

THE USE OF LAW AND MULTI-DISCIPLINARY MECHANISMS TO ADDRESS XENOPHOBIA IN SOUTH AFRICA

Mini-dissertation by:

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“When state agents or private actors are allowed to violate the law with impunity, the rule of law is truncated; rights become ‘lifeless paper promises’ and the equality and dignity of all – both citizen and immigrant, is at risk”- O'Donnell G (2004).

I dedicate this dissertation to my mother, Janet Mukwambogo, and my late father, Muchiri Kaungu, who sacrificed a lot to keep me in school.

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TABLE OF CONTENTS

DEDICATION	iii
ACKNOWLEDGEMENTS	iv
1. INTRODUCTION	1
1.1 Introduction	1
1.2 Background	1
1.3 The research problem	4
1.4 Assumptions	6
1.5 Objectives of the dissertation	7
1.6 Research questions	8
1.7 Preview of some existing literature on xenophobia in South Africa	8
1.8 Methodology	12
1.9 The conclusion	13
2. UNDERSTANDING XENOPHOBIA IN SOUTH AFRICA	14
2.1 Definition of xenophobia	14
2.2 Brief history of xenophobia in post-apartheid South Africa	15
2.3 Underlying historical and current causes of xenophobia in South Africa	18
2.3.1 History of exclusion and discrimination against blacks and non-nationals	18
2.3.2 Poor socio-economic situation of black South Africans	19
2.3.3 Consequences of internal and external movement restrictions and isolation during the apartheid regime	20
2.4 Regulation and/or lack of regulation of xenophobia in South Africa	21
2.4.1 Lack of a specific law on xenophobia or hate crimes	21
2.4.2 Ineffective immigration and refugee policies	23
2.4.3 Misunderstanding of xenophobia and other hate crimes	25
2.4.4 South Africa's culture of violence	25
2.4.5 Impunity and absence of the rule of law in South Africa's Townships	27
2.4.6 Racism	29
2.4.7 Issue of governance	30
2.4.8 Role of the media	31
3. MISSED OPPORTUNITY: THE EXISTING NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK THAT CAN BE USED TO COMBAT XENOPHOBIA AND RELATED CRIMES IN SOUTH AFRICA	32
3.1 National legal framework	32

3.2	International legal framework	33
3.2.1	The United Nations framework	33
3.2.2	The African Union framework	35
4. WHAT HAS BEEN DONE ELSEWHERE?: CASE STUDIES OF IMMIGRATION PRACTICES IN AUSTRALIA AND THE STATE OF ARIZONA IN THE USA		37
4.1	Introduction	37
4.2	Australia	39
4.2.1	Xenophobia in Australia	40
4.2.2	Immigration policies	40
4.2.3	Legal and institutional framework	42
4.2.4	Political will to acknowledge, plan for and combat xenophobia, racism and prejudice in Australia	43
4.3	The State of Arizona in the USA	44
4.3.1	Immigration policies	45
4.3.2	Legal framework	46
4.3.3	Conclusion	47
5. CONCLUSION AND RECOMMENDATIONS FOR AN ADEQUATE REGULATORY FRAMEWORK FOR SOUTH AFRICA		49
5.1	Combating xenophobia using legal and multi-disciplinary approaches	49
5.2	Recommendations for a better regulatory framework	50
5.2.1	Immigration reform	50
5.2.2	Legal solutions	51
5.2.3	Strengthening of institutions	52
5.2.4	Political responsibility	52
5.2.5	Inculcation of the values of tolerance through education	53
5.2.6	Integration of immigrants into South African society	53
5.2.7	Social solutions	53
5.2.8	<i>Acculturation</i> and the role of the international community	53
BIBLIOGRAPHY		55
PLAGIARISM CERTIFICATE		64

CHAPTER ONE: INTRODUCTION

1.1 Introduction

Since the end of apartheid and the transition to democracy in South Africa in 1994, xenophobia and xenophobic tendencies have been a common phenomenon in South African society.¹ The May 2008 countrywide violence, and the ongoing xenophobic attacks documented by human rights watchdogs Human Rights Watch (HRW)² and Amnesty International (AI)³ in 2012, illustrate the prevalence of xenophobia in the country.

In a 2004 World Values Survey report released by the South African Migration Project (SAMP), South Africans were found to hold the most hostile views on immigrants when compared to 29 other nations reviewed.⁴

Despite the prevalence of xenophobia in South Africa, specific laws or policies on socio-cultural change to address xenophobia have not been enacted in the country. It is therefore important to explore the underlying historical and current causes of the phenomenon and establish how the problem of xenophobia in the country can be addressed using legal or other mechanisms.

1.2 Background

Since 1994, when South Africa opened up to the world following the end of the apartheid era, xenophobic attitudes and acts have been consistently documented in the country.⁵ In its submission to the United Nations Human Rights Council (UNHRC) in November 2011, HRW

1 Valji N (2003) "Creating the nation: The rise of violent xenophobia in the new South Africa" available at: <http://cormsa.org.za/wp-content/uploads/Research/Xeno/riseofviolent.pdf>. (Accessed 20 Mar 2012)

2 Human Rights Watch (2012) "Universal periodic review South Africa" available at: <http://www.hrw.org/news/2012/01/20/universal-periodic-review-south-africa>. (Accessed 17 March 2012)

3 Amnesty International (2012) "South Africa report" available at: <http://www.amnesty.org/en/region/south-africa/report-2011>. (Accessed 17 March 2012)

4 Crush J & Pendleton W (2004) "Regionalizing xenophobia? Citizen attitudes to immigration and refugee policy in Southern Africa", p 9.

5 Neocosmos M (2010) "From 'foreign natives' to 'native foreigners': Explaining xenophobia in post-apartheid South Africa" CODESRIA, Dakar.

noted that non-nationals in South Africa continue to be subjected to xenophobic violence and called on the government to protect them.⁶ HRW documented xenophobic acts in South Africa as recently as 2012.⁷ Similarly, AI noted that non-nationals in South Africa continue to suffer violations of the right to life and to physical integrity.⁸ AI noted that in the first six months of 2011, at least fourteen incidents involving violent attacks and looting of shops, particularly of Somali and Ethiopian migrants were recorded in five provinces.⁹ At the same time, large-scale displacement of non-national communities occurred in a number of areas.¹⁰

Lawyers for Human Rights, a South African Non-Governmental Organisation (NGO) reported in September 2012 that between 2010 and 2011, more than 100 non-nationals were killed in xenophobic incidents that happened quietly across the country, without any media scrutiny or public outcry.¹¹

The Consortium for Refugees and Migrants in South Africa (CORMSA) warned that a pattern of xenophobic attacks in South Africa was evolving, with attackers now connecting legitimate anti-government service delivery protests with xenophobic attacks and violence.¹²

Perhaps the most notable manifestation of the xenophobic attitudes and acts in South Africa drew worldwide attention when the country was plunged into nation-wide xenophobic attacks on foreigners in May 2008. Many foreign nationals, asylum seekers and refugees were killed,

6 HRW (2012) n 2 above p 1.

7 HRW (2012) "A sick system abuses its refugees". This report documents acts of xenophobia in South Africa in March 2012. See <http://www.hrw.org/news/2012/03/18/sick-system-abuses-its-refugees>. (Accessed 20 March 2012)

8 AI (2012) n 3 above p 298.

9 *Ibid.*

10 *Ibid.*

11 Parker F (2012) "Xenophobia rears its head as war declared in Mayfair" *Mail & Guardian* 3 Sept 2012 available at: <http://mg.co.za/article/2012-09-03-xenophobia-rears-its-head-in-mayfair/>. (Accessed 25 Sept 2012)

12 CORMSA "CORMSA condemns attacks on foreign nationals in Botshabelo and calls for stronger protection mechanisms in communities and open dialogue between local government and residents to address grievances related to service delivery". Available at: www.cormsa.org.za. (Accessed 1 Sept 2012)

injured or sexually assaulted while others had their property looted or burnt.¹³ The violence was indiscriminate. It did not take into account a migrant's legal status in that naturalized citizens, permanent residents, refugees and asylum seekers with legal rights of residence and papers to prove this were all subject to attacks.¹⁴ There were reports of gender-based violence and the rape of women.¹⁵ In its 'reactionary', belated attempt to deal with the crisis, the State set up open temporary displacement sites where victims were warehoused for lengthy periods of time in deplorable conditions.¹⁶

It is baffling that the above attacks took place despite South Africa having ratified key international human rights instruments which prohibit discrimination of any kind against migrants in its territory. Such instruments include the 1951 Convention Relating to the Status of Refugees (UN Refugee Convention),¹⁷ the 1966 International Covenant on Civil and Political Rights (ICCPR),¹⁸ the 1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁹ the 1981 African Charter on Human and People's Rights (African Charter),²⁰ and the

13 The SAHRC reported that approximately 62 people were killed, over 100 000 were displaced and material losses were estimated as running into millions of Rands. Available at: <http://www.sahrc.org.za/home/index.php?ipkArticleID=55>. (Accessed 10 March 2012)

14 Statement by Joyce Tlou of the SAHRC at the OHCHR panel discussion on vulnerability of migrants to racism, xenophobia and discrimination, New York, 4 May 2011. Available at: <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=55>. (Accessed 25 Sept 2012)

15 SAHRC (2011) n 13 above p 1.

16 *Ibid.*

17 The preamble of the 1951 UN refugee convention provides that all refugees and asylum seekers shall enjoy dignity and all fundamental human rights and freedoms bestowed on human beings without discrimination on any basis. South Africa ratified this convention in 1996. Available at: <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. (Accessed 31 March 2012)

18 Articles 6 – 27 of the ICCPR, which South Africa ratified in 1998, reaffirm the right to non-discrimination for all human beings. Available at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en. (Accessed 25 Sept 2012)

19 Articles 1-7 of the CERD prohibit all forms of discrimination. South Africa ratified the CERD in 1998. Available at:

http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-2&chapter=4&lang=en. (Accessed 25 Sept 2012)

20 The preamble to the AU refugee convention provides that all refugees and asylum seekers in the continent, as human beings, shall enjoy dignity and all fundamental rights and freedoms bestowed on humanity without discrimination on any basis. South Africa has ratified this convention. Available at: <http://www.africa-union.org/root/au/documents/treaties/treaties.htm>. (Accessed 25 Sept 2012)

1969 Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).²¹

Xenophobic attacks and violence have been documented in various parts of the world, but the South African attacks are unique in the extreme and widespread hostility in attitudes exhibited by the local population towards foreigners, and the violence that often accompanies this intolerance.²²

Law can be used to bring about social and cultural change in any society.²³ This is because, law creates societal pressure for adherence; adherence creates habit; habit creates custom and custom becomes a cultural attribute.²⁴ In the case of South Africa, a legal regulatory framework should urgently be formulated and promulgated to address xenophobia.

