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Xenophobic Violence in South Africa and the Limits of African Union (AU) Legal Enforcement of Human Rights

Evans Owino[1]*, and Agbale Patience[2]

[1]*School of Law, Daystar University, Kenya, Email Address: evansowino210201@daystar.ac.ke*

[2]*Faculty of Law, Ambrose Alli University, Ekpoma, Edo State, Nigeria, Email: patient.agbale@aau.edu.ng*

** Correspondence: patient.agbale@aau.edu.ng*

Abstract: The xenophobic violence that occurs in South Africa highlights the challenges that exist between the constitutional democratic order, the phenomenon of migration, social inclusion, and African solidarity. Despite the emphasis placed on human dignity and equality in Africa, migrants are still victims of hostility, exclusion, intimidation and violent attacks. The situation has been worsened by a lack of accountability, repeated acts of anti-migrant mobilization and the lack of regional mechanisms for ensuring an appropriate state response to the problem. This research will seek to understand the dynamics and motivations behind xenophobic violence in South Africa and how the human rights institutions of the African Union can be used to address this violation and make sure there is compliance. The research will adopt a doctrinal methodology approach, where a descriptive and an analytical method will be used to analyze various legal instruments at both regional and international levels, institutional proceedings, judicial precedents, academic literature and reports from credible organizations. This study highlights that even though the African human rights regime identifies the existence of relevant rights, enforcement remains limited due to limited access to the African Court, dependency on state consent, poor implementation of recommendations by the Commission, and lack of follow-up. The paper therefore calls for the need for strong domestic and regional oversight mechanisms.

Keywords: Xenophobic Violence, Human Rights, Legal Enforcement, South Africa, African Union

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1. INTRODUCTION

The significance of human rights in the development of Africa lies in the fact that the struggle for independence was a fight against the oppression of the people and their humiliation and exclusion due to race[1]. Human rights link individual liberties with the interests of society in terms of equality, participation, development, culture, and non-discrimination. The philosophy of human rights of Africans is based on the principles and practices of colonialism, apartheid, exploitation, and inequality in citizenship[2]. The African Charter on Human and Peoples' Rights,

[1] Romola Adeola, "Preventing Xenophobia in Africa: What Must the African Union Do?" *African Human Mobility Review* 1, no. 3 (2015): 253–72.

[2] Oluwatoyin O. Ilesanmi, "Xenophobic Attacks and Other Violence in South Africa: A Challenge to World Peace," *IFE Psychologia: An International Journal* 16, special issue 1 (2008): 274–95.

which embraces civil and political guarantees, along with economic, social and cultural rights, rights of the peoples and duties of individuals, represents such an approach to human rights[3]. Nevertheless, at the same time, while the state undertakes to respect constitutionally established human rights, there remain some difficulties: political violence, discrimination, displacements, poverty, institutional weaknesses and inequality in access to justice. Migrants and refugees can become particularly vulnerable in cases where national citizenship becomes a precondition for being protected. The human rights system of the African Union attempts to introduce common standards and regional accountability in the area of human rights protection[4]. However, the efficiency of the efforts of the organization is contingent upon their implementation.

The African human rights system has evolved through continental and subregional institutions, state reporting, advocacy and adjudication processes. The African Commission on Human and Peoples' Rights advances and ensures human rights through the examination of state reports, communications, special mechanisms, resolutions and recommendations[5]. The African Court on Human and Peoples' Rights complements this process through the judicial interpretation and application of regional norms. These systems exist alongside domestic court systems, human rights commissions, civil society organizations and regional communities, which may detect any violation of the rights and ask their respective governments to take action in response to such violations[6]. Yet, there is an implementation challenge that exists since findings from the region are not automatically translated into any investigation, prosecution, compensation or institutional reform at the domestic level. Research on implementation challenges reveals weak follow-up, lack of resources, poor design and lack of political will as persistent challenges[7]. South Africa has ratified the Protocol to the Court but has not signed the 34(6) of this instrument that precludes individuals and NGOs from accessing the Court. This gap becomes critical where violations are widespread and politically sensitive and where the victims have little social clout[8].

