



INTERNATIONAL LAW AND XENOPHOBIA IN SOUTH AFRICA

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ABSTRACT: *For centuries, international law has regulated the actions and international relations of sovereign states. Though, some of these states in the international system have proven themselves to be compliant with international law in certain aspects of their complex relations, they have performed unsatisfactorily in others. The sporadic outburst of xenophobic attacks on foreign nationals in the Republic of South Africa remains an instance of a state's failure to fulfil its obligation as articulated in the international conventions it acceded to. Since the post-apartheid era began in 1994, there has been an influx of migrants into South Africa. Sadly, these migrants, mostly Black Africans, have been discriminated against and occasionally attacked by resentful locals. The objective of the paper is to briefly point out South Africa's obligation as a state party to several treaties that guard against racial discrimination and, the failure of successive South African governments to fulfil it. The historical approach was adopted for the paper and, the qualitative method of secondary data collection. The paper concluded that henceforth, South Africa as a civilised state in the international community, should perform in good faith its obligation of safeguarding the fundamental human rights of immigrants within its territorial jurisdiction.*

KEYWORDS: International Law, Xenophobia, Immigrants, Obligation, International Conventions, Locals, Rainbow Nation, Township, South Africa

INTRODUCTION

For centuries, sovereign states actions and relations have been regulated by international law. Though, some of these adjudged civilised states in the international system have been compliant with international law in certain aspects of their complex relations e.g. the inviolability of the premises of states' diplomatic missions on their soil, they have been disobedient in others such as the prevention of the cruel treatment and discrimination against the nationals of other polities. In the Republic of South Africa, this has been the experience of some refugees, asylum seekers and economic migrants of African and Asian origin which, over the years, attracted international condemnation.

Following the dismantling of the apartheid regime and the emergence of constitutional democracy in 1994, the inflow of migrants into South Africa witnessed a sharp increase, particularly from neighbouring African countries (Ogunnubi and Amusan, 2018: 61). This 'inflow' of mainly Black African migrants has for some years now been a problem for the locals and government of the rainbow nation. The autochthons claim that *Makwerekwere* (one out of several derogatory South African words for 'Black African immigrants') are competing with them for jobs that are in short supply in the formal and informal sector of South Africa's economy. They also chorus that they strain the insufficient public services e.g.



healthcare, education, electricity etc., are marrying their women to become citizens, are carriers and spreading infectious diseases such as HIV/AIDS, are accepting a paltry income and not participating in the struggle for better wages and working conditions and, are into drug trafficking, prostitution and other criminal activities (see Crush & Ramachandran, 2014: 3, SAHO, 2015; Durokifa & Ijeoma, 2017: 3295; Tlhabi, 2017; see Ogunnoiki, 2019: 71). These claims, most of which are unsubstantiated, have been debunked by several scholars and organisations with indubitable data (see Durokifa & Ijeoma, 2017: 3299-3300).

Against this backdrop is the discourse of international law and xenophobia in South Africa under the following sub-headings: conceptual clarification, the historical background to xenophobia in South Africa, xenophobia in South Africa: the nature, causes and consequences, international law and xenophobia in South Africa, and lastly conclusion.

Conceptual Clarification

Two major concepts will be used throughout this research paper. These concepts are none other than ‘international law’ and ‘xenophobia’ which need to be clarified.

International Law

Derived from the Latin word *jus gentium* (or *ius gentium*) which in English means ‘Law of Nations’, “[i]nternational law is the body of legal rules which apply between states and such other entities that have been granted international personality. It is seen as a body of rules that have been accepted by civilized nations as being binding in their relationship with one another” (Akinboye & Ootoh, 2005: 238). Succinctly, international law is “the rules and principles that govern states in their relations *inter se*” (Umozurike, 2005: 1).

Xenophobia

The concept ‘xenophobia’ is a multifaceted term. It originated from the Greek words ‘*xenos*’ (meaning: alien, stranger or foreigner) and ‘*phobos*’ (meaning: fear). Literally, xenophobia is the ‘fear of a foreigner’ but, there is a deeper meaning to it than this (Mills, 2018: 23; Ogunnoiki & Adeyemi, 2019: 2; Ogunnowo & Joshua, 2019: 3). Xenophobia can be seen as the “attitudes, prejudices, and behaviour that reject, exclude and often vilify persons based on the perception that they are outsiders or foreigners to the community, society or national identity” (ILO, IOM & OHCHR, 2001: 2 as cited in Misago et al., 2015: 17). Simply put, it is “a kind of fear and hatred for a foreigner that may result in violence and loss of belongings and life” (Mashau, 2019: 2).

