

**DIPLOMATIC PROTECTION
AND XENOPHOBIC VIOLENCE IN SOUTH AFRICA:
THE CASE FOR REPARATION TO MOZAMBICAN VICTIMS**

**SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS OF THE DEGREE LL.M (HUMAN RIGHTS AND
DEMOCRATISATION IN AFRICA)**

BY

AMÉRICO CARLOS MARINDZE

PREPARED UNDER THE SUPERVISION OF

DR HENRY ONORIA

AT THE FACULTY OF LAW, MAKERERE UNIVERSITY

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Declaration

I, Américo Carlos Marindze do hereby declare that the dissertation '**Diplomatic protection and xenophobic violence in South Africa: The case for reparation to Mozambican victims**' is my original work and that it has not been submitted for any degree or examination somewhere else. Where someone's work has been used (whether from a printed source, the internet or any other source) due acknowledgment has been given.

Student: Américo Carlos Marindze

Student No: 10675796

Signature:

Date.....

Supervisor: Dr Henry Onoria

Signature.....

Date.....

Dedication

To the deceased of 2008 xenophobic violence in South Africa

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South African Refugee Act 130 of 1998.

Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
CC	Constitutional Court
CCGC	<i>Conselho Coordenador de Gestão de Calamidades</i>
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CNOE	<i>Centro Nacional Operativo de Emergência</i>
CoRMSA	Consortium for Refugees and Migrants in South Africa
CRA	Constitution of the Republic of Angola
CRAI	Citizenship Rights in Africa Initiative
CRSA	Constitution of the Republic of South Africa
CRU	Constitution of the Republic of Uganda
DA	Democratic Alliance
DHRINCL	Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live
ECHR	European Convention on Human Rights
FMSP	Forced Migrants Studies Programme
GA	General Assembly
GDP	Gross of Domestic Product
HRC	Human Rights Committee
IACHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
INGC	<i>Instituto Nacional de Gestão de Calamidades</i>
Inter-American Convention	Inter-American Convention on Human Rights
MAE	<i>Ministério da Administração Estatal</i>
OHCHR	Office of the High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
R	Resolution
SA	South Africa
UN	United Nations
UDHR	Universal Declaration of Human Rights

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Chapter one: Introduction

1.1 Background

Xenophobia is a fear or contempt of that which is foreign or unknown, especially of strangers or foreign people. It comes from the Greek words ξένος (*xenos*), meaning "foreigner," "stranger," and φόβος (*phobos*), meaning "fear." The term is typically used to describe a fear or dislike of foreigners or of people significantly different from oneself.¹

On 11 May 2008 foreigners, mainly black people who lived in poor areas were attacked by South African citizens in South Africa; the attacks started in Alexandra, Johannesburg and spread to other areas in the country.² Due to the occurrence 62 people were officially confirmed dead; 342 foreigners' shops were looted and 213 burnt down.³ Forty one foreigners were killed during the incident; such kinds of xenophobic attacks against foreigners had taken place in the country before, having reached their peak in May 2008.⁴ Further, 'at least 670 people were wounded, and over 100 000 displaced.'⁵

Due to the intensity of the violence, the Democratic Alliance (DA) party urged the government of South Africa to organize and deploy the army in order to help the police stop the attacks.⁶ However, only on the eleventh day did the government deploy the army; at that moment about 'forty people had died, hundreds injured and thousands more displaced.'⁷ Only by 26 May 2008 the government declared the incident under its control.⁸

¹ 'Executive summary research report on the causes and immediate impact of xenophobic unrest in Gauteng' (June 2008) 1

<http://www.plus94online.co.za/.../xenophobic_violence_causes_and_impact_executive_summary.pdf>.

(accessed 14 August 2010) See also Merriam-Webster online dictionary, defining xenophobia as a 'fear and hatred of strangers or foreigners or of anything that is strange or foreign' <<http://www.merriam-webster.com/dictionary/xenophobia>> (accessed 14 August 2010).

² See JP Misango et al 'May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses' (2010) 41-46 <<http://www.cormsa.org.za/wp-content/uploads/2009/05/may-2008-violence-against-foreign-nationals-in-south-africa.pdf>> (accessed 5 August 2010).

³ Misango (n 2 above) 46.

⁴ n 2 above, 38-39.

