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**The adequacy of the South African legal framework in addressing
xenophobia**

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LLM (Multidisciplinary Human Rights)**

by

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Declaration of originality

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Dedication

I dedicate this work to my parents, Mrs Tsitsi M.N and Dr Sydney T Sekeramayi, without whose love, prayers, hard work, support, and encouragement I would not be here today. This is one of the fruits of your labor. *Ndinoramba ndichitenda*, I love you both endlessly.

This work is also dedicated to migrants in South Africa and globally who have been victims of xenophobia. The time has come for the plight of migrants to be understood and for our lives to be regulated with dignity.

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List of abbreviations

CESR	International Covenant on Economic, Social and Cultural Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
NAP	National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance
OAU	Organisation of African Unity
RRO	Refugee Reception Officer
RSDO	Refugee Status Determination Officer
SAHRC	South African Human Rights Commission
SADC	Southern African Development Community
UN	United Nations

Abstract

Xenophobia is a rampant problem in South Africa; it manifests itself in many ways and impedes the full enjoyment and protection of human rights for all migrants in the country. Xenophobia has deep roots and causes. One of the main problems in curbing xenophobia in South Africa is the lack of an adequate legal response, which can permeate and regulate other sectors of society where xenophobia is concerned. In recent times, xenophobic violence has been triggered and incited through online digital platforms such as Whatsapp and Twitter. This research assesses the legal regulation of xenophobia in South Africa, with a particular focus on the 'new' digital face of xenophobia. This research assesses the adequacy of the South African legal framework in addressing xenophobia with regard to South Africa's international and regional obligations for the protection of migrants and people in need of international protection and the impact this has on their human rights. This research offers interdisciplinary responses in relation to the changing face of xenophobia and what can be done in order to regulate the incitement of xenophobic violence, the perpetuation of xenophobic rhetoric and the results of this through online platforms with a legal response as the foundation. The research concludes that the changing face towards digital xenophobia requires the existing problems relating to 'traditional' manifestations of xenophobia to be addressed as well as the underpinning of a concrete and specific legal framework and policy framework that governs the peculiarities of xenophobia that are specific to the South African context.

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Chapter 1: Introduction

1.1. Background

South Africa is lauded worldwide for having a progressive Constitution and Bill of Rights that protects and upholds the rights of people within the borders of this nation. The Constitution of the Republic of South Africa, 1996 (South African Constitution) contains some rights that are limited to citizens, and some rights that are universal in their application and not limited by citizenship and as such should be available to and protect all people within the borders of this nation. This distinction is at the heart of a disconnect that informs this mini-dissertation.

South Africa has become the hub of African migration, with many categories of African migrants coming to South Africa searching for greener pastures at varying levels.¹ This has resulted in increasing numbers of migrant communities in all strata of South African society. Over the years, certain categories of these visitors to South Africa have not been met with or received the typical 'Rainbow Nation' welcome and behaviour of warmth, togetherness, and *Ubuntu*,² that is supposed to be part of the South African culture. They have instead experienced increased hostility, usually boiling up to the point of violence as seen in the spur of xenophobic violence against African migrants in particular.

Several definitions can be used to define the phenomenon of xenophobia. A plain language definition of xenophobia is described in the Oxford Dictionary as 'a strong feeling of dislike or fear of people from other countries'.³ Xenophobia can also be defined as 'attitudes, prejudices and behaviours that exclude and often vilify others because they are viewed as outsiders or foreigners to the community'.⁴ Specific to the

¹ World Bank 'Mixed migration, forced displacement and job outcomes in South Africa' (2018) 17 Global Migration Data Portal (2020) <https://www.migrationdataportal.org/regional-data-overview/southern-africa> (accessed 15 September 2021).

² J Y Mogkoro 'Ubuntu and the law in South Africa' (1998) 1(1) Potchefstroom *Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2. 'Ubuntu is defined as an African (although found in other cultural groups in a different context) world view and life philosophy which influences social conduct. It is based on principles of group solidarity, humanness, compassion, respect and human dignity.'

³ Oxford Dictionary <https://www.oxfordlearnersdictionaries.com/definition/english/xenophobia> (accessed 15 September 2021).

⁴ J Masenya 'Afrophobia in South Africa: A general perspective of xenophobia' (2017) *Bangladesh Journal of Sociology* 82.

South African context, xenophobia can be described as a feeling and attitude as well as 'a manifestation of violent attacks against foreigners.'⁵ The South African Human Rights Commission (SAHRC) has also defined xenophobia specific to the South African context as 'the deep dislike of non-nationals by nationals of a recipient state. Its manifestation constitutes a violation of human rights.'⁶

Xenophobic attitudes and disdain towards foreigners are documented to have been prevalent in South Africa from as early as 1994, at the end of the Apartheid era when the country re-joined the international community and started to receive flows of migrants of different kinds.⁷ Violent manifestations of xenophobia have been a feature of post-Apartheid South Africa since the 1990s, especially in townships where most of the vulnerable migrant communities had and still settle. Violent xenophobic attacks in a mob-justice manner by citizens on non-nationals were documented from 1994 in various areas, including townships in Johannesburg as well as the CBD and some areas in the Western Cape.⁸

These violent attacks have continued and intensified throughout the post-Apartheid era, with continued and sporadic violence prevalent in low-income communities that host migrants. The most documented and widespread attacks against foreigners took place in 2008, 2015 and 2019 in different parts of the country. In 2008 sporadic xenophobic attacks erupted in various parts of South Africa reaching the peak in May of the same year resulting in excessive violence concentrated in the township of Alexandra in Johannesburg and spreading to other provinces in the nation.⁹ The 2008 attacks led to the death of 62 people, including South Africans and the displacement of 50 000 foreign nationals.¹⁰ In 2015, xenophobic attacks had their epicentre in

⁵ Centre For Human Rights 'The nature of South Africa's legal obligations to combat xenophobia' (2009) 28.

⁶ South African Human Rights Commission's Braamfontein Statement on Racism and Xenophobia, 15 October 1999.

⁷ A Minnaar 'Sources, causes, forms and contemporary manifestations of xenophobia: The South African experience, post-1994' (2001) *Institute for Human Rights & Criminal Justice Studies Technikon SA* 1.

⁸ T Monson & JP Misago 'Why history has repeated itself the security risks of structural xenophobia' (2009) 29 *SA Crime Quarterly* 26.

⁹ M Beetar 'A contextualisation of the 2008 and 2015 xenophobic attacks: Tracing South African necropolitics' (2019) 67(1) *Current Sociology* 126.

¹⁰ Human Rights Watch World Report South Africa (2009) <https://www.hrw.org/world-report/2009/country-chapters/south-africa#28ab32> (accessed 24 November 2021).

Durban, then spreading to other metros particularly Johannesburg.¹¹ Inflammatory statements against foreigners by the late Zulu King Goodwill Zwelithini are said to have fuelled these attacks in Durban, attacks continued in the Eastern Cape later on that year.¹² In 2015 the death toll related to xenophobic attacks was estimated to be eight people.¹³ The use of social media in dissemination of xenophobic sentiments and threats as well as to raise awareness of potential xenophobic incidents was more prominent in 2015,¹⁴ a trend which would increase in following attacks. In 2015 a WhatsApp message addressed to 'all foreigners in South Africa' urging them to return to their homes and threatening the death of millions if this did not happen.¹⁵ These attacks have led to South Africa being labelled as a hostile destination for African migrants in particular and migrants from the Asian and Asian sub-continent such as Indians, Bengalis and Pakistanis.¹⁶ These attacks have led to death, displacement and damage to property of many migrants in the country.

Outside of its Constitution and constitutional obligations, South Africa is a party to international instruments that govern the protection and treatment of migrants, specifically asylum seekers and refugees. However, the migrant protection framework in terms of the legal, political and policy direction seems to fall short of this obligation in certain aspects, particularly regarding xenophobia. South Africa's Constitution requires that South Africa must consider customary international law and international law to the extent that it espouses the constitutional values that govern this nation and is consistent with constitutional provisions.¹⁷ Sections 231 and 233 of the Constitution dictate how South Africa ought to interpret international law and integrate this into domestic law and creates somewhat of a hybrid system of domestication. South Africa follows a monist approach to customary international law and a dualist approach to

¹¹ C Classen 'Explaining South African xenophobia' (2017) Afrobarometer Working Paper 173 3.

¹² Human Rights Watch South Africa World Report (2016) <https://www.hrw.org/world-report/2016/country-chapters/south-africa> (accessed 24 November 2021).

¹³ Aljazeera 'South Africa arrests hundreds over xenophobic violence' April 2015 <https://www.aljazeera.com/news/2015/4/20/south-africa-arrests-hundreds-over-xenophobic-violence> (accessed 24 November 2021).

¹⁴ S Bekker 'Violent xenophobic episodes in South Africa, 2008 and 2015' (2015) *African Human Mobility Review* 1(3) 239-240.

¹⁵ T Alfaro-Velcamp & M Shaw "'Please go home and build Africa': Criminalising immigrants in South Africa' (2016) 42(5) *Journal of Southern African Studies* 983-985.

¹⁶ Classen (n11) 1.

¹⁷ Constitution of the Republic of South Africa sections 231-233.

treaty law.¹⁸ The practical implication of these approaches is that customary international law and national law in South Africa are seen as a single system of law under the monist interpretation. In contrast, treaty law and national law are seen as two separate systems which require local incorporation.¹⁹

1.2. Motivation of the study

Xenophobia affects every type of migrant in South Africa, although its effect has been most severe on the most vulnerable groups of migrants that are usually medium to low skilled workers and usually asylum seekers. As a student in South Africa, I have observed how the problem of xenophobia is systemic in nature and affects sectors of society. It is not just a problem of the townships and among those who are uneducated and is an issue that needs to be addressed through all avenues possible. The changing face of xenophobia towards the digital sphere has also led to increased reach of this issue with different effects on the affected groups. Research, explanations, and solutions towards digital xenophobia will contribute significantly towards addressing the overall problem of xenophobia in South Africa.

1.3. Significance of the study

Xenophobic attitudes and subsequent action towards primarily African migrants in South Africa, from time to time taking the form of violent attacks, pose a threat to the development of South Africa and stability in the region.²⁰ This was exemplified in the 2019 xenophobic attacks in South Africa, which led to bursts of retaliatory attacks in other countries in the region, especially those that are home to South African businesses.²¹

It is essential in modern-day Africa to create the societies that the regional and international documents require state parties to espouse. African coordination can

¹⁸ G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal Law and Regional Law against the background of the dichotomy between monism and dualism' (2014) 17(4) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1473.

¹⁹ Ferreira & Ferreira-Snyman (n 18) 1471.

²⁰ L Landau et al 'Xenophobia in South Africa and problems related to it' (2005) *The forced migration studies working paper series* 33.

²¹ N Dlamini et al 'Afrophobia and South Africa's image on the continent: Implications for inter-state relations and diplomacy' (2020) 17(3) *African Renaissance* 20, 22, 24.

lead to increased development on the continent, and issues like xenophobia and its associated ills threaten the continent's ability to work towards sustainable development goals.

1.4. Problem statement

The problem to be assessed in this research is the legal regulation of xenophobia in South Africa, with a particular focus on the 'new' digital face of xenophobia. Xenophobia is a rampant problem in South Africa; it manifests itself in many ways and impedes the full enjoyment and protection of human rights for all migrants in South Africa. Xenophobia has deep roots and causes. One of the main problems in curbing xenophobia in South Africa is the lack of an adequate legal response, which can permeate and regulate other sectors of society where xenophobia is concerned. In more recent times, xenophobic violence has been triggered and incited through online digital platforms such as Whatsapp and Twitter.

Social media use, particularly in South Africa, was documented to have played a critical role in xenophobic violence in the 2015 and 2019 attacks. In 2015 and 2019, social media platforms such as Whatsapp were used to spread messages with warnings and threats of violence to foreigners, which eventually spilt over into physical violence.²² It is documented that South Africans have high levels of xenophobic expression online.²³ During the abovementioned eruptions of xenophobic violence, it is documented that social media conversations around the subject increased from 760 posts per day to 5,670 posts per day.²⁴

The inadequate implementation of the legal framework and response to governing xenophobia in all its forms has left migrants vulnerable to the effects of this phenomenon. Inadequate regulation of xenophobic acts and rhetoric has the effect that these crimes are left unpunished and perpetuated further due to the lack of

²² Alfaro-Velcamp & Shaw (n15) 983.
Human Rights Watch 'They have robbed me of my life.' Xenophobic violence against non-nationals in South Africa' (2020)
https://www.hrw.org/sites/default/files/media_2020/09/southafrica0920_web_4.pdf (accessed 15 September 2021) 39.

²³ A Khoza 'New social media research finds xenophobia rife among South Africans'
<https://www.news24.com/news24/SouthAfrica/News/new-social-media-research-finds-xenophobia-rife-among-south-africans-20170404> (accessed 15 September 2021).

