

**UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW**

The Role of Criminal Prosecution in Curbing Xenophobic Attacks in South Africa

**A Mini-Thesis submitted in partial fulfillment of the requirements for the degree of Master of
Laws (LLM)**

Faculty of Law of the University of the Western Cape

Talumba Mutale Kateketa

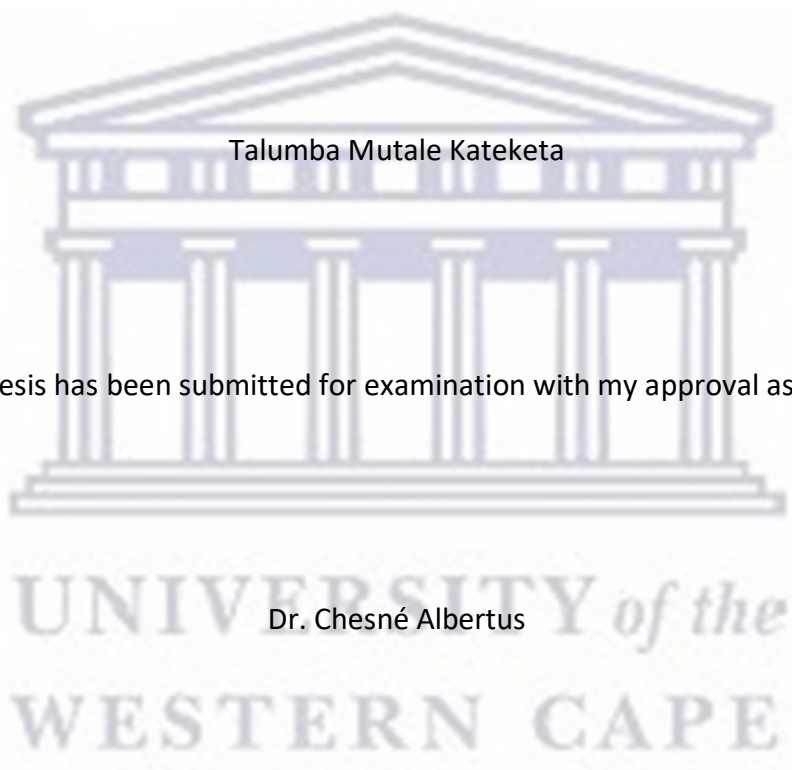
**UNIVERSITY of the
3515195
WESTERN CAPE**

Supervisor: Dr Chesné Albertus

November 2021

DECLARATION

I, **Talumba Mutale Kateketa**, declare that the thesis titled '**The role of criminal prosecution in curbing xenophobic attacks in South Africa**' is my original work and that all sources I have used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College or other institution of learning for examination or other awards.



November, 2021.

ACKNOWLEDGMENTS

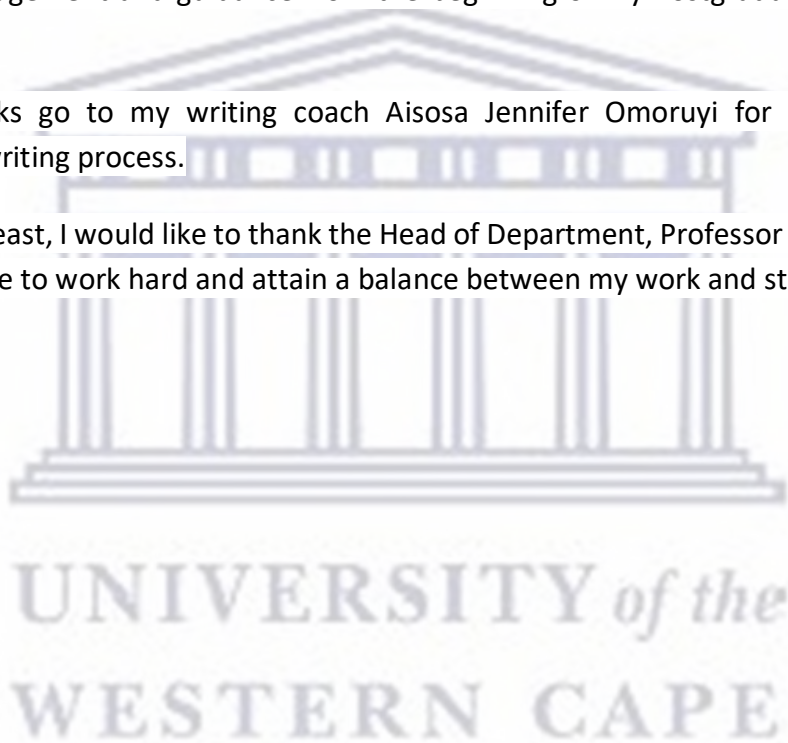
First and foremost, I would like to thank God for his grace and sustenance throughout my studies.

Secondly, a special thank you goes to the Law Faculty of the University of the Western Cape for awarding me a scholarship to pursue my Postgraduate studies.

I would like to extend a big thank you to my supervisor Dr. Chesné Albertus for her kindness, patience, encouragement and guidance from the beginning of my Postgraduate studies to the end.

My special thanks go to my writing coach Aisosa Jennifer Omoruyi for walking with me throughout the writing process.

Last but not the least, I would like to thank the Head of Department, Professor Patricia Lenaghan for challenging me to work hard and attain a balance between my work and studies.



DEDICATION

I dedicate my thesis to God, for giving me the grace to be able to start and complete this thesis. Had it not been for his grace and strength, I would have given up prior to completion.



KEYWORDS

Xenophobia

Afrophobia

Nationality

Discrimination

Punishment

Sentencing

Prosecution

Sensitisation

Deterrence

Hate speech



ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human Rights
AFCFTA	African Continental Free Trade Area
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
NAP	National Action Plan
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SACU	Southern African Customs Union
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
UNHCR	United Nations Convention and Protocol Relating to the Status of Refugees

UNIVERSITY *of the*
WESTERN CAPE

TABLE OF CONTENTS

Declaration	i
Acknowledgments.....	ii
Dedication.....	iii
Keywords.....	iv
Abbreviations and Acronyms.....	v
CHAPTER 1 - INTRODUCTION AND OVERVIEW OF XENOPHOBIA IN SOUTH AFRICA	1
1.1 Introduction and Background.....	1
1.2. South Africa's responses to xenophobia.....	9
1.3. Problem Statement	12
1.4. Research Questions.....	18
1.5. Objectives.....	19
1.6. Significance of the study.....	19
1.7. Literature Review	19
1.8. Methodology	23
1.9. Limitation of the Study.....	23
1.10. Chapter Outline	24
CHAPTER 2 - THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK THAT PROTECTS PERSONS AGAINST XENOPHOBIA IN SOUTH AFRICA	25
2.1. Introduction	25
2.2. International law instruments which protect the rights of foreign nationals.....	26
2.2.1. The Universal Declaration of Human Rights	26
2.2.2. International Covenant on Civil and Political Rights	30
2.2.3. The International Covenant on Economic, Social and Cultural Rights	31

2.2.4. The International Convention on the Elimination of All Forms of Racial Discrimination.....	33
2.2.5. United Nations Convention and Protocol Relating to the Status of Refugees.....	36
2.2.6. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	38
2.3. Regional framework on the protection of foreign nationals.....	41
2.3.1. Europe.....	41
2.3.1.1. The European Convention on Human Rights.....	41
2.3.1.2. Protocols to the ECHR.....	43
2.4. Regional framework on the protection of foreign nationals in African countries.....	44
2.4.1. The African Charter on Human and Peoples’ Rights.....	44
2.4.2. Southern African Development Community.....	47
2.4.3. Southern African Customs Union.....	48
2.4.4. The African Continental Free Trade Area	49
2.5. Domestic Law aimed at the protection of foreign nationals in South Africa.....	49
2.5.1. The South African Police Act Act.....	51
2.5.2. The National Prosecuting Authority Act.....	51
2.5.3. The Refugee Act.....	52
2.5.4. The Immigration Act.....	54
2.5.5. Promotion of Equality and Prevention of Unfair Discrimination Act.....	55
2.5.6. The Protection from Harassment Act.....	58
2.5.7. Prevention and Combating of Hate Crimes and Hate Speech Bill.....	59

2.6. Conclusion.....	60
----------------------	----

CHAPTER 3 - LEGAL MEASURES AGAINST XENOPHOBIA: AN ANALYSIS OF THE LEGAL FRAMEWORK OF RUSSIA AND SOUTH AFRICA.....62

3.1. Comparative Jurisdictions.....	62
3.2. Xenophobia in Russia during the 1990s.....	62
3.2.1. Investigation and Prosecution motivated by Xenophobia in Russia.....	66
3.2.2. Russia’s Legal System.....	67
3.2.3. The Russian Constitution.....	67
3.2.4. System of Governance.....	69
3.2.5. Political Challenges.....	69
3.2.6. Social and Economic Challenges	70
3.3. Russia’s Response to Xenophobia.....	71
3.4. South Africa’s Response to Xenophobia.....	73
3.5. The Russian Federal Law on Police.....	74
3.6. The Criminal Code of the Russian Federation.....	77
3.7. Conclusion.....	81

CHAPTER 4.....83

4.1. Recommendations and Conclusion.....	83
4.1.1 Recommendations.....	83
4.1.2 Conclusion.....	89

Bibliography.....91

CHAPTER 1

INTRODUCTION AND OVERVIEW OF XENOPHOBIA IN SOUTH AFRICA

1.1. Introduction

'Xenophobia' is defined as the

fear or hatred of foreign nationals by citizens of a country, which can be observed in attitudes and behaviour that is discriminatory and often accompanied by violence and abuse.¹

Xenophobic attacks on foreign nationals are not a new phenomenon in South Africa. It is endemic and persistent. Notwithstanding these realities, very little is known in the public domain about the criminal justice responses to such attacks. For this and other reasons, which will become clearer later, the research analyses the role of the criminal justice system in curbing xenophobic violence in South Africa. The research further scrutinises whether there are laws that address the problem of xenophobia adequately. Furthermore, it is considered whether there have been prosecutions of crimes motivated by xenophobia? To this end, it is necessary to first contextualise the motives for such attacks and to consider the state's responses to date.

To understand the motives for xenophobic attacks, it is useful to consider who the main or common perpetrators are. The perpetrators of xenophobic violence are usually young, black, indigent South African men who attack black foreign nationals from other African countries who reside in slums and poor residential neighbourhoods.² Research shows that ostensible or real economic threats such as poor service delivery and unemployment exist more in informal settlements and may seemingly be a motivation for xenophobic attacks.³ This, however, does not preclude the possibility that xenophobic tendencies are perceived in more affluent communities

¹ Solomon H & Kosaka H 'Xenophobia in South Africa: Reflections, Narratives and Recommendations' (2013)2(2) *Southern African Peace and Security Studies* 5.

² Hickel J 'Xenophobia in South Africa, Order, Chaos and the Moral Economy of Witchcraft' (2014)29(1) *Cultural Anthropology* 118.

³ Tevera D 'African Migrants, Xenophobia and Urban Violence in Post-apartheid South Africa' (2013)7 *Xenophobia and Urban Violence* 17.

and even the workplace or among those with formal education. There is evidence to show that foreign nationals are also discriminated against when gaining access to employment, health care, banking services, and accommodation to mention only a few.⁴ It is believed by some that xenophobic attitudes appear to be more prevalent among those with less formal education.⁵ This may imply that South Africans responsible for xenophobic violence may be persons who are either less informed or completely uninformed on the reasons why such attacks should not occur or be tolerated.⁶ Very often as shall become clearer later in this thesis, the perpetrators of violent attacks are the proverbial ‘foot soldiers’ of powerful public figures with sinister motives. There is evidence to show that the attackers are sometimes not aware of the influence that such powerful public figures or community leaders have on them.

Apart from the dangerous rhetoric such as foreign nationals being depicted as ‘job stealers’ through humiliating images in articles,⁷ which may influence perpetrators of xenophobic violence, it must be noted that prior to 1990, xenophobia was articulated in the form of unsympathetic anti-migration laws which preferred white labour immigrants, but discouraged a black immigrant workforce by not allowing them to be integrated into South African communities.⁸ The Mozambican and Lesotho apprentice workers, for example, were negatively affected by these race principles that were uncoded in the early 1990s.⁹ Xenophobic tendencies were expressed through undesirable naming of foreign black Africans as ‘Amakwerekwere’ which in English means a foreign visitor to a township.¹⁰ The word ‘Amakwerekwere’ signified ‘other’, meaning they were segregated.¹¹ It is contended here that the ‘othering’ of black immigrants was

⁴ United Nations High Commission for Refugees Report 2015-*Protection from Xenophobia* (2015)20.

⁵ Hickel J (2014)118.

⁶ Centre for Unity in Diversity Event Report (2019)-*Xenophobia and South Africa* (2019)2.

⁷ Tevera D (2013)16.

⁸ Wamundiya A ‘Xenophobia in South Africa-a Brief Summary’ (2017) available at https://www.canoncollins.org.uk/sites/canoncollins.org.uk/files/alice_wamundiya_on_xenophobia.pdf (accessed 21 March 2020).

⁹ Wamundiya A (2017).

¹⁰ Love H ‘Your Dictionary’ available at <https://www.yourdictionary.com/kwerekwere> (accessed 19 October 2020)

¹¹ Wamundiya A (2017).

not coincidental and that the anti-immigration laws planted the seed for some South Africans' xenophobic beliefs about other Africans.

Despite the state's seemingly intolerant attitude towards foreign nationals, the South African borders have been opened in recent years and this has created a passage for an influx of immigrants into South Africa.¹² The black apprentices who migrated to South Africa settled in communities where black South Africans resided. Many South Africans regarded the Africans from other African countries as successful, while they as citizens struggled to survive.¹³ Perhaps some South Africans believed that the 'success' of foreign nationals had been attained at their expense (as will become clearer later in this chapter). It may be for this reason that, between 2000 and 2017, black immigrants were targets of serious xenophobic violence.¹⁴ These brutal attacks on foreign nationals were perceived to be motivated by foreign nationals' economic success.¹⁵ The main victims were foreign nationals who owned small businesses, such as small convenience shops in informal settlements. The belief was that these small business owners were thriving, while many black South Africans lived in deep poverty.¹⁶ The fact that foreign nationals own shops and are perceived to make bigger profits than their South African counterparts continues to spur xenophobic attacks on foreign national traders in townships.¹⁷

In addition to perceived economic success and the belief that citizens must compete with foreign nationals for limited services and resources, some South Africans also believe that foreign nationals are responsible for bringing diseases such as HIV/AIDS to South Africa.¹⁸ Whilst there is

¹² Crush J (ed) & Ramachandran S *Xenophobic Violence in South Africa: Denialism, Minimalism, Realism* (2014)11.

¹³ Crush J 'The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa' (2008)50 *Southern African Migration Project* 49.

¹⁴ Wamundiya A (2017).

¹⁵ Crush J (2008)49.

¹⁶ International Centre for Migration Policy Development Report 2017- *South Africa Case Study: The Double Crisis-Mass Migration From Zimbabwe And Xenophobic Violence in South Africa* (2017)

26. The migration of foreign nationals into local communities brought them in close contact with local counterparts and caused current tensions concerning foreign nationals. (See Wamundiya 'Xenophobia in South Africa-a Brief Summary' (2017).

¹⁷ Tevera D (2013)16-17.

¹⁸ Crush J & Ramachandran S (2014)3. Another cause of attacks on foreign nationals is the allegation that foreign nationals indulge in unlawful activities and should thus not be protected and enjoy any services. (See Wick 'Xenophobic Violence in Democratic South Africa' (2015).

not an abundance of research that documents these beliefs as motives for xenophobic violence, they are frequently cited by the media.¹⁹ Another motive for xenophobic attacks which has been cited is the perception that male foreign nationals easily attract South African women as partners and are, therefore 'stealing' them from South African men.²⁰ Though there is a dearth of research into this issue, it cannot be gainsaid that the belief does exist and is prevalent amongst some communities.

There are, however, a myriad of reasons which have been cited as motives for xenophobic attacks on foreign nationals in South Africa. Some of these motives will be briefly referred to later in this chapter. Furthermore, some of the most recent responses to such xenophobic attacks will be discussed so as to contextualise the need for an analysis of the potential role which the criminal justice system may play in addressing the issue.

In addition to the causes of xenophobia that have been emphasised above, the poor or lack of service provision and rivalry for available resources are also motives for xenophobic violence.²¹ Put differently, it would seem that some South Africans believe that they have to compete, unfairly so, with foreign nationals for government services and already limited resources. Whilst this may be true in many instances, it is contended that citizens' dissatisfaction with the government is not a justification for violence against foreign nationals. Citizens ought rather to embrace the legal processes available to them to demand better services from the government.

In garnering an understanding of what motivates xenophobic violence, the historic structural inequalities created under the apartheid regime should not be overlooked. Black South Africans suffered the brunt of substandard education, limited health care services, poor housing, and discrimination in terms of jobs under apartheid. In light of these realisations, it seems ironic that,

¹⁹ Tevera D (2013)16.

²⁰ International Organization for Migration Report 2009-*Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009)22.

²¹ Kafwimbi T, Banaszhak K, Khan S 'et al' 'Violation of Human Rights of Disadvantaged and Vulnerable Refugees' (2010)1(5) *International Journal of Sustainable Development* 68.

they use xenophobic attacks against black foreign nationals to express their continued exasperation in a democratic dispensation.²²

Despite the motives for xenophobic attacks, the fact that many perpetrators are frequently not held criminally liable for these attacks strengthens the call that such acts ought to be taken seriously by the state.²³ The criminal justice system should hardly be reticent because the victims are not South African citizens. Prosecutions for crimes motivated by xenophobia are not common despite the prevalence of such crimes. In the case of *Said and Others v The Minister of Safety and Security and others*, this fact becomes evident.

In the case of *Said and others v The Minister of Safety and Security and others*, there was a flare-up of xenophobic attacks in Zwelethemba in 2008 where some refugees from Congo, Somalia, and Ethiopia owned shops. These refugees' shops were looted by community members and they lost their source of income.²⁴ In addition, some victims' were assaulted, suffered trauma, and were banished from their homes.²⁵ It was for this reason that the applicants alleged that acts of unfair discrimination had been committed against them which amounted to xenophobia.²⁶

The applicants alleged that the police failed to protect them from being attacked and their shops from being looted, whilst they had seen the police guarding South African-owned shops.²⁷ They used section 9 of the Constitution to contend against the respondents.

The South African Human Rights Commission (SAHRC) having an interest in the matter were tasked by the court to investigate what happened during the sporadic attacks against foreign nationals.²⁸ The applicants were not found to have been discriminated against as there was no evidence that the police had been guarding South African-owned shops.²⁹ This was reinforced by the fact that one of the victims also confirmed that they had a good relationship with the police

²² Crush J (2014)1-2.

²³ International Centre for Migration Policy Development Report (2017)64.

²⁴ *Said and Others v The Minister of Safety and Security and Others* (EC13/08) unreported judgment handed down on 7 December 2011, Paragraph 1.

²⁵ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 4.

²⁶ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 7.

²⁷ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 12.

²⁸ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 11.

²⁹ *Said and Others v The Minister of Safety and Security and Others* (2011) Paragraph 44.

and that prior to the attacks the police carried out regular checks on foreign nationals and showed concern for their safety.³⁰ This further confirmed that the police had not discriminated against foreign nationals in general.

It was, however, acknowledged that the police failed to protect one business owned by a foreign national from being completely destroyed.³¹ The police also failed to arrest the perpetrators.³² Their failure was exacerbated by a lack of resources and manpower. In addition, the Court found that the police had been insensitive to the traumatised victims as they (the police) advised them to flee when they tried to report the attacks.³³

Investigations were carried out after these incidents but were inadequate and very few perpetrators if any may have been arrested or prosecuted.³⁴ The Court found the police's conduct to be a miscarriage of justice and neglect of their duties. The police thus failed in their constitutional duty as prescribed in section 205(3) of the Constitution which is to safeguard the property, avert, intercede and investigate crime.³⁵

The SAHRC having been tasked to carry out investigations gave a report to the court detailing *inter alia* that there was fruitless communication between the victims and the police as the police opened one public violence docket for all the victims.³⁶ The police confirmed that the product of the investigations was incomplete. In addition, there were no non-governmental organisations (NGOs) in Zwelethamba supporting foreign nationals at the time.³⁷ Training in language and communication of foreign nationals was recommended.

In conclusion, the applicants failed to prove that they had been discriminated against by the respondents. The litigation, however, highlighted the plight of many foreign nationals insofar as the conduct of the police is concerned. Poor police investigations, a lack of interest in the safety and protection of foreign nationals and their property tend to deepen their struggle. The

³⁰ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 42.

³¹ *Said and Others v The Minister of Safety and Security and Others* (2011) Paragraph 52.

³² *Said and Others v The Minister of Safety and Security and Others* (2011) Paragraph 52.

³³ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 47.

³⁴ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 54.

³⁵ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 55.

³⁶ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 78.

³⁷ *Said and Others v The Minister of Safety and Security and Others* (2011) paragraph 85.

outcome of this case alludes to why there have not been many prosecutions following xenophobic incidents in South Africa. Apart from the failure to find that the applicants had been discriminated against, the fact that no one was charged for arson, looting, or *crimen injuria* speaks volumes to the contention that the criminal justice system often fails victims of xenophobia.

Tevera opines that urban South Africans display reluctance to accept foreign nationals into their communities.³⁸ Their reluctance is evidenced by xenophobic attacks on communities of foreign nationals, their livelihoods, and property.³⁹ Some South Africans also believe that foreign workers take employment openings that are potentially theirs. They allege that foreign nationals tend to accept low wages and do not fight for higher earnings and better conditions of employment.⁴⁰ Employers may therefore prefer to appoint submissive foreign nationals over assertive South African nationals to avoid dealing with the demands of citizens.

A less obvious motive for xenophobic attacks is incitement by some community and political leaders. The belief that foreign nationals cause hardship to South Africans may further spur xenophobic rhetoric from leaders. The incitement by leaders and lack of political will to combat xenophobic violence may also possibly account for the geographical spread of the violence. Wick contends that some leaders have instigated xenophobic attacks through their comments.⁴¹ Statements by local leaders such as a former Deputy Minister of Police, that 'foreign Africans are sabotaging South Africa's economy and threatening to overrun the country', incite black South African nationals to attack foreign nationals.⁴² It was further reported by the Democratic Alliance mayor at the time (Herman Mashaba) that his party had an election platform to 'get tough on

³⁸ Tevera D (2013)14.

³⁹ Wamundiya A (2017).

⁴⁰ Wick J 'Xenophobic Violence in Democratic South Africa' (2015) *SAHO* available at <https://www.sahistory.org.za/article/xenophobic-violence-south-africa> (accessed 9 April 2020).

⁴¹ Wick J (2015).

⁴² Fabricius P 'SA government flounders in the face of xenophobic attacks' *Daily Maverick* 5 April 2019 available at <https://www.dailymaverick.co.za/article/2019-04-05-sa-government-flounders-in-the-face-of-xenophobic-attacks/> (accessed 31 March, 2020).

foreign nationals'.⁴³ At this juncture, it may be argued that it could be possible that incitement by leaders may be an indication of why the criminal justice system does not always respond seriously to xenophobic attacks. There may be a lack of political will to do so. At community-level for example, the police may be influenced by the xenophobic rhetoric and therefore fail to investigate properly. Poor investigations in turn lead to insufficient evidence to prosecute.