1.3 The Research Problem

Xenophobic tendencies and acts have been documented in South Africa throughout the post-apartheid era.²⁵ A study carried out by SAMP in 2000 labeled many South Africans 'latent xenophobes'.²⁶ It noted that an increasing number of South Africans favored a total ban on immigration into the country.²⁷

According to Harris, hostile attitudes towards foreigners continue to harden, especially towards foreigners from Africa; much of the xenophobia is directed towards them and is perpetuated through a dynamic public rhetoric that actively stigmatizes and vilifies them by portraying

21 The preamble of the African Charter prohibits all forms of discrimination. South Africa ratified the Charter in 1996. Available at: <http://www.africa-union.org/root/au/documents/treaties/treaties.htm>. (Accessed 25 Sept 2012)

22 Crush J (ed) (2008) "The perfect storm: The realities of xenophobia in contemporary South Africa" SAMP policy series No 50 p 33.

23 Speech by Prof Maiman R to LLM Multidisciplinary Human Rights Students, University of Pretoria on 12 March 2012.

24 Sheshtak J H (1998) "The philosophic foundations of human rights" *HRQ* 20 p 233.

25 Crush J (2000) "The dark side of democracy: Migration, xenophobia and human rights in South Africa" *International Migration* Vol 38, No 6, pp 103-133.

26 *Ibid.*

27 *Ibid.*

them as a threat and making them scapegoats for the social problems bedeviling South Africa.²⁸

Harris further writes that hostility and xenophobic violence is an integral feature of the daily lives of black foreigners in South Africa.²⁹

Despite overwhelming evidence of its existence, xenophobia as a phenomenon seems to have been ignored by the South African public political discourse.³⁰

Three incidents which took place in early 2012 inspired this research. They demonstrate the peculiar nature of xenophobic tendencies in the country which range from inaction by the State to the role of State officials and organs in encouraging xenophobic attacks.

- In February the current Zulu King, Goodwill Zwelithini, while opening the provincial legislature in Kwa-Zulu Natal, targeted Congolese nationals in South Africa in a highly publicized, headline-making speech, in which he accused them of disrespecting South Africans. In direct xenophobic rhetoric, the King publicly stated that if the Congolese continued with their behavior, he had no doubt that locals would react in ways he did not mention.³¹
- In March it was widely reported in print media that the ruling party, the African National Congress (ANC), had agreed on a populist law to target and close down “spaza” shops owned by foreigners in the country.³²

28 Crush J & Ramachandran S (2009) “Xenophobia, international migration and human development” Human development research paper, No. 47 p 15.

29 Harris B (2002) “Xenophobia: A new pathology for a new South Africa?” in Hook D & G Eagle G (eds) *Psychopathology and Social Prejudice*. University of Cape Town Press p 12.

30 Crush & Pendleton (2004) n 4 above p 9.

31 Mdletshe C (2012) “The Zulu King slams foreign nationals” *The Sowetan* 21 February 2012. Available at: <http://www.sowetanlive.co.za/news/2012/02/21/the-zulu-king-slams-foreign-nationals>. (Accessed 26 Sept 2012)

32 Merten M (2012) “ANC looks at foreigner crackdown” *IOL News* 10 March 2012. Available at <http://www.iol.co.za/news/south-africa/anc-looks-at-foreigner-crackdown-1.1253415>. (Accessed 25 Sept 2012)

- In March Nigeria and South Africa were engaged in a diplomatic spat, with both nations deporting each others' nationals and threatening to cut diplomatic ties. South Africa deported 125 Nigerians in a planeload, accusing them of carrying fake vaccination cards. Speaking in the Nigerian Parliament on 6 March 2012, the Nigerian Foreign Minister, Olugbenga Ashiru, stated that the vaccination cards were genuine and accused South Africa of "ongoing xenophobia against Nigerians" and other African foreigners in the country.³³

1.4 Assumptions

This dissertation is premised upon the assumptions that:

1. Xenophobia and xenophobic tendencies are prevalent in South African society;
2. There are underlying historical and current causes of xenophobia in the country, which are not well understood and/or have not been addressed;
3. There are serious legal and institutional gaps in South Africa that encourage xenophobia and xenophobic manifestations;
4. Certain jurisdictions in the world, such as Australia or the State of Arizona in the United States of America (USA) have been able to successfully minimize xenophobic violence against foreigners by implementing a combination of multi-disciplinary approaches that include legal, educational and political measures; and
5. New legislation coupled with multidisciplinary mechanisms of implementation that result in socio-cultural change can be used to address xenophobia in South Africa.

33 Olukayode T (2012) "Nigeria, South Africa truce but cracks emerge" *The Nation* 9 March 2012. Available at <http://nigerianewsblog.blogspot.ch/2012/03/nigeria-south-africatruce-but-cracks.html>. (Accessed 25 Sept 2012)

1.5 Objectives of the dissertation

Xenophobia and hate crimes do not take place in a vacuum. The 2008 large-scale outbreak of xenophobic attacks in South Africa took place against a backdrop of prevalent xenophobic tendencies amongst the South African public as outlined by Valji,³⁴ sustained anti-immigrant rhetoric by the media³⁵ and politicians,³⁶ and the absence of a legal framework to respond to or address the situation.

This dissertation will examine legal and other avenues that the State, civil society and other actors can use to address xenophobia as a phenomenon in the country. It will foster a deeper understanding of xenophobia in South Africa from a human rights perspective. It will highlight how the prevalence of xenophobic attitudes in South Africa is an affront to the rule of law in the country in that it contributes to violations of human rights of migrants, refugees and asylum seekers in the country. Reasons why xenophobia thrives in the country will be examined and ways of addressing it will be suggested. The research will demonstrate that a specific law addressing xenophobia, coupled with an aggressive policy by the State to enhance a change of public attitudes is necessary to protect and promote human rights of migrants in the country; improve South Africa's current poor image as a global hotspot of xenophobia; and lessen or eradicate the effects of ongoing xenophobic violence in the country.

34 Valji (2003) n 1 above p 1.

35 Media Monitoring Project (2007) "Shades of prejudice, an investigation into the South African media's coverage of racial violence and xenophobia" . The report shows that the media in South Africa had been portraying and fuelling xenophobic sentiment in the public. The media often labels the majority of foreigners from Africa as "illegal immigrants" and that media continues to ignore the diversity between different categories of migrant. See Report at: http://www.mediamonitoringafrica.org/index.php/resources/entry/shades_of_prejudice/. (Accessed 11 March 2012)

36 High-ranking government officials and politicians have, at times, fuelled xenophobic views that portray refugees as a burden on the State. Eg., the Minister of Home Affairs stated in 1994 that: "If South Africans are going to compete for scarce resources with the millions of 'aliens' that are pouring into South Africa, then we can bid goodbye to our reconstruction and development programme." Minister of Home Affairs (1994), Introductory Speech, Budgetary Appropriation. National Assembly, 9 Aug 1994.

1.6 Research Questions

In achieving the above objectives, the dissertation will answer the following questions:

1. What are the main historical and current underlying causes of xenophobia in South Africa?;
2. What are the social and legal gaps that encourage xenophobic tendencies in South Africa?;
3. What lessons can South Africa learn from the State of Arizona in the USA or from Australia in promoting the rule of law and combating or minimizing xenophobic attacks against foreigners?; and
4. How can the prevalence of xenophobia in South Africa be addressed using new legislation or a multidisciplinary approach?

Based on the research findings, recommendations will be made on the best approach, legal or multidisciplinary, to address the problem of xenophobia in the country.

1.7 Preview of existing literature on xenophobia in South Africa

Various sources of literature consulted in preparation of this dissertation depict xenophobia as an ongoing problem which is deeply rooted in the history of South Africa and which is linked to migration trends in the country and the region.

The **UNHCR** writes that the problems of xenophobia, racism, discrimination and intolerance have been proven to thwart international efforts to protect refugees and asylum seekers.³⁷ They not only often force people into fleeing their countries and becoming refugees but also complicate efforts to protect them in countries of asylum and pose obstacles to finding solutions to their problems.³⁸

³⁷ UNHCR (2001) *Refugee protection: A guide to international refugee law* 90.

³⁸ *Ibid.*

Several authors have in the past tried to investigate the causes of xenophobic tendencies in South Africa. This dissertation will, inter-alia, pay special attention to the following key sources:

Harris³⁹ writes that the main explanations for the prevalence of xenophobic tendencies in South Africa are scape-goating for political advantage, isolationism and cultural reasons.

He blames the current high levels of poverty and the generally poor socio-economic state of ordinary South Africans for recurrent xenophobic violence in South Africa.⁴⁰ He argues that foreigners are seen as an economic threat to South Africans, primarily by taking up jobs, economic opportunities and social services which would otherwise benefit locals.⁴¹

A report by the **Centre for Human Rights (CHR)** at the University of Pretoria links the high prevalence of xenophobic tendencies in the country to an influx of a large number of immigrants into the country.⁴² The CHR report argues that South Africa has an obligation under national and international law to respect and protect the human rights of all persons within its borders, respect the principle of non-refoulement with regard to asylum seekers and refugees in the country, promote access to socio-economic rights to all in its borders and promote re-integration of victims of xenophobia.⁴³

The CHR report further recommends that in order to address the problem of recurrent xenophobic attacks in the country, South Africa should ratify and domesticate all relevant human rights instruments such as CMW and include the human rights situation of foreign nationals in State reporting mechanisms for such treaties.⁴⁴ It also recommended that South Africa, as a site of negative events related to xenophobia, should inspire and galvanize action

39 Harris (2002) n 29 above ch 1.

40 *Ibid.*

41 *Ibid.*

42 CHR (2009) "The nature of South Africa's legal obligations to combat xenophobia" ch 15.

43 *Ibid.*

44 *Idem* p 114.

on the realization of the goals of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance's Programme of Action to fight xenophobia.⁴⁵

Crush blames the current prevalence of xenophobia in South Africa on the history of the country, citing the use of immigration as a racial tool by the apartheid government.⁴⁶ He argues that after 1994, restrictions on African immigrants eased and there was an upsurge of immigration by Africans into the country, resulting in tension between immigrants and South Africans, leading to the current xenophobic sentiments and violence.⁴⁷

An **International Organization for Migration (IOM)** study carried out in 2009 found most xenophobic violence in South Africa was concentrated in black townships and most of the victims were black Africans.⁴⁸

A study by the **Institute for Democracy in Africa (IDASA)** concludes that the use of a social mechanism like integrating migrants into the local South African community could work to promote social cohesion and address xenophobic attitudes in South Africa.⁴⁹ This is an approach likely to fail, given current pre-existing prejudice and hostile attitudes towards foreigners in South Africa.

