EXAMINING THE PHILOSOPHY OF UBUNTU AND THE REGIME OF XENOPHOBIC UPSURGE ON AFRICAN IMMIGRANTS WITHIN THE SOCIO-LEGAL SPACE IN SOUTH AFRICA

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Abstract

The specifics of trying to analyse the concept of ubuntu are formidable. A person with ubuntu is someone who is welcoming, hospitable, warm and generous, and willing to share. Such persons are open, affirming and available to others. They are willing to be vulnerable, do not feel threatened that others are able and good for they have a proper self-assurance that comes from knowing that they belong to a greater whole. Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual's humanity. Ubuntu means that people are people through other people. This African philosophy which is well preached in South Africa is antithetical to the racist and xenophobic upsurge and experiences of immigrants within the urban space of South Africa in the face of the rule of law. South Africa has witnessed a surge in migration from the sub-continent in search of opportunities which the new democracy has to offer. From a doctrinal research method it is observed that despite the existence of international instruments and conventions on the protection of

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immigrants and South Africa's obligation to protect its citizens and foreigners this philosophy is a mere adornment, not reflective of the true reality of the relationship between the indigenes and the foreigners in South Africa. This article recommend that severe international sanctions should be imposed on South Africa for breach of this international human rights laws, for incessant xenophobic attack on foreigners despite its philosophy of brotherliness and communal living.

Keywords: *Xenophobia, Ubuntu, Immigration, Philosophy*

Introduction

In South Africa,the philosophy of *Ubuntu* is highly revered as virtues, with its absence culminating in confused and crime-riddled societies.[1] In African contexts, communities traditionally and collectively uphold the values of Ubuntu or botho. However, lately, individualism has become more evident and appeal has continuously been made to communities for the purpose of building social cohesion, revive ubuntu and the spirit of the African renaissance. This became necessary after the realization that this philosophy and values have become lip service in South African communities.[2] South Africa has one of the most robust economies in sub-Saharan Africa with a history of recruiting skilled and semi-skilled labour especially from countries in the South African Development Communities (SADC) with relatively weak

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[1] Johnson, L.R and Quan-Baffour K.P 2016 "The African Philosophy of 'Ubuntu' and Correctional Education in South Africa: A Case Study" African Studies Association of Australasia and the Pacific (AFSAAP) Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October, 2015.

[2] Gumbo, M.T.,2014. 'Elders decry the loss of Ubuntu', *Mediterranean Journal of Social Sciences*, 5 (10): 67-77.

economies and histories of political instability.[3] Xenophobia, and its various forms of intolerance and violence, is a source of concern because it generates rhetoric that at times provide moral justification for the exclusion of non-nationals from accessing basic services that they may be entitled to, such as public health and education, shelter, potable water and sanitation which contravenes the concept of oneness. It places migrants, asylum seekers and refugees in difficult situation as regard their human and labour rights[4] despite international legal instruments that seeks to secure these rights and promote development. A review report on the linkages between xenophobia, international migration and human development reveals that the increased volume of South-South migration since the late 1990s has resulted in repeated attacks on migrants in the receiving countries especially Africa and Asia.[5] This has resulted in the vulnerability and exploitation of various categories of migrants, including asylum seekers and refugees[6] with clear signs of discontent among these groups throughout the country about accessibility to necessities like basic education and employment.[7] It is commonly accepted and generally legal that

[3] Tevera, D., 2013 "African Migrants, Xenophobia and Urban Violence in Post-apartheid South Africa" in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[4] International Labour Organisation- ILO 2004. Towards a Fair Deal for Migrant Workers in the Global Economy, Geneva: International Labour Conference 2004, International Labour Organisation. See Taran, P., 2000. Human Rights of Migrants: Challenges of the New Decade. *International Migration* 38,6:7I-51
See Wickramasekara, P., 2008 Globalisation, International Labour Migration and the Rights of Migrants Workers. *Third World Quarterly* 29,7:1247-1264
See Lefko-Everett, K., 2007. Voices for the Margins: Migrant Women's Experience in Southern Africa SAMP Migration Policy Series No. 46.

[5] Crush, J., and Ramachandran, S., 2009. *Xenophobia, International Migration and Human Development* New York: UNDP

[6] Tevera, D., 2013 op cit

[7] Anand, S.,2013 "Positive Discrimination and Minorities in Post-apartheid South Africa: A case study of Indian South Africans" in Manik, S., and Singh,

preferential treatment or certain rights should be afforded citizens only, however, international human rights instruments and national laws that denounce discrimination on the basis of race, sex, language, religion or ethnic origin, widely retain traditional distinctions based upon nationality and often explicitly exclude lawfully resident aliens from some or all established guarantees. At the same time, arbitrary or invidious discrimination against aliens is prohibited and can be considered a manifestation of xenophobia although, in general, the latter term does not appear in legal instruments concerned with discrimination. Irrespective of the status or identity of the victim, nonetheless, attacks against foreigners increasingly are reported.[8]

Understanding the Concept of Ubuntu within an Urban Space
There is clearly a diversity of ways of understanding the meaning of the term ubuntu. The Collins English Dictionary[9] suggests that it is a noun describing humanity or fellow feeling, while the Oxford Dictionary[10] portrays it as an activity that is characterized by sympathy, consideration for others, compassion or benevolence. Archbishop Desmond Tutu considers this philosophy a very difficult concept to render into a western language other than to say it is "my humanity is caught up, is inextricably bound up, in what is yours." The word ubuntu comes from the Zulu culture, and has been summarized and translated to mean,' A person is a person through other persons, or I am because we are.' It is perceived as an innate duty to support one's fellow man. It presupposes that people should enrich themselves and grow in their own ubuntu, but