The violence against foreigners is one of the recurrent forms of hostility and violence against people who are considered foreigners or immigrants from other African countries[9]. Examples of xenophobic violence include threats, physical assault, killing, stealing, burning down houses and shops, forced evictions, intimidating migrants, as well as damaging the property of foreigners. The wave of violent attacks in May 2008 resulted in the death of more than 60 people and made tens of thousands of immigrants homeless. Also, the violence in 2015 and September 2019 once again made African migrants and refugees vulnerable to killings, injuries, damage to their property, and displacement[10]. These acts of violence occur repeatedly and not only in urban areas but also in the whole country, including townships. However, xenophobia occurs not only during these massive attacks but in ordinary life when migrants

[3] Israel Kehinde Ekanade and Kholofelo Annah Rakubu, "Politics of Belonging, Economic Competition and the Sustainability of Xenophobic Violence in Post-Apartheid South Africa," *OIDA International Journal of Sustainable Development* 18, no. 11 (2025): 19–30.

[4] Jean Pierre Misago, "Responding to Xenophobic Violence in Post-Apartheid South Africa: Barking up the Wrong Tree?" *African Human Mobility Review* 2, no. 2 (2016): 443–67.

[5] Jonathan Crush, "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa," *International Migration* 38, no. 6 (2001): 103–33.

[6] Jean Pierre Misago and Loren B. Landau, "'Running Them Out of Time': Xenophobia, Violence, and Co-Authoring Spatiotemporal Exclusion in South Africa," Geopolitics 28, no. 4 (2023): 1611–31.

[7] John C. Mubangizi, "Xenophobia in the Labour Market: A South African Legal and Human Rights Perspective," *International Journal of Discrimination and the Law* 21, no. 2 (2021): 139–56.

[8] Jean Pierre Misago, Iriann Freemantle, and Loren B. Landau, Protection from Xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia-Related Programmes (Geneva: United Nations High Commissioner for Refugees, 2015).

[9] Alex Eliseev et al., Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa (New York: NYU Press, 2008).

[10] Janet McKnight, "Through the Fear: A Study of Xenophobia in South Africa's Refugee System," *Journal of Identity and Migration Studies* 2, no. 2 (2008): 18–42.

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can experience harassment, exclusion from residential areas, extortion, discrimination, and even threats to work and earn money[11]. Moreover, African immigrants and refugees may be victims of the xenophobic attacks regardless of their positive influence on the local economy and the duration of stay in the country.

In South Africa, the Constitution guarantees equality, dignity, life and liberty of movement, and the Promotion of Equality and Prevention of Unfair Discrimination Act and the Refugees Act add more protections at the domestic level[12]. At the regional level, there is the African Charter on Human and Peoples' Rights and the African Union's refugee regime, both of which enhance obligations towards non-nationals. Domestic institutions, such as the judiciary, the police force, and the South African Human Rights Commission, have a responsibility to protect individuals from private violence and discriminatory practices by public officials. However, the major problem in the discussion here is that of the failure of enforcement of formal protective mechanisms[13]. Repeated attacks, lack of prosecution, poor investigations, use of inflammatory language, and patchy protection illustrate problems in preventing violence and ensuring accountability. For example, migrants may not report violations of their rights due to fears of being arrested, detained, deported or due to linguistic differences and suspicions about the officials[14]. Regionally, the African Union is capable of advocating for standards, evaluating grievances through human rights organs, and making recommendations but is not able to easily enforce national measures.

Existing scholarly works investigate the history of xenophobia, its socio-economic roots, mobilization, experiences of migrants and discrimination and violence in South Africa. Others have examined institutions for human rights in Africa, regional adjudication, compliance and implementation of decisions by States. Both sets of literature are largely separate. There is a need for doctrinal analysis that will help link frequent violent episodes in South Africa with limitations of the enforcement of African Union instruments, and means of seeking regional remedies and ways to secure state compliance. The current research seeks to fill this gap by analyzing application of regional human rights standards to xenophobic violence and the ability of African Union instruments to prevent such human rights violations, bring States to account and give remedy. Its innovation is that it connects the South African case with the enforcement of such instruments rather than viewing xenophobia as a domestic problem of migration and security. The main purpose of the current paper is an analysis of the capacity of the African Union to deal with xenophobic violence in South Africa.

2. METHOD

The research methodology applied is doctrinal legal research that applies descriptive and analytical approaches to the analysis of xenophobia in South Africa and the limitations of the African Union's enforcement of human rights provisions. The primary sources of law are the Constitution of South Africa, relevant domestic laws, the African Charter on Human and Peoples' Rights, the Protocol on the Statute of the African Court of Justice and Human Rights, the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, relevant international human rights instruments, judicial opinions, and decisions of African human rights bodies. Such sources are gathered from government gazettes, case law databases, websites of the African Union and the African Commission and treaty collections. Secondary

[11] Catherine Kavata Musuva, International Migration, Xenophobia and the South African State (Master's thesis, Stellenbosch University, 2015).

