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# Justice system's responses to the May 2008 xenophobic violence in South Africa and its impact on access to justice for migrants: a case study of greater Johannesburg

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**UNIVERSITY OF THE WITWATERSRAND**
**The Graduate School for the Humanities and Social Sciences**
**Forced Migration Studies Programme**

# Justice System's Responses to the May 2008 Xenophobic Violence in South Africa and Its Impact on Access to Justice for Migrants: A Case Study of Greater Johannesburg

**By**

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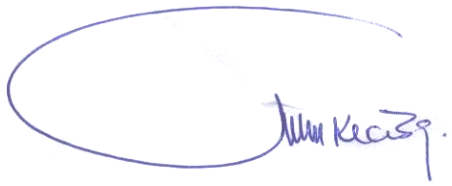
**A Thesis Submitted in Fulfillment of the Requirements for the Degree of Master of Arts (Research) in Forced Migration Studies**

**Supervisors:**
**Ms. Tara Polzer**

**May 2010**

## DECLARATION

I declare that "Justice System's Responses to the May 2008 Xenophobic Violence in South Africa and Its Impact on Access to Justice for Migrants: A Case Study of Greater Johannesburg" is entirely my own unaided work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete reference. It is submitted for the degree of Masters of Arts in Forced Migration Studies in the University of the Witwatersrand, Johannesburg. It has not been previously submitted as a research project, dissertation, or thesis, at any other University.



……..
ALEAMBONG EMMANUEL NKEA

This 27th day of May 2010

University of the Witwatersrand

## DEDICATION

I dedicate this entire work to my dear wife Juliet, and my loving son Vintz, in appreciation for all what you are to me.

## ACKNOWLEDEMENTS

I wish to give my deepest appreciation and respect to my Lead-supervisor, Ms Tara Polzer of Forced Migration Studies Programme (FMSP) at Wits University for first introducing me to the fascinating intellectual terrain of social science research. Your advice, support, cooperation and encouragement throughout the whole process, were invaluable.

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| **ACHPR** | African Charter on Human and Peoples Rights |
| **FPS** | Forensic and Pathological Services |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICERD** | International Convention on the Elimination of All Forms of Racial Discrimination |
| **ICESCR** | International Covenant on Economic, Social and Cultural Rights |
| **NPA** | National Prosecuting Authority of South Africa |
| **SAHRC** | South African Human Rights Commission |
| **SALRC** | South African Law Reform Commission |
| **SAPS** | South African Police Service |

## ABSTRACT

Xenophobia and its related violence have informed South African society since the fall of apartheid. Xenophobic beliefs find expression in public discourses and have shaped both state and society in South Africa. A research (Misago et al.: 2009: 2) on the May 2008 xenophobic violence in South Africa confirmed that: "62 people, including 21 South Africans, were dead; at least 670 wounded; dozens of women raped; and at least 100 000 persons displaced and property worth of millions of Rand looted, destroyed or seized by local residents and leaders". The post-1994 constitutional state that South Africa has become is based on the values of 'human dignity' and 'equality' among others. While law formed the basis of a divided and racist state prior to 1994, law has also taken a fundamental role in recognizing the universality of the human rights for all who live in South Africa today. Creating a strong visibility of human rights within the law, however, is only one step in the process. How the law is implemented determines its real worth and effectiveness. While these progressive laws further distinguish South Africa as a state with outstanding legal commitments towards the universality of human rights, they have failed to find expression in the implementation process.

This study examines how the criminal justice system responded to the May 2008 xenophobic violence in South Africa from the dimensions of legal and policy frameworks; legal processes; legal innovations; institutional issues; and context factors such as non-state policing and justice structures. It focuses on three key actors; the courts, the National Prosecuting Authority (NPA), and the South African Police Services (SAPS). To properly demonstrate the peculiar challenges faced by the SAPS and the NPA in

responding to the May 2008 violence, the study draws on the challenges faced by the SAPS and the NPA in investigating and prosecuting other violent crimes in South Africa.

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# CHAPTER ONE: INTRODUCTION

## 1. Background

Xenophobic violence has emerged as one of the key issues in forced migration discourse in contemporary South Africa. The horrific violence which gripped South Africa in May 2008 is a tragic case in point: "62 people, including 21 South Africans, were dead; at least 670 wounded; dozens of women raped; and at least 100 000 persons displaced and property worth of millions of Rand looted, destroyed or seized by local residents and leaders" (Misago et al.: 2009: 2).

Although justice is a fundamental human value and a central component of the Bill of Rights encapsulated in the 1996 Constitution of South Africa, for victims and survivors of xenophobic violence, justice appears to remain elusive. Motivated by the work of Misago et al. (2009) and Landau (2009), this study examines how the criminal justice system responded to the May 2008 xenophobic violence in South Africa from the dimensions of legal and policy frameworks; legal processes; legal innovations; institutional issues; and context factors such as non-state policing and justice structures. This research focuses on three actors; the courts, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS). To properly demonstrate the peculiar challenges faced by the SAPS and the NPA in responding to the May 2008 violence, the study draws on the challenges faced by the SAPS and the NPA in prosecuting other violent crimes in South Africa.

Xenophobic violence is a serious breach of the rights accorded to migrants under the Bill of Rights. Protection of the values entrenched in the Bill of Rights is a core mandate of the justice system. The justice system initially responded to the May 2008 violence by the arrest and detention of over 1627 alleged perpetrators by the SAPS (NPA: 2009). The Ministry of Justice and the NPA later promised to set up "special courts" to fast track these cases through the criminal justice system (Mabandla: 2008; de-Lange: 2008). While 44.4 per cent of the cases instituted have been withdrawn to date (NPA: 2009), more may possibly be dismissed from the courts' roll for want of diligent prosecution. To date, very few or no charges have been pressed for the most serious crimes such as murder, rape, grievous bodily harm and incitement. Preliminary inquiry made by this researcher also suggests the lack of protection of witnesses and the non use of the technique of plea bargain in maximizing justice outcomes in these cases. These facts suggest that most of the perpetrators of the May 2008 violence will not be held accountable.

The lack of legislation criminalizing xenophobia also affects the nature of charges arising from xenophobic violence that may be brought before the courts. While it has been argued (SAHRC: 2008) that xenophobia should be criminalized in order to suppress it, such argument ignores the role of the courts to develop the law in this regard in terms of section 8(3) (a) of the 1996 constitution. According to section 8(3) (a) of the 1996 constitution, a court

*"…in order to give effect to a right in the Bill must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right*".

Section 8(3) (a) of the constitution thus allows for judicial creativity whereby the courts may invalidate any act which runs contrary to the constitution or expand the scope of current laws to conform to the spirit of the constitution. Thus, the courts do not have to wait for a whole new piece of legislation to go through parliament to be able to deal with xenophobic violence.

The escalation of non-state forms of policing and justice structures in South Africa since 1994 (Minnaar: 1999), could also be a possible factor that may affect the response by the criminal justice system. These non-state policing and justice structures are well entrenched as the main conflict resolution mechanism in the townships – spaces where most of the violence in May 2008 occurred. While these non-state structures are supposed to compliment the efforts of the regular state order in dispensing justice (Schärf & Nina: 2001), Schärf (2003) argues that some of these structures are made up of citizens with a different perception of justice who regroup to enforce a particular set of values. Schärf (2003) also argues that these structures are important in defining and reproducing a particular value system within their constituencies. As an example, during the apartheid era, it was forbidden to steal from a poor neighbor, but stealing from the rich used to be condoned. According to Sachs (2000) these non-state policing and justice structures establish a multitude of normative and regulatory orders which overlap with, reinforce, undermine or function in parallel with the official, constitutionally-recognized state order. Because discrimination and violence against foreigners is an action that many people in South Africa (especially those in communities where the May 2008 violence occurred) consider legitimate, the entrenchment of these non-state justice structures in the

townships produces a bifurcated state. As such, instead of reinforcing the efforts of the regular state justice structures, these non-state policing and justice structures may rather shield the perpetrators of the May 2008 violence from facing justice.

In holding the perpetrators of xenophobic violence accountable, the criminal justice system (SAPS, NPA and the courts) will not only protect and uphold the rights of the victims, but will also validate the importance of the norms violated. The effective prosecution of the perpetrators of the May 2008 violence would also suggest a positive step by the criminal justice system towards the rule of law, justice and equality for *all*. This is why it is so important that prosecutions take place and accountability is established. However, an important caveat is the fact that the general point of enforcement of law in cases related to the May 2008 xenophobic violence and many other violent crimes in South Africa happens in a context of value pluralism – not everyone agrees that the law is right.

While the Criminal Act abjures and punishes all forms of violence against the person of another, xenophobic motive is not considered as an aggravating factor in sentencing the perpetrator. For example murdering a foreigner can be tried under murder *simpliciter,* but the xenophobic motivation for the murder does not affect the case in a legal sense because there is no specific law criminalizing xenophobic violence. Chapter II (the Bill of Rights) of the 1996 Constitution sets out clearly the inalienable rights of *all*, including migrants. The Criminal Procedure Act, Chapter II of the Constitution (1996), the National Crime Prevention Strategy (1996), the National Prosecuting Authority Act (1998), and the National Prosecution Policy (1999), together provides the domestic legal framework of this study.

International instruments such as the United Nations Guidelines on the Role of Prosecutors (UNGRP) (1990), the African Charter on Human and Peoples' Rights (ACHPR) (1981), the Universal Declaration of Human Rights (UDHR) (1948), and the International Convention for the Elimination of all forms of Racial Discrimination (ICERD) (1965) provide the international regulatory framework on the commitment of South Africa to uphold and protect the rights of migrants.

A previous research on the factors impacting on the criminal justice system in South Africa was conducted by Prinsloo (2005). The main aim of Prinsloo's research was to explore and compare the factors impacting on the criminal investigation process, at two selected police stations in Cape Town, in order to identify any "best practices" and constraints to an efficient crime investigative system. In his research, Prinsloo presented an overview of police officer's view as to the factors impacting on the criminal justice system. He found severe capacity and other resource constraints; organizational matters; social support/community factors; and gangs/syndicates as some of the key constraints affecting the criminal justice investigation system in South Africa.

## 1.1Problem Statement

The May 2008 xenophobic violence that gripped South Africa constituted a serious breach to the rule of law and the respect of the rights of migrants. The violence was perpetrated in ways that violate most of the rights accorded to migrants under the 1996 Constitution such as the rights to life, dignity, security of the person and equality before the law and therefore undermines the very foundation upon which the Constitution rests.

In addition to its commitments under some key international instruments, Crush (2000) argues that South Africa has one of the most progressive and inclusive Constitutions which guarantees and protects the rights of *all*, including migrants. The laws in South Africa therefore afford equal protection to *all* and do not discriminate against non-nationals. However the existence of these laws and policies by themselves does not guarantee protection of the rights contained in them. Proper implementation is required to give effect to these rights. Improper implementation of these laws and policies may generate an extensive gap between the law "in principle" and the law "in practice". Institutional capacity constraints; pervasive institutional cultures; political pressure; and attitudes amongst individuals within the SAPS and the NPA are factors that may adversely affect the full implementation of the law. This may render the rights accorded to migrants under these inclusive and progressive domestic and international legal frameworks ineffective.

Human Rights Watch (HRW) (2008) argues that there was in practice significant inequality and injustice in the implementation of justice. According to HWR, while some of the victims faced possible deportation due to their irregular status, most of the perpetrators were released without charge (sometimes precisely because the complainants had left the country or were unwilling to come forward to lay a charge or were not assured of their protection).

### 1.2. Research Question

Can the Justice System's response to the May 2008 xenophobic violence be explained through longstanding and broader access to justice challenges in

South Africa or are there additional challenges related to xenophobic violence?

### 1.3. Hypotheses for this Study

- A negative attitudinal and behavioral commitment by the SAPS and the NPA towards implementing laws and policies relating to protection of the rights of migrants has adversely affected justice outcomes to the May 2008 violence.
- The Justice System's coalition with non-state policing and justice structures has adversely affected justice outcomes to the May 2008 violence.
- The attitudes of the general public and the political leadership in South Africa with regards to migrants have created a hostile context that has adversely affected justice outcomes to the May 2008 violence.

### 1.4. Significance of this Study

This study seeks to examine how the criminal justice system has responded to the rising wave of violence against non-nationals with a particular focus on the May 2008 violence in South Africa and using the Greater Johannesburg Area as a case study.

Xenophobic violence is in direct confrontation with the laws. Yet, while a great deal of literature exists on the causes of xenophobia, little effort has been made to examine how the criminal justice system has engaged with this type of violence. Valji (2003: 1-2) argues that much of the existing analysis focuses on the economic elements of intolerance. Recent literature focuses

on the possible causes of xenophobic violence (Misago et al.: 2009; Landau: 2009; Nkealah: 2008), the humanitarian response thereto (Igglesden et al.: 2008), and the gaps between the law and practice with respect to the protection of refugees (McKnight: 2008). This has resulted in a bias towards understanding the rising tide of this phenomenon in South Africa rather than understanding institutional responses. The primary value of this research, therefore, lies in its capacity to refine our current understanding of xenophobia and xenophobic violence in South Africa from a legal perspective. It broadens and enriches existing debates in the field by exploring other possible ways of approaching the subject matter.

Furthermore, the May 2008 violence offers a unique yardstick in assessing the challenges that limit access to justice by migrants in South Africa. First, the violence was widespread and seemingly contagious across different communities and locations thereby constituting a broader threat to the rule of law than individualized violence. Second, it was targeted against some of the most vulnerable residents of the country, allowing us to ask whether the justice system is in fact there to protect the most vulnerable or rather a reflection of existing power structures and interest groups within a society.

### 1.5. Thesis Outline

This thesis comprises six chapters. The first chapter presents a general introduction to the study. It highlights the research problem and spells out the significance of the study. It also outlines the study objectives, hypothesis of the study, methods and the research question.

Chapter Two provides definitions of some key terms used in the study. It highlights the legislative and policy framework of the study and looks at the theoretical considerations underlying the study. It presents a review of literature on policy implementation, judicial creativity, xenophobia and hate crimes, and criminal investigations and prosecutions in South Africa.

The methods, procedures and techniques employed by the study are the focus of the Third Chapter. This chapter gives a rationale for the adoption of qualitative techniques of data collection and analysis. It also discusses and gives a justification for the selection of observation, focus group discussions and semi-structured interviews and the process of their application in the study. Finally, the Chapter outlines the limitations encountered in the course of the study.

In Chapter Four, I provide the context within which the study is conducted by spontaneously and briefly presenting an overview of the Criminal Justice system in South Africa. All the arguments in this chapter correspond with the research objectives, issues and assumptions outlined in the introduction in Chapter One.

It is in this chapter that I also present and discuss the findings of the study which fall under the major themes addressed in this study, namely:

- Nature of Charges before the Courts
- Lapse in Prosecution (Protection and bail, non-execution of Bench Warrants)
- Conviction Rate
- Acquittal Rate

- Prosecution Rate
- Withdrawal Rate
- Outstanding Cases Rate
- Findings in terms of the Hypotheses of this research and the research question

Chapter Five summarizes the findings with regard to the research question of this study and makes general conclusions. This Chapter also addresses the implications of the Criminal Justice System's response to the May 2008 xenophobic violence on the access to justice rights of migrants.

# CHAPTER TWO: LITERATURE REVIEW

This study draws on the literature on policy implementation, judicial creativity, xenophobia and hate crimes, and criminal investigations and prosecutions in South Africa. This part will begin by contextualizing some key concepts and will proceed with the policy framework of this study. The theoretical framework of this study will then follow. A review of existing literature will conclude this part.

## 2.1 Definitions of Concepts

Clarification of the following key concepts is relevant for this study:

### 2.1.1 Migrants

The word "migrant" may have different meanings depending on the context in which it is used. According to McBride (2009: 8) "migrants are taken to comprise non-nationals of a country who have moved (or are endeavoring to move) there from another one – often but not necessarily the one of their nationality – and whose presence there may or may not be lawful or regular". He argues further that, the move may either be voluntary or non-voluntary. Non-voluntary movement may be occasioned by the use of duress, undue influence, deception, economic or natural disasters and environmental catastrophes (McBride 2009: 8). Thus, there are generally two types of migrants; voluntary and forced migrants.

Voluntary migration refers to people who move from one location to another of their own free will for socio–economic gains. This form of migration is usually undertaken by both skilled and unskilled people, and is often

understood through the perspective of neoclassical economics. This type of migration can also be understood through push and pull factors in the sending and receiving states. These push and pull factors include but are not limited to population growth, failure of the state, environmental degradation and economic restructuring in sending states, and liberal migration laws, demand for labor, and high wages in receiving states (Boswell: 2002: 7). On the other hand, forced migration refers to people who are compelled to move by structural factors such as natural disasters (floods, droughts, landslide, earthquakes and volcanic eruptions), and man-made tragedies, including diverse forms of human rights violations and foreign invasion (Amisi: 2009)

For the purpose of this study, the notion of 'migrant' will be used broadly to refer not only to forced migrants such as refuges and asylum seekers, but also to regular and undocumented non-nationals who live and work in South Africa. I adopt this broader perspective of migrants because it must be understood that all categories of migrants; documented or undocumented, refugees or economic migrants, all, without exception have the right to safety and security of person and property, and if that right is violated must have unrestricted access to justice in South Africa.

### 2.1.2 Access to Justice

The phrase 'access to justice' is admittedly not easily defined. However, there are two main approaches to the use of the phrase. From the narrower perspective – the phrase is seen as being concerned with the means for securing vested rights, particularly through the use of courts and tribunals (Cappelleti and Garth: 1978). From this perspective the particular focus has been on developing measures to overcome obstacles faced by certain groups

in making use of the processes established by the justice system to provide redress where rights have been violated. Such processes are generally a means to obtaining respect for rights or appropriate remedies. In this narrow sense, the phrase 'access to justice', is limited essentially procedural in scope.

McBride (2009: 7) has asserted that the phrase 'access to justice' should be construed in a broader context, "with the focus being more on ensuring that legal and judicial outcomes are themselves 'just and equitable'". Access to justice in the broader context, is therefore not only concerned with the procedural aspect of justice, but also the substantive aspect of justice (UNDP: 2004). This approach is thus concerned with ensuring access to law-implementing processes and institutions.