⁵ 'Counting the cost of our descent: Xenophobia in South Africa today' (2010). <<http://www.xenophobia.org.za/newroutes.pdf>> (accessed 5 August 2010).

⁶ Citizenship Rights in Africa Initiative (CRAI) report 'Tolerating intolerance: Xenophobic violence in South Africa' (2009) 12 <<http://www.citizenshiprightsinafrica.org/Publications/2009/CRAISARReport.July2009.pdf>> (accessed 20 July 2010).

⁷ As above.

Thus, acts of xenophobia against foreigners in South Africa implicate state responsibility for injury to 'aliens,'⁹ under international law.¹⁰ It is said that '[in] no field of international law [has] more highly controversial questions arisen than in that which involves the relations between the state and citizens of foreign states.'¹¹ An injury to a foreigner can give rise to the duty of states to make reparation¹² to the injured individual.¹³ Therefore, in case of an injury to a foreigner, he or she may require protection from the state of nationality which can, for instance be exercised by means of diplomatic protection.¹⁴

In the mean time, the fact that acts of xenophobic violence were directed, mainly against black foreigners,¹⁵ having resulted in deaths and loss of property, the paper considers the right to life, the right to non-discrimination on the ground of race and nationality (hereinafter referred to as 'the right to non-discrimination') and the right to own property in relation to foreigners victims of xenophobic violence in South Africa. These three rights are discussed in order to find out whether foreigners have legal protection arising at the global level, regional and at the national affairs in South Africa. In addition, considering deaths of 17 Mozambican

⁸ M Duponchel 'Who's the alien? Xenophobia in post-apartheid South Africa' (2009) 4

<<http://www.csae.ox.ac.uk/conferences/2010-EdiA/papers/175-Duponchel.pdf>> (accessed 1 October 2010) See also V Igglesden 'Xenophobic violence in South Africa in May 2008: The humanitarian response in Gauteng and the Western Cape: a narrative account' (2008) 6
<<http://cormsa.org.za/wpcontent/uploads/Research/Disaster/NarrativeHumanitarianResponse.pdf>> (accessed 1 October 2010).

⁹ 'An Alien is an individual who, according to the laws of a given State, is not considered its national.' See C Tiburcio *The human rights of aliens under international and comparative law* (2001) 1. The paper makes no distinction between an alien and a foreigner. To this point, it refers to a foreigner as an alien or a natural person who is not a national of a certain State.

¹⁰ International law 'is ... commonly used for referring to laws that govern the conduct of independent nations in their relationships with one another ...' See Wikipedia, the free encyclopedia 'international law' (May 2010). <http://en.wikipedia.org/wiki/International_law> (accessed 15 October 2010). See also MN Shaw *International law* (2003) 1 & 2. However, it can be used to refer to public international law (State relations and intergovernmental organizations), and private international law or law of conflicts. See Wikipedia, the free encyclopedia (as stated herein).

¹¹ CG Fenwick *International law* (1965) 328.

¹² See chapter four.

¹³ See United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR)'s Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005) 16, principle 31 (E/CN.4/2005/102/Add 1). <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>> (accessed 14 October 2010).

¹⁴ See chapter two.

¹⁵ Research report (n 1 above) 2.

nationals due to the violence, the paper considers the right to life for purposes of reparation with regard to the Mozambican victims.

South Africa (SA) is party to the international human rights treaties which oblige State parties to ensure protection of the aforesaid human rights, for example, the International Covenant on Civil and Political Rights (ICCPR),¹⁶ International Convention on the Elimination of all Forms of Racial Discrimination (CERD)¹⁷ and African Charter on Human and Peoples' Rights (ACHPR).¹⁸ The paper research refers to a treaty as synonym of covenant, charter or convention.¹⁹ In addition, the Constitution of the Republic of South Africa (CRSA) obliges the government to ensure protection of the stated rights to 'all people' under its Bill of Rights (the Bill).²⁰ Be that as it may, some foreigners were killed and others lost their property in South Africa during the violence.

1.2 Problem statement

As a result of xenophobic attacks against foreigners 17 Mozambican nationals were killed by South African citizens.²¹ Ernesto Alfabeto Nhamuave of Mozambican nationality '... was dragged to the public square at the centre of Ramaphosa, doused with petrol, covered with his own clothes and blankets and set alight.'²² The aforesaid international human rights treaties and the CRSA enshrines and guarantees²³ the right to life to everyone.²⁴ It is noted

¹⁶ General Assembly (GA) Resolution (R) 2200A (XXI), 21 UN GAOR Supp, Doc, A/6316 No 16 52 1966. Entry into force 1976.

