

APPRAISING THE LEGAL FRAMEWORKS FOR MIGRANTS' RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS LAW: A CASE STUDY OF XENOPHOBIA IN SOUTH AFRICA AND NIGERIA*

Abstract

Since the eighties, an increasing number of people have crossed international borders outside of regularized migration channels whether by land, air or sea. Policy debates on these kinds of movements have generally focused on security to the neglect of focus on rights. In a range of situations, though irregular migrants who fall outside the protection offered by international refugee law and the United Nations' High Commissioner for Refugees (UNHCR), may have protection needs and in some cases are entitled to protection under international human rights law. Such protection may result from conditions in the country of origin or as a result of circumstances in the host or transit countries. On the other hand, xenophobia simply put, is the fear or hatred of foreigners or strangers; it is embodied in discriminatory attitudes and behaviours and often culminate in violence, abuse of all types and exhibition of hatred. The issue of Xenophobia has become a common phenomenon in South Africa, where significant number of innocent lives have been lost; properties worth millions of dollars destroyed and many people displaced. Surprisingly, the victims of these attacks are black Africans. The trend has been linked to the mindset of the South Africans that the foreign nationals are the cause of unemployment, poverty rate, spreading of deadly diseases and above all, have hijacked their socio-economic sector and the solution is to frustrate them. However, the attack on African migrants, especially Nigerians is barbaric and disturbing scenario. This work identified the various laws that guarantee refugees and migrants' rights in both South Africa and Nigeria, and presented a brief cursory look at the xenophobic violence of the South Africans against foreign nationals especially Nigerians. The work further made recommendations to quail these barbaric acts.

Keywords: Rights, Xenophobia, Migrants, South Africa, Nigeria, Legal Framework

1. Introduction

International agreements with respect to the protection of migrants all over the world impose the commensurate international obligations on State Parties who are signatories to such international agreements. Where any State is not a signatory to such international agreement, the national laws, such as the Constitution, which are regarded as customary international laws fill the lapses, to ensure the protection of migrants. South Africa and Nigeria are signatories to a number of international treaties, some of which have been ratified, and there are national laws, to the effect that migrants are protected from exploitation and attacks on their lives. This study shall proceed to identify some of the legal frameworks that guarantee migrants' rights under the international human rights law in South Africa and Nigeria.

2. Domestic Legal Frameworks for Migrants' Rights in South Africa

Constitution of the Republic of South Africa 1996

The South African Constitution of 1996 came into force in February 1997. It is the supreme law of the country.¹ According to the Constitution, 'the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'² The Bill of Rights entrenches the rights of 'everyone' in South Africa, inter alia, to equality before the law, human dignity, personal freedom and security, privacy, due process of law, freedom of expression and association, fair labour practices, adequate housing, health care, sufficient food and water, and social security.³ With respect to the right to have access to adequate housing and health care, food, water, and social security, the Bill of Rights requires the State to 'take reasonable legislative and other measures, within its available resources, to achieve their progressive realization...'⁴ It is important to note that Section 9 of the Constitution of South Africa, 1996 provides for legal and social equality. Section 9 was derived from the Universal Declaration of Human Rights which states that 'everyone is equal before the law and has the right to equal protection and benefit of the law.'

Thus, the section provides for the equality of both citizens and migrants before the law, and they have the right to equal protection and benefit from the law. Further, Section 10⁴ of the same Constitution recognises the right to human dignity and the need to respect and protect the same. It states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. The dignity of a human person cannot be realized if the person's security and freedom are not guaranteed. In the same vein, Section 11⁵ of the Constitution provides that 'everyone has the right to life.' This section 11 received judicial confirmation in *S v Makwanyane*,⁶ where the South African Court ruled that the current Constitution of South Africa prohibits capital punishment. In addition, Section 12 of the South African Constitution portrays that South Africa firmly believes in the fair treatment of persons within its territory and it provides that 'everyone has the right to freedom and security of the person which includes the right (a) not to be deprived of freedom arbitrarily or without just cause (b) not to be detained without trial;

*By **Jude Uchenna OKOYE, PhD**, Reader, Faculty of Law, Nnamdi Azikiwe University, Awka; and

* **Solomon NWOKE, LLB, LLM Candidate**, Faculty of Law, Nnamdi Azikiwe University, Awka

¹Constitution of the Republic of South Africa (No. 108 of 1996), chapter 1, section 2, <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1> (Accessed March 13, 2024). *Ibid.*, chapter 2, section 7(1).

