

## **XENOPHOBIA: A CRIME AGAINST HUMANITY AND ITS ATTENDANT IMPLICATIONS ON HUMAN RIGHTS\***

### **Abstract**

*Migrants across the globe often experience discrimination, exploitation and human rights violations such as xenophobic attacks. Xenophobic attacks have left thousands of foreigners dead and injured with their properties destroyed as well. This paper examines the various human rights violations perpetrated by xenophobes on migrants. It discusses xenophobia, its forms, basis and world cases. It explores xenophobia as a crime against humanity and the duty of states in protecting migrants. It highlights the various migrants' rights instruments and in conclusion, it puts forward amongst other recommendations that the provisions of Article 7 of the Rome Statute of the International Criminal Court should be enlarged to provide for xenophobia as a crime against humanity.*

**Key Words:** *Xenophobia, Duty of State, Crime against Humanity, Migrants, Rights, Aliens.*

### **1. Introduction**

An estimated 232 million people currently live outside their native country,<sup>1</sup> many having moved for a variety of reasons such as protection and better opportunities. Migration affects every region of the world and many countries are now simultaneously countries of origin, destination and transit.<sup>2</sup> Large numbers of migrants move between developing countries and around 40 percent of the total global migrant population have moved to a neighbouring country within their region of origin.<sup>3</sup> Some of these migrants often endure exploitation, discrimination and gross human rights violations such as xenophobic attacks. The latest in the series of xenophobic violence on the African Continent occurred in late March of 2015 in South Africa, starting in the port city of Durban. Shops were looted and set ablaze. Terrified foreigners had to hide in police stations and stadiums as a result of machete wielding attackers, who hacked immigrants to death in major cities of the country. The outburst of violence started after Zulu king, Goodwill Zwelithini was reported to have said at a gathering that “foreigners should pack their bags and go” because they are taking jobs from citizens though the office of the said king denied this and said he was misquoted by journalists.<sup>4</sup>

These attacks have greatly increased since the inception of Black democratic rule in 1994. Xenophobic attacks on foreigners occurred in Soweto and some other areas at the dawn of 2015.<sup>5</sup> This resulted in the looting of shops owned by foreigners, loss of livelihood, needless and preventable loss of lives. The sluggish reaction of South African authorities led to widespread carnage and destruction of properties. In 2008, Johannesburg was the center of the xenophobic campaign that left dozens dead and later spread to Cape Town, which had earlier suffered xenophobic attacks in 2006. A spate of violent anti-immigrant attacks was earlier carried out by xenophobes in 2008. These attacks resulted in the death of at least 67 people.<sup>6</sup> The angry xenophobes are generally poor, unemployed, black South Africans to whom the much celebrated liberation from the oppressive apartheid regime has not meant much due to non-

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<sup>1</sup>Office of the High Commissioner for Human Rights, (OHCHR) ‘Migration and Human Rights’ <<http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx>> accessed on 19 February, 2015.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> F Karimi, ‘What’s behind xenophobic attacks in South Africa’, <<http://edition.cnn.com/2015/04/18/africa/south-africa-xenophobia-explainer/>> accessed on 5 August 2015

<sup>5</sup> B Adenubi, ‘Nothing justifies xenophobia’, *The Punch*, April 23, 2015, p.27

<sup>6</sup> M Winsor, ‘South Africa Xenophobia 2015: Victims’ Names and Nationalities Released’ <[www.ibtimes.com/south-africa-xenophobia-2015-victims-names-nationalities-released-1900755](http://www.ibtimes.com/south-africa-xenophobia-2015-victims-names-nationalities-released-1900755)> accessed on 5 August 2015

improvement in terms of living condition and possibility for social mobility.<sup>7</sup> They accuse African immigrants of taking their already scarce jobs and contributing to the high rate of crime but this is not true because immigrants contribute to the South African's economy and bring skills that are in high demand in the country. Furthermore, they are angry that the operation of community shops, which was their means of livelihood, has been taken over by foreigners from Ethiopia, Nigeria, Somalia and other parts of Africa,<sup>8</sup> thereby transferring the aggression of the legacy of apartheid in the post-apartheid era on African migrants<sup>9</sup>.

According to Abdi, xenophobia cannot explain the conflict between native poor black South Africans and Foreign African Entrepreneurs because killing of foreigners cannot be alienated from the violence, brutality and cruelty that poor South Africans experience.<sup>10</sup> Inequality still remains a major concern despite the progress made by the country in this post-apartheid era. Black South Africans due to suppression, hurt and subjugation as a result of long suffering from apartheid have now grown vengeful with their vengeance misdirected at black non-citizens. The people targeted are those perceived to be weaker and more vulnerable – ‘a sort of pedagogy of the oppressed, the weak oppressing the weaker’.<sup>11</sup>

This will not be the first time such attacks would happen on the African continent. Xenophobia raised its ugly head with the overthrow of Kwame Nkrumah as Ghanaian's president. The administration of K.A. Busia (which replaced the Nkrumah regime after a short period of military rule) came up with the infamous and disgraceful Aliens Compliance Order which saw the brutal and compulsory expulsion of "aliens" mostly from Nigeria and Upper Volta (now Burkina Faso).<sup>12</sup> This was followed by a more brutal retaliation on the part of Nigeria. Hundreds of Ghanaians were burnt alive in an attempt to flush them out as "aliens" during the *Ghana must go* era of the early 1980s.<sup>13</sup> Malians were given a similar treatment in the wake of the struggle for political leadership between ex-president, Laurent Gbagbo, and incumbent president, Alasan Quatarra in Côte d'Ivoire.<sup>14</sup> Today, it is the similar situation in South Africa.