¹⁷ SA ratified ICCPR and CERD on 10 December 1998. See South African treaty series <<http://satreatyseries.net/hrights.htm>> (accessed 12 May 2010).

¹⁸ SA ratified ACHPR on 9 July 1996. See Chart of ratifications: African Union (AU) human rights treaties. <<http://www.africa-union.org.>> (accessed 5 July 2010).

¹⁹ 'A treaty is an agreement creating binding obligations between subjects of international law' See UO Umozurike *Introduction to international law* (1993) 17. A treaty can be used synonymously with convention, protocol, charter, accord, *compromis*, pact, statute, regulation, act, covenant, arrangement, understanding. See Umozurike (n 19 as stated in this note). See also West's encyclopedia of American law <<http://www.answers.com/topic/treaty>> (accessed 30 September 2010).

²⁰ CRSA, sec 7(1) & (2).

²¹ *Ministério da Administração Estatal/ Conselho Coordenador de Gestão de Calamidades (MAE/CCGC) Informação Especial número 4 2* (26 May-6 June 2008).

²² A Nyar 'What happened: A narrative of the May 2008 xenophobic violence' (2010) 18 <http://www.gcro.ac.za/sites/default/files/News_items/Xeno_reports_July2010/synthesis/4_What_happened.pdf> (accessed 3 September 2010).

²³ See ICCPR, art 2(3) and sec 38 of the CRSA. Under the latter provision, any person who has their rights under threat or infringed can seek reparation in South Africa.

several times that when a person is killed abroad states may not concentrate on what should be done to make a remedy on behalf of the victim; very often they focused on apologies towards another states or to the state of nationality of the individual and do not address the issue of reparation to the victims or their relatives. To this point, the issue whether the Mozambicans who died as a result of xenophobic violence in 2008 are entitled to reparation seems not to be centre of attention; it appears like nothing has happened at all.

As such, the research sought to find out whether South Africa has legal obligations under international law to make reparation to Mozambican nationals killed as a result of xenophobic violence towards foreign nationals under its jurisdiction. While it might be argued that reparation would be a nugatory remedy insofar as the victims have already died in this case such benefit would accrue to the deceased's next-of-kin.²⁵

1.3 Assumptions underlying study

When a state becomes party to a treaty, it must observe its content.²⁶ The international human rights treaties oblige state parties to ensure protection of human rights contained therewith irrespective of the nationality of the individual.²⁷ In other words, they oblige state parties to guarantee safety of all human beings within their jurisdictions. If the state is unsuccessful to apply such a treaty or treaties, as corollary under international law it has obligation to make reparation.²⁸ Thus, the assumption upon which this study was based is that states once party to a treaty they are obliged to ensure compliance with its content; in the context of international human rights treaties; they are obliged to warrant protection of human rights of all people in their jurisdictions enshrined thereof; and failure to do so entails legal obligations to make reparation.

1.4 Significance of the research

²⁴ See ICCPR, art 6, ACHPR, art 4 and the CRSA, sec 11.

²⁵ See *VR v HIACHR (Velásquez Rodrigues Case)* (29 July 1988) ser C/ No 4 para 194. The Inter-American Court ordered the State of Honduras to make reparation or compensate the next-of-kin of the victim (Velásquez's relatives) due to his disappearance.

²⁶ See Vienna Convention on the Law of Treaties (1969), arts 11-17.

²⁷ See European Convention on Human Rights (ECHR), art 1; Inter-American Convention on Human Rights (Inter-American Convention), art 1(1); ICCPR, art 2(1) and ACHPR, art 1.

²⁸ See *Factory at Chorzów (Factory at Chorzów)* Jurisdiction 1927 PCIJ ser A/No 9 21. See also *Case Germany v United States of America (La Grand)* ICJ (27 June 2001) (2001) ICJ reports 466 para 48; J Crawford *The international law commission's articles on state responsibility: Introduction, text and commentaries* (2002) 201; Umozurike (n 19 above) 125

This study sought to illustrate how diplomatic protection can be used by states in order to request reparation to their nationals victims of mob violence abroad from another States. It attempted to demonstrate the extent to which is a state under legal obligation in the international sphere to make reparation for its failure to protect foreigners in its jurisdiction. It is expected that the study guide the government of Mozambique as regards the available mechanisms to seek redress to its nationals. Furthermore, it is hoped that the research builds interest in the area and inspire more academic research in this field.

