

**Xenophobia: A critical study of the phenomenon and pragmatic
solutions for South Africa**

By

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**Submitted in fulfilment of the requirements for the degree
Doctor of Laws (LL.D)**

In the Faculty of Law, University of Pretoria

30 June 2016

Promoter: Professor CMA Nicholson

DECLARATION

I declare that this thesis which I hereby submit for the Degree of Doctor of Laws (LL.D) at the University of Pretoria is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.

Gideon Rwanda Muchiri

ACKNOWLEDGMENTS

I am deeply grateful to my promoter, Professor Caroline Nicholson, for the invaluable guidance, support and encouragement that she offered me throughout my studies.

I thank the following distinguished scholars for their invaluable advice and criticism, which helped to shape my ideas in the early stage of the writing of this thesis: Prof Karin Van Marle, Prof Frans Viljoen (University of Pretoria), Prof Tshepo Mosikatsana, Prof Loren Landau (the University of the Witwatersrand) and Dr Olivia Lwabukuna. I must say that I was properly guided during the course of writing of my thesis so I bear the full responsibility for any shortcomings of this study.

I appreciate the support and encouragement that I received from my dear wife Peninah, daughters Olivia and Emma, my mother Janet, siblings Maureen, Evans, Lillian, Mike, Magdalene and other family members. I am also grateful to Shant Dermegerdtchian, Kizitos Okisai and Veronica Modey-Ebi from the UNHCR Regional office for Southern Africa for facilitating my study in various important ways. Finally, I acknowledge and thank the University of Pretoria for awarding me the bursaries to pursue this LL.D on a topic that is so important to me.

DEDICATION

This thesis is dedicated to the CoRMSA, ACMS, LHR, SAMP and other NGOs, and private individuals who, through research, tireless advocacy and other efforts, are leading the fight against xenophobia and other hate crimes in South Africa.

ACRONYMS

ACCORD - African Centre for Constructive Resolution of Disputes
ACMS - African Centre for Migration and Society at the University of the Witwatersrand
ACU - Aliens Control Unit
AI - Amnesty International
AFP - Agence France Presse
ACHPR - African Charter on Human and People's Rights
AHRC - Australian Human Rights Commission
AMAC - Australian Multi-cultural Advisory Council
ANC - African National Congress
APRM - African Peer Review Mechanism
AU - African Union
CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC - Constitutional Court of South Africa
CEDAW – Convention on the Elimination of All Forms of Discrimination against Women
CERD - Convention on the Elimination of All Forms of Racial Discrimination
CHR - Centre for Human Rights at the University of Pretoria
CIA - Central Intelligence Agency
CMW - Convention on the Protection of Migrant Workers and Members of their Families
CNN - Cable News Network
CoE - Council of Europe
COSATU - Congress of South African Trade Unions
CoRMSA - Consortium for Refugees and Migrants in South Africa
CSVR - Centre for Society, Violence and Reconciliation
CXU - Counter Xenophobia Unit
DDPA - Durban Declaration and Programme of Action
DHA - Department of Home Affairs

DoJCD - Department of Justice and Constitutional Development
DRC - Democratic Republic of Congo
ECHR - European Convention on Human Rights
EIPR - Egyptian Initiative for Personal Rights
EOHR - Egyptian Organisation for Human Rights
EU - European Union
FBI - Federal Bureau of Investigations
FCA - Federal Court of Australia
FHCSA - Federal Hate crime Statistics Act
FMSP - Forced Migration Studies Programme at the Wits
GCRO - Gauteng City Region Observatory
HCSEA – Hate crimes Sentencing Enhancement Act
HCPA - Hate crimes Prevention Act
HIV - Human Immunodeficiency Virus
HREOC - Human Rights
HRF - Human Rights First
HRW - Human Rights Watch
HRC - UN Human Rights Council
HSRC - Human Sciences Research Council
ICCPR - International Covenant on Civil and Political Rights
ICESCR - International Covenant on Economic, Social and Cultural Rights
ILO - International Labour Organization
IOM - International Organization for Migration
IRIN - Integrated Regional Information Networks
JISA - Jesuit Institute of South Africa
LHR - Lawyers for Human Rights
OAU - Organisation of African Unity, now African Union
OHCHR - UN Office of the High Commissioner for Human Rights
OSCE – Organisation for Security and Cooperation in Europe
MMP - Media Monitoring Project

NDMC - National Disaster Management Centre
NCIA - National Cohesion and Integration Act
NCRA - National Consortium on Refugee Affairs
NEPAD - New Partnership for Africa's Development
NGO – Non-Governmental Organization
NPA - National Prosecuting Authority
PEPUDA - Promotion of Equality and Prevention of Unfair Discrimination Act
PSIRA - Private Security Industry Regulation Act
RBX - Roll Back Xenophobia Campaign
RDA - Racial Discrimination Act
RDC - Race Discrimination Commission
RDP - Reconstruction and Development Programme
SA - South Africa
SABC - South African Broadcasting Corporation
SADC - Southern Africa Development Community
SANDF - South Africa National Defence Force
SAGNA - South African Government News Agency
SANIA - South African National Intelligence Agency
SAHRC - South African Human Rights Commission
SAIIA - South African Institute of International Affairs
SALC - South African Law Reform Commission
SAMP - South African Migration Project
SAPS - South African Police Service
SASA - Somali Association of South Africa
SB 1070 – Arizona Senate Bill 1070
SCA - Supreme Court of Appeal of South Africa
TRC - Truth and Reconciliation Commission
UCR - Uniform Crime Reporting
UDHR - Universal Declaration of Human Rights
UK - United Kingdom

UN - United Nations

UNDP - United Nations Development Programme

UNGA - United Nations General Assembly

UNHCR- United Nations High Commissioner for Refugees

UNHRC - United Nations Human Rights Committee

USA - United States of America

USAID - United States Agency for International Development

Wits - The University of the Witwatersrand



Crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities... [w]e are not talking about the obvious physical damage inflicted during a hate motivated attack. We are referring to the fear, the terror, which one experiences when faced with a passionate rejection because of what one is. An absolute stranger looks at you and hates you...*

* 139 CONG. REC. H6792-01 (1993) cited in Scotting T "Hate crimes and the need for stronger federal legislation" (2001) 34 *Akron Law Review* 857.

SUMMARY

Xenophobia: A critical study of the phenomenon and pragmatic solutions for South Africa

In the post-apartheid period, thousands of refugees, migrant workers and other categories of foreign nationals have been attacked, killed, displaced or deprived of their property in xenophobic attacks throughout South Africa. These recurrent attacks violate a host of fundamental human rights of foreign nationals, including the right to life, right to own property and the right to seek and enjoy safe asylum.

Making South Africa a case study on the management of xenophobia, this study contextualises xenophobia as a deeply rooted and protracted socio-legal problem and argues that only deep understanding and research-based pragmatic interventions can alleviate the phenomenon.

Relying on conclusions from empirical surveys by experts and human rights organisations, the thesis explains various underlying historic factors that perpetuate xenophobia in the country. The thesis elucidates on these historic factors and analyses other on-going legal and institutional shortcomings that exacerbate xenophobia, thereby hampering social cohesion, the rule of law and peaceful coexistence between nationals and foreigners in the country.

The thesis examines and critiques the domestic and international legal as well as institutional framework that could be utilised to stem xenophobia. It finds that the legal and extra-legal interventions that have so far been implemented in SA have largely been ineffective in curbing the phenomenon. This is evidenced by the current situation, where xenophobic attacks are continuing unabated. The study further reviews some foreign jurisdictions where pragmatic interventions to

curb hate crimes such as xenophobia and racism have succeeded, to draw inspiration and examine certain lessons that SA could learn from their management of the phenomena. The thesis argues that, to effectively and decisively address xenophobia in SA, a multi-disciplinary approach which encompasses legal and extra-legal measures is necessary. This study concludes by proposing some short- and long-term pragmatic interventions for xenophobia in SA, both legal and extra-legal.

Having been prepared from legal and multi-disciplinary perspectives, this thesis aims to stimulate academic debate as well as inform future legal, policy and institutional reforms related to management of xenophobia.

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CHAPTER 1: INTRODUCTION

1.1 Introduction

South Africa (SA) has been grappling with the impact of xenophobia for at least two decades. In that period, thousands of foreign nationals have been attacked, killed, displaced or deprived of their property in xenophobic attacks which continue to happen in all parts of the country.

A review of available literature on xenophobia reveals that the phenomenon constitutes a deeply rooted, widespread, on-going and evolving socio-legal problem in SA. One that is difficult to eradicate.¹

This thesis investigates the historical and current factors responsible for the perpetuation of the phenomenon in the country from a socio-legal standpoint and reviews various legal and institutional responses to it. The best practices, successes and weaknesses in SA's approaches to management of the phenomenon are highlighted and critiqued.

The thesis includes a regional and international perspective informed by a comparison of SA's response to xenophobia with that of Australia, the state of Arizona in the United States of America (USA), Kenya and Egypt. This perspective is used in an attempt to illustrate means by which the SA response

¹ Misago J P, Monson T, Polzer T & Landau L "May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses" (2010) 9; & Crush J, Ramachandran S & Pendleton W "Soft targets, xenophobia, public violence and changing attitudes to migrants in South Africa" (2013) 47.

can be improved. The thesis concludes with recommendations for pragmatic interventions that may significantly alleviate the phenomenon locally.

1.2 Background

Xenophobia is a deeply rooted and protracted socio-legal problem in SA.² From 1994, when the country opened up to the world following the end of apartheid, widespread xenophobia and its manifestations through violent attacks, killings and lootings have been consistently documented across all regions of SA.³

² A 2000 survey by the South African Migration Project (SAMP) showed that a majority of South Africans favoured a total ban on immigration into the country. See Crush J "The dark side of democracy: Migration, xenophobia and human rights in South Africa" (2000) 38 *International Migration* 103-133. In a World Values Survey report released by SAMP in 2004, South Africans were found to hold the most hostile views on immigrants when compared to 29 other nations reviewed. See Valji N "Creating the nation: The rise of violent xenophobia in the new South Africa" (2003) available at: <http://cormsa.org.za/wp-content/uploads/Research/Xeno/riseofviolent.pdf> (accessed 5 Jan 2014). In 2013, the Centre for Human Rights at the University of Pretoria (CHR) noted that xenophobia remains an "epidemic" and a pervasive part of South African society which requires urgent multifaceted intervention, if it is to be managed. See CHR "Multi-pronged response required to curb xenophobia in South Africa" (2013) available at <http://www1.chr.up.ac.za/index.php/centre-news-2013/1160-multi-pronged-response-required-to-curb-xenophobia-.html> (accessed 14 Jan 2014).

³ For a detailed analysis on the prevalence of xenophobia in post-apartheid SA, see Palmary *et al* "Violent crime in Johannesburg" in Tomlinson *et al* (eds) *Emerging Johannesburg: Perspectives on the post-apartheid city* (2003) 112; Nyamnjoh F B *Insiders and outsiders: Citizenship and xenophobia in contemporary Southern Africa* (2006) ch 1; Misago J P, Landau L & Monson T *Towards tolerance, law and dignity: Addressing violence against foreign nationals in South Africa* (2009) 2-8; Landau L "Loving the Alien?: Citizenship, law, and the future in South Africa's demonic society" (2010) 109 *Journal of African Affairs* 213-230; Neocosmos M *From foreign natives to native foreigners: Explaining xenophobia in post-apartheid South Africa* (2010) ch 1; Matsinhe M D *Apartheid vertigo: The rise in discrimination against Africans in South Africa* (2011) ch 1; & Crush *et al* (n 1 above) 9.

In May 2008, SA was plunged into nation-wide xenophobic violence of an unprecedented scale and ferocity.⁴ Many foreign nationals, including registered asylum seekers and recognised refugees had their human rights grossly violated through physical attacks, killings, forced displacement and deprivation of property through looting and burning.⁵

While xenophobic attacks had happened in SA before, the May 2008 wave of violence saw foreign nationals, and even South African nationals who appeared like foreigners due to skin complexion and other physical features, attacked in at least 135 locations, across the country.⁶ To date, foreign nationals living in SA, including those living in the country legally, have to contend with constant and real fear of xenophobic discrimination and attacks.

Migration experts have pointed out that cross-border migration into SA, which is typically triggered by conflicts, economic deprivation, unemployment, droughts, effects of climate change and persecution for reasons of, amongst others, political opinion, race, religion and gender in neighbouring countries, will continue for the near future and this will consequently result in increased incidents of xenophobic attacks in SA.⁷

According to The Consortium for Refugees and Migrants in South Africa (CoRMSA) and the Forced Migration Studies Programme (FMSP) at the University

4 Crush J & Ramachandran S "Migration, xenophobia and human development" (2010) 11 *Journal of Human Development and Capabilities* 209-28; & Landau L (ed) *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary South Africa* (2012) 1-2.

5 The SAHRC reported that about 62 people were killed, over 100,000 were displaced from their homes and the victims incurred material losses which were estimated to run into the millions of Rands. The full SAHRC report is available at <http://www.sahrc.org.za/home/index.php?ipkArticleID=55> (accessed 14 Jan 2014).

6 Misago *et al* (n 1 above) 9.

7 Vorster J M "Racism, xenophobia and human rights" (2010) 54 *The Ecumenical Review* 1.

of the Witwatersrand (Wits), negative perceptions and attitudes towards foreign nationals in SA are currently a reality and these are unlikely to change in the near future.⁸

This thesis contextualises xenophobia as a phenomenon that thrives in the existing socio-legal systemic weaknesses in SA. It examines the phenomenon's prevalence, the underlying causes and impact on the inhabitants of the country. This analysis is important because experts have noted that the fundamental causes of xenophobia in SA are deeply rooted in the history of the country and are layered with historical and contemporary factors that continue to perpetuate and escalate violence and hatred towards foreigners in the country.⁹ The causes of xenophobic sentiments are diverse but may be understood in light of an examination of the historical and current influences.¹⁰

1.3 The research problem

Xenophobia's various manifestations represent serious human rights violations to various categories of foreign nationals living in SA, including refugees, asylum seekers, migrant workers and others. Xenophobic manifestations range from hostility, discriminatory attitudes, collective violence, institutional or social exclusion, harassment and other types of discriminatory conduct.

Recent preliminary research on xenophobia reveals that, with regard to the phenomenon, the *status quo* in SA currently is as follows:

8 Misago *et al* (n 1 above) 6.

9 As above.

10 Landau L, Ramjathan-Keogh K & Singh G "Xenophobia in South Africa and problems related to it" (2005) 2.

- (i) South Africans are highly desensitised to the magnitude and impact of xenophobia in their country, with the majority ignoring or denying the prevalence of xenophobia;¹¹
- (ii) The country lacks effective policy, legal regulatory frameworks or strong institutions which could be utilised to combat xenophobia or hate crimes, as evidenced by the perpetuation of attacks¹² and the breakdown of the rule of law;
- (iii) Governance related challenges, including corruption, mismanagement and poor coordination by agencies tasked with fighting xenophobia hamper efforts to combat the phenomenon;¹³
- (iv) The prevailing poor socio-economic situation of sections of the population in SA has resulted in competition for scarce resources between nationals and foreigners, leading to tension, hostility and violence;¹⁴ and
- (v) A sustained dynamic public rhetoric in SA which denies xenophobia, vilifies African foreigners by portraying them as an economic threat, and has effectively

11 See CHR (n 2 above); & Crush J & Pendleton W "Regionalizing xenophobia? Citizen attitudes to immigration and refugee policy in Southern Africa" (2004) 9.

12 Breen D & Neil J "The need for hate crime legislation" (2011) 38 *SA Crime Quarterly* 33; Muchiri G "The use of law and multidisciplinary mechanisms to address xenophobia in SA" Unpublished LL.M dissertation, University of Pretoria (2012) 22; & Misago *et al* (n 1 above) 12.

13 See generally, the International Organisation for Migration (IOM) "The effects of xenophobia on the integration of migrants in South Africa: An NGO perspective" (2012) available at <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-policy-and-research/migration-policy-1/migration-policy-practice/issues/august-september-2012/the-effects-of-xenophobia-on-the.html> (accessed 14 Jan 2014).

14 Harris B "Xenophobia: A new pathology for a new South Africa?" in Hook D & Eagle G (eds) *Psychopathology and Social Prejudice* (2002) 12.

made them scapegoats for the economic and social problems currently bedevilling the country.¹⁵

Genuine interventions to xenophobic attacks should be premised upon an acceptance of the fact that foreign nationals living in SA are entitled to the fundamental human rights guaranteed in binding domestic laws such as the country's Constitution, regional treaties and by Customary International law instruments like the Universal Declaration of Human Rights (UDHR). The thesis therefore aims to address the central question of what national, regional and international legal mechanisms are already in place to fight xenophobia in SA, to what extent they are being utilised and how effective they are in combatting the problem. The approach to answering these questions is informed by the expert view that any pragmatic response to xenophobia in SA should be human rights-based.¹⁶

Data from the IOM and the CoRMSA lay bare the magnitude of xenophobia in the country and supports the urgent need for action by the government, as xenophobic attacks are taking a toll on human life in the country. The IOM documents stipulate that between 2008 and 2013; approximately three serious xenophobic attacks were documented every week across SA, cumulatively resulting in an average of 150 deaths annually.¹⁷ Other information provided by the CoRMSA further shows that between 2008 and

15 Crush J & Ramachandran S "Xenophobia, international migration and human development" (2009) 15.

16 International Labour Organization (ILO), International Organization for Migration (IOM), Office of the High Commissioner for Human Rights (OHCHR) & the Office of the United Nations High Commissioner for Refugees (UNHCR) "International migration, racism, discrimination and xenophobia" paper for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) 18 available at <http://www.refworld.org/docid/49353b4d2.html> (accessed 10 Jan 2014).

17 The IOM (n 13 above).

2011, more than 4,000 foreign nationals residing in all provinces of SA were displaced from their homes or businesses by xenophobic violence.¹⁸

Unpublished data from the UNHCR further indicates that the frequency of xenophobic attacks actually increased in the period between 2012 and 2014. According to the UNHCR, in 2012, over 140 deaths and 250 serious injuries were recorded across the country that year, with some of the victims being burnt alive.¹⁹

The trend of xenophobic attacks continued into 2013. By August 2013 when some data was available to the UNHCR, 88 foreign nationals had been killed.²⁰ For its part, the Jesuit Institute of South Africa (JISA) reported that a total of 240 foreigners were killed in xenophobic attacks in 2013; some were murdered in the most gruesome circumstances.²¹

In summing up the situation of xenophobia in SA, the UNHCR declared in 2013 that its partners in the South African Police Services (SAPS) are overwhelmed by the increase in violence against foreign nationals, including refugees.²² David Holdcroft, the director of the Jesuit Refugee Service (JRS) in

18 See generally, CoRMSA "Protecting Refugees, Asylum-seekers and Immigrants in South Africa during 2010" (2011).

19 UNHCR Regional Office SA: Presentation during the UN Protection Working Group (PWG) meeting of 7 Mar 2014.

20 Citing xenophobic attacks as the main factor, the UNHCR notes that 88 foreign nationals had been killed in xenophobic attacks between January and August 2013. Most of them were Somali businessmen. See "How safe is going home to Somalia?" IRIN News 28 Nov 2013, available at: <http://www.irinnews.org/report/99219/how-safe-is-going-home-to-somalia> (accessed 05 Jan 2015).

21 Pollitt R "Our silence is our disgrace" (2015) 1.

22 UNHCR Regional Office SA: Presentation during the UN Protection Working Group (PWG) meeting of 7 Mar 2014.

Southern Africa, concluded in 2015 that “xenophobia appears to be a well-established part of the South African landscape”.²³ Experts have pointed out that while xenophobia is a global phenomenon, the South African attacks are unique in that the hostility towards foreign nationals is both extreme and widespread and is accompanied by violence.²⁴

Some legal flaws inhibit SA’s ability to respond to xenophobia using the law. The country does not have any laws which directly prohibit xenophobic conduct or hate crimes. SA has also failed to ratify the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW). This important international treaty provides a comprehensive legal framework for protection of foreign nationals and migrant workers against xenophobic hostility and attacks. The CMW achieves this by providing that state parties must provide legal sanctions against persons or groups who use violence, threats and intimidation against migrant workers.²⁵ The CMW provisions apply to all migrant workers, regardless of their immigration status in the country,²⁶ and they could thus enhance SA’s response.

South Africa has, however, ratified other important treaties that could be relied upon for the protection of foreign nationals living in the country from xenophobic attacks. These include the 1951 United Nations (UN) Refugee Convention, the 1966 UN International Covenant on Civil and Political Rights (ICCPR), the 1965 UN Covenant on the Elimination of all Forms of Racial

23 As above; see remarks by Fr David Holdcroft S J.

24 Crush J (ed) “The perfect storm: The realities of xenophobia in contemporary South Africa” (2008) 33.

25 CMW art 16 (2).

26 CMW art 1.

Discrimination (CERD), the 1981 African Charter, and the 1969 Organisation of African Unity (OAU) Refugee Convention.²⁷ These are examined in the thesis.

The Bill of Rights in SA's Constitution guarantees fundamental rights and freedoms to all living in the country, including foreign nationals.²⁸ Further, the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)²⁹ prohibit unfair discrimination and harassment; promote equality, human dignity and prevent and prohibit hate speech.³⁰

This thesis analyses the social, legal and policy mechanisms that have been implemented in SA by the government and non-governmental actors in past years, with a view to deducing any best practices therein. These actions have met with varying degrees of success and will be considered in the thesis. The thesis concludes by discussing pragmatic interventions which would have a significant impact on reducing xenophobia and xenophobic attacks in SA.

1.4 Assumptions

This thesis proceeds from the assumption that while xenophobia is a widespread and protracted socio-legal problem in SA, the country has not effectively utilised the existing national and international legal framework to combat it. This failure may be attributable, in part, to the lack of understanding of the phenomenon's historical or current root causes.

27 SA ratified the 1951 Refugee Convention in 1996, the 1966 ICCPR in 1998, the 1965 CERD in 1998, the 1981 African Charter in 1996, and the 1969 OAU Refugee Convention in 1995. See <http://treaties.un.org/pages/Treaties.aspx> (accessed 04 Jan 2014) and <http://www.africa-union.org/root/au/documents/treaties/treaties.htm> (accessed 04 Jan 2014).

28 The Constitution of the Republic of South Africa, 1996 s 39.

29 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

30 PEPUDA, Preamble.

One aspect in which most authors on the subject of xenophobia seem to concur is that the phenomenon is an on-going and evolving problem which requires further investigation, an escalated debate and search for solutions and a multi-faceted approach to address.³¹ They agree that efforts made in SA over the past two decades to manage xenophobia, for example, through enacting laws and by implementing policies, have failed to curb the phenomenon due to certain legal, institutional and policy gaps that persist.³²

Whilst other jurisdictions in the Southern African region can learn lessons from SA's experiences in managing xenophobia, SA can also learn from other jurisdictions, such as Australia, that have been able to successfully apply pragmatic mechanisms to regional control of xenophobia. Finally, the timely implementation of pragmatic interventions in legal, institutional, social and economic development areas will help to curb xenophobia in SA.

1.5 Research questions

Based on the research problem and assumptions set out above, the study seeks to examine pertinent issues concerning xenophobia in SA and the contribution of legal and extra-legal interventions to combat the phenomenon. In this respect, the thesis addresses the key question of whether the existing legal and extra-

³¹ CHR "The nature of South Africa's legal obligations to combat xenophobia" (2009) 114; Crush *et al* (n 1 above) 1-8; & Landau (n 4 above) 234-235. In "Xenophobic demons linger in SA" Landau argues that xenophobic "demons" still "linger" in SA and asserts that xenophobia has now been largely displaced in public and political discourse by the broader discussion on social cohesion; see Landau L "Xenophobic demons linger in SA" (2013) Mail & Guardian 17 May 2013. See <http://mg.co.za/article/2013-05-17-00-xenophobic-demons-linger-in-sa> (accessed 14 Jan 2014).

³² As above.

legal mechanisms are sufficient to combat xenophobia in SA. In the process of addressing this central question, the following underlying secondary questions will also be answered:

1. What are the key legal and extra-legal factors that contribute to and / or perpetuate xenophobia in SA?
2. What domestic and international legal framework is available to combat xenophobia and hate crimes? Is it sufficient?
3. Has SA made any gains in the fight against xenophobia and hate crime?
4. What legal and extra-legal lessons can SA learn from other jurisdictions on managing xenophobia and hate crime?
5. What legal and extra-legal pragmatic interventions could help counter xenophobia in ways that appeal to both foreigners and nationals in SA?

1.6 Motivation

Many scholars consider SA to be one of the most xenophobic countries in the world presently.³³ They depict xenophobia as a deeply entrenched, on-going, and

³³ For this view see Adjai C & Lazaridis G "Migration, xenophobia and new racism in post-apartheid South Africa" (2013) 1 *International Journal of Social Science Studies* 192; Dodson B "Gender and the brain drain" (2002) 23 *SAMP Migration Policy Series* 1; Landau *et al* (n 10 above) 2; & Steenkamp C "Xenophobia in South Africa: What does it say about trust?" (2009) 98 *The Round Table* 403.

evolving phenomenon in SA which will continue to feature as an important human rights issue in the foreseeable future.³⁴

It is estimated that there are between two and five million foreign nationals living in SA.³⁵ These foreign nationals are at risk of xenophobic attitudes and attacks which violate their fundamental human rights, including the right to life, right to own property and the right to seek and enjoy safe asylum.³⁶

The majority of the available writings on the topic of xenophobia are a “reactionary analysis” of the 2008 country-wide xenophobic violence that took place in SA.³⁷ Migration experts contend that xenophobia has been prevalent through-out SA’s post-apartheid history and will remain an integral part of the country’s social fabric in the near future.³⁸ They also argue that all efforts by various local institutional actors to address the phenomenon have failed to address it.³⁹ It is further predicted that, for the near future, SA will continue to find itself conceptually and practically imprisoned by the *status quo*, which is

34 See generally, n 3 above.

35 ACCORD “It’s not just xenophobia: Factors that lead to violent attacks on foreigners in South Africa” (2011) 1 & generally, IOM (n 13 above).

36 All these are fundamental human rights, protected in the 1948 UDHR.

37 See generally CHR (n 31 above) 78; Landau (n 4 above) 1-2; Misago *et al* (n 3 above) 3-8; Matsinhe (n 3 above) ch 1; Neocosmos (n 3 above) ch 1; Nyamnjoh (n 3 above) ch 1; & generally, SAHRC “Report of the open hearings on xenophobia and problems related to it” (2004).

38 For example, Professor Loren Landau of Wits, is a leading researcher and writer on the subject of xenophobia in SA. As early as 2006, Landau warned that the South African state was fuelling xenophobic practices over which it was bound to lose control. He wrote against populist, brutal and humiliating roundups and deportation of foreigners living in poor neighbourhoods of SA. He argued that this was bound to trigger xenophobic sentiments, which came to pass in 2008. See Landau L “Immigration and the state of exception: Security and sovereignty in East and Southern African” (2006) 34 *Journal of International Studies* 325-48.

39 Landau (n 4 above) 234-235.

characterised by xenophobia and violence against foreigners.⁴⁰ Experts therefore recommend the reforming of various institutions and taking of deliberate policy steps that will win the hearts and minds of South Africans and cause a positive shift in their thinking regarding foreign nationals.⁴¹

Empirical studies have indicated that the 2008 xenophobic violence in SA, which occurred in at least 135 locations across the country, was not triggered by a single event, a “third force”, a “human tsunami” or even poor economic conditions.⁴² It was caused by a myriad of historical and socio-political causes as well as current underlying factors that are not well understood and which continue to persist in the country.⁴³

That xenophobic violence continues to happen is evidence that the few preventative strategies that have been adopted or implemented are not working effectively.⁴⁴ Key objectives of this thesis are to foster a deeper understanding of the phenomenon of xenophobia in SA and stimulate academic debate around the phenomenon. In the long-term, the thesis aims to inform legal, policy and institutional reforms related to the management of xenophobia through various.

This thesis contributes to the academic, legal and human rights debate on xenophobia by contributing to the existing literature on the subject and sensitising readers to the phenomenon. The thesis distinguishes xenophobia from other acts of criminality and conducts a detailed study of the history of the phenomenon, the current situation and makes recommendations regarding its future management. It highlights current best practices as well as existing legal,

40 As above.

41 Landau (n 4 above) 235.

42 As above.

43 As above.

44 Misago *et al* (n 1 above) 20.

institutional and policy gaps hampering the management of xenophobia in SA. It concludes with recommendations for pragmatic interventions that may potentially significantly reduce or even curb xenophobia in SA. The thesis is intended to play a role in the future, in relevant legal, policy and institutional reforms targeting xenophobia.

1.7 Methodology

This thesis relies heavily on a thorough literature review of existing sources of information. Data from primary sources such as international treaties, the UN resolutions and national statutes are reviewed. The thesis also relies on data obtained empirically, analysed and published in secondary sources such as books, journal articles and information obtained from the websites of, amongst others, various human rights organizations. Semi-structured interviews with experts and documentary analysis supplements the literature review and provides insight into conceptual issues.

A legal comparative method has been applied in chapter six of this thesis to help contextualise issues, review and analyse various legal and policy discourses and standards used to manage xenophobia in SA and a few select jurisdictions, namely Australia, the state of Arizona in the USA, Egypt and Kenya. A comparative method has been chosen for this thesis because xenophobia is a global phenomenon that is not confined to SA.⁴⁵ All countries selected for comparison with SA in this thesis have been found to experience challenges similar to SA, including influxes of migrants from neighbouring countries and have noted cases of xenophobic attacks. Whereas anti-immigrant sentiments have also been found to be present in the other jurisdictions reviewed, large

⁴⁵ Crush & Pendleton (n 11 above) 1.

scale or country-wide outbreaks of xenophobic attacks and violence have only been documented in SA.

Some jurisdictions, notably Australia and the state of Arizona in the USA, have indeed been able to use sound legal, institutional, social and immigration policies to overcome or minimise xenophobia and to create harmonious, diverse and multi-cultural communities.⁴⁶ These are highlighted in the thesis.

In terms of the jurisprudential basis for comparison, the jurisdictions selected for comparison with SA are also constitutional democracies, whose public law systems are heavily influenced by the English common law, as is the case with SA. Solutions that have worked in these jurisdictions might reasonably be expected to be adaptable to the SA legal context.

1.8 Structure of the thesis

Chapter one of the thesis serves as an introduction to the research problem. It sets out the motivation and the assumptions that form the basis of the subject matter. It also explains the methodology to be applied and the objectives of the thesis. Literature review, which is traditionally included in chapter one of many studies, has been incorporated into the body of the thesis.

In chapter two, the thesis defines xenophobia and, distinguishes it from racism and other related forms of criminal conduct. The chapter further attempts to foster a deep understanding of xenophobia in SA, by *inter alia*, examining the

⁴⁶ See generally, Australian Human Rights Commission (AHRC) "Combating racism in Australia" a discussion paper by HREOC for the World Conference Against Racism (2001) available at http://www.hreoc.gov.au/racial_discrimination/consultations/national_consultations/combating_racism.html (accessed 14 Jan 2014).

history and current prevalence of the phenomenon in contemporary SA. It concludes by analysing expert viewpoints on the profile of xenophobes and most targeted foreign nationalities in SA. This understanding of the phenomenon is further enhanced in chapter three, where the main underlying historical and contemporary root causes of xenophobia are discussed in detail. An analysis of how the history of SA contributes to xenophobia is made. Legal, socio-economic, pathological and other contemporary factors which contribute to xenophobia are discussed in this chapter. Throughout this chapter, it is evident that xenophobia's causes are multi-disciplinary in nature. The chapter concludes by highlighting the impact of the phenomenon in SA, from an inter-disciplinary perspective.

Chapter four examines the national, regional and international legal frameworks that are available to combat xenophobia in SA and internationally. The chapter includes an assessment of the current utilisation of this legal framework in the fight against xenophobia. Chapter five examines SA's current efforts to curb xenophobia and highlights some best practices as well as the legal, policy and institutional challenges that hamper the effective management of the phenomenon in the country.

To achieve the comparative objective of the thesis, chapter six discusses important lessons that SA could learn from Australia, the state of Arizona in the USA, Kenya and Egypt, where xenophobia has been experienced and efforts have been made to combat it. The best practices and challenges encountered in these jurisdictions are evaluated and lessons clearly laid out.

Chapter seven comprises the conclusions of the thesis. Important findings of the research are highlighted and recommendations are made regarding the best short- and long term pragmatic interventions that could be implemented to curb xenophobia in SA. As xenophobia's causes are multi-disciplinary, the thesis proposes a multi-faceted approach to combating the phenomenon. These include

targeted legal, social, institutional and policy reforms, coupled with political and economic interventions is proposed.

1.9 Limitations of the study

Despite the fact that xenophobia has been the subject of some scholarly writings in recent years, most of the reference materials take the form of policy documents and Non-Governmental Organisation (NGO) reports published on their websites. Only a limited number of books on this topic are available. For this reason, the thesis relies on international treaties, national legislation, journal articles, policy papers and the Internet as the main sources of information.

Further, due to the evolving nature of xenophobia in SA and globally, it might reasonably be anticipated that new policies, laws or treaties may have been introduced or implemented during the writing of the thesis. All reasonable efforts have been made to ensure the currency of the material that appears in the thesis.

This is a human rights thesis of a social-legal nature. It integrates legal and multi-disciplinary perspectives on the study topic. Readers have to be open to multi-disciplinary literature and viewpoints.

CHAPTER 2: BACKGROUND OF XENOPHOBIA IN SOUTH AFRICA

2.1 Introduction

Various studies carried out in post-apartheid South Africa (SA) have documented strong, widespread, negative sentiments and hostility towards foreign nationals residing in the country.¹ Empirical studies have found that this hostility towards foreign nationals is xenophobic in nature² and that it cuts across every socio-economic and demographic group in SA.³ The most striking domestic response to almost every cycle of xenophobic violence in SA is *denialism* by various actors, including the government.⁴ Xenophobic violence is characterised and often treated as “just crime and not xenophobia”.

Whether this *denialism* is as a result of a genuine misunderstanding of what xenophobia actually means or is a deliberate attempt to deny the phenomenon, this categorization always results in few or no specific

1 See generally, Nyamnjoh F B *Insiders & outsiders: citizenship & xenophobia in contemporary Southern Africa* (2006); Human Sciences Research Council (HSRC) “Citizenship, Violence and Xenophobia in South Africa: Perceptions from South African Communities” (2008).

2 Nyamnjoh (n 2 above) 38 & Gauteng City-Region Observatory Report (GCRO) “City benchmarking quality of life survey 2013” (2014) 81.

3 As above.

4 Polzer & Takabvirwa argue that the state denies xenophobia because it would be “ideologically and politically uncomfortable; and an affront to their pan-African tradition” for the ruling African National Congress (ANC) to admit that SA citizens are xenophobic. See Polzer T & Takabvirwa K “Just crime? Violence, xenophobia and crime: discourse and practice” (2010) 33 *SA Crime Quarterly* 7-8.

interventions being implemented to combat xenophobia.⁵ It is therefore important to isolate and define what “xenophobia” is vis a vis other phenomena such as racism and related criminal behaviour, before commencing on further discussion on the topic.

This chapter therefore distinguishes xenophobia from other forms of related conduct such as assault, robberies and vandalism which are primarily driven by criminal motivations. The chapter’s main objective is to foster a deeper understanding of the phenomenon as it occurs in South Africa (SA) and also to examine the phenomenon’s history and underlying causes.

Distinguishing xenophobia from related concepts and conducting a background examination of the phenomenon are important first steps which will help the reader to make better sense of xenophobia and to correctly locate it in SA’s extended history of exclusion, apartheid and violence. Subsequent chapters will demonstrate how these factors continue to shape the concept of right to belonging, space and opportunities in today’s SA. The chapter further analyses the current prevalence of xenophobia in SA.

2.2 Definition of xenophobia

The word “xenophobia” is derived from the Greek words “xenos” and “phobos” which mean “strange” or “foreign” and or fear, respectively.⁶ The Merriam-

5 Misago J P, Freemantle & Landau “Protection from xenophobia: An evaluation of UNHCR’s Regional Office for Southern Africa’s xenophobia related programmes” (2015) 30.

6 Crush J & Ramachandran S “Xenophobia, international migration and human development” (2009) 1.

Webster online dictionary defines the term "xenophobia" as "fear and hatred of strangers or foreigners or of anything that is strange or foreign".⁷

Nyamjoh captures the definition of "xenophobia" in the South African context, by describing it as "the intense dislike, hatred or fear of others, who are foreign".⁸ He argues that "xenophobia" often encompasses some ethno-linguistic and cultural identifiers that form the basis of distrust and suspicion of the "other".⁹ Bordeau simply defines "xenophobia" as the irrational fear or distrust of foreigners or strangers.¹⁰

In the South African context, xenophobia is manifest in negative attitudes and perceptions together with accompanying acts of hostility, violence or discrimination against foreigners.¹¹ In SA, "xenophobia" presents certain distinct elements, including, a demonstrated fear or hatred of foreigners, accompanying violent actions and resultant loss of life and property.¹²

Harris argues that the term, "xenophobia", must be reframed to incorporate acts, manifestations or practices such as violence or physical abuse which normally accompany "dislike" or "fear" of foreigners.¹³ For Harris,

7 The Merriam Webster online dictionary <http://www.merriamwebster.com/dictionary/xenophobia> (accessed 14 Jan 2013).

8 Nyamnjoh F B *Insiders and outsiders: Citizenship and xenophobia in contemporary Southern Africa* (2006) 5.

9 As above.

10 Bordeau J *Xenophobia: The violence of fear and hate* (2010) 4.

11 Centre for Human Rights at the University of Pretoria (CHR) "The nature of South Africa's legal obligations to combat xenophobia" (2009) 80.

12 ACCORD "It's not just xenophobia: Factors that lead to violent attacks on foreigners in South Africa" (2011) 2.

13 Harris B "Xenophobia: A new pathology for a new South Africa?" in Hook D & Eagle G (eds) *Psychopathology and Social Prejudice* (2002) 170.

“xenophobia” broadly describes negative social perceptions of immigrants, refugees and migrants and the resultant violent actions against them.¹⁴ Although xenophobic violence mostly targets foreign nationals, it can also target nationals who are seen as being “foreign” to the area or are perceived, albeit incorrectly, to be from another country.¹⁵

For the purpose of this thesis, the widest possible meaning is attributed to “xenophobia”. This includes attitudes such as jealousy, fear, hatred, distrust, negative perceptions and manifestation through acts of discrimination or violence.

2.3 Xenophobia distinguished from racism

“Xenophobia” and “racism” are two closely related and, at times, mutually supporting forms of oppression.¹⁶ The two concepts are however quite distinct in that, while xenophobia mostly targets foreigners, racism expresses itself in entrenched prejudices and socially constructed notions of physical differences, which are singled out as ethnically significant, thus emphasising the superiority of one race over another.¹⁷

The South African Concise Oxford Dictionary defines “racism” as “the discrimination against or antagonism towards other races”.¹⁸ The World Conference on Racism, Racial Discrimination, Xenophobia and Related

14 As above.

15 Human Rights First “Combating xenophobic violence: Background document on xenophobic violence” (2011) 1.

16 Yakushko O “Xenophobia: understanding the roots and consequences of negative attitudes toward immigrants” (2009) 47-48.

17 As above.

18 *The South African Concise Oxford Dictionary* (2007) 962.

Intolerance¹⁹ adopted the following working distinction between xenophobia and racism:

Racism is an ideological construct that assigns a certain race or ethnic group to a position of power over others on the basis of physical and cultural attributes, as well as economic wealth, involving hierarchical relations where the 'superior' race exercises domination and control over others; Xenophobia describes attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.

Parallels can easily be drawn between "xenophobia" and "racism". In both phenomena, the "foreigner" or the "other" is viewed as a threat, discriminated against and excluded because of certain innate features such as race or origin.²⁰ In both phenomena, certain policies, for example, implementation of measures by states to tighten immigration controls, are likely outcomes.²¹ For Bordeaux, "xenophobia" differs from "racism" in that, "racism" is the belief that one's race is superior to another, while xenophobia, as explained above, is hatred of foreigners, motivated by their foreign-ness and based on fear.²²

19 The World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, SA, 31 Aug-8 Sep 2001. Additionally, art. 2 of the UN International Convention on the Elimination of Racial Discrimination defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

20 Adjai C & Lazaridis G "Migration, xenophobia and new racism in post-apartheid South Africa" (2013) 1 *International Journal of Social Science Studies* 192.

21 As above.

22 Bordeaux (n 10 above) 4.

In this context, a key difference between “xenophobia” and “racism” is that “racism” is an ideology with structural components.²³ For example, rules, laws, regulations and institutions are often formulated and created to reproduce racist ideology in institutions.²⁴ For xenophobia, certain government institutions like the police are used to exclude “the other”.²⁵

2.4 Distinction between acts of xenophobia and other forms of criminality

In many instances, actions inspired by xenophobia have been confused with, depicted as, or even treated in the same manner as other acts of criminality in SA.²⁶ This is perhaps because xenophobia is outwardly manifested, through criminal acts such as assault, threats, looting and vandalism of property, discrimination and group violence towards foreigners.

The Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand (Wits) warns that the nature of xenophobic violence witnessed in SA cannot be equated with organised crime.²⁷ This conclusion is arrived at by considering factors such as the primary motivation of attacks, the selective nature of the targets and victims and, the popular legitimacy of xenophobic attacks among the general population in the country.²⁸

23 Adjai & Lazaridis (n 20 above).

24 As above.

25 As above.

26 Hayem J “From May 2008 to 2011: Xenophobic violence and national subjectivity in South Africa” (2013) 39 *Journal of Southern African Studies* 78; & Monson T “Alibis for the state?: Producing knowledge and reproducing state borders after the May 2008 ‘xenophobic’ attacks in South Africa” (2012) 17 *Geopolitics* 445-481.

27 Misago J P, Monson T, Polzer T & Landau L “May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses” (2010) 10.

28 As above.

Experts have noted that the South African Police Service (SAPS), the key government institution that is involved in law enforcement, usually treats xenophobic attacks as normal acts of criminality and this has been found to hamper its prevention.²⁹

This trend of treating xenophobia as ordinary criminality is also evident in the following examples of statements by public leaders in SA: President Thabo Mbeki described the May 2008 countrywide xenophobic attacks across SA as “naked criminal activity” and “crimes of opportunity”.³⁰ In July 2010, the Minister of Police, Nathi Mthethwa, declared that “there is no such systematic thing as xenophobia in the country” and he blamed systemic attacks against foreign nationals on “criminality disguised as xenophobia”.³¹ In June 2011, a Zimbabwean man was stoned to death by residents of Polokwane in Limpopo, who also looted foreign-owned businesses. The Police spokesperson termed the attack “crime disguised under xenophobia”.³²

Polzer and Takabvirwa argue that describing xenophobic attacks or other forms of violence against foreign nationals as “crime” is sometimes empirically correct.³³ They posit that manifestations of xenophobia through murder, grievous bodily harm, arson, intimidation, incitement to commit violence, robbery and

29 Polzer T & Takabvirwa K “Just crime? Violence, xenophobia and crime: Discourse and practice” (2010) 33 *SA Crime Quarterly* 4.

30 The full statement by President Mbeki is available at <http://www.info.gov.za/speeches/2008/08070410451001.htm> (accessed 11 Jan 2014).

31 News24 “Xenophobia hysteria dismissed” (2010) article available at <http://m.news24.com/news24/SouthAfrica/News/Xenophobia-hysteria-dismissed-20100715> (accessed 27 Jan 2014).

32 Mail & Guardian “ANC Dithers on xenophobia” (2011) article available at <http://mg.co.za/article/2011-06-24-anc-dithers-on-xenophobia> (accessed 11 Aug 2013).

33 Polzer & Takabvirwa (n 29 above) 3.

looting are all against the law in SA. Therefore such actions are indeed “criminal”.³⁴

To them, the main distinction between crimes in general and xenophobic attacks is that xenophobic attacks are motivated by the fact that the victim is a foreigner and are condoned socially in SA. Criminal behaviour such as theft is not inspired by the victim’s nationality or foreignness and is socially unacceptable in the country.³⁵ Polzer *et al* allude to the reality that xenophobia is a complex mix of criminal conduct, negative attitudes and violent behaviour which is exacerbated by a myriad of factors. They posit thus:

There is not a one dimensional or indeed binary issue: Neither ‘just crime’ nor ‘just xenophobic attitudes’ is enough explanation for violence against foreigners in SA; a combination of attitudes, structural impunity, political mobilization, and, in some cases, short-term material gain, is at play...³⁶

Another angle to this discussion is advanced by Misago *et al*, who argue that xenophobic attacks, as with other hate crimes, should not be seen as isolated individual incidents, because they are “message crimes” intended to speak to the entire “hated group”.³⁷ In an attempt to find an appropriate meaning for xenophobia and its manifestation through attacks, Misago *et al* postulate as follows:

The [Xenophobic] attacks are meant to communicate to foreigners that they are unwelcome in a particular neighbourhood, community, school, or workplace, and serve a

34 As above.

35 Polzer & Takabvirwa (n 29 above) 7.

36 As above.

37 Misago J P, Landau L & Monson T *Towards tolerance, law and dignity: Addressing violence against foreign nationals in South Africa* (2009) 13.

threatening and warning function beyond the particular incident and those directly involved...³⁸

Maintaining that xenophobia and criminal activity are distinct does not deny that tackling crime could reduce xenophobic attacks. Polzer and Takabvirwa cite an example of this when, in July 2010, strong statements from the SAPS about “criminality” may have contributed to the prevention of violence against foreigners; since some potential perpetrators may not have wanted to be associated with “criminals”.³⁹

In summary, in this thesis, “xenophobic acts” refer to acts of criminality which are motivated by xenophobia. Common acts cited in this study include, but are not limited to, physical attacks, violence, looting, mistreatment, discrimination and targeted robberies.

This thesis focuses, as far as possible, on xenophobia targeting foreign nationals living in SA. Reference is made to Australia and other jurisdictions such as the state of Arizona in the United States of America (USA), Kenya and Egypt where relevant. The terms “foreigners”, “foreign nationals”, “migrants” or “immigrants” are used, sometimes interchangeably, to include “asylum seekers”, “refugees”, “migrant workers” and “foreigners” generally.

2.5 A brief history of xenophobia in SA

South Africa has an extended history of racial exclusion and violence, including political, criminal and xenophobic violence.⁴⁰ Experts opine that the reason as to

38 As above.

39 Misago *et al* (n 37 above) 8.

40 Misago *et al* (n 27 above) 21.

why this violence has morphed into the xenophobic attacks presently witnessed across the country is rooted in the country's history of immigration.⁴¹

Immigration is not a new phenomenon in SA; migrants from neighbouring African countries have been entering SA for decades, if not centuries.⁴² These migrants were traditionally received in SA and hosted in a welcoming and generous manner which allowed them to participate in the social and economic development of the nation. Indeed, much of SA's natural and mineral wealth has been produced on the backs of migrant mine workers.⁴³ Even the agriculture sector of SA, which is the largest in Africa, has for centuries, depended and blossomed on migrant labour.⁴⁴

For the past few decades, SA has been receiving refugees and migrant workers from various African countries.⁴⁵ In the 1980s, a large number of Mozambicans, uprooted by the civil war in their country, sought asylum and settled in SA. In the 1990s, a large number of asylum seekers originating from the conflict afflicted African nations of Nigeria, Angola, Somalia, Rwanda, Democratic Republic of Congo (DRC) and Burundi fled their countries and sought

41 Misago *et al* (n 27 above) 32.

42 International Organisation for Migration (IOM) "The effects of xenophobia on the integration of migrants in South Africa: An NGO perspective" (2012) available at <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-policy-and-research/migration-policy-1/migration-policy-practice/issues/august-september-2012/the-effects-of-xenophobia-on-the.html> (accessed 14 Jan 2014).

43 As above.

44 Bond P & Ngwane T "Xenophobia and civil society: Why did it happen?" Synthesis report: South African civil society and xenophobia (2010) 9.

45 As above.

asylum in SA.⁴⁶ Recently, SA has mostly received asylum seekers and other categories of migrants from Zimbabwe, Somalia and the DRC, in addition to those from other neighbouring African countries such as Malawi and Mozambique.⁴⁷

Presently, there are no accurate statistics on the exact number of asylum seekers, refugees or other migrants living in SA, but IOM estimates in 2012 put the number of migrants residing in the country at three million.⁴⁸ The UNHCR has documented 114,500 refugees and 798,000 asylum seekers living in SA in 2015.⁴⁹ A large number of foreigners living in SA are undocumented.⁵⁰

The influx of migrants and refugees that was witnessed in SA in the past few decades and the 1994 transition from an apartheid state to a democracy, are good points of departure from which to evaluate how an African society that historically generously received refugees, turned into a bastion of xenophobia, anti-immigrant violence and exclusion.

In 1994, SA attained democracy after decades of apartheid rule and racial discrimination. The country then enacted a new constitution⁵¹ which, by virtue of its generous human rights provisions is one of the most progressive constitutions in the modern world. The new Constitution introduced a raft of socio-economic

46 As above. For an updated breakdown of migrant populations living in SA, see UNHCR "Country operations profile South Africa" (2016) <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO> (accessed 14 Jan 2016).

47 McKnight J "Through the fear: A study of xenophobia in South Africa's refugee system" (2008) 2 *Journal of Identity and Migration Studies* 18-42.

48 IOM (n 42 above).

49 UNHCR (n 46 above).

50 As above.

51 The Constitution of the Republic of South Africa, 1996.

rights to be enjoyed by all those living within the borders of SA. These included the right of access to housing, clean water, healthcare and social assistance.

To enhance the realization of these socio-economic rights, the government of SA introduced the Reconstruction and Development Programme Socio-economic Policy Framework (RDP) in 1994. The early days of the RDP met with considerable success in providing housing, healthcare, clean water, electricity, social-assistance and infrastructure to many impoverished South Africans.⁵²

With a progressive constitution that anchored human rights protection, its borders open to all and a fast growing and dynamic economy, post-apartheid SA became attractive to migrants from Africa and beyond.⁵³ The harsh reality that migrants found in SA was that the democratic transition of 1994 did not eradicate inequality, poverty and insecurity.⁵⁴

From 1994 onwards, xenophobic sentiments against African migrants were nurtured and propagated through a sustained popular political rhetoric. Mangosuthu Buthelezi, who was the Minister of Home Affairs from 1994 to 2004, appears to have led this anti-immigrant crusade from the outset.⁵⁵ In August 1994, while addressing Parliament, Buthelezi stepped up anti-foreigner rhetoric when he publicly accused foreign nationals living in SA of receiving benefits from

52 Lodge T "The RDP: Delivery and Performance" in *Lodge T Politics in South Africa: From Mandela to Mbeki* (2003) 54-69.

53 Adjai & Lazaridis (n 20 above) 193; Dodson B "Gender and the brain drain" (2002) 23 *SAMP Migration Policy Series* 3; Landau L, Ramjathan-Keogh K; & Singh G "Xenophobia in South Africa and problems related to it" (2005) 2.

54 As above.

55 Crush J "A bad neighbour policy? Migrant labour and the new South Africa - Southern Africa Report" (1996) 3.

the RDP programme at the expense of South African nationals, thereby posing a direct threat to the success of the RDP and to the safety and security of all South Africans.⁵⁶ Buthelezi said:

If we South Africans are going to compete for scarce resources with millions of aliens who are pouring into SA, then we can bid goodbye to our RDP.... The employment of illegal migrants is unpatriotic because it deprives South Africans of jobs... the rising level of migrants has awesome implications for RDP as they will be absorbing unacceptable proportions of housing subsidies and adding to the difficulties we will be experiencing in healthcare...".⁵⁷

At the time, Buthelezi was the leader of the Inkatha Freedom Party (IFP), an influential opposition party, which had strong support in the Kwazulu Natal region. He was and remains an important opinion shaper in SA. Such an inflammatory statement would, at the very least, incite many South Africans to violence against foreign nationals.

The earliest documented incidents of violence against foreigners in SA took place in December 1994, barely months after Buthelezi's statements and shortly after the country's first democratic elections.⁵⁸ News reports detailed xenophobic attacks and the destruction caused by armed South African youths to foreign-owned property in Alexandra, Johannesburg.⁵⁹ The South African youths

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

57 HRW "Prohibited persons: Abuse of undocumented migrants, asylum-seekers, and refugees in South Africa" (1998) 1.

58 SAHRC "Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals" (2010) 21.

59 As above.

demanded that foreigners be removed from the area.⁶⁰ Similar attacks occurred throughout the country over the following decade.⁶¹

Minister Buthelezi's anti-immigrant rhetoric was aptly captured by Jonathan Crush in 1996, when he warned 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".⁶²

In addition to Buthelezi, some other South African politicians were also responsible for escalating anti-foreigner sentiments in the country. In 1997, the then Defence Minister, Joe Modise, made a well-publicised statement blaming migrants in SA for the spiralling crime rate in the country.⁶³ In the same year, Minister Buthelezi vehemently and publicly opposed the Southern African Development Community (SADC) ideology on free movement of goods and people in the region, declaring that it will "spell disaster" for SA.⁶⁴

At the same time, conservative South African academics and the local media perpetuated and intensified the hostile atmosphere against foreign nationals.⁶⁵ For example, the South African Human Sciences Research Council (HSRC) issued erroneous but highly inflammatory statistics, claiming that between five and eight million "impoverished foreigners" from African countries

60 As above.

61 As above.

62 Crush (n 55 above) 3.

63 "South African Defence Minister defends arms sales to Syria" London Al-Quds al-'Arabi 19 Nov 1997.