²⁴ Khoza (n 23).

repercussions.²⁵ In the modern digital age, social media and online platforms are being used as channels to organise xenophobic action and perpetuate xenophobic rhetoric. This discourse includes the peddling of offensive and untrue anti-migrant rhetoric that is usually based on ‘fake news’ or a one-sided, usually xenophobic view of migrants. These acts have clear perpetrators and usually lead to clear action, but no definitive punishment exists. This can be seen in the September 2020 xenophobic motivated protest marches to the Nigerian and Zimbabwean embassies that were calling for ‘illegal’ foreigners to leave the country.²⁶ These marches were mobilised through a Twitter hashtag, ‘#PutSouthAfricansFirst’, which called for the removal of foreigners from the country based on stereotypical profiles of foreigners as criminals, job stealers and a strain on the South African economy.²⁷

Although the South African government has taken steps to try and combat xenophobia such as the adoption of the ‘The National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance’,²⁸ the lack of a concrete legal framework with clear parameters pertaining specifically to xenophobia hampers the implementation of these steps. Xenophobic violence and crimes have no clear distinction or specified punishments. They are usually bundled under the umbrella of general violence and lawlessness, with no specific reference to the motivation behind the crimes. This usually impedes access to justice for those affected by such action, and due to the mob nature of most xenophobic violence, perpetrators are seldom brought to book.

The changing face of xenophobia, and the move towards digital incitement specifically, throws a spanner in the works of the existing issues around the regulation of xenophobia in South Africa. The nature of digital xenophobia allows the sentiments expressed to have a wide reach of audiences in a short space of time. It also mirrors the physical nature of xenophobia in South Africa in that it allows for an online mob-justice approach to incitement of violence against and harassment towards

²⁵ D Mavhinga ‘Is South Africa prepared for the next wave of xenophobic violence?’ 9 October 2020

<https://www.hrw.org/news/2020/10/09/south-africa-prepared-next-wave-xenophobic-violence> (accessed 15 September 2021).

²⁶ T Khumalo ‘South Africa: hatred of migrants reaches new heights’ 9 September 2020 <https://www.dw.com/en/south-africa-hatred-of-migrants-reaches-new-heights/a-55093941> (accessed 15 September 2021).

²⁷ Khumalo (n 26).

²⁸ See page 34 for an in-depth explanation of the National Action Plan.

foreigners.²⁹ For action that results from online incitement, it is possible that there are clear perpetrators that can be identified through investigation who can be persecuted for these crimes. However, because of the diverse nature of the digital face, the crimes committed with xenophobic intent may continue to become more faceless as time goes on. This double-edged nature was seen through the unmasking of the highly xenophobic account on Twitter that mobilised xenophobic action and peddled xenophobic rhetoric against migrants. The account was linked to the 'South Africans First' political party but investigations failed to unmask the real mastermind behind the account that was responsible for many xenophobic hashtags.³⁰ Investigations around this account and the xenophobic rhetoric peddled by it and similar accounts also showed that there is a concerted effort in curate xenophobic conversations that may then spill over into xenophobic action and violence in the physical sense.³¹ As such, decisive action needs to be taken to tackle the digitization of xenophobia.

The lack of an existing legal framework to combat xenophobia as a whole, including this changing nature of the phenomenon, remains a stumbling block for proper implementation of the policies put in place to tackle the xenophobia problem and fulfilment of South Africa's obligations to the protection of foreign nationals.

This research seeks to assess the adequacy of the South African legal framework in addressing xenophobia in regard to South Africa's international and regional obligations for the protection of migrants and people in need of international protection such as asylum-seekers and refugees. This research also analyses the impact of the regulation of xenophobia (or the lack thereof) on the human rights of migrants in South Africa. Furthermore, this research analyses the legal responses in relation to the changing face of xenophobia and what can be done in order to regulate the incitement

²⁹ T Odeyemi 'Digital xenophobia: the bullying of 'self' and the cultural caricature of a criminal Nigerian 'other' (2015) *South African Review of Sociology* 68.

³⁰ T Knight & J le Roux 'Afrophobic SA Twitter account connected to nationalist political party' 12 October 2020 <https://www.dailymaverick.co.za/article/2020-07-12-afrophobic-sa-twitter-account-connected-to-nationalist-political-party/> (accessed 15 September 2021).

³¹ N Seleka 'Coordinated attempt to manipulate xenophobia-centered conversations on SA social media', CABC report shows' August 2020 <https://www.news24.com/news24/southafrica/news/co-ordinated-attempt-to-manipulate-xenophobia-centered-conversations-on-sa-social-media-cabc-report-shows-20200824> (accessed 15 September 2021).

of xenophobic violence, the perpetuation of xenophobic rhetoric and the results of this through online platforms as well as the media.

1.5. Research question

The main research question addressed in this mini-dissertation is: Is the response of South African law adequate to deal with xenophobia in South Africa, particularly with reference to increasing digitisation of xenophobia?

This question encompasses the following sub-questions:

1. What are South Africa's legal obligations in protecting foreign nationals within the borders of the state?
2. Does South Africa's legal framework comply with the national and international obligations to protect foreign nationals, particularly against xenophobia?
3. Does the South African legal framework adequately govern the changing face of xenophobia in the digital age?
4. What responses can the state adopt to regulate xenophobia and its changing nature?

1.6. Literature review

South Africa's obligations to protect foreign nationals within the borders of this state exist on three main tiers: national, regional and international.

At the national level, South Africa's obligations to protect foreign nationals within their borders are informed by The Constitution of South Africa and specific legislation and policies that have been enacted to protect the population at large and other enacted specifically for the regulation of migrants.

The Constitution of South Africa, which is the supreme law of the land, sets out certain rights in the Bill of Rights, which are universal in application and apply to non-nationals and nationals alike. The rights that inform the state's obligations towards protection of non-nationals include section 9 which guarantees equality before the law, section 10 which guarantees the right to human dignity, section 11 which guarantees the right to life, section 12 which guarantees the right to freedom and security of the person and

other rights in the Bill of Rights that guarantee certain basic freedoms and entitlements to 'everyone'.³²

Protection against discrimination is also provided for in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). General protection and specifically regulation of the crimes committed during xenophobic attacks can also be found in the common law and criminal law framework.

South Africa's Constitution requires that South Africa must consider customary international law and international law to the extent that it espouses the constitutional values that govern this nation and is consistent with constitutional provisions.³³ This forms the basis of the regional and international legal obligations.

At the regional level, South Africa's obligations towards protecting migrants can be found in regional treaties such as the African Charter on Human and Peoples' Rights and the OAU Convention Governing Specific Refugee Problems in Africa. At sub-regional level, South Africa is a member of the Southern African Development Community (SADC) which has a sub-regional framework that governs issues relating to immigration in the SADC region.

South Africa is mandated at an international level both morally and legally to protect foreigners based on the binding international agreements that South Africa is a party to.³⁴ The UN Charter and the UN Declaration of Human Rights provide a normative basis for protecting specific categories of peoples, including migrants of different kinds and preventing certain forms of discrimination.

South Africa is also a party to legally binding international treaties that directly and indirectly inform and regulate their protection of foreigners. South Africa is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) that mandates state parties to take measures to prohibit and punish discrimination. South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR), which provide protection and provision of certain fundamental

³² Constitution of the Republic of South Africa sections 9-12.

³³ Constitution of the Republic of South Africa sections 231-233.

³⁴ H Solomon & H Kosaka 'Xenophobia in South Africa: Reflections, narratives and recommendations' (2013) 2(2) *Southern African Peace and Security Studies* 6.

human rights. South Africa has also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the UN Convention relating to the Status of Refugees and the protocol thereto.

South Africa's policy framework has taken steps to give flesh to the obligations relating to the protection of migrants and comply with the legal obligations towards this; however, these steps still fall short of fulfilling the obligations.

The existing literature documents that the main issues for South Africa's compliance regarding the protection of migrants are ambiguity, lack of or slow implementation of the policies set out, access to justice for victims of xenophobia as well as the problem of institutional xenophobia.

The legal framework and policy move towards more stringent immigration policies and regulations have actually contributed to increased exclusion of migrants, particularly those in need of international protection and have left them susceptible to the ills of xenophobia. This is seen in the recent amendments to the Refugees Act and also in the language of the Immigration Act.

Implementation of the legal framework to protect migrants remains a problem due to institutional xenophobia.³⁵ This is seen in the organs and mechanisms that should protect and regulate migrants harbouring xenophobic attitudes. Solomon and Kosaka show that institutions such as Home Affairs and the South African Police Service are rife with xenophobia, which then permeates to other sectors of the society and prevents the implementation of the protective function of these institutions.³⁶

The lack of a law that specifically targets xenophobia is also a major issue that affects South Africa's obligations towards protecting migrants in the country as they are left to rely on the existing framework, which seldom produces results for victims of xenophobia. This is seen in the lack of accountability for xenophobic crimes and slow prosecution rates for perpetrators of these crimes.³⁷

³⁵ Solomon & Kosaka (n 34) 7.

³⁶ Solomon & Kosaka (n 34) 8.

³⁷ D Mavhinga 'South Africa Launches Plan to Combat Xenophobia and Racism' 25 March 2019 <https://www.hrw.org/news/2019/03/25/south-africa-launches-plan-combat-xenophobia-and-racism> (accessed 15 September 2021).

The disconnect between the regional and international frameworks that govern the protection of refugees and asylum seekers and the implementation in host countries remains an issue worldwide and even on the continent.³⁸ This can also be seen by South Africa's failure to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention), which would offer specific legal reprieve and protection to migrants in terms of institutional xenophobia and xenophobia in work relations.

The digital age has changed the face of xenophobia and the rate at which information is disseminated regarding issues of xenophobia and other associated ills. It is documented that the increased use of social media in South Africa has increased the rate at which xenophobic and anti-immigrant rhetoric is spread and popularized, particularly in the urban areas of South Africa.³⁹

Responses to xenophobia in the digital age will require a multidisciplinary approach in order to curb the growing popularity of using online platforms to peddle this rhetoric and incite xenophobic action. The law can be used as the primary tool in this regard; in the first instance, South Africa will have to enact specific laws regarding xenophobia and criminalising xenophobic action.⁴⁰ A comprehensive law that deals with regulating the specific nature that xenophobia takes in South Africa will assist in giving flesh to the provisions of the various legal obligations that the state has and will also provide for clear channels of accountability.

Another legal approach that South Africa can take includes the regulation of fake news which fuels xenophobia and retaliatory attacks. This is approach would require similar legal regulation as has been taken during the COVID-19 era which criminalised the creation and spreading of fake news about the virus. Increased fact-checking and coordination between institutions to this effect will also help decrease the spread of fake news on both ends of the xenophobia spectrum. Fact-checking in relation to materials published in previous attacks led to uncovering the misleading nature of social media posts and their contribution to increasing tensions prior to, during, and

³⁸ World Bank (n1) 23.

³⁹ V Chenzi 'Fake news, social media and xenophobia in South Africa' (2020) *African Identities* 7.

⁴⁰ O Olowu 'Xenophobic violence in South Africa: An international and domestic legal perspective' (2008) 16 *IFE Psychologia: An International Journal* 310.

after xenophobic attacks.⁴¹ This was seen through the fake images of attacks in other regions being published as images of attacks in South Africa and the news around the retaliatory attacks in Nigeria, where videos and images of old attacks were disseminated.⁴²

At the heart of it, digital xenophobia is a manifestation of the existing xenophobic attitudes in South Africa and as such an essential step in curbing it will require the state to address the existing issues surrounding xenophobia. This includes addressing institutional xenophobia by addressing the institutional ills such as corruption and police brutality against migrants.⁴³ More coordinated approaches between the state and non-state actors towards education and community engagement of both migrant and local communities will also play a role in curbing the issue of xenophobia.⁴⁴

This research seeks to add to the existing literature regarding South Africa's obligations towards the protection of migrants within the borders of the state through highlighting the failures and successes of the respective efforts of the state. This research seeks to further add to the existing literature that highlights the need for a concerted legal effort to combat xenophobia in South Africa by creating and implementing a comprehensive and specific legal framework governing xenophobia as a stand-alone crime. Additionally, this research seeks to highlight the system's shortcomings in combating the changing face of xenophobia towards digital perpetuation and incitement of xenophobia and offering solutions of a legal and multidisciplinary nature.

1.7. Methodology

The theoretical approach used in this dissertation is an analytic review of legislation, treaties, and secondary literature. This is done by analysing South Africa's compliance with legal obligations towards the protection of migrants through an analysis of what is required of the state and what has been implemented. This approach is taken in

⁴¹ T Dube & M Tijani 'Misleading social media posts are fuelling the tensions over xenophobic attacks in South Africa' 5 September 2019 <https://factcheck.afp.com/misleading-social-media-posts-are-fuelling-tensions-over-xenophobic-attacks-south-africa> (accessed 15 September 2021).

⁴² Dube & Tijani (n 41).

⁴³ J Crush & S Ramachandran 'Xenophobia, international migration and development' (2009) *Journal of Human Development and Capabilities* 222.

