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The Ad Hoc Committee on
Probing Violence Against Foreign Nationals
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Dear Sirs,

**SUBMISSIONS TO THE AD HOC COMMITTEE ON PROBING VIOLENCE
AGAINST FOREIGN NATIONALS**

We refer to your invitation to make written submissions to the Ad hoc Committee on Probing Violence Against Foreign National. We hereby humbly submit our submissions on the topic above. We are grateful for, and welcome this opportunity to contribute to the work of the Committee in creating a safer South Africa for foreign nationals in our country.

Our submissions are a summary of a publication which we produced in 2013 entitled *Xenophobia and Sexual Assault in South Africa: Exploring the use of sexual violence in xenophobic attacks and the role and responsibilities of the South African government*. We believe that the findings of this report are still relevant to the circumstances and conditions of asylum seeker and refugee women in South Africa today.

INTRODUCTION TO THE LEGAL RESOURCES CENTRE

- 1 The Legal Resources Centre (hereinafter referred to as the “LRC”) is a public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society.
- 2 The LRC has since its inception in 1979 operated throughout South Africa from its offices situated in the cities of Johannesburg, Cape Town, Durban and Grahamstown.
- 3 The LRC, through its Equality and Non-Discrimination project (“the project”), focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, education and networking within and outside of South Africa. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons including sexual minorities, women, children, refugees and sex workers as being integral to the pursuit of social justice. It is in this context that we seek to ensure that the existing legal apparatus available and in development are appropriately cognisant of the rights and realities of vulnerable and marginalised groups. We believe that this will ensure that their experiences of discrimination and prejudice are reduced and eventually diminished. Furthermore, we believe that the national, regional and international laws are collaboratively an instrumental tool in securing substantive equality for vulnerable individuals.
- 4 Through strategic litigation, advocacy, education and training the LRC has played a pivotal role instrumental in developing a strong jurisprudence for equality and non-discrimination. It is against this backdrop and the work that we have undertaken that we make these submissions to the Committee.

INTRODUCTION

- 5 The South African Immigration Act broadly defines the word ‘foreigner’ to describe non-nationals. In these submissions the words foreigner and migrant will be used interchangeably to refer to non-nationals regardless of their immigration status¹.
- 6 The May 2008 xenophobic attacks started in Alexandra, Diepsloot, Tembisa and soon spread to other communities throughout South Africa. Between 11 May and June 14 an estimated 62 deaths, hundreds of injuries, and the displacement of more than 100,000 foreigners nationally had been reported². Although the victims of the attacks included both South African citizens and foreign nationals, the violence revealed the presence of powerful xenophobic sentiment that remains to this day. While estimates are available to account for the deaths, injuries, displacements and rand value of property damage or loss, there is a dearth of information about victims of sexual violence.
- 7 Prior to 2008, xenophobic attacks on foreigners were isolated and random at best, the 2008 attacks were sustained and the scale of violence, incomparable³. Nevertheless, the attacks exposed many of the tensions that exist in the country.
- 8 While the perpetrators of the 2008 xenophobic attacks did not discriminate on the basis of gender, the vulnerabilities of migrant women are often overlooked. The prevalence of violence in South Africa, particularly gender-based sexual violence, is well documented and researched. Legislation has been passed to further protect complainants and to combat the high incidence of sexual offences. However, the prevalence of sexual violence in the domain of the 2008 xenophobic attacks remains, largely, undocumented.
- 9 Xenophobia and sexual violence are often thought to be separate and distinct. However, in South Africa, there is a significant overlap between

¹ The status of foreign nationals is governed either by the Immigration Act or the Refugees Act 130 of 1998

² 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

³ G Friebel, JM Gallego & M Mendola *Xenophobia attacks, migration intentions and networks: Evidence from the South Africa* J Popul Econ (2013) 26 555-591

the criminal dimension of sexual violence and xenophobia. The challenges faced by migrant women have been described as a ‘double jeopardy’⁴. As both foreign and female, migrant women are at a key intersection of two groups that are particularly vulnerable to violence, exploitation, and abuse. It is at the intersection of xenophobia and sexual violence that foreign women are left vulnerable with little or no intervention from significant role players.

- 10 These submissions examine the role that xenophobia plays in South Africa today. We explore the connection between xenophobic sentiment, sexual violence and the impact it has on the lives of foreign women in South Africa. We will examine the obligations of the South African government in respect of refugees and will consider to what extent, if at all, the government has a duty to protect foreign migrant women from sexual violence.

WHAT IS XENOPHOBIA?

- 11 The word ‘xenophobia’ originates from the Greek words for foreign ‘xenos’ and fear ‘phobos’⁵. Literally translated it is the ‘*hatred or fear of foreigners or strangers.*’ Bronwyn Harris argues that xenophobia is characterised by a negative attitude towards *foreigners, a dislike, a fear, or hatred*⁶. While there is no legal definition of xenophobia in South Africa, the South African Human Rights Commission (SAHRC) defines it as *the ‘deep dislike of non-nationals by nationals of a recipient state’*⁷. Describing xenophobia, Lesley Wexler states that:

Such hatred manifests itself in the misguided fears that migrants drive up crime, disrupt cohesive communities, and use valuable government resources without making positive contributions in return. Once citizens see immigrants as outsiders in the relevant community, it becomes much easier to dehumanize them and treat them poorly. Similarly, many at the bottom of the socioeconomic ladder view migrants as threats to their livelihoods because migrants take dirty, dangerous, or degrading jobs, often at lower pay than what citizens demand.’