² *Ibid.*, chapter 2, sections 9, 10, 12, 14, 16, 18, 23, 26, 27, 33, 34, and 35.

³ *Ibid.*, chapter 2, sections 26(2) and 27(2). ¹⁹ *Ibid.*, chapter

2, section 13. ²⁰ *Ibid.*, chapter 2, section 25

⁴ The Constitution of South Africa 1996

⁵ *Ibid*

⁶ *S v Makwanyane* (1995) ZACC 3; 195 (6) BCLR 665

(c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.⁷

Notwithstanding the general application of the Constitution to everyone in South Africa, the Bill of Rights expressly limits specific rights to South African citizens such as the right to vote, to form a political party, to stand for public office, to obtain a passport, to enter into the country, to freely choose a trade, occupation or profession, and to benefit from state measures to foster conditions that enable access to land.⁸ In addition, section 231 provides that where South Africa has ratified any international instrument or where such international instrument is of a technical, administrative or executive nature, or does not require the ratification or accession of the Parliament, it is bound by that international instrument.

Immigration Act 13, 2002

The Immigration Act, 2002 repealed the Aliens Control Act and the Aliens Control Amendment Act 76 of 1995. The Immigration Act primarily provides for the regulation of admission of foreigners to, their residence in and their departure from the Republic of South Africa and for matters connected therewith. It is administered by the Department of Home Affairs, which works in synergy with the Department of Foreign Affairs, the South Africa Police Service and other State Departments to ensure that illegal foreigners are detected, deterred and deported.⁹ According to Section 2 of the Act, the Department of Home Affairs shall pursue a 'human rights and civil rights' based culture in immigration control in protecting the borders of South Africa. The Act is also designed to 'promote a climate of cooperation' between State departments and agencies and 'preventing xenophobia' within the Department of Home Affairs and in any other departments of the State. The Act copiously avails migrants the legitimate ways to come into and settle in South Africa. By the various provisions of the Act, migrants have the main options of temporary residence or permanent residence as approved ways of stepping into South Africa.¹⁰ Some of the ways mentioned in the Act include temporary residence permit, visitor's permit, diplomatic permit, study permit, treaty permit, crew permit, business permit, medical treatment permit, relative's permit, work permit, retired person's permit, corporate permit, exchange permit, asylum, cross-border and transit passes, permanent residence, direct residence, residence on other grounds, etc. In addition, migrants who fall within the categories of prohibited and undesirable persons are not allowed into South Africa.¹¹ The Immigration Act defines a 'foreigner' as an individual who is not a citizen and an 'illegal foreigner' as a foreigner who is in South Africa and in contravention of the Act.¹² Section 34 of the Immigration Act, as amended by the Immigration Amendment Act, governs the procedures for the arrest, deportation, and detention of 'illegal foreigners'.¹³ The legislation also forbids employers to hire undocumented foreigners,¹⁴ and makes it an offense, punishable by a fine or imprisonment, to hire or aid 'illegal foreigners'.¹⁴ Section 37 of the Immigration Act provides for the Immigration Court, where the application or enforcement of the Act shall be judicially reviewed. As mentioned above, the Immigration Act repealed the Aliens Control Act, 1991 and Aliens Control Amendment Act, 1995.¹⁵ This is important, as any reference to the above-mentioned repealed laws in any other law, such as the Refugees Act,¹⁶ becomes obsolete and inoperative, for purposes of actions taken after the repeal of the said laws, including any purported offence. The Immigration Amendment Act was introduced and became fully operational with the publication of new Immigration Regulations in July 2005.¹⁷

Refugees Act No 130, 1998

The Refugees Act No. 130, 1998¹⁸ was enacted upon the accession of the Government of South Africa to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments. The Act generally provides for the reception of asylum seekers, regulation of the applications for and recognition of refugee status, the rights and obligations that flow from such status and other matters connected therewith. Thus, a qualified person can make an application for asylum under section 21 of the Act and upon a successful application will be issued an asylum seeker

⁷*Ibid*

⁸*Ibid.*, chapter 2, sections 19, 21(3), 21(4), 22, 25(5). Section 37(6) and 37(7), relating to rights of detainees in a state of emergency, do not apply to persons who are not South African citizens

⁹ See section 34 of the Immigration Act, 2002.