⁴⁴ Crush & Ramachandran (n 43) 224.

order to highlight the disconnect between South Africa's obligations in the respective documents that govern this and the shape that the South African legislative and regulatory framework has taken. The mini-dissertation also uses academic perspectives of writers who have looked at these and related issues for a qualitative analysis. The type of research that will be conducted in compiling this dissertation is desk research, and the main type of data that will inform this research is secondary data.

1.8. Limitations

The limitations of this mini-dissertation will be the focus: The discussion of migrants and refugees in the context of this mini-dissertation relates exclusively to African migrants who enter into South Africa from other African countries and migrants from the Asian and Asian sub-continent in the discussion. In other words, migrants from other parts of the world are not included, except to provide comparison, so as to highlight the disparities in the treatment of African and Asian migrants and those from other parts of the world. This limitation is as a result that these categories of migrants are the most marked victims of xenophobia and its violent and digital manifestations in South Africa.

1.9. Structure

The dissertation is divided into six chapters. The first chapter is an introductory chapter that provides a background on the mini-dissertation and an introduction to the research problem and how it will be tackled in chapters to follow and an explanation of relevant terms. This chapter also illustrates the approach taken in the mini-dissertation.

The next three chapters are dedicated to answering the research questions in their respective order. The second chapter addresses South Africa's legal obligations towards protecting migrants through the three tiers that these obligations exist. The third chapter addresses South Africa's compliance with legal obligations to protect migrants particularly regarding xenophobia. The fourth chapter addresses the adequacy of South Africa's legal system in governing xenophobia in the digital age.

The fifth chapter makes recommendations to issues canvassed in preceding chapters. The final chapter is a conclusionary chapter and provides an overall conclusion of what has been illustrated in the previous sections and the position of the mini-dissertation.

Chapter 2: South Africa's legal obligations in protecting foreign nationals within the borders of the state

2.1. Introduction

South Africa is constitutionally mandated to protect the human rights of all individuals within its territory and to enact legislation that gives effect to these obligations. South Africa is also part of the greater regional and international legal framework and has obligations by virtue of being a party to international agreements that create duties and norms for states that are parties thereto. South Africa's legal obligations in protecting foreign nationals within the state's borders exist on three tiers: national, regional, and international. This chapter highlights South Africa's main legal obligations towards protecting migrants through the three tiers that these obligations exist and answers the question of what South Africa's legal obligations in protecting foreign nationals within the state's borders are. The chapter focuses on the main national, regional, and international instruments that guide South Africa's obligations towards the protection of non-nationals within the state. The broad focus of this chapter is to illustrate the extent of the obligations to protect non-nationals within the state. This broad approach and extent of the obligations then links with the discussion in the following chapters insofar as the general obligations relate to protecting non-nationals from xenophobia in all its manifestations, particularly digital xenophobia.

2.2. The UN legal framework

2.2.1 UN Convention and protocol relating to the status of refugees

South Africa ratified the 1951 Convention in 1996; the Convention contains elaborate rights for refugees within the countries that they flee to.⁴⁵ The state domesticated this protocol within the framework of the Refugees Act. Some of the rights of refugees protected in this Convention include; the right to non-discrimination, rights of association, and access to the courts.⁴⁶

⁴⁵ Convention Relating to the Status of Refugees 1951 (1951 Convention).

⁴⁶ 1951 Convention (n 45) arts 3,15, 16.

Most notably, the 1951 Convention provides for socio-economic rights for refugees lawfully in a country and even mandates that they be treated the same as the nationals of that state in certain instances. Instances where the 1951 Convention obliges the same treatment between refugees and the nationals of their receiving state include; wage earning employment,⁴⁷ public elementary education,⁴⁸ and public relief.⁴⁹

Article 33 of the Convention protects against refoulement, this prevents refugees being returned at the frontier or in another way to a country where their life or freedom would be threatened.⁵⁰

The 1951 Convention creates the basis for the treatment of Refugees in the International system and as such creates binding obligations on South Africa to give effect to the provisions of the Convention to provide protection to non-citizens, particularly refugees within the state. The South African legal system has incorporated this Convention as a standard of interpretation of laws relating to refugee matters, this is seen in section 6 of the Refugees Act. The Convention also provides for a wide interpretation of rights provided to refugees. Article 5 of this the Convention states that the provisions contained therein do not impair any rights granted to refugees outside of those it provides for.

However, the practical application of this Convention in South African jurisprudence remains limited. International refugee law, premised on this convention and similar provisions, has taken a secondary role in South African case law,⁵¹ this is despite the constitutional obligations on South African courts to consider international law and interpret legislation in an international law friendly manner.

The courts sparingly used this convention as their primary source to interpret South Africa's international obligations referring to the treatment of refugees and asylum seekers.⁵² This has been seen in several judgments where the court has opted to make declaratory orders as opposed to opting to truly harmonize local implementation of legislation and treatment of refugees and asylum seekers with the international

⁴⁷ 1951 Convention (n 45) article 17.

⁴⁸ 1951 Convention (n 45) article 22.

⁴⁹ 1951 Convention (n 45) article 23.

⁵⁰ 1951 Convention (n 45).

⁵¹ R Ziegler 'Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications?' (2020) *Constitutional Court Review* 71.

⁵² Ziegler (n 51) 74.

position as provided for by instruments such as the 1951 Convention. In certain instances where the court has had an opportunity to adjudicate matters with regard to South Africa's obligations as set out in international refugee law, the court has opted to apply South African constitutional principles and the Bill of Rights.⁵³

2.2.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976 and South Africa ratified this treaty in 1998.⁵⁴ It contains legally binding obligations towards the protection of civil and political rights for people within the territory of member states. Article 2 of the Covenant provides for non-discrimination based on listed grounds, including nationality and social origin where provision and protection of the rights in the Covenant are concerned.⁵⁵

Article 6 of the Covenant provides for the right to life.⁵⁶ Article 9 provides for the right to freedom of security of the person and against arbitrary arrests and rights of detained persons.⁵⁷ Article 17 provides for protection against 'arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation' and the right to protection of the law in such instances.⁵⁸

Article 20(1) prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.⁵⁹ Article 26 provides for the prohibition of discrimination based on certain listed grounds, including national or social origin.⁶⁰

2.2.3. Other binding international agreements creating legal obligations

Outside of the international agreements specifically mentioned above, South Africa has ratified other international agreements that provide for the protection of rights of specific groups of people. These treaties also create legally binding obligations for South Africa regarding the specific protection of these people as separate categories and insofar as they are migrants within the state. These treaties include the

⁵³ Ziegler (n 51).

⁵⁴ International Covenant on Civil and Political Rights (ICCPR).

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ As above.

⁶⁰ As above.

Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination.

2.3. The regional legal framework

At the African regional level, the specific instruments that create legal obligations for South Africa to protect foreign nationals within their borders to be analysed in this section are the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and Peoples' Rights.

2.3.1 The African Charter on Human and Peoples' Rights

South Africa is a party to the African Charter on Human and Peoples' rights; the state acceded to this treaty in 1996.⁶¹ This treaty was concluded between the member states of the OAU (now the African Union) and came into force in 1986. The treaty creates legal obligations for South Africa by virtue of ratification and through the constitutional mandate in section 233 of the South African Constitution.

In Article 1, the African Charter mandates state parties to recognize the rights and duties contained in the document and take legislative measures to give effect to the rights and duties enshrined in the Charter. Article 2 of the Charter sets out the prohibition of discrimination when it comes to the rights provided for by the Charter, of particular importance to South Africa's obligations towards non-nations are the following grounds listed in Article 2; 'ethnic group', 'language', 'national and social origin' and 'birth or other status'.⁶²

The Charter makes use of language that makes a distinction between the rights that are available to citizens of a country and those that are available to everyone in the territory of the state parties. Thereby creating specific obligations for states to their citizens and separate obligations to non-citizens within the state. Therefore, the rights not qualified by citizenship should be available to those who find themselves within the borders of state parties to the Charter.

⁶¹ African Commission on Human and Peoples' Rights <https://www.achpr.org/ratificationtable?id=49> (accessed 15 September 2021).
⁶² African Charter on Human and Peoples' Rights 1981, Art 2 (African Charter).

Article 3 of the Charter provides for equality before the law and encompasses equal protection before the law.⁶³ Article 4 of the Charter guarantees the right to life as an inviolable right.⁶⁴ Article 5 provides for the right to dignity and prohibits exploitation and degradation of 'men', including 'cruel, inhuman or degrading punishment and treatment'.⁶⁵ The Charter provides for freedom and security of the person in Article 6, including protection against arbitrary arrest.⁶⁶

Article 12 of the Charter provides for freedom of movement within the borders of member states subject to the national laws and prohibits the targeted mass expulsion of non-nationals.⁶⁷ In General Comment 5,⁶⁸ the African Commission sheds light on the contents of article 12(1) of the Charter and gives guidelines towards the interpretation and application of this provision. The general comment provides guidelines for specific arms of the machinery of state parties and what it is they can do towards proper implementation of article 12(1) within their states. It also goes on to provide recommendations on the interpretation of article 12(1) with reference to specific categories, including; asylum seekers, refugees and migrant workers. General Comment 5 gives content to states' obligations towards facilitating access to the freedom of movement provided for in terms of article 12.

Particularly relating to the movement of refugees and migrants, General Comment 5 requires states to remove impediments to the freedom of movement for all within their borders regardless of their legal status.⁶⁹ General Comment 5 gives states an obligation to ensure the right to freedom of movement is respected and an obligation to prevent non-state actors from interfering with the free movement of persons within the borders of a particular state.⁷⁰ Related to preventing interference with the right to freedom of movement by third parties, states are required to pass laws that prohibit

63 African Charter (n **Error! Bookmark not defined.**).

64 As above.

65 As above.

66 As above.

67 As above.

68 General Comment 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1)) (General Comment 5) <https://www.achpr.org/legalinstruments/detail?id=74> (accessed 15 September 2021).

69 General Comment Number 5 (n 68) para 25.

70 General Comment Number 5 (n 68) para 40.

xenophobia as well as a review of laws that create unfavourable conditions for migrants and contribute towards xenophobic attitudes.⁷¹

When effecting article 12 of the African Charter, General Comment 5 is a key tool of interpretation and direction that can inform how states can practically implement this provision and afford true protection of this right as envisioned by the Charter, through the Commission.

The Charter further provides for the provision of socio-economic rights which accrue to everyone within the member states.

2.3.2. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The OAU Convention was adopted in 1969 and South Africa ratified the Convention in 1995.⁷²

Article 2 of the Convention governs the right to asylum and sets out certain and duties of member states regarding the granting of asylum and protection of people in need of international protection. Article 2(1) of the Convention mandates member states of the OAU to receive refugees and secure their settlement. Article 2(2) states that granting asylum is regarded as a peaceful act and places a duty on states not to take this as an unfriendly act.⁷³ Article 2(3) provides for the right of non-refoulement, that is rejection at the frontier or compelling a person to go back to a territory where they would be at risk.⁷⁴

Article 4 of the 1969 Convention provides for non-discrimination and mandates state parties to apply the provisions of the treaty to all refugees regardless of certain listed grounds, which include nationality.⁷⁵

The Convention also provides for specific obligations regarding the treatment of refugees on the continent and the specific administrative requirements thereto.

⁷¹ General Comment Number 5 (n 68) para 35.

⁷² Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (1969 Convention).

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

2.3.3. Other aspects of the regional legal framework

South Africa is a party to other binding regional instruments that create legally binding obligations towards the protection of rights of specific groups of people. These treaties also create legally binding obligations for South Africa regarding protection of migrants in the state to the extent that they fall into the specific categories. These treaties include the Protocol on the Rights of Women in Africa (Maputo Protocol), which South Africa ratified in 2004 and the African Charter on the Rights and Welfare of the Child, which was ratified in 2000. By virtue of being a member of the SADC, South Africa is a party to sub-regional instruments that are to be implemented specifically in the SADC sub-region such as the SADC Protocol on Facilitation of Movement of Persons which has not yet come into force. The greater policy direction and formation on the Continent is also influenced and informed heavily by Agenda 2063.⁷⁶

2.4. The national legal framework

2.4.1 The Constitution of South Africa

South Africa operates under a system of constitutional supremacy, with the Constitution as the supreme law of the land.⁷⁷ The Constitution mandates that any law or conduct that is inconsistent with it is invalid and that the obligations imposed by the Constitution must be fulfilled.⁷⁸

Section 7 of the Constitution mandates the state to 'promote, protect and fulfil the rights in the Bill of Rights'.⁷⁹ The Constitution provides legal obligations for South Africa through the Bill of Rights, which contains certain rights that apply to 'everyone' in the Republic. The effect of the wording in the rights that accrue to 'everyone' is that it applies to non-nationals and nationals alike. This was confirmed in *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development*.⁸⁰ The matter dealt

⁷⁶ African Union 'Agenda 2063 is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance. Agenda 2063 encompasses Africa's Aspirations for the Future and identifies key Flagship Programmes which can boost Africa's economic growth and development and lead to the rapid transformation of the continent.' <https://au.int/en/agenda2063/overview> (accessed 25 November 2021).