⁴ R Sigworth (Fuller) ‘Double Jeopardy: Women Migrants and Refugees in South Africa’ (2009)

⁵ J Crush The Perfect Storm: *The Realities of Xenophobia in Contemporary South Africa* (2008) 15

⁶ B Harris *Xenophobia: A Pathology of a new South Africa?* In Hook D & Eagles G (eds) *Psychopathology and Social Prejudice* (2002) 169 – 184

⁷ South African Human Rights Commission, Braamfontein Statement on Xenophobia, 15 October 2008

- 12 According to Wexler, xenophobia goes beyond disliking migrants and takes it a step further by engaging in the dehumanizing treatment of migrants because of the economic or social threats they are perceived to be.
- 13 Xenophobia is not unique to South Africa. A study by the Centre for the Study of Violence and Reconciliation identified three main areas as the central in the fight against xenophobia⁸. These are (1) media, (2) political statements; and (3) vigilantism. Since 1995, quantitative and qualitative studies indicate the existence of strong xenophobic sentiments throughout Southern Africa and the rest of the world. Generally, there has been a global rise in xenophobia following the end of the Cold War, and this may be attributed to acceleration in the process of globalisation⁹. For example, in recent years, a number of European countries have seen a rise in the popularity of political parties pushing for stricter immigration laws and associating immigrants or ethnic minorities with crime, unemployment, incivility, welfare dependency and a decline of patriotic values.
- 14 Similarly, in South Africa, xenophobic sentiment manifests itself in political rhetoric, the media, and in public attitudes. In each of these forums, specific groups of foreigners are targeted, revealing unmistakable negative attitudes toward foreign nationals. Although many organizations have made recommendations on measures that can be taken to avoid xenophobic violence in the future, the risk of further xenophobic violence remains a sad reality for many foreigners. Most of the suggestions made require interventions that the government has, so far, been either reluctant or slow to implement.

CAUSES OF XENOPHOBIA

- 15 The possible causes of xenophobic attitudes and behaviour have been alluded to and are numerous, complex and go beyond the ambit of this report. However, a brief consideration of some of the opinions may provide some useful context.

⁸ B Harris (2001) *'A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition'* Centre for the Study of Violence and Reconciliation (CSVR) Series volume 5

⁹⁹ N Valji *Creating the Nation: The Rise of Violent Xenophobia in the New South Africa* (unpublished master's thesis, York Univeristy (2003) 9

- 16 Some researchers have theorised that xenophobia can be understood in the context of limited resources such as housing, education, healthcare and employment. As provided in the description of xenophobia by Lesley Wexler foreigners are 'scapegoats' for social ills and personal frustrations¹⁰. Xenophobia is therefore caused by poor service delivery in the form of jobs; housing and limited social benefits that citizens feel entitled to, but, find themselves unable to access. One of the most common examples of this is the role that economic opportunities play through the interaction between locals and migrants in the *spaza* shop phenomenon.
- 17 Others argue that the isolation experienced by South Africans during apartheid and the post democratic transition which has led to the opening up of the South African borders, as a possible explanation for xenophobia. Here, violence against foreigners in South Africa is traced back to the months immediately following the country's first democratic elections. In December 1994, news reports detailed the destruction of foreign-owned property in Alexandra by armed South African youths who demanded that foreigners be removed from the area¹¹. This view does not suggest that xenophobia did not exist prior to 1994 but simply suggests that return of South Africa into the global economy has exposed it to more interaction to the outside world than before. It is this exposure that has led to more migrant interaction with locals that has possibly resulted in xenophobic tension.
- 18 Some academics argue that xenophobia, all over the world, is a symptom of poor intercultural communication¹². The argument here is that people will always be suspicious of the unfamiliar and unknown. The absence of cultural tools to deal with or embrace difference suspicion will lead to hostility and it is at this point that xenophobia manifests. Many scholars argue that no one theory provides an answer but recognise that xenophobia, as a phenomenon, is complex and multi-faceted.
- 19 Whatever the causes of xenophobia are in South Africa; it is clear that all these theories could apply and play a role in helping us understand why

¹⁰ L Wexler *Human Rights Impact: An Immigration Case Study* (2008) 22 Geo Immigration LJ 285

¹¹ 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) 21

¹² H Solomon *Xenophobia in South Africa: Origins, Trajectory and Recommendations* Presentation at the University of Pretoria

xenophobic attacks occur. The importance of understanding the possible causes of xenophobia rests in our ability to identify it and to prevent its occurrence or to effectively deal with it when it occurs.

HOW DOES XENOPHOBIA PRESENT IN SOUTH AFRICA?