For the purpose of this study, access to justice shall refer to the right of *all* victims of the May 2008 xenophobic violence to a just and equitable justice outcome for their grievances through the criminal justice system. This will include the ability to initiate and sustain legal proceedings through the criminal justice system without let or hindrance. This right to access justice includes complementary obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them according to the laws in force.

### 2.1.3 Criminal Justice System

The phrase 'criminal justice system' in its broad sense comprises the police; the National Prosecuting Authority (NPA); the courts; and the correctional service and to an extent informal justice and policing structures such as

vigilante groups and community courts. By ‘criminal justice system’, this research refers to all those formal structures with an oversight over investigations and prosecution of criminal cases. In the South African context, this would include the National Prosecuting Authority (NPA), the South African Police Service (SAPS), Magistrates and Judges.

### 2.1.4 Plea Bargain

A "plea bargain" is a deal offered by a prosecutor as an incentive for a defendant to plead guilty. If the defendant pleads guilty he is usually given a lesser sentence, or possibly a suspended sentence or a symbolic fine. The convicted defendant may then be used as a prosecution witness in the trial of other defendants.

### 2.1.5 Non-State Policing and Justice Structures

Non-state policing and justice structures refer to all structures that exercise some form of non-state authority in providing safety, security and dispute resolution. This includes a range of traditional, customary, religious and informal mechanisms that deal with disputes and/or security matters. For the purpose of this study non-state ordering and justice structures shall refer to any such structure except private security companies.

## 2.2 Policy Framework

In addition to the South African Constitution, other policy documents which are relevant for the work of prosecutors includes but are not limited to the

National Prosecuting Authority Act (NPA Act), and the United Nations Guidelines on the Role of Prosecutors.

### 2.2.1. The South African Constitution *Act 108 of 1996*

The Bill of Rights encapsulated under Chapter II of the Constitution of South Africa (*Act 108 of 1996*) enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality, and freedom. According to Chapter II (section 7) the state must respect, protect, promote and give effect to the rights listed in the Bill of Rights. The rights relevant for the purposes of this research would include the right to equality (section 9); the right to human dignity (section 10); the right to life (section 11); the right to freedom and security of person (section 12); the right to property (section 25); and the right to access to court (section 34).

The 1996 Constitution also envisages the establishment of a National Prosecuting Authority (NPA) and the office of the National Director of Public Prosecutions (section 179). While the NPA is empowered to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental thereto, the National Director of Public Prosecutions is responsible for the supervision of criminal prosecution throughout the country.

### 2.2.2The National Prosecuting Authority Act and Prosecution Policy

Pursuant to section 179 of the 1996 Constitution, national legislation stipulating details of a National Prosecuting Authority for South Africa was enacted by Parliament in 1998. The National Prosecuting Authority (NPA) Act (1998), determines the powers, duties and functions of NPA members

(chapter 4). The Act which hinges on the belief that an efficient prosecutorial system enhances confidence in the criminal justice system, also seeks to promote the exercise of authority by prosecutors and to contribute to the 'fair and even-handed administration' of criminal law by prosecutors (Schönteich: 2001).

Like the 1996 Constitution (section 179 (5)), the NPA Act (section 22(1)) also empowers the National Director of Public Prosecutions to determine a prosecution policy for the NPA. The first prosecution policy[1] that was tabled in Parliament in 1999 and revised in 2005 is the result of a combined effort of the major stake holders in the criminal justice system realized through consultations. In his work on the National Prosecuting Authority, Schönteich (2001) argues that "the prosecution policy sets out with due regard to the law, the way in which the NPA and individual prosecutors should exercise their power and discretion in order to make the prosecution process 'more fair, transparent, consistent and predictable". In addition, the Section 3 of the prosecution policy enjoins prosecutors to ensure that the interest of victims and witnesses are promoted.

Prosecutors have varied and very wide discretion which may be exercised at various stages in the criminal justice process. According to Schönteich (2001), prosecutors have the discretion to decide "whether or not to institute criminal proceedings against an accused, whether or not to withdraw charges or stop the prosecution against an accused, whether or not to oppose an application for bail, or to release an accused person who is in custody following an arrest, to decide with which crimes an accused is charged,

[1] The National Prosecuting Authority of South Africa *Prosecution Policy* 1999 as revised in 2005

whether or not to accept a plea of guilty tendered by an accused, to decide which evidence to present during trial". Prosecutors have the additional discretion pursuant to Section 3 of the prosecution policy to decide whether or not to pursue an appeal after a case has been concluded in the court.

How this discretion is exercised will either have a positive or negative effect on the entire criminal justice process reasons why the prosecution policy (section 3) enjoins prosecutors to exercise their discretion in good faith. Therefore, their discretion should not be motivated by factors such as their "personal views regarding the nature of the offence, or the race, national origin, gender, religious beliefs, status, political beliefs or sexual orientation of the victim, witnesses or the accused" (Schönteich: 2001).

One of the most important decisions which turn out to be very crucial in the entire criminal justice process is the decision of the prosecutor to decide whether or not to prosecute. The importance of this decision is recognized by the prosecution policy which has identified and laid down certain guiding principles to guide prosecutors in coming to a decision whether to prosecute or not. Schönteich (2001) argues that the exercise of the prosecutorial discretion whether to prosecute or not is of prime relevance because the decision may have profound consequences not only for the victims and witnesses, but also for the accused and their families.

While a wrong exercise of discretion by a prosecutor may adversely affect the peoples' trust in the entire criminal justice system, a proper exercise of discretion will invariably boost the image of not only the prosecution system, but also the criminal justice system at large. Prosecutors are therefore advised to be diligent and meticulous by focusing only on those

cases which have a reasonable prospect of success. Because the 'reasonable prospect' test is an objective one, due diligence should be applied in order to avoid an unjustified prosecution. However, it is possible that at one point or another in the criminal justice process, the prosecutor may be in a fix; not knowing whether or not to institute prosecution. The prosecution must exercise due diligence at this stage which will require him to look far beyond the police case files handed over to him. Pre-trial conferences with potential witnesses as well as the accused persons is a crucial aspect of the exercise of due diligence on the part of prosecutors. Pre-trial conferences are relevant in that they enable prosecutors to evaluate the strength of the evidence at hand and help the prosecutor to determine the credibility of both the witnesses and the accused persons. This has the potential of maximizing justice outcomes in cases that are eventually registered before the courts.

In exercising the prosecutorial discretion whether to prosecute or not, the prosecutor must in line with the prosecution policy take into account the following issues: the strength of the state's case; the admissibility of the state's evidence; the credibility of the state's witness; the strength of the defense's case; and the extent to which the prosecution would be in the public interest (Schönteich: 2001). Like in most other jurisdictions, the prosecution policy also gives the prosecutors the powers to discontinue a case already before the courts at any time before judgment and as well as the right to re-register them any time thereafter. The prosecution policy requires that prosecutors should not only present their cases 'fearlessly, vigorously and skillfully', but also that they must do so fairly (Schönteich: 2001). Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where

necessary and with information on the trail process. In terms of the investigation and prosecution of crime, the policy requires a robust relationship between prosecutors and the police, with the important caveat that there should be mutual respect for the operational independence of each institution.

### 2.2.3 United Nations Guidelines on the Role of Prosecutors

According to Schönteich (2001), the National Prosecuting Authority Act makes it mandatory for the National Director not only to bring to the notice of the directors of public prosecutions and prosecutors the provisions of the *United Nations Guidelines on the Role of Prosecutors*, but also enjoins him to ensure their respect for and compliance with the principles it contains. The main objectives of the guidelines are to assist member states in their effort to secure and promote the effectiveness, impartiality and fairness of prosecutors in criminal proceedings (Schönteich: 2001). The guidelines (sections 1 and 2 thereof) deal with issues touching on the selection and training of prosecutors, their status and conditions of service as well as the role of prosecutors in criminal proceedings (sections 3-7).

The Constitutional Court has stressed that section The relevance of section 13(b) of the guidelines for South African prosecutors was emphasized by the Constitutional Court in the case of *Carmichele v Minister of Safety and Security and Another 2001 (10) BCLR 995 (CC) 1012A*. In this case the court held inter alia that "In the performance of their duties, prosecutors shall:

(a) …

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrelevant of whether they are to the advantage or disadvantage of the suspect; …"' (Keuthen: 2007: 28)

By virtue of section 11 of the guidelines, prosecutors shall play an active role in the criminal justice process, including but not limited to the investigation and prosecutions of crimes. Concerning discretionary functions of public prosecutors it has been recommended (Keuthen: 2007: 29) that in countries where prosecutors are vested with the powers to investigate and prosecute crimes, there should be another regulatory mechanism to enhance fairness and consistency of approach in taking decisions in the prosecution process.

In addition, sections 21-24 of the UN Guidelines also contain provisions regarding the relations of prosecutors to other government agencies or institutions, as well as disciplinary proceedings.

### 2.2.4 Criminal Justice Policy Papers

#### a) National Crime Prevention Strategy

In 1996, the National Crime Prevention Strategy (NCPS) was adopted as the South African government's blueprint for dealing with crime. It seeks to establish a comprehensive policy framework which addresses crime 'in a coordinated and focused manner by tapping into the resources of all government agencies, as well as the civil society (Keuthen: 2007). According to Keuthen (2007) the NCPS sets out nine national programmes with underlying key aims to address the criminal justice process in South

Africa. One of these national programmes requires a prosecutorial policy which identifies priority crimes. The NCPS requires a close working relationship not only between the prosecutors and the police, but also between the prosecutors and other stake holders in the justice delivery sector. Under the NCPS, prosecutors are encouraged to fast track and deal with cases identified as priority crimes.

The use of diversion programmes is also encouraged under the NCPS for minor offences and young offenders. Prosecutors are tasked in this regard to consider the propriety or otherwise of the use of non-criminal alternatives to prosecution in resolving these matters.

**b) Integrated Justice System**

The Integrated Justice System (IJS) is one of the bi-products of the NCPS (Keuthen: 2007). According to the South Africa Year Book (SAYB) (2009/10: 373) the aim of the IJS is to "increase the efficiency and effectiveness of the entire criminal justice process by increasing the probability of successful investigation, prosecution, punishment for priority crimes and rehabilitation of offenders". In view of the limited resources at its disposal to combat crime and provide other services, the government intends to "eliminate duplication of services at all levels by the strategic alignment of cluster activities" (SAYB: 2009/10: 373).

Several programmes have been put in place in line with the IJS to improve service delivery in the criminal justice system and enhance caseload management. These includes, a criminal justice review commission; a victim empowerment programme; specialized courts to deal with commercial,

sexual, and environmental crimes; case-flow management centers; an e-justice programme and a court process project (Keuthen: 2007).

## 2.3 Policy Implementation Theory

As noted earlier, South Africa has a plethora of legal instruments which guarantee the rights of access to justice by migrants. However, poor implementation has rendered the inclusive and progressive nature of these laws ineffective for migrants. The issue of implementation is central to the realization of policies and to give effect to laws.

Scholars of "Policy Implementation Theory" recognize five interlinked variables as important shapers of a successful policy outcome (Pülzl & Treib: 2006; Brynard: 2000). These are: the context; the content; client and coalitions; capacity; and commitment. I address each of these issues below.

According to Mazmanian and Sabatier (Quoted in Brynard: 2000) implementation refers to the carrying out of a basic policy decision, usually incorporated into a statute but which may also take the form of executive directives or court judgments. Generally, such policy decision identifies the problem(s) to be redressed, maps out the objective(s) and structures the implementation process. Implementation analysis argues Brynard (2000) is relevant in explaining policy failures. On his part Sabatier (1986) cautions that the implementation process is loaded with complexity. He demonstrates how complex implementation really is and why it is not logical to assume that just because a policy had been made it will be implemented.

Berman (1978) argues that an important variable that shapes the successful implementation of a particular policy is the Context in which the policy was

made. He argues that it is vital for policy-makers, implementers and researchers to pay attention to the social, economic, political and legal setting of the country in order to successfully create, implement and analyze a policy.

Warwick (1982) identifies Commitment by the implementers as another significant variable. He argues that the benefits of a particular policy may outweigh its costs, but if those responsible for its implementation are either unwilling or unable to do so, then very little can happen. In addition to the context in which the policy was framed, Sabatier (1986) argues that the content of the policy itself is also important. The Content refers to the substance of the policy document itself. The content of the policy will determine whether the policy is distributive, redistributive or regulatory in nature. Distributive policies generally create public goods for the general welfare and are non-zero-sum in nature. Redistributive policies seek to change allocations of wealth or power of some groups at the expense of others. Regulatory policies specify rules of conduct with sanctions for failure to comply.

This research is concerned with policies - Chapter II (*Act 108 of 1996*), ACHPR (1981), ICERD (1965) and UDHR (1948)) which regulate the rights of migrants to justice and how the justice system has sought to enforce these rights in the wake of the May 2008 violence. The policy which this research is looking at is therefore regulatory. This research will not focus on all the five variables discussed above because previous researches (SALRC: 2000; Schönteich: 2005a; Prinsloo: 2004) have made authoritative findings on one of the variables – capacity but also because of the limited time within which this work had to be submitted. This research will focus on only three of the

variables discussed above - context, commitment. A third variable – coalition is discussed below.

Elmore (1979) argues that one of the most robust findings of implementation theory is that implementation is affected in a critical sense by the formation of local coalitions of individuals and entities affected by the policy. Thus for successful policy implementation, it is important for government to synergize with other stakeholders who actively support a particular implementation process. This variable is important in understanding how the coalition between the formal justice sector and non-state policing and justice structures have affected the response by the formal justice system to the May 2008 violence in South Africa. Schärf's (2003) argument that some of these structures are made up of citizens with a different perception of justice supports the earlier contention by Sachs (2000) that non-state policing and justice structures may in fact operate in ways that undermine the official, constitutionally-recognized state order. Rather than reinforce the efforts of the regular state order in bringing to justice the perpetrators of the May 2008 violence, these non-state structures may instead shield the perpetrators from prosecution.

Brynard (2000) contends that capacity of the public sector may have important consequences on the implementation process. He argues that the political, administrative, economic, technological, cultural and social environment within which action occurs must be sympathetic or conducive to successful implementation.

## 2.4 Literature Review

With the above definitions and theoretical framework the following paragraphs introduce a review of literatures on xenophobia and hate crimes, judicial creativity and efficiencies in criminal investigation and prosecution in South Africa.

Although the May 2008 xenophobic violence was in direct confrontation with the laws, the focus of existing literature is limited to its possible causes (Misago et al.: 2009; Landau: 2009; Nkealah: 2008), and the humanitarian response thereto (Igglesden et al.: 2008). Thus there is a gap in understanding the May 2008 violence from a legal perspective in terms of legal response. In focusing on the gaps between the law and practice with respect to the protection of refugees, McKnight (2008), attempts to explain the May 2008 violence from a legal perspective. However, McKnight's work looks specifically at justice issues from the victim's perspective. Her work is also limited in scope to refugees only. This research seeks to close these gaps by reviewing justice responses from the institutional perspective and in terms of migrants as a whole.

McDonald and Jacobs (2005: 296) maintain that xenophobia is "… the deep dislike of non-nationals based on fear of the unknown or anything perceived as different and involves attitudes, prejudices and behaviors that reject, exclude, and often vilify persons on the perceptions that those persons are outsiders or foreign to the community, society or national identity". This definition by McDonald and Jacobs suggests that xenophobic violence is a hate-motivated act. Under Common Law, the term hate crime is commonly used to refer to unlawful, violent, destructive or threatening conduct in which the perpetrator is motivated by prejudice toward the victim's putative

group (Green et al.: 2001). Xenophobic violence therefore fits squarely as a hate-motivated crime.

Like Lawrence (1999), most scholars on hate crimes (Watts: 2001; Perry: 2001; Franklin: 2002) argue that in order to punish hate crimes, vulnerable groups should be protected by hate crime legislation. These scholars are unanimous that offenders who are motivated by discriminatory animus warrant more severe punishment for their crimes than individuals whose crimes are not so motivated. In South Africa, lobbyists like the South African Human Rights Commission (2009) believe that in order to deal with xenophobia, South Africa must pass a Hate Crimes law. However the focus of these existing literatures is limited to the law making role of Parliament. It fails to appreciate the law making role of the courts.

Existing literature on the law making role of the courts in South Africa (Ipp: 2004; Lenta: 2004; Dersso: 2007; Diala: 2007), also fails to capture how the courts may suppress xenophobia in South Africa through judicial activism. By focusing on how the courts in South Africa have exercised their law making role while adjudicating on cases arising from the May 2008 violence, this research attempts to close these gaps. Jurisprudence and case law from the Constitutional Court of South Africa such as the 2007 case of

*S V. Masiya 2006 (11) BCLR 1377 (T)* provides an additional framework within which to assess the concept of judicial activism in South Africa. [2]

[2] According to the brief facts of this case; Mr. Masiya was brought before the Court on a charge of rape. The evidence established that the victim was penetrated anally. The state applied that he be convicted of rape. The defence contended that if Mr. Masiya were to be found guilty he should be convicted of indecent

Landau (2009) explains the May 2008 violence by focusing on an extended history of statecraft that has generated an enemy within: a segment of the population that is institutionally and socially excluded from legal protection despite regularly engaging with agents of law. He argues that, following a pattern seen elsewhere in the world, South Africa has *de facto* suspended elements of its normal legal order vis-a-vis refugees, asylum seekers, and undocumented migrants either by commission or (more regularly) omission. He maintains that, under these circumstances, the right to space and life cease to be delimited by constitutional principles. This work suggests a hostile environment with respect to the protection of the rights of migrants in South Africa. Landau's work will help this research to situate the context within which the criminal justice system is expected to give effect to the rights of migrants in South African.

In their edited work on 'Non-state Ordering in South Africa', Schärf and Nina (2001) capture the emergence, growth, and functioning of the various types of non-state policing and justice structures in South Africa. The central thesis in their work is that the law enforcement role of the state is largely being eroded by the emergence and sustenance of non-state policing and justice structures. According to Tshehla (2002) and Schärf (2003), some of these non-state structures have different perceptions of justice from those of

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assault. Since the statutory definition of rape did not contemplate anal penetration, the Court on its own motion held that the definition of rape should be developed to promote constitutional objectives given Parliament's delay … so as to afford society the full protection of the Constitution. The definition of rape was accordingly developed by the court to include anal penetration of a female or male by the penis. The Constitutional Court upheld the court's view in part by allowing for the definition of rape to include un-consensual anal penetration of a female by the penis.

the regular justice structures. Baker (2002) examines the extent, nature and attitudes towards non-state policing in South Africa in its different forms and argues that non-state policing and justice structures have the potential to exacerbate inequality and at times may even deny people their constitutional rights. As Misago et al. (2009) argue, there is a high level of anti-foreigner sentiments within these non-state structures. These non-state structures are an important partner in law enforcement in South Africa. According to Schärf (2001), there is a working relationship between these informal policing and justice structures and the regular state order in terms of cross-referral and co-operation in dealing with justice issues in the townships. The literature on non-state policing and justice structures in South Africa will help this research to examine how the partnership between the regular state justice structures and the non-state justice structures have affected the response of the state justice system to the May 2008 violence.