## 2. Xenophobia

Xenophobia is an unreasonable fear or hatred of foreigners or strangers or that of which is foreign or strange.<sup>15</sup> It is racial intolerance or dislike for foreigners and it can manifest in many ways involving the relations and perceptions of an ingroup towards an outgroup, including a fear of losing identity, suspicion of its activities, aggression, and desire to eliminate its presence to secure a presumed purity.<sup>16</sup> Furthermore, it is an irrational and unreasoned fear, whose origin are from the Greek words for “phobos” and “xenos” which means “fear” and “stranger” respectively.<sup>17</sup> Literally from the Greek translation, it means “fear of the stranger” but usually the term is taken to mean “hatred of the strangers”. Xenophobia has been defined as the attitudes, prejudices and behavior that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society

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<sup>7</sup> T Falola, ‘We are all South Africans’ *The Punch*, April 21, 2015, p.29

<sup>8</sup> Ibid.

<sup>9</sup> African migrants are used as patsy and forced to take the blame for apartheid related actions and inactions

<sup>10</sup> C Abdi; ‘Labeling South Africa turmoil “Xenophobia” scapegoats poor blacks’ <<http://edition.cnn.com/2015/04/20/opinions/south-africa-violence-inequality/>> accessed on 20 April 2015

<sup>11</sup> D Ariyo, ‘South Africa and the end of ‘ubuntu’’ *The Punch*, April 22, 2015, p.30

<sup>12</sup> Suhuyini, ‘Causes of Xenophobia’ (2001) <<http://www.worldsocialism.org/spgb/causes-xenophobia>> accessed on 5 August 2015

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> <<http://dictionary.reference.com/browse/xenophobia>> accessed on 22 April 2015

<sup>16</sup> <<http://en.m.wikipedia.org/wiki/xenophobia>> accessed on 22 April 2015

<sup>17</sup> <<http://examples.yourdictionary.com/examples-of-xenophobia.html>> accessed on 22 April 2015

or national identity.”<sup>18</sup> Xenophobia can be understood as “an attitudinal orientation of hostility against non-natives in a given population”<sup>19</sup>

### **2.1 Forms of Xenophobia**

According to Wikipedia,<sup>20</sup> there are two forms of xenophobia. The first is a population group present within a society that is not part of the society. They are frequently new immigrants but xenophobia can be aimed against what has been existing in a society for centuries or become part of that society by conquest and territorial expansion.<sup>21</sup> The second form of xenophobia is cultural in nature. The objects of the irrational fear here are cultural elements such as clothing or language,<sup>22</sup> which are opposed because they are deemed to be foreign and unfamiliar.<sup>23</sup>

### **2.2 Xenophobia and Racism**

Xenophobia and racism often overlap and have some common characteristics but they are different from one another. Xenophobia entails behavior based on the idea that the other person is foreign to or originates from outside the nation while racism usually involves distinction based on physical characteristic differences such as hair type, facial features, skin colour, e.t.c. It is often difficult to make a distinction between racism and xenophobia as inspiration for behaviour due to the fact that, dissimilarity in physical individuality are often used to differentiate within a common community.<sup>24</sup> According to UNESCO, since the 1990s, xenophobic eruptions have resulted in acts of racist violence in several societies in the world.<sup>25</sup> The ideological roots and reasons in the rise of xenophobia are different from the old form of racism that led to Fascism and Nazism in that it developed on cultural differences and not that of biological.

### **2.3 Basis of Xenophobia**

Despite xenophobia being irrational, there are bases or grounds for it. Such bases or grounds include but not limited to common dread or fright of something different, little or no experience with people from certain groups and misinformation and contact with xenophobic conduct and attitude by some people in the society can also rub off on or pressurize others. Consequently, xenophobic behaviors are based on extant cultural, ethnic, racist, religious or national prejudice. Two reasons have been proffered on the renaissance of xenophobic and racist movements towards the end of the twentieth century. The first is the new migration patterns that have developed as an effect of the gradual internationalization of the labour market during the post-colonial era. Thus, social groups in disapproving position in the receiving countries regard newcomers as contenders for jobs and public services. This promoted a social and political climate that generates xenophobia and racism (defensive reactions against migrants)

