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Policing and non-nationals

Analysis of police prevention, detection and investigation of xenophobic violence in South Africa

Louise Edwards and Laura Freeman



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INTRODUCTION

Overview

The Preamble to the Constitution of the Republic of South Africa, 1996 (the Constitution), reflects on the country's history of inequality and injustice and expresses the belief that South Africa belongs to *all* people who reside within it, 'united in our diversity'.¹ Equality and non-discrimination are among the foundational elements of South Africa's democratic transformation; they apply not only as stand-alone rights, but also as a benchmark against which the achievement of other fundamental human rights can be measured. This includes the rights to life, dignity, privacy and security, the enjoyment of which is not qualified by a person's citizenship status. However, since the advent of democracy, xenophobic violence and related hate crimes against non-nationals have exposed a fault line in the country's commitment to ending discrimination and promoting social cohesion.

The March 2019 launch of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) signals a prioritisation by government to address xenophobia, and co-opts all sectors of society to achieve this. While the NAP includes consideration of the need to strengthen law enforcement and prosecution as part of its overarching strategy, it does not provide detail on how these broad policy aims are to be accomplished by the South African Police Service (SAPS).²

At both the international and local level, much work has been done to understand and address the causes and impacts of xenophobic violence. A common thread across this work has been the capacity of the SAPS to effectively prevent, detect and investigate incidents of xenophobic violence, and to consistently render equal and non-discriminatory policing services to non-nationals. These various processes have resulted in credible and evidence-based recommendations to the SAPS and its stakeholders in order to address identified challenges. However, the implementation of these recommendations has been limited. The recent focus by government on xenophobia through the planned cross-sectoral implementation of the NAP provides an opportunity for the SAPS to examine and address deficits in its current legislative enactments, policy and practice within this thematic as part of its obligation to give effect to the NAP.

With support from the European Union (EU), the African Policing Civilian Oversight Forum (APCOF) has commissioned this study in order to examine the legislative, policy and operational framework governing the SAPS' response to xenophobic violence and related hate crimes, and, in so doing, identify opportunities under the current NAP implementation to improve service delivery to non-nationals.

Terminology

In this study, the term 'non-national' is used to describe a person who resides in the Republic of South Africa and is perceived to be 'foreign', as not belonging to South Africa, and/or as originating from another country. The term includes:³

- migrants;
- immigrants;
- foreigners/foreign nationals;
- undocumented immigrants;
- refugees and asylum-seekers; and
- South Africans who are perceived to be foreign, including naturalised citizens and those from other ethnic groups.

The study adopts the definition of xenophobia in the NAP, which is given as:⁴

...an unreasonable fear, distrust or hatred of strangers, foreigners or anything perceived as foreign or different and is often based on unfounded reasons and stereotypes. It can manifest itself in several ways in a country. For example, it can be through victimisation on the basis of one's nationality or appearance, brutal assaults, murders, ethnic cleansing in an area, and mass expulsion from the country.

Methodology

The research that underpins this study involved a desktop review of the literature and relied mainly on secondary data published in research reports, academic writings, and government reports. Limited interviews were conducted with experts. Although every attempt was made to interview targeted experts and senior police officers with the requisite knowledge of the subject matter, it was not always possible to do so, as many were not available for interviews.

Structure

This study begins by examining the legislative and policy framework for the policing of non-nationals in South Africa before moving on to an examination of the fault lines and challenges relating to the implementation of that framework and its impact on responsiveness and equitable service delivery by the SAPS to non-nationals. It then considers some of the key recommendations emanating from the various processes at international and local level in order to understand and address xenophobic violence and related hate crimes. The study concludes by providing nuanced recommendations on how the deficits identified in the legislative, policy and operational environment can be addressed through the immediate opportunity of NAP implementation.

LEGISLATIVE AND POLICY FRAMEWORK FOR THE POLICING OF NON-NATIONALS

Overall, the constitutional, legislative and policy framework for policing in South Africa imposes a clear obligation on the SAPS to ensure equitable service delivery to non-nationals, as well as the effective prevention and detection of, and response to, xenophobic violence and related hate crimes. However, there are clear gaps in terms of both legislation and policy that limit full and effective realisation of this obligation. This includes: a lack of recognition in law of xenophobia as a distinct criminal offence; operations that circumvent procedural safeguards provided under immigration law; and the lack of detail in the NAP to guide the specific investment required by the SAPS to promote effective responses to xenophobic violence and related hate crimes and ensure equitable service delivery to all who reside in the Republic, including non-nationals.

This section sets out the key constitutional, legislative and policy provisions that govern the SAPS' obligation to render equitable and effective policing services to non-nationals. Furthermore, it unpacks the key gaps that impede full implementation of this obligation.

Constitutional, legislative and policy framework

The SAPS has a constitutional mandate to prevent and combat crime, maintain public order, protect and secure all persons and their property, and uphold and enforce the law.⁵ In carrying out its mandate, and as part of its mandate to uphold the law, the SAPS is required to uphold and safeguard the fundamental rights of every person as guaranteed in the Constitution, including the right to equality and freedom from discrimination on grounds that include, inter alia, race, ethnic origin, culture and birth.⁶ Equality and non-discrimination apply not only as stand-alone rights, but also as a benchmark against which the achievement of other fundamental human rights can be measured, including the right to life, dignity and security of all persons within the Republic.⁷

The Preamble to the South African Police Service Act 68 of 1995 (SAPS Act) restates the constitutional obligations of equality and non-discrimination. In addition, it imposes further relevant objectives, namely promoting cooperation between the police and communities as well as respect for victims of crime and their needs.⁸ The concept 'all people' encompasses non-nationals, as neither the Constitution nor the SAPS Act distinguishes between citizens and non-nationals in this context, and the SAPS has recognised that its constitutional and legislative mandates extend to all people 'irrespective of whether they are foreigners or citizens'.⁹ This obligation to ensure equitable and non-discriminatory services includes, in terms of the powers and functions of SAPS under the SAPS Act, the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act), the Immigration Act 13 of 2002 (Immigration Act), the Refugees Act 130 of 1998 (Refugees Act), the Regulation of Gatherings Act 205 of 1993 (Regulation of Gatherings Act), and all other legislative instruments from which SAPS members derive their powers.

South Africa is also a party to international and regional agreements that impose an obligation to promote, protect and respect the human rights of all persons in the country, regardless of their national origin. Internationally, these agreements include the 1951 United Nations (UN) Refugee Convention and its 1967 Protocol. Regionally, the African Charter on Human and Peoples' Rights, as interpreted by the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), protects the rights of non-nationals in the context of access to justice and outlines specific protection obligations, including freedom from discrimination, equal access to services, access to language interpreters, and consular assistance and assistance by other relevant third parties.¹⁰ These guarantees are reflected in the Criminal Procedure Act and in SAPS Standing Order 341 (General), which cover arrest and the treatment of an arrested person.

The legal framework pertaining to immigration in South Africa includes the powers and obligations of the SAPS. The Immigration Act regulates the entry, exit and residence of non-nationals who are not citizens and provides the SAPS with discretionary power to arrest and detain people suspected of residing in South Africa in contravention of the Act.¹¹ This Act is accompanied by a standard operating procedure on the arrest and detention of undocumented persons until they are handed over to the Department of Home Affairs (DHA) for repatriation.¹² The emphasis of the procedure, according to testimony given by the SAPS to the South African Human Rights Commission (SAHRC), is to encourage members to avoid confrontation, to deal with matters without delay, and to assist in terms of verifying a person's status in the country.¹³

The Refugees Act is also applicable. It gives effect to South Africa's obligations under the 1951 UN Refugee Convention and its 1967 Protocol,¹⁴ as well as under the 1969 African Union (AU) Refugee Convention.¹⁵ The principle underpinning the refugee framework is *non-refoulement*, that is, once an individual has applied for asylum, such individual cannot be sent back to his or her home country if he or she is at risk or threat of torture, ill-treatment, or other serious human rights violations.¹⁶ The Refugees Act applies this principle through the establishment of a system for the application for, and granting of, asylum-seeker permits, through procedures for the refusal and withdrawal of these permits, and through a process for deportation with appropriate procedural safeguards. In terms of the SAPS Act, the police have the power to arrest and detain a person only when an asylum-seeker permit has been withdrawn.¹⁷

Instructions and codes

The SAPS also has national instructions, standard operating procedures, and codes of conduct and ethics that are relevant to the policing of non-nationals and which align with the general constitutional and legislative protections outlined above.

National Instruction 12 of 2019 deals with the arrest and treatment of 'illegal foreigners' in accordance with the powers granted to SAPS officers under the Immigration Act relating to undocumented persons. It recognises that the powers of arrest granted to the SAPS under the enabling legislation are discretionary and that 'South African law does not require the detention of asylum seekers and refugees as *illegal foreigners*' (emphasis in the original). The National Instruction is informed by the constitutional and legislative framework outlined herein. It sets out the process regarding arrest, the verification of identity and status, detention, and reporting to the DHA. It furthermore covers the procedural

safeguards that apply during arrest and detention (including that the person be brought before court within 48 hours of arrest), the information that must be recorded in the Occurrence Book and Custody Register, and the responsibilities of Station and Community Service Centre Commanders.¹⁸

In the context of public-order management operations, including operations relating to conduct that can be attributed to, or results in, xenophobic violence and related hate crimes, SAPS National Instruction 4 of 2014 on public-order management applies. This document provides that, in the exercise of their duties, SAPS officers are prohibited from engaging in conduct that amounts to unfair direct or indirect discrimination on grounds that include 'ethnic or social origin, ... culture, language or birth'.¹⁹

Although not directly relevant to the subject of this study, as they deal with issues relating to temporary international visitors, as opposed to residents of South Africa, National Instruction 5 of 2014 and Standard Operating Procedure 1 of 2016 are instructive regarding what is expected of the SAPS in the treatment by its members of non-nationals, and both are framed in terms of the SAPS' constitutional obligations. The Standard Operating Procedure, in particular, is unequivocal and states as follows:²⁰

The South African Police Service ... is responsible for [the] safety and security of all inhabitants of South Africa, including officials or citizens [sic] of foreign countries. Therefore, the South African Police Service has a mandate to protect and serve ... foreign nationals.

All foreign nationals [irrespective] of their status [legal or illegal] in the country should be treated with respect and dignity at all times in accordance with the Constitution of the Republic of South Africa.