¹⁰ Sections 10-28, *Ibid*. See also section 31 for the category of persons who are exempted from following the strict immigration protocols.

¹¹ Sections 29 and 30, *Ibid*.

¹² Immigration Act, as amended by Immigration Amendment Act, section 1.

¹³ Lawyers for Human Rights challenged the constitutionality of parts of section 34 in the Pretoria High Court, and sought confirmation in the Constitutional Court of the High Court's order with respect to those provisions that the High Court ruled to be unconstitutional. Despite these constitutional challenges, section 34 remains intact. For the High Court judgment, see *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another* 2003(8) BCLR 891(T). For the Constitutional Court judgment, see Constitutional Court of South Africa. *Lawyers for Human Rights and Ann Francis Eveleth v. Minister of Home Affairs and Director-General: Department of Home Affairs*, Case CCT 18/03.

¹⁴ Immigration Act, section 38(1).

¹⁴ Immigration Act, section 49, as amended by Immigration Amendment Act, section 45.

¹⁵ See section 54, *Ibid.*;

¹⁶ See section 22(2) & (7) of the Refugees Act, 1998.

¹⁷For the presidential directive, see "Address by Hon. NN Mapisa-Nqakula on the Occasion of the Presentation of the 2006 Budget Vote of the Department of Home Affairs (Budget Vote 4)," The National Assembly, Cape Town, May 30, 2006, <http://www.home-affairs.gov.za/speeches.asp?id=161> (Accessed March 15, 2024). On differences between the Immigration Act, 2002, and the Immigration Amendment Act, 2004, see Crush and

¹⁸ Hereinafter referred to as 'the Act.'

permit under section 22 of the Act.¹⁹ Such refugee becomes entitled to all the rights as guaranteed by the Act, the Constitution, and is

Labour Relations Act No 66, 1995²⁰

The preamble to the Constitution of South Africa states that South Africans believe that South Africa belongs to all who live in it, united in diversity. Section 23 of the Constitution provides that everyone has the right to fair labour practices. The Labour Relations Act²¹ was enacted to give effect to the provisions of section 27 of the Constitution which guarantees the right to health care services, food, water and social security. Also, the Act states that anyone applying the Act must interpret its provisions in compliance with the Constitution and public international law obligations.²² The Act, guided by the Constitution, is the principal law that regulates all forms of labour practices in South Africa. Hence, it takes precedence over other labour laws.²³ Section 5(1) of the Act provides that no person may discriminate against an employee for exercising any right conferred by the Act. This implies that where a migrant becomes an employer, such migrant must comply with the provisions of the Act and interpret same in line with the Constitution and other laws regulating labour practices in South Africa.

3. International Legal Frameworks for Migrants' Rights in South Africa

Under the South African Constitution, international laws must be considered in the interpretation of the Bill of Rights and other national legislations.²⁴ South Africa is a member of many international organisations such as the International Labour Congress, World Health Organisation, African Union, etc. As such, South Africa is a signatory to some international instruments that affect migrants, and has ratified some of them. We shall consider some of the international legal frameworks for migrants' rights in South Africa.

International Covenant on Civil and Political Rights (ICCPR) 1976

The International Convention on Civil and Political Rights (ICCPR) was signed by South Africa on 3 October 1994 and ratified same on 10 December 1998.²⁵ Most rights provided for in the ICCPR apply to everyone, regardless of immigration status. For example, the ICCPR prohibits the use of torture or cruel, inhuman or degrading treatment or punishment,²⁶ and slavery, servitude, and or forced or compulsory labour.²⁷ It also provides for the right of everyone to liberty and security of person and prohibits arbitrary arrest or detention;²⁸ requires all persons deprived of their liberty to be treated with humanity and respect for human dignity; and further specifies the segregation of accused and convicted persons and of juveniles from adults.²⁹ However, the ICCPR reserves a few specific rights for citizens. Only citizens have the right to vote, to have access on general terms of equality to public service, and to take part in public affairs.³⁰ The ICCPR also makes a distinction between the rights of lawful and unlawful 'aliens'.³¹ In particular, only legal residents, like citizens, have the right to liberty of movement and freedom to choose their residence, subject to specific restrictions, including that any restrictions be provided by law.³² The ICCPR also regulates the procedure for the expulsion of a non-citizen legally within the state. A decision to expel a foreigner legally in a country must be in accordance with law. Foreigners legally in the state can only be expelled on the basis of an individual decision taken relating to their expulsion following due process, including the right to submit reasons against their expulsion, to have an opportunity to appeal against expulsion and to have a review by a competent authority.³³