⁷⁷ Constitution of the Republic of South Africa, section 2.

⁷⁸ Constitution of the Republic of South Africa section 2.

⁷⁹ Constitution of the Republic of South Africa.

⁸⁰ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) 2004 ZACC 11 (*Khosa case*).

with provision of access social security to permanent residents in South Africa (non-citizens).⁸¹ The Constitutional Court applied a purposive interpretation of the word 'everyone' and that in a context where no distinction is made that a right specifically applies to citizens, and in the context of section 27 of the Constitution, non-citizens would be encompassed in the meaning of 'everyone'.⁸²

Section 9 provides for equality before the law. This provision creates an obligation regarding protection and benefit of the law, which should be equal to everyone in the Republic.⁸³ This section prohibits unfair discrimination against persons based on certain listed grounds. The grounds that apply to the protection of foreigners and prohibition of discrimination of this category of persons include; ethnic and social origin, culture, language and birth.⁸⁴ Section 9 also creates an obligation on the state to enact legislation that prevents unfair discrimination;⁸⁵ this obligation was fulfilled through the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2002 which also forms part of the national legal obligations of South Africa which will be discussed below.

Section 10 of the Constitution provides for the right to dignity, which places a horizontal and vertical obligation to respect and protect the dignity of 'everyone'.⁸⁶ Section 11 guarantees the right to life. Section 12 guarantees the right to freedom and security of person which protects against arbitrary detention, violence from public and private sources, torture and cruel and inhumane punishment.⁸⁷

Section 23 of the Constitution guarantees the right to fair labour practices. Section 30 of the Constitution protects the right to language and culture. It guarantees the right of 'everyone' to use the language of their choice and participate in the cultural life of their choice as long as it is consistent with the Bill of Rights. Section 31 protects cultural, religious and linguistic communities. It states that people may not be denied the right to partake of these communities if it is consistent with the Bill of Rights. Section 34 of the Constitution provides for access to courts and relevant legal tribunals.

⁸¹ *Khosa case* (n 80).

⁸² *Khosa case* (n80) para 44.

⁸³ Constitution of the Republic of South Africa s9(2).

⁸⁴ Constitution of the Republic of South Africa s9(3).

⁸⁵ Constitution of the Republic of South Africa s9(4).

⁸⁶ Constitution of the Republic of South Africa.

⁸⁷ Constitution of the Republic of South Africa s12(1) (a-e)

The Constitution also provides for the provision of socio-economic rights, some of which apply to 'everyone'. International frameworks mandate the state to provide the same treatment for refugees in the state as nationals in respect of specific socio-economic rights.

Sections 231 and 233 oblige the state to recognise customary international law and international law, to the extent that it is consistent with constitutional provisions.⁸⁸ This provision creates both a national and international obligation for South Africa to be bound by international and regional agreements and treaties that have been adopted by resolution by the legislature through the National Assembly as well as the National Council of Provinces and have binding force on South Africa,⁸⁹ and customary international law as well as the binding obligations created by it. Examples of the binding nature of sections 231 and 232 can be found in South African case law as seen in the case of *Glenister v President of the Republic of South Africa and Others*.⁹⁰ This case concerned the disbandment of the Directorate of Special operations and the establishment of the Directorate of Priority Crime Investigation and, among other issues, the state's obligations in terms of international law to set up an independent anti-corruption unit. In this case, the court fleshed out the meaning of the obligations arising from sections 231 and 232 of the Constitution.⁹¹ The Constitutional Court, in this case, sets out that the obligations in international agreements that the state has become party to and domesticated in national law become constitutional obligations through the functioning of section 231 and 232 read with section 39(2).⁹² International agreements become binding once they have been domesticated except in certain cases where they are not constitutionally compliant, and once an international obligation has been domesticated, there is both a national and international obligation to uphold the duties therein.

⁸⁸ Constitution of the Republic of South Africa ss 231-233.

⁸⁹ Constitution of the Republic of South Africa ss 231-233.

⁹⁰ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC). (*Glenister*).

⁹¹ *Glenister* (n90).

⁹² As above.

2.4.2. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2002

The Promotion of Equality and Prevention of Unfair Discrimination Act of 2002 was enacted to give effect to the obligation in section 9 of the Constitution, which required the enacting of legislation to promote the achievement of equality.⁹³ The Act applies to and binds the state and all persons.⁹⁴ Section 6 of this Act governs the general prohibition of unfair discrimination.⁹⁵ Section 10 of PEPUDA contains the prohibition of hate speech based on the prohibited listed grounds.⁹⁶ Section 11 contains the prohibition against harassment, and section 12 of the Act prohibits disseminating unfair discriminatory information.

PEPUDA also establishes a special jurisdiction for equality courts to provide redress for victims of unfair discrimination, hate speech, harassment and provide a platform to enforce the provision of PEPUDA. The establishment of the Equality Courts also gives effect to section 33 of the Constitution as this increases access to courts.

PEPUDA is important regarding the regulation of xenophobia in South Africa as it can provide an avenue for redress for victims of xenophobia insofar as birth, ethnic and social background are listed grounds upon which claims can be brought before the equality court. The establishment of the equality courts, with the intention to make them more accessible, also provide a platform for the adjudication of matters of xenophobia. This Act further gives flesh to South Africa's obligation in terms of the Constitution towards the protection and fulfilment of the section 9 right to equality which is not limited to citizens and as such should be afforded to non-citizens and citizens alike.

2.4.3. The Refugees Act

The Refugees Act was enacted in 1998 in order to give effect to international obligations relating to the protection of refugees and asylum seekers in the country. The Act is enacted to give form to the state's obligations in terms of the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status

⁹³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002 (PEPUDA) S2. Constitution of the Republic of South Africa s9(2).

⁹⁴ PEPUDA (n 93).

⁹⁵ As above.

⁹⁶ As above.

of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.⁹⁷

The principle of non-refoulement is domesticated in South African law in Section 2 of the Refugees Act. In South African law this principle encompasses both definitions of the concept as provided for in the 1951 Convention and the 1969 Convention respectively and this codification was used by the court in *Minister of Home Affairs and Others v Watchenuka*,⁹⁸ as an example of the Act giving effect to its international obligations in the 1951 and 1969 Conventions.

The Refugees Act provides for the protection of Refugees in section 27 of the Act. This explicitly provides that refugees enjoy full protection and access to the rights set out in chapter two of the Constitution.⁹⁹ Section 27 entitles refugees to seek employment in the Republic and guarantees their right to the same basic healthcare services and basic primary education as nationals receive.¹⁰⁰

The Refugees Amendment Act 11 of 2017 came into force in January 2020 and made significant amendments to the principal Act. The Amendment Act extended the grounds on which asylum seekers can be excluded from refugee status including commission of a schedule 2 offence in the Republic,¹⁰¹ fraudulent possession of South African travel or identity documents and failure to present oneself before a refugee status determination officer (RSDO) within 5 days of entering the Republic. These amendments are similar to those contained in section 3 of the Act. However, section 3 applies to the cessation of refugee status of migrants who have already obtained this status.¹⁰² Section 18 of the amendment Act removes the automatic right to work and study as an asylum seeker in the Republic and creates a new regulation that will see this right needing to be endorsed on the visa of an asylum seeker or refugee in both cases of study or work.¹⁰³

⁹⁷ Refugees Act 130 of 1998 (Refugees Act).

⁹⁸ R Kapindu 'No return to persecution or danger: Judicial application of the principle of non-refoulement in refugee law in South Africa and Malawi' (2020) 10(1) *Constitutional Court Review* 114; *Minister of Home Affairs and Others v Watchenuka and Another* [2004] 1 All SA 21 (SCA) para 2.

⁹⁹ Refugees Act (n 97) s 27(b).

¹⁰⁰ Refugees Act (n 97) s 27(f-g).

¹⁰¹ Refugees Amendment Act 11 of 2017 s 2 (Refugees Amendment Act)

¹⁰² Refugees Amendment Act (n 101) s 3.

¹⁰³ Refugees Amendment Act (n 101) s 18(9).

The abovementioned amendments to the Refugees Act have been criticised as they impose stricter administrative requirements on asylum seekers. The policy changes are a movement from South Africa's previous rights-based approach towards a more exclusionary approach; this has negatively impacted the rights of asylum seekers and contributes to making South Africa a hostile destination.¹⁰⁴ Specific provisions of the Amendment Act are in conflict with South Africa's international obligations and particularly the principle of non-refoulement, which is protected in international refugee law.¹⁰⁵ The amendments have the effect of perpetuating institutional xenophobia by creating increased barriers to access the asylum system which leaves asylum seekers in a more vulnerable position and more susceptible to having irregular status in the country.¹⁰⁶

2.4.4 Other aspects of the national legal framework

The South African legal system also provides for a criminal law system and other legislation that can create obligations towards the protection of migrants in the Republic. The criminal law and common law systems that create obligations towards the protection of migrants in the country apply on the horizontal plane between migrants and citizens of the state in cases of xenophobia and associated violence and damage. These laws regulate the civil aspect of xenophobia and allow a legal basis of the criminal aspects of xenophobic actions to be regulated. Some of the crimes associated with xenophobic violence include murder, assault and damage to property. The xenophobic motivation for these crimes is seldom addressed.

2.5. Analysis of the legal obligations to protect foreign nationals

On the national scale, South Africa's Constitution informs the treatment of all persons in the state and informs the local legal framework due to the principle of Constitutional supremacy. The Constitution also informs the application of the international legal framework insofar as South Africa's obligations are concerned.

¹⁰⁴ F Khan & N Rayner 'Country fiche South Africa' (2020) 15 https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_South-Africa_Final_Pub.pdf (accessed 15 September 2021).

¹⁰⁵ R Zeigler 'Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications?' (2020) *Constitutional Court Review* 95.

¹⁰⁶ Khan & Rayner (n 104).
F Khan & M Lee 'Policy shifts in the asylum process in South Africa resulting in hidden refugees and asylum seekers' (2018) 4 *African Human Mobility Review* 1218.

The obligations that South Africa has on both a national and international scale require the implementation of policies and legislation that can give rise to the full protection of migrants as per the listed obligations. At the core of the obligations is the need to protect migrants against discrimination and provide them with channels to seek redress in situations of discrimination. South Africa is obliged to apply a human rights framework in its treatment of migrants and locals alike.

The legal obligations to protect foreign nationals are framed through the lens of the positive and negative obligations of the state at all the levels of protection. A positive obligation on the state where protection of foreign nationals is concerned requires positive steps taken by the state to ensure protection, framed in the various legal documents to be achieved through implementation of laws and policies that harmonize and give effect to these policies that facilitate for protection of migrants. The negative obligations require the state to refrain from a particular course of action towards migrants. What is particularly important in an analysis of the obligations of South Africa in respect of protecting migrants relates to the obligation of the state to prevent interference of the rights of migrants by third parties, including other citizens of the state and machinery of the state.

The state has noticeably clear obligations towards the protection of migrants by virtue of both the local and international frameworks. However, in implementing these and complying with them it is important for the state to subscribe to both manifestations of these obligations namely the positive and negative aspect.

2.6. Conclusion

This chapter has highlighted the main instruments that contain South Africa's legal obligations towards the protection of foreigners within the state. The various legal obligations are interlinked and provide for similar obligations. The interlinkages highlighted by the similarities in the obligations at the various levels discussed above are a result of South Africa's membership of the greater international legal community and as result of the nature of South Africa's Constitutional democracy.

Chapter 3: Compliance of South Africa's legal framework with the national and international obligations to protect foreign nationals: a focus on xenophobia

3.1. Introduction

South Africa is legally obliged at a domestic and international level to protect those within the borders of this state. As seen in the previous chapter, there are various legally and morally binding documents that ought to inform South Africa's interaction with and protection of foreign nationals within the borders of this country. In this chapter, the mini-dissertation answers the question of whether South Africa's legal framework complies with international obligations to protect foreign nationals with a particular focus on protection against xenophobia. This chapter assesses the compliance through the lens of national compliance as well as international compliance, which will also incorporate a regional analysis.

3.2. International compliance

South Africa's international compliance with obligations towards the protection of foreign nationals is documented in the Concluding Observations of South Africa's state reports to various treaty monitoring bodies. The following paragraphs will provide an outline of the most important observations and recommendations of various treaty bodies regarding South Africa's compliance with international obligations. The concluding observations analysed in assessing South Africa's international compliance with their obligations towards protection of foreign nationals include the: UN Committee against Torture's observations of South Africa's compliance with the CAT; the Committee on the Elimination of Racial Discrimination's observations of South Africa's compliance with the ICERD and the Human Rights Committee's observations of South Africa's compliance with the ICCPR.

A key issue regarding compliance with South Africa's international obligations relating to the protection of migrants is the state's ratification status of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The state party has not ratified this treaty; ratification of this treaty and

acceptance of the obligations contained therein has been suggested in the concluding observations of various treaty bodies.