The SAPS Codes of Conduct and Ethics similarly reflect the broad obligations established in the Constitution and the SAPS Act. The Code of Conduct is signed by every police officer, and failure to comply with it is treated as serious misconduct.²¹ The Code of Conduct requires every police officer to commit to, inter alia, creating:

a safe and secure environment for all people in South Africa by preventing actions which may threaten the safety and security of any community, investigating criminal conduct which has endangered the safety and security of the community and bringing the perpetrators thereof to justice.²²

Further, it requires that police officers:

at all times uphold the Constitution and the law; uphold and protect the fundamental rights of every person; act impartially, courteously, honestly, respectfully, transparently and in an accountable manner; [and] exercise the powers conferred upon [them] in a responsible and controlled manner;²³

In addition, the SAPS Code of Ethics commits police officers to the rule of law and the provision of equitable policing services for all. In particular, the Code outlines five key principles critical for policing: integrity, respect for diversity, obedience to the law, service excellence, and public approval. Significantly, the Code also commits police officers to 'always show respect for the cultural and other diversities in the community' and to 'treat every person with equal respect and honour their rights as inhabitants of South Africa'.²⁴

Policy

On the specific issue of accessing services as a victim of crime, the SAPS Victim Support Policy promotes the provision of professional, accessible and sensitive services by SAPS officers. Although the SAPS Service Charter for Victims of Crime and its implementing framework, the Minimum Standards of Service for Victims of Crime, do not deal directly with the treatment of victims who are non-nationals, they are nonetheless intended to be applied in order to promote the rights of all victims of crime, regardless of immigration or citizenship status.²⁵

Challenges arising from the current legislative and policy framework

A review of the current constitutional, legislative and policy framework that applies to the delivery of equal and non-discriminatory policing services to non-nationals reveals a number of interrelated gaps and challenges at the policy and operational level.

No SAPS policy on non-nationals

There is no one unifying SAPS policy to guide the organisation's approach to the delivery of equal and non-discriminatory services to non-nationals.

At a broader, cross-sectoral level, the NAP aims to provide a blueprint for all sectors to address issues that include xenophobic violence and related hate crimes. While the NAP is an important signal of the government's intention to address issues relating to xenophobic violence across all sectors, including law enforcement, the current framing of the policy and its 2019–2024 Implementation Plan limit the impact in terms of policing and xenophobia in a number of ways.

First, the policy focus almost 'totally overlooks' the issue of xenophobia in favour of dealing with racism and racial discrimination.²⁶ Where it does deal with issues of xenophobia, researchers have identified three challenges relating to its treatment of these issues:²⁷

- Although the NAP makes some reference to xenophobic violence, it fails to discuss or plan for other forms of xenophobia and discrimination faced by non-nationals in service delivery. This includes the challenges identified in relation to equal and non-discriminatory policing services elaborated on below.
- The NAP outlines 'empirically questionable' and broad underlying causes of xenophobia without addressing the issue of instigators of xenophobic attacks and their motivation, which is relevant to the role of the SAPS in ensuring accountability for acts of xenophobic violence and related hate crimes.
- The NAP does not address or condemn the scapegoating of non-nationals for South Africa's economic and crime-related issues, including that by local, provincial and national political figures. As expanded on below, the conflation of issues of migration and crime has fuelled community xenophobia and violence and, arguably, profiling and discriminatory policing practices by SAPS members.

Secondly, the NAP does not make meaningful reference to the role of the SAPS in its implementation, despite its references to law enforcement and prosecutions as a key objective. The absence of any

specific reference to the SAPS is a surprising omission given the central and visible role played by the SAPS in both the prevention and resolution of xenophobic violence and related hate crimes.²⁸ As this study will detail, various international, national and provincial inquiries, court cases and research that have sought to understand and address the phenomena of xenophobic violence in South Africa have identified strengthening of the performance of the SAPS as a key component.

In terms of the SAPS' role in the implementation of the NAP, the 2019–2024 Implementation Plan references only the establishment by the Department of Justice and Constitutional Development (DoJCD) of an early-warning system linked to a rapid-response mechanism. In terms of the plan, the DoJCD is responsible for ensuring that accurate data is available on the number of xenophobic offences reported to the police, on whether these cases are prosecuted and why, and on the outcome of prosecuted cases.²⁹

Xenophobia, xenophobic violence and related hate crimes are not 'distinct crimes'

Xenophobia, xenophobic violence and related hate crimes are not distinct criminal offences under South African law. Non-discrimination laws and policies, and the constitutional protections set out above, provide a framework for the SAPS in understanding discriminatory behaviour and their obligation to provide equitable and non-discriminatory service delivery. However, missing from the overarching framework is a legal classification for xenophobia, xenophobic violence and related hate crimes – whether as a separate crime or aggravating component of an existing crime.

In the absence of a separate category, attacks against foreign nationals are often categorised as 'ordinary criminality',³⁰ or 'general criminality'. A senior SAPS officer interviewed for this study explains that assigning xenophobic motivation is difficult, as it may not be possible to distinguish between a crime where the victim happens to be a non-national (but this is not a relevant factor in the crime) from one where a non-national is targeted for being 'foreign', or where that forms part of the motivation for the crime.³¹ However, assigning attacks targeting non-South Africans to the category of 'ordinary criminality' ignores the fact that, in many instances, looting and violence are widespread among community members and are popularly supported in communities.³² In the context of large-scale xenophobic attacks, Monson states:³³

It is undeniable that criminal opportunism plays a role in the attacks, but two factors mitigate against a reduction of motives to merely criminal ones. First, it leaves open the question of why criminals would choose foreign nationals as their targets. Second, and more importantly, we remain unable to explain the popular nature of mobilisation against foreigners unless we are content to assert that entire communities are comprised of 'criminals'.

In addition, the SAPS has tended to characterise crimes where non-nationals are the victims as 'opportunistic' rather than 'systemic'. For example, in the 2014 crime statistics report, the only mention of crime against non-nationals is in relation to spaza-shop robberies in the informal sector. The report reads:³⁴





... the overwhelming majority of business robberies involved informal businesses such as spaza/tuck shops and/or taverns. In some areas the majority of such businesses belong to foreign small traders not utilising any banking services and keeping their cash on the premises. The vulnerability of such shops is also increased by a lack of effective security measures, the irregular trading hours they keep and environmental factors associated with the areas in which they operate. Many of the robberies targeting such shops are actually opportunistic crimes targeting items such as cash, airtime, cigarettes and other consumer items.

The categorisation of the crimes as 'opportunistic' does not take into account, for example, the factors that may lead to the identified vulnerability on the basis of a person's immigration status, such as the inability to open a bank account, or that 'foreign-owned' shops are specifically targeted for business robberies. In the context of more widespread xenophobic violence, where xenophobic attacks are classified as 'general criminality', the response by the SAPS tends to focus on the return to public order, which does not address the underlying causes of the crime or violence.³⁵

Only by having a specific definition of xenophobia-related crimes can these crimes be categorised and can the police develop a strategy and operationalise a response to deal with them.

The release of the 2019/2020 crime statistics included, for the first time, an analysis of the causative factors relating to a number of the most serious contact crimes – common assault, assault with intent to do grievous bodily harm (GBH), attempted murder, and murder – with a new motivation marker 'Antagonism against foreign nationals'.

Causative factors: some categories of contact crime

Causative factors	Common assault 	Assault GBH 	Attempted murder 	Murder 	Total
Arguments/misunderstanding (not related to domestic)	37 876	31 699	2 974	3 447	75 996
Domestic-related	21 344	14 907	923	1 482	38 656
Retaliation/vengeance	3 126	2 674	526	782	7 108
Robbery (house/business/street)	271	1 146	2 841	1 061	5 319
Vigilantism/mob justice	595	1 867	224	1 202	3 888
Gang-related	40	97	1 248	905	2 290
Rape-related	380	401	50	82	913
Bullying at school	546	345	19	9	919
Prison fight	474	390	10	3	877
Taxi-related	248	68	149	271	736
Self-defence	286	65	44	58	453
Factional fighting	115	203	19	43	380
Public/service delivery protest	230	63	51	9	353
Labour related	193	63	11	35	302
Witchcraft related	46	139	3	9	197
Illicit mining	6	11	100	80	197
Muti-related	76	18	0	2	97
Antagonism towards foreigners	22	36	9	8	75
Politically motivated	19	12	8	21	60
Ethnic conflict/racism	38	19	1	0	58

Source: SAPS annual crime situation 2019/2020 slides.

To generate the data, the Crime Registrar analyses information within the crime administration system which shows the factors that led to particular crimes, based on information provided in the dockets.³⁶ While these causative factors are not categories of crime, they do provide an understanding of the extent to which the police, in the investigation and compilation of dockets, are engaging with the issue of xenophobia by identifying and recording the information. However, limitations regarding the methodology of SAPS data collection – which relies on individual officers identifying and recording xenophobia as a causative factor, rather than it being specifically included as a category within the current system of data capture – means that these figures are likely to be an under-representation of the prevalence of xenophobia.³⁷

Circumvention of the Immigration Act and the Refugees Act

Rather than relying on the Immigration Act or Refugees Act as the ground for immigration and asylum policing in all instances, the SAPS has also been utilising section 13(7) of the SAPS Act. This section gives the National Commissioner or Provincial Commissioners the power to cordon off particular areas for reasons of restoring public order or ensuring the safety of the public, and, without a warrant, to conduct search-and-seizure operations in respect of any person or property within that area. This so-called ‘sweeps-and-raids’ power circumvents the Immigration Act and the Refugees Acts and their associated procedural safeguards, which offer context-specific protections to non-nationals in compliance with South Africa’s constitutional and international human rights law obligations.

In 2020, the South Gauteng High Court held that the SAPS’ power under section 13(7)(c) to conduct searches of persons and property and to seize property within the cordoned-off area in accordance with section 13(7)(c) was unconstitutional, as it infringed the right to privacy as guaranteed in section 14 of the Constitution:³⁸

[T]he extent of the invasion of the innermost component of the personal right to privacy authorized by s 13(7)(c) of the SAPS Act is substantially disproportionate to its public purpose. The section is clearly overbroad in its reach insofar as it also permits warrantless, extensive and intrusive searches of private homes and persons inside them. It is furthermore deficient in failing to guide police officers as to the manner in which searches of private homes and those present in them should be conducted.

As discussed below, the issue of sweeps and raids has a broader sociopolitical context which impacts on the rights of non-nationals, and others who are perceived to be non-nationals, on the basis of their appearance or other characteristic. Furthermore, it impacts on the ability of the SAPS to meet its constitutional and legislative obligations with respect to non-discriminatory service delivery to non-nationals.

IMPLEMENTATION OF THE LEGAL AND POLICY FRAMEWORK

Introduction

Comprehensive data on the prevalence of violence against non-nationals arising from xenophobia is not available in South Africa because, as explained above, xenophobia is not a distinct category of crime, and the SAPS does not disaggregate or publicly report on crime data on the basis of a victim's nationality or national origin. However, what is known is that, between 2008 and the time of writing, outbreaks of violence across South Africa had resulted in the displacement, assault and death of non-nationals, as well as the looting and destruction of property belonging to them.³⁹ For example, during the 2008 xenophobic violence, approximately 60 people were killed and thousands were displaced,⁴⁰ while, as recently as 2019, targeted violence against non-nationals resulted in the ransacking of over 1 000 foreign-owned shops.⁴¹ Data analysed by the Institute for Security Studies (ISS) indicates that xenophobic attacks are a regular occurrence and are often observed as a by-product of protest action, if not the explicit aim.⁴²

The challenges inherent in the policing of xenophobia, and in the delivery of equal and non-discriminatory policing services to non-nationals in South Africa, are complex and numerous. In 1994, the SAPS underwent a comprehensive legislative, policy and institutional transformation, with significant efforts being made to promote democratic and rights-based policing practices aligned with the new constitutional dispensation, which, at its core, espouses the values of non-discrimination and equality in service delivery. Despite these efforts, discrimination in the delivery of policing services to non-nationals has been observed and documented. This has manifested itself in challenges to the SAPS' capacity to ensure the safety and security of non-nationals in South Africa in terms of what can be described as the dual phenomena of 'over- and under-policing', which will be discussed in more detail in the following sections.