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

65 Danso R & McDonald DA "Writing xenophobia: Immigration and the press in post-apartheid South Africa" (2000) 17 *SAMP Migration Policy Series* 1.

had “swamped” SA. This served to provide scientific legitimacy to anti-immigrant crusaders.⁶⁶

In terms of institutional actions, the Home Affairs Ministry set up Aliens Control Units (ACU) across SA. Officials of these units were let loose on the streets and in workplaces to randomly arrest suspected foreign nationals , mainly on the basis of their vaccination cards, skin colour or even the way they pronounced words.⁶⁷

Experts suggest that the current xenophobia and general anti-immigrant attitudes in SA draw directly from the negative political rhetoric exemplified by Buthelezi and Modise’s anti-foreigner crusade from the 1990s.⁶⁸ In 1997, the Southern Africa Migration Project (SAMP) released the results of a nation-wide survey on the attitudes of South Africans to foreigners. The survey established that xenophobic attitudes were widespread, cutting across all races, income groups, age groups and educational groups.⁶⁹ South Africans were more hostile to foreigners than nationals of any other country for which comparable data was available.⁷⁰ More worrying to experts, the study established that anti-foreigner perceptions were worsening; South Africans were becoming increasingly intolerant of foreign nationals.⁷¹ Crush thus warned:

66 Crush J “Making up the numbers: Measuring illegal immigration to South Africa” (2001) 3 *SAMP Migration Policy Series* 17.

67 Crush J (ed) “The perfect storm: The realities of xenophobia in contemporary South Africa” (2008) 18.

68 Misago *et al* (n 27 above) 34.

69 Mattes R, Taylor D, McDonald D, Poore A & Richmond W “Still waiting for the barbarians, SA attitudes to immigrants and immigration” (1997) 7.

70 As above.

71 As above.

Facilitated by a decade of in-fighting on immigration policy, irresponsible political statements and an uncritical and xenophobic press, the cancer spread. At first, with some exceptions, it remained in the heads and words of South Africans. But when thought turned to action, xenophobic thugs discovered that they could act with virtual impunity. Increasingly their 'cause' became less random and took on the character (and eventual horror) of 'ethnic cleansing' campaigns in other parts of the world.

In 1998, the South African Human Rights Commission (SAHRC) noted that xenophobia was like a "blight" on SA's democratic values and that it needed to be eradicated.⁷² Indeed, from 1998 onwards, there were countless aggressive xenophobic attacks on foreigners across the country.⁷³ These attacks ranged from verbal insults to physical assault and killings. In 1998, three foreigners were brutally thrown off a moving train in Pretoria by a mob of South Africans returning from a protest on unemployment.⁷⁴

In 1999, the South Africa Broadcasting Corporation (SABC) reported that a total of 30 refugees had been killed in separate xenophobic attacks across the country.⁷⁵ In 2001, the Congress of South African Trade Unions (COSATU) declared that xenophobia had grown to "unacceptable proportions" in SA. It called on the government and civil society groups in the country to prioritise the fight against xenophobia.⁷⁶

72 SAHRC "Braamfontein statement on xenophobia" 15 Oct 1998. Full report is available at: <http://www.queensu.ca/samp/migrationresources/xenophobia/responses/sahrc2.htm> (accessed 26 Sep 2012).

73 Adjai & Lazaridis (n 20 above) 195.

74 Crush J "The dark side of democracy: Migration, xenophobia and human rights in South Africa" (2000) 38 *International Migration* 103-133.

75 SABC "Two way programme" of 29 January 2001 as cited in Adjai & Lazaridis (n 20 above) 195.

76 COSATU "Statement on xenophobia" 8 Feb 2001 available at <http://www.queensu.ca/samp/migrationresources/xenophobia/responses/cosatu.htm> (accessed 26 Sep 2013).

A SAMP xenophobia survey found South Africans to exhibit high levels of intolerance and hostility towards foreign nationals “unlike virtually anything seen in other parts of the world”.⁷⁷ An important but worrying indicator showed that South Africans were the least open to outsiders and wanted the severest restrictions on immigration when compared to other nations surveyed.⁷⁸

Another survey conducted in 2006 uncovered “pervasive xenophobic attitudes” amongst South African police officers.⁷⁹ This survey found that 78 percent of police officers sampled, believed that foreign nationals are involved in crime, regardless of their immigration status.⁸⁰ Around the same time, Loren Landau wrote that through the government’s populist, brutal and humiliating actions of roundups and deportation of foreigners living in poor neighbourhoods of the country, the state was fuelling xenophobic practices in the country, over which it was bound to lose control.⁸¹ Landau argued that government actions were bound to trigger or escalate xenophobic sentiments in the country.⁸²

Other triggers of xenophobia came from unlikely quarters. A 2009 report by the FSMP quoted the Director-General of Home Affairs, Billy Masetlha’s inflammatory statement against foreign nationals’ involvement in criminal activities in the following way: ⁸³

77 Crush (n 67 above) 1.

78 As above.

79 Misago *et al* (n 27 above) 35.

80 As above.

81 Landau L “Immigration and the state of exception: Security and sovereignty in East and Southern African” (2006) 34 *Journal of International Studies* 325.

82 As above.

83 Misago *et al* (n 37 above) 6.

Approximately 90 percent of foreign persons who are in RSA with fraudulent documents, i.e., either citizenship or migration documents, are involved in other crimes as well... it is quicker to charge these criminals for their false documentation and then to deport them than to pursue the long route in respect of the other crimes that are committed.

The 2007 African Peer Review Mechanism (APRM) report on SA criticised “growing xenophobic tendencies” in the country and noted that the phenomenon was on the rise.⁸⁴ The APRM noted that African foreigners were singled out for attacks, brutality and inhuman treatment motivated by xenophobia.⁸⁵ The South African government denied that xenophobia was a problem in the country and rejected the APRM report.⁸⁶ It however appears that the South African government ignored the warnings from the SAHRC and COSATU at the time, and did not move to root out xenophobia as both organizations demanded.⁸⁷

Xenophobic attacks escalated in 2006 and 2007.⁸⁸ For example, in 2007, over 100 Somalis were killed across SA.⁸⁹ Their businesses were also looted and burnt. In one incident, thirteen Somali shopkeepers were found murdered in their shops in a Township near Cape Town, nothing had been stolen from the shops.⁹⁰

84 African Peer Review Mechanism (APRM) *South Africa country review report No 5 Sep 2007*, par 956.

85 As above.

86 APRM (n 84 above) Appendix 2: Comments of the South African Government on the Report, par 103-5.

87 Crush (n 67 above) 20.

88 As above.

89 As above.

90 CoRMSA “Taking action on threats of xenophobic violence: Recommendations for the Inter-Ministerial Committee” (2010) available at <http://www.cormsa.org.za/2010/06/21/cormsa-submits-recommendations-on-xenophobic-violence-to-inter-ministerial-committee/> (accessed 14 Jan 2014).

In May 2008, nation-wide xenophobic violence broke out in SA, starting in Alexandria Township in Johannesburg. Refugees, asylum seekers, migrant workers and other categories of foreign nationals were attacked, killed, deprived of their property through looting and arson, sexually assaulted and many were uprooted from their communities and displaced. The SAHRC reported that 62 people were killed and over 100,000 were displaced. The material losses ran into millions of Rands.⁹¹

Crush has recently noted that hostile attitudes towards foreign nationals living in SA have continued to harden.⁹² Indeed as another expert concludes, hostility towards foreigners has become one of the most significant features of post-apartheid South African society.⁹³

2.6 Prevalence of xenophobia in contemporary SA

Many scholars consider SA to be one of the most xenophobic countries in the world.⁹⁴ Various sources of literature depict xenophobia as a deeply entrenched, on-going, and evolving phenomenon in SA which will continue to feature as an

91 According to the SAHRC, approximately 62 people were killed, over 100 000 were displaced and property worth millions of Rands was destroyed or looted. Available at: <http://www.sahrc.org.za/home/index.php?ipkArticleID=55> (accessed 10 Mar 2014).

92 Crush & Ramachandran (n 6 above) 15.

93 Sinclair M "I know a place that is softer than this... emerging migrant communities in South Africa" (1999) 37 *International Migration* 466.

94 For this conclusion, see Adjai & Lazaridis (n 20 above) 192; Dodson (n 53 above) 1; Landau L, Ramjathan-Keogh K & Singh G "Xenophobia in South Africa and problems related to it" (2005) 2; and generally, Steenkamp C "Xenophobia in South Africa: What does it say about trust?" (2009) 98 *The Round Table* 439-447.

important human rights issue in the country for the foreseeable future.⁹⁵ Experts have maintained that existing efforts and mechanisms have failed or been ineffectual in curbing xenophobic sentiments or preventing the recurrence of attacks in the country.⁹⁶ Various authors have cited empirical data to warn that xenophobic attacks are ongoing in the country and that negative attitudes towards foreigners are not improving. Several of these expert reports are highlighted in detail below.

According to Harris, a general climate of xenophobia prevails in SA, rendering foreigners perpetually vulnerable to exploitation and violence.⁹⁷ Harris argues that xenophobia is a socially located phenomenon in SA, which is also pathological.⁹⁸ Harris argues that SA has an historical and on-going pervasive culture of violence, which forms part of the norms in the country.⁹⁹ Harris argues that in SA, violence is a legitimate means to achieve goals, and is legitimised by most political role-players.¹⁰⁰

95 For this view see Adjai & Lazaridis (n 20 above) 192; Crush J, Ramachandran S & Pendleton W "Soft targets, xenophobia, public violence and changing attitudes to migrants in South Africa" (2013) 47; and generally, Steenkamp (n 94 above).

96 Landau L (ed) *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary South Africa* (2012) 234-235; & IOM (n 42 above).

97 Harris B "A foreign experience: Violence, crime and xenophobia during South Africa's transition" (2001) 5 *Violence and Transition Series* 9. In this research paper, Harris, a South African psychologist, concludes that corruption and xenophobic discrimination mark the institutional interface between foreigners and South African officials, especially the SAPS and Immigration officials.

98 Harris (n 13 above) 169-184.

99 As above.

100 As above.

In 2012, the Consortium for Refugees and Migrants in South Africa (CoRMSA) reported that SA “is nowhere close to addressing xenophobia”.¹⁰¹ It blamed widespread impunity among perpetrators, coupled with the lack of coordination amongst various actors fighting xenophobia in SA, for the recent escalation of the phenomenon.¹⁰² The CoRMSA warned that a pattern of xenophobic attacks in SA is evolving; attackers are now connecting legitimate anti-government service delivery protests with xenophobic attacks and violence.¹⁰³

In 2013, the Centre for Human Rights at the University of Pretoria (CHR) gave a damning indictment of the situation in SA regarding the fight against xenophobia.¹⁰⁴ The CHR emphasised that SA was losing the battle against the phenomenon:¹⁰⁵

The South African population has grown apathetic to these issues [of xenophobia] with little hope of them being addressed. Similarly, public actions seem to imply that the gravity of the situation is lost on us, despite the fact that xenophobic violence has been a pervasive part of our society since 2008.

The CHR further highlighted the fact that local media houses had failed to regularly investigate or report on the recurrent, country-wide xenophobic

101 IOM (n 42 above).

102 As above.

103 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” (2012) available at www.cormsa.org.za (accessed 8 Dec 2013).

104 See CHR “Multi-pronged response required to curb xenophobia in South Africa” (2013). For full press release, see <http://www1.chr.up.ac.za/index.php/centre-news-2013/1160-multi-pronged-response-required-to-curb-xenophobia-.html> (accessed 14 Jan 2014).

105 As above.

attacks.¹⁰⁶ It noted that the failure by the media to highlight cases of xenophobic attacks had only served to desensitise the public to the scale and impact of xenophobia in their country.¹⁰⁷

In a 2009 study on the nature of SA's legal obligations to combat xenophobia, the CHR established that the police and other law enforcement officials in the country are themselves xenophobic and this negated any meaningful measures that have been put in place to investigate and prosecute perpetrators of attacks.¹⁰⁸

Even if they could [investigate and prosecute perpetrators of xenophobic attacks], their personal circumstances in some instances made it impossible to achieve the objective. Interviews conducted concluded that many police agents exhibit very high levels of xenophobic attitudes, which obviously interfered with their objective assessment of the situation and, therefore, the manner of intervention. The state has failed in its duty to provide such legislative and other policing measures to curb the spread of xenophobia...¹⁰⁹

A serious consequence of the xenophobic attitude exhibited by law enforcement officials is that victims and foreign nationals generally, have lost faith in the pursuit of justice.¹¹⁰ The fact that the police and other law enforcement agencies are xenophobic or do not question the rationale of attacking foreign nationals demands a more practical and pragmatic response to the phenomenon. This means that in addition to enacting the right laws to combat xenophobia, other extra-legal measures carefully designed to win the

106 As above.

107 As above.

108 CHR (n 11 above) 78.

109 As above.

110 As above.

hearts of the perpetrators and change their attitudes are needed. Some of these interventions are discussed in the last chapter of the thesis.

In 2013, the SAMP released the shocking findings of an annual survey which found that South Africans remain amongst the most anti-foreign and xenophobic populations in the world.¹¹¹ The SAMP warned that:

Despite some positive shifts in recent years, South Africans remain amongst the most anti-foreign and xenophobic populations in the world. Across a wide range of variables, South Africans still display high levels of ignorance, intolerance and hostility. They feel threatened by the presence of migrants and refugees, want to deny them various basic rights and prefer draconian policy options such as electrifying all borders, requiring migrants to carry identity documents with them at all times and, forcing them to live in border camps...¹¹²

The SAMP report concluded that xenophobia is deeply entrenched in SA; that migrants will remain “soft targets” of xenophobic attacks in the near future because the police victimise and extort them rather than offer protection; that South Africans do not feel that migrants are entitled to the enjoyment of human rights in their country; and Ministers and other state officials continue to deny the existence of xenophobia in the country.¹¹³ This report clearly highlights a gap in the existing mechanisms and points to a need to continue further research and the search for solutions aimed at combating xenophobia in the country.

In June 2013, Landau wrote that “xenophobic demons” still linger in SA and that xenophobia has largely been displaced in public and political discourse,

111 Crush *et al* (n 95 above) 47.

112 As above.

113 Crush *et al* (n 95 above) 48.

by broader discussions on social cohesion.¹¹⁴ Landau argues that the prevalence of xenophobia in modern-day SA is largely due to the fact that voices against xenophobia and other non-racial forms of discrimination have remained overlooked or are overtly silenced in scholarly, popular, and political discourse in post-apartheid SA.¹¹⁵ In other words, actors in SA are focused on addressing other phenomena like racism which affects nationals. In 2012, Landau conceded that all efforts by various actors in SA to address xenophobic sentiments and manifestations through violent attacks on non-nationals have failed.¹¹⁶ He predicted that SA will continue to find itself conceptually and practically imprisoned by the *status quo*, which is characterised by xenophobia and violence against foreigners.¹¹⁷ He argued that widespread official *denialism* of xenophobia is the biggest challenge to combating the phenomenon in the country.¹¹⁸

Vorster notes that immigration into SA will continue in the near future, due to the continuation of triggering factors such as wars, human rights violations in some countries in the region, poverty, droughts, effects of climate change and etcetera, and this will result in increased incidents of xenophobic attacks in SA.¹¹⁹

Hayem warns of a potential for repetition of the May 2008 xenophobic violence if the South African government and other actors fail to take steps to

114 See generally Landau L "Xenophobic demons linger in SA" (2013) Mail & Guardian 17 May 2013. See <http://mg.co.za/article/2013-05-17-00-xenophobic-demons-linger-in-sa> (accessed 14 Jan 2014).

115 See, for instance Landau (n 96 above) 2.

116 Landau (n 96 above) 234-235.

117 As above.

118 Landau (n 96 above) 226.

119 Vorster J M "Racism, xenophobia and human rights" (2010) 54 *The Ecumenical Review* 1.

address xenophobia in the country.¹²⁰ She argues that the fact that perpetrators of the attacks go unpunished has exacerbated the phenomenon.¹²¹ Hayem further notes that the South African government has adopted a “policy of silence” towards xenophobia and does not contest the rationale of targeting and attacking non-nationals.¹²² She questions the government’s failure to highlight the positive role played by foreign expatriate professionals like doctors and engineers working in various sectors in SA and contributing positively to the country’s development.¹²³

Another expert, Neocosmos, argues that xenophobia is a part of SA’s new “political discourse” and an on-going “process of exclusion”.¹²⁴ He reasons that xenophobia is about the denial of social rights and entitlements to foreign nationals who are popularly perceived as “strangers”.¹²⁵

Kabwe-Segatti writes that recurrent xenophobic attacks are a “new paradox” in SA.¹²⁶ She argues that “despite the overall legal framework offering migrants in general, more rights and guarantees than ever before, their situation in terms of human rights’ abuses, economic and social rights and day-to-day interactions remains a source of concern”.¹²⁷ She opines that SA will continue to

120 Hayem J “From May 2008 to 2011: Xenophobic violence and national subjectivity in South Africa” (2013) 39 *Journal of Southern African Studies* 77.

121 Hayem (n 120 above) 78.

122 Hayem (n 120 above) 87.

123 Hayem (n 120 above) 89.

124 Neocosmos M *From foreign natives to native foreigners: Explaining xenophobia in post-apartheid South Africa* (2010) 15.

125 As above.

126 Kabwe-Segatti *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (2008) 33.

127 As above.

find it difficult to attract and keep qualified foreign skilled labour due to tensions related to xenophobia and other migration issues.¹²⁸

Even the former SA Minister for Home Affairs, Naledi Pandor, conceded in 2013 that existing legal safeguards, policies and other mechanisms have failed to achieve the aim of reducing xenophobic sentiments among the populace, to build tolerance between nationals and foreign nationals living in the country or to protect foreign nationals from xenophobic attacks and violence.¹²⁹ Pandor acknowledged that the poor rating that SA has consistently received from the African Peer Review Mechanism (APRM) regarding efforts to fight on-going xenophobia is an indication of the prevalence of the phenomenon in the country.¹³⁰ Such acknowledgement by state officials like Pandor is a positive indication, but we must wait to see if these pronouncements will translate into concrete action against xenophobia. In keeping with predictions from experts above, it is important to highlight that a wave of xenophobic violence and looting was underway in the Soweto Township of Johannesburg and across many other parts of SA when this thesis was concluded in March 2015. In these attacks, hundreds of foreign nationals were displaced and property amounting to millions of Rands looted or burnt down.¹³¹

128 As above.

129 Address by the then Minister of Home Affairs, Naledi Pandor, introducing the Home Affairs Budget Debate in the National Council of Provinces
<http://www.dha.gov.za/index.php/statements-speeches/188-address-by-minister-naledi-pandor-introducing-the-home-affairs-budget-vote-debate-in-the-ncop-28-may-2013> (accessed 14 Jan 2014).

130 As above. Also see South African Institute of International Affairs (SAIIA) "South Africa Report 2011: Implementing the APRM, views from the civil society" (2011) 58.

131 <http://southafrica.iom.int/iom-condemns-violence-soweto-alexandra-langlaagte-foreign-nationals/> (accessed 5 Feb 2015).

The key lesson we can learn from the expert analysis above is that xenophobia is a serious and ongoing human rights issue in SA. Only sustained, long-term, coordinated and pragmatic interventions are required to address the problem.

2.7 The profile of xenophobes

Successive studies have demonstrated that xenophobic attitudes pervade all economic, racial and educational strata of South African society. According to Polzer and Takabvira, South Africans from all walks of life espouse strong negative sentiments towards foreign nationals.¹³²

Crush argues that xenophobic attitudes in SA are so pervasive and widespread that it is actually impossible to identify any kind of "xenophobe profile" amongst the South African population.¹³³ In other words, the rich, poor, employed, unemployed, male, female, black, white, conservative and liberal, all express remarkably similar xenophobic attitudes.¹³⁴

Crush's view is further supported by the CoRMSA who, in 2012, argued that SA "is nowhere close to addressing xenophobia" and that "deep and persistent negative feelings against foreign nationals transcend race, class or gender".¹³⁵

In 2013, the SAMP released the findings of an annual survey which found that xenophobia is an on-going and evolving phenomenon in SA, which is deeply

132 Polzer & Takabvirwa (n 29 above) 6.

133 Crush (n 67 above) 4.

134 As above.

135 IOM (n 42 above).

entrenched in the country.¹³⁶ The findings highlighted that foreign nationals will remain “soft targets” of xenophobic attitudes and violence in the foreseeable future unless a solution is found.¹³⁷

According to a 2009 report on xenophobic attitudes in the Gauteng city-region, 69 percent of South African nationals living in the Gauteng city-region hold deep-seated xenophobic attitudes towards foreign nationals.¹³⁸ Even those that are well educated express similar attitudes.¹³⁹ The Gauteng City-Region Observatory Report (GCRO) states:¹⁴⁰

Education seemed to make little difference to pervasive xenophobic attitudes... 73% of those with tertiary education thought that foreigners were taking benefits meant for them; 75% of those with no education at all thought the same. This is a frightening finding, suggesting that we have done little or nothing to combat xenophobic attitudes across society since the violence of May 2008, which killed scores of foreign migrants.

While empirical studies have established that South Africans of all demographics are equally xenophobic towards all foreigners,¹⁴¹ physical and

136 Crush *et al* (n 95 above) 48.

137 As above. In concluding that foreign nationals living in SA are “soft targets”, Crush explains that the SAPS often victimize and extort foreign nationals affected by xenophobic violence, rather than offering protection to them; that South Africans do not feel that migrants are entitled to enjoyment of human rights, police and legal protection; and that Ministers and other senior state officials continue to ignore and deny the reality of xenophobia in SA.

138 Gauteng City-Region Observatory Report (GCRO) “Report on xenophobic attitudes” (2009) 1-2.

139 As above.

140 As above.

141 GCRO “City benchmarking quality of life survey 2013” (2014) 81; & Nyamnjoh F B *Insiders and outsiders: Citizenship and xenophobia in contemporary Southern Africa* (2006) 38.

verbal attacks are mostly perpetrated by Black South Africans against Black Africans.¹⁴²

2.8 Most targeted foreign nationalities

A SAMP xenophobia survey released in 2008 found that migrants from the Southern African Development Community (SADC) countries of Botswana, Lesotho and Swaziland are regarded in a more favourable light in SA than other African migrants.¹⁴³ Migrants from the rest of Africa are negatively perceived, with the most unpopular nationalities being Angolan, Somali and Nigerian.¹⁴⁴

From a global perspective, migrants from Europe and North America, who are generally White by race, are regarded more favourably in SA.¹⁴⁵ In conclusion, it is important to note that an overwhelming majority of South Africans have an unfavourable impression of foreigners regardless of their origins.¹⁴⁶ This is an indication that race is an important element in xenophobia.

2.9 Conclusion

This chapter has defined xenophobia both in the local and global context. The chapter has also distinguished xenophobia from racism and other criminal conduct such as assault, vandalism and robbery. While some parallels exist between xenophobic conduct and closely related phenomena, it is important to

142 Adjai & Lazaridis (n 20 above) 192; & Steenkamp (n 94 above) 442.

143 Crush (n 67 above) 4.

144 As above.

145 As above.

146 As above.

note that the concepts are distinct. This chapter has demonstrated the difference.

The chapter has further offered insight into the history of xenophobia as it has been experienced in post-apartheid SA. The chapter has highlighted many missteps which were made by various actors, including the state agencies, enabling the phenomenon to thrive, and these have been analysed in this chapter. The latter part of the chapter has analysed the consensus amongst experts and findings of empirical surveys, that xenophobia is highly prevalent in SA. This demonstrates that the phenomenon is an ongoing human rights issue in the country which requires pragmatic solutions.

An important revelation by this chapter is the increasing role of Black on Black racism as a factor of contemporary xenophobia in SA. Black African nationalities suffer most xenophobic discrimination and violence. In a bid to seek answers to such negative attitudes, the following chapter will focus on the main underlying causes of the phenomenon in SA, from both historical and contemporary perspectives. The impact of the phenomenon on the victims will also be analysed.

CHAPTER 3: HISTORICAL AND CONTEMPORARY EXPLANATIONS FOR XENOPHOBIA IN SOUTH AFRICA

3.1 Introduction

South African nationals exhibit high levels of xenophobic attitudes, especially towards African migrants, in what experts are now referring to as “afro-phobia” or “new racism”.¹ The root causes of these attitudes, and their manifestation through recurrent country-wide violence and attacks, lie in a complex mix of legal, political, cultural, economic and social factors.² For this reason, xenophobia should be understood within specific historical, cultural, economic and political contexts.

This chapter analyses key explanations for the prevalence of xenophobia in South Africa (SA) from an interdisciplinary perspective. The main focus is on the root causes of the phenomenon, both historical and contemporary. This inquiry is important because understanding the root causes of xenophobic intolerance is a critical step in formulating pragmatic interventions to the phenomenon at local and national levels.

The chapter also includes a brief analysis of the human rights impact on the victims of xenophobic attacks. The objective of this chapter is to enable the reader to appreciate the social, political and economic roots of the phenomenon

1 Adjai C & Lazaridis G “Migration, xenophobia and new racism in post-apartheid South Africa” (2013) 1 *International Journal of Social Science Studies* 192.

2 Dodson B “Locating xenophobia: Debate, discourse, and everyday experience in Cape Town, South Africa” (2010) 56 *Africa Today* 4.

as it is experienced in SA. Subsequent parts of the thesis will link the root causes of xenophobia with appropriate legal, socio-economic and political interventions.

3.2 The underlying historical causes of xenophobia in SA

As with occurrences of xenophobia elsewhere in the world, the fundamental causes of xenophobia in SA have their foundations in the nation's history and are layered with underlying historical and contemporary factors that have allowed for the escalation of violence and hatred towards foreigners.³

The causes of deep-seated xenophobic sentiments vary but, they revolve around the history of apartheid and racism in SA, fear of economic competition from foreigners, the belief that foreigners are inherently criminal and a drain on public resources and scapegoating of foreigners to justify failures of the system, among others.⁴

While some experts such as Jamie Bordeau, view xenophobia as a phenomenon caused by a wide range of varying factors,⁵ others, such as Neocosmos, Landau and McKnight, see specific causes and triggers based on the South African context. These divergent views are analysed in detail below.

3 As above.

4 Landau L, Ramjathan-Keogh K & Singh G "Xenophobia in South Africa and problems related to it" (2005) 2.

5 Jamie Bordeau's book *Xenophobia: The violence of fear and hate* analyses xenophobia as a global phenomenon. He identifies economic distress, increased nationalism and nativism and pressures related to immigration as the main causes of xenophobia in the contemporary world. See Bordeau J *Xenophobia: The violence of fear and hate* (2010) 4.

3.2.1 South Africa's history of apartheid, racism, exclusion and nationalism

Since its formation as the Union of South Africa in 1910, SA has been a deeply divided society where discrimination, legalised apartheid, racism and exclusion are firmly established in its political and social fabric.⁶ Successive governments entrenched racist ideologies and, from 1948 when the National Party took over power in the country, apartheid was the official government policy.⁷ Misago *et al* attribute the present-day culture of communal violence and xenophobia to apartheid era's brutal governance system, which they describe in the following words:⁸

During the Apartheid era, the threat of violence, whether 'vertical' [State against citizens] or 'horizontal' [citizens or rival political and social factions against each other], saturated the lives of South Africans residing in the volatile, tightly policed townships... The effects of this historical fabric can be seen in the recent xenophobic attacks, when violence was justified by reference to the politics of housing and employment allocation as well as defending access to 'our women', and where criminal opportunism in some cases masqueraded under the evidently more acceptable guise of anti-foreigner initiatives.

Shortly after democratization in 1994, SA was faced with the challenge of forging one nation out of a multi-cultural and multi-ethnic society. The nation focused on using citizenship as the key unifying force and means of achieving national identity.⁹ Foreigners and others who could not meet the criteria of citizenship were effectively excluded.¹⁰ Henceforth, citizenship became the main

6 Adjai & Lazaridis (n 1 above) 192.

7 As above.

8 Misago J P, Landau L & Monson T *Towards tolerance, law and dignity: Addressing violence against foreign nationals in South Africa* (2009) 10.

9 Adjai & Lazaridis (n 1 above) 194.

10 As above.

means of exclusion, as it drew boundaries between foreigners and nationals.¹¹ Since then, access to public resources as well as human rights in SA is popularly determined by the notion of citizenship.¹²

In the pre-1994 era, SA experienced international sanctions and isolation. Domestically, the apartheid government imposed strict pass laws on the black population, causing movement restrictions within the country.¹³ Morris argues that a combination of the two forms of restrictions effectively limited South Africans' ability to mix, accommodate one another or tolerate differences amongst themselves and between themselves and foreigners.¹⁴ Morris further points out that during the apartheid era, severe restrictions were imposed on immigration by Africans into SA, and this limited the number of black foreigners entering the country.¹⁵

In 1994, SA became a democracy, integrated into the international community and opened its borders to regional immigration. It ratified the SADC treaty, allowing for free movement of people and goods throughout the region. This brought many South Africans into direct contact with foreigners for the first time.

Since democratization in 1994, there has been a substantial increase in illegal and legal migration by Africans into SA.¹⁶ The interface between previously isolated South Africans and unknown foreigners created a space for hostility and

11 As above.

12 As above.

13 As above.

14 As above.

15 Morris A "Our fellow Africans make our lives hell: The lives of Congolese and Nigerians living in Johannesburg" (1998) 21 *Journal of Ethnic and Racial Studies* 1125.

16 As above.

xenophobia to develop. In this respect, Morris argues that when a group that has no history of incorporating strangers in its community is faced with an influx of migrants, it may find it difficult to be welcoming.¹⁷ Morris further opines that South Africans find difference threatening and dangerous and that xenophobia exists because of the very “foreign-ness” of foreigners.¹⁸

Several leading authors blame isolation brought about by strict pass laws and racial discrimination during the apartheid era in SA for the current hatred and hostility towards foreigners. Key among them is Landau, who argues that the prevailing discriminatory attitudes towards foreigners is likely to be a result of a mind-set inculcated into South Africans during the apartheid era of legalised racial categorization, political fragmentation, and isolation.¹⁹ Landau is of the opinion that as a long-time oppressed minority, black South Africans are now demonstrating their new-found political and economic power by discriminating against a still lesser category of people, the non-nationals.²⁰ He asserts that the apartheid government engineered and maintained a social system where every person was assigned inflexible racial or ethnic groups, which were then isolated and assigned rights exclusive to a geographically regulated area.²¹ This system has had an indelible effect on South Africans’ perception of how society should be organised; based on their territorial or ethnic origin.²²

Another author, McKnight, similarly attributes the high prevalence of xenophobia in SA to a historical culture of exclusion and racism in the country,

17 As above.

18 As above.

19 Landau L, Ramjathan-Keogh K & Singh G “Xenophobia in South Africa and problems related to it” (2005) 8.

20 As above.

21 As above.

22 As above.

going back to apartheid days.²³ He contends that discrimination and exclusion based on innate qualities like “foreignness” or racial differences have been prevalent throughout SA’s history.²⁴ McKnight cites the apartheid government’s use of strict pass laws and residence restrictions to limit the rights of black people, regardless of whether they were South African or migrants.²⁵

After the end of apartheid and the introduction of democracy in 1994, pass laws were annulled and everyone could reside and travel anywhere in the country, regardless of their colour.²⁶ With the introduction of these new freedoms, Black foreign nationals living in the country became disadvantaged, as immigration controls and legal visa restrictions were imposed on them but not on nationals.²⁷ McKnight maintains that this past history of legalised exclusion of certain groups and legalised racism through pass laws has provided a foundation for xenophobia to flourish, even after 1994.²⁸

Historic racism is being played out in SA today in a different form. Research by Crush concluded that xenophobia is currently propagated predominantly by Black South Africans and mostly targets black immigrants from

23 McKnight J “Through the fear: A study of xenophobia in South Africa’s refugee system” (2008) 2 *Journal of Identity and Migration Studies* 21.

24 As above.

25 As above.

26 As above.

27 As above.

28 As above.

African countries.²⁹ Xenophobia has therefore effectively replaced racism in the country, as the new way of excluding “others”.³⁰

Some studies show that certain Black African nationalities are more affected by xenophobia than others. A 2009 study by Neocosmos concluded that xenophobic discrimination in contemporary SA is overwhelmingly directed towards Black Africans with certain nationalities, for example, Nigerians and Mozambicans are singled out and stereotyped for illegal activities like drug-dealing and illegal immigration respectively.³¹ This study found that xenophobic exclusion, discrimination and “foreign status” are nowadays popularly conferred on the “crudest of racial stereotypes”- darker skin complexion.³² He further blames rampant xenophobia on “Afro-phobia”.³³ Therefore, in addition to its racist undertones, xenophobia is a discourse concerned with social, economic and political exclusion of foreign nationals from the life and matters of mainstream South African society.³⁴ Neocosmos posits:

Exclusion from the community means exclusion from the citizenship, its rights and duties, as it is the latter which defines community membership in particular... This exclusion is regularly seen as necessary for the existence of the community/nation in that the ‘other’ must be excluded for ‘we’ to be.³⁵

29 Crush J & Ramachandran S “Xenophobia, international migration and human development” (2009) 15.

30 As above. See also Nieftagodien N “Xenophobia’s local genesis: Historical constructions of insiders and the politics of exclusion in Alexandra Township” in Landau L (ed) *Exorcising the Demons Within: Xenophobia, violence and statecraft in contemporary South Africa* (2012) 109.

31 As above.

32 Neocosmos M *From foreign natives to native foreigners: Explaining xenophobia in post-apartheid South Africa* (2010) 15.

33 As above.

34 Neocosmos (n 32 above) 1.

35 As above.

While many authors have presented their views on racial exclusion and even afro-phobia as triggers of xenophobic sentiments, an important common denominator that appears to elicit xenophobic feelings in SA is the nationality of the victims. Even when “darker skinned” Black South African nationals are targeted, the key assumption by the attackers is that the victims are of foreign origin.

3.2.2 Institutionalised xenophobia dating back to the apartheid era

During apartheid times, South African state institutions used the idea of the “alien” or “foreigner” to exclude and deny both political rights and rights of residence and movement within the cities to “foreigners” who, at the time, included Black South Africans.³⁶ This institutional order served as an antecedent to the current socio-political configuration and as a precursor to the post-1994 South African state’s and citizens’ “discriminatory” approach to foreign nationals.³⁷

Even after 1994, human mobility continues to be seen by many in SA as a threat to the economic well-being of the country.³⁸ Misago *et al* provide the following interesting analogy to expound on this view:

Non-nationals are the functional equivalent of black South Africans two decades ago. The primary difference is that the citizenry is now SA’s black majority and the ‘aliens’ are, with notable and disturbing exceptions, people from beyond the country’s political boundaries...³⁹

36 Misago *et al* (n 8 above) 15.

37 As above.

38 Misago J P, Monson T, Polzer T & Landau L “May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses” (2010) 33.

39 As above.

Consequently, foreign nationals in SA have been turned into “violable aliens”, primarily through legal status and documentation, lack of access to constitutional protections available to nationals and related processes such as arrests, detention and deportations.⁴⁰

Xenophobic discrimination and exclusion have consequently been bureaucratically and socially institutionalised in important areas such as legal status, documentation and the general lack of access to constitutional protections.⁴¹ According to several experts, various government institutions are manned by officials who are themselves xenophobic towards foreign nationals and therefore support the community’s hostile attitudes towards foreign nationals.⁴² For example, a survey conducted in 2006 found that police officers in SA are extremely xenophobic, with 87 percent of the policemen sampled believing that all illegal immigrants are involved in some criminal activities in SA; 78 percent of those sampled believed that foreign nationals are involved in crime, regardless of their immigration status.⁴³ Even in the aftermath of the 2008 countrywide xenophobic attacks, the government has not implemented any systematic effort to hold those responsible for the violence accountable.⁴⁴

Many senior police officers are also opinion shapers in SA. The impact of institutionalised xenophobia in the SAPS and other arms of the public service is that it vindicates and fuels the pre-existing xenophobic sentiments within the general public and limits recourse options available to victims of attacks.⁴⁵

40 As above.

41 Misago *et al* (n 38 above) 15.

42 Misago *et al* (n 38 above) 3.

43 Misago *et al* (n 38 above) 35.

44 Misago *et al* (n 38 above) 3.

45 Misago *et al* (n 38 above) 35.

Consequently, Africans seeking safe asylum or other opportunities in today's SA end up becoming *racialised* targets for exclusion and xenophobic violence as soon as they enter and settle in the country.⁴⁶

3.2.3 History of vigilantism in SA

Xenophobia's manifestation in contemporary SA ranges from passive discriminatory attitudes to harassment and overt forms of interpersonal and collective violence against foreign nationals. Typically, when xenophobic violence breaks out, groups of South African nationals mobilise and attack businesses or residences of foreign nationals. This mob violence is what often results in looting, lynching and destruction of property.

Prior to 1994, community justice in SA was meted out through People's Courts or Disciplinary Committees which operated as "kangaroo courts".⁴⁷ Even after 1994, the Black South African community continued to support local security initiatives and community justice in the form of community vigilante groups.⁴⁸ Thus, crime fighting vigilantes and organised "security" groups are common in South Africa's townships.⁴⁹

The work of vigilante groups in fighting crime is popularly perceived as a stop-gap measure to address security in the townships in the light of failing policing and justice systems which are often perceived to protect criminals.⁵⁰ Attacks against foreign nationals or "criminals" are therefore widely supported as

46 Adjai & Lazaridis (n 1 above) 194.

47 Misago *et al* (n 38 above) 28.

48 As above.

49 As above.

50 As above.

a mechanism for community self-protection.⁵¹ Vigilantism has the benefit of instituting instant justice, often through extortion and compensation to the aggrieved.⁵² This history of vigilantism, coupled with endemic prejudice, rampant impunity and expedient political scapegoating against foreign nationals as criminals, present a cocktail of factors that ultimately result in targeting of and attacks against, foreign nationals in various parts of the country.⁵³

3.2.4 Culture of impunity and violence in the townships and informal settlements

South Africa's townships have historically been subjected to social and economic disadvantage, repressive policing and criminal predation by successive governments, leading to a predictable recourse to violence, vigilantism and high levels of impunity for criminal conduct within the townships.⁵⁴ Violent crime has thus been a feature of life in South Africa's townships since their inception at the beginning of the last century.⁵⁵

The South African Human Rights Commission (SAHRC) has pointed out that the major cause of xenophobia in SA is the lack of rule of law and the reign of impunity in the informal settlements and townships across the country.⁵⁶ According to the SAHRC report released after investigations into the 2008 xenophobic violence in most townships in SA, impunity "reigns" and the rule of

51 As above.

52 Misago *et al* (n 38 above) 29.

53 Misago *et al* (n 38 above) 35.

54 As above.

55 Misago *et al* (n 38 above) 26.

56 SAHRC "Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals" (2010) 8.

law “barely exists”.⁵⁷ In its report, the SAHRC further highlighted the fact that the perpetrators of the 2008 xenophobic violence acted with impunity and that most government officials did not understand human rights provisions in the Constitution and consequently ended up treating foreign nationals with impunity and xenophobia.⁵⁸

Some authorities have echoed the views of the SAHRC above. For example, Hamber and Lewis argue that violence is the norm and a pervasive part of SA’s social fabric.⁵⁹ They contend that South African society endorses and accepts violence as an acceptable and legitimate means to resolve problems and achieve goals.⁶⁰ Hamber and Lewis also trace the foundations of this pervasive culture of violence to the apartheid era, when violence was sanctioned across the political and social spectrum in the country.⁶¹ Misago *et al*/connect this pervasive culture of violence and the prevalent culture of impunity in SA’s townships to the perpetual xenophobic violence in the country thus:

A culture of impunity with regard to public violence in general and xenophobic violence in particular encourages the ill-intentioned to attack non-nationals and other outsiders for personal and/or political gain.⁶²

Bond and Ngwane blame repetitive violence against foreigners on a long history of dispossession, legalised racism and violence which has since generated

57 As above.

58 As above.

59 Hamber B & Lewis S *An Overview of the consequences of violence and trauma in South Africa* (1997) ch 1.

60 As above.

61 As above.

62 Misago *et al* (n 38 above) 178.

a “national psyche”. This has now become the norm and resorting to brutal force is a common problem-solving strategy in SA.⁶³ They state that:

Structural causes were simply not addressed and the terrain on which xenophobic ideas can grow into threatening forms of action is relatively undisturbed, ready to again seed very dangerous weeds of violence.⁶⁴

Further, as noted above, during the apartheid era, various forms of violence saturated the lives of South Africans residing in the volatile, tightly policed townships. This violence was in the form of state against citizens or citizens against fellow citizens.⁶⁵ After the end of apartheid in 1994, SA became a democratic state, the violence transformed and horizontal violence dominated.⁶⁶ The legacy of this culture of violence continues to form part of the norms of South African society.⁶⁷ The “normalisation” of societal violence in SA, coupled with prevailing attitudes result in “intense tension and violence by South Africans towards immigrants”.⁶⁸

It is against this background that a 2009 report by the Centre for Human Rights at the University of Pretoria (CHR) concludes that xenophobia is an on-going phenomenon in SA for which legal and extra-legal preventative measures are required.⁶⁹ An important finding of this report was that high levels of

63 Bond P & Ngwane T “Xenophobia and civil society: Why did it happen?” Synthesis report: South African civil society and xenophobia (2010) 7.

64 As above.

65 Hamber B “Have no doubt it is fear in the land: An exploration of the continuing cycles of violence in South Africa” (1999) 12 *South African Journal of Child and Adolescent Mental Health* 5-18.

66 As above.

67 As above.

68 Tshitereke C “Xenophobia and relative deprivation” (1999) 4.

69 CHR “The nature of South Africa’s legal obligations to combat xenophobia” (2009) 114.

impunity exist amongst perpetrators of xenophobic attacks across SA. The CHR attributes these high levels of impunity to the absence of a specific law to prosecute offenses related to xenophobia.⁷⁰

Polzer and Takabvirwa support the CHR's findings. They cite the fact that even though some perpetrators of the May 2008 xenophobic attacks were arrested and even convicted, the public perception of judicial impunity towards attacks on foreign nationals remains.⁷¹ The CHR attributes the persistence of this impunity to lack of specific laws targeting the phenomenon and the laxity of the judicial system in applying existing criminal laws to punish or deter xenophobia-related offenses.

3.3 Socio-economic causes of xenophobia

In addition to legal, institutional and historical factors such as apartheid, socio-economic dynamics are another important explanation for the prevailing xenophobia in SA. Empirical studies have shown that the xenophobic attacks of May 2008 were mainly located in parts of cities characterised by shack settlements, high levels of poverty and unemployment, overcrowding, deteriorating services and competition for scarce resources.⁷²

Several empirical studies have established that socio-economic deprivation is a major cause of hostility towards foreigners living in SA. In this respect, independent research by Morris,⁷³ McKnight,⁷⁴ and the International Organisation

70 CHR (n 69 above) 78.

71 Polzer T & Takabvirwa K "Just crime? Violence, xenophobia and crime: Discourse and practice" SA (2010) 33 *SA Crime Quarterly* 6.

72 Silverman M & Zack T "Housing delivery, the urban crisis and xenophobia" in *Go home or die here: Violence, xenophobia and the reinvention of difference in South Africa* (2008) 147.

73 Morris (n 15 above) 1116-1136.

for Migration (IOM)⁷⁵ in different parts of SA concluded that a major cause of deep-seated xenophobic sentiments in SA is the fact that foreigners are perceived as a threat to SA jobs, housing, education, healthcare and other economic benefits. These views point to socio-economic deprivation as a main cause of xenophobic sentiments and are assessed in detail below.

3.3.1 Poor socio-economic situation of Black South Africans

The socio-economic impact of the apartheid system on Black South African nationals is still evident in contemporary South African society. Millions of South African Blacks remain poor, unemployed and live in shacks surrounding urban areas. Indeed, in 2013, around 25 percent of SA's working population was unemployed.⁷⁶

In terms of healthcare challenges, SA is home to the world's largest HIV/AIDs population living in a single country.⁷⁷ Illiteracy rates are high, it is estimated that around 24 percent of adults over fifteen years of age, that is about six to eight million adults, are illiterate.⁷⁸

74 McKnight (n 23 above) 21.

75 Misago *et al* (n 38 above) 15.

76 Statistics South Africa "Statistical Release P0211; Quarterly labour force survey, Q3 of 2013" (2013) iv, available at <http://beta2.statssa.gov.za/publications/P0211/P02113rdQuarter2013.pdf> (accessed 23 Jan 2014).

77 Central Intelligence Agency (CIA) "The world fact book" (2014), available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2155rank.html> (accessed 30 Jan 2014). The CIA notes that with a prevalence rate of 17.8%, SA has the largest population of people living with HIV/Aids in the world.

78 Adjai & Lazaridis (n 1 above) 193.

Educational disparities based on race are stark: While approximately 65 percent of Whites and 40 percent of Indians of 20 years of age and above have a high school or higher qualification, only fourteen percent of Blacks and seventeen percent of coloureds have similar educational qualifications.⁷⁹ At the present time, unemployment, crime rates and the gap between rich and poor are all increasing, fuelling social tensions.⁸⁰

One of the main explanations for xenophobia in SA and globally is that foreigners are a burden or competition to citizen's access to services like healthcare, employment and other social services in communities they migrate to.⁸¹ Landau argues that with SA's high unemployment and poverty rates, it is inevitable that there will be resentment towards foreign nationals who have the potential to either fill available jobs or push down the price of labour for those who are working. He posits:⁸²

That many non-nationals are, in fact, better trained, more experienced, and willing to work for lower wages than the South Africans with whom they compete, provides some empirical justification for such sentiments.

Landau's argument is supported by Harris who expresses the view that the poor socio-economic situation among Black South Africans has contributed to their hostile attitudes towards Black African migrants and other foreigners living in their country.⁸³ Landau attributes this antipathy to competition for scarce

79 As above.

80 As above.

81 Landau *et al* (n 19 above) 6.

82 As above.

83 Harris B "Xenophobia: A new pathology for a new South Africa?" in Hook D & Eagle G (eds) *Psychopathology and Social Prejudice* (2002) 12.

resources such as employment opportunities, housing, health services and education.⁸⁴

Even with the transition to democracy in 1994, security, poverty and inequality levels have not improved significantly and this has fuelled frustration in South African society.⁸⁵ Landau argues that the optimism and hope for a better life under a black government in a democratic SA seems to have diminished; indeed, many South African nationals experience greater economic insecurity than they did during the apartheid era.⁸⁶ Given this school of thought, xenophobia becomes a tool to express disillusionment regarding government's inability to deliver, and the "other" become the target of frustrations.⁸⁷

3.3.2 Economic competition between nationals and foreigners and the consequent perceptions

The competition for scarce resources between poor South Africans and foreign nationals living in the townships and informal settlements is an important explanation for the persistent xenophobic sentiments in the country. A baseline survey conducted by the IOM and the Forced Migration Studies Programme at the Wits (FMSP) in 2009 established a close relationship between the prevalence of xenophobic sentiments and economic competition between nationals and foreigners running businesses in the various townships of SA.⁸⁸ This survey found there were existing socio-economic tensions, jealousy by nationals towards successful foreign small business owners, high levels of impunity,

84 As above.

85 McKnight (n 23 above) 21.

86 Landau L "Attacks on foreigners in South Africa: More than just xenophobia?" (2009) 5.

87 Adjai & Lazaridis (n 1 above) 194.

88 Misago J P, Landau L & Monson T *Towards tolerance, law and dignity: Addressing violence against foreign nationals in South Africa* (2009) 3-8.

institutionalised discrimination against foreigners, and high levels of vigilantism in the townships which might easily lead to a fresh country-wide outbreak of xenophobic attacks if the underlying factors that trigger xenophobia are not urgently addressed.⁸⁹

In the case of SA, foreign national groups such as Somalis and Ethiopians are running thriving businesses in Townships, and are therefore perceived to be taking customers from South African competitors. Foreigners are thus stereotyped to be taking customers and work opportunities meant for nationals. In an empirical study conducted by the FMSP in 2010, most South African respondents identified the presence of foreign nationals in their communities as the primary cause of challenges to their economic well-being and as a trigger to their antipathy towards them.⁹⁰ The South African nationals who participated in this survey cited the ability of non-nationals to work and flourish in business activities in their communities as the reason for this hostility.⁹¹ Some respondents also mentioned their perception that foreign nationals are involved in criminal activity and their role as “disease carriers”, among others, as the main source of their anti-immigrant prejudice and revulsion.⁹²

Competition for space and housing services in SA’s Townships has also been identified as a major contributor to locals’ hostile behaviour towards foreign nationals. According to a report released by the Human Sciences Research Council of South Africa (HSRC) in the aftermath of the 2008 xenophobic violence, the occupation of state-provided houses by foreign nationals was one of the most important triggers of xenophobic sentiments and even violence, in a

89 Misago *et al* (n 88 above) 3.

90 Misago *et al* (n 38 above) 36.

91 As above.

92 As above.

number of Townships and informal settlements in the country.⁹³ The study indeed found that some foreign nationals had acquired access to RDP housing in the Townships by renting or buying from SA nationals who were beneficiaries, or through corruption.⁹⁴

Black, African, foreign nationals living with Black South Africans in the Townships or informal settlement communities often run profitable businesses, appearing to outmanoeuvre businesses owned by South Africans.⁹⁵ Consequently, foreigners have become scapegoats, often blamed for the failure of businesses owned by locals and, by extension, a target to blame for increasing poverty and deprivation in SA.⁹⁶

Empirical studies have also found that in many cases, xenophobic violence is organised by South African business owners, intent on eliminating foreign competitors.⁹⁷ Studies by Morris,⁹⁸ McKnight,⁹⁹ and the IOM¹⁰⁰ concur that foreigners living in SA are seen as a threat to scarce social services including housing, healthcare, jobs and education. According to Morris, a majority group that is living in a perilous economic position is likely to feel threatened by minorities, especially if the minorities are foreign, and this may lead to xenophobia and violence.¹⁰¹

93 HSRC "Violence and xenophobia in South Africa: Developing consensus, moving to action" (2008) 26.

94 As above.

95 As above.

96 As above.

97 Misago *et al* (n 8 above) 2.

98 Morris (n 15 above) 1116-1136.

99 McKnight (n 23 above) 21.

100 Misago *et al* (n 8 above) 15.

101 Morris (n 15 above) 1125.

The above position has been established to be true through empirical studies. In a 2009 survey conducted in various municipalities throughout SA, there was near unanimity of perceptions by South Africans that foreign nationals take resources away from them:¹⁰²

Residents in some municipalities show particularly high levels of agreement with the notion of foreigners taking resources away from South Africans... The highest scores were in Mogale City, where nearly 8 in 10 respondents (80%) agreed with the statement put to them. The next highest scores were found in Lesedi (73%) and Kungwini (72%). Residents in the larger and wealthier municipal areas, where jobs and resources are concentrated, display only slightly lower levels of xenophobia, with 70% of Johannesburg, 69% of Tshwane and 69% of Ekurhuleni residents agreeing that foreigners were taking things away from them.

Other empirical studies have established that employment of foreign nationals in certain sectors in SA is an important issue that motivates nationals to be xenophobic towards them.¹⁰³ In a survey carried out on the East Rand area near Johannesburg, researchers found that immigrants were specifically resented because of their better education and higher qualifications which gave them an edge in a competitive job market.¹⁰⁴

A 2008 survey of 2000 South African nationals in Johannesburg established that the main reason for their xenophobic attitudes towards foreigners was that qualified foreigners had been accepting employment at lower

102 Gauteng City-Region Observatory Report (GCRO) "Report on xenophobic attitudes" (2009) 1. Findings by this GCRO that business tensions between foreigners and South Africans exist were further supported in 2015, when SA's Small Business Development Minister Lindiwe Zulu appeared to attribute then on-going xenophobic attacks in Soweto to foreigners "barricading themselves and not sharing business ideas and practices with locals". See "Zulu urges foreigners to share trade secrets" Dispatch Live 29 Jan 2015.

103 Bond & Ngwane (n 63 above) 3.

104 Bond & Ngwane (n 63 above) 7.

salaries than their national counterparts.¹⁰⁵ South Africans generally believe that every job given to a foreign national translates to one less job for a citizen; this view is exacerbated by high unemployment rates.¹⁰⁶

Ironically, the supposed “economic threat” posed by foreign nationals is not based on empirical evidence. The Southern Africa Migration Project (SAMP) released results of a national xenophobia survey in 2008 in which over two-thirds of respondents indicated that they did not know anyone who had lost a job to a foreigner.¹⁰⁷ Indeed, foreign nationals have been empirically proven to create jobs for South Africans by employing them in their businesses or renting business premises from nationals.¹⁰⁸

As a way to redress poverty, lack of skills and unemployment in South African communities, it is plausible to say that empowering South Africans with skills that would enable them to compete with foreign business owners at the lower and informal levels would remove the economic threat and reduce xenophobia and organised attacks in townships and informal settlements.¹⁰⁹ This suggestion reinforces the reality that economic deprivation amongst South Africans is a major contributor to their hostility towards foreigners who excel in business ventures in their communities.

105 Plus94 “Xenophobic violence: Causes and impact” cited in Bond & Ngwane (n 63 above) 4.

106 ACCORD “It’s not just xenophobia: Factors that lead to violent attacks on foreigners in South Africa” (2011) 3.

107 Crush J (ed) “The perfect storm: The realities of xenophobia in contemporary South Africa” (2008) 4.

108 Black R, Crush J, Peberdy S *Migration and development in Africa: An overview* (2006) 117.

109 This idea is shaped by a conversation I had with Prof Loren Landau of the Wits 12 Feb 2014. Prof Landau was of the opinion that since economic competition is a major trigger of xenophobia, empowering South African nationals with skills would reduce the threat posed by more experienced foreign businessmen and reduce the existing antipathy towards them.