According to Human Rights Watch (2008; 2009), the government should ensure that victims of the May 2008 xenophobic violence remain in South Africa to participate in bringing their attackers to justice. Although these reports shed light on how the discharge of some perpetrators and the possible deportation of victims of the May 2008 violence may affect the accountability process, they fail to address the important question of protection of the witnesses. This study will highlight not only to what extent the justice system offered protection to the witnesses but also whether the principle of "plea bargain" was utilized to maximize justice outcomes.

Neser (1993) and Grant (2002) argue that every justice system represents an apparatus society uses to enforce the standards of conduct necessary to protect individuals and communities. Forst (2004) argues that when crimes

(such as xenophobic violence) go unpunished, either because the perpetrators are not arrested or because if arrested they are released without charge, then a culture of impunity ensues. According to him, the integrity of the justice system becomes threatened both by the reality and perception of ineffectualness. Beyond Forst's arguments is perhaps the fact that impunity holds disastrous consequences: it allows the perpetrators to think that they will not have to face the consequences of their actions; it ignores the distress of the victims and serves to perpetuate crime; it weakens state institutions; it denies human values and debases the whole of humanity. According to Sarkin (2001) punishment will not only advance the protection of human rights and fundamental freedoms, but will also repair the damage that has been caused.

There is extensive literature on the criminal justice system in South Africa. For the purpose of this study, this research will focus on literature on the efficiency of the criminal system in tracking violent crimes. Some relevant research on this includes the works of South African Law Reform Commission (SALRC) (2000), Schonteich (2005a & 2005b), and Prinsloo (2004).

In their research on the "Conviction Rates and Other Outcomes of Crimes Reported in Eight South African Police Areas" SALRC (2000), compares the number of convictions with the number of cases reported, examining how effectively SAPS and NPA work together to hold perpetrators of violent crime accountable. The research found that for every 100 violent crimes reported in South Africa, perpetrators in only 6 cases had been convicted after two years. Only 11 per cent of reported murders result in convictions in South Africa. The research associates this low conviction rate to under-

trained and overworked detectives and prosecutors who have inadequate support staff and services; high levels of illiteracy in police; problems with discipline and morale; and members of the public failing to cooperate despite being witnesses or having evidence about a crime or suspected perpetrators. The research also identified potentially inadequate police investigation of violent crime: in 55 per cent of reported crimes, police are unable to identify a suspect.

In his work titled "Murder in South Africa: What we Know and Don't Know" Schonteich (2005a), looks at murder statistics from 1994-2004 in South Africa. He notes that in the year 2000, for every 100 murder cases recorded, 46 were referred to court, 34 went undetected, 25 were prosecuted, and 16 were convicted. He contends that in 1994, the number of prosecutors per murder was 0.1 as compared to 0.9 in Russia, 4.4 in Sweden, 6.7 in Belgium. Schonteich (2005b) also makes the point that NPA's performance is partly determined by factors out of its control such as: crimes recorded by police; cases investigated by police; and quality of police investigations.

In his study on criminal investigation in Cape Town, Prinsloo (2004) examines case withdrawals. He observes that communication between police and prosecutors is primarily through docket. The police and prosecutor hardly hold a prosecutors' conference to discuss cases before trials. According to Prinsloo, some key constrain to criminal investigation include: resources; organizational matters; social support/community factors; and gangs/syndicates.

Together, this body of literature on the criminal justice system in South Africa will help this study to appreciate whether the justice systems response

to the May 2008 violence was any different from its responses to other violent crimes.

# CHAPTER THREE: METHODOLOGY & DESIGN

The purpose of this section is to provide a detailed outline of the research methodology and design that was used in gathering data on the responses to the May 2008 violence by the criminal justice system in the Greater Johannesburg Area**.**

## 3.1 Data Collection

In addition to my own research, the research benefited from data collected by ongoing research by the Migrants Rights Monitoring Project of the Forced Migration Studies Programme. Together with a research assistant[3] the researcher conducted part of the first phase of this research which was aimed at coming up with a list of cases emanating from the May 2008 xenophobic violence from the courts in the Greater Johannesburg Area. Together, we also visited the Forensic Pathological Services in Johannesburg and Boksburg to gather information relating to death cases suspected to be related to the May 2008 xenophobic violence from the mortuaries. Part of the literature review for this research on the background of the efficiencies of the criminal justice system in South Africa was extracted from part of the information gathered[4] in view of a broader research project on access to justice carried out by the Forced Migration Studies Programme. However, the researcher personally administered the entire questionnaire.

The researcher personally conducted a review of all finalized cases arising from the May 2008 violence in the affected 9 courts in the Greater

[3] Linda Melissa, an undergraduate student with the Wits Law School
[4] Rebecca Sutton, Research Intern, Forced Migration Studies Programme, Wits University,Winter 2009.

Johannesburg Area. From the dockets and court judgments reviewed in these courts, the researcher was able to determine the type of charges which were pressed against the perpetrators, the various reasons for the dismissal of cases from the court rolls, the reasons for acquittals and the nature of convictions. This provided the researcher with a general view of the withdrawal, acquittal and conviction rates in these cases.

To get relevant information for cases which were *sub judice*, the researcher adopted the non-participant observation technique. This required the researcher to sit in court and follow up proceedings in ongoing cases arising from the May 2008 violence. In this regard, the researcher was able to follow up proceedings in seven (7) of the thirteen (13) outstanding cases. Non-participant observation is a qualitative technique in data-collection which is used widely in all areas of research. This technique according to Fox (1998:11) involves the use of all human senses, and reliability rests on the researcher rather than secondary sources. Bell (2000) also asserts that, at the heart of every case study lies a method of observation. He argues that, "… observation is a technique that can often reveal the characteristics of groups or individuals which would have been impossible to discover by other means…."

The researcher then conducted in-depth interviews with selected institutional respondents. This allowed me to gain an insight into the issues identified in the dockets and judgments and thus in answering the question raised in this research. This type of interview was chosen because it is best for exploratory research methodology. According to Mouton & Marais (1991:43), an exploratory research methodology is used to explore a relatively unknown research area that leads to insight and comprehensive view rather than the

collection of accurate and replicable data. As the researcher's aim was to get an insight into how the SAPS, NPA and the courts responded to the May 2008 xenophobic violence, this approach was relevant to the research. To determine whether justice outcomes to the May 2008 violence were related to lack of commitment as a result of antipathy and negligence on the part of NPA and SAPS; the coalition between non-state policing and justice structures; and the hostile climate with regards to migrants, I made a brief comparison of how these institutions have dealt with other forms of violent contact crimes in the past.

The research for this study was also archival and socio-legal in nature; in that case dockets of the NPA and case law on the May 2008 xenophobic violence were interrogated. The research was also assisted by information from library sources such as books, journal articles, research papers, and reports.

### 3.2 Mixed Method Design

Mixed methods research refers to those studies or lines of inquiry that integrate one or more qualitative and quantitative techniques for data collection and/or analysis. According to Hunt (2007), "a mixed research design is a general type of research that includes quantitative and qualitative research data, techniques and methods in one case study". It has been argued that (Hunt: 2007) mix research design "involves research that uses mixed data and uses both deductive and inductive scientific methods and has multiple forms of data collecting and produces eclectic and pragmatic reports".

Hunt (2007) also asserts that there are two main types of a mixed method: mixed method and mixed model research. A mixed research method is that in which quantitative data is used for the primary phase of a research study and qualitative data for the secondary phase of the same research. A mixed model design on the other hand is a research study in which there is a mixing of quantitative and qualitative approaches at every level of the research.

I adopted the mixed model design for this research. Qualitative methods in the form of observations and in-depth interviews generated data for the study. Quantitative methods were also required as one of the goals of this research was to collect data to present statistical descriptions and explanations in the form of prosecution rates, conviction rates, acquittal rates and withdrawal rates. Furthermore, archival sources (laws, dockets and judgements) were also consulted.

According to Leedy (1997), investigation of policies and programmes often use qualitative research to describe programme implementation, understand problems, experiences and perspectives of the actors and quantitative research to explain, illustrate and to qualify findings from a qualitative research. Johnson and Onwuegbuzie (2004) also assert that a mixed method employs qualitative research objectives, qualitative data collection, and quantitative data analysis. According to Borkan (2004), mixed methods are advantageous for research in that: they suggest, discover, and test hypotheses; they give new insights on complex phenomenon; they allow the investigator to address practice and policy issues from the point of view of both numbers and narratives; they add rigor. The mixed model design was therefore the most appropriate research method for this study.

### 3.3 Case Study Research

It is through a case study approach that results of qualitative research can be presented in the most effective way. A case study, argue Brown and Dowling (1998), allows for a more in-depth study of a phenomenon. According to Leedy (1997), there are two types of case studies; single and multiple case studies. A single case study focuses on a single site as the setting for collecting data relevant to a research question. Multiple case studies on the other hand involve two or more research sites as the settings for investigating a research question. This study adopted the multiple case studies approach as it collected data in nine sites. This approach was more effective as it enabled the researcher to make a more generalized conclusion of the research findings for the Greater Johannesburg Area.

### 3.4 Research Sites/Sampling Frame

The Sampling Frame for this study included the nine (9) Courts which dealt with cases arising from the May 2008 xenophobic violence in the Greater Johannesburg Area. These courts are located in Wynberg, Germiston, Tembisa, Johannesburg, Boksburg, Randburg, Soweto, Krugersdorp and Roodeport. From these court areas, prosecutors, police officers and magistrates were identified and interviewed.

### 3.5 Research Participants/Sampling Method

From the dockets and judgments reviewed, a sample of 10 cases was identified and selected for in-depth analysis. To select these 10 cases, the researcher took interest in those cases which were well prosecuted on the one hand and those cases which were poorly prosecuted on the other hand.

In order to identify these 10 cases, the researcher considered issues such as, seriousness of the charges; the execution or non-execution of arrest warrants against absconding witnesses; the reasons for withdrawal/dismissal of a case; and the grounds for acquittal and or conviction.

After taking the above issues into consideration the researcher selected the following 10 cases for in-depth analysis. The first set of five cases represents those that were properly prosecuted and the second set of five cases represents those that were poorly prosecuted. The cases include Case No RC3/459/08 (Wynberg) between the State V. Byuso and 3 others (Theft); Case No SH 416/08 (Rodeport) between the State V. Mbolani and 1 other (Robbery and Malicious Intentional Damage to Property); Case No RC/3/2344/08 (Randburg) between the State V. Maxase (GBH and Assault); Case No SH/239/08 (Boksburg) between the State V. Mbatha and 5 others (Theft and House Breaking); and Case No 43/926/08 (Soweto) between the State V. Mbona (Theft, Public Violence, House Breaking, Possession of fire arms/ammunition). The second set of cases includes; Case No 4SH/91/08 (Germiston) between the State V. Ramasia (Murder); Case No 43/968/08 (Soweto) between the State V. Buthelezi and 4 others (GBH, Robbery, Malicious Intentional Damage to Property and Public Violence); Case No TRC/520/08 (Tembisa) between the State V. Mahlangu and 10 others (Possession of Dangerous Weapons and Public Violence); Case No 41/966/08 (Johannesburg) between the State V. Mchunu and others (Public Violence); and Case No RC/3/09 (Randburg) between the State V. Buthelezi and 3 others (Murder (Attempt), GBH, and House Breaking).

Based on the primary findings from the in-depth analyses of the information contained in the case dockets of the above selected cases, the researcher then

proceeded to select a sample of 25 respondents for in-depth interviews. The 25 respondents selected consisted of 10 (NPA), 10 (SAPS) and 5 (Magistrates). In selecting these 25 respondents, the researcher focused on those police detectives and NPA prosecutors who handled the case files. The case dockets reflected the details of both the detectives and the prosecutors, reasons why it was a bit easy to identify the police detectives and NPA prosecutors concerned. This enabled the researcher to get further information required for the analysis of the findings. By selecting these 25 respondents, a purposive sampling technique of institutional actors was adopted. No interviews were conducted with victims because the research focused strictly on institutional responses to the May 2008 xenophobic violence.

Neumann (2000) maintains that purposive sampling is acceptable for three situations: when a researcher wants to select a specific case that is especially informative; when selecting members of a difficult-to-reach specialized population; and when a researcher wants to identify cases for in-depth investigation. Because this research focused on specific cases from the sampling frame as well as relied on an in-depth investigation to capture the responses of a target specialized groups (SAPS/NPA/Magistrates) to the May 2008 xenophobic violence, this sampling technique was therefore relevant for this research.

### 3.6 Access to Research Sites

Generally, decisions on cases that have been finalized fall in the category of information within the public domain. Accessing case dockets of cases that had been completely dealt with by the courts did not pose any difficulty or

require any extra measure from the researcher. However, cases which are *sub-judiced* do not fall in the category of information within the public domain. Execution of the non-participant observation technique adopted to deal with *sub-judiced* cases did not also pose any difficulty as prior permission was not required for the researcher to sit in court and follow up court proceeding.

The researcher had initially planned to also visit the relevant police stations and conduct a review of the police station diaries as well as police case dockets. Based on the primary findings from the station diaries and police dockets, an in-depth interview with selected police officers was to follow. This did not turn out to be the case, because police station dairies and police case dockets do not generally fall in the category of information within the public domain. However, the researcher was able to conduct general interviews with members of the SAPS without reference to the police station diaries and police case dockets.

### 3.7 Research Design

To test the three variables: commitment; coalition; and context (stated in the hypotheses of this research) and thus to answer the question posed in this research, the researcher adopted a four–prong research design.

First, the researcher looked at the withdrawal, acquittal and conviction rates for similar violent crimes as well as the challenges facing the criminal justice system in the Greater Johannesburg Area from the most recent available statistics. The 2007/2008 annual reports of the NPA and the SAPS

released in September 2008 and March 2008 respectively was of prime relevance here.

The researcher then proceeded by reviewing the judgments in cases arising from the May 2008 xenophobic violence. This provided information on the withdrawal, acquittal and conviction rates in these cases.

In-depth interviews were then conducted with the selected respondents to test the hypothesis in this study.

Findings were interpreted and analyzed and conclusions drawn on the extent to which each of the above stated variables affected the justice outcome in these cases.

### 3.8. Data Analysis

The data was analyzed using a mixed method approach. A qualitative analysis was used in constructing an exploratory and descriptive understanding of how justice was served by the NPA, the SAPS and the courts in cases arising from the May 2008 violence. A quantitative analysis was used in presenting the conviction, acquittal, withdrawal and outstanding case rates. Content analysis of the case dockets/judgments and interviews was employed to supplement the qualitative analysis.

### 3.9. Ethical Considerations

Prior permission was sought from the NPA prosecutors attached at the various courts for access to their dockets. The researcher carried with him at all times a letter which introduced him and the research. This letter which also outlined the rights of the respondents was presented to all respondents

prior to all interviews. This approach was adopted because the use of formal consent forms would not have been realistic in interviewing professionals. The researcher also came across information which was vital for this research during 'off the record' conversations with some of the respondents. In such situations, especially in cases where the respondents elected to speak 'off the record'; the researcher used the information gathered from such interviews to corroborate the responses from other respondents.

Respondents were informed of the nature of the research, and their rights to voluntary participation and withdrawal at any point of the interview; their rights to anonymity and confidentiality; their right to have the interview tape-recorded and not to answer any question. There was no remuneration for respondents. At the close of any scheduled interview, respondents were handed a copy of the consent form and were informed on subsequent follow ups if any.

Since the sole aim of this research is for academic purposes and not to initiate legal proceedings, illegal activities uncovered during the course of the research were not reported. However, no cases of serious perversion of justice were uncovered; otherwise the researcher would have alerted the authorities of the University.

### 3.10 Limitations

This research is limited in a number of ways. First the research focused only on cases in the Greater Johannesburg Area and did not look at justice responses from other jurisdictions. Second, the research is limited to criminal cases and did not look at the justice issues related to civil claims.

Although the SAPS is the entry point of cases into the criminal justice system and an important first stop for matters relating to crimes, much of the needed information could not be gotten from the police station diaries and police case dockets because as stated above; these documents do not fall in the category of information within the public domain. To access the police station diaries and police case dockets therefore required a formal clearance from the office of the Commissioner of Police. To get a clearance would have taken at least six months to materialize.[5] A second reason why the clearance issue with the SAPS was not pursued any further was that Forced Migration Studies Programme was simultaneously running a separate project on informal policing that required uninhibited access to police stations and there was a concern that this research might hinder or jeopardize that research.

The SAPS were also not as collaborative as the NPA, reasons why these research findings became more focused on the NPA. Even when some members of the SAPS volunteered to speak to this researcher they however expressed great suspicion; this might also have negatively affected the outcome of their answers in responding to certain questions posed. Another limitation was the lack of information and prior research in this aspect of xenophobia. A bigger and representative sample was not possible due to nature of this research as well as time constraint. Some respondents both from the SAPS and the NPA became hostile at one stage or the other during the interviews. Some of them even threatened to use violence on the researcher when a certain line of questioning was pursued. All these may in

[5] Interview with Darshan Vigneswaran who was at the time coordinating a research project on informal policing, 20 April 2009

turn impact on this research. Hence, the research does not intend to make generalizations as it would be unrealistic to do so in the circumstance.

The present research findings will however still be valuable in that, it reveals specific insights into the research question and hypotheses of this study as well as the general trends, which may be further investigated.