1.5 Objectives

The overall objective of this paper was to examine the case for reparation to Mozambican victims of xenophobic violence by means of State's diplomatic protection. The specific objectives included:

- a) To look at the causes of xenophobic violence in South Africa;
- b) To explore whether South Africa has legal obligations to protect human rights of foreigners under its jurisdiction, notably the right to life, non-discrimination and the right to own property;
- c) To explore the impact of xenophobic violence on Mozambican victims or affected by the violence;
- d) To examine South Africa's legal obligations at the international level, if any to make reparation to Mozambican nationals victims of xenophobic violence;
- e) To analyse the available mechanisms that Mozambique could through diplomatic protection ask for reparation to its nationals victims of the violence in South Africa from the South African government;
- f) To raise awareness on the topic, amongst others, states, scholars, legal practitioners and commentators;
- g) To guide the government of Mozambique with respect to the steps to follow in order to ask for reparation to its nationals;
- h) To make recommendations to the government of South Africa as regards prevention or steps to adopt in similar scenarios in future.

1.6 Research questions

The study sought to answer the following research questions:

- a) What are South Africa's legal obligations under international law to make reparation to Mozambican nationals killed in May 2008 as result of xenophobic violence in its territory?

- b) What are the available mechanisms that Mozambique can through diplomatic protection ask for reparation to its nationals victims of xenophobic violence from the South African government?
- c) What are the existing means of reparation under international law?
- d) Is there any standard of treatment of foreigners in relation to states?

1.7 Literature review

The review of existing literature on xenophobic violence, diplomatic protection and reparation was conducted to give insights concerning the research. Researchers, national and international human rights organizations, political parties commented and wrote on the possible causes of xenophobia against foreigners in South Africa; its impact and possible solutions with regard to the incident. However, none of them addresses how the victims of such acts should be redressed, particularly for Mozambican nationals who were killed in the violence.

Considering the magnitude of xenophobic violence in May 2008 and its implications to foreigners or even to the South African government; taking into account reports of ongoing of such acts in South Africa there is actually need to explore or expand this area in order to explain the uselessness of xenophobia in South Africa or elsewhere so that hopefully the handling of the situation either by states, citizens or other entities can change and people can understand and refrain from xenophobic attitudes.

The most recent research report (April 2010) on xenophobic violence against black foreigners in South Africa was conducted by Consortium for Refugees and Migrants in South Africa (CoRMSA) and Forced Migrants Studies Programme (FMSP) in the most affected areas. The research found that economic, social concerns, for instance unemployment, crimes, marriage issues might have contributed to the outbreak of xenophobic attacks against foreigners in South Africa but they fall short to explain the outburst of the incident in certain areas but not in others with similar features; thus the study concluded, amongst other reasons behind xenophobic violence, lack of conflict resolution mechanisms within townships and existence of behaviours or conducts of xenophobia among South African citizens.²⁹

The expectations were high during the reading of this report in the sense that it could somehow addresses the issue of reparation to the victims killed in 2008 xenophobic attacks. Additionally, in its recommendations it does not mention or urge the government of South

²⁹ n 2 above, 167-168 & 177-178.

inter alia to criminalize acts of xenophobia in the country, to protect witnesses and facilitate complaints or actions in the domestic courts against people who perpetrated 'criminal' acts or xenophobic violence towards foreigners. It does not even come up with an establishment of an 'intelligence police officers' to try to identify and report on the instigators and perpetrators of xenophobic conducts against foreigners in South Africa.

Academics and the ILC's Draft Articles on diplomatic protection with commentaries (2006) (hereinafter referred to as 'Draft Articles on Diplomatic Protection') and ILC's Draft Articles on State responsibility for the internationally wrongful acts (2001) (later cited as 'Draft Articles on State responsibility') explore diplomatic protection, its requirements, the treatment of foreigners with respect to states and the consequences arising for states' internationally wrongful acts.³⁰

The ILC's Draft Articles on diplomatic protection although deal with the secondary rules of diplomatic protection; they do not foresee any situations dealing with mob violence or referring to indigence to exempt individuals to exhaust domestic remedies with respect to the exercise of diplomatic protection by their states.