- 20 As stated in the previous section, xenophobia is by no means a new phenomenon in South Africa. Since the advent of democracy in 1994, xenophobia has become more prevalent in politics, news media, and in the general attitudes of the South African public. What is characteristic about the presentation of xenophobia in South Africa is the ease with which the negative attitudes transform into 'intense tension and violence by South Africans towards immigrants.¹³ Acts of violence are therefore one of the main features of xenophobia in South Africa.
- 21 What is also interesting to note about xenophobia in South Africa is the distinct racial element. Not all foreigners are victims of negative attitudes and violent acts but immigrants from the African continent appear to be the main targets of xenophobic sentiment and attacks. The xenophobic attitudes prevalent in South Africa reveal a level of racism or ethnic bias. Migrants from Europe and North America are received favourably as are those from Botswana, Lesotho, and Swaziland. Mozambicans and Zimbabweans are welcomed less favourably and Angolans, Somalis, Nigerians, and Congolese appear to be the least welcome¹⁴.
- 22 This racial element could be attributed to geographical proximity. Most xenophobic attacks have occurred in or occur in townships or informal settlements where people live in close proximity. African migrants are more likely to live and work with locals than non-African migrants. They are also more likely to belong to the same social class leading to the perception that locals and foreigners will fight for limited resources. What is evident from research is that when analysing xenophobia, there is a considerable disconnect between perception and reality. As with any fear, most attitudes emanate from a wrong or biased perception of the feared/disliked thing or person rather than from a real or rational experience.

¹³ Harris at 170

¹⁴ J Crush *The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa* (2008)
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- 23 The 2006 South African Migration Project's (SAMP) Xenophobia Survey (2006 SAMP survey) found that compared to citizens of other countries worldwide, South Africans are among the least open to outsiders and desire the greatest restrictions on immigration¹⁵. Interestingly, popular attitudes of intolerance towards immigrants have also created a unique national unity. South Africans share similar sentiments on the issue of immigration regardless of their race, level of education, or income bracket. According to the 2006 SAMP survey, the proportion of people favouring immigration for the purposes of employment rose from 12% in 1999 to 23% in 2006. The survey also found that the proportion of those who wanted a total ban on immigration increased from 25% in 1999 to 35% in 2006. In 2006, 84% of South Africans felt that too many foreign nationals are permitted into the country¹⁶. Furthermore, 74% supported a policy of deporting anyone who is not contributing to South Africa's economy¹⁷. When it comes to immigrants' rights, an overwhelming 85% believed that unauthorised migrants should have no rights to freedom of speech or movement. At least 60% feel that they should not enjoy police protection or access to services¹⁸. But when it comes to refugee protection, the survey found that South Africans are divided, 47% support refugee protection while 30% oppose it. Additionally, only 30% support permitting refugees to work¹⁹.
- 24 The SAMP report notes that South Africans generally continue to consider foreign nationals as a threat to their social and economic well-being. The proportion of people who believed that foreign nationals undeservedly consume resources grew from 8% in 1999 to 67% in 2006. The proportion that associated migrants with crime grew from 45% to 67% in 2006. In addition, the 2006 SAMP survey found that nearly half (49%) of people believed that migrants bring disease into the country²⁰.
- 25 The veracity of the belief that foreigners are guilty of criminal activity and usurping employment from local citizens has been frequently called into question. A 1998 survey of 70 immigrant entrepreneurs in inner-city Johannesburg found that each migrant employed between two and four

¹⁵ Crush at 21

¹⁶ Crush at 24

¹⁷ Ibid

¹⁸ Valji at 3

¹⁹ Crush at 26

²⁰ Crush at 29

people, at least half of whom were South African. These interviews also revealed that these entrepreneurs reinvested most of their profits back into South Africa²¹. In addition, the SAMP survey, for example, found that African migrants do not take jobs away from South Africans, but instead make a valuable contribution to the South African economy.

- 26 On a 2011 trip to South Africa, the UN Special Rapporteur was told that foreign workers, particularly Zimbabweans, accept lower wages and longer working hours and thus are favoured by employers; the absence of relevant data and statistics means that these hearsay allegations cannot be supported²². Many citizens continue to cite fear of unemployment as the primary cause of xenophobic sentiment, but these fears appear to be unfounded as there is not yet sufficient evidence to prove or disprove these allegations.
- 27 The presence of a number of undocumented migrants has also led to tremendously inflated estimates on the actual number of illegal migrants residing in South Africa. This further fuels the perception that the country is being 'flooded' by foreign nationals²³. This notion that South Africa was being 'swamped' by Africa's poor and desperate was given regrettable 'scientific legitimacy' by the Human Sciences Research Council(HSRC) which not only erroneously claimed that there were 5-8 million 'illegal aliens' in the country but painted a picture of a country inundated by impoverished 'floods' and 'hordes' from the rest of Africa²⁴. A 2011 report by the UN Human Rights Council (UNHRC) shows that the lack of reliable statistics regarding international migration facilitates rumours and false assumptions. The report goes on to state that migration is much less numerically significant than suggested by popular belief. It is estimated that there are between 1.6 and 2 million foreign nationals in South Africa. This figure equates to only 3-4% of the total population²⁵.
- 28 Despite South Africa's transition to democracy, the South African Human Rights Commission (SAHRC) notes that violence is often still viewed as a means of resolving issues. Consequently, foreign migrants face