# CHAPTER FOUR: FINDINGS AND ANALYSYS

The United Nations Office for Drug and Crime (UNODC) (2003: 53) has identified crime as one of the most pressing and visible social problems confronting contemporary South Africa which has been recognized by the Government as a high priority issue. The victimization pattern of violent crime in South Africa is shaped by factors such as gender, age, income, race, and place of residence (UNODC: 2003), and now nationality. Thus, while socio-economic factors and living circumstances are key determinants of who is victimized by what type of crime, being a foreigner in South Africa has since 1994 also emerged as one of the interpretative keys of the victimization pattern in South Africa. The nature of the 1994 transition, and more specifically the opening of the borders, encouraged an increase of foreign migration into South Africa making the foreign migrants major targets of xenophobic violence.

According to Schönteich (2003), "one of the major flaws in the South African government's approach to crime lies in its inability to expeditiously rectify glaring weaknesses in the criminal justice system". He argues that an effective criminal justice system is important in more ways than one; first it serves as deterrence; it inspires confidence and trust among victims; improves on the conviction rate; and makes the community feel safer.

## 4.1 Prevalence of Contact Crimes

According to a SAPS Annual Report[6] serious violent crimes such as murder, attempted murder, rape and assault with the intent to inflict grievous bodily

[6] SAPS 2007/2008 Annual; Report

harm (assault GBH), common assault, indecent assault, aggravated robbery and other robberies are grouped together under a category known as contact crimes. This categorization is important for victims of xenophobic attacks not only because the crimes involves physical contact between the victims and perpetrators, but also because such contact is usually of a violent nature. Beyond these two issues is perhaps the more important fact that contact crimes frequently impacts on victims in more ways than one; death as an immediate or delayed result of the degree of violence employed (some death; injuries of various degrees; psychological trauma and; loss of and/or damage to property. According to the SAPS[7] contact crimes accounted for 33 per cent of South Africa's recorded serious crime in the 2008/2009 financial year; the period during which the May 2008 xenophobic violence erupted. Although the serious consequences of contact crime and the fact that South Africa experiences exceptionally high levels of these crimes have been generally acknowledged by the government and despite the fact that measures have been put in place to reduce contact crimes by 7-10 per cent per annum[8], the table below suggests that this target has not been realized.

[7] SAPS 2008/2009 Annual Report
[8] See SAPS 2004/2005 Annual Report for details

| Crime Category | 2006/2007 | 2007/2008 |
|---|---|---|
| **Contact Crimes** | | |
| Murder | 2.4% | -4.7% |
| Rape | 6.0% | -8.8% |
| Indecent Assault | 7.1% | -2.1% |
| Attempted Murder | -3.0% | -7.5% |
| Assault with the intent to inflict Grievous Bodily Harm | -4.9% | -4.6% |
| Common assault | -8.7% | -6.6% |
| Robbery with Aggravating Circumstances | 4.6% | -7.4% |
| Common Robbery | -5.8% | -9.5% |
| **Contact Related Crimes** | | |
| Arson | 2.0% | -6.6% |
| Malicious Damage to Property | -1.7% | -5.4% |
| **Property Related Crimes** | | |
| Burglary at Residential Premises | -5.9% | -5.6% |

**Table1: A comparison of the increases or decreases in the ratios of recorded serious crime between 2006/2007and 2007/2008 (Source: 2007/2008 SAPS Annual Report)**

At the end of the May 2008 xenophobic violence in South Africa, this research found that the SAPS and the NPA succeeded in placing 68 case files consisting of 327 suspects for prosecution before the courts in the Greater Johannesburg Area. From the break down of the charges placed before the courts, the research also found that the NPA pressed a total of 107 counts on all the suspects. These counts were generally of a violent nature ranging from public violence (40 counts); robbery (21 counts); house breaking (15 counts); theft (9 counts); Malicious Intentional Damage to Property (MITP) (6 counts); assault (5 counts); assault occasioning grievous bodily harm (GBH) (5 counts); rape (2 counts); murder (2 counts); possession of firearms (2 counts); and intimidation (2 counts). This breakdown of counts and offences confirms that most of the crimes committed during the May 2008 xenophobic violence in the Greater

Johannesburg Area were contact crimes. Although this category of crime is not status specific to migrants who were victims of the May 2008 xenophobic violence, the fact that migrants constitute a vulnerable group is an aggravating factor that can not be ignored.

In order to assess whether the SAPS and the NPA were effective and efficient in their investigative and prosecutorial roles and functions, it is crucial to analyze their performance in terms of how many probable cases never made it to court as well as how the cases arising from the May 2008 xenophobic violence were investigated and prosecuted. A general performance assessment of how cases emanating from the May 2008 violence were processed by the criminal justice system follows.

## 4.2 Assessment of the Performance of Criminal Justice System

According to Ejimofo (2007: 56) "the criminal justice process includes everything that is required to be done from the moment of arrest of a person suspected of having committed an offence through interrogation, arraignment, prosecution, conviction, sentence and incarceration to the release by the state". Ejimofo (2007) also rightly maintains that freedom may come to a suspect or accused at any different stages in the criminal justice process; a person may be granted pre-trial or awaiting trial bail by the police or the court respectively; the prosecution may exercise their prosecutorial discretion to discontinue with the case for want of evidence; the Attorney General may enter a *nolle prosequi*; the court may dismiss the case for want of diligent prosecution or lack of evidence; the court may enter a verdict of not guilty at the conclusion of the hearing; or the state may grant a person a state pardon on conviction.

In South Africa, the criminal justice system comprises the police, the National Prosecuting Authority (NPA), the court and the prisons. A suspect or accused as the case may be may come in contact with any of these institutions respectively at three levels. These are during arrest and investigations by the police, during the prosecution of the case in the courts by the NPA, and after a custodial sentence in the prisons.

Assessing the performance of the criminal justice system may not be an easy exercise. This is so because as Sutton (2009: 5) argues, there are several performance indicators that can be explored to assess the efficiency of the criminal justice system. Some key performance indicators of the criminal justice system would include not only factors such as prosecution rates, conviction rates, acquittal rates, and withdrawal/dismissal rates, but also indicators such as the number of "unnecessary arrests" made by the SAPS, the number of people who were granted bail but remain in prison because they are simply too poor to pay the bail amount set by the court, and the impact of minimum sentence legislation on the prison population. This section provides a performance assessment of the SAPS, the NPA and the courts.

A background research on the May 2008 xenophobic attacks in South Africa, (Sutton: 2009) suggests that there are no clear measures or indicators of assessing the efficiency of the criminal justice system in South Africa. She argues that, the various institutional actors in the criminal justice system in South Africa use different performance indicators of their choice. Sutton argues that conviction rates are difficult indicators in assessing the performance of the SAPS and the NPA because both institutions use different methods to determine their success/conviction rates. The NPA

would for example use the number of convictions secured on a case by case basis by looking at the number of convictions against the number of cases that went to trial as a performance measure of the conviction rate. On the other hand the SAPS would rather consider the number of convictions secured per count; in cases where more than one (1) count is brought, a conviction on one (1) count would be considered as a performance indicator of the conviction rate notwithstanding the fact that an acquittal was had in the other counts.

### 4.2.1 Assessment of the Investigating Performance of the SAPS

In terms of the Constitution of the Republic of South Africa (*Act No 108 of 1996),* the aim of the Department for Safety and Security which oversees the SAPS, is to prevent, combat and investigate crime; to maintain public order; to protect and secure the inhabitants of South Africa and their property; and to uphold and enforce the law.

In order to successfully implement this constitutional mandate, the Ministry has come out with a policy and implementation programme divided into five programmes of action. Under Programme 2 which is Visible Policing Programme[9], the SAPS is required to discourage all crimes occurring by providing a proactive and responsive policing service that will prevent the priority crime rate from increasing annually. Under Programme 3 which is the Detective Services Programme[10], the SAPS is required to contribute to the successful prosecution of crime by investigating and gathering all related evidence, thereby preventing the detection rate from decreasing annually.

[9] SAPS 2004/2005 Annual Report
[10] Ibid

According to Louw (1998), common measures used to assess police performance includes clearance rates (number of cases 'closed' by the police through, for example, withdrawals or court acceptance, as a ratio of reported cases), arrest rates (number of arrests as a ratio of recorded cases) and attrition rates (number of arrests that lead to convictions). For the South African Police Service[11], performance of the detective services of the SAPS is evaluated through indicators such as the number of cases/charges referred to court; detection rate; and conviction rate.

#### 4.2.1.1 Cases/Charges Referred to Court

As indicated above there were serious barriers in accessing and collecting information from the SAPS. Information concerning the number cases and the nature of charges investigated by the SAPS on cases emanating from the May 2008 xenophobic violence, could only have been determined by reviewing the police station diaries and police case dockets. However, this turned out not to be the case. It was therefore not practically possible for this researcher to determine the actual number of cases and specific nature of charges of offences arising from the May 2008 xenophobic violence that were investigated by the SAPS in the Greater Johannesburg area.

As a result of the above difficulties, it was also not possible for this researcher to determine the actual number of cases and the specific nature of charges that the SAPS referred to the NPA for prosecution in the courts. However, what seems to be obvious is the fact that all the 68 cases that were eventually placed before the courts were referred to the NPA by the SAPS.

[11] The 2008/2009 Annual Report of the SAPS

#### 4.2.1.2 Detection Rate

According to Smith et al. (2004: 229), detection rates are normally seen as the number of cases solved divided by the number of cases recorded. There are two ways of calculating the detection rate for a specific year: take the recorded crimes for this year as starting point, and then look at the subset of these crimes consisting of those crimes that are solved; take all crimes that are solved in this year as starting point, without looking at the registration year and then divide this number by all recorded crimes in that year (Smith et al.: 2004). A crime is solved where at least one 'suspect (offender) is found' (Leggett: 2003). It now becomes crucial to ask the question - at what stage can a suspect (offender) be said to have been found? Different jurisdictions answer this question in different ways. For example, in order for a crime to be deemed 'detected' in England and Wales: a suspect must be identified and notified of the investigation; there must be sufficient evidence to charge the suspect with a crime; and the suspect must in fact have been charged, or there must be one of a number of clearly specified reasons why a charge should not be brought[12]. In contrast, the SAPS would include types of cases to determine the detection rate: cases referred to court after identification of a chargeable suspect; cases affirmatively determined by the police to be without merit; and cases withdrawn before charging a suspect, at the request of the victim and with the approval of the prosecutor[13].

In view of the difficulties highlighted (in section 4.2.1.1) above, it was not possible for this researcher to determine the detection rate of cases emanating from the May 2008 xenophobic violence in Greater

[12] Home Office of the United Kingdom, Counting Rules for Recorded Crime, Section H: Detections.
[13] South African Police Service Standing Order (General) 325; South African Police Service Annual Report 2001/2

Johannesburg. However, in their research on the May 2008 xenophobic violence in South Africa, Misago et al. (2009: 3) found that "in responding to the threats and outbreaks of violence … local leaders and police were typically reluctant to intervene on behalf of victims. In some cases, this was because they supported the community's hostile attitudes towards foreign nationals. In others, they feared losing legitimacy and political positions if they were seen as defending unpopular groups. In almost all instances, local leaders and police spoke of their incapacity to counter violence and violent tendencies within their communities."

#### 4.2.1.3 Conviction Rate

Assessing the conviction rate of the SAPS with respect to the cases emanating from the May 2008 xenophobic attacks in the Greater Johannesburg area was not effective. This is partly so because this researcher had to rely solely on the NPA case dockets. To effectively measure the conviction rate of the SAPS would require information on the number of cases registered/referred to the NPA as well as the detection rate. Since this information was not accessible at the time of writing this research, it became unnecessary to measure the conviction rate of the SAPS as the assessment would not have been valuable in the circumstance.

### 4.2.2 Assessment of the Prosecuting Performance of the NPA

In this section I look at the performance of the NPA through such indicators as the conviction rate, acquittal rate, prosecution rate, outstanding cases rate and withdrawal/dismissal rate. I also present findings on other performance lapses recorded.

The NPA structure inter alia includes the National Prosecuting Services (NPS), the Witness-Protection Programme, and specialized units such as the Sexual Offences and Community Affairs Unit. The NPA is empowered under the NPA Act to institute and conduct criminal proceedings on behalf of the State; carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and to discontinue criminal proceedings by way of a *nolle prosequi*.

According to its 2002/2003Annual Reports, the NPA has made steady progress towards achieving productivity in courts, but this has to be viewed in the light of substantial increases in the number of new cases. Between January 2002 and December 2002 for example, the lower courts finalized a total of 833 594 cases, of which 421 213 were withdrawn. Outstanding cases on the lower courts' rolls decreased from 195 638 in January 2002 to 180 953 by the end of December 2002. Over the same period the conviction rate was 81 per cent. The High Courts finalized 1 684 cases between January 2002 and the end of September 2002. Of these, 288 were rape cases referred by the lower courts, for which the High Court must give at least the minimum sentence; with 1 130 receiving a verdict of guilty (81per cent). There was an outstanding roll of 1 048 cases and 1 827 new cases were registered.

It is difficult to measure the performance of the NPA reliably and fairly (Schönteich :2001: 95), because their role of prosecution, as part of the whole criminal justice system, is shaped by a variety of factors, over which it has little or no control (Keuthen: 2007). This is partly so because as Keuthen (2007) argues, the work of the prosecution service is linked closely to the performance of other role players in the criminal justice system such

as the police detectives. The prosecutor's performance is thus not only influenced by the length of time it takes to dispose of a case in court, but also on a diligent and meticulous investigation by the police s. The situation becomes more critical when it is understood that a prosecutor has very limited control over the way the police carry out their investigations. Even when a good prosecutor explores his limited control and guides the police detective in the investigation process, much will still depends on the quality of work delivered by the police. A successful prosecution by the NPA therefore depends largely on a successful detection and investigation of crimes by the SAPS. Thus, the detection and case processing rates remains vital performance measurements to determine the efficiency and effectiveness of the criminal justice system in dealing with cases emanating from the 2008 xenophobic violence in Greater Johannesburg.

#### 4.2.2.1 Cases Registered For Prosecution

As indicated above, the total number of cases where the NPA instituted prosecution were 68. Of the 107 counts pressed by the NPA, 40 counts (37.3 per cent), were for public violence; 21counts (19.6 per cent), were for robbery; 15 counts (14 per cent), were for house breaking; 9 counts (8.4 per cent), were for theft; 6 counts (5.6 per cent), were for MITP; 5 counts (4.6 per cent), for common assault; another 5 counts (4.6 per cent), for GBH; and 2 counts (1.8 per cent) each for rape, murder, possession of fire arms and intimidation. I present this statistics in the table below.

| Break down of offence type and Counts | | | | |
|---|---|---|---|---|
| **Offence** | **No of Counts** | | **Per cent** | |
| | **Specific** | **Total** | **Specific** | **Total** |
| **Public Violence** | **40** | | **37.3** | |
| **Robbery** | **21** | **61** | **19.6** | **56.9** |
| **House Breaking** | **15** | **76** | **14.5** | **71.4** |
| **Theft** | **9** | **85** | **8.4** | **79.8** |
| **MITP** | **6** | **91** | **5.6** | **85.4** |
| **Common Assault** | **5** | **96** | **4.6** | **90** |
| **GBH** | **5** | **101** | **4.6** | **94.6** |
| **Rape** | **2** | **103** | **1.8** | **96.4** |
| **Murder** | **2** | **105** | **1.8** | **98.2** |
| **Possession of fire arms** | **2** | **107** | **1.8** | **100** |

**Table III: Nature of Offences Committed and No of Counts Pressed per offence type.**

A striking feature from Table III above is the fact that, there were very few charges for the most serious offences such as murder, rape and assault occasioning grievous bodily harm (GBH). A list of deaths suspected to be arising from the May 2008 xenophobic violence was forwarded to this researcher by the Forensic and Pathological Services (FPS) in Johannesburg. According to this official source, at least 18 deaths occasioned by violence of various types occurred between the 1st and 26th of May 2008 in the Greater Johannesburg area. However, since this research was limited in scope to the period between 11th May and 5th of June 2008, it became necessary to examine the FPS list from this narrow scope. From the FPS list, 15 deaths suspected to be related to the May 2008 violence, occurred within the Greater Johannesburg area between the periods 11 – 26 May 2008.

Even though these deaths were not confirmed as particularly arising from the May 2008 violence, it also has to be accepted that the FPS list was by no means exhaustive. More so, the registered cause of death, the area where the

dead bodies were found and the high level of anti foreigner violence in these areas at the time make a strong case why these dead bodies were rightly suspected to be related to the May 2008 xenophobic violence. The FPS list is therefore suggestive of the minimum number of murder charges that ought to have appeared before the courts.

According to a Disaster Response Evaluation Report by the Forced Migration Studies Programme (Igglesden et al.: 2009), there are a number of possible explanations for why very few cases were followed-up by the SAPS. The report argues that one of such possible explanation is the fact that many perpetrators were released shortly after their arrest. Other possible explanations advanced by the report includes: community pressure on prosecutors to suspend prosecution by not proceeding beyond the investigation phase (in return for community participation in re-integration initiatives); victims unwilling to press charges, perhaps because of lack of confidence in the system, and/or fear of reprisal; some victims and witnesses were repatriated or encouraged to leave the country without any arrangements being made for their return in order to attend to any pending court processes; and the state's failure to lay claims on behalf of the victims.

#### 4.2.2.2 Conviction Rate

This is seen as the number of cases resulting in a conviction as a proportion of the total number of recorded cases. Generally conviction rates are high. For example, the 2008/2009 Annual Report of the NPA shows that during the 2008/2009 financial year, the High and Lower Courts finalized a total of 313, 446 case with a conviction rate of 86.3 per cent. Conviction rates are

important indicators of telling how well the criminal justice system is doing (SALRC: 2000).

It is particularly important for victims of xenophobic violence that their attackers are convicted and appropriately punished. A high conviction rate will not only restore hope in the victims, but will also deter future perpetrators as well as boost the credibility of the criminal justice system in dealing with this category of crime. A low conviction rate on the other hand impacts negatively on the credibility of the criminal justice system and creates a sense of impunity for perpetrators. From the perspective of a victim of crime, it makes no difference if the system fails them at the stage of the police investigation, the prosecution in court or because of a disjointed interaction between the two (SALRC: 2000: 3). The effective response of the criminal justice system can therefore only be measured by looking at the system as a whole. Conviction rates are a crucial determinant in assessing the effectiveness of collaboration between the police and prosecutors.

