Use of Diplomatic Protection to Prosecute Perpetrators of Xenophobic Attacks in South Africa.

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Abstract: Xenophobia in South Africa is expressed as negative attitudes towards foreigners, but also, it occurs in xenophobic practices such as discrimination, exploitation and violence. The attitude of hatred towards foreigners is especially held against people coming from other African countries. Being a nation of hope and “greener pasture” to foreigners from especially many African countries, such discriminatory attitudes and practices may lead to consequences of magnitude proportion if left unabated. Following a qualitative approach of enquiry, the aim of this paper is to consider whether the doctrine of diplomatic protection may be used to prosecute perpetrators of xenophobic attacks in South Africa; in light of developments under international law.

Keywords: Xenophobia in South Africa; Discrimination against foreigners; Diplomatic Protection

INTRODUCTION

South Africa represents a beacon of light, the chance of a better life, on the southern tip of Africa. African people from Malawi, Zambia, Lesotho, Nigeria and other African countries have been migrating to South Africa for many years to work mainly in the mining industry for a defined period of time (Muller, 1999). Many foreigners come from these critical areas, where there have been internal and regional conflicts. Some of them do not want to leave their countries but because they are threatened, persecuted and their lives are in danger, they leave their homelands out of fear and go to South Africa as refugees, (Molelo, 2014). When some African countries are not plagued by disruption, corruption or civil war, some continue to suffer from drought and famine. Hence, many Africans cross the borders with the hope of finding some work and relief. They see South Africa as a land of opportunities. South Africa also tries to strengthen economic ties with some of these African countries. In 2015, the theme of the African Development Report for the same year was Regional Integration for Inclusive Growth. It recognizes that regional integration is not an end in itself, but rather a tool for enhancing economic growth and fostering inclusion within and between African countries (United Nations Publication, 2015). With an average growth of about 5%, the value of intra-African trade has increased fourfold over the last decade to reach USD 130 billion (United Nations Publication, 2015). All these have been tainted by recent violent xenophobic attacks by some South Africans on foreigners from mainly other African countries. The damage caused by these violent attacks to South Africa’s reputation, among other factors, has been immeasurable (Okon, 2010).

Already, South Africa has experienced a downturn in tourism partly due to this problem; but as a result of other factors – e.g. new and stringent immigration laws. At a point in time South Africa’s credit rating was at the verge of being downgraded to junk status; this may scare off potential investors. Also, there are many other factors apart from the current matter. The Minister of Finance was tasked to prove to rating agencies that the government will rein in the public sector wage bill, cut spending and raise taxes. The outlook for coming years was cut to 2.4% from 2.8% (Vollgraff, 2016). Notwithstanding other factors, recent xenophobic attacks have dented the economic image of South Africa and made many African countries aware of the need to protect their citizens who are bona fide residents in the country.

Initially the doctrine of diplomatic protection held that States were under no international legal obligation to provide their nationals with diplomatic protection when they are harmed in foreign countries and local remedies are ineffective (Hooge, 2010). States may intervene on behalf of their nationals, but choosing to provide protection is their discretionary right. The International Court of Justice’s decision in the Barcelona Traction case, (1970) is the leading case for this proposition. This doctrine was formed during a period in which international law held a fixed view of state sovereignty as entailing only rights to control
OREIGN ARTICLE

DEFINING XENOPHOBIA

The review of existing literature on xenophobic violence, diplomatic protection and reparation was conducted to give insights concerning the paper. Researchers, national and international human rights organizations (Human Rights First, 2011), academics (Misango, 2010; Marindze, 2010; Hooge, 2010), political parties (Holomisa - United Movement), commented and wrote on the possible causes of xenophobia against foreigners in South Africa; its impact and possible solutions with regard to the incident. However, none of them address how the perpetrators would be prosecuted under the doctrine of diplomatic protection, particularly for foreign nationals who were killed in the violence.