The amendments to the Refugees Act as mentioned above that create stricter administrative requirements for foreigners to access the asylum system have hampered South Africa's compliance with international obligations insofar as they constitute a threat against the principle of non-refoulement. The legal framework provided for in the Immigration Act that gives wide powers to police officers and encourages community policing also poses a threat to true protection of foreigners against xenophobia.

The immigration system in South Africa and the associated deficiencies, including the backlogs, corruption and inaccessibility to the asylum system, have been noted as impediments to South Africa's full compliance with international obligations towards protection of foreign nationals. As mentioned above, inaccessibility of the system leaves foreigners vulnerable and usually pushes them to remain undocumented which then results in failure to access basic services and thus making them vulnerable to systemic xenophobia.

3.3. Regional Compliance

At a regional level, South Africa's compliance mirrors that of the international level. South Africa has not ratified the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention); this Convention is key to the response of dealing with victims of xenophobia and the effects of the violent xenophobic attacks resulting in migrants become internationally displaced within the state.¹⁰⁷ Displacement of foreigners as a result of xenophobic violence has been recorded in 2008, 2015 and 2019 as well as in periods of sporadic xenophobic attacks occurring between these most marked incidences.¹⁰⁸ The state's response to providing accurate data about the true population of foreign nationals in the state has also been flagged as an area of concern regarding compliance with regional obligations. The inflated statistics of the size of migrant communities in South

¹⁰⁷ R Adeola 'Xenophobia and internal displacement in Africa: Defining protection and assistance through the Kampala Convention' (2020) 27(4) *South African Journal of International Affairs* 500.

¹⁰⁸ Adeola (n120); J Crush & S Ramachandran 'Xenophobic violence in South Africa: Denialism, minimalism, realism' (2014) 66 *Migration Policy Series* 6.

Africa have a significant effect on xenophobic mindsets and resultant action. In addition to this South Africa has been flagged as failing to implement measures that allow for the true enjoyment of freedom of movement for migrants as provided for in the African Charter.

By virtue of being part of the SADC region, South Africa has duties towards protection of foreign nationals at that level. Implementation of cohesive migration frameworks to facilitate for the free movement of persons at SADC level remains low. The slow implementation of the SADC frameworks signals a lack of political will. Most SADC states, including South Africa have to date only managed to standardise visa free entry into the nations in the bloc for citizens of other member states for up to 90 days in situations that preclude migrants from working or studying under such arrangements,¹⁰⁹ albeit this position has been made possible through multi-lateral and bilateral agreements as opposed to implementation of the existing regional framework.¹¹⁰

3.4. National compliance

Historically, since the end of Apartheid South African immigration policies, especially regarding the protection of migrants in need of international protection, have been lauded as progressive. This was linked to South Africa's rights-based approach that provided for access to particular rights for refugees and asylum seekers similar to those provided to citizens, as illustrated in the preceding chapter. The South African immigration policies were also lauded based on the Constitutional Supremacy of the state and the guarantee of certain universal rights in the Bill of Rights that accrue to 'everyone'.

South Africa has also been hailed in the region based on their treatment of individuals needing international protection and the fact that the South African system does not apply the encampment policy in regulating refugees. There have been several victories regarding the state's national compliance in relation to protecting migrants. However, the legal and policy framework in South Africa has become increasingly stringent and restrictive towards migrants, and this has had an effect on the status of

¹⁰⁹ O Maunganidze & J Formica 'Freedom of movement in Southern Africa A SADC (pipe)dream?' (2017) *Institute for Security Studies* Southern African Report 3.

¹¹⁰ Maunganidze & Formica (n124).

South Africa's compliance with the obligations illustrated above. An issue of particular concern in the restrictive legal and policy framework that the South African refugee protection is the move for the establishment of 'asylum seeker processing centres' where asylum seekers are to be held while their visas are being processed. These centres were set to be established at the northern borders of the state.¹¹¹ This was included in the White Paper on Migration and has been criticised by civil society organisations working with migrants as a move that can result in the increased detention of these vulnerable groups.¹¹² The infamous Lindela Repatriation Centre (Lindela) in Krugersdorp continues to come under scrutiny for violation of human rights due to the conditions in which migrants are living under at that centre.¹¹³ The poor conditions at Lindela have been also been highlighted by the UN Committee Against Torture and encompass issues such as overcrowding, inadequate sanitation, inadequate nutrition and inadequate access to healthcare.¹¹⁴ There are also reports of increased incidences of migrant detention in places that are not designated for the detention of migrants such as police stations.

At national level South Africa is guided by the Constitution, national legislation and policies that ought also to be influenced and guided by international law where possible and applicable.¹¹⁵

The Constitution provides for certain rights that are available to 'everyone' including foreign nationals; these rights have been mentioned in the previous chapter. There have been positive steps in South Africa's compliance to the Constitutional mandate to provide for the rights of non-citizens, in which case the Courts have been the main vehicle in achieving and upholding the Constitutional mandate.¹¹⁶ There have been

¹¹¹ Khan & Rayner (n103) 14.

¹¹² Scalabrini, 'What is the White Paper on International Migration?' (2018) <https://www.scalabrini.org.za/news/what-is-the-white-paper-on-international-migration/> (accessed 24 November 2021).

¹¹³ Lawyers for Human Rights (LHR), 'Monitoring Policy, Litigious and Legislative Shifts in Immigration Detention in South Africa,' (2020) <https://www.lhr.org.za/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital-1.pdf> (accessed 24 November 2021) 46-50

¹¹⁴ LHR (n128).

¹¹⁵ Constitution of South Africa as above.

¹¹⁶ J Y Mogkoro "Ubuntu, the Constitution and the rights of non-citizens" (2010) 21(2) *Stellenbosch Law Review* 224.

several important decisions where the court has solidified the position of migrants in the state in so far as it relates to their access to constitutional rights.

*Centre for Child Law and Others v Minister of Basic Education and Others*¹¹⁷ is one of the most recent judgments to provide relief to the plight of migrants concerning access to their constitutional rights particularly access to education. The case concerns a directive from the Department of Basic Education that led to the exclusion of children without the requisite identity documents from school feeding programs and access to funding and subsequent exclusion of children from a no-fee school in the Eastern Cape.¹¹⁸ The Eastern Cape High Court ordered that the Immigration Act be interpreted in a way that upholds the Bill of Rights and as such be interpreted in a way that allows migrant children access to education irrespective immigration status.¹¹⁹ The case held that the directive to deprive children of access to education based on their inability to provide the requisite identification documents was unconstitutional.¹²⁰ The court upheld the right to basic education for migrant children as provided for in the Constitution and internationally protected in international treaties.

In *Koyabe v Minister of Home Affairs*, the Constitutional Court upheld the section 33 constitutional right of access to just administrative action when it held that foreign nationals are entitled to reasons for status determinations that declare them illegal foreigners as per the Immigration Act.¹²¹ The courts have also protected the rights of migrants in cases such as *Khosa*, which concerned the right of access to social security of permanent residents in South Africa and the infringement of section 9 of the Constitution that had taken place by depriving them of access to this right.¹²² The legal framework in so far as enforcement of the rights provided for in the Constitution and protection of these rights by the court works in the favour of migrants and leads to compliance with national obligations as set out in the Constitution. The courts have shown a willingness to interpret the relevant rights in the Bill of Rights that apply to 'everyone' as also being applicable to foreign nationals.¹²³

¹¹⁷ *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 1 All SA 711 (ECG) (*Centre for Child Law case*).

¹¹⁸ *Centre for Child Law case* (n **Error! Bookmark not defined.**) at para 65.

¹¹⁹ *Centre for Child Law case* (n **Error! Bookmark not defined.**) at para 127.

¹²⁰ *Centre for Child Law case* (n **Error! Bookmark not defined.**) at para 131.

¹²¹ *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) 2009 ZACC 23.

¹²² *Khosa case* (n11).

¹²³ *Mogkoro* (n **Error! Bookmark not defined.**) 226.

While this can be a positive step towards the protection of non-citizens in South Africa, the constant need for litigation for migrants to fight for the protection and promotion of their rights is often beyond the reach of many categories of non-citizens in terms of cost and accessibility of the law unless they can gain this access through the assistance of non-governmental and other associations.¹²⁴ The constant need for litigation in order to gain access to rights in the Constitution that should be available to non-citizens in this country means that these rights remain inaccessible to various categories of migrants. This is a result of the costs of litigation as mentioned above as well as the accessibility of the option of litigation as well as permeation of the judgments handed down by courts to all the spheres of society.

Cases have been brought before the equality courts for remedies related to unfair discrimination based on xenophobia. However, there has not been great success in adjudicating xenophobia in these platforms. Some of the issues that have been highlighted as impediments to access the equality courts include the complex nature of proving discrimination, which necessitates the need for legal counsel which is not always readily available to migrants.¹²⁵

Insofar as the policies and laws being actioned to protect foreign nationals in South Africa, the legal framework highlights the disconnect between what is provided for on paper and the implementation of these policies in practice. This can be seen in the most recent amendments to the Refugees Act as well as certain provisions of the Immigration Act. The National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance is also another example of the national state of compliance towards protecting migrants in South Africa.

The most recent amendments to the Refugees Act include a reversal of the automatic right to work and study of refugees, seen as a reversal of the *Watchenuka* decision, shorter time periods to present oneself before a RRO, an extension of the time period one has to stay in the Republic before qualifying for permanent residence status, and more grounds on which refugee status can cease. These amendments create a hostile environment for foreigners trying to access the already elusive asylum system and

¹²⁴ Khan & Lee (n 61) 1209.

¹²⁵ J de Jager 'Addressing xenophobia in the equality courts of South Africa' (2011) 28(2) *Refuge: Canada's Journal on Refugees* 112.

potentially threaten the principle of non-refoulement and the right to just administrative access for these categories of migrants.¹²⁶ The difficulty in accessing the system essentially leaves refugees and asylum seekers vulnerable to xenophobia and unable to access their rights as it forces them to remain in the country illegally due to failure to access the requisite documentation.

The government of South Africa launched the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) in March of 2019.¹²⁷ This policy came as a result of the World Conference against Racism, Racial Discrimination, Xenophobia and related intolerance (WCAR) in 2001 and the Durban Declaration and Programme of Action, which required states to take urgent steps to establish and implement policies that will see issues of xenophobia and the other intolerances covered by the NAP addressed. The launch of this 5-year plan 18 years after the Conference that mandated 'steps without delay' has been criticised and shows the urgency with which issues of xenophobia are handled at a political level. The NAP was also intended to assist South Africa in compliance with its international and treaty obligations, which it did in part and theoretically in terms of compliance with the need to enact policies and plans around the issue of governing xenophobia.

The NAP provides possible methods of combating xenophobia in South Africa, which include 'acknowledging and condemning acts of bias-motivated violence whenever they occur, enacting hate crime laws, strengthening law enforcement, and prosecuting offenders.'¹²⁸ The NAP also seeks to promote and increase reporting of instances of xenophobia and promote integration in communities most affected by xenophobia and calls for clear government condemnation of xenophobia and related acts in the nation.

However, the National Action Plan fails to address key issues that surround the xenophobia problem in South Africa and that are important elements in ensuring actual implementation of the plan; issues of policing, and police brutality against foreign nationals and the treatment of foreign nationals by law enforcement officers which

¹²⁶ T Maluwa & A Katz 'Who is a refugee? Twenty-five years of domestic implementation and judicial interpretation of the 1969 OAU and 1951 UN Refugee Conventions in post-apartheid South Africa' (2020) 27(2) *Indiana Journal of Global Legal Studies* 169.

¹²⁷ National action plan to combat racism, racial discrimination, xenophobia and related intolerance (NAP).

¹²⁸ NAP (n 142) para 81.

plays a critical role in protection against xenophobia as well as adjudication of the associated crimes.¹²⁹

While the implementation of this plan has been lauded as a positive step towards addressing the xenophobia issue, there is still a need for concrete mechanisms towards implementing the goals set out in the plan. The NAP is silent regarding the budgetary needs that will assist in implementing the set goals and brings criticism regarding the feasibility of the actual implementation of this plan in reality.¹³⁰

The government of South Africa has been criticized regarding their approach to xenophobia in the country. The lack of acknowledgement and lack of accountability regarding the perpetrators of this violence at both the horizontal level between individuals within the state (locals and foreigners) and vertically between the state and foreigners continues to foster a positive breeding ground for xenophobia and xenophobic attitudes. The lack of political acknowledgement and meaningful engagement around the issue of xenophobia affects the totality of the national compliance and renders xenophobia and its associated human rights violations and ills as a back bencher in the spectrum of important issues that the South African state is currently dealing with.

3.5. Conclusion

On the face of it South Africa has complied with the international obligations relating to the protection of foreign nationals. This can be seen in the application of the OAU Convention and the UN Convention relating to the protection of refugees which have been translated into legislation through the Refugees Act. South Africa has also complied insofar as they have been a party to specific instruments governing migrants.