3.4 Pathological explanations for xenophobia in SA

There is evidence suggesting that xenophobia is a pathological phenomenon, with roots in SA's culture. Brownwyn Harris, a South African psychologist based at the Wits, blames the high prevalence of xenophobia in SA on "a general climate of xenophobia" which has prevailed in the country since, at least, 1994.¹¹⁰ Harris argues that xenophobia is both a socially located phenomenon in SA and one which is also pathological.¹¹¹ She further notes that institutional interaction between foreigners and South African officials working in the South African Police Service (SAPS) and immigration is mostly characterised by discrimination, corruption and xenophobia.¹¹² She argues that the phenomenon has roots in a historical culture of violence, which forms part of the norms of the country.¹¹³

Harris groups pathological explanations for xenophobia in SA into three independent hypotheses, namely, "the scapegoating hypothesis", "the isolation hypothesis", and "the bio-cultural hypothesis". These three hypotheses are explained in detail below.

3.4.1 Scape-goating hypothesis

Under the "scapegoating hypothesis", Harris locates xenophobia within the context of social transition and change. Foreigners are seen as "scapegoats", blamed for all economic and social ills as well as personal frustrations in contemporary SA.¹¹⁴ For example, in 1994, the then Minister for Home Affairs,

110 Harris (n 83 above) 9.

111 Harris (n 83 above) 169-184.

112 As above.

113 As above.

114 As above.

Mangosuthu Buthelezi, blamed “millions of aliens that were pouring into SA” for competing for scarce resources with nationals, and accused them of derailing the RDP programme that the government was implementing.¹¹⁵ This had the effect of inflaming relations between nationals and foreigners and escalating pre-existing prejudice and xenophobia.¹¹⁶

It is important to note that some other experts agree with Harris hypothesis. Tshitereke uses the “scapegoating hypothesis” to explain xenophobia in terms of broad social and economic factors. By being a threat to jobs, housing, education and healthcare, foreign nationals are a perfect “frustration-scapegoat”.¹¹⁷ Tshitereke further argues that there is a causal link between relative deprivation, xenophobia and collective violence.¹¹⁸ He posits that the rampant hostility exhibited towards foreigners is as a result of limited resources, such as health, housing and employment opportunities, coupled with the high expectations created among nationals when a Black government took over SA after the collapse of apartheid.¹¹⁹

It is important to note that a subjective feeling of discontent by South Africans, based on the belief that they are getting less than they are entitled to and blaming this deprivation on the presence of foreign nationals in their communities, results in frustration and a feeling of relative deprivation. People release their anger on the “frustration-scapegoat”, usually non-national minorities, through violent attacks.¹²⁰ Neocosmos supports Tshitereke’s and Harris’s view above. He reasons that xenophobia in SA is closely linked to the

115 Misago *et al* (n 38 above) 35.

116 As above.

117 Tshitereke (n 68 above) 4.

118 As above.

119 As above.

120 As above.

denial of social rights and perceived entitlements to foreign nationals, who are viewed as “strangers” by nationals.¹²¹

In conclusion, the collective scapegoating of foreign nationals as the cause of deprivation in SA’s poor communities has the effect of magnifying prejudice against them, creating challenges for them to overcome prejudice in the future.

3.4.2 Isolation hypothesis

The “scapegoating hypothesis” as discussed above, does not explain why only foreigners, and no other social groups living in SA such as social, ethnic or racial minorities, are singled out as the scapegoats of social and economic deprivation in the country. One of the apartheid era’s enduring legacies is the isolation it created in the South African population. The “isolation hypothesis” understands xenophobia in relation to the external and internal seclusion that SA and its people underwent in the brutal environment created by apartheid.¹²² Foreigners were the “unknown” to South Africans.

In 1994, the borders of the country opened up and migrants entered SA in large numbers, bringing South Africans in direct contact with the “unknown” for the first time. This created a space within which suspicion, hostility and xenophobia could flourish.¹²³

It follows then that if a group, such as South Africans, does not have a history of interacting with the outside world and incorporating strangers, it will

121 Neocosmos (n 32 above) 16.

122 Harris (n 83 above) 4.

123 As above.

find it difficult to recognise the opportunities presented by welcoming foreigners.”¹²⁴ This creates a perfect environment for xenophobic sentiments to emerge and thrive as it has in SA. Hence, the difference, or foreignness, engendered by foreigners’ accounts for the xenophobia, violence and hostility meted out to them by South African nationals.¹²⁵

“Past isolation” in SA which leads to xenophobia today should therefore be seen in the same light as the “change and rapid social transformation” that is resulting in xenophobic sentiments in, for instance, conservative European societies.¹²⁶ It is therefore important to appreciate this link, between the isolation that the people of SA experienced in the apartheid days and the ongoing “correction” presented by immigration and influxes of refugees and asylum seekers into local communities in the post-apartheid era.

3.4.3 Bio-cultural hypothesis

The “bio-cultural hypothesis” locates xenophobia at the level of visible difference, or otherness. This is often seen in terms of physical, biological factors and cultural differences exhibited by African foreigners in SA.

Experts have revealed that xenophobia in SA is not directed equally towards all foreigners. Some foreigners are at greater risk than others.¹²⁷ On several occasions, darker-skinned “foreign-looking” Black South African nationals have also been targeted and attacked, while lighter skinned “non-foreign-

124 ACCORD (n 106 above) 4.

125 As above.

126 As above.

127 Harris (n 83 above) 5.

looking”, undocumented foreigners might go undetected.¹²⁸ This perhaps explains the finding that of the 62 people killed during the 2008 xenophobic violence in the country, 21 of them were South African nationals.¹²⁹

A recent example to support this bio-cultural hypothesis on skin-complexion profiling and its relationship to xenophobia came to the fore in December 2013, in an incident involving Tumelo Mboweni, the son of The AngloGold Ashanti chairman and former South African Reserve Bank governor Tito Mboweni. Tumelo was pulled out of a minibus taxi in Sandton, Gauteng, by police on suspicion that he was a foreigner, due to his dark-skinned complexion.¹³⁰ He was then arrested, detained and threatened with “deportation” by policemen who believed he was a foreigner.

As in Tumelo Mboweni’s case above, Somali, Congolese and Nigerian nationals living in SA are easily identifiable to the South African public and to the police by their skin complexion, race and other inert physical features. It is not surprising then that they make up the majority of victims of harassment, discrimination and xenophobic attacks in the country over the years.¹³¹

3.5 The underlying contemporary causes of xenophobia in SA

There are many contemporary factors which contribute to the perpetuation of xenophobia in SA at the present time. Crush sees political and moral failures as important elements and posits that:

128 As above.

129 Misago *et al* (n 38 above) 2.

130 “Tito’s son held for being too dark” IOL News 30 Dec 2013; available at <http://www.iol.co.za/news/crime-courts/tito-s-son-held-for-being-too-dark-1.1627323#.UubHQdL8K71> (accessed 14 Jan 2014).

131 As above.

There has been both a political and a moral failure in SA. Morally, South Africans have let themselves down by tending and nurturing xenophobia while engaging in rounds of hearty self-congratulation about their constitution, their deep respect for human rights and their leadership role in Africa and the world...¹³²

3.5.1 Legal *lacuna*: There is no law tailored to fight xenophobia

South Africa lacks a specific law to prosecute xenophobia and other prejudice motivated crimes.¹³³ When foreigners are killed or have their property looted in xenophobia-related attacks, the perpetrators are usually prosecuted under the country's general criminal law.¹³⁴ The failure to promulgate a specific law to address xenophobia and other hate crimes hampers the fight for its eradication,¹³⁵ and promotes a deep-seated sense of impunity amongst perpetrators of attacks on foreigners.¹³⁶ It also clouds the parameters of justice for law enforcers confronted by reports of xenophobia-motivated crimes and other hate crimes.¹³⁷ Muchiri opines that the lack of an official hate crime monitoring and reporting mechanism clouds and often conceals the magnitude of the problem in SA. He posits:¹³⁸

The country [SA] lacks a publicised, official hate crime monitoring and reporting mechanism which could be utilised to collect data on violent hate crimes or that

132 Crush (n 107 above) 7.

133 CHR (n 69 above) 78.

134 As above.

135 Breen D & Neil J "The need for hate crime legislation" (2011) 38 *SA Crime Quarterly* 33; & Muchiri G "The use of law and multidisciplinary mechanisms to address xenophobia in SA" Unpublished LL.M dissertation, University of Pretoria (2012) 22.

136 As above.

137 As above.

138 As above.

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.

While SA hosts 65,000 recognised refugees and 230,000 documented asylum seekers from different countries,¹³⁹ the country's Refugees Act¹⁴⁰ is silent on the issue of xenophobia against refugees and asylum seekers. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), the main constraint on enjoyment of safe asylum, protection and integration prospects for these refugees and asylum seekers in SA is the "recurrent xenophobic attacks on refugees meted out by members of local communities".¹⁴¹ Acts of xenophobic violence and other hate crimes against refugees are not distinguished from other acts of criminality and are simply addressed through the criminal justice system.¹⁴²

Indeed, the re-integration of foreign nationals displaced by xenophobic attacks remains a great challenge to the government and civil society groups. This is mostly because xenophobia, as an interpersonal phenomenon is not merely addressed when its manifestation through group violence temporarily abates due to interventions by the police or politicians. As experience has shown over and over, xenophobic violence often recurs all over the country, even in communities where displaced foreign nationals return.

139 For the number of documented asylum seekers and refugees, see UNHCR website for South Africa" <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO> (accessed 13 Jan 2014).

140 See generally, Refugees Act 130 of 1998.

141 UNHCR "Country operations profile South Africa" (2013) <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO> (accessed 14 Jan 2014).

142 CHR (n 69 above) 78.

In terms international conventions, it is important to highlight that SA has not ratified the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW), a key convention whose object is to safeguard the human rights of migrant workers in foreign countries.¹⁴³ The CMW contains a comprehensive legal framework that could be used for the protection of foreign nationals and migrant workers in SA against xenophobic hostility and attacks. For instance, the CMW's provisions apply to all migrant workers, regardless of their immigration status in the country.¹⁴⁴ It obliges state parties to provide legal sanctions against persons or groups who intimidate, threaten or use violence against migrant workers.¹⁴⁵

South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)¹⁴⁶ indeed peripherally mentions xenophobia, by providing that discrimination on the basis of the nationality of the victim constitutes a breach of the Act.¹⁴⁷ Unfortunately, there is no jurisprudence to show the application of PEPUDA in the context of fighting xenophobia. The lack of laws tailored to target xenophobic conduct, coupled with weak enforcement of the existing criminal laws is to blame for existing impunity amongst perpetrators of xenophobic attacks.

143 A list of all signatories of the CMW is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed 28 Apr 2014).

144 CMW art 1.

145 CMW art 16(2).

146 Act 4 of 2000.

147 PEPUDA art 1(xvii) interprets "practices associated with xenophobia and other adverse assumptions of a discriminatory nature" to include "nationality". It is important to mention here that as at June 2014, there was no jurisprudence of South African courts applying this law as a basis for prosecution of perpetrators of xenophobic attacks.

3.5.2 Poor coordination by agencies dealing with xenophobia

The government, communities, refugees, Non-Governmental Organisations (NGOs) and the like have implemented some initiatives locally to deal with xenophobia in SA.¹⁴⁸ Unfortunately, the failure of actors to develop a well-coordinated plan to deal with the issue hampers the effective management of xenophobia in SA.¹⁴⁹ The IOM notes that this lack of coordination renders good work repetitive, contradictory and ineffective.¹⁵⁰

In another obvious legal contradiction that has persisted over the years, the Refugees Act¹⁵¹ expressly permits asylum-seekers and refugees to seek and accept employment opportunities in the country.¹⁵² This provision has however never been enforced and many employers, including the government, could prohibit the employment of refugees in direct contravention of the Act. Such exclusions and contraventions fuel xenophobia as they make refugees feel

148 Since the 2008 violence, SA government departments have taken some steps to counter social conflict and improve social cohesion. These include working on a National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance by the DoJ&CD; the development of a plan on Social Cohesion by the Department of Social Development (DSD); the work carried out by the Department of Home Affairs and its Counter-Xenophobia Unit; and the Early Warning Systems being developed by Visible Policing and the National Disaster Management Centre.

149 IOM "The effects of xenophobia on the integration of migrants in South Africa: An NGO perspective" (2012) available at <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-policy-and-research/migration-policy-1/migration-policy-practice/issues/august-september-2012/the-effects-of-xenophobia-on-the.html> (accessed 14 Jan 2014).

150 As above.

151 Refugees Act 130 of 1998.

152 Refugees Act 130 of 1998, sec 24.

unwelcome in many South African workplaces.¹⁵³ In an interview with international media in 2011, the African Centre for Migration and Society (ACMS) observed that SA's government responses to increasing xenophobic attacks in the country were "fragmented, poorly resourced and with limited political commitment".¹⁵⁴ For its part, the Consortium for Refugees and Migrants in South Africa (CoRMSA) observed that, while many government agencies have taken some action to promote cohesion and reduce xenophobia, there remains a need for on-going national co-ordination.¹⁵⁵

3.5.3 Ineffective immigration policies

There is a close link between immigration and xenophobia. Immigration policies enforced in any country play a significant role in exacerbating or reducing xenophobic sentiments and actions.¹⁵⁶ Over the years, SA failed to reform its immigration system to achieve a solid and effective policy to manage its immigration, refugee and asylum-seeker admissions.¹⁵⁷ The country has for

153 As above.

154 Integrated Regional Information Networks (IRIN) "South Africa: Government gets lowest rating on xenophobia" (2011) available at <http://www.irinnews.org/Report/93130/SOUTH-AFRICA-Government-gets-lowest-rating-on-xenophobia> (accessed 24 Sept 2013).

155 CoRMSA "Taking Action on Threats of Xenophobic Violence: Recommendations for the Inter-Ministerial Committee" (2010) available at <http://www.cormsa.org.za/2010/06/21/cormsa-submits-recommendations-on-xenophobic-violence-to-inter-ministerial-committee/> (accessed 14 Jan 2014) 3.

156 International Labour Organization (ILO), International Organization for Migration (IOM), Office of the High Commissioner for Human Rights (OHCHR) & the Office of the United Nations High Commissioner for Refugees (UNHCR) "International migration, racism, discrimination and xenophobia" paper for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) 18, available at <http://www.refworld.org/docid/49353b4d2.html> (accessed 24 Jun 2014).

157 Aggad F & Sidiropoulos E "South Africa's tipping-point" (2008) 1.

decades, lacked a coherent approach to immigration and this has resulted in uncontrolled immigration, which in turn causes frustration and outbursts of violence against foreigners.¹⁵⁸ Aggard *et al*/observed in 2008:

Regrettably, immigration law remains one of the apartheid legacies that South Africa maintains, with slight changes, from which xenophobic attitudes grow and explode...¹⁵⁹

South Africa's immigration laws have, over the years, been focused on controlling and excluding immigrants rather than on properly managing immigration to the benefit of the country.¹⁶⁰ Sections 32(1) and (2) of the Immigration Act¹⁶¹ effectively criminalise undocumented immigration and make generous provision for arrests, detention and deportations.¹⁶²

This restrictive approach to immigration has forced thousands of non-nationals already in SA to attempt to regularise their stay in the country through false asylum claims.¹⁶³ This has consequently resulted in South African nationals developing negative perceptions about immigration. The SAMP notes that for this reason, many South African nationals feel their country is "under siege from outside" and are willing to turn to violence and other unconstitutional measures to ensure foreign nationals are kept out.¹⁶⁴

Feelings of insecurity in the face of refugee influxes also play a part in perpetuating xenophobic sentiment. The UNHCR attributes the start of much

158 As above.

159 Bond & Ngwane (n 63 above) 10.

160 Landau *et al* (n 19 above) 14.

161 Immigration Act 13 of 2002 (as amended in 2004 and 2014).

162 As above.

163 As above.

164 Crush J "The dark side of democracy: Migration, xenophobia and human rights in South Africa" (2000) 38 *International Migration* 110.

xenophobia against refugees to nationals feeling threatened by immigration into their countries.¹⁶⁵ Xenophobic sentiments are easily inflamed by irresponsible media or are manipulated for political, rather than humanitarian, purposes.¹⁶⁶

Analysts argue that South African nationals do not view immigration as a tool that could benefit the country in any way. Indeed, even highly skilled immigrants are stereotyped as a threat to the economic and social interests of nationals.¹⁶⁷ There is a general assumption that national development and skills immigration are not compatible.

South Africa has historically imposed policies that restrict the immigration of skilled Black African immigrants into the country. A SAMP report released in 2000 aptly captures SA's government immigration policy in respect of Black, often African, migrants vis a vis White, often European, migrants into the country. Three-quarters of skilled White non-nationals who had been in SA since 1991 had attained permanent residence status as compared to only ten percent of Black skilled immigrants.¹⁶⁸ This clearly demonstrates that officially, White non-nationals enjoy far more privileges than Black non-nationals. This discriminatory approach towards Black African migrants, coupled with on-going xenophobic attacks, discourages skilled immigrants of African descent from coming to SA.¹⁶⁹

Kabwe-Segatti, writing in 2012, supported SAMP's view. She opined that SA will continue to find it difficult to attract and keep qualified foreign skilled

165 See generally UNHCR (n 141 above).

166 UNHCR *Refugee protection: A guide to International Refugee Law* (2001) 89-92.

167 Mattes R, Crush J & Richmond W "The brain gain: Skilled migrants and immigration policy in post-apartheid South Africa" (2002) 20 *SAMP Migration Policy Series* 1-3.

168 Mattes *et al* (n 167 above) 2.

169 Mattes *et al* (n 167 above) 31.

labour from the African region due to tensions related to xenophobia and various restrictions imposed on Black African immigrants.¹⁷⁰

3.5.4 Widespread denial of xenophobia

The South African leadership continues to deny that xenophobia exists in the country. For instance, after a 2007 APRM report warned that xenophobia against other Africans was rising in SA and should be “nipped in the bud”, President Thabo Mbeki said the report’s assessment was “simply not true”.¹⁷¹ After the 2008 attacks began, President Mbeki denied that xenophobia was the motivating factor and blamed criminality for the attacks.¹⁷²

More worrying to experts, government officials in crucial departments such as the South African National Intelligence Agency (SANIA) have made overtly incorrect statements to deny xenophobia in critical moments. This was the case during the 2008 outbreak of xenophobic attacks in SA when the then Director General of the SANIA, Manala Manzini, insisted that the 2008 xenophobic violence in SA was orchestrated “by internal and external racist elements bent on destabilising the 2009 general election in the country”.¹⁷³ In 2010, the South African Institute of Race Relations (SAIRR) quoted Gauteng premier, Nomvula Mokonyane on the country’s leadership’s perception of

170 Kabwe-Segatti *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (2008) 33.

171 SA Press Association “Mbeki critical of crime issues in APRM report” as cited in Bond & Ngwane (n 63 above) 2.

172 Crush (n 107 above) 2.

173 Friedman S “One centre of power” Report to Atlantic philanthropies” as cited in Bond & Ngwane (n 63 above) 2.

xenophobia when she declared: "We don't actually believe South Africans are xenophobic. We see that as a pure act of criminality".¹⁷⁴

Public perceptions also point towards a misunderstanding of the ongoing nature of the phenomenon. Polzer and Nakabvira point out, with reference to an empirical study, that xenophobia in SA is generally viewed as a one-time event that happened in 2008, and not the on-going phenomenon it is.¹⁷⁵ Many South Africans view xenophobia as securely in the past and deny that it should be revisited in current debates.¹⁷⁶

The denial of xenophobia also appears to be a politically expedient position for the ruling class in SA. Declaring that voters are xenophobic could be ideologically and politically suicidal for many politicians as it may make them unpopular and importantly, lose them votes. Polzer argues that one way to deal with this discomfort is to deny the discrepancy in political party and popular positions (amongst the public) and maintain that it is impossible for "South Africans" to be xenophobic.¹⁷⁷

A 2009 SAHRC report exposed a widespread lack of knowledge about foreign nationals and their rights, which the South African government has done little to remedy.¹⁷⁸ This ignorance, it has been alleged, prevents South Africans from understanding xenophobia as a phenomenon.¹⁷⁹

174 South African Institute of Race Relations (SAIRR) "Denialism all over again" (2010), available at <http://www.sairr.org.za/sairr-today-denialism-all-over-again-19th-july-2010> (accessed 27 Jan 2014).

175 Polzer & Takabvirwa (n 71 above) 7.

176 As above.

177 As above.

178 SAHRC (n 56 above) ch 1.

179 Harris (n 83 above) 12.

The net impact of denying xenophobia is to undermine its seriousness by diminishing the scale of xenophobic attacks; making them appear isolated and unplanned; manageable and less alarming.¹⁸⁰ It also insinuates that the conventional and established methods of response, such as the use of the existing criminal justice system approaches, are appropriate and sufficient to address the issue.¹⁸¹

The other implication of denying xenophobia is that the responses to xenophobic attacks are the same responses as to other forms of crime with a complete disregard for the discriminatory aspect of such violence, its patterns or victims.¹⁸² This shifts the focus from the underlying causes of xenophobia and the fact that it is focused on particular social groups and undermines preventative efforts.¹⁸³

South Africa's denial of xenophobia was highlighted in the 2011 APRM report on SA, which painted a worrying picture of the SA government's handling of xenophobia in the country. The APRM report gave SA a red rating, which is the worst possible rating a country can get on any issue assessed.¹⁸⁴ Importantly, the report highlighted that xenophobia was a major problem in the country; and that the government was not doing enough to address it, with senior government officials actually denying or ignoring the phenomenon.¹⁸⁵ Further, in a January 2015 open letter to the President of SA, the Africa Diaspora

180 As above.

181 As above.

182 Harris (n 83 above) 8.

183 As above.

184 South African Institute of International Affairs (SAIIA) "South Africa Report 2011: Implementing the APRM, views from the civil society" (2011) 57-59.

185 SAIIA (n 184 above) 58.

Forum (AFD) urged the leadership of SA to recognise that persistent attacks against foreigners in the country are xenophobic in nature, and not “crime” as the government had been claiming “since 2008”.¹⁸⁶

As long as xenophobia continues to be denied and characterised as “just crime”, the phenomenon as a concept and a widespread attitude will not be addressed or resolved in SA.¹⁸⁷ SAIIA postulates:

The emphasis on criminality to the exclusion of other elements of xenophobic discrimination presents a slippery slope, where certain acts of discriminatory aggression [such as intimidation and harassment] can be seen as acceptable, as long as they are not violently 'criminal'...¹⁸⁸

The SAHRC has depicted the denial of xenophobia by senior figures in the government as hypocritical at best, since certain departments have acknowledged it as a social problem that has existed in SA since 1994.¹⁸⁹ It is also important to note that constant denial of xenophobia by the political class of SA presents other challenges, including being an impediment to the re-integration of displaced victims, after the violence abates. Re-integration requires resource allocation, which depends on the political will of the political class which cannot prioritise a phenomenon whose existence they deny. Consequently, re-integration of those affected by xenophobic violence has not been an effective remedy in SA.

186 African Diaspora Forum (ADF) “Open letter to President Zuma – attacks are xenophobic, not criminal” 26 Jan 2015.

187 As above.

188 As above.

189 SAHRC (n 56 above) 21.

3.5.5 Xenophobia as a new form of racism

Black South African nationals exhibit high levels of xenophobia and racial prejudice against Black African migrants living in SA.¹⁹⁰ Despite this, a 2006 SAMP national xenophobia survey conducted in SA established that foreign nationals from Europe and North America, the majority of whom are White by race, are generally regarded more favourably in SA than Black African migrants.¹⁹¹

Empirical research by the SAMP has established that Caucasian migrants' are more favourably received in SA.¹⁹² Migrants from neighbouring SADC countries such as Namibia are also more favourably perceived than migrants from other African countries.¹⁹³ Black migrants from sub-Saharan Africa are hostilely perceived.¹⁹⁴ However, the same study showed that an overwhelming majority of South Africans have an unfavourable impression of foreigners regardless of where they come from.¹⁹⁵

Paradoxically, while the victims of xenophobic and racial attacks are predominantly Black, the majority of perpetrators are also Black.¹⁹⁶ This has consequently resulted in a situation where Black Africans from neighbouring

190 Adjai & Lazaridis (n 1 above) 192. For a similar view, also see Landau *et al* (n 19 above) 4, where a number of experts argue that South Africans' negative attitude towards non-nationals is largely directed towards other Africans, although there are increasing reports of discrimination against new arrivals from the Indian sub-continent.

191 Crush (n 107 above) 4.

192 As above.

193 As above.

194 As above.

195 As above.

196 Harris B "A foreign experience: Violence, crime and xenophobia during South Africa's transition" (2001) 5 *Violence and Transition Series* 11.

countries who travel to SA to seek refuge, asylum or other opportunities are being targeted for exclusion and xenophobic violence. Harris attributes this negative attitude towards Black immigrants to a new form of racism that has taken root in SA since 1994.¹⁹⁷ He argues that Black African foreigners are exposed to a greater risk of xenophobic violence, persecution and economic exploitation in SA than their White counterparts.¹⁹⁸

One explanation given for this Black on Black racism in SA is that the country's Black population is more likely than their White compatriots, to interact or engage with Black foreign nationals on the streets, in the workplace, in public places like restaurants and in the country's public administration such as in government offices, schools and hospitals.¹⁹⁹

Commentators also argue that the Black on Black racism in SA is a consequence of the entrenched history of apartheid discrimination, political transition and contemporary governance trends in SA, characterised by successive ANC governments' continued apartheid immigration policy of discrimination against Black African migrants.²⁰⁰

3.5.6 Bad governance at national and local levels

Experts have noted that xenophobic attacks and violence came to prominence after the 1994 transition to democracy in SA, creating a link between xenophobia and policies implemented by post-apartheid governments in the country.²⁰¹

197 Harris (n 196 above) 5.

198 As above.

199 Landau *et al* (n 19 above) 8.

200 As above.

201 Valji N "Creating the nation: The rise of violent xenophobia in the new South Africa" (2003) 1-2.

Ikome argues that good governance reduces corruption and conflicts, entrenches the rule of law, improves management of resources and generally promotes socio-economic development for all.²⁰² Bad governance at the grassroots level can create conditions for deficits in the rule of law, as seen in 2008, and, this has the potential to spiral into uncontrollable public violence and xenophobic attacks.²⁰³ Bond and Ngwane argue that xenophobic rhetoric and attacks in SA are grounded in grassroots and national politics that can be traced to leadership decisions and explicit discourses in both the apartheid and post-apartheid eras.²⁰⁴

Indeed, an empirical study conducted by the FMSP in 2009, established that in many locations, the attacks that accompanied the 2008 violence were actually rooted in the micro-politics of the country's townships and informal settlements and their bad governance.²⁰⁵ The study found that local leaders often mobilised nationals to attack and evict foreign nationals living amongst them as a means to strengthen their personal, economic or political power or interests within the local community.²⁰⁶ The study found that political vacuums in community leadership at township level encouraged the emergence of unofficial, illegitimate and often violent forms of local leadership. These illegitimate leadership structures were often abused to foster communities' resentment towards what was perceived as "non-compliant" foreign nationals.²⁰⁷ The

202 Ikome F "From the Lagos plan of action to the New Partnership for Africa's Development (NEPAD): The political economy of African regional initiatives" (2007) 204.

203 SAHRC (n 56 above) 22.

204 Bond & Ngwane (n 63 above) 8.

205 Misago *et al* (n 38 above) 2.

206 As above.

207 Misago *et al* (n 38 above) 3.

“illegitimate” leaders were found to have often used vigilante attacks and mob justice against foreign nationals.²⁰⁸

Recently, SA has been rocked by a wave of service delivery protests in different parts of the country.²⁰⁹ Most of them end in anger, frustration and xenophobic violence against foreign nationals.²¹⁰ Burger attributes recurrent service delivery protests to a public dissatisfaction with the poor delivery of municipal services, high unemployment rates, rampant corruption and nepotism in municipal governments, all of which are associated with bad governance, as the causes of the protests.²¹¹

Neocosmos introduces the concept of political governance and policies of the day to this argument. He posits that xenophobia is usually at a minimum when leaders pursue racially “inclusivist” politics and policies both at national and local levels.²¹² Conversely, he argues that xenophobia is usually at the highest levels if “exclusivist” politics dominate the national and local politics in a country.²¹³ Neocosmos attributes the current “exclusionary” concept of state-nation building in contemporary SA to the mode of rule pursued by both the apartheid and the ANC governments.²¹⁴

In addition to adopting “exclusionary” leadership models during the apartheid and post-apartheid eras, South African leadership seems to have done

208 As above.

209 Burger J “The reasons behind service delivery protests in South Africa” (2009) 1, available at <http://www.issafrica.org/topics/corruption-and-governance/29-jul-2009-iss-today-the-reasons-behind-service-delivery-protests-in-south-africa> (accessed 28 Jan 2014).

210 As above.

211 As above.

212 Neocosmos (n 32 above) 18.

213 Neocosmos (n 32 above) 18.

214 As above.

little to educate the public on the underlying causes of foreigner migration to SA, some of which are humanitarian.²¹⁵ Consequently, many South Africans are oblivious to the plight faced by many African foreigners in their countries of origin which triggers their migration and they thus remain un-empathetic to their needs.²¹⁶

3.5.7 Stereotyping of foreign nationals

There is an “assumed link” between the presence of foreigners in SA and the high crime rates in the country.²¹⁷ Nationally, more than half of South Africans associate foreign nationals with criminal activity.²¹⁸ Misago *et al*/state:

Prejudice against foreign nationals is endemic in SA, and this problem is magnified by expedient political scapegoating of foreign nationals, baseless inflation of immigration statistics, assumptions about opportunistic asylum claims, and xenophobic attitudes within the police and the Department of Home Affairs.²¹⁹

Sections of the South African media present foreign nationals in a stereotypical manner, thereby fuelling xenophobia against them.²²⁰ The media

215 ACCORD (n 106 above) 4.

216 As above.

217 Landau *et al* (n 19 above) 7.

218 As above.

219 Misago *et al* (n 38 above) 35.

220 A case in point is the Daily Sun’s coverage of the May 2008 xenophobic attacks in SA. In the weeks of the attacks, the Daily Sun repeatedly and inappropriately published headlines such as “Alien terror” and “War on aliens” in a manner that seemed to stoke xenophobia and perpetuate stereotypes in the country. The Daily Sun’s stereotypical and negative references to foreign nationals served to exacerbate xenophobic sentiment against them. See Bird W “Does the pandering perpetuate the xenophobia? Is this simply xenophobia?” (2008) 28 *Rhodes Journalism Review* 18.

carelessly use the word “illegal” to refer to immigrants in the country, regardless of their immigration status in the country, thereby lending credence to the criminalization of foreign nationals.²²¹ This has had the impact of *stoking* xenophobia and even legitimizing police abuse and vigilante violence against foreign nationals because it depicts them as criminals deserving of punishment.²²² Speculative and often incorrect media reports regularly link foreign nationals to crime, increasing poverty, diseases, unemployment and increased social costs in SA, inflaming hostility towards them.²²³ Misago *et al state*:

There is a common xenophobic sentiment held by some in the South African community that the high rate of crime and violence – mostly gun running, drug trafficking and armed robbery – is directly related to the rising number of illegal migrants in South Africa...²²⁴

Studies have exposed the significant role that the media has played over the years in fuelling xenophobic sentiments amongst South Africans. One such study found that the media stereotypes and labels the majority of migrants from Africa as ‘illegal immigrants’, regardless of their status or diversity.²²⁵ The other popular but false stereotypes against foreign nationals in SA are that foreigners brought HIV/AIDS to the country²²⁶ and that Black Africans, regardless of their

221 Misago *et al* (n 38 above) 36.

222 As above.

223 As above.

224 Human Sciences Research Council (HSRC) “Citizenship, violence and xenophobia in South Africa” (2008) 1.

225 Media Monitoring Project “Shades of prejudice: An investigation into the South African media’s coverage of racial violence and xenophobia” (2007) 59.

226 Landau *et al* (n 19 above) 8.

immigration or refugee status, are opportunists who are only in SA for economic benefits.²²⁷

Due to widespread xenophobic sentiments and false stereotypes across all sections of the population, the SAPS and other law enforcement agencies often refuse to prosecute perpetrators of xenophobic attacks. This failure is attributed to the fact that many officers are themselves xenophobic and that many do not contest the rationale of targeting and attacking foreigners.²²⁸

3.5.8 The masquerade of violence as legitimate “crime fighting”

According to the FMSP, various forms of pre-1994 violence have now been idealised and legitimised in SA. These include social violence in the townships which is popularly justified as legitimate crime fighting because nationals see foreigners as illegal and therefore criminals.²²⁹ Attacking foreign nationals is therefore seen as a legitimate law enforcement mechanism, especially in the absence of proper border control by the state.²³⁰

In this context, crime-fighting vigilantes are common in SA’s poorer communities.²³¹ Their work is seen as a stop-gap for a failing justice system which is often perceived to protect criminals.²³² These attacks are also often

227 McKnight (n 23 above) 18–42.

228 Hayem J “From May 2008 to 2011: Xenophobic violence and national subjectivity in South Africa” (2013) 39 *Journal of Southern African Studies* 87.

229 Misago *et al* (n 38 above) 27.

230 As above.

231 Misago *et al* (n 38 above) 28.

232 As above.

contextualised as a mechanism of community self-protection from “dangerous” foreigners.²³³

3.6 The impact of xenophobia on foreign nationals

Experts contend that xenophobia and its manifestations through violence, looting, killings and discrimination contribute to a wide range of challenges which ultimately deprive foreign nationals of their basic human rights.²³⁴ Firstly, due to accompanying discrimination, foreign nationals are subjected to disproportionate difficulties in accessing employment, accommodation, banking services and healthcare.²³⁵ Secondly, xenophobic attitudes and acts have also legitimised extortion, corruption, and a host of other human rights abuses including arbitrary arrests and targeted criminal attacks and hate crimes perpetrated against foreign nationals.²³⁶

Landau argues that, in addition to primary victimization, foreign nationals affected by xenophobia also face systematic discrimination, social exclusion, and political alienation and generally feel unwelcome and unprotected in SA.²³⁷

Migrant groups, such as refugees and asylum seekers, are often denied services such as healthcare and education due to deep-seated xenophobic sentiments that are exhibited by government officials and other service providers

233 As above.

234 Regional migration experts Loren Landau, Jean Pierre Misago and Tamlyn Monon argue that xenophobic violence leads to stereotyping and structural exclusion of foreigners, effectively preventing them from exercising political rights and rights to residence in the cities across the country. See Misago *et al* (n 38 above) ch 1.

235 As above.

236 As above.

237 Landau *et al* (n 19 above) 21.

across the country.²³⁸ Crush points out that some socio-economic rights that should otherwise be available to refugees and other categories of foreign nationals are denied due to service providers' ignorance of immigrant's rights.²³⁹

Analysts have noted that xenophobic attitudes and prejudice amongst service providers, criminal justice officials or health-service providers, exposes victims of xenophobia to secondary victimization through discrimination, de-prioritization and neglect.²⁴⁰ Breen *et al* put it thus:

The combination of immigrant *rightlessness* and structural exclusion, amidst a perceived invasion of 'foreigners', has resulted in organised social activism against individuals perceived as dangerous to the socio-cultural and moral fabric, and as threatening the economic opportunities of poor South Africans and this happens within a system set up by wealthy South Africans to super-exploit migrant labour from both South Africa and the wider region....²⁴¹

In its December 2009 Guidance Note on Combating Racism, Racial Discrimination, Xenophobia, and Related Intolerance through a Strategic Approach, the UNHCR noted: "Racism, racial discrimination, xenophobia, and related intolerance constitute a serious threat to the overall protection environment for people of concern."²⁴² Xenophobia has the net effect of undermining the concept of free access to safe asylum by causing the tightening of immigration controls and causing increased use of extortion, corruption, arbitrary arrests and detentions of refugees and asylum seekers.

238 Crush J "South Africa: Policy in the face of xenophobia" (2008) 2.

239 As above.

240 Breen & Neil (n 135 above) ch 1.

241 Bond & Ngwane (n 63 above) 9.

242 UNHCR "Guidance Note on Combating Racism, Racial Discrimination, Xenophobia, and Related Intolerance Through a Strategic Approach" (2009), available at <http://www.unhcr.org/refworld/pdfid/4b30931d2.pdf> (accessed 19 Jan 2014).

Foreign nationals who fear xenophobic attacks and violence cannot move freely in the towns and cities in which they mostly reside, much less participate fully in the larger social and economic activities. As a consequence, a study carried out by the IOM in 2012 established that rampant xenophobia has hampered the integration of migrants into South African society.²⁴³

Xenophobic violence sends a message of fear to entire communities of foreign nationals or other targeted groups who share a similar identity such as country of origin. Attacks therefore threaten the equal enjoyment of fundamental human rights and freedoms by both individuals and groups of migrants.²⁴⁴

A 2008 report by the SAHRC uncovered severe problems in victims of the 2008 xenophobic violence accessing justice. This resulted in “significant levels of impunity” for perpetrators.²⁴⁵ Victims of xenophobic attacks have been found to fail to press charges against perpetrators, for fear of retaliatory attacks.²⁴⁶ The fear of retaliatory violence also often prevents potential victims from seeking available protection and services, including food, medical care, education and

243 IOM (n 149 above) 3; Peberdy S “Imagining immigration: Inclusive identities and exclusive policies in post-1994 South Africa” (2002) 48 *Africa Today* 15-34.

244 Gerstenfeld P B *Hate crime: Causes, controls, and controversies* (2004) ch 1. This assertion by Gerstenfeld is supported by findings from an empirical survey carried out in the Johannesburg area in 2000 by Peberdy & Majorina. The survey found that as many as 70% of Somali children of school-going age were not attending school for various reasons, including discrimination and xenophobia. See Peberdy S & Majorina Z “Just a roof over my head?: Housing and the Somali refugee community in Johannesburg” (2000) 11 (2) *Urban Forum* 273.

245 SAHRC (n 56 above) 8.

246 CoRMSA (n 155 above) 4.

access to judicial institutions. This results in progressive marginalization, abuse of human rights and exclusion.²⁴⁷

The UNHCR opines that the fear of repetitive xenophobic attacks impedes integration of refugees and other categories of foreign nationals into communities where they live.²⁴⁸ For the specific case of SA, the UNHCR notes that the main constraint on enjoyment of safe asylum, protection and integration of refugees and asylum seekers in SA is the “recurrent xenophobic attacks on refugees meted out by members of local communities”.²⁴⁹

While providing guidance on local integration in host states, the UNHCR called on states to take bold steps to combat xenophobia, racism and intolerance and to foster empathy and understanding towards refugees. The UNHCR reckons that this can be achieved through appropriate legislation, public statements by opinion shapers and social policies. Special regard should be given to the particular situation of refugees with the aim of allowing asylum seekers and refugees to participate actively in the economic, civic, cultural and social life of the host country.²⁵⁰

Another aspect of xenophobic attacks is related to the domestic stability and national security of SA. To Polzer and Takabvirwa, the persistent xenophobic attacks constitute a significant national security threat for SA, in terms of the

247 UNHCR “Note on international protection” (2010) available at <http://www.unhcr.org/refworld/docid/4caaeabe2.html> (accessed 19 Jan 2014).

248 UNHCR “Contribution to the 13th Meeting of the OSCE Ministerial Council” (2005), available at <http://www.osce.org/mc/17188> (accessed 19 Jan 2014).

249 UNHCR (n 141 above).

250 UNHCR “Conclusion on local integration” (2005) available at <http://www.unhcr.org/refworld/docid/4357a91b2.html> (accessed 19 Jan 2014).

domestic stability and international reputation of the country.²⁵¹ They note that most primary manifestation of xenophobia, for example, violent attacks, looting and killings, are criminal offences in SA law.

Kabwe-Segatti, a migration expert is of the opinion that SA will continue to find it difficult to attract and keep qualified foreign skilled labour, especially those originating from the African continent, mostly due to tensions related to xenophobia and other migration issues that are mishandled locally.²⁵² The fear of experiencing xenophobic discrimination or attacks, coupled with other domestic challenges such as insecurity and crime, therefore play a significant role in discouraging some skilled African professionals from immigrating to SA.

3.7 Conclusion

This chapter has provided some important explanations for xenophobia in SA from an interdisciplinary perspective. A combination of historical and contemporary factors have been considered and discussed in detail. Because of the nature of xenophobia, few of the causes are strictly legal. Many of the causes are historical, socio-economic, legal or even pathological.

It may be correctly deduced from the analysis in this chapter and expert assessments referred to, that anti-foreigner sentiment in SA remains strong, extremely widespread and cuts across virtually every socio-economic and demographic group in the country.²⁵³ Some surveys show that xenophobic

251 Polzer & Takabvirwa (n 71 above) 3.

252 Kabwe-Segatti (n 170 above) 33.

253 Nyamnjoh F B *Insiders and outsiders: Citizenship and xenophobia in contemporary Southern Africa* (2006) 38.

attitudes are worsening by the day.²⁵⁴ Widespread xenophobia and its manifestations through violence must be counteracted by all available means if SA is to thrive as a peaceful and united nation where human rights of all inhabitants are protected.

It is important therefore, to ponder how legal interventions could respond to the factors analysed above to limit xenophobia and its manifestations, particularly through group violence against foreign nationals. The rule of law is a critical component of civilised societies. From the above analysis, it is instructive that the lack of a law tailored to combat xenophobic conduct and the laxity in the enforcement of the existing criminal laws to curb xenophobic attacks perpetuates the phenomenon. This legal *lacuna* has greatly perpetuated the phenomenon and contributed to the high level of impunity exhibited by the perpetrators of xenophobic violence. This is because SA cannot confront xenophobia and other hate crimes in the absence of appropriate legal mechanisms.

This begs the question of whether there are any available laws that can be used to fight xenophobia in SA. An important way to thwart xenophobic conduct such as collective violence against foreigners, looting, assaults and murder, is to apply any existing laws of the land to prosecute the perpetrators and protect the victims of attacks. The following chapter considers the existing domestic, regional and global legal framework that could be utilised to combat xenophobia in the country.

254 According to a 2013-2014 survey by the Gauteng City-Region Observatory (GCRO), xenophobic sentiment and intolerance of foreigners are increasing in the Gauteng region of SA. 35% of all respondents to the GCRO survey supported the expulsion of all foreigners from SA "now", regardless of the foreigners' immigration status. See GCRO "City benchmarking quality of life survey 2013" (2014) 81.

CHAPTER 4: THE EXISTING LEGAL FRAMEWORK

4.1 Introduction

That law can be used to effect social change in any society is trite. This is because law creates societal pressure for adherence; adherence creates habits; habits develop into customs; and customs become cultural attributes of societies.¹ The murders, destruction of property, assaults, impunity and other criminal activities which are all associated with xenophobic violence can be addressed through committed investigations and prosecution of the perpetrators.

This chapter comprises of a review of the existing national, regional and international legal framework that can be used to combat xenophobia or address injustices occasioned by the phenomenon in South Africa (SA). The chapter will also consider whether or not the available legal framework is currently applied and whether it has been effective in curbing the phenomenon.

Discriminatory attitudes, institutional or social exclusion, harassment, collective violence against foreign nationals, physical attacks, destruction of property, murder and looting are some of the outward manifestations of xenophobia, that violate or undermine the enjoyment of human rights by foreign nationals in SA. The right to life is violated, for the victims who lose their lives in violent attacks. For refugees and asylum seekers, the right to enjoy safe asylum in the country is infringed when xenophobic violence breaks out and they are displaced from their homes. For foreign business owners and investors, the right to own property is violated when their businesses are attacked and looted or burnt down.

The chapter aims to demonstrate that while SA does not have laws which explicitly prohibit or govern xenophobic conduct in the country, there are various

1 Sheshtak J J "The philosophical foundations of human rights" (1998) 20 *Human Rights Quarterly* 233.

constitutional and statutory provisions which could be relied upon to combat some manifestations of xenophobia. This is inspired by the fact that regardless of their status, foreign nationals living in SA should never be denied fundamental human rights provided under self-executing Customary International law and relevant national laws of the country, including the Constitution.² This view has been upheld by the Constitutional Court of South Africa (CC), which stated in 2000, that, foreign nationals living in SA have the same constitutional rights and entitlements as South African citizens, unless the contrary emerges clearly from the nation's Constitution.³ The obligation to respect, protect and fulfil these human rights rests on both the state and non-state actors.

4.2 The domestic legal framework

South Africa's domestic laws oblige the state to protect foreign nationals living in the country from attacks by non-state actors.⁴ Failure to prevent attacks, protect foreign nationals or provide remedies to the victims of such attacks constitutes a breach of this obligation.⁵ Under these laws, unless otherwise expressly stated, foreign nationals are subject to the same legal protections, duties and restrictions as citizens.⁶ These legal instruments are discussed in detail below.

2 International Labour Organization (ILO), International Organization for Migration (IOM), Office of the High Commissioner for Human Rights (OHCHR) & the Office of the United Nations High Commissioner for Refugees (UNHCR) "International migration, racism, discrimination and xenophobia" paper for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) 20. This joint publication is available at <http://www.refworld.org/docid/49353b4d2.html> (accessed 10 Jan 2014).

3 *Patel & Another v Minister of Home Affairs & Another* (2000) 4 All SA 256 (D).

4 Centre for Human Rights at the University of Pretoria (CHR) "The nature of South Africa's legal obligations to combat xenophobia" (2009) 3. Examples of such laws include the Constitution of the Republic of South Africa (1996) and the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) (PEPUDA). The specific provisions of the above laws are discussed in detail below.

5 As above.

6 Landau L, Ramjathan-Keogh K & Singh G "Xenophobia in South Africa and problems related to it" (2005) 13.

4.2.1 The Constitution of the Republic of South Africa

South Africa is a constitutional democracy. The country promulgated a progressive national Constitution in 1996, following a lengthy process of negotiations. Experts believe that the framers of the South African Constitution aspired to deliver a Constitution that would heal the divisions of the past which included racial divisions, exclusions, human rights abuses and to establish a society based on democratic values, social justice and respect for fundamental human rights.⁷

The Preamble to the Constitution explicitly declares that "South Africa belongs to all those who live in it". The Bill of Rights in the country's Constitution commits the government to protect various civil, political, cultural and socio-economic rights for "everyone" residing in SA.⁸ The most pertinent of these rights, for purposes of this thesis, include; the right to equality before the law,⁹ the right to life,¹⁰ property,¹¹ access to housing,¹² food, water and basic healthcare,¹³ universal access to basic education¹⁴ and the right of access to the courts for the administration of justice.¹⁵

The Bill of Rights dictates that the Constitution of the Republic should be applied in a manner that is consistent with international law and can only be limited

7 Heyns C "Advancing social justice in South Africa through economic and social rights – From the margins to the main stream" (1998) 1 *ESR Review* 1.

8 The Constitution of the Republic of South Africa, 1996, ch 2.

9 The Constitution of the Republic of South Africa, 1996, s 9. The so called "*equal protection clause*" under Article 9 of the Constitution guarantees access to equal treatment, protection and benefit from the law to all persons living in SA, regardless of their status.

10 The Constitution of the Republic of South Africa, 1996, s 11.

11 The Constitution of the Republic of South Africa, 1996, s 25.

12 The Constitution of the Republic of South Africa, 1996, s 26.

13 The Constitution of the Republic of South Africa, 1996, s 27.

14 The Constitution of the Republic of South Africa, 1996, s 29.

15 The Constitution of the Republic of South Africa, 1996, s 34.

in terms of a law of general application and only if the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.¹⁶ With regard to the protection of foreign nationals from xenophobic attacks and related incidents, the Constitution contains unambiguous provisions that protect the right to freedom and security of the person.¹⁷ Every person living in SA has the right to freedom and security of the person,¹⁸ which includes the right to be free from all forms of violence from either public or private sources;¹⁹ the right not to be treated or punished in a cruel, inhuman or degrading way;²⁰ the right to bodily and psychological integrity;²¹ and the right to security in and control over one’s body.²² The Bill of Rights is thus clear on the duty of the state to respect, protect, promote and fulfil the rights guaranteed therein, for every resident of SA, including foreign nationals.

South African jurisprudence shows that foreign nationals have in the past, successfully petitioned for the implementation of Constitutional provisions on socio-economic rights. For example, in the landmark case of *Khosa & Others v Min of Social Development & Others*,²³ the Constitutional Court (CC) ruled that South African permanent residents of Mozambican descent had a legal right to access the socio-economic rights provided in the Constitution. The Court held further, that any law barring the applicants from accessing such socio-economic rights was unconstitutional.²⁴ In the judgment, Justice Mokgoro reiterated that Section 7(1) of

16 The Constitution of the Republic of South Africa, 1996, s 36. Additionally, important international customary law rights contained in instruments such as the Universal Declaration of Human Rights (UDHR) including its Preamble & arts 3-23 as well as treaty-based rights in art 6-16 of the International Covenant on Civil and Political Rights (ICCPR) are discussed later in this Chapter.

17 The Constitution of the Republic of South Africa, 1996, s 12.

18 The Constitution of the Republic of South Africa, 1996, s 12 (c) (1).

19 The Constitution of the Republic of South Africa, 1996, s 12 (1) (c).

20 The Constitution of the Republic of South Africa, 1996, s 12 (1) (e).

21 The Constitution of the Republic of South Africa, 1996, s 12 (2).

22 The Constitution of the Republic of South Africa, 1996, s 12 (2) (b).

23 *Khosa & Others v Min of Social Development & Others* 2004 (6) BCLR 569 (CC).

24 Para 86.

the Constitution of SA indeed safeguards the rights and freedoms of “all people in our country”.²⁵

It can be argued that in making the above determination, the CC was convinced that “everyone” includes all categories of people in SA, including citizens and various categories of foreign nationals. The CC also highlighted that the right of foreign nationals to access socio-economic rights such as the right to housing is part and parcel of their right to human dignity.²⁶ These rights are directly applicable to categories of non-nationals such as refugees, asylum seekers and undocumented migrants in the country.²⁷ Indeed, other decisions from the CC demonstrate that the South African courts have adopted a generous and purposive interpretation of all rights contained in the Constitution of the Republic.²⁸

In the same vein, South African courts have enforced a section of the Constitution, which prohibits detention of children in the country, regardless of whether the affected minors are South African or foreign.²⁹ Such was the decision of the High Court in the landmark case, *The Centre for Child Law v the Minister of Home Affairs*.³⁰ In this case, Judge Annemarie de Vos ruled that detention of some refugee children was unlawful and invalid.³¹ She ordered their immediate release from detention.

In another landmark CC decision touching on the equal protection of all persons living in SA under the Constitution, Yacoob J, in the *Grootboom* case, fondly referred to the equality clause in the Constitution as an “embodiment of the

25 Paras 46 & 47.

26 Para 52.

27 As above.

²⁸ See generally, *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁹ The Constitution of the Republic of South Africa, 1996, s 28.

³⁰ *The Centre for Child Law & Another v the Minister of Home Affairs* 2005 (6) SA 50 (T) 2005 (6) SA, at 50.

³¹ As above.

aspirations of the people of South Africa to achieve social economic inclusion”.³² Yacoob J further emphasised that the Constitution declares the founding values of our society (SA) to be “human dignity, the achievement of equality and the advancement of human rights and freedoms”.³³

To conclude, SA’s constitutional jurisprudence has given the meaning to “human dignity” to encompass a human right and a constitutional core value which should be protected by the state.³⁴ The on-going xenophobic attacks in SA demonstrate that the nation has not lived up to this constitutional aspiration, of building an inclusive country that belongs to all who live in it. The reality for foreign nationals has been the opposite. Their daily lives are marked with xenophobia, discrimination, exclusion and fear.³⁵ All these manifestations of xenophobia infringe on their rights, as guaranteed by the Constitution.

32 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

33 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) as per Yacoob J.

³⁴ As above.

35 Dodson B “Locating xenophobia: Debate, discourse, and everyday experience in Cape Town, South Africa” (2010) 56 *Africa Today* 4.

4.2.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was promulgated in 2000.³⁶ The PEPUDA not only recognises South Africa's 1996 Constitutional obligation for the legislature to enact national legislation to prevent or prohibit unfair discrimination,³⁷ but also fulfils the country's international obligations under the 1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).³⁸

PEPUDA's Preamble declares that the Act applies to "all" residing in SA, and this can be interpreted to mean it applies even to foreign nationals residing in the country.³⁹ PEPUDA's stated aims, as elucidated in the Preamble include: 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. This Act also acknowledges that all

36 Act 4 of 2000.

37 S 9 (3) of the Constitution of the Republic of South Africa, 1996, provides that the state may not unfairly discriminate directly or indirectly, against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Further, sec 9(4) provides that "national legislation must be enacted to prevent or prohibit unfair discrimination.

38 This position is asserted in PEPUDA's Preamble. SA ratified the CERD in 1998 and the CEDAW in 1995. Article 4 of the CERD requires state parties to "take positive, legislative and other measures designed to eradicate all incitement... declare punishable by law all dissemination of ideas based on racial superiority... and declare illegal and prohibit all such organizations". Art 2 of the CEDAW contains similar obligations.

39 According to the Preamble, the PEPUDA's objective is to uphold the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where "all" and "every person" may flourish.

South Africa's international human rights obligations under Customary International law and under the conventions the nation has ratified are binding on the state.⁴⁰

In a specific provision that can benefit foreign-nationals subjected to xenophobic attacks in the country, the PEPUDA provides that discrimination on the basis of "nationality" constitutes a breach of its provisions.⁴¹ This Act further provides that practices associated with xenophobia and assumptions of a discriminatory nature should be interpreted as discrimination on the basis of "nationality".⁴² On unfair discrimination, section 28 of the PEPUDA stipulates thus:

If it is proved in the prosecution of any offence that an unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this *must* be regarded as an aggravating circumstance for the purpose of the sentence.⁴³

Of crucial importance here is that the PEPUDA's drafters used the word "must" in section 28, thereby placing an obligation on South African courts *not* to ignore unfair discrimination as an element in the commission of crimes. It then obliges the state to ensure that legislative and other measures are taken, to address unfair discrimination.⁴⁴

Regrettably, section 28 of the PEPUDA does not elaborate on the concept of *nationality of origin*, a key motivation for xenophobic discrimination and attacks. It also fails to explicitly provide that the nationality motive should be an aggravating factor in cases of unfair discrimination falling within the ambit of this section. This means that victims of xenophobic discrimination or attacks motivated by their

40 The Preamble of the PEPUDA singles out the 1979 CEDAW and the 1965 CERD as some of the international human rights instruments which promote equality and prohibit unfair discrimination and which are binding on SA.