In simple terms, xenophobia is the fear or hatred of foreigners. It is embodied in discriminatory attitudes and behaviour, and often culminates in violence, abuses of all types, and displays of hatred, (Mogekwu, 2005). According to the South African Human Rights Commission, xenophobia is the deep dislike of nonnationals by nationals of a recipient state. This displays a violation of human rights. Xenophobic and other bias-motivated violence is a global phenomenon, not limited to any one country or region of the world; for example in the Dominican Republic, Haitian refugees, migrants and stateless persons of Haitian descent have been brutally assaulted and killed, (Mariela, 2009). In Egypt, refugees and migrants from Sudan, Somalia, Ethiopia, and Eritrea have been the targets of racist violence and harassment, (Yeagain: 2011). There are more dated and more recent occurrences. The focus of this paper, however, is South Africa; being the country of interest to the authors.

Bearing in mind the magnitude of xenophobic violence in 2008 and again in 2015 and their implications to foreigners or even to the South African government, there is actually a need to explore this area in order to explain the uselessness of xenophobia in South Africa. This may help change the reaction and hopefully the handling of the situation for States, citizens or other entities in order for people to understand and refrain from xenophobic attitudes. The most recent research report on xenophobic violence against black foreigners in South Africa was conducted by the United Nations Human Rights Council (UNHRC) in the most affected areas, (Human Rights First, 2011). The research found that economic, social concerns, for instance poverty, unemployment, crimes, might have contributed to the outbreak of xenophobic attacks against foreigners in South Africa. However, they fall short to explain the outburst of the incident in certain areas but not in others with similar features. Thus the study concluded, amongst other reasons over physical territory and populations and no reciprocal responsibilities or obligations.

The changing definition of sovereignty as entailing not only control, but also responsibility towards citizens as reflected in the adoption by the United Nations’ General Assembly and Security Council of the Responsibility to protect doctrine. The Responsibility to protect doctrine found that sovereignty not only gave a state the right to control its affairs, it also conferred on the state primary responsibility for protecting the people within its borders. It proposed that when a state fails to protect its people either through lack of ability or a lack of willingness the responsibility shifts to the broader international community, (UN, 2000). More so, South Africa is a party to the international human rights treaties which oblige state parties to ensure protection of foreigner’s human rights. As well as the rise of international human rights law in the 20th century and the inclusion of individual persons as legitimate subjects of international law. Hence, the aim of this paper is to illustrate how the doctrine of diplomatic protection can be used by injured States to prosecute perpetrators of xenophobic violence in South Africa. It attempts to demonstrate the extent a state under international law has legal obligation to protect foreigner nationals in its jurisdiction. The paper further examines the rules of international law as it applies to the doctrine of diplomatic protection as well as lessons learned from other democracies.

The remainder of this paper is structured as follow: methodology; a literature review that encompasses: definition of xenophobia, xenophobia in South Africa, xenophobia vs. discrimination, diplomatic protection and conditions thereof; discussion on how this applies to South Africa; and a concluding part.

METHODOLOGY OF THE PAPER

The research focuses on already collected and recorded information or data emanating from secondary sources in the literature, reports, journals, books, unpublished works, monographs, similar material sources, (Osaze&Izedomni, 2010) and on the internet. The author critically assesses South Africa’s intervention towards foreign national’s victims of xenophobic violence. On the whole, the research is based on qualitative desktop research. Furthermore, an attempt will be made to present the position of other states using case law regarding their opinion on diplomatic protection.
behind xenophobic violence, lack of conflict resolution mechanisms within townships and existence of behaviours or conducts of xenophobia among South African citizens, (Misango, 2010).

XENOPHOBIA IN SOUTH AFRICA

In South African, xenophobia is a negative attitude towards foreigners which is confirmed in extreme cases with violent attacks against them. Such negative attitudes are attributed to a number of causes such as, the fear of loss of social status and identity, a threat, to citizens’ economic success, a feeling of superiority, and poor intercultural information (Harris, 2001). Mogekwu states that xenophobes presumably do not have adequate information about the people they hate and, since they do not know how to deal with such people. Clearly a need for education is one of the ways to curb this epidemic. Xenophobia derives from the sense that foreigners pose a threat to the nationals’ identity or their individual rights, and is also closely connected with the concept of nationalism, the sense in each individual of membership in the political nation as an essential ingredient in his or her sense of identity, (Kaysen, 1996). To this end, a notion of citizenship can lead to xenophobia when it becomes apparent that the government does not guarantee protection of individual rights. This is all the more apparent where poverty and unemployment is widespread, which is evident in South Africa.