However, the SALRC (2000) report cautions that conviction rate should not be seen as the only appropriate performance indicator. The Report maintains that heavy focus on conviction rates alone may be detrimental to the interest of justice. In a constitutional democracy such as South Africa's, the law does not only guarantee the presumption of innocence for any alleged offence, but also affords the suspects with certain rights. Thus the police are compelled to follow due process and are not allowed to violate the law just to obtain a conviction. It is also highly probable that majority of the cases of xenophobic violence never came to court or were even reflected in a police docket; and fairness dictates that an accused must be acquitted if reasonable doubt exists about his guilt. However, the progress and outcome of cases is

indicative of the systemic performance of the criminal justice process and this is the subject of this section.

It has been contended (Schönteich: 2003) that in assessing the performance of the NPA through its conviction rates, regards must be had to the fact that the success of a prosecution is largely determined by the way a crime is investigated by the police. Schönteich (2003) also made the important argument that "a poorly investigated case, where for example no statements are recorded from potentially vital witnesses, or where incomplete or inaccurate statements are recorded, or where evidence is obtained in an illegal manner, is likely to result in the acquittal of an accused person who would have otherwise been found guilty". He concludes that even a good prosecutor, let alone an inexperienced one, will not find it possible to salvage a case where crucial aspects of its investigation are flawed.

To measure the conviction rate in cases arising from the May 2008 xenophobic violence in the Greater Johannesburg Area, the researcher considered all the number of cases in which a conviction was secured by the NPA and divided it over the total number cases registered. As of the time of writing this research, the NPA had succeeded to pick 6 convictions out of the 68 cases registered in court. Mathematically, this constitutes just 8.8 per cent of the total number of cases registered. When this is measured with the general conviction rate of 86.3 per cent registered in the 2008/2009 financial year, it suggests that the conviction rate for cases emanating from the 2008 xenophobic attacks were extremely low.

#### 4.2.2.3 Acquittal Rate

In addition to conviction rates, acquittal rate another important performance indicator in assessing how effective and just the criminal justice system is. The acquittal rate is measured as the proportion of cases in which the accused was discharged after a full trial over the total number of cases registered before the courts by the NPA. According to the Prosecuting Policy of the NPA, prosecutors should only institute criminal proceedings against an accused, where there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution (Schönteich: 2001). It has been argued (Schönteich: 2001) the chances of having a high conviction rate by the prosecutors is influenced by the fact that the prosecution policy lists a range of factors which should be taken into account by prosecutors in deciding whether or not to institute a prosecution: the strength of the state's case, the admissibility of the state's evidence, the credibility of the state's witness, the strength of the defense's case, and the extent to which the prosecution would be in the public interest. The reason for this lies in the fact that cases are usually prosecuted only where there is a reasonable prospect of obtaining a conviction, which means cases where the evidence is substantially in favor of the prosecution's case. Against this background it seems that the prosecution service now screens with more accuracy which cases it takes on.

It therefore becomes important to assess the performance of the NPA by looking at the number of acquittals they registered in prosecuting these cases. This is all the more important because the Prosecuting Policy requires the prosecutors to present their cases 'fearlessly, vigorously and skillfully'. The acquittal rate is therefore indicative of the extent of vigorousness and

skillfulness implored by the prosecutors in handling these cases. While the NPA succeeded in picking just 6 convictions in all the 68 cases registered, they however suffered an acquittal in 12 cases. This gives an acquittal rate of 17.6 per cent. From the 2008/2009 NPA Annual Report which placed the conviction rate at 86.3 per cent, it follows that the acquittal rate in the same year would be 13.7 per cent. When these two figures are compared, it shows that the acquittal rate for the May 2008 xenophobic cases was higher than the average.

#### 4.2.2.4 Prosecution Rate

Prosecution refers to the number of cases which successfully went through the court system resulting in either a conviction or an acquittal. As seen above, the number of convictions and acquittals registered were 6 and 12 respectively, making a total number of 18 cases. When this is measured as a proportion of the number of cases registered, it gives a low prosecution rate of just 26.4 per cent.

In 1999 it was 25.4 per cent for murder, about 16 per cent for rape and for assault with the intent to commit grievous bodily harm, 10.2 per cent for common assault, 6.5 per cent for residential housebreaking and 4.3 per cent for robbery with aggravating circumstances (Schönteich). Although the prosecution rate for cases arising from the May 2008 xenophobic violence in the Greater Johannesburg Area is appears to be a more little more impressive, a proper understanding of this figure can only be had when reference is made to fact that the acquittal rate was 17.6 per cent.

Quizzed on what they observed as some of the factors that adversely affected a successful prosecution in these cases, MAG4 had this to say:

*"…from the way the witnesses were led in court… you could see that they hardly had any pre-trial conference with the prosecutors…"*

MAG2 would add that:

*"…there appeared to have been a complete disconnect between the prosecutors and the detectives…"*

**4.2.2.5 Cases Withdrawn from Court/Dismissed by Court**

There are several reasons that can lead to the withdrawal of a case in court. For example, a victim knows the offender or is related to him and declines therefore to testify against him. Sometimes an expert's report is required in a particular matter and may delay the trial until it is furnished. Consequently, there will be always a certain percentage of cases withdrawn in court. But a relatively high withdrawal rate is nevertheless an indicator for the fact that cases are referred to the court, even though they were not properly investigated and checked by the prosecutors.

According to the NPA Annual Report for 2005/2006, there were 1,075,581 new cases taken on by the prosecution service of which 311,087 were withdrawn, giving a quota of 29 per cent. The number of cases withdrawn in court saw a decrease from that of the last three financial years from 414,211 in 2002/03 to 311,087 in 2005/06. This was a reduction of 24.9 per cent over that period. In 1996, 34 percent of the cases referred to court were withdrawn, thereafter withdrawals increased as follows: 36 per cent in 1997,

38 per cent in 1998, 42 per cent in 1999, and 46 per cent in 2000 (Schönteich: 2001). Against this background it seems that the prosecution service now screens with more accuracy which cases it takes on. The 2008/2009 Annual report of the NPA shows that as at March 2009, a total of 1 058 376 cases were taken on by the NPA of which 638 720 were removed from the roll. The latter includes cases withdrawn, transferred, struck from the roll and warrants issued. This gives a withdrawal rate of 60.3 per cent.

However, with regards to the May 2008 xenophobic violence cases, the research found from case dockets that other reasons were recorded for the withdrawal and or dismissal of cases from court. For example; cases were withdrawn because: the witnesses were untraceable (21 cases); the witnesses were unable to identify the accused persons (2 cases); for want of diligent prosecution: there were missing or no case dockets in court, the witnesses were unjustifiably absent from court, failure by the police and prosecutors to execute bench warrants against absconding accused persons, and failure by the prosecutor to issue subpoena (9 cases); insufficient evidence (2 cases); incomplete investigations (1 cases); accused dies in custody (1 case) and victims did not want to proceed (2 cases). While most of these factors are lapses attributable to the NPA, the SAPS must accept responsibility over lapses such as incomplete investigation and insufficient evidence as well as share the blame over witnesses who could not be traceable.

The above reasons contributed for the withdrawal or dismissal of 37 cases from court. When this is measured as a proportion over the total number cases registered, it gives a withdrawal/dismissal rate of 54.4 per cent. When this figure is compared with the 60.3 per cent withdrawal in 2008/2009 it seems that fewer cases were withdrawn than normal. Nonetheless, 54.4 per

cent is still considered high, when compared with the conviction rates in the 2008 xenophobic cases. Beyond this high withdrawal/dismissal rate is perhaps a more worrying fact; that all the two murder cases that were listed for prosecution were both dismissed for no docket in court.

#### 4.2.2.6 Outstanding Case Rate

These are cases in which the prosecution is yet to commence and/or conclude with the trial of the accused person in court. This may be as a result of so many factors. For example, the accused person may request for more time to enable him to secure the services of a lawyer and adjournments which could also be at the instance of lawyers representing the accused persons. Over these factors the prosecution service has little or no control (Keuthen: 2007). However, it has been argued (Keuthen: 2007) that most often than not, the conclusion of majority of cases is prolonged because of poor caseload management by the courts. Fluctuating levels of outstanding cases constitutes another important barometer for the measurement of the efficiency and performance of the prosecution service because it is something which the prosecution service can manage.

According to the NPS the various targets for case cycle times requires that 78% of the cases in the regional courts should not be older than 6 month, for district courts, 90 per cent of the cases should not be older than 6 month (Keuthen: 2007). Any number of cases which exceeds their normal cycle times as indicated above would qualify as backlog. An increase in backlog of cases also raises serious concerns on the constitutional right of the suspect to an expedited hearing.

The NPA has identified and listed several factors that contribute to the increased backlog of cases to issues such as failure of the accused persons to appear in court; large number of warrants issued by the courts; inadequate court facilities; incomplete investigations; unavailability of some role players in the criminal justice process; lack of commitment to implement case flow management principles and; a high vacancy rate in the prosecution service (Keuthen: 2007).

At the time of this research, there were thirteen (13) cases still pending in the courts. This figure represents 19.2 per cent of the entire number of cases emanating from the May 2008 xenophobic violence in the Greater Johannesburg area. Taking the NPS targets for case cycle times and the fact that this research was carried out over one year after the May 2008 xenophobic violence erupted, it seems legitimate to classify all the outstanding cases as backlogs. It thus becomes crucial to determine the root causes of these delays. The case cycle times in these cases increased because the accused persons did not attend court proceedings, courts issued a number of warrants that were pending execution, and/or the accused or counsel on their behalf requested for more time to prepare their defence. The increased backlog also resulted from a lack of commitment to properly implement directives by the head of the NPA and the Department of Justice and Constitutional Development for these matters to be fast tracked and dealt with expeditiously. I present the statistics on the conviction, acquittal, withdrawal and pending rates in the graphical illustration below.

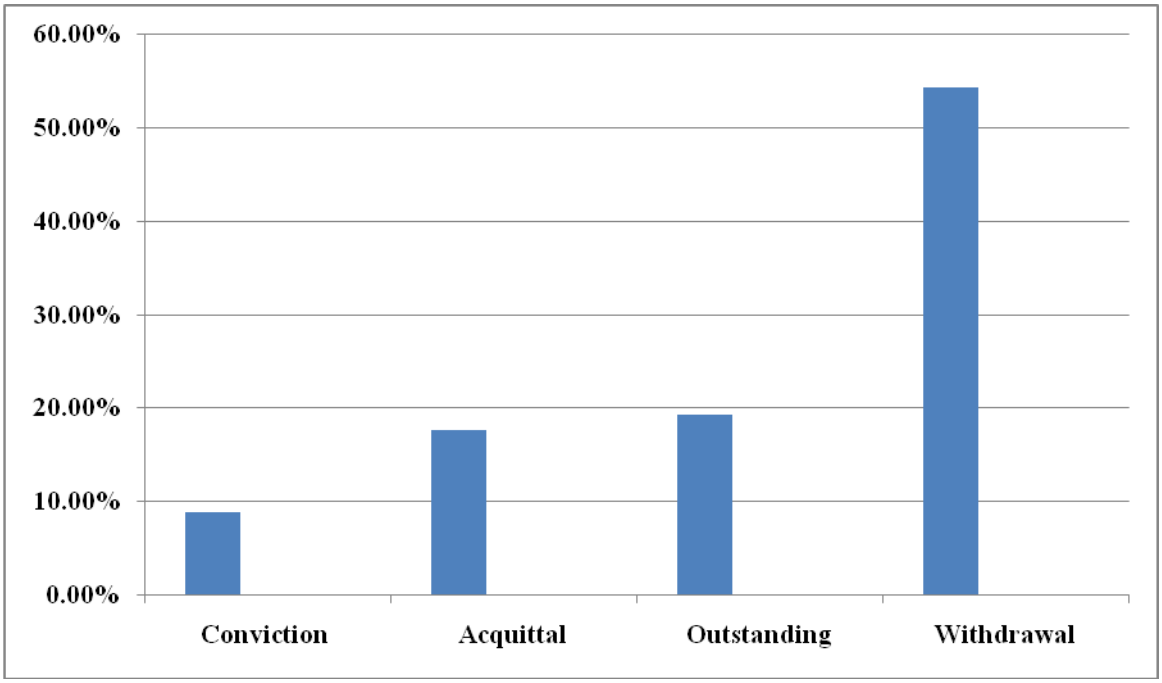


**Figure 1: Conviction, Acquittal, Pending and Withdrawal Rates of cases emanating from the May 2008 xenophobic attacks in the Greater Johannesburg Area.**

### 4.2.3 Assessment of the Court Performance

Court performance is usually measured by using conviction rates, that is, by looking at the number of convictions as a ratio of cases placed before the court (Louw: 1998). According to the 2007/2008 Annual Report of the NPA, an overall criminal conviction rate of 85.9 percent was achieved in the year to 31 March 2008. A total of 1081 High Court trials were finalized during this period with 987 convictions, or 91 percent. In the District Courts, 259 571 cases were finalized with a verdict of 227 482 convictions, or 88 percent. The conviction rate in Regional Courts was 73 percent, with 34 971 cases finalized and 25 362 convictions. On average, the High and Lower Courts managed to achieve a positive clearance ratio, keeping up with its incoming caseload during the year. Altogether 1 037 583 new cases were received and 1 043 857 cases were successfully dealt with by the courts.

At the end of 2008, the backlog in all courts was 39 736 cases older than 12 months in the High Courts, nine months in the Regional Courts, and six months in the District Courts since enrolment.

In assessing the performance of the court with regards to cases emanating from the May 2008 xenophobic violence the researcher looked at the sentences imposed by the courts in the six (6) cases in which convictions were secured. In doing so, the researcher considered issues such as the severe/custodial-versus-lenient/suspended sentences. In analyzing the sentencing options, the researcher utilized the 'principle of proportionality'. According to Lovegrove (2000), proportionality is a principle for the allocation of sanctions, requiring commensurability between offence seriousness and sanction severity. It relates to the sentencing goal of punishment according to just deserts, its appeal lying in its grounding – the idea of fairness.

A basic principle of sentencing is that the sentence imposed by the court should never exceed that which is appropriate or proportionate to the gravity of the crime. The objectives and aims of punishment are traditionally stated as retribution, deterrence, rehabilitation and incapacitation. However, this classification does not capture the other functions of the criminal law which imposes a minimal standard of acceptable behavior in society. Below is a summation of the sentences.

| No | Accused(s) | Court | Case No | Charge(s) | Sentence |
|---|---|---|---|---|---|
| 1 | Mbona | Soweto | 43/926/08 | Theft, P/Viol, House/Breaking, Possession of fire arms/ammunition | Accused acquitted on charges of theft, P/Viol and House/breaking. Found guilty on the charge of unlicensed possession of fire arms: 3years imprisonment & unfit to possess fire arms. |
| 2 | Mbatha/5Ors. | Boksburg | SH/239/08 | Theft, House/breaking | Accused persons found guilty. 6 years imprisonment, suspended for 4 years. Read alongside Section 103 Act 60/2000. Not fit to possess fire arms |
| 3 | Maxase | Randburg | RC/3/2344/08 | Assault, GBH | Accused found guilty as charged: R6000 or 1year imprisonment for GBH; R4000 or 4 months imprisonment- sentence to run consecutively |
| 4 | Mbolani/1 Or. | Rooderport (RC) | SH 416/08 | Robbery, MITP | Accused persons found guilty as charged. 9 years imprisonment, 3 years of which are suspended for 5 years |
| 5 | Byuso/3 Ors. | Wynberg/RC | RC3/459/08 | Theft | 3yrs imprisonment wholly suspended for 5yrs. No order in terms of sec. 103(1) Act 60 of 2000 |
| 6 | Nkosi | Wynberg/RC | RC2/468/08 | P/Viol, H/breaking | 3yrs imprisonment in terms of section 276(1)(i) |

**Table IV: Nature of Sentences Imposed by the various courts in the Greater Johannesburg area.**

### 4.2.3.1 Severe/Custodial –versus –Lenient/Suspended Sentences

At the close of each case, it became the responsibility of the courts to arrive at a just decision. Where a verdict of not guilty is found the courts have just one option - to discharge and acquit the suspect. But where a verdict of guilt is established, then the courts have the onerous duty to impose an appropriate sentence. This sentence must be proportionate to the gravity of the offence, having regard to all the circumstances of the case.

Appropriate sentences give the victims and the community at large a feeling that justice has been served. It assures the victims (especially victims from a vulnerable such as migrants) of the government's commitment to protect and give effect to their rights guaranteed under the Constitution. A severe

sentence for crimes accompanied by a discriminatory animus communicates a strong message of denunciation for such crimes and may deter other potential perpetrators from committing similar offences in the future.

#### 4.2.3.2 Severe/Custodial Sentences

In the six (6) cases under review, the courts imposed severe sentences in three (3) of these cases. In one of such cases (Case No 43/926/08), the accused was acquitted on charges of theft, public violence and house breaking, but was found guilty on the charge of unlicensed possession of fire arms. The accused was handed a mandatory jail term of three (3) years imprisonment and pronounced unfit to possess fire arms. In the second case (Case No RC/3/2344/08) the Randburg Regional Court not only found the accused person guilty but also imposed an exemplary sentence. The convict was sentenced to pay a fine of R6000 or in default to serve one (1) year imprisonment on count one and another R4000 or in default to serve a further four (4) months imprisonment on count two. Yet, in another case (case No RC2/468/08) Wynberg Regional Court imposed a three (3) year jail term after convicting the accused on charges of public violence and house breaking.

Perhaps the most severe sentence was that handed down by the Roodeport Regional Court in Case No SH 416/08. In this case the court found the accused persons guilty as charged. In handing down sentence, the court imposed a nine (9) years jail term on all the convicts. Although the court suspended three (3) years of this imprisonment term for 5 years, the convicts were nevertheless required to spend up to six (6) years in jail. When

considered as a ratio over the overall conviction rate, these four cases will represent an impressive rate of 66.6 per cent.

Although these sentences are considered severe comparatively to the other three cases in which the courts imposed suspended sentences, the courts did not however use xenophobic prejudice as an aggravating factor in handing down sentences. Even more noticeable is the fact that the courts failed to use this opportunity to make pronouncements albeit *obiter dicta* denouncing xenophobia.

#### 4.2.3.3 Lenient/Suspended Sentences

In the other three cases, the courts imposed suspended sentences of varying degrees. In case no SH/239/08 the Boksburg Magistrates Court found all five accused persons guilty. In sentencing the convicts to six (6) years imprisonment each, the court however ordered that the imprisonment shall be suspended for four (4) years. Similarly, in case no RC3/459/08), the Wynberg Regional Court after sentencing the convicts to serve a three (3) year jail term ordered that the imprisonment be wholly suspended for five (5) years.

