

Xenophobia and internal displacement in Africa: Defining protection and assistance through the Kampala Convention

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Abstract

Over the last decade, the issue of xenophobia has emerged as a pertinent concern in many parts of the African continent. While significant scholarly literature on the issue of xenophobia has notably considered the subject from various dimensions including human rights, an evident gap relates to situations of internal displacement. The aim of this article is to examine the issue of xenophobia from the perspective of internal displacement in Africa, with an examination of the experiences of South Africa and Kenya as examples. Discussion considers provisions for protection of persons internally displaced by xenophobia within the context of the Kampala Convention of the African Union (the Convention for the Protection and Assistance of Internally Displaced Persons in Africa). The research points to the need for a more definitive statement by the African Union prohibiting xenophobia and resultant internal displacement.

Keywords: Internally Displaced Persons; internal displacement; Kampala Convention; African Union; Africa; Xenophobia

Introduction

The question of xenophobia and its underlying premise has garnered significant attention over the last decade. Clearly implicit in the narrative is the question of difference among people groups and how that difference is operationalised in societal orderings and is contextually rendered in a manner that excludes specific categories on the basis of citizenship and nationality. Although these exclusions are generally condemned within national legal provisions, the factual reality and prevalence of exclusion on the basis of xenophobia has precipitated discussions and necessitated attention to the root causes of xenophobia and the ways in which the challenges it poses may be effectively tackled.

In various parts of the world, significant scholarly research has examined the issue of xenophobia within a plethora of contexts, but often with consensus around the notions of the foreign-other alongside the citizen-national of a state. There has been considerable research on the treatment of non-nationals within states and the need for enhanced protection. Scholars have significantly examined the root causes of these tensions¹ and considered strategies for addressing related concerns by a range of actors.² However, in the literature, a significant area that has not been examined relates to the issue of internal displacement in situations where xenophobia results in the forced displacement of populations. The aim of this article is to examine this issue.

For the most part, scholars have in the past focused on conflict as a root cause of internal displacement. In more recent times, there have also been discussions on the relationship between natural disasters, including climate change, and displacement, as well as displacement arising from development projects. However, another significant cause of internal displacement that requires attention is xenophobia. This article examines the issue of xenophobia from the perspective of internal displacement, contextualising the discussion in the context of the African Union Convention for the Protection and Assistance of Internally Displaced Persons (aka, the Kampala Convention) which was adopted in 2009.³

In advancing the discussion, this article is divided into three parts. The first part examines the issue of xenophobia in Africa, considering the concern across the continent and drawing on the rich scholarly discussion on this issue. The second part examines the issue of xenophobia as a root cause of internal displacement, specifically highlighting dimensions of the connection. The third part of this article discusses the Kampala Convention and leverages on the framework in articulating a policy response to the issue of xenophobia as a root cause of internal displacement.

The rhetoric of xenophobia

Much of the discussion on xenophobia on the continent has, in the past twenty years, been with specific reference to South Africa within the Southern African context.⁴ This is in part premised on the reality that much of the issue has gained momentum in the South African national context given the prevalence of reports and actual physical violence against non-nationals in the country. However, the fear of the foreign-other is a reality that cuts across various national contexts in the African region and indeed dates to the early periods of decolonisation as countries began to form national identities and determine who belonged within the nation-state. That it is a question of politics has indeed gained ground; observing the South African context, scholars such as Neocosmos, for instance, assert that the issue of xenophobia is:⁵

... an issue of power, of politics; in the absence of an understanding of this fundamental fact, it seems impossible to begin to address the problem, and the utterances of state institutions condemning xenophobia will continue to seem more and more like empty rhetoric, as it is state institutions which have provided the conditions for a hegemonic discourse of xenophobia in the first place.