The ILC's Draft Articles on State responsibility for internationally wrongful acts do not look at the issue of xenophobic violence against foreigners as an internationally wrongful act giving rise to state responsibility, therefore the relevance of exploring this field.

The government of Mozambique recorded some documents addressing the impact of xenophobic violence on Mozambicans and also documented its assistance on behalf of its nationals victims of the occurrence in South Africa.³¹ The aforesaid documents do not deal with or mention the way forward in which the government of Mozambique should adopt to seek reparation to its nationals killed by South Africans under South Africa's jurisdiction. Thus, the research seeks to contribute in this regard.

³⁰ See J Dugard *International law: A South African perspective* (2005) 269-298; AAC Trindade *The application of the rule of exhaustion of local remedies in international law: Its rationale in the international protection of individual rights* (1983) 111-112 (*deals with the element of exhaustion of local remedies and its exceptions under international law*); Draft Articles on Diplomatic Protection <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> (accessed 7 October 2010); Tiburcio (n 9 above) 1-69; Draft Articles on State responsibility ILC report on the work of its 53rd session UN GAOR 56th Session/Supplement /No10 UN Doc A/56/10 29 (2001).

³¹ See n 21 above. See also *Ministério da Administração Estatal/ Instituto Nacional de Gestão de Calamidades/ Centro Nacional Operativo de Emergência (MAE/INGC/CNOE) Informação especial número 15 CENOE/INGC/2008* (5 June 2008).

Unpublished work thesis by Mnyaka (2003), Culbertson (2009) and Zarifis (2009) have written on xenophobia and reparation respectively. This study is different from the theirs in the sense that, it deals with diplomatic protection as a tool in which could be exercised by the government of Mozambique to obtain reparation from the government of South Africa on behalf to its nationals killed as a result of xenophobic attacks against foreigners in South Africa. For instance, Mnyaka differs from this study by examining xenophobia in the perspective of gospel and *ubuntu* ethical principles after the apartheid in South Africa and exilic Israel. Culbertson explores xenophobia in the perspective of its impact on Zimbabweans in South Africa. Zarifis examines reparation in the light of the victims of gross human rights violations in post conflict areas, specifically Uganda.

In short, there is considerable literature written on diplomatic protection, xenophobic violence in South Africa and on reparation, however there is not any similar approach as concerns this study which attempted to combine them to reach a unique goal. In other words, this study sought to use diplomatic protection as a means to ask reparation on behalf of the victims of xenophobic violence in South Africa, specifically the Mozambican nationals killed at that time.

1.8 Methodology

The research focused on already collected and recorded information or data emanating from secondary sources in the literature, reports, journals, books, unpublished works, monographs, similar material sources³² and on the internet. It also involved discussion with an official of the government of Mozambique. The author critically analysed the government of South Africa's intervention towards foreign nationals victims of xenophobic violence in South Africa in 2008. On the whole, the research was based on qualitative desktop research.

1.9 Limitation of study

The research focused on diplomatic protection in its broad sense which include amongst other means, negotiation, conciliation and consular relations. It is expected that the problem arising in this paper is sorted out between Mozambique and South Africa without resorting to other means like arbitration or judicial mechanisms. Regardless of other forms of reparation that may be agreed to take place between Mozambique and South Africa; considering the fact that the targets for reparation are Mozambican nationals who were killed in the violence,

³² See BE Osaze & PF Izedonmi, *Guidelines for writing theses and dissertations for postgraduate students in Africa* (2006) 20.

due to lack of time and word limit, the paper examines financial compensation as a form in which should be established for the victims through their relatives. It is stressed that for the purposes of exercising diplomatic protection in this work, the research addresses to natural persons. Bureaucratic procedures within the institutions of the government of Mozambique served as limitation to access documented information on xenophobic violence against its nationals in South Africa and also to have discussions with officials. Once more, the period of time (August-October) and the place (Uganda) where the main research work was conducted to some extent limited the collection of data on xenophobic violence.