A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[8] Commission of the European Communities "Legal Instruments to Combat Racism and Xenophobia" Directorate General Employment, Industrial Relations and Social Affairs 200, rue de la Loi B- 1049 Brussels. Available at http://aei.pitt.edu/8697/1/8697.pdf accessed on 7th February 2017

[9] 12th edition 2014

[10] 2nd edition 2003

true enrichment will naturally align with the duty to act towards the spiritual growth of one's community.[11] This philosophy exists in many variations within different African cultures and languages, each conceptualization retains the same core of meaning that is both a goal and a guide for humanity. It runs through a range of other cultures, often combining the concept of generosity with genuine humanity.[12]

Defining Xenophobia and its Theoretical Background

The concept of xenophobia originates from the Greek words: xenos (foreigner or stranger) and phobos (fear) hence the fear of a stranger.[13] It has also been seen as to entail contempt or loathing of strangers,[14] hatred and prejudice against foreigners[15] Several

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[11] Mandela, N.R. Interviewed by Tim Modise. Experience Ubuntu Interview. May 24, 2006. Available online: http://en.wikipedia.org/wiki/File:Experience_ubuntu.ogg (accessed on 17 July 2017).

[12] In the Tswana language of Botswana, this concept is represented as the ideal of Botho, captured in the phrase, 'motho ke motho ka batho', the Botswana people use the term botho to describe a person who has a well-rounded character and realizes his or her full potential both as an individual and as a part of the community to which he or she belongs. Botho is an example of a social contract of mutual respect, responsibility and accountability that members of society have toward each other and defines a process for earning respect by first giving it, and to gain empowerment by empowering others. ‖See *Botho and Vision 2016*. School of Graduate Studies, University of Botswana. Available online: http://www.ubotho.net/Botho-Vision2016 (accessed on 17 July 2017). In Malawi, this concept is called uMunthu. It is explained through the proverb, ―kali kokha nkanyama, tili awiri ntiwanthu,‖ meaning, ―when you are on your own you are as good as an animal of the wild; when there are two of you, you form a community. Claire E. Oppenheim "Nelson Mandela and the Power of Ubuntu" Erich Lindemann Mental Health Center, 25 Staniford St., 2nd Floor, Massachusetts General Hospital, Boston, MA 02114, USA

[13] Soyombo, O., 2008 Xenophobia: A Comtemporary Issue in Psychology, IFE Psychologia- Special Issue: Xenophobia 16, 2:85-104

[14] Van der Veer,K.R Ommundsen, O Yakushko,L Higler, S Woelders & KA Hagen 2013. Psychometrically and Qualitatively Validating a Cross-national Cumulative Measure of Fear-based Xenophobia. Quali Quant 47: 1429-1444.

theories can be used to explain the basis of xenophobia. Most relevant of these theories are the psychologically postulated theories of integrated Threat and Scapegoating.[16] Some components of threats are felt by one group in relation to another. For instance realistic threats seeks to endanger the well-being of the group and includes fear of harm or a decline in quality of life; symbolic threats are seen as threatening the group's culture or place in the wider society by challenging or undermining accepted norms while intergroup anxiety occurs when two groups come into contact and relates to fear over the ability to communicate positively and effectively; negative stereotyping are ingrained attitudes and responses to members of another group that mediate contact, set expectations and can hamper the process of mediation.[17] Often times, people use prejudice and discrimination to express hostility which arises from frustration. This is referred to as scapegoating.[18] This theory is to the effect that foreigners are responsible for limited resources like jobs and education. Foreigners are perceived as responsible for most of the crimes committed. They take away jobs meant for South Africans.[19] This is used as a convenient scapegoat for those experiencing the reality

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[15] Laher, H 2009. *Explaining Xenophobic Violence, Information Sheet from MRC and UNISA. Lenasia: Unisa*

[16] Stephan, W and Stephan, C., 2000. "An Integrated Threat Theory of Prejudice "in Oskamp, S (ed): *Reducing Prejudice and Discrimination.* Mahwah, NJ: Lawrence Erlbaum Associates.

[17] Harrison,N., and Peacock,, N., 2010 Cultural Distance, Mindfulness and Passive Xenophobia: Using Integrated Threat Theory to Explore Home Higher Education Students' Perspectives on 'internationalisation at home' *British Educational Research Journal* 36, 6;877-902 See also Anand, S.,2013 opcit p.87

[18] Osman, R., 2009 "The Phenomenon of Xenophobia as Experienced by Immigrants Learners on Inner City Schools of Johannesburg" Unpublished Master's Thesis, UNISA

[19] Harris, B., 2002 Xenophobia: A New Pathology for a New South Africa? In Hook, Derek and Gillian Eagle (eds): *Psychopathology and Social Prejudice* Cape Town: University of Cape Town Press.

of hardship that has worsened since the arrival of foreigners into South Africa.[20]