The Historical Background to Xenophobia in South Africa

“South Africa [has] witnessed widespread xenophobic attacks since 1994 in provinces such as Gauteng, Western Cape, Free State, Limpopo and KwaZulu Natal” (SAHO, 2015). Between December 1994 and January 1995, a campaign dubbed ‘Operation Buyelekhaya’ (go back home) began in Alexandra township. The aim of those involved in the said operation was to rid the township of foreigners some of whom were marched to the police station (Desai, 2008: 50; Durokifa & Ijeoma, 2017: 3298; Solomon, 2019: 3).

On January 03, 1998, “six white officers of the South African Police Services (SAPS) East Rand Dog Unit set attack dogs on three Mozambican migrants who were badly mauled and



then physically and verbally abused” (Crush & Ramachandran, 2014: 4). Eight months later, a Mozambican was thrown out from a moving train by some people returning from a rally in Pretoria under the banner of the organisation “Unemployed Masses of South Africa” while the two Senegalese that climbed on the roof to escape the crowd were unfortunately electrocuted (as cited in Vale, 2003: 86). Following these horrendous incidents have been reported and unreported cases of xenophobia in South Africa. But in the paragraphs after this, only high-profile cases in the 2000s will be examined.

On May 11, 2008, xenophobic attacks started in the township, Alexandra, in Johannesburg and later spread to Gauteng Province, other urban areas across the country – Durban and Cape Town and, the townships of rural areas such as Limpopo Province. By the time the anti-foreigner violence was over, several foreign-owned businesses and homes had been looted and destroyed. In total, 62 people lost their lives (21 of whom were South Africans), over 600 people were wounded, more than 100,000 people were displaced and, dozens of women were sexually assaulted (Crush & Ramachandran, 2010: 217-218; Landau, 2011: 1; McKnight 2008: 8, Misago et al., 2008: 5 as cited in Dassah, 2015: 132; Ojedokun, 2015: 169; Qukula, 2015; SAHO, 2015; Tella, 2016: 143; Amisi et al., 2011 as cited in Durokifa & Ijeoma, 2017: 3298; Tlhabi, 2017; Ogunnoiki & Adeyemi, 2019: 11).

In March 2015, the Zulu King, Goodwill Zwelithini, reportedly made an inciting comment in Pongola, KwaZulu-Natal (KZN) province. He allegedly likened Black African immigrants in South Africa to ‘head lice’ and asked them to pack their bags and go back to their countries because, they were enjoying South African resources at the expense of the locals (Tella, 2016: 143; Ogunnoiki & Adeyemi, 2019: 12). Hence, xenophobic violence broke out in April 2015 which led to the death of 7 persons in the cities – Johannesburg and Durban (BBC News, 2019a; BBC News, 2019b). “Following the outbreak of xenophobic violence, the government established a national inter-departmental task team with the aim of eliminating criminal activities across the country. The task team, named ‘Operation Fiela’ (which, translated, means operation ‘sweep clean’) has executed several raids across the country, which have been criticised by some for allegedly targeting foreign nationals and the use of force” (Qukula, 2015).

In the month of March 2019, xenophobia again erupted in South Africa which some people traced back to a remark made by the African National Congress (ANC) presidential hopeful, Mr Cyril Ramaphosa while campaigning before the general elections which took place on May 08, 2019. The xenophobic violence that broke out lasted till the early days of April 2019. Few months after the March-April incident, Mr Zweli Ndaba, the leader of the Sisonke People’s Forum, inadvertently instigated attacks on Black African immigrants with his inciting flyers (Bornman, 2019; Ogunnoiki & Adeyemi, 2019: 12). The violence which started in the latter part of August into early September 2019 led to the untimely death of at least 10 persons (most of whom were South Africans).

