, despite calls from the international community to condemn xenophobia, pressure from CSOs and South African business interests demands for more pro-labor laws, there still remains a lag time concerning policy change. Even the Immigration Bill (2002) and its amendments, clearly express a divide in bureaucratic politics,

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<sup>102</sup> Quoted in Neocosmos (2008) P.592. These ideas are also supported by Dodson, Belinda. “Locating Xenophobia: Debate, Discourse and Everyday Experience in Cape Town, South Africa.” *Africa Today* 56.3 (2010): 2-22. *Project Muse*. Web. 3 May 2015. <http://www.muse.jhu/journals/at/summary/v056/56.3dodson.html> ; and Pugh, Sarah A. "Advocacy in the Time of Xenophobia: Civil Society, the State, and the Politics of Migration in South Africa." *Politikon: South African Journal of Political Studies* 41.2 (2014): 227-47. *Taylor and Francis Online*. Web. 9 Dec. 2014. <http://www.dx.doi.org/10.1080/02589346.2014.905255>.

wherein a mixtures of provisions (pro-rights v. pro-exclusion) have resulted in unsatisfying legislation (Segatti, 2011b). This is a result of a continuance of South African policy-makers who perceive immigrants as threats to social welfare of South Africa as well as those who capitalize on the negative perceptions community leaders and South African citizens have of immigrants.

### **4.3.3 Domestic Factors: State Structure and Strength**

International challenges and the strategies adopted by the state to meet those challenges are often constrained and manipulated by state strength and structure. As a result, the second intervening variable neoclassical realism emphasizes is national political power, or the ability of the state apparatus to respond to external pressures and exploit national material power. As discussed in Chapter 2, national political power depends on the strength and structure of a state. First, this section will examine state structure, how it has been influenced by apartheid, and how it has impacted migration policy in South Africa. Then, the section will turn to state strength, which can help explain why South Africa has chosen not to fashion more liberal migration laws, as well as why the implementation of more liberal policies has failed to materialize.

The continuance of past-apartheid practices, administrations, and institutions in charge of migration management ensured that national migration policy would remain protectionist in the new South African state. Instead of being dismantled, the DHA remained (and still is) at the center of migration politics, with little change to its organization. Despite more public input and collaboration to form migration amendments, ancillary regulations are under the discretion of the DHA, giving them significant power over policy construction. Additionally, continuation of apartheid personnel, including Buthelezi, also meant that migration laws retained a “strong security and sovereignty agenda reflecting a narrowly defined notion of national interests that bears strong resemblance to positions held by the previous regime” (Landau & Segatti, 2009: 30). Moreover, laws such as the 1991 Aliens Act (and its mild amendments) persisted to govern migration in an apartheid-like manner, emphasizing restriction and discrimination, until 2002, when the new immigration act was adopted. Even apartheid’s two-gate labor system still exists in present day South Africa. Foreigners, who want to work in South Africa must either come under mining agreements (now through corporate permits)/bilateral agreements (MOUs) *or* they must be hired through the Immigration Act. Again this system, like it did during apartheid, reveals a continuance of an institution that prefers temporary, oscillating migration, wherein

foreign labor does not typically take up permanent residency.

Further, the country's new state structure was built on providing social security to the new South African citizen. The ANC government made promises to all South African citizens to develop the country and provide poverty alleviation, through the Reconstruction and Development Programme. The RDP claimed that addressing poverty was the number one priority of the new government. In 1996, the new Constitution even acknowledged the right to social security, access to food, water and healthcare facilities. Nation building and identity of the new South Africa, was as much political and social as it was economic: society had been fundamentally divided by social equity during apartheid, which demanded calls for greater material equality in 1994 (HSRC Report, 1994: 48-9). Thus, the state has played a large and active role in providing social security post-apartheid, which has continued into the new millennium. In 1994/5, more than 80% of state expenditure was spent on public order and safety, health, social protection, education and housing (SAS, 2012: 145). With the dramatic worsening of income poverty by 2002, the government significantly increased its government spending and welfare programs. Social grants more than doubled between 2000/1 and 2006/7 (Van De Berg and Moses, 2012: 133). But, because social delivery was part of the nation-building process, the new state defined social security on a traditional notion of national interests rather than a regional one. Only citizens were privy to the new social rights guaranteed by the government. As government officials viewed migrants as threatening to social security and development it makes sense that migration laws adopted post-apartheid remained protectionist and excluded foreigners from government services. However, why do they remain protectionist twenty years after nation-building?