Indeed, this observation is evident in the discourse of identities in many parts of the world.⁶

In Africa, this dilemma dates to the early periods of post-colonialism when power consolidation characterised the political landscape in the newly formed nation-states. The narrative on the benefits of citizenship and nationality was fraught with prejudices that were antithetical to the narrative of pan-Africanism and solidarity on the basis of collective identities. And even where access to the benefits of citizenship was constitutionally embedded, the reality within states often undermined the legal basis of these state protections. At the same time, the deontological underpinnings in matters of protection for excluded groups were not often a factor determining electoral victories within populist spaces. With the rise in notions such as *ivorité*, used as a descriptor of the purported intrinsic characteristics of an indigenous Ivorian, in contrast to immigrants,⁷ and the consequential implications of this ideation,⁸ constricting the rights of those who did not belong by virtue of nationality or

citizenship became notionally acceptable. Within these political processes, the constriction of mobility became an evident notion.

Further, as mobility became increasingly negotiated, there was a need to define who should have access – and to what spaces such access should be granted. Indeed, the economic realities in some national contexts in Africa created situations in which the right of some categories of people were reconsidered, with priority granted based on nationality and citizenship. This invokes the question of the social contract and the identities of the original parties in that contract. Social contract discussions subsequently became a dialogue between the population of the state by virtue of nationality and citizenship, on the one hand, and the representative-elect, or those that aspired to being representatives, of the nation-state. While it is worth noting that this was not necessarily the groundwork upon which societies emerged in pre-colonial Africa, with the existence of heterogeneity in cultures, languages and traditional rulership and a significant construction of identities along ethnic lines, this changed by the 1960s. In particular, they were affected by the advent of borders and the retention of the *uti possidetis* doctrine – under which newly-formed sovereign states retain the borders in place at independence – post-1960,⁹ notably at the Cairo Conference in 1964.¹⁰ In short, the optics for the social contract had to emerge from the idea of the nation-state and the preservation of such, with implications for who belongs and who does not – a dynamic with great consequences in later years.

Within this narrative are three stark realities: allegiance to the nation-state, ethnic/clan groupings and the broader continental narrative of integration. Depending on which society an individual is part of, allegiance to the nation-state may be prioritised over ethnic/clan groupings, or vice versa. While in some societies, the clash between loyalties to the nation-state versus ethnic/clan grouping identities has morphed into civil war, in others the greater conflict has arisen in the clash between those belonging to a nation-state and those who are perceived to be non-members of that nation-state.

Looking as far back as the 1960s, one can see evidence of xenophobia in many African countries. One manifestation of this issue has been through mass expulsions of foreign nationals. For instance, in 1969, Prime Minister Busia of Ghana issued an Aliens Compliance Order which required non-nationals to leave the country in a space of two weeks.¹¹ Yankson-Mensah describes the implications of this act for non-nationals, noting that it ‘seriously infringed on the property rights of foreign nationals, as their properties were confiscated by the state and distributed amongst supporters of the Busia government’.¹² She further notes that those ‘who remained in the country were also barred from engaging in specific local businesses and were therefore placed in very difficult economic positions’.¹³

In this and other instances of xenophobia on the part of African governments, it did not seem to matter that such ideation had minimal evidential basis when cast against empirical data. These emotive positions were often cast against the notion of scarcity of resources and an inward vantage point in determining access. For instance, the fact that jobs are limited could redefine access. In this context, foreign nationals become scapegoats of national frustrations, for instance, in the 1980s in Nigeria.¹⁴ While the economy is often the prevalent point upon which such rhetoric is constructed, there have been times when a personality cult has precipitated anti-foreigner sentiments. A famous instance is in Gabon with the tension between former President Bongo of Gabon and former President Kérékou of Benin.¹⁵ What started as an accusation on the part of Kérékou that some Gabonese officials were implicit in

a foiled coup in Benin, resulted in the deportation of thousands of Beninese from Gabon.¹⁶ Christopher Gray observes that:¹⁷

... [t]he Gabonese president was furious, viewing the accusations as both a personal insult and as an affront to the integrity of the Gabonese state. Thus, the person of Bongo and the image of the state were now merged in the minds of many Gabonese citizens.

There are other instances where this rhetoric is set out on the narrative that foreign-nationals are after natural resources of the state and it is imperative that diligence and caution be exercised against these populations in order to maintain national wealth. For instance, following a 2004 coup attempt in Equatorial Guinea, Adam Roberts observed that a senior government representative urged citizens to:¹⁸

beware of foreigners and ‘commandos’, who are more highly trained than an ordinary military officer ... [and] were going to come into Equatorial Guinea under the effects of drugs, and so they were not going to have pity on anyone.