The incitement by leaders and lack of political will to combat xenophobic violence may also account for the geographical spread of the violence. There have been extensive xenophobic outbreaks in Gauteng, Western Cape, Free State, Limpopo, and Kwa-Zulu Natal since 1994.⁴⁴ At the end of 1994, the homes and belongings of migrants who were alleged not to have legitimate residence documents, were destroyed by adolescent gangs.⁴⁵

Between 2008 and 2015, an upsurge of xenophobic attacks occurred in Johannesburg.⁴⁶ Numerous houses were scorched as well as shops.⁴⁷ Apart from many people being wounded, thousands were chased out of communities where they resided and worked.⁴⁸ The problem of xenophobia has thus been enduring and yet it was only the recent flare-up of xenophobic attacks in 2019 which urged an international diplomatic battle between South Africa and another African state, namely, Nigeria.⁴⁹ South Africa cancelled its diplomatic missions in Lagos and Abuja provisionally while Nigeria declared strategies to stay away from a major economic summit on trade in Cape Town.⁵⁰ Demonstrations in several African countries indicated the disapproval of

⁴³Fabricius P 'South Africa: Attacks on Foreign Nationals' Daily Maverick 5 April 2019 available at <https://www.hrw.org/news/2019/04/15/south-africa-attacks-foreign-nationals> (accessed 31 March 2020).

⁴⁴ Wick J (2015).

⁴⁵ Wick J (2015).

⁴⁶ Wick J (2015).

⁴⁷ Crush J (2008)11.

⁴⁸ Wamundiya A (2017). During the xenophobic attacks of 2008, some women were raped by a bunch of hooligans, men and women were knifed and others thrown in flames and died. (See Kafwimbi T, Banaszhak K, Khan S 'Violations of Human Rights of Disadvantaged and Vulnerable Refugees' (2010)68.

⁴⁹ Holmes C 'What's behind South Africa's xenophobic violence last week'? available at <https://www.washingtonpost.com/politics/2019/09/09/whats-behind-south-africa-s-xenophobic-violence-last-week/> (accessed 7 June 2020).

⁵⁰ Holmes C (2019). Further protests against the violence were also seen through the withdrawal of the Zambian, Nigerian and Malaysian soccer teams from the scheduled matches (See Holmes C 'What's behind South Africa's xenophobic violence last week'? (2019)). The National association of Nigerian students organised protests that involved restraining of South African companies (See Krippahl 'Xenophobia in South Africa strains international

African countries against South Africa's failure to combat xenophobic attacks.⁵¹ Yet, the question still remains as to what has been done to address and prevent such attacks from recurring. Next, some of the South African government's responses to xenophobia will be discussed briefly.

1.2. South Africa's responses to xenophobia

One of the earliest attempts to address xenophobia was the Roll Back Xenophobia Campaign. This campaign was conceived in 1997.⁵² The intended purpose was to advance a communal and broadcasting education programme and condemn the unfounded bigotry and antagonism towards non-nationals.⁵³ Whilst the idea seemed promising for the eradication of xenophobia, the campaign, unfortunately, did not ensue and the continued xenophobic attacks is evidence of the government's failure to act.⁵⁴

Years later, it was reported that another attempt at dealing with xenophobia was made when, the South African Human Rights Commission (SAHRC) in partnership with the United Nations High Commissioner for Refugees (UNHCR) and the National Consortium on Refugee Affairs (NCRA), recognised xenophobia as the main source of concern to human rights and democracy in South Africa.⁵⁵ These efforts, unfortunately also yielded no notable or significant positive changes as xenophobic attacks continued to occur and intensify.

It must be mentioned that in 2002, the then-new Immigration Act 13 of 2002, was passed. Section 3(f) was aimed at taking measures against xenophobia by educating the Department of Home Affairs officials on the issue. Such officials would have had to work with the Human Rights

relations'(2019)). Demonstrations against diplomatic missions and South African businesses also occurred in the Democratic Republic of Congo (See Holmes (2019)).

⁵¹ Fabricius P (2019).

⁵² Mbecke P 'Anti-Afrophobia Policy Shortfall and dilemma in the New Partnership for Africa's Development and South Africa' (2015)11(4) *The Journal for Transdisciplinary Research in Southern Africa* 78.

⁵³ Parsley J 'We Are Not Treated Like People: The Roll Back Xenophobic Campaign in South Africa (2000)17 *The Humanitarian Exchange Editorial* 9.

⁵⁴ Mbecke P (2015)78.

⁵⁵ Mbecke P (2015)78.

Commission.⁵⁶ The idea of educating officials seemed positive, but has not yielded notable positive results as foreign nationals continue to complain of poor treatment by officials and xenophobic violence continues.

There are some notable examples of police intervention in response to some xenophobic attacks. One such example followed the 2008 attacks in a Cape Town township called Masiphumelele, where goods were stolen from foreign nationals who owned shops.⁵⁷ The police and members of the community went to retrieve the goods from the homes of the perpetrators.⁵⁸ This was a notable positive intervention by the police, but unfortunately, it has not been sustained and this appears to have been a once-off win in the fight against xenophobia. Furthermore, despite the initial positive response by the police, the perpetrators were not arrested.⁵⁹ This is an indication that criminal justice responses ought to be comprehensive so as to at least have some deterrent effect. The retrieval of the stolen goods alone did not inhibit future attacks.

It is noteworthy that during xenophobic attacks that prevailed between May 2008 and 2015, the police were reported to lack the necessary skill to disperse the attackers and were deemed to be ineffective.⁶⁰ Bekker and Eigelaar-Meets claim that there was a poor selection of police officers for this task.⁶¹ The selection of officers seemed to be regarded as unassertive and unresisting.⁶² Furthermore, the government's delayed response to the attacks appeared to have created a free reign for perpetrators.⁶³ Insofar as police responses were concerned, it must be mentioned that at times the police appeared to be instrumental in the crimes perpetrated against foreign

⁵⁶ Crush J (2008)6.

⁵⁷ International Organization for Migration Report (2009)35.

⁵⁸ International Organization for Migration Report (2009)35.

⁵⁹ International Organization for Migration Report (2009)35.

⁶⁰ Bekker S, Eigelaar-Meets I & Eva G 'et al' *Xenophobia and Violence in South Africa: A desktop of the trends and a scan of explanations offered* (2008)49.

⁶¹ Bekker S 'et al' (2008)49.

⁶² Bekker S 'et al' (2008)49. Shops owned by nationals from Somali and Bangladesh were looted in Soweto in 2015. It was disclosed that present at the scene were police officers who actively stole goods and helped the attackers to break in the shops during the devastating attacks on foreigners. (See Wick (2015)).

⁶³ Kafwimbi T 'et al' (2010)68. The government only mobilised an army only after many victims had been wounded, deaths and looting of property had occurred. (See Bekker S, Eigelaar-Meets I & Eva G 'Xenophobia and Violence in South Africa: A desktop of the trends and a scan of explanations offered' (2008)48.

nationals. In an area called Zondi, for example, the police coordinated the looting of shops owned by foreign nationals.⁶⁴ The blatant act of disregard for the law undeniably deserved swift, definitive and transparent reaction from the government. Whether the police in these crimes were held accountable is, however, not known as such information was never made available to the public.

Crush correctly asserts that South Africa has not considered past incidents of xenophobic violence as serious enough to prosecute the perpetrators.⁶⁵ This is evidenced by the fact that of the 1000 arrests which were made during the 2008 xenophobic attacks, only 105 perpetrators were prosecuted and 70 perpetrators were found guilty.⁶⁶ However, only one individual has been sentenced for one of the sixty-three murders committed at the time.⁶⁷ Although anecdotal accounts show that sexual violence occurred, no one was sentenced for rape. Prosecutors were of the view that their cases were not strong enough to hold up in court and dropped the charges altogether.⁶⁸ The National Prosecuting Authority (NPA) also mentioned challenges such as failure to trace witnesses and difficulties in finding interpreters.⁶⁹ Of even greater concern is the fact that suspects were often freed by the police due to persuasion from communities and local leaders.⁷⁰ Consequently, the manner in which the South African criminal justice system dealt with these attacks leaves an open door for violence against foreign nationals.⁷¹ In a nutshell, South Africa has disregarded the severity of these crimes that stem from xenophobia and has done nothing to hold the perpetrators liable. This ultimately portrays a failure of the criminal justice system.

⁶⁴ Wick J (2015).

⁶⁵ Crush J (2008)8.

⁶⁶ Kafwimbi T 'et al' (2010)69.

⁶⁷ Mutanda D 'Xenophobic Violence in South Africa: mirroring economic and political development failures in Africa'. (2017)15(3) *African identities* 285.

⁶⁸ Kafwimbi T 'et al' (2010)69.

⁶⁹ Mutanda D (2017)285.

⁷⁰ Misago JP *Migration, Governance and Violent Exclusion: Exploring the determinants of Xenophobic Violence in Post-Apartheid South Africa* (PHD thesis, University of Witwatersrand, 2016)217.

⁷¹ Kafwimbi T 'et al' (2010)69.

Between 2008 and 2015, an estimated 357 foreign nationals who were killed as a result of xenophobic attacks were not even reported to the police.⁷² This may be an indication that the victims have no faith in the South African criminal justice system. On the other hand, all the foreign perpetrators that killed three South Africans in 2015, during xenophobic attacks were arrested.⁷³ However, it is not known whether they were convicted and sentenced.

After the xenophobic attacks that prevailed between 2008 and 2015, the state's response was elusive, and they denied the scope and gravity of the attacks.⁷⁴ The government denied both the magnitude and the grave nature of the outbreaks in Alexandra, Diepsloot, and elsewhere. The government also denied that the attacks were of a xenophobic nature.⁷⁵ They claimed that the perpetrators were ordinary criminals. Thus, the state found justification for criminal and gang behaviour.⁷⁶ This denial of the real motive for the attacks is dangerous as it may signal a condonation of such crimes. The lack of documented and accessible data on xenophobic attacks and criminal prosecutions as well as redress to victims, furthermore, speaks volumes to the government's lack of commitment to curbing xenophobia.

1.3. Problem Statement

The persistent problem of violence against foreign nationals in South Africa justifies the need for an analysis of the criminal justice system's challenges and response(s) to xenophobic attacks. The reality that many perpetrators are often not held criminally responsible for such attacks bolsters the contention that violent acts motivated by xenophobia ought not to be treated as ordinary offences.⁷⁷ Despite this, an accused may not be found guilty of a crime if the law has not in clear terms proscribed the type of conduct with which he is charged as a crime.⁷⁸ The principle further

⁷² Mutanda D (2017)285.

⁷³ Mutanda D (2017)285.

⁷⁴ Bekker S 'et al' (2008)28.

⁷⁵ Bekker S 'et al' (2008)29.

⁷⁶ Misago JP (2016)88.

⁷⁷ International Centre for Migration Policy Development Report (2017)64.

⁷⁸ Snyman CR *Criminal Law* 6 ed (2014)36.

prescribes that crimes should not be articulated unclearly and the definition of the crime should be interpreted specifically rather than generally. Thereafter, the appropriate verdict must be executed regarding the method and degree after the accused has been found guilty. The court should not enforce any sentence other than the one legally authorised.⁷⁹ Bearing these principles in mind, it is appropriate to consider how the criminal justice system may deter and effectively prosecute crimes motivated by xenophobia.

There often appears to be a problem of prejudice against foreign nationals. This settled way of thinking is ingrained in some police officers who believe that foreign nationals who do not possess legal documents (often as a result of the delay in administrative processes) are criminals. This stereotyping deepens the oppression of foreign nationals.⁸⁰ This may contribute to black South African communities attacking foreign nationals and claiming that the government is doing nothing about illegal immigrants.⁸¹

Xenophobia in itself is not a crime. However, it is the motivation for serious, persistent, and widespread crime. While the motive for the crime in itself cannot be punishable in terms of law, the state needs to provide practical and legal solutions on how to deal with crimes that stem from xenophobia.

At various junctures of the criminal justice system, there appears to be hindrances to the successful prosecution of crimes that stem from xenophobia. Research shows that the National Prosecuting Authority (NPA) mentioned challenges such as the failure to trace witnesses and difficulties to find interpreters during investigations of xenophobic attacks.⁸² This calls for the training of officials working for the NPA as well as employing interpreters who can translate in different foreign languages. It is therefore necessary to ascertain whether such hindrances are occasioned by the law itself or by law enforcement.

⁷⁹ Snyman CR (2014)37.

⁸⁰ International Organization for Migration Report (2009)16-17

⁸¹ International Organization for Migration Report (2009)18.

⁸² Mutanda D (2017)285.

The prevailing legislation in South Africa such as the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998, the Protection from Harassment Act 17 of 2011, the Refugee Act 130 of 1998, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 fail to address the problem of xenophobia as will be discussed below.

Section 27 (b) of the Refugee Act of 1998 provides that, a refugee should benefit from legal protection which comprises the rights enshrined in Chapter 2 of the Constitution.⁸³ However, these provisions have not been upheld by the South African government as the rights of migrants are not respected in practice.⁸⁴ Thus, refugees are victims of the violation of their right to dignity, freedom and security of a person, as well as the right to life during xenophobic violence.

Many foreign nationals are mentally, psychologically, and physically harassed or face economic harm as a result of xenophobic attacks. Section 2(1) of the Protection from Harassment Act 17 of 2011 allows a complainant to apply for a protection order.⁸⁵ However, perpetrators of xenophobic violence are often not known to the complainant. This is due to the fact that xenophobic attacks occur in the midst of confusion and chaos. Section 5 of the Protection from Harassment Act requires a complainant to include the name and address of the respondent.⁸⁶ It is difficult and often impossible for a victim of xenophobic violence to rely on the Act and make use of a protection order. The Protection from Harassment Act does not emphasise how foreign nationals who are harassed during xenophobic attacks can be protected and enjoy the rights embodied in the Constitution. The right to freedom and security of a person is therefore not given reasonable protection.⁸⁷

Apart from the challenges presented by section 5 of the Protection from Harassment Act, it may also be possible that foreign nationals may be afraid to report crime as this will involve interaction with the police. The reality is that many foreign nationals do not have the required legal

⁸³ The Refugee Act 130 of 1998.

⁸⁴ Mbecke P (2015)76.

⁸⁵ The Protection from Harassment Act 17 of 2011.

⁸⁶ The Protection from Harassment Act (2011).

⁸⁷ Constitution of the Republic of South Africa, 1996.

documentation to reside in South Africa and may face deportation if this comes to the attention of the authorities. They would therefore tolerate the crimes committed against them even if it amounts to grave violations of their rights. This may even be the case for immigrants who do possess legal documentation. They may be apprehensive of interacting with the police based on the well-known fact that the police officers themselves may have xenophobic beliefs.

Section 2(v) of the Promotion of Equality and Prevention of unfair Discrimination Act 4 of 2000, forbade incitement to cause harm against people based on ethnicity.⁸⁸ This section, which may have offered some protection to foreign nationals was omitted when the Act was amended. Some may reasonably regard the omission as a mistake and a loss to those who advocate against xenophobia. Pessimistically, some may even view the omission as an indication of a lack of seriousness in combating xenophobia. The aforementioned suspicion may be strengthened by the fact that in the past, some political leaders have instigated xenophobic attacks against foreign nationals in order to win popularity during elections.⁸⁹

The Immigration Act 13 of 2002, does not have any section that explicitly mentions the training of the police. It is expected that the police, like all other departments affected by the Act, should fulfil their duties with the highest applicable standards of human rights protection. As a result, the police have taken it upon themselves to embark on race and discrimination training.⁹⁰ However, research was conducted to discover the degree to which police officers had acquired training on race and discrimination. The findings show that only 37.7 percent received the training in 2006.⁹¹ There is no further research that reveals training of officers specifically on race and discrimination or other issues related to xenophobia. The lack of training on these issues may be a contributing factor to the lack of an effective police response to xenophobic attacks.

⁸⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁸⁹ International Organization for Migration Report (2009)31.

⁹⁰ Adjai C & Lazaridis G 'People, State and Civic Responses to Immigration, Xenophobia and Racism in the New South Africa' (2013)15(2) *Journal of International Migration and Integration* 249.

⁹¹ Centre for the Study of Violence and Reconciliation Report 2006-*Diversity and Transformation in the South African Police Service: A study of police perspectives on race, gender and the community in the Johannesburg policing area* (2006)28.

The Immigration Act 13 of 2002 does not proscribe the consequences of crimes committed against immigrants by nationals of South Africa such as xenophobic attacks, yet such laws should depict measures that the state ought to take to protect immigrants in line with constitutional values.⁹² The Preamble of the Immigration Act 13 of 2002, levied a statutory obligation on government to challenge xenophobia in civil society and the public service.⁹³ However, this clause was omitted in the 2004 Immigration Amendment Act. The omission is rather curious but could probably not have meant that the government will not defy xenophobic behaviour.⁹⁴

According to Mojapelo, South Africa has prescribed legislation such as: the Promotion of Equality Act and Prevention of Unfair Discrimination Act 4 of 2000; Refugee Act 130 of 1998, the Protection of Harassment Act 17 of 2011 and the Immigration Act 13 of 2002.⁹⁵ However, he claims that there is no law against xenophobia. As a result, the response to xenophobia by state actors is camouflaged under other crimes such as murder, robbery, theft, assault, and defamation.⁹⁶ Yet, where such crimes are motivated by xenophobia the criminal justice system appears not to be responsive.

The Centre for the Study of Violence and Reconciliation has in the past associated xenophobic attacks to hate crime.⁹⁷ They allude to the fact that hate crimes cannot be seen as separate incidents as they send a message of hatred to the victim and affected persons.⁹⁸ The Prevention and Combating of Hate Crimes and Hate Speech Bill is at the time of writing awaiting promulgation into law.⁹⁹ It speaks to issues of racism, racial discrimination, xenophobia, hate

⁹² The Immigration Act 13 of 2002.

⁹³ The Immigration Act (2002).

⁹⁴ Adjai C 'et al' (2013)246.

⁹⁵ Reilly K 'The Role of Law in Curbing Xenophobia' (2015) available at <https://www.derebus.org.za/role-law-curbing-xenophobia/> (accessed 10 September 2020).

⁹⁶ Reilly K (2015).

⁹⁷ International Organisation for Migration Report (2009)13.

⁹⁸ International Organisation for Migration Report (2009)13.

⁹⁹ Masuku T 'Xenophobia, like racism must be treated as a crime' available at <https://issafrica.org/iss-today/xenophobia-like-racism-must-be-treated-as-a-crime> (accessed 2 October 2020).

crime and hate speech offences, in accordance with international law obligations.¹⁰⁰ If this Bill is promulgated into law and proper enforcement and implementation is done, it is highly likely to speak to the problem of crimes emanating from xenophobia to some extent.

The Prevention and Combating of Hate Crimes and Hate Speech Bill purports to promote values of equality and dignity and ensure the protection of these rights for all. In addition, the Bill purports to address issues of incitement, advocacy of hatred that section 16 of the Constitution does not extend to.¹⁰¹ The objective of the Hate Speech Bill is to prosecute individuals who commit the proscribed offences; publishing, propagating and advocating whatsoever is hurtful; encouraging and promulgating hatred based on various grounds which includes nationality, migrant or refugee status as well as ethnic or social origin will be convicted of an offence of hate speech.¹⁰² Section 6 of the Prevention and Combating of Hate Crimes and Hate Speech Bill prescribes the penalties that anyone found guilty of the transgressions subject to section 3 will incur, such as imprisonment, periodical imprisonment, a fine, correctional supervision or a suspended sentence. These are the common penalties for crime in South Africa and it must thus be questioned how these sanctions will deter xenophobic violence.

Once the Prevention and Combating of Hate Crimes and Hate Speech Bill becomes law, it may answer to some of the persistent problems of xenophobic attacks on foreign nationals. However, it must be borne in mind that South Africa has failed to sustain its obligations under national and international law.¹⁰³ South Africa is obliged to comply with international human rights instruments: which includes the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. These conventions in harmony with the Constitution create jointly reinforcing assurances of life, liberty, human dignity and security of the person.¹⁰⁴

In addition, these treaties do not allow discrimination based on nationality. South Africa as a party to international refugee conventions in harmony with the Refugee Act, has appended its

¹⁰⁰ Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018.

¹⁰¹ Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018.

¹⁰² Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018, s2 & s4.

¹⁰³ Kafwimbi T 'et al' (2010)69.

¹⁰⁴ Kafwimbi T 'et al' (2010)69.

signature to protect refugees and asylum seekers residing in the country. Refugee law is established on the principle to protect and South Africa's failure to prevent xenophobic attacks is a great disappointment and a shirking of its duties. Despite South Africa being party to these conventions, not much has been done to curb xenophobic attacks against foreign nationals.¹⁰⁵ The passing into law of the Prevention and Combating of Hate Crimes and Hate Speech Bill is, therefore, unlikely to be the proverbial silver bullet to problems of xenophobia. An analysis of the existing challenges and responses of the criminal justice system to xenophobic attacks is necessary.

The lack of effective legal responses to xenophobia is in itself, a major problem that appears to contribute significantly to the failure to combat the crimes which occur as a result. The South African government has ignored the advice given by the former commissioner of the United Nations for Human Rights Navin Pillay, to develop laws that would prevent the resurgence of xenophobic attacks.¹⁰⁶ This failure has been met by a recurrence of xenophobic attacks.¹⁰⁷ Thus there is a need for legal measures to address and eradicate xenophobic beliefs and perceptions. This research seeks to analyse the relevant laws and to identify and highlight some of the gaps which significantly impact xenophobia in South Africa and the failure to hold culprits criminally responsible.

1.4. Research Questions

What are the legal challenges (if any) to the prosecution of xenophobic attacks in South Africa?
What role does the police and the National Prosecuting Authority play in the successful prosecutions of xenophobic attacks in South Africa?

¹⁰⁵ Kafwimbi T 'et al' (2010)69-70.

¹⁰⁶ Mutanda D (2017) 283.

¹⁰⁷ Mutanda D (2017)283.

1.5. Objectives

An analysis of the challenges to the successful prosecution of xenophobic attacks.

A reflection on the role of the police and the NPA in ensuring successful prosecution of xenophobic attacks against foreign nationals.

1.6. Significance of the study

Xenophobia has become a growing phenomenon in South Africa. This study seeks to establish the role of criminal prosecutions in dealing with and curbing xenophobic attacks in South Africa. Many activists and researchers have addressed the possible solutions to combat xenophobia such as, the need for countries to value and adhere to human rights in the endeavour to achieve positive results. However, very few have reflected on how the prosecution of perpetrators of xenophobic attacks may impact the problem. It is vitally important that an assessment of the current laws be undertaken to gauge some of the effects they have on xenophobic attacks.

1.7. Literature Review

According to a 1998 survey of human rights awareness piloted by the Community Agency for Social Enquiry (CASE), awareness of the existence of the Bill of Rights is not significant among the South African population.¹⁰⁸ The lack of knowledge of their own constitutional rights and duties and that of others, may well be a contributing factor to the impunity with which foreign nationals are attacked. It is also reported that information dissemination initiatives have had minimal positive effects as they are not consistent but are interspersed only during the incidences of xenophobia.¹⁰⁹ Mbecke asserts that the media, though it has great potential to educate South Africans on immigration matters and on the rights of foreign nationals as well as on myths has not taken up the opportunity to do so.¹¹⁰

¹⁰⁸ Mbecke P (2015)76.