The strength of the new state has directly impacted South Africa's ability to implement more liberal migration policies, which policy-makers cite as a reason not to do so. While public expenditure is now better targeted at the poor, and subsidies and cash transfers have attempted to redistribute wealth, South Africa still faces problems with social delivery. Poverty has remained widespread and the proportion of the population living in poverty has not dropped significantly since 1994 (Seekings, 2013: 2). Primary concerns of delivery remain related to access to housing, water sanitation, electricity and adequate medical attention. Government health spending has had minimal impact on public health outcomes, with high levels of dissatisfaction with the current public health services (Van De Berg & Moses, 2012). Between 2000 and 2012,

HIV/AIDs related deaths have risen from 23.5% to 31.5% of the total population (SAS, 2012: 64). Additionally, the ANC has been unable to reduce the high unemployment rate in South Africa, which has remained around 25% since 2000. Poor service delivery has played a significant role in heightening social tensions especially against foreigners, who dissatisfied citizens blame for stealing their government resources.<sup>103</sup> Recalling Rose (1998), countries with weak states will take longer to translate an increase in material power into expanded policy action. South Africa's inability to deliver more robust poverty alleviation and development has been used by politicians and government representatives as a reason not to implement more expansive liberal policies.<sup>104</sup> For instance, South Africa legitimized its refusal to sign SADC's Free Movement Protocol by pointing to its own incapacity to cope with the consequences of free movement. Again, this directly connects to government officials' beliefs that migrants are a threat to social security.

Even when South Africa has tried to integrate more liberal policies into its migration legislation, the country has struggled to successfully implement them. The DHA continues to lack a coherent governance system, which is compounded by the lack of adequate training of immigration officials. Budget and human resources constraints have further exacerbated the DHA's ability to perform its duties, as the department was in charge of migration as well as civic matters. Under-resourced and poor management led to the severe backlog of immigration applications as well as an escalating number of pending applications and delays in providing official documents of those approved. For instance, some of the most progressive changes to migration law are in regards to refugee/asylum seekers; however, the state's incapacity to implement these pro-right reforms has resulted in not only the lack of protection of those asylum-seekers awaiting documents, but also their ability to work and go to school in South Africa. Klaaren & Ramjii (2001) argue that endless lines, irrationally strict standards and failure to provide documentation have made people "illegal", contributing to an increase in undocumented migration. The system was so faulted and mismanaged that legal channels were limited. Immigration officials handled major backlogs by "often rejecting" applications on

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<sup>103</sup> See International Organization for Migration. *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign National in South Africa*. Rept. no. 1. Pretoria: IOM, 2009. *IOM Research*. Web. 30 May 2015. <http://www.migration.org.za/uploads/docs/report-12.pdf> P. 33

<sup>104</sup> Refer back to Chapter 4.3.2 of this thesis, "Individuals' Perceptions and Policy-Making".

“unsustainable grounds” such as whether a country was “refugee generating” (Handmaker, 2001: 98). Moreover, Nigerians have often been rejected refugee status due to the prevailing beliefs (held by Home Affairs, media and police) that they are drug dealers (Klotz, 2013: 195).

Constructivism and the role of nation-building post-apartheid can help to reveal why South Africa has adopted such policies. As part of the nation-building process, South Africa’s transition to democracy, and reemergence on the world stage, the country began forming its national identity. Perceiving migration and migrants themselves as threats to the new nation’s identity has prompted the country’s construction of control and exclusion-oriented policies. However, constructivist theory fails to explain how these policies have remained impervious to global and regional norms and why they persist into the new millennium, despite the numerous negative implications. In contrast, neoclassical realism presents the most comprehensive and concise explanation of why South Africa has adopted and continues to pursue a protectionist migration agenda. NCR provides a more linear and richer explanation of this political outcome due to its ability to recognize the interconnectedness and interaction among all levels of analysis, its incorporation of both material as well as ideational factors, and its particular emphasis on national political power, particularly significant in the case of South Africa.