The **Refugees Act**⁵⁰ is silent on the issue of xenophobia against refugees. Acts of xenophobic violence and other hate crimes against non-nationals are currently addressed through the criminal justice system since the parameters of the phenomenon of xenophobia and other hate crimes against foreigners are generally unknown to law enforcement agencies.⁵¹

45 *Ibid.*

46 Crush (eds) (2008) n 22 above p 1.

47 *Ibid.*

48 IOM (2009) "Towards tolerance, law and dignity; addressing violence against foreign nationals in South Africa" No.1. According to the IOM foreign nationals in South Africa make up about 4% of the total population. Categories of foreign nationals include refugees, asylum seekers and economic migrants. IOM South Africa: <http://www.iom.int/jahia/Jahia/south-africa>. (Accessed 3 Sept 2012)

49 IDASA (2009) "Migration and social cohesion" p 2.

50 Refugees Act 130 of 1998.

51 CHR (2009) n 42 above p 78.

In the aftermath of the 2008 xenophobic violence, the **SAHRC** opined that many of the xenophobic sentiments held by the general South African populace were based on a lack of information about foreigners and their rights⁵². The SAHRC further reported that perpetrators of violence against foreigners act with impunity and pointed to weaknesses in government institutions in dealing with acts of xenophobic mob violence against foreigners.⁵³ It alluded to the fact that the State has the primary responsibility to offer protection to foreigners in the country.⁵⁴ The report recommended a multi-faceted, multi-dimensional and collective effort that is firmly founded on basic human rights as the best way of addressing xenophobia in the country; in addition to xenophobia awareness and outreach campaigns targeting various sectors of society and urged training of immigration officials, law enforcement and judicial officers, the general public and even the immigrant community.⁵⁵ These recommendations recognize that a change in societal attitudes is required to address xenophobia.

In March 2010, the **SAHRC** reported that despite South Africa having ratified some important international human rights instruments; having a constitution that is the envy of other democratic countries worldwide; and an array of domestic legislation to promote equality it has failed dismally to adequately protect the rights of migrants.⁵⁶

“The ambivalent attitude and baffling lack of political will in authoritatively and speedily acknowledging the violence as xenophobic; the slow security response; the slow pace of investigations into complaints of human rights violations; the small number of prosecutions and convictions; the lack of witness protection; the poor coordination in providing humanitarian assistance as well as the quality thereof and

52 SAHRC (2004) “Report of the Open hearings on xenophobia and problems related to it”. A summary of the report is available at http://www.idasa.org/our_products/resources/output/report_open_hearings_on_xenophobia/. (Accessed 11 March 2012)

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 This report is available at the Parliamentary Monitoring Group website, <http://www.pmg.org.za/report/20101124-briefing-unicef-thier-work-plan-agreement-department-social-development>. (Accessed 10 March 2012)

the lack of compensation for material losses all led to unprecedented criticism of the overall State response to the crisis”.⁵⁷

The SAHRC report alluded to the fact that only a minimal number of perpetrators from the 2008 violence were criminally charged, and it was with common law offences such as common assault.⁵⁸

In summation, substantial research and writing has already been done on the phenomenon of xenophobia in South Africa. However, xenophobic manifestations have persisted in the country up to the time this dissertation was written. This demonstrates a need for human rights scholars and other academics to continue researching the topic to expand the existing literature on the subject and provide new solutions and recommendations that could be used to solve a real problem.

1.8 Methodology

The method that will be used to achieve the stated objectives of this dissertation will involve a detailed literature review of human rights reports, books, journal articles, United Nations and NGO reports, Government reports, studies, newspaper reports, legislation and international conventions. This dissertation will review existing material on the subject. Most of the materials will be accessed from the websites of the relevant institutions or published policy papers and journals.

The dissertation will also be informed by two case studies. It will briefly evaluate how the use of legislation and the rule of law have been used to minimize or prevent xenophobic attacks in Australia and the State of Arizona in the United States of America (USA). Both jurisdictions have experienced an influx of migrants in a fashion similar to South Africa but, large-scale outbreaks of xenophobic violence have not been documented as has been the case with South

⁵⁷ SAHRC (2004) n 52 above p 1.

⁵⁸ *Ibid.*

Africa. These two case studies will be used to make a brief illustrative comparison with the South African situation but a full scale comparative study will not be undertaken.

1.9 The conclusion

While this dissertation will look at the problem of xenophobia in general, it will concentrate on the phenomenon as it happens in South Africa and in the post apartheid era specifically. Brief references to the State of Arizona in the USA and Australia will be made to illustrate how the two jurisdictions have introduced functional legal and institutional mechanisms to address immigration; and that within the context of these mechanisms, large scale xenophobic attacks have not been recorded to date.

CHAPTER TWO: UNDERSTANDING XENOPHOBIA IN SOUTH AFRICA

2.1 Definition of xenophobia

The English term “xenophobia” is derived from the Greek words “xenos” and “phobos” which respectively mean “strange” or “foreign” and “phobia” or “fear”.⁵⁹ The *South African Concise Oxford Dictionary* defines “xenophobia” as “intense or irrational dislike or fear of people from other countries”.⁶⁰ The *Merriam-Webster Online Dictionary* defines “xenophobia” as “fear and hatred of strangers or foreigners or of anything that is strange or foreign”.⁶¹

Xenophobia is closely related to racism. For instance, the International Labour Organisation (ILO), IOM and Office of the High Commissioner for Human Rights (OHCHR) defined “xenophobia” to mean “attitudes, prejudices, and behavior that reject, exclude and often vilify persons based on the perception that they are outsiders or foreigners to the community, society or national identity”.⁶²

In the South African context, xenophobia is manifested by both negative attitudes and perceptions together with acts of hostility, violence or discrimination against foreigners.⁶³

For the purpose of this dissertation, xenophobia will be broadly defined to include attitudes, perceptions and manifestation through acts of discrimination or violence.

59 UNDP (2009) “Xenophobia, international migration and human development” Human Development Research Paper p 1.

60 *The South African Concise Oxford Dictionary* (2007) Oxford University Press p 1359.

61 *Merriam Webster Online Dictionary* available at: <http://www.merriamwebster.com/dictionary/xenophobia>. (Accessed 20 May 2012)

62 ILO, IOM and OHCHR (2001) “International migration, racism, discrimination and xenophobia” paper for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance” (WCAR) Aug 2001.

63 CHR (2009) n 42 above p 80.

2.2 Brief history of xenophobia in post-apartheid South Africa

As early as 1994, the Minister of Home Affairs Mangosuthu Buthelezi declared that “illegal immigrants” posed a direct threat to the success of the Reconstruction and Development Programme (RDP), and to the safety and security of all South Africans.⁶⁴

In 1996, Professor Jonathan Crush wrote of a “blunt, and increasingly bellicose, mythology targeted at non-South Africans living in the country” and its use by politicians and the press to “whip up” anti-immigrant sentiment.⁶⁵

In 1997, South Africa’s Defence Minister, Joe Modise, blamed foreigners for South Africa’s spiraling crime rate.⁶⁶ During this crucial early period, conservative South African academics and an uncritical media perpetuated and intensified the hostile atmosphere.⁶⁷ For instance, the idea that South Africa was being “swamped” by millions of poor and desperate African immigrants was given regrettable “scientific legitimacy” by the Human Sciences Research Council (HSRC) which not only erroneously claimed that there were five to eight million “illegal aliens” in the country, but painted a picture of a country inundated by impoverished “floods” and “hordes” of immigrants from the rest of Africa.⁶⁸

In the meantime, the South African government, through Home Affairs Minister Buthelezi, killed off the Southern African Development Community (SADC) protocol on free movement of goods and people in the region by declaring in 1997, that the protocol “spelt disaster” for

64 Budgetary Appropriation 1994: Review of policy: Introductory speech by Mangosuthu Buthelezi, Minister for Home Affairs 30 Aug 1994.

65 Crush J (1996) “A bad neighbour policy? Migrant labour and the new South Africa” *Southern Africa Report* 12(1) p 3.

66 LAQA (eds) (1997) “South African defence Minister defends arms sales to Syria” *London Al-Quds al-‘Arabi* 19 Nov 1997.

67 Danso R & McDonald DA (2000) “Writing xenophobia: Immigration and the press in post-apartheid South Africa” SAMP Migration Policy Series No. 17 Cape Town p 1.

68 Crush J (2001) “Making up the numbers: Measuring illegal immigration to South Africa” SAMP Migration Policy Series No. 3 Cape Town p 17.

South Africa.⁶⁹ Buthelezi's ministry then set up the Aliens Control Units (ACU) and let its officers loose on the streets and in workplaces to arrest non-nationals.⁷⁰ Crush notes:

"Citizens planning anti-foreign attacks in May 2008 need have looked no further for inspiration than the often lawless activities of these Units in the 1990s as they swept through townships; arresting people at random on the basis of vaccination marks, skin colour or the way they pronounced words; tearing up documentation; allowing local residents to help themselves to the spoils; dumping the deportees in holding centers like the notorious Lindela Detention Centre and loading them up like convicts on trains at Johannesburg Station for the ride to Ressano Garcia on the border with Mozambique".⁷¹

In 1997, SAMP carried out a survey on the attitudes of South Africans to foreigners. The results were shocking in the following ways: Firstly, as the study noted, opposition to immigration and foreign citizens was "widespread"; secondly, South Africans were more hostile to immigration than citizens of any other country for which comparable data was available; thirdly, the public had become more intolerant of foreigners than they were in 1994; fourthly, and most alarming of all, "these hostile attitudes were so widespread that they cut across all races, income groups, age groups and educational groups"⁷². SAMP had uncovered an "attitudinal" profile that will not be easily overcome.⁷³

In 1998, the SAHRC noted that xenophobia was like a "blight" on South Africa's democratic values and that it needed to be eradicated.⁷⁴

69 Keynote address by Buthelezi MG, MP, Minister of Home Affairs, SAMP conference on "After amnesty: The future of foreign migrants in South Africa" Pretoria 20 June 1997.

70 Crush (2008) n 22 above p 18.

71 *Ibid.*

72 Mattes R, Taylor D, McDonald D, Poore A & Richmond W (1999) "Still waiting for the barbarians, SA attitudes to immigrants and immigration" SAMP Migration Policy Series No. 14.

73 Crush (2008) n 22 above p 18.

74 SAHRC (1998) "Braamfontein statement on xenophobia" 15 Oct 1998. Full report is available at:

<http://www.queensu.ca/samp/migrationresources/xenophobia/responses/sahrc2.htm>. (Accessed 26 Sept 2012)

In 2001, the Congress of South African Trade Unions (COSATU) issued a statement, noting that xenophobia had grown to “unacceptable proportions” and called on government, civil society and all organs of the state to “prioritize the fighting of xenophobia”.⁷⁵

The 2007 African Union Peer Review of South Africa (AUPR) criticized growing xenophobic tendencies in South Africa, noting that xenophobia was on the rise and that foreigners, especially those of African descent, were subjected to brutality and inhuman treatment motivated by xenophobia.⁷⁶ The South African government rejected the AUPR report.⁷⁷

At the same time, the South African government did not appear to heed the warnings of the SAHRC and COSATU and certainly did not move to root out xenophobia as both organizations were demanding.⁷⁸

Throughout 2006 and 2007, attacks on foreign nationals escalated in their brazenness and brutality.⁷⁹ In a spate of attacks in 2007, over 100 Somalis were killed and Somali businesses and properties were looted and torched.⁸⁰ “Certainly there were plenty of danger signs for all to see that xenophobia was becoming a problem in the nation”.⁸¹

The attacks escalated, and in May 2008, South Africa was plunged into nation-wide xenophobic violence.⁸² Many foreigners, including asylum seekers and refugees were attacked, killed, injured or sexually assaulted while others had their property looted or burnt.⁸³ The

75 COSATU (2001) “Statement on xenophobia” 8 Feb 2001. Full report is available at:
<http://www.queensu.ca/samp/migrationresources/xenophobia/responses/cosatuh.htm>. (Accessed 26 Sept 2012)

76 African peer review mechanism, South Africa Country Review Report No 5 Sept 2007, par 956.

77 *Idem* Appendix 2: Comments of the South African Government on the Report, pars 103-5.