[12] E. Tendayi Achiume, "Beyond Prejudice: Structural Xenophobic Discrimination against Refugees," *Georgetown Journal of International Law* 45 (2013): 323.

[13] Aidan Mosselson, "'There Is No Difference between Citizens and Non-Citizens Anymore': Violent Xenophobia, Citizenship and the Politics of Belonging in Post-Apartheid South Africa," *Journal of Southern African Studies* 36, no. 3 (2010): 641–55.

[14] Bethuel Sibongiseni Ngcamu and Evangelos Mantzaris, Addressing Xenophobia in South Africa: Drivers, Responses and Lessons from the Durban Untold Stories (Bingley: Emerald Publishing, 2021).

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sources of information are peer-reviewed journal articles, textbooks, theses, institutional reports, and policy documents published by reliable civil society organizations. These are accessed via scholarly databases and institutional repositories of universities and research institutions, such as the African Centre for Migration and Society and Afrobarometer. The analysis assesses the effectiveness of these measures in relation to violence incidents, access barriers, state accountability and the implementation of regional decisions. Criticism involves identifying doctrinal weaknesses, making comparisons between the institutional mandates and actual enforcement, and formulating legal policy proposals. No empirical evidence is collected by the research, while reports and statistics serve as secondary sources.

3. RESULT AND DISCUSSION

3.1. Xenophobic Violence in South Africa

Xenophobic violence refers to hostility, exclusion or aggression towards individuals who are considered foreigners, outsiders, or culturally different from the local population[15]. In the case of South Africa, it not only includes violent attacks but also threats, intimidation, verbal abuse, extortion, evictions, denial of services, discriminatory treatment in health facilities, and destruction of migrants' property[16]. Therefore, xenophobic violence encompasses both periodic attacks on immigrants and daily actions that create insecurity in public areas, places of work, shopping centres, and neighbourhoods in South Africa. The 2025 report from Xenowatch defines xenophobia in a broader sense and covers discrimination based on xenophobic attitudes regardless of the legal status of the victims[17]. This is due to the fact that individuals can be discriminated against on account of appearance, accent, language, name, nationality, among other factors, even though they are legally living in the country. Xenophobia entails othering the demarcation between individuals who are perceived to belong to the nation and the outsiders or rivals to the nation.

Figure 1: Conceptual framework of xenophobic violence in South Africa



Source: Design by authors based on doctrinal data obtained

[15] Hilary Nwaechefu, Nnawulezi Uche, Mary-Ann O. Ajayi, and Ogah Chinyere Constance, "Addressing the Emerging Issues of Xenophobic Attack and Human Rights Violations in South Africa: Adopting a Human Rights-Based Approach," *The Age of Human Rights Journal* (2023): e7806.
[16] Odiaka Ngozi, "The Face of Violence: Rethinking the Concept of Xenophobia, Immigration Laws and the Rights of Non-Citizens in South Africa," *BRICS Law Journal* 4, no. 2 (2017): 40–70.
[17] Okoro Sunday Asangausung, Nkereuwem Ndarake James, Ben Edet Oyombio, and Peter Archibong Essoh, "Xenophobic Violence in South Africa: Lessons for African Regional Security Integration," *Global Journal of Leadership and Democratic Research* 1, no. 2 (2026): 36–56.

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The history of xenophobic violence in democratic South Africa shows repetition rather than one-off crises. The attacks that occurred in 2008 occurred in many provinces, resulting in the death of more than 60 people and displacing tens of thousands[18]. There were further attacks in 2015 on the continent of Africa migrants and businesses owned by foreigners, with attacks in September 2019 that included looting, arson, killings and displacements. In the period from March 2019 to March 2020, there was a case documented by Human Rights Watch where harassment and attacks occurred by both private individuals and public officials[19]. Xenowatch, through their later dataset, records 110 incidents in 2022, 62 in 2023 and 83 in 2024. It can be noted that there is a drop, but the problem is still not solved. Another element is that the geography also changes. The province that records the highest numbers of incidents for the years 2022-2024 is KwaZulu-Natal, followed by Gauteng. These incidents show how quickly anti-migrant attitudes may escalate based on local arguments, protests or politics.