African Charter for Human and Peoples' Rights (ACHPR) 1981

The Charter emphasized political, economic, social and cultural rights. The African Charter provides for establishing the African Commission on Human and Peoples Rights and ensures these rights are protected. It should be noted in this international instrument that South Africa was a signatory and domesticated, as exemplified in the provision of the South African Constitution cited earlier. The ACHPR recognizes the inextricable link between economic, social, and cultural rights and civil and political rights in its preamble. Article 15 of the ACHPR provides that 'every individual shall have the right to work under equitable

¹⁹ See generally, Part 3 of the Act.

²⁰ There are other laws regulating labour relations between employers and employees in South Africa. Some of them include the Employment Equity Act No. 55, 1998, the Skills Development Act No. 97, 1998, the Occupational Health and Safety Act No. 85, 1993, the Compensation for Occupational Injuries and Diseases Act No. 130, 1993, etc.

²¹ This Act has been amended by the Labour Relations Amendment Act No. 8, 2018 to make further provisions on matters relating to collective agreement, picketing regulations, minimum service, voting, advisory arbitration panel, etc.

²² Section 3 of the Labour Relations Act.

²³ S T Mzangwa, Legislation and employment relations in South Africa: a narrative overview of workplace dispute, *Journal of Governance and Regulation*, Vol 4, Issue 1, 2015 p. 167- 177 available at https://virtusinterpress.org/IMG/pdf/10-22495_jgr_v4_i4_c1_p4.pdf accessed 28 November 2024.

²⁴ Constitution of the Republic of South Africa, chapter 2, section 39(1) (b) and chapter 15, section 233.

²⁵ Available at <https://tbinternet.ohchr.org>Treaty> accessed 28 November 2024.

²⁶ ICCPR, art. 7.

²⁷ ICCPR, art. 8.

²⁸ ICCPR, art. 9.

²⁹ ICCPR, art. 10.

³⁰ ICCPR, art. 25.

³¹ The UN Human Rights Committee, in General Comment 15 on "The Position of Aliens under the Covenant" has stated that the ICCPR obligations apply to any foreign national in the territory of a state party, except those rights in article 25 recognized in the ICCPR, which are expressly applicable only to citizens. United Nations Human Rights Instruments, *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies*, HRI/GEN/1/Rev4, February 7, 2000, p. 98, para. 7.

³² ICCPR, art. 12.

³³ ICCPR, art. 13.

and satisfactory conditions, and shall receive equal pay for equal work.³⁴ In December 2004 the African Commission on Human and Peoples' Rights¹²⁴ adopted a Resolution on Economic, Social and Cultural Rights in Africa.³⁵ The resolution incorporated the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, which articulates the scope of several of the articles of the ACHPR, including article 15.³⁶ The adopted declaration sets out that the right to work in article 15 of the ACHPR.

International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976

The International Covenant on Economic, Social and Cultural Rights (ICESCR), was signed by South Africa on 3 October 1994 and ratified same on 12 January 2015.³⁷ The ICESCR recognizes a defined set of social, economic, and cultural rights, which states undertake 'individually and through international assistance and co-operation' and to the maximum of their available resources, to realize progressively.³⁸ In addition to the progressive realization, and a dependency on available resources, the ICESCR also permits developing countries explicit, but limited, discretion as to the extension of economic rights to foreign nationals. Article 2(3) says, 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.'

There is considerable overlap between the economic rights contained in the ICESCR and the economic rights provided for in the Constitution of the Republic of South Africa, which is particularly relevant in light of the imperative that international law inform the scope of the constitutional provisions. Article 7 of the ICESCR, which recognizes 'the right of everyone to the enjoyment of just and favourable conditions of work,' is reflected in the constitution's guarantee of fair labour practices (section 23). Article 7 explicitly states that such conditions must ensure '(a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind...; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted...; [and] (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.'³⁹ The ICESCR also requires that working mothers during a reasonable period before or after childbirth should be accorded paid leave or leave with adequate social security benefits.⁴⁰ Article 7 of the ICESCR also recognizes the right of everyone to social security, including social insurance⁴¹ and adequate housing,⁴² and in these respects is akin to section 27 of the Constitution of South Africa.