1.10 Chapter overview

The paper consists of five chapters. The current chapter establish the introduction of the research, providing background, problem statement, theoretical framework, significance of the research, objectives of study, research questions, literature review, methodology, and delineation and limitation of study.

Chapter two examines the conceptual framework of diplomatic protection, its requirements and state responsibility for injury to foreigners. Lastly, it explores the treatment of foreigners given with respect to states.

Chapter three deals with legal obligations and the case for reparation to Mozambican nationals victims of xenophobic violence. Hence, this chapter explores South Africa's legal obligations, if any to make reparation to Mozambican nationals killed during the violence. First, it establishes South Africa's legal obligations to protect foreigners under its jurisdiction and its compliance or not of the rule of due diligence with respect to foreign nationals; it briefly looks at the presence of lawfully foreigners in South Africa and the possible causes of xenophobic violence including its impact on Mozambican nationals victims of the incident.

Chapter four deals with the available mechanisms which Mozambique can rely on in order to ask for reparation to its nationals killed as a result of xenophobic attacks against foreigners in 2008.

Finally, chapter five outlines the main conclusions and recommendations with regard to the research.

Chapter two: **State responsibility for injury to foreigners and diplomatic protection**

2.1 Introduction

In this chapter the paper examines the treatment of foreigners in relation to states. That is to say, what is the position of states as concerns to the treatment of foreigners in their territories? As starting point, it deals with the conceptual framework of state responsibility for injury to foreigners and finally, it examines diplomatic protection including the circumstances in which it can be exercised by States.

2.2 Conceptual framework

2.2.1 Diplomatic protection

The term 'diplomatic' is 'connected with managing relations between countries [or] ... diplomacy.'³³ Diplomacy is 'the activity of managing relations between different countries; skill in dealing with people in difficult situations without upsetting or offending them.'³⁴ The word 'protection' means 'the state of being protected.'³⁵ It is from the verb 'to protect' which means 'to make sure that somebody or something is not harmed, injured, [or] damaged ...'³⁶

Thus, literally defining, diplomatic protection is the activity of managing relations between different countries in order to make sure that somebody or something is not harmed. This definition is incomplete for the purposes of this paper but it helps to understand the gist of the two terms.

Black's law dictionary defines diplomatic protection as 'protection given by one country's representatives to a person, usu[ally] its citizen, against another country's alleged violations of International law.'³⁷ In addition to that, it states that³⁸

³³ Oxford advanced learner's dictionary (2006) 410.

³⁴ As above.

³⁵ Oxford advanced dictionary (n 33 above) 1168.

³⁶ P Procter 'Cambridge international dictionary of English' (1995) 1136. See also n 33 above, 1168.

³⁷ BA Garner 'Black's law dictionary' (2004) 490. Tiburcio defines diplomatic protection as 'an elementary principle of international law under which an individual who was wronged in a strange land and who had there been unable to obtain that justice which had been refused him can obtain justice.' See n 9 above, 37.

³⁸ Black's law dictionary (n 37 above) 490-491.

[t]he term diplomatic protection is not altogether precise. First, not only diplomatic agents and missions and other foreign offices may and do exercise diplomatic protection, but also, at a different level, consuls, and, although very rarely, military forces. Secondly, the term diplomatic protection does not clearly denote the boundary line to other diplomatic activities for the benefit of individuals, such as mere promotion of interests in one's own nationals in a foreign State, or friendly intercessions with foreign authorities. Thus, diplomatic or consular actions to obtain concessions or other government contracts for nationals from the receiving State, or the arrangement of legal defence for a justly imprisoned national are not diplomatic protection in our sense; they are usually neither directed against the other State nor based on a real or alleged violation of international law ...

As outlined above diplomatic protection can be exercised by diplomatic missions, foreign offices, consuls, and rarely by military forces. It is clarified that diplomatic or consular actions to obtain concessions or other government contracts for nationals in another State, the legal defence for a justly imprisoned nationals or other similar arrangements do not constitute diplomatic protection strictly defined provided that they are usually neither directed against the other state nor based on a real or alleged violation of international rule. The paper refers to diplomatic protection on the premise that there is a breach of an international obligation and the claim, specifically the problem in consideration through the paper is directed against another state's representatives.