41 PEPUDA s 1 (xvii).

42 As above.

43 PEPUDA s 28 (1).

44 PEPUDA s 29 (2) & (4).

foreignness cannot utilise section 28 while seeking redress for such offences in local courts.

To enforce its provisions, the PEPUDA established Equality Courts.⁴⁵ It also established an Equality Review Committee with the mandate to advise the Minister of Justice and Constitutional Development on the operation of PEPUDA and other pieces of legislation that impact on equality.⁴⁶ Narnia Bohler-Muller is optimistic about the potential of Equality Courts to be bastions of justice for those experiencing various forms of discrimination and human rights abuses such as xenophobic attacks:⁴⁷

Our equality courts have an opportunity to be an open space for individuals, in which to be heard; especially victims of sexual and racial discrimination and hatred who have not had loud enough voices in the past. This approach to moral/legal judgment allows us to situate others and ourselves in our respective societal contexts and in so doing, ensure that equality becomes a reality and not merely a rule.

Other authors are equally enthusiastic that the Equality Courts can deliver “human dignity, the achievement of equality and the advancement of human rights and freedoms” in SA.⁴⁸ Even though the PEPUDA is an important piece of legislation regarding violations of human rights pertaining to non-nationals, including xenophobic attacks, there has been no jurisprudence from South African courts to date, in terms of which this Act has been applied to prosecute perpetrators of xenophobic attacks and violence.

One explanation for the failure of the state to utilise the PEPUDA to prosecute perpetrators of xenophobic violence is that SA is overly focused on promoting

45 PEPUDA s 16.

46 PEPUDA s 32.

47 Bohler-Muller N “What the equality courts can learn from Gilligan’s ethnics of care” (2000) 1 *South African Journal of Human Rights* 623.

48 See generally Mendes E P “Taking equality into the 21st Century: Establishing the concept of equal human dignity” (2000) 14 *National Journal of Constitutional Rights*.

domestic racial harmony between South African citizens of various races and has paid little attention to realising or protecting human rights of foreign nationals affected by xenophobia. Landau argues that xenophobia “has largely been displaced and ignored in public and political discourse” by the broader discussions on social and racial cohesion in the country.⁴⁹ Foreign nationals are not a priority in this discourse. Landau further opines that xenophobia and other non-racial forms of discrimination have remained overlooked or are overtly silenced in scholarly, popular, and political discourse in post-apartheid SA.⁵⁰

4.2.3 The Refugees Act

South Africa’s Refugees Act⁵¹ governs all matters related to SA’s refugee regime. It domesticates the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The two were ratified by SA in 1996 and are discussed in the second part of this section. The Act sets out the procedure for applying for and granting of refugee status in South Africa.⁵²

The Refugees Act does not subject asylum seekers⁵³ to mandatory detention in immigration facilities or refugee holding centres upon entry into the country. Upon approaching the Department of Home Affairs (DHA) at designated offices located at various points of entry into the country, asylum seekers are entitled to be issued

49 Landau L “Xenophobic demons linger in SA” Mail & Guardian of 17 May 2013.

50 Landau L (ed) *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary South Africa* (2012) 2.

51 Act 130 of 1998.

52 Sec 3(a) of the Refugees Act defines a Refugee to include any person seeking asylum from persecution for the reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group. Sec 3(b) expands this definition to include the “African context” to include those fleeing from external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order.

53 An asylum seeker is anyone who has left their country for the purposes of seeking protection as a refugee in another country and is awaiting his or her refugee claim be assessed.

with renewable temporary permits and allowed to live free in the country until their refugee claim is assessed and determined.⁵⁴

The Preamble to the Refugees Act of SA thus proclaims:

Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.

It is worth noting at the outset, that asylum processes in SA are hampered by inefficiency, backlogs and delays in processing decisions.⁵⁵ This state of affairs raises questions about the commitment of SA to look after the welfare of applicants.⁵⁶ These delays have also been found to encourage refugees and asylum-seekers to resort to the underground economy or even crime.⁵⁷

Despite the fact that the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) estimated in 2012, that for the past five years there have been three serious incidents of xenophobic attacks per week, 99 deaths per annum and approximately 1,000 persons displaced permanently or temporarily per annum,⁵⁸ the Refugees Act is silent on xenophobia

54 Refugees Act 130 of 1998, s 22. A temporary asylum seeker permit issued in terms of s 22 grants asylum seekers the rights to work and study in SA.

55 UN, Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante" (2011) 11.

56 As above.

57 UN, Human Rights Council (n 55 above) 13.

58 IOM (2012) "The effects of xenophobia on the integration of migrants in South Africa: An NGO perspective" <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-policy-and-research/migration-policy-1/migration-policy-practice/issues/august-september-2012/the-effects-of-xenophobia-on-the.html> (accessed 13 Aug 2013).

and other hate crimes. This means the Act provides no tangible reprieve for the victims of xenophobic attacks.

Consequently, the Centre for Human Rights at the University of Pretoria (CHR) recommends that, in the absence of statutory provisions providing a direct legal reprieve for victims of xenophobic attacks, asylum seekers and refugees should turn to the existing national laws and international human rights law for protection.⁵⁹

The failure by the Refugees Act to provide relief for victims of xenophobic attacks has presented a myriad of challenges to international organisations dealing with foreign nationals, such as the UNHCR. For instance, according to the UNHCR representative in SA, the main challenge to enjoyment of safe asylum, legal protection and the integration of refugees and asylum seekers in SA as envisaged in the Act, is the “recurrent xenophobic attacks on refugees meted out by members of host South African communities”.⁶⁰

59 CHR (n 4 above) 69.

60 UNHCR “2014 UNHCR country operations profile - South Africa” (2014) available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO> (accessed 22 Jul 2014).

The Refugees Act of SA should be commended as progressive, in that it does not provide for an encampment policy in SA,⁶¹ as is the case with many neighbouring jurisdictions such as Namibia,⁶² Mozambique,⁶³ Zimbabwe,⁶⁴ Zambia⁶⁵ and Botswana.⁶⁶ Even other regional jurisdictions like Kenya,⁶⁷ host refugees in designated refugee camps.

For SA, refugees and asylum seekers have to socially and economically integrate into communities without restrictions on areas of residence. Section 22 the Refugees Act of SA allows asylum seekers to enjoy the right to work and study in the country. Section 24 of the Act entitles refugees to the same socio-economic rights as citizens of SA, without distinction of any kind. Section 24 of the Act further outlaws the institution of any proceedings in respect of unlawful entry or presence in SA if the person has applied for asylum, until a determination has been made on the application. Section 34 of the Act obliges refugees to abide by the laws of SA.

With few employment opportunities in the formal sector, refugees and asylum seekers are therefore predictably forced into the informal employment sector where they compete with South Africans and face xenophobia. Paradoxically, while Sections

61 UNHCR "2014 Regional Operations Profile- Southern Africa" (2014) available at <http://www.unhcr.org/pages/49e45abb6.html> (accessed 22 Jul 2014). Other countries in the region such as Zimbabwe, Botswana, Mozambique and Zambia implement a strict encampment policy where refugees are restricted to living in tightly policed camps.

62 As above.

63 As above.

64 As above.

65 As above.

66 As above. S 6(b) of the Botswana Refugees Recognition and Control Act CAP 25:01 of 1967, still applicable in Botswana, provides for the automatic detention of asylum seekers in special immigration facilities pending the determination of their refugee claims. Presently, Botswana detains all asylum seekers at the Centre for Illegal Immigrants located in Francistown.

67 Kenya hosts 535,000 refugees, with almost all of them residing in Dadaab and Kakuma refugee camps. Kenya implements a strict encampment policy for refugees and asylum seekers residing in the country. See UNHCR "2014 Regional Operations Profile- Kenya" (2014) available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16&submit=GO> (accessed 22 Jul 2014).

22 and 24 of the Refugees Act grant refugees and asylum seekers the right to work in SA, the Private Security Industry Regulation Act (PSIRA)⁶⁸ restricts employment in the country's private security industry, one of the largest employers in the country, to South African citizens and permanent residents.⁶⁹ The constitutionality of PSIRA was tested in the case of *Union of Refugee Women v Director: Private Security Regulatory Authority*. The CC upheld the Act. It is disappointing to note the opinion of the majority of the judges:

Section 27(f) of the Refugees Act provides that "[a] refugee is entitled to seek employment". Section 23(1) (a) of the Security Act limits the refugees' right to choose employment only to the extent that they may not work in the private security industry. It in no way prevents them from seeking employment in other industries...⁷⁰

The most plausible way to cure the inefficiencies of the Refugees Act would be through amendment to include clauses that prohibit or sanction xenophobic conduct against asylum seekers and refugees. It is important to note that past amendments to the Refugees Act have failed to expand its sphere to cover xenophobia attacks.

4.2.4 Immigration Law

Immigration matters in SA are regulated by the Immigration Act⁷¹ (last amended in May 2014). The Act outlaws entering or remaining in the country without a proper permit or immigration papers⁷² by providing for the arrest and deportation of "illegal foreigners".⁷³ South Africa's immigration regime has, over the years, served more as

68 Act 56 of 2001.

69 Private Security Industry Regulation Act 56 of 2001, s 2(2)(c).

70 *Union of Refugee Women v Director: Private Security Regulatory Authority* (2007) (4) SA 395 CC.

71 Act 13 of 2002.

72 Immigration 13 of 2002, s 49.

73 Immigration Act, 2002, s 34.

a form of immigration control rather than facilitation.⁷⁴ Little has changed in the country's immigration policy, even after the transition from the apartheid to the democratic era. In particular, experts have concluded that the Immigration Act is anti-migration and that it exacerbates rather than curbs xenophobia in the country.⁷⁵ They note that the Act is overly focused on "controlling" and "excluding immigrants" rather than properly managing immigration to the benefit of the country.⁷⁶

The Act contains an open and generous provision for arrest, detention and deportation of immigrants deemed "illegal foreigners".⁷⁷ Effectively, such persons can be arrested, detained and deported by immigration officials without the need for an arrest warrant.⁷⁸ This effectively criminalises being in the country "illegally", regardless of the purpose of entering the country,⁷⁹ and may disadvantage those intending to seek asylum and those who are protected under other laws of the country such as the Refugees Act.

In 2011, the South African government began the process of shutting down refugee reception centres in major urban centres and relocating them to border points.⁸⁰ According to the Consortium for Refugees and Migrants in SA (CoRMSA), the effect of this action is that it forces asylum seekers and refugees to travel to

74 Rasool F, Botha C & Bisschoff C "The effectiveness of South Africa's immigration policy for addressing skills shortages" (2012) 10 *Managing Global Transitions* 399.

75 Landau *et al*/(n 6 above) 14.

76 As above.

77 S 32(1) & (2) of the Immigration Act, 2002, declares that any "any" illegal foreigner in SA "shall" be deported without creating exemptions for potential asylum seekers. It is important to note that under the Immigration Regulations of 2005, "illegal foreigner" should be issued a "Form 20" which essentially exempts them from arrest and detention pending the outcome of their application for status in the Republic.

78 S 31(1).

79 Landau *et al*/(n 6 above) 14.

80 CoRMSA "The implications of moving refugee reception offices to the border areas" (2012) 1.

border areas to renew their documents, and this would naturally discourage them from complying with asylum regulations.⁸¹

The 2002 Act was amended in 2014, by the enactment of the Immigration Regulations, which were implemented by the DHA from May 2014. The amendments do not alter the provisions of the Act relating to arrest, detention and deportation of “illegal foreigners” discussed above. They do, however, introduce more restrictions regarding entering the SA labour market and make some far-reaching changes to the visa regimes. Segatti and Landau critique South Africa’s immigration regime by noting that:⁸²

Despite the overall legal framework offering migrants in general more rights and guarantees than ever before, their situation in terms of human rights’ abuses, economic and social rights and day-to-day interactions remains a source of concern. Recurrent xenophobic outbreaks... and regular complaints from the private sector about the South African state’s incapacity to attract and keep foreign skilled labour and investors illustrate the day-to-day tensions around migration issues.

The restrictive nature of South Africa’s immigration laws has also caused a serious skills shortage in the country, effectively making SA less competitive in the global skills market.⁸³ The restrictions have forced thousands of non-nationals to make false asylum claims, in order to obtain refugee documentation and regularize their stay in the country.⁸⁴ It is in the best interest of SA to review and amend its immigration laws, not only to streamline its refugee administration regime and curtail their contribution to xenophobia but also to benefit the country in terms of improving its ability to attract skilled workers.

81 CoRMSA (n 80 above) 4.

82 Segatti & Landau *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (2008) 58.

83 Rasool *et al* (n 74 above) 408.

84 As above.

In an encouraging development, there is jurisprudence to show that South African authorities including courts, are bound to apply immigration laws consistently with the provisions of the country's Constitution. In a 2004 Constitutional Court (CC) decision touching on the treatment of foreign nationals in SA, sections of the Immigration Act⁸⁵ that allowed "illegal foreigners" to be detained without trial were found to be unconstitutional and declared null and void.⁸⁶ This is because the relevant sections of the Immigration Act did not provide for judicial oversight before a decision to detain them without trial could be taken by immigration or law enforcement officials.⁸⁷ In this decision, the CC underscored the necessity of affording constitutional safeguards to detained persons including "illegal foreigners".⁸⁸

4.2.5 Criminal law framework

The main sources of South Africa's criminal law are legislation, common law and case law. None of these explicitly label acts of physical violence, looting and the like, motivated by xenophobia as criminal offences *per se*. Still, there are ways to

85 In *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* CCT 18/03 2004 (4) SA 125 (CC), the Constitutional Court of SA considered two provisions of the Immigration Act 13 of 2002. These two sections concerned with how "illegal foreigners" arrested at ports of entry of SA could be treated pending their removal from the country. The two sections that were considered are: Section 34(8), which provided that illegal foreigners could, if an immigration officer so decided, be detained on the vehicle in which they arrived in the country and be removed from South Africa by that vehicle; and section 34(2) which provided that detained illegal foreigners should be released from detention within 48 hours, except for those detained on a vehicle who would be arraigned in court and later removed from the country. The CC held that the two sections were unconstitutional because they did not afford Constitutional safeguards to detained persons, including "illegal foreigners".

86 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* CCT 18/03 2004 (4) SA 125 (CC).

87 See the decision in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* Case CCT 18/03 2004 (4) SA 125 (CC) at paras 42-43.

88 As above.

prosecute xenophobia and other hate crimes which are motivated in part or whole by bias regarding the other's foreignness.

Motive is an important element in the commission of criminal offenses and it is thus considered during the prosecution of criminal conduct. In *S v Legoa*,⁸⁹ the court explained that criminal trials in SA are divided into two stages, the trial stage, during which the guilt or innocence of the accused on the offence charged is determined, and the sentencing phase, during which an appropriate sentence is passed on a person who has been found guilty.⁹⁰ During the sentencing stage, the presiding officer may exercise a discretion, although the Criminal Law Amendment Act⁹¹ provides for minimum sentences to be imposed for certain serious criminal offences. It is at the sentencing stage that the prosecution should ideally introduce evidence to show that hatred motivated by foreignness or xenophobia, was a motivating factor in the commission of a crime. This factor should then be considered in aggravation.

Further, if xenophobia were to be declared a hate crime, as this thesis recommends below, the Criminal Law Amendment Act could be applied, hate motives considered as aggravating factors and minimum or fairer sentences imposed. Judge Cameron highlighted the importance of the specific motivation and elements of the offence in *Legoa*, by noting:⁹²

Findings of fact may be relevant to both stages. However, those in the first stage relate to the elements of the offence [or the specific form of the offence] with which the accused is

89 *S v Legoa* (2002)4 All SA 373 (SCA) at para 15.

90 In the *S v Legoa* case, two questions were determined by the Supreme Court of Appeal of SA. These are the meaning of "value" in SA's 1997 minimum sentencing provisions; and whether at the trial of an accused charged with dealing in prohibited substances [such as marijuana in Legoa's case], the state was entitled prove the "value" in question after conviction but before sentencing, so as to invoke the minimum sentences.

91 Act 105 of 1997.

92 *S v Legoa* CC at para 15.

charged. Those in the second mitigate or aggravate the sentence appropriate to the form of the offence of which the accused has been convicted.

While it is possible to apply the existing criminal law framework to prosecute perpetrators of xenophobic attacks who rob, vandalize property, loot or even kill foreign nationals, xenophobia as a unique criminal offense is, in the absence of explicit hate crime legislation, unknown to police.⁹³

Other relevant legislation within the criminal law framework is the Criminal Procedure Act,⁹⁴ as amended, and the Defence Act.⁹⁵ The former provides for the arrest and detention of “prohibited immigrants” in SA, a category of persons which is different from those deemed “illegal foreigners” under the Immigration Act of 2002.⁹⁶ What the distinction is The Defence Act applies in areas under border control and it governs the arrest and detention of those crossing the borders illegally.

4.2.6 Interim Conclusion

The domestic national laws of SA do not explicitly provide for xenophobia as a criminal offence. The contribution of the domestic legal framework in combating xenophobia is that a victim of a xenophobic attack can, however, argue that such attacks were motivated by unfair discrimination on the basis of their foreign nationality. In such a case, the court would be compelled by the PEPUDA, to consider discrimination as an aggravating factor and to impose a harsher punishment than it would otherwise.⁹⁷ This said, as indicated above, there is no SA court jurisprudence that evidences the PEPUDA’s application in the prosecution of hate crimes and xenophobic attacks.

93 CHR (n 4 above) 78.

94 Act 51 of 1977.

95 Act 42 of 2002.

96 The Criminal Procedure Act, 2002 s 40 (I).

97 Sec 28 (1) Act 4 of 2000.

4.3 Regional legal framework

4.3.1 Introduction

South Africa is a sovereign country and is empowered to regulate entry to its jurisdiction in accordance with its own laws and international treaty obligations. South Africa has, however, ratified various regional and international human rights conventions that oblige the state to protect foreign nationals living in the country from xenophobic attacks and hate crimes. Similarly, Customary International Law, which is binding on SA, imposes obligations on SA to protect the rights of foreign nationals.⁹⁸

At the regional level, SA has ratified the African Charter on Human and Peoples' Rights (ACHPR)⁹⁹ and the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).¹⁰⁰ The country is also bound by the Southern African Development Community (SADC) framework on regional immigration and human rights.¹⁰¹ The legal obligations emanating from these treaties are discussed in detail below.

98 These include the human rights obligations enshrined in the Universal Declaration of Human Rights (UDHR), the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR).

99 SA ratified the ACHPR in 1996.

100 SA ratified the OAU Refugee Convention in 1995.

101 SA acceded to the SADC treaty in 1994.

4.3.2 The OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969)

The OAU Refugee Convention expands the definition of “refugees” in the 1951 UN Convention Relating to the Status of Refugees,¹⁰² from an “African perspective”. This expansion, *inter alia*, seeks to include “persons compelled to flee their countries owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality” within the ambit of international refugee protection.¹⁰³

The Preamble of the OAU Refugee Convention reiterates the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, as espoused in the Charter of the United Nations and the UDHR. The OAU Refugee Convention prohibits state parties from forcibly returning asylum seekers and refugees to countries where they would be persecuted or face danger to their lives and property.¹⁰⁴ It obliges signatories to admit such persons to their territory and to provide secure asylum conditions and a host of other human rights.¹⁰⁵

The OAU Refugee Convention expressly obliges state parties to offer protection and security to all refugees, without discrimination as to race, religion,

102 According to the 1951 Convention Relating to the Status of Refugees, a refugee is “every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it”. The OAU Refugee Convention expands this definition by adding external aggression, occupation, foreign domination or events seriously disturbing public order as other grounds upon which asylum seekers can rely to apply for asylum.

103 OAU Refugee Convention, art 1.

104 OAU Refugee Convention, art 1-2.

105 As above.

nationality, membership of a particular social group, or political affiliation.¹⁰⁶ This last is particularly relevant within the context of xenophobia.

It is important to emphasize that the OAU Refugee Convention would be the most convenient instrument to cater for African migrant groups in the South African context. Many foreign nationals seeking asylum in SA would, in the strict application of the 1951 UN Refugee Convention, not qualify as refugees mostly because they flee generalised violence in countries such as Somalia, Burundi, Zimbabwe or the Democratic Republic of the Congo. Fleeing generalised violence is not a ground for recognition as a refugee under the 1951 UN Refugee Convention, but is a ground under the OAU Refugee Convention. Recognition as a refugee in SA presents some advantages for the concerned migrant groups, as they are issued with documentation confirming their status, which other categories of migrants often lack to their detriment.

4.3.3 African Charter on Human and Peoples' Rights (1981)

In terms of the ACHPR, state parties like SA are obliged to adopt legislative or other measures to prohibit discrimination of any kind on the basis of race, social origin, ethnicity and other analogous grounds.¹⁰⁷ The ACHPR enshrines the right of "every individual" to life and integrity of the person,¹⁰⁸ liberty and security,¹⁰⁹ a judicial process before expulsion from a country,¹¹⁰ to seek and enjoy asylum,¹¹¹ and to property.¹¹² Xenophobic discrimination and attacks on foreign nationals violate these rights.

106 As above.

107 ACHPR art 2.

108 ACHPR art 4.

109 ACHPR art 6.

110 ACHPR art 12.

111 As above.

112 ACHPR art 14.

While specifically reacting to persistent xenophobic attacks against foreign nationals in SA, the African Commission on Human and Peoples Rights met in 2008 and adopted a resolution reiterating that the human rights of migrants in SA are regulated by national, regional and international human rights instruments and applicable refugee laws.¹¹³ The Commission, in the above resolution, further urged SA to “investigate and prosecute perpetrators of xenophobic attacks and to institute further measures to ensure the protection of foreign nationals in SA, and their property”.

Women migrants are often the worst affected by xenophobic attacks and accompanying violence. An important Protocol to the ACHPR which pertains to the rights of women in Africa was agreed upon in 2003 by African nations, including SA. This Protocol binds state parties to protect the rights of women asylum seekers, refugees, returnees and internally displaced persons, against all forms of violence in host countries. The Protocol binds state parties to ensure that acts of violence against women refugees, asylum seekers and internally displaced persons are considered war crimes, genocide and/or crimes against humanity. The Protocol further compels state parties to ensure that perpetrators of such violence against women are brought to justice before a competent domestic criminal jurisdiction.¹¹⁴

There is jurisprudence from the African Commission on Human and People’s Rights to support judicial enforcement of the human rights provisions of the ACHPR in Africa. In a landmark decision pertaining to mass expulsion of West African migrants from Zambia in the early 1990s,¹¹⁵ the African Commission held that Zambia was in breach of its human rights obligations under the ACHPR. The Commission further ruled that state parties should secure the rights protected in the Charter to all persons within their jurisdictions, nationals or non-nationals. Through

113 Res 131 (XXXXIII) of the ACHPR, venue: Ezulwini, Kingdom of Swaziland on 7-22 May 2008.

114 AHCPR Protocol on Women’s Rights in Africa, 2003, art 11(3).

115 See *Rencontre Africaine pour la Defense des Droits de L’Homme (RADDHO) v Zambia* (Communication 71/92, Compilation of Decisions on Communications of the African Commission on Human and People’s Rights) 367.

this decision, African states, including SA can be held accountable, in their own judicial institutions or regional institutions, for human rights abuses against migrants living in their territories.¹¹⁶

4.3.4 Treaty of the Southern African Development Community (SADC)

Under the SADC legal framework, SA has, since 2009, entered into various bilateral agreements with all neighbouring SADC countries which allow citizens of neighbouring states to enter the country on a free visa and remain for up to 30 days.¹¹⁷ The SADC Treaty, to which SA is a party, further obliges state parties to respect the fundamental human rights and freedoms contained in instruments such as the African Charter on Fundamental Social Rights and the UDHR.¹¹⁸ The treaty further obliges state parties to respect and uphold the human rights of all persons living in the territories of member states and maintain the rule of law.¹¹⁹

The SADC Protocol on the Facilitation of Movement of Persons similarly obliges state parties to protect the rights of refugees and asylum seekers by respecting existing refugee law instruments such as the OAU Convention and the 1951 Convention Relating to the Status of Refugees.¹²⁰ This Protocol, when fully implemented, will progressively facilitate the movement of people in the SADC region through the introduction of free visas and the right of the region's citizens to work and establish themselves freely.¹²¹ Even though it has been signed by all state parties, the SADC Protocol has not yet come into operation.

116 For this view, see also Beyani C *Protection of the Right to Seek and Obtain Asylum under the African Human Rights System* (2013) 4.

117 UN, Human Rights Council (n 55 above) 6.

118 See the African Charter on Fundamental Social Rights, Available at <http://www.sadc.int/index/browse/page/171> (accessed 29 Jan 2014).

119 The SADC Treaty, art 4(c).

120 The SADC Protocol on the Facilitation of Movement of Persons, signed 18 May 2005 in Gaborone, Botswana.

121 UN, Human Rights Council (n 55 above) 5.

For enforcement purposes, the SADC Treaty established the SADC Tribunal whose mandate was to preside over disputes arising from the texts adopted in the SADC.¹²² The SADC Tribunal's Protocol was revised and the Tribunal disbanded in 2012 without developing any jurisprudence on cases related to xenophobic attacks in the region.

4.3.5 Interim Conclusion

As demonstrated above, there exists a domestic and regional legal framework which SA could utilise to fight xenophobia. SA should abide by the human rights obligations it acquired under these treaties, to protect foreign nationals. However, continued attacks, deeply entrenched xenophobic attitudes and the perpetuation of the phenomenon in SA generally, are evidence that the available domestic legal and extra-legal responses have been largely unutilised or ineffective.

In addition to domestic and regional legal interventions discussed above, SA is party to some international treaties on which it could rely to protect foreign nationals from xenophobic attacks. These instruments and their specific interventions are discussed in detail below.

4.4 The international legal framework

4.4.1 Introduction

South Africa is party to some important international legal and human rights instruments, which expressly prohibit discrimination based on nationality or ethnic origin. These include the 1948 Universal Declaration of Human Rights (UDHR), the 1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD), the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1979

¹²² The SADC Treaty, art 16. The SADC Tribunal was established in 2002, inaugurated in November 2005 but later disbanded in 2012.

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹²³

The other important treaties to which SA is a party include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment International (CAT) and the optional protocols to the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). South Africa also committed itself to implement the programme of action developed during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001. The principal way in which SA could rely on these international treaties to fight xenophobia locally is to fully domesticate the treaties and review its existing laws in light thereof or enact new laws which specifically target the perpetrators of xenophobic attacks and other hate crimes. The pertinent human rights provisions of these instruments are discussed below.

It is important to highlight at the outset of this discussion that in 1993, the UN Commission on Human Rights (UNCHR) established the office of a *Special Rapporteur*, an independent human rights expert on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. This mandate has been extended and expanded several times and remains to date. The UNCHR has since been reconstituted as the UN Human Rights Council (HRC) and is currently the UN body responsible for protecting and promoting human rights across the world. In 2008, the HRC mandated the *Special Rapporteur* to focus on phenomena such as xenophobia, racism, racial discrimination and various forms of intolerance.¹²⁴ The *Rapporteur* is now responsible for monitoring human rights violations relating to xenophobia. The *Rapporteur* is also tasked with transmitting communications and

123 SA ratified the 1966 ICCPR in 1998, the 1965 CERD in 1998, 1951 Refugee Convention in 1996, the 1981 African Charter in 1996, and 1969 OAU Refugee Convention in 1995). For further information related to these ratifications and others, see <http://treaties.un.org/pages/Treaties.aspx> and <http://www.africa-union.org/root/au/documents/treaties/treaties.htm> (both accessed on 4 Jan 2014).

124 UN HRC resolution 7/34 of March 2008.

urgent appeals to states concerning cases of xenophobia, racism, racial discrimination and related intolerance.

4.4.2 Universal Declaration on Human Rights

The 1948 UDHR is the cornerstone of Customary International law and its provisions are meant to be observed by all nations, including SA.¹²⁵ It is important to note that the provisions of the UDHR benefit everyone whose fundamental rights have been threatened, including foreign nationals living in SA.¹²⁶ The UDHR's Preamble declares that all members of the human family have inherent dignity and equal and inalienable rights. Article 2 of the UDHR specifically prohibits discrimination based on nationality or social or ethnic origin.

In SA, xenophobia is outwardly manifest, through discriminatory practices by the state and private citizens as well as physical attacks and violence, meted out to foreigners.¹²⁷ To protect migrants from human rights violations as happens in xenophobic attacks, the UDHR obliges nations around the world to safeguard the following human rights: The right to life, liberty and security of the person;¹²⁸ the right to recognition everywhere as a person before the law and the right to equality before law;¹²⁹ and the right to seek and to enjoy asylum from persecution in other countries.¹³⁰ The other important human rights which are protected under the UDHR and that apply to migrants are: Freedom from torture, cruel, inhuman or degrading treatment,¹³¹ the right to own property,¹³² freedom from arbitrary arrest, detention or exile,¹³³ and the right to work and free choice of employment.¹³⁴

125 The UDHR falls under Customary International law, and is applicable in South Africa as a self-executing "soft law".

126 See the Preamble to the UDHR.

127 CHR (n 4 above) 28.

128 UDHR art 3.

129 UDHR art 6-7.

130 UDHR art 14.

131 UDHR art 5.

It is important to note that as a non-binding tool of Customary International law, the UDHR is not enforceable in the domestic courts of SA. Nevertheless, as a member of the international community, SA is morally obliged to observe and implement the progressive human rights provisions of the UDHR in its domestic human rights practices. From the wording of the Constitution of the Republic and the international treaties that SA has ratified, one can deduce that the state has indeed attempted to domesticate the progressive provisions of the UDHR.

4.4.3 International Convention on the Elimination of All Forms of Racial Discrimination

The CERD, adopted in 1965, obliges state parties like SA to eliminate all forms of racial discrimination propagated in their territories by public institutions and private individuals.¹³⁵ It does this by requiring state parties to:¹³⁶

Condemn all propaganda which attempt to justify or promote racial hatred and discrimination in any form... take positive, legislative and other measures designed to eradicate all racial incitement... declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof... not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The CERD is quite explicit on discrimination based on racial attributes or nationality. It obliges state parties "to take steps to guarantee the right to non-discrimination to 'all'; without distinction based on their race, colour, or national

132 UDHR art 17.

133 UDHR art 9.

134 UDHR art 23.

135 CERD art 4. The CERD was adopted on 21 Dec 1965 by United Nations General Assembly (UNGA) Resolution 2106 (XX).

136 CERD art 4.

origin; and the right to security of person and protection by the state against violence or bodily harm.”¹³⁷ SA therefore has an obligation, under the CERD, to criminalize acts of xenophobic discrimination, violence and attacks on foreign nationals.

A CERD Committee is established under the Convention to interpret the CERD treaty provisions and monitor its implementation by state parties. All state parties are obliged to submit regular reports to the Committee on how the rights contained in the treaty are being implemented in their territories.

The Committee has, in the recent past, made important recommendations which directly touch on xenophobia in member states like SA. First, the Committee noted that “victims of xenophobic attacks require just and adequate reparation for any damage suffered as a result of such violence”.¹³⁸ Second, the Committee noted that “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 state parties to take action against these perpetrators”. Third, the Committee encouraged state parties to “address xenophobic attitudes and manifestations towards foreign 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”.¹³⁹

137 As above.

138 CERD Committee General Recommendation No 30 par 18.

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

In 1993, the CERD Committee stated that article 4 of the treaty is mandatory for all treaty members.¹⁴⁰ Therefore article 4 of the CERD treaty is undoubtedly applicable in SA.

Another important recommendation of the CERD Committee was that states should collect comprehensive statistical and other information on complaints, prosecutions, and convictions in cases of racist or xenophobic violence.¹⁴¹

In a specific provision touching on xenophobia in SA, the CERD Committee recommended in 2006 that "SA 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".¹⁴²

In conclusion, it is important to note that the CERD Convention does not affect the legal provisions that a state may enact in relation to nationality, citizenship, naturalization or immigration, however restrictive the provisions might be, provided they do not discriminate against a particular nationality.¹⁴³

140 CERD Committee General Recommendation No 15. The Committee stated in this recommendation that state parties have not only to enact appropriate legislation, but also to enforce it. The recommendation further states that "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression".

141 CERD Committee "General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system" A/60/1, 2005; available at http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf (accessed 14 Jan 2014).

142 CERD Committee Concluding Observations, SA CERD/C/ZAF/CO/3, 19 Oct 2006 par 27.

143 CERD art 1 (2) & (3).

4.4.4 International Covenant on Civil and Political Rights

The ICCPR was adopted in 1966. SA ratified it in 1998 and is currently bound by its human rights provisions.¹⁴⁴ According to the ICCPR, state parties are obliged to ensure respect for human rights “without distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹⁴⁵

The most pertinent human rights protected by the ICCPR treaty are: The inherent right to life, which should be protected by law and from which no derogation can be permitted;¹⁴⁶ protection from torture and inhuman treatment;¹⁴⁷ protection and security of the person;¹⁴⁸ protection from arbitrary arrest and detention;¹⁴⁹ the right to equal treatment before national courts and tribunals;¹⁵⁰ and the right to be recognised as a person everywhere before the law.¹⁵¹

The ICCPR further obliges state parties to respect “due process rights”, such as the right to be heard, before arbitrary detention or deportation of any person from their territories.¹⁵² State parties to this convention are further charged with the obligation of ensuring that any person in their jurisdiction, whose rights are violated, has access to an effective remedy. Indeed, in terms of the ICCPR, the expulsion of foreign nationals without affording them an opportunity to be heard has been

144 The ICCPR was adopted in 16 Dec 1966, through UNGA resolution 2200A (XXI).

145 ICCPR art 2.

146 ICCPR art 6.

147 ICCPR art 7.

148 ICCPR art 9.

149 As above.

150 ICCPR art 14.

151 ICCPR art 16.

152 “Due process rights” as encapsulated in the ICCPR include; the right to be treated fairly, right to a fair trial and the right to efficient or quality administration of justice. These rights primarily guarantee fundamental fairness and justice to citizens, accused persons, *et cetera*.

considered to be a violation of the African Charter by the African Commission on Human and Peoples' Rights.¹⁵³

Available jurisprudence shows that the UN Human Rights Committee (UNHRC) has in the past, ruled that article 9 of the ICCPR protects the right to security of the person in cases where a state party ignores threats to the personal security of non-detained person residing in its jurisdiction. This was the conclusion in the landmark case of *Chongwe v Zambia*,¹⁵⁴ a Zambian case in which a Zambian national had been shot and wounded by security forces in Zambia. State authorities in Zambia refused to investigate or prosecute the perpetrators of the shooting, forcing the applicant to take the matter to the UNHRC. After adjudicating the case, the UNHRC found Zambia to be in breach of article 9(1) of the ICCPR. The UNHRC made recommendations that Zambia should launch effective investigations, hold the perpetrators of the shooting accountable and possibly pay damages to the applicant in the event that investigations and prosecutions find government agents to be responsible for the shooting incident.¹⁵⁵ In theory, and inferring from the UNHRC's decision above, a victim of xenophobic attacks by private or public agents who fails to get justice in the South African courts can appeal to the UNHRC for appropriate relief.

4.4.5 Durban Declaration and Programme of Action

The Durban Declaration and Programme of Action (DDPA) was negotiated and agreed upon in 2001 in Durban, SA, with the host country as a party to it. It provides a comprehensive framework which SA could rely on to combat xenophobia

153 For this position see, *Organisation Mondiale Contre la Torture and Ors v Rwanda* (2000) AHRLR 282 (ACHPR 1996).

154 *Chongwe v Zambia* (2001) AHRLR 42 (HRC 2000).

155 See the decision in *Chongwe v Zambia* (2001) AHRLR 42 (HRC 2000) at para 7.

in its territory.¹⁵⁶ The DDPA provides that human rights instruments such as the CERD, which prohibit racial discrimination and xenophobia, would apply to migrants living in state parties, regardless of their immigration status.¹⁵⁷

The DDPA requires state parties to prioritise the fight against xenophobia, through *inter alia* “the initiation of innovative and holistic approaches and the strengthening and enhancement of practical and effective measures at the national, regional and international levels”;¹⁵⁸ “combat manifestations of a generalised rejection of migrants”; and actively to discourage “xenophobic behaviour and negative sentiments towards, or rejection of, migrants living in their territories”.¹⁵⁹ In another resolution which is important to this discussion, the DDPA recognises that xenophobic violence has a destabilising impact on affected communities. It obliges state parties to carry out thorough investigations and spare no effort to put an end to impunity for violations of human rights and fundamental freedoms of individuals and groups who are victimised by xenophobia in their territories.¹⁶⁰

South Africa also took part in the sequel to the DDPA, the Durban Review Conference of 2009, where the states agreed on an Outcome Document that reaffirmed the responsibility of governments to respond to racist and xenophobic crimes and called on governments to collect reliable information on these and other forms of hate crimes.¹⁶¹

156 The resolutions of the DDPA were endorsed by the UNGA through resolution A/RES/56/266 of 15 May 2002. The full text of the DDPA is available at <http://www.un.org/WCAR/durban.pdf> (accessed 23 Jul 2014).

157 As above.

158 DDPA art 3.

159 DDPA art 24.

160 See the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, “Declaration and Programme of Action,” Sep 8, 2001, Available at <http://www.un.org/WCAR/durban.pdf> (accessed 17 Jan 2014).

161 OHCHR “Outcome document of the Durban Review Conference” (2009) available at http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf (accessed 15 Jan 2014).

4.4.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) was globally adopted in 1990.¹⁶² It defines a migrant worker as “any person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national”.¹⁶³ The CMW acknowledges the vulnerability of migrant workers and members of their families to discrimination and deprivation of fundamental rights in the countries where they live.¹⁶⁴ It obliges state parties to protect migrant workers’ rights.

The rights relevant to foreign nationals, which are relevant to this discussion, are: the right to equal protection of the law; liberty and security of person; dignity; access to justice and due process; emergency medical treatment; access to basic education; protection against unauthorised confiscation or destruction of identity documents; and protection against collective expulsion.¹⁶⁵

This convention provides that state parties should legally sanction persons or groups who use violence, threats and intimidation against migrant workers.¹⁶⁶ The CMW provisions apply to all migrant workers, regardless of their immigration status in the country,¹⁶⁷ and this could be usable in SA’s case. SA has not ratified the CMW to date and is therefore not yet bound by the provisions of this important convention.¹⁶⁸

162 The CMW was adopted through the UN General Assembly resolution 45/158 of 18 Dec 1990.

163 CMW art 2(1).

164 CMW art 7.

165 As above.

166 CMW art 16.

167 CMW art 1.

168 The list of the signatories of the CMW treaty is available at: UN treaties:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en
(accessed 28 Apr 2014).

In the above scenario, where the unavailability of legal protection complicates the plight of migrant workers already faced with xenophobic discrimination and attacks, experts opine that a socio-legal approach would be the best way to safeguard their rights.¹⁶⁹ Here, the host society should “accept” that migrants are human and are entitled to the enjoyment of fundamental human rights and create an amiable environment for them to realise those rights freely.¹⁷⁰ Other workers should join migrant workers in solidarity, in the struggle for the realization of their human rights.¹⁷¹

4.4.7 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol

The 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) is the centrepiece of international refugee protection today. This convention entrenches article 14 of the UDHR, which recognises the right of persons to seek and enjoy safe asylum from persecution they have faced in their countries.¹⁷²

The 1951 Refugee convention is particularly relevant in SA, given the large number of refugees and asylum seekers living in the country.¹⁷³ South Africa ratified

169 Namukasa A “Demystifying human rights: A socio-legal approach to the political framing of migrant workers’ rights in Africa” in Viljoen F (ed.) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 136-137.

170 As above.

171 Namukasa (n 169 above) 137.

172 UNHCR “State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol” (2014) available at <http://www.unhcr.org/3b73b0d63.html> (accessed 22 Jul 2013). Arts 3 & 33(1) of the 1951 Refugee Convention as read with its 1967 Protocol bind SA to welcome and offer protection and security to refugees and asylum-seekers fleeing persecution and conflicts in their countries. Under Customary International law, the UDHR art 14(1) states that “everyone has the right to seek and enjoy in other countries, asylum from persecution”.

173 As noted above, it is not possible to accurately predict the exact number of refugees and other migrants living in SA at the time of writing, but the IOM estimates in 2012, put the number at 3

the 1951 Refugee Convention and its Protocol in 1996¹⁷⁴ and domesticated them by promulgation of the Refugees Act.¹⁷⁵ The country thus attracted obligations in terms of both the 1951 Refugee Convention and the 1967 Protocol.

The Preamble to the 1951 Refugee Convention expressly obliges SA to ensure that refugees and asylum seekers living in the country enjoy dignity and all fundamental human rights and freedoms bestowed on all human beings –including the right to physical security- without discrimination on any basis. The 1951 Refugee Convention also affirms the rights of refugees to acquire refugee status in the Republic, to own property, to enjoy freedom of association, to access the courts, to access employment, and education, amongst other freedoms.¹⁷⁶

The 1951 Refugee Convention safeguards the right to *non-refoulement* or forced return of asylum-seekers or refugees to a country where they would face a threat to their lives or freedoms.¹⁷⁷ This right to *non-refoulement* is guaranteed for asylum-seekers under international law, at least until a durable solution is found for their situation.¹⁷⁸

The UNHCR is the UN agency mandated to monitor the application of the 1951 Convention Relating to the Status of Refugees by states.¹⁷⁹ In its latest

million. The UNHCR has documented 65,881 refugees and 230,442 asylum seekers as living in SA in 2014. A large number of foreign nationals are undocumented. See UNHCR (n 60 above).

174 As above.

175 Act 130 of 1998.

176 Full text of the 1951 Refugee Convention is available on the UNHCR Website <http://www.unhcr.org/3b66c2aa10.pdf> (accessed 20 Mar 2014).

177 Under article 33(1) of the 1951 Refugee Convention "No Contracting state shall expel or return ('refoul') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion".

178 CHR (n 4 above) 91-92.

179 UN General Assembly, resolution 428 (v) of 14 Dec 1950.

guidance note on xenophobia and related intolerance, it emphasises that racism and xenophobia affects its persons of concern at all stages of the displacement cycle.¹⁸⁰

The UNHCR acknowledges that xenophobia could be the cause of flight from countries of origin or transit and also the main protection challenge in countries of asylum as it can hinder integration into the host society or that of resettlement and make return less viable for refugees to repatriate, if racial or ethnic tensions remain high.¹⁸¹ The UNHCR further notes that xenophobia against refugees “is an on-going human rights issue, which makes refugees particularly vulnerable and needs to be addressed”.¹⁸² The organization identifies some challenges posed by xenophobia to refugee protections worldwide, to include:¹⁸³

- (i) Restrictive asylum policies such as the increased use of detention;
- (ii) Arbitrary denial of citizenship or deprivation of nationality to deserving persons;
- (iii) Marginalization, exclusion and segregation;
- (iv) Denial of access to rights and services, such as healthcare and education;

- (vii) Reduced possibilities of finding durable solutions to refugee problems occasioned by the reluctance of countries to facilitate local integration in their jurisdictions, to receive returnees or receive resettled refugees; and

180 UNHCR “Combating racism, racial discrimination, xenophobia and related intolerance through a strategic approach” (2009) 3. The UNHCR is actively engaged in various specific anti-xenophobia activities in SA. These are discussed in detail in chapter 5, 5.3.4.2 below.

181 As above.

182 As above.

183 UNHCR (n 180 above) 5-6.

(viii) The increase in hate crimes targeting refugees.

From the foregoing, it is clear that the application of the 1951 Refugee Convention globally is hampered by xenophobic attitudes. For SA, the UNHCR has singled out xenophobia as constituting a serious threat to the safety and overall protection environment for people of concern under the 1951 Refugee Convention.¹⁸⁴

4.5 Conclusion: The efficacy of current legal mechanisms

This chapter has discussed the available domestic, regional and international legal framework and how the legal and human rights provisions in those instruments could be utilised to combat xenophobia and its manifestations in SA. As demonstrated above, SA has ratified various international human rights treaties and promulgated a host of domestic laws that place a legal and moral obligation on the state to utilise them to defend the fundamental rights of non-nationals being subjected to xenophobic attacks, ensure justice and combat the culture of impunity under which their rights are violated.¹⁸⁵ Whether the country has met its obligations is now examined. This analysis is important as it demonstrates if and how the applicable legal framework has been applied to limit xenophobia.

South Africa, as a member of the community of nations, has a further obligation to treat foreign nationals in a civilised way that respects their fundamental human rights. Dugard argues that the standard of treatment of victims of xenophobic attacks has since changed from the international standard to one set by the human rights movement.¹⁸⁶ He argues that the best standard of treatment for foreign nationals, including those subjected to human rights abuses like xenophobic

184 UNHCR (n 60 above).

185 SAHRC "Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals" (2010) 9.

186 Dugard J *International law: A South African perspective* (2005) 281.

attacks, should be consistent or better than the one sanctioned by international human rights norms and International Customary law.¹⁸⁷

The on-going xenophobic attacks and the failure of state law enforcement agencies to provide remedies are sufficient proof that the South African state has failed to discharge its obligation to protect foreign nationals from xenophobic attacks.¹⁸⁸ Human rights watchdogs such as Human Rights Watch (HRW),¹⁸⁹ Amnesty International (AI),¹⁹⁰ the UN Refugee Agency,¹⁹¹ the IOM,¹⁹² the CoRMSA,¹⁹³ the SAHRC,¹⁹⁴ the South African Migration Project (SAMP),¹⁹⁵ the CHR,¹⁹⁶ and the Africa Peer Review Mechanism,¹⁹⁷ amongst others, have all highlighted the on-going nature of xenophobic attacks in SA.

187 As above.

188 As above.

189 HRW "World report 2014" (2014) 169.

190 Amnesty International (AI) "The state of the world's human rights" (2013) 141.

191 The UNHCR Office in SA has declared that one of the major challenges to the security and adequate protection of refugees and asylum seekers residing in the country is the "recurrent xenophobic" attacks spearheaded by SA nationals against refugees. See UNHCR (n 60 above).

192 See generally, the IOM (n 58 above).

193 The CoRMSA argues that xenophobia is evolving and calibrating with national mood and service delivery failure and also that "SA is nowhere close to addressing xenophobia" and that "deep and persistent negative feelings against non-nationals transcend race, class or gender. See generally, IOM (n 58 above).

194 See generally SAHRC (n 185 above), where the SAHRC found that the widespread lack of rule of law and the reign of impunity were the major causes of xenophobic attacks in the country.

195 See generally Crush J, Ramachandran S & Pendleton W "Soft targets, xenophobia, public violence and changing attitudes to migrants in South Africa" (2013).

196 See generally CHR "Multi-pronged response required to curb xenophobia in South Africa" (2013) where the CHR argues that xenophobia is an on-going "epidemic" and a pervasive part of South African society.

197 The last APRM review of SA gave the country a red rating on its handling of xenophobia, the worst possible rating any country could get on any issue assessed. See South African Institute of International Affairs (SAIIA) "South Africa Report 2011: Implementing the APRM, views from the civil society" (2011) 57-59.

It is easy to link the perpetuation of xenophobic attacks to the failure of the state to use the available legal framework to protect foreign nationals. Landau and Misago, for instance, decry the overt lack of interest demonstrated by the National Prosecuting Authority of SA (NPA), which they argue has prosecuted only a “handful” of xenophobia related cases since 1994, with “few” perpetrators being charged and “even fewer” being convicted.¹⁹⁸ They argue that the NPA has a tendency to drop or refuse to investigate cases that are related to xenophobia.¹⁹⁹ They cite instances where state agents have intervened to actively protect those accused of anti-foreigner violence.²⁰⁰ Even South Africa’s own institutions and senior government officials have indicated that xenophobia is an on-going problem, whose solution remains a challenge.²⁰¹

As demonstrated in the preceding chapters, xenophobic conduct emanates from both state officials and private citizens. The absence of a law that directly deals with xenophobia or hate crimes makes it difficult for victims to seek recourse within the national, regional and global human rights framework discussed above. It also entrenches impunity for xenophobic attacks.²⁰² SA should therefore work quickly to

198 Landau L & Misago J P “Who to blame and what’s to gain? Reflections on space, state, and violence in Kenya and South Africa (2009) 44 *Africa Spectrum* 103.

199 As above.

200 Two particular incidents are cited by Landau & Misago. One of them is a 2006 case in Masiphumelele Township, where the former Western Cape Premier and the local Police Commander intervened to secure the release of businessmen arrested for perpetrating xenophobic attacks. The other cited instance is an example where community protests and mobilisation in various parts of SA led to the release of most of the culprits arrested after the 2008 violence. See Landau & Misago (n 198 above) 104.

201 In 2013, the then Minister of Home Affairs, Naledi Pandor, conceded that existing legal safeguards, policies and other mechanisms had failed to reduce xenophobic sentiments among the populace, build tolerance between nationals and non-nationals living in the country or to protect non-nationals from xenophobic attacks and violence. See Address by the then Minister of Home Affairs, Naledi Pandor, introducing the Home Affairs Budget Debate in the National Council of Provinces <http://www.dha.gov.za/index.php/statements-speeches/188-address-by-minister-naledi-pandor-introducing-the-home-affairs-budget-vote-debate-in-the-ncop-28-may-2013> (accessed 19 Jul 2014).

202 SAHRC (n 185 above) 12.

enact a hate crime law to address this gap.²⁰³ This is because, as a constitutional democracy based on the rule of law, SA is under an obligation to investigate and punish the perpetrators of xenophobic attacks and provide redress to the victims.²⁰⁴

In order to provide sufficient protection for the rights of foreign nationals living in the country and respond to xenophobia, SA needs to urgently ratify the CMW and domesticate it,²⁰⁵ and then report on its implementation to the relevant

203 For many years, there have been calls for South Africa to enact a hate crime law targeting xenophobia and other hate crimes. In March 2016, the Department of Justice and Constitutional Development (DOJCD) announced that a new Hate Crimes Bill, the Prevention and Combating of Hate Crimes Bill, would be tabled in SA's Parliament in September 2016. Clause 4 of the Bill covers crimes motivated by xenophobia. It creates the offence of 'hate crimes' arising from criminal conduct which is motivated by unlawful bias, prejudice or intolerance. The Bill acknowledges that prejudice or intolerance that leads to the commission of hate crimes is motivated by inert qualities of the victim which are real or perceived. These include nationality, race, sex, sexual orientation, gender and gender identity, ethnic or social origin, religion, belief, culture, language, birth, albinism and occupation or trade, HIV status and occupation. The Bill provides that such offences relate to the physical and emotional integrity of the person, as well as offences against the property of the victims, for example murder, attempted murder, rape, assault, robbery, housebreaking, malicious damage to property, *crimen injuria* and arson. More importantly for those who have been watching xenophobia unravel in the country for the past two decades, Clause 4 of the Bill criminalises any conduct which amounts to an attempt, incitement, instigation and conspiracy to commit a hate crime. Clause 5 of the Bill outlaws hate speech through intentional advocating for hatred against any person or group of persons, based on the same grounds as listed in clause 4. This Clause will handily deal with anti-foreigner rhetoric, public mobilisation and hateful speeches which have led to xenophobic violence in the past. This Bill, if enacted into law, will strengthen the role of law enforcement officials including the police, the National Prosecuting Authority (NPA) and courts in holding perpetrators of hate crimes, including xenophobic conduct, legally accountable for not only the criminal acts committed, but also for the hate motive. The law, if enacted, will thus send a message to the society that crimes motivated by hate and xenophobia will not be tolerated in South Africa and are subject to punishment. See the Keynote address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, at the Annual General Meeting of the Hate Crimes Working Group, Cape Town, 30 March 2016, available at: http://www.justice.gov.za/m_speeches/2016/20160330_HateCrimes.html#sthash.vhQulwe4.dpuf (Accessed 19 June 2016).

204 CHR (n 4 above) 115.

205 CHR (n 4 above) 114.

treaty monitoring body.²⁰⁶ The country should also, as a matter of priority, implement and enforce pre-existing domestic and international legal and security obligations owed to foreign nationals, as discussed above. The effectiveness of the success of a new hate crime law and the application of pertinent international treaties would be measured through their application, for example, by examining if perpetrators of hate crimes are successfully prosecuted. Other far-reaching recommendations to address xenophobia are discussed in chapter 7 below.

The effectiveness of using the available legal framework to effect social change, combat xenophobic tendencies and other human rights violations is both direct and indirect. Respect for the rule of law is effective where there is a threat of legal sanctions for the law breakers. For criminal and human rights law, experience shows that coercion and other forms of sanctions often yield compliance.²⁰⁷ Sanctions such as fines, imprisonment, reparations, shaming, apology, re-education *et cetera*, could go a long way in protecting and promoting human rights and equality for all, as envisioned in the Constitution of the Republic.²⁰⁸

The on-going nature of xenophobia as manifest through recurrent attacks and entrenched attitudes is clear evidence that all legal and extra-legal interventions applied to date, have been ineffective. The lack of a hate crime monitoring mechanism means the country is not able to tell how many hate crimes are prosecuted using the criminal justice system. In the next chapter, the thesis reviews some notable best practices developed from SA's experience with xenophobia and the weaknesses that hamper SA's efforts to eliminate the phenomenon.