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<sup>18</sup> Declaration on Racism, discrimination, xenophobia and related intolerance against Migrants and trafficked persons. Asia-Pacific NGO Meeting for the world conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Tehran, Iran 18 February, 2001. cited in Learning to live together. <<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia>> accessed on 22 April 2015

<sup>19</sup> K Boehnke, in NGO Working Group on Migration and Xenophobia for the World Conference (in International Migration, Racism, Discrimination and Xenophobia, 2001). A publication jointly produced by ILO, IOM, OHCHR, in consultation with UNCHR, page 2, cited in Learning to live together, available at <<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia>> accessed on 22 April 2015

<sup>20</sup> <<http://en.m.wikipedia.org/wiki/xenophobia>> (n.16)

<sup>21</sup> Here, a group is not considered part of the society as a result of immigration though xenophobia can be present in relation to groups who joined the society quite some time earlier. This form of xenophobia results in and educes persecution, unfriendly, antagonistic and vicious reactions like genocide or mass expulsion of immigrants.

<sup>22</sup> This type of xenophobia rarely leads to aggression against individual persons but campaigns for cultural or linguistic purification may become the outcome.

<sup>23</sup> <<http://examples.yourdictionary.com/examples-of-xenophobia.html>> (n.16)

<sup>24</sup> Xenophobia may occur against people of identical physical characteristics when such people arrive, return or migrate to area where they are considered as outsiders by the occupiers.

<sup>25</sup> ‘Learning to live together’ <<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia>> (n.18)

likewise nationalism (demands that the state provide better protection against foreigners for its own population).<sup>26</sup> The second reason proffered is globalization. Increased competition between states has led states to reduce their services in areas of social welfare, education and healthcare and this reduction has influenced the segments of the population living on the edge of the society. These groups are often in direct competition with migrants for welfare service and are the main breeding ground for xenophobic and racist ideologies.<sup>27</sup> It is trite that harsh economic disparity and denial of access to basic economic and social conditions result in tensions and manifestations of xenophobia and racism by the citizenry.<sup>28</sup>

## 2.4 World Cases of Xenophobia

Cases of xenophobia in action that have left deep scars on the human race include the Jewish Holocaust; murder of black families by members of the Ku Klux Klan (KKK); Indian caste system; Segregation of Japanese-Americans and Japanese-Canadians from the population during World War II especially after the bombing of Pearl Harbour by Japan in 1941; Rwandan ethnic cleansing; Hate crimes against Indians (particularly students) that occurred in Australia in 2009; Ethnic conflicts over political denomination in the former Yugoslavia; Caged human beings particularly of African, tribal pygmy and Filipino descents who were publicly exhibited with or without exotic animals in Human Zoos; Hate crimes committed against the Chinese in the late 1800s in the United States of America; and treatment of the Native Americans by colonists.<sup>29</sup>

From the foregoing, xenophobia is one of the most barbaric, heinous and abominable inhuman acts that a man is capable of committing against his fellow man.

## 3. Legal Issues and Human Rights Violations

### 3.1 Treatment of Aliens

According to Gupter, persons who live in a state other than those states of which they are nationals are called aliens.<sup>30</sup> In contemporary times, the benefits of and the needs for commercial and social intercourse have resulted in the presence of a large numbers of aliens in virtually every nation of the world.<sup>31</sup> The State is the evaluator of the rights and privileges which aliens are permitted to enjoy in common with the citizens of the State but the fundamental human rights of person and ownership of property of the alien supersede the privileges provided by the state because the privileges may be revoked while the fundamental human rights remain inalienable and follows the alien wherever he goes.<sup>32</sup>

The doctrine of equality as claimed by some state governments is that an alien coming into another state of his freewill is entitled to no better treatment than the citizens of that state. This means that the alien cannot share in all of the privileges enjoyed by the citizens but the mere rights that the law permits him to enjoy will be protected as would the rights of the citizens.<sup>33</sup> A citizen of one state coming within the jurisdiction of another state as a transient visitor or permanent resident has no favoured status. His substantive rights are the same with the rights of the citizens of the country but do not include their reserved special and political rights.<sup>34</sup> He enjoys the same procedural rights as the citizens of the country. He is expected to make use of the same law and courts for redress whenever he is wronged. His rights of personal security and his personal liberty are as sacred as those of the citizens. Also his right to own property and rights under contract as limited as they may be are entitled to the same protection of the law.<sup>35</sup> Furthermore, if he is prosecuted for violating any law of the host country and he

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Those believed to be outsiders or foreigners (migrants, asylum seekers, refugees, etc) are the main targets.