XENOPHOBIA VS RACIAL DISCRIMINATION

Xenophobia is often referred to in conjunction with racial discrimination. Racial discrimination is defined as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. While the two phenomena, they also overlap.

Xenophobic attitudes may lead to discriminatory actions against foreigners on the basis of their nationality or ethnic origin and thus be linked to racial discrimination. While racism is a distinction based on difference in physical characteristics, xenophobia stems from a perception that the other is foreign to or originates from outside the community or nation. It results in intense violence by South Africans towards foreigners, (Tshitereke, 1999). With xenophobia, it has been noted that it is particularly dominant in countries undergoing transition because it is a problem of post-coloniality, one which is associated with the politics of the dominant groups in the period following independence, (Neocosmos, 2006).

Harris argues that this has to do with a feeling of superiority, but is also, part of a blaming process, where unfulfilled expectations of a new democracy result in the foreigner coming to personify unemployment, poverty and deprivation, (Harris, 2000). On the other hand, (Kollapan, 2000) warns that xenophobia cannot be separated from violence and physical abuse. He further states that xenophobia is not just an attitude, it is an activity. It is not just a dislike or fear of foreigners it is a violent practice that results in bodily harm and damage. More so, the violent practice that comprises xenophobia must be further refined to include its specific target, because, in South Africa, not all foreigners are uniformly victimised. Rather, black foreigners, particularly those from Africa, comprise the majority of victims, (Harris, 2000). Some states such as Nigeria and Malawi, for instance, recorded some documents addressing the impact of xenophobic violence on their nationals and also documented their assistance on behalf of victims of their nationalities in South Africa (Okon, 2010). The aforesaid documents do not deal with or mention the way forward in which these governments should adopt to seek justice for its nationals killed by South Africans under South Africa’s jurisdiction. Thus, this paper seeks to contribute in this regard.

Unpublished theses by Marindze (2010), Hooge (2010), Hägensen (2014), have written on xenophobia and the doctrine of diplomatic protection respectively. Unlike these, this paper deals with diplomatic protection as a tool in which could be exercised by injured governments (governments with affected nationals) to prosecute perpetrators of xenophobic violence on their nationals. For instance, Marindze differs from this paper by using the doctrine of diplomatic protection to obtain reparations for injured nationals of Mozambique. Hooge focuses on the responsibility to protect as duty to protect by reassessing the doctrine of diplomatic protection in light of modern developments in international law. Hägensen tries to understand the causes and the nature of xenophobia in South Africa.

Academics and the International Law Commission’s (ILC) Draft Articles on diplomatic protection with commentaries and ILC’s Draft Articles on State responsibility for the internationally wrongful acts explore diplomatic protection, its requirements, the treatment of foreigners with respect to states and the consequences arising for states’ internationally wrongful acts, (Dugard, 1983). The ILC’s Draft Articles on diplomatic protection although deal with
the secondary rules of diplomatic protection, they do not foresee any situations dealing with mob violence or referring to indigence to exempt individuals to exhaust domestic remedies with respect to the exercise of diplomatic protection by their states. The ILC’s Draft Articles on State responsibility for internationally wrongful acts do not look at the issue of xenophobic violence against foreigners as an internationally wrongful act giving rise to state responsibility, therefore the relevance of exploring this field, (Dugard, 1983).