²¹ N Valji *Creating the Nation: The Rise of Violent Xenophobia in the new South Africa* at 16

²² SAHRC Report on the visit of the Special Rapporteur at 12

²³ HSRC *Citizenship, Violence and Xenophobia in South Africa: Perceptions from South African Communities* (2008) 13

²⁴ *Making up the Numbers: Measuring Illegal Immigration to South Africa* SAMP Migration Policy Brief No. 3 (2001) at 13

²⁵ *Ibid.*

significant risk of falling victim to what the SAHRC describes as the 'culture of violence'²⁶. As a result, it is difficult to separate xenophobia from violence and physical abuse because it is these hate or fear-filled sentiments that compel the perpetrators of violence to act²⁷. We contend that, in our context, it would be appropriate for the definition of xenophobia to include awareness that it can be a 'violent practise that results in bodily harm and damage.'²⁸

SEXUAL VIOLENCE

- 29 Violence against women in South Africa has been described as 'endemic'²⁹. The high incidences of sexual violent and the prevalence of sexual offences, in particular, are of grave concern³⁰. To the extent that one is unable to provide an accurate comparison between countries when it comes to statistics, it becomes imperative to consider local perceptions.
- 30 The absence of reports on crimes against women during the xenophobic attacks raises some questions. To some extent it is not surprising that media reports of sexual violence during xenophobic attacks are close to non-existent. The very nature of sexual violation is that victims are reluctant to discuss their experiences in private, what more of the public domain of the news media.
- 31 The causes of sexual violence are difficult to identify and fall within the ambit of multi-disciplinary studies such as psychology and criminology. One factor that has been said to contribute to sexual violence is the pattern of female exploitation and patriarchy that extends back to colonial South Africa and was reinforced during apartheid. Women in pre-colonial Southern Africa did not wield extensive political power, but they held considerable influence over some decision-making because of their productive and reproductive roles in society³¹. During colonisation by the

²⁶ Ibid.

²⁷ Harris at 170

²⁸ Ibid.

²⁹ F Boonzaier @ C de La Rey "He's a Man, and I'm a Woman": *Cultural Constructions of Masculinity and Femininity in South African Women's Narrative of Violence* vol. 9 no. 8 1003-1029

³⁰ Rape Crises Cape Town Trust *Rape in South Africa: The Soul City Research Report* (February 2003)

³¹ H Britton *Organising Against Gender Violence in South Africa (2006)* 32 *Journal of Southern African Studies* 148

Dutch and the British, and later under apartheid, the imposition of gendered hierarchies strengthened long-standing patriarchal structures and diminished what power and influence women previously held. Domineering Afrikaner masculinity was perpetuated and enforced by the white minority government through policies and laws that further oppressed women³². Rape was used as a weapon by the apartheid government: when tensions would flare, women were raped as a means of subduing resistance, asserting control, ensuring obedience and conformity to the era's racial norms³³.

- 32 Apart from the physical trauma that sexual violence caused, gender-based violence was an effective weapon of psychological torture and control. Women's family members, particularly their children, were also threatened if they did not obey the government's order. Sexual humiliation was also a common tactic used by police to harass and humiliate women while they were menstruating – security forces are known to have denied women access to sanitary pads as a means of ridicule³⁴. The sexuality and modesty of African women was and is still seen, culturally, as something that must be preserved and kept private. Public sexual humiliation as a means of coercion was therefore particularly effective.
- 33 Since the end of apartheid, gender-based and sexual violence has assumed various forms. Rather than being used as a state-mandated force of coercion, it is now seen as a reactive or defensive response to shifting gender roles, the attempt by feminist and gender organisations at reordering civil society, and the overall political advancement of women³⁵. As sexual violence was used by the apartheid government to punish and coerce, contemporary violence can be seen as serving a similar purpose. For instance, the sexual assault of lesbians or what is often referred to as 'corrective' rape, serves as a punishment for the failure of lesbian women to conform to western-imposed heteronormative gender roles³⁶. Also, it is not uncommon to read of men infected with HIV/AIDS who have sex with or rape young women or virgins believing that such acts will cure them of the virus³⁷.

³² Britton at 145 - 163

³³ Britton at 145

³⁴ Ibid.

³⁵ Britton at 150

³⁶ Britton at 149

³⁷ Ibid.

34 The government has pledged to prioritise sexual and gender-based violence³⁸, but in the face of the evidence that sexual assaults have actually not decreased substantially, it appears that this pledge has not been followed up by action. One explanation for the lack of an effective government response to gender-based and sexual violence is that such crimes are perceived to be ‘women’s’ or ‘private’ issues that are the concern of feminist and women’s groups within civil society³⁹. There continues to be a gap between the equality rhetoric, the enacted legislation and the realities of everyday life of women all over the country who remain vulnerable to sexual violence.