78 Crush (ed) (2008) n 22 above p 20.

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 SAHRC (2008) n 13 above.

83 *Ibid.*

SAHRC reported that approximately 62 people were killed, over 100,000 were displaced and material losses, estimated to run into the millions of Rands were incurred.⁸⁴ Many foreigners, refugees and asylum seekers were forced to flee the country.⁸⁵ There were reports that foreign females were raped.⁸⁶

Hostile attitudes towards foreigners, especially African foreigners have continued to harden.⁸⁷ As recently as March 2012, human rights watchdogs HRW⁸⁸ and AI⁸⁹ posted reports on South Africa, documenting ongoing xenophobic attacks against foreigners in the country.

Hostility and xenophobic violence is indeed a reality of the daily lives of black foreigners in South Africa.⁹⁰ Now, hostility towards foreigners has become one of the most significant features of post-apartheid South African society.⁹¹ Indeed, according to the UN, persistent xenophobic attacks illustrate that hostility to foreigners and “outsiders” is a prevalent issue in South African society.⁹²

2.3 Underlying historical and current causes of xenophobia in South Africa

2.3.1 History of exclusion and discrimination against blacks and foreigners

An historical culture of exclusion and discrimination based on race and other innate human qualities has been prevalent in South Africa throughout the country's history.⁹³ For instance, during the apartheid era, strict pass laws were implemented against black people, limiting their

84 *Ibid.*

85 *Ibid.*

86 Statement by Joyce Tlou of the SAHRC n 14 above.

87 Crush & Ramachandran (2009) n 28 above p 15.

88 HRW (2012) n 2 above p1.

89 AI (2012) n 3 above p1.

90 Harris (2002) n 29 above p 12.

91 Sinclair M (1999) “I know a place that is softer than this ... emerging migrant communities in South Africa” International Migration Series 37 (2) p 466.

92 UN Media (2008) “UNHCR condemns xenophobic attacks in South Africa”. Available at: <http://www.unmultimedia.org/radio/english/detail/86156.html>. (Accessed 20 April 2012).

93 McKnight J (2008) “Through the fear, a study of xenophobia in South Africa's refugee system”. *Journal of Identity and Migration Studies* No 2 p 21.

freedom of movement and even the right of residence to certain areas where they were registered.⁹⁴ Following the African National Congress (ANC) victory in the 1994 democratic elections, the black majority in South Africa acquired political power and rights of movement and residence.⁹⁵ All South Africans regardless of color could now reside and move anywhere. Black non-nationals were disadvantaged as they continued to lack political power and were subjected to immigration controls.

McKnight wrote that this past history of exclusion against certain groups in the country provided a foundation upon which hate crimes such as xenophobic attacks developed and continued to flourish in the country after the end of apartheid era.⁹⁶ He further opined that the hatred against foreigners that is being witnessed in South Africa is slowly replacing racism between white and black South Africans.⁹⁷

McKnight's views are further reinforced by research that showed that hate crimes such as violent xenophobic attacks are propagated by native, black South Africans targeting mostly black immigrants from African countries.⁹⁸

2.3.2 Poor socio-economic situation of black South Africans

The poor socio-economic situation among black South Africans has contributed to hostile attitudes towards black, often poor non-nationals who live in their communities.⁹⁹ This is because important resources such as housing, education and employment are limited and subject to competition among the groups.¹⁰⁰

In the run up to the transition to democracy in 1994, the black majority in South Africa had high expectations that their socio-economic situation would improve through the efforts of a

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 Crush & Ramachandran (2009) n 28 above p 15.

99 Harris (2002) n 29 above p 12.

100 *Ibid.*

government run by blacks; but from 1994 onwards, while black South Africans' expectations have been heightened, a realization that the delivery of crucial services would not be immediate has fuelled frustration in society.¹⁰¹ Hope seems to have diminished; poverty and inequality levels have either remained constant or increased since 1994 and many citizens experience greater economic insecurity than they did during the apartheid era.¹⁰²

At the same time, many black, African non-nationals have been living in Townships and often running profitable businesses which compete with those owned by nationals.¹⁰³ Harris argues that this is an ideal breeding ground for hate crimes such as xenophobic attacks to take root and flourish in the country.¹⁰⁴ Harris further argues that foreigners have become a scapegoat, and a target to blame for ongoing deprivation and poverty in South Africa.¹⁰⁵

Morris,¹⁰⁶ McKnight,¹⁰⁷ and the IOM¹⁰⁸ argue that foreigners in South Africa are perceived as a threat to jobs, housing, education and health care.

Morris observes that both research and historical events have indicated that if a majority group is in a perilous economic position they are more likely to feel threatened by minorities, especially if they are foreign, and that this may lead to violence.¹⁰⁹

2.3.3 Consequences of internal and external movement restrictions and isolation during the apartheid regime and consequent isolationism

Morris writes that the currently high incidence of xenophobic attitudes and hatred towards foreigners is due to isolationism which South Africa experienced before 1994; he argues that in

101 McKnight (2008) n 93 above p 21.

102 Landau L B (2009) "Attacks on foreigners in South Africa: More than just xenophobia?" University of the Witwatersrand p 5.

103 *Ibid.*

104 McKnight (2008) n 93 above p 21.

105 *Ibid.*

106 Morris A (1998) "Our fellow Africans make our lives hell: The lives of Congolese and Nigerians living in Johannesburg" *Ethnic and Racial Studies* 21 (6) pp 1116-1136.

107 McKnight (2008) n 93 above p 21.

108 IOM (2009) "Towards tolerance, law and dignity. Addressing violence against foreign nationals in South Africa" No 1 p15.

109 Morris (1998) n 106 above p 1125.

addition to seclusion from the international community, the apartheid South African government had imposed internal movement restrictions on its black population.¹¹⁰ He concludes that a combination of the two effectively restricted South Africans' ability to mix, accommodate, and indeed, tolerate difference amongst themselves and with foreigners.

With the political transition to democracy in 1994, South Africa's borders opened up and the country became integrated into the international community. The opening of borders allowed many foreigners to enter the country, bringing South Africans into direct contact with the unknown, the foreigners. According to the isolation hypothesis advanced by Morris, the interface between previously isolated South Africans and unknown foreigners creates a space for hostility to develop: "when a group has no history of incorporating strangers it may find it difficult to be welcoming".¹¹¹ Morris concluded that South Africans find difference threatening and dangerous and that xenophobia exists because of the very "foreign-ness" of foreigners. In this hypothesis, foreigners represent the unknown to South Africans.

2.4 Regulation and/or lack of regulation of xenophobia in South Africa

A general climate of xenophobia prevails in South Africa, rendering foreigners vulnerable to exploitation and violence.¹¹²

Various legal, institutional, social and governmental gaps which appear to catalyze and encourage xenophobia and xenophobic tendencies in South Africa are discussed below:

2.4.1 Lack of a specific law on xenophobia or hate crimes

110 *Ibid.*

111 *Ibid.*

112 Harris B (2001) "A foreign experience: Violence, crime and xenophobia during South Africa's transition". *Violence and Transition Series* Vol 5 p 9.

South Africa does not have a specific law for the prosecution of xenophobia and other bias or prejudice motivated crimes. It is therefore important that the country adopt laws that isolate bias-related crimes from general crimes which are covered under criminal laws. For instance, in South Africa, recurrent targeted attacks on foreign owned shops should not be prosecuted under the country's general criminal law because such attacks are motivated by bias or xenophobic sentiments against foreigners.

As a result of the lack of a specific law to address xenophobia, the parameters of the phenomenon of xenophobia and other hate crimes against foreigners are generally unknown to law enforcement agencies such as the police.¹¹³ As a result, significant levels of impunity exist for the individuals responsible for orchestrating violent mob raids in areas populated by foreigners.¹¹⁴

As of 2012, South Africa did not have a publicised, official hate crime monitoring and reporting mechanism which could be utilized to collect data on violent hate crimes or that encourages the recording by police of potential bias, a key factor in determining if the crime was motivated by bias. This hampers policymakers from seeing and understanding the full scope of the problem and developing adequate responses.

Tara Polzer Ngwato of the African Centre for Migration and Society (ACMS) at the University of the Witwatersrand in Johannesburg argued in 2011, that "government responses to xenophobic attacks have been fragmented, poorly resourced and with limited political commitment," despite a significant rise in attacks on foreign-owned shops in several provinces since the beginning of 2011.¹¹⁵

113 CHR (2009) n 42 above p 78.

114 *Ibid.*

115 IRIN (2011) "South Africa: Government gets lowest rating on xenophobia." Available at <http://www.irinnews.org/Report/93130/SOUTH-AFRICA-Government-gets-lowest-rating-on-xenophobia>. (Accessed 24 Sept 2012)

South Africa has so far not ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹¹⁶ This international instrument could be used to safeguard the rights of non-nationals and migrants in the country.

The only law in South Africa that does mention xenophobia is the Equality and Prevention of Unfair Discrimination Act of 2000. This Act states that “discrimination” on the basis of “nationality” of the victim constitutes one of the breaches under it; it further interprets “practices” associated with xenophobia and other adverse “assumptions” of a “discriminatory nature” should be included within the ambit of “nationality”.¹¹⁷ The Act has however never been applied to prosecute perpetrators of xenophobic attacks and, as of 2012, there was no jurisprudence from South African courts regarding prosecution of xenophobic attacks under this Act.

2.4.2 Ineffective immigration and refugee policies

Ineffective post 1994 immigration policies have, to an extent, contributed to an influx of immigrants from the neighboring countries into South Africa, which in turn fuelled the anger of the South African population towards foreigners.¹¹⁸

According to Crush, the phenomenon originates from the prolonged internal and external isolation of South Africa during the apartheid era which led to little immigration into the country; after apartheid ended and democratization started in 1994, the borders of South Africa opened and migrants and refugees from elsewhere in Africa entered the country in large numbers.¹¹⁹ This caused widespread panic among South Africans who seem to have lost faith

116 See: UN treaties: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en. (Accessed 3 September 2012)

117 The Equality and Prevention of Unfair Discrimination Act No. 4 of 2000. This Act mentions xenophobia by implication, by stating in Article 34 that discrimination on the basis of “nationality” constitutes to its breach. Article 1 (xvii) interprets ‘practices associated with xenophobia and other adverse ‘assumptions’ of a discriminatory nature’ to be included within the ambit of ‘nationality’.