Xenophobia in South Africa: The Nature, Causes and Consequences

The nature of xenophobia in South Africa is somewhat the same in some countries e.g. India (see Crush & Ramachandran, 2010: 217-222). Xenophobia in the rainbow nation has little to do with the ‘fear of a foreigner’ as ‘xenophobia’ literally means. It is more of a prejudice, negative attitude, hate, and intolerance problem in the Southern African country. Xenophobia in the rainbow nation has over the years manifested in the following ways – the use of



derogatory words or making negative comments, stereotyping, intimidation, mistreatment and violence (the beating, stabbing, gunning, stoning and burning alive of Black African immigrants and, the looting, destruction and, torching of their businesses and shacks).

Furthermore, xenophobia in South Africa has to do with the related but distinct issue of racism (Nyamnjoh, 2010: 67; Choane et al., 2011: 134-135; Neocosmos 2006 as cited in Solomon & Kosaka, 2013: 8; Ojedokun, 2015: 170; SAHO, 2015; Tihabi, 2017). In South Africa, xenophobes discriminately make the vulnerable minority group of Black African immigrants (who are easily identified by their dark-skin colour, dressing, vaccination scar, accent, inability to speak one of South Africa's local languages etc.), their businesses, and personal effects the object of attack in infrequent xenophobic violence. Unsurprisingly, some dark-skinned South Africans have been mistaken for foreigners and brutally attacked in the country (SAHO, 2015; Muchiri, 2016: 55; see Tella, 2016: 146; Durokifa & Ijeoma, 2017: 3295). Thus, many scholars the world over are in agreement that the locals are actually suffering from 'afrophobia' and not the generic 'xenophobia' (Ogunnoiki & Adeyemi, 2019).

This brings us to the causes of xenophobia in South Africa which has two dimensions: the international and domestic. The first of the causes of xenophobia in the rainbow nation from the international realm is, 'globalisation'. Owing to the gradual removal of barriers between states and the integration of national economies, there has been an inflow and settlement of refugees, asylum seekers and economic migrants in South Africa from the Asian countries – Bangladesh and Pakistan and, predominantly African countries – Nigeria, Ghana, Zimbabwe, Somalia, Ethiopia, Malawi, Mozambique, the Democratic Republic of Congo (DRC) etc. This consequently, has "...exacerbated insecurities and anxieties, bringing about an obsession with citizenship and belonging and the re-actualization of boundaries through xenophobia" (Nyamnjoh, 2006: 1). Lastly are the ugly political and socio-economic realities in Africa – bad governance, chronic and systemic corruption, abject poverty, protracted armed conflicts, rising unemployment rate, insurgency and terrorism, political instability, persecution of ethnic groups etc. in some Sub-Saharan African (SSA) countries such as Nigeria, Somalia, the DRC and Zimbabwe (SAHO, 2015; Tella, 2016: 154). Thus, many of the nationals of these countries flee to South Africa, a 'safe haven' and one of, if not the most industrialised country on the African continent.

The other causes of intermittent xenophobic attacks on Black African immigrants can be identified by looking at the issue from a domestic dimension. First and foremost is the apartheid experience of Black South Africans (Solomon & Kosaka, 2013: 10). The racial segregation of Black South Africans by the apartheid regime led to a violent liberation struggle which many Black South Africans have not psychologically recovered from in the post-apartheid era. Secondly is the failure of the South African government to adequately provide economic opportunities and resources for the locals – jobs, housing, schools, healthcare etc. (Choane et al., 2011: 136). Making matters worse for the locals is the inflow of mostly Black African migrants whom they claim strain these limited resources. Thus, the frustrated turned aggressive locals do scapegoat them infrequently. Thirdly is the stereotyping of Black African immigrants as e.g. illegals, criminals and drug peddlers by mainly the white-run media, especially the print media (see Desai, 2008: 55; see Nyamnjoh, 2010: 68-73). The locals, feeding their minds from time to time with negative news reportage on Black African immigrants, develop hatred for them and, in a matter of months, there is an outbreak of xenophobic violence in the country. The fourth cause is none other than alarmists' exaggeration of the number of Black African migrants entering South Africa. This has not