¹⁰⁹ Mbecke P (2015)76.

¹¹⁰ Mbecke P (2015)76.

Crush is of the view that there is a need for sensitisation on immigration and managed migration.¹¹¹ A comprehension that immigration has great benefits for South Africa is important and may ensure that perpetrators of xenophobic attacks do not act based on false beliefs.¹¹² In a multi-racial society, hatred and violence are frequently associated with institutionalised systems of an identity crisis, segregation and prejudice are prevalent in South Africa's social-political space.¹¹³ Akinola avers that almost everyone is a culprit of xenophobic actions. This includes residents, community leaders, public servants, political officials, bureaucrats, and law enforcement agents.¹¹⁴ Akinola claims further that the police and immigration departments in South Africa are regarded as ciphers of xenophobia as several of their officials are xenophobic.¹¹⁵ If law enforcers share the same xenophobic attitude as perpetrators, it may be expected that crimes against foreign nationals will persist and that the potential for criminal prosecution will be diminished. Much has, however, not been said or done to address this issue. It would seem that legal literature also only refers to the issues without interrogating the problem extensively.

There seem to be opinions that foreign nationals do not deserve the protection of the police as they are criminals.¹¹⁶ This calls for a sensitisation of the police to the plight of immigrants and they ought to play an educative role in the curbing of xenophobia. They ought to model a positive attitude towards immigrants. Little has, however, been written about this and this is where the significance of this study lies. The police as law enforcers in communities are arguably well placed to model positive behaviour towards foreign nationals and to debunk myths that inspire violence against them.

¹¹¹ Crush J (2008)9.

¹¹² Crush J (2008)9.

¹¹³ Akinola AO 'The South African xenophobic question: a reflection on complicity of state actors' (2018)7(1) *Journal of Conflict and Social Transformation* 66.

¹¹⁴ Akinola AO (2018)67.

¹¹⁵ Akinola AO (2018)55. Despite the fact that Akinola claims that the police and immigration departments in South African may be regarded as ciphers of xenophobia, he acknowledges that some have shown a great sense of concern for foreign nationals (See Akinola 'The South African Xenophobic Question: A Reflection on Complicity of State Actors' (2018)55).

¹¹⁶ Mutanda D (2017)283.

Some public servants reportedly deny foreign nationals access to services to which they are entitled. Law enforcement agents are also known for coercion, harassment, illogical detention, and selective implementation of the laws against foreign nationals.¹¹⁷ The education and training of such officials have unfortunately not enjoyed significant consideration in legal sources. Moreover, the law does not specifically provide guidance on how such officials may be held accountable for their conduct so as to inhibit such behaviour in the future.

According to Steinberg, when there is a xenophobic attack, the police lack enthusiasm and would start an investigation but later bury it without people knowing what happened to the case.¹¹⁸

A 2009 study showed that local leaders and the police were unenthusiastic to intercede on behalf of victims because they braced the community's unsympathetic attitudes towards foreign nationals.¹¹⁹ The apathy of leaders and law enforcers renders the fight against xenophobia fatal in any country. This does, however, not mean that nothing can be done. The law needs to provide for the accountability of leaders and law enforcement agents.

In addition to the apathy displayed towards the plight of foreign nationals, there is also some evidence of the police themselves being instrumental in the attacks on foreign nationals as pointed out earlier in this chapter. Some studies also have alluded to tenacious police harassment, and theft from small businesses owned by foreign nationals.¹²⁰ Despite these reports, officials engaged in such crimes are not known to be held accountable or prosecuted. Laws which specifically speak to this problem are necessary.

South Africa lacks a governance model which speaks to the complexities that proliferate xenophobic attacks.¹²¹ If the government commits to formulating policies and implementing projects to directly address the problems that lead to obstacles that prevent the curbing of

¹¹⁷ International Organisation for Migration Report (2009)2-3.

¹¹⁸ Steinberg J 'Xenophobia and Collective Violence in South Africa: A Note of Skepticism About a Scapegoat' (2018)61(3) *African Studies Review* 120.

¹¹⁹ International Organisation for Migration Report (2009)3.

¹²⁰ International Centre for Migration Policy Development Report (2017)63.

¹²¹ Misago JP (2016) vi.

xenophobic attacks, progress may be made. One of the major obstacles to gaining a better understanding of xenophobia and addressing it is the failure to create better access to research data on finalised xenophobia-related court cases. This is exacerbated by the government's failure to implement the idea of 'Special' courts that the government had recommended dealing with xenophobic related problems.¹²² These are major missed opportunities to curb xenophobia. It is submitted that the government can close the gaps that hinder successful criminal prosecutions and can stem the tide of xenophobia. The South African government ought to heed the media reports concerning xenophobia as opposed to ignoring it as in the past.¹²³ Moreover, the government should direct the police on how they ought to treat crimes against immigrants.¹²⁴

Misago and Loren, are of the view that the National Prosecuting Authority (NPA) and political leaders of diverse levels do not appear to be interested in holding the perpetrators of xenophobic violence liable.¹²⁵ Other researchers are of the view that a lack of conflict resolution tools may be a contributor to the recurring xenophobic attacks on foreign nationals.¹²⁶ Though the problems have been highlighted, the literature does not suggest possible solutions as will be explored in the study.

Akinola suggests that the police need to be mindful of their duties as their failure to fight crime intensifies xenophobic feelings and conduct.¹²⁷ Despite these statements, there appears to be no legal study that analyses the problem.

Mbecke avers that South Africa does not have steadfast anti-xenophobic policies despite having progressive legislation on numerous other issues.¹²⁸ Statements to this effect further highlight

¹²² Misago JP (2016)218.

¹²³ Adjai C 'et al' (2013)242.

¹²⁴ Adjai C 'et al' (2013)242.

¹²⁵ Misago JP 'Linking Governance and Xenophobic Violence in Contemporary South Africa' (2019)19(1) *African Journal on Conflict Resolution* 66.

¹²⁶ Misago JP (2016)215.

¹²⁷ Akinola AO (2018)75.

¹²⁸ Mbecke P (2015)76. The author of this article refers to xenophobia as afrophobia. He is of the view that xenophobic attacks occur between people of the same race. In this thesis, reference will be made to xenophobia.

the need for an analysis of the legal framework within which xenophobic crimes must be dealt with. While much is written about xenophobia as a motive for violent attacks, there is no significant consideration of the legal responses which ought to occur. For this reason, there is a need to undertake a study of the legal framework in this regard.

Akinola avers that SADC has failed to oppose xenophobia in South Africa.¹²⁹ Instead, SADC praised the Zuma administration for condemning the violence. The African Union has also not done anything concrete to condemn xenophobic violence in South Africa.¹³⁰ All these shortcomings cement the need for an analysis of the criminal justice system as proposed here.

1.8. Methodology

A desktop study was used for research done on this thesis. Primary sources such as regional and international instruments were used. Further analysis was done on case law. Secondary sources such as textbooks and journal articles were also used to enrich the study.

1.9. Limitation of the Study

The study was conducted in South Africa. It is limited to the legal criminal justice responses to xenophobia. In addition, the study is limited to an evaluation of the challenges to the police and the NPA as key players in the criminal justice system. Issues related to immigration statuses and the problems inherent in these processes are beyond the ambit of this study. Furthermore, this is a legal study that does not engage or assess in-depth the general attitudes concerning xenophobia. Finally, Russia is used as a comparative jurisdiction. Though the literature on Russia used in this study is available in English, it is acknowledged that some of the translations from Russian to English may not have been absolutely accurate.

¹²⁹ Akinola AO (2018)73.

¹³⁰ Akinola AO (2018)73.

1.10. Chapter Outline

Chapter 1 –Overview of the study

Chapter 1 commences with an introduction to the research area. It briefly provides a cursory overview of what motivates xenophobic attacks on foreign nationals. This is followed by a discussion of the responses from state actors, and the problem the issue poses. A brief synopsis of the xenophobic instances between 2008 and 2019 is also provided. Lastly, an explanation of the problem, as well as the methods to undertake the study, is offered.

Chapter 2

Chapter 2 provides an analysis of the international and domestic legal framework that deals with xenophobia and the protections they offer to affected persons. These frameworks are also analysed to gauge an understanding of how they speak to the issue of policing and prosecutions in the context of xenophobia. Emphasis on the current responses and the challenges of the police and the NPA in doing so are also discussed.

Chapter 3

In Chapter 3, a comparative study is conducted to determine how another country that experienced xenophobic violence responded to the problem. In particular, attention is given to how perpetrators were held accountable. Russia is chosen as a suitable comparator as the motivations for xenophobic attacks on foreign nationals are analogous to those in South Africa.

Chapter 4

Chapter 4 concludes the research and recommendations are made.

CHAPTER 2

THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK THAT PROTECTS PERSONS AGAINST XENOPHOBIA IN SOUTH AFRICA

2.1. Introduction

In Chapter 1, the historic roots, as well as the recurrent nature of xenophobic violence in South Africa, were discussed.¹ On the face of it, these periodic outbreaks of xenophobic violence may be an indication of the state's failure to fulfil its obligations as prescribed in universal agreements that South Africa has ratified.² The need to combat and eradicate such violence is therefore urgent and compelling for various reasons including *inter alia* the responses of other African states pointed out in chapter 1.³

In the light of the above-mentioned considerations, it is contemporaneously, imperative to question whether existing legal measures address the phenomenon of xenophobia in South Africa. To this end, the chapter sketches the international as well as the domestic legal frameworks, which seek to protect the rights of foreign nationals and may be the basis for addressing the problem of violence motivated by xenophobia. The discussion proceeds with an analysis of relevant legal instruments at the international law level, followed by instruments that apply regionally. Finally, the domestic legal framework within which xenophobia should be contended is discussed.

¹ Misago JP 'Political Mobilisation as a Trigger of Xenophobic Violence in Post -Apartheid South Africa' (2019)13 *International Journal of Conflict and Violence* 1.

² Ogunnoiki AO 'International Law and Xenophobia in South Africa' (2020)3(1) *African Journal of Law, Political Research and Administration* 1.

³ Holmes C 'What's behind South Africa's xenophobic violence last week? Available at <https://www.washingtonpost.com/politics/2019/09/09/whats-behind-south-africa-s-xenophobic-violence-last-week/> (accessed 7 June 2020). Protests against the violence were seen through the withdrawal of scheduled matches in Zambia, Nigeria and Malaysia (Holmes C). In addition, the National Association of Nigerian Students organised protests that involved restraining of South African companies (See Krippahl 'Xenophobia in South Africa strains international relations' (2019). Demonstrations against diplomatic missions and South African businesses also occurred in the Democratic Republic of Congo (See Holmes (2019).

2.2. International law instruments which protect the rights of foreign nationals

This section focuses specifically on international instruments. It illustrates how states ought to protect foreign nationals in their territories and deal with xenophobia. The current responses and challenges experienced in some states are considered.

The United Nations prohibits practices that are discriminatory and domineering.⁴ This consequently confirms that prejudice between human beings based on race, colour, and cultural origin is a hindrance to positive relations among states and further disrupts harmony and refuge among individuals who co-exist in one country.⁵

The United Nation's purpose to achieve international co-operation in promoting respect for human rights and fundamental freedom, birthed global apprehension for racial discrimination.⁶ The United Nations Assembly best demonstrated such apprehension in 1965, when it adopted the Declaration on the Elimination of All Forms of Racial Discrimination, which will be discussed later in this section. The goal of the United Nations was to eradicate separation, discrimination, animosity and disunity among people.⁷ The manner in which states deal with issues concerning foreign nationals in their territory should be viewed through these lenses.

2.2.1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted in 1948.⁸ The UDHR is a declaration by the global community of the least possible measure of state exercise and is considered as a pronouncement of states' human rights duties as members of the Charter of the

⁴ International Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly of the United Nations Resolution 2106(XX) on 21 December 1965 and entered into force on 12 March 1969.

⁵ International Convention on the Elimination of All Forms of Racial Discrimination (1969).

⁶ International Convention on the Elimination of All Forms of Racial Discrimination (1969).

⁷ United Nations Human Rights Council 'Human Rights: Peace, dignity and equality on a healthy planet' available at <https://www.un.org/en/global-issues/human-rights> (accessed 23 January 2021).

⁸ Dugard J *International Law: A South African Perspective* 4 ed (2011)325.

United Nations.⁹ Nevertheless, the South African Constitution enshrines customary international law and it is therefore significant to observe the values of transnational law.¹⁰

Article 1 of the UDHR mandates nations to consider all persons to naturally enjoy freedom and have uniform dignity and rights.¹¹ This means that all persons regardless of their nationality should be at liberty and celebrate their self-worth wherever they live. It is quite clear that foreign nationals who are victims of xenophobia do not enjoy their liberty in South Africa, as they are cognisant of the periodic recurrence of xenophobic raids. The fact that they are also referred to by derogatory terms such as 'Amakwerekwere' gives them a sense of less self-worth.¹²

Article 2 of the UDHR further states that everyone inherently deserves to enjoy all the rights and freedoms prescribed in this declaration without discrimination on any ground such as race, colour, sex, language, religion, nationality, social origin, property or other status.¹³ 'Everyone' in article 2 means all persons and one may argue that it includes foreign nationals in a country. They too should enjoy rights and freedoms without discrimination based on their 'nationality' as a ground upon which discrimination is prohibited. This undeniably rejects xenophobia.

Article 3 of the UDHR provides that all persons have the right to life, freedom and safety.¹⁴ This means that no one may be deprived of their right to life. In South Africa, many lives were lost due to xenophobic violence as mentioned in Chapter 1. There are also examples of police brutality which resulted in deaths of foreign nationals. One glaring example of such killings is the case of a Mozambican national who was aged 27 when he was tied to the back of a South African police

⁹ South Africa's Obligations under International and Domestic Law available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 8 February 2021).

¹⁰ South Africa's Obligations under International and Domestic Law (1998).

¹¹ Universal Declaration of Human Rights adopted by the United Nations General Assembly Resolution 217A on 10 December 1948 and entered into force on 10 December 1948.

¹² Wamundiya A 'Xenophobia in South Africa-a Brief Summary' (2017) available at https://www.canoncollins.org.uk/sites/canoncollins.org.uk/files/alice_wamundiya_on_xenophobia.pdf (accessed 21 March 2020).

¹³ Universal Declaration of Human Rights (1948).

¹⁴ Universal Declaration of Human Rights (1948).

van and dragged on the ground. The victim sustained head injuries and later died in a police cell.¹⁵ This is contrary to what article 3 prescribes.

Article 5 further protects all persons against torture, harsh, merciless, or humiliating treatment or punishment.¹⁶ During xenophobic attacks in South Africa, it is precisely these rights in the UDHR that are violated, as victims are brutally murdered and tortured by vigilante groups. These acts are therefore clear violations of the protection afforded in terms of the UDHR.

Article 7 of the UDHR affords everyone equal treatment and protection by the law.¹⁷ Persons who are culpable of xenophobic acts should therefore be dealt with justly. They ought not to be treated with unreasonable leniency due to the victims' status as foreign nationals.

Article 8 of the UDHR states that

everyone has the right to an effective remedy by the competent national tribunals to acts violating the fundamental rights granted him by the Constitution or by law.¹⁸

This entails that persons whose human rights have been infringed can be referred to an investigative body where they can be afforded relief as a recourse for the rights violated.

Article 9 of the UDHR prohibits unlawful confinement, detention or deportation.¹⁹ The article speaks directly to the plight of many foreign nationals as it means that foreign nationals cannot be detained, incarcerated or deported arbitrarily. The protection afforded by article 9 is important in the South African context in light of the 2015 xenophobic attacks. At the time, the South African government introduced Operation Fiela to curb these attacks.²⁰ However, the operation brought to light that many government officials and members of the South African

¹⁵ Wick J 'Xenophobic Violence in Democratic South Africa' (2015) *SAHO* available at <https://www.sahistory.org.za/article/xenophobic-violence-democratic-southafrica> (accessed 9 April 2020).

¹⁶ Universal Declaration of Human Rights (1948).

¹⁷ Universal Declaration of Human Rights (1948).

¹⁸ Universal Declaration of Human Rights (1948).

¹⁹ Universal Declaration of Human Rights (1948).

²⁰ Desai A 'Migrants and Violence in South Africa: The April 2015 Xenophobic attacks in Durban' available at <https://ujcontent.uj.ac.za/vital/access/services/Download/uj:16403/SOURCE1> (accessed 1 August 2020).

police held negative, false beliefs about foreign nationals who in fact had legal status in South Africa. Consequently, these foreign nationals were arrested arbitrarily as illegal immigrants. This hampered integration and deepened discrimination between nationals and non-nationals.²¹ The observance of article 9 is thus important to improving the position of foreign nationals.

Article 10 of the UDHR states that all persons have a right to a fair trial by a neutral and impartial court of law in the determination of their constitutional rights and duties and of any illegitimate charges against them.²² In South Africa, there is no evidence that crimes motivated by xenophobia are generally prosecuted.

Article 25(1) of the UDHR provides that all persons have a right to well-being pertaining to sufficient material goods tolerable for their health and well-being as well as security in intervals of joblessness, illness, disability, and other adverse circumstances.²³ While this article may prove challenging for many developing states, limited resources are arguably not a justification for the absolute exclusion of foreign nationals from receiving some benefits during times of crisis. It appears, however, that in South Africa, the plight of indigent foreign nationals was overlooked during the Coronavirus pandemic (Covid-19) when the government provided modest social grants to unemployed individuals who were unable to sustain themselves. Foreign nationals in South Africa, unfortunately, did not receive similar assistance from the government, as individuals had to present a green identity card to access this grant.²⁴ This is a violation of article 25(1).

²¹ Desai A (2015).

²² Universal Declaration of Human Rights (1948).

²³ Universal Declaration of Human Rights (1948).

²⁴ Mukumbang FC, Ambe AN, Adebiji BO 'et al' Unspoken inequality: how Covid-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees and undocumented migrants in South Africa (2020)141 *International Journal for Equity in Health* 1.

2.2.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 but only became effective in 1976.²⁵

Article 3(b) of the ICCPR subject to subsection (a) states that anyone requesting recourse on a right violated is entitled to bring the matter before a competent legislative body in order to obtain legal relief.²⁶ The ICCPR, therefore provides guidance to investigative and prosecutorial bodies. Section 3(c) of the ICCPR further states that the proficient body must enforce the relief granted to anyone whose right has been violated. This definitely guarantees foreign nationals the relief sought and enhances the protection of their rights.

Article 7 of the ICCPR mandates states parties not to torture anyone or put them under harsh, merciless, or humiliating treatment or penalty.²⁷

Article 9(1) of the ICCPR mandates states parties not to deprive anyone of their right to freedom and safety. This means that nobody should be irrationally arrested or subjected to confinement without a legitimate reason.²⁸ Unfortunately, such arrests and confinement have on occasion occurred in South Africa. Foreign nationals, despite being able to prove that they were legally resident in South Africa, were arrested and detained for extended periods during police raids.²⁹ The arrest and detention of such foreign nationals were clear violations of foreign nationals' right to freedom and safety.

²⁵ Dugard J (2011)327.

²⁶ International Covenant on Civil and Political Rights (1976).

²⁷ International Covenant on Civil and Political Rights adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966 and entered into force on 23 March 1976.

²⁸ International Covenant on Civil and Political Rights (1976).

²⁹ Human Rights Watch 'Xenophobic Violence Against Non-Nationals in South Africa: They Have Robbed Me of My Life' available at <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south> (accessed 14 March 2021).

Article 10 (1) of the ICCPR provides that everyone dispossessed of freedom ought to be treated with kindness and esteem for the innate dignity of a human being. It is an obligation of every states party to ensure that vulnerable people in this situation are taken care of.³⁰ This entails that foreign nationals who have been deprived of liberty ought to be treated in a friendly, generous, and considerate manner.

Article 26 of the ICCPR prescribes that everyone is equal before the law and eligible for the same protection. Prejudice is forbidden by law and this assures uniform, and an effective safeguard against segregation based on race, colour, sexual category, religion, nationality, or social origin.³¹ As already mentioned earlier, it is significant that 'nationality' is listed as a ground upon which persons should not be discriminated against. Arguably, the drafters of the ICCPR understood the vulnerability of persons who are not citizens of a country and thus anticipated the need for protection and the corresponding duty on the states to provide such protection.³²

2.2.3. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 but became effective in 1976.³³ South Africa assented to the ICESCR in 1994 and ratified it in 2015.³⁴

The purpose of the ICESCR as enshrined in article 1 is to warrant the protection of economic, social and cultural rights, which takes account of the right to autonomy of all persons.³⁵ This is particularly relevant to non-citizens of a country whose social and cultural background may be very different to that of citizens. The protection of such persons' social, cultural and economic

³⁰ International Covenant on Civil and Political Rights (1976).

³¹ International Covenant on Civil and Political Rights (1976).

³² International Covenant on Civil and Political Rights (1976), preamble.

³³ International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966 and entered into force on 3 January 1976.

³⁴ ESCR-Net 'The Government of South Africa ratifies the ICESCR' available <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (accessed 15 March 2021).

³⁵ International Covenant on Economic, Social and Cultural Rights (1976).

rights, should not negatively affect other rights and may at times demand that action be taken to uphold them.

Article 2 (1) of the ICESCR allows states parties to seek international assistance in adopting legislative processes that will aid in attaining progressively the complete fulfilment of economic, social, and cultural rights. The South African government has failed to embrace this article even though lack of service provision and rivalry for resources is one of the commonly cited motivations for xenophobic attacks in South Africa.³⁶

Like the ICCPR, article 2 (2) of the ICESCR mandates states parties to provide assurance of equal protection of rights irrespective of one's race, colour, culture, social origin, nationality, religion, birth, or other status.³⁷ At this juncture, it becomes plain that at the level of international law, the vulnerability of persons due to their nationality is recognised. Importantly, the need for protection is vital.

Article 7 of the ICESCR prescribes that states parties must identify the right for all to enjoy favourable conditions of work which will facilitate fair wages, a reasonable living standard for all and their families, harmless and good physical or mental conditions.³⁸ Research has shown that some South African employers prefer employing foreign nationals as they can pay them lower wages and foreign nationals sometimes settle for poor working conditions.³⁹ These practices as already mentioned incite hostility towards foreign nationals. The South African government should therefore ensure that the rights guaranteed in article 7 are enforced to avoid both the exploitation of foreign nationals and the exclusion of citizens.

³⁶ Kafwimbi T, Banaszak K, Khan S 'et al' 'Violation of Human Rights of Disadvantaged and Vulnerable Refugees' (2010)1(5) *International Journal of Sustainable Development* 68.

³⁷ International Covenant on Economic, Social and Cultural Rights (1976).

³⁸ International Covenant on Economic, Social and Cultural Rights (1976).

³⁹ International Organization for Migration Report (2009)57.

The ICESCR is silent on providing guidance to investigative and prosecutorial bodies. This may pose challenges as far as investigating and prosecuting xenophobic attacks against foreign nationals is concerned.