SEXUAL VIOLENCE AND XENOPHOBIA

35 Given the backdrop of a violent society in which sexual assaults against women is endemic, it is not mere assumption to argue that foreign women are victims as much as local woman are. The SAPS does not segregate the data it provides to the public according to the nationality of victims. Because of their gender and their foreign-ness, migrant women remain at a key intersection of two groups that are particularly vulnerable to violence, exploitation, and abuse⁴⁰. This vulnerability was exploited not only in the May 2008 xenophobic attacks, but before and it continues to this day. Although migrant women in South Africa have proven their resilience in the face of their vulnerability, the South African government needs to take appropriate steps to alleviate the threats they face as victims of sexual violence during xenophobic attacks.

36 Xenophobia and sexual violence are often considered separate and distinct. Violence against women is generally perceived as criminal, domestic, and private in nature while xenophobic violence is considered political and motivated by the dynamics of exclusion and inclusion, access to resources and nationalistic identities. In South Africa, the line between the two is becoming increasingly blurred. We recognise that in some cases, incidents of rape are apolitical or purely criminal in nature – an effect of gender structures within society rather than of xenophobia⁴¹.

³⁸ State Report which lists the key elements of 2009 – 2011 National Strategic Plan one of which is specifically focused on women’s rights at page 120

³⁹ State Report at 147

⁴⁰ R Sigworth, CNgwane & A Pino *The Gendered Nature of Xenophobia in South Africa* (2008) Centre for the Study of Violence and Reconciliation 8

⁴¹ R Sigworth *Double Jeopardy: Foreign and Female* (May 2012) 2

However, as Fuller argues, violence against women is a central part of the xenophobic violence in South Africa and contains both political and criminal dimensions⁴². Rape is often used as a tool to punish and humiliate women of different nationalities and ethnic groups. Women have historically been viewed as property owned by men, and because that ownership is considered fouled through the act of rape, the abuse of women, becomes a political tool⁴³.

- 37 In practice it may be difficult to differentiate between rape perpetrated due to an atmosphere of violence from rape motivated by xenophobia or assault perpetrated opportunistically. Research into this has not been conducted and perpetrators have not been interviewed to determine their motivation. The lack of reporting is greatly exacerbated in the context of migrant women. Not only are these women foreigners in a country where the police is associated with corruption, intimidation, and xenophobia, but they are living in a society where victims of sexual violence frequently suffer secondary victimisation at the hands of those tasked with assisting them. This victimisation is made worse when the victim's immigration status is suspect and could be questioned by the officials she reports the crime to. These factors contribute to the creation of a foundation of fear that has likely deterred many migrant women from reporting rapes.
- 38 While it is difficult to ascertain the exact reasons why xenophobia disproportionately affects migrant women, two contributory factors are critical to at least a superficial understanding of the underlying issues. Research indicates that women and children often fall prey to xenophobic violence because they are central to the settlement process⁴⁴. Women are the traditional caregivers and bear the bulk responsibility of clothing, feeding and, to some extent, providing shelter for their families. A host population may view migrant men as being transitory because they are only present for the purposes of employment or better economic circumstances, and are therefore not necessarily a permanent resident. Women and children denote a more permanent move and the laying down of roots in the new country. The settlement of family units can be read as an indication that the male earner does not intend to leave as he is prospering to the point of being able to bring his

⁴² R Fuller Double Jeopardy: Women Migrants and Refugees in South Africa (2009) 7-8

⁴³ R Fuller at 7

⁴⁴ R Fuller at 8

family to the host country. It is this element of perceived prosperity that may be greater than that of the host community that becomes a source of tension, and woman and children may bear the brunt of this conflict.

- 39 Secondly, xenophobia against migrant women has to a large extent been attributed to competition for resources, particularly over housing and employment opportunities, between migrants and locals. A study conducted by the Centre for the Study of Violence and Reconciliation(CSVR) found that the tension extended beyond mere resources to the very nature of many migrant women. The CSVR noted that migrant women's entrepreneurial spirit, independence from government assistance, and their drive to improve their quality of life evokes envy and dislike from South African nationals. These same characteristics exposed migrant women to xenophobia when they try to make a life for themselves in South Africa through employment, starting their own businesses, or educating themselves and their children⁴⁵.

REPORTED SEXUAL VIOLENCE IN THE XENOPHOBIC ATTACKS OF 2008

- 40 Migrant women in townships were disproportionately affected by the May 2008 xenophobic attacks. Not only were their homes burnt and looted, but they suffered physical injuries due to beatings and rape. Attacking a woman's home has far-reaching symbolism and implications as the home is considered a place of safety and security⁴⁶. Threats of sexual violence were used to force migrant women and their families to flee their homes. For example, a woman in Gauteng was threatened, 'If you do not leave by tomorrow you will be raped'⁴⁷.
- 41 The true scope of the number and impact of sexual violations during the 2008 violence is impossible to verify for the same reasons that general sexual violence statistics remain elusive. These reasons include underreporting due to fear of arrest and/or deportation, the lack of trust in police and health care providers, the low level of awareness of the value of seeking swift medical assistance, the stigma associated with the acknowledgement of violence, the lack of information on how to report crimes, and the lack of standardised reporting procedures⁴⁸. A woman in