4. National Legal Frameworks for Migrants' Rights in Nigeria

Immigration Act 2015

The extant principal law guiding migrations in Nigeria is the Nigeria Immigration Act of 2015, together with the Immigration Regulations 2017. It revoked the Immigration Regulations of 1963 and Immigration (Control of Aliens) Regulations of 1963.⁴³ The Immigration Act primarily regulates the embarkation and disembarkation of persons and cargoes out of and into Nigeria. The Act provides for the close monitoring of all ports of entry into Nigeria through the land, air and sea. The Act provides for various kinds of permit to allow such entry and exit such as business permit, visiting permit, residential permit, transit permit, visa on arrival, etc.⁴⁴ The Act expressly prohibits the smuggling of migrants and prescribes punishment for offenders.⁴⁵ Immigrants can be gainfully employed under the Act. However, such employment shall be made to the Comptroller-General in writing, stating the particulars of the prospective employee such as the full name, date and place of birth, nationality, date and place of issue of passport, etc.⁴⁶ Dependants of a principal immigrant may be issued with residence permit for such not exceeding the validity of the principal immigrant's residence permit.⁴⁷ It is pertinent to mention that the Immigration Act principally caters to legal migrants. Hence, any migrant that seeks to legally stay in Nigeria must regularize their identification documents with the Nigeria Immigration Service, as stipulated under the Immigration Act, 2015 and Immigration Regulations, 2017.

National Commission for Refugees, Migrants and Internally Displaced Persons Act 2022

The National Commission for Refugees, Migrants and Internally Displaced Persons Act, 2022 was enacted to manage, rehabilitate, return, reintegrate and resettle refugees, migrants and victims of displacement. The Act seeks to safeguard the

³⁴ ACHPR, art. 15.

³⁵ The African Commission on Human and Peoples' Rights has a mandate under article 45 of the ACHPR to promote and protect human rights in Africa.

³⁶ The African Commission on Human and Peoples' Rights in collaboration with the International Centre for Legal Protection of Human Rights (Interights), the Cairo Institute for Human Rights Studies, and the Centre for Human Rights, University of Pretoria, held a Seminar on Economic, Social and Cultural Rights on September 13–17, 2004, in Pretoria, South Africa, which culminated in the adoption of the Declaration (September 17, 2004).

³⁷ Available at <https://tbinternet.ohchr.org>Treaty> accessed 28 November 2024.

³⁸ ICESCR, art. 2 (1).

³⁹ ICESCR, General Comment No. 18, Right to Work, E/C.12/GC/18, on Article 6.

⁴⁰ ICESCR, art. 10(2).

⁴¹ ICESCR, art. 9.

⁴² ICESCR, art. 11.

⁴³ Section 78 of the Immigration Act, 2015.

⁴⁴ See sections 4–10, *Ibid.*

⁴⁵ See sections 54–68, *Ibid.*

⁴⁶ Section 74, *Ibid.*

⁴⁷ Section 13, *Ibid.*

interests of persons of concern in Nigeria by ensuring that the sanctity of human persons is protected. In the actualization of its objectives, the Act implements the treaties and conventions in relation to refugees, migrants, asylum seekers, and internally displaced persons, which are ratified and domesticated by Nigeria.⁴⁸ The Act defines⁴⁹ an 'internally displaced person' as persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed any of Nigeria's internationally recognised borders. The Act also defines 'persons of concern' as refugees, asylum seekers, returnees, stateless persons, migrants, Nigerian migrants abroad, internally displaced persons, or such other persons affected by voluntary or involuntary displacement or migration. A refugee under the Act has the same meaning as Article 1 of the 1951 United Nations Convention, Article 1 of the 1967 Protocol Relating to the Status of Refugee and Convention Governing the Specific Aspects of Refugee Problems in Africa. In a nutshell, a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁵⁰ A person may apply for the refugee status in accordance with section 16 of the Act and is allowed to remain in Nigeria pending the final determination of his application. In the event such application is refused, the applicant shall be given 30 days to seek admission as a refugee in another country.⁵¹ Nonetheless, by the combined provisions of sections 17 and 18 of the Act, a refugee within the meaning of the Act shall not be expelled, extradited or returned from Nigeria on the ground of illegal entry or illegal presence pending the determination of his refugee status. The refugee shall remain especially where there is a threat to his life, freedom, physical integrity and liberty.⁵² Such refugee shall have the right to reside in Nigeria with the members of his family pending the recognition as refugee. However, where the final decision denies the status of such applicant as a refugee, he has 30 days to leave Nigeria and seek asylum with his family in any other country of his choice. A person shall not be granted a refugee status where such person constitutes a threat to the security of Nigeria or such person by a court or tribunal for committing any serious crime prohibited by any of the conventions.⁵³