In the table below, I present a summation of the raw statistics of the conviction, acquittal, prosecution, withdrawal and outstanding rates per court area.

| Courts | Prosecution | | Withdrawal/Dismissed | Part Heard | Total Cases |
|---|---|---|---|---|---|
| | Convictions | Acquittal | | | |
| **Wynberg** | 02 | 03 | 08 | 01 | 14 |
| **Boksburg** | 01 | 02 | 05 | 00 | 08 |
| **Johannesburg** | 00 | 00 | 03 | 01 | 04 |
| **Roderport** | 01 | 00 | 00 | 01 | 02 |
| **Soweto** | 01 | 02 | 04 | 04 | 11 |
| **Krugersdorp** | 00 | 00 | 01 | 02 | 03 |
| **Ranburg** | 01 | 00 | 01 | 00 | 02 |
| **Tembisa** | 00 | 01 | 12 | 03 | 16 |
| **Germiston** | 00 | 04 | 03 | 01 | 08 |
| **Total** | 06 | 12 | 37 | 13 | 68 |
| | **18 (26.4 %)** | | **54.4 %** | **19.2 %** | **100%** |

**Table V: Summation of Prosecution, Withdrawal and Part Heard Case rates per court area**

## 4.3 Other Lapses in Prosecution

In this section, the researcher presents other identified lapses on the part of the NPA in prosecuting these cases.

### 4.3.1 Plea and Sentence Agreements

Plea and sentence agreements shorten the length of trials and reduce the workload of courts (Keuthen: 2007), as such they have been used increasingly to maximize productivity and enhance justice outcomes in criminal justice processes in South Africa. For example, from a total of 414,282 cases finalized in 2005/06, plea and sentence agreements were reached in 2,164 cases (Keuthen: 2007). From April 2008 to March 2009 a total 1 120 plea agreements were concluded, by the NPA[14]. However, the NPA did not utilize this strategy in dealing with cases emanating from the

[14] NPA 2008/2009 Annual Report

May 2008 xenophobic violence in the Greater Johannesburg Area. Giving the apparent success of the plea and sentence agreement strategy in enhancing justice outcomes in criminal matters, it seems necessary therefore, to explore why this strategy was not explored while prosecuting the May 2008 xenophobic violence cases.

Asked why this technique was not adopted by the NPA, all the respondent – prosecutors could not advance any reason whatsoever why they failed to utilize this strategy. In their first public statement after the May 2008 xenophobic violence, the NPA made public their resolve to expedite proceedings and to maximize justice outcomes in these cases. This will ensure that justice is served on both the victims and the accused persons alike. Giving that no specific challenges were advanced by the prosecutors why this strategy was never utilized is a pointer of lack of commitment by the NPS to properly prosecute these cases in line with the Prosecution Policy of the NPA.

### 4.3.2 Witness Protection

The witness protection system is regulated by the Witness Protection Act 2000 and is managed by the NPA. Witness protection deals with the safekeeping of identified, vulnerable and intimidated witnesses requiring protection whilst testifying in criminal proceedings. Thus, the purpose of the Witness Protection Programme is to provide support service to the criminal justice system by protecting vulnerable, threatened and intimidated witnesses. By placing them under protection, it is expected that these witnesses will appear and testify in criminal and other defined proceedings

in which their testimonies are vital. This has the potential to avoid secondary victimization of the victims and witnesses.

South Africa operates a rights based criminal justice system. In such a system, the courts are required to strike out any case in which the prosecution is unable to proceed because of the non-appearance of their witnesses and or to discharge and acquit the accused where there is no sufficient evidence to ground a conviction. Therefore, the courts will be constrained to either strike out a case from its roll or proceed to discharge and acquit an accused person where a vital witness fails to appear in court.

There have been a number of allegations of reported cases of failure by the witness protection system to adequately protect witnesses testifying in criminal matters. For example according Human Rights Committee (2001), numerous criminal cases against members of the People Against Gangsterism and Drugs (PAGAD), a vigilante organization based in the Western Cape, have seen witnesses killed; a number of witnesses were also assassinated before the trial against PAGAD member Ebrahim Jeneker and two witnesses were killed in relation to the trial for the murder of Ben Lategan. Gottschalk (2005) also reported of the assassination of Ashraf Saban, which left no witnesses against those accused of planting a bomb outside the Wynberg Magistrate's Court. According to ***The Sowetan***, (March 2005), all these assassinations occurred despite the witness being in the witness protection programme.

Contrary to the above report, official statistics emanating from the NPA Annual Report for 2008/2009 which is reflected in the table below gives a different picture of the witness protection programme. According to these

statistics, no witness under this programme has been harmed in the past seven years. This gives the impression that the witness protection programme has been very successful.

| Witness Protection | | | | | | |
|---|---|---|---|---|---|---|
| **Indicator** | **2004/2005** | **2005/2006** | **2006/2007** | **2007/2008** | **2008/2009** | **Change over period** |
| **Witnesses** | 247 | 220 | 229 | 231 | 218 | -11.7% |
| **Total including families** | 499 | 488 | 497 | 428 | 431 | -13.6% |
| **Witnesses harmed** | 0 | 0 | 0 | 0 | 0 | + 0.00% |
| **Walking off %** | 6% | 3% | 3% | 24% | 16.9% | +181.7% |

**Table 2: Official Statistics of the Witness Protection Programme. (Source: 2008/2009 NPA Annual Report)**

The prosecution policy advises prosecutors to show sensitivity and understanding to victims and witnesses and to assist in providing them with protection where necessary and with information on the trial process. The whole purpose of the witness protection programme is to provide protection to vulnerable, threatened and intimidated witnesses in order to guarantee their appearance and testimonies in court. Since some victims of the May 2008 xenophobic violence were undocumented migrants, fear and the possibility of secondary victimization made the protection of witnesses in these cases a crucial aspect in determining their participation in the prosecution of their assailants. Despite the presence of the requisite law which spells out the procedure and conditions under which witnesses must be given protection, all respondents who spoke to this researcher confessed that they did not utilize these procedures in protecting victims (witnesses).

None of the victims (witnesses) of the May 2008 xenophobic violence cases in the Greater Johannesburg area was ever protected under this programme.

Responding to a question as to what steps were taken by the NPA to protect witnesses in cases emanating from the May violence Respondent PP6 had this to say:

*"We did not find it necessary to protect witnesses in these cases …there was nothing special about these cases… they were just ordinary criminal offences as others".*

Rather than offer protection to these victims and witnesses, the state instead preferred to provide them with assistance for their voluntary repatriation back home. This had far reaching consequences on the entire process as 57 per cent of cases emanating from the May 2008 xenophobic violence in the Greater Johannesburg Area were either withdrawn or dismissed because the witnesses were untraceable. This finding is corroborated by a report from the Department of Justice and Constitutional Development specifically linking the NPA's withdrawal of the majority of cases emanating from the May 2008 violence to the fact that 'witnesses became missing or left the country (DoJCD 2009). An extended consequence of this would be that, most of perpetrators of the May 2008 xenophobic violence in the Greater Johannesburg area were never held accountable for their acts.

Although respondents PP2 and PP5 identified high cost of witness protection as one of the significant barriers to witness protection, the high rate of successes recorded by the witness protection programme, made it legitimate to have expected that the NPA would admit most of the witnesses in these

cases into the programme. Measures could have been taken to identify and protect the victims *cum* witnesses whilst they took temporal shelter at the police stations and the camps. One possible interpretation of why such measures were not taken is because of the tendency by the SAPS and the NPA to see foreigners primarily in terms of their non-citizenship and as outsiders who fall within the exclusive preserve of the Department of Home Affairs and thus outside the mandate of other government agencies.

Respondent PP2 captures the gravity of this lapse when he admits that:

> *"Things are not so easy for us… either there are no witnesses to testify or when we have them they are afraid to come forward and testify in court… for example, I have this lady here in the township that can identify the assailants of one of the deceased but she is not willing to testify in court"*

### 4.3.3 Bail not opposed on Grounds of Witness Protection

It was also found that in the few cases were the prosecution opposed bail being granted to the accused, they did so only on grounds that the physical addresses of the accused persons needed to be verified and for other reasons. Bail was never opposed on the grounds that the accused persons could tamper with the victims despite the glaring possibilities to that effect. Thus, it seems safe to conclude that the prosecutors did not consider the protection of witnesses as vital to the justice outcomes in these cases.

### 4.3.4 Non-execution of Bench Warrants for Absconding Accused Persons.

In most cases where bench warrants were issued by the courts for the apprehension of absconding accused persons, the prosecution failed to execute such warrants. The blame is placed on SAPS. Although, Respondent PP3 cites pervasive corruption by SAPS officials as a significant reason for not executing these warrants, Respondent PP6 gave another dimension for the reasons why the warrants were not executed. He had this to say,

*"...even if the warrants were executed, we would have had no witnesses to prosecute the suspects in court".*

Arresting these absconding accused persons would have been one way of enhancing the accountability process by ensuring that the perpetrators of the May 2008 xenophobic violence are brought to book.

### 4.3.5 Culture of Impunity

In their research on the May 2008 xenophobic violence in South Africa, Misago et al (2009), presents strong evidence that the May attacks were fueled and managed by local community leaders. From interviews and field work, this researcher could not locate even a single case in which charges were pressed against any community leader in the entire Greater Johannesburg area. Misago et al also found that before, during and after the May 2008 violence, some arrests were made at the different scenes of violence but most of those arrested were released without charges either at the level of the police or the courts due to the mobilization of communities and their leaders.

When asked how many suspects were released by the police without charge and why? Most of the respondent police officers admitted that some suspects

were released without charge but could not state the exact number. Respondent PO3 for example said

*"... yea, its true that some people were released without charge... many of them but you would never know the reasons behind the release... sometimes it could be a directive from the boss or simply because no incriminating evidence was found against them..."*

Respondent PO1 was more forthcoming, hear him

*"... residents of the township marched to the station, requesting the release of the comrades... things were almost getting out of hand ...it was better in the circumstance to release them without charge so as to avert a bloody confrontation ..."*

Respondent PO5 on his part said

*"... you don't expect us to apply the law mechanically... what do you do with about 100 people arrested for the same offences? We had to release some of them whom we thought were not as directly involved...the witnesses were not also forthcoming to enable us associate a particular suspect to a particular act"*

Perhaps the earlier research of Misago et al. (2009: 34), addresses this issue better when they found inter alia that

*"...criminals were arrested but released because the Premier and MEC Ramathlakane negotiated with the police. People said they can't speak to the Premier unless the people arrested are released. The Premier met the Station Commander in Ocean View and they were released..."*

There are two critical points to make here. First, a good number of suspects were released from police custody and without charge for a number of different reasons. For example because of pressure from the local residents; their large numbers; the fact that they were not as directly involved; there were no witnesses to identify the offenders. The decisions to have them released were also motivated from different quarters; station commanders and local politicians. It is therefore likely that those who should bear the greatest responsibilities for the May 2008 attacks were not brought to justice because their cases never entered or were never sustained in the criminal justice system. The combined effect of these two issues is that most of the perpetrators of the May 2008 xenophobic violence in South Africa were not held accountable for their acts.

The above situation is exacerbated by the fact that in those cases where charges were pressed, the prosecution was only able to proceed with just 26.4 per cent of the entire cases with an overall conviction rate of only 8.8 per cent. With 54.4 per cent of the entire cases withdrawn, plus 17.6 per cent acquittals, it is also obvious that most of the perpetrators of the May 2008 attacks in the Greater Johannesburg Area were not held accountable for their acts by the criminal justice system. This has serious consequences on the criminal justice system in general but more particularly for the victims of the May 2008 xenophobic violence. The combined effect of these two issues is that most of the perpetrators of the May 2008 xenophobic violence in South Africa were not held accountable for their acts.

### 4.3.6 Failure to Press Charges for Incitement/Conspiracy

Incitement, conspiracy and attempt fall under the category of offences known as inchoate crimes. The word ‘inchoate’’ denotes something that has ‘‘just begun’’ or is ‘‘underdeveloped’’ (Ashworth: Quoted by Timmermann: 2006), ‘‘partially completed’’ or ‘‘imperfectly formed’’ (Garner: Quoted by Timmermann: 2006). According to Timmermann (2006), “inchoate offences are therefore incomplete offences, which are deemed to have been committed irrespective of the fact that the substantive offence, that is, the offence whose commission they were aiming at, is not completed and the intended harm is not realized”. A justification for criminalizing inchoate crimes can be found in the fact that such criminalization permits law enforcement officers and the judiciary to become involved before any harm occurs, and thus serves to reduce the incidence of harm (Ashworth: Quoted by Timmermann: 2006). In cases where there is a substantial likelihood that harm will result (as was the case with the May 2008 xenophobic violence), and where that harm is of a particularly egregious nature, this justification is especially pertinent (Timmermann: 2006).

The South African Constitution guarantees, among other things, the rights of equality, human dignity and freedom of expression. The right to freedom of expression entrenched in the 1996 Constitution of South Africa is however not absolute; it is limited to some degree in certain circumstances. For example, the Constitution provides in section 16(2) (c) that the right to freedom of expression does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm (Marcus: undated).

Researchers (Misago et al.: 2009; Landau: 2009) have authoritatively established the crucial role played by the media and community leaders in inciting the May 2008 xenophobic violence in South Africa. In spite of this neither the SAPS nor the NPA investigated and/or pressed any charges of incitement and/or conspiracy. There were no processes instituted by the NPA to have the courts disband those non-state structures whose leaders were identified to have incited the violence. Although the Constitution purports to be a bridge between a deeply divided past and a future founded on the recognition of human rights, democracy and peaceful coexistence of all who live in South Africa, the heritage of hate motivated crimes such as racism and now xenophobia cannot be wished away.

### 4.3.7 Failure to Apply the Principle of Judicial Activism

Most scholars on hate crimes (Lawrence: 1999; Watts: 2001; Perry: 2001; Franklin: 2002) are consistent that in order to punish hate crimes, vulnerable groups should be protected by hate crime legislation. They also make the strong argument that justice in these cases requires that, offenders who are motivated by discriminatory animus warrant more severe punishment for their crimes than individuals whose crimes are not so motivated. After a thorough scan on the existing legislations under which charges were pressed for these cases, it was found that xenophobic intent or discriminatory animus does not constitute an aggravating circumstance in all of the offences that went through the courts. Although the South African Criminal Procedure Act and the Criminal Law Amendment Act are both silent on xenophobia and its related violence; section 8 (3) (a) of the Constitution of South Africa makes adequate provision for judicial activism. The *MASIYA Case* (supra) is a classic example of how the courts in South Africa gave effect to this

Constitutional provision. This is what Thayer (cited by Kmiec: 2004) rightly refers to as the growth of the law at the hands of judges.

With these preliminary findings, the researcher sought to probe into the reasons why the courts in handing down sentences failed to invoke section 8 (3) (a) of the Constitution. There are three important issues to clarify here.

First, it is agreed that if the courts had extended the law retroactively that would have violated the principle of legality and by extension, the fair trial rights of the accused persons. It must be noted here that, although the courts in the case of *Masiya* (supra) successfully extended the law, this retroactive extension did not apply to the convict (Masiya) as the Constitutional Court rightly held that any such application would have infringed on Masiya's fair trial rights.

Second, it is crucial to recognize that the *Masiya case* emanated from the District Court and that the first decision to expand the law with regards to the definition of rape was made at the Regional Court. A good number of cases arising from the May 2008 xenophobic violence were dealt with by Regional Courts. Thus while it is admitted that by the provisions of section 110 of the Magistrates Court's Act, Magistrate Courts are under an attenuated duty in relation to the development of the common law, it must also be admitted that this attempt by the Regional Court had the ultimate effect of expanding the law.

Third, it is common tradition for the courts to make strong pronouncements of their opinion albeit *obiter dicta* when dealing with live issues which are not appropriately addressed by existing legislation. In this regard, it was

legitimate to have expected the courts in their judgments to at least denounce the xenophobic motive behind this violence.

Most of the respondents who spoke to the researcher confirmed that this route was never explored by them. According respondent MAG02:

*"…what is of prime importance is the fact that the accused/convicts have been given appropriate sentences… I did not see any compelling need to engage myself in that direction…"*

Respondent MAG05 on his part added that:

*"…at the time we dealt with most of these cases, the general feeling was for these matters to be dealt with expeditiously ….trying to invoke section 8 (3) (a) of the Constitution would have had the opposite effect…"*

The response of respondent MAG05 was even more technical. According to him:

*"…section 8 (3) (a) did not erode the role of parliament as the legislative arm of government…such provisions should therefore be sparingly applied…"*

While all the other respondents shoved away the question as on their reluctance denounce xenophobic motive by way of obiter dictum, respondent MAG4 said:

*"…these are issues which are entirely within the discretion of a trial judge… and you cannot question that discretion …"*

Eighty per cent of the concerned respondents admitted to be aware of the provision of the constitution but also admitted that they never sought to use it in extending the aggravating circumstances of the offences charged to include discriminatory animus. From the above, it is very clear that while the judiciary in South Africa is known to have one of the most activist courts in the world (Smithey: 2004), the courts did not extend this activism when dealing with cases emanating from the May 2008 xenophobic violence.

The framing of the Criminal Procedure Act shows that Parliament did not foresee the need to specifically address xenophobic violence in South Africa. By engaging in judicial creativity while adjudicating on cases arising from the May 2008 violence, the courts would have closed this gap and fulfilled their constitutional mandate of upholding and protecting the rights to justice of migrants. This would have given effect to the Bill of Rights by affording migrants the full protection of the Constitution.

### 4.4Findings on the Research Hypotheses

In the following paragraphs the researcher reflects on further research findings to draw conclusions on the hypotheses in this research. In doing so, the researcher has tried to reproduce some of the answers I received from respondents whilst administering the questionnaire. The context; the content; client and coalitions; capacity; and commitment are the five interlinked variables that affect a successful policy outcome. This research however focuses only on three of these variables; context, commitment and coalition. These three variables were central to the formulation of the hypotheses of this study. I shall now deal with the hypotheses seriatim.