<sup>29</sup> Xenophobia Examples in world history; <<http://www.medindia.net/patients/patientinfo/xenophobia-examples.htm>> accessed on 24 April 2015

<sup>30</sup> S P Gupter, *International Law and Human Rights*, (Haryana-India: Allahabad Law Agency, 2009) p.255

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid., p. 256

<sup>34</sup> C G Fenwick, *International Law*, Third Indian Reprint (1971) pp. 329-330. Cited in S P Gupter (n.30)

<sup>35</sup> Ibid.

is denied due process of law or given a sentence that is not commensurate with the offence committed, his own state has a duty of asserting an international right to secure proper redress for him.<sup>36</sup> An alien upon entering into a state immediately falls under its territorial supremacy and owes allegiance to it for the duration of his residence although he still remains under the personal supremacy of his home state.<sup>37</sup>

### 3.2 Xenophobia as a Crime against Humanity

An international crime is an act which the international community recognizes as not only a violation of ordinary state criminal law but one which is so serious that it must be regarded as a matter of international concern and cannot be left for the state which would normally have jurisdiction due to a variety of reasons such as efficiency, practicality and likelihood of prosecution by the State with jurisdiction.<sup>38</sup> Almost all international crimes are serious human rights violations.<sup>39</sup> Crimes against humanity are mass crimes committed against a civilian population.<sup>40</sup> Most serious is the killing of entire groups of people, which is also characteristic of genocide.<sup>41</sup> The difference between crime against humanity and genocide is that crimes against humanity are broader than genocide and they need not target a particular group but a civilian population in general.<sup>42</sup> Werle proffered that in addition to the most serious cases of killing and extermination, crimes against humanity include manifestations and also deriving from sad historical experience such as enslavement through forced labour, expulsion of people from their native regions, imprisonment or torture of perceived political opponents, mass rape of defenceless women, forced disappearances, persecution through discriminatory laws and apartheid, which is an institutionalized form of racial oppression.<sup>43</sup>

Crimes against humanity have been perpetrated against innocent civilian groups since the dawn of time. Despite this long duration of perpetration of evil, it was not only in the last hundred years or so that the international community recognized such crimes as morally unacceptable and reprehensible<sup>44</sup> with the introduction of the Hague Convention IV of 1907.<sup>45</sup> In addition, the treaty of Versailles of 1919 contained provisions for war crimes but did not provide for individual prosecutions for atrocities committed against civilians.<sup>46</sup> Since crimes against humanity are inherently broad, there is always the danger that any comprehensive list provided by law will never be precise or adequately competent enough to cover all variations of this offence.<sup>47</sup>

Although crime against humanity are offences under some international tribunals, such as International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), emphasis here will be on crime against humanity as provided for under the Rome Statute of the International Criminal Court. Article 7 of the Rome Statute of the International Criminal Court provides for acts that amount to crimes against humanity. Such crimes as related to xenophobia include murder, extermination and other inhumane acts.<sup>48</sup> Consequently, this author opines that xenophobic attacks are crimes against humanity committed under International criminal law because they are widespread or systematic attacks perpetrated on a large scale against civilian groups.<sup>49</sup> Furthermore, the author proffers that crimes against humanity as listed under Article 7 of the ICC statute without xenophobia as one of the crimes is not comprehensive.

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<sup>36</sup> Ibid.

<sup>37</sup> S P Gupter (n.30) p.258

<sup>38</sup> C De Than & E Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003) p.13

<sup>39</sup> Ibid.

<sup>40</sup> G Werle, *Principles of International Criminal law* (The Hague: T. M. C Asser Press, 2005) p.216

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> De Than & Shorts, (n.38) p.87

<sup>45</sup> Though this convention borders on Laws and Customs of War on Land

<sup>46</sup> De Than & Shorts, (n.38) p.88

<sup>47</sup> Ibid., p.96

<sup>48</sup> Article 7 (1) (a), (b), (h) and (k) of the Rome Statute of the International Criminal Court 1998 (Entry into force in 2002)

<sup>49</sup> Article 7 (n.48)

### 3.2.1 Crimes against humanity as related to Xenophobia

The various categories of crimes against humanity as related to xenophobia are:

(a) **Murder**<sup>50</sup>

Article 7 (1) (a) of the ICC statute provides for the individual act of murder. Xenophobes through their inhumane attacks and conduct have caused the death of others. According to Rodley, murder within the context of a widespread or systematic attack against a civilian population, is a crime against humanity.<sup>51</sup>

(b) **Extermination**

Article 7 (1) (b) of the ICC Statute provides for the crime of extermination. The genocide of European Jews was treated and punished as a crime against humanity of extermination.<sup>52</sup> Mass killing of political opponents or annihilating attacks on cultural, economic and social groups are considered as a crime against humanity, which can be direct or indirect cause of death.<sup>53</sup> Xenophobia is synonymous with mass attacks based on annihilating foreign people with other cultural background.

(c) **other inhumane acts**

Article (7) (1) (k) of the ICC statute criminalizes other inhumane acts of a similar character. Such inhumane acts include intentional acts that cause great suffering or serious injury to body or mental or physical health or human dignity and incitement to commit hate crimes. The fear of being attacked may prevent vulnerable immigrants from seeking available services such as education, medical care and food aid.