The nation’s people were urged ‘to be vigilant with foreigners, regardless of colour because the target is the wealth of Equatorial Guinea, the oil’.¹⁹ Similar rhetoric has also emerged in Angola. In 2018, Human Rights Watch (HRW) condemned the expulsion of migrants from the Democratic Republic of Congo (DRC) in Angola following a crackdown on diamond mining activities.²⁰ According to a report obtained by HRW from one of those affected:²¹

Angolan soldiers forced us to leave with just our clothes,’ a 40-year-old Congolese diamond digger and father of two told Human Rights Watch over the phone. ‘I showed them my Angolan residency document, but they tore it apart. Then they forced us onto trucks and we were driven to the border with Congo. Before we were forced to leave, youth from the Tshokwe community attacked the Congolese in our town with machetes and looted our homes.

Blaming foreign nationals for criminal activities has also emerged in xenophobic rhetoric. The claim that it is imperative to constrict the movement of foreign nationals due to crime is a widely pervasive narrative in many societies – one that legitimises xenophobia even within liberal democracies. However, this conflation of migration with criminality cuts across the very basis of the constitutional protection of civil liberties. Moreover, on many grounds it factually goes against the commitment of states to the human rights norm of non-discrimination which exists as a cornerstone of international human rights law.²² To suggest that a group of people is made up of criminals by virtue of their nationality without factual basis is to reinforce the narrative of prejudice, with grave consequences for human security.

Far more to the point is the fact that a significant number of the economies across the continent rely heavily on the informal sector. Given that this sector is often far more accessible to foreign nationals as a means of making a living, particularly in countries where portability of formal skills and educational qualification is limited, there may be grounds for concern. With a vast majority of the national populations of many states also surviving on incomes from the informal sector, there is bound to be conflict where adequate, rights-based regulations, are not in place. Across many African societies, this is an issue which needs significant attention in the furtherance of sustainable solutions to xenophobia and in building cohesive societies. Not only is this important in the South African context, but in other

African countries where unemployment lies at the heart of much of the contemporary rhetoric on xenophobia.²³

Xenophobia and internal displacement

Before discussing the proposition that xenophobia is a root cause of internal displacement, it is pertinent to examine the issue of internal displacement itself, and to explain what is meant by the term in the context of forced migration. This is pertinent given the fact that the issue of internal displacement has not received as much consideration in the literature as comparable terms, such as the movement of persons outside the borders of a state,²⁴ often within the narrative of refugee protection – where these persons fit the definition of refugee under international law and are categorically distinct from IDPs.

From the start, it is useful to delineate the applicable normative frameworks for both IDPs and refugees, which are legally covered by distinct sets of regimes, both global and regional. At the global level, the UN Guiding Principles on Internal Displacement (henceforth, the Guiding Principles) were developed in 1998 to provide guidance on the protection and assistance of IDPs.²⁵ Many years earlier, in 1951, the UN Refugee Convention was developed in response to the refugee crisis of the Second World War.²⁶ However, given its dateline limitation (to events before 1 January 1951) and the geographic scope (only referring to Europe), it was limited in terms of applicability to other regions where refugee movements emerged – notably Africa, with the movement of people due to conflict in newly emerging post-colonial states. Even before a subsequent protocol was adopted in 1967 to address the limitations of the 1951 UN Refugee Convention,²⁷ the Organization of African Unity (OAU) had begun the process of developing a regional normative framework on refugee protection. This was subsequently adopted in 1969, although by then as a regional complement to the global framework.²⁸

It was only in the 1980s, however, that concrete discussions on the need to develop an international response to the plight of persons displaced within borders emerged, notably at the 1998 International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa, in Oslo, Norway.²⁹ Following advocacy led by non-governmental organisations including the Friends World Committee for Consultation (the Quakers), coupled with political momentum at the global level towards a response to the plight of persons displaced within state borders, the UN Secretary-General appointed a Special Representative on IDPs to engage in consultations and examine the existing normative frameworks on internal displacement.³⁰ The consultations and studies by the special representative eventually culminated in the development of the Guiding Principles in 1998.