**DIPLOMATIC PROTECTION DEFINED**

According to Dugard (2005) the law of diplomatic protection is a rule of customary international law, which was developed at a time when individuals were known to be bearers of rights in international law. Only states could bear rights and duties under international law, exclusively enjoying the right to invoke proceedings against another state for breach of international law or treaty law, including violation of rights of nationals of the complainant state resident in a foreign state. The principle of diplomatic protection is based on the historic right of states to take actions to protect their citizens. State intervention against other states to seek compensation for wrongs committed against their citizens is an ancient one, (Brownlie, 2003). It is inherent to enter an analysis of diplomatic protection with reference as a starting point to the 1924 decision of the Permanent Court of International Justices in the Mavrommatis Palestine Concessions case. In this case, the court set out a clear conception of diplomatic protection, and particularly noted that it was a remedy available only to states. The conditions that must exist before the right to diplomatic protection may be invoked are that;

a) An act contrary to international law must have been committed,
b) The act must be attributable to a State,
c) The act must have been committed against a national of another State,
d) The national must have been unable to obtain relief from the offending State through ordinary means, generally referred to as the exhaustion of local remedies requirement.
e) The victim must have been a national of the complaining State at the time the wrong was committed and also at the time the complaint was lodged, (Guy: 1971) and
f) The victim cannot be a dual national of both the offending State and the complaining State.

However, with the evolution of international human rights law, discussions arose as to whether, in fact the state invoking diplomatic protection was enforcing a right of its own, or whether it was now to be considered as enforcing a right of the injured national. This was one of the clarifying questions that Mr. Bennouna left for the ILC in his Preliminary Report. According to Dugard, it is the state’s right that is being enforced, and that the victim has no right to have diplomatic protection enforced on his behalf. Consequently, international law recognizes no human right to diplomatic protection, (Warbrick: 2000).

The International Criminal Justice, in Barcelona Traction case particularly dealt with the area of human rights violations. Various maxims acknowledged that certain types of wrongs fall into the category of erga omnes obligations, that is to say, that all countries are harmed by their violation. The court particular stated, matters such as genocide and human rights violations. Alain Pellet has pointed out that, human rights rules are not reciprocal, in the sense that the obligation of a State to adhere to them does not arise from the adherence to them by other states, they are free standing obligations of all states. In the East Timor (Portugal v Australia:1995) case it was stated that the existence of an erga omnes obligation does not, in itself, provide the ICJ with jurisdiction, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) I.C.J. 3 February 2006. The court held that the erga omnes nature of a norm and the rule of consent to jurisdiction are two different things.

There is no doubt that the ICJ, in Barcelona Traction, was speaking of diplomatic protection as something apart from human rights treaties. Further, the court will not assume jurisdiction solely because human rights violations are the basis of the claim. But once jurisdiction exists, it does not seem logical or just that the court would deny the remedy on the basis of the dual nationality issue. The act that gives rise to a claim of diplomatic protection must be one that is a violation of a state’s obligations at international law.

In the Serbian Loans case, the court stated that the dispute originated when the French government entered into diplomatic negotiations with the Serb-Croat-Slovene government, which suggests that diplomatic protection was actually exercised from the moment the French government adopted its nationals’ claim and not from the moment the case was brought before the PCJ.

In the Nottebohm case (1955), Liechtenstein sought to enforce diplomatic protection against Guatemala in respect of alleged expropriations by the respondent State of assets belonging to one Mr. Friedrich Nottebohm. Nottebohm had been born in Germany, but had resided most of his life in Guatemala and maintained his business interests there.
He became a naturalized citizen of Liechtenstein in 1939 in what had the appearance of a much abbreviated version of the normal naturalization process. One of the issues raised by Guatemala was that Nottebohm did not possess “nationality” in Liechtenstein sufficient to found the remedy of diplomatic protection. The ICJ accepted that, while it is within each state’s sovereign right to grant nationality on such basis as it sees fit, the connection between Nottebohm and Liechtenstein in the particular case was not sufficient to require that Guatemala or the court recognize it for purposes of diplomatic protection. In order that this unilateral act might entitle Liechtenstein to claim diplomatic protection against Guatemala, a genuine link between them, would have to exist. In the result of the case, the ICJ rejected the claim for diplomatic protection on the basis that, in the circumstances under which Nottebohm was naturalized, there was no genuine effective link between him and Liechtenstein. Accordingly, Liechtenstein was not permitted to enforce diplomatic protection against Guatemala.