Recommendations have been made by a range of actors at the international and local level aimed at directing the SAPS towards addressing identified gaps in its implementation of the constitutional and legislative framework. However, there is limited information (and evidence) that these recommendations have been implemented, beyond perhaps increasing visible policing to known hotspot areas on an ad hoc basis and some provincial-level investment in cross-sectoral early-warning systems.⁴³ Concerningly, a recent report on xenophobic violence by Human Rights Watch (HRW) posits that many of the institutional and systemic challenges across all sectors that were identified in 2008 by the SAHRC as preconditions to the violence then, still persisted in 2020.⁴⁴

Accordingly, while the constitutional and legislative framework governing the SAPS supports a human rights-compliant policing model in the context of non-nationals, implementation remains an ongoing challenge. This is not an issue limited to the SAPS' performance in relation to the policing of non-

nationals, but is part of a broader challenge to improve the SAPS' overall compliance with, and implementation of, legal and policy frameworks.⁴⁵

The over-policing of non-nationals

Research indicates that non-nationals experience profiling and targeting by the police.⁴⁶ This type of over-policing can have the effect of undermining the rights of non-nationals to dignity and non-discrimination, dissuades victims from reporting crime because of fear or distrust of the police, and limits cooperation between non-nationals and the SAPS with regard to early-warning systems for combating violence.⁴⁷ It can also perpetuate the distrust, stigmatisation and socio-economic exclusion already experienced by non-nationals in the community.

This last point is significant, as public-opinion surveys have repeatedly shown that xenophobic attitudes are extremely prevalent in South Africa across population, socio-demographic and racial markers.⁴⁸ An analysis of recent surveys reveals the following findings:

- The 2019 South African Reconciliation Barometer showed high levels of distrust in respect of all non-South Africans, at 54.1% for African non-nationals and 51.9% for non-Africans.⁴⁹
- The South African Social Attitudes Survey, conducted in 2018, similarly revealed high levels of intolerance and mistrust by South Africans with respect to non-nationals, with respondents pointing to the actions of non-South Africans as precipitating violence against them.⁵⁰
- Afrobarometer's 2011 survey found that 32% of South Africans would take part in action to prevent foreign nationals from moving into their neighbourhoods, and that 35% would work to prevent foreign nationals from operating businesses in their areas.⁵¹ The 2018 survey round showed that 48% of South African respondents believed South Africa should not provide asylum for those seeking protection (up from 44% in 2011), and 50% agreed that foreign nationals take away jobs from South Africans and should not be allowed to work (up from 45% in 2011).⁵²

As one of the most visible manifestations of the state's presence and power at the local level, the policing of non-nationals can either reinforce prevailing attitudes of distrust and hostility or provide leadership that can contribute to evidence-based counter-narratives, promote social cohesion, and encourage respect for, and the positive treatment of, non-nationals in their community (thus working to prevent xenophobia, violence and related hate crimes). Unfortunately, the literature indicates that the policing of non-nationals has contributed to reinforcing, rather than countering, distrust and harmful rhetoric, particularly in relation to the perceptions about non-nationals and crime.

The key challenges that contribute to the over-policing of non-nationals as identified in the literature are discussed in turn below.

Non-nationals and crime profiling

Despite the lack of available data that disaggregates crime statistics by national origin, recent statements by SAPS operational⁵³ and political⁵⁴ leadership have sent clear messages to the community that non-nationals (and particularly undocumented migrants) are disproportionately responsible for serious crime, an attitude that an earlier study at a Johannesburg police station suggests may be a view shared by a majority (78%) of SAPS members at that station, at least.⁵⁵

However, even the most comprehensive set of statistics does not support the conclusion that non-nationals are responsible for the majority of, or the rise in, violent crimes.⁵⁶ Newham of the ISS explains it thus:

... the SAPS [in 2016/17] is able to detect perpetrators in only 23.9% of murders and in 17.9% of aggravated robberies. This means that in more than 75% of murders and in over 80% of aggravated robberies, the police have no idea who the perpetrators are. It therefore isn't possible to make accurate assertions that undocumented foreign nationals commit most crimes such as murder and robbery.⁵⁷

Data for the same period reveals that non-nationals comprised only 2% of the prison population who were sentenced for contact crimes, which was much lower than their population proportion in South Africa of around 5%.⁵⁸ The SAPS' own analysis of the data may also be limited. The last time a docket analysis of non-national perpetration was conducted was in the late 1990s to early 2000s, and it found that non-nationals were under-represented in data sets relating to the perpetration of crime.⁵⁹

This perception of high rates of criminality in non-national communities can blur the lines between legitimate law enforcement operations with a crime detection or prevention objective, and those which are designed to target non-nationals for immigration enforcement in a way that circumvents procedural safeguards. Organisations monitoring the perceptions and attitudes of South Africans regarding non-nationals have consistently found deep-rooted and pervasive animosity towards non-nationals, with South Africans 'holding them responsible for crime, bringing (in) diseases and stealing jobs, services and resources, and view[ing] them as being illegal in the country'.⁶⁰ Accordingly, when non-nationals are visibly and systematically targeted by law enforcement operations, including high-profile and visible 'sweeps', it can reinforce the perception of disproportionate criminality within the community, which fuels xenophobic violence and related hate crimes.

High-profile counterfeit good raids, in particular, have been identified in research as a source of xenophobic harassment and violence, both in terms of the behaviour of state officials and law enforcement in the conduct of these operations (which fail to respect procedural rights) and the contribution to narratives of the disproportionate levels of criminality in non-national communities. Tackling the counterfeit goods market in South Africa may be a legitimate law enforcement objective,⁶¹ with reports that the country has among the world's fastest-growing counterfeit industries, estimated to be worth approximately R362 billion.⁶² Under the Counterfeit Goods Act 37 of 1997, the sale and manufacture of counterfeit goods is a criminal offence which attracts significant penalties, including up to 10 years' imprisonment. However, a recent report by HRW has identified these raids as contributing to a breakdown in trust between the police and non-national communities, with concerns that the search for and seizure of counterfeit goods are being used as a 'cover' for xenophobic harassment and attacks,⁶³ with non-nationals, who often exist on the margins of the formal economy, likely to be caught in such operations.

Similarly, the SAPS' social crime prevention strategy and its targeting of non-nationals for immigration enforcement under the rubric of 'legitimate' crime prevention activities in response to perceptions of high rates of criminality, has been subject to criticism. As with counterfeit-goods raids, these types of operations have the effect of exacerbating existing social tensions between the SAPS, non-nationals and the community, and of entrenching the social exclusion of non-nationals, in addition to diverting resources away from the detection and prevention of more serious forms of crime.⁶⁴

The policing of South Africa's borders is a legitimate law enforcement objective, and the SAPS has a clear mandate to conduct activities related to this by way of the Immigration Act and Refugees Act. As explained above, although the Immigration Act gives the SAPS the power to enforce immigration law, including the

power to make arrests if there are reasonable grounds to believe that a person is not lawfully residing in the country,⁶⁵ the SAPS in Gauteng regularly circumvents the procedures and protections afforded to non-nationals under the Immigration Act by conducting 'sweeps and raids' in accordance with their powers to conduct crime prevention operations under section 13(7) of the SAPS Act.⁶⁶

As far back as 1999, the SAHRC urged law enforcement agencies to refrain from conducting 'spot checks' and sweeping exercises as a method of identifying suspected non-nationals residing in South Africa in contravention of the Immigration Act, on the basis that such actions were contributing significantly to high rates of arbitrary arrest and were reinforcing negative perceptions of non-nationals.⁶⁷ However, so-called sweeping exercises persist as a crime prevention and detection strategy.⁶⁸

There is also an increasing pattern of raids and sweeps being conducted in the immediate aftermath of xenophobic attacks, suggesting that they are being conducted in response to community concerns and demands in respect of linkages between 'illegal' non-nationals and crime. The SAPS accordingly becomes reactive to the demands of the community rather than taking a strategic and rights-based approach to the policing of migration and asylum as required in terms of the broader constitutional requirements of equal and non-discriminatory policing services, the Immigration Act and the Refugees Act. For example, Operation Fiela, which was launched in 2015 less than two weeks after broad-scale xenophobic violence in Durban and Gauteng, was a joint operation between the SAPS and the South African National Defence Force (SANDF). It was initially described by the SAPS as an 'anti-xenophobia initiative' aimed at crime in general and intended to provide protection for non-nationals. Instead, it became an enforcement operation against non-nationals, with large-scale round-ups and rushed deportations.⁶⁹ Non-nationals accounted for over 80% of the arrests in the operation's first week.⁷⁰ The operation established, and reinforced, the association between non-nationals and serious crime, as articulated by the VISPOL (visible policing) leadership:⁷¹

[T]he focus of Operational Fiela is ... [illicit] drug trafficking and contraband and undocumented migrants and also your human trafficking and children trafficking[,] including ... prostitution, hijacking and illegal occupation of buildings and illegal firearms and ammunitions ... [T]his is not an operation targeting migrants but ... [comprises the] widespread [targeting] of all illegalities that are happening.

Alfaro-Velcamp and Shaw found that, in interviews with senior officers involved in the operation, such officers were aware that the context and the aim of the operation was to 'net foreigners', but were careful to attribute their actions to 'targeting crime'.⁷² In January 2018, Operation Fiela II was launched, with the DHA unequivocally making the direct link between the operation and the need for a security-sector response to addressing community grievances regarding non-nationals.⁷³ As observed by advocates for the rights of non-nationals, 'to equate crime with the presence of undocumented people in our country is not tackling xenophobia, it is legitimising it'.⁷⁴

Another recent example is that of the actions in the immediate aftermath of the looting of foreign shops in Diepsloot, north of Johannesburg, in January 2020, when immigration raids followed.⁷⁵ During the operation, 157 non-nationals were arrested (23 of whom were released after their status had been verified),⁷⁶ with reports of police misconduct being alleged during the 'crime stabilisation' operation that lasted into March 2020.⁷⁷

Aside from the intention of the operations, the manner in which sweeps and raids were undertaken raises concerns regarding respect not only for the procedural rights afforded under the SAPS Act, Criminal Procedure Act, Immigration Act and Refugees Act, but also for the constitutional guarantees of non-discrimination and dignity.⁷⁸

Enforcement of the Refugees Act

The policing of refugees and asylum-seekers adds an additional layer of complexity to the relationship between the SAPS and non-nationals because of issues associated with the implementation of relevant legislation. In recent years, the arrest, detention and deportation of asylum-seekers has resulted in litigation against the SAPS for failure to abide by procedural guarantees that has resulted in the wrongful deportation from South Africa of both asylum-seekers and refugees.⁷⁹ This is particularly the case with regard to the arrest and detention (as well as deportation) of asylum-seekers who are awaiting final determination of their asylum applications⁸⁰ – and this, despite the courts confirming that those applying for asylum have the right to freely sojourn in South Africa while their asylum applications are pending but have not yet been approved.⁸¹