⁴⁵ R Sigworth, C Ngwane & A Pino *The Gendered Nature of Xenophobia in South Africa* (2008)

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⁴⁶ R Sigworth *Double Jeopardy* at 1

⁴⁷ M Marsh *Inter Agency Assessment* at 12

⁴⁸ M Marsh at 3

the Boksburg internal displacement site in Gauteng said that ‘women are afraid to report cases of sexual violence because they are afraid of being deported⁴⁹.’ Another female migrant in the Western Cape stated that foreigners cannot rely on the police to solve their problems and that police often tell them to go back to where they came from. Young migrant girls in the Western Cape reported that they would not report sexual violence due to fear of losing their dignity⁵⁰. The preservation of one’s dignity with regard to sex is critical. Rape dehumanises victims leaving them with intense feelings of personal and communal shame. As a result of the violent act perpetrated against a woman and because of her status within a largely patriarchal society, a woman’s self-value diminishes after she has been sexually assaulted. She risks being ostracised and identified with the stigma of being a rape victim. The victim also runs the very real risk of being abandoned by her husband or partner. The ostracism and abandonment only compound her vulnerability as she remains in a foreign country and reliant on the support of family and fellow immigrants who are in South Africa with her.

- 42 Overwhelmingly, the women who have consulted with the LRC have come to South Africa to join their husbands who are already settled. These women could be in relationships that have undergone problems and, more often than not, they are financially reliant on their husbands and male counterparts. The LRC assists about 20 refugee couples per month with joinder applications in respect of refugee status in terms of the Refugees Act 1998⁵¹. Many immigrant women are therefore not only economically dependent on male partners but for many of them, their very status in the country is dependent on their partners or family members. During interviews at the Blue Waters Camp, women expressed fear of informing their spouses that they had been raped fearing that they would be abandoned, left destitute and without legal status in a foreign country. Xenophobic violence and attitudes experienced by migrant women in South Africa augments the trauma that many of these women have faced in their country of origin, trauma that may have motivated their move to South Africa and their claim for asylum⁵².

⁴⁹ M Marsh at 12

⁵⁰ M Marsh at 12-13

⁵¹ Section 3(c) of the Refugees Act 130 of 1998

⁵² R Sigworth above at 4-5; Marsh above at 3

- 43 A rapid inter-agency assessment of gender-based violence shows that women and girls were victims of threatened, attempted, and actual sexual assault during the 2008 xenophobic attacks. Investigations by the United Nations Children’s Fund (UNICEF) and the United Nations Population Fund confirmed the results of the assessment through both first-hand and anecdotal reports of from the Western Cape and Gauteng Provinces⁵³.
- 44 Dee Smythe, of the University of Cape Town Law, Race, and Gender Research Unit⁵⁴ reports on women’s accounts of reporting rapes during the attacks. One victim reported that the police had refused to help her and said that they do not assist ‘kwere kwere’ (a derogatory term for African immigrants). They then told her to report the incident to the police in her home country the Democratic Republic of Congo (DRC). The victim did not receive any medical examination, post-exposure prophylaxis to reduce her risk of contracting HIV, the morning-after pill, or legal support of any kind⁵⁵. Other female migrants reported sexual assaults in supporting affidavits in the *Blue Waters*⁵⁶ case where the Legal Resources Centre represented occupiers of the safety site. One Khayelitsha resident from Somalia reported being raped several times prior to the 2008 xenophobic violence. She said that ‘as a Somali woman, I could not report the rape to the police because we believe rape is a humiliating act which should not be publicised.’ However, the victim obtained medical attention and fortunately tested negative for HIV/AIDS. When the xenophobic attacks broke out in 2008, she was again raped and her family members were beaten⁵⁷.
- 45 Another refugee from the DRC and living in Kraaifontein revealed that one of her daughters had been raped prior to the 2008 attacks. Although the family reported the incident to the local police station, threats from local community members forced them to drop the charges and relocate. During the 2008 violence her two daughters were sexually assaulted. When she reported one of the incidents to the police and camp management they told her that the suspect was only sixteen years old and thus too young to be prosecuted. No further legal action were taken and her daughters never received medical attention or counselling of any

⁵³ M Marsh above at 3

⁵⁴ P Luhanga IOL News ‘Some displaced female immigrants were raped’ 13 June 2008

⁵⁵ Ibid.

⁵⁶ City of Cape Town v Others, Western Cape High Court case number 5083/2009

⁵⁷ Bluewaters pleadings at 10

kind⁵⁸. In this instance she had reported the crime, the perpetrator was known and identified but the police and prosecution did not follow through with the case. As a foreigner she did not question the police on whether their advice was indeed correct and simply assumed that there was no further legal remedies available.