Varying Perception on Xenophobia and the Concept of Ubuntu

Consequent upon the grant of political independence, the legacies of the apartheid system combined with new forms of discrimination such as xenophobia towards African refugees and immigrants came to limelight through the country's period of political transition.[21]This long history of racial politics and stratification has had an important effect on how citizens perceive non-nationals. Foreign nationals living in South Africa have been exposed to discriminatory behavior not just by South African citizens but also by state departments such as the Department of Home Affairs and the South African Police Services (SAPS).[22] Xenophobic prejudices is manifested in various ways and is sometimes subtle and sometimes obvious. Furthermore, given the background of hostilities by local South Africans towards other African nationals, any form of discrimination against these foreign African nationals is perceived as being tinged with xenophobia.[23]

The hostility of South Africans towards foreign African nationals was baffling because it contravened the Ubuntu philosophy which South Africans purported to embrace.[24] A person with Ubuntu[25] is

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[20] Osman, R., 2009 The Phenomenon of Xenophobia as Experienced by immigrant Learners on Inner City Schools

[21] Muthuki, J., (2013) "The Complexities of Being a Foreign African Student in a South African Tertiary Institution" in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[22] Gopal, N., (2013) "They call us 'Makwerekweres'- Foreign Learners Speak out against xenophobia" in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[23] Muthuki, J. op cit p.114

[24] Muthuki, J. op cit p.117

welcoming, hospitable, warm and generous, willing to share. Such a person is open and available to others, willing to be vulnerable, affirming of others, does not feel threatened that others are able and good, for they have a proper self-assurance that comes from knowing that they belong in a greater whole.[26] However, this philosophy is not in tandem with the experience and sentiments expressed by non-nationals with regards to practical realities. In this wise, scholars have submitted that the rise in xenophobia in the 1990's cannot be isolated from the country's apartheid past of racial and class segregation and attitudes of uniqueness and superiority towards the rest of Africa. Even though spatially located in Africa, the Apartheid regime had consciously situated itself ideologically, temporally and dispositionally in the western, white world.[27] It is a form of fragile sense of national consciousness by the national bourgeoisie to mimic its western counterpart.[28]

Policing Immigrants in South Africa

The perception that "illegal immigrants" are responsible for higher crime rates is deeply rooted in public opinion and is sustained by media anecdote and popular myth.[29] In the absence of rigorous empirical research, stereotypes about immigrants and crime often provide the underpinning for public policies and practices and shape public opinion and political behavior.[30] Periods of increased

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[25] In the words of the South African Nobel Laureate, Archbishop Desmond Tutu

[26] Panse, S., (2006) Ubuntu- African Philosophy Available at http: //www.Buzzle.com/authors.asp//authors762 accessed on 15th February 2017

[27] Crush, J., (2008) "The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa." Cape Town: Southern African Migration Project

[28] Fanon, F., (1990) *The Wretched of the Earth*. London: Penguin Books.

[29] Rumbaut, R.G., "Undocumented Immigrants and Rates of Crime and Imprisonment- Popular Myths and Empirical Realities" available at https://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-D_0.pdf accessed on 19th February 2017

[30] Chavez, L.R., (2001) Covering Immigration: Popular Images and the Politics of the Nation. Berkeley University of California Press. See Hagan, j., and

immigration have historically been accompanied by nativist alarms, perception of threats and pervasive stereotypes of new comers, particularly during economic downturns or national crisis[31]with the twist that "illegal immigrants" are now singled out with added animus and framed as harbingers of crime.[32]

Police work has a social and structural context and since xenophobia is a national problem in South Africa and members of the police force are part of South African society, they may not be immuned to such prejudices.[33] The fact that the police deal on an on-going basis with migrants and refugees may in fact, exacerbates their prejudices.[34] This high incidence of police brutality against nationals is because the police themselves share the same xenophobic sentiments as the community. These circumstances are aptly encapsulated in the following statement:

Palloni, A., (1999) " Sociological Criminology and the Mythology of Hispanic Immigration and Crime" Social Problems 46: 617-32 See Lee, M.T., (2003) Crime on the Border: Immigration and Homicide in Urban Communities. New York: LFB Scholarly Publishing. See Martinez, J., and Valenzuela A., (2006) Immigration and Crime: Race, Ethnicity and Violence. New York: New York University Press

[31] The challenges of managing migration in South Africa became more complex due to the apartheid regime. Immigrants arrived en masse and differed substantially from the native-born in religion, language, physical appearance and world region of origin. See Fry, B.N., (2006) Nativism and Immigration: Regulating the American Dream. New York: LFB Scholarly Publishing. See Johnson, K.,(2005) "The Forgotten 'Repatriation' of Persons of Mexican Ancestry and Lessons for the 'War on Terror.'" Pace Law Review 26, 1: 1-26 See Kanstroom, D.,(2007) Deportation Nation: Outsiders in American History. Cambridge Harvard University Press.

[32] Rumbaut, R.G op cit.