Enforcement of the Refugees Act requires not only an understanding of a very technical area of the law, but also an appreciation of the stages associated with an application for asylum, and how these affect a person's status in the country. However, despite this and the regularity of joint operations with the DHA, SAPS members do not currently receive basic training in immigration or refugee law,⁸² or on issues related to the process and documentation of asylum-seekers, which can make verification of documentation difficult.⁸³ SAPS officers are also not provided with regular information on the challenges associated with the renewal of asylum permits, which, at the time of writing, encompasses significant limitations insofar as access to South Africa's five Refugee Reception Centres is concerned. During the COVID-19 pandemic, all centres have been closed,⁸⁴ which means that all asylum-seeker permits have technically expired. While the DHA has extended them en masse, obtaining individual documentation to confirm this is not possible, which makes asylum-seekers and refugees vulnerable to arrest for lack of documentation.⁸⁵

Corruption

Corruption has been identified as a contributing factor in the targeting of non-nationals for the purposes of law enforcement, whether in terms of ordinary criminal law or immigration law. Corruption in the asylum system and, to a lesser extent, in the immigration system is well known and documented.⁸⁶ Within the criminal justice system, immigration offences are low-priority crimes, yet they entail heavy penalties (both fines and a prison sentence, as well as lost income, deportation, etc.), which, according to analysts, 'encourages the police to "turn a blind eye" to immigration offences while also encouraging undocumented foreigners to offer bribes in exchange for their freedom'.⁸⁷

In a recent survey of migrants, asylum-seekers and refugees, it was found that, in Johannesburg and Pretoria, 42% had paid a police officer to avoid arrest; 11% had paid an official to avoid deportation; and 8% had paid to get out of detention.⁸⁸ In a 2015 study, 56% of respondents said they had been stopped by an official requesting documentation, with reports that police target their operations at asylum-seekers coming in from urban areas to renew expired permits or those close to Refugee Reception Offices.⁸⁹

Independent Police Investigative Directorate (IPID) investigators in Gauteng and KwaZulu-Natal reported that extortion and bribery involving SAPS officers and non-nationals were widespread. One investigator highlighted that all informal businesses were vulnerable to police corruption. However, businesses owned or run by non-nationals are a target, as they have more cash and stock on their premises, not to mention concerns about being deported, which means that the police will elicit larger bribes from them. These illicit practices range from petty cases, where the SAPS will accept airtime and cigarettes, broader extortion of small businesses that 'operate on the fringes of the law' (such as spaza shops, scrapyards and shebeens), all the way to, in some cases, police officers actually being on the payroll of the businesses concerned.⁹⁰

IPID investigators also reported that foreign nationals are seen as an easy target for corrupt police officials, as they are considered unlikely to report crimes that the police commit against them.⁹¹ The investigators noted that SAPS officers will often go to another area than the one they are allocated in order to engage in extortion.⁹² IPID officers openly acknowledge that their figures on SAPS bribery, extortion and corruption do not reflect the actual scale of the illegal practices, which they know are much more widespread.⁹³ IPID has to wait for a signed affidavit from a victim before it can formally start an investigation. However, most vulnerable groups will not make such an affidavit, which means that formal accountability mechanisms fail.⁹⁴ In addition, as a policing researcher explains, bribery creates an added issue, as the complainant – the foreign national – by paying a bribe becomes complicit to a crime. On the other hand, the perpetrator – the SAPS officer – is comfortable in committing the crime because he or she is secure in the knowledge that his or her commission of the crime is unlikely to be reported.⁹⁵

The under-policing of non-nationals in South Africa

At the same time as being profiled, targeted and 'over-policed', non-nationals in South Africa simultaneously experience the phenomena of 'under-policing', which is observed in the lack of effective detection, prevention and investigation of xenophobic violence and related hate crimes. Under-policing also manifests in the failure by the SAPS to provide basic service delivery or provide the support expected in terms of legislation and policy to non-nationals as victims of crime.

In some situations, this relates to biases and anti-foreigner attitudes among SAPS members, with the presence of xenophobic attitudes within the organisation's ranks identified as a contributing factor to poor levels of service delivery to non-nationals, and to a lack of responsiveness to incidents of xenophobic violence.⁹⁶ As pointed out above, public-opinion surveys indicate a high level of anti-foreigner sentiment in South Africa that cuts across population, socio-demographic and racial markers. Given that the SAPS represents a cross section of South African society, it is likely that the majority of officers similarly have xenophobic attitudes.⁹⁷ Such attitudes can manifest in lack of empathy, compassion, urgency and response on the part of SAPS members regarding distress calls by non-nationals when under violent attack or when their property is being looted.⁹⁸ This challenge has been acknowledged by the SAPS, which has cautioned that, in the context of xenophobia within the ranks of the Service, '[m]embers must be vigilant and guard themselves against being influenced in the performance of their functions and duties by the prejudices and dislikes prevailing in the community they come from'.⁹⁹

Under-policing can also be explained by weaknesses in the SAPS' broader institutional capacity to respond effectively to xenophobia and related hate crimes, including the lack of effective early-warning systems, operational preparedness, and specialised training or expertise within the organisation to deal with the complexities of these type of crimes. Research also indicates a reluctance by the SAPS to acknowledge xenophobic violence as a specific phenomenon, a challenge compounded by the lack of a separate crime category for xenophobia and related violence and hate crimes. Each issue is discussed in turn below.

Xenophobia as a recognised phenomenon

In the absence of a separate crime category, attacks against foreign nationals are often categorised as 'ordinary criminality', or 'general criminality'.¹⁰⁰ This manifests in a lack of available data on the prevalence of xenophobic violence and related hate crimes, as explained above. This has an impact on the mandate and capacity of the SAPS to develop evidence-based policing responses to the issue. Compounding the

issue is a questioning, at the highest levels of SAPS political leadership, of xenophobia as a phenomenon, which, according to experts interviewed for this study, fundamentally limits policing responses to xenophobic violence, from early warning through to operational preparedness, in a systemic way. To illustrate, speaking during ongoing attacks in September 2019, Minister of Police Bheki Cele stated: 'Xenophobia is just an excuse that is being used by people to commit criminal acts ... it is not xenophobia, but pure criminality'.¹⁰¹

Failure to prevent xenophobic violence and related hate crimes

One of the most persistent, recurring challenges for the SAPS has been the lack of an effective and coordinated early-warning system to detect imminent violence against non-nationals and prevent it from starting and spreading.¹⁰² In 2008, the lack of such an early-warning system was identified by an SAHRC inquiry as a significant constraint on the capacity of the SAPS to monitor and identify patterns that would indicate the risk of violence and its escalation.¹⁰³

Research indicates that violence targeting non-nationals tends to take two forms: a spin-off from community protests, and more targeted forms of collective violence aimed at 'getting the foreigners out'. In both instances, the instigators are almost always local community leaders or figureheads in some form,¹⁰⁴ and there is usually some coordination or advance warning, such as community meetings, social media messages, posters or leaflets.¹⁰⁵

Xenophobic violence rarely occurs within an authorised gathering but is often the result or by-product of a community protest, for which, on occasion, a permit may have been issued. The National Instruction on public-order policing emphasises in several places the importance of crime intelligence, including that 'Station Commanders must identify indicators of potential violent disorder in their areas by continuously gathering information and tasking Crime Intelligence to gather information on potential violent disorder'.¹⁰⁶ The policy guideline further elaborates that the use of intelligence as part of policing of public protests and gatherings is essential. Therefore, the relationship between the POP (public-order policing) units and Crime Intelligence can assist in both the planning for, and deployment at, protests and gatherings, as well in terms of POP units proactively identifying possible threats and targets.¹⁰⁷

The SAPS acknowledges that there are often warning signs. A senior police official interviewed for this research explained that 'in most cases there will be information long before the attacks happen, there would have been information on the ground ... commonly there will be accusations of foreign nationals taking jobs'. He continues 'that information will always come in and be utilised by the [SAPS] members who are involved operationally – operational commanders – to plan their interventions'.¹⁰⁸ There are positive examples of the SAPS working to prevent xenophobic violence, for example in Dunoon in the Western Cape while attacks were ongoing in Gauteng – there, the SAPS worked with community stakeholders to attempt to prevent attacks on non-nationals. This included holding two meetings with community members, printing isiXhosa and English pamphlets, using the police vehicle public address system to send out messages of concern about xenophobic violence, and formulating a contingency plan should attacks occur. However, there were still attacks targeting foreign-owned businesses.¹⁰⁹

More often, research indicates that the police fail to act on warning signs that violence is about to take place, and that, where there is indeed a response, it is slow and reactive. This was the situation observed in a systematic study of the 2008 attacks,¹¹⁰ and interviews with experts for this research confirmed that this remains an issue of concern. The reactive response of SAPS members generally

results in escalation of violence, displacement, and destruction of property before the police even enter communities.¹¹¹ The SAPS has acknowledged this as a challenge. However, it attributes this to the slow responses to issues of capacity at local police stations, as well as the time it takes to obtain the necessary policing numbers and expertise – which often occurs owing to the fact that public-order policing and other specialised units need to be reassigned within a province.¹¹² Experts interviewed for this research also point to issues such as the SAPS ignoring warnings by members of civil society,¹¹³ and to the lack of a clear structure or unit to which to report threats at station, provincial or national level.¹¹⁴

At a national level, it is reported that the Justice, Crime Prevention and Security Cluster (JCPS Cluster) has put in place a mechanism to coordinate efforts with Crime Intelligence in order to provide early warning of xenophobic attacks and of escalation at both the provincial and national level.¹¹⁵ However, this mechanism was criticised by Parliament as being ineffectual in preventing violence spreading throughout major metros across South Africa during 2019, resulting in the death and displacement of non-nationals and the looting of foreign-owned shops.¹¹⁶ There have been other efforts at the level of the metro police,¹¹⁷ and through collaboration among the United Nations High Commissioner for Refugees (UNHCR), government and civil society,¹¹⁸ which can provide useful information and collaboration, but neither address the critical need for an effective early-warning facility within the broader crisis-intervention response of the SAPS and its justice and security-sector stakeholders.

Several reasons have been advanced to explain why efforts to implement an early-warning system have been ineffective in detecting violence against non-nationals and in preventing such violence. Among these reasons are capacity constraints with regard to intelligence-gathering, as well as issues relating to the broader lack of social cohesion, which has resulted in what is described as ‘apathy and paralysis’ in policing responses.¹¹⁹ The African Centre for Migration and Society (ACMS) also reports that fragmentation and lack of coordination across government institutions, including resource constraints and lack of political commitment to support the full operation of the system, have hindered the implementation of a complete and effective system.¹²⁰

Operational preparedness and coordination with regard to xenophobic violence

Challenges have been identified regarding the SAPS’ operational preparedness and capacity to coordinate with other key stakeholders before, during and after outbreaks of xenophobic violence. During the SAHRC’s inquiry into the 2008 violence, it was found that the SAPS lacked effective operational plans to deal with violence which drew on its past experiences and lessons learnt. The SAHRC further found that:

interventions were not monitored, records were not kept, or [were] no longer accessible, and [the] SAPS [did] not recognise the importance of institutional memory in planning to prevent or mitigate the effects of mobilization against non-nationals in South African communities.¹²¹

The lack of a comprehensive, evidence-based national operational plan in 2008 directly resulted in an escalation of violence to the point where the SANDF had to be called on to assist with the policing response.¹²² At that time, violence, which started in Gauteng, spread to other major cities in South Africa and it was left to local authorities and police stations to respond. The lack of a national response resulted in, for instance, both the SAPS and Disaster Management at provincial levels activating separate and uncoordinated operational centres.¹²³ In the intervening years, the existence of a coordinated national operational plan has not been evident in the response by the SAPS to large-scale outbreaks of xenophobic violence.