### 3.3 The Legal Frameworks on Human Rights in correlation with xenophobia

States have the primary obligation to protect individuals, whether citizens or non-citizens, regardless of their legal status from discrimination by addressing xenophobia.<sup>54</sup> Several key international treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1951 Refugee Convention, and the Outcome Document of the Durban Review Conference, outline specific obligations and commitments of States to protect immigrants and other persons of concern from discrimination and bias-motivated violent acts.<sup>55</sup>

These rights fall under four general categories.<sup>56</sup> The first category consists of the comprehensive International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, (ICCPR and ICESCR).<sup>57</sup> The second category consist of comprehensive regional conventions such as European Convention on Human Rights 1950, American Convention on Human Rights 1969 and African Charter on Human and People's Rights 1981. The third category consists of conventions dealing with specific wrongs such as genocide, racial discrimination or torture. The fourth category deals with conventions related to the protection of particular set of people such as women, children, refugees and migrant workers. Though not nationals of a State, immigrants have inherent human rights that they possess wherever they found themselves and these rights are civil, economic and social in nature and must be protected by the government of the host nation. These rights are guaranteed by the following covenants and declarations.

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<sup>50</sup> The mental element required for this offence is that the perpetrator must have caused the death of another through his conduct with reckless disregard for human life. See also Article 30 of the ICC Statute

<sup>51</sup> N S Rodley, 'Integrity of the person' in D Moeckli, S Shah & S Sivakumaran (ed), *International Human Rights Law* (Oxford: Oxford University Press, 2012), p.222

<sup>52</sup> G Werle (n.40) p.234

<sup>53</sup> Ibid.

<sup>54</sup> Human Rights First, 'Combating Xenophobic Violence; A Framework for Action' (2011) 5 <[www.humanrightsfirst.org](http://www.humanrightsfirst.org)> accessed on 11 August 2015

<sup>55</sup> Human Rights First (n.54)

<sup>56</sup> I Brownlie, *Principles of Public International Law* (6<sup>th</sup> Ed, New York: Oxford University Press, 2003) p.536

<sup>57</sup> These covenants were unanimously accepted by the General Assembly of the UNO in 1966 but came into force in 1976

### **3.3.1 The International Covenant on Civil and Political Rights (ICCPR)**

This instrument governs fundamental rights such as right to life,<sup>58</sup> right to dignity of human person,<sup>59</sup> right to liberty and security,<sup>60</sup> freedom of aliens from arbitrary expulsion<sup>61</sup> and the prohibition of propaganda of war and of incitement to national, racial or religious hatred.<sup>62</sup> Therefore, every person whether a national of a state or an immigrant has a right to life and he or she shall not be intentionally deprived of this inherent right, unless in the execution of the sentence of a court in respect of a criminal offence of which he or she has been found guilty. Furthermore, every immigrant is entitled to respect for the dignity of his person, and as such, he or she cannot be subjected to inhuman treatment. This is not the scenario in Xenophobia. Victims of xenophobic attacks were deprived of their lives without no just cause. States are under compulsion to ensure and protect these rights without any distinction whether as a result of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>63</sup>

### **3.3.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)**

This Covenant was promulgated in accordance with the principles proclaimed in the Charter of the United Nations, namely, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family based on the foundation of freedom, justice and peace in the World.<sup>64</sup> It was also promulgated in accordance with the Universal Declaration of Human Rights (UDHR) and in recognition of the ideals of free human beings enjoying freedom from fear and want, which can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.<sup>65</sup> This Covenant guarantees the right to work by all, whether citizens or non-citizens.<sup>66</sup>

### **3.3.3 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1969**

This third generation human rights instrument compels States to combat racial discrimination and report to the Committee on the Elimination of Racial Discrimination (CERD). States are under obligation to condemn and eliminate racial discrimination by private individuals, public institutions and officials.<sup>67</sup> The rights to security of person and protection by the State against violence or bodily harm are guaranteed to citizens and immigrants without discrimination as to race, color, or national origin.<sup>68</sup> Here, rights are based on the principle of equality and non-discrimination. This principle is applicable to every human being and it prohibits discrimination on the basis of sex, nationality amongst others.<sup>69</sup> Under this covenant, state parties are mandated to criminalize the incitement of racist hatred,<sup>70</sup> ensure

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<sup>58</sup> Article 6 of the International Covenant on Civil and Political Rights (ICCPR) 1966 (Entry into force in 1976). This right is also guaranteed in the constitutions of many Nations. For examples, see Constitution of the Federal Republic of Nigeria 1999 s. 33 and Constitution of the Republic of South Africa, 1996 s. 11

<sup>59</sup> Article 7 of the ICCPR (n.58). This right is also guaranteed in the constitutions of many Nations. For examples, see Constitution of the Federal Republic of Nigeria 1999 s. 34 and Constitution of the Republic of South Africa, 1996 s. 10

<sup>60</sup> Article 9 of the ICCPR (n.58). This right is also guaranteed in the constitutions of many Nations. For examples, see Constitution of the Federal Republic of Nigeria, 1999 s. 35 and Constitution of the Republic of South Africa, 1996 s. 12

<sup>61</sup> Article 13 of the ICCPR (n.58)

<sup>62</sup> Article 20 of the ICCPR (n.58)

<sup>63</sup> Article 2 of the ICCPR (n.58)

<sup>64</sup> Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESR)1966 (Entry into force in 1976)

<sup>65</sup> Preamble to the ICESR (n.64)

<sup>66</sup> Article 6 (1) to the ICESR (n.64)

<sup>67</sup> Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1969

<sup>68</sup> Article 5 of the ICERD (n.67)

<sup>69</sup> See also Article 1 of the Universal Declaration of Human Rights 1948 (Entry into force in 1948) which provides that "all human beings are born free and equal in dignity and rights."