206 As above.

207 Gutto S B O *Equality and non-discrimination in South Africa – The political economy of law and law making* (2001) 203.

208 As above.

CHAPTER 5: STRENGTHS AND WEAKNESSES IN SOUTH AFRICA'S APPROACH TO THE ELIMINATION OF XENOPHOBIA

5.1 Introduction

Xenophobia has emerged as one of the great human rights challenges of this decade in South Africa (SA). The phenomenon, which is manifested in violent attacks, hostility and other forms of exclusionary attitudes, has been documented in SA from at least the time that apartheid ended in 1994.¹ In its wake it has left thousands of foreign nationals attacked, killed or deprived of property. This has in turn created a challenge for SA in terms of adopting ways to respond to a crisis that is essentially internal in nature.

The unprecedented violence and displacement witnessed during the 2008 country-wide attacks, however, proved to be a turning point for SA.² These attacks prompted South African state authorities and civil society organisations based in the country to take a variety of steps in attempts to combat the phenomenon and prevent a repeat of the violence.³ These interventions met with varying degrees of success and also some challenges. Some of the more successful interventions are worth highlighting and emulating in other jurisdictions. There are also some apparent weaknesses in SA's response to xenophobia, which contribute to the perpetuation of the phenomenon in the country.

1 Misago J P, Monson T, Polzer T & Landau L "May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses" (2010) 38. They argue that xenophobic violence has indeed been an ongoing reality for post-1994 South Africa.

2 Landau L (ed) *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary South Africa* (2012) 1-2; & SAHRC "Investigations into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals" (2010) 8.

3 SAHRC (n 2 above) 8.

This chapter will further examine the best practices and lessons that SA can offer other jurisdictions in dealing with xenophobia and related human rights challenges like hate crimes. The chapter will also consider some weaknesses in the approach to the problem in SA, which hamper the nation's efforts to curb xenophobia and could be avoided in other jurisdictions.

5.2 Actions by agencies of the South African government

While the state bears the primary responsibility in combatting xenophobia in SA, experience shows that addressing the phenomenon locally and elsewhere cannot be the responsibility of the government or one institution alone. Concerted efforts cutting across many institutions are required to fight xenophobia. In this part of the chapter, the positive measures that government organs and non-governmental organisations in SA have taken to address the phenomenon in recent years are examined.

On paper, SA has strong legal and constitutional guarantees for human rights, which are available to protect all persons living in the country against deprivation of their liberty.⁴ Various domestic legal instruments prohibit various forms of discrimination and facilitate the progressive achievement of a host of socio-economic rights.⁵ SA's Bill of Rights is regarded as one of the most progressive in the world, with most of its provisions applying to all persons living in the country, citizens and foreign nationals alike.⁶

The 2008 country-wide xenophobic violence in SA was a momentous event to test the efficacy of the country's legal and institutional capacity to fight xenophobia. The attacks created awareness of xenophobia amongst the Cabinet, civil society

4 UN, Human Rights Council "Report of the Special *Rapporteur* on the human rights of migrants, Jorge Bustamante" (2011) 8.

5 As above.

6 As above.

groups, NGOs and sections of the South African public.⁷ This awareness spawned progressive action by the government, civil society groups and key NGOs in the country that have had some considerable success in highlighting the impact of attacks, preventing or reducing the number of reported violent attacks, minimising the impact of attacks, preventing attacks or simply galvanising action to combat the phenomenon through research publications.

5.2.1 The Cabinet

The initial response to the 2008 violence by the government of SA was to create task forces in Parliament, provincial governments and specialized units in the police force that were tasked with unearthing the causes of the violence and recommending interventions.⁸ The task force released its findings after conducting country-wide investigations.⁹ The report concluded that xenophobia, socio-economic triggers, criminality and “third-force” involvement were responsible for the violence.¹⁰

Also in reaction to the 2008 violence, the South African Cabinet launched an Inter-Ministerial Committee, headed by the Minister of Police, to deal with prominent

7 Hayem J “From May 2008 to 2011: Xenophobic violence and national subjectivity in South Africa” *Journal of Southern African Studies* (2013) 78.

8 UN, Human Rights Council (n 4 above) 8. In this UN report, the following measures taken by the SA government in 2008 are acknowledged: “The social dialogue on the promotion of tolerance and diversity, an initiative developed by the DHA... and, the parliamentary task teams on migration, xenophobia and refugees, formed by the Parliamentary Portfolio Committee of Home Affairs”. The report notes that this task team has “engaged in the promotion of the justice and human rights of migrants and marginalized communities”.

9 Parliament of the Republic of SA “Report of the task team of Members of Parliament probing violence and attacks on foreign nationals in pursuance of a National Assembly resolution agreed on Tuesday, 13 May 2008 (undated) available at <http://www.parliament.gov.za/content/Tast%20Team%20Report%20Xenophobic%20Attacks.pdf> (accessed 12 Aug 2014).

10 Parliament of the Republic of SA (n 9 above) 11.

cases of xenophobia that might occur in SA in the future.¹¹ Various government departments such as the DHA, Local Government and Social Development introduced some social-cohesion programs.¹²

Another laudable, related development was the decision by the South African government to set up a Counter Xenophobia Unit (CXU) in 2004.¹³ This unit made some positive efforts to intervene in subsequent instances of xenophobic violence in the country.¹⁴

For example, after the 2008 violence, the CXU launched a nationwide anti-xenophobia awareness campaign known as “Operation Ubumbano”, or “togetherness”. This campaign targeted South African nationals and it sought to address anti-foreigner stereotypes, highlight the negative consequences of xenophobia, educate the public on the rights and responsibilities of South Africans and foreign nationals, promote reconciliation between locals and foreign nationals and highlight the benefits of international migration to the country.¹⁵

In addition, the CXU contracted the CoRMSA to train community development workers and local councillors on xenophobia, human rights of migrants and

11 See generally, IOM “The effects of xenophobia on the integration of migrants in South Africa: An NGO perspective” (2012), available at <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-policy-and-research/migration-policy-1/migration-policy-practice/issues/august-september-2012/the-effects-of-xenophobia-on-the.html> (accessed 14 Jan 2014).

12 As above.

13 SAHRC (n 2 above) 43.

14 As above.

15 SAHRC (n 2 above) 44. In this report, while highlighting CXU’s unsuccessful efforts, the SAHRC doubts the ability of awareness-raising or anti-xenophobia campaigns to prevent future attacks. It cites CXU’s efforts before 2008 and notes that “they did not prevent hatred and resentment of foreigners from reaching unprecedented levels in 2008”.

immigration laws.¹⁶ The CXU, through the CoRMSA, also trained some 121 immigration officers on human rights.¹⁷

5.2.2 Timely and independent investigations by the South African Human Rights Commission

In the immediate aftermath of the 2008 xenophobic violence in the SA, the South African Human Rights Commission (SAHRC) conducted timely and independent investigations into the attacks and prepared a detailed report (SAHRC Report) with findings and recommendations to avoid a repetition of the violence.¹⁸

The involvement of the SAHRC is discussed here because, as a national human rights institution mandated by the Constitution,¹⁹ it should enjoy trust and credibility from both foreign nationals and South African nationals. The report is important as it enlightened South Africans on the root causes of xenophobia and also made recommendations to address the phenomenon.

Some weighty findings and observations made by the SAHRC in its report are:²⁰ That persistent governmental and institutional coordination weaknesses played a part in hindering timely response to the violence; that the impunity enjoyed and exhibited by the perpetrators of xenophobic violence was a result of the failure of law enforcement officials and the criminal justice system to thoroughly investigate

16 As above.

17 As above.

18 SAHRC (n 2 above) ch 1.

19 The mandate of the SAHRC is set out in Section 184 (1) & (2) of the Constitution of the Republic of South Africa. Primarily, the SAHRC was established to promote respect for human rights and a culture of human rights in the country; promote the protection, development and attainment of human rights and, to monitor and assess the observance of human rights in the country. The commission has powers to investigate and report on the observance of human rights in the country, conduct research and even take steps to ensure redress where human rights violations take place in the country.

20 SAHRC (n 2 above) 11-12.

the violence and prosecute the perpetrators; but, that local actors such as governmental and non-governmental agencies had made some progress in their efforts to curb xenophobia. The SAHRC also acknowledged improvements in contingency planning on matters related to xenophobic violence by various provincial governments across the country.

The SAHRC also provided some concrete recommendations to government departments, including the Departments of Cooperative Governance,²¹ Education,²² Home Affairs,²³ Justice and Constitutional Development,²⁴ Social Development,²⁵ Human Settlements,²⁶ Local government,²⁷ Provincial Government,²⁸ Independent Complaints Directorate,²⁹ the SAHRC,³⁰ the South African Police Service (SAPS), the SA National Defence Force (SANDF)³¹ and the Treasury.³² The objective of the recommendations was to strengthen state institutions to work towards implementation of preventative measures to reduce social conflict or mitigate it whenever it arises, inspire institutional and policy reforms and shape future national policy towards xenophobia.

Some important recommendations by the SAHRC are as follows: That the Department of Justice and Constitutional Development (DoJCD) should develop hate crimes legislation and support measures to roll it out countrywide. The SAHRC recommended to the SAPS, that the organisation should train its officers in

21 SAHRC (n 2 above) 12.

22 SAHRC (n 2 above) 13.

23 As above.

24 SAHRC (n 2 above) 14.

25 As above.

26 As above.

27 SAHRC (n 2 above) 15.

28 As above.

29 As above.

30 SAHRC (n 2 above) 16.

31 SAHRC (n 2 above) 17.

32 SAHRC (n 2 above) 18.

investigation and prosecution of xenophobia related crimes, improve its record-keeping systems, standardise reporting and draw up guidelines in order to ensure that xenophobic attacks and other hate crimes are adequately reported. The report recommended that the DHA should henceforth work with the SAPS and disaster management organs of state to identify key precursors to larger acts of xenophobic violence in the country, like those of 2008.

In addition to providing a conclusive report with findings and recommendations to various government departments, the involvement of the SAHRC in the initial response to the 2008 violence is important, as the organisation further committed to independently monitor the implementation of the report's findings and recommendations by the state.

The action by the SAHRC to conduct a timely independent investigation and to publish the findings and recommendations is a best practice that other jurisdictions could learn from while responding to national human rights challenges such as countrywide violence.

5.2.3 Post-2008 reforms in the South African Police Service

The SAPS is the organisation which is mandated by the national Constitution and other relevant laws of SA³³ to police, arrest and prosecute criminal offenders in SA.³⁴ Indeed, the SAPS website sets out the organization's responsibilities to include: preventing, combating and investigating crime, maintaining public order, protecting and securing the inhabitants of SA, preventing anything that may threaten the safety

33 The other important law from which the SAPS draw their mandate is the South African Police Service Act, 1995 (Act 68 of 1995), as amended by the South African Police Service Amendment Act, (Act 57 of 2008).

34 Constitution of the Republic of South Africa, 1996, s 205.

or security of any community, creating a safe environment and participating in efforts to address causes of crime.³⁵

In the context of xenophobic attacks in SA, the SAPS ultimately hold the responsibility to arrest and prosecute the perpetrators of criminal conduct targeting foreign nationals such as physical attacks, targeted robberies, looting and destruction of property.

The SAPS has learnt from the 2008 experience and responded by implementing progressive reforms in the organisation that have had, and will continue to have, some positive impact on fighting xenophobia. For example, after the 2008 attacks, the SAPS created and filled the post of National Coordinator for Xenophobia at the level of a Director within the Visible Policing Department. The appointee to the position holds the rank of a military general, ensuring that he/she will be respected within the government system when raising issues with superiors.

Another notable police reform since 2008 which has ultimately contributed to improved efforts to curb xenophobic violence and general crime in SA increased visible policing in areas prone to high rates of crime, xenophobic attacks and violence.³⁶ This initiative appears to have enjoyed some success.³⁷

According to Lawyers for Human Rights (LHR), the SAPS Visible Policing effort in xenophobic attacks hotspots has successfully managed to quell many potential threats and actual incidents of xenophobic violence in various parts of the country.³⁸ Some of the important interventions and successes have been recorded in Gauteng

35 SAPS "Vision and mission" (2014) available at

http://www.saps.gov.za/org_profiles/vision_mission.htm (accessed 7 February 2014).

36 Polzer T & Takabvirwa K "Just crime? Violence, xenophobia and crime: Discourse and practice" (2010) 33 *SA Crime Quarterly* 8.

37 As above.

38 See generally, Kaajal Ramjathan-Keogh "Five years on and still no closer to solving xenophobic hatred" (2013), available at <http://www.lhr.org.za/blog/2013/5/five-years-and-no-closer-solving-xenophobic-hatred> (accessed 22 Jul 2014).

Province where the police have faster and easier access to communities affected by xenophobic violence due to better access roads.³⁹ However, certain rural parts of the country, including parts of the Free State, Limpopo and Eastern Cape provinces, which lack good road infrastructure, continue to be in dire need of police intervention to prevent xenophobic attacks.⁴⁰

In reaction to the 2008 violence and subsequent threats of country-wide attacks, the SAPS also established a specialised team to collect and collate crime intelligence data regarding crimes against foreign nationals.⁴¹ The main objective of this was to establish country-wide patterns and assist in prevention of further attacks and in response planning.

Polzer and Takabvirwa praise these actions by the SAPS thus:⁴²

Since early 2010, these police structures have been engaging with other government departments to develop an operational multi-agency preparedness plan for potential cases of widespread violence; although so far with limited success in achieving a collective, practicable plan. Furthermore, the police structures have been developed on the basis of on-going consultation and engagement with United Nations agencies and domestic civil society organisations, suggesting new levels of openness and a desire to find effective, and not only institutionally expedient, measures to prevent and respond to anti-foreigner violence... There are many examples where the police have responded quickly and decisively to early signs of violence, stopped its spread, arresting people inciting and perpetrating violence, and assisting foreign nationals to protect lives and belongings.

Another positive development is that since the 2008 xenophobic attacks, SA has recorded improved cooperation between national police, civil society and UN agencies such as the UNHCR in matters related to the response to xenophobia.⁴³ There has also been improved communication between the SAPS and other

39 As above.

40 As above.

41 As above.

42 Polzer & Takabvirwa (n 36 above) 5.

43 As above.

agencies, and this has led to a quicker deployment of police, thereby reducing the number of fatal incidents.⁴⁴ On this front, LHR notes that while an average of 238 threats or actual xenophobic incidents are reported to the SAPS on a monthly basis, the police have, through early intervention efforts, been able to achieve a success rate of about 50% in preventing injury, loss of property, physical attacks, displacements or deaths.⁴⁵

These are positive measures which should be expanded upon and could certainly be emulated in other jurisdictions.

5.3 Actions by South Africa's civil society organisations and NGOs

An important move by civil society groups in SA to try and address xenophobia was the launching of the Roll Back Xenophobia Campaign (RBX).⁴⁶ This campaign was launched in December 1998 in response to the rising levels of xenophobia against foreign nationals in the country. The RBX was initially, a partnership between the National Consortium on Refugee Affairs (NCRA), the SAHRC and the UNHCR. Part of the RBX campaign's anti-xenophobia activities included public education through the media, workplaces and schools. This campaign died in 2002 due to lack of funding.

In 2007, realising that xenophobic sentiments and tensions were escalating, civil society organisations re-initiated various peace-building activities such as awareness campaigns and sporting events in various parts of the country to try to diffuse these tensions between foreigners and nationals. These initiatives climaxed with the "Celebration of Unity" festivities in SA in 2007.⁴⁷

The 2008 violence appears to have galvanised further action from local civil society groups and NGOs to prevent a repeat of xenophobic violence. Following the

44 As above.

45 See generally, Ramjathan-Keogh (n 38 above).

46 SAHRC (n 2 above) 43.

47 Misago *et al* (n 1 above) 143.

attacks, several organizations conducted research studies, launched peace-building initiatives and public awareness campaigns promoting peaceful coexistence and social cohesion and even held monitoring initiatives.⁴⁸ Other civil society groups have provided emergency humanitarian assistance to the victims and carried out other interventions which have had a positive impact worth emulating in other jurisdictions.⁴⁹

Prominent South African organisations, civil society groups and NGOs whose anti-xenophobia activities are examined in this section include: the Consortium for Refugees and Migrants in South Africa (CoRMSA), the Centre for Human Rights at the University of Pretoria (CHR), the African Centre for Migration and Society (ACMS) and the UNHCR in South Africa.

5.3.1 Consortium for Refugees and Migrants in South Africa

The CoRMSA comprises of NGO member organizations, various civil societies and individuals based in SA. Their main activity is to advocate for rights-based refugee and immigration policies and laws, promote best-practice models, and to encourage compliance with minimum international and national constitutional standards. Its programmes in the country include advocacy, research, creating public awareness, capacity building, and networking for the benefit of refugees and migrants.⁵⁰

48 See generally, the IOM (n 11 above).

49 See generally, Igglesden V, Monson T & Polzer T "Humanitarian assistance to internally displaced Persons in South Africa: Lessons learned following attacks on foreign nationals in May 2008" (2009).

50 Retrieved from www.cormsa.org.za (accessed 30 Jan 2014).

As part of its work, the CoRMSA has made a significant contribution to the fight against xenophobia in SA over the past decade.⁵¹ An important and timely early contribution by the CoRMSA towards enhancing media accountability for stereotypical and xenophobic reporting in SA happened in 2008. In this instance, the CoRMSA and the Media Monitoring Project of SA (MMP) filed an official complaint with the then Press Ombudsman Joe Thloloe and the SAHCR against the *Daily Sun's* use of negative, biased, discriminatory and stereotypical references to foreign nationals.⁵² In the complaint, the CoRMSA and the MMP argued that through the *Daily Sun's* repeated, unjustifiable and incorrect stereotyping of foreigners; the news group was indeed exacerbating xenophobia towards them. The outcome of this complaint is that the CoRMSA and the MMP succeeded in having the *Daily Sun* barred from describing foreign nationals as "aliens".⁵³

Another important development took place in 2009 when the CoRMSA, in collaboration with the SAHRC, conducted an investigation into the causes of the 2008 xenophobic violence. In 2010, they forwarded a ten point list of

51 As early as 1998, the CoRMSA, the SAHRC and the UNHCR launched a partnership and worked with a range of targeted stakeholders to raise awareness on issues relating to xenophobia against foreign nationals from a rights-based perspective. In the aftermath of the 2008 violence, the CoRMSA worked with the Counter Xenophobia Unit (CXU) of the government to train community development workers and local councillors on xenophobia and offer training on national and international laws relating to immigration and human rights respectively. Its advocacy activities have continued over the years. Presently, the CoRMSA is part of the Hate Crimes Working Group (HCWG) of SA and is actively engaged in lobbying, research and publications aimed at combating xenophobia and hate crimes. See www.cormsa.org.za (accessed 13 Aug 2014).

52 MMP "Media Monitoring Project submits complaint about Daily Sun reporting on xenophobia" 28 May 2008. Available at http://www.mediamonitoringafrica.org/index.php/news/entry/media_monitoring_project_submits_complaint_about_daily_sun_reporting_on_xen/ (accessed 31 Dec 2014).

53 MMP "MMP wins a great victory over the word alien" 3 Nov 2008, available at http://www.mediamonitoringafrica.org/index.php/news/entry/mmp_wins_a_great_victory_over_the_word_alien/ (accessed 31 Dec 2014).

recommendations to the Inter-Ministerial Committee established by the SA government to deal with the phenomenon, on how to address xenophobia in SA.⁵⁴

In the above report's recommendations, the CoRMSA urged SA to strengthen its xenophobia early detection and response mechanisms and to improve access to justice and the rule of law by promulgating a hate crime law in the country. Linking incessant xenophobic attacks to political inaction, the CoRMSA called for political leaders and opinion shapers across the country to condemn all threats and outbreaks of attacks against foreign nationals. It further called for concrete action by the state to prevent social conflict, promote social cohesion and, at the same time, hold all government employees found to exhibit xenophobic tendencies accountable. Further, the CoRMSA advised that education and public information campaigns could play an important role in tackling negative stereotypes of foreign nationals and promote an understanding of the benefits of diversity.

5.3.2 Centre for Human Rights at the University of Pretoria

Since the 2008 xenophobic violence in SA, the CHR has been at the forefront of the fight against xenophobia in the country through its publications and advocacy touching on the phenomenon and on human rights generally.

Firstly, in 2009, the CHR conducted a detailed study and released a report with findings which touched on South Africa's legal obligations to fight xenophobia.⁵⁵ The study concluded that SA is obliged by national and international law to respect and protect the human rights of all persons living within its borders, respect the principle of *non-refoulement* with regard to asylum seekers and refugees in the

54 CoRMSA "Taking action on threats of xenophobic violence: Recommendations for the Inter-Ministerial committee" (2010), available at <http://www.cormsa.org.za/2010/06/21/cormsa-submits-recommendations-on-xenophobic-violence-to-inter-ministerial-committee/> (accessed 26 Jan 2014).

55 See generally, CHR "The nature of South Africa's legal obligations to combat xenophobia" (2009).

country, promote access to socio-economic rights to all within its borders and promote re-integration of victims of xenophobia.⁵⁶

The CHR urged SA to ratify and domesticate all relevant human rights instruments such as the CMW and to include the human rights situation of foreign nationals in periodic state reporting mechanisms for such treaties.⁵⁷ In addition, the CHR pointed out that SA lacks a hate crime law and this has forced law enforcement officials to address xenophobic attacks through the criminal justice system.⁵⁸ The CHR argued that this has led to a significant increase in impunity amongst perpetrators of violent mob raids against foreigners.⁵⁹

The CHR further noted in 2013, that xenophobia is an on-going “epidemic” and a pervasive part of South African society.⁶⁰ It underscored the fact that local media houses had regularly failed to investigate or report on the recurrent, country-wide xenophobic attacks, a fact that had only served to desensitize the public to the scale and impact of xenophobia in the country.⁶¹ The CHR opined that by regularly reporting on xenophobic attacks around the country, the media could heighten popular awareness of the phenomenon and influence public perception on the need to take pragmatic steps to fight xenophobia.⁶²

The CHR has established a *Xenophobia Project* and a website⁶³ containing educational literature on the subject of xenophobia in SA which is regularly updated with new information.

56 CHR (n 55 above) 114.

57 As above.

58 CHR (n 55 above) 78.

59 As above.

60 CHR “Multi-pronged response required to curb xenophobia in South Africa” (2013), available at <http://www1.chr.up.ac.za/index.php/centre-news-2013/1160-multi-pronged-response-required-to-curb-xenophobia-.html> (accessed 20 Jul 2013).

61 As above.

62 As above.

63 <http://www1.chr.up.ac.za/index.php/xenophobia-project.html> (accessed 20 Jul 2013).

5.3.3 African Centre for Migration and Society at the University of the Witwatersrand

The ACMS, formerly the Forced Migration Studies Program (FMSP), is a research centre based at the Wits in Johannesburg. After the 2008 violence erupted in SA, the ACMS carried out several empirical studies related to xenophobia in the country.⁶⁴ The most relevant study and report regarding this topic was released in 2010, when the ACMS partnered with the CoRMSA to conduct a detailed inquiry on the causes of the 2008 xenophobic violence in SA.⁶⁵

Relying on empirical evidence collected in various locations in the country, the ACMS (then the FMSP), uncovered for the first time, that, contrary to popular belief, the violence was not triggered by a “third force”, human “tsunami”, poor economic conditions, competition for resources or poor service delivery.⁶⁶ The study further concluded that the violence was also not a result of organised crime as claimed by political leaders.⁶⁷

The FSMP study revealed that the violence was rooted in the micro-politics of township and informal settlement life in the country.⁶⁸ It also established that the violence was led by local groups and individuals who used popular frustrations to

64 Some important ACMS-affiliated studies and publications on xenophobia, which were published after the 2008 violence include: “Triggers, territory, and terror: Explaining the 2008 xenophobic violence in South Africa” (2008); “May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses” (2010); “Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa (2009); *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary South Africa* (2013); & “Promoting social cohesion and countering violence against foreigners and other outsiders: A study of social cohesion interventions in fourteen South African Townships (2013).

65 See generally Misago *et al* (n 1 above).

66 Misago *et al* (n 1 above) 10.

67 As above.

68 As above.

mobilize nationals to attack foreign nationals.⁶⁹ The organizers of the violence used the violence as a means to appropriate localised state authority for personal political and economic gain.⁷⁰ The FMSP answered the important question of what factors translate xenophobic attitudes in SA into actual violence. These include vacuums in political leadership and competition for leadership positions in the townships, which have, over the years, led to the emergence of parallel self-serving leadership structures. These structures turn violent or encourage violence when threatened.⁷¹

The FSMP study blamed the violence on the failure of the existing conflict resolution mechanisms in the townships and an entrenched culture of vigilantism and impunity which encourage the perpetrators of xenophobic violence to attack foreign nationals without fear of consequence. Widespread, general lack of knowledge of immigration laws and human rights provisions applicable to migrants in the country was also found to cause xenophobic attitudes, as it was found to lead to general criminalization of foreign nationals regardless of their immigration status.⁷²

The other factors uncovered by the above FSMP study were that officials holding leadership positions and even law enforcement officers themselves, held xenophobic attitudes and that local authorities in the townships supported and enforced unlawful and xenophobic practices against foreign nationals, such as limiting of business ownership and inciting the general population.⁷³ The ACMS remains one of the most active entities in conducting research and issuing publications on the phenomenon of xenophobia.

69 As above.

70 As above.

71 As above.

72 As above.

73 As above.

5.3.4 The UN Refugee Agency (UNHCR)

5.3.4.1 UNHCR'S global anti-xenophobia action

The UN Refugee Agency's global mandate is to provide protection and assistance to all persons of concern. Such persons include refugees, asylum seekers and stateless persons. The UNHCR is fondly described by experts as:

A teacher of international norms which promotes and disseminates international refugee law; socialises states into ratifying key conventions and incorporates the main tenets of international refugee law within domestic legislation and policy frameworks of States...⁷⁴

The organisation issues authoritative guidance notes to member states and its staff on emerging trends in international refugee law and the general protection of refugees and migrants.⁷⁵

Some major anti-xenophobia activities undertaken at the global level by the UNHCR in recent years include: Its participation in developing the sections of the 2001 Durban Declaration and Programme of Action (DDPA) that touch on refugees and asylum seekers;⁷⁶ releasing guidance notes relating to combating racism, racial discrimination, xenophobia and related intolerance; contributions to reports of the UN Special *Rapporteur* on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance and; involvement with NGOs, states and other humanitarian partners it works with, at country levels.

74 Betts A, Loescher G & Milner J *UNHCR: The politics and practice of refugee protection* (2012) 82.

75 This is pursuant to the organisation's global mandate and, specifically, as provided under the UNHCR Statute, Article 35 of the 1951 UN Refugee Convention as well as Article II of the 1967 Protocol to the UN Refugee Convention.

76 See generally, The World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, "Declaration and Programme of Action," Sep 8, 2001, Available at <http://www.un.org/WCAR/durban.pdf> (accessed 17 Jun 2014).

The UNHCR's latest guidance note on combating racism, racial discrimination, xenophobia and related intolerance was released in 2009. In this note, the UNHCR identifies xenophobia as constituting a serious threat to the overall protection environment for people of concern presently and for the foreseeable future.⁷⁷ It advises states that xenophobia, racism and intolerance should be strategically prioritised in refugee protection activities, as they pose major challenges to the global asylum and protection regime.⁷⁸

The UNHCR has also warned that negative politicisation of asylum processes and hostile anti-refugee and immigrant attitudes are on the rise and taking root, often featuring in election campaigns in many parts of the world.⁷⁹ The UNHCR redefines the concept of xenophobic discrimination and harm, to provide that the harm may be based on the grounds of race, colour, descent, or national or ethnic origin, in combination with other grounds, such as religion, gender, disability and even nationality.⁸⁰

To address the human rights threat posed by emerging trends of xenophobia and intolerance at the global level, the UNHCR has called upon the UN, states, international and regional organisations, NGOs and community groups to make concerted efforts to tackle racist and intolerant attitudes.⁸¹ The UNHCR opines that racist and intolerant attitudes could be prevented from developing through human rights education and public information campaigns.

The UNHCR further recommends that a global strategic approach to address xenophobia should encompass several actions. These are: Monitoring signs of hate crimes, analysing the underlying causes of xenophobia and hate crimes, assessing

77 The United Nations High Commissioner for Refugees (UNHCR) "Combating racism, racial discrimination, xenophobia and related intolerance through a strategic approach" (2009) 13.

78 As above.

79 Betts *et al* (n 74 above) 4.

80 Betts *et al* (n 74 above) 15.

81 As above.

the manifestations of these phenomena and their impact on target populations, understanding and highlighting the legal obligations of host nations to protect all individuals from xenophobia and hate crimes, involving diverse local and international organisations to complement responses and solutions, involving the affected groups in the strategic approach; and providing necessary support to victims of xenophobia and hate crimes.⁸²

Even though the UNHCR guidance notes are not legally binding, they are important in guiding domestic actions of states. This is because SA and other state parties to the UN Refugee Convention have a treaty-based obligation to cooperate with the UNHCR.

5.3.4.2 UNHCR's anti-xenophobia action in SA

Following the 2008 xenophobic violence in SA, the UNHCR country office started partnering with civil society groups, NGOs and national as well as provincial government agencies to prevent more xenophobic attacks and provide support to victims who fall under the organisation's mandate.⁸³

In its work, the UNHCR has collaborated with various civil society organisations, international organisations, UN agencies and government agencies, to establish a Protection Working Group (PWG).⁸⁴ The PWG was established in response to the 2008 xenophobic violence in SA. Chaired by the UNHCR, the PWG is

82 Betts *et al* (n 74 above) 4-12.

83 UNHCR partners include, amongst others, NGOs like LHR (legal partner), the CoRMSA. A full list of UNHCR partners in SA is available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO> (accessed 28 Jan 2014).

84 Members of the PWG include representatives from the government like SAPS, the SAHRC, the Department of Home Affairs (DHA), the Department of International Relations and Cooperation (DIRCO), the Department of Justice (DoJCD), UN agencies such as the UNHCR, the IOM, the UN OCHA, the UNICEF) and civil society organisations such as the CoRMSA and LHR, Amnesty International (AI), Oxfam, and religious organisations. Diplomatic embassies are also represented in the PWG.

a measure taken by International Organisations to pursue a coordinated response to xenophobia and security matters affecting refugees, asylum seekers and other migrants in South Africa. The PWG meets regularly to deliberate on these matters. Through the PWG, the UNHCR is able to voice the issues affecting foreign nationals under its mandate.

In its other anti-xenophobia efforts, the UNHCR has identified and mapped areas that have been persistently affected by xenophobic violence and then established a network of community-based outreach volunteers in xenophobia flashpoints.⁸⁵ These volunteers work with law enforcement officers and local authorities to minimise attacks and provide reintegration support to refugees and asylum seekers affected by xenophobic threats and violence.⁸⁶

Working with the refugee informers, volunteers and NGOs it partners with, the UNHCR in SA presently utilises a “xenophobia hotline” to alert the SAPS of any potential mobilisation to commit xenophobic violence in various locations across the country.⁸⁷ The UNHCR also promotes activities aimed at social cohesion, capacity building, anti-xenophobia education and the promotion of social cohesion.⁸⁸

It is difficult to gauge the extent to which the UNHCR has succeeded in its efforts to reduce or alleviate xenophobic attacks or sentiment. The UNHCR’s SA website does not have an analysis of any tangible achievements by the organisation or its partners. However, through the use of the “xenophobia hotline” which results in timely deployment of SAPS officers, the UNHCR’s efforts have been able to avert

85 This information was obtained from an informal interview with UNHCR Senior Regional Community Services Officer, Mr Alphonse Munyaneza, on 8th Jan 2014. An interview with Mr Munyaneza was necessary because a review of publicly available material on the UNHCR website does not reveal that an existing formal and coherent anti-xenophobia strategy was being implemented by the organisation.

86 As above.

87 As above.

88 As above.

many incidents of attacks and looting, thereby saving lives, property and generally preventing crime.⁸⁹

5.3.5 The South African Migration Project

The South African Migration Project (SAMP) is an international network of organisations that were founded in 1996. They promote awareness of migration-development linkages in the SADC through publications and advocacy. The SAMP has played a significant role in anti-xenophobia efforts in post 2008 SA, primarily through conducting periodic empirical studies, which survey and track xenophobic sentiment amongst the South African and regional populace.⁹⁰

5.3.6 Interim conclusion

One of the criticisms directed at civil society responses to xenophobia in SA is that these groups tend to focus on providing humanitarian assistance to victims rather than engaging the government to actively formulate realistic policies and institute

89 Mr Munyaneza clarified that while the UNHCR uses the “xenophobia hotline” to prevent xenophobic attacks against refugees and asylum seekers, the SAPS mainly attributes such attacks to “general crime” in such locations.

90 Through the SAMP policy series, the organization has been able to publish well-researched articles on migration and xenophobia trends in the region. Some significant SAMP publications relating to xenophobia in SA are: “Challenging xenophobia: Myths and realities of cross-border migration in Southern Africa” (1998); “The lives and times of African migrants & immigrants in post-apartheid South Africa” (1999); “Writing xenophobia: Immigration and the press in post-apartheid South Africa” (2000); “Creating the nation: The rise of violent xenophobia in the new South Africa” (2003); “Regionalizing xenophobia? Citizenattitudes to immigration and refugee policy in Southern Africa” (2004); “The perfect storm: The realities of xenophobia in contemporary South Africa” (2008) “Xenophobia, migration and human development” (2009); “Medical xenophobia: Zimbabwean access to health services in South Africa” (2011); & “Soft targets: Xenophobia, public violence and changing attitudes to migrants in South Africa after May 2008” (2013).

far-reaching reforms to eliminate xenophobia.⁹¹ The other social cohesion actions they undertake in communities, such as sports and awareness campaigns have not been empirically proven to have a positive impact in toning down anti-foreigner sentiments. It is however important to note that research and publications can positively influence policy makers and general audiences.

5.4 Weaknesses in South Africa's approach to the elimination of xenophobia

South Africa has experienced dealing with xenophobia and its manifestations for the past two decades. During this period, the country has recorded both successes and challenges. Legal, institutional and other weaknesses encountered in SA's approach to the elimination of xenophobia will be discussed below.

5.4.1 Structural weakness in South Africa's justice system

Experts have highlighted that there is an existing general structural weakness in the justice system in SA, which limits the extent to which victims of xenophobic attacks in the country can access justice.⁹² For example, over the past two decades during which xenophobia has manifest as a problem in the country, there has been no serious attempt to pursue justice on behalf of the foreign national victims of xenophobic attacks through their identification, identification of witnesses or protection of witnesses of xenophobic attacks.⁹³

It is important to note that there have been no notable prosecutions of any high-ranking politician responsible for inciting xenophobia or of high profile architects of xenophobic attacks. Landau and Misago argue that the National Prosecuting Authority (NPA) lacks interest in prosecuting xenophobia-related

91 Pugh, SA "Advocacy in the time of xenophobia: Civil society, the state and the politics of migration in South Africa" (2014) 1 *South African Journal of Political Studies* 1.

92 Misago *et al*/(n 1 above) 13.

93 As above.

offenses, as evidenced by the fact that only a handful of cases have been prosecuted since 1994.⁹⁴ They also note that the NPA has a tendency to drop or refuse to investigate cases that are related to xenophobia and that state agents, have in the past intervened with the police in order to protect suspected perpetrators of xenophobic attacks.⁹⁵

The primary explanation offered for this failure of the justice system is that SA authorities are overly focused on promoting domestic racial harmony amongst South African citizens of various races, at the expense of pursuing justice for foreign nationals affected by xenophobia.⁹⁶ Xenophobia has thus been largely displaced and ignored in public and political discourse.⁹⁷

In 2012, the CoRMSA declared that “despite all the measures that have been implemented to address xenophobia so far, gaps in addressing the phenomenon still remain”.⁹⁸ The CoRMSA has pointed out the lack of coordination between various actors in the fight against xenophobia and the pervasive impunity that continues to be demonstrated by perpetrators of xenophobic attacks across the country is a clear indication that SA has failed to address the phenomenon.⁹⁹

5.4.2 Lack of an explicit law to tackle xenophobia and other hate crimes

Researchers have decried the impunity exhibited by the perpetrators of xenophobic attacks in SA.¹⁰⁰ The best way to counter impunity and foster accountability for such

94 Landau L & Misago J P “Who to blame and what’s to gain? Reflections on space, state, and violence in Kenya and South Africa (2009) 44 *Africa Spectrum* 103.

95 As above.

96 Landau L “Xenophobic demons linger in SA” Mail & Guardian of 17 May 2013.

97 As above.

98 See generally the CoRMSA (n 54 above).

99 As above.

100 SAHRC (n 2 above) 8.

attacks is to hold the perpetrators legally accountable and realise justice for the victims.

Presently, SA lacks a specific law to address xenophobia and other hate crimes.¹⁰¹ Experts contend that none of the existing laws in the country- statutory or common law- is specifically tailored to address xenophobia or hate crimes.¹⁰² This is contrary to the spirit of the Constitution of the Republic, which provides an enabling environment for enactment of hate crime legislation. The Constitution states that “to achieve equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be undertaken”.¹⁰³

In 2013, the DoJCD stated that it was finalising “a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance” and a “Policy Framework on Hate crimes” that would lay the basis for a hate crime law in SA.¹⁰⁴ This law had not been promulgated as of June 2016.

That SA does not have a hate crime law is a paradox, given the country’s history of racial discrimination, apartheid and persistent xenophobic attacks. Successive studies by the SAHRC, the CoRMSA and other organisations have recommended promulgation of a hate crime law as the best way to stem xenophobia in the country.¹⁰⁵ Its absence means that perpetrators of xenophobic attacks are

101 Breen D & Neil J “The need for hate crime legislation” (2011) 38 *SA Crime Quarterly* 33; & Muchiri G “The use of law and multidisciplinary mechanisms to address xenophobia in SA” Unpublished LL.M dissertation, University of Pretoria (2012) 22.

102 Breen & Neil (n 101 above).

103 The Constitution of the Republic of South Africa, 1996, s 9 (2).

104 Department of Justice & Constitutional Development, Media statement of 18 January 2013, available at http://www.justice.gov.za/m_statements/2013/20130118_create-training-centre.html (accessed 12 Aug 2014).

105 See the SAHRC (n 2 above) & the CoRMSA (n 54 above).

prosecuted using common-law offences such as public violence, common assault or theft.¹⁰⁶

While there is jurisprudence from South African courts showing there has been prosecution for racially-motivated attacks,¹⁰⁷ there have been no prosecutions or convictions associated with xenophobia-motivated attacks. In the few instances where such attackers of foreign nationals are prosecuted, this is done using common law offences such as assault.¹⁰⁸ The consequence of such actions was highlighted by the SAHRC in 2011:

The fact that the minimal number of perpetrators from the 2008 violence were criminally charged with common law offences such as common assault galvanised activists to call for the State to draw up a hate crimes and prejudice related legislation to deal with- among others- acts of xenophobia....¹⁰⁹

Experts note that even when offences motivated by xenophobia are prosecuted using common law offences, many such cases cannot be pursued to their conclusion.¹¹⁰ An examination of statistics relating to withdrawal of criminal cases

106 A past SAHRC report on the investigations into xenophobic violence alluded to the fact that xenophobia thrives and attacks persist because even after the SAPS make arrests, only a minimal number of perpetrators are criminally charged, and it is always with common law offences such as common assault. See SAHRC "Report of the open hearings on xenophobia and problems related to it" (2004) 2.

107 See *S v Salzwedel & Others* 2000 (1) SA 786 (SCA) in which, white men associated with the AWB attacked a group of black men whose car had broken down. The court held that the racist motivation behind the crimes was an aggravating factor which was taken into account during sentencing.

108 Monson T & Misago J P "Why History has repeated itself: The security risks of structural xenophobia" (2009) 29 *SA Crime Quarterly* 30.

109 SAHRC "The vulnerability of migrants in particular women and children to xenophobic violence: A presentation to the OHCHR panel discussion on vulnerability of migrants to racism, xenophobia and discrimination" in New York, 4 May 2011.

110 Monson & Misago (n 108 above) 30.

throughout the country reveals that withdrawal or termination is four times more likely in xenophobia-related cases.¹¹¹

Failure of the legislature to enact laws to prosecute xenophobia-motivated crimes poses several challenges: It sends a message to the country that hate and xenophobia-motivated crimes are not taken seriously by South African society.¹¹² Judges, investigating officers and prosecutors across the country are not sensitised, trained or experienced in handling xenophobia-motivated offences.¹¹³ Evidence which could support convictions for xenophobia-motivated crimes is often not collected or considered and hence, South African courts don't prosecute such offenses.

It is important to acknowledged that the law may not the sole means by which the hate crimes such as xenophobia can be addressed. Law could however make an important contribution to the solution in a multidisciplinary approach.

5.4.3 Lack of political will to fight xenophobia

A consistent issue that has been highlighted by various investigative reports into the causes of xenophobia in the country is the widespread use of xenophobic political rhetoric¹¹⁴ and the lack of political will to fight the phenomenon through the prosecution of offenders and implementation of mechanisms to prevent it.¹¹⁵

After carrying out investigations into the 2008 violence, the CoRMSA opined that SA suffers "a lack of political will for institutional or legislative reforms that would protect the rights of non-nationals in the country", with the President of SA

111 As above.

112 CoRMSA "Hate crimes legal brief" (2010) 24.

113 As above.

114 CHR (n 55 above) 8.

115 CoRMSA "Protecting refugees, asylum seekers & immigrants in South Africa" (2008) 16. Available at <http://www.lhr.org.za/sites/lhr.org.za/files/Cormsa08-Final.pdf> (accessed 20 Jan 2014).

opposing the need for reforms and maintaining that “the country’s policies have always promoted the peaceful integration of migrants in our midst”.¹¹⁶

According to Polzer & Takabvira, it is ideologically and politically uncomfortable for senior government officials to admit that the citizenry, their electorate, is xenophobic.¹¹⁷ Indeed, the initial reaction to the 2008 violence was a chorus of denial by senior political officials, who argued that the attacks were not motivated by xenophobia. President Mbeki blamed them on “naked criminality” and declared thus:

These masses are neither antipathetic towards, nor do they hate foreigners. And this I must also say - none in our society has any right to encourage or incite xenophobia by trying to explain naked criminal activity by cloaking it in the garb of xenophobia.¹¹⁸

In 2013, the SA Cabinet issued a statement, to the effect that:¹¹⁹

Communities must be vigilant against the possible resurgence of criminal violence targeting foreign nationals. Cabinet is cautious not to label this violence as xenophobia because ... these acts may be driven primarily by criminality.

In a January 2015 protest letter to the SA government, the African Diaspora Forum (ADF) noted that the persistent denial of xenophobia by government officials was hampering efforts to alleviate the phenomenon. The ADF highlighted the difficulty of fighting a phenomenon that senior officials of the state deny by noting:

116 As above.

117 Polzer & Takabvirwa (n 36 above) 7.

118 Address of the President of South Africa, Thabo Mbeki, at the national tribute in remembrance of the victims of attacks on foreign nationals, Tshwane, 03 Jul 2008 available at <http://www.thepresidency.gov.za/pebble.asp?relid=3330> (accessed 24 Jun 2014).

119 Statement from the SA cabinet meeting of 29 May 2013. Available at <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-29May2013> (accessed 24 Jul 2014).

Despite the escalation of violence over the past 6 years causing numerous deaths, the government has denied that there is xenophobia... always questioning the nature of this violence and attributing it to 'crime' instead of recognising it for what it is - xenophobic violence... This attitude, from our perspective, has condoned the violence and allowed it to reach institutional heights making things even more difficult for foreign nationals living in South Africa, but also for South Africans wishing for social peace and integration...¹²⁰

Misago *et al* also contend that there is a “regrettable lack of political will” by senior state officials to act on xenophobia by investigating past attacks or planning to prevent future attacks.¹²¹ According to Crush, by denying xenophobia as the motivation for attacks against foreign nationals, the South African state “externalises and stands outside the phenomenon” thereby diverting the focus of fighting xenophobia from its programmes and policies.¹²² In addition, by denying xenophobia, the state embeds the phenomenon in its structures and policies.¹²³

The lack of political will to fight xenophobia or pursue justice for its victims is often baffling. It should never be forgotten that a third of those killed in the 2008 xenophobic violence were South African citizens who were attacked for various reasons, including their morphological features such as darker skin, refusal to participate in the violence or association with foreigners through marriage or business connections.¹²⁴ The state should therefore have an incentive to fight the phenomenon as it affects South African citizens as well.

It is worth noting that some senior government officials have now acknowledged that xenophobia is an issue in the country. For example, in 2013, the former South African Minister of Home Affairs, Naledi Pandor, twice publicly conceded that existing legal safeguards, policies and other mechanisms have failed

120 “Government ignoring xenophobia- ADF” ENCA News 25 Jan 2015.

121 Misago *et al* (n 1 above) 227.

122 Crush J “Doing business with xenophobia: Urban informality and migrant entrepreneurship in Southern Africa” (2014) 5.

123 As above.

124 Misago *et al* (n 1 above) 53.

to reduce xenophobic sentiments among the populace, build tolerance between nationals and non-nationals living in the country or to protect non-nationals from xenophobic attacks and violence.¹²⁵

5.4.4 Absence of monitoring, recording and reporting mechanisms for xenophobia-motivated offenses

The SAHRC has highlighted that South Africa lacks a centralised oversight mechanism to monitor and evaluate xenophobia-related offences. In the aftermath of the 2008 violence, the SAHRC even acknowledged its failure to monitor past recommendations with regard to xenophobia as a social issue in SA.¹²⁶ The lack of monitoring mechanisms poses a challenge to policy makers to understand which interventions and policies work well and which do not. Muchiri posits:

There is no pivot point around which communities in most need of particular messages are prioritised for intervention. Nor is there a central mechanism to track which communities have received anti-xenophobia messages and which have not...¹²⁷

To date, SA has no publicised, official hate crime monitoring and reporting mechanism.¹²⁸ Such a mechanism is essential to the collection of reliable statistics relating to violent hate crimes like xenophobia.¹²⁹ Such a mechanism would empower police to record or track trends in bias-motivated crime. The lack of a

125 Address by the former Minister of Home Affairs, Naledi Pandor, introducing the Home Affairs Budget Debate in the National Council of Provinces on 28 May 2013, available at <http://www.dha.gov.za/index.php/statements-speeches/188-address-by-minister-naledi-pandor-introducing-the-home-affairs-budget-vote-debate-in-the-ncop-28-may-2013> (accessed 19 Jul 2013). Pandor also expressed similar sentiments during her speech on World Refugee Day 20 June 2013 when she condemned xenophobic attacks on refugees and urged action to combat xenophobia.

126 SAHRC (n 2 above) 8.

127 Breen & Neil (n 101 above) 33; & Muchiri (n 101 above) 22.

128 Muchiri (n 98 above).

129 As above.

monitoring mechanism prevents policymakers from seeing and understanding the full scope of the problem and developing adequate responses.”¹³⁰

The gathering, recording, processing and analysing of xenophobia-related crimes and information would create a new impetus among policymakers to fight this scourge in the country. This would, in turn, accelerate the enactment of hate crime legislation and result in more resources being allocated to fight xenophobia and other hate crimes.¹³¹

5.4.5 Poor coordination by institutions dealing with xenophobia

SA hosts many NGOs and humanitarian organisations that deal with migrants and that are somewhat involved in activities that address xenophobia. From an institutional, organisational perspective, the response to xenophobic attacks in SA has been found to be “chaotic”, primarily because of poor coordination amongst stakeholders.¹³²

Experts have pointed out that SA lacks coordinated contingency planning and an evaluation mechanism related to xenophobia.¹³³ According to the SAHRC, government organs such as the National Disaster Management Centre (NDMC), the SAPS and the SA National Defence Force (SANDF), which would hitherto take up the responsibility of responding to emergencies of a security nature, were unprepared for the 2008 country-wide violence.¹³⁴

As part of the South African government anti-xenophobia strategy, a Counter Xenophobia Unit (CXU) was set up in 2004.¹³⁵ This unit made efforts to intervene in

130 As above.

131 Muchiri (n 101 above) 28.

132 Misago *et al* (n 1 above) 186.

133 See generally IOM (n 11 above).

134 SAHRC (n 2 above) 74.

135 SAHRC (n 2 above) 43.

in some instances of xenophobic attacks in the country.¹³⁶ The CXU has, however, been ineffective due to lack of human and financial resources and a limited mandate.¹³⁷ A report released by the parliamentary task team mandated to investigate the 2008 violence found that the CXU was not visible during the crisis.¹³⁸ Equipping agencies with the resources they need and facilitating them to network with their counterparts would serve to improve coordination and efficiency in responses to xenophobic attacks.

5.4.6 Policing failures

Policing practices are implicated in the widespread xenophobic violence in SA. Experts have pointed out that SA lacks an effective policing and redistributive justice mechanism and this has, over the years, created a thriving “culture of impunity” amongst perpetrators of attacks on foreign nationals across the country.¹³⁹ For instance, the widespread use of violence and vigilantism as a means to resolve disputes in the townships has only served to increase the rate of crime in the areas and ultimately, escalated incidents of violence targeting foreign nationals living in SA.¹⁴⁰

Steinberg links policing failures in respect of the 2008 xenophobic attacks across the country thus:¹⁴¹

Struggling to maintain its bond with the poor, the SA government signalled, through police practices, that a quotient of South Africans’ freedom was being stolen and that the

136 As above.

137 As above. The CXU’s initial mandate was restricted to addressing attitudes among government staff, not the general population.

138 SAHRC (n 2 above) 43.

139 Bond P & Ngwane T “Xenophobia and civil society: Why did it happen?” Synthesis report: South African civil society and xenophobia (2010) 5.

140 As above.

141 Steinberg J “Security and disappointment: Policing, freedom and xenophobia in South Africa” (2011) 1 *British Journal of Criminology* 345.

perpetrators should be punished. It is this that led mobs into the streets, for it gave purchase to the idea that the business of making the city secure was forever unfinished.¹⁴²

There is a widespread mistrust of the police and the general criminal justice system in SA amongst the general public and foreign nationals that is attributable to past experiences of police inefficiency, corruption, xenophobic tendencies and collusion with criminals.¹⁴³ Also, some policemen fear to act against perpetrators of xenophobic violence, as attacks on foreigners often enjoy popular support within local communities. Law enforcement officials fear that they will be victimised by members of the community.¹⁴⁴

As early as 2000, Lubkemann highlighted that corruption among police officers was catalysing xenophobia and insecurity in SA.¹⁴⁵ He wrote of policemen pulling suspected foreign nationals into alleys, asking them to roll up sleeves to see their vaccination marks. The policemen would then extort money from non-nationals found to be foreigners.¹⁴⁶ He argued that actions such as these served to undermine the faith of nationals and foreigners in police protection.¹⁴⁷

Over the years, foreign nationals living in the country have been subjected to stereotyping as criminals.¹⁴⁸ Consequently, many have been attacked in xenophobic violence. Despite this, very few perpetrators have been arrested or charged, let alone convicted.¹⁴⁹ Failure to prosecute such attacks on foreign nationals has only

142 As above.

143 Misago *et al* (n 1 above) 31.

144 As above.

145 Lubkemann S "The transformation of transnationality among Mozambican migrants in South Africa" (2000) 34 *Canadian Journal of African Studies* 41–63.

146 As above.

147 As above.

148 Lubkemann (n 145 above) 32.

149 Monson & Misago (n 108 above) 29.

served to communicate a message of impunity to would-be perpetrators and to legitimise attacks by implying state support of vigilante, anti-immigrant actions.¹⁵⁰

Policing failure undermines efforts by law enforcement authorities and escalates xenophobic violence. Misago *et al* also argue that policing failure has promoted the risk of recurrent xenophobic violence, as the public turns to vigilantism and group violence against foreigners and perceived criminals.¹⁵¹ Residents support vigilante structures as performing a vital service in ridding their neighbourhood of criminals.¹⁵²

Vigilantism is therefore seen as an inevitable consequence of the perceived failure of the police to address runaway crime in the townships.¹⁵³ Mob violence and killings through “necklacing” are amongst the most common outcomes of vigilante violence in South Africa’s townships.¹⁵⁴ Since 1994, the majority of victims of this type of violence are criminals and foreigners.¹⁵⁵ Steinberg sums up the assumed role that vigilantes play vis a vis the failure by the state to provide security by stating as thus:

If one follows closely the chain of events that led to the violence, and if one listens to the voices of those who took to the streets, it seems that they in fact believed that they were doing the State’s work, or, at any rate, that they were finishing a piece of business that the police had begun.¹⁵⁶

150 As above.

151 As above.

152 As above.

153 Misago *et al* (n 1 above) 31.

154 Misago *et al* (n 1 above) 32.

155 As above.

156 Steinberg (n 41 above) 346.

5.4.7 Weaknesses in domestic institutional response

Empirical inquiry into the response to xenophobia by South African institutions has revealed that some state institutions function according to personal interests of key officials heading them, rather than in accordance with their legal mandates.¹⁵⁷ Other institutions such as community security mechanisms have been compromised or lack legitimacy to fulfil their mandates, causing them to be replaced by violent vigilante groups.¹⁵⁸ This eventually leads to a breakdown of the rule of law in locations where such activities occur.¹⁵⁹

Further, research has indicated that some government officials, local leadership structures in townships, some elected leaders and the police, are reluctant to intervene when foreign nationals are attacked because they share xenophobic attitudes with the general population and also want foreign nationals to be evicted from their neighbourhoods.¹⁶⁰ Some public institutions have been found to condone xenophobia or to refuse to intervene when attacks occur as they fear victimization from the community and losing legitimacy and political positions.¹⁶¹

5.4.8 Conclusion

This chapter has analysed various actions strengths and weaknesses of South Africa's approach to the elimination of xenophobia. Actions by the government and civil society organisations have been considered. It is emphasized that the existing legal framework is inadequate to tackle xenophobia and other crimes which are motivated by hate and prejudice, including racism and racial discrimination. In this regard, it is also important to highlight that the state bears the biggest responsibility to end xenophobia and to prosecute perpetrators.