46 A third female migrant from the DRC living in Philippi was raped by two men during the 2008 attacks. When she reported at the police station, the police told her that she could not make a report since she could not identify the two men who raped her. No docket was opened by the police and no investigation was conducted. Although the police advised her to go to a clinic in Khayelitsha for testing, she felt it was too dangerous to go to another township while reports of foreigners being attacked in townships persisted. She remained untested, even in the safety camp, until November 2008 when she finally attended counselling services offered by a local civil society organisation that had come to the safety site.

47 Studies conducted by the Centre for the Study of Violence and Reconciliation (CSVR) before, during, and after the May 2008 violence found that migrant women viewed the 2008 violence as a magnified example of the sexual violence that they consider to be an unavoidable aspect of their daily lives⁵⁹. However, it is not only migrant women who are vulnerable to xenophobic violence. Black South African men have long accused foreigners of 'taking our women.' Given that sexual violence has long been a means of punishing and controlling women; rape is used against South African women to control and limit their ability to choose foreign men over South African men. During the integration visits after the 2008 attacks the UNHCR compiled a report noting some of these comments but the report formed part of the integration exercise and was never published. Consequently, South African women who marry or are in relationships with foreign men are also vulnerable to being ostracised from their communities or families and are vulnerable to xenophobic sexual violence⁶⁰.

48 In this instance rape reinforces the patriarchal view of women. If a woman steps outside of the bounds of acceptable sexual behaviour she

⁵⁸ Bluewaters at 11

⁵⁹ R Sigworth at 1

⁶⁰ Sigworth at 4

is punished through the act of rape so that she will conform to what her community requires of her. This form of 'corrective' rape perpetuates the notion that women are property, and incapable of making independent decisions. Under such circumstances the question becomes one of what assessing what government is doing to protect migrant and local women and whether the state bears such a responsibility. We argue that the Constitution demands such a responsibility.

THE STATES OBLIGATION TO PROTECT

49 Xenophobia has continued since the 2008 attacks. While the post-2008 incidents have not grown to the scale experienced in 2008, the continuance of attacks is concerning. The Constitution states that:

'[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom' ⁶¹(own emphasis).

50 It is therefore evident that migrant women in South Africa are protected by the Constitution⁶². In addition to the Constitution, the Refugees Act was enacted to further ensure the protection of refugees. Section 32 of the Refugee Act states that refugees 'enjoy full legal protection, which includes the rights set out in Chapter 2 of the Constitution.'

51 Legally, it is accepted that our constitutional rights are applicable to all people in South Africa. This position has been confirmed by the Supreme Court of Appeal of South Africa in the case of *Patel v Minister of Home Affairs*⁶³ when it held that '[a]liens have the same rights under the Constitution that citizens have unless the contrary emerges from the Constitution.'⁶⁴

52 In addition, the Constitution provides that '[w]hen interpreting the Bill of rights, a court, tribunal or forum must consider international law⁶⁵.' It also states that '[w]hen interpreting any legislation, every court must prefer any

⁶¹ Constitution section 7

⁶² The Constitution protects the right to life, freedom and security of the person, the right to dignity and prohibits unfair discrimination and arbitrary deprivation of property.

⁶³ *Patel v The Minister of Home Affairs* 2000 (2) SA 343 (D) ("*Patel*")

⁶⁴ *Patel* Supra at 349

⁶⁵ Section 39(2) of the Constitution

reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.⁶⁶

53 South Africa is signatory to and has ratified a number of international and regional treaties that impose obligations on the government to realise, protect and promote human rights. International agreements are 'binding on the Republic after they have been enacted into law by national legislation⁶⁷.' International law provides an additional source of protection for migrant women, and includes, among others, the;

- Convention Relating to the Status of Refugees (Refugee Convention);
- Protocol Relating to the Status of Refugees (Refugee Protocol);
- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Covenant on the Elimination of All Forms of Racial Discrimination (CERD); and
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Convention on the Rights of the Child (CRC)

54 In addition, regional protocols, such as the African Charter on Human and Peoples' Rights (African Charter) and the Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention), also serve to protect the safety and interests of migrant women in South Africa. Similar to the constitutional rights that apply to everyone in South Africa, except for a few rights applicable only to citizens the rights envisaged in these conventions and treaties apply to all persons physically present in South Africa. This interpretation has been confirmed by the Human Rights Committee (the Committee). The Committee is responsible for the monitoring and implementation of the ICCPR by state parties. In General Comment 15, the Committee found that the rights in the ICCPR apply to everyone regardless of their nationality or statelessness⁶⁸. The Committee further stated that as a

⁶⁶ Section 233 of the Constitution

⁶⁷ Section 231 (4) of the Constitution

⁶⁸ Human Rights Committee, General Comment 15

‘general rule’, the rights enshrined in the Covenant ‘must’ be guaranteed without discrimination and that the requirement for non-discrimination applies to ‘aliens and citizens alike.’

55 General Comment 31 further highlights the applicability of rights to everyone physically present in the country in question. In emphasising this, the Committee stated that the ‘enjoyment of Covenant rights is not limited to citizens of State parties but must be available to all individuals, regardless of nationality or statelessness such as asylum seekers, refugees, migrant works and other persons⁶⁹...’.