## 5. Conclusion

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This thesis has sought to highlight the drivers for protectionism in the case of South Africa's national migration policies. The thesis outlined the migration patterns in sub-Saharan Africa and the pressures that increased migration have had on the development and maintenance of South Africa's migration agenda. Through an exploration of concepts and the recurring themes of nativism, control-orientation and non-rights focus, the thesis emphasized the protectionism within and surrounding South Africa's national migration policies and the negative implications these have had on the country and region. These implications include the mistreatment and neglect of refugee and asylum seekers, the unlawful detention and deportation of legal in-migrants, the failure to address societal xenophobia, the continuation of a severe skills crisis and the lack of effectiveness of regional bodies to manage migration. Even today, these laws remain, to an extent, impervious to South Africa's attempts in establishing a national identity based on human rights, Pan-Africanism, *ubuntu*, and democracy. This sparked an impetus for seeking to analyze the drivers of protectionism in the case of South Africa.

As the formation of migration policy rests at the juncture of international and domestic politics, involving political coalitions, policy-makers perspectives and geopolitical pressures, the thesis chose to employ constructivism and neoclassical realism: two theories that examine all units of analysis and necessitate an in-depth understanding of policy outcomes, attributes essential for examining this topic and case study. Through application of constructivism, the thesis argued that migration policy is a central discursive site in the formation of national identity, wherein managing migration flows involves critical issues like citizenship, ethnicity and belonging. Continuous negative language surrounding in-migration, wherein migration is believed to be threat to national and social security *in conjunction with* South Africa's commitment to fashioning a new identity based on nativism, rather than ethnicity (as during apartheid), have been major causes for South Africa's protectionist agenda. Thus, the exclusion of foreigners has become an incremental part of the state's construction of South African nationality, defining South Africans from non-South Africans. However, constructivism fails to

explain how these policies have remained impervious to global and regional norms and why they continue into the new millennium, despite the numerous negative implications and South Africa's departure from the post-apartheid era.

In order to explain the discrepancies found in constructivist theory and present a more comprehensive and concise explanation for the persistence of protectionist migration policies in South Africa, the thesis employed neoclassical realism theory. Using NCR, the theory revealed that the persisting flows of undocumented and illegal migration movement into South Africa was a substantial driver for the formation and persistence of South Africa's restrictive migration politics. However, *more significantly*, policy-makers perceive this flow as a substantial threat to the social welfare and national security of South Africa and a more liberal coalition of policy-makers has not arisen within the DHA or other relevant departments to contradict these institutionalized beliefs. Moreover, the continuance of apartheid structures and institutions as well as the state's commitment to meet social delivery goals and development standards has restrained the liberalization of the country's migration policies twenty years after apartheid. The inability to provide adequate social delivery has contributed to the maintenance of migration control-oriented laws and South Africa's inability to implement more progressive policies.

International migration is increasingly becoming an economic, social, and political concern for countries worldwide, marked by a greater degree of intensity and diversification: immigration has become a matter of high politics. Thus, while there has been a global trend toward more protectionism that partly explains South Africa's decision to adopt certain policies, it does not fully explain South Africa's incentives for adopting a protectionist migration agenda. It is worth noting that large migrant receiving countries have also trended toward assimilation, such as Canada, countries in the EU that have accepted the Schengen agreement, and other regions that are attempting to implement free movement protocols. As a result, the large inflow of migrants is not the only driver for adopting protectionism. As previous studies concerning South Africa's migration policies have been very specific or focus on one type of migrant, they have not been able to systematically organize and incorporate all the different and significant reasons for South Africa's migration policies. Whereas, this thesis has employed two different international relations theories in order to provide a more holistic picture and comprehensive explanation for South Africa's decision to implement control-oriented migration legislation. As a large migrant-receiving country, South Africa is a valuable case study in which protectionism

has had mixed effects on the host country: these policies may have helped to fashion national identity and unify the national community after years of discriminative politics, but they have also had severe negative implications, which may require a future implementation of more liberal and regionally-oriented laws.

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