This was also the approach adopted by the Iran; United States Claims Tribunal in settling the claims arising out of the Teheran Hostages case, (1997). The Foreign Claims Settlement Commission charged with determining the amount and validity of claims were required to apply the applicable principles of international law, and equity. In resolving the claims, those individuals with dual United States – Iranian nationality were permitted to make a claim; provided they could establish that their dominant and effective nationality was that of the United States, The criteria for assessing nationality included all relevant factors, including habitual residence, centre of interests, family ties, participation in public life, and other evidence of attachment.

It can have very practical implications in a world in which people depart their homelands in search of freedom and the rule of law. One such person was Zahra Kazemi. She was an Iranian, Canadian photo journalist, living in Montreal with her son. She had fled Iran in 1973 and, after some years in France had moved to Canada where she had received her citizenship. In June 2003 she entered Iran to cover student demonstrations taking place. On the 23 June 2003 she was arrested by Iranian authorities while photographing detainees outside Even Prison. She died 19 days later while in custody. The Iranian government initially claimed that she had died in hospital after a stroke, later it emerged that it was from head injuries after an “accident”.

On 23 March 2005 a former Staff physician of the Iranian Defence Ministry revealed that he had examined Ms. Kazemi’s body four days after her arrest and had observed signs of torture, including evidence of rape, skull fracture, two broken fingers, severe abdominal bruising, swelling behind the head and evidence of flogging. Unfortunately, shortly after her death, Ms. Kazemi’s body was buried. The Iranian government has refused to return the body to her son, or to permit an independent autopsy to be performed.

On 30 July 2003 Iranian Vice-President, acknowledges that Ms. Kazemi had probably been murdered. In July 2004, the Iranian government offered her son $12,000.00 as compensation. The Iranians have, however, taken the position that they do not recognize the Canadian nationality of Ms. Kazemi, and will not permit any Canadian or independent investigation into the circumstances surrounding her death. This case raises at least two areas in which the unsettled nature of the law of diplomatic protection may prevent Canada from seeking justice at the ICJ as a result of the killing of one of her nationals. The first is the issue of exhaustion of local remedies, and how this applies to the necessity of pursuing remedies inside Iran. The second issue relates to the dual nationality of Kazemi and her family members.

The equality principle would in the Kazemi case, operate against the Canadian government claiming diplomatic protection on behalf of the Kazemi family and particularly her son who is also a nationalized Canadian citizen. If, however, effective nationality is applied, in accordance with the law as posited by Dugard then it is more likely that Canadian state to bring proceedings in the ICJ. If so, and if the other requisites for the enforcement of diplomatic protection exist, then perhaps the Iranian State could be held accountable. It is clear, however, that the ability to hold Iran accountable turns on the state of the law of diplomatic protection.

**REQUIREMENTS FOR EXERCISE OF DIPLOMATIC PROTECTION**

The principle that states have a responsibility over foreign nationals resident in their territories is not debatable, the standard of treatment of foreign nationals by host states have two theories, namely, the international minimum standard and the national treatment. Calvo, an Argentinian jurist, supported the national treatment theory which provides that states ought to treat foreign nationals the same way they treat their own nationals, this doctrine was adopted by the First International Conference of American States in Washington in 1899-1900. Various scholars suggested that international minimum standard approach has already acquired customary international law status by virtue of its inclusion in commercial contracts, treaties...
and judicial decisions. However both approaches received strong criticism, the former was the undesirability of having variable standards forming the basis on which foreign nationals should be treated in different countries, especially with the increase in totalitarian and tyrannical regimes in world politics, (Lillich, 1983).

On the latter, critics persisted that the main weakness is the inability to draw its parameters. Dugard observed that states were divided the developing supported the equal treatment approach, while the developed world supported the international minimum standard approach. He further stated that the requirements of diplomatic protection comprises of primary and secondary rules. Nationality and exhaustion of local remedies are secondary rules, while the conduct of the state which violates norms of international law in relation to the treatment of foreigners fills the primary rule of diplomatic protection. The Draft Articles on Diplomatic Protection only deals with the secondary rules. With regard to nationality and citizenship, which at times are used interchangeably, as well as, nationality, which dictates a territorial term where the person is born or in relation to the place in the country.