[33] Vahed, Y.,(2013) "Crime, Fear of Crime and Xenophibia in Durban, South Africa" in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[34] Crichter, T., Jefferson, T., Clarke, J., and Roberts, B.,(1978) " *Policing the Crisis Mugging, the state and Law and Order.* London*:* Macmillan Press *Lt*d

As in many other countries, immigrants have been blamed for a rise in violent crime, drug dealing and a rise in drug abuse, unemployment, and other social ills. Immigrants from African countries have been the target of attacks, often because they are perceived as being in direct competition with South Africans for jobs or services. In addition, African immigrants are often the target of random violence and robbery, as criminals perceive them as easy targets because they are unlikely to go to the police. The Police and Home Affairs officials have shared this antagonism toward foreigners. The general negative attitude toward foreigners encourages and condones abuses by police, army, and Home Affairs not only against those suspected of being undocumented migrants, but also against non-South Africans who are lawfully in the country, who can expect little or no help from the police when they themselves are victims of crime, including violent assault and theft.[35]

Commentaries recount the barbaric incidence of 2013 when a 26 year old taxi driver, Mido Macia, a Mozambican national, was handcuffed by police officers to their van and dragged several hundred metres through the streets of Daveyton, east of Johannesburg to such prejudice. He was later found dead in police cell. Subsequently, nine police officers were charged for his murder.[36] In this case, the roots of xenophobia are to be found within the police force and not the residence who offered support to the deceased and his family.[37] Actions like this from the police only

[35] Human Rights Watch, "VI. Xenophobia And Attacks against Migrants," in Report on the Situation in South Africa March 1998, available at http://www.hrw.org/legacy/reports98/sareport/Adv5a.htm#_1_49

[36] Vahed, Y.,(2013) p.210 op cit

[37] Kuper,J., 37% of South Africans Admit to often Feeling Angry 27 May 2013, Available at: http:www.politicsweb.

helps to increase perceptions that lives of other Africans living in South Africa are cheap, thus fuelling xenophobic attacks.

Immigration Officials and Laws Governing Migration in South Africa

It is common knowledge that officials in the Department of Home Affairs and at various point of entry into South Africa tend to 'drag their feet' about the treatment of foreign migrants, partly because of political sensitivity over the rights of foreigners'[38] Immigrants seeking refugee status are often initially given the status of asylum seekers and it could take up to six years for their application to be processed by Home Affairs.[39] Turner's concept of liminality is powerfully in this waiting game, as refugees live in limbo, unsure what is to become of them.[40] Between 2002 and 2008 around 30,000 people applied for asylum per annum,[41] with a massive backlog in processing applications at Home Affairs and thousands are unsure whether they will ever be attended to.[42]

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co.za/politicsweb/view/politicsweb/en/page71654?oid=364710&sn=Details&pid=71616 accessed on 19th February 2017

[38] Murray, M., (2003) Alien Strangers in Our Midst: The Dreaded Foreign Invasion and 'Fortress South Afica', Canadian Journal of African Studies 37, 2/3: 440-466.

[39] Harris, B., (2001). A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition. Violence and Transition Series, 5 August. Available at: http://www.csvr.org.za/docs/racism/aforeignexperience.pdf. Accessed on 19th February 2017

[40] Turner, V., (1982) *From Ritual to Theatre: The Human Seriousness of Play* New York: PAJ Publications.

[41] Vigneswaran, D., (2008) A Foot in the Door: Access to Asylum in South Africa, Migration Studies Working Paper Series NO. 40, Forced Migration Studies Programme, University of the Witwatersrand. Available at: http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/26030/24063 accessed on 19th February 2017

[42] Goolam, V., and Ashwin, D., (2013) "The May 2008 Xenophobic Violence in South Africa: Antecedents and Aftermath" in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

Immigration policy during the 1990's must be contextualized within the South African political transition from apartheid or authoritarian state legislated on racism to a democracy governed by constitutional equality.[43] The major piece of legislation governing migration policy in South Africa is the Alien Control Act, enacted in 1991 and consolidated into one piece of legislation a number of provisions regulating entry and residence.[44] Often, hostility towards foreigners is explained in relation to limited resources, such as housing, education, health care and employment, coupled with high expectations during transition.[45]

The Alien Control Act of 1991 ensured that racism remained entrenched in the immigration policy. The Act maintained racism during the early 1990s and guaranteed that the alien remained a black alien across that period, it also formed the basis for the 1995 Aliens Control Amendment Act.[46] Despite certain amendment to the Act, contemporary immigration policy has been built on racist foundation.[47]The question surrounding Aliens Control Amendment Act of 1995 have resulted in the development of three legislative instruments to redress immigration. They are the Green Paper on

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[43] Shanta, B.S.,(2013) " Voices from behind Bars': Xenophobia and Foreign Nationals Incarcerated in South African Correctional Centre" in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[44] Peberdy, S.A and Crush, J.,(1998) " Rooted in Racism: The Origins of the Aliens Control Act. In Crussh J., (ed): *Beyond Control*: Immigration & Human Rights in a Democratic South Africa. Cape Town: Idasa

[45] Morris, a., (1998) "Our Fellow Africans Make Our Lives Hell": The Lives of Congolese and Nigerians Living in Johannesburg. Ethnic and Racial Studies, 21,6: 1116-1136 See also Tshitereke, C., (1999) Xenophobia and Relative Deprivation. Crossings 3,2:4-5

[46] Singh, S.B.,(2013) 'Voices from behind Bars': Xenophobia and Foreign Nationals Incarcerated in a South African Correctional Centre. in Manik, S., and Singh, A., (ed) Love thy Neighbours- Exploring and Exposing Xenophobia in Social Spaces in South Africa Interdisciplinary Journal for the study of Arts and Humanities in South Africa Special Edition No 7,

[47] Peberdy, S.A and Crush, J., (1998) op cit.