Operational responses to public violence

In terms of a generalised public-order response, the National Instruction relevant to policing when it comes to the management of the public order and of public events does not include anything relating specifically to xenophobic violence, or, more broadly, to public protest that transforms into public violence.¹²⁴ However, the policy framework that preceded the National Instruction did include a consideration of SAPS responses in the context of public unrest and violence. It was critical of the existing POP responses to public violence, describing the framework for POP responses as lacking proper structure and formation, whether in response to planned or spontaneous events.¹²⁵ The framework made a range of recommendations to improve operational approaches to the policing of gatherings, including violent gatherings.

Lack of direction on this issue results in reports of the police failing to take decisive action to quell violence during xenophobic attacks.¹²⁶ A senior SAPS officer explains the difficulty and dilemmas on the ground during public-order incidents:¹²⁷

As an officer on the ground you have to find a balance: do I act now and risk it getting more violent, or do I allow these people – I ignore them when they take papers from this auntie, which is theft, but do I ignore it for the sake of peace? Even with the arrests, you also assess and say 'If I arrest this leader now, I might have a problem of more violence, or do I leave him to follow him at a later stage when this thing has diffused'?

The police also report frustration in managing xenophobic attacks – they disperse the crowds, make arrests, and otherwise clear an area of a threat, only for the crowd to return and attack non-nationals and their property once the police have withdrawn from the area,¹²⁸ with there being no tactical or operational responses based on lessons learnt from previous incidents.

Rather, the strategy appears to be evacuation – when there is violence, the SAPS may intervene to evacuate non-nationals to places of safety, which includes SAPS stations.¹²⁹ However, this approach has been observed as leaving properties and businesses vulnerable to looting, and, in terms of community perceptions, the SAPS is assisting them to achieve their xenophobic objective of removing non-nationals from the community.¹³⁰

Coordination with other operational role players during xenophobic violence

NATJOINTS (National Joint Operational and Intelligence Structure) is a multi-agency structure formed to develop strategic responses to security threats. Security-cluster ministers, and directors general from the SANDF, the SAPS, the DHA, the National Prosecuting Authority (NPA) and other bodies, issue instructions at meetings of the structure. The equivalent structure at provincial level is PROVJOINTS (Provincial Joint Operational and Intelligence Structure).¹³¹ The apparatus associated with NATJOINTS is substantial and displays a coordinating capacity on the part of relevant stakeholders. The chair of NATJOINTS explains:¹³²

This structure works as follows ... it is an integrated structure where we make sure that, whenever there is something happening, we do not have to go and look for somebody else. It sits monthly or as and when there is a need, [and], if there is any safety issue around the country, that structure sits, and it sits with only the relevant departments [needed to deal with] the specific threat or issue at hand.

When large-scale xenophobic attacks happen, NATJOINTS should automatically call an emergency session to respond to such attacks, and NATJOC (the National Joint Operational Centre) should start

running operations. However, in 2008, NATJOC 'was only activated one week after the start of the violence[,] indicating that on the operational and tactical level there was no coordination between the role players'. In addition, there was 'no formal liaison with the National Disaster Management Centre ... [meaning that] guidelines from the national level were unclear'.¹³³ As a result, provinces themselves had to develop plans and coordinate responses. Again, in 2015, NATJOINTS was reported to have met only two weeks after violence broke out in KwaZulu-Natal.¹³⁴

Importantly, NATJOINTS and the structures related to it have not developed a strategic plan to respond to xenophobic attacks. This means that, each time, 'it's like starting to reinvent the wheel all over again', and time is wasted in formulating new plans.¹³⁵ As a former senior SAPS officer explains:¹³⁶

SAPS memory is very short because once a situation is finished, then it's over ... It might be that the next time a xenophobic attack or a huge incident in the country happens we have new role players in charge sitting at the Joints and they never had to deal with this before... So that continuity, ... lessons learned, setting up databases and understanding what was done previously and building on and continuously reviewing [doesn't happen].

Accordingly, important institutional knowledge and lessons learnt from previous responses to xenophobic violence are entirely lost. Moreover, NATJOINTS – through the way in which it operates and because of the significant lags from the beginning of attacks to activation – becomes an entirely reactive rather than proactive structure.¹³⁷

Another important issue relating to NATJOINTS/PROVJOINTS is their coordination with provincial governments. Reflecting on the 2008 attacks in Gauteng, Boshoff notes:¹³⁸

Both the SAPS and Disaster Management on provincial level immediately activated separate operational centres. These were however two separate centres and no personnel or communication were exchanged, [with both] working in isolation to such an extent that the United Nations (UN) and, non-governmental organisations (NGOs) asked for a meeting to try and coordinate between the two operational centres... Although the National Disaster Management Centre was activated it was operating from a very well-established and functioning Gauteng Disaster Management Centre in Midrand. There was however no liaison with the Provincial Joint Operational Centre (PROVJOC) that was established by the SAPS.

In other words, the SAPS' operational response was not coordinated with the Gauteng governmental response. This may, in part, be attributed to the long delay (two weeks) in the national government declaring the xenophobic attacks a disaster in Gauteng and the Western Cape.¹³⁹ This presents a serious gap in operational coordination at a time when police resources and capabilities were clearly stretched.

Responsiveness and accessibility of general policing services to non-nationals

There is a strong perception among non-nationals that the police 'don't care' about them. Xenowatch and ACMS researchers report that many non-nationals complain that, if they call the police during an ongoing xenophobic incident, the police do not come out (or do not come for hours) and drop their calls. At times, the police are reported as saying that they do not have the capacity, for example that the police vehicle is not available. However, the result of this repeated experience over time is that non-nationals' perception is that there is a lack of protection from the SAPS. This has led to non-nationals finding ways to protect themselves, such as purchasing unlicensed firearms or paying protection fees to local gangs and other power-holders.¹⁴⁰

Indeed, non-nationals report difficulties in accessing basic policing services. They report that, if you 'sound foreign', the police will not continue communicating with you when you call. They also report difficulties in getting police officers to commission affidavits, and they report problems in having crime dockets opened. Even the simplest of policing functions – the commissioning of an affidavit – has become increasingly commodified for foreign nationals, with SAPS officials often asking to see their ID and to be given a 'can of coke' before they will do the commissioning.¹⁴¹ Furthermore, IPID reports that there have been cases of intimidation of non-nationals if they attempt to lay a complaint regarding their treatment by the police.¹⁴²

There are also challenges reported by the SAPS in terms of their capacity to deliver policing services to non-nationals who are victims of crime. This includes issues relating to the availability of interpreters as well as complainants relocating once a docket has been opened.¹⁴³ IPID acknowledges that one of the major issues which limits accountability at both community and state level for xenophobic violence and related hate crimes is high levels of mistrust among non-nationals of the police and associated structures such as IPID. According to organisations that work with directly affected non-nationals, this means that victims and key witnesses refuse to come forward, or are unwilling to lay a charge.¹⁴⁴ This is exacerbated by a general lack of knowledge of the criminal justice system on the part of non-nationals in South Africa.¹⁴⁵

The courts have found that failure by the SAPS to effectively respond to the safety and security needs of non-nationals is incompatible with section 7(2) of the Constitution, which imposes an obligation on the state, including the SAPS, to respect, protect, promote and fulfil the Bill of Rights. In the *Said* case, the Western Cape High Court heard an application from a group of non-national shop owners in Zwelethemba, Cape Town, who alleged discrimination by, inter alia, the SAPS. They contended that the SAPS had failed to offer them assistance when the local community attacked and looted their shops, but at the same time provided protection for South African-owned shops. They also claimed that the SAPS had failed to adequately investigate the criminal conduct that occurred before, during and after the incidents of violence. The court found, among other things, that the SAPS had failed in its obligation under section 7(2) by:¹⁴⁶

- Not ensuring that the police at Zwelethemba and Worcester had sufficient resources to adequately protect the complainants and the properties of other non-nationals;
- Ignoring the looting of properties taking place in their presence;
- Not adequately investigating the acts of looting of foreign-owned shops, thereby denying the complainants the right of access to justice; and
- Treating the victims of the attack with disrespect, thus violating their right to dignity.

Research also indicates that there is limited internal accountability within the SAPS for failure to provide equitable and non-discriminatory policing services, and to protect people and property, during xenophobic violence.¹⁴⁷

The challenges related to equitable service delivery and responsiveness by the SAPS to systemic safety concerns experienced by sections of the community are not a phenomenon limited to the experience, by non-nationals, of policing. The Khayelitsha Commission of Inquiry, for example, heard and accepted evidence of systematic under-resourcing of policing services to areas which are predominantly poor and black and which experience among the highest rates of murder and other violent crime in South Africa.¹⁴⁸ One of the key findings of the Commission was that there should be an urgent review of SAPS mechanisms for making determinations on resource allocations. As explained by Redpath and Nagia-Luddy:¹⁴⁹

The issue of allocation by the state of human resources to policing is one that impinges on various constitutional rights, such as the right to safety and security of the person, dignity, life and equality before the law, together with the right not to be unfairly discriminated against.

The Commission also heard evidence of the impact of under-policing in the Khayelitsha area, which echoes that found in the literature regarding the under-policing of non-nationals (an aspect explored below), namely, a breakdown in trust between the community and the police, and ineffective policing responses to known safety and security concerns.¹⁵⁰

Community pressure

Police members themselves may fear victimisation by community members, who could perceive them to be supporting the interests of non-nationals over citizens when performing police duties.¹⁵¹ According to an analysis of the 2008 violence:

on the one hand, local police were under-equipped to respond to large-scale violence and could not be everywhere at once, but on the other, some were seen to be intimidated by the prospect of opposing what appeared to be the general will of the people (for good reason – in Itireleng, a police officer who fired rubber bullets was later assaulted by community members).¹⁵²

The deployment of police from other localities during xenophobic violence has been recommended by researchers to overcome this challenge.¹⁵³

Related to this issue is that of the accountability of perpetrators and instigators of xenophobic violence and related hate crimes. According to research, there are few arrests of instigators of xenophobic violence. Where arrests are made, these tend to be of perpetrators of public violence, assault and looting, but without investigations into the instigators of the violence. Without accountability of the instigators, it has been observed that violence is often repeated in the same communities, and is organised by the same people.¹⁵⁴ There is no systematic study of SAPS arrests during and following xenophobic violence. However, data available indicates that the SAPS generally makes a relatively small number of arrests in proportion to the scale of the violence, and they tend to be for lesser charges such as public violence, with few arrests being made for inciting violence.¹⁵⁵

Recruitment and training

The demographics of a police organisation, the training offered to members, and the attitudes and actions of management with regard to the policing of non-nationals have been shown in the literature to have an impact on whether a police organisation can deliver equitable and non-discriminatory policing services and can play an effective role in the prevention and detection of xenophobic violence and related hate crimes.¹⁵⁶ In two key areas – recruitment and training – concerns have been raised about the extent to which the SAPS is representative of the communities it serves, and about the extent to which its members are both trained and managed to fulfil their constitutional and legislative obligations with respect to non-nationals.