The courts have been instrumental in enforcing in interpretation and enforcement of South Africa's constitutional framework regarding the protection of migrants within the country, which is a positive step in terms of the human rights approach of adjudication in the nation. However, the need for constant intervention of the courts in issues

¹²⁹ Mavinga (n 25).

¹³⁰ Centre For Human Rights NGO Forum at the African Union <https://www.youtube.com/watch?v=B3SB1xa9S84&t=4684s> (accessed 15 September 2021).

regarding access to rights renders these inaccessible in the daily lives of the most vulnerable groups if there is a constant need to access the courts to enforce these.

However, South Africa's legal framework has taken a more regulatory approach as opposed to a protection approach where migrants are concerned in the country. This can be seen in the stringent migration controls that have been introduced in the amendments to the Refugees Act and certain provisions of the Immigration Act. Over the years the South African migration system has become increasingly protectionist and state-security centred which has led to further alienation of certain categories of migrants particularly refugees and asylum seekers

South Africa's legal system also faces the issue of compliance where implementation is concerned, and this remains the major stumbling block towards South Africa truly fulfilling its objectives in protecting foreigners and ensuring that they are protected from xenophobia and its associated ills.

Chapter 4: The adequacy of South Africa's legal framework governing digital xenophobia

4.1. Introduction

As xenophobia continues to become a chronic issue in the South African society and the continent at large, there is a need to take decisive action in order to govern and solve the issues surrounding this phenomenon. To add to the existing issues, the increased access to the internet and social media platforms has 'developed' a different form of xenophobia that can now be incited and even perpetuated online. In this chapter the mini-dissertation reflects on the adequacy of the South African legal framework in addressing this changing nature of xenophobia. This is done by looking at the current legal framework governing 'online xenophobia' and assessing whether this framework adequately regulates online xenophobia. The question engaged with in this chapter is whether the South African legal framework adequately governs the changing face of xenophobia in the digital age.

4.2. The changing face of xenophobia in South Africa

The increased use and ease of access to the internet and the associated services it provides has drastically changed the way people relate in the last decade. There have been positive effects of the 'internet revolution' such as increased access to information, ease of communication, improved commercial relations and general inter connectedness of the world, further proliferating the 'global village' narrative that was birthed as a result of globalisation.

However, along with the positive contributions that the internet revolution has brought about, there have also been negative contributions. The increased use and access of the internet has also changed the way in which social ills are perpetrated, particularly relating to the publishing and perpetuation of xenophobic and other derogatory and prejudicial information through the use of internet based and online platforms extending right to the incitement of violent attacks and other manifestations of hate

crimes.¹³¹ It is in this regard that the face of xenophobia is changing in South Africa, a position which is not unique to this state and is fast becoming a global phenomenon as evidenced during the COVID-19 pandemic and the subsequent global xenophobia directed at people of Chinese origin which has been largely perpetuated on online platforms.¹³²

The use of online platforms to perpetuate and spread xenophobic rhetoric has been increasing in South Africa and is documented in the most recent xenophobic attacks of 2015 and 2019. The use of social media has increased the rate at which the ills of xenophobia are published and the subsequent reactions. It also mirrors the physical nature of xenophobia in South Africa in that it allows for an online mob-justice approach to incitement of violence against and harassment towards foreigners.¹³³

The nature of digital xenophobia allows the sentiments expressed to have wide reach of audiences in a short space of time. This is documented as a result of social media taking over the monopoly of dissemination of information and news from the mainstream media avenues, which have typically been the gatekeepers of disseminating information and regulators of the speed at which information is disseminated and accessed.¹³⁴ The ease of access and speed of dissemination in peddling xenophobic rhetoric through the use of digital platforms has also resulted the proliferation of 'fake news.' Due to the increased use of social media, the instant sharing of news and information poses a threat for true verification of the information spread and contributes to the desensitization of communities to violence and gruesome images.¹³⁵ This was typified in the global attention directed at the 2010 and 2019 spurs of xenophobic violence that erupted in the country which came as a result of increased visibility which has been correlated with the increase in use of digital platforms and increased accessibility and spread of information.¹³⁶ Some instances of

¹³¹ C O'Regan 'Hate speech online: An (intractable) contemporary challenge?' (2018) 71(1) *Current Legal Problems* 404.

¹³² International Organization of Migration 'Countering xenophobia and stigma to foster social cohesion in the COVID 19 response and recovery' (2020) Issue Brief 1.

¹³³ T Odeyemi 'Digital xenophobia: the bullying of 'self' and the cultural caricature of a criminal Nigerian 'other' (2015) *South African Review of Sociology* 68.

¹³⁴ P Gerbaudo *Tweets and the street: Social media and contemporary activism* (2012) Pluto Press.

¹³⁵ G Odock 'Social media and xenophobic solidarity in post-colonial africa' (2020) *African Human Mobility Review* 76.

¹³⁶ Chenzi (n 39) 6.

reporting on xenophobia or even the xenophobic rhetoric and action carried out during this period were based on fake news linked to pictures of old attacks and the spread of messages with incorrect information.

While various online platforms are used to spread xenophobic rhetoric, including Whatsapp and Facebook, Twitter is a popular platform for this type of xenophobia.¹³⁷ Several papers have examined the nature of anti-foreigner sentiments on Twitter which are popularised through the use of hashtags, these tweets usually perpetuate xenophobic stereotypes which portray all foreigners as illegal, foreigners as criminals and as competition to nationals for socio-economic benefits.¹³⁸ This digital form of xenophobia, usually directed at African migrants, is then popularised on Twitter as a 'trending topic', allowing this xenophobic rhetoric to gain traction and reach larger audiences.

Some tweets incite violence or provide 'warnings' to foreigners. Tweets of this kind have managed to spill over into physical manifestations of xenophobia, violent or otherwise, including actual attacks on foreigners or marches and protests that peddle xenophobic rhetoric. This was most clearly evidenced in the #PutSouthAfricansFirst march where protestors called for the removal of illegal foreigners from the country, this was incited and mobilised through engagements on Twitter. The interlinkage between the changing face of xenophobia to the virtual space and its effect on physical manifestations was also evidenced in the 2019 attacks on foreigners that were incited through WhatsApp.¹³⁹

The digital space has been documented as a new arena for xenophobic attacks; in some instances, the attacks have resulted in physical manifestations.¹⁴⁰ The virtual element to xenophobia in South Africa constitutes a form of attack on migrants through the rhetoric peddled on these spaces that often amounts to hate speech and threats

¹³⁷ K Tarisayi 'Afroophobic attacks in virtual spaces: The case of three hashtags in South Africa' (2021) 37(1) *Migracijske i etničke teme* 31.

¹³⁸ Tarisayi (n 152).

¹³⁹ S Evans & M Wiener 'Xenophobic attacks: Did the authorities miss the signs?' 8 September 2019 <https://www.news24.com/news24/SouthAfrica/News/xenophobic-attacks-did-the-authorities-miss-the-signs-20190907> (accessed 15 September 2021).

¹⁴⁰ Tarisayi (n 152) 34.

to the security of migrants within the nation, as well as inflammatory, and defamatory statements, addressed to migrants.¹⁴¹

4.3. The current framework and adequacy thereof

The current legal framework governing xenophobia on a holistic level has been discussed in the preceding chapters. As illustrated above, there are many barriers in the efficiency of the legal framework's protection of the 'traditional' manifestations of xenophobia.

The state of the current legal framework governing xenophobia and specifically digital xenophobia shows a gap in the law at both an international and local level. On an international level, we have seen treaties and soft law obligations that regulate xenophobia and encourage states to take action to do the same.¹⁴² However, the lack of a concrete and individual document governing this specific issue which has far-reaching effects on the human rights of migrants, allows crimes of xenophobia and digital xenophobia alike to 'fall through the cracks' as a result of lack of specificity.

One of the main areas of concern where digital xenophobia is concerned is how to classify this crime.¹⁴³ There has been an attempt to classify digital xenophobia under the umbrella of hate speech. Due to the nature and effects both in terms of the geographical and legal scope of the phenomenon of online hate speech and xenophobia, regulation of this has proven a difficult task, often leaving the protection provided and the regulation thereof inadequate.

Regulating hate speech requires a balancing of rights that are protected in international law and the Constitution of South Africa such as free speech and freedom of expression with the need to regulate expression and speech that cause harm.¹⁴⁴ From an international perspective, the specific concept of hate speech is not explicitly defined in international treaties and soft law as an independent concept.¹⁴⁵ Hate speech is defined in the negative sense of the right to free speech and freedom of

¹⁴¹ Tarisayi (n 152) 43.

¹⁴² G Alvarado 'Countering hate speech against refugees and migrants: An evaluation of international human rights treaties and soft law instruments' *Revista Relaciones Internacionales* 118.

¹⁴³ As above.

¹⁴⁴ Alvarado (n 157) 107.

¹⁴⁵ Alvarado (n 157) 105.

expression, that is there is a negative obligation on persons to refrain from using their free speech in ways that would amount to hate speech.¹⁴⁶

At the local level, a lack of specific legal rules that are targeted at xenophobia and its resultant action and damage has been documented as a deficiency of the South African legal response towards combatting this phenomenon. The lack of specific laws has led to the bundling of xenophobia-motivated crimes with general lawlessness and hampered the proper reporting and adjudication of crimes related to xenophobia in the different forms that they take. The lack of a specific law governing xenophobia has also resulted in inadequate statistics regarding the phenomenon in South Africa and the associated ills which hampers proper policy direction and implementation where xenophobia is concerned as illustrated in preceding chapters.¹⁴⁷

The PEPUDA, which can be an avenue of redress for victims of xenophobia, perpetuates 'offline' has been rendered somewhat ineffectual because of the focus and scope of this Act. It has been argued that the Act focuses specifically on particular types of discrimination and creates a hierarchy of sorts leaving the listed grounds with which victims of xenophobia could use legal standing in the equality courts at the bottom of this hierarchy.¹⁴⁸ As indicated above the equality courts are not as readily accessible as they were likely envisioned to be due to administrative and other barriers, this is likely to have a disproportionate effect on victims of xenophobia. The nature of the remedies provided for by PEPUDA insofar as it provides for civil remedies as opposed to criminalising the various acts and discrimination that it regulates also hampered its effectiveness in regulating discrimination and the associated ills of which xenophobia forms a part.¹⁴⁹ In addition to this, the PEPUDA has also failed to cater for the changing face of hate crimes in general towards the digital space and particularly xenophobia.¹⁵⁰

The current legal framework in South Africa governing the use and behaviour in the digital space in South Africa is a mixed system consisting of existing common law and

¹⁴⁶ As above.

¹⁴⁷ Open Society Foundation of South Africa 'Why does South Africa need hate crime legislation' 7.

¹⁴⁸ The Southern African Liaison Office (SALO) 'The Prevention and Combating of Hate Crimes and Hate Speech Bill' Policy Brief 2.

¹⁴⁹ SALO (n 163) 3.

¹⁵⁰ As above.

various pieces of legislation that govern a wide spectrum of issues.¹⁵¹ The existing framework is mostly targeted at regulating economic activities online and data protection and privacy laws.¹⁵²

The above discussion regarding the regulation of xenophobia shows an evident inadequacy in the laws of South Africa, where the regulation of digital xenophobia is concerned. There are currently no laws that directly regulate and criminalise online xenophobia and the resultant manifestations of this phenomenon. The focus of the current laws in place that victims of xenophobia may rely on in order to access redress is inadequate in providing the requisite remedies.

The South African legislature has adopted one important piece of legislation and is currently in the process of considering another which may change the position of inadequacy that the current legal framework is in when it comes to regulating hate crimes in South Africa as a whole, of which xenophobia is a most violent manifestation of as well as the changing face of xenophobia in the digital age.

The Cybercrimes Bill was passed by both houses of Parliament in December of 2020 and was subsequently, in May 2021, assented to by the President and became the Cybercrimes Act 19 of 2020.¹⁵³ However, the Act is not yet in force and will only come into force at a date as gazetted by the President. Once in force, this Act will see an improvement to the current online regulation framework in South Africa. This Act will provide for criminalisation of certain online behaviours including “malicious communications – being the distribution of data messages with the intention to incite the causing of damage to any property belonging to, or to incite violence against, or to threaten a person or group of persons...”, which will encompass the recent manifestations of online xenophobia.¹⁵⁴ The Act also provides for sentences and penalties for those who commit these cybercrimes.¹⁵⁵

¹⁵¹ P Bhagatjee & A Gouvaza ‘The Cybercrimes Bill is one step away from becoming law’ 7 July 2020 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/technology/tmt-alert-7-july-The-Cybercrimes-Bill-is-one-step-away-from-becoming-law.html> (accessed 15 September 2021).

¹⁵² Bhagattjee and Gouvaza (n 167)

¹⁵³ Parliamentary Monitoring Group <https://pmg.org.za/bill/684/> (accessed 15 September 2021).

¹⁵⁴ Cybercrimes Act 19 of 2020 ss13, 14, 15, 17.

¹⁵⁵ Cybercrimes Act (n 169) s19.