The ILC's Draft Articles on Diplomatic Protection define diplomatic protection as³⁹

... the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

'Diplomatic action' requires legally recognized means used by a certain state to inform another of its concerns regarding an issue by protesting, requesting for an inquiry or to enter into negotiations in order to solve a problem.⁴⁰ 'Other means of peaceful settlement' 'embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement.'⁴¹

In *Kaunda and others v the President of South Africa and another (Kaunda Case)*⁴² Chaskalson CJ quoting the report of the special rapporteur⁴³ on diplomatic protection said

³⁹ Draft Articles on Diplomatic Protection, art 1.

⁴⁰ Draft Articles on Diplomatic Protection, art 1 commentary (comm) 8.

⁴¹ As above.

⁴² *Kaunda Case* 2004 10 BCLR 1009 (CC) para 27.

that diplomatic protection comprises, 'in a broad sense,' "consular action, negotiation, mediation, judicial and arbitration proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures."

The commentary on draft article 1 above explains the meaning of 'diplomatic action' as well as 'other means of resolving an issue and *Kaunda case* apart from enquiry reiterates negotiation and adds *inter alia*, 'consular action' as diplomatic protection in its broad sense. Hence, diplomatic protection in this its broad sense is adopted as a working designation throughout the paper.

As concerns to the theoretical source of diplomatic protection, it is controversial; first its theory commonly supported is that once a person is one of the elements of the state and also party of it, 'whoever ill-treats ... [him or her] harms the State of nationality itself.'⁴⁴ This theory perceives diplomatic protection as a right entitled to the state and not to the individual.⁴⁵ In *Von Abo v Government of the Republic of South Africa (Von Abo Case1)*⁴⁶ the earlier position was set aside, having the court held that diplomatic protection was a right entitled to the individual and not to the state; therefore, the latter had a duty to protect its nationals by means of diplomatic intervention. The second, is objective theory in the sense that every state is bound by rules of international law so whoever breaches it, is responsible; finally, a philosophical theory emphasising respect for human rights by calling on the state of nationality of the individual to act on its behalf due to the personal difficulties in accessing remedies in the international spheres.⁴⁷ Alternatively, this theory emphasises the idea that disputes on the similar matter are solved between sovereign states.⁴⁸

2.2.1.1 Requirements for exercise of diplomatic protection

The requirements of diplomatic protection comprise primary and secondary rules.⁴⁹ Nationality and exhaustion of local remedies are secondary rules and the conduct of the

⁴³ See Report of the ILC on the work of its 52nd session 1 May to 9 June and 10 July to 18 August (2000) A/55/10 15.

⁴⁴ See n 9 above, 63.

⁴⁵ *Mavrommatis Palestine Concession Case* 1924 PCIJ reports ser A/No 2 12. See also *Penevezys-Saldutiskis Railway Case* 1939 PCIJ reports ser A/B No 76 4 16. The Permanent Court held that the State's right of diplomatic protection is conferred by the 'bond of nationality' between the person and the State.

⁴⁶ *Von Abo Case* 2009 2 SA (T) para 60.

⁴⁷ n 9 above, 63.

⁴⁸ As above.

⁴⁹ Dugard (n 30 above) 282.

state which violates norms of international law in relation to the treatment of foreigners fills the primary rule of diplomatic protection.⁵⁰ The Draft Articles on Diplomatic Protection only deals with the secondary rules.⁵¹ As Tiburcio points out the condition for exercise of diplomatic protection depends on the state of nationality of the injured individual to act; depends on the exhaustion of local remedies by the individual and finally, it depends on the existence of a wrongful conduct considered as such at the international level imputable to the foreign state.⁵² It is stressed that the paper analyses diplomatic protection in the perspective of natural persons. Henceforth, it examines the aforementioned conditions for exercise of diplomatic protection in turn.

Nationality

In certain situations, nationality and citizenship are used interchangeably,⁵³ including 'naturalty' which generally dictates a territorial term where the person is born or in relation to the place in the country.⁵⁴ Citizenship relates to constitutional law designation normally referred to people inside the country as holders of civil and political rights, and nationality is used as an international law term, indicating legal connection between the State and the individual for external reasons.⁵⁵

In Case *Liechtenstein v Guatemala (Nottebohm Case)*,⁵⁶ the Court held that it was up to any state to establish rules in order to allow people acquiring its nationality at the domestic level⁵⁷ but for the purposes of exercising diplomatic protection on behalf of its national it depended on international law. This position receives support under ILC's Draft Articles on Diplomatic Protection.⁵⁸ As a general rule, according to ILC's Draft Articles on Diplomatic Protection a state may exercises diplomatic protection on behalf of its national who is not national of the defendant state.⁵⁹ This line of consideration has support in the Hague Convention.⁶⁰

⁵⁰ As above.