Over the last two decades, the Guiding Principles have been recognised as the primary text on internal displacement. In 2005, the UN General Assembly recognised the Guiding Principles ‘as an important international framework for the protection of internally displaced persons’.³¹ Consequently, there was a ‘resolve to take effective measures to increase the protection of internally displaced persons’.³² Since formation of the Guiding Principles, at least 32 national laws and policies make reference to the Guiding Principles,³³ and at least 21 norms explicitly endorse the definition on IDPs.³⁴ Under the Guiding Principles, IDPs are described as³⁵

... persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of

human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.

This is also reflected in the Kampala Convention, as a legal definition. On the other hand, the UN 1951 Refugee Convention defines a refugee as a person who³⁶

... owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

While incorporating this definition under the 1951 Refugee Convention, the 1969 OAU Refugee Convention further expands on the definition of refugee as³⁷

... every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The fact that an IDP remains within the border of the state of displacement distinguishes an IDP from a refugee quite clearly. However, there is also the fact that while protection in the refugee context is provided by a state other than the state of displacement, protection in the context of internal displacement remains with the state in which an individual is displaced. Moreover, there is also the fact that being a refugee grants the so deemed person a particular status, which is not true for those deemed IDPs.

There is also the fact that IDPs may be forced to flee for a plethora of reasons not often captured in the global definition of a refugee. For instance, under international refugee law, a refugee is considered to be a person who flees the state of origin based on a well-founded fear of persecution on any one of five grounds – race, religion, nationality, membership of a particular social group and political opinion.³⁸ In the OAU Refugee Convention, a refugee is a person who ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality’ are ‘compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.³⁹

While the grounds upon which a person becomes an IDP broadly relate to ‘armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters’,⁴⁰ the definition of an IDP is not solely restricted to these issues. Although these provide a widely inclusive set of grounds upon which a person may be displaced, there are yet other root causes of internal displacement – such as development projects and climate change – as specifically recognised in the Kampala Convention. And indeed, there are other root causes not specifically recognised in the instruments relating to the protection and assistance of IDPs. Explicitly what is imperative to note about the global definition of an IDP is the fact that these are persons who have experienced ‘involuntary or forced movement, evacuation or relocation’ within the borders of a state.⁴¹ Moreover, the Kampala Convention seeks to prevent displacement ‘caused by any act, event, or phenomenon of comparable

gravity ... which is not justified under international law, including human right and international humanitarian law'.⁴²

It is relevant to emphasise that there is no requirement of nationality or citizenship linked to the description of an IDP.⁴³ Under the Kampala Convention, IDPs are defined as '*persons or groups of persons* who have been forced or obliged to flee or leave their homes or places of habitual residence' (emphasis added). What is imperative to keep in mind is the involuntary nature of the movement and the fact that displacement takes place within the borders of the state where these persons are resident.

Discussion now moves to the question of the relationship between xenophobia and internal displacement. More to the point, what provisions are there for the protection of persons who may be displaced specifically by xenophobia? This discussion looks at xenophobia and IDPs much more specifically, rather than perhaps subsuming the discourse within a much broader context such as violation of human rights. There are three pertinent reasons for this. First, understanding xenophobia as a root cause of internal displacement creates a basis for conceptualising solutions to the issue of internal displacement beyond the conventional narratives, such as that focused on armed conflict as a cause of internal displacement. Given the compelling need for finding sustainable solutions to the root causes of internal displacement, it is imperative to take into account these various factors.

The episodic triggers of xenophobic attacks and the complacency of national actors, or even the collusion of political structures within nation-states, makes a focus on this issue and its intersection with internal displacement critical. Linked to this are also the consistent narratives of political, economic and social grievances externalised through extreme forms of inhumane treatment of 'the other' within a society. These narratives have become a significant challenge for liberal democracies and for the ideology of human rights protection.

With the surge in local exploitation of difference within national territories, against the backdrop of increasing movements of populations across state borders in an era of globalisation and attendant attitudinal orientations, paying significant attention to the issue of xenophobia within the context of internal displacement is imperative. While xenophobia is an issue for which extensive interest has emerged in the global migration discourse, notably with respect to criminalisation of migration and refugee movements, there is yet a significant lacuna in research on the nexus between xenophobia and internal displacement.