Xenophobia is the result of interactions between social, economic and political forces, rather than any one factor. Economic factors like high unemployment rates, poverty, inequality, competition for trade, and frustration with government-provided services can make the environment where foreigners are made scapegoats for societal issues that stem from broader structural failures[20]. Xenowatch sees economic insecurity, the weak response of the state and scapegoating as constant triggers of xenophobia, and there is research on how political discourse portrays immigrants as threats to employment, national security and national culture. Xenophobia is a simplification of economic conditions and a shift of people's frustrations against foreigners. Vigilantism becomes a way to translate xenophobia into concrete actions in the form of orders that foreigners have to move out of neighbourhoods, shut down their businesses, or stop accessing public services[21]. Movements like Operation Dudula exemplify how xenophobia campaigns become organized and geographically significant. Nevertheless, economic suffering alone does not lead to xenophobic acts; leadership, social ties, propaganda, law enforcement, and relationships in the community play a role in whether xenophobia turns into violence[22].

Xenophobic violence has both human and economic impacts, going beyond the initial harm of physical injuries. The victims will lose their loved ones, property, businesses, savings, employment, educational prospects, as well as access to healthcare services[23]. In fear of further attacks, they might be forced to move from one place to another, which might interfere with the education of their children. Xenowatch's 2025 report on the 2022–2024 years counted 255 violent events, 57 deaths, 6,134 individuals who were displaced, and 810 shops looted during the mentioned period. Also, incident classifications done by Xenowatch include 109 incidents of violence, 32 of harassment, 26 of extortion, and 22 of threats. Such numbers clearly show that the most common type of incident registered is violence; however, coercion and exclusion have an impact on the lives of the migrants as well. The report mentions the problems with the quality of the available information due to data limitations and underreporting. As

[18] Odion Olowu, "Xenophobic Violence in South Africa: An International and Domestic Legal Perspective," *IFE Psychologia: An International Journal* 16, special issue 1 (2008): 296–318.

[19] Human Rights Watch. "They Have Robbed Me of My Life: Xenophobic Violence against Non-Nationals in South Africa." 17 September 2020.

[20] Loren Brett Landau, Kaajal Ramjathan-Keogh, and Gayatri Singh, Xenophobia in South Africa and Problems Related to It (Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand, 2005).

[21] Nicos Trimikliniotis, Steven Gordon, and Brian Zondo, "Globalisation and Migrant Labour in a 'Rainbow Nation': A Fortress South Africa?" *Third World Quarterly* 29, no. 7 (2008): 1323–39.

[22] Ede Tendayi Achiume, "Governing Xenophobia," *Vanderbilt Journal of Transnational Law* 51 (2018): 333.

[23] Carol Yemotele Adjai, The Halo Slips? Xenophobia and Its Consequences in the New South Africa (University of Leicester, 2010).

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such, the number of incidents recorded might be smaller than the actual harm inflicted[24]. Furthermore, the consequences affect South African people because of broken businesses, broken relations in the neighbourhood, fear, and lack of trust.

Public opinion is an influential factor in the xenophobic environment, although negative sentiments do not necessarily result in violence. In its 2024 South African survey, Afrobarometer found that 57 per cent of respondents would feel comfortable with a foreign worker or immigrant living next door, and 39 per cent disliked them[25]. According to the Afrobarometer survey, people generally showed high tolerance for individuals who belong to other religions and other ethnic groups, indicating that acceptance of diversity becomes lower when national origin and migration are at stake. According to an Afrobarometer survey conducted in January 2026, 69 per cent saw the economic effect of immigration in a negative light and 83 per cent of citizens were in favour of limiting the number of foreign job seekers. Public opinion may play a role in discourse and political discourse and even in ordinary interactions with migrants[26]. However, such survey results should not be taken literally because dissatisfaction with the immigration policy does not equate to violence and discrimination against immigrants. The task for the researcher is to understand how restrictive views, disinformation, political interests, and low levels of trust between social groups justify exclusion.

Figure 1: Human and material consequences, 2022–2024

Recorded consequence	Number
People displaced	6,134
Deaths	57
Shops looted	810
Total recorded incidents	255

Source: Xenowatch, 2025 report on xenophobic discrimination in South Africa, 2022–2024[27].