On the issue of recruitment, South Africa is a diverse country with a diverse population, and it is estimated that approximately two to three million foreign nationals are in residence – an estimate that includes both documented and undocumented migrants, refugees and asylum-seekers.¹⁵⁷ In 2020, there were 187 358

people employed by the SAPS, of which only 10 were identified as non-nationals, with none deployed to visible policing or other community-oriented roles.¹⁵⁸ Proportionately, therefore, non-nationals are significantly under-represented as a population group within the ranks of the SAPS. (It should be noted that recruitment is limited to non-citizens who are permanent residents of South Africa).¹⁵⁹

There are several benefits in providing employment opportunities for non-nationals in the police service in a diverse country such as South Africa, particularly in front-line and community-focused roles. This includes promoting empathy for, and understanding of, difference both within the ranks of the service and in engagements between members and the community.¹⁶⁰ Grattan, cited in Falvin, argues that 'police agencies that are rich in diversity are simply more likely to garner individual trust among a group of citizens because the agency is reflective of the community and is inclusive of officers of the many backgrounds and experiences'.¹⁶¹ A recent study into targeted recruitment designed to increase representation of ethnic minorities in police agencies also found an association between an increase in minority representation and greater satisfaction with policing services on the part of minority communities.¹⁶²

Training has also been identified as a key component in building empathy and understanding among police officers with regard to the diverse communities they serve. However, research indicates that there is no dedicated module or programme within the SAPS training curriculum that deals specifically with non-nationals. This includes training in the powers of the police in terms of various legislative instruments as they pertain to non-nationals, as well as so-called diversity training designed to promote understanding and empathy in the context of difference on the basis of national or ethnic origin. Research also indicates that training to address bias (unconscious or otherwise) against non-nationals may prove useful in promoting more equitable service delivery to non-nationals and more effective SAPS responses to xenophobic violence and related hate crimes. The value of training in improving responses has been recognised at a judicial level, with the Western Cape High Court identifying training for SAPS members as key to changing entrenched negative attitudes with respect to non-nationals.¹⁶³

As mentioned earlier, despite it being a technical area of the law, and notwithstanding the challenges consistently faced by SAPS members in correctly enforcing refugee or immigration law, there is currently no training in SAPS colleges in this regard.¹⁶⁴ Some ad hoc training is provided at the provincial level by civil society and academic partners. However, there has been no investment at national level through the provision of basic or specialised training for all recruits and members.

INTERNATIONAL AND LOCAL PROCESSES TO ADDRESS XENOPHOBIC VIOLENCE AND RELATED HATE CRIMES

At a local and international level, both governmental and intergovernmental processes have been put in place to understand and address the underlying causes and consequences of xenophobic violence and related hate crimes. At a local level, such processes include those initiated by the SAHRC in 2008, by the National and Provincial Assemblies' Ad Hoc Joint Committee on Probing Violence against Foreign Nationals in 2015, and by the Special Reference Group on Migration and Community Integration in KwaZulu-Natal. South Africa's issues concerning xenophobic violence and related hate crimes, and the role played by the SAPS, have also not escaped international attention. At both the levels of the UN and the AU, attention has been given to issues ranging from the institutional profile and culture to the lack of operational preparedness and the implementation of early-warning mechanisms. Some challenges speak directly to the issue of the policing of non-nationals, others affect the capacity of the SAPS to respond to outbreaks of xenophobic violence and related hate crimes against non-nationals, while yet others impact on both.

What follows is a summary of the key recommendations arising from these various processes as they relate to policing and associated issues.

South African processes

Subsequent to its investigation into issues pertaining to the rule of law, justice and impunity arising from the 2008 public violence against non-nationals, the SAHRC made the following targeted recommendations to the SAPS and its management with a view to actively addressing institutional challenges and shortcomings and ensuring enhanced provision of equitable policing services:¹⁶⁵

- Provide members with training in matters pertaining to xenophobia and related hate crimes;
- Revise the Standing Orders and Operational Protocols used in policing social conflict and require provincial police offices to develop contingency plans for the full range of such conflict;
- Boost the visibility of policing following an outbreak of violence against non-nationals and immediately deploy all backup forces; Coordinate with the Department of Justice and Constitutional Development (DoJCD) in drawing up a set of best-practice guidelines that, in the case of future scenarios, would constitute the most efficient use of resources;
- Work with the NPA in compiling an evaluation of the joint agreement and the challenges regarding its implementation, in the process providing concrete recommendations to minimise the SAPS' weaknesses and promote its strength of response in cases of a similar situation arising in the future;

- Engage with the DoJCD to ensure that sporadic xenophobic hate crimes, as well as opportunistic crime exploiting the marginal position occupied by non-nationals, receive adequate focus and judicial responses; and
- Consider ways of using media footage to assist in investigations.

In 2015, the National and Provincial Assemblies' Ad Hoc Joint Committee on Probing Violence against Foreign Nationals recommended that the Parliamentary Committee on Safety and Security establish the ability both of crime-combating units within the police to deal with crowd control in order to stem future attacks and of police responses to violent situations in general.¹⁶⁶

At a provincial level, in an outcome report of an inquiry into the cases and consequences of violent attacks against foreign nationals in the province of KwaZulu-Natal in 2025, the Special Interest Group that undertook the inquiry emphasised that there was a lack of effective and impartial policing throughout the province, which had a disproportionate impact on foreign nationals, and that numerous law enforcement officers did not have the necessary knowledge regarding the rights of foreign nationals and their documents. It accordingly recommended that the Provincial Government develop and implement a mandatory and province-wide education and sensitisation programme with particular emphasis on law enforcement agencies.¹⁶⁷

African regional responses

In its Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa, the African Commission on Human and Peoples' Rights, the principal human rights organ on the continent, expressed its concerns about, inter alia, acts of xenophobia and other intolerance directed at foreign nationals and recommended that South Africa strengthen the various initiatives undertaken in the fight against xenophobic attacks and initiate a more coordinated response to the increased need of foreign nationals for protection.¹⁶⁸

International focus

In 2016, the Human Rights Committee, in its Concluding Observations on the Initial Report by South Africa, expressed concern about increasing xenophobic attacks against non-nationals and about the inability of the authorities, including the SAPS, to prevent and address xenophobic attacks and hold the perpetrators accountable. It recommended that South Africa redouble its efforts to prevent and eradicate racism and xenophobic attacks, as well as improve policing response to violence against non-nationals.¹⁶⁹

In its Concluding Observation on the Combined Fourth to Eighth Periodic Reports of South Africa, the Committee on the Elimination of Racial Discrimination expressed concerns regarding the lack of training in human rights, particularly the rights embodied in the International Convention on the Elimination of All Forms of Racial Discrimination, and recommended that South Africa offer specialised training to, inter alia, police officers and law enforcement officials and report back on the impact of the training.¹⁷⁰

In South Africa's last two periodic reviews, a number of countries expressed concerns about the large-scale incidents of xenophobic violence in the country. Two of the most relevant observations with respect to South Africa were that it:

- Continue efforts to prevent and eradicate all manifestations of racism and xenophobia and improve policing responses to violence against non-nationals; and¹⁷¹
- Introduce measures to mitigate the scourges of xenophobia through, among others, visible policing, community-awareness programmes, and the promotion of tolerance and cultural diversity.¹⁷²

Implementation of recommendations

The concerns and challenges expressed in this section regarding the situation at the local, regional and international level highlight the existence of gaps and deficiencies within the SAPS' early-warning and response mechanism. The absence of specific and structured training and of a clear and overarching policy on xenophobia seems to be the common denominator. A specific focus on the development of a clear and coherent policy as well as on the development and delivery of training programmes is critical to the institutionalisation of an equitable and rights-centred approach in the provision of policing services by the SAPS.

However, research suggests that there has been limited uptake by the SAPS of the recommendations generated both by local and international processes. As a recent report into xenophobic violence reflected, many of the institutional and systemic challenges across all sectors that were identified as early as 2008 as preconditions to the violence still persisted in 2020.¹⁷³

CONCLUSION AND RECOMMENDATIONS

This study examined the legislative, policy and operational framework governing the SAPS' response to xenophobic violence and related hate crimes as well as the framework pertaining to its general service delivery to non-nationals. It identified a number of gaps in both frameworks and considered the consequences thereof for the SAPS' constitutional mandate to deliver equal and non-discriminatory policing to non-nationals. At the legislative and policy level, the study identified critical gaps in the current SAPS' frameworks, including the lack of an overarching SAPS policy on the policing of non-nationals and on the detection and prevention of, and response to, xenophobic violence and related hate crimes. It also highlighted the failure to classify xenophobic violence and related hate crimes as distinct from ordinary or general criminality. The circumvention of the Immigration Act and the Refugees Act and their associated procedural safeguards in favour of broader 'sweep-and-raid' powers provided for by section 13(7) of the SAPS Act was also identified as a key challenge as well as a contributor to broader sociopolitical challenges related to the enforcement of migration law.

The study further examined the implementation of the legislative and policy framework, positing that the dual phenomena of over- and under-policing result in non-nationals being both a target of the police as well as victims of their inaction. Prominent issues in this analysis included the profiling of non-nationals in law enforcement operations and the lack of effective mechanisms for the prevention and detection of, and response to, xenophobic violence and related hate crimes, including early-warning systems and operational preparedness and coordination. Training was a cross-cutting issue and was reflected in the recommendations at both local and international level that have sought to address deficits in SAPS responses.

Based on the deficit analysis, and within the context of the broader objectives of the NAP and its implementation priorities, the study concludes with the following recommendations being made to the SAPS and its stakeholders in order to improve the policing of xenophobic violence and related hate crimes located within the implementation of the NAP. This is considered to be a way in which to promote cohesion in the approach to addressing such issues across not only the justice sector, but also other relevant sectors.

As a threshold issue, the analysis of the NAP itself identified critical gaps in its approach to addressing xenophobia and related hate crimes, including an almost complete lack of focus on the role of the SAPS in its overarching policy objectives and Implementation Plan. Despite the limitations of the NAP, it remains an important resource to benchmark and prioritise recommendations for action that the SAPS can take to improve its performance in policing xenophobia and related hate crimes, as it is the agreed cross-sectoral blueprint for addressing this critical issue. The Implementation Plan, in particular, contains broad areas of action that relate to challenges identified in this study and which can guide the formulation of policy and operational responses by the SAPS that keep within the priorities and themes of the NAP itself.

Recommendation 1:

Establish an overarching SAPS policy on xenophobia, violence and related hate crimes

The absence of an overarching policy framework to guide the SAPS' approach to the prevention and detection of, and response to, xenophobic violence and related hate crimes, and to its service provision to non-nationals more generally, is a key gap identified in this study. The constitutional and legislative framework lays a solid foundation for the promotion of responsive, equitable and non-discriminatory policing services but lacks detail in terms of how the SAPS intends to implement these obligations at the institutional and operational level. A cohesive policy framework would identify the approach and priorities required by the SAPS, and, if aligned with the broader objectives of the NAP and its 2019–2024 Implementation Plan, would provide coherence in approach across the justice sector.