Understanding this nexus is pertinent in appreciating the various root causes of internal displacement. Locating xenophobia as an IDP research agenda is also imperative given the increased xenophobia, as earlier identified in the rhetoric globally. In Africa, this manifests through the economic and socio-political discourse on access to resources and opportunities.

While much of this discussion dates back to the early periods of decolonisation, with the distinction of 'in-groups' and 'out-groups' within newly formed nation-states and the consolidation of sovereignty, the surge in nationalism as a conduit for establishing societal belonging and linked with this, access to economic resources, has fomented the rhetoric. Connected with this is the deconstruction of the idea of social cohesion even in national consciousness and political rhetoric as an endeavour that is abstract to the notion of general inclusivity. When the ideology of cohesion is divided into an 'in-group' and 'out-group' binary, or not significantly implemented with an appreciation of a collective, the out-group becomes susceptible. In the context of increased competition for limited resources or an increasing need for securitisation, with the emergence of insurgencies or even within the

context of consolidation of political power, hierarchies form with regard to access to societal spaces, often excluding the ‘out-group’ as the foreign-other. These exclusions may be through economic marginalisation or outright mass expulsions, as evidenced in a plethora of instances across the continent. Internal displacement has also emerged as a concern. The next section examines the nexus, or interlinkages, between xenophobia and internal displacement.

The interlinkages

In understanding the interlinkage between xenophobia and internal displacement, it is relevant to examine developments which have unveiled this concern in Africa where there are two observable connections between the issue of xenophobia and internal displacement. These are: 1) xenophobia-induced generalised violence and 2) the implementation of discriminatory anti-foreigner policies.⁴⁴ In drawing these connections, it is useful to consider two examples that significantly demonstrate the issues requiring attention: the situation in South Africa and the situation in Kenya. Each of these situations is discussed in turn.

In South Africa

First, the issue of xenophobia-induced generalised violence has been mostly prevalent in the South African context. Going back to 2008, the wave of attacks against foreign nationals led to the displacement of individuals from their homes and places of habitual residence in the Alexandria region.⁴⁵ It was reported subsequently, that the May 2008 riots led to the displacement of an estimated 100,000 individuals.⁴⁶ A subsequent wave of attacks against foreign nationals in South Africa’s Western Cape Province led to the displacement of about 3,000 people, mainly Zimbabweans. The attacks in 2015, led to the displacement of over 5,000 people in the Kwa-Zulu Natal region.⁴⁷ Most of those displaced in the attacks were nationals from Malawi, Zimbabwe and Mozambique. In 2019, the UN Refugee Agency reported that about 1,500 individuals were displaced in xenophobic attacks, with a constituent majority being refugees and asylum seekers in addition to migrants.⁴⁸

In Kenya

Aside from situations of xenophobia-induced generalised violence, there are also instances where internal displacement occurs as a result of the implementation of discriminatory anti-foreigner policies. An example of such a situation, for instance, is in Kenya with respect to Somali refugees. In 2012, for instance, the government of Kenya released a directive requiring all ‘asylum seekers and refugees from Somalia’ to ‘move back to Dadaab refugee camps’ and also ‘all asylum seekers and refugees in the urban area from other countries’ to ‘move back to Kakuma refugee camps’. In its statement, it expressed that:⁴⁹

Hosting [a] large number of refugees [on] our borders has not been without challenges. Among them, major challenges [have] been rampant insecurity in the refugee camps and urban areas. It is in this public domain that many people have been killed and several more injured with grenade attacks in our streets, churches, buses, and in business places. Due to this unbearable and uncontrollable threat to national security, the government has decided to put in place a structure encampment policy.

Regarding refugees with existing legal documentation, the Acting Commissioner for Refugee Affairs at the time noted that:⁵⁰

... their legal documentation ... ceased to function in the urban areas. So, if [refugees] continue staying in the urban areas, then they will be staying illegally and that is a function of another department of government, probably police and immigration.

Subsequently, thousands of Somali refugees were forcibly moved into refugee camps, scapegoated as the cause of terrorist attacks.

These two examples of internal displacement due to xenophobia provide a context for the following discussion of the Kampala Convention.