157 Misago *et al* (n 1 above) 12.

158 As above.

159 As above.

160 Misago *et al* (n 1 above) 11.

161 Misago *et al* (n 1 above) 15.

While law alone may not instantly change human hearts and end hate attitudes, it is in the interest of the rule of law and human rights for the state to put in place initiatives that send a clear signal that hate crimes such as xenophobia, racial discrimination, racism and others will not be tolerated in the country. This will be achieved through a new, specific legal framework to deal with xenophobia and hate crimes. Other institutions, such as non-state actors, including the civil society, have a role to support the state in this function.

In the following chapter, the thesis considers the experiences that other jurisdictions have had with xenophobia and hate crimes, and what lessons SA could draw from them.

CHAPTER 6: PRACTICES REGARDING XENOPHOBIA AND HATE CRIMES IN OTHER JURISDICTIONS

6.1 Introduction

Hate crimes such as xenophobia and racism are global phenomena and not limited to South Africa (SA).¹ For instance, anti-immigrant attacks attributed to xenophobia have been reported in other jurisdictions, including developed countries such as the United States of America (US), Australia, Germany and Ireland.² Available literature reveals that SA researchers have focused their studies on incidents of xenophobia that have taken place within the borders of SA, especially the 2008 violence, and have not examined experiences in foreign jurisdictions.³

1 Crush J & Pendleton W "Regionalizing xenophobia? Citizen attitudes to immigration and refugee policy in Southern Africa" (2004) 1.

2 According to Human Rights First (HRF), in recent years, there have been many cases of arson targeting foreign-owned businesses. There have also been many cases of assault, murder and other hate crimes against foreigners in, inter alia, Germany, the UK, Ireland and the US. See generally, HRF "2008 Hate crime survey: Racism and xenophobia" (2008). For detailed reports on the prevalence of xenophobia in various European countries, see generally Coenders M, Lubbers M, Scheepers P Majorities' attitudes towards minorities, findings from the Eurobarometer and the European Social Survey (2005).

3 The majority of writings on xenophobia in SA are focused on the prevalence of the phenomenon in the country. See generally; Valji N "Creating the nation: The rise of violent xenophobia in the new South Africa" (2003); Nyamnjoh FB *Insiders and outsiders: Citizenship and xenophobia in contemporary Southern Africa* (2006); Misago J P, Landau L & Monson T *Towards tolerance, law and dignity: Addressing violence against foreign nationals in South Africa* (2009); Crush J & Ramachandran S "Migration, xenophobia and human development" (2010) 11 *Journal of Human Development and Capabilities* 209; Landau L "Loving the Alien?: Citizenship, law, and the future in South Africa's demonic society," (2010)109 *Journal of African Affairs* 213; Neocosmos M *From foreign natives to native foreigners: Explaining xenophobia in post-apartheid South Africa* (2010); Matsinhe, Mário D *Apartheid vertigo: The rise in discrimination against Africans in South Africa* (2011); Landau L (eds) *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary South Africa* (2012); & Crush J, Ramachandran S & Pendleton W "Soft targets, xenophobia, public violence and changing attitudes to migrants in South Africa" (2013).

With regard to the interventions that have already been implemented locally, it has been observed that the SA government has prioritised promoting domestic racial harmony to fighting xenophobia.⁴ Xenophobia, like racism deserves to be treated with greater sensitivity and concern than other forms of crime. Comparative analysis of SA and other jurisdictions could therefore be useful, in providing some insight and broadening perspectives beyond the country and the region. Analysing other jurisdictions' approaches to the phenomenon allows insight into some policy, legal, social and institutional interventions which have worked elsewhere to alleviate xenophobia and other hate crimes. This chapter therefore analyses experiences from foreign jurisdictions which have also encountered xenophobia and hate crimes, and the vital lessons that SA could learn from their interventions to combat the phenomena.

The first part of this chapter deals with case studies within the African jurisdictions of Kenya and Egypt. These studies clearly demonstrate that xenophobia occurs elsewhere in Africa. As this thesis will demonstrate, Egypt is a country where the majority of citizens are Arabic, thus racially different from the targeted migrants who are Black Africans. This can be contrasted with Kenya, where the majority of citizens are Black Africans as are the migrants. While there is little to learn from Egypt's experiences and responses, it is worth noting that Kenya has developed laws to address xenophobia and hate crimes.

The second part of the chapter looks at the Western jurisdictions of Australia, the United Kingdom (UK) and the state of Arizona in the USA. Australia, for example, has successfully utilised legal, institutional, social and immigration policies to overcome or minimise xenophobia in its territory.⁵ The US and the UK have enacted

4 Landau L "Xenophobic demons linger in SA" Mail & Guardian 17 May 2013.

5 Australian Human Rights Commission (AHRC) "Combating racism in Australia" a discussion paper by HREOC for the World Conference against Racism" (2001) available at http://www.hreoc.gov.au/racial_discrimination/consultations/national_consultations/combating_racism.html (accessed 14 Jun 2014).

legislation and developed hate crime reporting mechanisms that have worked well to accurately document and address hate crimes. Thematic lessons, apparent best practices and the challenges encountered in fighting xenophobia and hate crimes in all the analysed jurisdictions are scrutinised in an attempt to develop best practice models for SA.

It is important to note that all jurisdictions cited for analysis are, jurisprudentially speaking, comparable with SA. They are all constitutional democracies where legislative interventions have been effectively utilised to combat hate crimes. These interventions could potentially, be easily adapted and applied in SA.

6.2 Xenophobia in Egypt and Kenya

Incidents of xenophobia and its manifestations through attacks, discrimination and harassment of foreign nationals have been documented, *inter alia*, in the African nations of Kenya and Egypt.

In Egypt, the main targets of xenophobia and racist violence are refugees, asylum seekers and other migrants from Sub-Saharan African countries.⁶ In Kenya, Somali migrants and ethnic Somalis born in the North-Eastern region of Kenya are subjected to xenophobic discrimination and related human rights abuses due to their imputed links to terrorism.⁷ The extent of xenophobia and its impact in these countries is elaborated upon in detail below.

6 Human Rights First (HRF) "Combating xenophobic violence: A framework for action" (2011) 3-4.

7 Human Rights Watch (HRW) "Kenya: Halt crackdown on Somalis" (2014), available at <http://www.hrw.org/news/2014/04/11/kenya-halt-crackdown-somalis> (accessed 30 Sept 2014).

6.2.1 Xenophobia in Egypt

As of 2014, Egypt hosted approximately 183,000 documented refugees of various nationalities.⁸ The majority of the refugees residing in the country come from Somalia, Sudan, Ethiopia, Eritrea and Iraq.⁹

Independent researchers and human rights organisations based in Egypt have persistently reported xenophobic attacks including physical and verbal abuse against foreign nationals in Egypt.¹⁰ According to Yeargain, refugees and other migrants who move to Egypt from non-Arab countries experience racism and xenophobia on a daily basis.¹¹ Human Rights First found that African migrants, including Eritreans, Ethiopians, Somalis and other Black Africans from sub-Saharan Africa face xenophobia, racial violence and general harassment because they are easily identifiable by Egyptians due to their racial features.¹²

Incidents of xenophobia which are most prevalent in Egypt include verbal and physical harassment on the streets, extortion by landlords and gangs, violent physical attacks, poor treatment at public places including hospitals, as well as targeted human organ harvesting by criminal gangs.¹³ It has been noted that refugees in Egypt have experienced an increase in the incidence of xenophobic attacks since President Hosni Mubarak was removed from power in 2011.¹⁴

8 UNHCR "2014 country operations profile- Egypt" (2014).

9 As above.

10 HRW "Sinai perils, risks to migrants, refugees, and asylum seekers in Egypt and Israel" (2008), available at <http://www.hrw.org/en/node/75941/section/1> (accessed 15 Jan 2014); & Yeargain K "No protection: Egypt's refugees & migrants" (2011), available at <http://muftah.org/?p=716> (Accessed 19 Jan 2014).

11 Yeargain (n 10 above).

12 HRF (n 6 above) 3.

13 HRF (n 6 above) & Yeargain (n 10 above).

14 "Egypt: Refugees hit by discrimination, violence amid heightened nationalism" IRIN News 24 Nov 2011.

According to the Cable News Network (CNN), hundreds of Black, sub-Saharan African asylum seekers and refugees in Egypt have been singled out, attacked, kidnapped, tortured, had their organs harvested or even been killed in xenophobic and criminal attacks over the past few years.¹⁵ These attacks are orchestrated by the general public, police, border guards and criminal gangs.¹⁶ In this report, the CNN further highlights that authorities offer little or no help because of prevailing lawlessness and the fact that law enforcement officials have a xenophobic attitude.

Al-Jazeera International supports the view expressed by CNN and points out that asylum seekers from sub-Saharan Africa experience long-standing racism and xenophobic attitudes from Egyptians in addition to challenges emanating from an over-burdened and highly bureaucratic asylum system.¹⁷ *Al-Jazeera* reported as follows:

Sub-Saharan refugees are treated by different informal rules than those of Arab origin - excluded from schools, facing hurdles opening businesses and finding work, and hampered in legal cases.... Round-ups of anyone who 'looks' African are often reported and are unmistakably racially-motivated...¹⁸

According to the Egyptian Initiative for Personal Rights (EIPR), a human rights Non-Governmental Organisation (NGO) based in Egypt, racism and xenophobia are a common occurrence in Egypt with Black African migrants being subjected to verbal harassment and physical attacks on the streets by members of the public and by law-enforcement officials.¹⁹ The EIPR reported:

15 "Sinai organ smugglers" Cable News Network 3 Nov 2011.

16 As above.

17 "Black Egyptians decry daily racism" Al-Jazeera International 19 Jul 2013.

18 As above.

19 Egyptian Initiative for Personal Rights (EIPR) "Egypt: Protection of the rights of all migrant workers and members of their families; NGO alternative report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families April 2007" (2007) 5.

Newspaper articles expressing xenophobic views in general or racist views towards black Africans in particular often appear in the Egyptian press, including the State-owned press. Migrants are often portrayed as communities with low morals who spread disease...²⁰

Having established that xenophobia and racism are prevalent in Egypt, the domestic legal framework and its effectiveness in combating the phenomena are assessed below.

6.2.1.1 The domestic and international legal framework in Egypt

Egypt adopted its most recent Constitution in 2014. The Constitution guarantees a range of social, economic, civil and political rights, including the right to petition and access the courts.²¹ The Egyptian Penal Code²² outlaws acts of incitement or discrimination towards individuals or groups of people on several stated grounds which include race and origin.²³

Furthermore, Egypt has acceded to some important international human rights conventions, on which it could rely to protect foreign nationals living in the country from xenophobic attacks and abuse. The most pertinent of these is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).²⁴

Other important international conventions to which Egypt is party are: The International Convention on the Elimination of all forms of Racial Discrimination (CERD), the 1951 United Nations Convention Relating to the Status of Refugees (1951 Refugee Convention), the International Covenant on Civil and Political Rights

20 EIPR (n 19 above) 6.

21 The Constitution of the Arab Republic of Egypt, 2014.

22 Law 147 of 2006. This law amended the existing provisions of art 3 of the Egyptian Penal Code; Official Gazette issue no. 28, 15 Jul 2006.

23 It should be noted that there is no jurisprudence from Egypt evidencing the application of this law.

24 Egypt ratified the CMW in Feb 1993.

(ICCPR), the African Charter on Human and Peoples' Rights (the African Charter); and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT).²⁵

There is little evidence that Egypt abides by these conventions. According to Egypt's leading human rights organisation, the Egyptian Organisation for Human Rights (EOHR), Egypt has routinely violated the 1951 Refugee Convention through its inhuman treatment of African migrants living in the country and fails to protect them from harm caused by non-state actors.²⁶

The EOHR further notes in its 2014 submission to the UN Human Rights Council for the Universal Periodic Review on Egypt, that many migrants from sub-Saharan African countries are unlawfully detained by state authorities and tortured or killed in Egypt by non-state actors.²⁷

In 2013, Amnesty International (AI) also reported that Syrian and Palestinian refugees were subject to xenophobic attacks and hostility in Egypt, due to their imputed support for the opposition Muslim Brotherhood organisation.²⁸ State authorities would routinely round them up, unlawfully detain and *refoul* them in

25 Egypt ratified the CERD in 1967, the 1951 Refugee Convention in 1981, the ICCPR in 1982, the African Charter in 1984 and the CAT in 1986. For information relating to Egypt's ratification of these treaties see <http://treaties.un.org/pages/Treaties.aspx> (accessed 04 Jan 2014) and <http://www.africa-union.org/root/au/documents/treaties/treaties.htm> (accessed 04 Jan 2014).

26 EOHR "Submission to the UN Human Rights Council Universal Periodic Review UPR on Egypt for the year 2014" available at <http://en.eohr.org/2014/03/16/eohr-submitted-a-report-on-egypt-for-the-united-nations-universal-periodic-review/> (accessed 14 Oct 2014).

27 The EOHR notes in the above submission to the UN Universal Periodic Review on Egypt, that the country has failed to combat targeted killings or illegal detentions of African migrants in the country. The EOHR reported a total of 53 incidents of torture in 2010, 694 incidents in 2011 and 165 in 2012.

28 See generally, AI "Egypt: End deplorable detention and deportation of refugees from Syria" (2013).

contravention of Egypt's legal obligations under the 1951 Refugee Convention.²⁹ AI attributes these acts to xenophobia and intolerance.³⁰

The EIPR reports that Egypt routinely violates the CMW through arbitrary detentions of migrants, their inhuman treatment and physical violence directed towards them.³¹ Egypt subjects all foreign workers to mandatory HIV testing as a pre-condition for obtaining work permits.³² Those found to have the virus are denied work permits, subjected to discrimination and stigmatisation and often deported from the country.³³ This is a blatant violation of the CMW, which safeguards the equal treatment of migrant workers and nationals of the state of employment.³⁴

As in SA, xenophobic attitudes in Egypt are exacerbated by a failure of successive governments to raise awareness, provide information and dispel myths about migrant workers and to clarify the positive economic role they play.³⁵

Likewise, Egypt, like SA, lacks an official data collection or reporting system on xenophobia and other hate crimes. This makes it difficult to assess the extent of the phenomena in the country.

29 As above.

30 As above.

31 See EIPR "Egypt: Protection of the rights of all migrant workers and members of their families; NGO alternative report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families April 2007" (2007) 5-6. Art 14 of the CMW safeguards the right to legal protection against arbitrary or unlawful interference in the privacy of individuals and families of migrant workers. Art 10 of the CMW safeguards the right to protection of the law against torture, degrading or inhuman treatment or punishment. Finally, art 16 safeguards the right to protection by the state against violence, physical threats and intimidation.

32 EIPR "Egypt: Protection of the rights of all migrant workers and members of their families; NGO alternative report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families April 2007" (2007) 2.

33 As above.

34 CMW, art 43.

35 As above.

6.2.2 Xenophobia in Kenya

The East African nation of Kenya hosted about 535,000 registered refugees and 52,000 asylum seekers in 2014.³⁶ These refugees and asylum seekers came from Somalia, Ethiopia, Eritrea, the Democratic Republic of Congo and other African countries.

Xenophobia against ethnic Somalis is a growing phenomenon in Kenya, as the country grapples with threats posed by the Al-Shabaab terror group, which is based in Somalia.³⁷ The Kenyan police and the general public often suspect Somali refugees and even Kenyan nationals of Somali ethnicity of being terrorists or harbouring terrorists and treat them accordingly.³⁸ In October 2012, heavy clashes between Kenyan nationals and ethnic Somalis were reported in the suburb of Eastleigh following a terrorist grenade attack in Nairobi.³⁹ Members of the general public attacked the Eastleigh Somali suburb and physically assaulted Somalis, trying to evict them from the neighbourhood.

International aid organisations operating in Kenya have also reported xenophobia. For example, the US Agency for International Development (USAID) recently warned of growing “fears” and “false perceptions” in Kenya, regarding Somalis and Muslims generally, who are imputed to have links to terrorism or extremism.⁴⁰

In September 2013, armed terrorists from the Al-Shabaab group attacked the Westgate shopping mall in Nairobi, killing 67 people. In the immediate aftermath of the attack, Kenyan Muslims and ethnic Somalis renounced the attacks, called for

36 UNHCR “Country operations profile- Kenya” (2014).

37 “Rising xenophobia against Somalis in Kenya” Al-Jazeera International 20 Nov 2012.

38 As above.

39 As above.

40 US Agency for International Development (USAID) “Strengthening voices against xenophobia in Kenya” (2013), available at <http://www.usaid.gov/results-data/success-stories/strengthening-voices-against-xenophobia-kenya> (accessed 19 Nov 2013).

tolerance and showed solidarity with other Kenyans by donating blood and money to the victims.⁴¹ A nationwide backlash against people of Somali ethnicity, including both Kenyan nationals and refugees ensued.⁴² Kenyan authorities reacted to the attacks by tightening encampment policies for refugees and asylum seekers. All refugees and asylum seekers living in urban areas were ordered to relocate to the overcrowded Dadaab and Kakuma refugee camps.⁴³

Reports of ethnic Somalis and Muslims being targeted, subjected to excessive security screening and harassed by the police and the general public escalated after the Westgate Mall attack.⁴⁴ According to Human Rights Watch (HRW) more than 4000 ethnic Somalis were arrested in 2014 during “Operation Usalama Watch”, meant to flush out “perceived criminals” and illegal aliens in Nairobi.⁴⁵ These Somalis were detained, often beyond the 24- hour limit provided for by the Constitution, and deported to Somalia on suspicion of being terrorists or for being undocumented asylum seekers.⁴⁶ During the first half of 2014, there were many documented instances of physical abuse of ethnic Somalis by the police in places outside the capital.⁴⁷ Ethnic Somalis are also regularly verbally abused and called “Al-Shabaab”.⁴⁸ Muslim clerics of Somali-Arab origin have also been targeted and assassinated on suspicion of being linked to terrorism and extremism.⁴⁹

41 Mhlanga B, Thiemann I, Jennings PW & Young LA “State of the world’s minorities and indigenous peoples 2014: Africa” (2014) 53.

42 As above.

43 “Kenya orders Somali refugees back to camps after attacks” Reuters News 25 Mar 2014 available at <http://uk.reuters.com/article/2014/03/25/uk-kenya-somalia-refugees-idUKBREA201OS20140325> (accessed 24 Nov 2014).

44 Mhlanga *et al* (n 41 above).

45 HRW (n 7 above).

46 As above.

47 As above.

48 As above.

49 “Riots in Kenya after killing of Muslim cleric” New York Times 4 Oct 2013.

In 2014 the local media reported on targeted arrests of Somalis. The *Star Kenya* reported that Kenyan police engaged in “security” swoops all over Nairobi, in which thousands of ethnic Somalis, including Kenyan nationals of Somali ethnicity, were arrested in an indiscriminate manner and held for several months in a “concentration camp” at Kasarani stadium located on the outskirts of the city.⁵⁰

6.2.2.1 The domestic and international legal framework in Kenya

Kenya has enacted a number of laws which outlaw hate speech and hate crimes *per se* and prescribe judicial sanctions for those found contravening them. For instance, the Kenyan Constitution⁵¹ guarantees freedom of expression. The Constitution limits this freedom of expression if expressed statements are found to constitute hate speech, incitement to violence, ethnic incitement, vilification of others and general incitement to cause harm to another individual or group.⁵²

The Kenyan Penal Code also outlaws uttering of words that are “calculated to bring death or physical injury to any person or to any body of persons or to lead to the damage or destruction of property”.⁵³ These are all common manifestations of xenophobia.

Hate speech is also prohibited by the National Cohesion and Integration Act (NCIA).⁵⁴ This Act forbids the use of threatening, abusive or insulting speech to stir up or attempt to cause ethnic hatred.⁵⁵ It further outlaws any form of discrimination

50 “Hundreds of Somalis still held at Kasarani” *The Star Kenya* 3 Jul 2014.

51 The Constitution of the Republic of Kenya, 2010.

52 The Constitution of the Republic of Kenya, 2010, art 33(1).

53 The Kenyan Penal Code, Cap 69, Laws of Kenya s 96.

54 National Cohesion and Integration Act (NCIA), Act 12 of 2008. The Preamble to the Act declares that it’s objective is to encourage national cohesion and integration by outlawing discrimination on ethnic grounds.

55 NCIA s 13(1).

or harassment on the basis of ethnicity, race, or ethnic or national origins of the victim.⁵⁶

The NCIA further clarifies that “ethnic hatred” refers to hatred “against a group of persons defined by reference to colour, race, nationality [including citizenship] or ethnic or national origins”.⁵⁷ On this basis, foreign nationals can rely on the NCIA if their rights as espoused in that Act are violated.⁵⁸

Article 2(6) of the Constitution of Kenya provides that all international treaties that Kenya has ratified form part of Kenya’s domestic laws. In this vein, Kenya has acceded to various international human rights treaties that touch on hate crimes and the treatment of citizens and foreign nationals by nationals and authorities.

The most pertinent treaties which Kenya has ratified are the CAT,⁵⁹ the 1951 Refugee Convention, the ICCPR, the CERD,⁶⁰ the 1981 African Charter and the 1969 Organisation of African Unity (OAU) Refugee Convention.⁶¹ The above treaties prohibit various forms of discrimination and a host of other human rights abuses against migrants. These international treaties are binding on Kenya and can be relied upon by victims of xenophobic attacks and other hate crimes, for redress in national courts. Like SA, Kenya has not ratified the CMW to date.

56 NCIA s 3(1)(i) & (ii).

57 NCIA s 6.

58 NCIA s 13(3).

59 Kenya ratified the CAT in 1997.

60 Kenya ratified the ICCPR in 1976 and the CERD in 2001.

61 For information relating to Kenya’s ratification of these treaties see <http://treaties.un.org/pages/Treaties.aspx> (accessed 04 Jan 2014) and <http://www.africa-union.org/root/au/documents/treaties/treaties.htm> (accessed 04 Jun 2014).

6.2.3 Conclusion on xenophobia in Egypt and Kenya

Official data collection and public reporting systems regarding xenophobic or bias-motivated crimes are non-existent in both Egypt and Kenya.⁶² This has not only made it difficult to assess the extent of the phenomena in these countries, but has also led to the conclusion that there is little for SA to learn from such African jurisdictions.

There are no legal or institutional mechanisms that have been developed to specifically curb xenophobia and other hate crimes in either Egypt or Kenya. Furthermore, the author could not find jurisprudence in either country that evidences either having utilised their domestic or international legal frameworks to fight xenophobia and other hate crimes perpetrated against foreign nationals living there. For this reason, the best lessons to be learnt are to be found in the Western jurisdictions that have successfully managed or contained the phenomena. Examples of these are discussed below.

6.3 How selected developed countries have dealt with xenophobia and other hate crimes

6.3.1 Introduction

Selected developed countries that have developed and implemented domestic anti-hate crime policies and legislation over decades, will be discussed below.⁶³ These countries have improved upon and perfected the application of these policy and legal interventions and it is proposed that SA can learn from these jurisdictions in its attempt to eliminate or reduce xenophobia and hate crimes domestically. To this end, strategies that have worked elsewhere are critically examined to establish

⁶² HRF (n 6 above) 17.

⁶³ Australia, the United Kingdom (UK) and the United States of America (US) have had hate crime laws and implemented them for several decades. This thesis analyses some lessons that can be learnt from these jurisdictions and adapted for application in SA.

whether or not, with the necessary adaptation, they could serve as best practice for SA.

It is important to highlight that while SA primarily grapples with xenophobia manifested through attacks and violence, most developed countries analysed below, experience a combination of racism and xenophobia as their main categories of hate crime. The interventions discussed here cover hate crimes broadly, meaning they apply to racism, xenophobia and other forms of hate motivated conduct.

To understand “hate crimes” generally, it is important to refer to the CERD. Article 4 of this Convention obliges state parties to “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”. The article specifically provides for punishment of certain identified hate crimes committed in state parties by way of the following forms of (mis)conduct:

- “(i) all dissemination of ideas based on racial superiority or hatred,
- (ii) Incitement to racial hatred,
- (iii) All acts of violence or incitement to violence against any race or group of persons of another colour or ethnic origin, and,
- (iv) The provision of any assistance to racist activities, including the financing thereof.”

Countries to be reviewed below include: Australia, the US and the UK. This analysis will begin with an examination of the approach adopted in Australia.

6.3.2 Australia

Australia's demographic diversity is easily comparable to that of SA. Every year, thousands of immigrants and asylum seekers from neighbouring countries seek residence in Australia. This Notwithstanding, the Australian Human Rights Commission (AHRC) notes that Australia has been able to minimise xenophobia, promote social cohesion, diversity and tolerance amongst citizens and foreign nationals living in the country. The country has achieved that by developing and implementing wide-ranging, proactive legal, social and policy measures.⁶⁴ Before delving into those measures, it is important to explain why Australia was chosen for comparison with SA.

6.3.2.1 The jurisprudential basis for comparison of Australia and South Africa

Despite the fact that the 2014 UN Development Programme (UNDP) categorises Australia as a developed country with high human development levels and SA as a developing country with a medium human development index,⁶⁵ they are both confronted by large influxes of refugees and migrants from neighbouring countries. This influx is accompanied by a rise in xenophobic and racist sentiments amongst their native populations.⁶⁶

Both SA and Australia are constitutional democracies, where the legislature is the arm of government that makes the law. South African and Australian legal systems were heavily influenced by the English common law, dating back to the colonial era.

64 AHRC (n 5 above).

65 See UNDP "Human development report 2014; Sustaining human progress: Reducing vulnerabilities and building resilience" (2014) 160-162.

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

Australia relies on a purely English common law legal system while SA is a mixed legal system in which the Common law combines with both Roman-Dutch, English and traditional African law influences.⁶⁷ Further, neither Australia nor SA has ratified the CMW as of 2014. Therefore neither jurisdiction relies on this convention to protect migrants within their territory.

Despite the commonalities noted above, it is important to note that whereas anti-immigrant sentiments are present in both jurisdictions, the types of large-scale or country-wide outbreaks of xenophobic attacks and violence which have been documented in SA, have never occurred in Australia.⁶⁸ Comparative analysis of the two jurisdictions is therefore appropriate to determine what lessons, if any, SA could learn from Australia in fighting xenophobia and other hate crimes. Australia could potentially offer SA important insights and lessons on legislative, judicial and even extra-legal interventions that have worked in its jurisdiction to curb xenophobia and hate crimes. These will be analysed below.

67 The Supreme Court of Appeal of South Africa (SCA) explains that South African law is an amalgam of Roman-Dutch law, English law and African traditional or indigenous law. The Roman-Dutch law was introduced into SA by the Dutch immigrants in the 17th and 18th centuries. Towards the end of the 18th century parts of SA were occupied by the British and consequently, English Common law and the English law of evidence in criminal and civil matters were introduced into the legal system. In some civil matters such as family law, South Africans of African descent can claim to be judged by traditional or tribal laws and custom, provided that these do not contravene the Constitution. This is the system of Common law that applies in the country to date. See SCA "History and Background of South African Law" (2014), available at <http://www.justice.gov.za/sca/historysca.htm> (accessed 20 Nov 2014).

68 There have been reports of xenophobia-inspired demonstrations in Australia in the recent past. In December 2005, about 7000 youth took to the streets of the beach suburb, Cronulla to demonstrate against the presence of people of Middle-Eastern decent on their beaches. In the days leading up to the riot, media groups had frequently broadcast hateful and racist messages against foreigners in the area. See "Journalism in multicultural Australia – case studies" Reporting diversity 11-18 Dec 2005, 62-69. Available at http://www.reportingdiversity.org.au/cs_four.pdf (accessed 18 Nov 2014).

6.3.2.2 Australia: The management of hate crimes through domestic legal and extra-legal mechanisms

Over the past few decades, Australia has experienced an influx of migrants from China, Africa, the Middle East and neighbouring Asian countries like Indonesia. These migrants arrive in the country primarily by boat and are commonly known as “boat people”.⁶⁹ Despite Australia being located in a challenging geographical area that is only accessible by sea, a total of 34,503 refugees and 13,600 asylum seekers were registered there in 2014.⁷⁰

The predictable consequence of hosting a racially diverse population and large numbers of refugees and other categories of immigrants in its territory is that Australia experiences domestic social problems such as anti-immigrant sentiments amongst the populace, racism and religious intolerance.⁷¹ These have been the major social issues in the country throughout the twentieth century.⁷²

As with the influx of migrants to SA, the large influx of “boat people” into Australia has been “highly charged” and often politicised in Australia.⁷³ Available literature shows that in the past, there was some lingering fear of immigrants in Australia, particularly those of Asian and Chinese origins.⁷⁴ This fear can be traced back to the founding of the British colonies in Australia; and is attributable to xenophobia.⁷⁵

69 UNHCR “2014 UNHCR regional operations profile - East Asia and the Pacific” (2014).

70 As above.

71 Kuhn (n 66 above). Kuhn’s assertion is supported by a 2014 report by the AHRC which highlights that Australians of Aboriginal and Torres Strait Islander origins still experience racism and discrimination in various spheres of life. See UN General Assembly (UNGA), Report of the Special *Rapporteur* on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mutuma Ruteere, 21 Aug 2014, A/69/334. See contributions from the AHRC at 4.

72 Kuhn (n 66 above).

73 Twibell T S “Immigrant nations: A comparison of the immigration law of Australia and the United States” (2000) 19 *University of Tasmania Law Review* 57-144.

74 As above.

75 As above.

Xenophobia in Australia was highlighted from as early as 1991, when evidence gathered by the Human Rights and Equal Opportunity Commission of Australia (HREOC) showed that Arab-Australians were “one of the four most vilified groups in the country”, along with Aborigines, Asians and members of the Jewish community.⁷⁶

From the mid-1990s to 2002, several xenophobic attacks occurred in Australia.⁷⁷ The majority of these attacks targeted Lebanese youth and ethnic Arabs, a phenomenon Poynting and Mason call “a period of criminalisation of ethnicity and the *ethnicisation* of crime”.⁷⁸

Recently, in May 2009, nine separate incidents of xenophobic attacks against students of Indian origin were reported in the cities of Sydney and Melbourne.⁷⁹ In one of these incidents, in May 2009, a 21-year-old Indian was attacked by a group of “native” Australian men while on a college campus in Melbourne, and slashed with a box-cutter.⁸⁰

In a 2014 report to the UN General Assembly, the AHRC expressed concerns over an increase in racism disseminated through the Internet.⁸¹ The report however lauded the existing initiatives by the state to counter xenophobia and racism.⁸²

It is, however, important to note that large-scale or country-wide outbreaks of xenophobic attacks and violence, such as those witnessed in SA in 2008, have not

76 Poynting S & Mason V “The resistible rise of Islamophobia: Anti-Muslim racism in the UK and Australia before 11 September 2001” (2007) 1 *Journal of Sociology* 73.

77 Poynting & Mason (n 76 above) 75.

78 As above.

79 “Australian Envoy admits attacks on Indians racist” Cable News Network-Indian Broadcasting Network (CNN/IBN) 4 June 2009.

80 As above.

81 UNGA (n 71 above) 4-5.

82 As above.

occurred in Australia. This is credited to a combination of government policy reforms and initiatives, an efficient immigration control regime and an effective legal framework which has been implemented since the 1970s. These interventions have, to a large extent, succeeded in controlling xenophobia and its devastating impact on refugees, asylum seekers and migrant populations in Australia.⁸³

It is evident that a major paradigm shift occurred in Australia in the early 1970s.⁸⁴ Analysts argue that Australia seems to have acknowledged that xenophobia and racism presented barriers to social and economic participation of their immigrant minorities which, in turn, resulted in social exclusion and entrenched disadvantage for immigrants living in the country.⁸⁵

Xenophobia and racism were found to undermine social cohesion and worked against the nation's goal and commitment to create diverse and inclusive multicultural communities.⁸⁶ Australia reacted to this state of affairs by setting up institutions, implementing social and institutional policies and instituting major anti-racism campaigns across the country.⁸⁷ These efforts eventually paid off and consequently, resulted in changed perceptions amongst local populations regarding foreign nationals.⁸⁸

A broad social framework prohibiting all forms of racial discrimination and a deliberate policy of multiculturalism has been functional in the country since the 1970s.⁸⁹ In the last three decades, the Australian Labour Party and the Liberal Party, the two major political parties in the country, have unanimously supported the

83 AHRC (n 5 above).

84 Kuhn (n 66 above).

85 As above.

86 Kuhn (n 66 above) 116.

87 As above.

88 As above.

89 Poynting & Mason (n 76 above) 67.

ideology of “multiculturalism” and associated policies, which emphasise “equal access and social justice for all”.⁹⁰

6.3.2.3 Legislative and institutional measures

Australia has developed and implemented a wide range of official national legislative and policy measures aimed at promoting racial tolerance and diversity within its borders.⁹¹ Some of the measures that were aimed at combating racism, xenophobia and other hate crimes include the establishment of human rights, equal opportunity and anti-discrimination institutions at federal, state and territory levels.⁹²

Education is a tool that can shape behaviour and attitudes of citizens from an early age. Australia has utilised its federal education system to fight xenophobia and foster social cohesion. In 1999, the federal government reformed the school curriculum and introduced a nationwide programme known as “*A New Agenda for a Multicultural Australia*”.⁹³ This supplemented the existing social cohesion programmes, the “*Living in Harmony*” and “*Civics and Democracy*” programs.⁹⁴

Australia has established a National Anti-racism Secretariat and a Race Discrimination Commission (RDC) situated within the AHRC.⁹⁵ The Race Discrimination Commissioner is mandated to hear complaints about conduct that contravenes the Act and provides for civil remedies through a process of conciliation.⁹⁶ Australia has also established an evolving national anti-racism and

90 As above.

91 AHRC (n 5 above).

92 As above.

93 As above.

94 As above.

95 AHRC “National anti-racism partnership and strategy discussion paper” (2012), available at http://www.humanrights.gov.au/antiracism/discussion_paper/NARPS_2012_Discussion_Paper%20FINAL.pdf (accessed 20 Jul 2014).

96 As above.

prejudice strategy.⁹⁷ These institutions are mandated to fight racism, promote social cohesion and reduce xenophobic prejudice in the country.⁹⁸

At an international level, Australia has ratified and actively implements the ICCPR⁹⁹ and the ICESCR.¹⁰⁰ Crucially, Australia has also ratified the CERD treaty¹⁰¹ and domesticated it through the Racial Discrimination Act (RDA).¹⁰² The RDA applies to everyone in the country, including immigrants and racial minorities.¹⁰³

In a bid to ensure that people of all backgrounds and origins are treated equally and have the same opportunities without racial distinction, the RDA outlaws racial discrimination by declaring thus:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.¹⁰⁴

The RDA elaborates on specific illegal behaviour such as discrimination that is motivated by race, colour or national or ethnic origin. It prohibits “public” acts that are:¹⁰⁵

97 As above.

98 As above.

99 Australia ratified the ICCPR in 1980.

100 Australia ratified the ICESCR in 1975.

101 UN treaties available at

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en
(accessed 19 Jan 2014).

102 RDA of 1975.

103 RDA s 5.

104 RDA s 9.

105 RDA s 18.

(i) Reasonably likely to offend, insult, humiliate or intimidate another person or a group of people; and,

(ii) If such an act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

To safeguard citizens' freedom of expression, the RDA has specific provisions which protect the right of Australians to such freedom.¹⁰⁶ The RDA further provides an exemption for acts done or spoken "reasonably and in good faith", for example, in the context of fair and accurate reporting, artistic works, discussions and debates and in cases of fair comment expressing a genuine belief. Again, for an action to qualify as hate speech, it must be public. An act is deemed public if it "causes words, sounds, images or writing to be communicated to the public".¹⁰⁷

It is contended that this broad anti-racism legal framework has given Australia the tools it needs to foster the rule of law and to fight racism, xenophobia and other criminal acts, particularly those motivated by prejudice.

6.3.2.4 Immigration reforms

Australia has also introduced critical immigration reforms. It manages its federal immigration through the Migration Act of 1958. Since enactment of this Act, immigration to the country has evolved positively and immigration has been well regulated through the introduction and enforcement of refugee and migrant intake targets and "caps and quotas" for various immigrant visa streams.¹⁰⁸ Within the refugee quotas, Australia has established a humanitarian resettlement programme in

106 RDA part IIA.

107 RDA s 18(c)(2).

108 Carrington K, McIntosh A & Walmsley J *The social costs and benefits of migration into Australia* (2008) 1.

terms of which it accepts a significant number of migrants from across the world for humanitarian reasons.¹⁰⁹

The consequence of good immigration management is that Australia is now able to strategically address its own domestic issues, including demand for cheap labour for its industries, declining population, low birth rates and diversity in its population.¹¹⁰

To curtail illegal immigration, Australia has implemented a policy in terms of which local and overseas detention facilities for illegal immigrants were created.¹¹¹ At present, Australia is implementing a program whereby it will process all asylum claims by “boat people” through off-shore processing centres located in Papua New Guinea.¹¹²

Policy measures enforced to curb illegal immigration are implemented in close conjunction with border protection laws. Australia’s Border Protection Legislation Amendment Act, which was adopted in 1999, is strictly enforced in the country. This law has largely achieved its stated purpose of stemming “the surge in undocumented migration to Australia, particularly by persons of Middle Eastern origin”.¹¹³

In another laudable strategy, Australia conducts television campaigns in countries that are the source of illegal migrants, especially in the Middle East and neighbouring Central Asian countries, in a bid to discourage their nationals from illegally visiting Australia.¹¹⁴ These television campaigns usually warn illegal migrants not to travel to Australia by boat as they may die at sea and, if they succeed in

109 UNHCR *Resettlement handbook: Country chapter, Australia* (2011), available at <http://www.unhcr.org/3c5e542d4.html> (accessed 15 Jun 2014).

110 Twibell (n 73 above) 119.

111 As above.

112 “Australia says no to more boat-people” Al-Jazeera News 19 Jul 2013.

113 As above.

114 Twibell (n 73 above) 92.

reaching Australian shores, they will be detained in camps or face a myriad of dangers including bites by poisonous snakes, spiders and crocodiles in forests.¹¹⁵

Border control efficacy has been further enhanced through the elimination of corruption at entry points and the use of technological mechanisms, such as biometric screening of visitors, and advanced security features on identification documents and passports.¹¹⁶

6.3.2.5 Judicial enforcement of hate-speech laws in Australia

Over the years, Australia has addressed the challenge of hate crimes through judicial enforcement of existing laws. In a 2014 report to the UN General Assembly, the AHRC expressed concerns over increased incidence of hate speech in Australia, which is disseminated through the Internet.¹¹⁷ This is an on-going challenge in Australia. Some past judicial interventions to address cyber-racism and hate speech will now be examined.

Hate-speech cases can be referred to courts by the RDC or by private entities. In recent times, the Federal Court of Australia (FCA) has adjudicated on some cases relating to cyber-racism and held that the RDA also applies to those hosting websites who fail to remove offensive material posted by users.¹¹⁸

The FCA has thus moved to uphold the provisions of the RDA with regard to racially offensive material posted on the Internet. Domestic legal experts have lauded the effectiveness of the Federal Court's actions in the fight against hate-speech.¹¹⁹ Three pertinent cases where hate speech offenders were prosecuted are discussed below.

115 As above.

116 <http://www.dfat.gov.au/dept/passports/> (accessed 18 Nov 2014).

117 UNGA (n 71 above).

118 See for example, *Jones v Toben* (2003) 129 FCR 515.

119 Hunyor J "Cyber-racism: Can the RDA prevent it?" (2008) *Law Society Journal* 34.

In *Jones v Toben*,¹²⁰ the FCA adjudicated a case involving the dissemination of material containing racist or hateful information on the Internet. In this matter, Jeremy Jones, a private citizen, and the Executive Council of Australian Jewry filed a lawsuit against Frederick Toben of the Adelaide Institute who had published anti-Jewish material on the institute's website, designed to cast doubts on whether the holocaust indeed happened.

Under the RDA, Australian law prohibits acts that are "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; if the act is done because of the race, colour or national or ethnic origin of the other person, or of some or all of the people in the group".¹²¹ In its decision in *Jones v Toben*, the FCA ruled that publishing on the Internet without password protection is a "public act".¹²² The court further held that posting anti-Jewish material on the Internet is a direct violation of Section 18C of the RDA.¹²³ It ordered the anti-Semitic material to be removed immediately.¹²⁴ Similarly, in *Jones v The Bible Believers' Church*,¹²⁵ the FCA sanctioned the respondents for publicly publishing offensive anti-Jewish material on the Internet. The respondent was found to be in breach of the RDA.¹²⁶

In *Silberberg v The Builders Collective of Australia and Buckley*,¹²⁷ the respondent's Internet website had a public online forum for discussion of issues relating to the building industry. Internet users could post messages on the forum, even anonymously. One user posted material which was found to be offensive to the applicant who was of Jewish ethnicity and to other such persons. In the ruling,

120 *Jones v Toben* (2003) 129 FCR 515.

121 RDA s 18(c).

122 *Jones v Toben* (2003) 129 FCR 515, per Branson J at para 73.

123 *Jones v Toben* (2003) 129 FCR 515, per Branson J at para 102.

124 *Jones v Toben* (2003) 129 FCR 515, per Branson J at para 118.

125 *Jones v The Bible Believers' Church* (2007) FCA 55.

126 RDA S 18 (C).

127 *Silberberg v The Builders Collective of Australia and Buckley* (2007) FCA 1512.

Justice Gyles found that the respondent was in breach of the RDA and ordered the material removed.¹²⁸

It is averred that SA can learn valuable lessons from Australia, particularly in the areas of legislative interventions, immigration reforms, and political support for anti-hate crime mechanisms, institutional reforms and judicial enforcement of existing laws to curb racism and xenophobia.

6.3.2.6 Conclusion

It can be surmised that, as a result of the above multidisciplinary measures undertaken by the state, foreign nationals living in Australia currently face less prejudice, xenophobia and discrimination in the country than they experienced three decades ago. It is therefore asserted that SA can learn much from the Australian example and should adapt some of the abovementioned mechanisms to inform the country's legal and policy frameworks.

6.3.3 The United Kingdom: Fighting hate crimes through domestic legislation

The UK is another jurisdiction that has implemented notable domestic legislative interventions to combat racial prejudice, xenophobia and hate crimes. Given the English law influence on SA legal development, this jurisdiction is also comparable to SA and thus some of its legislative interventions might meaningfully be explored for guidance on improving the SA approach to these problems. The various interventions implemented in the UK are examined below.

In the UK, a "hate crime" is defined as "any criminal offence which is perceived, by the victim or any other person, to be motivated by hostility or

¹²⁸ *Silberberg v The Builders Collective of Australia and Buckley* (2007) FCA 1512, per Gyles J, at para 34.

prejudice towards someone based on a personal characteristic”.¹²⁹ Since 2007, law enforcement agencies in the UK are required to monitor and record all crimes motivated by race, religion, gender and disability.¹³⁰

Statistics reflect that the UK experiences numerous hate crimes, with racially-motivated crimes predominating.¹³¹ The Crime and Disorder Act¹³² is the principal UK law that addresses hate crimes and other offences motivated by bias founded upon inherent characteristics such as nationality, ethnic origin and race.¹³³ The Act defines a racially motivated offence as one where “at the time of committing the offence or immediately before or after doing so, the offender demonstrates towards the victim, hostility based on the victim’s membership [or presumed membership] of a racial group or the offence is motivated wholly or in part by hostility towards a racial group”.¹³⁴

The Crime and Disorder Act¹³⁵ creates four crimes which, when aggravated by racial motivation, are punishable as hate crimes.¹³⁶ These crimes are: criminal damage, assault, public order offences and harassment.¹³⁷ The UK Anti-Terrorism Crime and Security Act¹³⁸ amended the Crime and Disorder Act¹³⁹ to include religious

129 This common definition of a hate crime was agreed upon in 2007 by the UK’s criminal justice system organisations, including the Police Service, the Crown Prosecution Service (CPS) and the National Offender Management Service. See, UK Home Office, Office for National Statistics and Ministry of Justice “An overview of hate crime in England and Wales” (2013) 11.

130 As above.

131 The UK government statistics website records accurate and current statistics on racial attacks in the country. See <http://www.justice.gov.uk/docs/stats-race-criminal-justice.pdf> (accessed 26 Sep 2014).

132 The UK Crime and Disorder Act of 1998, amended in 2001.

133 UK Crime and Disorder Act of 1998 part ii sec 28(1)(a)-(b).

134 As above.

135 The UK Crime and Disorder Act of 1998.

136 UK Crime and Disorder Act of 1998 part ii sec 29-32.

137 As above.

138 UK Anti-Terrorism Crime and Security Act of 2001.

139 UK Crime and Disorder Act of 1998.

hatred as a hate crime and to increase the sentence for hate crimes from two to four years imprisonment.¹⁴⁰

Furthermore, the UK Criminal Justice Act¹⁴¹ indicates that bias and hostility motivated by race, religion, sexual orientation or disability must be considered aggravating factors in criminal trials and result in stiffer penalties.¹⁴² The Racial and Religious Hatred Act¹⁴³ prohibits religious hate speech through the use of threatening words or behaviour; or the display of any written material which is threatening and is aimed at causing religious hatred.¹⁴⁴

The above anti-hate speech legislative framework is backed up by a national hate crime recording and data collection framework, which is discussed below.

6.3.3.1 Effective national hate crime recording mechanisms in the UK

Unlike SA, the UK has established an efficient hate crime monitoring system operated by the country's police force and backed up by accurate, current statistics regarding hate crimes.¹⁴⁵ Thus, for example, in the period 2006/2007, approximately 61,262 general incidents of hate crimes were reported and recorded across the UK.¹⁴⁶ Of these, 42,551 attacks were established to be religiously and racially aggravated offences.¹⁴⁷

140 UK Anti-Terrorism Crime and Security Act of 2001 ch 24 part 5 sec 39-41.

141 UK Criminal Justice Act of 2003.

142 UK Criminal Justice Act of 2003 ch 44 part 12 sec 145-146.

143 UK Racial and Religious Hatred Act of 2006.

144 UK Racial and Religious Hatred Act of 2006 art 29 (b).

145 Retrieved from <http://www.justice.gov.uk/docs/stats-race-criminal-justice.pdf> (accessed 26 Sep 2014).

146 The UK, Ministry of Justice, Statistics on Race and the Criminal Justice System – 2006/7, July 2008. Available at <http://www.justice.gov.uk/docs/stats-race-criminal-justice.pdf> (accessed 26 Jul 2014).

147 As above.

In the 2012/2013 year, a total of 42,236 hate crimes were committed across the UK.¹⁴⁸ The data collected is accurate to the extent of aggregating it to extract specific information on the motivation for hate crimes. Consider this: In the 2012/2013 year, the motivation for hate crimes in the UK was established to be as follows:

- (i) 35,885 (85%) - racial hatred;
- (ii) 1,573 (4%) - religious hatred;
- (iii) 4,267 (10%) - sexual orientation;
- (iv) 1,841 (4%) - disability of the victims; and,
- (v) 361 (1%) - transgender hate crimes;

The importance of establishing a hate crime monitoring and data collection system in SA, especially with regard to xenophobic attacks, cannot be gainsaid. Empirical, accurate and current data would enable the state to appreciate the magnitude of the problem and aid in aligning responses to hate crimes in different regions of the country.

Another lesson from the UK that is worth emulating in SA, is the “Stop the Hate” initiative which was launched in Essex City in December 2013.¹⁴⁹ The initiative is backed by Internet campaigns and workshops involving campaigners and delegates from various parts of the country.¹⁵⁰ The initiative’s objective is to improve awareness, encourage victims to report various types of hate crimes and also raise

148 The UK Home Office, Office for National Statistics and Ministry of Justice “An overview of hate crime in England and Wales” (2013) 12-13.

149 <http://www.stopthehate.org.uk/2013/12/launch-of-stop-the-hate-initiative/> (accessed 14 Oct 2014).

150 As above.

confidence amongst members of the public that the police are acting on such crimes.¹⁵¹

The “Stop the Hate” initiative has recorded remarkable success to date, in terms of increased reporting of hate crimes which might otherwise have gone unreported. According to the Police Commissioner of the Essex region, the inception of the initiative was followed by a spike in the number of members of the public who came forward to report hate crimes to the police.¹⁵² The roll-out of the initiative has also resulted in increased public confidence in reporting hate crimes. This has enabled the police not only to investigate and bring offenders to justice but, also to work with partner law enforcement agencies to prevent hate crimes from occurring.¹⁵³

It is averred that SA can learn from the various modes of intervention to hate crimes in the UK. Of relevance are hate crime laws, crime monitoring and modern data collection systems. The involvement of law enforcement and members of the public in hate crime prevention is worth emulating.

6.3.4 The United States of America

For many decades, large influxes of immigrants into the US were generally tolerated by the public, as the migrants provided a source of cheap labour to the nation’s flourishing industries and farms.¹⁵⁴ However, in recent years, hostile public attitudes towards, and negative perceptions of, illegal immigration have been noted, often

151 As above.

152 “PCC welcomes rise in reported hate crime” available at <http://www.stopthehate.org.uk/2013/12/pcc-welcomes-rise-in-reported-hate-crime/> (accessed 14 Oct 2014).

153 As above.

154 See generally, Morrison Institute for Public Policy, Arizona State University “Illegal Immigration: Perceptions and realities” (2010).

leading to hate crimes such as racial and xenophobic attacks.¹⁵⁵ With experience spanning several decades, the US has developed various mechanisms for the management of hate crimes, which could serve as models for other nations.

Some important lessons that SA could learn from the US on the management of hate crimes include: The implementation of a federal hate crime recording mechanism; a comprehensive domestic hate crime legal framework; efficient enforcement of hate crime laws through the court system; and model state-based immigration control in the US state of Arizona. These interventions are discussed further below.

6.3.4.1 Effective federal hate crime recording mechanisms

In the US, hate crimes are recorded at federal level and the records are managed by the Federal Bureau of Investigation (FBI), through the Uniform Crime Reporting (UCR) program.¹⁵⁶ The statistics are disaggregated into categories of hate crime such as racial attacks (such as attacks on Blacks) and ethnic attacks (such as attacks on Hispanics).¹⁵⁷ Hate crimes are further grouped into single-bias and multiple-bias offences.¹⁵⁸

155 As above.

156 From 1930, the FBI has been tasked with collecting, publishing and archiving statistics on various forms of crimes across the US. Under this program, Hate Crime Statistics is an important, annual publication by the FBI. See FBI "Uniform crime reports" (2014) available at <http://www.fbi.gov/about-us/cjis/ucr/ucr#hate> (accessed 7 Oct 2014).

157 As above.

158 According to the FBI, single bias incidents happen when one or more offense types are motivated by the same bias, for example race or religion of the victim. A multiple-bias incident is when more than one type of offense occurs and at least two offense types are motivated by different biases. FBI "Uniform crime reports" (2014) available at <http://www.fbi.gov/about-us/cjis/ucr/ucr#hate> (accessed 7 Oct 2014).

The current US hate crime statistical framework was developed in terms of the Federal Hate Crime Statistics Act (FHCSA).¹⁵⁹ The existing law, under the Hate Crime Statistics Act¹⁶⁰ obliges the US Attorney General to collect data on incidents of hate crimes and to collate statistics for each calendar year.¹⁶¹ This information is then used to monitor occurrences of hate crimes, measure the effectiveness of hate crime laws, increase public awareness regarding incidents of hate crimes, and inform law enforcement policies and to identify trends in hate crimes to facilitate addressing these throughout the US.¹⁶²

In compliance with the Hate Crime Statistics Act, the FBI has, since 1992, kept an accurate annual record of reported hate crimes. Available records show that a large number of hate crime incidents are recorded and reported annually across the US. For example, according to the US Attorney General, Eric Holder, more than 77,000 hate crime incidents were recorded by the FBI as having been committed in the US during the period 1998 to 2007.¹⁶³ This means that, on average, about 7,700 hate crimes were committed annually and that one hate crime was committed “every hour of every day over the span of a decade”.¹⁶⁴

In 2009, the FBI recorded 6,604 cases, involving 8,336 victims.¹⁶⁵ Of these, 6,598 incidents were determined to be single-bias incidents while six were multiple bias incidents.¹⁶⁶ In 2012, the FBI recorded 5,796 hate crime incidents across the US, involving 6,718 offenses.¹⁶⁷ Statistics on racial parameters show that racial

159 US Federal Hate Crime Statistics Act (FHCSA) of 1990, as amended in 2010.

160 US Hate Crime Statistics Act 2010 (as amended, 28 U.S.C. § 534).

161 US Hate Crime Statistics Act 2010 (as amended, 28 U.S.C. § 534) sec 1.

162 As above.

163 “Holder pushes for hate crime law, GOP un-persuaded” Cable News Network 25 Jun 2009.

164 As above.

165 FBI “Hate crime statistics 2009” (2010) table 1, available at <http://www2.fbi.gov/ucr/hc2009/incidents.html> (accessed 30 Jul 2014).

166 As above.

167 Out of these 5,796 cases, 5,790 were single-bias incidents involving 6,705 separate offenses while six were multiple-bias involving thirteen offenses.

attacks on African Americans constituted a third of all hate crimes committed in the US in 2009.¹⁶⁸ Xenophobic attacks and other hate crimes targeting Hispanics, sexual minorities and Muslims were also found to be increasing steadily.¹⁶⁹ This information is used to monitor occurrences of hate crimes, assess effectiveness of hate crime interventions, increase public awareness about the occurrence of hate crimes and inform law enforcement policies in addressing hate crimes.¹⁷⁰ The specific information gathered regarding the rates, trends and motivations of hate crimes has been used to formulate preventative and responsive interventions against hate crimes.¹⁷¹

Such accurate recording and reporting of hate crimes is worth emulating in other jurisdictions, including SA, as it would help in formulating timely responses and interventions to the phenomena.