International Migration (1997), The White Paper on Refugees (1998) and The White Paper on International Migration (1999). The Green Paper made attempt at challenging the existing focus on control and expulsion rather than facilitation and management which is implicit in previous immigration policy. The paper recommends that migration should be managed and planned rather than being reactive and it offers a human right-based alternative to the racism contained in the Aliens Control Amendment Act of 1995.[48]

The Department of Home Affairs (DHA) made developments and amendments to the recommendations contained in the Green Paper. This amendment was further criticized for being conservative, punitive and that the home office is becoming increasingly hard-lined about foreigners.[49]

African Human Rights Traditions
The Organization of African Unity in 1981[50] established a holistic human rights system, including comprehensive legal instruments[51]

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[48] Harris, B.,(2001) A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition . Available at: http://www.csvr.org.za/papers/papvtp5.htm accessed on 19th February 2017

[49] Cooper, J.(1999) Undocumented Aliens: An International Human Rights and Constitutional Assessment. Johannesburg: Centre for Applied Legal Studies. See also Williams, V., (1999) Spot theAlien. Crossings 3, 2.

[50] Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39, *available at* http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf. The Organization of African Unity ("OAU") was adopted in Addis Ababa, Ethiopia, by the Heads of State and Government of Africa. The OAU was created during the decolonization process in Africa. *Id.* Its main objective was to unify the independent states and to facilitate the end of colonialism on the continent. *Id. See generally* Immanuel Wallerstein, *The Early Years of the OAU: The Search for Organizational Preeminence*, 20 INT'L ORG. 774 (1966). In 2001, the OAU transformed into the African Union ("AU"). Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 132 (2005). *See generally* The Constitutive Act, AFRICAN UNION, http://www.africa-

and institutional organs[52] to ensure the promotion and protection of human rights in Africa. However on the contrary, Africa continues to be the continent with exceptional gross human rights abuses.[53] This paradox between institutional protection and the realities of daily life is created in part by the lack of a widespread human rights culture, which was created by the political and economic

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nion.org/root/au/aboutau/constitutive_act_en.htm (last visited Dec. 11, 2013); Tiyanjana Maluwa, *The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?Proceedings of the Annual Meeting*, 98 AM. SOC'Y OF INT'L L. 232 (2004); Kofi Oteng Kufuor, *The Collapse of the Organization of African Unity: Lessons from Economics and History*, 49 J. OF AFR. L. 132 (2005).

[51] *See generally* African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm; *see generally* The African Charter on the Rights and Welfare of the Child, July 11, 1990, CAB/LEG/24.9/49, *available at* http://www1.umn.edu/humanrts/africa/ afchild.htm; *see generally* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, CAB/LEG/66.6, *available at* http://www.achpr.org/files/instruments/ womenprotocol/ achpr_instr_proto _women_eng.pdf.

[52] *See*, *e.g.*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., http://www.achpr.org/ (last visited Nov. 15, 2013); AFR. COMMITTEE OF EXPERTS ON THE RTS. & WELFARE OF THE CHILD, http://acerwc.org/ (last visited Nov. 15, 2013); *see, e.g. The African Court on Human and People's Rights*, AFR. CT. ON HUM. & PEOPLES'RTS., http://www.african-court.org/ (accessed on 16th July , 2017).

[53] Makau Mutua, *The African Human Rights System: A Critical Evaluation*, HUMAN DEVELOPMENT REPORT 2000, 1-2, *available at* http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf; George Mukundi Wachira, *African Court on Human and Peoples' Rights: Ten Years on and Still No Justice*, MINORITY RTS. GROUP INT'L 5-6 (2008), *available at* http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf. *See generally* Adama Dieng, *Introduction to the African Court on Human and Peoples' Rights*, 15 INTERIGHTS 1, 3 (2005), *available at* http://www.interights.org/document/49/index.html; Ben Kioko, *The African Union and the Implementation of the Decisions of the African Court on Human and Peoples' Rights*, 15 INTERIGHTS 1, 7 (2005).

conditions on the continent.[54]   Africa has amnesia about its pre-slave past and still nurtures a "colonial hangover."[55] In a brutal and

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[54] *See* Mutua, *supra* note 5, at 35-38; Wachira, *supra* note 5; Kathryn Birdwell Wester, *Violated: Women's Human Rights in Sub-Saharan Africa*, TOPICAL REV. DIG.: HUM. RTS. IN SUB-SAHARAN AFR. 1, *available at* http://www.du.edu/korbel/hrhw/researchdigest/africa/WomensRights.pdf