118 Crush (2008) n 47 above p 1.

119 *Ibid.*

in their government's ability to control immigration or to deal with illegal immigrants.¹²⁰ This large influx of refugees and other migrants into South Africa after 1994 caused South Africans to take the law into their own hands and to become intolerant of and violent towards foreigners in their country.¹²¹

Over the years, South Africa has failed to develop a solid and effective policy on refugees and asylum-seekers.¹²²

Immigration in South Africa is managed under the Immigration Act, which, according to Crush, is primarily focused on controlling and excluding immigrants from entering the country rather than proper management and development of immigration.¹²³ Crush further notes that South Africa suffers a net brain drain of qualified professionals and concludes that by adopting and applying the Immigration Act in its current form, the country is missing an important opportunity to tap into the benefits of immigration such as attracting scarce skills like engineering and medicine into the country.¹²⁴

South Africa has consistently ignored the crisis in Zimbabwe and simply allowed Zimbabwean nationals into the country as "economic migrants", notwithstanding that many of them flee their country as refugees for political reasons.¹²⁵ This has led to many international organizations calling on South Africa to introduce a stronger, consistent refugees' Bill that would help it to accommodate the dynamics of immigrants, especially those from Zimbabwe.¹²⁶

120 *Ibid.*

121 *Ibid.*

122 Aggad F & Sidiropoulos E (2008) "South Africa's tipping-point" p 1. Available at: <http://www.opendemocracy.net/article/africa/south-africas-tipping-point>. (Accessed 26 Sept 2012)

123 Crush (2008) n 47 above p 2.

124 *Idem* 3. Also see the general provisions of the Immigration Act 2002.

125 *Ibid.*

126 *Ibid.*

The lack of a coherent approach to immigration in response to accumulating migration pressures reinforces the government's failures in other areas, and forms part of the context for the outbursts of violence against foreigners.¹²⁷

2.4.3 Misunderstanding of xenophobia and other hate crimes

In the aftermath of the May 2008 countrywide xenophobic attacks, the then President, Thabo Mbeki, denied that xenophobia or hatred towards foreigners was an issue in South Africa and blamed the attacks on criminals.¹²⁸

Harris argues that many South Africans still don't understand "xenophobia" as a phenomenon and gives several examples where South African media outlets depict "foreigners", regardless of their immigration status, in a manner that makes it appear as if they are a threat to the new, post-1994 nationalism in the country.¹²⁹

Morris emphasizes that the South African government needs to appreciate the realities of xenophobia in the country in order to address the problem.¹³⁰

2.4.4 South Africa's culture of violence

Various research studies have established that South Africa is an extremely violent country. For example, a five-year study concluded in 1996 found that about 70 percent of the urban population of South Africa, randomly sampled, had been violently victimized on at least one occasion.¹³¹

127 *Ibid.*

128 Crush (2008) n 22 above p 2.

129 Harris (2002) n 29 above p 12.

130 Morris (1998) n 106 above pp 116-1136.

131 Van Dijk J (1996) "Victim empowerment and support in an international perspective" in Camerer L & Nelputting J *Putting victims on the agenda* Institute for Security Studies, Monograph series No. 7 pp 18-30.

South African society endorses and accepts violence as an acceptable and legitimate means to resolve problems and achieve goals.¹³² The culture of violence in South Africa finds its roots in the 1980s, when violence was predominantly political in nature.¹³³ At that time, violence was utilized and sanctioned across the political spectrum.¹³⁴ The politics of the 1980s effectively laid the foundation for an ongoing culture of violence in modern-day South Africa.¹³⁵

According to analysts, the form of violence transformed across the pre-1994 period; with Hamber explaining that “whilst levels of political violence have generally dropped ... the transition has been characterized by dramatic increases in violent crime”.¹³⁶

Although the form of violence may have altered with time, violence itself still persists as the dominant means to solve problems in South Africa.¹³⁷

Xenophobic violence should therefore be conceptualized in the context that xenophobic attacks are a form of violence and violence is the norm in South Africa. Further, violence is an integral part of the South African social fabric.¹³⁸

According to Crush, the horrific events of May 2008 in which over 60 migrants were killed and tens of thousands hounded out of their communities by South Africans, are the tip of the iceberg.¹³⁹ He cites a nationally representative survey of South African attitudes that SAMP conducted in 2006 which showed very high levels of intolerance across the entire

132 Hamber B & Lewis S (1997) “An Overview of the consequences of violence and trauma in South Africa. Johannesburg: Centre for the Study of Violence and Reconciliation”. Available at: http://www.csvr.org.za/index.php?option=com_content&view=article&id=1778:an-overview-of-the-consequences-of-violence-and-trauma-in-south-africa&catid=138:publications&Itemid=2. (Accessed 20 April 2012)

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 *Ibid.*

139 Crush (2008) n 22 above p 4.

population.¹⁴⁰ The comparative study showed that South Africans are among the most hostile to outsiders globally.¹⁴¹

“Xenophobia remains a deep and pervasive phenomenon that the government has not yet fully acknowledged, much less addressed, beyond isolated efforts”.¹⁴²

2.4.5 Impunity and absence of the rule of law in South Africa’s Townships

“When state agents or private actors are allowed to violate the law with impunity, the rule of law is truncated; rights become ‘lifeless paper promises’ and the equality and dignity of all – both citizen and immigrant – is at risk”.¹⁴³

“The ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.¹⁴⁴

140 *Ibid.*

141 *Ibid.*

142 *Ibid.*

143 O’Donnell G (2004) “Why the rule of law matters?” *Journal of Democracy* 15 no. 4 p 32.

144 Secretary-General to the UN Security Council “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”. United Nations Security Council, (2004) S/2004/616, 4.

The lack of rule of law and the reign of impunity in the informal settlements and Townships across South Africa is a major problem highlighted in a SAHRC report investigating the 2008 xenophobic violence.¹⁴⁵

The SAHRC reported that in the Townships, the rule of law “barely exists” and that impunity “reigns” for rogue leaders and common criminals alike.¹⁴⁶

SAHRC reported:

“Widespread frustrations about the nature and extent of service delivery, employment and housing, which leaves residents of these areas, convinced that they are on their own in dealing with social problems. Issues of the rule of law, justice and impunity in informal settlements must be seen embedded in an holistic context, where interventions in each component of the whole could generate improvements in the rule of law over time – not only as it relates to violence against non-nationals, but also as regards other forms of civil unrest, such as protest related violence”.¹⁴⁷

The SAHRC report highlighted that some key government officials do not understand the Constitution with respect to human rights.¹⁴⁸ For instance, in enforcing immigration provisions against foreigners, officials acted with impunity, treating the provisions of the Immigration Act as superseding the Bill of Rights and other Constitutional imperatives, with regard to the human rights of immigrants in South Africa.¹⁴⁹

145 SAHRC (2009) “Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals” p 8.

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 SAHRC (2009) n 145 above p 8-9. The Preamble to the 1996 Constitution declares that the country “belongs to all who live in it” and that human rights are applicable to “all people”. According to this SAHRC report, immigration officials did not respect migrants’ rights to life, freedom and security of person, freedom from discrimination on any grounds, and freedom from arbitrary eviction or deprivation of property, which are all provided under Sections 11, 12 and 15 of the Constitution.

Harris notes that corruption and xenophobic discrimination mark the institutional interface between foreigners and South African officials, especially the South African Police Service and Immigration officials.¹⁵⁰

Limitations and failings in the South African criminal justice system, for instance the lack of specified criminal penalties for perpetrators of xenophobic attacks, play a role in perpetuating the culture of violence for South Africans and foreigners alike.¹⁵¹

2.4.6 Racism

According to Harris, many Africans are subjected to xenophobic violence in South Africa due to racism by black South Africans.¹⁵² He writes that black or African foreigners are at greater risk for xenophobic violence and economic exploitation than their white counterparts.¹⁵³ Harris argues that while victims of xenophobia are predominantly black, the majority of perpetrators are also black South Africans.¹⁵⁴

For many African foreigners, “racism by whites” is not entirely unexpected because it is seen as an extension of apartheid power relations which South Africa was formerly known for.¹⁵⁵ In contrast, many find “black racism” rather surprising.¹⁵⁶

They locate this phenomenon as a consequence not only of apartheid but also within political transition and contemporary governance in South Africa where the incumbent ANC

150 Harris (2001) n 112 above p 5.

151 Harris (2001) n 112 above p 12.

152 Harris (2001) n 112 above p 5.

153 *Ibid.*

154 Harris (2001) n 112 above p 11.

155 *Ibid.*

156 *Ibid.*

government continues the apartheid immigration policy of discrimination against black African migrants when compared to white migrants.¹⁵⁷

Harris also introduces a new aspect to xenophobic tendencies in South Africa. He points out an important role of racism in explaining that darker-skinned “foreign-looking” black South African citizens often get attacked, while lighter skinned “non-foreign-looking”, undocumented foreigners might go undetected, all thanks to racist attitudes.¹⁵⁸

2.4.7 Issue of governance

Valji highlights a “dramatic” increase in xenophobic attacks and violence in the country after the 1994 transition, and blames the phenomenon on post 1994 government policies in South Africa.¹⁵⁹

Good governance is known to reduce conflicts, corruption and mismanagement of resources, entrench the rule of law and promote socio-economic development for all.¹⁶⁰ However in the South African case, there appears to be a major gap between the expectations that politicians create in successive electoral campaigns and what they actually deliver after elections.¹⁶¹ This results in frustration and discontent which has often resulted in anger that is later manifested in xenophobic violence against foreigners.¹⁶²

Burger writes that South Africa has recently been affected by a wave of country-wide protests against poor service delivery, especially by residents of poor, informal settlements.¹⁶³ Many of

157 *Ibid.*

158 Harris (2001) n 112 above p 33.

159 Valji (2003) n 1 above p 1.

160 Ikome F (2007) “From the Lagos plan of action to the New Partnership for Africa’s Development (NEPAD): The political economy of African regional initiatives” Midrand: Institute for global dialogue p 204.

161 Burger J (2009) “The reasons behind service delivery protests in South Africa”. Available at: <http://www.polity.org.za/article/the-reasons-behind-service-delivery-protests-in-south-africa-2009-08-05>. (Accessed 24 Aug 2012)

162 *Ibid.*

163 *Idem* p 1.

them are due to poverty and poor service delivery by the government and municipal authorities, especially with regard to services promised during elections.¹⁶⁴

2.4.8 Role of the media

Generally, South African media represents foreigners in a negative and stereotypical manner which encourages hostility against them.¹⁶⁵ The media regularly links foreigners with crime, poverty, unemployment and large social costs.¹⁶⁶ For instance, a lot of xenophobic hostility has been directed towards Zimbabweans and Nigerians, who are stereotyped by both media and state functionaries as criminals or drug dealers respectively.¹⁶⁷

164 *Ibid.*

165 Harris (2001) n 112 above p 44.

166 *Ibid.*

167 *Idem* p 46.

