

Harold Wolpe Minutes  
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## **Xenophobia**

Speakers:

### **ADVOCATE JACOB VAN GARDEREN**

Jacob van Garderen is the national director of the Refugee and Migrant Rights Project at Lawyers for Human Rights (LHR). Established in 1996 the LHR Refugee Rights Project is a specialist programme that advocates, strengthens and enforces the rights of asylum seekers, refugees and other marginalised categories of migrants in South Africa.

### **DUNCAN BREEN**

Duncan Breen is from The Consortium for Refugees and Migrants in South Africa (CoRMSA). CoRMSA, formerly known as the National Consortium for Refugee Affairs, is a registered Non Profit Organisation tasked with promoting and protecting refugee and migrant rights. It is comprised of a number of member organisations including legal practitioners, research units, and refugee and migrant communities.

Introduction:

There's a list going round for all of you who would like to sign up to the mailing list. Thank you to Butlers Pizza's for donating butler's tonight.

Tomorrow is World Refugee Day, which is partly why we chose to do our talk tonight on xenophobia. All of us have been touched and affected by the events of the last few weeks. Although this is a topic we've been thinking about for a while, it's fitting that it happens tonight. The talk tonight focuses on determining what policy and practice issues we should begin to look at in order to respond to what has been happening.

**Jacob Van Gaderen** – holds a B.Com and LLB from the University of Pretoria. He is an advocate of the High Court and associate member of the Johannesburg Bar and Heads the strategic litigation unit of Lawyers for Human Rights.

Jacob van Garderen:

It's an interesting time to discuss these issues and what our reactions should be. Tomorrow marks a special day. And this year we're marking the 10<sup>th</sup> anniversary of the adoption of the Refugee Act. In my presentation I will look at what the Act is doing to protect refugees and migrant workers. In South Africa at the moment, it seems that the wheels are coming off – food prices are increasing, there have been attacks on non-nationals, there is criticism over the government's foreign policy regarding Zimbabwe,

there have been service delivery protests, and finally, the great controversy of the events in Polokwane. It is difficult to make sense of all these events. To what extent does one event impact on another? With regards to the growing intolerance towards foreigners, many of the recent developments have had an impact on how South Africans react to foreigners.

In the recent attacks, we have seen 100 000 people displaced and over 50 people killed since the beginning of May; businesses have been looted and houses destroyed. The questions which arise are: What now? What must government do and what policy must it put in place to normalise the situation? I will try to not repeat the analysis in the newspapers and will focus on the little extra I can add. A number of views have been put forward, including the idea that it is the large number of migrants that have brought us to this boiling point. Others believe the reason for the attacks is the South African government's inability over years to deal with unresolved issues of violence. Others believe that the issue is more practical and involves the government's inability to respond to political and socio-economic needs – the attacks are a response to government's inability to respond to political processes.

I will deal with two subjects in this presentation. Firstly, I hope to identify and dispel some of the myths that are prevalent. Secondly, I'd like to talk about immigration policies and how the government can deal with the issue of immigration.

The first myth is the idea that the attacks caught us by surprise. I'm more cynical in this regard - the attacks weren't a surprise. A WITS migration study shows attacks in communities around South Africa over the last year. The list goes on and on. There were reports many months ago of violent attacks on Somali traders and the media called for the government to deal with the situation. Since September last year, more than 2000 people were forced to leave their homes. Clearly the recent attacks were not a sudden surprise.

The second myth is that the Third force has been responsible for the organisation of the attacks. I believe that it is irresponsible for officials to use a sinister force as a scapegoat for these attacks. Even though there's a level of co-ordination in the attacks, it doesn't go beyond the locality of the attacks. Hence, the attacks are locally organised, with a degree of copy-cattling given the perceived success of the attacks. There is no central force that has organised and co-ordinated the attacks at a national level. Politicians use comments about a third force as a distraction to remove blame from themselves.