The methodology for the development of the policy framework is arguably as important as the finalisation of the framework itself. Given the significant fault lines identified in this study regarding the relationship between the SAPS and non-national communities, a consultative approach to the development of the policy could provide an opportunity for forward-looking engagement, assist in building positive partnerships between the police and community leaders and groups, and establish, from the outset, the expectations as well as practical limitations of the SAPS' approach to service delivery and the policing of xenophobic violence and related hate crimes.

This study identified a number of broad issues that require a policy response by the SAPS in order to improve its policing of xenophobia and related hate crimes. An overarching policy framework could address these issues, and its implementation plan would provide an agreed road map for action. These issues include:

- **Xenophobia and related hate crimes.** The lack of a legal status in respect of xenophobia as a stand-alone crime, coupled with what some researchers have described as 'denialism' about the systemic nature of xenophobic violence within the SAPS' political leadership, has hindered an effective response to the challenge. An overarching strategy would afford the SAPS an opportunity to provide an evidence-based acknowledgement of, and response to, this issue, reflecting on past challenges and framed within its broader obligations with regard to the delivery of equal and non-discriminatory services to all who reside in the Republic.
- **Recruitment.** This study has argued that including eligible non-nationals (permanent residents) in front-line and community-focused roles can have a positive impact on the SAPS' engagement with, and service delivery, to non-nationals. Proportional representation of non-nationals within the SAPS, with a particular emphasis on recruitment in areas where non-national communities are most likely to be living and working, is recommended by this study for inclusion in a SAPS policy on xenophobia and related hate crimes.
- **Training.** Based on the information available to the researchers involved in the present study, there is currently no training of SAPS members, either as part of basic or ongoing training, that deals with issues of diversity on the basis of ethnic or national origin or with the legislative regimes governing migration and asylum. Recommendation 3 below sets out in more detail the type of training recommended to promote compliance with legislative frameworks and to improve attitudes to non-nationals. However, the policy should deal with issues of training in terms of the preconditions necessary to promote effective and accountable policing services for non-nationals.
- **The use of sweeps and raids.** Such operations that net non-nationals have been identified in this study as one of the most visible manifestations of the policing of non-nationals in South Africa, as

well as both a cause and effect of negative attitudes to non-nationals at the community level and within the ranks of the SAPS. In legitimate law enforcement operations, sweeps and raids may be tactically justified. However, clarity and direction are required in terms of when they should be used in the context of policing operations that target, or are likely to affect, non-nationals, and how the planning, conduct and review of these operations accounts for the constitutional requirement of equal and non-discriminatory policing services.

- **Profiling.** Similarly, the profiling of non-nationals based on perceptions of high rates of involvement in criminality, or on a lack of understanding of the application and enforcement of immigration and asylum laws, has been identified throughout the study as a significant contributor to over-policing and the breakdown of the relationship between the SAPS and non-nationals. Reflection on the data available – which does not support the prevailing narrative that conflates issues of criminal conduct with irregular migration – and reflection on the efficacy and rights-impact of profiling practices more generally, should be dealt with in an SAPS policy.
- **Social crime prevention strategies.** The policy should address the issue of current social crime prevention approaches and the way in which the implementation of these through targeted profiling and sweeps, particularly in major metros, have been found by the courts and others to be unfairly discriminatory towards non-nationals. Policy guidance is required here to ensure that operations targeting social crime prevention are planned and implemented in terms of not only the constitutional requirement of equitable and non-discriminatory policing services, but are also consistent with the procedural safeguards guaranteed by law, particularly in terms of immigration and refugee law.
- **Zero tolerance of xenophobia.** Finally, the policy should be unequivocal about the prohibition against actions or omissions by members that amount to xenophobia or tolerance thereof. Within existing review and disciplinary processes, the policy should promote the prioritisation of identifying and addressing xenophobia within the Service through a variety of measures, including prevention (by way of training and recruitment screening) and combating (by means of the enforcement of the Code of Conduct and effective internal and external accountability).

Recommendation 2:

Improve data collection in respect of xenophobic violence and related hate crimes

The lack of accurate and complete data on the prevalence of xenophobic violence and related hate crimes has been consistently identified in this study as hindering effective and evidence-based prevention, detection and response on the part of the SAPS. However, there are two current processes that will require the SAPS to address the issue of crime classification and data capture in the context of such violence and crimes. First, the NAP has among its implementation activities improvement in the collection and reporting of data related to incidents of racist and xenophobic offences/hate crimes reported to the SAPS.¹⁷⁴ Secondly, the Prevention and Combating of Hate Crimes and Hate Speech Bill, once passed by the National Assembly, will either create stand-alone offences related to xenophobia or will include xenophobia as an aggravating element of existing crime categories.¹⁷⁵ This will require the addition in the Crime Administration System (CAS) of new categories of crime/a substantiation for existing crime categories related to, inter alia, xenophobia.

The NAP implementation, in particular, provides an opportunity for the SAPS to address this current data gap and to put in place the associated processes required to ensure that data is captured and reported accurately. This study has specifically highlighted the challenges regarding under-reporting of the crimes

concerned by non-nationals to the SAPS. In view of this, an investment will need to be made, in line with Recommendation 5 below, to encourage reporting through community outreach and an improvement in service delivery so that reporting crime to the SAPS is viewed within the community as worthwhile and safe. The training of SAPS detectives will also become critical, and identifying and designating a motivation for a crime will also then fall within their ambit.

Recommendation 3:

Provide training in order to promote compliance with legislative frameworks, and improve attitudes regarding non-nationals

Training is consistently identified in the literature as a key weakness in the capacity of the SAPS to deliver equal and non-discriminatory policing services to non-nationals, as well as effectively detect and prevent, and respond to, xenophobic violence and related hate crimes. This study has identified three streams of training that will need to be developed and rolled out to all members as part of basic and ongoing training:

- **Unconscious bias training/dignity and diversity training.** Training should be delivered to all SAPS members with a view to addressing issues of conscious and unconscious bias towards non-nationals and promoting understanding and acceptance of diversity on the basis of national or ethnic origin within the community. There is precedent for this type of training within the SAPS with the current roll-out by the Employee Health and Wellness Unit of dignity and diversity training. The aim of this training is to change attitudes within the SAPS towards groups that have been traditionally identified as vulnerable to discrimination in the criminal justice context – this includes the LGBTI community, sex workers and drug users. The focus of the training is not on procedural issues relating to the policing of these communities but on improving treatment, understanding and empathy during interactions, as well as on addressing issues of unconscious or conscious bias that may contribute to both the over- and under-policing of these communities. Similar training, but on issues relating to non-nationals, could be included as a module within the existing training or as a stand-alone offering.
- **Immigration and refugee law in South Africa.** It is critical that all SAPS members be trained in the legislative framework that applies to immigration and asylum matters, and in the scope and limitations of the SAPS' powers under these regimes. To address issues identified in this study relating to documentation, and to access and delays within the DHA, the training should also include practical components that expose members to immigration and asylum paperwork, as well as to a broader contextual understanding of the limitations of, and challenges inherent within, the immigration and asylum system.
- **Detective services.** The need to improve data collection regarding xenophobia and related hate crimes will depend on detective services being provided with capacity to identify and designate xenophobia as a motivating factor for crime. This includes training in bias indicators, such as objective facts, circumstances or patterns connected to a criminal act that, alone or in conjunction with other indicators, suggest that a crime was motivated in whole or in part by bias, prejudice or hostility related to xenophobia.
- **Public-order management.** As the study has detailed, while the POP units are integral to the SAPS' response to outbreaks of xenophobic violence, concern has been expressed about the ability of local stations to effectively respond in the period up to the arrival of POP capacity. One of the key challenges identified in the literature is the lack of general training of SAPS members

in public-order management. Given the potential influence that the visible appearance of SAPS officials can have on the way in which an incident develops, and the need to address challenges with regard to public violence from a rights-based perspective, training in public-order management should be developed and included as part of basic and ongoing training for all operational members.

Recommendation 4:

Engage in community outreach to non-national communities and South Africans on issues of service delivery, xenophobia and related hate crimes

As this study has highlighted, the breakdown in the relationship between the SAPS and non-nationals requires specific intervention. The NAP includes in its implementation priorities community awareness and engagement concerning issues relating to xenophobia and related hate crimes. As part of implementing the NAP, and as a complementary measure with regard to the policy and operational recommendations made to improve policing service delivery to non-nationals, efforts should be made to establish a formal platform for ongoing engagement between the SAPS and non-national communities, from national through to local level.

Building trust between the SAPS and the community has been the subject of a provincial-level programme that could be reviewed by the SAPS for potential expansion and replication. As this study has highlighted, there is gross under-reporting of crime against non-nationals to the SAPS because of the lack of trust between non-nationals and the SAPS, as well as a lack of understanding about criminal justice processes in South Africa. To address this issue (and to promote dialogue and engagement by the SAPS and non-nationals in a non-contested environment), the Refugee Rights Centre has been working with the SAPS to host workshops for non-nationals. The workshops focus on the situation where non-nationals are victims of crime (thus contributing to an alternative discourse to that of non-nationals as criminals). The workshops are practical and deal with scenarios such as robberies and intimidation. They also guide non-nationals on issues relating to crime scenes, reporting, working with public prosecutors, bail processes, and court processes.¹⁷⁶

Recommendation 5:

Establish mechanisms and procedures to improve the prevention and detection of, and response to, xenophobic violence

The challenges inherent in the capacity of the SAPS to prevent and detect, and respond to, xenophobic violence has formed a significant portion of this study's overall analysis of the SAPS' delivery of policing services to non-nationals. As one of the most visible aspects of the broader manifestation of xenophobia and related hate crimes in South Africa, the role of the police has been subject of scrutiny at the international and local level, including, notably, in the 2008 SAHRC inquiry into xenophobic violence, by the Ad Hoc Joint Committee on Probing Violence against Foreign Nationals, and by the Special Interest Group on Migration and Community Integration in KwaZulu-Natal. From the literature review, original research undertaken for this study,, and a review of previous recommendations arising from local and international processes, three key opportunities to improve the prevention and detection of, and response to, xenophobic violence are apparent:

- **Early-warning systems.** The NAP locates the development of an early-warning system within the DoJCD, which, from a coordination standpoint, makes sense given the multi-agency participation required to ensure the establishment and operation of such a system. For its part, the SAPS will require internal processes that support an effective early-warning facility within its broader crisis-intervention response to xenophobic violence. As a first step, this study recommends a review of current SAPS capacity to identify and act on intelligence and warning signs, as well as the modelling of a system to improve both operational responsiveness to threats and coordination with other stakeholders as part of a broader cross-departmental early-warning system.
- **Operational preparedness and response.** This study has detailed the challenges inherent in the SAPS' operational preparedness for, and response to, xenophobic violence, noting critical gaps in the current framework for addressing issues of public violence and the lack of institutional planning to prevent or mitigate the effects of mobilisation against non-nationals. This has been identified as a challenge ever since the 2008 SAHRC inquiry, which recommended the revision of standing orders and operational protocols used in policing social conflict more generally, including the establishment of contingency plans for a full range of social conflicts. Based on the literature review and on developments in the policing of xenophobic violence since the 2008 SAHRC report, it is recommended that the SAPS undertake a review of current standing orders and operational protocols in order to identify where these can be strengthened to improve operational preparedness, in line with the challenges identified in this and other studies. It is also recommended that a model contingency plan and risk assessment framework be established that can be operationalised in the context of xenophobic violence, in line with the minimum considerations for contingency planning and risk assessments proposed by the African Commission on Human and Peoples' Rights in its Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa.¹⁷⁷
- **Improve coordination through NATJOINTS.** This study has detailed how the lack of responsiveness and coordination through NATJOINTS has impacted the capacity of the SAPS to respond effectively to xenophobic violence. In particular, the study set out various issues relating to the way in which the structure operates and pointed to the significant lags from the beginning of attacks to activation, which has resulted in the facility becoming an entirely reactive rather than proactive structure. It is thus recommended that, to address the issues of structure and lag, that SAPS lead a process within NATJOINTS to develop a strategic plan for responding to xenophobic attacks based on lessons learnt from previous efforts, including provision for effective coordination between JOINTS at the national and provincial level.