CHAPTER THREE: MISSED OPPORTUNITY: THE EXISTING NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK THAT CAN BE USED TO COMBAT XENOPHOBIA AND RELATED CRIMES IN SOUTH AFRICA

3.1 National legal framework

South Africa is required by its own Constitution to provide all fundamental rights and freedoms guaranteed in it to “everyone” in South Africa.¹⁶⁸ The Constitution further dictates that the Bill of Rights shall be interpreted and applied consistently with International Law.¹⁶⁹

In the context of the xenophobia, South Africa is obliged to protect victims from attacks by non-state actors, that is, the individuals who perpetrated the violence.¹⁷⁰ In 2008, the government failed to discharge this obligation and continues to violate the obligation by failing to provide remedies to the victims.¹⁷¹

South Africa’s Promotion of Equality and Prevention of Unfair Discrimination Act, promulgated in 2000,¹⁷² also aims to prevent and prohibit unfair discrimination and harassment; to promote equality, human dignity and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.¹⁷³ That this Act’s provisions benefit “any” person in South Africa implies that immigrants could rely upon the Act in cases relating to xenophobic discrimination. The Act cites discrimination on the basis of “nationality” as

168 The Constitution of the Republic of South Africa, 1996 s 39. South African courts have interpreted this constitutional requirement in a progressive manner. For instance in the landmark case of *Khosa & Others v Min of Social Development & Others* (2004(6) BCLR 569 (CC) the Constitutional Court of South Africa assessed a case filed by Mozambican immigrants living in SA as permanent residents who had approached the court to challenge the constitutionality of a law excluding non-citizens from social grant entitlements. The Court held that the Constitution gave “everyone” the right to have access to social security and other human rights guaranteed by the Bill of Rights – not merely citizens – and that “everyone” would include those residing in the country legally. The court highlighted the interdependence and interconnectedness of rights.

169 *Ibid.*

170 CHR (2009) n 42 above p 3.

171 *Ibid.*

172 Act No. 4 of 2000.

173 The preamble of Act No. 4 of 2000 as read with Objects of the Act, ch 1 (2).

constituting a breach, while it further interprets “practices associated with xenophobia and other adverse ‘assumptions’ of a discriminatory nature” to be included within the ambit of “nationality”.¹⁷⁴

In its preamble, the Act acknowledges South Africa’s international obligations under binding treaties and Customary International Law in the field of human rights which promote equality and prohibit unfair discrimination. The preamble singles out the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and the 1965 Convention on the Elimination of All Forms of Racial Discrimination as some of the international human rights instruments that impose human rights obligations on South Africa.

The Act establishes equality courts for enforcement of its provisions, but as of June 2012, there was no jurisprudence on the application of this Act to the prosecution of perpetrators of xenophobic violence in South Africa or as a remedy for victims of xenophobic attacks in the country.

3.2 International legal framework

South Africa has an obligation under various regional and global human rights instruments to respect and protect “all” persons within its borders from violations of their right to liberty and security of the person.¹⁷⁵

3.2.1 The United Nations framework

South Africa has ratified several global instruments within the UN framework that provide protection against discrimination and the violent manifestations that have characterised expressions of xenophobia in the recent past.¹⁷⁶

174 *Idem* art 1 (xvii).

175 *Ibid.*

176 CHR (2009) n 42 above p 56.

Foreign nationals in South Africa should not be denied fundamental human rights enshrined in the 1965 CERD, 1948 Universal Declaration of Human Rights (UDHR) and the 1966 ICCPR all of which South Africa has ratified.¹⁷⁷

The UDHR, ICCPR and the CERD specifically prohibit discrimination based on nationality or social or ethnic origin.¹⁷⁸

The CERD is more explicit with regard to xenophobia. It encourages States signatories to “address xenophobic attitudes and manifestations towards non-nationals, in particular hate speech and racial violence and to take resolute action to counter any tendency to target, stigmatize, stereotype or profile on the basis of race, ... national or ethnic origin, members of ‘non-citizen’ population groups, especially by politicians, officials, educators and the media, on the internet and other electronic communications networks and in society at large”.¹⁷⁹

The right to equal protection under the law and recognition before the law enables victims to gain access to redress mechanisms against perpetrators of xenophobic violence and obliges States parties to take action against these perpetrators.¹⁸⁰ Victims require just and adequate reparation for any damage suffered as a result of such violence.¹⁸¹

South Africa further hosted and signed the Durban Declaration and Programme of Action (DDPA),¹⁸² and the Outcome Document of the Durban Review Conference¹⁸³ which also

177 *Ibid.* South Africa ratified the ICCPR in and the CERD in 1998. See UN Treaties collection, <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>. (Accessed 29 Nov 2012)

178 See UDHR art 2; ICCPR art 2 & CERD art 5.

179 CERD Committee General Recommendation No 30 pars 11 & 12.

180 *Ibid.*

181 CERD Committee General Recommendation No 30 par 18.

182 UN, Durban Declaration and Programme of Action, adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 Sept 2001, and endorsed through the UN-GA resolution A/RES/56/266 of 15 May 2002. Available online at: <http://www.unhcr.org/refworld/docid/3db573314.html>. (Accessed 20 April 2012)

183 Outcome document of the Durban review conference 24 April 2009. Available online at:

provide a comprehensive, action-oriented framework to combat racism, racial discrimination, xenophobia and related intolerance. The DDPA treaty urges states to combat manifestations of generalized rejection of migrants, including xenophobia.¹⁸⁴ It reiterates the general applicability of human rights instruments regardless of the immigration status of the migrant.¹⁸⁵

As of September 2012, South Africa has not ratified the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) which requires State signatories to protect migrant workers' rights including the right to equal protection of the law, to liberty and security of person, dignity, access to justice and due process.¹⁸⁶

The CMW would be of value in protecting the rights of foreigners affected by xenophobic violence in the South African context.

Indeed, the prevalence of xenophobia in South Africa evoked concern by the CERD Committee in its concluding observations regarding South Africa's State Report in October 2006. The Committee consequently recommended that South Africa:

“Should strengthen its existing measures to prevent and combat xenophobia and prejudices which lead to racial discrimination, and provide information on the measures adopted with regard to promoting tolerance”.¹⁸⁷

3.2.2 African Union framework

The key African human rights instruments that South Africa has ratified, and which could be invoked to protect the rights of migrants and refugees within the country are the 1981 African

<http://www.unhcr.org/refworld/docid/49f584682.html>. (Accessed 20 April 2012)

184 UN (2001) n 182 above.

185 *Ibid.*

186 CMW art 7.

187 CERD Committee concluding observations, SA CERD/C/ZAF/CO/3, 19 Oct 2006 par 27.

Charter on Human and Peoples' Rights (ACHPR)¹⁸⁸ and 1969 OAU Refugee Convention.¹⁸⁹ The ACHPR prohibits discrimination of any kind on the basis of race, social origin, ethnicity and analogous grounds.¹⁹⁰

The OAU refugee convention provides for admission, secure asylum¹⁹¹ and non-discrimination¹⁹² for all refugees in the territory of a signatory.¹⁹³

In reaction to the South African xenophobic violence, the African Commission on Human and Peoples Rights met under the auspices of the African Union and adopted a resolution¹⁹⁴ in which it reiterated that the human rights of migrants in South Africa are regulated by "general regional and international human rights instruments, unless they qualify for protection under national, regional and international refugee laws and instruments".¹⁹⁵ The resolution urged South Africa to "investigate and prosecute those responsible for xenophobic attacks, and to institute further measures to ensure the protection of foreign migrants in the country, and their property".¹⁹⁶

188 South Africa ratified the ACHPR on 09 July 1996.

189 South Africa ratified the 1969 OAU Refugee Convention on 15 Dec 1995.

190 ACHPR art 2.

191 1969 OAU Refugee Convention art 2.

192 *Idem* art 4.

193 *Idem* art 2.

194 ACHPR/Res.131 (XXXXIII), by the African Commission on Human and People's Rights 43 rd Ordinary Session held in Ezulwini, Kingdom of Swaziland, on 7-22 May 2008. Available at: <http://www.achpr.org/sessions/43rd/resolutions/131/>. (Accessed 23 May 2012)

195 *Ibid.*

196 *Ibid.*

CHAPTER FOUR: WHAT HAS BEEN DONE ELSEWHERE?: CASE STUDIES OF IMMIGRATION PRACTICES IN AUSTRALIA AND THE STATE OF ARIZONA IN THE USA

4.1 Introduction

Most of the materials quoted above directly relate the increase in xenophobic tendencies in South Africa to the influx and presence of immigrants in the country. Large numbers of immigrants who enter a country's jurisdiction have fled persecution in their countries to seek safe asylum. Under the 1951 Convention Relating to the Status of Refugees, the UNHCR works with governments to provide protection to those who have sought asylum in a foreign country.¹⁹⁷

The concept of asylum in International law implies not only the duty of a host country to offer a place of refuge, but also to give protection and security to refugees and asylum seekers.¹⁹⁸

The CMW obligates States to respect the fundamental human rights of migrants, including undocumented migrants, guarantee equality of treatment and provide the same working conditions for migrants and nationals.¹⁹⁹

It is important to note from the outset that immigration policies should be balanced with the international obligation to offer safe asylum as enshrined in international refugee law.²⁰⁰ Both the USA and Australia have established resettlement programmes under which they take in a large number of migrants for humanitarian reasons.²⁰¹

197 See: Art 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol.

198 Goodwin-Gill GS & J McAdam J (2003) *The refugee in international Law* (3 ed) p 355. This book reaffirms the role of the UNHCR, governments and the international community in providing assistance to refugees and asylum seekers.

199 CMW part 3.

200 The UDHR declares in art 14 (1) that "Everyone has the right to seek and to enjoy in other countries, asylum from persecution".

201 UNHCR (2011) *Resettlement Handbook*: Country chapters: USA & Australia. Available at www.unhcr.org. (Accessed 3 Sept

This chapter briefly compares trends in South Africa, Australia and the State of Arizona in the USA. The comparison will be used to illustrate how the promulgation and enforcement of sound immigration policies and laws has helped certain jurisdictions to properly manage immigration and minimize violence against immigrants perpetrated by the general population in those jurisdictions. It should be noted that the comparison is only of illustrative value and does not purport to be a detailed comparative analysis.

Even though South Africa has a unique history given the apartheid era, all three jurisdictions examined, currently host large numbers of immigrants, tabulated below, who are racially different from the local populations and hail from neighboring countries.

South Africa is currently witnessing a large influx of migrants and asylum seekers from neighboring countries, with a total of 275,000 asylum applications being made at the Department of Home Affairs by Zimbabwean asylum seekers in 2010 alone.²⁰² A total of 57, 899 refugees and 219, 368 asylum seekers were registered in South Africa as at August 2012.²⁰³

Over the past decade, Australia has experienced an influx of migrants from China, Middle Eastern countries and neighboring Asian countries like Indonesia who arrive in the country primarily by boat and are commonly known as “boat people”.²⁰⁴ Despite being located in a difficult geographical area only accessible by sea, a total of 23,434 refugees and 5,242 asylum seekers were registered in Australia as at August 2012.

2012)

202 UNHCR (2012) “Country operations profile, South Africa”. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO>. (Accessed 03 Sept 2012)

203 *Ibid.*

204 UNHCR (2012) “Country operations profile, Australia”. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487af6&submit=GO>. (Accessed 03 Sept 2012)

The USA has 264,000 refugees and 11,721 asylum seekers documented in the country as at August 2012.²⁰⁵ A large number of these entered the country through the State of Arizona, which borders Mexico. Due to the distinct federalism in the USA, this dissertation will examine immigration practices of the State of Arizona only.

All three jurisdictions of Australia, South Africa and the USA are yet to ratify the CMW.²⁰⁶

Whereas anti-immigrant sentiments may be present in all three jurisdictions, large scale country-wide outbreaks of xenophobic attacks and violence have only been documented in South Africa.