The third myth is the belief that if we can tighten border control, it will close the tap and stop the stream of migrants to South Africa. This view is very simplistic and does not help to get to bottom of the problem. The Institute for Race Relations proposed this option. SA already spends a large amount of resources on border control, but it is not very effective. In 2006, SA deported 260 000 people with little effect - even the minister in parliament admitted this.

The final myth I'd like to deal with is the view that only poor black people are xenophobic and middle class white people aren't. The Southern African Migration Project, a collaboration between a number of SADC universities, IDASA and Queens University in Australia, has done a comparative study on xenophobia. Its finding was that all South Africans are xenophobic, no matter what their race, class or background. People's reactions may be different, but xenophobia is one of those ironic things that bind us as a country.

How should the government formulate a policy for looking forward? There is a great need to regularise the migrants in SA by allowing them to register. In terms of terminology, traditionally, 'migrant worker' refers to those who have come to SA to work whereas 'refugee' refers to those who have come due to political persecution. South Africa has an unfortunate history relating to migrant workers. Apartheid's Alien's Control Act has laid the groundwork for our future approach to issues around migration. It took the new government almost a decade to replace the act – it was only in 2004 that the new act was approved and operationalised. Even though the government made commitments to using a human rights framework, in its implementation the act didn't bring us closer to a rights-based approach to immigration. The approach to migration is still set in the old control-based framework which focused on enforcement and does not allow fair opportunity for migrant worker to regularise their status, get documents etc. The current policy is inflexible. It was made by a government who doesn't view immigration as a priority. It was done under Buthelezi as Minister of Home Affairs, at a time when tension between the ministry and the ANC govt meant that adoption of a proper policy didn't succeed. Hence, the Immigration Act only promotes the immigration of highly skilled people, but ignores the reality of migrant workers who come to work in mines, farms, and construction. As a result, most of these migrants remain undocumented and become vulnerable to arrest and deportation.

The Department of Home Affairs is one of the poorest functioning departments in the country. It has not developed into a modern system that provides a proper and efficient service to the people. Another trademark of the current act is the overuse of the asylum system because unskilled migrants have no other option other than to apply for asylum. As a result, there is a large backlog and real asylum seekers can't get in the door.

Another challenge is that of Zimbabwe - two million Zimbabweans fled to South Africa in fear of persecution, many after their homes and livelihoods had been destroyed. These people are not voluntary migrants or typical migrant workers and need to be recognised as such. But the government has not formulated a policy to deal with the situation.

The practical question is what should we do with the undocumented migrants in SA? Deport them? Grant them all asylum? Put them in refugee camps? Do nothing? Mbeki said that we can't erect a Berlin wall on our borders. I support this. South Africans have to live with fact that there are Zimbabweans in SA. But how do we deal with them? In my view it's important to have an immigration framework that recognises people's status

as migrant workers. This can be done by giving migrant workers permits etc. The benefits are that they will no longer be vulnerable to arrest and deportation. In addition, the government will know who they are and have a record of their details. The government will also save money from reduced deportation. Further, by implementing these measures, South Africa will be meeting its international obligations regarding migrant workers. The result will also be that there is less of a burden on the state with a reduced backlog in the asylum system and less dependence as migrant workers will be allowed to make living and become self-sufficient. There may also be a reduction in the crime problems faced by the country as this policy would allow the police more time and resources to focus on real issues rather than on the investigation and arrest of refugees and migrant workers.

In closing, I recognise that this is a difficult political issue for the government. Public opinion shouldn't stop the government from fulfilling its legal obligations and doing what's right.

**Duncan Breen** – from the Consortium for Refugees and Migrants in South Africa. CORMSA promotes and protects refugee and migrant rights. Duncan completed his Masters in Development Studies with a focus on refugee studies at UCT.

I'd like to say thank you to all here on behalf of CORMSA, particularly to all who have played a role in assisting during the present crisis. There has been a huge public response to the crisis.