3.2. AU Legal Framework concerning Enforcement and Protection of Human Rights in Xenophobic Violence in South Africa

In the African Union, the protection of human rights in light of xenophobic violence against foreigners in South Africa is entrenched in continental instruments providing substantive rights for all humans[28]. Article 2 of the African Charter on Human and Peoples' Rights provides that every person has the right to the enjoyment of rights and freedoms without discrimination

[24] Joel Adelusi Adeyeye and Daniel Friday Atidoga, "African Union Peacekeeping Operations: Challenges and Emerging Issues," *Scholarly International Journal of Law, Crime and Justice* 4, no. 8 (2021): 492–511.
[25] Afrobarometer. Mpako, Asafika, and Stephen Ndoma. "South Africans Embrace Diversity, but Trust between Citizens Is Lacking." 15 November 2024.
[26] Afrobarometer. Mpako, Asafika, and Stephen Ndoma. "South Africans Oppose Immigration, Express Mixed Attitudes toward Foreigners." 10 January 2026.
[27] Mlilo, Silindile N. Xenophobic Discrimination in South Africa: An Overview of Trends, Effects, and Responses (2022–2024). Xenowatch Brief Report, September 2025.
[28] Geoff Budlender, "Human Rights Groups Face New Challenges in South Africa," *Human Rights Brief* 3, no. 2 (1996): 1.

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of any kind as to race, ethnic group, color, nationality or social origin[29]. The non-discrimination provision is fundamental in the analysis of xenophobic violence against foreign African nationals in South Africa. In addition, Article 3 of the African Charter provides that every individual shall be entitled to the enjoyment of equal protection of the law without discrimination[30]. The obligation to provide adequate protection of these rights and freedoms falls under Article 1 of the Charter when foreigners are victims of violence from violent mobs in a host state. Apart from the guarantees of equality provided by the Charter, Article 4 provides the right to the inviolability of the person and of the human being, while Article 5 prohibits torture[31].

Apart from providing rights to basic physical security of persons, the regional laws make specific guarantees regarding the legal status and movements of foreigners among member states. Under Article 12(1) of the African Charter, every person has the right to freedom of movement and residence within the borders of a state subject to observance of the laws of that state[32]. Most importantly, Article 12(4) stipulates that every non-national lawfully within the territory of a state party shall not be subjected to expulsion except pursuant to a decision reached in accordance with the law. About xenophobia, where foreigners can experience mob expulsion or arbitrary expulsion, Article 12(5) prohibits mass expulsion of foreigners under continental law. The prohibition serves to protect foreigners from mob displacement and arbitrary expulsions during times of social unrest. Additionally, under Article 14, there is the property right and thus foreigners will not experience illegal seizure of their belongings. Furthermore, under Article 28, every person is supposed to have the duty to respect other people without any form of discrimination.

The machinery that was put in place to enforce charter rights relies largely on the African Commission on Human and Peoples' Rights, as per Article 30 of the African Charter. Having been charged under Article 45 to promote and protect human rights, interpret provisions of the Charter, and formulate rules to resolve any legal problem, the Commission forms the main supervisory body on the continent. States are required under Article 62 to prepare and submit periodic reports at intervals of two years on the steps taken in legislation and operations to implement Charter rights. In situations of widespread xenophobia, the commission can use its mandate of promotion and protection of human rights to carry out investigations on state activities, study state periodic reports, and make recommendations[33]. Article 58(1) of the Charter states that where communications before the Commission point to a pattern of gross or mass violations of human rights, the Commission must bring it to the attention of the Assembly of heads of state and government. The assembly may subsequently request a comprehensive study which yields a factual report and findings[34].

To strengthen and fortify the protective role of the African Commission, the African Union enacted the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights under Article 1. As described in Article 2, the Court acts as a means to strengthen the activities of the Commission by making binding judicial decisions on human rights disputes. According to Article 3(1), the jurisdiction of the Court covers all cases involving the interpretation and application of the Charter, the Protocol, and any other human rights treaties ratified by the state involved[35]. Where xenophobia leads to

[29] African Charter on Human and Peoples' Rights
[30] Ibid
[31] Ibid
[32] Ibid
[33] Jonathan Crush and Sujata Ramachandran, "Xenophobia, International Migration and Development," *Journal of Human Development and Capabilities* 11, no. 2 (2010): 209–28.
[34] Damian Etone, "African States: Themes Emerging from the Human Rights Council's Universal Periodic Review," *Journal of African Law* 62, no. 2 (2018): 201–23.
[35] David Everatt, "Xenophobia, State and Society in South Africa, 2008–2010," *Politikon* 38, no. 1 (2011): 7–36.

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violations of life, personal dignity, freedom of person under Article 6, or the right to a fair hearing under Article 7, the aggrieved individuals or monitoring entities may take their grievances to the Court. In the case of utmost gravity and urgency, Article 27(2) allows the Court to make provisional orders where individuals exposed to mob violence risk irreparable harm. Besides, Article 27(1) enables the Court to make necessary remedies to the affected parties, including financial reparations.