[55] K. Mathews, *The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights, 1981*, 34 AFR. TODAY 85, 87 (1987). "Africa is perhaps the worst hit by colonial and imperialist exploitation. Its productive forces were the least developed by colonialism and imperialism. It was outright plunder of the most rapacious kind. Further, it is the last continent to be decolonized. These circumstances had tremendous negative impact in terms of human and economic development. Other countries developed on account of this process. Human rights violations during the colonial era and their part in colonial economic re-organization, as well as their continuation in the post-colonial era, are now fairly well known." *Id.* at 87. "Most of the laws, institutions and attitudes that underwrote the egregious violations of human rights that were habitual during colonialism did not just survive independence, they prospered thereafter." Odinkalu, Chidi Anselm Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa*, 47 J. OF AFR. L. 1, 34 (2003)., at 8. Posits that, "[m]any countries have adopted new constitutions with new and improved Bills of Rights. In nearly all cases, however, the adoption of new Bills of Rights has not been followed with the review or repeal of the insuperably oppressive raft of legislation that African countries inherited from colonialism. In effect, many elected African governments still find themselves able to exercise dictatorial and arbitrary powers under the appearance of both constitutional and electoral legitimacy." *Id.* at 11. This appalling situation is explained by Odinkalu quoting Abdullahi An-Na'im: "it is unrealistic to expect the postcolonial African state to effectively protect human rights when it is the product of colonial rule that is by definition the negation of these rights. However one evaluates precolonial African political regimes from the point of view of human rights, it is clear that colonialism was incapable of creating and sustaining the institutions and processes necessary to protect rights." *Id.* at 2. For example, the Family Code of Senegal is a copy of the French Civil Code of the sixties, except for the provisions on polygamy and inheritance under Islamic law (although Senegal is a secular state). Fatou Camara, *Women and the Law: A Critique of Senegalese Family Law*, 13 SOCIAL IDENTITIES 787, 790 (2007). Thus despite the signing and ratification of CEDAW and of the African Women's

barbarous colonial context, many African communities become harsher and increasingly insensitive to human rights; the rule of might replaces the rule of right. It is bewildering that even law enforcement agencies are equally guilty of this ruthlessness. The economy is no longer geared towards satisfying the needs of the local population, but instead becomes ruthlessly predatory.[56] Initially member states of the African Union (formally OAU) were indifferent on the issue of human rights; they were more concern about decolonization of the continent and the end of apartheid.[57] Eventually, the OAU agreed to address the calamitous situation of human rights in Africa. Consequently, in 1979, at the request of the Assembly of Heads of States and Government of the OAU, the General Secretary of the OAU in 1979 appointed a committee of

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Protocol, the concepts of marital power ("puissance paternelle"- the husband is chief of the family) and paternal power ("puissance paternelle" - the father has sole exercise of parental authority) remain in force.

[56] Odinkalu, *ibid* ("[t]he focus today on human rights in Africa is against the background of a long history of colonial and post-colonial repression, political instability and economic pauperization of the continent and its peoples. The colonial background is important because its legacies continue to determine, often conclusively, the contest for rights and access to power in Africa and the long and painful history of instability that has accompanied the transition from independence").

[57] *See* Rose M. D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 J. OF AFR. L. 72, 72-73 (1985); *see also* Mathews, K *The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights, 1981*, 34 AFR. TODAY 85, 87 (1987). "Africa is perhaps the worst hit by colonial and imperialist exploitation. Its productive forces were the least developed by colonialism and imperialism. It was outright plunder of the most rapacious kind. Further, it is the last continent to be decolonized. These circumstances had tremendous negative impact in terms of human and economic development. Other countries developed on account of this process. Human rights violations during the colonial era and their part in colonial economic re-organization, as well as their continuation in the post-colonial era, are now fairly well known." *Id.* at 87. "Most of the laws, institutions and attitudes that underwrote the egregious violations of human rights that were habitual during colonialism did not just survive independence, they prospered thereafter."

experts to draft a regional human rights convention.[58] This gave birth to the African Charter on Human and Peoples' Rights[59] The charter was adopted June 28, 1981 at the Conference of Heads of State and Government in Nairobi, Kenya.[60] It entered into force on October 21,1986.[61] By 1999, the Charter was ratified by all member states of the OAU.[62] In the wake of the adoption of the African Charter, the African Charter on the Rights and Welfare of the Child (Children's Charter) was adopted by the OAU in 1990 and was entered into force in 1999.[63] In November 2010, all member states of the AU had signed the Children's Charter, and all but eight[64] had ratified it. Since then, a Protocol to the African

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[58] *History of the African Charter*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., http://www.achpr. org/instruments/achpr/history/ (accessed on 15thJuly 2017)

[59] B. Obinna Okere., B, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141, 145 (1984);

[60] *History of the African Charter*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., http://www.achpr. org/instruments/achpr/history/ (accessed on 17th July 2017)

[61] Ibid

[62] Ibid

[63] The African Charter on the Rights and Welfare of the Child, July 11, 1990, CAB/LEG/24.9/49, *available at* http://www1.umn.edu/humanrts/africa/afchild.htm; *see generally* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, CAB/LEG/66.6, *available at* http://www.achpr.org/files/instruments/womenprotocol/achpr_instr_proto _women_eng.pdf.Women in Africa, July 11, 2003, CAB/LEG/66.6, *available at* http://www.achpr.org/files/instruments/ womenprotocol/ achpr_instr_proto _women_eng.pdf. accessed on 17th July 2017

[64] The eight member states that have signed but not ratified the Charter are: Central African Republic, Djibouti, Democratic Republic of the Congo, the Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, Swaziland, and Tunisia. *Ratification Table: African Charter on the Rights and Welfare of the Child*, AFR. COMMISSION ON HUM. & PEOPLES RTS., http://www.achpr.org/instruments/child/ratification/ South Africa signed it in 1999 and ratified it in 2000

Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) has also been adopted by the African Union in 2003.[65] It entered into force in 2005.[66] All these human rights instruments put forward their respect for positive African values. This unambiguous stand on the elimination of any religious or customary practices that violate the rights of individuals is accompanied by an equally clear statement that Africa has a civilization based on positive values, which state parties must promote.[67] The African Charter on Human and Peoples' Rights paved the way by stating in its preamble that its provisions are adopted by the state parties: "[t]aking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights."The Preamble also declares that state parties are "[f]irmly convinced of their duty to promote and protect human and peoples' rights and freedoms[,] taking into account the importance traditionally attached to these rights and freedoms in Africa."[68] South Africa being one of the parties to the African Charter on Human and Peoples' Right in its post-apartheid era enacted a new Constitution which has been described as: "one of the most advanced constitutions in history,"[69] and also as "one of the best constitutions in the world" with a Bill of Rights "which is considered among the

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[65] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, CAB/LEG/66.6, *available at* http://www.achpr.org/files/instruments/ womenprotocol/ achpr_instr_proto _women_eng.pdf. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, CAB/LEG/66.6, *available at* http://www.achpr.org/files/instruments/ womenprotocol/ achpr_instr_proto _women_eng.pdf. South Africa ratified this protocol in 2004

[66] Ibid

[67] Camara, F.K., Teaching, Promoting and Implementing Human Right Instruments in Africa: The Need to Contextualise" 03_CAMARA.EICREVIEW.FINAL.DOCX

[68] African Charter on Human and Peoples Right Ibid

[69] Dugard (2007) *International Law: A South African Perspective* 546-547

most comprehensive of all Bills of Rights to date."[70] The Constitution unambiguously provides in section 39(1)(b) that "when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law". Under section 233, when interpreting any legislation, a court must ensure that it adopts an interpretation that is in line with South Africa's international law obligations. Sections 231 and 232 are to the effect that customary international law and treaties are sources of law in South Africa.[71] This underscores the sublime philosophy of unbuntu.

Right of Access to Justice by Immigrants and the Role of Law
The rights entrenched in the Bill of Rights in South Africa's final Constitution are, with a few exceptions, guaranteed to citizens and non-citizens alike. Ordinarily, citizenship can be acquired by being born in a country (*jus soli* or the law of the place); being born to a parent who is a citizen of the country (*jus sanguinis* or the law of blood); naturalization; or a combination of any of these paths. Persons falling outside of these borders are non-citizens.[72] These include people who reside in the country but were not born there and owe no allegiance to it, and also some people who owe allegiance to the country and have been living in it for generations but still find themselves in this category.[73] Non-citizens however, include refugees, asylum seekers, documented migrants and undocumented migrants.[74] An asylum seeker is one who has left his or her own country of origin in order to seek international

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[70] Ibid

[71] Mujuzi J.D "The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations" available at www.saflii.org/za/journals/LDD/2008/12.pd *accessed on 15th July 2017*

[72] UN Office of the High Commissioner for Human Rights (OHCHR), The Rights o.f Non-Citizens, 2006, HR/ PUB/06/11 (May 15, 2017), available at http://www.ohchr.org/documents/publications/noncitizensen. pdf.

[73] Patricia E. & Helga L, *Beyond National Citizenship: Turkish Immigrants and the (RE)Construction of Citizenship in Germany*, 24(2) Urban Geography 127, 127–128 (2003

[74] The Rights of Non-Citizens, op cit

protection as a refugee.[75] In South Africa, a person becomes an asylum seeker when he or she states his or her decision to apply for refugee status. The fact that a person is fleeing from his or her home country to seek international protection does not automatically make him or her an asylum seeker. Under the South African Law, such a person must first make the claim for asylum before he or she can be considered an asylum seeker.[76] South Africa committed itself to the principle of non-refoulement. This principle finds expression in section 2 of the Refugees Act which prohibits the return of refugees and asylum seekers to a country from which they are fleeing persecution based on the grounds specified in it. Most asylum seekers do not enter the country through the designated entry point for fear that they would be denied the right of entry if they present themselves at the port of entry.[77] Consequently, they only seek asylum after their irregular entry into the country.[78] However, by the provisions of the Immigration law, a person who enters and remains in the country must do so within the confines of the law[79] because an asylum seeker who enters the country through irregular means could potentially be regarded by authorities as undocumented migrants, especially if they are not in possession of any other form of documentation. They are usually arrested and detained if found to have no document or to be in possession of expired asylum seeker permits.[80] Apart from refugees and asylum seekers, non-citizens

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[75] Weissbrodt, *The Human Rights of Non-Citizens* 110 (Oxford: Oxford University Press, 2008).

[76] Sec. 23 of the Immigration Act No. 13 of 2002 as amended by sec. 15 of the Immigration Amendment Act No. 13 of 2011

[77] Weissbrodt 2008

[78] Ibid

[79] Secs. 9(1),(4) and 10(1) of the Immigration Act No. 13 of 2002

[80] *Arse v. Minister of Home Affairs and Others*, (25/2010) [2010] ZAS CA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) (March 12, 2010); *Hassani v. Minister of Home Affairs*, (01187/10) SGH C (February 5, 2010) (unreported); *Kibanda Hakizimana Amadi v. Minister of Home Affairs*, (19262/10) SGHC (June 1, 2010) (unreported);

consist of migrant workers, foreign students, business visitors, tourists and undocumented migrants or "illegal foreigners."[81] There is a disjuncture between the guaranteed rights and the realities that face non-citizens.[82] Xenophobia leads to denying noncitizens their rights and access to justice which are guaranteed in domestic and international law.[83] The overarching international instrument for the protection of human rights remains the UDHR with its ancillary treaties like the International Covenant on Civil and Political Rights (ICCPR)[84] and the ICERD among others.[85] Since these instruments apply to all human beings, they apply to both citizens and non-citizens[86]alike irrespective of where one comes from and they safeguard everyone from arbitrary arrest and detention,[87] arbitrary killing[88] torture and inhuman treatment.[89]

Jean Paul Ababason Bakamundo v. Minister of Home Affairs and 2 Others, (17217/09) SGHC (May 12, 2009).