### 4.4.1 Negative Attitudinal and Behavioral Commitment by the SAPS and the NPA

The first hypothesis for this research was that a negative attitudinal and behavioral commitment by the SAPS and the NPA towards implementing laws and policies relating to protection of the rights of migrants has adversely affected justice outcomes to the May 2008 violence. To test this hypothesis, the researcher posed questions to both members of the SAPS and the NPA which revealed their knowledge of existing protective and enhancement measures. From the primary findings, the researcher then proceeded with questions to determine the extent to which these measures were utilized in cases emanating from the May 2008 xenophobic violence. To establish the extent to which the non application of these measures was specific to xenophobic violence cases, the researcher sought to know how similar violent crimes cases had been handled by the same officers. As pointed out above in this Chapter, the non protection of victims and witnesses in cases arising from the May 2008 violence was a defining factor that adversely contributed to the justice outcomes in these cases. I will now to turn to the issue relating to the application of Witness Protection Act by the SAPS and the NPA as far as these matters are concerned with specific reference to the Greater Johannesburg Area.

All the respondents were asked what measures exist for the effective protection of witnesses of violent crimes. All the respondents knew that the Witness Protection Act makes adequate provision for the protection of witnesses, especially witnesses and victims of violent contact crimes. Asked further, how often this Act has been applied by them to protect witnesses, all the Respondents maintained that they do not hesitate to utilize this method

once it becomes clear to them that the security of a vital witness is at stake especially with regards to his participation in testifying in a trial in court, because as PP1 concludes:

*"…we are sure to have the most vital witnesses in court when we need them … this has actually improved our chances of picking a conviction in cases that would have otherwise resulted either in a dismissal, a withdrawal or an acquittal".*

However, when asked whether they were aware that witnesses in xenophobic cases were afraid to come forward and testify in the trial of their assailants in courts, the respondents suddenly became evasive. For example respondent PP5 qualified his response thus:

*"Yes, this is possible…but it is not automatic".*

Respondent PP3 was blunt:

*"There are other issues involved in the protection of witnesses; it is not as easy as you see it… we did not get the go ahead from those responsible … I must have to go… I think you are asking too much … if they were protected, then they were protected, if they were not protected, so be it!"*

The response of respondent PP1 was even more revealing:

*"…why do you think that these people needed protection? …since you want to teach me my job you may as well go ahead and protect them…"*

For respondent PP2, the researcher was already overstepping his bounds, hear him:

*"...when you came here we assisted you with the case dockets because we saw that you needed information for your school work...but now you have started asking questions as if we (the Prosecutors) are under investigation...I think we have been too nice too you... you have overstayed your welcome here..."*

The response of PP4 was particularly telling:

*"...you foreigners always look for every opportunity to give this country a bad name... when you get good jobs and earn good salaries you do not conduct research on that... but when there is a small problem you always want to make a mount out of it...when these people were coming here did they inform us? ...but now we must give them protection."*

According to respondent PO4- a police officer, those who look for trouble should be willing to face the consequences:

*"...even as we sympathize with these people we are also aware...they look for this themselves...if you place your hand in the mouth of a hungry lion, I tell you my friend, it will cut it off...why were these people not attacked before now?...you must accept with me that something very serious went wrong in the townships... it is not by protecting them that these problem will be solved!"*

From the foregoing it is not surprising that none of the victims or witnesses in the xenophobia related cases was ever protected.

Furthermore, when these responses are fitted together they tend to support Landau's (2009) arguments that; the May 2008 violence can be best

explained by focusing on an extended history of statecraft that has generated an enemy within: a segment of the population that is institutionally and socially excluded from legal protection despite regularly engaging with agents of the law. The evidence also supports Landau's view that South Africa has *de facto* suspended elements of its normal legal order vis-a-vis refugees, asylum seekers, and undocumented migrant either by commission or omission and that, under these circumstances, the right to space and life cease to be delimited by constitutional principles.

The above findings suggest that, there is a negative attitudinal and behavioral commitment by the SAPS and the NPA towards implementing laws and policies relating to protection of the rights of migrants. This has adversely affected justice outcomes to the May 2008 violence cases in that more than 60 per cent of the cases listed for prosecution were either withdrawn and or the suspects acquitted.

### 4.4.2 Impact of Non Justice Structures

This research was also centered on the hypothesis that, the justice system's coalition with non-state policing and justice structures in upholding and protecting the rights of migrants has adversely affected justice outcomes to cases emanating from the May 2008 xenophobic violence. To test this hypothesis, the researcher first reviewed existing literature on Non-state justice and policing actors in South Africa. Respondents were then interviewed on the extent of their institutional collaboration with these non-state structures and the extent of collaboration between the formal justice structures and these non-state structures in dealing with the May 2008 violence.

In the context of a high crime rate, many communities in South Africa are increasingly engaging in vigilante activity (Schönteich: 2001: 3), and other non-state action in combating crime in South Africa. The extreme prevalence of non-state policing and justice structures in South Africa is due in part to the general lack of confidence in the police services (Burton et al.: 2004). According to Schönteich (2001), this prevalence can also be associated to the popular perceptions that the country's post-1994 constitutional order and criminal justice system are at best ineffectual when it comes to fighting crime or, at worst, afford greater protection to criminals than law abiding citizens. Harris (2001) on his part noted that the prevalence of vigilante groups may also be due not solely to inadequacies in the formal criminal justice system, but to a more deep-rooted public desire for fast, retributive justice that is incompatible with the constitutional rights-based criminal justice system that is in place.

With a few exceptions such as the Mapogo-a-Mathamaga, most vigilante actions are localized and disorganized affairs. In a research paper on vigilantism in South Africa, Gottschalk (2005) argues that vigilante groups tend to provide protection for the poorer classes, generally free of charge. According to him, one of the largest, Mapogo-a-Mathamaga, claimed around 50 000 members, with over 90 branches throughout Gauteng in 2000. Other renowned vigilante groups include PAGAD and the Peninsula Anti-Crime Agency (PEACA). These highly organized, cohesive organizations have a wide network of members and operate under some form of command structure. However, alongside these organizations, a significant amount of vigilante activity is also carried out by local ad hoc groupings that come together within a community to deal with suspects, sometimes using

informal justice mechanisms known as ‘peoples’ courts’, to provide a rough-and-ready form of trial (Harris: 2001).

In their research on ‘Public Perceptions about Crime Prevention and Criminal Justice’ Burton et al (2004) found that vigilantism was prevalent particularly in poor, black areas, where public confidence in the formal system remains low. The state has taken some firm steps against the highest profile vigilante groups. As a result, their activities have scaled down since the mid- to late 1990s, when PAGAD and Mapogo-a-Mathamaga were involved in high-profile bombings and public assassinations. The state has set up special investigative squads and many members of vigilante groups have been arrested, with some successful prosecutions. However, the rate of convictions has been relatively low, in large part due to the unwillingness of potential witnesses to come forward after the murder of a string of witnesses in trials against PAGAD members.

Harris (2001) found that for those with limited access to policing and the formal court system, vigilante groups offer protection from crime and justice against perpetrators when no other realistic alternatives may exist. However, for the state, fighting vigilantism remains a priority, representing a direct challenge to the state monopoly on force and South Africa’s constitutional rights-based criminal justice system. Community self-help actions can play a constructive role; but this is more likely when they are in liaison with the state, such as through Community Police Forums or neighborhood watches, rather than in parallel to the state.

It is well established that non-state policing and justice structures are an important partner in law enforcement in South Africa (Schärf 2001).

According to Schärf, there is a working relationship between these informal policing and justice structures and the regular state order in terms of cross-referral and co-operation in dealing with justice issues in the townships. This issue was posed to all the SAPS respondents. Respondent PO3 corroborated this working relationship when he admitted thus:

*"…the police can-not be everywhere at the same time…we have an informal agreement with them… where they have serious matters they refer to us".*

Respondent PO6 was even more categorical according to him

*"…the police have a very good relationship with them… they serve as the eye of the police… the police needs reliable informants to effectively combat crime and we have found in them this reliability…".*

Respondent PO5 on his part further corroborated these statements by adding that

*"… when we receive minor complaints we refer them to community groups, they in turn refer serious matters to us …we co-operate on all sorts of crimes".*

From the above responses it is clear that the police do not only have a working relationship with these informal justice and policing structures, but that they do cross referral of cases amongst themselves in all types of cases.

For a partnership between these non-state structures and the formal justice structures to be mutually beneficial to the extent of benefitting the general public, both the formal and non-state structures must have shared values and a common purpose. Regrettably, the notion of justice within these non-state

justice and policing structures as it relates to migrants is totally at odds with the conventional notion of justice within the formal justice and policing structures. For example, although xenophobic violence and other related offences are at least recognized common law offences; they are not recognizable offences within the non-state structures. The fact that community leaders effectively planned and incited the May 2008 xenophobic violence (Misago et al.: 2009) supports this view. It can thus be legitimately expected that these non-state structures will not collaborate with the regular justice and policing structures in prosecuting cases emanating from the May 2008 xenophobic violence. Responding to a question whether the non-state justice and policing structures assisted in the arrest or identification of suspected perpetrators of the May 2008 violence, all the Respondents answered in the negative. Asked further whether there was any referral of cases emanating from the May 2008 violence from the non-state structures, all the Respondents also answered in the negative. This is a pointer to the fact that the regular and non-state structures collaborate on all types of cases except those matters which are related to xenophobic violence.

While this lack of collaboration with regards to cases emanating from the May 2008 xenophobic violence may be directly linked to the high level of anti-foreigner sentiments within non-state policing and justice structures in South Africa, it is also important to note the far reaching consequences this has had on the justice out come in these cases. This non-collaboration negatively impacted on the justice out come in these cases in more ways than one. First, members of these non-state structures have the ability to identify and track down perpetrators at the township (grass root) level; they

know and can identify most of the residents in their neighborhood. Second, they can easily effect arrest on the residents in their neighborhood. Third, they would have in the circumstances serve as vital witnesses for the prosecution in these cases. As Respondent PO5 puts it:

*"... yes, they were potential witnesses... we tried to use some of them as witnesses but they would not accept.... even in their area of command where they must have known those who were responsible for the violence..."*

The refusal by members of these non-state structures to co-operate with the police in bringing to book perpetrators of the May 2008 xenophobic violence is indicative of the fact that the justice system's coalition with non-state policing and justice structures in upholding and protecting the rights of migrants adversely affected justice outcomes to the May 2008 violence.

### 4.4.3 Attitude of Public and Political Leadership.

The research was also anchored on the assumption that the attitudes of the general public and the political leadership in South Africa with regards to migrants have created a hostile context that adversely affected justice outcomes to cases emanating from the May 2008 xenophobic violence. To explore this assumption, the researcher made a scan of existing literature and then related them to the responses offered by respondents during the research.

Existing literature (Crush: 2001; Harris: 2001; SAHRC: 2004; Misago et al.: 2009: Landau: 2009: Monson & Misago: 2009) confirms the presence of high level of anti-foreigner sentiments within administrative and policing structures in South Africa. In November 2004, the South African Human

Rights Commission (SAHRC) and the Parliamentary Portfolio Committee on Foreign Affairs held open hearings on xenophobia and human rights abuses experienced by foreigners in South Africa. The report issued by the SAHRC and the Parliamentary Portfolio Committee on Foreign Affairs following the open hearings confirmed that the government had made numerous commitments to uphold the rights of refugees and migrants, including ratifying international laws that protect their rights, enacting national legislation, and participating in conferences on migrant rights. However the report also noted that governments' implementation of these commitments was 'sporadic and inconsistent' (SAHRC: 2004: 43). In a written submission to the open hearings the United Nations High Commission for Refugees noted that although South Africa's President has openly condemned xenophobia, only a small number of Parliamentarians and Cabinet Ministers have publicly agreed with the President. For example former Cabinet Ministers such as Mangosuthu Buthelezi and other highly placed politicians have used public mediums to openly express their dislike for foreigners.

A 2006 police diversity survey also confirmed highly pervasive xenophobic attitudes amongst the SAPS: 87 per cent of police believed most undocumented migrants in Johannesburg are involved in crime, and over 78 percent believed that foreigners caused a lot of crime regardless of immigration status (Newham, Masuku & Dlamini: 2006). Misago et al. (2009) argues that, in politics, perception drives action and these statements, however inflated or irresponsible, have helped ensure that prejudice against foreigners is endemic in South Africa. A news item by *IRIN News* (21 November 2009) further strengthens the existence of pervasive xenophobic

attitudes within the SAPS. The *IRIN News* report quotes a victim of xenophobic violence on the alleged lack of protection from the police as follows:

*"Omari, a Tutsi who fled ethnic violence in the eastern Democratic Republic of Congo, said she decided to return to her community in July, after a month in the camp, so that her five children could go back to school. The first night back there shots were fired, and she and her husband filed a police report the next day. 'I told my husband, 'Let's go to the police station, because this bullet is proof, and maybe they'll come to make an investigation'.' They reported the incident. Omari, who speaks Xhosa, one of South Africa's main languages, said the officer called a colleague on the police radio, but she heard him decline to investigate the case. "The police asked which kind of people it was for, and said, 'Oh, its makwerikweri [derogatory term for a foreigner], I don't want to come. They want to prove why they don't want to go back to the community. If I make an investigation for them, maybe that paper [document opening a case] will be that proof [evidence of the incident]'," Omari alleged."*

It is in the above circumstances that Landau (2009) rightly positions foreigners in the eyes of South Africans as the "enemy within". According to Palmary (2002), the attitudes of police officials may fuel existing levels of xenophobia among South African communities, because senior police officials can be important role models as can any public service official who uses a public platform to espouse unfounded anti-foreigner sentiments. In their research on the assessment of the South African Police Service published by the *Centre for the Study of Violence and Reconciliation*, Bruce et al. (2007: 106) states: "another issue that has been little explored in South

Africa is the category of hate crimes motivated by prejudice". Individuals from groups that are consistently exposed to prejudicial treatment may also generally be reluctant to approach the police for assistance, as they may anticipate discriminatory treatment. Immigrants constitute one group that may be regarded as vulnerable to such crimes, partly because they may be subject to racist and/or xenophobic victimization. These arguments support Palmary's (2002: 17) earlier view that one of the effects of xenophobia in the public service is that it has the potential to limit the likelihood that victims of xenophobic violence will report crimes or even when reported, that serious actions will be taken, because these non-nationals are always treated with indifference by the same authorities.

### 4.5 Findings on the Research Question

The central theme of this research is to answer the question whether the justice system's response to the May 2008 xenophobic violence can be explained through longstanding and broader access to justice challenges in South Africa or whether there are additional challenges related to xenophobic violence. To answer this question, the researcher put specific questions to both the SAPS and NPA respondents. All the respondents were asked to say what specific difficulties they encountered in investigating and prosecuting cases arising from the May 2008 xenophobic violence.

In addition to the other responses contained in section 4.3 above, most of the SAPS respondents identified their incapacity to deal with the large number of suspects as a major constraint. For example respondent PO6 captured it in these words:

*"…there were too many suspects but too few police detectives…we were too thin on the ground"*

Respondent PO2 would add thus:

*"…it was like a mob action… very difficult to associate any particular suspect to a particular act except where the suspect was caught in the act…"*

For respondent PO5:

*"...potential witnesses were not forthcoming…"*

For the NPA respondents, there were many more issues than merely capacity merely constraints. According to respondent PP2:

*"…we had undue pressure to finalize these cases…both from the general public and from the NPA hierarchy…"*

Another respondent (PP5) believes that there were far too many cases that were not properly investigated. According to him:

*"...we received cases dockets from the police that failed to locate the address of the witnesses or disclose the reasons why the suspects were charged by the police…"*

Respondent PP9 added that there was poor collaboration between the main role players; the SAPS and the NPA.

*"…the police will not respond to our request for further information on the case dockets…sometimes they even refuse to pick up their calls when they notice that the call is in relation to a case in court…"*

In a ‘2009 progress report relating to cases emanating from the 2008 xenophobic attacks’ (DoJCD: 2009: 3), the Department of Justice and Constitutional Development admits that “...notwithstanding pressure and promises to prioritize these cases, it still took nearly a year to deal with the majority of ...cases and some are still to be finalized**...”** The same report also identifies a few challenges that confronted the key actors in dealing with these cases satisfactorily. “...the promises of prioritisation by the role players (SAPS and NPA) could not be sustained in view of capacity and case flow management challenges.” (DoJCD: 2009: 4).

According to a research report (SALRC: 2000), some of the major challenges faced by the criminal justice system includes; undertrained/overworked detectives and prosecutors; inadequate support staff and services for police and prosecutors; high levels of illiteracy in the police; lack of discipline and morale in the SAPS. The report also found as a challenge the fact that members of the public fail to cooperate with the SAPS and the NPA despite being witnesses or having evidence about a crime or suspected perpetrators. Inadequate police investigation of violent crimes was also identified by the report as one of the key problems facing the criminal justice system.

When the above noted challenges are related to the policy implementation theory, then it becomes very clear that capacity constraint is one of the crucial challenges which continue to affect the effective implementation of laws by the criminal justice system in South Africa. When these findings are considered together with the findings in section 5.4 above, it becomes clear that the criminal justice system in South Africa has long standing access to justice challenges including capacity constraints; a politicized and complex

relationship with the general public, especially those in poorer semi-urban areas.

However, as demonstrated above, these factors were only partly responsible for the justice system's response to the May 2008 xenophobic violence. Additionally challenges that explained the response of the criminal justice system to the May violence would include factors such as lack of commitment within the SAPS and the NPA to fully implement the laws; the hostile environment; and the nature of the partnership between non-state justice and policing structures on the one hand and the formal justice structures on the other.

# CHAPTER FIVE: CONCLUSIONS

In this Chapter, I reflect on the research findings to draw conclusions on the research. This Chapter also explores the impact of the criminal justice system's response on the rights of migrants.

The investigative and prosecutorial lapses noted in Chapter five of this research has a negative impact on the rights to justice for migrants in the Greater Johannesburg Area. A low conviction rate of 8.8 per cent and a relatively high acquittal and withdrawal rates of 17.6 per cent and 54.4 per cent respectively, reflects a poor response from the criminal justice system. This poor response has important consequences on the victims of the May 2008 xenophobic attacks, but also to the general community of migrants as well. It has led in the past, and will continue to lead, to serious and massive violations of the access to justice rights of migrants.

The combination of pervasive xenophobic sentiments within key role players in the formal justice structures, the prevalence non-state policing and justice structures (that do not collaborate with the police when it comes to enforcing the rights of migrants), and the hostile environment with respect to migrants on the one hand, and the poor justice out comes and other institutional lapses related to the 2008 xenophobic cases on the other hand is a source of difficulty for the achievement of the rights to justice by migrants.