At the broader continental level, the Constitutive Act of the African Union provides sovereign principles that guide continental interventions in cases of human rights violations[36]. Indeed, under Article 3(8) of the Constitutive Act, the Union undertakes to promote and defend human and peoples' rights in accordance with the provisions of the African Charter. In addition, under Article 4(m), some of the core working principles of the Union include respect for democratic principles, human rights, the rule of law, and good governance. Furthermore, Article 4(o) obligates respect for the sanctity of human life and zero tolerance for impunity. Nonetheless, this regime of law is always faced with the challenge of enforcing human rights within the legal framework of Article 4(g) of the Constitutive Act, which guarantees non-interference in the internal affairs of any member state by any other member state of the Union. Article 4(h) of the Constitutive Act provides the exceptional right to intervene in a member state in accordance with an Assembly decision. However, such an intervention is legally limited only in cases of war crimes, genocide, and crimes against humanity.

Table 2: Comparative Analysis: Domestic Legal Framework (South Africa) vs. Regional Legal Framework (African Union)

Comparison Dimension	Host Country Domestic Legal Framework (South Africa)	Regional African Union Legal Framework
Primary Legal Basis & Instruments	South African National Constitution, Domestic Immigration Laws, Refugee Laws, and Domestic Criminal Law Legislation.	African Charter on Human & Peoples' Rights, Constitutive Act of the AU, and Protocol of the African Court on Human and Peoples' Rights.
Non-Discrimination & Protections for Foreign Nationals	Enforces guarantees provided by domestic statutes; dependent on domestic law enforcement, police capabilities, and domestic politics.	Art. 2 (No discrimination), Art. 3 (Equal protection), Art. 12(4)-(5) (Protection against arbitrary expulsion & prohibition of mass expulsions).
Right to Property & Physical Security	Domestically enforced through domestic magistrate/high courts and the South African Police Service (SAPS).	Art. 4 (Right to life), Art. 5 (Dignity & prohibition of degrading treatment), Art. 14 (Protection of property rights).
Judicial Mechanisms & Access to Remedies	Jurisdiction over crimes committed locally; requires prosecution through domestic magistrate courts, High Courts, and the Constitutional Court.	African Commission (Quasi-judicial, Art. 30/45) & African Court on Human & Peoples' Rights (Judicial decisions binding, Art. 1/3).

[36] Magnus Killander and Michael Gyan Nyarko, "Human Rights Developments in the African Union (January 2017–September 2018)," *African Human Rights Law Journal* 18, no. 2 (2018): 732–57.

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Direct Access for Victims & NGOs	Litigation is possible directly for residents/foreigners before domestic courts.	Restricted: Petition by individuals/NGOs to the African Court needs to submit the "Article 34(6)" Declaration (which South Africa hasn't deposited).
Sovereignty & Enforcement Limits	Domestic sovereignty controls domestic policing, criminal prosecution, and domestic social order.	Bound by Art. 4(g) (Non-interference); Intervention under Art. 4(h) can only be for war crimes, genocide, and crimes against humanity.

3.3. Responsibilities of the African Union in Legal Enforcement and Protection of Human Rights

The major role of the African Union in ensuring that there is the protection of human rights involves laying down regional standards and ensuring compliance[37]. In Article 3(8) of the Constitutive Act of the African Union, one of the constitutional goals is the promotion and protection of human rights in line with the African Charter. The mandate is further strengthened through Article 4(m) and Article 4(o), which stipulate the importance of upholding human rights, democracy, rule of law, sanctity of life and no impunity. In Article 1 of the African Charter, State Parties commit themselves to adopting legislative measures to ensure the implementation of the rights identified[38]. To assist in the implementation of the mandate locally, Article 45(1)(b) of the Charter empowers the African Commission to develop rules and principles to help solve legal issues concerning basic freedoms on which African governments can base their laws. Moreover, Articles 60 and 61 require continent-wide bodies to be guided by international human rights law and African legal practice in formulating a harmonized regional normative regime for the protection of all human beings[39].