4.2 Australia

Racism against native ethnic Aborigines and xenophobia against immigrant Muslims and refugees was a major problem in Australia throughout the twentieth century.²⁰⁷ However, from the 1970s, a major shift occurred in Australia.²⁰⁸ The State set up elaborate institutions, adopted laws and policies and instituted major anti-racism campaigns within the country that have resulted in changed perceptions amongst local populations regarding foreigners.²⁰⁹ As a result, migrants now face less prejudice and discrimination in the country than they did in the past.²¹⁰

205 UNHCR (2012) "Country operations profile, USA". Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492086&submit=GO>. (Accessed 03 Sept 2012)

206 See: UN treaties: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en. (Accessed 3 Sept 2012)

207 Kuhn R (2009) "Xenophobic racism and class during the Howard years" *Marxist Interventions* 1 p 53.

208 *Ibid.*

209 *Ibid.*

210 *Ibid.*

4.2.1 Xenophobia in Australia

The immigration issue of “boat people” has been for decades, a highly charged issue in Australia.²¹¹ There has been some lingering fear of immigration, particularly of Asian and Chinese immigrants, which traces back to the founding of British colonies in Australia.²¹² Some of this fear is based in reality; mostly however, it is attributable to xenophobia.²¹³

In May 2009, there were reported incidents of racist attacks against students of Indian decent in the capital, Sydney, by some members of the local population.²¹⁴ The Australian government admitted the attacks were motivated by racial bias and took immediate action to provide security to the affected students, thereby preventing further escalation of the attacks beyond the isolated incidents reported in Sydney.²¹⁵

4.2.2 Immigration policies

Australia adopted the Migration Act in 1958 and, since then, immigration to the country has become increasingly regulated with the imposition of migrant intake targets, caps and quotas for various visa streams.²¹⁶

According to Carrington, the Australian government policy of controlled immigration has been economically beneficial to the country, which is located in a peculiar geographic location.²¹⁷ Together with its Asian neighbors, such as Indonesia, Australia has adopted a regional trade

211 Twibell T S (2000) “Immigrant Nations: A comparison of the immigration law of Australia and the United States” *University of Tasmania LR* Vol 19 No. 1 pp 57-144.

212 *Ibid.*

213 *Ibid.*

214 CNN-IBN, “Australian Envoy admits attacks on Indians racist” *Cable News Network-Indian Broadcasting Network (CNN/IBN)* available at: <http://ibnlive.in.com/news/australian-envoy-admits-attacks-on-indians-racist/94175-3.html>. (Accessed 23 May 2012)

215 *Ibid.*

216 Carrington K, McIntosh A & Walmsley J (2008) “The social costs and benefits of migration into Australia” *University of New England* p 1.

217 *Ibid.*

strategy of reducing barriers to trade and encouraging cross-border financial investment flows of goods, financial resources, information and people.²¹⁸

Using sound immigration policies, Australia has been able to address its own domestic problems such as declining population and birth rates, demand for cheap labor and diversity of its population.²¹⁹

“It has hence been established that the social benefits of migration into Australia far outweigh the costs, especially in the longer term. The evidence that is available overwhelmingly supports the view that migrants to Australia have made and continue to make substantial contributions to Australia’s stock of human, social and produced capital”.²²⁰

To curb illegal immigration, Australia has increased its local detention facilities for illegal immigrants and made additional efforts to enforce its laws in order to stop illegal immigration and human trafficking through for instance, the implementation of the Border Protection Legislation Amendment Act, adopted in 1999 with the aim of stemming “the surge in undocumented migration to Australia, particularly by persons of Middle Eastern origin”.²²¹

Australia also launched vigorous television campaigns in the Middle East and Central Asia warning viewers not to go to Australia illegally by boat.²²² The television campaigns emphasize that, if the migrants do not die at sea, they will: (1) Be detained in camps; or (2) face dangers that include poisonous snakes, spiders and crocodiles.²²³

218 *Ibid.*

219 Twibell (2000) n 211 above p 119.

220 *Ibid.*

221 *Ibid.*

222 *Ibid.*

223 *Ibid.*

4.2.3 Legal and institutional framework

Australia has, over the years, developed and implemented a wide range of official national legislative and policy measures aimed at promoting racial tolerance and diversity within its borders.²²⁴ It has taken deliberate proactive steps to combat racism and xenophobia by putting in place various human rights, equal opportunity and anti-discriminations institutions at federal, state and territory levels.²²⁵ The country has thus developed a broad legal framework prohibiting all forms of racial discrimination which functions within the context of a long-established policy of multiculturalism.²²⁶

Australia appears to have recognized early, that the education system is an important tool in fighting xenophobia as it builds attitudes and shapes behaviors of citizens from an early age as can be demonstrated by a move by the federal government in 1999 to introduce “A New Agenda for a Multicultural Australia” which added to the “Living in Harmony” program and civics and democracy education in school curricula.²²⁷

Australia has ratified the ICCPR²²⁸ and ICESCR.²²⁹ The country has also ratified the CERD²³⁰ and domesticated it through the Racial Discrimination Act (RDA).²³¹ This has given Australia a major tool to fight xenophobia, racial discrimination and other acts of prejudice, hence

224 Australian Human Rights Commission (AHRC) (2001) “Combating racism in Australia” a discussion paper by HREOC for the World Conference Against Racism. Available at:

http://www.hreoc.gov.au/racial_discrimination/consultations/national_consultations/combating_racism.html. (Accessed 25 Sept 2012)

225 *Ibid.*

226 *Ibid.*

227 *Ibid.*

228 Australia ratified the ICCPR in 1980. See UN treaties: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. (Accessed 3 Sept 2012)

229 Australia ratified the ICESCR in 1975. See UN Treaties: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (Accessed 3 Sept 2012)

230 See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en. (Accessed 22 May 2012)

231 RDA of 1975, Laws of Australia.

fostering the rule of law. The RDA applies to all, including immigrants and racial minorities within Australia.²³²

Racial discrimination as defined in the RDA may be direct or indirect, whereby a particular practice, policy or law that is neutral on its face has a differential impact on a particular racial group.²³³ The Act aims to ensure that people of all backgrounds are treated equally and have the same opportunities.²³⁴ It makes discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful.²³⁵

The RDA further established a commission, the Race Discrimination Commission, headed by a Race Discrimination Commissioner.²³⁶ The institution undertakes a wide range of activities, including research, education, community empowerment and advocacy projects to tackle racism and promote greater understanding between people of different cultures and backgrounds.²³⁷

4.2.4 Political will to acknowledge, plan for and combat xenophobia, racism and prejudice in Australia

As noted above, Australia has established a Race Discrimination Commission, a national anti-racism Secretariat and an evolving national anti-racism and prejudice strategy which aims at reducing racism and xenophobic prejudice in its society.²³⁸

By establishing the above institutions, Australia has accepted that acts of racism and prejudice have a significant impact both on the individuals who experience them and on the wider

²³² *Idem* s 5.

²³³ *Idem* s 9.

²³⁴ *Idem* s 10.

²³⁵ *Idem* s 9.

²³⁶ *Idem* s 19.

²³⁷ *Idem* s 20.

²³⁸ AHRC (2012) "National anti-racism partnership and strategy discussion paper." Available at:

http://www.humanrights.gov.au/antiracism/discussion_paper/NARPS_2012_Discussion_Paper%20FINAL.pdf. (Accessed 22 May 2012)

Australian community, including an impact on their health, reduced productivity and reduced life expectancy.²³⁹

Australia also acknowledges that prejudice and racism present barriers to social and economic participation which lead to social exclusion and entrench disadvantage in their communities in addition to undermining social cohesion and working against its goal and commitment to a diverse and inclusive community.²⁴⁰

4.3 The State of Arizona in the USA

In 2009, the USA Department of Homeland Security (DHS) estimated that there were 11 million illegal immigrants in the USA, with 500,000 living in the State of Arizona alone.²⁴¹

The general public sentiment of immigrants in Arizona and South Africa appear quite similar in the prejudice and negative perceptions that immigrants have in both jurisdictions. For instance, the term “immigrant” in Arizona is easily interchangeable with “illegal immigrant” or the “Mexican who manages to cross the USA-Mexico border illegally” regardless of the immigration status of the individual.²⁴²

In an interesting similarity to South Africa, there is an established sense among the general populace in Arizona that American jobs are being taken by immigrants and that illegal immigrants are living off the USA welfare system.²⁴³ Similarly, the main sources of anti-immigrant information in Arizona are the media, including television and newspapers.²⁴⁴

239 *Ibid.*

240 Kuhn (2009) n 207 above p 116.

241 US Department of Homeland Security (DHS): http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf. (Accessed 22 May 2012)

242 Twibell (2000) n 211 above p 117.

243 *Ibid.*

244 *Idem p 116.*

4.3.1 Immigration policies

The presence of large numbers of immigrants in the State of Arizona, as in South Africa, has been tolerated by State authorities and the general public over the years because immigrants have been an essential component of the State's economy, primarily by providing cheap labour.²⁴⁵

The large influx of undocumented immigrants over the past twenty years has sharpened public attitudes and presented Arizona with serious public policy challenges.²⁴⁶

Arizona relies on US Federal immigration policies for legal immigration into the State. The US Federal Immigration Act²⁴⁷ established an annual quota of immigrants permitted to enter the USA.²⁴⁸ The quota is based on the nationality of the immigrants.²⁴⁹

In 1952, the Immigration and Nationality Act was passed by the US congress, replacing the Immigration Act of 1924.²⁵⁰ This led to the establishment of the Immigration and Naturalization Service (INS) which was later renamed the DHS.²⁵¹ The DHS is the federal organization responsible for immigration to the USA and in Arizona to date.²⁵² The Immigration and Nationality Act upheld and retained the nationality-based quota system of immigration to the USA as established by the Immigration Act of 1924.²⁵³

245 Morrison Institute for Public Policy, Arizona State University (2010) "Illegal Immigration: Perceptions and realities". Available at: <http://morrisoninstitute.asu.edu/publications-reports/2010-illegal-immigration-perceptions-and-realities-1>. (Accessed 23 May 2012)

246 *Ibid.*

247 US Federal Immigration Act of 1924.

248 *Idem* Section 6.

249 *Ibid.*

250 See: The US Department of State, The Immigration and Nationality Act of 1952 (The McCarran-Walter Act). Available at: <http://history.state.gov/milestones/1945-1952/ImmigrationAct>. (Accessed 3 Sept 2012)

251 *Ibid.*

252 *Ibid.*

253 *Ibid.*

Unlike in South Africa, immigration to the USA and the State of Arizona is managed through pre-set immigrant quotas which are sometimes implemented through diversity lotteries where countries with low rates of immigration to the USA are given priority.²⁵⁴

Using sound immigration policies enables the USA to get cheap labour, highly skilled immigrants and also diversify its population.²⁵⁵ Thus the USA has been able to attract professionals such as computer programmers, engineers and other professionals which are scarce locally.²⁵⁶

Further, unlike South Africa which allows illegal immigrants to apply for asylum once in the country, the US immigration law currently provides for few if any options for illegal entry into the country thus, effectively placing illegal immigrants outside the immigration system.²⁵⁷

4.3.2 Legal framework

In response to a large influx of immigrants into its jurisdiction in 2010, the State of Arizona legislature adopted an immigration enforcement law known as Arizona SB 1070.²⁵⁸ The legislation was signed into law by the State Governor in May 2010 and has since been billed as the toughest bill on illegal immigration in the United States.²⁵⁹

Arizona SB 1070 introduced stricter border controls and immigration law enforcement mechanisms in the State by criminalising any “alien” in Arizona not carrying required documents,²⁶⁰ authorizing State law enforcement officers to confirm individual’s immigration status during a lawful stop, detention or arrest in incidents where there is a reasonable

254 *Ibid.*

255 Twibell (2000) n 211 above p 119.

256 *Ibid.*

257 *Idem* p 118.