2.2.4. The International Convention on the Elimination of All Forms of Racial Discrimination

South Africa is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1969.⁴⁰ South Africa assented to the ICERD in 1994 and only ratified it in 1999.⁴¹

Article 1(1) of the ICERD, defines 'racial discrimination' as any division, segregation, limitation or favouritism on the grounds of race, colour, background, national or ethnic origin that has the motive or consequence of annulling or prejudicing the appreciation, pleasure or equal application, of human rights and essential liberties in the political, economic, social, cultural or any other arena of communal life.⁴² Xenophobia in South Africa, as alluded to in chapter 1, entails racial discrimination, as it is only Black Africans who are victims of violence. The word 'Afrophobia' has thus become common in describing xenophobia in South Africa. Article 1 of the ICERD outlines segregation and prejudice shown to human beings on account of nationality and ethnicity. Segregation between persons based on race, colour, or ethnic origin is a hindrance to pleasant and tranquil relationships among states.⁴³

The second mandate of the ICERD is to take prompt measures to eliminate the stimulation of prejudice which is contrary to the values in the UDHR.⁴⁴ The values enshrined in the preamble of

⁴⁰ United Nations Committee on the Elimination of Racial Discrimination (CERD) Report 2006 –*Discrimination based on race, nationality, and ethnicity* (2006)1 available at <https://www.refworld.org/docid/45c30bc80.html> (accessed 23 January 2021).

⁴¹ South African Human Rights Commission Shadow Report 2006- *South Africa's Compliance with the Provisions of International Convention against all Forms of Racial Discrimination* (2006)7.

⁴² International Convention on the Elimination of All Forms of Racial Discrimination (1969).

⁴³ International Convention on the Elimination of All Forms of Racial Discrimination (1969).

⁴⁴ International Convention on the Elimination of all Forms of Racial Discrimination (1969) article 1(4).

the UDHR are to identify inborn dignity, equivalent and undeniable rights of human beings as the base of liberty, fairness, and harmony worldwide.⁴⁵ To this effect, the ICERD endeavours to eradicate the motivation of prejudice among people. Consequently, upholding these values helps to foster the prevention of xenophobic attacks against foreign nationals.

Article 4 of the ICERD states that

States Parties condemn all propaganda and all organizations which foster ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.⁴⁶

The foregoing article cements the obligation on states parties to adopt immediate and positive measures designed to eradicate all incitement to, or acts of such discrimination.⁴⁷ Though this article does not explicitly mention xenophobia, it does afford protection against it. The perpetrators of xenophobic violence in South Africa are usually young, black, indigent South African men who attack black foreign nationals from other African countries who reside in slums and poor residential neighbourhoods.⁴⁸ Though the commonly cited motives for such attacks are not race or ethnicity, it is indeed the ethnic origin of foreign nationals which renders them vulnerable to attacks. They are targets because they are believed to be from poorer parts of Africa. Foreign national business owners from outside of Africa are generally not as vulnerable to attacks. This indicates distinctive prejudice towards a specific group. Animosity, incitement, segregation and brutality, and any treatment against foreign nationals that are unfair ought to be openly condemned.

Article 4(a) of the ICERD provides that

[S]tates parties shall declare an offence punishable by law, all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.⁴⁹

⁴⁵Universal Declaration of Human Rights (1948).

⁴⁶ International Convention on the Elimination of all Forms of Racial Discrimination (1969).

⁴⁷ International Convention on the Elimination of all Forms of Racial Discrimination (1969).

⁴⁸ Hickel J 'XENOPHOBIA IN SOUTH AFRICA, Order, Chaos and Moral Economy of Witchcraft' (2014)29(1) *Cultural Anthropology* 118.

⁴⁹ International Convention on the Elimination of All Forms of Racial Discrimination (1969).

This article makes it clear that violence motivated by prejudice against a group must be prosecuted. Undoubtedly, this obligates South Africa and other states parties to hold perpetrators of xenophobic violence accountable. In this regard the idea of specialised courts to deal with xenophobic crimes would be ideal to comply with this international obligation.

Article 5 of the ICERD prescribes that

[S]tates parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.⁵⁰

This article clearly affords state protection against violence motivated by the listed grounds. As a states party, South Africa's obligation to prevent xenophobic violence is unquestionable. That mass and consistent attacks occurring is a flagrant shirking of its duty under the ICERD. Even worse is the failure to address and prosecute such crimes.

All signatory states have committed themselves to act mutually or distinctly, in harmony with the ICERD.⁵¹ This necessitates that errant states, like South Africa, be held accountable until it complies with the obligation to prevent and sanction violations of the human rights of foreign nationals.⁵²

The ICERD provides guidance to investigative and prosecutorial bodies as far as individuals whose rights have been violated are concerned. States parties are encouraged to refer their disputes to the International Court of Justice.

⁵⁰ International Convention on the Elimination of All Forms of Racial Discrimination (1969).

⁵¹ International Convention on the Elimination of All Forms of Racial Discrimination (1969).

⁵² Crush J 'The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa' (2008)50 *Southern African Migration Project* 11.

2.2.5. United Nations Convention and Protocol Relating to the Status of Refugees

The United Nations Convention and Protocol Relating to the Status of Refugees (UNHCR) was adopted in 1951. It became effective in 1954 and is the heart of refugee protection.⁵³ The foregoing convention was previously known as the Refugee Convention but was later amended in 1967 and became known as the United Nations Convention and Protocol to the Status of Refugees.⁵⁴ This amendment eliminated the geographical and temporal restrictions of the 1951 Convention. South Africa acceded to the UNHCR in 1996.⁵⁵

Article 3 of the UNHCR prescribes that member states should execute the provisions of this convention to refugees without segregation based on racial, religious, or national grounds.⁵⁶ This means that no one should be discriminated against on the aforementioned bases. Many refugees in South Africa are, however, unemployed and some own small businesses to earn a living, yet one of the primary motives for xenophobic attacks is that foreign nationals accept work that ought to have been given to South Africans.

Article 5 of the UNHCR forbids any rights of refugees to be violated and that no legal rule in this covenant should prejudice any such right. Presumably, this means that the basic human rights such as their right to life, dignity and freedom ought not to be violated as a consequence of their status as refugees.

⁵³ Convention Relating to the Status of Refugees adopted by the United Nations General Assembly Resolution 429(V) on 28 July 1951 and entered into force on 22 April 1954.

⁵⁴ Convention and Protocol Relating to the Status of Refugees adopted by the United Nations General Assembly Resolution 2198(XXI) on 16 December 1966 and entered into force on 4 October 1967.

⁵⁵ Department of Justice General Measures of Implementation, Chapter 3 available at <https://www.justice.gov.za/policy/african%20charter/afr-charter03.html> (accessed 13 February 2021).

⁵⁶ Convention Relating to the Status of Refugees (1954).

Article 7 of the UNHCR prescribes that refugees shall be afforded the same treatment as other foreign nationals.⁵⁷ This means that all the protections, rights and freedoms that apply to foreign nationals who are legally in South Africa, must be extended to refugees. In practice, this is evidently not the case.

Article 16 of the UNHCR affords refugees free access to court in the land of all member states.⁵⁸ To this effect, the UNHCR provides guidance to investigative and prosecutorial bodies. In South Africa, however, as mentioned in Chapter 1, immigrants tend to avoid the courts even if their rights are violated as they fear deportation or harassment. The need to make the courts conducive to foreign nationals is important to the curbing of xenophobic violence and crime.

Article 23 prescribes that member states should afford legitimate refugees similar treatment as that afforded to nationals. This pertains to communal aid and support as that afforded to their nationals. This is arguably important in the South African context where there is a belief that foreign nationals should not be entitled to the same services as nationals. In the dissemination of information to dispel and debunk xenophobic beliefs and myths, the aforementioned entitlement ought to be explained to the public.

Article 33 of the UNHCR forbids member states to banish a refugee to his home country or any other nation where his life or liberty would be endangered on grounds of race, religion, nationality and social group.⁵⁹ South Africa has ratified the UNHCR. Nevertheless, during the May 2008 xenophobic attacks against foreign nationals in South Africa, 32 foreign nationals in East Rand were attacked, robbed and deported afterwards.⁶⁰ This was a violation of article 33. This also implies that the state was instrumental in the violation of the rights of refugees.

⁵⁷Convention and Protocol Relating to the Status of Refugees (1967).

⁵⁸Convention Relating to the Status of Refugees (1954).

⁵⁹ Convention Relating to the Status of Refugees (1954).

⁶⁰ International Organization for Migration Report (2009)24.

2.2.6. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted in 1984 but entered into force in 1987.⁶¹ South Africa signed UNCAT in 1993 and ratified it in 1998.⁶²

Article 3(1) of UNCAT provides that, no government shall repatriate an individual to another country where there is a belief or threat of being exposed to torture.⁶³ This means a states party to UNCAT cannot deport a migrant back to his country, if there is reason to believe that they will be tortured in that country. From this, it may be inferred that no state may subject a foreign national to torture within its borders too and where the risk of such torture exists, whether it is from public or private sources, the state ought to offer protection against such torture. Part of such protection must be the real possibility of criminal conviction of perpetrators.

UNCAT mandates South Africa to make torture illegal under its national law and to act and be able to prosecute such an act when it is perpetrated in South Africa. This occurs when the perpetrator or complainant is a national of South Africa.⁶⁴ Torture is criminalised under customary international law and is designated as a form of crime against humanity under the Rome Statute of the International Criminal Court.⁶⁵

Article 4 of UNCAT prescribes that every states party shall ensure that all acts of torture are criminalised. Attempts to perpetrate torture will have the same consequences as the act of torture. Member states use the appropriate sentence by considering the seriousness of the

⁶¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly resolution 44/144 on 10 December 1984 and entered into force on 26 June 1987.

⁶² National Council of Provinces Security and Justice Report 2019 - *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: briefing, with Deputy Minister* (2019).

⁶³Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987).

⁶⁴ Dugard J (2011)160.

⁶⁵ Dugard J (2011)160.

offence.⁶⁶ Countries that have ratified UNCAT are thus obligated to criminalise and punish all acts of torture.

Article 16(1) of UNCAT provides that

each states party shall undertake to prevent in any territory under its jurisdiction other acts of cruel inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.⁶⁷

The case of *El Alwani v Libyan Arab Jamahiriya* is instructive in this regard. El Alwani, a Libyan Citizen was domiciled in Swaziland. He brought an application before the Human Rights Committee. He brought a claim for human rights violations regarding political adversaries. The matter concerned Alwani and his deceased brother, Ibrahim.⁶⁸ Alwani's brother was arrested by the internal security forces in the early hours of the morning. He was detained without certification (no warrant of arrest) and this attracted contestation from Alwani. This consequently, resulted in Alwani being arrested.⁶⁹ While in prison, Ibrahim's family were not permitted to visit him (Ibrahim) and he was alleged to have been a member of a banned Islamic group.⁷⁰ In 1996, a report was given that members of this uprising were subdued and murdered.⁷¹ Later in 2002, the police authorities informed Alwani's family that Ibrahim had died without furnishing reasons for the cause of death and only sent a death certificate.⁷² The applicant alleged that the police authorities had failed to take applicable measures to protect his brother from dying, detained him unlawfully, and violated Article 6 of the ICCPR.⁷³ The Human Rights Committee alluded to the fact that denial of freedom and failure to reveal the whereabouts of

⁶⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987).

⁶⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987).

⁶⁸ *El Alwani v Libyan Arab Jamahiriya*, comm.1295/2004,U.N Doc. A/62/40, Vol 11, at 173 (HRC 2007) paragraph 1.

⁶⁹ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 1.

⁷⁰ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 2.3.

⁷¹ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 2.3.

⁷² *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 2.4.

⁷³ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 3.2.

anyone is a violation of the right not to be subjected to torture or cruel, inhuman, or degrading punishment.⁷⁴

The Committee held that the right to life prescribed in article 6 of the ICCPR had been infringed and was severe. In addition, failure to investigate the termination of the deceased's life was a breach of contract in terms of general comment No.31.⁷⁵ The Human Rights Committee found that the states party had infringed articles 6, 7, and 9 of the ICCPR.⁷⁶ They ruled that the perpetrators of the deceased be indicted and that the applicant be given relief.⁷⁷ UNCAT effectively, provides guidance to investigative and prosecutorial bodies and calls for actions to be taken in cases where the rights of a foreign national had been violated.

In summation, it is evident that at the level of international law, all persons have a right not to be discriminated against based on their nationality, race, or social origin. This by implication means that they ought to be afforded protection by the law regardless of their legal status in a country. The principle that refugees must be afforded the same protection as foreign nationals with legal status in a country and that they are equal before the law suggests that there is a recognition of the vulnerability of a person when they are outside of their home country. Though the instruments discussed above do not specifically mention xenophobia, the protection they offer strongly militates against xenophobic actions. Importantly, they call for states to hold perpetrators accountable in an effort to uphold the rights of foreign nationals.

In addition to the protection that foreign nationals ought to enjoy in terms of the international legal framework, regional law ought to offer similar guarantees. Below regional instruments applicable to Europe and Africa shall be discussed respectively.

⁷⁴ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 6.2.

⁷⁵ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 6.9.

⁷⁶ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 7.

⁷⁷ *El Alwani v Libyan Arab Jamahiriya* (2007) paragraph 8.

2.3. Regional framework on the protection of foreign nationals

2.3.1. Europe

2.3.1.1. The European Convention on Human Rights.

The European Convention on Human Rights (ECHR) is a universal human rights treaty that has a membership of 47 states. These states are members of the Council of Europe.⁷⁸ The ECHR was signed in 1950 and only became effective in 1953.⁷⁹

Governments that assented to the ECHR made a legal pledge to observe certain principles of conduct. Consequently, this would ensure the protection of basic human rights and liberties of individuals. The ECHR promotes the restriction of arbitrary exercise of power and promotes democracy in European nations.⁸⁰

Article 1 of the ECHR provides that the states parties ought to ensure that the rights and liberties of everyone in their jurisdiction are protected.⁸¹ This means that states parties are mandated to safeguard measures that ensure that everyone enjoys and benefits from the rights that are prescribed by the Convention. Presumably, the protection ought to be extended to foreign nationals in a country too, regardless of their status at the time that they are present in a country.

According to article 5 of the ECHR, all persons are entitled to the enjoyment of freedom and safety. The exceptions to the rule are; during confinement when serving the sentence; when it is a consequence of contempt of court; when it is used as a measure to summon one to appear before the court; when a minor is in custody to ease educational supervision and when there is a sanction of entry into a country against one who has a pending deportation or extradition order.⁸² Consequently, no one should be incarcerated without just cause. As discussed earlier in this

⁷⁸ Amnesty International UK 'What is the European Convention on Human Rights?' available at <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> (accessed 20 March 2021).

⁷⁹ Equality and Human Rights Commission 'What is the European Convention on Human Rights?' available at <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> (accessed 21 March 2021).

⁸⁰ Amnesty International UK (2018).

⁸¹ European Convention on Human Rights adopted by the European Council Resolution 4.XI on 4 November 1950 and entered into force on 3 September 1953.

⁸² European Convention on Human Rights (1953).

chapter, foreign nationals who are legally in South Africa have on occasion been arrested and detained despite producing documentation that proved their legitimate status in South Africa. Article 5, though not applicable in the South African context, is instructive insofar as the treatment of foreign nationals in South Africa is concerned.

According to article 13 of the ECHR, all persons have the right to seek successful judicial relief before a national authority. This will be done in their attempt to seek justice for any right in this Convention that is violated.⁸³ This, therefore, provides guidance to investigative and prosecutorial bodies. Arguably, this suggests that even foreign nationals may approach the courts or other national authorities to uphold their rights. Such an entitlement is important to the plight of persons who are vulnerable in a country where they do not have citizenship.

Article 14 obliges all states parties to ensure that everyone benefits from the rights prescribed in the ECHR. No segregation is allowed on the grounds of race, nationality, colour, religion, opinion, political, social origin or association with a national minority group.⁸⁴ This principle mirrors international law as discussed in the previous section and is thus vital to uphold. A recent Human Rights Watch report demonstrated the importance of the principle. Three asylum seekers in France were deprived of material and monetary sustenance, which resulted in them being homeless and living in inhuman and humiliating circumstances.⁸⁵ In addition to their plight, they experienced police brutality. For this reason, NGOs had to arrange for assistance but were later forbidden on the claim that it was not approved by the state. The French Ombudsperson as a national authority reacted to this and averred that it was discriminatory against foreign nationals.⁸⁶ The continuous experience of persecution and mistreatment of foreign nationals is an indication of the police's failure to uphold the principle of non-discrimination.

⁸³ European Convention on Human Rights (1953).

⁸⁴ European Convention on Human Rights (1953).

⁸⁵ Human Rights Watch report 2021-*Human Rights conditions in nearly 100 Countries and territories Worldwide in 2020*(2021) 255.

⁸⁶ Human Rights Watch Report (2021) 255-256.

Article 17 of the ECHR provides that no states party should take part in any activity that has the purpose of violating any rights and liberties enshrined in this convention.⁸⁷ This entails that everyone's rights ought to be protected and respected by states parties to this Convention. It may be inferred that states will not be permitted to pass law or introduce any actions which will violate the rights protected in the ECHR. Protections that foreign nationals are provided in the ECHR are therefore guaranteed and may not be limited by governments or their officials.

2.3.1.2. Protocols to the ECHR

Article 1 of Protocol No.3 of the ECHR stipulates that everybody has the right to enjoy his belongings. No one shall be dispossessed of his belongings unless it is to the benefit of the public subject to the provision of law and values of international law.⁸⁸ Such protection is imperative. In the South African context, xenophobic attacks often involve arson, looting and malicious damage to the property of foreign nationals. Admittedly, the chaotic nature of such attacks as mentioned in chapter 1, results in major challenges to the prosecution of perpetrators. However, it is also true that material reparations are generally not made where persons have lost all or most of their belongings. In the light of the fact that states have a duty to protect foreign nationals against such actions, the protection afforded in article 1 of the protocol is instructive in addressing the plight of victims of xenophobia in South Africa.

Article 4 of Protocol No. 4 of the ECHR states that collective expulsion of foreign nationals is not permitted. This entails that states parties to the ECHR should not force foreign nationals to leave as a group. According to the Press Unit of the European Court of Human Rights, collective expulsion is a process of forcing foreign nationals as a collection, to vacate a nation, unless the procedure is taken based on a rational analysis of a specific person's case in the group.⁸⁹ In the

⁸⁷ European Convention for the Protection of Human Rights (1953).

⁸⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, adopted by the Council of Europe Resolution 4.XI on 4 November 1950 and entered into force on 3 September 1953.

⁸⁹ European Court of Human Rights Press Unit on the *Collective Expulsion of Aliens* (2021).

case of *Georgia v Russia*, Georgian nationals were arrested, detained, and expelled as a group from the Russian federation. Despite the fact that the decision to expel Georgian nationals was made on an individual basis, the expulsion of huge numbers had made it difficult to conduct a rational and impartial analysis of each individual case. The Court found that article 4 of Protocol No.4 had been violated.⁹⁰ The principle in the case is instructive in that it demonstrates that there is sometimes a need to deal with an individual case on its own merits. In South Africa, foreign nationals are often viewed as and dealt with as a group with no consideration of the unique circumstances of every individual.

The instruments discussed above do not deal directly with the issue of xenophobia, but they do protect the rights of persons who are affected by xenophobia. Many of the provisions may also be understood to call for action to be taken against perpetrators of such violence. The European Convention on Human Rights and Protocols are not the only international law instruments that protect the rights of foreign nationals. Below, the African regional framework that protects foreign nationals in African countries will be discussed.

2.4. Regional framework on the protection of foreign nationals in African countries.

2.4.1. The African Charter on Human and Peoples' Rights.

The African Charter on Human and Peoples' Rights (ACHPR) was endorsed in 1981 but became effective in 1986. South Africa signed this instrument on 15 December 1995 and acceded to the Charter on 15 January 1996.⁹¹

Article 2 of the ACHPR states that everybody shall benefit from human rights without discrimination.⁹² This entails that people from any race, cultural category, colour, sex, language,

⁹⁰ European Court of Human Rights Press Unit on the *Collective Expulsion of Aliens* (2021).

⁹¹ African Commission on Human and Peoples' Rights 'State Parties to the African charter' available at <https://www.achpr.org/dates> (accessed 1 February 2021).

⁹² African Charter on Human and Peoples' Rights adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5, 211.L.M 58(1982), entered into force on 21 October 1986.

religion, nationality, and social origin should not be deprived of their rights.⁹³ Nevertheless, many foreign nationals residing in South Africa have experienced a violation of their rights. This is evident through the destruction of their property, bodily harassment in the form of violence, deracination, and verbal abuse.⁹⁴

Article 4 of the ACHPR obligates states parties to treat every individual with respect for his life and honour.⁹⁵ South Africa ought to ensure that every person irrespective of their national or cultural origin enjoys the protection of equal rights. During xenophobic attacks, it became evident that foreign nationals are not provided with such protection in the first place and when their rights are violated, the perpetrators are not held accountable. Victims of xenophobic violence are also not offered any assistance to restore or mitigate their losses. This denotes disrespect and a lack of consideration for their lives and honour.

Article 5 of the ACHPR mandates states parties to regard the self-worth of every person and respect people's legal status. This entails that mistreatment and humiliation of man in terms of slavery, torture, cruel, inhuman, or humiliating retribution, and treatment shall be forbidden.⁹⁶ The brutal attacks against foreign nationals and the lack of justice that victims of xenophobic incidences in South Africa continue to experience demonstrate a violation of article 5.

Article 6 of the ACHPR provides for the right to freedom and protection against arbitrary arrest.⁹⁷ This means no one should be arrested or detained arbitrarily, and without a legal reason. The arrest of foreign nationals based on stereotypical assumptions that they do not have valid documentation to reside in South Africa is an example of a violation of this article.

⁹³ African Charter on Human and Peoples' Rights adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5, 211.L.M 58 (1982), entered into force on 21 October 1986.

⁹⁴ Centre for Unity in Diversity Event Report 2019-*Xenophobia and South Africa* (2019)1.

⁹⁵ African Charter on Human and Peoples' Rights (1986).

⁹⁶ African Charter on Human and Peoples' Rights (1986).

⁹⁷ African Charter on Human and Peoples' Rights (1986).

Article 7 of the ACHPR allows persons whose rights have been violated to bring a matter before a competent body.⁹⁸ This provides guidance to investigative and prosecutorial authorities.

Article 14 of the ACHPR guarantees the right to property for everyone. This right may only be violated if it is in the general welfare of the public and in harmony with the requirements of applicable laws.⁹⁹ A foreign national is able to buy property in South Africa provided they are residing in South Africa legally. However, research shows that there is a perception among some South African nationals that foreign nationals should not own property in South Africa if a South African citizen does not own any.¹⁰⁰ The assumption is that the house that a foreign national owns should have been in the ownership of a South African citizen.¹⁰¹ Arguably, this may also be the cause of xenophobic attacks. Furthermore, article 14 may be interpreted to offer protection to foreign nationals whose property is damaged, stolen, or destroyed during xenophobic attacks.