6.3.4.2 Comprehensive domestic anti-hate crime legal framework

Under the US federal law, a hate crime occurs when a defendant intentionally selects a victim because of the victim's actual or perceived race, colour, religion, national origin, ethnicity, gender, disability, or sexual orientation.¹⁷² In the US, hate crime legislation exists at both federal and state levels. In terms of the federal legal framework, hate crimes in the US have been regulated by statutes that have evolved over the years. These statutes are discussed below. The US generally follows two approaches with regard to punishing hate crimes like racist attacks or xenophobia. It

168 Coker C T "Hope-fulfilling or effectively chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment" (2011) *Vanderbilt Law Review* 273.

169 As above.

170 Scotting T "Hate crimes and the need for stronger federal legislation" (2001) 34 *Akron Law Review* 874.

171 U.S. Department of Justice, FBI, Criminal Justice Information Services Division, Hate Crime Statistics, 2006, Fall 2007, cited in HRF "Violence based on racism and xenophobia: 2008 hate crime survey" (2008) 5.

172 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 280003 (a) 108 Stat. 1796 (1994) (codified in part, as amended at 28 U.S.C § 994 (2006)).

either enacts free-standing hate crime legislation or takes the hate element into consideration as an aggravating factor during the sentencing stage of the proceedings.¹⁷³

According to Scotting, the 1981 Anti-Defamation League legislation was the foundation for current hate crime legislation in many states of the USA.¹⁷⁴ By 1992, more than 46 states and the District of Columbia had enacted their own hate crime statutes.¹⁷⁵

The Civil Rights Act of 1871 prescribed criminal sanctions and a civil damages action for offenses which had the effect of depriving any person of equal rights, privileges, or immunities under the law.¹⁷⁶ This Act provides the foundation for modern federal hate crime laws. Thus, the Civil Rights Act of 1968 borrows heavily from this Act. The Act created federal criminal and civil liability for crimes motivated by the victim's colour, national origin or race that were committed against people engaging in "federally protected activities".¹⁷⁷ These activities included voting, attending a public school, serving as a juror, traveling between states, or attending a public event.¹⁷⁸ Relying on this law, prosecutors could claim the violation of federal civil rights to elicit stricter penalties for hate crimes.¹⁷⁹

The Hate Crimes Sentencing Enhancement Act (HCSEA)¹⁸⁰ was enacted in 1994. This Act makes provision for the imposition of stricter penalties in instances where the court is satisfied that a victim was targeted for a federal hate crime, such

173 Scotting (n 170 above) 875-876.

174 Scotting (n 170 above) 853.

175 Coker (n 168 above) 277.

176 Coker (n 168 above) 273.

177 18 U.S Code s 245(b).

178 As above.

179 Coker (n 168 above) 272.

180 Hate Crimes Sentencing Enhancement Act of 1994, Pub. L. No. 103-322, § 280003, codified as 28 U.S Code 994).

as assault, because of their race, colour, religion, national origin or ethnicity.¹⁸¹ Scotting lauded the success of the HCSEA, noting that since its enactment, the majority of states across the US impose stricter penalties where a hate or prejudice motive has been established.¹⁸²

Currently, the enhancement of the penalty based upon the hate or prejudice motive varies from state to state. For instance, in the state of Alabama, if a crime is proven to have been motivated by hate, the sentence may be increased by up to fifteen years. In Florida, the prosecution can ask that the sentence be tripled and in Vermont, the sentence may be doubled.¹⁸³

Prior to 1998, the federal hate crime law of the US generally applied only if victims were engaging in “federally protected activities” when attacked.¹⁸⁴ In 1998, a forty-nine-year-old African American man named James Byrd Junior from Jasper, Texas was abducted, tied behind a pick-up truck and dragged for three miles and then brutally murdered in a race-motivated crime.¹⁸⁵ The perpetrators were members of a White supremacist group who bore swastikas and anti-Black tattoos on their bodies.¹⁸⁶ Prosecutors were powerless to seek enhanced sentences for the perpetrators of this murder or use hate motive as an aggravating factor as the prevailing state and federal hate crime laws were inadequate.¹⁸⁷ All three perpetrators of this crime were nevertheless convicted of capital murder. Two were sentenced to death and one received a life sentence.¹⁸⁸

181 See the sentencing guidelines under the US Federal Violent Crime Control and Law Enforcement Act of 1994. This Act has been codified as 28 U.S.C & 994 (1994).

182 Scotting (n 170 above) 866.

183 As above.

184 18 U.S Code s 245(b).

185 Coker (n 168 above) 272.

186 As above.

187 As above.

188 As above.

Following the murder of James Byrd Junior, civil rights advocacy groups intensified campaigns across the US, pressuring the state to remove the parameters of “federally protected activities” and enact a tougher hate crime law.¹⁸⁹ This culminated in the promulgation of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA) in 2009 by the US Congress.¹⁹⁰ The Bill was signed into law by President Barack Obama on 28 October 2009.¹⁹¹

The HCPA effectively amended the existing laws by expanding the scope of hate crimes beyond the “federal protected activities”. For the first time in US history, the HCPA brought “violence motivated by the... gender, sexual orientation, gender identity, or disability of the victim” within the ambit of prohibited hate crimes.¹⁹²

In a real sense, the HCPA prohibits federal crimes such as assault motivated by race, colour, religion, nationality or origin, sexual orientation, disability, gender or gender identity irrespective of the activity in which the victim was engaged at the time of the attack.¹⁹³ It further authorises the Department of Justice to investigate and prosecute bias-motivated criminal offences country-wide. The previous limitation restricting federal intervention to “federally restricted activities” does not appear in the new legislation, thus making its prohibition much wider than its predecessor. As a federal law, the HCPA can be applied to prosecute hate crimes in states that do not have their own hate crime laws. The HCPA also provides for capacity building, hate crime tracking, and information collection.¹⁹⁴

189 “Obama signs hate crime law rooted in crimes of 1998” USA Today 28 Oct 2009, available at <http://content.usatoday.com/communities/theoval/post/2009/10/620000629/1#.VD2KyWeSzA0> (accessed 14 Oct 2014).

190 As above.

191 As above.

192 The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111–84, §§ 4701–4713, 123 Stat. 2835 (2009). The amendments touching on Federal protected activities are contained in ss of 18, 28, & 42 U.S.C.

193 HCPA sec 7.

194 HCPA sec 5.

Coker sums up the gains achieved under the HCPA, by noting that in terms of the legislation, prosecutors are no longer forced to seek justice for most hate crimes in state courts as was previously the case in the absence of federal law.¹⁹⁵ Law enforcement officials are now entitled to federal assistance in investigating, prosecuting and combating hate crimes. Crucial federal funding is also provided for. Finally, the Act acts as a deterrent and provides for new classes of victims with the means of achieving retribution.¹⁹⁶

6.3.4.3 Broad political support for hate crime laws in the US

Defying decade-long opposition by lobbyists and some members of the US Congress to a tougher hate crime law, President Barack Obama acted decisively in getting the HCPA passed by the US Legislature in 2009.¹⁹⁷ He succeeded in achieving this by attaching the HCPA Bill to the National Defense Authorization Act for fiscal year 2010, thereby giving opposing Congressmen little choice but to approve the Bill or deny the military critical funding.¹⁹⁸ This demonstrates political will to fight hate crimes from the very top echelons of the US leadership.

Other US politicians have spoken out publicly against hate crimes and in support of stricter hate crime law. Speaking in support of the HCPA, US Representative Dick Gephardt from Missouri posited:

The law sends a message to the world that crimes committed against people because of who they are... are particularly evil, particularly offensive. It says that these crimes are committed,

195 Coker (n 168 above) 299.

196 As above.

197 "Remarks by the President at the signing of the National Defense Authorization Act for fiscal year 2010" The White House 28 Oct 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-signing-national-defense-authorization-act-fiscal-year-2010> (accessed 14 Oct 2014).

198 As above. In 2007, the HCPA Bill had passed the US Congress and Senate but it was withdrawn when the then President, George W. Bush, threatened to veto the entire Defense Authorization Bill if the HCPA was attached.

not just against individuals, not just against a single person, but against our very society, against America. Our legal system penalises bias crimes with the aforementioned warnings and policies in mind...¹⁹⁹

Similar sentiments were expressed by Representative Rush Dew Holt from West Virginia who noted that the HCPA would make US hate crime laws more comprehensive. He argued that the HCPA would help make the US more tolerant, reduce hate crimes in all forms and finally, send a strong message to all that hate-based crime cannot be tolerated and will be vigorously prosecuted.²⁰⁰

6.3.4.4 Prosecution of hate crime offenders in US courts

Available jurisprudence shows that US courts have applied hate crime laws to prosecute offenders in the past.²⁰¹ In *Barclay v Florida*,²⁰² a case that was determined before the promulgation of the HCPA; the court stated that the US Constitution does not prohibit a trial judge from considering elements of racial hatred and prejudice as aggravating factors in a case of racially-motivated murder.²⁰³

In *Wisconsin v Mitchell*,²⁰⁴ a Black man who intentionally selected a White victim for aggravated battery and theft, received an enhanced sentence after it was proven in court that race was the motivating factor in the attack. After watching a movie on race violence, Mitchell selected a young White man and beat him

199 146 Congress Records H7532, daily edition of 13 Sep 2000, statement of Rep. Gephardt, cited in Coker (n 168 above).

200 153 Congress Records H4421, daily edition 3 May 2007, statement of Rep. Holt, cited in Coker (n 168 above).

201 See *Barclay v Florida* 463 U.S. 939, 949–50 (1983); *Wisconsin v Mitchell* 508 US 476 (1993); *Apprendi v New Jersey* 530 US 466 (2000); and *R.A.V. v St. Paul* 505 U.S. 377, 387 (1992). These four cases have been discussed in detail below.

202 *Barclay v Florida* 463 U.S. 939, 949–50 (1983).

203 As above.

204 *Wisconsin v Mitchell* 508 US 476 (1993).

unconscious, causing him to remain in a coma for four days. The accused successfully appealed the decision by the court of first instance, on the basis that relying on his hate motive to enhance his sentence violated his freedom of thought, a First Amendment right under the US Constitution. The Wisconsin State Supreme Court upheld Mitchell's appeal, prompting the prosecutor to appeal to the US Supreme Court which overturned the appeal. In a landmark decision, the US Supreme Court ruled that, while the Constitution protects freedom of thought, even hateful thoughts, it does not protect those who act on their hateful thoughts to commit crimes.²⁰⁵

In *Wisconsin v Mitchell*, the bias motive was ultimately applied as a determining factor in enhancing the final sentence. The Supreme Court noted that the systemic effects of hate crimes were substantial enough to justify the imposition of enhanced sentences.²⁰⁶

In *R.A.V. v. St. Paul*,²⁰⁷ the US Supreme Court found that an anti-cross burning ordinance amounted to "content discrimination" of certain groups of people, under the First Amendment of the US Constitution.²⁰⁸ The case was filed after the state of Minnesota issued an ordinance which prohibited cross burning with intent to arouse resentment based on race and religion.²⁰⁹ In this case, the act of cross burning was considered to be "non-verbal" but "expressive conduct" in many parts of the US.

In *Apprendi v New Jersey*,²¹⁰ Charles Apprendi, a White man, deliberately fired gunshots into a Black-owned family dwelling thereby endangering the

205 *Wisconsin v Mitchell* USC judgment at para 486.

206 *Wisconsin v Mitchell* USC judgment at paras 487–488.

207 *R.A.V. v St. Paul* 505 US 377, 387 (1992).

208 The First Amendment of the US Constitution is on the Freedom of Speech. It bars government officials from discriminating against anyone, based on disagreement with the content of a person's speech.

209 See St. Paul Minnesota Legislation EGIS CODE 292.02 (1990).

210 *Apprendi v New Jersey* 530 US 466 (2000).

occupants. He pled guilty to the charge of unlawful second-degree possession of a fire-arm for unlawful purposes under New Jersey law. He admitted to having fired the shots because the family was Black in colour and that he did not want Blacks in his neighbourhood. After the accused pled guilty, the prosecutor applied for an enhanced sentence, claiming a hate motive. In handing down the judgment, the court enhanced the maximum sentence for the offence by two years on the basis of a finding that the offence was motivated by racial prejudice. The defendant appealed the sentence. The US Supreme Court upheld the sentence, on the basis that a hate motive had been proven.²¹¹

The measures discussed above are implemented at the federal level. An analysis of state-level interventions follows below. This discussion will focus on the state of Arizona because of its location on the border of the US and Mexico, which makes the state a major recipient of illegal migrants and refugees from Mexico and other Latin American countries.

6.3.4.5 State of Arizona in the US: Model immigration enforcement at state level

The state of Arizona relies on US federal immigration legislation and policies.²¹² Since 1924, the US Federal Immigration Act²¹³ provided for the setting of an annual quota of immigrants permitted to enter the US.²¹⁴ In recent years, the general public in Arizona, much like that in SA, have exhibited a general anti-immigrant sentiment with an entrenched sense that local jobs are being unfairly occupied by immigrants and that illegal immigrants are living off the state and federal welfare system.²¹⁵ In

211 *Apprendi v New Jersey* 530 US 466 (2000) 544-47.

212 While hate crime legislation is managed at both federal and state levels, matters pertaining to immigration into the US are managed at Federal level. Some aspects of immigration enforcement can however, be legislated at the state level, thus the enactment of SB 1070 of 2010 (SB 1070).

213 US Federal Immigration Act of 1924, amended 1952.

214 See generally US Federal Immigration Act of 1924.

215 Twibell (n 73 above) 117.

response to escalating negative public sentiments on illegal immigration and in an attempt to address a large influx of uncontrolled immigrants entering the state, the state of Arizona legislature implemented model immigration enforcement legislation which has, as indicated below, worked well to curb uncontrolled immigration into the state.

In 2010, the Arizona state Legislature adopted an immigration enforcement law known as Arizona SB 1070 of 2010 (SB 1070).²¹⁶ SB 1070 introduced stricter border controls; reinforced immigration law enforcement mechanisms in the state by criminalising entry and movements of “illegal aliens” without legal documents;²¹⁷ authorised law enforcement officers to lawfully stop suspects and confirm their immigration status;²¹⁸ barred state agencies from restricting the enforcement of federal immigration laws; and imposed strict penalties for those harbouring, transporting or hiring illegal immigrants.²¹⁹

The critics of SB 1070 argued that Arizona had usurped a federal immigration function and that it gave law enforcers wide discretion which would result in arbitrary searches and racial profiling.²²⁰ The proponents of the law lauded it as an appropriate response, given Arizona's unique position as an immigration gateway from Mexico and Central America, and the lack of federal immigration enforcement at the time.²²¹

SB 1070 recorded remarkable success in a very short period of time, in achieving its intended objective of stemming illegal immigration into the state of

216 The Support our Law Enforcement and Safe Neighbourhoods Act of 2010 (introduced as Arizona Senate Bill 1070).

217 SB 1070 art 3.

218 As above. Under this requirement, all law enforcement officials were required to take steps to verify the immigration status of any individual they suspected was violating immigration law.

219 As above.

220 Rick S “Commentary: The overlooked significance of Arizona’s new immigration law” 2010 *Michigan Law Review* 76.

221 As above.

Arizona. It was reported that 23,000 illegal immigrants voluntarily repatriated back to Mexico within three months of the promulgation of SB 1070.²²² The media reported that studies indicate that up to 100,000 illegal immigrants left the state for other states with lax immigration laws.²²³ The important lesson from SB 1070 for SA, is that the state can devise and enforce tough immigration laws to control or address influxes of illegal immigrants.

In June 2012, after a long-running legal contest between the US federal government and the state of Arizona, the Supreme Court ruled that some parts of SB 1070 were unconstitutional as they were already pre-empted by existing federal law.²²⁴ The Supreme Court however upheld parts of SB 1070, including the section that allowed state law enforcement officials to investigate a person's immigration status on suspicion that he was an illegal immigrant.²²⁵

6.4 Conclusion

As demonstrated above, different jurisdictions have applied a variety of interventions in attempts to fight hate crimes. Such interventions may be of value in developing a solution to the problem in SA. Whatever the intervention, however, the different

222 "Study: 100,000 Hispanics leave Arizona after immigration law debated" NBC News 11 Nov 2010.

223 As above.

224 The parts of SB 1070 that were contested by the US federal government in court are: Sec 3, which makes the failure to comply with federal alien-registration requirements a State misdemeanour in Arizona; sec 5(c), which makes it a state misdemeanour for an unauthorized alien to seek or engage in work in Arizona; sec 6, which authorised state and local law enforcement officers to arrest suspected illegal immigrants without a warrant of arrest and; Section 2(b) which required law enforcement officers to make efforts to verify the person's immigration status with the federal government. The Supreme Court relied on the provisions of art 6(2) of the US Constitution which declares the Supremacy of federal law in cases where it conflicts with state or municipal law. See the decision in *Arizona et al v United States* 567 US 2012, available at <http://www.supremecourt.gov/opinions/11pdf/11-182.pdf> (accessed 14 Oct 2014).

225 The Supreme Court upheld sec 2 of the SB 1070, in that it did not conflict with any existing federal law.

context in SA demands that it not simply be adopted and applied but that it should be approached with caution and adapted for SA's unique situation. Thus, for example, applying stricter penalties in cases where crimes are found to have been motivated by xenophobic sentiment may work well in SA, offering victims justice, dispelling the sense of impunity that exists and sending a clear message that the state is committed to fighting hate crimes.

It appears that the African jurisdictions discussed offer less by way of possible lessons for SA than the more developed Western jurisdictions. The above analysis will be drawn upon in the next chapter in making recommendations regarding mechanisms that may meaningfully be applied to improve the current South African approach to the problems of xenophobia and hate crimes.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

Writing on hate crime law in the United States of America (US), Coker Carter wrote:

The powerful sense of violation that hate crimes victims experience is comparable only to that of rape victims. In both situations, victims "tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a profound sense of isolation..."¹

This thesis set out to make South Africa (SA) a case study in the management of xenophobia and analyse important legal and extra-legal factors surrounding the phenomenon as it occurs in the country. The study relied on findings from empirical research by experts to explore historical and contemporary factors that contribute to the phenomenon. An examination of the domestic and international legal framework demonstrates that the state has legal options it could utilise to tackle the phenomenon.

The ongoing nature of xenophobia is a vindication of the assertion by experts that SA needs to do more to combat xenophobia. Important lessons on the management of xenophobia were sought from other jurisdictions such as Australia, the United Kingdom (UK) and the US that have made progress in tackling similar challenges. Key among these lessons is the demonstrable success of anti-hate crime laws in Australia, the UK and the US. There is no doubt that by enacting domestic legislation targeting xenophobia and other related hate crimes, SA can make some progress in the fight against the phenomena.

¹ Coker C T "Hope-fulfilling or effectively chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment" (2011) *Vanderbilt Law Review* 275.

The evaluation of these important findings in the first section of the chapter sets the stage for the conclusion which comprises of proposals for some short and long-term pragmatic interventions, which may offer SA an effective means of dealing with the phenomena of xenophobia and related hate crimes in the future. This is because it is more crucial now than ever, to pursue legal and policy changes which can help counter various interests which perpetuate xenophobia in a lasting manner. Such interventions need to appeal to both nationals and foreign nationals in order to be effective.

7.1 Important research findings

Considering the evidence adduced in the empirical studies analysed in preceding chapters, it is incontestable that SA has made little progress in the fight against xenophobia and other hate crimes. This is attributable to the inadequacy of the legal and extra-legal interventions that the state has employed. Key indicators of xenophobia were analysed and demonstrate that the phenomenon is constant or worsening. In a new dynamic, some emerging contemporary factors such as service delivery failure are increasingly contributing to the intensification of the phenomenon.

An important question which lingers throughout the thesis is why xenophobic attacks do not occur in certain neighbourhoods of SA. Answers to this question are explored and explanations for the violent behaviour by perpetrators of xenophobic attacks are offered in this chapter. The extent to which the current immigration policies of SA and the disregard for the African spirit of *ubuntu* contribute to the negative attitudes of South Africans towards migrants are also summarised here.

Recent empirical data from the United Nations High Commissioner for Refugees (UNHCR) is referenced in this chapter to demonstrate that the assumption that xenophobia is solely the product or consequence of the large number of refugees and asylum seekers entering and living in SA is incorrect. It will be demonstrated that despite SA's current popularity as a destination for asylum

seekers and other migrants, its burden as a refugee hosting nation compares favourably with other nations both globally and regionally, yet the incidence of hate crimes and xenophobic attacks is disproportionately high.

7.1.1 Key indicators of xenophobia in South Africa remain unchanged



Source: *The Sunday Times* 23 Jan 2015.

There is no evidence that SA is making any quantifiable progress in addressing xenophobia, even after experiencing the phenomenon for a prolonged period of time. Indeed, recent empirical studies regarding xenophobia and other hate-motivated crimes in SA reveal that hostile attitudes and xenophobic sentiments have

worsened over the past six years.² This is an indication that the strategies implemented to address xenophobia and hate crimes have been ineffective. Experts have therefore concluded that xenophobia, hate attitudes and general negative perceptions towards foreign nationals in the country are a daily reality and will continue to be so for the near future.³

According to a 2013 report of an empirical survey released by the South African Migration Project (SAMP), important indicators of xenophobia in SA were either unchanged or worsened between 2006 and 2013.⁴ A majority of South Africans are still willing to transform their hostile, negative attitudes and anti-foreigner convictions into forceful action, both individual and collective, against foreign nationals living in their neighbourhoods.⁵ The percentage of South Africans ready to remove migrants violently from their neighbourhoods actually increased in the period 2006 to 2010.⁶

Another disturbing finding in the SAMP 2013 survey is that a quarter of South Africans are willing to act physically to prevent foreigners from operating businesses in their communities and a similar number is willing to stop foreigner's children from enrolling in the same schools as their own.⁷ On negative perceptions against foreigners, the survey found that over 60 percent of South Africans thought the

2 Crush J, Ramachandran S & Pendleton W "Soft targets, xenophobia, public violence and changing attitudes to migrants in South Africa" (2013) 6. In this nation-wide study which tracked public sentiment towards migrants between 2006 and 2013, it was established that the percentage of South Africans willing to engage in violent acts such as forced removal of foreign nationals from their communities, preventing migrants from operating businesses and preventing the enrollment of migrant children in the same schools as their own; was actually increasing.

3 Misago J P, Monson T, Polzer T & Landau L "May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses" (2010) 11.

4 Crush *et al*/(n 2 above) 6-7.

5 As above.

6 As above.

7 As above.

2008 xenophobic violence occurred because of the involvement of foreign nationals in crime or because they took jobs from South Africans or were culturally different.⁸

In a global analysis, the SAMP 2013 survey found that South African respondents were the most opposed to immigration of all those nations reviewed.⁹ In this respect, approximately 80 percent of SA citizens supported a total prohibition on the entry of migrants into their country or, alternatively, strict limitations on such entry.¹⁰

The results of SAMP's 2013 survey are consistent with the results of an earlier survey, carried out in 2011 by the Institute for Democracy in Southern Africa (IDASA). IDASA established that xenophobic attitudes towards foreign nationals and particularly migrants from Black African countries remained as strong and pervasive as they were during the 2008 country-wide attacks. South Africans are opposed to Black foreigners living in their neighbourhoods, operating businesses, attending schools with their children or working in the country.¹¹

2014 figures show that South Africans are becoming even more hostile to foreign nationals living in the country. Empirical data collected in surveys by the Gauteng City-Region Observatory, and released in August 2014, reveals extreme xenophobic attitudes in townships like Mamelodi in Tswane, where between 50 and 75 percent of residents surveyed wanted all foreigners living in the country to be repatriated to their countries of origin, regardless of their immigration status in SA.¹²

8 As above.

9 As above.

10 Crush *et al* (n 2 above) 4.

11 See generally, IDASA "The Afrobarometer: Migration bulletin" (2011).

12 The Gauteng City-Region Observatory (GCRO) "Quality of life III: The Gauteng City-Region survey 2013" (2014) 16.

The above findings are especially disturbing given the socio-economic rights promised to refugees and asylum seekers in terms of the SA Constitution and the protections promised in terms of the Refugees Act .¹³

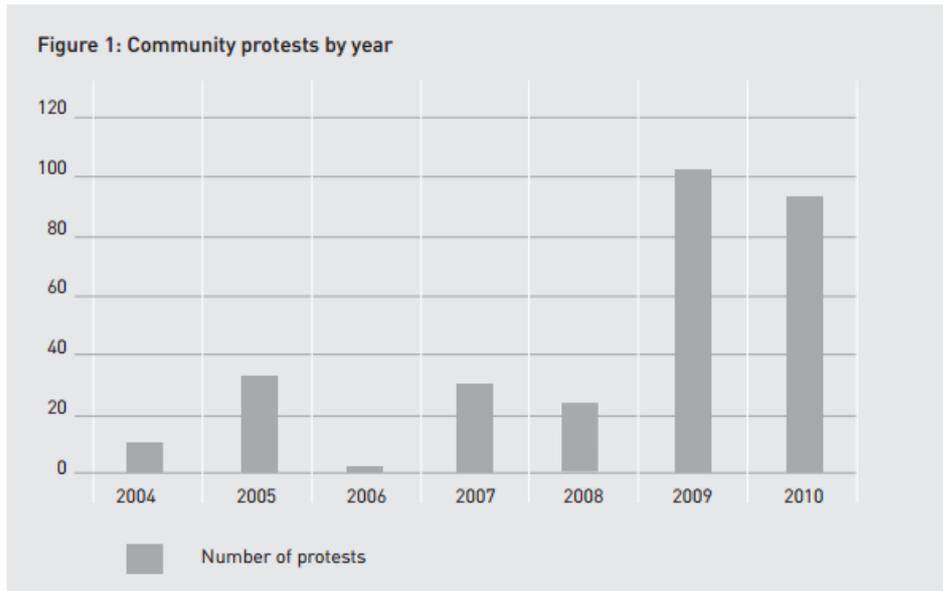
There is evidence that xenophobia and hate crimes are evolving and becoming increasingly difficult to combat in SA. A 2011 study by the Centre for the Study of Violence and Reconciliation (CSVr) established a growing nexus between xenophobic attacks and hate crimes targeting foreigners and service delivery protests across the country.¹⁴ The report highlights the fact that the number of service delivery protests recorded across SA increased steadily between 2004 and 2010, and that the protests led to an increase in the incidents of xenophobic attacks and hate motivated crimes during this period.¹⁵

13 Chapter 2 of the SA Constitution guarantees socio-economic rights, such as the right to study and work, to refugees and asylum seekers. Similarly, sec 22 & 24 (3) (a) of the Refugees Act, 130 of 1998 proclaims that refugees are entitled to the socio-economic rights guaranteed in the Constitution.

14 CSVr "The smoke that calls: Insurgent citizenship, collective violence and the struggle for a place in the new South Africa. Eight case studies of community protest and xenophobic violence" (2011).

15 CSVr (n 14 above) 5. There was an exception of one year, 2006, when a reduction in service delivery protests was recorded.

The table below reflects the trend of protests tracked over a period of seven years.



Source: CSV, 2011.

It is important to note that in recent years, community service delivery protests have become increasingly violent. Almost all recorded community service delivery protests are marked by the destruction of public and private property and confrontations between armed police and stone-throwing crowds.¹⁶ An overwhelming majority of the protests have been found to include an element of xenophobia manifest in attacks on foreigners and foreign-owned businesses.¹⁷

According to the CSV, the interplay between community service delivery protest violence and xenophobic attacks is that xenophobic attacks occur as an adjunct activity to the main focus on community protest.¹⁸ Indeed, in many instances, service delivery protests morph into xenophobic attacks.¹⁹ Protest leaders often initiate or facilitate violence directed at targets other than the state, namely,

16 CSV (n 14 above) 6.

17 As above.

18 CSV (n 14 above) 16.

19 As above.

foreign nationals.²⁰ The CSVR found that in most cities they researched, the protest leaders led the demonstrators to attack and loot business premises owned by foreigners.²¹

That community service delivery protests and xenophobic attacks often overlap, demonstrates a link between the two and reveals the challenge faced by policy-makers in addressing xenophobia and other hate crimes targeting foreigners. Xenophobia can therefore no longer be easily isolated from other challenges facing local communities across the country.

Given the interrelatedness of xenophobia and other socio-legal challenges in SA, an attempt is made below to determine any pattern that has evolved regarding the location in which the xenophobic attacks occur and any consistent social characteristics that are common to such locations.

7.1.2 The localised context of xenophobia

While xenophobic perceptions of, and attitudes towards foreigners are widespread in all areas throughout SA, empirical data reveals that certain locations throughout the country have not experienced any incidents of xenophobic violence.²² In other words, certain communities in SA have so far neither exhibited nor witnessed incidents of group-based violence directed towards foreigners, despite having a similar demographic profile to other communities in which such violence is rife.²³

20 As above.

21 As above.

22 Crush *et al* (n 2 above) 9.

23 Misago J P, Landau L & Monson T *Towards tolerance, law and dignity: Addressing violence against foreign nationals in South Africa* (2009) 2-6.

Research has revealed that xenophobic attacks and other forms of group-based violence against foreign-nationals occur in specific, highly localised contexts.²⁴ It is essential to identify the contexts in which it occurs in formulating a country-wide solution to the phenomenon.

A forensic examination of the 2008 violence found that persistent xenophobic attacks are rooted in the micro-politics of the country's townships and informal settlements.²⁵ In most areas where violence recurs, the attacks are organised and led by individuals or local groups engaged in efforts to claim or consolidate the authority and power needed to further their individual or group political and economic interests.²⁶

By comparing areas such as Mamelodi township in Pretoria, that are worst affected by the violence with some of the least affected areas across the country, researchers have discovered that the best way to prevent or reduce xenophobic sentiments and attacks is by reforming township leadership structures to establish a trusted, competent and committed leadership from grassroots level up.²⁷

In Alexandra and Tembisa townships in Johannesburg, conscientious community leaders were able to successfully mobilise their constituencies to prevent attacks against foreign nationals.²⁸ This demonstrates clearly that, in addressing xenophobia and other hate crimes targeting foreign nationals, the government should identify and promote positive leadership models committed to tolerance and the rule of law.²⁹

24 Kabwe-Segatti *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (2008) 42.

25 Misago *et al* (n 3 above) 2.

26 Kabwe-Segatti (n 24 above) 42.

27 Misago *et al* (n 3 above) 11.

28 Misago *et al* (n 3 above) 52.

29 As above.

It should be noted that foreign nationals often form a substantial proportion of small business ownership in many Townships across SA. It would be important to include their representatives in local leadership structures to enable them to participate in decisions that affect the communities and to enable them to share information and their concerns.

The promotion of positive and conscientious leadership models in SA's townships could work more successfully in curbing xenophobia and hate crimes against foreign nationals if proactively implemented hand-in-hand with the promotion of African cultural values that foster social cohesion. Primary among these values is *ubuntu*.

7.1.3 Deficiency of *ubuntuism* and the link to the rise of xenophobia in SA

Ubuntu is the African humanist tradition which "addresses our interconnectedness, our shared and common humanity, and the responsibility to one another that flows from that connection".³⁰ *Ubuntu* is a common or shared foundation of many African cultures. One of democratic South Africa's founding fathers, Desmond Tutu, coined the idea of a "rainbow nation" and urged South Africans to embrace the ideals of *ubuntu* in a bid to bring about social cohesion and foster respect for human rights in the country.

Tutu wrote in 1999:

Ubuntu speaks of the very essence of being human... My humanity is caught up, is inextricably bound up, in yours... A person is a person through other persons... We belong in a bundle of life... A person is a person through other persons. I am human because I belong. I participate, I share... Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* - the greatest good...³¹

30 Nussbaum B "Ubuntu: Reflections of a South African on our common humanity" in Murove M F (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 101.

31 Tutu D M *No future without forgiveness* (1999) 31.

It follows then that; *ubuntu* obliges South African nationals to act hospitably towards their "African brothers and sisters through the fundamental issue of their shared and intertwined humanness".³²

While *ubuntu* should, in essence, find a natural home in a multicultural and multiracial society like South Africa, the opposite is true. Deep-seated xenophobic attitudes amongst South Africans and concomitant violence demonstrate the absence of hospitality or tolerance towards other Africans.³³

Researchers argue that pervasive xenophobic attitudes and consequent attacks undermine the spirit of *ubuntu* and negate the aspirations of SA's founding fathers, like Tutu, of building a multicultural and cohesive nation based on the rule of law and human rights for all.³⁴ Ndebele argues that South Africans have an "intriguing capacity to be disarmingly kind and hospitable to others at the same time as being capable of the most horrifying brutality and cruelty".³⁵

Recent studies have disclosed a disturbing disregard for the ideals of *ubuntu* in SA. For instance, Gibson found that while a majority of South African nationals from different races accepted being "proudly South African", only a small minority of Black South Africans want to identify themselves as "Africans".³⁶ This is because, as aptly explained by Krog, to many Black South Africans, "Africa spells failure and embarrassment".³⁷ According to Adjai, *ubuntu* extends only to South African

32 Sanders M *Complicities: The intellectual and apartheid* (2002) 125.

33 Adjai C & Lazaridis G "Migration, xenophobia and new racism in post-apartheid South Africa" (2013) 1 *International Journal of Social Science Studies* 202.

34 Adjai & Razaidis (n 33 above) 194.

35 Ndebele N *The Cry of Winnie Mandela* (2003) 70.

36 Gibson J *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (2006) cited in Adjai & Lazaidis (n 33 above) 202.

37 Krog A *Begging to be Black* (2009) 236; & Mnyaka M M N "Xenophobia as a response to foreigners in post-apartheid South Africa and post exilic Israel: A comparative critique in the light of the gospel and ubuntu ethical principles" Unpublished Ph.D thesis, UNISA (2003) 103-104. In the latter

nationals, to the exclusion of foreign nationals living in the country, particularly Blacks from other regions of the African continent.³⁸

Kabwato therefore concludes that the pervasive xenophobic attitude and incessant attacks expose a major disconnect between the *ubuntu* African “rhetoric” and the reality in the country.³⁹ Tadjó, for his part argues that, to South Africans, *ubuntu* is “considered an exclusive and peculiarly authentic trait of South Africans” and is a discourse of “national consciousness” to the exclusion of other Black Africans.⁴⁰ He concludes that in SA, democratic ideals like *ubuntu* are construed narrowly, only to benefit South Africans to the exclusion of others.

Fasselt, also writing on South Africans’ exclusionist practices, supports Tadjó’s argument and makes the following observation:

The overriding notion of African humanity, commonly known as *ubuntu*, belies the [often] fraught relationship between South Africa and the continent, which has become particularly manifest in the violence committed against African immigrants residing in the country... *ubuntu*, as the political tool into which it has been transformed in post-apartheid nation-building rhetoric, excludes rather than includes African immigrants from the embrace of a shared humanity...⁴¹

reference, Mnyaka, a South African theologian, argues that the *ubuntu* concept has failed because Black South Africans, motivated by a sense of entitlement and exclusiveness, see themselves as somewhat superior and different from other Africans in terms of racial, material and cultural parameters.

38 Adjai & Razaidis (n 33 above) 194.

39 See generally, Kabwato C “The peculiar pathology of xenophobic violence” *Rhodes Journalism Review* 28 Sep 2008.

40 Tadjó V “Constructing the other: Learning from the Ivorian example” in Kupe T H & Worby E (eds) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* (2008) 225.

41 Fasselt R “Ke nako [It is time] to scrutinise *ubuntu*: Reading South African hospitality towards African immigrants in Patricia Schonstein Pinnock’s *Skyline*” in Gallagher Kelly *Multiculturalism: Critical and Inter-Disciplinary Perspectives* (2014) 1.

The prevalence of xenophobic attitudes in SA is proof that Tutu's ideals of friendliness towards fellow Africans have been disregarded. In order to remedy this, post-2008 SA should consider embracing the concept of *ubuntu* as a moral antidote to the current social upheaval brought about by xenophobia.

One of the main outward manifestations of this xenophobia-linked social upheaval is that brutal attacks and collective violence are perpetrated on victims. Possible explanations for the violent behaviour of attackers are explored below.

7.1.4 Explanations for the violent behaviour of xenophobes

Experts have highlighted an important finding that, while violent xenophobic attacks happen in other parts of the world, the South African phenomenon is unique in the extreme violence and the widespread hostility in attitudes that accompany xenophobia.⁴² It is therefore important to consider why violence is the main outward manifestation of xenophobia in SA.

Various explanations for xenophobic violence in contemporary SA have been offered. For example, Harris argues that a deep-rooted culture of violence emanating from the brutal nature of the apartheid state continues to prevail in the country.⁴³ Violence is seen by many South Africans as a natural and legitimate means of solving problems in the country.⁴⁴ Homes, schools, streets and other social spaces across SA are scarred by the scourge of violence.⁴⁵ Social relations and interactions in many aspects of people's lives are characterised by violence.⁴⁶ As the

42 Crush J (ed) "The perfect storm: The realities of xenophobia in contemporary South Africa" (2008) 33.

43 Harris B "A foreign experience: Violence, crime and xenophobia during South Africa's transition" (2001) 5 *Violence and Transition Series* ch 1.

44 As above.

45 Hamber B & Lewis S *An overview of the consequences of violence and trauma in South Africa* (1997) Ch 1. Also see generally, Kabwato (n 39 above).

46 Hamber & Lewis (n 45 above).

CSVR notes, the use of xenophobic violence feeds off SA's local histories of violence and thereby begets further cycles of violence and revenge.⁴⁷

In a 2011 interview with the CSVR, one violent protester in Kungcatsha township summed up his motivation for using public violence to achieve certain objectives, in the following words:

Violence is the only language that our government understands. Look we have been submitting memos, but nothing was done. We became violent and our problems were immediately resolved. It is clear that violence is a solution to all problems...⁴⁸

Research has established that endemic impunity with regard to public violence, especially against foreign nationals, encourages the perpetrators or potential perpetrators of xenophobic violence in SA's townships to launch such attacks without fear of consequences.⁴⁹

A pervasive culture of vigilantism and mob justice in SA's townships further contributes to the violent behaviour of attackers. Studies have established that perpetrators of these attacks include local leaders and business competitors in the townships, whose objective is to evict foreigners.⁵⁰

Another influence on violence is general ignorance of the law amongst community leaders and residents. Studies have confirmed that in many cases, community leaders and private citizens have little or no knowledge of international laws, immigration rules or human rights laws.⁵¹ This causes them to criminalise the very presence of foreign nationals in the country, regardless of their immigration status.⁵² The result of this ignorance is that private citizens, with little faith in their

47 CSVR (n 14 above) 29.

48 CSVR (n 14 above) 28.

49 Crush (n 42 above) 11.

50 Misago *et al* (n 3 above) 3.

51 Crush (n 42 above) 28.

52 As above.

law enforcement institutions, take the law into their own hands and “enforce the law” using violence.⁵³

Public institutions in SA have been found to repeatedly and publicly dehumanise foreign nationals seeking public services.⁵⁴ For instance, local authorities and other public institutions in SA publicly treat foreign nationals in a xenophobic manner and this reinforces the general public’s resentment of them.⁵⁵ Local authorities are also known to support unlawful actions against foreign nationals such as violent removals, the enforcement of illegal quotas and restrictions on business ownership.⁵⁶

Statements by government officials have also been found to encourage violent acts and lawlessness rather than peaceful coexistence between citizens and foreign nationals. For example, during the 2008 violence, the Deputy Minister of Safety and Security Susan Shabangu urged law enforcement officials to “shoot and kill criminals and to ignore law governing their treatment”.⁵⁷

The above supports the view that institutionalised xenophobia in SA’s public institutions serves to inflame public emotions and consequently results in violence. This situation is exacerbated by prevailing immigration policies as discussed below.

7.1.5 The negative impact of the prevailing immigration policies

South Africa’s current immigration regime is restrictive, and primarily serves to control, rather than facilitate immigration into the country.⁵⁸ The current law

53 As above.

54 As above.

55 As above.

56 As above.

57 Misago *et al* (n 3 above) 28.

58 Rasool F, Botha C & Bisschoff C “The effectiveness of South Africa’s immigration policy for addressing skills shortages” (2012) 10 *Managing Global Transitions* 399.

contains generous provisions for arrest, detention and deportation of “illegal immigrants”, often with few checks and balances.⁵⁹

Some apparent flaws in the immigration policies of SA need to be addressed as a matter of priority. For instance, the Immigration Act⁶⁰ declares that:

(i) Any illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending his or her application for a status;⁶¹ and,

(ii) Any illegal foreigner shall be deported.⁶²

The Act does not clearly elaborate upon who an “illegal foreigner” is. This provision can be abused to deport refugees and asylum seekers in contravention of SA’s international obligation to admit asylum seekers into its territory and not to *refoul* those with a well-founded fear of persecution in the countries they have fled.⁶³ The Act simply directs immigration officials with “reasonable grounds” to think that a foreign national is in the country in contravention of the Act, to arrest and detain such foreigner.⁶⁴

59 Sec 32 (1) & (2) of the Immigration Act 13 of 2002, as amended in 2014 (Proc. Nos. R32 and R33, Gazette No. 37679).

60 Immigration Act 13 of 2002.

61 Immigration Act 13 of 2002 sec 32(1).

62 Immigration Act 13 of 2002 sec 32(2).

63 Under art 33 of the 1951 Convention relating to the Status of Refugees, SA is bound to allow the entry of refugees and asylum seekers into its territory and not to deport or forcibly return them to territories where they would face persecution and a threat to their lives. Even though art 23 of the Immigration Act provides for the issuance of a 5-day Asylum Transit Visas to asylum seekers, the practice at many border entry points such as Musina and the OR Tambo Airport is that the Act is often not applied to the letter. Many asylum seekers are turned back; immigration officials rely on the same Act to declare their refugee claims to be “manifestly unfounded”. The 5-day Transit Visa provided for under the Act also needs to be reconsidered, and probably extended to a longer period, as the time is often not sufficient for newly arriving asylum seekers to travel to the nearest Reception Office.

64 Immigration Act 13 of 2002 sec 33(5)(a)(ii).

Experts point out that the “reasonable grounds” standard set out in the Act is not clearly defined in either the actual framework or by jurisprudence. The meaning is left at the discretion of immigration officials.⁶⁵ It is to be expected that the exercise of this discretion and the interpretation of the meaning of the provisions will vary from officer to officer. It is therefore apparent that loopholes in the Immigration Act contribute to some degree, to the mistreatment of foreign nationals by authorities and, ultimately exacerbate xenophobia and other hate crimes targeting foreign nationals.

Some amendments were introduced to the Act in May 2014, but these do not cure the defects highlighted above. Indeed, they give more discretion to authorities which could be used to abuse foreign nationals and create loopholes for corruption. For example, the new amendments empower immigration officers to arrest, detain and deport illegal foreigners *without* the need for a warrant.⁶⁶ Doing away with the need for an arrest warrant creates a discretion that can be abused by immigration or law enforcement officers to deport genuine asylum seekers or to solicit bribes.

65 UN, Human Rights Council “Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante” (2011) 13. It is important to note that this section was not amended in subsequent amendments to the Act, including the latest amendments in 2014. It is critical to highlight that there is indeed jurisprudence from the Supreme Court of Appeal of SA, to the effect that “illegal foreigners” should not be detained for more than 120 days, but that there is no evidence that State authorities have implemented it. This jurisprudence emanates from a decision in *Arse v Minister of Home Affairs and Others* 2012 (4) All SA 361 (SCA), where the Supreme Court of Appeal ordered the immediate release of an Ethiopian asylum seeker who had been detained for over seven months at Lindela Detention Centre in contravention of sec 34(1) of the Immigration Act (2002) which provides for a maximum detention period of 120 days. However, in this case, the Court was adjudicating the case of a person who had already applied for asylum and protection in SA. The court emphasized that an individual remains an asylum-seeker throughout the asylum appeal and review process, and that the granting of a permit to any asylum seeker rendered that person an asylum-seeker and not an “illegal foreigner” as immigration officials were contending.

66 Immigration Act 13 of 2002 sec 34, as amended in 2014 (Proc. Nos. R32 and R33, Gazette No. 37679).

Furthermore, according to a 2001 report by the UN Special *Rapporteur* on the human rights of migrants, Jorge Bustamante, the absence of a comprehensive immigration policy in SA, coupled with the lack of regional or multilateral agreements have created hurdles in addressing the challenges posed by xenophobia in SA.⁶⁷

A clear and comprehensive domestic immigration policy would be a necessary precursor to the creation and maintenance of conditions necessary for the lawful and successful integration of migrants into South African society.⁶⁸

From a regional perspective, SA lacks a regional institutional strategy on migration.⁶⁹ The state is party to the Southern African Development Community (SADC) Protocol on the Facilitation of the Movement of Persons. With regard to the SADC region, SA's post-apartheid foreign policy reflects a "commitment to forging close economic, diplomatic and security co-operation and integration as well as the promotion of democracy, adherence to human rights and the preservation of regional solidarity, peace and stability".⁷⁰ However, while the successful implementation of a regional migration policy and system would require the establishment of administrative capacity, institutions and coordination mechanisms in SA and other neighbouring states, no such mechanisms have been established to date.

67 UN, Human Rights Council (n 65 above) 10.

68 As above.

69 As above.

70 *The South Africa Yearbook* (1998) 177.

South Africa's existing immigration policies not only foment xenophobia against foreign nationals living in the country but they also cause a "brain drain" of skilled South African workers and impede economic growth and job creation in the country.⁷¹

Researchers attribute the pre-1994 significant inflow of white, mostly European, skilled foreign workers into SA to the policies of the apartheid government.⁷² This inflow turned into a major outflow of the same group after apartheid ended and democracy was introduced in 1994.⁷³ The post-1994 outflow of skilled migrants has been accompanied by a decrease in the inflow of skilled immigrants. This phenomenon is attributable to SA's restrictive immigration policies and on-going xenophobic attitudes to foreign Africans living in the country.⁷⁴

The on-going emigration of highly skilled South Africans has been credited primarily to the following factors: High crime rates; declining quality of life; poor service delivery; unhappiness with the political situation; inadequate government healthcare; and declining education standards.⁷⁵ The shortage of skilled labour has also been cited as a major impediment to economic growth and job creation in SA.⁷⁶

71 Rasool *et al* (n 58 above) 400. Rasool's article singles out the effect of the amendments to the apartheid government's Aliens Control Act of 1991; the introduction of the Immigration Amendment Act 19 of 2004 and the Immigration Regulations of June 2005 as the main cause of the on-going emigration of skilled South Africans. The authors argue that the regulations regarding the policy on skills immigration established post 1994, are, in many instances restrictive and create obstacles to immigration of highly skilled people into SA. The impediments cited are: The quota for work permits; immigration application backlogs; poor evaluation of qualifications; police clearance requirements; bureaucratic processes to obtain business permits and intra-company transfer work permits; and restrictive procedures in attaining permanent residence status. The article concludes that the recruitment of skilled foreign workers, which could be used to address skills shortages in SA, has so far been unsuccessful.

72 Rasool *et al* (n 58 above) 400.

73 As above.

74 As above.

75 As above.

76 As above.

The need for civic education on the benefits of immigration is made more apparent by the fact that the SA public incorrectly views an expansive immigration policy as a contributor to domestic unemployment.⁷⁷ Paradoxically, many developed countries are presently relaxing immigration controls for skilled workers. For example, the US even offers tax incentives as a means of attracting skilled immigrants to local firms.⁷⁸ Australia, New Zealand and Canada have implemented immigrant selection processes which have resulted in the successful attraction of skilled workers from countries like SA.⁷⁹ SA therefore needs to prioritise reforming its immigration laws in order to attract scarce-skills immigrants.

Another significantly misunderstood issue in SA is the comparative burden of hosting refugees and asylum seekers in the country, when compared to other nations in Africa and globally.

7.1.6 The influence of refugee and asylum-seeker numbers on the incidence of xenophobic attacks

While xenophobia and other hate crimes are global phenomena, the widespread violence and extreme intolerance associated with it in SA has not been seen in other countries. One explanation offered for the violence is that SA is “under siege” from asylum seekers and migrants from neighbouring countries, who have “swarmed” the country since 1994.⁸⁰ The veracity or otherwise of this explanation is to be found in a comparison with the situation in other countries.

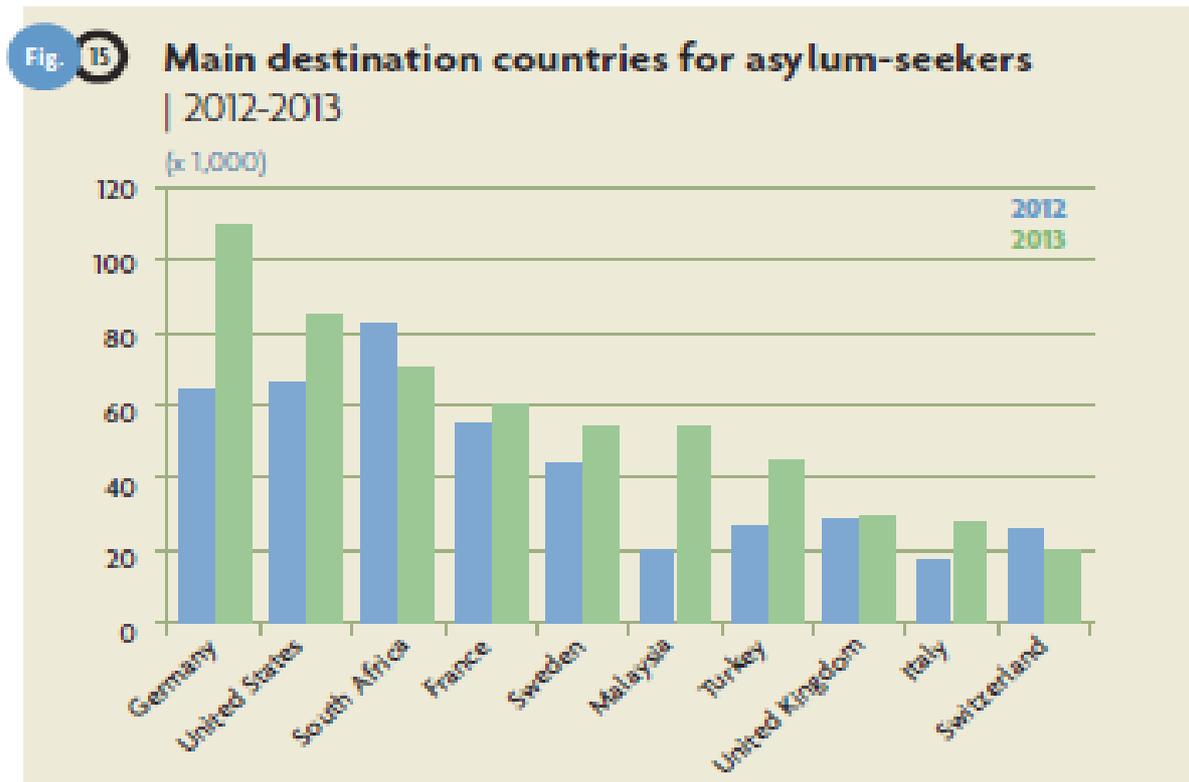
77 Rasool *et al* (n 58 above) 402.

78 As above.

79 As above.

80 Crush J “Making up the numbers: Measuring illegal immigration to South Africa” (2001) 3 *SAMP Migration Policy Series* 17.

While it is a fact that SA is a major destination for refugees in Africa,⁸¹ it does not have the highest number of refugees and asylum seekers worldwide or even in Africa.⁸² Nor does it have a disproportionately high refugee or asylum-seeker burden. The ten leading asylum-seeker receiving countries in the world in the period between 2012 and 2013 appear in the table below:

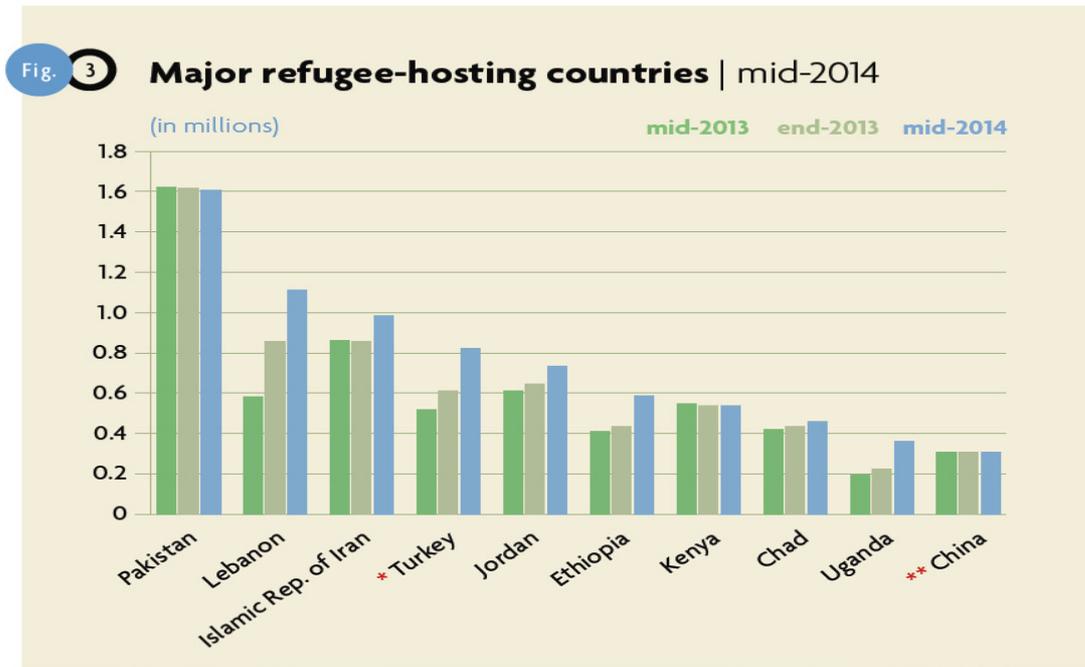


Source: UNHCR, Global trends 2013

81 As at 2013, SA had the largest backlog of pending asylum claims in Africa. See UNHCR "Global trends 2013" (2013) 42.

82 According to the UNHCR, Ethiopia hosts the largest refugee population in Africa, with 587,700 refugees, followed by Kenya with 537,000 refugees. Globally, Pakistan hosts the largest number of refugees in the world, with 1.6 million refugees. See UNHCR "Mid-year trends 2014" (2015) 6.