Employees' Compensation Act 2010

The Employees' Compensation Act, 2010 repealed the Workmen's Compensation Act, Cap W6, LFN 2004. The Act was enacted to make comprehensive provisions for the payment of compensation to employees who suffer from occupational diseases or sustain injuries arising from accidents at workplace or in the course of employment. The Act applies to all employers and employees in the private and public sectors in the Federal Republic of Nigeria.⁵⁴ Accident was defined under the Act as an occurrence arising out of or in the course of work which results in fatal or non-fatal occupational injury that may lead to compensation under the Act.⁵⁵ Similarly, the Act defines as 'employee' as a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy.⁵⁶ In the same vein, the Act defines 'employer' to include any individual, body corporate, Federal, State or Local Government or any of the government agencies who has entered into a contract of employment to employ any other person as an employee or apprentice.⁵⁷ Thus, where a migrant or refugee falls within the definition of employee as stipulated under the Act, such person is well within rights to be duly compensated therefrom. The Act made provisions for different degrees of injuries and the procedures for making any claim for each degree of injury.⁵⁸ A migrant or refugee's dependent can also apply to the Nigeria Social Insurance Trust Fund Management Board for compensation. Under the Act, a 'dependent' includes those members of the family, including adoptive and foster family, of the deceased or disabled employee who were wholly dependent upon his earnings at the time of his death, or would, but for the disability due to the occupational accident or diseases, have been so dependent.

5. International Legal Frameworks for Migrants' Rights in Nigeria

Nigeria has ratified and even domesticated a number of international instruments, some of which affect migrant workers in Nigeria. We shall briefly consider some of the instruments.

African Charter on Human and People's Rights (Ratification and Enforcement) Act 1983⁵⁹

The African Charter on Human and People's Rights (Ratification and Enforcement) Act, 1983 was enacted into law after its adoption. The Act has the force of law in Nigeria and is given full recognition and effect. The Act copiously provides for the rights of every human, unlike the Constitution that principally provides for the Nigerian citizens. The Act provides for the rights

⁴⁸ Section 1 of the National Commission for Refugees, Migrants and Internally Displaced Persons Act, 2022.

⁴⁹ Section 40, *Ibid.*

⁵⁰ Convention relating to the Status of Refugees, 1951. Available at <https://www.un.org/docs.pdf> accessed 28 November 2024.

⁵¹ Section 16(8), *Ibid.*

⁵² Section 17, *Ibid.*

⁵³ Section 17(2), *Ibid.*

⁵⁴ Section 2 of the Employees' Compensation Act, 2010.

⁵⁵ Section 73, *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Sections 7-30, *Ibid.*

⁵⁹ Available at <https://placng.org/lawsofnigeria/view2.php?sn=24> accessed 28 November 2024

to freedom from discrimination,⁶⁰ equality and equal protection of the law,⁶¹ life,⁶² dignity of his person,⁶³ liberty and security of his person,⁶⁴ be heard,⁶⁵ etc.⁶⁶ Consequently, migrants and refugees can apply to enforce their human rights through the provisions of this Act. The Act also established the African Commission on Human and Peoples' Rights to promote human and people's rights and ensure their protection in Africa.⁶⁷

Other International Conventions

Nigeria has ratified quite a number of international conventions touching on the subject of migrants and refugees. However, Nigeria has not domesticated most of those international conventions but is taking giant strides to subtly apply some them. For instance, Nigeria submits a periodic report on its compliance with the International Convention on the Elimination of all Forms of Racial Discrimination.⁶⁸ Also, some new legislations embody the spirit of some of the international laws