[81] This terminology comes from sec. 32 of the Immigration Act No. 13 of 2002. It was contested at the time of drafting by the SAHRC who felt it was offensive and objectified the persons concerned – *see* SAHRC Submission on Immigration Bill (2002) (May 15, 2017), available at https://www.sahrc.org. za/home/21/files/7%20SAHRC%20Submission%20on%20Immigration%20 Bill%20%28Parl.%29%20, April%202002.pdf

[82] Weissbrodt 2008,

[83] Ibid.

[84] UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations, Treaty Series, vol. 999, at 171.

[85] *See* the following treaties: African Charter on Human and Peoples' Rights; UN General Assembly, Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, at 3; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, United Nations, Treaty Series, vol. 1249, at 13. All these treaties have been ratified by South Africa and contain similar protections applicable to all, including migrants

[86] Art 2 of the UDHR; Art 1 of the ICERD

[87] Art. 9 of the ICCPR.

[88] A rt. 6 of the ICCPR

[89] A rt. 7 of the ICCPR

Understanding the reason and the role of law in curbing this violence and ensuring access to justice for immigrants is important for the country for several reasons: on a micro-level it would help prevent future attacks, while on a macro-level, the country would be able to meet regional cooperation such as tolerance and acceptance of non-citizens which the philosophy of ubuntu stands for.[90] According to Sachs J minority judgment in *the Union of Refugee Women's*[91]*case the basic tenets of xenophobia is the deep dislike of non-nationals by nationals of a recipient State. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non- nationals is not acceptable under any circumstances.*[92]

He cautioned however, that the manifestation of this phenomenon struck at the heart of the Bill of Rights, warning that it could subconsciously sip into the mainstream of life through biased interpretation and application of laws.[93] In an attempt to explain why xenophobia exists in South Africa, blame has been placed on the country's immigration laws which are perceived as exclusionary in context and operation.[94] The immigration law[95] is structured in such a way as to rope in the citizenry, businesses,

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[90] Nina .H. & de Jager, N., *Locals Only: Understanding Xenophobia in South Africa*, 33(1) Strategic Review for Southern Africa 120, 121 (2011).

[91] Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others, (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 IL J 537 (CC) (December 12, 2006),

[92] Para. 143

[93] Ibid

[94] Hopstock & de Jager 2011, at 127. The delay in implementing a new immigration system meant that the Aliens Control Act with its emphasis on security, sovereignty and exclusion continued in force until 2002. *See also* Neocosmos 2006. In 1997, the Department of Home Affairs led by Chief Mangosuthu Buthelezi (IFP) specifically rejected a Draft Green Paper on International Migration that was produced by an independent task team which called for a right-based approach to immigration.

[95] The Immigration Act No. 13 of 2002.

schools, tertiary institutions, hospitals, hotels and other local entities to identify and report undocumented migrants.[96] The Act requires that non-citizens should prove their lawful status in the country at all times, even to non-state actors such as landlords, businesses, schools, hospitals, banks and colleges.[97] The effect of this law is that it paints all noncitizens as "others" who, in accessing public and private services, must continually prove and justify the legality of their presence in the country. These xenophobic attitudes and practices by institutions of the state dehumanize foreign nationals in the country, rendering them easy and soft targets for non-state actors.[98]

Conclusion

This article has interrogated the concept of ubuntu and the experiences of immigrants in South Africa in view of International legal instruments that protects immigrants. It is observed that this revered philosophy of ubuntu is honoured more in breach than in observance even within the palace of the justice system which should uphold the virtues of human right and preservation of lives. It is equally observed that no person or group of persons has ever been prosecuted and punished for several xenophobic attacks on foreigners. This makes not only the citizens guilty but the government of South Africa as a whole. It will be recommended that international sanctions be placed on South Africa for several

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[96] Secs. 38 to 45 of the Immigration Act No. 13 of 2002. *See also* Darshan Vigneswaran, *Enduring Territoriality: South African Immigration Control*, 27(7) Political Geography 783 (2008).

[97] Vicki Igglesden et al., *Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008* (Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand, 2009);

[98] Jean-Pierre Misago et al., *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluation Responses*, Forced Migration Studies Programme (FMS P), University of the Witwatersrand and Consortium for Refugees and Migrants in South Africa (CoRMSA) (April 2010) (May 15, 2017), available at www.migration.org.za/uploads/docs/report-27.pdf.

and incessant xenophobic upsurge on foreigners. This principle of neighborliness and oneness should not only be preached but seen to be practiced among members of the South African communities. The various laws which expressly or impliedly encourage indigenes to police immigrants thereby creating unfriendly environment for foreigners should be amended to reflect the African concept of oneness. This philosophy of neighborliness should be preached through the mass media and taught in schools thereby emphasizing the need to live in harmony.