<sup>70</sup> Article 4 of the ICERD (n.67)

judicial remedies for racial discrimination<sup>71</sup> and to carry out enlightenment through public education in order to promote understanding and tolerance.<sup>72</sup>

### **3.3.4 The Durban Declaration and Programme of Action**

This document directs States to carry out thorough investigations and to combat impunity in cases of racism or xenophobic violence. Sequel to the Durban Review Conference (2009), most United Nations member States agreed in an **Outcome Document** that reaffirmed the responsibility of governments to respond to racist and xenophobic crimes and called on governments to collect reliable information on these and other forms of hate crimes.

### **3.3.5 Vienna Declaration and Programme of Action (VDPA)**

The Vienna World Conference on Human Rights (1993) noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. The Declaration urges all states to take immediate measures and to develop strong policies to prevent and combat all forms of xenophobia where necessary through the enactment of suitable legislation including penal measures.<sup>73</sup>

### **3.3.6 UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live**

This 1985 Declaration states that all foreigners should enjoy rights pertaining to life and security of person, choice of a spouse, ability to marry and found a family, freedom of movement, freedom of thought and religion and power to transfer earnings abroad.<sup>74</sup> The Declaration further provides for the right of foreigners to retain their own language, culture, and tradition.<sup>75</sup>

### **3.3.7 International Convention on the Protection of Migrant Workers and their Families 1990**

This UN convention is applicable to all migrant workers and their families. It avails them of protection by the state threats, intimidation, violence, attacks and injury by government officials, private individuals, groups and organizations.<sup>76</sup> It provides for rights such as freedom of movement from one state to another,<sup>77</sup> freedoms of religion<sup>78</sup> and expression.<sup>79</sup> The Convention prohibits arbitrary deprivation of property as is the case in xenophobic attacks.<sup>80</sup>

## **3.4 Regional Human Rights Instruments**

The following regional human rights instruments also contain provision against discrimination and guarantee the right not to be arbitrarily deprived of life: European Convention on Human Rights (ECHR),<sup>81</sup> American Convention on Human Rights (ACHR)<sup>82</sup> and African Charter on Human and Peoples' Rights (ACHPR).<sup>83</sup>

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<sup>71</sup> Article 6 of the ICERD (n.67)

<sup>72</sup> Article 7 of the ICERD (n.67)

<sup>73</sup> Part II, Para 25 of the Vienna Declaration and Programme of Action (VDPA) 1993

<sup>74</sup> Article 5 of the UN Declaration on the Human Rights of Individuals who are not nationals of the Country in which they live, 1985

<sup>75</sup> Article 5 – 1 (g) (n.74)

<sup>76</sup> Article 16 International Convention on the Protection of Migrant Workers and their Families, 1990 (Entry into force in 2003)

<sup>77</sup> This right is subject to restrictions “necessary to protect national security, public order, public health or morals or the rights and freedoms of other.”

<sup>78</sup> Article 12 (n.74)

<sup>79</sup> Article 13 (n.74)

<sup>80</sup> Article 15 (n.74)

<sup>81</sup> Protocol No. 12 of the European Convention on Human Rights (ECHR) 1950 (Entry into force in 1950)

<sup>82</sup> Article 4 of the American Convention on Human Rights (ACHR) 1969 (Entry into force in 1978)

<sup>83</sup> Article 4 of the African Charter on Human and Peoples' Rights (ACHPR) 1981 (Entry into force in 1986)

#### **4. Implications of Xenophobia on Human Rights**

Human rights are rights inherent to all human beings, whatever the nationality, race, place of residence, sex, ethnicity, colour, religion, language or any other status.<sup>84</sup> These rights are all interrelated, interdependent and indivisible.<sup>85</sup> These rights are universal in nature and are often expressed and guaranteed by law in the forms of treaties, customary international law, general principles and other sources of international law.<sup>86</sup> International Human Rights law provides for the obligations of the governments to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.<sup>87</sup> Furthermore, although states possess the sovereign right to decide conditions of entry into and stay within their domain, they are under obligation to respect, protect and fulfill the human rights of all individuals under their jurisdiction, regardless of their nationality, origin and immigration status.<sup>88</sup> Xenophobic attacks have raised grave issues of human rights, economic and social concerns though this varies from country to country. These issues are elucidated hereunder.