Article 19 of the ACHPR assures equality among all people. This guarantees uniform enjoyment of reverence and other rights without allowing anyone to dominate over others.¹⁰² The treatment received by foreign nationals during xenophobic attacks in South Africa attests to a lack of equality between citizens and foreign nationals. The violence suffered was in fact exacerbated by the inaction and unfair treatment of the state.

The African Charter ought to be an antidote to the problem of xenophobia against foreign nationals, which South Africa continues to face. Nonetheless, the Charter does not seem to have played a significant role in aiding South Africa to curb xenophobic attacks against foreign nationals.

⁹⁸ African Charter on Human and Peoples' Rights (1986).

⁹⁹ African Charter on Human and Peoples' Rights (1986).

¹⁰⁰ International Organization for Migration Report 2009 –*Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009)19.

¹⁰¹ International Organization for Migration Report (2009)19.

¹⁰² African Charter on Human and Peoples' Rights (1986).

Several African countries have joined together and entered into treaties. For the purposes of this thesis, only regional organisations that South Africa is a party to will be discussed.

2.4.2. Southern African Development Community.

The Southern African Development Community (SADC) is a political and economic body that assembles a systematic order for countries in the region to integrate. SADC started with a purpose for states to influence the political freedom of Southern Africa.¹⁰³

SADC was formed in 1980 and at the time, it was called Southern African Development Coordination Conference (SADCC). The purpose of SADCC was to promote political freedom and condense dependency on South Africa among member states.¹⁰⁴ It later changed its goals to development and economic achievement and thus changed its name to SADC.¹⁰⁵ South Africa became a member of SADC in 1994. SADC has a membership of 16 countries in the southern part of Africa. These include South Africa, Zimbabwe, Zambia, Botswana, Tanzania, Mauritius, Madagascar, Angola, Lesotho, Mozambique, Swaziland, Malawi, Democratic Republic of Congo, Namibia, Comoros and Seychelles.¹⁰⁶

Prior to 2001, the goals of SADC were to reduce poverty, to uphold democracy, human rights, peace, and national autonomy. Nevertheless, after 2001, SADC's goal was to change the structure and leadership of SADC.¹⁰⁷

South Africa's migration policy is not related to SADC's policies. SADC lacks a comprehensible migration regime. Even though there are numerous policy outlines and regional rules on migration-related concerns, not many protocols have been consented to and executed domestically.¹⁰⁸

¹⁰³ Southern African Development Community Report 2012-*Towards a common future* available at <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 12 May 2021).

¹⁰⁴ Southern African Development Community Report (2012).

¹⁰⁵ Southern African Development Community Report (2012).

¹⁰⁶ Southern African Development Community Report 2012- *Towards a common future* available at <https://www.sadc.int/member-states/> (accessed 12 May 2021).

¹⁰⁷ Southern African Development Community Report (2015).

¹⁰⁸ Langalanga A 'A Tale of Two Continents: Comparing Migration Experiences in South Africa and Germany' (2019)296 *South African Institute of International Affairs* 6.

A brief overview of the goals of SADC mentioned above shows that SADC, as a regional framework has not been able to address the problem of xenophobia in South Africa. Despite the fact that upholding human rights was part of its goals prior to 2001, when the goals were amended in 2001, the focus changed to SADC structure and principle of leadership. SADC is silent on the provision of guidance to investigative and prosecutorial bodies.

2.4.3. Southern African Customs Union.

The Southern African Customs Union (SACU) was established in 1910. SACU consists of a membership of five countries which are South Africa, Swaziland, Botswana, Namibia, and Lesotho.¹⁰⁹ South Africa became a member of SACU in 1969.¹¹⁰

The aim of SACU is to ease inter-border transfer of goods; create successful, open, and democratic institutions which will make certain fair trade benefits; stimulate an environment of fair competition in regions that share the same customs duty; encourage growth in investment prospects; increase trade and industry, variation, industrial development and competitiveness of state parties.¹¹¹

SACU provides guidance to investigative and prosecutorial bodies. The matters brought before the tribunal are disputes that relate to trade between parties.

SACU has not in any way answered to the problem of xenophobia against foreign nationals in South Africa. This is because its goals do not speak to the problem of xenophobia. This is a gap in many structures as xenophobia is a phenomenon that affects all spheres of life.

¹⁰⁹ Office of the United States Trade Representative 'South African Customs Union (SACU)' available at <https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/southern-african-customs-union-sacu> (accessed 20 October 2021).

¹¹⁰ Office of the United States Trade Representative (2003).

¹¹¹ Southern African Customs Union 'Objectives of SACU' (2021) available at <https://www.sacu.int/show.php?id=397> (accessed 26 March 2021).

2.4.4. The African Continental Free Trade Area.

The African Continental Free Trade Area (AFCFTA) came into force in 2019. It has a membership of 36 countries to date. South Africa ratified the treaty (AFCFTA) in 2019.¹¹²

Some of the aims of AFCFTA include: to form a single market which will expand economic coordination of the continent; create a free market through conciliation; promote the transfer of resources and human beings; advance towards creation of a customs union on the continent; maintain all-encompassing social-economic expansion, gender parity and structural change within member states and inspire industrial growth through variation.¹¹³

AFCFTA has not yet achieved much because it was recently implemented. However, a report on the Continental Free Trade Area in Africa shows that migrant traders have been harassed in the past and exposed to the action of their goods being seized.¹¹⁴ Many African countries such as Malawi, Zimbabwe, Somalia, and Zambia carry out trade in South Africa.¹¹⁵ There is a likelihood that once the AFCFTA is in full operation, it will speak to some of the problems that stem from xenophobia against foreign nationals in the trade sector. Presently, the AFCFTA is silent on the guidance to investigative and prosecutorial bodies.

Xenophobic attacks experienced by foreign nationals are diverse. The AFCFTA may answer to problems of xenophobia that are aligned to its aims.

2.5. Domestic Law aimed at the protection of foreign nationals in South Africa

The preamble of the Constitution of South Africa protects everyone who resides in the country.¹¹⁶ It mandates the state to protect the rights of all who live in the country, which includes foreign nationals.¹¹⁷ South Africa has not yet enacted a law that explicitly proscribes xenophobia. To this

¹¹² South African Revenue Services 'Agreement Establishing the African Continental Free Trade Area' available at <https://www.sars.gov.za/legal-council/international-treaties-agreements/afcfta/> (accessed 27 March 2021).

¹¹³South African Revenue Services Report (2020).

¹¹⁴ United Nations Economic Commission for Africa Report 2015-The Continental Free Trade Area: *A Human Rights Africa Perspective* (2015)63.

¹¹⁵United Nations Economic Commission for Africa Report (2015)64-65.

¹¹⁶ Constitution of the Republic of South Africa, 1996.

¹¹⁷ Centre for Unity in Diversity Event Report (2019)1.

effect, Masuku is correct in the view that it should be proscribed.¹¹⁸ Like most instruments, the Constitution does not mention xenophobia but it arguably provides some protection in terms of sections 16(2) (b) and (c).

Section 16(2) (b) of the Constitution subject to subsection 1, forbids individuals to provoke unlawful behaviour or urge someone to behave unlawfully.¹¹⁹ This means that the Constitution offers some protection for foreign nationals from the abuse of freedom of expression, which can often instigate xenophobic attacks.

Section 16(2) (c) subject to subsection 1 does not allow freedom to express a hateful opinion. The advocacy of strong feelings of dislike or hatred on the ground of an individual's racial grouping, culture, sexual category or religious conviction is forbidden.¹²⁰ This provision was evidently violated during the xenophobic outbursts in Alexandra, a township in Gauteng, as the Intelligence Minister stated that prior to the attacks, meetings had been held in hostels and instilled hate for foreign nationals.¹²¹ Such gatherings ought to be criminalised as they give rise to attacks on foreign nationals.

South Africa has enacted law such as the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998, the Protection from Harassment Act 17 of 2011, the Refugee Act 130 of 1998, and the Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002, but they do not seem to address the problem of xenophobia as briefly outlined in chapter 1. Below, however, each of these Acts will be briefly analysed to ascertain how it may afford much needed protection to vulnerable foreign nationals in South Africa.

¹¹⁸ Centre for Unity in Diversity Event Report (2019)2.

¹¹⁹ Constitution of South Africa (1996).

¹²⁰ Constitution of South Africa (1996).

¹²¹ Bekker S, Eigelaar-Meets I & Eva G 'et al' *Xenophobia and Violence in South Africa: A desktop of the trends and a scan of explanations offered* (2008)29.

2.5.1. The South African Police Service Act 68 of 1995

The South African Police Service Act 68 of 1995 (Police Act) was enacted in 1995. It was implemented to realise the constitutional requirement of national legislation that provides the foundation, authority and role of the South African Police.¹²² The purpose of the police force is to; guarantee the safety of all persons and property in the country; protect the human rights of everyone as enshrined in chapter 3 of the Constitution; ensure collaboration between the police service and the people it serves; replicate respect for people wounded by crime; ensure functional civilian oversight over the service and guarantees the presence of an executive that averts and investigates national priority crimes.¹²³

The Police Act does not speak to the problem of xenophobia, but rather addresses the problem of crime in general. As earlier outlined in chapter 1 of this thesis, the police appeared not to be responsive during xenophobic attacks that prevailed between 2008 and 2015. This may call for legislation that defines and speaks to the problem of xenophobia to be enacted and for the police force's duties in this regard to be specified.

2.5.2. The National Prosecuting Authority Act 32 of 1998

The National Prosecuting Authority Act 32 of 1998 (NPA Act), was enacted in 1998. It was established to bring into effect the constitutional provision to regulate a sole National Prosecuting Authority.¹²⁴

The purpose of the NPA Act is to; warrant that the prosecuting authority performs its duties without fear, favor or partiality; to give effect to the Constitutional provision that the National

¹²² The South African Police Act 68 of 1995, preamble.

¹²³ The South African Police Act (1995).

¹²⁴ The National Prosecuting Authority Act 32 of 1998.

Director of Public Prosecutions may intercede in the course of prosecution when guiding principles are not followed and decide not to or prosecute.¹²⁵

The NPA Act does not specifically speak to the problem of xenophobia. This entails that there are no provisions in the Act that proscribe xenophobia, whether or not to prosecute crimes that stem from xenophobia.

As earlier outlined in chapter 1 of this thesis, there have been instances during past xenophobic attacks in South Africa where cases were dropped by the NPA without a proper evaluation being done. Unfortunately, the NPA was not held accountable for this failure. This is despite the fact that section 35 of the NPA Act states that the prosecuting authority will be accountable to Parliament.¹²⁶ It is, however, difficult to do so if the South African government has not acknowledged that xenophobic attacks against foreign nationals exist in South Africa.

2.5.3. The Refugee Act 130 of 1998

Section 2 of the Refugee Act 130 of 1998 states that no one may be denied admission into the Republic, deported, repatriated to any country as a result of denial of entry, extradition or any other reason.¹²⁷ The premise not to repatriate a foreign national or deny them entry into the country is based on the presumption in section 2(a) that when a refugee is denied entry they may face persecution if returned to their country.¹²⁸ One can only be called a refugee if there is political, religious, racial or tribal unrest in their country of origin that may interrupt one's safety if they continue to reside there.¹²⁹

¹²⁵ The National Prosecuting Authority Act (1998).

¹²⁶ The National Prosecuting Authority Act (1998).

¹²⁷ The Refugee Act 130 of 1998

¹²⁸ The Refugee Act (1998).

¹²⁹ The Refugee Act (1998), s3.

Though section 2 appears to afford protection to refugees who are very vulnerable, its enforcement appears to be unreliable. As mentioned earlier, research shows that after the 2008 xenophobic attacks, at least 32 foreign nationals who had been attacked and robbed were deported by police.¹³⁰ It may be contended that this could have been a once-off contravention of section 2, but in contrast it may be concluded that this example is an indicator that the law is not a barrier to the conduct of the state officials. It also indicates that xenophobia amongst such officials does exist. There is thus, a need for state officials to be held accountable and to be afforded training and information to address their xenophobic beliefs.

Section 27 of the Refugee Act states that a refugee is eligible to an official written acknowledgement of refugee status. A refugee ought to benefit from the lawful protection outlined in Chapter 2 of the Constitution.¹³¹ Many refugees have been victims of attacks during xenophobic raids. Some have died during such attacks. Despite these attacks being atrocious and inhumane, very few perpetrators have been prosecuted for committing crimes against foreign nationals.

The Refugee Act has proscribed illegal conduct committed by a refugee.¹³² Nonetheless, it does not clearly outline the consequences that perpetrators of xenophobic attacks against foreign nationals will face. To this effect, there seems to be a lack of protection afforded to refugees against these attacks that are likely to recur. This further results in perpetrators repeating these offences with impunity.

There appears to be some reservations as to whether the provisions of the Refugee Act will cement the protection the Constitution affords.

¹³⁰ International Organization for Migration Report (2009)24.

¹³¹ The Refugee Act (1998).

¹³² The Refugee Act (1998) s37.

2.5.4. The Immigration Act 13 of 2002

The preamble of the Immigration Act 13 of 2002, states that economic progress is enhanced through the employment of foreign workers. In addition, the involvement of foreign nationals in the South African workforce does not negatively influence the existing employment standards, privileges, and opportunities of South African employees.¹³³ This essentially means foreign nationals contribute positively to the economy of South Africa by supplying labour and it does not infringe upon the rights and interests of South Africans. Unfortunately, this view is not shared by many South Africans and it has been mentioned that the perception that foreign nationals take work opportunities meant for citizens has motivated xenophobic violence in the past. The law in this regard ought therefore to be brought in line with the realities in South Africa.

Section 9 of the Immigration Act stipulates that no one should come in or leave the country at the wrong port of entry.¹³⁴ This means foreign nationals arriving in the country should use correct designated points of entry. It is a known fact that some foreign nationals do not enter the Republic through the borders. Unfortunately, some foreign nationals enter South Africa using unofficial entry points because they do not have legitimate documents. It is usually due to desperation that persons enter the country in this manner. Such persons are often the most vulnerable to exploitation and abuse. Legal and other measures should be introduced to specifically address the plight of such foreign nationals insofar as they are vulnerable to physical violence and abuse by others including the police.

Section 34(1) of the Immigration Act states that an illegitimate foreign national must be arrested.¹³⁵ This, however, does not mean that foreign nationals should be arbitrarily arrested. In 2015, after the South African government had realised that xenophobic attacks against foreign nationals had been on the increase, they introduced Operation Fiela to curb these attacks.¹³⁶ However, the undesirable perceptions about foreign nationals from the government officials and

¹³³ The Immigration Act 13 of 2002.

¹³⁴ The Immigration Act (2002).

¹³⁵ The Immigration Act (2002).

¹³⁶ Desai A (2015).

South African police resulted in many foreign nationals being arrested arbitrarily as illegal immigrants though not all of them were proven to be in the country illegally. Consequently, this hampered integration and deepened discrimination between nationals and non-nationals.¹³⁷

Section 49(1)(a) of the Immigration Act states that anybody who comes in the country in contravention of the Immigration Act will be culpable of an offence and legally responsible when convicted. This will attract a fine or incarceration for not more than three months.¹³⁸ Though this provision is important to prevent uncontrolled influxes of persons coming into the country without authorisation, this may be the law that also contributes significantly to the struggles of illegal immigrants. Such immigrants may tolerate abuse, violations of their rights and unfair and undignified treatment, as they will not report such contraventions to the authorities due to fear of being identified as illegal immigrants, which may lead to their prosecution and punishment. The punitive nature of this law ought to be reconsidered.

2.5.5. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The purpose of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is to put sections 9 and 23(1) of the Constitution of the Republic of South Africa into practice.¹³⁹ The purpose of PEPUDA is to prevent unfair discrimination based on race, gender and disability. It focuses on problems relating to violation of the right to equality, unfair discrimination, hate speech with the purpose of eliminating the post-apartheid spectre which divided the nation on the basis of race, sexual category and economically.¹⁴⁰

¹³⁷ Desai A (2015).

¹³⁸ The Immigration Act (2002).

¹³⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁴⁰ Department of Justice and Constitutional Development National Action Plan (NAP) Report 2001- *Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances* (2001) 39. According to section 3 of the Prevention and Combating of Hate Speech Crime, a hate crime is a wrongdoing acknowledged by law, which is committed due to one's bias and prejudice towards another.

In applying this Act, it is important to be cognisant of the various grounds on which people can be discriminated against. Nationality, disability, race, and gender are grounds that have their roots in the apartheid era.¹⁴¹

Section 11 of PEPUDA provides that 'no person should subject any person to harassment'.¹⁴² Whilst this provision may be welcomed and may not be criticised, it does not explicitly state the consequences of not abiding by these precepts. Since 1994 to date, foreign nationals have been harassed or killed in South Africa on account of their national origin.¹⁴³ This comportment is contrary to section 11 of the PEPUDA and perpetrators of such conduct ought to be prosecuted. Consequently, deterrence for misconduct will be heightened.

Section 10 of PEPUDA stipulates that nobody can issue, publicise, or communicate words that can be interpreted insensitive or encourage hatred.¹⁴⁴ The late Goodwill Zwelithini, Zulu King at the time, said migrants should take their belongings and leave South Africa.¹⁴⁵ He alleged that migrants were altering the landscape of South Africa and delight in the wealth that South African citizens ought to be enjoying.¹⁴⁶

The words uttered above can be inciting and stir attitudes of discrimination among South Africans against foreign nationals, especially when uttered by an influential person such as a king. To date similar utterances by other leaders or influential persons have not been dealt with in terms of the law. This is also a failure in upholding the principles of PEPUDA. It also suggests that the state does not recognise the harm that such utterances may cause to foreign nationals. Prosecuting persons for utterances that amount to hate speech may often impede the violence and losses which may have occurred as a result of such speech.

¹⁴¹ Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

¹⁴² Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

¹⁴³ International Organization for Migration Report (2009)7.

¹⁴⁴ Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

¹⁴⁵ Kinge GTW *International Dimensions of Xenophobic Attacks on Foreign Nationals in South Africa* (MSS thesis, North-West University, 2016)25.

¹⁴⁶ Kinge GTW (2016)42.

Section 12 of PEPUDA states that no one may circulate information or issue a notification that could be interpreted to have a purpose of discriminating against certain individuals.¹⁴⁷ During the 2008 xenophobic attacks in South Africa, the violence was observed to be well organised. Prior to these attacks, meetings had been held in hostels to plan the attacks.¹⁴⁸ It is highly likely that words that are hurtful, provoke harm, and propagate hate were used against foreign nationals and triggered these attacks. Despite the fact that section 10 of PEPUDA forbids hateful speech and propaganda for hatred, it has been evidenced that prior to xenophobic raids, these offences have been perpetrated and nothing was done against perpetrators of these crimes.

Section 24 of PEPUDA states that the state has an obligation to ensure that equality is upheld and attained.¹⁴⁹ Noticeable efforts insofar as combating xenophobia are not observed currently.

Section 25(1) of PEPUDA stipulates that the state ought to acquire aid from the constitutional institutions when it is necessary to do so. The ultimate goal is to achieve the following: to improve cognisance of essential rights so that an environment of reciprocal respect and impartiality is stimulated; to take action for the improvement and execution of programmes that enhance fairness and pass additional law that stimulates equality and creates a legislative framework aligned with the objects of this Act.¹⁵⁰ This is a vast responsibility and it would be necessary for the state to take steps in seeking help from the constitutional institutions in order to embark on goals that are not only good on paper but are feasible.

The prevailing law in South Africa does not seem to promote equality when it comes to foreign nationals residing in South Africa. Based on section 25(1) (c) (ii) of PEPUDA, it is the role of the state to enact a legal framework that will answer to the problem of xenophobia.

Chapter 2 of PEPUDA outlines that race, gender, disability, hate speech, harassment and dissemination and publication of unfair discriminatory information that unfairly discriminates are

¹⁴⁷ Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

¹⁴⁸ Bekker S et al' (2008)29.

¹⁴⁹ Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

¹⁵⁰ Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

prohibited grounds of discrimination.¹⁵¹ Despite the fact that nationality has not been listed, this is not an exhaustive list. The current provisions do not seem to provide an answer to the problem of xenophobia.

2.5.6. The Protection from Harassment Act 17 of 2011

Harassment has been defined in section 1 of the Protection from Harassment Act 17 of 2011, as openly or secretly engaging in behaviour that results in harm to an individual or an intricately linked person.¹⁵² Harm may be mental, psychological, physical, or economic.

Section 2(1) of the Protection from Harassment Act states that a victim may bring an application before the court seeking a protection order against harassment.¹⁵³ However, perpetrators of xenophobic violence are often not known to the complainant. This is due to the fact that xenophobic raids occur in the midst of confusion and chaos.

Section 5 of the Protection from Harassment Act requires a complainant to include the name and address of the respondent.¹⁵⁴ As already mentioned earlier, it is difficult for a victim of xenophobic violence to rely on the Act and make use of a protection order. The Protection of Harassment Act does not emphasise how foreign nationals who are harassed during xenophobic attacks can be protected and enjoy the rights embodied in the Constitution. The right to freedom and security of a person is therefore not given reasonable protection.¹⁵⁵

The Protection from Harassment Act barely provides a solution to the problem of xenophobia against foreign nationals in South Africa.

¹⁵¹ Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

¹⁵² The Protection from Harassment Act 17 of 2011.

¹⁵³ The Promotion from Harassment Act (2011).

¹⁵⁴ The Protection from Harassment Act (2011).

¹⁵⁵ Constitution of South Africa (1996).

2.5.7. Prevention and Combating of Hate Crimes and Hate Speech Bill B19-2018.

The Prevention and Combating of Hate Crimes and Hate Speech Bill B19 of 2018, is at the time of writing awaiting promulgation into law. It speaks to issues of racism, racial discrimination, xenophobia, hate crime and hate speech offences, in accordance with international law obligations.¹⁵⁶ If this Bill is promulgated into law and proper enforcement and implementation are done, it is highly likely to speak to the problem of crimes emanating from xenophobia.

The Hate Speech Bill purports to promote values of equality and dignity and ensure the protection of these rights for all. In addition, the Bill purports to address issues of incitement, advocacy of hatred that section 16 of the Constitution does not extend to.¹⁵⁷ The objective of the Hate Speech Bill is to prosecute individuals who commit the proscribed offences: publishing, propagating, and advocating whatsoever is hurtful; encouraging and promulgating hatred based on various grounds, which includes nationality, migrant or refugee status as well as ethnic, or social origin will be convicted of an offence of hate speech.¹⁵⁸

According to section 3 of the Bill, a hate crime is wrongdoing acknowledged by law, which is committed due to one's bias and prejudice towards another.¹⁵⁹ Crimes committed during xenophobic attacks are therefore hate crimes. Anyone found guilty of this transgression will be sentenced to imprisonment periodical confinement, pronouncement as an inveterate offender, committal to an establishment recognised by legislation, a fine, correctional supervision, and confinement from which a person may be placed under correctional observation.¹⁶⁰ These sanctions are not unique as they are imposed in respect of other ordinary crimes too. It may have been advisable to include in these sanctions an element of reparation to victims, education and awareness to perpetrators.

¹⁵⁶ Prevention and Combating of Hate Crimes and Hate Speech Bill B19- 2018.

¹⁵⁷ Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018.

¹⁵⁸ Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) s2 &s4.

¹⁵⁹ Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) s3.

¹⁶⁰ Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) s6.