These principles have to be monitored, investigated and supervised within Africa. Article 30 of the African Charter provides for the establishment of the African Commission on Human and Peoples' Rights, which acts as an independent organ established under Article 45(2) for the purpose of ensuring that human rights are protected within the conditions provided in the Charter. One of its functions includes evaluation of compliance with the principles through periodic reporting, which is mandatory under Article 62, and where State Parties are obliged to provide biennial reports with regard to measures taken to protect human rights[40]. In situations where there are inter-state complaints under Articles 47 to 49 or individual communications under Article 55, the Commission is entitled under Article 46 to employ any appropriate means of investigation. Where investigations indicate that there is a series of grave or massive violations of human rights, the Commission is bound under Article 58(1) to bring the matter to the attention of the Assembly of Heads of State and Government.

Apart from quasi-judicial monitoring, the AU faces an immense judicial obligation to provide legally binding solutions through the African Court on Human and Peoples' Rights. Established under Article 1 of its Protocol in order to complement the duty of the Commission as per Article 2, the Court enjoys wide judicial jurisdiction under Article 3(1) in relation to all

[37] Felicia Lombard, Policies and Programmes to Reduce Xenophobic Violence against Black African Foreign Nationals in South Africa: A Case Study of the City of Cape Town's Metro Police and Business ... (University of the Western Cape, 2015).

[38] Loren B. Landau, "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy," *Journal of Refugee Studies* 19, no. 3 (2006): 308–27.

[39] Thaddeus Metz, "Ubuntu as a Moral Theory and Human Rights in South Africa," *African Human Rights Law Journal* 11, no. 2 (2011): 532–59.

[40] Timothy Murithi, The African Union: Pan-Africanism, Peacebuilding and Development (London: Routledge, 2017).

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disputes on issues of interpretation and application of the Charter. The judicial obligation includes the provision of binding decisions as per Article 28(2) and monitoring compliance by states through the Council of Ministers as per Article 29(2). In case states do not meet their obligations in cases of violent attacks on persons who are non-nationals, the judicial obligation of the Court includes providing legally binding solutions such as fair compensation or monetary compensation to the victims of such violence as per Article 27(1). To prevent any form of irreparable damage during violent mob attacks, the Court is under an obligation under Article 27(2) to provide urgent provisional measures.

The ultimate responsibility to ensure the protection of human rights lies with the supreme organs of governance in the African Union, namely the Assembly and Executive Council[41]. According to Article 9(1)(e), the Assembly of Heads of State and Government is mandated to ensure policy implementation and compliance among all the member states. Such mandate involves the authority to direct executive action in cases of emergency according to Article 9(1)(g), and the authority to exercise its right to intervene in cases of war crimes, genocide, or crimes against humanity according to Article 4(h). Moreover, Article 13(1)(j) mandates the Executive Council to be responsible for regional policies with regard to issues of nationality, residency, and immigration, which are critical with respect to foreign nationals subjected to hostility from within. In the case where member states continually violate the decisions of the Union and their human rights obligations, the Assembly has the authority to impose political and economic sanctions according to Article 23(2). The African Union has an institutional responsibility through legislative standard setting, quasi-judicial investigation, judicial decision making, and executive sanctioning.

3.4. Limits of AU Legal Enforcement and Protection of Human Rights in Xenophobic Violence in South Africa

Even after putting in place a comprehensive system of rights protection, the African Union legal structure still suffers from substantial structural limitations emanating from sovereignty and jurisdiction considerations[42]. One of these major structural limitations is the principle of non-interference provided for in Article 4(g) of the Constitutive Act of the African Union, which clearly forbids member states from interfering in the internal domestic affairs of any other sovereign member state. However, while Article 4(h) provides for the balancing principle that allows for the right of the Union to intervene in a member state under the decision of the Assembly, such an intervention can only be justified in the case of war crimes, genocide, and crimes against humanity[43]. Since local xenophobic violence, rioting, and economic attacks against foreigners in South Africa are always treated by states as domestic issues related to law enforcement and not international crimes, they do not meet the strict criteria necessary for intervention in accordance with Article 4(h). Thus, the African Union does not have any mechanism for enforcing its legal protection or deploying security intervention forces to protect foreign African nationals[44].

One significant procedural hurdle that prevents continental protection is the absolute necessity to exhaust domestic remedies before seeking regional intervention[45]. As per Article 50 and Article 56(5) of the African Charter, the African Commission shall consider the matter if it

[41] Mutsa Murenje and Sipho Sibanda, "A Human Rights-Based Perspective on the Integration Experiences and Vulnerabilities of Zimbabwean Migrants Living in Johannesburg, South Africa," *Genealogy* 10, no. 1 (2026): 8.

[42] Rachel Murray, Human Rights in Africa: From the OAU to the African Union (Cambridge: Cambridge University Press, 2004).