Brownlie has emphasized, it is trite to assert that diplomatic protection may only be exercised by a State in respect of its nationals. When the PICJ dealt with the issue in the 1939 Panevezys v Saldutiskis Railway case (1939) it stated by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection.

What is clear is that nationality as a basis of diplomatic protection is not qualified by any words about how that nationality is attained. The rule makes no distinction between nationality by birth, and nationality by naturalization process. Nationality became a problematic issue in the 20th century, because the world became an international community in which people moved between states with great ease. Human immigration, protection of refugees, asylum seekers, and the evolution of transnational corporations created situations in which nationality became less clearly cut. The requirement that the victim must first exhaust all locally available remedies is not absolute and has been the subject of a great deal of discussion.

While the extent to which the victim must avail himself of all local remedies remains undefined, it is clear that it is unnecessary to use all the local remedies when they are obviously biased, lack integrity or do not meet an international standard. The ICJ held, in the ElectronicaSicula case (1989), that for an international claim to be admissible it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedure and without success. If the defendant state breached an obligation or a treaty accorded with the former state (direct injury) but it is normally required to do so by the individual if there is a breach of an international obligation or a treaty through its nationals (indirect injury) (Amerasinghe, 2004). It is sometimes not clear to establish a distinction between direct and indirect injuries of the state, mainly in mixed cases. In these situations normally courts apply ‘preponderance test’.

STATE RESPONSIBILITY TO PROTECT FOREIGNERS

States have the primary obligation to protect individuals, citizens and non-citizens, regardless of their legal status from any discrimination by promptly addressing xenophobic and other forms of bias-motivated violence. Several key international treaties including the International Covenant on Civil and Political Rights (hereafter referred as ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter referred as ICERD), the 1951 Refugee Convention and the Outcome Document of the Durban Review Conference, outline specific obligations and commitments of states to protect refugees, asylum seekers, migrants, and other persons of concern from discrimination and bias-motivated violent acts. International bodies, including the United Nations (hereafter referred as UN) agencies, can and should also take action to address xenophobia and other bias-motivated violence as a central protection challenge, playing complementary and collaborative roles given their various mandates and responsibilities.

It must be commented that the Office of the High Commissioner for Human Rights, the International Organization for Migration, and the OSCE’s Office for Democratic Institutions and Human Rights (ODHIR) have all taken some steps to address xenophobia and bias-motivated violence. However, there is more that these and other organizations should do in close collaboration with states and civil society, to address the protection needs of refugees, asylum seekers, internally displaced persons, stateless persons,
migrants, and other non-nationals facing imminent bias-motivated violence.

WRONGFULNESS UNDER INTERNATIONAL LAW

The Draft Articles on State Responsibility provides that every internationally wrongful act of a state entails the international responsibility of that state. There is a breach of an international obligation when an act or omission of the state is not in conformity with what is required of it by that obligation, regardless of its origin. It is said that any violation by state of any obligation of whatever origin gives rise to state responsibility and consequently, to the duty to make reparation, as stated in the Rainbow Warrior case (1990). The consequences resulting from breaching a treaty are deemed matters of customary law of state responsibility. In Spanish Zone of Morocco Claims Case, (1928), the court held that responsibility is a necessary result of a right.

All rights of an international character involve international responsibility, then, the internationally wrongful act takes place if the state infringes those rights and its obligations, (Dupuy: 1989). States can exercise diplomatic protection in direct injury or in indirect injury with regard to direct injury they need not meet all the requirements of diplomatic protection, like the exhaustion domestic remedies. As a general rule, in indirect injury states are required to meet all the requirements, namely nationality of the individual in relation to the intervening state, exhaustion of local remedies in the defendant state by the individual and existence of an internationally wrongful conduct committed by the defendant state considered as such under international law.

SOUTH AFRICA AND DUE DILIGENCE

According to the United Nation Convention on the Status of Refugees, the term refugee applies to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.