only created fear in the heart of the locals that South Africa's "national territory is under siege from outside", but has also fueled the belief that Black African immigrants are a threat to the identity and society of South Africans (Crush & Ramachandran, 2010: 214; see Crush & Ramachandran, 2014: 14). Fifthly is the weak criminal justice system of the country. The criminal justice system of South Africa has repeatedly failed to bring to book most, if not all, of the perpetrators of mob violence against Black African immigrants. Hence, there is a growing culture of impunity among xenophobes in some of the country's townships and cities. The sixth trigger is the underlying people-government communication gap. Some of the locals in recent past made attempts to meet one-on-one with top government officials *vis-à-vis* the unemployment problem and social ills in their communities, but were ostensibly not granted audience (see Bornman, 2019). Thus, the natives take the law into their hands by attacking Black African immigrants whom they blame for their socio-economic problems. The seventh is the inflammatory statement of public office holders or influential people in the rainbow nation. Inciting remarks against Black African immigrants have purportedly been made in recent past which many believe were the cause of the April 2015 and March-April 2019 xenophobic violence. Last but not least is South African politics. Prior to elections, immigration is one way or the other discussed by members of registered political parties. In order to get the votes of the locals for their political party, some party members make statements during the electioneering period that are misconstrued by the locals as supporting xenophobic attacks on Black African immigrants.

The rife xenophobic violence in South Africa has consequently reduced the country's soft power as well as dented its positive image on the world stage. As Tella and Ogunnubi (2014: 156) rightly said:

".... a major source of South Africa's soft power is its political values, which include, among others, its liberal democracy, human rights culture and progressive constitution. However, the country's xenophobic culture and the sometimes-attendant violence has tarnished its global image as a champion of democracy and human rights and has consequently reduced the efficacy of its soft power currencies in Africa."

Also, the Republic of South Africa is fast losing its status as the legitimate representative of Africa to the Federal Republic of Nigeria. Over the years, Nigeria has used "South Africa's xenophobic posture to portray itself as a benign or benevolent hegemon and legitimate regional power" (Ogunnubi & Amusan, 2018: 64).

International Law and Xenophobia in South Africa

There are several international conventions that guard against the racial discrimination of immigrants within the confines of states that signed and ratified them. For this section, only the conventions that South Africa is a state party to shall be examined briefly.

Article 2, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) states that:

"States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or



practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;” (ICERD, 1965)

Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights (1966) reads:

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (ICESCR, 1966)

Article 2, paragraph 1 of the International Covenant on Civil and Political Rights states that:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (ICCPR, 1966)

Lastly, in Article 2 of the African Charter on Human and Peoples’ Rights (1981) it was clearly stated that:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” (ACHPR, 1981)

From the provision of the above treaties, South Africa, in line with the principle *pacta sunt servanda* (Latin: meaning ‘agreements must be kept’), is to ensure that all foreign nationals are not discriminated against based on their skin pigmentation by government departments’ officials or its citizenry. But successive South African governments have failed in this regard. They have repeatedly denied that there is xenophobia in the country. To them, the killing of Black African immigrants and the looting and destruction of their businesses and property by the indignant locals are nothing but ‘criminal acts’ (see Crush & Ramachandran, 2014: 8-9; see Tella, 2016: 149-150).

It is no longer news that xenophobia has been institutionalised in South Africa. Xenophobic attitude can be observed in the Department of Home Affairs (DHA) where the processing of many undocumented Black African immigrants’ application for legal status is being delayed by officials. Without a legal status, some of them have been arrested and detained before they are deported in the Lindela Repatriation Centre, a privately managed holding facility known for immigrants’ human rights abuses (McKnight 2008: 27 as cited in Choane et al., 2011: 136-137; Landau, 2011: 9; see Tella & Ogunnubi, 2014: 155; Neocosmos 2008 as cited in Tella, 2016: 153). Also, xenophobic attitude can be seen in the South African Police Service (SAPS) operation in purging the rainbow nation of illegal immigrants. In its operation,



undocumented Black African immigrants are not only assaulted by SAPS officers but arrested.

CONCLUSION

Xenophobia remains a crime against humanity in some part of South Africa that has cost many Black African immigrants their irreplaceable lives, valuable businesses and belongings worth millions of rand. To date, the incumbent ANC government like its predecessors has not fulfilled to the letter its obligation in ensuring that immigrants are not discriminated against in any way as stated in the international conventions South Africa acceded to or, treated in an inhumane manner. Henceforth, the Republic of South Africa as a civilised state in the international community, should perform in good faith its international and constitutional duties of safeguarding the fundamental human rights of immigrants within its territorial jurisdiction.

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