I've called my talk 'Reluctant Hosts: Government's response to immigration in the post-apartheid era'. I want to have a frank discussion on South Africa's treatment of migrants and foreigners. Our refugee policy is generally good, it is progressive in that it allows (although it doesn't *encourage*) integration, skills development and sharing, and freedom of movement. On the other hand, our immigration policy tries to attract skills, but makes no provisions for unskilled migrants or humanitarian grounds for entry.

There is a huge gap between skilled the work permit and asylum system. Due to this gap, unskilled workers apply for asylum, as it is only way to legalise their stay in the country. The law says that the decision regarding whether or not an individual is granted asylum must be made in three months, but in practice it takes a few years and during this time applicants are forced to return regularly to renew their papers. In the meantime they get no government assistance. The Department of Home Affairs has advised banks not to open accounts for these people. There has been no government campaign to inform asylum seekers, the public or the police of what the rights of asylum seekers are. There has been no education of the police regarding the different statuses and accompanying documents. This is all indicative of a lack of political will.

What are effects of this? Asylum seekers live in limbo. It is difficult to get long term work if one only has a temporary permit. They don't know if their permits will be

renewed; they have to take time off work and have to pay to travel to refugee reception offices to renew their papers. But there are only five offices in the country and these are located in the big cities. There is not guaranteed access to the refugee reception office so a person may have to go more than once. Many people spend the night sleeping out in the cold outside the offices in lines in order to ensure that they are seen to. During the time before they receive their documents, these people have to be self-sufficient or rely on NGOs for their survival as they don't receive assistance from the state. Even when they have valid documents, many employers don't recognise their papers and won't give those jobs on that basis. Many banks won't open accounts for them (a notable exception in this case is First National Bank). Civil servants generally aren't familiar with the papers, so make decisions based on their own feelings regarding non-nationals. The police harass and extort them, and in many cases they tear up valid documents. An example of this is the raid on the Methodist church in Johannesburg where people with valid papers were also targeted by the police. Landlords also tend to charge higher rental. This is the situation for documented migrants.

In terms of undocumented migrants, most apply for refugee status. However, they are not given any documents during the 3 month application time. During this time they receive no government assistance. They have to accept any work that can get, and this generally means that the work won't be in good labour conditions and will have poor pay. This in turn undermines the labour standards that COSATU has worked to maintain. Further, it fuels beliefs that non-nationals are stealing the jobs of South Africans. Employers see that they can get away with paying lower wages so turn away South Africans. In addition, people don't report labour abuses. Undocumented women get raped and don't report it to the police. Most police stations ask for documents, and if you don't have them, you can't lay a charge. Another huge concern is that whilst undocumented, children can't go to school.

The ultimate result of the policy is the creation of an underclass. It creates the perception that these people's rights are worth less than everyone else's. It undermines the society based on equal rights for all that we are trying to build.

The general public reaction is that the public believe these people are using all our resources. Politicians stoke these beliefs with statements saying that these non-nationals are "half of Africa is wandering in and out of our country, eating our food and using our hospitals and clinics". They are accused of stealing our jobs. They have also been accused of stealing our women. The attitude this statement takes towards women is so patriarchal. They are also called names such as amakwerekwere. As a result of the public reaction, people are targeted for robbery and chased from communities.

Non-nationals are marginalised at various levels. No government department is responsible for protecting the rights of non-nationals. Home Affairs says its responsibility is documentation, so it won't take on responsibility to ensure that rights are protected. As a result, it is civil society and a few isolated government departments that take

responsibility for protecting them. What does this say about South Africa, about how we treat guests, about us as a people?

Where to now? Do we just send everyone back to their countries? But many can't go back as they face huge human rights issues in their countries. In addition, a measure such as this won't address the source of conflict. Do we keep them in camps? This also doesn't address the source of conflict. Even within camps, there is still violence and human rights abuses; it is a waste of skills and prevents skill transfer; it is expensive to maintain camps; it doesn't promote a sense of integration and regionalism; and it makes people reliant on assistance.