Another important addition to the statute book that may provide better regulation of both online and offline manifestations of xenophobia is the Prevention and Combating of Hate Crimes and Hate Speech Bill, which will provide for criminalisation of hate crimes in South Africa with xenophobia as one of the specific targets of the Bill. This Bill is currently before the National Assembly for consideration.¹⁵⁶ This Bill will impose stricter sanctions to hate speech including xenophobic, racist and other prejudicial speech, with sentences of up to ten years unlike the provisions of the PEPUA.¹⁵⁷ If passed this Bill will also criminalise the perpetuation of hate speech online,¹⁵⁸ which provide a specific criminal sanction for instances of digital xenophobia.

4.4. Conclusion

This chapter has discussed the current legal framework of South Africa insofar as it relates to the changing face of xenophobia. The framework as it stands, is inadequate in the regulation of digital of xenophobia and the provision of adequate remedies to victims of traditional manifestations of xenophobia. The South African legislature is currently in the process of adopting legislation that will remedy the inadequacies of the existing frameworks and provide a coherent legal framework for the adjudication of the digital manifestations of xenophobia and the damage caused both online and offline as a result of this.

¹⁵⁶ Parliamentary Monitoring Group <https://pmg.org.za/bill/779/> (accessed 15 September 2021).

¹⁵⁷ Cybercrimes Act.

¹⁵⁸ Cybercrimes Act (n 169) s 4(b).

K Rajuli & N Nyathi 'South Africa and Kenya's legislative measures to prevent hate speech' (2017) 2 *Conflict Trends* 44.

Chapter 5: Potential remedies for the state to adopt in regulating xenophobia and its changing nature

5.1. Introduction

The issue of xenophobia in South Africa is an issue that affects all types of migrants and permeates to different strata of society affecting the livelihoods, quality of life and enjoyment of human rights of those affected. The response to xenophobia and its associated ills has been inadequate in South Africa, presenting a gap in the law, effective policies and even on a social level in communities. The lacklustre response to xenophobia in its physical manifestations coupled with the greater international law response to this problem in the physical manifestation has also slowed the pace of generating solutions to the changing face of xenophobia and the associated digital manifestations thereof.

In charting the way forward to addressing this issue, the state must adopt a multi and interdisciplinary approach that encompasses a transformation of all strata of society towards a 'migrant-friendly' direction. Indeed, the solutions to curb physical and digital xenophobia tend to overlap given the fact that both are manifestations of xenophobic ideals in people and as such require a people centred approach. In the following paragraphs possible solutions that the state can adopt to remedy this situation will be proffered with a legal response as the basis of the solutions however, cognizant that the law alone will not remedy an issue that has its roots in a plethora of issues.

5.2. The legal framework

The preceding sections of the mini-dissertation illustrate the state's legal obligations at a national and international level to protect migrants within their borders. One of the main solutions based on these obligations requires the legal framework both at an international and national level to be harmonized and directed to a concerted effort to regulate xenophobia.

There need to be concrete laws that govern xenophobia as a stand-alone issue, this is something that has been lacking in all levels of the xenophobia response. The issue

is often bundled with other forms of prejudicial behaviour and indeed even in those categorizations, it is an issue that is not at the forefront of scrutiny. A development of legislation already governing migrants and refugees and supplementary legislation that specifically governs the problem of xenophobia in South Africa needs to be prioritized for a directed response to this issue. The issue of defining xenophobia and identifying its manifestations as well as removing them from the larger scope of general lawlessness has been a hindrance to the proper regulation of issues related to xenophobia in South Africa. Additionally, if the state develops a more specific framework relating to xenophobia, it will allow for focus on all manifestations of this phenomenon, including digital xenophobia.

The refugee protection framework in South Africa needs to be adapted to embody the human rights ethos as envisaged by the Constitution and as previously adopted by the state. The state security approach taken in regulating refugees and asylum seekers, seen in the most recent amendments of the Refugees Act, has the effect of relegating these categories of migrants which often leaves them undocumented and unprotected. This makes them susceptible to xenophobia and leads to alternative methods of survival which may infringe the rights of these migrants and also lead them into or exposes them to criminality in efforts to secure their stay in the country.

The adoption of the Cybercrimes Act as discussed above is a step in the right direction towards provision of a concrete legal solution to the issue of digital xenophobia specifically. The Prevention and Combating of Hate Crimes and Hate Speech Bill (Hate Crimes Bill) is still before parliament and under consideration in the National Assembly. Calls for public comment and submissions on the Bill were opened in August 2021. The Cybercrimes Act and the Hate Crimes Bill, once adopted, have the potential to address the issue of digital xenophobia and provide criminal sanctions for crimes associated with this phenomenon. The potential of this legislation to address digital xenophobia specifically and the violent manifestations that occur 'offline' is based on the specificity of these laws in relation to xenophobia; thus, partially addressing a gap that still exists in the law where this is concerned. The implementation of the available frameworks remains essential in addressing the issue of digital xenophobia, as with the problem of xenophobia at large in South Africa.

Improved regional and continental regulation of xenophobia will also be essential in curbing the problem of xenophobia in South Africa specifically and the continent at large. Implementation of a framework at the AU level and within the regional blocs as was adopted by the Council of Europe to formulate the Framework Decision on Combating Racism and Xenophobia.¹⁵⁹ This will set standards and best practice that can be followed by all member states of the AU and can ensure that there is regional consensus on how to tackle the issue of xenophobia which will inform the digital regulation thereof.

5.3. Political response

The political response to xenophobia in South Africa is part of the larger problem. The responses including denialism, lack of urgency pertaining to the issue and in some instances, xenophobic rhetoric peddled from the hallways of power that entrench a culture and systems of systemic xenophobia. The political response to xenophobia also has a grave influence on the nation's policy direction in addressing this issue and has long been a contributor to the inadequate response.

Politicians, particularly the executive branch of government, the legislature and those involved in policy making need to make a concerted effort towards putting xenophobia as an issue that is at the top of the agenda in South African politics. It is imperative in addressing the political response to the protection of migrants, the government gives due regard to guidelines provided in documents such as the General Comment 5 discussed in previous sections. General Comment 5 gives direction in the implementation of the African Charter's right to freedom of movement and residence that prevents it from political manipulation and encourages a system of checks and balances that reviews political power in this regard as well as a review of the legislative framework in place to moderate this. It is also essential that the political response informs policy, legislative and institutional reforms in institutions such as the SAPS, the DHA and institutions that regulate the treatment of migrants within the state. This is a delicate balancing act given the cleavages that prevail in the South African society

¹⁵⁹ Council of Europe Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

however, this approach will acknowledge that there is a problem to be addressed. These attitudes can permeate to different sectors of society, and this can also translate into concrete policy and legislative reforms as the slow pace of these has typically been attributed to lack of political will.

5.4. Technological responses

While state action is central towards curbing digital xenophobia, the involvement of private actors in the digital sphere is also crucial towards the efficacy of the state's responses particularly the legal interventions. To this end increased collaboration between state and non-state actors in regulating the digital space is vital.

Think tanks and organisations that work in the digital space can collaborate with the state to monitor the prevalence of xenophobic rhetoric online. An example of this was seen at a local level through the Citizen Research Centre and their monitoring and analysis of the type of rhetoric that South Africans are taking part in online specifically where xenophobia is concerned.¹⁶⁰ Understanding the true extent of this rhetoric can inform meaningful policy intervention and possibly influence the response at a societal level. Monitoring of this online behaviour can also be instrumental in situations where the xenophobic rhetoric spills over into the physical world and leads to protests or xenophobic as technological companies have the ability to assist in tracing perpetrators through their online personas which can assist the state which would otherwise not be capacitated in this manner.

Internationally we saw the rise of regulation of the online space during the 2020 American election in filtering untrue information or that peddled prejudicial agendas. This was most prominently seen on Twitter, which introduced a fact-checking label.¹⁶¹ This label flagged potential harmful or untrue statements and had links to external resources where users could further investigate an issue brought up by a Tweet.¹⁶² It is important for social media platforms to take this approach within the necessary

¹⁶⁰ SABC News 'Citizen Research Centre report shows increase in xenophobia attacks' March 2017 <https://www.youtube.com/watch?v=ZQyJifC19gE> (accessed 15 September 2021).
<https://vibrand.co.za/xenophobia-on-social-media/> .

¹⁶¹ C Thorbecke 'What to know about Twitter's fact-checking labels' 20 July 2020
<https://abcnews.go.com/Business/twitters-fact-checking-labels/story?id=70903715> (accessed 15 September 2021).

¹⁶² As above.

confines of protecting and respecting the rights that guarantee freedom of expression but informed by the need to prevent their spaces for becoming breeding grounds for xenophobic rhetoric and incitement of xenophobic action. The solution of ‘nipping’ this type of expression ‘in the bud’ is particularly important on social media as ideas gain traction and support through sharing and the ability to reach vast audiences in a short time. Completely blocking prejudicial sentiments or running fact-checks on them to allow those who consume and share this type of content to check the factual and legal basis of their comments as well as preventing the wide reach that unregulated sharing would give rise to.

Successful efforts of regulating online hate speech, including xenophobia, have been seen in application in the European Union (EU) where the states in the Union have developed some common standards to prevent these manifestations within the bloc. Successful integration of policies in the EU led to the development of a code of conduct on illegal hate speech in which digital platforms commit to having ‘rules or community guidelines in place clarifying that they prohibit the promotion of incitement to violence and hateful conduct’.¹⁶³ This is somewhat of a hybrid approach that combines a technological response informed by legal and policy guidelines. Social media platforms party to this code of conduct adhere to reviewing and removing content flagged as illegal hate speech according to the stipulated EU guidelines within 24 hours of the content being posted.¹⁶⁴ Applying similar guidelines within the South African context and at the AU and SADC level will be a step in the right direction towards combatting online xenophobia and ensuring that the hosts of online platforms regulate content posted on these platforms in a manner that balances rights yet also ensures that their platforms do not become breeding grounds for xenophobic rhetoric and incitement of violence and hate crimes.

5.4. Policy and community responses

There is a need to strengthen the policy directives related to the protection of migrants in South Africa and adopt policies that can extend protection to migrants that aligns with the greater national and international obligations of the state towards the

¹⁶³ European Union Code of conduct on countering illegal hate speech online.

¹⁶⁴ As above.

protection of migrants. Coherent policies around the governing of migrants may offer direction to the institutions that are tasked with implementing these policies, including the DHA and the SAPS to increase access to redress for migrants in instances where they are harmed.

An important policy and community response that can be implemented through digital platforms as well as physically within communities is the sensitisation of local communities on the issue of the mutual benefit of migration.¹⁶⁵ Foreigners are often the target of xenophobic violence in this country as a result of the perception that they are merely competitors for scarce resources and do not contribute to the South African society in any way. Highlighting the economic, social and cultural benefits of foreigners to the South African society will also assist in curbing xenophobic rhetoric and attitudes that are based on this common misconception.

Integration of migrant communities and their South African counterparts also plays an important role in the responses to regulating xenophobia, since the most violent manifestations of this present at community level. The notion of 'otherness' plays a significant role in shaping xenophobic mindsets, concerted efforts to foster harmony between migrant and local communities through various initiatives such as can contribute to effective solutions to the xenophobia issue that come from the people. The success of curbing xenophobic attitudes within communities that harbour such attitudes and are likely to express them in violent manifestations has been attributed to greater integration between migrant communities and local communities. Research documents that most locals have negative perceptions of migrants based on xenophobic stereotypes that are perpetuated through inaccurate media depiction, political and other avenues rely on these sources for information that shapes their perceptions of migrants within their communities. Interaction between locals and their migrant counterparts within communities they reside in is limited. This contributes to the notion of otherness that fuels the violent manifestations of xenophobia and online xenophobic rhetoric. Greater cohesion of communities at local and regional level in Africa can allow for integration and greater understanding of different social and cultural groups which ultimately addresses the notion of otherness that usually fuels

¹⁶⁵ A Amodu 'Xenophobia and Africa in the 21st Century: Towards a Xenophilial Framework for Sustainable Development' (2019) 6 *International Journal of Social Sciences and Humanities Invention* 5682.

xenophobia.¹⁶⁶ Community togetherness can allow communities to address these issues at the level which they are perpetuated which can be more effective than imposed solutions. Tackling the digital manifestation of xenophobia at community level may also lead to a more directed effort in cases where known members of the society peddle xenophobic rhetoric it is easier to identify it from this level and assist in identifying of perpetrators.

5.5. Conclusion

As a result of the systemic nature of South Africa and the problems associated with it, there needs to be an interdisciplinary approach to addressing the issue. The changing face towards digital xenophobia requires the existing problems relating to ‘traditional’ manifestations of xenophobia to be addressed as well as the underpinning of a concrete and specific legal framework and policy framework that governs the peculiarities of xenophobia that are specific to the South African context.

¹⁶⁶ Amodu (n 180) 5681.

Chapter 6: Conclusion

This mini-dissertation assessed the state and the adequacy of the South African legal framework in regulating the phenomenon of xenophobia in this state. The mini-dissertation paid a particular focus to the emerging phenomenon of digital xenophobia through which xenophobic rhetoric is peddled through the use of digital technologies which also leads to the incitement of xenophobia in the 'physical' sense.