258 The Support Our Law Enforcement and Safe Neighborhoods Act 2010 (introduced as Arizona Senate Bill 1070).

259 Archibold R (2010) “Arizona Enacts Stringent Law on Immigration” *The New York Times* 23 Apr 2010. Available at: <http://www.nytimes.com/2010/04/24/us/politics/24immig.html?ref=us>. (Accessed 23 May 2012).

260 SB 1070 art 3.

suspicion that the individual is an illegal immigrant²⁶¹ and barring State agencies from restricting the enforcement of federal immigration laws and cracking down on those sheltering, hiring or transporting illegal immigrants.²⁶²

Opinion polls conducted by Rasmussen pollster showed that the law received State-wide support among the general populace, with sixty-four percent of Arizona voters expressing support and confidence in the new law's ability to curtail illegal immigration into their State.²⁶³

The Rasmussen report also stated that "most Arizona voters, about fifty seven percent favor an immigration policy that welcomes all immigrants, except for national security threats, criminals, and those who would come here to live off our welfare system".²⁶⁴

Shortly after the enactment of SB 1070, the government of Mexico reported that over 23,000 of its citizens who had been living in the USA illegally had returned to the country from Arizona between June and September 2010.²⁶⁵ Other studies reported that over 100,000 illegal immigrants had left Arizona after the promulgation of the tough immigration law.²⁶⁶

4.3.3 Conclusion

Australia and the State of Arizona in the USA have implemented effective control of immigration through a combination of sound policies and a tough legal framework for immigration. Political will by authorities to set up and enforce policies, adherence to the rule of

261 *Ibid.*

262 *Ibid.* This provision of SB 1070 was, as at June 2012, being contested in a US District court in Arizona on grounds that it contradicted US Federal law. Regardless of the outcome of the court case, the effect of the SB 1070 had already been felt between its promulgation in 2010 and the time of writing this dissertation in June 2012.

263 Rasmussen Report on the SB 1070 law:

http://www.rasmussenreports.com/public_content/politics/current_events/immigration/nationally_60_favor_letting_local_police_stop_and_verify_immigration_status. (Accessed 23 May 2012)

264 *Ibid.*

265 Stevenson M (2010) "Study: 100,000 Hispanics leave Arizona after immigration law debated" *NBC News*. Available at: http://www.msnbc.msn.com/id/40141843/ns/us_news-immigration_a_nation_divided/#.T7zH5Nzjtjg. (Accessed 25 Sept 2012)

266 *Ibid.*

law by citizens and the establishment of institutions have aided in the success achieved in the two jurisdictions in effective control of migration.

It is not surprising then that citizens have faith in the ability of the law and institutions to deal with immigrants in the two jurisdictions. Consequently large-scale xenophobic attacks or violence against foreigners by locals have never been documented.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS FOR AN ADEQUATE REGULATORY FRAMEWORK FOR SOUTH AFRICA

Protecting foreign nationals living in South Africa from xenophobic attacks, racism and other hate crimes will require legal, political and social action. Fears amongst the local population provide a fertile breeding ground for the growth of xenophobia, racism, discrimination and related intolerance.²⁶⁷ Those fears are easily exacerbated by irresponsible politicians and the media or are manipulated for political purposes.²⁶⁸

5.1 Combating hate crimes in South Africa using legal and multi-disciplinary approaches

Despite overwhelming evidence of its existence, xenophobia and intolerance towards foreigners as a phenomenon seems to have been largely ignored by the South African political discourse. For instance, in the aftermath of the May 2008 countrywide xenophobic attacks on foreigners, the political establishment responded by largely denying that xenophobia was the main problem instead, blaming criminal masterminds for the violence.²⁶⁹

Some of the key influences on xenophobia and other hate crimes in South Africa are socio-political misconceptions about migrants amongst the host population, and a perception by the local population that foreigners are economic competition and a threat to their physical security.²⁷⁰ This is exacerbated by a general lack of knowledge about foreign nationals and their rights, which the establishment has done little to remedy.²⁷¹

The UN Special Rapporteur on Racism and Related Forms of Discrimination, Doudou-Diène opined in 2008 that "only a cultural and ethical approach can address the deep-rooted

267 UNHCR (2001) n 37 above p 90.

268 *Ibid.*

269 Crush (2008) n 47 above p 4.

270 McConnel C (2009) "Migration and xenophobia in South Africa" *Conflict Trends* Issue 1 pp 34-40.

271 SAHRC (2004) n 52 above p 1.

problems of racism and discrimination and promote long-term tolerance and living together among all communities".²⁷² This implies that young South Africans need to be taught to tolerate difference.

It is proposed that, in addition to using the law to tackle problems of xenophobic attacks and other hate crimes in the country, it is imperative that South Africa adopt a comprehensive, multi-disciplinary approach to enforce existing laws and to change societal perceptions, stereotypes and prejudice against foreigners.

To address the problem of xenophobia in a real sense, national and local-level governments should be prepared to devote more resources and efforts towards eliminating the root causes of xenophobia and intolerance.

5.2 Recommendations for a better regulatory framework

5.2.1 Immigration reform

South Africa should reform its immigration policies to adopt policies that control the influx of large numbers of unauthorized immigrants and, at the same time, allow free migration into the country for those who meet legal requirements. The State should make serious efforts to document the many undocumented "illegal" immigrants in the country by, *inter-alia*, expediting asylum applications, determining the status of all those that have applied for refugee status and issuing all with documents.

In addition, South Africans need to be educated about immigration and the benefits of a well managed migration system. They need to be disabused of negative myths and stereotypes regarding foreigners. They need to know that immigration is not as harmful as they think, and

272 UN News Service (2008) "UN rights expert 'dismayed' at xenophobic violence in South Africa" 30 May 2008. Available at: <http://www.unhcr.org/refworld/docid/4860ae5ec.html>. (Accessed 16 April 2012)

that a well managed immigration system can be extremely beneficial in promoting economic growth and attracting professionals with scarce skills into the country.

In order to reap maximum benefit from immigration, South Africa needs to review its immigration policies and establish immigration quotas of those with scarce, beneficial skills. Such quotas could target neighboring countries. The USA and Australia have successfully implemented such a strategy.²⁷³

5.2.2 Legal solutions

South Africa should sign and ratify the CMW and further domesticate it by adopting specific legislation to address (hate crime) violence.

Alternatively, the country can amend its laws to make any act of violence against individuals or property on the basis of a person's race, nationality, religion, ethnicity, sexual orientation or gender identity "hate crime" an aggravating circumstance in all criminal laws. It is important that a specific legal regime or policy that defines the parameters of xenophobic violence and imposes a criminal sanction over and above the existing framework is promulgated and implemented.

The government should strengthen enforcement of this law through prosecution of offenders. This recommendation is informed by the fact that the law can be used to bring about social change in any society.²⁷⁴ This is because law creates societal pressure for adherence; adherence creates habit; habit creates custom; and custom becomes a cultural attribute.²⁷⁵

273 See n 247 & 216 above.

274 Maiman (2012) n 23 above.

275 Sheshtak (1998) n 24 above p 233.

In enforcing migration laws, South Africa should root out corruption and strictly apply its laws at the border and within the country. This would slow the influx of migrants entering the country.

Perpetrators of racist and xenophobic attacks, regardless of the extent of the harm caused to foreign nationals, must be effectively and openly condemned through courts of law and other institutions such as human rights commissions and ombudsmen's offices.

5.2.3 Strengthening of institutions

South Africa should provide resources to key institutions such as the police, immigration officials, justice and other relevant officials to root out corruption and inefficiencies. The country should strive to ensure the successful implementation of the provisions of the above proposed laws, including training on detecting, recording, and prosecuting hate crimes and monitoring trends. Further, the government should establish a department that deals with social cohesion and task it with addressing hate crimes in the country.

South Africa should strengthen border policing to prevent illegal immigrants from entering the country.

5.2.4 Political responsibility

South African leaders should first be aware of the influence they exert in shaping public opinion and its impact in fueling intolerance and xenophobic sentiments against non-nationals. They should increase high-level rhetoric and action in support of tolerance and non-discrimination and routinely speak out and act against hate crime violence against foreigners whenever such attacks occur.

The government should ensure that every effort is made to thoroughly investigate all past, current and future incidents of hate crimes such as xenophobic attacks and hold the

perpetrators accountable. This could be achieved by undertaking parliamentary, inter-agency or other special investigatory inquiries into all incidents of hate crimes.

2.2.5 Inculcation of the values of tolerance through education

South Africa should inculcate values of tolerance of foreigners through education programmes. Broad, high-profile, multi-media, government-initiated and sponsored anti-xenophobia education programmes should extend into schools, workplaces, communities and the corridors of the public service to address intolerance. The government should reach out to various groups including youths, perpetrators and victims.

5.2.6 Integration of immigrants into the South African society

South Africa needs to implement policy measures to ensure that immigrants who live in the country are integrated into its communities. This could be achieved through promotion of inter-cultural activities involving migrants and local populations. Both local communities and immigrants need to be well prepared to coexist peacefully.

5.2.7 Social solutions

Major institutions at all levels of South African society including inter alia the family, churches, mosques, schools, workplaces should foster social change by promoting tolerance.

5.2.8 Acculturation, the role of the international community

Xenophobic attacks against non-nationals are human rights violations. The international community, notably South Africa's neighbors and international human rights organizations could play a role in putting pressure on South Africa to act on recurrent reports of xenophobic attacks on foreign nationals within its territory.

Traditionally, international human rights institutions exert influence over States that abuse human rights by using persuasion or coercion, especially through a system of rewards, sanctions or even force if authorized by the UN Security Council.²⁷⁶

Goodman and Jinks recommend that States which abuse or condone abuse of human rights could also be influenced through a new system, *acculturation*, which is a process similar to assimilation by neighboring States. Under *acculturation*, State actors would adopt the beliefs and behavioral patterns of the culture in the neighboring region and apply varying degrees of cognitive social pressure on a State violating human rights to ensure uniform conformity with human rights norms.²⁷⁷ A combination of persuasion, coercion and *acculturation* would present the best model to positively influence South Africa to act on ending xenophobic attacks.

²⁷⁶ Goodman R & Jinks D (2004) "How to influence States: Socialization and international human rights law" 54 *Duke LJ* p 2.

²⁷⁷ *Idem* p 5.

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