Endnotes

- 1 Constitution of the Republic of South Africa, 1996 (Constitution), Preamble, emphasis added.
- 2 Republic of South Africa (2019), National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, para. 81, available at https://www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf (accessed 7 February 2021).
- 3 South African Human Rights Commission (SAHRC), 'Non-nationals', available at <https://www.sahrc.org.za/home/21/files/FINAL%20Non-Nationals%20Educational%20Booklet.pdf> (accessed 7 February 2021).
- 4 Republic of South Africa (n 2 above), para. 80.
- 5 Constitution, section 205(3).
- 6 Constitution, section 8(3).
- 7 The only permissible limitations on constitutional rights as they apply to non-nationals who are not citizens are those contained in sections 19 (political rights), 21(3) and (4) (right to enter and remain in the Republic and to hold a passport), and 22 (freedom of trade, occupation and profession).
- 8 Preamble to the South African Police Service Act (SAPS Act) 68 of 1995.
- 9 SAPS presentation to the SAHRC National Hearing on Social Cohesion and Xenophobia in South Africa (February 2018), hearing transcript, Slide 4.
- 10 L Edwards & K Stone (2016), 'Implementation of the Luanda Guidelines: Review of arrest, police custody, and remand detention in South Africa', APCOF Policy Paper, available at <http://apcof.org/wp-content/uploads/2017/03/014-implementation-of-the-luanda-guidelines-review-of-arrest-police-custody-and-remand-detention-in-south-africa-.pdf> (accessed 14 February 2021).
- 11 Immigration Act 13 of 2002, sections 41 and 34(1).
- 12 SAPS presentation (n 9 above), Slide 9.
- 13 Brigadier General Portia Lesese (February 2018) – testimony given during SAPS presentation to the SAHRC National Hearing on Social Cohesion and Xenophobia in South Africa, hearing transcript, p. 396.
- 14 United Nations High Commissioner for Refugees (UNHCR) (2015), 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', available at <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.
- 15 African Commission on Human and Peoples' Rights (ACHPR), Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa, available at <http://www.achpr.org/instruments/refugee-convention/ratification/>.
- 16 UNHCR, 'The principle of non-refoulement under international human rights law', available at <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (accessed 23 February 2021).
- 17 Refugees Act, sections 23 and 36.
- 18 SAPS, National Instruction 12 of 2019: Arrest and Treatment of Illegal Foreigners, 1(4).
- 19 SAPS, National Instruction 4 of 2014, Public Order Police: Crowd Management during Public Gatherings and Demonstrations, 1(2).
- 20 SAPS, Standard Operating Procedure (SOP) 1 of 2016: Detention, Death or Victim of Crime of a Foreign National, emphasis added. This SOP relates to notification requirements concerning the detention, death or victimisation of international visitors to South Africa, not the categories of non-nationals who are the subject of this research study.
- 21 Brigadier General Portia Lesese (n 13 above).
- 22 SAPS Code of Conduct.
- 23 Ibid.
- 24 SAPS Code of Ethics, available at <https://www.saps.gov.za/about/ethics.php#:~:text=Ethical%20policing%20demands%20that%20we,the%20approval%20of%20the%20public.&text=Application%3A%20Employees%20of%20the%20SAPS,being%20of%20the%20outmost%20importance> (accessed 12 November 2020).

- 25 SAPS presentation (n 9 above), Slide 4.
- 26 Loren Landau, 'South Africa has a plan to fight prejudice. But it's full of holes', *The Conversation*, 1 April 2019, available at <https://theconversation.com/south-africa-has-a-plan-to-fight-prejudice-but-its-full-of-holes-114444>.
- 27 Ibid.
- 28 L Edwards, 'The inaction (and complicity) of South African police fuels xenophobic violence', *Daily Maverick*, 24 September 2020, available at <https://www.dailymaverick.co.za/opinionista/2020-09-24-the-inaction-and-complicity-of-south-african-police-fuels-xenophobic-violence/>.
- 29 Republic of South Africa (n 2 above), para. 189.
- 30 P Fabricius (2014), 'Is xenophobia becoming part of the South African way of life?', available at <https://issafrica.org/amp/iss-today/is-xenophobia-becoming-part-of-the-south-african-way-of-life>.
- 31 Interview with Social Crime Prevention senior SAPS officer, 1 September 2020.
- 32 In Masiphumelele, Western Cape, for example, when respondents were asked 'Who caused the attacks?' or 'Who looted?', the overwhelming response was 'The community' – see N Mngqibisa, L Mawere & L Freeman (October 2017), 'Masiphumelele research report – xenophobia and outsider exclusion', available at https://www.researchgate.net/publication/338792477_Masiphumelele_Research_Report_-_Xenophobia_Outsider_Exclusion.
- 33 Tamlyn Monson (2015), *Citizenship, 'xenophobia' and collective mobilization in a South African settlement: The politics of exclusion at the threshold of the state*, PhD thesis, London School of Economics and Political Science, p. 20.
- 34 SAPS, *Annual Crime Statistics, 2013/14*, p. 11.
- 35 This might not be a role only for the SAPS and is discussed in forthcoming research for the African Policing Civilian Oversight Forum (APCOF) on the role of the community policing forums in the prevention of xenophobic violence and related hate crimes.
- 36 Interview with Institute for Security Studies representative, 29 July 2020.
- 37 Indeed, the SAPS data aligns with that of Xenowatch, which, according to information with which the present researchers were provided, has reported that its data is also likely to be under-representative because not all cases are reported to the platform.
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- 96 SAHRC (n 40 above). This was supported by statements made to the researchers in the present research study during interviews with policing experts and researchers on xenophobia.
- 97 Data and research suggest that police officers have more xenophobic bias than the rest of the population, not less. In a survey of Johannesburg police officers in the mid-2000s, 78.4% of interviewed police officers agreed with the statement, ‘Foreigners in general (whether they are undocumented or not) cause a lot of crime in Johannesburg’, and the overwhelming majority (87.1%) regarded undocumented or illegal immigrants in the city as being involved in crime. The same study indicated that xenophobic sentiments by the police tended to be directed at poor, African migrants:
- When it comes to immigrants, there is so much xenophobia out there and it is the same in the police. The problem is with black migrants from Africa. There are illegal white, Indian and coloured foreigners, but they are not hunted down like we do to African migrants. You see sting operations in Johannesburg targeting only places where African migrants will be found’* (white male inspector) (bold added)
- see Gareth Newham, Themba Masuku & Jabu Dlamini (2006), ‘Diversity and transformation in the South African Police Service’, CSVR, p. 44, available at <https://www.csvr.org.za/docs/policing/diversity.pdf>.

- 98 The researchers in the present study asked respondents about how they would characterise the police's response to xenophobic attacks. Responses included: 'Just standing there' (Interview with Refugee Rights Centre representatives, 10 July 2020); 'It's almost like they don't care' (Interview with Refugee Social Services representative, 17 July 2020); 'Reluctant' and 'Blaming the victim' (Interview with Institute for Security Studies representative (policing expert), 29 July 2020); 'Often with a hands-off approach' and 'Arms folded and watching' (Interview with CSVR representative, 11 August 2020); 'Uneven', 'They often step back to allow communities to take a bit of action', and 'Only interven[ing] when there is media attention' (Interview with APCOF representative, 29 July 2020); and 'The police do not respond to xenophobia as such' and 'Weak and ineffective, generally speaking' (Interview with ACMS/Xenowatch representatives (xenophobic violence experts), 31 July 2020).
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- 105 Some examples were provided by respondents to interviews conducted by the researchers for this study: 'Violence doesn't come out of nowhere[;] it's not always a spontaneous reaction as people call it. It is actually organised and planned in advance' (interview with ACMS/Xenowatch representatives (xenophobic violence experts), 31 July 2020); 'Statements are often being made by leadership', 'Warning signs are always there' and '[It] never comes as a surprise' (interview with CSVR representative, 11 August 2020); and 'Nearly every xenophobic attack we see follows community meetings[;] the attacks follow eviction notices, they follow social media messages calling for violence' (interview with ACMS/Xenowatch representatives (xenophobic violence experts), 31 July 2020). See, also, Jan Bornman, 'The people who sparked xenophobic violence', *The Citizen*, 11 September 2019, available at <https://citizen.co.za/news/south-africa/insight/2177958/the-people-who-sparked-the-xenophobic-violence/>: 'There are often posters or leaflets circulating. For example, one flyer from Gauteng in September 2019 reads: "Sisonke People's Forum ... invite all the residents of this country ... to come together as South Africans with one voice of ENOUGH IS ENOUGH, ON SELLING OF DRUGS, ON PROPERTY THEFT, AND ON OUR WORK TAKEN BY FOREIGN NATIONALS".'
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- 111 Interview with CSVR representative, 11 August 2020.
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- 113 Interview with ACMS/Xenowatch representatives (xenophobic violence experts), 31 July 2020.
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ABOUT THIS REPORT

The African Policing Civilian Oversight Forum (APCOF) is funded by the European Union (EU) in order to support the development of the South African Police Service's (SAPS) capacity to detect and prevent, and respond to, xenophobic violence and related hate crimes. The present project is set against the backdrop of numerous incidents of xenophobic violence and hate crimes directed, since 2008, at non-nationals and other persons marginalised on the basis of their national origin who reside in the Republic of South Africa. Outbreaks of xenophobic violence have, however, persisted, and the SAPS' capacity to effectively detect, prevent and respond has been questioned, despite successive research studies, inquiries and recommendations by national, regional and international human rights bodies over the past 11 years designed to strengthen the SAPS' capacity.

The present research was conducted in order to: better understand the challenges relating to current SAPS policy, training, instructions and practices in respect of the prevention, detection and investigation of racist and xenophobic violence and hate crimes; identify gaps in the existing SAPS regulatory, training and management architecture; and make recommendations so as to address these gaps. The project has also been informed by several national developments, namely: the government's 2030 National Development Plan (NDP); the adoption of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance; and the tabling in Parliament of the Prevention and Combating of Hate Crimes and Hate Speech Bill.

ABOUT APCOF

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

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