Protection under the Kampala Convention

In 1969, the Organisation for African Unity (which by 2002 had evolved into the African Union) adopted a regional framework on refugee law as a regional complement to the global framework on international protection of refugees. At the time, there were internal conflicts within states and populations were being displaced, however for the most part there was silence from the international community given the fact that such situations were understood to fall entirely within the sovereign control of the state concerned. With respect to the internal conflict in the Sudan between the northern and southern regions that started in the 1950s and sporadically returned until the independence of South Sudan in 2011, Hiram Ruiz observed that the government had been able to pursue policies of internal displacement ‘by insisting that the issue of internal displacement in the Sudan [was] a domestic concern and [had] donned the mantle of state sovereignty to keep the international community at bay’.⁵¹

However, with the emergence of the notion of sovereignty as responsibility,⁵² the conversation began to shift; increasingly, there was recognition of the fact that sovereignty was not a cloak to preclude responsibility but rather the state derived its legitimacy by exercising its authority responsibly. And within this emerging recognition, there was a place for the international community to respond to the protection of civilian populations, both refugees who had crossed borders and also IDPs, given the precarity of their situations – often heightened by the fact that the state in which internal displacement occurred may be unable or unwilling to provide protection and assistance. Within an understanding of this pertinent fact, an international regime emerged on the protection and assistance of IDPs. Though non-binding, the Guiding Principles have crystallised into an acceptable global standard on IDPs, reflecting sensitivity to various normative contexts and providing an optic for advancing durable solutions to internal displacement concerns in various national contexts. Moreover, within the Great Lakes Region, it further finds expression as part of the Great Lakes Pact on Security, Stability and Development, through the Protocol on the Protection and Assistance to Internally Displaced Persons adopted in 2006.⁵³

Due, in part, to the need to reinforce protection and assistance at the regional level, the AU decided to adopt a specific framework on internal displacement, leveraging on this global framework. Adopted by the AU Assembly in 2009 following a drafting process that started with an AU Executive Council decision in 2004, the Kampala Convention has become an important framework for fostering IDP safeguards. As the blueprint on protection and assistance of IDPs in Africa, the Kampala Convention has had notable impacts across various levels of governance. Not only has the Kampala Convention found expression in the development of national frameworks, it has also shaped continental and regional strategies towards strengthening protection for IDPs. Notably, it guides the regional humanitarian agenda on IDP issues. And with significant ratification by AU Member States, the Kampala

Convention has shaped the optics for discussing internal displacement concerns across various states in the region. The Kampala Convention complements the global framework on internal displacement while also infusing elements of the regional dimension on protection and assistance for IDPs, through its recognition of certain innovative areas around which there is a need to articulate protection and assistance. Significantly through its 23-article provisions, the Kampala Convention sets out the content of IDP safeguards. Notably, it articulates state responsibility in the prevention of displacement, the protection of IDPs and the provision of humanitarian assistance, and suggests pathways to durable solutions.

Essentially, the Kampala Convention restates provisions of international law and is quite emphatic on the need for states to comply with international legal provisions in advancing protection and assistance of IDPs. This particular narrative is specifically incorporated in Article 4(1) of the Kampala Convention, which provides that states ‘shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, so as to prevent and avoid conditions that might lead to the arbitrary displacement of persons’.⁵⁴ The crux of this is that in abiding by international legal obligations, states can prevent conditions of arbitrary displacement. In this sense, the Kampala Convention significantly points to the respect of existing norms as articulated in various treaties as a precondition for the protection of IDPs. Considering the plethora of regional treaties, the Kampala Convention draws on a wide array of normative frameworks, including frameworks relating to the preservation of democratic governance, gender and the furtherance of environmental protection. Abiding by existing provisions of these normative frameworks provides a foundation from which to construct policies for prevention of international displacement, as articulated in Article 4(1) of the Kampala Convention. This is imperative, not least, given the fact that much of what eventually results in arbitrary displacement is often precipitated by a failure to comply with existing international legal obligations.⁵⁵

Central to the thesis of the Kampala Convention is the right not to be arbitrarily displaced, which reinforces the need for states to ensure that all persons are protected from displacement that is not justified in international law and which does not follow due process requirements. The right not to be arbitrarily displaced is integral to defining the constituent scope of the Kampala Convention. While rooted in human rights, the expanse of this right relates to the various normative frameworks that are integral to ensuring that persons are protected against arbitrary displacement.