Should we resettle people? Should we send people to be resettled in 1<sup>st</sup> world countries? The main problem with this option is that the UNHCR can't decide how many people to resettle. Rather, they get given a quota every year by the receiving countries. Hence, the process is very complicated. The issue in resettlement is who will take those being resettled and given the general crack-down on immigration that is happening world-wide, the quota is steadily decreasing.

Hence, it seems that we must set our minds to re-integration. However, was there ever integration to begin with? Before the current situation, there was conflict and we must address the source of the conflict. But how do we manage conflict at a local level? How do we ensure the safety of all in our communities?

There have been calls to seal our borders. However, the methods by which border are sealed are likely to be a source of human rights abuses in and of themselves. For example, we could use electric fences that were used pre-1994, but people may die in attempts to climb over them. Can we abuse rights in that way? Aside from that, we have clear evidence that the EU can't hold off illegal migration and they have a great deal more resources than us. We need to manage immigration rather than avoid it. We need to find ways to use it for development

South Africa's economic situation is hugely reliant on regional stability. There is also a major reliance in the region on remittances. It is suggested that Zimbabwe is surviving on remittances from SA. Migrants provide an opportunity to meet our skills shortages and access to larger markets for SA goods. Migration allows for an exchange of skills and ideas and opportunities for increased social integration.

Migration is perceived negatively. We need to change the mentality from one which tries to control migration to one managing migration, and as a result, reap the benefits and make a contribution to regional development.

Questions:

1. Aren't we losing sight of the bigger picture? The main problem is violence, xenophobia is just a symptom. Aren't we just treating the symptom here? We have a situation where members of the ANC are stabbing each other at meetings, Zuma is calling for his machine gun and we need leadership to get out.
2. Pass laws proved in the Western Cape in the 80s that border control doesn't work. The government is increasing the problem rather than helping solve it. What should civil society and the legal fraternity be doing to challenge the government? What can they do to challenge the government to implement useful changes?
3. I have read that our labour law allows refugees and migrants to have the same employment rights as a citizen. But this conflicts with what the speakers have said about these people being vulnerable to arrest and deportation. The recent judgment of the labour court resulted in one of the most flexible policies for people without documents in the country. How do you explain this apparent contradiction?
4. I'd like to congratulate the speakers on their articulation of the problem – they have set the issues out clearly for all of us, even those who have been personally involved. Speaking for a personal perspective, we have 5 refugees in our back garden. This includes a Rwandan family of four that are sharing a single room and as a result is a situation that can't continue indefinitely. The speaker spoke of the need for a change of mentality in South Africa, but that is a long-term process. What do we do in the shorter term? We can't tell the Rwandan family that they need to start thinking of going elsewhere, that the conditions that they're living in aren't hygienic. What can be done in shorter term for people that are desperate?

Jacob – in response to question 2, there's a lot to do. We have a progressive constitutional framework in terms of which one could measure the law and see if it fulfils the requirements of the constitution, particularly the right in the Bill of Rights. Most rights in the constitution are open to any person in the country. We need to take a more activist and daring approach to ensure social justice to everyone. I'm excited about what the LRC has done in getting the courts to do more than declaring policy unlawful, but rather working with the government on a solution. This is done through a structural interdict where the government has to report back to the court. However, it creates difficulties because it's close to the separation of powers line. The constitutional court has been useful in this respect. I've also been surprised by the Johannesburg bar and the law society, both of which have made members available to assist those people who were arrested at the Methodist church.

Regarding question 3 – the recent judgment was very progressive and the CCMA has recently adopted an opinion written by Gilbert Marcus to include in its mandate undocumented migrant workers. But this is different from the government policy and its practical implementation.

Duncan – Regarding question 1 and the problem of violence. My organisation had a programme to inform the public of refugees' rights. The key issues are the way we address conflicts and the problems in the communities. We had meeting on Tuesday to

discuss how to address the problem of integration. What is important is conflict resolution, to get leaders to address conflicts in a less violent manner.