A general overview of South Africa's legal obligations towards the protection of foreigners within the borders of the state was given to illustrate the nature and extent of these obligations and the various sources. Obligations towards protection of foreigners within South Africa exist on three tiers; national, regional, and international and can be found in various documents including binding legal documents as well as soft-law instruments that provide normative and moral obligations.

The mini-dissertation focused on the compliance of the state with the various obligations that were highlighted. This analysis had varying results which showed certain levels of compliance and adherence to certain instruments through adoption of these into South African law and through the jurisprudence that exists in relation to the protection of migrants in the state. This analysis revealed the South African courts' role in adopting migrant friendly interpretation of laws in the nation and incorporation of international legal obligations towards the protection of migrants in adjudication of matters involving migrants and their access to rights in South Africa. The human rights approach of the court is a positive step towards compliance with obligations towards the protection of migrants which advocate for such an approach. This analysis also revealed that South Africa's legal framework has taken a more regulatory approach that is more protectionist and state-security centred as opposed to a protection approach where migrants are concerned in the country. South Africa's legal system also faces the issue of compliance where implementation is concerned, and this remains the major stumbling block towards South Africa truly fulfilling its objectives in protecting foreigners and ensuring that they are protected from xenophobia and its associated ills.

The current legal framework of South Africa insofar as it relates to the changing face of xenophobia towards the digital manifestations and incitement was also assessed. The current framework is inadequate in regulating digital xenophobia and providing adequate remedies to victims of traditional manifestations of xenophobia. However, there are steps being taken towards implementing specific laws that will assist in regulating digital xenophobia.

The mini-dissertation provided potential responses to be adopted in the regulation of xenophobia in all its manifestations in South Africa. An inter- and multidisciplinary approach to addressing this issue was suggested with responses including legal, political, policy, technological, and community-based. In this section, throughout the mini-dissertation, argument was made towards a holistic approach to governing xenophobia due to the interconnected nature of this phenomenon in South Africa where the digital manifestation represents 'offline' attitudes and behaviours. It was also put forward that there is a need for a specific legal framework and policy framework that governs the peculiarities of xenophobia that are specific to the South African context.

A reflection of the frameworks of protection against xenophobia in South Africa shows that there are inadequacies in the framework in terms of a specific framework tackling xenophobia as a stand-alone issue within the state and the continent at large. Implementation of the current framework is insufficient and largely happens on a reactionary basis in South Africa and the continent which impedes the ability to tackle xenophobia and the protection of the rights of migrants who are most affected by this phenomenon. Given the changing face of xenophobia towards online incitement and perpetuation of xenophobic rhetoric on digital platforms, this mini-dissertation argues for a more direct and inter and multi-disciplinary approach to regulating xenophobia in South Africa.

Bibliography

International treaties

African Charter on Human and Peoples' Rights 1981

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

UN Convention Relating to the Status of Refugees 1951

International Covenant on Civil and Political Rights 1996

South African legislation

Constitution of the Republic of South Africa, 1996

Cybercrimes Act 19 of 2020

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002

Refugees Act 130 of 1998

Refugees Amendment Act 11 of 2017

South African case law

Centre for Child Law and Others v Minister of Basic Education and Others 2020 1 All SA 711 (ECG)

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)

Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) 2004 ZACC 11

Koyabe and Others v Minister for Home Affairs and Others (CCT 53/08) 2009 ZACC 23

Minister of Home Affairs and Others v Watchenuka and Another [2004] 1 All SA 21 (SCA)

Soft law instruments

General Comment Number 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence

Policy documents

National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance

Books

Gerbaudo P (2012) *Tweets and the street: Social media and contemporary activism* Pluto Press

Journal articles

Adeola R 'Xenophobia and internal displacement in Africa: Defining protection and assistance through the Kampala Convention' (2020) 27(4) *South African Journal of International Affairs* 494

Alfaro-Velcamp T & Shaw M "'Please go home and build Africa": Criminalising immigrants in South Africa' (2016) 42(5) *Journal of Southern African Studies* 983

Amodu A 'Xenophobia and Africa in the 21st century: towards a xenophilial framework for sustainable development' (2019) 6 *International Journal of Social Sciences and Humanities Invention* 5679

Beetar M 'A contextualisation of the 2008 and 2015 xenophobic attacks: Tracing South African necropolitics' (2019) 67(1) *Current Sociology* 122

Chenzi V 'Fake news, social media and xenophobia in South Africa' (2020) *African Identities* 1

Crush J & Ramachandran S 'Xenophobia, international migration and development' (2009) 11(2) *Journal of Human Development and Capabilities* 209

De Jager J 'Addressing Xenophobia in the Equality Courts of South Africa' (2011) 28(2) *Refuge:Canada's Journal on Refugees* 107

Dlamini N et al 'Afrophobia and South Africa's image on the continent: Implications for inter-state relations and diplomacy' (2020) 17(3) *African Renaissance* 9

Ferreira G & Ferreira-Snyman A 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17(4) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1471

Kapindu R 'No return to persecution or danger: Judicial application of the principle of non-refoulement in refugee law in South Africa and Malawi' (2020) 10(1) *Constitutional Court Review* 107

Khan F & Lee M 'Policy shifts in the asylum process in South Africa resulting in hidden refugees and asylum seekers' (2018) 4 *African Human Mobility Review* 1205

Maluwa T & Katz A 'Who is a refugee?: Twenty-five years of domestic implementation and judicial interpretation of the 1969 OAU and 1951 UN Refugee Conventions in post-apartheid South Africa' (2020) 27(2) *Indiana Journal of Global Legal Studies* 169

Maunganidze O & Formica J 'Freedom of movement in Southern Africa A SADC (pipe)dream?' (2017) 17 *Institute for Security Studies Southern African Report* 1

McConnell C 'Migration and xenophobia in South Africa' (2009) 1 *Conflict Trends in Africa* 34

Mogkoro J Y 'Ubuntu, the constitution and the rights of non-citizens' (2010) 21 *Stellenbosch Law Review* 221

Mogkoro J Y 'Ubuntu and the law in South Africa.' (1998) 1(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*

Monson T & Misago JP 'Why history has repeated itself the security risks of structural xenophobia' (2009) 29 *SA Crime Quarterly* 25

Odiaka N 'The face of violence: Rethinking the concept of xenophobia, immigration law and the rights of non-citizens in South Africa' (2017) *BRICS Law* 40

Odock G 'Social media and xenophobic solidarity in post-colonial Africa' (2020) *African Human Mobility Review* 66

Olowu O "Xenophobic violence in South Africa: An international and domestic legal perspective" (2008) 16 *IFE Psychologia: An International Journal* 296

O'Regan C 'Hate speech online: An (intractable) contemporary challenge?' (2018) 71(1) *Current Legal Problems* 404

Rajuli K & Nyathi N 'South Africa and Kenya's legislative measures to prevent hate speech' (2017) 2 *Conflict Trends* 44

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

Tarisayi K 'Afroophobic attacks in virtual spaces: The case of three hashtags in south africa' (2021) 37(1) *Migracijske i etničke teme* 30

Zeigler R 'Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications?' (2020) 10(1) *Constitutional Court Review* 65

Reports and papers

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

Classen C 'Explaining South African xenophobia' (2017) Afrobarometer Working Paper 173

Crush J & Ramachandran S 'Xenophobic violence in South Africa: Denialism, minimalism, realism' (2014) 66 *Migration Policy Series* 6

Human Rights Watch World Report South Africa

2009 <https://www.hrw.org/world-report/2009/country-chapters/south-africa#28ab32> (accessed 24 November 2021)

2016 <https://www.hrw.org/world-report/2016/country-chapters/south-africa> (accessed 24 November 2021)

International Organization of Migration 'Countering xenophobia and stigma to foster social cohesion in the COVID 19 response and recovery' (2020) Issue Brief 1 https://www.iom.int/sites/g/files/tmzbdl486/files/documents/countering_xenophobia_and_stigma_130720.pdf (accessed 23 November 2021)

Khan F & Rayner N 'Country fiche South Africa' (2020) 2

https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_South-Africa_Final_Pub.pdf (accessed 15 September 2021)

Landau L et al 'Xenophobia in South Africa and problems related to it' (2005) *The forced migration studies working paper series* 33

Lawyers for Human Rights (LHR) 'Monitoring policy, litigious and legislative shifts in Immigration Detention in South Africa' (2020)

<https://www.lhr.org.za/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital-1.pdf> (accessed 24 November 2021)

Minnaar A 'Sources, causes, forms and contemporary manifestations of xenophobia: The South African experience, post-1994' (2001) *Institute for Human Rights & Criminal Justice Studies Technikon SA*

Open Society Foundation of South Africa 'Why does South Africa need hate crime legislation'

The Southern African Liaison Office (SALO) 'The Prevention and Combating of Hate Crimes and Hate Speech Bill' Policy Brief (2019)

World Bank 'Mixed migration, forced displacement and job outcomes in South Africa' (2018)

Websites

Aljazeera 'South Africa arrests hundreds over xenophobic violence' April 2015 <https://www.Aljazeera.com/news/2015/4/20/south-africa-arrests-hundreds-over-xenophobic-violence> (accessed 24 November 2021).

Bhagatjee P & Gouvaza A 'The Cybercrimes Bill is one step away from becoming law' 7 July 2020 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/technology/tmt-alert-7-july-The-Cybercrimes-Bill-is-one-step-away-from-becoming-law.html> (accessed 15 September 2021)

Dube T and Tijani M 'Misleading social media posts are fuelling the tensions over xenophobic attacks in South Africa' <https://factcheck.afp.com/misleading-social-media-posts-are-fuelling-tensions-over-xenophobic-attacks-south-africa> (accessed 15 September 2021)

Evans S & Wiener M 'Xenophobic attacks: Did the authorities miss the signs?' 8 September 2019 <https://www.news24.com/news24/SouthAfrica/News/xenophobic-attacks-did-the-authorities-miss-the-signs-20190907> (accessed 15 September 2021)

Global Migration Data Portal 2020 <https://www.migrationdataportal.org/regional-data-overview/southern-africa> (accessed 15 September 2021)

Knight T & le Roux J 'Afrophobic SA Twitter account connected to nationalist political party' 12 October 2020 <https://www.dailymaverick.co.za/article/2020-07-12-afrophobic-sa-twitter-account-connected-to-nationalist-political-party/> (accessed 15 September 2021)

Khoza A 'New social media research finds xenophobia rife among South Africans' <https://www.news24.com/news24/southafrica/news/new-social-media-research-finds-xenophobia-rife-among-south-africans-20170404> (accessed 15 September 2021)

Khumalo T 'South Africa: Hatred of migrants reaches new heights' 9 September 2020 <https://www.dw.com/en/south-africa-hatred-of-migrants-reaches-new-heights/a-55093941> (accessed 15 September 2021)

Krige N 'UCT deep dive into xenophobia on Twitter' 7 September 2020 <https://www.news.uct.ac.za/article/-2020-09-07-uct-deep-dive-into-xenophobia-on-twitter> (accessed 15 September 2021)

Mavhinga D 'South Africa Launches Plan to Combat Xenophobia and Racism' 25 March 2019 <https://www.hrw.org/news/2019/03/25/south-africa-launches-plan-combat-xenophobia-and-racism> (accessed 15 September 2021)

Mavhinga D 'Is South Africa prepared for the next wave of xenophobic violence?' 9 October 2020 <https://www.hrw.org/news/2020/10/09/south-africa-prepared-next-wave-xenophobic-violence> (accessed 15 September 2021)

Parliamentary Monitoring Group <https://pmg.org.za/bill/684/> (accessed 15 September 2021)

Parliamentary Monitoring Group <https://pmg.org.za/bill/779/> (accessed 15 September 2021)

SABC News 'Citizen Research Centre report shows increase in xenophobia attacks' March 2017 <https://www.youtube.com/watch?v=ZQyJifC19gE> (accessed 15 September 2021)

Scalabrini, 'What is the White Paper on International Migration?' (2018)

<https://www.scalabrini.org.za/news/what-is-the-white-paper-on-international-migration/> (accessed 24 November 2021).

Seleka N 'Coordinated attempt to manipulate xenophobia-centered conversations on SA social media', CABC report shows' August 2020 <https://www.news24.com/news24/southafrica/news/co-ordinated-attempt-to-manipulate-xenophobia-centered-conversations-on-sa-social-media-cabc-report-shows-20200824> (accessed 15 September 2021)

Thorbecke C 'What to know about Twitter's fact-checking labels' July 2020 <https://abcnews.go.com/Business/twitters-fact-checking-labels/story?id=70903715> (accessed 15 February 2021)

<https://vibrand.co.za/xenophobia-on-social-media/> (accessed 15 September 2021)

Oxford Dictionary

<https://www.oxfordlearnersdictionaries.com/definition/english/xenophobia> (accessed 15 September 2021)