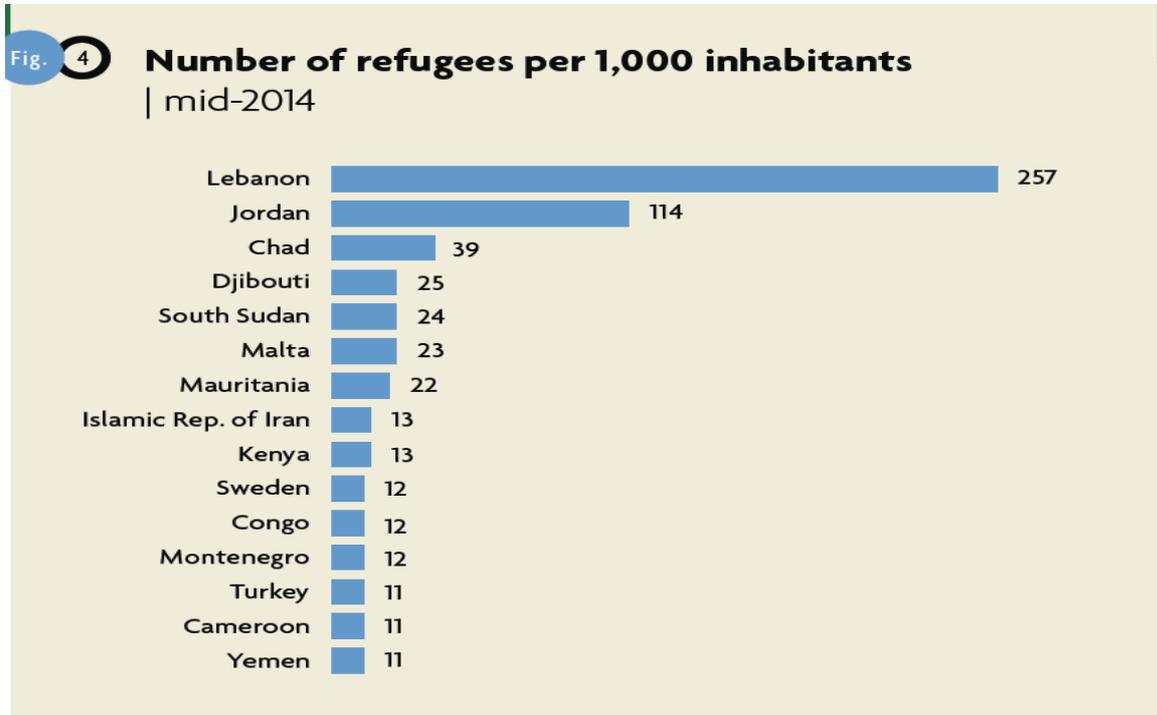
The ten leading refugee hosting countries in the world in the period of 2013 to 2014 are shown in the table below:



Source: UNHCR, Mid-year trends 2014

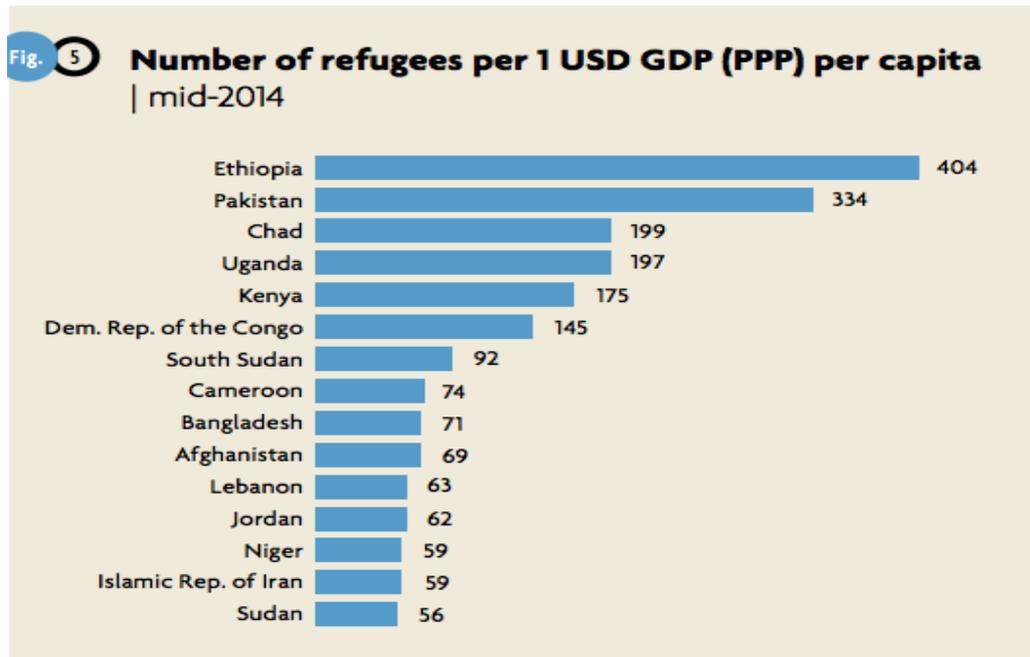
The socio-economic burden that hosting refugees and asylum seekers places upon the national population of the host country and its government becomes apparent when the percentage of refugees and asylum seekers calculated as a percentage of the total population of a host country is determined.

The UNHCR data for 2014 represented in the tables below give a sense of the socio-economic burden of hosting refugees:



Source: UNHCR, Mid-year trends 2014

The UNHCR has further provided the “proxy measure of the burden of hosting refugees” for the top fifteen leading refugee hosting countries in the world. It is worth noting that SA is not amongst the top fifteen.



Source: UNHCR, Mid-year trends 2014

7.1.7 Interim conclusion

The burden of hosting refugees and asylums-seekers, experienced by SA is clearly not excessive considering the burden other nations face. The strain that hosting such persons puts on the economy is likewise not excessive. The general public of SA, however, continue to resent the allocation of scarce resources to such persons. Thus, the research above is valuable and must be drawn upon in developing appropriate interventions to address xenophobia and other hate crimes in SA. Suggestions for pragmatic interventions that might successfully alleviate xenophobia in SA are analysed below.

7.2 Pragmatic interventions: Recommendations for South Africa

Several international human rights organisations came together in Durban, SA, in 2001 and summed up the importance of universal human rights, for all, in the following words:

The battle for universal human rights is a fight for hearts as much as it is a fight for laws and policies. We must strive to remember that we are all one human family, regardless of our race, our ethnic origin or any other difference. If this twenty-first century is to be the era of peace we all hope for, we have no choice but to respect each other's differences and recognize that we all share the basic traits of what it is to be human. Governments must recommit themselves to the principle that all persons, including migrants and refugees, have the right to be treated equally and fairly. Let us build upon shared values and see in diversity, not a threat, but rather enrichment. Our daughters and sons deserve nothing less...⁸³

7.2.1 Introduction: Towards a xenophobia-free SA

Appropriate interventions by government and civil society organisations can reduce xenophobic sentiments and foster tolerance in communities affected by the phenomenon.⁸⁴ Citing a prevailing combination of deep-seated xenophobic sentiments amongst the populace, widespread violent behaviour and weak rule of law, the UN forecasts that it will take time, concerted efforts and goodwill from all concerned parties for anti-xenophobia efforts to bear meaningful fruit in the country.⁸⁵

As SA is the regional economic, political and cultural hub of Africa, it is anticipated that the number of asylum seekers and other migrants seeking a variety

83 ILO, IOM, OHCHR & UNHCR "International migration, racism, discrimination and xenophobia" paper for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, from 31 Aug-8 Sept 2001 at ii.

84 United Nations Development Programme (UNDP) "Human Development Report 2009: Overcoming barriers: Human mobility and development" (2009) 105.

85 As above.

of opportunities in the country will continue to rise.⁸⁶ A large number of migrants flee to SA to seek asylum from persecution in their home countries. As of 2013, SA had the largest backlog of asylum claims in Africa.⁸⁷ This means that the legal status of such asylum seekers is undetermined. Therefore, there are compelling economic, humanitarian and legal reasons for SA to do more to protect the rights of foreign nationals living in the country. This can primarily be achieved through the utilisation of existing legal, extra-legal and institutional mechanisms.

South Africa has ratified many important international conventions and enacted domestic legislation it could utilise to protect asylum seekers, refugees and other migrants.⁸⁸ These conventions and domestic laws oblige the state to safeguard the human rights of foreign nationals in the country.⁸⁹

South Africa's international reputation regarding the treatment of refugees and other migrants is at stake. As Landau argues, the denial of foreigner's rights will negatively affect the country's international reputation, economic prospects and ability to deliver on its promise of freedom.⁹⁰ An effective, durable solution to human rights violations experienced by migrants during xenophobic attacks in SA begins

86 Landau L, Ramjathan-Keogh K & Singh G "Xenophobia in SA and problems related to it" (2005) 4. Friebel, amongst others, also argues that SA will continue to attract migrants due to the potential it offers for economic advancement and access to good education, healthcare and infrastructure. See Friebel G, Gallego J M & Mendola M "Xenophobic attacks, migration intentions and networks: Evidence from the South of Africa" (2013) 26 *Journal of Population Economics* 555-591. Ruhs & Chang also support Friedbel's view and argue that SA should not close its borders to migrants from the region. See Ruhs M & Chang H J "The ethics of labor immigration policy" (2004) 58 *International Organization* 69-102.

87 UNHCR (n 81 above) 42.

88 The most important of these are the 1951 Convention Relating to the Status of Refugees and the Constitution of the Republic of South Africa.

89 Centre for Human Rights at the University of Pretoria (CHR) "The nature of South Africa's legal obligations to combat xenophobia" (2009) 3.

90 As above.

with strengthening the rule of law and promoting respect for and protection of, human rights for all persons living in the country.⁹¹

In addressing the problem in the SA context, structural problems that provide fertile ground for the growth of xenophobic attitudes will also need to be resolved. To develop and implement effective interventions to alleviate xenophobia, policy-makers need a complete and accurate understanding of the nature and causes of the phenomenon and to consider experiences from other jurisdictions.⁹² This thesis has dealt with these issues in the preceding chapters.

South Africa must allocate adequate resources and commit every effort to developing an understanding of xenophobia and hate crimes in the country and to address the root causes. While investigations have been conducted in the past, these have not succeeded in ending anti-foreigner violence.

The initiation of an on-going, systemic inquiry into anti-foreigner violence in the country will therefore serve the purpose of continually updating policy-makers on past xenophobic incidents and the current impact of xenophobia in the country.⁹³ With a clear understanding of the past and current situation, policy-makers will be better placed to address institutionalised xenophobia by disempowering those persons and institutions responsible for the perpetuation of xenophobia in SA.⁹⁴

Although past studies of xenophobia and hate crimes targeting foreign nationals have spawned a variety of recommendations regarding the phenomena, this thesis proposes some multi-disciplinary interventions that could have significant short and long-term impact on combating the phenomenon. These are discussed below.

91 As above.

92 Misago *et al* (n 3 above) 14.

93 Misago *et al* (n 3 above) 14.

94 Misago *et al* (n 3 above) 15.

7.2.2 Early warning as a violence prevention or mitigation mechanism

The design and implementation of an early detection mechanism for xenophobic violence is one pragmatic measure that should receive urgent attention from the South African government, if it is serious in its intentions to curb such violence. Such a system, once designed should be promoted country-wide.⁹⁵

The rationale of using an early warning system to curb xenophobic violence and reduce the impact of associated attacks is simple. While xenophobic attitudes are so widespread in SA that attacks occur in all regions of the country,⁹⁶ researchers have found that the motivation for the attacks and violence against non-nationals differs according to specific, highly localised contexts.⁹⁷

The Consortium for Refugees and Migrants in South Africa (CoRMSA) notes that xenophobic violence and attacks occur in certain predictable patterns, most importantly, they accompany protests against poor service delivery. These protests are often planned and publicised in advance.⁹⁸ It is therefore possible to use local mechanisms to predict when protests and attacks may happen and deter or adequately respond to them as they happen.

95 Early warning and prevention mechanisms were previously mooted by the CoRMSA in 2010, in recommendations contained in CoRMSA "Taking action on the threats of xenophobic violence: Recommendations for the inter-ministerial committee" (2010) and in the recommendations made by the FMSP in 2010 in Misago *et al* (n 23 above). It was also mooted by experts in a 2010 report by the African Centre for Migration & Society at Wits (ACMS). See Misago *et al* (n 3 above) 53.

96 Mattes R, Taylor D, McDonald D, Poore A & Richmond W "Still waiting for the barbarians: SA attitudes to immigrants & immigration" (1999) 14 *SAMP Migration Policy Series* ch 1.

97 Kabwe-Segatti (n 24 above) 42.

98 See generally 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" (2012).

While it is useful to develop aggregated responses to xenophobia and hate crimes targeting foreign nationals across SA, it is also crucial to consider specific cities, localities and neighbourhoods, on an individual basis.⁹⁹ The majority of xenophobic attacks in SA have been found to target specific groups of non-nationals, especially those engaging in economic activities perceived to compete with South African enterprises, for example, Somali or Ethiopian shopkeepers.¹⁰⁰ Context-specific responses are therefore crucial for any effective response to anti-migrant violence.

To set up an effective early warning mechanism, the state should first map out potential hotspots for attacks across the country. It should then establish a centralised command centre in the form of a dedicated and adequately resourced institution reachable by way of a hotline number. Existing resources should be harnessed to carry out intelligence gathering in areas prone to attacks. Such resources include security agencies, community members, the South African Police Service (SAPS) and “at-risk” groups of foreign nationals such as refugees, or foreign shopkeepers, in a given locality. At migrant community level, refugees and other “at-risk” groups could easily be mobilised into focus groups.¹⁰¹

The SAPS, UNHCR and other Non-Governmental Organisations (NGOs) that deal with migrants and representatives from the local community, such as trusted community leaders, could also play a vital role in giving early warnings. Effective collaboration between the actors and provision of adequate resources, both human

99 Kabwe-Segatti (n 24 above) 42.

100 Charman A & Piper L “Xenophobia, criminality and violent entrepreneurship: Violence against Somali shopkeepers in Delft South, Cape Town, South Africa” (2012) 43 *South African Review of Sociology* 81.

101 Some migrant groups are already organized into associations. For instance, the Somalis are organized into Associations, amongst others, the Somali Association of South Africa (SASA), a group with membership and branches in all cities of SA. The SASA’s network is acknowledged by the Red Cross as one of their main enablers in tracing and re-establishing family networks among Somali refugees in SA. <http://www.icrc.org/eng/resources/documents/update/2013/03-14-somalia-relatives-family-links.htm> (accessed 2 Sep 2013).

and technological, would be crucial prerequisites for the success of this system. The use of a technology-based hotline system such as Short Message Services (SMS) or even social media such as Twitter and Facebook would be useful in disseminating messages to members of focus and target groups.

In the event that there is intelligence information or signs of pending service delivery protests, planned vigilante violence, mobilisation of nationals in preparation for attacks, or threatened or imminent attacks against non-nationals planned in any neighbourhood, city or locality, the early warning system could easily utilise technology to warn the “at-risk” migrant groups, municipal authorities, the SAPS, and NGOs to take action to prevent the loss of life or property. Such actions could include evacuation of “at-risk” populations, removal of valuables, an increase in visible policing or police intervention and arrest and prosecution of perpetrators.

On the viability of an early warning system, it is important to note that the UNHCR in SA has an informal early warning mechanism which it uses to alert SAPS whenever refugees or asylum seekers under its mandate call them to report threats or mobilisation of the public for attacks in various locations.¹⁰² According to the IOM, this informal early warning mechanism spearheaded by the UNHCR has to a great extent succeeded in preventing massive lootings in many incidents reported in recent years.¹⁰³

For the reasons stated above, it is recommended that any early warning system designed for use in SA should be initiated, owned and driven by the state. This recommendation is based on the fact that the state has an existing intelligence gathering apparatus across the country. In any case, the allocation of resources to such an initiative would be justified given the positive impact that such measures would have on socio-economic stability within the country. Further, it is important to

102 Information obtained from informal interview with former UNHCR Senior Community Services Officer, Mr Alphonse Munyaneza on 8 Jan 2014.

103 See generally, IOM “The effects of xenophobia on the integration of migrants in South Africa: An NGO perspective” (2012) (accessed 14 Jan 2014).

note that the state bears the ultimate responsibility for the security of South African nationals, refugees and asylum seekers and for the other categories of foreign nationals present in the country who may be affected by xenophobic violence.

7.2.3 Address the known socio-economic causes of xenophobia

One theme that recurs in qualitative research into xenophobia is that SA is yet to address important structural causes of the phenomenon in the country.¹⁰⁴ According to experts, key amongst such socio-economic causes of xenophobia are: Extremely high unemployment rates; lack of adequate housing; corruption at the Department of Home Affairs; unacceptably high crime rates; and service delivery shortfalls throughout the country.¹⁰⁵

The UNHCR gives the following prognosis regarding the socio-economic causes of xenophobia in the SA context:

Competition between refugees and South African nationals for jobs, housing, business opportunities and social services has raised tensions, and aggravated xenophobic attitudes among some in the local community. It is noticeable that poor socio-economic conditions among host communities provide a breeding ground for xenophobia...¹⁰⁶

104 See for example, Amisi B; Bond P; Cele N & Ngwane T "Xenophobia and civil society: Durban's structured social divisions" (2011) 38 *South Africa Journal of Political Studies (Politicon)* 63; & Misago *et al* (n 23 above) 8.

105 As above.

106 UNHCR "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: South Africa" (2012). Available at <http://www.unhcr.org/refworld/docid/4ed724952.html> (accessed 20 Jul 2014).

Disturbing images of entire communities engaging in looting of shops owned by foreigners are rife whenever service delivery protests take place.¹⁰⁷ Such behaviour may reflect not only widespread xenophobic sentiment but also opportunistic crime indicative of extreme poverty as underlying motives for the attacks.

In addressing socio-economic causes of xenophobia, priority should be given, *inter alia*, to employment creation, economic empowerment targeting the poor, timely provision of services like housing and fighting corruption. This will cushion citizens from vulnerabilities occasioned by extreme poverty. Reducing the number of service delivery protests could potentially also decrease instances of accompanying looting and other forms of attacks against foreign nationals.

One possible approach to tackling the unemployment problem in SA is to empower SA nationals with entrepreneurial skills and the necessary resources to enable them to compete favourably with foreign nationals. This, Landau argues, would remove the economic threat posed by foreigners to South African businesspersons at lower and informal levels and consequently reduce xenophobia and organised attacks in townships and informal settlements.¹⁰⁸

Landau's argument for economic empowerment of the poor as a means of fighting xenophobia finds support amongst other researchers.¹⁰⁹ These researchers

107 <http://www.sowetanlive.co.za/news/2014/07/31/picture-of-the-day-service-delivery-protest-or-plain-theft> (accessed 13 Aug 2014). The UNHCR's view that economic competition could trigger xenophobic attacks is supported by Sharp. See Sharp J "Fortress SA: Xenophobic violence in South Africa (2008) 24 *Anthropology Today* 1-3.

108 This idea is shaped by a conversation I had with Prof Loren Landau of Wits on 12 Feb 2014. Prof Landau was of the opinion that since economic competition is a major trigger of xenophobia, empowering South African nationals with skills to enable them to compete with foreign nationals would reduce the threat posed by more experienced foreign business persons and reduce the existing antipathy towards them.

109 Bond P, Ngwane T & Amisi B "Xenophobia and civil society: Why did it happen? Synthesis report" (2011) 30.

argue that SA should move to address the basic needs of South Africans as a means of addressing their hostility towards foreign nationals.¹¹⁰

7.2.4 Address immigrant "*rightlessness*"

Writing on the regulation of hate crime in the US, Lawrence C, said:

The bias crime victim cannot reasonably minimize the risk of future attacks because he is unable to change the characteristic that made him a victim.¹¹¹

Foreign nationals living in SA are entitled to the fundamental human rights guaranteed in the Universal Declaration of Human Rights (UDHR), Customary International law, human rights instruments and relevant national laws, most notably the national Constitution.¹¹² These are not realised in reality and foreign nationals remain mostly without rights *or are perceived as such*, and are vulnerable to xenophobic attacks and other forms of human rights abuses.

Public perception in SA is generally that the majority of foreign nationals are not entitled to the enjoyment of any human rights enjoyed by citizens. This is evident from the following: 80 percent of South Africans sampled in 2013, believed that irregular migrants living in the country should not be granted any fundamental human rights.¹¹³ The figure was arrived at after an empirical survey was conducted countrywide. The survey did not distinguish between respondents who were law enforcers and those who were civilians.¹¹⁴ Only 31 percent of South African citizens thought that refugees fleeing dangerous situations in their countries of origin and enjoying recognition from the government in SA deserved to enjoy legal rights in the

110 As above.

111 Lawrence C R, "If he hollers let him go: Regulating racist speech on campus" (1990) 1 *Duke Law* 431.

112 ILO, IOM & OHCHR (n 83 above) ii.

113 Crush *et al* (n 2 above) 32.

114 As above.

country.¹¹⁵ It is therefore argued that actual or perceived “rightlessness” of foreign nationals definitely makes them soft targets for attacks, police harassment and discrimination.

Legislative and other legal mechanisms to protect the rights of foreign nationals should be implemented urgently. Organizers and perpetrators of attacks against foreign nationals should be prosecuted and held accountable, regardless of their status in society. Victims should be compensated by their assailants and a restorative justice approach developed for application in instances where xenophobic attacks have taken place.

Widespread public ignorance of how xenophobia manifests itself as a distinct offense diminishes the ability of law enforcement agencies to deal with the phenomenon effectively.¹¹⁶ It is important to develop a specific legal strategy in terms of which the parameters of xenophobia as a hate crime are clearly defined and criminal sanctions imposed that distinguish these offences from those that lack the distinctive nature of a hate crime. The strategy must reflect the seriousness with which the hate motive is viewed.¹¹⁷

South Africa currently lacks dedicated legislation that criminalises xenophobic attacks and other bias-motivated crimes, despite the fact that a substantial number of foreign nationals living in the country are refugees or asylum seekers. The Refugees Act¹¹⁸ is silent on the issue of xenophobia and hate crimes targeting refugees. Xenophobic attacks are therefore, currently treated as “normal acts of criminality” and addressed as such.¹¹⁹ This has resulted in perpetrators acting with impunity. Perpetrators who loot foreign-owned shops are, for example, often

115 As above.

116 CHR (n 89 above) 81.

117 As above.

118 Refugees Act 130 of 1998. For the number of documented asylum seekers and refugees, see UNHCR website for South Africa” available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO> (accessed 13 Jan 2014).

119 CHR (n 89 above) 78.

charged with causing public violence, a simple misdemeanour.¹²⁰ It thus appears that xenophobic acts are not treated as distinct and no special measures are taken by law enforcement agencies in the prosecution of such acts in SA.¹²¹

South Africa is a constitutional democracy, which aspires to respect the rule of law and promote human rights. The Constitution provides for legislative intervention to combat crimes motivated by unfair discrimination.¹²² The Department of Justice and Constitutional Development (DoJCD) and the SA Law Reform Commission (SALRC) should therefore champion law reform aimed at the achievement of this goal. To this end, the Legislature can:

- (i) Promulgate new legislation, criminalizing acts of xenophobia and other hate crimes targeting foreigners by declaring prejudice based on “foreignness” to be an aggravating factor in criminal offences. The Perpetrators of such offenses could receive stricter penalties as should those who commit other hate crimes motivated by a victim’s nationality, ethnicity, religion, race or gender; and
- (ii) Amend existing laws such as the Refugees Act¹²³ or the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),¹²⁴ to make a bias motive based upon a person’s nationality, ethnicity, religion, race or gender an aggravating circumstance in all xenophobic attacks against individuals or property.

The enactment of a hate crime law is possible in terms of section 9(2) of the Constitution which provides:

120 SAHRC “Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against foreign nationals” (2010) 8.

121 As above.

122 Constitution of the Republic of South Africa, sec 9 (4).

123 Refugees Act 130 of 1998.

124 PEPUDA Act 4 of 2000.

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect persons or categories of persons disadvantaged by unfair discrimination may be taken.

If foreign nationals and other minorities are viewed as disadvantaged groups, the legislature would be discharging its constitutional mandate if it were to enact anti-xenophobic legislation to protect victims or potential victims of hate crimes.

Regardless of the legislative intervention chosen, SA will need to supplement such measures with the training of law enforcement officers, prosecutors, judges and others on the nature and effects of hate crimes such as xenophobia. This will improve the quality of responses to such attacks and investigations into incidents. It will also encourage prosecution and conviction of offenders.

The effectiveness of a hate crime law in combating xenophobia may depend on it receiving legitimacy and acceptance within South African society. Its success will depend on SA's willingness to implement it by targeting the actual organizers and perpetrators of xenophobic violence.

Landau cautions that legislation should be drafted carefully to avoid it creating an isolated, adversarial identity of "foreignness" *vis a vis* nationals, as this situation may further inflame the pre-existing divisions between the groups and make foreigners more vulnerable to continued xenophobia.¹²⁵ This concern is echoed by other experts who also advise that authorities should avoid interventions that separate people into categories, which permit the perception of one group as the

¹²⁵ This idea is shaped by a conversation I had with Prof Loren Landau in Feb 2014. Prof Landau was of the opinion that the success of a hate crime law depended on support from the community and implementation by law enforcement officers. Both these requisites are lacking in the existing framework.

“the problem” and the other as the “victim group”.¹²⁶ Instead, interventions should seek to unite all persons as part of a single community engaging to resolve a shared problem.

7.2.5 Reform refugee processing and immigration systems

South Africa is an asylum seeker “hotspot” that is repeatedly faced with influxes of refugees from throughout Africa and beyond.¹²⁷ This is best demonstrated by UNHCR figures, which show that in 2010, about 845,800 people applied for refugee status worldwide and that 20 percent of these applied in SA.¹²⁸

Experts contend that to date, SA has been unable to reform its immigration system to achieve a solid and effective policy to manage its immigrant, refugee and asylum-seeker intake.¹²⁹ The country lacks a coherent approach to immigration and this has resulted in uncontrolled immigration often leading to an influx of migrants in the country. This in turn, causes frustration and outbursts of violence against foreigners.¹³⁰

The Immigration Act¹³¹ is principally focused on controlling and excluding immigrants rather than properly managing immigration to the benefit of the country.¹³² This “restrictionist” policy has forced thousands of foreign nationals to

126 Monson T, Takabvira K, Anderson J, Ngwato T P & Freemantle I “Promoting social cohesion and countering violence against foreigners and other outsiders: A study of social cohesion interventions in fourteen South African townships (2013) 53.

127 See UNHCR “Global trends 2012” (2012) 13; & UNHCR (n 81 above) 42.

128 UNHCR (n 81 above) 13.

129 Aggad F & Sidiropoulos E “South Africa's tipping-point” (2008) 1.

130 As above.

131 Immigration Act 13 of 2002, amended 2014.

132 Crush (n 42 above) 2; & Landau *et al* (n 86 above) 14.

attempt to regularize their stay in the country through false asylum claims, resulting in negative perceptions by citizens.¹³³

Arrests, detentions and deportations of immigrants rather than effective border control, are the primary means of immigration enforcement in SA.¹³⁴ The Immigration Act¹³⁵ and jurisprudence from the Supreme Court of Appeal¹³⁶ provide that “illegal foreigners” should not be detained for more than 120 days. Despite this, the Department of Home Affairs has violated this requirement and detained foreign nationals for longer periods.¹³⁷

It is important to highlight that in *Arse v Minister of Home Affairs and Others*, the landmark case that generated the above jurisprudence, the appellant had already applied for asylum. It can therefore be argued that the court’s pronouncement may not benefit foreign nationals who have not applied for asylum in SA.

133 McConnell C “Migration and xenophobia in South Africa” (2009) 11 Conflict Trends 34-40. In this article, Christy McConnell, a development researcher, argues that the net effect of the enforcement of the Act in its current form is that it has inevitably pushed illegal migration further underground and this had the effect of exacerbating xenophobic sentiments amongst citizens.

134 De Jager N & Hopstock N “Locals only: Understanding xenophobia in South Africa” (2011) 33 Strategic Review for Southern Africa 120-139. See also UN, Human Rights Council (n 65 above) 13.

135 Immigration Act, 2002, s 31(1)(d).

136 See the decision in *Arse v Minister of Home Affairs and Others* 2012 (4) All SA 361 (SCA). In this case, the Supreme Court of Appeal ordered the immediate release of an Ethiopian asylum seeker who had been detained for over seven months at Lindela Detention Centre while s 34(1) of the Immigration Act (2002) provided for maximum detention of 120 days. The Court further reiterated that that an individual remains an asylum-seeker throughout the appeal and review process, and that the granting of a permit to any asylum-seeker rendered that person an asylum-seeker and not an “illegal foreigner” as immigration officials contended.

137 UNHRCI (n 65 above) 13.

The restrictive nature of SA's immigration regime has directly caused a serious skills shortage in the country.¹³⁸ This situation is negatively influencing the economic prospects and global participation of the country.¹³⁹

The legal lacuna highlighted above is compounded by the failure of SA to ratify the Convention on the Rights of Migrant Workers and Members of their Families (CMW).¹⁴⁰ This means that the rights of migrant workers and irregular unskilled migrants operating in the country are unclear and often infringed.¹⁴¹ This is the case, despite the fact that the rights contained in the Bill of Rights in the 1996 Constitution are guaranteed to "everyone". It is important to highlight that presently, there is no dedicated domestic legislation that offers individual migrant worker victims any recourse.

The vulnerability of foreign nationals is further exacerbated by the lack of access to documentation for the purposes of identification,¹⁴² which is often occasioned by corruption and inefficiencies at the Department of Home Affairs.¹⁴³

138 Rasool *et al* (n 58 above) 399.

139 As above.

140 The CMW came into effect in 1990. SA had not ratified the Convention as of October 2014. A list of all signatories of the CMW is available at

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed 28 Apr 2014).

141 Jara M & Peberdy ? "Taking Control: Civil Society Responses to the Violence of May 2008" (2010) ch 1.

142 CHR (n 89 above) 115.

143 Harris B "A foreign experience: Violence, crime and xenophobia during South Africa's transition" (2001) 5 *Violence and Transition Series* 9. See also Misago *et al* (n 23 above) ch 1. Recently, the ACMS noted that the Department of Home Affairs repeatedly violates national laws pertaining to migrants "by closing offices without warning, arresting and detaining people beyond legally prescribed limits, or deporting people against direct court orders". This demonstrates that the ongoing disregard of the rule of law by a state department directly compromises the enjoyment of other rights bestowed on migrants by SA's domestic laws, such as the right to documentation. See Landau "Xenophobia, a backtrack on promise of tolerance" Sunday Star 1 Mar 2014.

To address the drawbacks occasioned by these legal and administrative failures, SA should implement some critical reforms to the immigration system and achieve a comprehensive policy. In order to attain this objective, it is critical for SA to work with neighbouring migrant-producing SADC member states like Zimbabwe, to formulate a regional approach.¹⁴⁴ Such an approach ought to address the flow of refugees and labour migration in the region and should be anchored in a human rights-based approach.¹⁴⁵

Domestically, SA should reform its immigration system to make it more transparent and, at the same time, increase channels for legal immigration into the country. The country should enact policies that control the influx of large numbers of unauthorized immigrants into the country whilst safeguarding free migration into the country for those who meet the legal requirements.¹⁴⁶ In that way, SA will reap maximum benefits from global migration, which include attracting skilled professionals from foreign countries.

Experts contend that progressive reforms to the immigration system would discourage illegal migration and help reverse clandestine migration.¹⁴⁷ This is because the action would open up avenues for legal migration for qualified foreign nationals who might otherwise have made false asylum claims.¹⁴⁸ Increasing opportunities for legal migration would further help to reduce the prevalent “exclusionist” mentality that permeates both leaders and citizens and which contributes to xenophobic sentiments and leads to attacks in the country.¹⁴⁹

144 UN, Human Rights Council (n 65 above) 11.

145 As above.

146 Muchiri G “The use of law and multidisciplinary mechanisms to address xenophobia in SA” Unpublished LLM dissertation, University of Pretoria (2012) 50-51.

147 Misago *et al* (n 23 above) 6.

148 As above.

149 As above.

Finally, making the process more transparent would reduce corruption, exploitation and other associated inhuman practices that undermine the rights and welfare of foreign nationals and even citizens.¹⁵⁰

Concerted efforts should be made to document all undocumented immigrants in SA. This could be achieved by concluding or expediting pending asylum applications. For those immigrants who have not applied for asylum or attempted to regularise their status in the country, SA should consider declaring amnesties for specified periods. Such amnesties could be backed with sanctions for those who fail to take advantage of the opportunity to register.¹⁵¹ The use of amnesties backed with incentives to encourage illegal immigrants to regularise their status has been employed in other jurisdictions like the US with some success.¹⁵² The application of such measures in SA would require some local adaptation. The advantage of the implementation of such measures would be that SA could reduce the resource allocation required for tracking illegal immigrants inside the country and redirect it to securing its borders.

Further, targeted immigration quotas could meaningfully be introduced. Foreign jurisdictions like Australia and the US have successfully used immigration quota systems to encourage immigration of skilled professionals to their territories or for humanitarian purposes.¹⁵³ Given SA's position as a regional economic power, this approach would most likely succeed in attracting skilled professionals from the continent. For SA, immigration reforms should be implemented hand-in-hand with

150 As above.

151 SA has in the past, issued a temporary moratorium against the arrest and deportation of Zimbabwean nationals when the country was affected by civil strife. The moratorium was waived afterwards. See "South Africa: Deportation of Zimbabweans to resume again" IRIN News 3 Sep 2010.

152 "Obama offers amnesty to 5 million illegal immigrants, defies GOP" Washington Times 20 Nov 2014.

153 Carrington K, McIntosh A & Walmsley J *The social costs and benefits of migration into Australia* (2008) 1. See also the provisions of the US Federal Immigration Act of 1924.

public education campaigns, where the state explains the benefits that the general public derives from having skilled foreigners in their country.¹⁵⁴

7.2.6 Promote tolerance, inclusivity and accountability in local leadership structures

Competition for political power in SA's townships is an important factor that promotes xenophobia against foreign nationals. According to a study by the Forced Migration Studies Program at Wits (FMSP),¹⁵⁵ violence against foreign nationals is rooted in the exclusive politics of the country's townships and informal settlements and is mostly perpetuated by local leaders competing for political and economic power.¹⁵⁶

Local leaders regularly mobilize citizens to attack and evict foreign nationals living amongst them as a means to strengthen their personal, economic or political power or interests within the local community.¹⁵⁷ Public administration and political party officials working in townships and informal settlements therefore need to build more inclusive and rights-based forms of governance at the local level.

The role of the South African government in curbing this pervasive public violence would be to promote tolerance, justice and the rule of law at all levels of governance in the country. Misago *et al*, amongst others, opine thus:

“Mechanisms within the public administration and political parties should encourage efforts to build more inclusive and rights-based forms of governance. Doing so will require more inclusive community justice

154 As above.

155 See generally, Misago *et al* (n 23 above).

156 Misago *et al* (n 23 above) 2.

157 As above.

mechanisms, a more effective and responsive police service, and legal support for disenfranchised and marginalized groups.”¹⁵⁸

A 2013 report by the SAMP found that increased contact between migrants and citizens has a beneficial effect on fostering tolerance and lowering xenophobic views of citizens.¹⁵⁹ Those with more contact with foreigners expressed remarkably tolerant views.¹⁶⁰

Further, the ACMS argues that elected, traditional, religious and even informal leaders could play a major role in preventing xenophobia, if they could “support and advocate for non-violent approaches to resolving tensions in the communities across SA”.¹⁶¹ The thinking here is that educating nationals on South African and general African history and current affairs could help local communities understand the plight of foreigners, including refugees, and make them more tolerant of them.¹⁶²

In promoting tolerance and inclusivity between nationals and foreign nationals, emphasis should be placed on highlighting to South Africans, the benefits of a peaceful coexistence between the two groups. Efforts should be made to explain the existing socio-economic benefits of inclusivity and this should include highlighting the many socio-economic benefits South African communities gain from the presence of foreign nationals in their communities. It is worth highlighting here, that foreign nationals mostly lease business premises from South Africans, create employment in local communities, offer a market for goods and services produced locally and offer access to goods and services at the local levels.

158 Misago *et al* (n 23 above) 4.

159 Crush *et al* (n 2 above) 29.

160 As above.

161 Monson *et al* (n 126 above) 26.

162 As above.

7.2.7 Implement civic education on the rights of foreigners

Recurrent xenophobic attacks in SA violate the fundamental human rights of foreign nationals living in the country, including the right to life, right to own property and the right to seek and enjoy safe asylum.¹⁶³ According to the South African Human Rights Commission (SAHRC), there exists a general widespread lack of knowledge about foreign nationals and their human rights. While this is a major factor contributing to continued violations of foreigners rights through xenophobic attacks and hate crimes in SA, successive governments have done little to remedy this situation through public education.¹⁶⁴

Public information sources like the media, have also contributed to this ignorance through the stereotyping of foreign nationals as “aliens” or “illegal” immigrants regardless of their immigration status in SA.¹⁶⁵ Herman alludes to the contribution of the media to xenophobic stereotypes, thus:¹⁶⁶

A cursory look at tabloid content makes it clear that these papers have been tapping into the widespread xenophobic attitudes in the country and amplifying them for sensational value. “Clamp-down operations” on “illegal aliens” get prominent and gleeful coverage, and foreign nationals are often glibly associated with crime... The coverage given to the violent rage of communities lashing out against suspected criminals in their midst often stops just short of celebration.

Indeed, during the xenophobic attacks of May 2008, SA media sensationalized the violence in a manner that spread the ignorance and possibly incited the spread of the attacks from Gauteng to other parts of the country. For example, the *Daily*

163 All these are fundamental human rights, protected in the 1948 UDHR.

164 SAHRC (n 120 above) 8.

165 Misago *et al* (n 3 above) 36.

166 Herman W “Telling stories: South African tabloids and post-apartheid politics- conference paper” (2008) 31. Retrieved from <http://eprints.lse.ac.uk/21584/> (accessed 31 Dec 2014).

Sun used two headlines: “War on aliens” and “alien terror”, to describe xenophobic violence.¹⁶⁷

The *Daily Sun* was further found to propagate xenophobic views when it declared that South Africans have a good reason to hate and attack foreign nationals because of their involvement in crime.¹⁶⁸ The South African Press Appeals Panel, on 22 October 2008, found in favour of the CoRMSA and the MMP by ruling that the *Daily Sun*’s repeated use of “alien” to generally refer to foreign nationals regardless of their migration status was inappropriate and discriminatory.¹⁶⁹ The Press Appeals Panel barred the *Daily Sun* from describing foreigners as “aliens”.

SA does not have accurate statistics on the number of foreign nationals living in the country, allowing for misperceptions and assumptions to take hold. Misinformation thrives and engenders anti-foreigner stereotyping. South African citizens feel that their country is “under siege from outside” and are willing to turn to violence and other unconstitutional measures to ensure foreign nationals are excluded.¹⁷⁰

Organisations such as the South African Human Sciences Research Council (HSRC) have fuelled the fire by issuing erroneous statistics, claiming that between five and eight million “impoverished foreigners” from African countries have

167 The Media Monitoring Project (MMP) and the CoRMSA filed a complaint with the Press Ombudsman and the SAHRC against the Daily Sun’s stereotypical reporting. See MMP “Media monitoring project submits complaint about Daily Sun reporting on xenophobia” 28 May 2008; available at

http://www.mediamonitoringafrica.org/index.php/news/entry/media_monitoring_project_submits_complaint_about_daily_sun_reporting_on_xen/ (accessed 14 Dec 2014).

168 Sandwith C “Post-colonial violence: Narrating South Africa, May 2008” (2010) 22 *Current writing: Text and reception in Southern Africa* 60-82.

169 MMP “MMP wins a great victory over the word alien” 3 Nov 2008, available at http://www.mediamonitoringafrica.org/index.php/news/entry/mmp_wins_a_great_victory_over_the_word_alien/ (accessed 31 Dec 2014).

170 Crush J “The dark side of democracy: Migration, xenophobia and human rights in South Africa” (2000) 38 *International Migration* 110.

“swamped” SA.¹⁷¹ This image of an “invasion of SA by foreigners” has been exploited by anti-immigrant crusaders as scientific proof, lending legitimacy to hostile sentiments against foreign nationals.¹⁷²

According to the UNHCR, foreign nationals, both documented and undocumented comprise, at most, only three to four percent of the total population of SA.¹⁷³ This figure is considerably lower than that of other African countries like Kenya, that are destinations for refugees and migrants. It is a fact that, contrary to popular belief, migration is far less numerically significant in SA than it is in many other countries in Africa.¹⁷⁴

Civic education on human rights of foreigners should go hand-in-hand with the protection of the existing human rights of foreigners. A study conducted by the CHR in 2009 concluded that SA is obliged by national and international law to respect and protect the human rights of all persons living within its borders.¹⁷⁵ The study recommended that SA should respect the principle of *non-refoulement* with regard to asylum seekers and refugees living in the country and promote access to socio-economic rights for all within its borders.¹⁷⁶ The study also promoted the re-integration of victims of xenophobia into the country.¹⁷⁷

The national and international laws alluded to by the CHR report include the Constitution, applicable refugee laws, immigration laws and the many international

171 See Crush (n 80 above) 17.

172 As above.

173 UNHCR “Flow of asylum seekers to South Africa grows in 2006” (2007) available at www.unhcr.org/cgi-bin/texis/vtx/newsitem?id=45c35d1c4 (accessed 20 Jul 2014).

174 The latest World Bank data shows that the ratio of refugees to citizens in SA is far less than countries like Kenya, Egypt, South Sudan and many others. See generally, World Bank “Refugee population by country or territory of asylum” (2014), available at <http://data.worldbank.org/indicator/SM.POP.REFG> (accessed 20 Jul 2014).

175 CHR (n 89 above).

176 CHR (n 89 above) 114.

177 As above.

conventions that SA has ratified. These contain specific provisions that safeguard the human rights of foreign nationals living in the country and have been discussed in detail in the preceding chapters of this thesis. Regional human rights bodies have urged SA to fulfil its human rights obligations by enforcing the laws and abiding by the conventions it has ratified.¹⁷⁸

Existing laws and obligations should form the basis of a robust human rights education that should be implemented in SA to curb ignorance of the rights of immigrants living in the country. South Africa should emulate Australia where, human rights education has been successfully incorporated into the school curriculum.

The recommendation to implement human rights education as an antidote for xenophobia is supported by the latest advice from the UN Special *Rapporteur* on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere.¹⁷⁹ Ruteere recommends that states should invest in human rights education by incorporating it in “both conventional and non-conventional curricula, in order to transform attitudes and correct ideas of racial hierarchies and superiority promoted by extremist political parties, movements and groups and counter their negative influence”.¹⁸⁰ This implies that such education should target young, school-going South Africans, law enforcement agencies and government officials in key departments like immigration and Home Affairs.

178 Indeed, the African Commission on Human and Peoples Rights met in 2008 and adopted a resolution reiterating that the human rights of migrants in SA are regulated by national, regional and international human rights instruments and applicable refugee laws. See Res.131 (XXXVIII) of the ACHPR, venue: Ezulwini, Kingdom of Swaziland, of 7-22 May 2008.

179 UN General Assembly (UNGA), Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mutuma Ruteere, 21 Aug 2014, A/69/334. See recommendations at 16.

180 As above.

7.2.8 Embrace *ubuntuism* as part of national values

Scottling warns on the lasting psychological effect of hate crimes on the victims by writing:

Hate crimes... leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together...¹⁸¹

Ubuntu is a way of being African; it is all-encompassing and it expresses values, attitudes and actions that are uniquely African.¹⁸² Every individual in African society treats others with dignity, compassion and respect and anticipates being recognised and treated in a similar manner by others.

This thesis argues that SA should consider embracing *ubuntu* ideals as a moral remedy or a new discourse to counter pervasive xenophobia in the country. *Ubuntu* ideals have, for many centuries, sustained African communities in SA and in Africa as a whole. In SA for instance, *ubuntu* is understood as a “set of institutionalized ideals which guide and direct the patterns of life of Africans”.¹⁸³

Mnyaka, a South African theologian, argues that “an understanding and the implementation of the principles and values of ubuntu can challenge and inspire South Africans to view and treat African immigrants differently”.¹⁸⁴

181 Clinton W J “Radio Address on Hate Crime” quoted in Scottling T “Hate crimes and the need for stronger federal legislation” (2001) 34 *Akron Law Review* 853.

182 Koenane M L J “Xenophobic attacks in South Africa: An ethical response – Have we lost the underlying spirit of ubuntu?” (2013) 1 *International Journal of Science Commerce and Humanities* 110. Swanson argues that *ubuntu* is an African indigenous philosophy which is situated within the African epistemology and the socio-political contexts of the continents’ peoples. See Swanson D M “Ubuntu: An African contribution to (re)search for/with a humble togetherness” (2007) 2 *Journal of Contemporary Issues in Education* 53.

183 Mnyaka (n 37 above) 142.

184 Mnyaka (n 37 above) 141.

Nobel Laureate Archbishop Desmond Tutu has also been a keen proponent of *ubuntu* ideals in SA. He wrote this in 1999:

One such [universal] law is that we are bound together in what the Bible calls 'the bundle of life.' Our humanity is caught up in that of all others. We are humans because we belong. We are made for community, for togetherness, for family, to exist in a delicate network of interdependence...¹⁸⁵

Bennet argues that even SA's 1996 Constitution is premised upon *ubuntu* ideals.¹⁸⁶ The Preamble of the PEPUDA,¹⁸⁷ the constitutive instrument of SA's Truth and Reconciliation Commission (TRC),¹⁸⁸ expressly refers to *ubuntu* as one of its guiding ideals. Indeed, the spirit of *ubuntu* played an important role in the final political settlement that ended apartheid in SA.¹⁸⁹

There is ample jurisprudence from the SA Constitutional and High courts to demonstrate *ubuntu's* influence on the country's legal discourse.¹⁹⁰ South African

185 Tutu (n 31 above) 196.

186 Bennet TW "Ubuntu: An African equity" (2011) 14 *Potchefstroom Electronic Law J.*

187 PEPUDA Act 4 of 2000.

188 The Promotion of National Unity and Reconciliation Act 34 of 1995.

189 Bennet (n 186 above) 34.

190 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) at para 91. In this case, Judge Froneman J argued that South Africa's participatory democracy was "in fact, an ancient principle of traditional African methods of government". The case pertained to the unfinished business of the TRC and the question was whether those who had not participated in its business could be granted amnesty. While President Mandela pardoned them, the Constitutional Court held that their participation was essential in order to establish the truth and to achieve the objectives of nation-building and national reconciliation in SA.

courts have held that justice, fairness and civility are deeply rooted in traditional culture and therefore, inseparable from *ubuntu*.¹⁹¹

In *S v Makwanyane*, Justice Mokgoro aptly captured *ubuntu's* role in upholding compassion, respect and human dignity:¹⁹²

[*ubuntu*] envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Other Africans from across sub-Saharan Africa understand and identify with *ubuntu* ideals. To demonstrate this point, Kamwangamalu wrote in 1999:¹⁹³

This concept [of *ubuntu*] has phonological variants in a number of African languages: *umundu* in Kikuyu and *umuntu* in Kimeru, both languages spoken in Kenya; *bumuntu* in kiSukuma and kiHaya, both spoken in Tanzania; *vumuntu* in shiTsonga and shiTswa of Mozambique; *bomoto* in Bobangi, spoken in the Democratic Republic of Congo; *gimuntu* in kiKongo and giKwese, spoken in the Democratic Republic of Congo and Angola, respectively.

For Koenane, a South African philosopher, *ubuntu* ideals can actually work to alleviate xenophobia in SA, because what SA encounters is not truly xenophobia, but afro-phobia and Black on Black hatred.¹⁹⁴ He attributes pervasive xenophobic attitudes to the loss of the *ubuntu* spirit that glued African people together in the past.¹⁹⁵ He argues that since there have been no major violent attacks on the many European, American, South American, Australian or other non-African foreign

191 *Masetlha v President of the RSA and Another* 2008 1 SA 566 (CC).

192 *S v Makwanyane* 1995 3 SA 391 (CC) para 308.

193 See Metz T "Toward an African moral theory" (2007) 15 *Journal of Political Philosophy* 321; & Metz T "African conceptions of human dignity" (2012) 13 *Human Rights Review Journal* 19.

194 Koenane (n 182 above) 107.

195 Koenane (n 182 above) 109.

nationals residing in SA, the problem at hand should be addressed using *ubuntu* and other accepted African values. To him, the best way to address xenophobia is to challenge the acts morally and respond appropriately, through the application of an *ubuntu* paradigm. Koenane concludes that embracing *ubuntu* would bring about empathy, good neighbourliness, compassion and hospitality and thus make “Black African foreigners” an obsolete reference given that in the SA context they would not be viewed as foreigners at all.¹⁹⁶

The ACMS argues that while xenophobia is a clear weakness in SA’s social cohesion, embracing *ubuntu* would foster such cohesion. It argues that *ubuntu* “brings with it values of mutuality and shared humanity... and is seen either as a means of achieving social cohesion or as the condition of social cohesion itself... where there is *ubuntu* there is social cohesion”.¹⁹⁷

As a way forward, Swanson recommends that South Africans should embrace *ubuntuism* as a key guiding ideology within the nation-building project of post-apartheid South Africa.¹⁹⁸ She argues that *ubuntuism*, which is considered as an indigenous perspective amongst Africans in SA, gives them some insights on social-cultural relationships, moral education, socio-political discourses, as well as perspectives on sustainable and democratic human relations in general.¹⁹⁹ Swanson said of *ubuntu’s* role in promoting respect for human rights in the country:

Ubuntu undoubtedly emphasizes responsibilities and obligations towards a collective well-being. *Ubuntu* provides legitimizing spaces for transcendence of injustice and a more democratic, egalitarian and ethical engagement of human beings in relationship with each other. In this sense, *ubuntu* offers hope and possibility in its contribution to human rights, not only in the South African and African contexts, but across the globe..²⁰⁰

196 Koenane (n 182 above) 110.

197 Monson *et al* (n 126 above) 22.

198 Swanson (n 182 above).

199 Swanson (n 182 above) 54.

200 Swanson (n 182 above) 65.

Swanson concludes that embracing *ubuntu* in totality is like embarking on a personal and collective journey, moving towards “becoming human” and being part of a greater humanity that is compassionate towards fellow humans.²⁰¹

7.2.9 Conclusion

This Chapter has discussed some important research findings. These findings offer answers to various questions that have engaged the researcher. The chapter contains recommended short- and long-term interventions to address xenophobia in SA. Xenophobia is the consequence of various legal and extra-legal factors and thus requires a multidisciplinary approach to combat it. The absence of a hate crime law only exacerbates the phenomenon. Further research into this evolving phenomenon is required and recommended. A new conception of pursuing human rights for all living in SA, a government-led change of approach to implement rights-based approaches and the establishment of new systems to safeguard the basic rights of foreign nationals are required immediately.

It is important to acknowledge that SA’s democratic dispensation is only two and half decades old. Therefore, the country remains in transition. Such transition, it is contended, entails three stages: Liberalisation, democratisation, and socialisation.²⁰² In the first stage, a variety of previously-denied rights are extended to the populace.²⁰³ In the democratisation stage, citizenship, participation and representation for all in the political process are extended to the population.²⁰⁴ In the final stage, socialisation, social and economic equality are extended to the

201 Swanson (n 182 above) 54.

202 O’Donnell G, Schmitter P & Whitehead L *Transitions from Authoritarian Rule: Comparative Perspectives* cited in Parsley J & Everatt D “Xenophobia synthesis report: Summary of findings and recommendations” South African civil society and xenophobia (2010) 2.

203 As above.

204 As above.

population.²⁰⁵ It has been argued that as SA has not yet achieved the third stage, its transition is incomplete.²⁰⁶

Regardless of the stage that SA's democratic dispensation is at presently, the nation should pursue the enforcement of laws already on its statute books and respect the international conventions it has ratified. This is in the best interests of all living in the country. In addition to the existing laws of SA, a new law targeting hate crimes such as xenophobia is of immediate and strategic importance to SA and is emphasised in this thesis. Elevating xenophobia to the status of a hate crime would have the effect of setting it apart in the minds of the public and raising awareness of the human rights implications of this conduct. Treating xenophobia within the broader context of hate crime would thus cause some reduction in the incidents of such behaviour when the law is enforced.

As SA moves forward as a national, regional and global player, the country should commit every effort to prioritise fighting xenophobia and other hate crimes as well as to restore the rule of law, safety and dignity of migrant populations, fostering social cohesion and human rights for all. It is clear that in order to address xenophobia in the country, concerted efforts are required from all concerned parties, including NGOs, the government of SA, citizens and foreign nationals. Xenophobia, like racism, deserves to be treated with greater sensitivity and concern than other forms of crime. In this regard, pressure must continue to be placed on the state to enact legislation that reflects the abhorrence of xenophobic behaviour that is shared by right-minded residents of South Africa.

205 As above.

206 As above.

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