There is something to be said about the fact that the binding nature of the Kampala Convention creates significant leverage through which this right may be legitimately asserted against states by IDPs, for instance, before supervisory mechanisms at various levels of governance. Moreover, the existence of this right grounds the discussion on internal displacement within a much more robust normative context – the human rights system with its consequential benefits of jurisprudence, supervision and state reporting. Encased in Article 4(4) of the Kampala Convention, the right not to be arbitrarily displaced significantly bolsters the narrative of internal displacement in binding obligations even beyond the Guiding Principles. In short, within the African context, states may incur responsibility for violation of this right which is explicitly guaranteed for all persons within its borders.

In article 4(4) of the Kampala Convention, several causes that may give rise to arbitrary displacement are recognised. These include:

1. Displacement based on policies of racial discrimination or other similar practices aimed at or resulting in altering the ethnic, religious or racial composition of the population;
2. Individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law;
3. Displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict;
4. Displacement caused by generalised violence or violations of human rights;
5. Displacement as a result of harmful practices;
6. Forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected;
7. Displacement used as a collective punishment;
8. Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.

Furthermore, the opening paragraph of Article 4(4) articulates that the ‘prohibited categories of arbitrary displacement include but are not limited to’ the various issues recognised in this provision.⁵⁶ As such, there may be other situations that could give rise to internal displacement for which the Kampala Convention is relevant for the furtherance of protection and assistance. However, it is pertinent to emphasise the central thrust of the convention – that is, the protection of all persons against arbitrary displacement.

For the purposes of the present discussion, the question arises, how should protection for persons internally displaced by xenophobia be understood? Or put differently, what are the parameters for the protection and assistance of persons thus affected by xenophobia, within the provisions of the Kampala Convention?

Generally, xenophobia is not permissible under international law, specifically human rights law, and is recognised categorically as an infraction on human rights. According to the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, ‘[r]egardless of the way in which it manifests itself, xenophobia violates the fundamental principles of equality and non-discrimination that are at the core of international human rights law’.⁵⁷ Displacement on the basis of xenophobia, given that it is impermissible, should therefore be regarded as arbitrary. Consequently, setting in place measures to prevent xenophobia must be an essential starting point for conceptualising the obligation to prevent arbitrary displacement. Put differently, it is crucial for states to ensure that measures are taken to prevent xenophobia; such social cohesion measures should be activated through action-oriented policy and through legislation at the state level. A good example of such a policy calling for action is the South African National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (the South African NAP), which was adopted in 2019 as a strategy to address the issues of focus, including xenophobia. Recognising that xenophobia ‘presents a serious challenge towards the protection of human rights’,⁵⁸ the South African NAP emphasises the need to set in place measures to combat xenophobia. Some of these measures include ‘acknowledging and condemning acts of bias-motivated violence whenever they occur, enacting hate crime laws, strengthening law enforcement and prosecuting offenders’.⁵⁹

In order to ensure that effective safeguards against xenophobia exist, it is imperative that states put in place strong institutional measures, including accountability structures and legislation that criminalises xenophobia, and that they avoid any policies that perpetuate discrimination against foreign nationals. In view of evolving trends pointing to the vast dissemination of the rhetoric of xenophobia over social media and other digital platforms as seen in South Africa⁶⁰ – referred to as the digitisation of xenophobia – safeguards must also be put in place in the digital space.

Another significant thrust of the Kampala Convention is the imperative of maintaining due process; protection and assistance must be accorded and not denied to those that have been displaced as a consequence of an illegal act. Such due process entails three elements.⁶¹ First, general guarantees must be provided, as entrenched in various provisions of the Kampala Convention. These range from the provision of adequate living conditions for IDPs to efforts toward sustainable solutions. Second, there are group-based guarantees which require that measures be taken in the furtherance of protection and assistance of specific groups such as women and children. Third, there are cause-specific guarantees, generally relating to those conditions that are required for the furtherance of protection and assistance in the context of particular root causes of internal displacement. In the context of internal displacement induced by xenophobia,⁶² adequate structures should be established for ensuring swift humanitarian assistance as with protection from harm. Also, specific services should be made accessible to those displaced including consulate services for their countries of origin. In the context of sustainable solutions, long-term social cohesion strategies must also be vigorously pursued. The South African NAP, for instance, reinforces the need for the state to:⁶³

... promote a spirit of integration through engaging communities where xenophobia is rampant. Government should send out clear messages that violence against foreign nationals and xenophobic attacks will not be tolerated and that those involved in such activities will be prosecuted.