##### **4.1 Right to Life and arbitrary killings**

Arbitrary killings with the use of force as is the case in xenophobic attacks contradict the right to life,<sup>89</sup> which is the fundamental of all human rights because all other human rights can only be exercised by a person who is alive. Such killings do not reflect the cultural value of any sane society because in any culture, life is valued over and above any other thing.

##### **4.2 Right to work and loss of means of livelihood**

Xenophobes attack the places of business of foreigners, disrupting their businesses, while stealing and looting from them in the process. Xenophobia has unabatedly caused loss of livelihood to foreigners, who cannot go about their daily business and attend to their means of livelihood because of xenophobic attacks or fear of same. Any act that destroys the means of livelihood of another as it is in the case of xenophobic attacks is considered as violation of the right to life. The Indian Supreme Court in the case of *Olga Tellis v Bombay Municipal Corporation*,<sup>90</sup> held inter alia that “the sweep of the right to life ... does not mean merely that life cannot be extinguished or taken away .... An equally important facet of that is right to livelihood, because no person can live without the means of living .... Deprive a person of his livelihood and you shall have deprived him of his life”. The same court stated the nexus between the right to life and means of livelihood in *Frannus v. Union Territory of Delhi*, where it stated that what makes life livable must be deemed to be an integral component of the right to life.<sup>91</sup> The right to work and earn a living is a universally recognized right, which should not be violated.<sup>92</sup> However, this right has been breached with the enormous destruction of shops, attacks on markets and businesses of foreigners. It is also an affront to the provisions of Article 6 of the ICSE, which guarantees the right to work for nationals of a State and non-nationals.

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<sup>84</sup> Office of the High Commissioner for Human Rights, (OHCHR) ‘What are Human Rights?’ <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed on 16 February, 2015

<sup>85</sup> OHCHR (n.84)

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> OHCHR (n. 1)

<sup>89</sup> Article 4 of the African Charter (n.1) provides that “Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right”  
The Constitution of the Federal Republic of Nigeria 1999 s. 33 (1) provides that “every person has a right to life and no one shall be deprived intentionally of his life, save in execution of a sentence of a court in respect of a criminal offence of which he has been found guilty.”

<sup>90</sup> A.I.R.I 86 Ct. 180 (App. 7)

<sup>91</sup> A.I.R. 1981 SCC 7

<sup>92</sup> Article 23(1) Universal Declaration of Human Rights 1948 provides that “everyone has the right to work, the choice of employment, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

### **4.3 Right to the dignity of person and prohibition of torture, cruel, inhuman or degrading treatment**

Xenophobic attacks violate this right in the sense that immigrants are made to suffer inhuman and degrading treatment such as torture. According to Human Rights First, Egyptian traffickers kidnapped, detained and tortured African refugees and migrants, held them hostage for ransom and in some cases harvested their organs.<sup>93</sup> Acts of torture are carried out during xenophobic attacks and such nefarious acts are gross violations of the UDHR<sup>94</sup>, ICCPR<sup>95</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, the Rome Statute of the International Criminal Court criminalizes torture as a war crime.<sup>96</sup> This right is akin and synonymous with the right to life as expounded also by the Indian Supreme Court in *Maneka Ghandi v. Union of India*,<sup>97</sup> where it stated that ‘the right to life goes beyond the fundamental right to life’. The court subsequently held that ‘the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate food, nutrition, clothing and shelter over the head’.

### **4.4 Right to own property and prohibition of arbitrary destruction and deprivation of property**

During xenophobic attacks, xenophobes damage and burn properties of foreigners. Human Rights First<sup>98</sup> reported that the dwellings of Zimbabwean workers were attacked and demolished by South African xenophobes, who were protesting access to jobs on local wine farms. This is a violation of the intent of the provisions on the right to property as enshrined in most constitutions of the world.<sup>99</sup>

## **5. Duty of States**

It is trite that migrants enjoy greater protections under International law than under National laws. However, States have the primary responsibility to protect all individuals from xenophobic violence and a sacred duty to execute their international legal obligations in combating discrimination manifested in bias-motivated attacks as is the case in xenophobia.<sup>100</sup> Despite this obligated duty, there have been shortcomings on the part of States in carrying out this duty. Similarly, there has been slow and incomprehensive response on the parts of the States even when the States decide to act. An example is the case of South Africa, earlier mentioned in the preceding part of this study.

According to Human Rights first, one particular obstacle to States response is underreporting. It stated further that in order to understand the nature and frequency of hate crimes such as xenophobia, governments must be aware of their occurrence in order to respond to individual incidents, and develop sound public policy. Underreporting of crimes remains one of the principal impediments to improved government responses, especially among irregular migrants and other vulnerable minorities.<sup>101</sup> Reasons proffered for this kind of underreporting includes fear of retaliation by the perpetrators of violent acts, fear that reporting incidents will lead to deportation, back to persecution or other difficult or dangerous situations, fear of victimization by law enforcement officers, some of whom may be corrupt and may share the same biases as the perpetrators of the violence or in some instances, may even be the perpetrators themselves, loss of faith in the ability of the State to provide protection, uncertainty about how/where to report the incident or how reporting will help the victims in their lives and language barriers.<sup>102</sup> It consequently advised that governments must make particular efforts to ensure that hate crimes are reported to the appropriate government agency so that action can be taken against the