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concludes that all the domestic remedies are exhausted, except where it appears to the Commission that the domestic remedies have been unreasonably protracted. In a similar vein, Article 6(2) of the Protocol to the African Charter states that the African Court shall assess the admissibility of the case in light of all provisions laid down in Article 56 of the Charter. For those affected by xenophobia in South Africa, access to domestic magistrate courts and law enforcement institutions poses great challenges and difficulties such as language barriers, imminent threats of deportation, and hostility from the community. Nevertheless, since South Africa has a functional constitutional democracy and an independent judiciary, it follows that continental legal institutions strictly apply the doctrine of exhaustion, thus prolonging judicial proceedings of continental courts for years while victims continue to suffer from violence and economic dislocation without any continental legal protection.

The jurisdiction of the African Court on Human and Peoples' Rights is greatly limited by jurisdictional requirements related to direct access by individuals and non-governmental organizations. According to Article 5(1) of the Court's Protocol, automatic access to the Court is given only to the African Commission, State Parties and intergovernmental organizations in Africa. The conditions for access by individuals and concerned non-governmental organizations with observer status are stated in Article 5(3) and are strictly provided in terms of Article 34(6) of the Protocol. This provision requires that at the time of its ratification or afterwards, the State Party makes a special declaration recognizing the competence of the Court to receive direct individual communications. It also states that the Court does not receive any individual communication against the state party that has not made such a declaration[46]. Since South Africa has not made an Article 34(6) declaration granting direct access, victims of xenophobia and human rights NGOs cannot bring direct cases before the Court against South Africa.

Thirdly, the African Union legal framework is highly deficient in terms of enforcement and confidentiality provisions, and hence lacks political accountability[47]. The protection measures provided in Article 59(1) of the African Charter are always confidential until the supreme Assembly of Heads of State and Government decide otherwise. Such confidentiality clauses inhibit diplomatic intervention during the occurrence of xenophobic outbursts because the information cannot be released to the general public. Moreover, although the African Court makes legally binding judgments pursuant to Article 28(2), enforcement of the same is dependent on political bodies and not on independent judicial enforcement methods. Article 29(2) of the Court Protocol provides that the Executive Council of Ministers is responsible for the enforcement of judgments, while Article 31 only demands the reporting of non-compliant states to the Assembly[48]. However, Article 23(2) of the Constitutive Act provides the authority of the Assembly to impose political and economic sanctions on defaulting member states, but only through political consensus as per Article 7(1). Political tolerance between African Heads of State inhibits the imposition of such sanctions on regional powers such as South Africa.

4. CONCLUSION

The study on the xenophobic violence in South Africa highlights a notable gap between the substantive provisions of human rights by the African Union and their implementation through law. Despite the fact that the African Charter has strong guarantees of non-discrimination under Article 2, equality under Article 3, inviolability of the person under Article 4, dignity under Article 5 and prohibition of mass expulsions under Article 12(5), legal restrictions under sovereign laws are binding. The non-interference provision under Article 4(g) of the Constitutive Act of the African Union restricts the use of Article 4(h) for intervention to only serious crimes against international law and thus is not applicable to domestic xenophobic

[46] Randall Williams, The Divided World: Human Rights and Its Violence (Minneapolis: University of Minnesota Press, 2010).
[47] Nsongurua J. Udombana, "Can the Leopard Change Its Spots? The African Union Treaty and Human Rights," *American University International Law Review* 17 (2001): 1177.
[48] Ibid

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mob violence. Besides, legal procedures in terms of exhausting the national remedies under Article 56(5) of the Charter and the lack of a South African Article 34(6) declaration for limiting individual petitions to the African Court are paralysing regional judicial solutions. For these enforcement gaps to be addressed, it is highly advisable for the African Union and member states to adopt legal reforms. Firstly, the South African government must make the declaration under Article 34(6) of the Court Protocol so that victims of xenophobic violence and human rights NGOs are legally empowered to file cases before the African Court. Secondly, the AU Assembly must broaden the interpretation of Article 4(h) of the Constitutive Act or adopt an emergency protocol under Article 58(3) of the African Charter to deal with human rights abuses. Thirdly, the African Commission must improve state reporting under Article 62 by adopting guidelines regarding the protection of non-nationals from foreign African countries. Lastly, the AU Executive Council must develop compliance mechanisms under Article 23(2) to enforce Court decisions through financial compensation and proper police protection of vulnerable non-nationals in member states.

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