The right to access to justice for migrants is regulated in South Africa by such domestic and international instruments as the Constitution (1996); the ACHPR (1981); the ICERD (1965); and the UDHR (1948). These legal instruments, to a large extent, all protect migrants as a vulnerable group,

distinguishing South Africa as a state with outstanding legal commitments towards the universality of human rights. The right to justice entails obligations for the State: not only to investigate violations and prosecute the perpetrators, but to ensure that they are adequately punished if their guilt is established. This implies that all victims should have the opportunity to assert their rights and receive a fair and effective remedy. The research findings suggest that the SAPS and the NPA do not recognize this as a fact reasons why they fail to respond effectively in cases that bear on the protection of migrants.

A lack of judicial effectiveness compromises the ability of judicial mechanisms to remedy human rights violations of migrants. When the right to an effective remedy is not guaranteed, the extended consequence is that the state fails to guarantee the non-recurrence of such violations. The implication is that migrants may be victimized with impunity, be this ordinary criminal victimization or for xenophobic reasons.

The issue of effective remedy in relation to xenophobic violence is very crucial not only because South Africa is a country where high levels of violent crime affect all, but also because African foreigners are often worst affected as they occupy spaces where levels of violence are at their highest. This is compounded by the fact that they are not afforded the same protection by the state, either because of their status or because of xenophobic attitudes among officials. In such situations migrants may become reluctant to report violent crimes perpetrated against them because the police neglect to follow up cases, commonly interrogate and victimize the complainant, and, most importantly, because they risk being detained themselves, regardless of the validity of their documentation (*Business Day:*

22 May 2008). In addition, some migrants may be in the country illegally, or fear victimization; as such they too may not approach the police for assistance because of their irregular status.

The situation of migrants and their human rights can therefore be seen as a spectrum, from integration and equality to marginalization and exclusion. A weak response from the criminal justice system may also impact negatively on the access to justice rights of migrants in that they may also find themselves excluded from the protections of other national protective mechanisms.

Lack of protection for victims and witnesses has a huge impact on the effectiveness of the legal system and may serve as a barrier for those wanting to assert their rights. For example, statistics on the cases that have passed through the criminal justice system have a high probability of being dismissed or withdrawn and thus remaining unpunished. This creates a perception of impunity for the perpetrators of violent crimes against foreigners. The effects of impunity or the perception of it on the exercise of the right to justice for migrants are particularly troubling as they may lose confidence in the justice system and thus resolve not to use it at all. The research findings suggest that cases emanating from xenophobic attacks have a history of inefficient investigations and a lack of results. The impunity that prevails as a result of the criminal justice system's incapacity and/or lack of will to investigate in an effective manner the attacks, and assassination of migrants further encourage future aggressors. These prevent or inhibit the full exercise of the rights to justice by migrants. A weak response from the criminal justice system further slows down or prevents

access to remedy by victims and restricts the ability of the judiciary to enforce the law.

From the foregoing, it is very clear that even where the courts are constitutionally protected, the judiciary independent, and the laws drafted in fairness to *'all'*, the legal system will be of little benefit to migrants unless they are able to use the legal levers that it makes available to assert their rights.

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**Appendix I: List of Court Cases Reflecting the Status such as convictions, acquittals, and the reasons for dismissals or withdrawals. (Source: Compiled by the researcher from field work).**

| No | Accused | Court | Case No. C | Charge | Status |
|---|---|---|---|---|---|
| 1 | Leboho/1Or. | Germiston | 4SH/89/08 | P/Viol | Both accused discharged & acquitted |
| 2 | Tembile/11 Ors. | Germiston | 4SH/120/08 | P/Viol | Withdrawn. Witnesses say they cannot identify accused persons. |
| 3 | Njoko/3 Ors. | Germiston | 4SH/92/08 | P/Viol | All accused persons discharged and acquitted |
| 4 | Ramasia | Germiston | 4SH/91/08 | Murder | Matter dismissed for want of diligent prosecution (no docket in court). |
| 5 | Dlamini/8 Ors. | Germiston | 4SH/119/08 | P/Viol | Matter withdrawn, testimony of witnesses during prosecutors' conference inconsistent with evidence. |
| 6 | Ncuze/13 Ors. | Germiston | 4SH/97/08 | P/Viol | Ongoing |
| 7 | Ntepe/3 Ors. | Germiston | 4SH/102/08 | Theft | Not guilty |
| 8 | Nkosana/2 Ors. | Germiston | 4SH/101/08 | Robbery | Not guilty. All accused persons discharged and acquitted |
| 9 | Tswarii/3Ors. | Soweto | 43/918/08 | House/Breaking, P/Viol | Withdrawn; witnesses untraceable |
| 10 | Zondi/1Or. | Soweto | 43/921/08 | GBH, P/Viol | Withdrawn: witnesses unable to identify accused persons |
| 11 | Ngweya | Soweto | 43/1285/08 | Robbery | Withdrawn by Senior Prosecution after consultation with witnesses. |
| 12 | Hadebe/4Ors. | Soweto | 43/907/08 | House/Breaking, P/Viol | On trial |
| 13 | Mhlanga | Soweto | 43/1064/08 | Aggravated Robbery | On trial |
| 14 | Kunene | Soweto | 43/1087/08 | Robbery, P/Viol, House/Breaking | Accused discharged & Acquitted |
| 15 | Phungwayo/2Ors. | Soweto | 43/984/08 | Possession of suspected stolen goods | On trial |
| 16 | Mbona | Soweto | 43/926/08 | Theft, P/Viol, House/Breaking, | Accused acquitted on charges of theft, P/Viol and House/breaking. Found guilty on the charge of unlicensed possession of fire arms: 3years |

| | | | | | |
|---|---|---|---|---|---|
| | | | | Possession of fire arms/ammunition | imprisonment & unfit to possess fire arms. |
| 17 | Buthelezi/4Ors. | Soweto | 43/968/08 | GBH, P/Viol, MITP, Robbery | Case struck off for want of subpoena of witnesses by prosecution. |
| 18 | Ntsomi | Soweto | 43/1004/08 | Robbery | Accused discharged/acquitted |
| 19 | Mabote | Soweto | 43/1077/08 | Robbery, House/breaking | On trial |
| 20 | Mahkuru/6Ors. | Tembisa | TRC/518/08 | Theft, P/Viol, House/breaking, MITP | Withdrawn: witnesses untraceable |
| 21 | Malange | Tembisa | TRC/517/08 | Armed Robbery | Withdrawn: witnesses untraceable. |
| 22 | Sebesha/1Or. | Tembisa | TRC/516/08 | P/Viol | Struck off the roll for want of diligent prosecution |
| 23 | Mbengu/2Ors. | Tembisa | TRC/504/08 | P/Viol | Withdrawn: witnesses untraceable. |
| 24 | Nkosi/4 Ors. | Tembisa | TRC/500/08 | Armed Robbery | Withdrawn: witnesses untraceable. |
| 25 | Mahlangu/10Ors. | Tembisa | TRC/520/08 | Possession of Dangerous weapons, P/Viol | Struck off: witnesses not in court. No explanation from prosecution. |
| 26 | Mangunta/1Or. | Tembisa | TRC/529/08 | MITP, Rape (attempt) | On trial |
| 27 | Mofokeng/3Ors. | Tembisa1 | TRC/528/08 | P/Viol | Accused discharged/acquitted |
| 28 | Mazibuko/2Ors. | Tembisa | TRC/519/08 | Armed Robbery, P/Viol | Withdrawn: witnesses not showing up. |
| 29 | Manana | Tembisa | TRC/532/08 | P/Viol, Assault | Struck off: no docket in court |
| 30 | Mpoko/1Or. | Tembisa | TRC/530/08 | MITP, Armed Robbery | Withdrawn: witnesses untraceable |
| 31 | Ngwenyama/3Ors. | Tembisa | TRC/533/08 | Armed Robbery | On Trial |
| 32 | Lephothe/1Or. | Tembisa | TRC531/08 | Assault, Armed | Struck off: no witnesses in court |

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|---|---|---|---|---|---|
| | | | | Robbery | |
| 33 | Ngobeni/39Ors. | Tembisa | TRC/590/08 | P/Viol, Intimidation, House/breaking, MITP, Theft | On trial |
| 34 | Zulu | Tembisa | TRC/553/08 | Intimidation & Assault | Withdrawn: witnesses untraceable |
| 35 | Gama/4Ors. | Tembisa | TRC/601/08 | MITP, Theft, Assault, P/Viol | Struck off: witnesses absent |
| 36 | Mchunu/Ors. | Jburg | 41/966/08 | P/Viol | Withdrawn. Suspects and Witnesses did not show up in Court. BW for arrest of absconding suspects not executed |
| 37 | Mbongani/Ors. | Jburg | 41/978/08 | P/Viol | Withdrawn by Senior Prosecutor. |
| 38 | Chongo/Ors. | Jburg | 41/975/08 | House/Breaking | Fixed for trial on the 21/08/2009 as a firmed date |
| 39 | Putlane | Jburg | 41/977/08 | Robbery | Withdrawn as suspect dies in custody |
| 40 | Ntambo/25 Ors. | Boksburg | SH/645/08 | P/Viol | On trial |
| 41 | Mbatha/5Ors. | Boksburg | SH/239/08 | Theft, House/breaking | Accused persons found guilty. 6 years imprisonment, suspended for 4 years. Read alongside Section 103 Act 60/2000. Not fit to possess fire arms |
| 42 | Sifiso/8 Ors. | Boksburg | SH/645/08 | P/Viol | Accused 2, 4, 5, 7, 8&9 discharged/acquitted. Accused 1, 3& 6 absent, BW to issue. |
| 43 | Sambo/15 Ors. | Boksburg | SH224/08 | P/Viol | Withdrawn; insufficient evidence |
| 44 | Parker/1Or. | Boksburg | SH/220/08 | P/Viol | Withdrawn: witnesses untraceable. |
| 45 | Lebese/13 Ors. | Boksburg | SH/222/08 | P/Viol | Withdrawn; witnesses untraceable |
| 46 | Dalamo/5 Ors. | Boksburg | SH/218/08 | P/Viol | Withdrawn: incomplete investigation |
| 47 | Makhoti/1Or. | Boksburg | SH/226/08 | P/Viol | Withdrawn: witnesses untraceable |
| 48 | Buthelezi/3 Ors. | Randburg | RC/3/09 | Murder(attempt), GBH, House/breaking | Struck off: no docket in court |

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|---|---|---|---|---|---|
| 49 | Maxase | Randburg | RC/3/2344/ 08 | Assault, GBH | Accused found guilty as charged: R6000 or 1year imprisonment for GBH; R4000 or 4 months imprisonment- sentence to run consecutively |

| | | | | | |
|---|---|---|---|---|---|
| **50** | Mbolani/1 Or. | Rooderport (RC) | SH 416/08 | Robbery, MITP | Accused persons found guilty as charged. 9 years imprisonment, 3 years of which are suspended for 5 years |
| **51** | Mbona/2 Ors | Rooderport (DC) | DH 2057/08 | Armed Robbery | For trial. BW for all suspects not yet executed |
| **52** | Maheso/4Ors. | Krugersdorp (RC) | D2759/08 RC 143/08 | H/Breaking, GBH, Robbery | For trial |
| **53** | Mothibi/3 Ors. | Krugersdorp (DC) | D2439/08 RC 143/08 | Robbery | For trial |
| **54** | Mooki/3 Ors | Krugersdorp (RC) | K391/08 | AG – Robbery, Theft | Withdrawn, witnesses untraceable |
| **55** | Dube/7 Ors. | Wynberg/RC | RC1/425/08 | Robbery, P/Viol | Pending hearing- (Accused persons Requested for Legal Aid) |
| **56** | Msimango/3 Ors. | Wynberg/RC | RC3/431/08 | Robbery, Rape, P/Viol | Withdrawn. Witnesses cannot be traced. |
| **57** | Madison/4 Ors. | Wynberg/RC | RC3/441/08 | P/Viol | Withdrawn. Complainant did not want to proceed. |

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|---|---|---|---|---|---|
| 58 | Zakwe | Wynberg/RC | RC2/446/08 | P/Viol | Withdrawn. Witnesses untraceable. |
| 59 | Simelane | Wynberg/RC | RC1/454/08 | H/breaking, P/Viol | Not guilty |
| 60 | Mbatha/3 Ors. | Wynberg/RC | RC2/427/08 | H/Breaking, P/Viol | Struck of the roll for want of diligent prosecution(reconstruction of case docket), Bail of 1st accused forfeited |
| 61 | Byuso/3 Ors. | Wynberg /RC | RC3/459/08 | Theft | 3yrs imprisonment wholly suspended for 5yrs. No order in terms of sec. 103(1) Act 60 of 2000 |
| 62 | Khoza/13 Ors. | Wynberg/RC | RC2/432/08 | H/Breaking, P/Viol | Struck off the rolls. No case docket in court. |
| 63 | Nkosi | Wynberg/RC | RC2 /468/08 | P/Viol, H/breaking | Guilty- 3yrs imprisonment in terms of section 276(1)(i) |
| 64 | Mtshali | Wynberg /MC | F507/08 | P/Viol | Withdrawn. Victim testifies that accused was not involved. |
| 65 | Mjoka/2 Ors. | Wynberg/MC | F503/08 | P/Viol | Not guilty |
| 66 | Phungulu/ 1 | Wynberg/MC | F516/08 | P/Viol | Withdrawn. Witnesses untraceable |

| | | | | | |
|---|---|---|---|---|---|
| | Or. | | | | |
| 67 | Mogatha | Wynberg/MC | G470/08 | P/Viol | Withdrawn. Witness untraceable |
| 68 | Xaba/1 Or. | Wynberg/RC | RC3/475/08 | P/Viol, H/Breaking | Not guilty |

**Appendix II: Consent Form**
**Interview number:** ……
**Interviewee professional group** ……

**To be read to all before the beginning of the interview**

My name is ALEAMBONG EMMANUEL NKEA from the Graduate School for the Humanities at the University of the Witwatersrand, Johannesburg. I am conducting a study that seeks to understand and to analyze how the criminal justice system responded to the May 2008 xenophobic violence in the Greater Johannesburg Area. I don't work for the government or any aid organization; this study is mainly for academic purposes.

Please note that, apart from my appreciation, I don't promise any form of compensation for you participating. It is your free choice to participate in this study and you are free not to answer questions you don't feel comfortable with or to stop the interview at any time.

The information that you will give me and your identity will be kept in strict confidentiality. The interview will take between 30 and 45 minutes.

Would you like to continue? **Yes** ……; **No** ……. (Mark where applicable)

If the answer to the question above is yes, the interviewer should proceed to appendix "B".

## Appendix III. Questionnaire

### Questions 1-7 to be filled by interviewer (Applicable to all respondents)

1. Date of Interview
2. Location/Interview area
3. Start Time
4. Finish Time
5. Total Minutes spent on the interview
6. Respondent sex
7. Respondent race

### 1. Guiding Questions for SAPS

100. How old are you?

101. In which police station were you attached in May 2008?

102. How long have you been a police officer?

103. What do your understanding of justice (arrest, investigate, prosecute and punish offenders)?

104. Ho do you usually investigate violent crimes?

105. How do you protect victims of violent crimes up to prosecution?

106. What is the nature of xenophobic violence that was recorded in your station (murder, rape, grievous bodily harm, theft, house breaking, public violence etc.?)

107. What is the nature of charges referred to the NPA?

108. How many people were arrested during the May 2008 xenophobic violence here?

109. How many suspects were released by the police without charge? why?

110. Who made the decision to release them?

111. How did you ensure the protection of victims of xenophobic violence?

112. What do you usually do to ensure effective outcomes in the cases you investigate?

113. What did you do to ensure effective outcomes in the xenophobic cases which you investigated?

114. What are the difficulties you face in investigating violent crimes?

115. What were the specific difficulties you encountered in investigating cases arising from the May 2008 xenophobic violence?

116. What is your relationship as a police officer with the community police/vigilante groups?

117. Do the community police/vigilante groups refer matters or hand over suspected criminals to the police?

118. Did the community police/vigilante groups assist in the arrest or identification of some perpetrators of the May violence?

119. Did you receive reports and or investigate anyone for inciting xenophobic violence?

120. What do you think of xenophobic violence in South Africa?

## 2. Guiding Questions for NPA

200. How old are you?

201. Where were you attached in May 2008?

202. How long have you been a prosecutor?

203. What are the challenges that you face as in prosecuting violent crimes?

204. Did you prosecute any case of xenophobic violence before 2008?

205. Did you receive any file and or prosecute anyone for inciting xenophobic violence?

206. What is your conviction rate for xenophobic violence and other violent crimes?

207. How many cases were discharged by the Courts? Why?

208. What are the specific difficulties encountered in prosecuting cases of xenophobic violence?

209. In what circumstances and how often have you utilized plea bargain?

210. How often did you utilize plea bargain in the cases of xenophobic violence?

211. Are you aware of the law making powers of the courts under sections 8(3) (a) and 39 (2) of the constitution?

212. In what circumstances have you urged the courts to utilize these powers?

213. How often have you urged the courts to invoke these powers?

214. How often did you invite the courts to utilize these powers in the xenophobia cases?

215. How often do case dockets get lost?

216. What accounts for this loss?

217. How often do you hold pre-trial conference with your witnesses?

218. How often did you hold pre-trial conferences with victims of xenophobic violence?

219. What measures exist for the effective protection of witnesses of violent crimes?

220. Are you aware that witnesses in xenophobic cases were afraid to come forward and testify in the courts?

221. How were the witnesses in xenophobia cases protected?

222. What is your understanding of the relationship between vigilante groups, community police forums on the one hand and the NPA?

### 3. Guiding Questions for Magistrates

300. Are you aware of the powers of the courts to develop the common law under sections 8(3) (a) and 39 (2) of the constitution?

301. In what circumstances have you as Magistrate utilized these powers?

302. How often were you invited by the prosecution to invoke these powers?

303. Did the suo moto invoke this power while adjudicating in the xenophobia cases?

304. Did you as magistrate witness any practical lapses in the prosecution of xenophobia cases from other cases?

305. What measures exist for the effective protection of witnesses?

305. How were the witnesses in xenophobia cases protected before your court?