Section 4 of the Hate Speech Bill stipulates that, anyone who circulates, disseminates, or communicates to one or more individuals in a manner that could rationally be interpreted to establish a clear motive to be hateful or stimulate harm, or encourage propaganda will be culpable of wrongdoing. Among the many grounds listed for which hate crimes can be penalised are nationality, ethnicity, race, language, colour, disability to mention only a few.¹⁶¹

Section 6(3) of the Hate Speech Bill states that anyone who is found guilty of an offence enshrined in section 3 shall be legally responsible, and will be sentenced to either an initial sentence, a fine, or incarceration not more than three years. A recurrence in the crime will be punishable by a fine or incarceration for a period of not more than five years.¹⁶²

Once the Prevention and Combating of Hate Crimes and Hate Speech Bill becomes law, it may address some of the persistent problems of xenophobic attacks on foreign nationals. It will then be possible also to gauge realistically the role that the criminal justice system may play in curbing xenophobic violence.

2.6. Conclusion

The existing legal framework at the international, regional and domestic levels is supposed to afford unequivocal protection to foreign nationals. They ought to be free from all forms of violence from private and public sources. Yet, most of these instruments do not refer to xenophobia specifically. Notwithstanding the omission, it is abundantly clear that any harm perpetrated against a foreign national ought to be dealt with and perpetrators must be held accountable. Nonetheless, foreign nationals in South Africa have been victims of the violation of their rights.

South Africa has failed to uphold many of its international obligations. This is evident in the irrational arrests of foreign nationals, abuse by police officials, and the failure to prosecute serious crimes against foreign nationals.

¹⁶¹ Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) s3.

¹⁶² Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) s6.

Domestic law such as the Refugee Act 130 of 1998, the Protection from Harassment Act 17 of 2011, the Immigration Act 13 of 2002, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the South African Police Service Act 68 of 1995 and the National Prosecuting Authority Act 32 of 1998 does not suffice in protecting foreign nationals from violent attacks.

The Constitution of South Africa does not expressly mention xenophobia but has provisions that afford protection against violence motivated by xenophobia such as sections 9, 10, 11, 12, and, 16.

These provisions are not sufficient to address the problem of xenophobic attacks against foreign nationals residing in South Africa. It is, therefore, vital for South Africa to promulgate a law on xenophobia. The reality is that many foreign nationals do not have the required legal documentation to reside in South Africa and may face deportation if this comes to the attention of the authorities. They would therefore tolerate the crimes committed against them even if it amounts to grave violations of their rights. Despite their illegal status, South Africa has a duty to protect everyone in its territory.



CHAPTER 3
LEGAL MEASURES AGAINST XENOPHOBIA: AN ANALYSIS OF THE LEGAL FRAMEWORK OF
RUSSIA AND SOUTH AFRICA

3.1. Comparative Jurisdictions.

This chapter assesses Russia as a jurisdiction that has responded to xenophobic attacks against foreign nationals. The legal measures employed by Russia are, where appropriate, compared to South Africa's response to xenophobia. Russia appears to have responded positively to combating xenophobic attacks against foreign nationals by accepting some strict measures offered by human rights organisations such as Human Rights Watch.¹⁶³

Russia, though different from South Africa in terms of history, politics, and economy, is a suitable comparator to the extent that it has dealt with xenophobia. Currently, xenophobia is an on-going occurrence against foreign nationals in South Africa. There are credible similarities between Russia and South Africa regarding the emergence of xenophobic attacks against foreign nationals. A few differences between South Africa and Russia, which will become evident later in this chapter, have been observed. Despite the variances, however, Russia is a suitable comparator in that there are arguably lessons which may be adopted and/or accepted to improve South Africa's approach to xenophobic violence. To contextualise Russia as a comparator, a brief look is taken at its legal system, economic and political challenges, as well as xenophobic incidences.

3.2. Xenophobia in Russia during the 1990s

A detailed discussion of Russian history is beyond the scope of this thesis. For the purposes of this chapter, it suffices to commence with a brief discussion of xenophobia in Russia during the

¹⁶³ Solomon H & Kosaka H 'Xenophobia in South Africa: Reflections, Narratives and Recommendations' (2013)2(2) *Southern African Peace and Security Studies* 17.

1990s. Russia witnessed xenophobic attacks against foreign nationals in the 1990s.¹⁶⁴ Solomon and Kosaka are of the view that xenophobia has been pronounced as being rampant in nations experiencing a transition, especially ones related to policies of supreme governing groups.¹⁶⁵ In South Africa, the system of apartheid has had an enormous influence on the attitudes towards diversity of some South African citizens for a number of reasons.¹⁶⁶ The apartheid system treated Black South Africans like foreign nationals. This was done by creating Bantustans and Homelands as independent 'countries' for the African population.¹⁶⁷ Imaginably, the segregation of foreign nationals and some citizens has permeated the psyche of many.

Xenophobic attacks in Russia were targeted against foreign nationals who were optically different from citizens due to their belonging to a different race or culture. As a result of these differences, some people were perceived to be foreign nationals in the community of a region or country.¹⁶⁸ These groups are considered as minorities and they are vulnerable as a result of being foreign nationals who lack social amenities for survival in a foreign nation. In addition, they are not able to enjoy the safeguard of some of their human rights such as protection from arbitrary arrests.¹⁶⁹ Just like Russia, xenophobic attacks in South Africa have targeted individuals who seemingly do not speak or look like South Africans and are harmed during xenophobic raids.¹⁷⁰ This difference is perceived in language, culture, and geographical origin.¹⁷¹ These attacks have also targeted tribal groups that are not dominant in South Africa.¹⁷² This is evidenced in the 2019 xenophobic raids, where ten among the twelve that were killed were South Africans. This suggests that individuals who look different can be targeted during xenophobic attacks.¹⁷³

¹⁶⁴ Enstad JD 'Perspectives on Terrorism: Right-Wing Terrorism and Violence in Putin's Russia' (2018)12(6) *JSTOR* 96.

¹⁶⁵ Solomon H & Kosaka H (2013)6.

¹⁶⁶ Solomon H & Kosaka H (2013)10.

¹⁶⁷ The African Centre for Migration and Society Evaluation Report 2015-*Protection from Xenophobia* (2015)19.

¹⁶⁸ The Russian Jewish Congress Sociological Research Report 2018-*Xenophobia Racism and Antisemitism Parameters in Present-Day Russia* (2018)4.

¹⁶⁹ The Russian Jewish Congress Sociological Research Report (2018)4.

¹⁷⁰ Centre for Unity in Diversity Event Report (2019)-*Xenophobia and South Africa* (2019)2.

¹⁷¹ The African Centre for Migration and Society Evaluation Report (2015)19.

¹⁷² The African Centre for Migration and Society Evaluation Report (2015)19.

¹⁷³ Centre for Unity in Diversity Event Report (2019)2.

In Russia, preference for Russian nationals as opposed to foreign nationals, hostility, abusive or threatening speech, ethnic segregation, and prejudice against foreign nationals which manifest in negative behavioural patterns and ferocity, had been observed.¹⁷⁴

Xenophobia in South Africa is similarly characterised by prejudice, hostility, resentment, hatred and intolerance.¹⁷⁵ The key features of xenophobic attacks in South Africa are unlawful premeditated killing, physical injury, looting, arson, intimidation and displacement of foreign nationals from their homes.¹⁷⁶ These attacks against foreign nationals may be perceived to be institutionalised.¹⁷⁷

Hate crimes in Russia may be perceived to be institutionalised by state organised and administrative management systems.¹⁷⁸ Contemporary research indicates that some Russians in government positions, law enforcement and educational systems restrict anti-discrimination approaches that may assist in preventing certain acts of discrimination against foreign nationals and vulnerable minorities.¹⁷⁹ In the South African context this has also been observed amongst state officials.¹⁸⁰ This may be an indication that xenophobic tendencies are found among people with formal education and those without. Victims of xenophobia in Russia are also attacked on religious grounds and experience ideological hatred.¹⁸¹ Research shows, for example, that persons belonging to the Jehovah's Witness church were persecuted and accused of indulging in activities that were considered extremist.¹⁸² They were sentenced and punished despite their

¹⁷⁴ Sevortian A 'Xenophobia in Post-Soviet Russia' (2009)3 *The Equal Rights Review* 19.

¹⁷⁵ Ogunnoiki AO 'International Law and Xenophobia in South Africa' (2020)3(1) *African Journal of Law, Political Research and Administration* 3-4.

¹⁷⁶ Misago JP 'Political Mobilisation as a Trigger of Xenophobic Violence in Post-Apartheid South Africa' (2019)13 *International Journal of Conflict and Violence* 1.

¹⁷⁷ The African Centre for Migration and Society Evaluation Report (2015)20.

¹⁷⁸ The Russian Jewish Congress Sociological Report (2018)5.

¹⁷⁹ The Russian Jewish Congress Sociological Report (2018)17.

¹⁸⁰ Akinola AO 'The South African Xenophobic Question: A Reflection on Complicity of State Actors' (2018)7(1) *Journal of Conflict and Social Transformation* 66.

¹⁸¹ SOVA Center for Information and Analysis Reports and Analyses 2018 -*Xenophobia in Figures: Hate Crimes in Russia and Efforts to Counteract it in 2017* (2018).

¹⁸² SOVA Center for Information and Analysis 'Inappropriate Anti-Extremism in July 2021' available at <https://www.сова-center.ru/misuse/publications/202108/d44664> (accessed 8 August, 2021).

religious practice not being legally proven to be extremist.¹⁸³ This is as a result of the platitudinous and abusive use of anti-extremism legislation which sometimes influences unfair verdicts such as these usually with a minimal number of acquittals.¹⁸⁴

Institutionalised hate crimes in South Africa as pointed out in chapter 1, are also observed through unlawful arrests of foreign nationals and allegations that foreign nationals are residing in the country illegally. The refusal by police officials to consider that foreign nationals are affected by administrative delays during the application process also denotes xenophobia. The fact that foreign nationals are sometimes arrested based on uninformed opinions is a further example of xenophobic attitudes by the police.¹⁸⁵

With regard to the perceived denialism of the existence and occurrence of xenophobia in the country, South Africa and Russia appear to be similar. The Russian government largely disregarded claims of xenophobia and attributed the rise of widespread hostility to the economic and social transition.¹⁸⁶ Similarly, the South African government has denied the occurrence of xenophobic attacks in South Africa and rather considered them to be acts of criminality induced by socio-economic problems that are exacerbated by an influx of foreign nationals into South Africa.¹⁸⁷

Although South Africa and Russia are similar in respect of their initial response to the phenomenon of xenophobia, it is also necessary to contextualise Russia as a country. This may provide some insight into the government's responses to xenophobia over time. To this end, a brief discussion of Russia's legal system, system of governance, political, social and economic conditions follow.

¹⁸³ SOVA Center for Information and Analysis (2021).

¹⁸⁴ The European Commission against Racism and Intolerance Report 2019-*The Russian Federation* (2019)10. Hate speech against Muslims, based on stereotypical allegations of terrorism is expressed through petitions resisting the construction of mosques. (See the European Commission against Racism Report (2019).

¹⁸⁵ International Organisation for Migration Report 2009-*Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009)17.

¹⁸⁶ Sevortian A (2009)21.

¹⁸⁷ Crush J *Deadly Denial: Xenophobia Governance and the Global Compact for Migration in South Africa* (2020)1-2.

3.2.1 Investigation and prosecution motivated by Xenophobia in Russia

Russia faced challenges in its attempts to eliminate xenophobia for more than a decade after xenophobic attacks against foreign nationals had first been noticed.¹⁸⁸ Some of the many challenges cited, include: Russian law did not criminalise or afford protection against racial discrimination; anti-discrimination legislation did not exist and there was no legal framework in the form of domestic law at the time.¹⁸⁹ Thus, the definition of discrimination did not appear in any law.¹⁹⁰

It has been submitted that the absence of the legal prohibition of discrimination, resulted in the Russian government's failure to promote the rights of foreign nationals.¹⁹¹ While the absence of a law is not an excuse for the tolerance of discrimination, it would seem that the Russian government's approach went beyond indifference to the plight of foreign nationals; Law enforcement officers displayed an oppressive attitude towards foreign nationals and the government shirked its responsibility in holding them accountable for human rights violations perpetrated during conflict.¹⁹² Similarly, a 2019 report by the Centre for Unity in Diversity showed that it has not been confirmed whether anyone has been charged and sentenced for crimes that stem from xenophobia in South Africa.¹⁹³ While some may question the accuracy of this report, one may at best concede that there is indeed not a prevalence of prosecutions of crimes motivated by xenophobia. As mentioned in chapter 1, there are challenges which inhibit effective investigations and prosecutions of such crimes. Such challenges do, however, not justify the apparently complete lack of consideration of the problem by government. The South African government continuously denies the existence of xenophobia in South Africa. The government

¹⁸⁸ Sevortian A (2009) 19-20.

¹⁸⁹ Anti-Discrimination Centre MEMORIAL and SOVA Center for Information and Analysis Report 2013-*Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination by the Russian Federation* (2013)8.

¹⁹⁰ Anti-Discrimination Centre MEMORIAL and SOVA Center for Information and Analysis Report (2013)7-8.

¹⁹¹ Anti-Discrimination Centre MEMORIAL and SOVA Center for Information and Analysis Report (2013)8.

¹⁹² Anti-Discrimination Centre MEMORIAL and SOVA Center for Information and Analysis Report (2013)8.

¹⁹³ Centre for Unity in Diversity Event Report (2019)2.

categorises violence against foreign nationals as ordinary acts of criminality induced by economic issues that are exacerbated by an influx of foreign nationals into South Africa.¹⁹⁴ Russia's response to xenophobia will be discussed next.

3.2.2. Russia's legal system

Russia has a supreme Constitution which protects basic human rights. Article 4(2) of the Russian Constitution affirms its supreme status.¹⁹⁵ This means that no other law may contradict the Constitution and in instances where there is conflict, the Constitution will prevail. In this regard, Russia and South Africa are similar as both countries have a supreme Constitution.

Russia has a civil law system. This includes both codified laws such as the Civil Code and the Criminal Code and uncodified laws.¹⁹⁶ International law and case law are acknowledged as part of the authorised system of Russia. International conventions and treaties which have been ratified are considered to be a fundamental part of the Russian legal system.¹⁹⁷ This is also true for South Africa.

3.2.3. The Russian Constitution

The Constitution of the Russian Federation (Russian Constitution) has some provisions that speak to the problem of xenophobia, despite it not explicitly mentioning xenophobia. These provisions will be discussed briefly next.

Article 19(2) of the Russian Constitution states that, the state should ensure that all human beings enjoy the right to equality irrespective of their sexual category, race, national origin, language,

¹⁹⁴ Crush J (2020)1-2.

¹⁹⁵ The Constitution of the Russian Federation 1993 with amendments through 2014.

¹⁹⁶ Kachura V and Kuznetsov A 'Legal Systems in the Russian Federation: overview' available at [https://uk.practicallaw.thomsonreuters.com/w-010-2803?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-010-2803?contextData=(sc.Default)&transitionType=Default&firstPage=true) (accessed 21 July 2021).

¹⁹⁷ Kachura V and Kuznetsov A (2021).

and religious beliefs. In addition, any constraint of human rights based on race, nationality, and culture should be forbidden.¹⁹⁸ This mandates the state to safeguard the rights of everyone including foreign nationals and to ensure that they are not violated. With the supreme Constitution as a basis for the equal protection of everyone's rights, Russian legislation ought to reinforce these protections.

Article 29 (2) of the Russian Constitution forbids incitement of hatred and strife based on race, religion, language, and nationality.¹⁹⁹ This is reinforced by article 282 of the Russian Criminal Code, discussed later in this chapter.

Article 45 of the Russian Constitution provides that every person's human rights and liberties are protected in Russia.²⁰⁰ This right guarantees the protection of civil rights for all including non-nationals. It also protects everyone against violations of their rights by the state and individuals. While article 45 does not provide for exceptions to the protection it affords, one glaring example of non-compliance with this article is the case in which persons belonging to the Jehovah's Witness church were sentenced and punished for practicing their religion.²⁰¹ This case demonstrated that constitutional guarantees can be futile in the face of a lack of political will. This may also be evident from the later discussion in this chapter of Russia's response to xenophobia under the leadership of President Putin.

Article 53 of the Russian Constitution provides that all persons have the right to be compensated for any destruction caused by illegitimate action of organisations of state power and their officials.²⁰² Xenophobic attacks are often synonymous with damage to, the theft and destruction of victims' possessions. This article is therefore important to the plight of victims of xenophobia.

¹⁹⁸ The Constitution of the Russian Federation (1993).

¹⁹⁹ The Constitution of the Russian Federation (1993).

²⁰⁰ The Constitution of the Russian Federation (1993).

²⁰¹ SOVA Center for Information and Analysis (2021).

²⁰² The Constitution of the Russian Federation (1993).

In the South African context, however, it is rare if not completely unheard of for foreign nationals to be compensated for their losses. This issue will also be elaborated upon later in this chapter.

3.2.4. System of Governance

Russia is a semi-presidential republic. This system comprises the president, as the utmost authority, who is responsible for overall leadership. The president appoints a Prime Minister which is confirmed by a chamber of parliament known as the State Duma and other members of the government.²⁰³ Executive power is exercised by the government, which comprises the Prime Minister, the deputy prime ministers, and the federal ministers.²⁰⁴

Just like South Africa, Russia has three branches of government, which are the legislature, the executive, and the judiciary.²⁰⁵

3.2.5. Political challenges

Russia faced economic and political upheavals in the 1990's.²⁰⁶ The prevalence of widespread crime and the urgent need to acquire autonomy resulted in a struggle. In addition, the Soviet Union had been sanctioned by the United States of America as it was one of the countries suspected of helping Iran in the missile and nuclear programme.²⁰⁷ To this effect Russia struggled to uphold order and the established order did not have the population's confidence as a result, intolerant attitudes were therefore birthed in large parts of the population.²⁰⁸

Though the political history of South Africa differs from that of Russia, both countries experienced a period of unrest, instability and sanctions from the global community. These challenges evidently impacted upon the populace of each country. South Africa equally faced economic and

²⁰³ Kachura V and Kuznetsov A (2021).

²⁰⁴ Kachura V and Kuznetsov A (2021).

²⁰⁵ Kachura V and Kuznetsov A (2021).

²⁰⁶ Sevortian A (2009)21-22.

²⁰⁷ Luzin P 'Sanctions and the Russian defence industry' available at <https://www.ridl.io/en/sanctions-and-the-russian-defence-industry/> (accessed 18 July, 2021).

²⁰⁸ Enstad JD (2018)96.

political challenges. In the mid-1980s, South Africa also faced global sanctions in the effort to sway the ruling government at the time, from practicing a policy of racial segregation.²⁰⁹ Other than the economy of South Africa being adversely affected by external borrowing, some scholars believe that sanctions contributed to South Africa's economic struggle.²¹⁰

3.2.6. Social and Economic Challenges

Russia is characterised by social-economic challenges which often have an effect on xenophobic behaviour.²¹¹ Fairly recent research indicates that labour migrants in Russia are often accused of stealing jobs and agree to work for lesser wages than citizens. Citizens also claim that these jobs are meant to be taken up by Russian nationals.²¹² South Africa is equally pervaded by social-economic challenges that motivate xenophobic attacks against foreign nationals. Indigent South Africans, as was the case in Russia, allege that foreign nationals take employment opportunities that are potentially theirs.²¹³ As outlined in chapter 1, indigent South Africans are of the view that indigent foreign nationals agree to be paid lower wages that citizens cannot agree to work for, hence they are stealing their jobs.²¹⁴

As discussed in chapter 1 of this thesis, many South African citizens make the same claims against foreign nationals from African countries. Furthermore, like foreign nationals in South Africa, foreign nationals in Russia are usually defenceless against violent attacks from citizens as a result of competition for limited socio-economic resources.²¹⁵ As in the South African context, the perpetrators of such attacks in Russia have low levels of formal education, are unemployed, and become hostile towards foreign nationals.²¹⁶ In both countries, it seems that many indigent

²⁰⁹ Levy PI Center Discussion paper *Sanctions on South Africa: What did they do?* (1999)2.

²¹⁰ Levy PI (1999) 4-5.

²¹¹ Sevortian A (2009)19.

²¹² The Russian Jewish Congress Sociological Report (2018)33.

²¹³ Crush J (ed) & Ramachandran S *Migrant Entrepreneurship, Collective Violence and Xenophobia in South Africa* (2014)24.

²¹⁴ Wick J 'Xenophobic Violence in Democratic South Africa' (2015) SAHO available at <https://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa> (accessed 9 April 2020).

²¹⁵ Gorodzeisky A 'Opposition to Immigration in Contemporary Russia' (2019)35(3) *Post-Soviet Affairs* 7.

²¹⁶ Gorodzeisky A (2019)7.

citizens attack other indigent foreign nationals as they compete for work and other limited resources.

Based on the above, it appears that xenophobia can sometimes be motivated by socio-economic challenges experienced by citizens who believe that foreign nationals are taking resources meant for them (citizens). Whether this is factually true or not, is, however, not a legal justification for the violence and crimes committed against foreign nationals. The question of how the state addresses such crimes, which lies at the heart of this thesis, thus arises. Next, prosecutions in Russia will be briefly discussed with a view to establishing, albeit to some extent only, how such crimes are dealt with in the criminal justice system.

3.3. Russia's Response to Xenophobia

From the above, it may be evident that the Russian government, like the South African government, was not initially intent on addressing xenophobia as a matter of urgency. In South Africa, as discussed in chapter 2 of this thesis, however, the supreme Constitution and various legislation afford protection against discrimination. Such protection also extends to foreign nationals. In this regard, Russia was admittedly different from South Africa. In 1990, however, Russia identified trends of xenophobia, racism and nationalism.²¹⁷ This ensued after Russia experienced a high degree of xenophobic attacks against foreign nationals. Arguably, it had become impossible for the Russian government to overlook xenophobia.²¹⁸

After a decade of xenophobic attacks occurring in Russia, the violence by far-right groups intensified.²¹⁹ Some of the worst incidents included, the murder of foreign national students in Saint Petersburg city in North Western Russia as well as a 9-year old girl from central Asia in 2004.²²⁰ Some believe that incidents of this nature impelled the Russian government to respond positively to these atrocities.²²¹

²¹⁷ Enstad JD 'Right-Wing Terrorism and Violence in Putin's Russia' (2018)12(6) *Perspectives on Terrorism* 89.

²¹⁸ Sevortian A (2009)19-20.

²¹⁹ Enstad JD (2018)90.

²²⁰ Sevortian A (2009)20.

²²¹ Sevortian A (2009)22.

It was reported that a positive response to curbing xenophobic attacks against foreign nationals in Russia became noticeable.²²² In 2005, the then Russian President Vladimir Putin, examined the problem of xenophobia and considered it as severe. Significantly, President Putin hosted an online conference where the problem was addressed.²²³ Research shows that the conference was attended by Russian citizens and the problem of extremism and xenophobic violence was on the agenda.²²⁴

Furthermore, President Vladimir Putin directed the chief prosecutor to pass legislation that calls for organisations seen to encourage xenophobia to be interdicted.²²⁵ In chapter 1 of this thesis, it was pointed out that sometimes individuals such as South African political leaders incite xenophobic attacks in their speech as they address community members. South Africa may, therefore, consider passing legislation such as that passed in Russia to prohibit the encouragement of xenophobia.