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<sup>93</sup> Human Rights First (n.54) p.18

<sup>94</sup> Article 5 provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>95</sup> Article 7 of the ICCPR (n.58)

<sup>96</sup> Article 8 (2) (c) (i)- (iv) (n.48)

<sup>97</sup> (1978) ISCC 248

<sup>98</sup> Human Rights First (n.54) p.23

<sup>99</sup> see Constitution of the Federal Republic of Nigeria, 1999 s. 43 and Constitution of the Republic of South Africa, 1996 s. 25

<sup>100</sup> Though the role of various international organizations is important due to the multiple populations affected by xenophobic violence

<sup>101</sup> Human Rights First (n.54) p.7

<sup>102</sup> Ibid.

perpetrators responsible in individual incidents and for better measure in state response over time.<sup>103</sup> Victims who come forward to report such crimes should not suffer negative consequences such as detention or deportation due to their decision to approach government authorities.<sup>104</sup> It further advised that Governments can increase confidence in the system and encourage reporting by speaking out publicly against bias-motivated violence, responding to instances of abuse by law enforcement officials against victims of such violence, developing systems of third party reporting, providing guarantees that victims' legal status in the country will not be regarded when reporting an incident to the police, exploring the potential of protection visas for victims of violent crimes and enhancing outreach to UNHCR, civil society groups and other entities that may have regular and direct contact with the various populations who have been victims of violence.<sup>105</sup>

## 6. Recommendations and Conclusion

Migrants play important roles and contribute to the economic growth and human development in both their home and host countries.<sup>106</sup> They also enrich societies through cultural diversity, foster understanding and respect among peoples, cultures and societies.<sup>107</sup> Through migration, they improve their living conditions and realize their human rights.<sup>108</sup> Hence, they need to be protected from all forms of discrimination, human rights violations and racial bias violence such as xenophobia.

The principle of universality of human rights is the cornerstone of international human rights law.<sup>109</sup> Human rights are inalienable and should not be taken away by xenophobic acts. Nothing justifies xenophobia because the deprivation of one right adversely affects the others and the improvement of one right facilitates the advancement of others.<sup>110</sup> All human rights are indivisible whether they are civil, political, economic, social or cultural. Human rights entail rights and obligations.<sup>111</sup> States are obligated and duty bound under international law to respect, protect and fulfill human rights. By virtue of this, States are obligated to protect individuals and groups within their jurisdictions from human rights abuses such as xenophobia and to also take positive actions to facilitate the enjoyment of fundamental human rights but human rights are not enjoyed by immigrants as a result of xenophobia.

The consequences of xenophobia are severe and demoralizing. States should do everything possible to avoid problems that can arise from prejudice and fear in order to avoid xenophobia on a societal and widespread level and this can be done by preventing acquisition or manifestation of xenophobia by its citizens through enlightenment programs and anti-xenophobia campaigns. Furthermore, the right to life is the supreme human right<sup>112</sup> and is the fountain from which all human rights spring<sup>113</sup> and should be jealously protected by States.

Given the foregoing, the following are hereby suggested as antidotes to xenophobia. The provisions of Article 7 of the Rome Statute of the International Criminal Court should be enlarged to provide for xenophobia as a crime against humanity in order for victims of xenophobic attacks to seek redress at the International Criminal Court when National States fails to act. States should treat xenophobia as a crime against humanity with top priority and also enact laws prohibiting crimes against humanity in order to combat xenophobia, incitement and propaganda leading to xenophobia. States and their respective agencies should without delay prosecute cases bordering on xenophobic attacks in order for victims to have confidence in the judicial system. Police protection and adequate security should be

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<sup>103</sup> Ibid.

<sup>104</sup> Human Rights First (n.54) p.7

<sup>105</sup> Human Rights First (n.54) p.7

<sup>106</sup> OHCHR (n.1)

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> OHCHR (n.84)

<sup>110</sup> Ibid.

<sup>111</sup> Ibid

<sup>112</sup> HRC, General Comment 6, HRI/GEN/I/Rev.9 (Vol. I) 176, Para 1

<sup>113</sup> Report of the UN Special Rapporteur on summary and arbitrary executions, E/CN.4/1983/16 (31 January 1983) Para 22.

beefed up so that victims who approach the police can be properly attended to and their safety guaranteed. States should create a data base for reporting of xenophobic attacks and collation of such attacks and should respond with quick alacrity whenever a xenophobic attack occurs in order to safeguard the lives and properties of foreigners. States should enlighten its citizens about the ills and evils of xenophobia through awareness campaigns and also establish and empower anti-discrimination bodies/agencies to combat xenophobia. It has been shown from the South African experience that xenophobia is the *sine qua non* of an unequal society; thus States should create and put into practice relevant strategies that will correct the harms of the past and touch the lives of citizens perfectly in order to prevent future harm.