56 This sentiment is echoed in the African Charter on Human and Peoples’ Rights. Article 2 of the Charter provides that:

‘[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.’

57 The South African Constitution enshrines principles and provisions that highlight the universality of human rights and this commitment is in keeping with international and regional law obligations.

58 As we have argued, the South African government’s response to xenophobic violence has been unsatisfactory. The US State Department noted that a study had implicated local ward politicians in the coordination of xenophobic attacks to gain influence with residents, but no arrests have been made⁷⁰. The State has a duty to effectively respond if these allegations are true, and particularly if the local politicians are government agents. The government is obligated to take reasonable measures that would effectively prevent violence from occurring, and to discourage anything that would serve to strengthen racial division.

59 The study revealed that of the 1,627 people initially arrested for suspected participation in the 2008 xenophobic attacks, only 70 were found guilty and the Forced Migration Studies Programme’s (FMSP)

⁶⁹ Human Rights Committee, General Comment 31

⁷⁰ 2009 US Country Report

report only found one individual convicted of murder⁷¹. This not only shows the failure to effectively respond to glaring human rights violations, but it also demonstrates a lack of due diligence and determination.

- 60 Human Rights Watch, in its 2010 World Report, detailed the situation of the approximately 50,000 people who were internally displaced as a result of the attacks⁷². The report found that government, in its efforts to quickly reintegrate individuals into the community⁷³ and out of temporary shelters, exposed some victims to further violence upon return to their communities. Additionally, in a December 2009 report on migrants in South Africa, Human Rights Watch gave the account of a Methodist Church threatened with eviction by local government officials for allowing between 1,000 and 3,000 Zimbabweans to take shelter on its floors each night⁷⁴. If the government succeed in taking away the protective, albeit inadequate, shelter from these refugees and they are forced to return to high-risk areas; the state will be responsible for creating a situation in which the rights of these individuals would be severely threatened. This is not in compliance with their obligations to protect.
- 61 The South African Human Rights Commission has found that the trials and prosecution of alleged perpetrators is one method required for enforcement of government obligations. According to its own analyses, of the 597 cases arising out of the 2008 attacks, only 159 had been finalised with a verdict and 218 had been withdrawn as of October 2009⁷⁵. Victims of the attacks have attained only limited justice and perpetrators have received significant levels of impunity. These can both be attributed to delays in the judicial process stemming from the lack of cross-province consistency in the establishment of special courts dealing solely with the xenophobia-related cases and high levels of case withdrawal by complainants⁷⁶.
- 62 These examples, along with countless others, illustrate the reluctance of the State to respect and ensure the human rights of refugees in South Africa, because they have failed to take the necessary steps to give effect to those rights. The South African government announced in May

⁷¹ Ibid.

⁷² Human Rights Watch Report (2010) – South Africa

⁷³ Ibid.

⁷⁴ Human Rights Watch *No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa* (2009) 7

⁷⁵ Human Rights Watch above at 68

⁷⁶ Human Rights Watch above at 69-70

2008 that it would set up special courts to speed up the prosecution of the perpetrators of the violence⁷⁷. These Courts were only created in the Western Cape, and significant delays were reported during the prosecutions of offenders.

- 63 Interventions in courts for matters concerning xenophobic violence have been somewhat positive. For example in the case of *City of Cape Town v All those adult and males whose names are set out in annexure 'HS1'* the court ordered the City of Cape Town to provide temporary housing for those identified as vulnerable in the matter. In making this order, the court emphasised the obligation of the government in protecting vulnerable people, notwithstanding their nationality or immigration status. This was the first judgement in which a court has recognised government's obligation to provide for the safety and security of foreign nationals in South Africa.

CONCLUDING REMARKS

- 64 'Fear' is at the core of the definition of a refugee⁷⁸, and those who come to South Africa seeking protection continue to live in fear owing to threats emanating from government and private parties. The South African Refugee Act grants refugee status to any person who shows a 'well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion'. Because of their status immigrants are vulnerable to attacks, abuses, and violations of their basic, human rights over and above the abuses that locals endure⁷⁹.
- 65 We have argued that migrants are 'ill-equipped' to defend themselves or assert their rights because sometimes they are undocumented or their asylum status makes them reluctant to follow through with reporting incidents. In addition, the fact that certain offences are not per se criminalised makes it even more challenging to report such incidents. Women, being more vulnerable to sexual violence bear the brunt of the violence. Domestic and International law establish that South Africa has an affirmative duty to both respect and ensure the physical security of migrant women and refugees under their jurisdiction. As demonstrated, this obligation extends beyond the State refraining from violent acts and

⁷⁷ 2009 US Country Report

⁷⁸ UN Refugee Convention Article 1(A)(2) and section 3 of the Refugees Act

⁷⁹ Wexler above at 290 – 291

beyond creating laws that prohibit violence. The State is obliged to proactively engage the public, taking all reasonable and appropriate measures to ensure the fundamental rights of migrant women are upheld. Most importantly, the State must set the standard, showing, by example, that refugees and migrant women are to be treated with the dignity and respect.

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