A national report was submitted by Russia to the United Nations Universal Periodic Review confirming the rise in extremist attacks.²²⁶ Research conducted by the SOVA Center equally revealed an upsurge in the number of victims and deaths due to xenophobic violence.²²⁷ SOVA Centre and Analysis is a Moscow-based Russian non-profit organisation that carries out investigations and gathers data on nationalism, racism, human rights issues and extremist work.²²⁸ A SOVA Centre for Information and Analysis report showed that at least 33 fruitful trials in 19 regions of Russia were conducted by 2008.²²⁹ Research indicates that between 2008 and 2012 when there was a reduction in xenophobic attacks against foreign nationals, Russia had been going through a recession.²³⁰ Arguably, this calls into question some of the contentions that xenophobia is often motivated by socio-economic conditions. It is likely that during an economic

²²² Sevortian A (2009)19.

²²³ Sevortian A (2009)20.

²²⁴ Sevortian A (2009)20.

²²⁵ Solomon H & Kosaka H (2013)19.

²²⁶ Sevortian A (2009)20.

²²⁷ Sevortian A (2009)20.

²²⁸ Anti-Discrimination Centre MEMORIAL and SOVA Center for Information and Analysis Report (2013)1.

²²⁹ Sevortian A (2009)21.

²³⁰ World Bank Report 2012-*Russian Economic report 28: Reinvigorating the Economy* available at <http://worldbank.org/en/news/press-release/2012/10/08/russian-economic-report-28> (accessed 3 June, 2021).

recession most people and especially the indigent will experience severe hardship. Many would in fact be competing for limited resources. If competition for resources was a definite motive for xenophobia, then it stands to reason that attacks upon foreign nationals would be rife during a recession. Economic hardships as a motive for xenophobia is therefore either a myth, or the research findings are defective or more likely, there were other major factors at play that discouraged xenophobia in Russia during the period under discussion.

It is true that an increase in xenophobic attacks has been recorded in Russia after 2017 but the measures that Russia took between 2011 and 2017 clearly show a positive change in the decrease of xenophobic incidences. This analytic synopsis may suggest that South Africa may achieve positive results if it emulates the measures that Russia took to effect a diminution of xenophobic attacks against foreign nationals.

3.4. South Africa's Response to Xenophobia

The responses to xenophobia by South African state actors and institutions were discussed in chapter 1. The xenophobic attacks against foreign nationals that have occurred between 2008 and to date, have revealed many challenges that impeded the solution to the persistent problem of xenophobia. One of the challenges pointed out in chapter 1, was that the police officials did not have the necessary skill to disperse the crowds and was depicted in the case of *Said and Others v The Minister of Safety and Security and Others*.²³¹ This may be an indication that the police in South Africa require training for them to be effective and efficient during xenophobic raids and that they require education on the law. Foreign nationals in South Africa have faced challenges and state responses to these challenges will be discussed.

²³¹ Bekker S, Eigelaar-Meets I & Eva G 'et al' Xenophobia and Violence in South Africa: A desktop of trends and a scan of explanations offered (2008)49.

3.5. The Russian Federal Law on Police

The Russian Federal Law on Police was promulgated in 2011.²³² This Law was enacted to ensure accountability on the police in identifying, subduing, and inhibiting extremist actions as well as to bar institutions that were seemingly promoting xenophobia.²³³ Provisions of the Russian Federal Law on Police will be discussed next.

The Federal Law has contributed to the decrease in xenophobic attacks against foreign nationals in Russia which was observed between 2008 and 2012.²³⁴ Various articles of the Federal Law on Police that speak to xenophobia are outlined below.

According to article 1 of the Russian Federal Law on Police, the police should safeguard the life, constitutional rights of nationals, foreign nationals, stateless persons, prevent crime, and put into effect the law.²³⁵ This provision offers direct protection to foreign nationals against xenophobic attacks as it specifically refers to stateless persons and foreign nationals. Furthermore, the provision mandates police officials to protect stateless persons and foreign individuals in the same way as they would nationals. Article 1 thus serves as a powerful expression of the rights of non-nationals.

Article 5(1) of the Russian Federal law on police encourages the actions of the police to be founded on reverence of the constitutional rights and liberties of all persons.²³⁶ This article thus reinforces the duty of the police not only to protect the rights of foreign nationals, but also to respect their rights.

²³² United Nations General Assembly Report 2011- *Special Rapporteur on Contemporary forms of Racism, racial discrimination, xenophobia and related intolerance*(2011)14.

²³³ United Nations General Assembly Report (2011)14.

²³⁴ Anti-Discrimination Centre “MEMORIAL and SOVA Center for Information and Analysis Report (2013)36.

²³⁵ Federal Law No.3-F2 of February 7, 2011 on the police available at <https://cis-legislation.com/document.fwx?rgn=32699> (accessed 9 May, 2021).

²³⁶ Federal Law on the Police (2011).

Article 5(2) of the Russian Federal law on police, prohibits the violation of the rights of persons.²³⁷ Police officials are therefore mandated not to infringe on any person's human rights. Furthermore, subsection 3 does not allow police officials to use torture, ferocity, or harsh or demeaning attitudes as a recourse against persons.²³⁸ This entails that police officials may not use torture or harsh treatment against persons in their effort to perform their duties. In the event that a police officer wants to obtain evidence from an accused person, they cannot use torture to acquire it.

Article 7(1) of the Russian Federal Law on police safeguards the protection of people's rights regardless of their sexual orientation, racial grouping, culture, language, religion, and nationality. This too speaks to the issue of xenophobia and expresses the grounds upon which persons are often discriminated against. Police officials are as a result obliged to defend the civil liberties of all people, irrespective of their national origin and any of the grounds mentioned in Article 7(1). The aim is clearly to combat xenophobia.

Article 7(3) of the Russian Federal Law on Police states that the police should take into consideration the various cultural, ethnic, and religious groups of people and encourage co-existence of various ethnic groups and unity.²³⁹ The article is interesting and perhaps unique in that it confers upon police officials a duty not only to respect diversity but also encourage it. These positive duties upon the police arguably denote that law enforcement officials should play a proactive role in thwarting xenophobia.

Article 27(1) of the Russian Federal law on police outlines the elementary responsibilities of a police officer which includes adherence to the Constitution of Russian, judicial and legitimate acts in the interior activities and ensuring its execution.²⁴⁰ In order to accomplish the aforementioned, police officers are required to submit to regular procedural tests to evaluate their awareness of

²³⁷ Federal Law on the Police (2011).

²³⁸ Federal Law on the Police (2011).

²³⁹ Federal Law on the Police (2011).

²⁴⁰ Federal Law on the Police (2011).

the Russian Constitution and legal framework.²⁴¹ Such awareness helps police officials to uphold the protection of the rights of non-nationals. Logically, those who enforce and uphold the law should know the law. The inclusion of article 27 in the legislation is, therefore, a necessary measure for constitutional law enforcement.

South African law does not place an express obligation on police officers to undertake continuous training and testing aimed at ensuring awareness of the law and the Constitution. Law enforcement agents must be afforded training and education to capacitate them as they have the capacity to disseminate accurate information about the rights of foreign nationals and model positive behaviour towards them. Additionally, such training should be continuous and ought to be made legitimately mandatory. Humane policing may assist in addressing xenophobia in the country. There is also research to support the contention that training police officials and providing them with clear guiding principles on law enforcement, can lead to more victims reporting hate crimes and may significantly advance the interaction between the police and victims.²⁴² Confidence in the police and normalising the reporting of hate crimes may to some extent serve as deterrents to such crimes.

There is no law that obligates South African police officials to encourage respect and diversity in communities. There is thus an urgent need to train police officials.²⁴³

Article 33 of the Russian Federal law on Police states that police officials will face sanctions for committing felonies against persons. These penalties are recognised by the federal law.²⁴⁴ This article is important as it ensures that police officers who commit crimes face punishment. This may consequently also serve as a deterrent for police officials. Moreover, it cements the principle that no one is above the law, not even law enforcement officials.

²⁴¹ Federal Law on the Police (2011).

²⁴² United Nations High Commissioner for Refugees Report 2015- *Protection from Xenophobia* (2015)57.

²⁴³ Centre for Unity in Diversity Report 2019-*Xenophobia and South Africa* (2019)2.

²⁴⁴ Federal Law on the Police (2011).

Apart from the Russian Federal law on Police, the Criminal Code of the Russian Federation also formed part of the legislative armoury against xenophobia. This part of Russia's domestic legal framework shall be discussed next.

3.6. The Criminal Code of the Russian Federation

The Criminal Code of the Russian Federation No.63 of June 13, 1996(Criminal Code) is founded on the Constitution of the Russian Federation and recognised ethics and standards of universal law.²⁴⁵

Article 2 protects: the rights and free will of persons; possessions, public order, and communal safety; the constitutional system against unlawful violation as well as crime prevention.²⁴⁶ This article offers protection that extends to many aspects of a foreign national's welfare and safeguards their protection. Such a provision arguably should speak directly to the reality that xenophobic attacks are often not only against the person, but also against the property of foreign nationals. In both South Africa and Russia cognisance ought to be taken of the fact that it is likely that when foreign nationals' property or possessions are damaged or destroyed, they need recourse and restoration. They are less likely than nationals to be insured, have access to state, community, or familial support when they fall victim to attacks. Governments ought to intervene in such instances. The issues of damage to property are, however, discussed in greater detail later in this chapter.

According to article 4 of the Criminal Code, people who have committed crimes shall be treated equally by holding them accountable irrespective of their gender, race, ethnic group, dialect, and origin.²⁴⁷ This article perhaps recognises the mindset of many perpetrators who believe that they are entitled to cause harm to others based on certain demographics. In South Africa, for example,

²⁴⁵ The Criminal Code of the Russian Federation No.63-F2 of June 13, 1996 with amendments through 2012.

²⁴⁶ The Criminal Code of the Russian Federation (1996).

²⁴⁷ The Criminal Code of the Russian Federation (1996).

anecdotal reports indicate that some nationals believed that they were justified in committing violent acts against foreign nationals, because the latter are illegally in the country.²⁴⁸ Presumably, they believed that their own legal status justified their illegal actions. Legislation like article 4 of Russia's Criminal Code which explicitly provides that a perpetrators' demographics are irrelevant to accountability is therefore necessary to cement the principle that no one is above the law.

It appears to be evident why Russia had to introduce article 4, in 2008 as more extremist crimes were reported by the SOVA centre. Hate crimes had become progressively cruel as organisations instigated discriminatory acts with impunity.²⁴⁹ This means xenophobic attacks were being initiated at an institutional level. There is no accessible or readily available information which indicates whether these organisations were prosecuted or not, but there is evidence of a 20% increase in hate crimes.²⁵⁰ Given the heinous nature of such crimes and thus the extent of the human rights violations, there was a need for transparency as to how the perpetrators which included organisations, were dealt with. In the absence of such information, it must be re-emphasised that if the organisations were not held accountable, then such omission is contrary to article 4. Article 4 does not make exceptions for perpetrators based on their nationality. It arguably also does not exempt perpetrators based on their legal personality.

In 2009, it was reported that there had been an increase in the prosecution of hate crimes committed by individuals, but seemingly this was inadequate to address and combat the magnitude at which the attacks occurred.²⁵¹ Though prosecution is important and has the potential to be a deterrent, it is a reactive measure, which should be augmented with other interventions. Such interventions cannot be solely driven by non-governmental organisations and movements, given the scale and nature of the problem. The state should be the driving force behind interventions aimed at combatting xenophobia. Denialism by the state, as discussed earlier in this chapter and in chapter 1 usually bear grave consequences.

²⁴⁸ International Organisation for Migration Report (2009)16-17.

²⁴⁹ Sevortian A (2009)20.

²⁵⁰ Sevortian A (2009)20.

²⁵¹ Sevortian A (2009)20.

Article 59(1) of the Criminal Code prescribes capital punishment as a sanction that may be imposed on anyone who commits severe crimes that violate the right to life. In addition, Article 59(3) allows for capital punishment to be substituted by life imprisonment or a period of 25 years imprisonment.²⁵² These two provisions ought to serve as a deterrent to perpetrators of xenophobic violence who would otherwise commit serious and inhumane crimes against foreign nationals. In practice, however, there have been instances where foreign nationals were brutally killed during xenophobic raids, but neither article 59(1) or (3) was applied.²⁵³ Good legislation is therefore not the panacea to the problem of xenophobia. The enforcement of the law is vital to addressing the problem of xenophobia.

Article 111 of the Criminal Code proscribes 'the intentional infliction of a serious injury which is dangerous to the life of a person. In addition, it prescribes a sentence of eight years imprisonment'.²⁵⁴ This article is arguably a positive measure in curbing xenophobic attacks as it specifically covers the act of planning attacks. Xenophobic attacks are often not random acts. They are usually incited and planned. While article 111 does not specifically refer to xenophobic attacks, it may be useful in the prosecution of such crimes in Russia. In South Africa, xenophobic attacks are also usually preceded by incitement and planning. South African law also sanctions premeditated crimes. Crimes motivated by xenophobia are, however, treated as ordinary crimes by the criminal justice system. This may be futile to the plight of foreign nationals who are the targets of such attacks.

Article 167 of the Criminal Code speaks to the intentional damage of another person's property. It prescribes the following sanctions: If the destruction is substantial, it will attract a fine of forty thousand roubles or an amount equivalent to the earnings of the perpetrator for a term of three months; Mandatory labour of 100 to 120 hours; Corrective labour for a year or a three months' detention or two years' imprisonment. These sanctions may be heavy, but it does not take

²⁵² The Criminal Code of the Russian Federation No.63-F2 of June 13, 1996.

²⁵³ Gabdulhakov R 'In the Bullseye of Vigilantes: Meditated Vulnerabilities of Kyrgyz Labour Migrants in Russia' (2019)7(2) *Cogitatio* 235.

²⁵⁴ The Criminal Code of the Russian Federation (1996).

account of the victim's loss as was mentioned earlier in this chapter. The damage and loss suffered by foreign nationals can be significant and in the absence of support and/or redress, they may experience severe suffering.

South African law allows victims who have lost property to be compensated. Section 300(1) of the Criminal Procedure Act, in particular, provides for an award of compensation by the court during criminal proceedings, if the person who has suffered loss or destruction of property brings an application before the court.²⁵⁵ Though this provision is a positive measure for all victims who suffer loss due to crime, not many people are aware that they should bring an application before the court. Further, because section 300(1) does not apply automatically and it requires that an application ought to be initiated by the victim, many would in all likelihood not pursue this avenue as it will come with additional costs and they may not have the means to make the application. Importantly, interaction with the criminal justice system is generally not a pleasant experience for most people and many might not want to have further engagement with the system. The restoration which the section offers may thus be conducive only for some victims. Though victims of xenophobic attacks suffer significant losses, many foreign nationals may be less likely than South African nationals to invoke section 300(1). Their reluctance may be attributed to factors such as fear of retaliation which may be exacerbated by the knowledge that the police ordinarily do not offer protection to them. Another factor may be that some foreign nationals will not report serious crimes against them as they wish to avoid any interaction with the authorities due to their (foreign nationals) illegal status in South Africa. Section 300(1), though a positive step towards victim support is, however, an unattainable solution for the most vulnerable victims.

Article 282 of the Criminal Code forbids actions directed at stimulating animosity on grounds of sexual category, race, culture, linguistic background, birthplace, religious or community social group or through mass media.²⁵⁶ Numerous penalties are proscribed for the aforementioned

²⁵⁵ Criminal Procedure Act 51 of 1977.

²⁵⁶ United Nations General Assembly Report (2011) 14.

crimes. These include: a fine of 100 to 300 minimum wages for a term of one to two years; any earnings of the sentenced person for one to two years or mandatory work for 120 hours. This article is important for the prosecution of crimes motivated by xenophobia as it appears to criminalise actions such as incitement, indoctrination and other actions which are aimed at instigating violence and harm to others based on the grounds mentioned.

Studies on xenophobia in Russia indicate that xenophobia is not completely controllable.²⁵⁷ One of the major obstacles to eradicating xenophobia is still the reluctance of law enforcement agencies to prosecute hate-motivated crimes and this may potentially be one of the reasons why there was a recorded increase of xenophobic attacks in Russia in 2017 and in recent years.²⁵⁸ As already mentioned, though criminal prosecution is evidently not the only solution to curbing xenophobia, it is indeed a necessary measure to addressing the problem.

3.7. Conclusion

In conclusion, a supreme Constitution and the protection afforded by legislation are necessities in the quest to combat xenophobia. The training and knowledge of law enforcement officers, are furthermore essential instruments to addressing xenophobia. The explicit duty of the police, to encourage harmonious communities and the sanctions, which they may face for being instrumental in attacks are also imperative in the fight against xenophobia. Yet the overarching lesson is that no good can come from an apathetic, or even worse, a complicit government and therefore, political will is key to any progress.

Though Russia still appears to be struggling with xenophobia, the period between 2011 and 2017, when there was a significant decrease of xenophobic incidences, is worth taking cognisance of. Furthermore, the spike in attacks observed after 2017 ought also to be considered as it could hold potential lessons for South Africa.

²⁵⁷ Anti-Discrimination Centre Memorial and SOVA Center for Information and Analysis Report (2013)9.

²⁵⁸ SOVA Center for Information and Analysis Report (2018).

Though Russia and South Africa are two very different states as already mentioned and on the face of it, comparisons may be questionable, the preceding discussions unequivocally denote that South Africa may learn some lessons from Russia's experience and responses to xenophobia. As outlined earlier, Russia faced an economic recession during the period in which xenophobia decreased. The South African government's problem regarding limited resources ought therefore not to be a major obstacle to initiating a concerted and reasonable response to xenophobia.



CHAPTER 4

4.1. Recommendations and Conclusion

4.1.1. Recommendations

The problem of xenophobia in South Africa has been persistent as pointed out in the previous chapters. Foreign nationals from other African countries, in South Africa, have suffered persecution, lost their property and some have even been murdered due to their national origin. Unfortunately, there is no instant or single panacea to xenophobia and the atrocities which have ensued to date. Much needs to be done to address and combat this complex evil. This thesis, however, makes some recommendations that may contribute to the alleviation of the plight of foreign nationals in South Africa and gradually eradicate xenophobia in South African communities. These recommendations are based primarily on education and sensitisation, the enactment of legislation, and a few criminal justice responses. For convenience, the aforementioned recommendations will be dealt with under different headings next.

The criminal justice system responses

Once legislation that speaks to xenophobia has been enacted and the police are more adept at and committed to investigating such violence, it may be easier for the NPA to prosecute perpetrators of xenophobic attacks against foreign nationals. It is not possible for an accused to be found guilty of a crime if the law has not in clear terms proscribed the type of conduct with which he is charged. It is only when a felony is proscribed and properly investigated, that the appropriate verdict may be executed regarding the method and decree, after the accused has been found guilty. Consequently, deterrence for xenophobia will be heightened. On several occasions as pointed out in chapter 1, cases have been withdrawn. The reasons for withdrawing such cases must be thoroughly investigated and addressed.

There is an urgent need for knowledge on effective ways to respond to crimes that stem from xenophobia, to be imparted to police officials, prosecutors, and judges. This, therefore, means further studies and training ought to be done on the issue. As pointed out in chapter 1, the police were reported not to have the necessary skill to disperse the attackers and were deemed to be ineffective.

It is evident in chapter 1 that during a xenophobic raid, 357 foreign nationals who were killed were not reported. Sometimes, foreign nationals fail to report these crimes as they are afraid of the police and assume that no action will be taken against perpetrators. Police officers are principal actors who can facilitate the prevention of xenophobic attacks. They are the first to come in contact with victims and should therefore have a good interface with them so that victims can be free to report crimes committed against them by perpetrators of xenophobic attacks. In the *Said and Others v The Minister of Safety and Security* case, the police were unresponsive to the needs of the victims as they tried to give their (victims) statements. A police official advised a victim to rather run away for their safety than give a statement. Responses from the police such as these can hinder their role to facilitate the prevention of crime. Alternatively, a specialised task team should be recommended to focus on the problem of xenophobia. The current police are not trained in this area and many are prejudiced.

South Africa needs to engender an official level solution aimed at establishing a society inclusive of foreign nationals which will require official government support. The training of police officials must not only include how to respond swiftly at the scene of the attack but must encompass training on the law and human rights so that they know how to apply the acquired knowledge when the need arises. The government should not only ensure that the police undergo training but should appoint better-qualified police officials in the first place. In chapter 1, it was noted that the scale of xenophobic violence is often overwhelming to the police as they have limited manpower and many of their recruits are poorly trained. This impacts the safety and protection of foreign nationals and their property. The inability of the police to investigate properly further exacerbates the plight of foreign nationals. The lack of resources was also reported to have been

a huge challenge for the police to prevent the attacks on foreign nationals in the *Said and Others v The Minister of Safety and Security* case.

During some xenophobic raids in informal settlements, it may have been observed that the police helped foreign nationals whose lives were in danger while perpetrators looted their shops which unfortunately resulted in loss of stock. The Police should also be trained on the protection of property of foreign nationals. In addition, compensation should be granted to foreign nationals who have lost their property during xenophobic attacks as prescribed in section 300 of the Criminal Procedure Act. This may be cemented by the inclusion of a similar provision in the Prevention and Combating of Hate Crimes and Hate Speech Bill.

The *Said and others v The Minister of Safety and Security and Others* case discussed in chapter 1 put the spotlight on the plight of the refugees. In this case, though the applicants were not able to prove that the police had discriminated against them, the case exemplifies how foreign nationals often suffer losses due to xenophobic violence and that they are very rarely compensated for their losses. Though their stores had been looted, no one was prosecuted. It seems that the police had been insensitive to the complaints of the foreign nationals. There was no support for victims of the violence. The support of NGOs which are often the only support that victims can rely on was also absent at that stage. It is thus recommended that while NGOs cannot be expected to fulfil the duties of government, they may be well-placed to offer support to persons affected by xenophobia and xenophobic violence. This may require collaboration between the government and the NGO sector. Policies and strategies may therefore have to be devised to ensure that the issue of xenophobia is addressed at a community level.

The *Said and others v The Minister of Safety and Security and Others* case further demonstrates the problem with witnesses to xenophobic violence. Whilst the state had several witnesses who testified, the applicants barely had witnesses. Arguably, this may be because of the chaotic nature of the raids, but it is also possible that eye-witnesses at the scene of the attack may have been reluctant to testify for the victims for fear of being attacked. This may suggest that there is a need to strengthen the witness protection in cases of xenophobic violence.

Furthermore, though this is not unique to the *Said and Others v The Minister of Safety and Security* case, the language used by police and the courts may present challenges to victims. There is thus a need for interpreters who will assist foreign nationals to overcome the language barrier during investigations. This will preclude inaccurate information from being recorded during investigations, giving of statements, and during court proceedings.

Enactment of legislation

Just like Russia, as pointed out in chapter 3, South Africa should enact laws that will regulate the police and proscribe misconduct that stems from xenophobia. They should be provided with consistent training and should be legally obligated to know the law. This will hamper the arbitrary exercise of power and counter impunity. Russia has continuous training and assessment to ensure that the police understand the law that they must apply, the same may be recommended for South Africa.