Besides emphasising the obligation on states to prevent arbitrary displacement, the Kampala Convention requires states to ensure that non-state actors are prevented from engaging in arbitrary displacement.⁶⁴ However, there is a question as to the nature of this obligation. The significance of this question in the context of the discussion on xenophobia arises from the fact that agents of displacement in instances of xenophobia may be private individuals and not public officials. In constructing the nature of this obligation, it is instructive to examine the relevant provisions of international law. Generally, in international law, an act of a non-state actor may be attributed to a state where the actions of such actors are under the control of the state. However, international human rights law further recognises a dimension of responsibility; that is, in situations where a state fails to exercise due diligence and as such fails to take specific measures against a non-state actor, such a situation may place the responsibility for such an act of a non-state actor upon the state. The scope of this due diligence obligation has been firmly established by the African Commission in jurisprudence; notably, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the African Commission on Human and Peoples' Rights (African Commission) articulates the parameters of this obligation in emphasising that:⁶⁵

A State can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights. However, unlike for direct State action, the standard for establishing State responsibility in violations committed by private actors is more relative.

Responsibility must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action... This [non-action] sends a message that such attacks are justified and will not be punished. To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.

Placed within the context of the discussion, the obligation of the state with respect to non-state actors is to ensure due diligence in the furtherance of protection and assistance of IDPs. As such, states must ensure that its own laws are enforced whether in the case of state or non-state actors, and that perpetrators of displacement are held accountable. Generally, this will require effective institutional structures within the state, which in turn rely upon the existence of a bedrock of normative frameworks that articulate both protection and assistance for IDPs as well as the means to hold accountable non-state actors, in line with the Kampala Convention.

Conclusion

The issue of xenophobia has emerged as a serious concern in Africa. Addressing this concern in its various dimensions has become a significant issue necessitating effective solutions. Focusing on the issue of internal displacement due to xenophobia, this article examines the issue of protection and assistance to IDPs by leveraging on the Kampala Convention. As the regional framework to address the need for protection and assistance for IDPs, the Kampala Convention has significantly influenced the development of normative frameworks to guide the development of institutional responses at various levels of governance on the continent, and has contributed to the legal corpus on forced migration in Africa. Recognising the interlinkages between the issues of xenophobia and internal displacement, this article argues that protecting IDPs within the context of xenophobia requires states to ensure that adequate mechanisms are established to provide legal protections and humanitarian assistance to those displaced, as well as effective social cohesion measures in the furtherance of durable solutions. Moreover, both state and non-state actors should be held accountable. In moving the debate forward regionally, it is here proposed that a statement be adopted by the African Commission – in the form of an AU General Comment – specifically on the issue of xenophobia. That statement should reflect on the evident link between xenophobia and internal displacement, leveraging on relevant normative frameworks including the Kampala Convention. As the issue of xenophobia has been emphasised by the African Commission as a recurring challenge,⁶⁶ articulating an actual response will be useful in addressing the concern. The African Commission has, in the past, used General Comments to advance clarity on specific issues of significant concern that may not be explicitly covered by regional treaties. For instance, through its General Comment No 5, it elaborated on the right to freedom of movement and residence within the borders of states as provided under article 12(1) of the African Charter.⁶⁷ Similarly, it has utilised General Comments to provide clarity on the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa.⁶⁸ Jointly with the African Committee on Experts on the Rights and Welfare of the Child, it has also advanced clarity on state obligations with respect to child marriage.⁶⁹ Given the recurring challenge of the issue of xenophobia, adopting a General Comment will be useful in advancing clarity. Such a statement will support the AU's regional drive towards integration and a unified continent.

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Notes

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