In response to Q4 – Regarding the change of mentality, what is important is the mentality of our leaders. The Deputy Minister of Home Affairs has been making comments about the shift from control to human rights as the focus of our immigration policy. What to do in the short-term is a key question. It's different in Gauteng where the camps are better run and the conditions and monitoring are better. Camps in Cape Town are worse. There is a lot of activity here trying to deal with the issue of how people will be accommodated in the short-run. Some form of compromise regarding how people are accommodated and assisted is needed now. The focus is on how to reintegrate people. There is investigation of how to return people to their communities, but refugees still have a huge distrust of return to the communities. My advice is that if you're in a position to help people in the short run, keep an eye on the sites (camps etc) where people can be moved to and if these sites stabilise then move people there. Unfortunately that is all I can say now.

5. Does anyone have any legal responsibility for the situation of refugees? The municipality, local government, or national government? There are churches, such as Shade and the Methodist church, that are helping, but there is no government involvement. Is there any allocation of responsibility?
6. Most of us didn't see this coming and were taken by surprise. Some of us spent time overseas and studied overseas. We've had a hard time trying to explain to friends that this isn't a representation of SA. What would your advice to government be as a way forward regarding this issue? How do they do damage control? Another question regards economics; Employment seems to be the root cause of the incidents, the local are having a tough time due to competition with non-nationals. Duncan, how do we handle diversity? Diversity within context of our own South African society. And how do we hold govt responsible or accountable.
7. With influx of people from other countries that are taking jobs, South Africans are quick to blame governments, but could this situation have been avoided? Refugees have been displaced from their places of work and they can't go back to their jobs. Will there be monetary compensation for people that have lost jobs or work time?
8. There has been a lot of talk about documentation and registration. But a piece of paper won't protect you against a mob. This is not just a xenophobia thing but a law and order thing. What about addressing this?

Jacob- Regarding questions 8: yes, this is the real issue. The attacks are violent and difficult to stop. One strategy is deterrence - perpetrators must be found and prosecuted, and police must be assisted in investigating and prosecuting the crimes. Deterrence will help. Dealing with impunity will help to reduce attacks.



Question 7 dealing with compensation: we have a programme that helps victims to see if they can identify perpetrators and when they can, compensation is possible. It's also possible where police have failed or refused to take a case, as we can then hold police responsible for negligence. But we need to look at non-litigation options. For example, we have a refugee board that receives money from the treasury – this is a good way of spending that money. Money is a good way to help re-integration. Putting people back in communities with police protection won't help. The process needs to happen organically. Giving people money allows them to pay rents and buy groceries for a year.

Dealing with govt and its negative attitude – there is a need for a more responsive government. Ordinary citizens feel alienated and removed from decision-making. On specific issues of intolerance, we have to deal with stereotypes. These stereotypes include views that our borders are overrun by one-directional traffic, but in reality it is more circular, migrants come to earn money and go back. The statistics are grossly over-exaggerated by politicians, the police etc. We need to have perceptions changed by a strong government with accurate information from research organisations doing proper research.

Duncan: Regarding structures, we have structures at each municipality that are supposed to take care of people as with any other disaster. The City of Cape Town had a plan, so were better prepared than Johannesburg. Disaster management in Cape Town were more involved.

Regarding competition for jobs – many of the non-nationals that come here create jobs. Most come from places with a long history of job creation. We see that spaza shops have been set up, and many non-nationals become small traders.

How do we handle diversity? This is a major question and can not be answered simply. I think each individual should look at South Africa and see how much one knows about ones neighbours and those people that are different from me. By learning from others and going through that process, we may get an answer.

How do we hold governments accountable? The LHR is a member of a consortium and we engage on the diplomatic side with government. When that fails we resort to legal action.

Could this situation have been avoided? Yes, I think both speeches tonight showed that. The issue of documentation and including people is an approach to reducing the targeting of non-nationals and integrating them.

Regarding compensation, the government has said that there will be no direct compensation, but there will be assistance from the disaster relief fund to help people to restart their businesses etc.