South Africa is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States Parties to declare, an offence punishable by law, all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence against any race or group of persons of another colour or ethnic origin. This Committee makes recommendation to State Parties to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination. Also, if a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee on the Elimination of Racial Discrimination (CERD).

The Committee shall then transmit the communication to the State Party concerned, within three months. The receiving State shall submit to the Committee written explanations clarifying the matter and the remedy that may have been taken by that State, Article 11. The International Covenant on Civil and Political Rights (ICCPR), guarantees migrants a number of basic rights, including: the right to life, to not be subjected to torture, or cruel, inhuman or degrading treatment or punishment, to the liberty and security of person, to liberty of movement, to the freedom to choose ones residence for those lawfully within the territory of a state, and to the right to protection from arbitrary or unlawful interference with their right to privacy.

Bias-motivated violence is always harmful to society but is particularly destructive when there is either no response or an inadequate response by State institutions. A failure by political leaders to speak out against such crime and to hold the perpetrators accountable increases the negative impact and the feeling of fear and vulnerability that victims and their communities feel. Such a failure to act also sends a message of impunity to those who commit such crimes. However, South African courts must be applauded for upholding justice. In the murder trial of a Mozambican national, Emmanuel Sithole, who was 35 when he died during April 2015, became a symbol of the xenophobic violence sweeping South Africa after photographs of his brutal murder were published in the Sunday Times. Four males, including a minor, accused of stabbing Sitholehas been convicted in 2016 for his murder.

The United Nations High Commissioner for Refugees (UNHCR) has noted that while concerted efforts are required from all concerned parties like the states, the United Nations, and other international and regional organizations, non-governmental Organisations (NGOs) and community groups, to address the xenophobic problems, ultimately the success of any such effort will be directly proportional
to the political will of states to put in place systems for the protection of basic rights and mechanisms for ensuring their effective implementation.

IMPLICATIONS ON INTERNATIONAL RELATIONS

In all honesty, xenophobia battered the South African brand. It is not possible to divorce the business and image of South Africa from the look of the brand. The nation was at one point perceived as a nation of savages with thugs running amok with machetes hacking fellow Africans. The hatred to fellow Africans was evident in the pictures of the slaughter of Emmanuel Sithole and the pictures of the wanton destruction of property belonging to immigrants which was, so to say on repeat across the world as if South Africa was in flames.

As for foreign direct investment (FDI), which is unfortunately linked to the brand for a very good reason, an investor or tourist, buys into a trusted product - South Africa moreover, he or she buys into a set of values that can deliver against the aspirations for a better life. Amidst these xenophobic attacks South Africa could certainly not be seen as a ‘South Africa that belongs to all’ as aspired to by the Freedom Charter, but a nation whose soul is slowly fading. Foreigners’ stereotypical images are maddeningly difficult to dislodge. Branding and marketing a country is a complex business, especially when the exercise stretches beyond boosting tourism and into the realms of branding foreign policy, diplomacy and international relations and FDI. In this context, the word ‘branding’ is about modifying people’s perceptions of South Africa as a rainbow nation.

CONCLUSION

The most important reasons behind the prevalence of xenophobia in South Africa are economic and the tendency to criminalise foreigners. There is need to set up community organisations for both formal and informal education projects. Educating them on the various issues about the plight and status of aliens, their suffering and the rights they have both in international and South African law. Trade unions, youth, political and civic organisations are to be targeted so as to avail their members for this kind of education. If South Africans are hoping to promote good human relations and to assist foreigners then the value of Ubuntu, must be the starting point.

Existing explanations in terms of economic crises, political transition, relative deprivation, or remnants of apartheid all contain an element of truth but are not in themselves sufficient. Proclamations from politicians coupled with media reporting on drug syndicates, prostitution and human trafficking, all feed and in turn feed off a popular perception that migrants are bad for South African society and its economy. It is all too easy for the media and the government to place blame on immigrants for crime, unemployment and housing problems but it is not a long-term solution and, eventually, can only be detrimental for the economy, culture, society and the international brand of South Africa. The government faces a pressing need to find a way for citizens and foreigners to live peaceably together and to tackle the problems that xenophobes justify their actions by.

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