The Prevention and Combating of Hate Crimes and Hate Speech Bill is awaiting promulgation as pointed out in chapter 2. Once it has been enacted into law, it may be a step in the right direction to combat xenophobia. The current Bill speaks to issues of xenophobia and hate speech. Criminal prosecutions under this legislation may become possible and may create the basis for the criminal justice system to deal effectively with perpetrators.

In particular, political and community leaders who instigate xenophobic attacks must be held legally accountable under this law. They have a legal and moral obligation not to incite violence and hatred towards foreign nationals. Leaders who are culpable under this legislation ought to be educated also on the consequences of their actions. In the same vain that local leaders address the community and incite xenophobia, if they conversely, condemn xenophobia publicly and encourage indigent South Africans to refrain from attacking foreign nationals, this sensitisation will bring about a positive change as leaders have the power to influence people through speech. Provisions to this effect ought also to be included in the Prevention and Combating of Hate Crimes and Hate Speech Bill.

Provisions that specifically speak to the resurgence of xenophobic attacks ought also to be included in the Bill. Sanctions for xenophobic crimes should include some form of reparation to victims where reasonably possible. Sanctions that also result in awareness-raising, sensitisation, consequences of xenophobia, and education on the plight of foreign nationals will also assist in curbing such violence. This is not to say that such options should be 'softer' alternatives to deserved punishments. Awareness-raising, sensitisation, and education must be imposed as additional to or part of the ordinary sanctions.

It has been pointed out in chapter 2 that one of the purposes of refugee law is to eliminate the distress and displacement of refugees and make them feel at home. Refugee law ought to facilitate the healing and restoration of refugees by providing a safe haven for traumatised victims of xenophobic attacks. The Refugee Act should, therefore, be amended to include protection against xenophobic attacks. Further, the punitive nature of the Immigration Act should be reconsidered in order to afford protection to undocumented migrants who will tolerate violations of their rights for fear of interacting with the authorities. While it is acknowledged here that South Africa has to deal with the influx of migrants, this does not justify violations of their rights. South Africa is a states party to many international and regional instruments which bind the state to protect foreign nationals against unlawful attacks.

The issue of competition in the labour market was discussed in Chapter 2 of this thesis. The sentiment that some employers prefer employing foreign nationals instead of South Africans requires urgent attention as it is one of the major motivations for xenophobic attacks. The belief that foreign nationals are more accepting of lower wages and willing to settle for poor working conditions is cause for concern. This consequently incites hostility towards foreign nationals. South Africa thus needs to include provisions in legislation such as the Basic Conditions of Employment Act that will protect the rights of foreign nationals from exploitation. It may also inspire a greater sense of equality amongst South Africans.

Education and sensitisation

Finding a solution to xenophobia should ostensibly be a responsibility of the government and community rather than a few stakeholders. A collaborative approach to addressing xenophobia in South Africa is key. As shown in chapter 1 of this thesis, the South African Human Rights Commission (SAHRC) in partnership with the United Nations High Commission for Refugees (UNHCR) and the National Consortium on Refugee Affairs (NCRA) embarked on the Roll Back Campaign with the intention to sensitise communities on the intolerance of xenophobia. Unfortunately, the government did not commit to the implementation of the campaign. This was a major missed opportunity in the quest to eradicate xenophobia, but it is an indication that even if non-governmental organisations and society at large collaborate, the state should still be at the forefront of any project. A joint effort allows for sharing of knowledge and avoids fruitless programme designs. In addition, efforts and projects to curb xenophobia will require resources that may be provided from the national budget. This, therefore, calls for a joint effort between government and society for the problem of xenophobia to be effectively combatted.

International and regional organisations can only assist a nation like South Africa to solve the problem of xenophobia, once the government and its citizens have identified and acknowledged the existence of the problem, otherwise, all their efforts will be futile. Acknowledgment of the existence of xenophobia by national leaders and citizens of South Africa, is therefore vital for this endeavour to become a reality.

Concerted studies to research and document the circumstances which lead to and sustain xenophobia are necessary. Investment in such studies will also confirm the government's acknowledgment of the problem and its seriousness to eradicate xenophobia. Currently, sporadic, privately funded and small-scale studies are not adequate to deepen a comprehensive understanding of xenophobia in South Africa.

A further necessity to enhancing our understanding of xenophobia in South Africa, lies in educational programmes. There is an urgent need for national education programmes that will

be all inclusive, in schools, institutions of higher learning, workplaces, communities and the public service. The community needs to be made aware that foreign nationals should not be seen as rivals and be sensitised on the positive benefits that migration can bring to the economic welfare of a nation. This will be accomplished by: incorporating civic education on diversity and acceptance in the school / tertiary education curricula; community sensitisation on diversity and benefits of migration as well as the inclusion of these themes in the public service training. Consequently, indigent South Africans who initially showed hostility towards foreign nationals may accept them and foster mutual respect and assimilation.

In addition, educating South African nationals on the plight of foreign nationals as well as the benefits of their participation in the economy may dispel the myths which give rise to xenophobia. There is perhaps also a need to remind South Africans of *Ubuntu*, an African value which in short translates to 'I am because you are'. This value is premised on the belief in the universal humanity of all and has arguably been a pivotal reminder of the need for unity in South Africa during the formative years of its democracy. While South Africa may still be grappling with this value, it would not be farfetched to educate South Africans on how other African countries such as Zambia, Tanzania, Swaziland, Nigeria, and Lesotho gave sanctuary to South Africa's political exiles due to their sense of Ubuntu towards South Africans. While some may regard this as manipulation, there may be more who would appreciate that South Africa's liberation is in part attributable to the rest of Africa's sense of Ubuntu towards the country and its people.

4.1.2. Conclusion

Xenophobic attacks against foreign nationals have been detected in South Africa since 1994. State actors have sporadically tried to respond to this problem but to no avail. It is worth noting that there has not been an acknowledgment by the South African government of the existence of xenophobia as attacks against foreign nationals are considered ordinary criminal attacks. To this effect, no legal framework that directly speaks to xenophobia has been enacted and xenophobia is not mentioned or prohibited in the South African Constitution. The Prevention and Combating of Hate Crimes and Hate Speech Bill is awaiting its promulgation and has provisions

that speak to xenophobia. With some of the additions mentioned above this may be a step in the right direction to counter the problem of xenophobia.

At the heart of stemming the tide of xenophobic violence, is the need for the South African government's unwavering political will to uphold the rights of everyone within its borders. *Ubuntu*, the basis of the nation's character, ought to inspire concerted efforts by all the branches of the South African government as well as the citizenry to recognise the dignity of nationals and non-nationals. The dignity of non-nationals, after all, do not lie only in what they have to offer, but also in their representation of our own Africanness.

In conclusion, there has been few prosecutions of crimes motivated by xenophobia. In cases where there has been a successful prosecution, this fact has not been made known to the public and the crime has thus been treated as an ordinary crime. Violence motivated by xenophobia should not be treated as an ordinary crime as it camouflages the root of the problem and assists in its perpetuation. Extraordinary measures ought thus to be taken to curb xenophobia and the widespread violence and suffering which it causes. The criminal justice system does have a definite role to play in this regard. Special courts, as initially recommended by the government, should be introduced to deal with the problem of xenophobia. Importantly, data on xenophobic violence and prosecutions should be documented by the government so as to gain a real understanding of the extent of the problem and to devise appropriate legal and other strategies to combat it. It may be determined that there is an urgent need for South Africa to take practical and sustainable measures that will help curb xenophobic attacks against foreign nationals.

Bibliography

Articles

Adjai C & Lazaridis G 'People, State, Civic Responses to Immigration, Xenophobia and Racism in the New South Africa' (2014)15(2) *Journal of International Migration and Integration* 237-254.

Akinola AO 'The South African xenophobic question: a reflection on complicity of state actors' (2018)7(1) *Journal of Conflict and Social Transformation* 53-79.

Crush J 'The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa' (2008)50 *Southern African Migration Project* 1-61.

Enstad JD 'Perspectives on Terrorism: Right- Wing Terrorism and Violence in Putin's Russia' (2018)12(6) *JSTOR* 89-103.

Gabdulhakov R 'In the bullseye of Vigilantes: Mediated Vulnerabilities of Kyrgyz Labour Migrants in Russia' (2019)7(2) *Cogitatio* 230-241.

Gade C 'The Historical Development of Written Discourses in Ubuntu' (2011)30(3) *South African Philosophy* 300-329.

Gorodzeisky A 'Opposition to Immigration in Contemporary Russia' (2019)35(3) *Post- Soviet Affairs* 1-38.

Hickel J 'Xenophobia in South Africa, Order, Chaos and the Moral Economy of Witchcraft' (2014)29 (1) *Cultural Anthropology* 103-127.

Kafwimbi T, Banaszak K, Khan S, Morgan J & Nadori A 'Violation of Human Rights of Disadvantaged and Vulnerable Refugees' (2010)1(5) *International Journal of Sustainable Development* 67-83.

Mbecke P 'Anti-Afrophobia policy shortfall and dilemma in the New Partnership for Africa's Development and South Africa' (2015)11(4) *The Journal for Transdisciplinary Research in Southern Africa* 71-82.

Misago JP 'Linking Governance and Xenophobic Violence in Contemporary South Africa' (2019)19(1) *African Journal on Conflict Resolution* 57-80.

Misago JP 'Political Mobilisation as a Trigger of Xenophobic Violence in Post-Apartheid South Africa' (2019)13 *International Journal of Conflict and Violence* 1-11.

Mukumbang FC, Ambe AN, Adebisi BO 'et al' Unspoken Inequality: how Covid-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees and undocumented migrants in South Africa (2020)141 *International Journal for Equity in Health* 1-7.

Mutanda D 'Xenophobic Violence in South Africa: mirroring economic and political development failures in Africa' (2017)15 (3) *African Identities* 277-294.

Ogunnoiki AO 'International law and xenophobia in South Africa' (2020)3(1) *African Journal of Law, Political Research and Administration* 1-9.

Parsley J 'We Are Not Treated Like People: The Roll Back Xenophobia Campaign in South Africa' (2000)17 *The Humanitarian Exchange Editorial* 9-10(Publication of the Humanitarian Network).

Sevortian A 'Xenophobia in Post-Soviet Russia' (2009)3 *The Equal Rights Review* 19-27.

Solomon H & Kosaka H' Xenophobia in South Africa: Reflections, Narratives and Recommendations (2013)2(2) *Southern African Peace and Security Studies* 5-26.

Steinberg J 'Xenophobia and Collective Violence in South Africa: A Note of Skepticism About the Scapegoat' (2018)61(3) *African Studies Review* 119-134.

Tevera D 'African Migration, Xenophobia and Urban Violence in Post-apartheid South Africa (2013)7 *Xenophobia and Urban Violence* 9-26.

Books

Crush J *Deadly Denial: Xenophobia Governance and the Global Compact for Migration in South Africa* (2020) Cape Town: Bronwen Dachs Muller.

Crush J & Ramachandran S *Migrant Entrepreneurship Collective Violence and Xenophobia in South Africa* (2014) Cape Town: Bronwen Dachs Muller.

Crush J(ed) & Ramachandran S *Xenophobic Violence in South Africa: Denialism, Minimalism, Realism* (2014) Cape Town: Bronwen Dachs Muller.

Dugard J *International Law: A South African Perspective* 4 ed (2011) Cape Town: Juta

Snyman CR *Criminal law* 6 ed (2014) Cape Town: LexisNexis.

Case Law

Kiliko and Others v Minister of Home Affairs and Others 2006(4) SA 114(C).

Kiliko and Others v Minister of Home Affairs and Others (2739/05) [2008] ZAWCHC.

Kiliko and Others v Minister of Home Affairs and Others (2739/2005) [2009] ZAWCHC 79(9March 2009).

Tsebe and Another v Minister of Home Affairs and others [2012]1 All SA 83.

Discussion Papers

Levy PI Center Discussion paper 796 *Sanctions on South Africa: What did they do?* (1999) 1-14.

Internet References

African Commission on Human and Peoples' Rights 'State Parties to the African Charter' available at <https://www.achpr.org/dates>.

Amnesty International UK 'What is the European Convention on Human Rights'? available at <https://www.amnesty.org.uk/what-is-the-european-covention-on-human-rights>.

Department of Justice 'General Measures of Implementation, Chapter 3' available at <https://www.justice.gov.za/policy/african%20charter/afr-charter03.html>.

Desai A 'Migrants and Violence in South Africa: The April 2015 Xenophobic attacks in Durban' available at <https://ujcontent.uj.ac.za/vital/access/services/Download/uj:16403/SOURCE1>.

Equality and Human Rights Commission 'What is the European Convention on Human Rights'? available at <https://www.equalityhumanrights.com/en/what-european-convention-human-rights>.

ESCR-Net 'The Government of South Africa ratifies the ICESCR' available at <https://www.escr-net.org/news/2015/government-south-africa-raties-icescr>.

Fabricius P 'SA government flounders in the face of xenophobic attacks' Daily Maverick 5 April 2019 available at <https://www.dailymaverick.co.za/article/2019-04-05-sa-government-flounders-in-the-face-of-xenophobic-attacks/>.

Fabricius P 'South Africa: Attacks on Foreign Nationals' Daily Maverick 5 April 2019 available at <https://www.hrw.org/news/2019/04/15/south-africa-attacks-foreign-nationals>.

Federal Law No.3-F2 of February 7, 2011 on the Police available at <http://cis-legislation.com/document.fwx?rgn=32699>.

Holmes C 'What's behind South Africa's xenophobic violence last week'? available at <https://www.washingtonpost.com/politics/2019/09/09/whats-behind-south-africa-s-xenophobic-violence-last-week/>.

Human Rights Watch 'South Africa's Obligations under International and Domestic Law' available at

<https://www.hrw.org/legacy/reports98/sareport/App1a.htm#:~:text=The%20South%20African%20Constitution%20guarantees,the%20legislature%2C%20the%20executive%2C%20the>.

Human Rights Watch 'Xenophobic Violence Against Non-Nationals in South Africa: They have Robbed Me of My Life' available at <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south>.

Kachura V and Kuznetsov A 'Legal Systems in the Russian Federation: overview' available at [https://uk.practicallaw.thomsonreuters.com/w-010-2803?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-010-2803?contextData=(sc.Default)&transitionType=Default&firstPage=true).

Krippahl C 'Xenophobia in South Africa strains international relations' (2019) available at <https://www.dw.com/en/xenophobia-in-south-africa-strains-international-relations/a-50275526>.

Love H 'Your Dictionary' available at <https://www.yourdictionary.com/kwerekwere>.

Luzin P 'Sanctions and the Russian defence industry' available at <https://www.ridl.io/en/sanctions-and-the-russian-defence-industry/>.

Masuku T 'Xenophobia, like racism must be treated as a crime' available at <https://issafrica.org/iss-today/xenophobia-like-racism-must-be-treated-as-a-crime>.

Mavhinga D 'South Africa: Attacks on Foreign Nationals Rise in Xenophobic Violence as Elections Near' available at <https://www.hrw.org/news/2019/04/15/south-africa-attacks-foreign-nationals>.

Office of the United States Trade Representative 'South African Customs Union (SACU)' available at <https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/southern-african-customs-union-sacu>.

Pradana N "The Rise" of Xenophobia in Germany: Is it True that Every Social Problem is immigrants' Fault?' available at https://www.researchgate.net/publication/340934247_The_Rise_of_xenophobia_in_Germany_is_it_True_that_Every_Social_Problem_is_Immigrants'_Fault.

Reilly K 'The Role of Law in Curbing Xenophobia' (2015) available at <http://www.derebus.org.za/role-law-curbing-xenophobia/>.

Southern African Customs Union 'Objectives of SACU' (2021) available at <https://sacu.int/show.php?id=397>.

South African Development Community Report 2012-*Towards a Common Future* available at <https://www.sadc.int/about-sadc/overview/history-and-treaty>.

Southern African Development Community Report 2012-*Towards a Common Future* available at <https://www.sadc.int/member-states/>.

Southern African Development Community Report 2015-*Towards a Common Future* available at <https://www.sadc.int>.

South Africa's Obligations under International and Domestic Law available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm>.

South African Revenue Services 'Agreement Establishing the African Continental Free Trade Area' available at <https://www.sars.gov.za/legal-council/international-treaties-agreements/afcfta/>.

SOVA Center for Information and Analysis 'Inappropriate Anti-Extremism in July 2021' available at <https://www.sova-center.ru/misuse/publications/202108/d44664>.

United Nations Committee on the Elimination of Racial Discrimination (CERD) Report 2006-*Discrimination based on race, nationality and ethnicity* (2006)¹ available at <https://www.refworld.org/docid/45c30bc80.html> (a.

United Nations Human Rights Human Rights Council 'Human Rights: Peace, dignity and equality on healthy planet' available at <https://www.un.org/en/global-issues/human-rights>.

Wamundiya A 'Xenophobia in South Africa-A Brief Summary' available at https://www.canoncollins.org.uk/sites/canoncollins.org.uk/files/alice_wamundiya_on_xenophobia.pdf.

Wick J 'Xenophobic Violence in Democratic South Africa' (2015) *SAHO* available at <https://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa>.

World Bank Report 2012-Russian Economic Report 28: Reinvigorating the Economy available at <https://worldbank.org/en/news/press-release/2012/10/08/russian-economic-report-28>.

Occasional Papers

Langalanga A 'A Tale of Two Continents: Comparing Migration Experiences in South Africa and Germany' (2019)²⁹⁶ South African Institute of International Affairs 1-26.

Press Units

European Court of Human Rights Press Unit on the *Collective Expulsion of Aliens* (2021)) 1-10.

Reports and policies of governmental bodies

Anti-Discrimination Centre MEMORIAL and SOVA Center for Information and Analysis Report 2013-*Implementation of International Convention on the Elimination of All forms of Racial Discrimination by the Russian Federation* (2013) International Partnership for Human Rights and International Federation for human Rights: Moscow.

Centre for Unity in Diversity Event Report 2019-*Xenophobia and South Africa* (2019) Centre for Unity in Diversity: Cape Town

Department of Justice and Constitutional development Report 2001- *National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) Department of Justice: Cape Town.

Human Rights watch Report 2021- *Human rights conditions in nearly 100 countries and territories Worldwide in 2020* (2021) Human Rights Watch: New York.

International Centre for Migration Policy Development Report 2017- *South Africa Case Study: The Double Crisis-Mass Migration From Zimbabwe And Xenophobic Violence in South Africa* (2017) International Centre for Migration Policy Development: Vienna.

International Organization for Migration Report 2009-*Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009) International Organization for Migration: Pretoria.

National Council of Provinces Security and Justice Report 2019-*Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: briefing with Deputy Minister* (2019) National Council of Provinces Security and Justice: Mpumalanga.

South African Human Rights Commission Shadow Report 2006- *South Africa's Compliance with Provisions of International Convention against all Forms of Racial Discrimination* (2006) South African human Rights Commission: South Africa.

SOVA Center for Information and Analysis Report 2018-*Xenophobia in Figures: Hate Crimes in Russia and Efforts to Counteract it in 2017* (2018) SOVA Center for Information and Analysis: Moscow.

The Department of Community safety report 2019-*Detective Services confirms lack of training and under resources* (2019) Western Cape Government: Cape Town.

The European Commission against Racism and Intolerance Report 2019-*The Russian Federation* (2019) The European Commission against Racism and Intolerance: Strasbourg.

The Public Service Commission Detective Dialogue 2012-*SAPS Detective Services: roles, training, cares, modernisation & other challenges* (2012) Government Communications: Centurion.

United Nations Economic Commission for Africa Report 2015- *The Continental Free Trade (CFTA) Area in Africa: A Human Rights Perspective* United Nations Economic Commission for Africa: Geneva.

United Nations General Assembly Report of *Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance* (2011) The General Assembly: Geneva.

United Nations High Commissioner for Refugees Report 2015-*Protection from Xenophobia* (2015).

Research Reports

Bekker S, Eigelaar-Meets I, Eva G & Poole C *Xenophobia and Violence in South Africa: A desktop of trends and a scan of explanations offered* (2008) South African Print Media: South Africa.

Centre for the Study of Violence and Reconciliation Report 2006- *Diversity and Transformation in the South African Police Service: A Study of Police Perspectives on Race, Gender and the Community in the Johannesburg Policing Area* (2006) Centre for the Study of Violence and Reconciliation: Braamfontein.

Crush J, Tawodzera G & Chikanda A, Ramachandran S, & Tevera D *South Africa Case Study: The Double Crisis-Mass Migration From Zimbabwe And Xenophobic Violence in South Africa* (2017) South African Migration Programme: Austria.

International Organization for Migration Report 2009-*Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009) International Organization for Migration: Pretoria.

The African Centre for Migration and Society Evaluation Report 2015-*Protection from Xenophobia* (2015) The African Centre for Migration and Society: Johannesburg.

The Russian Jewish Congress Sociological Research Report 2018-*Xenophobia, Racism and Antisemitism Parameters in Present-Day Russia* (2018) The Russian Jewish Congress: Moscow.

The Constitution

Constitution of the Republic of South Africa, 1996.

The Constitution of the Russian Federation of 1993 with amendments through 2014.

Theses

Kinge GTW International Dimensions of Xenophobic Attacks on Foreign Nationals in South Africa (MSS thesis, North-West University, 2016).

Misago JP *Migration, Governance and Violent Exclusion: Exploring the Determinants of Xenophobic Violence in Post-Apartheid South Africa* (PHD thesis, University of Witwatersrand, 2016).

Treaties and Conventions

African Charter on Human and Peoples' Rights adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 211.L.M (1982), entered into force on 21 October 1986.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly resolution 44/141 on 10 December 1984 and entered into force on 26 June 1987.

Convention and Protocol Relating to the Status of Refugees adopted by the United Nations General Assembly Resolution 2198 (XXI) on 16 December 1966 and entered into force on 4 October 1967.

Convention Relating to the Status of Refugees adopted by the United Nations General Assembly Resolution 429 (V) on 28 July 1951 and entered into on 22 April 1954.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, adopted by the Council of Europe Resolution 4.XI on 4 October 1950 and entered into force on September 1953.

European Convention on Human Rights adopted by the Council of Europe Resolution 4.XI on 4 November 1950 and entered into force on 3 September 1953.

International Convention on the Elimination of All forms of Racial Discrimination adopted by the General Assembly of the United Nations General Assembly Resolution 2106 (XX) on 21 December 1965 and entered into force on 12 March 1969.

International Covenant on Civil and Political Rights adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966 and entered into force on 23 March 1976.

International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1996 and entered into force on 3 January 1976.

Universal Declaration of Human Rights adopted by the United Nations General Assembly Resolution 217A on 10 December 1948 and entered into force on 10 December 1948.

Legislation

Criminal Procedure Act 51 of 1977.

National Prosecuting Authority Act 32 of 1998.

Prevention and Combating of Hate Crimes and Speech Bill B19- 2018.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Criminal Code of the Russian Federation No.63-F2 of June 13, 1996 with amendments through 2012.

The Immigration Act 13 of 2002.

The Protection from Harassment Act 17 of 2011.

The Refugee Act 130 of 1998.

The South African Police Service Act 68 of 1995.