Perhaps it would be informative for people to look on [www.cormsa.org.za](http://www.cormsa.org.za), where they will find the report issued yesterday and that will help shed some light on these matters.

9. Can we not look at the current situation as both a challenge and an opportunity whilst foreign nationals are massed in camps to bring in home affairs with teams to sort out documents and fast-track decent documents for non-nationals?
10. It's a crisis we're in. What of the talk about our government's responsibility beyond our borders? Isn't it failing to play the game of the new SA? People need to have a role to play. We have lost our purpose as South Africans. Human Rights are a bedrock, but the main aim is for people to feel that they have a role to play. Foreigners are actually driving a lot of production in the country. We don't have a culture of that in SA and need to be responsible beyond our borders.
11. I believe xenophobia has been there for a long time, but is an issue now that the media has focused on it. I know academics have their own perception of why xenophobic attacks are taking place. But why aren't they happening in Camps Bay or Hout Bay or Seapoint? They are happening in Khayelitsha and Gugulethu. We have to determine what the cause is. The cause is that the government is not delivering there. Mbeki has failed. There are those that are unemployed and we have to educate them about their rights. Most of those people don't attend these debates. I am privileged and I'll be able to go back to my community and report on these issues. We need to secure our democracy for the future generation.
12. Can the Mandela Children's Fund not play a role in supporting children? What message is going through in schools? The Turks in Germany had a hard time at first but integrated well. Can't we look at them now and see how that happened?
13. What would happen if poverty was declared a disaster? We are struck by the compassion of people ferrying the people to refugee camps and helping them. What makes us so moved to respond to this situation and not to the disaster that is poverty. Is poverty too structural and systemic to invoke the same response? I don't mean to say that we should try to link instrumentally the terrible events taking place recently to these issues. In Khayelitsha we have people in shacks, and this is as awful as having people in Soetwater. Why do we respond differently to this situation?
14. I have a practical question. I have been to several safe sites and want to know if these camps, Soetwater, military camp etc, are actually legal. To my mind, the conditions they're under – they are near to the sea, experience bad weather conditions and are vulnerable to storms – seem unacceptable. This perpetuates the view of the attackers that these people don't belong here, because the camps are so far away. What will happen generally? Community workers were supposed to look after camps. Is it not a contradiction of the Africanist Theory?

Jacob – Question 14: We must revisit our national project on who it excludes and who it includes. We need to revisit it and look at a more cosmopolitan approach.

There is discomfit at the possibility that through our approach in the humanitarian crisis, we have prioritised non-nationals over our own poor nationals. We need to remember that the struggles of non-nationals are the same as those felt by South Africans. There should be an integrated system to deal with these struggles, regardless of nationality. If a poor kid can't afford school, we should give waiver regardless of whether they are a citizen or not.

There seems to be a re-emergence of social activism. I felt proud when dock workers refused to off-load the ship going to Zimbabwe laden with arms. Trade-unions have often led the way in social activism. In Zimbabwe, it was religious institutions that demanded that SA take a stand.

Should we look to examples overseas? Yes, it is not only SA that suffers from conservative policies. The EU has a policy of detention for 18 months of undocumented migrants. Australia has mandatory detention for undocumented migrants.

Duncan:

Regarding the rainbow nation and a nationalistic response, Buthelezi said that we define what a South African is by what we're not. We are not illegal immigrants so the response has been to band against them.

Are the camps illegal? This would be determined by technicalities regarding whether they are in the public interest. They are definitely illegal if there is any case where people are forced to go there.

Regarding challenges and opportunities such as documenting people: Home Affairs needs to address this issue and we need to address the underlying conflict. We need to take responsibility in SA. We each need to say that crime and poverty are my responsibility.

The question about Nelson Mandela and schools: the Department of Education has a values department to deal with these questions. These issues need to be addressed early on in schools. The Nelson Mandela Children's Fund can play a role here.

People are feeling alienated and left out by the government. There are huge issues that need to be looked at. However, government hasn't responded in some cases.