6. A cursory Look at the Xenophobic Violence of the South Africans against Foreign Nationals especially Nigerians

Multiple reports of increased xenophobic attacks have been recorded since 2008, 2015 and 2019 after the pre-apartheid attacks. An increasing rate of Xenophobia undermines the social fabric of South Africa, creating division and distrust among different communities. Xenophobic attacks have damaged South Africa's reputation and hindered its efforts to promote regional integration and cooperation. Foreign nationals who are victims of xenophobic violence often face difficulties accessing justice, seeking asylum, and receiving adequate psychological support. The recent case of Chidimma Vanessa Onwe Adesina further indicates that xenophobia is still on rampage in South Africa. The victim was to participate in the Miss South Africa contest that held in 2024 but because she was born in South Africa by a Nigerian father and Mozambiquan mother, it was alleged that her mother is an illegal migrant. Sadly, even without proper investigation, she was pressured out of the competition. Regrettably, many perpetrators of xenophobic violence have not been brought to justice, further eroding the trust in the legal system and emboldening further attacks.

7. Conclusion and Recommendations

This article found that Nigeria and South Africa have legal and institutional framework for the protection of migrants' rights under international human rights law. The legal framework for workers is consistent with the government of South Africa's obligations under those international conventions. It has ratified the International Covenant on Civil and Political Rights, The African Charter for Human and Peoples' Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The law guiding migrations in Nigeria is the Nigerian Immigration Act of 1963, which was recently amended in 2017 (FM.IA).⁶⁹ This is strongly guided by basic international human rights instruments such as the UDHR OF 1948, International Covenant on Civil and Political Rights, CEDAW, the Rights of the Child, the Constitution of the Federal Republic of Nigeria, some basic international human rights laws and the ECOWAS treaties and protocols, which Nigeria has ratified as a member state. However, these laws protect the rights of the documented migrants. Consequently, the study found that out the laws and statutory institutions (agencies) are not effective in protecting the law guiding migrant rights in Nigeria and South Africa. Labour inspectors in both countries may promote, monitor, and enforce compliance with an employment law by advising employees and employers of their rights and obligations in terms of an employment law, conducting inspections, investigating complaints, and by securing, undertakings or issuing compliance orders. But still this mechanism was found not to be effective due to repeated occurrence of xenophobia in South Africa. Firstly, the attack created hatred in the minds of Nigerians leading to Nigerians having a negative impression which led to less association with South Africans. In addition, other implications include: political and diplomatic impact, economic impact, social and psychological impact. Some of the measures that have been employed towards ensuring an effective enforcement of migrants' rights under international human rights law includes and not limited to; policy strategies, engagement with various stakeholders, inter-governmental strategies, regional engagement, technical and media related strategies, state- civil society strategies, legal and constitutional strategies, deployment of security agencies etc. By way of findings, this article finds that there is wanton violation of migrants' rights across Africa and most part of the world as it relates to xenophobia. The article also found that there is dearth of legislation protecting these rights. The ones that even exist do not stipulate stringent penalties for violation of these rights. It is also discovered that this also affects the relationship between South Africa and Nigeria.

In the light of the above, the following recommendations were made. There should be review or promulgation of the existing laws both locally and internationally to meet up with the current challenges of xenophobia by making more stringent provisions against the violation of the rights. It is encouraged that local legislations be made within South Africa in order to specifically protect immigrants from violent attacks such as xenophobia as well as the provision of agencies competent enough to execute these laws. In addition, they should holistically implement the international and regional human rights instruments and all relevant standards that protect the human rights of all persons at risk of xenophobia. The South African government should not seize to arrest, prosecute, and convict the perpetrators; and strengthen existing international laws by enacting policies that will prevent the occurrence of such attacks in the future. The leadership of both countries should put measures in place towards restoring amiable relationship through strategic consultations, functional bilateral engagements, and diplomatic dialogue.

⁶⁰ Article 2, African Charter on Human and People's Rights (Ratification and Enforcement) Act, 1983.

⁶¹ Article 3, *Ibid.*

⁶² Article 4, *Ibid.*

⁶³ Article 5, *Ibid.*

⁶⁴ Article 6, *Ibid.*

⁶⁵ Article 7, *Ibid.*

⁶⁶ See generally, Articles 8-29, *Ibid.*

⁶⁷ Article 30, *Ibid.*

⁶⁸ Available at https://www.ohchr.org/CERD/Nigeria_CERD_C_467_Add.3.pdf accessed 29 November 2024.

⁶⁹ Federal Ministry of Internal Affairs (Nigeria) 1991, Nigerian Immigration Services: ECOWAS Residence and Manual Abuja