⁵¹ Arts 3-15 .

⁵² n 9 above, 37. See also Trindade (n 30 above) 7.

⁵³ Dugard (n 30 above) 282.

⁵⁴ n 9 above, 1.

⁵⁵ Dugard (n 30 above) 283.

⁵⁶ *Nottebohm Case* ICJ (6 April 1955) (1955) ICJ reports 4 paras 20-21.

⁵⁷ Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) 179 LNTS 89, art 1. Entry into force 1 July 1937, 'United Nations Treaty Collection'

<<http://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=512&lang=en>> (accessed 24 August 2010).

⁵⁸ Art 4.

⁵⁹ Art 6.

However, the state of predominant nationality of the individual at the time of his or her injury and the date of the claim may exercise diplomatic protection on their behalf against another state.⁶¹ Diplomatic protection also takes into account continuous nationality of the individual.⁶² Predominant nationality or the criteria of effective nationality in matters of dual nationality referred to earlier on relates to '[s]tronger factual ties between the person concerned and one of the states whose nationality is involved,' regular domicile, interests and involvement in public life of the individual.⁶³

Exhaustion of local remedies

As a general rule a state can present a claim or problem in the international sphere after the harmed individual exhausted domestic remedies.⁶⁴ There is need not exhaust local remedies to intervene by the state of nationality of the individual, if the defendant state breached an obligation or a treaty accorded with the former state (direct injury) but it is normally required to do so by the individual if there is a breach of an international obligation or a treaty through its nationals (indirect injury).⁶⁵ It is sometimes not clear to establish a distinction between direct and indirect injuries of the state, mainly in mixed cases.⁶⁶ In these situations normally courts apply 'preponderance test.'⁶⁷

Eagleton points out that in violent crowd against foreigners the rule of exhaustion of local remedies does not apply,⁶⁸ therefore the state of nationality of the individual can intervene. Furthermore, according to the advisory opinion requested by the Inter-American Commission on Human Rights to the IACHR relating to a complaint in which the complainant could not afford legal expenses in order to exhaust local remedies, the Court bearing in mind states general obligations to ensure and guarantee protection of all people in their jurisdictions

⁶⁰ Hague Convention (n 57 above), art 4.

⁶¹ Draft Articles on Diplomatic Protection, art 7.

⁶² Draft Articles on Diplomatic Protection, art 5.

⁶³ See I Brownlie *Principles of public international law* (1998) 418.

⁶⁴ Draft Articles on State Responsibility, article 14. See also *Case Switzerland v United States of America (Interhandel Case)* ICJ (21 March 1959) (1959) ICJ reports 6 para 27. The Court held that exhaustion of domestic remedies for the purposes of exercising diplomatic protection was a 'well-established rule of customary international law.'

⁶⁵ CF Amerasinghe, *Local remedies in international law* (2004) 145-168. See also Draft Articles on Diplomatic Protection, art 14, comm 9.

⁶⁶ Dugard (n 30 above) 293. See also Draft Articles on Diplomatic Protection, art 14, comm 9.

⁶⁷ Dugard (n 30 above) 293.

⁶⁸ C Eagleton *The responsibility of states in international law* (1970) 92.

(article 1(1) of the Inter-American Convention); considering as well equal protection of people under the law (article 24 of the Inter-American Convention) held that preventing a petitioner to present a claim for non-exhaustion of local remedies due to unaffordable ‘... necessary legal counsel or the costs of the proceedings ...’ was discriminatory on the basis of the person’s economic standing.⁶⁹ As such, it concluded as follows:⁷⁰

... [I]f legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies.

The Inter-American Court’s assessment in relation to the Inter-American Commission’s request is relevant for the purposes of this paper as much as the victims of violent crowd in South Africa as illustrated at the problem statement in chapter one, first are foreigners, second they are already dead and they were not well off to allow their relatives to initiate costly legal proceedings in order to seek reparation or compensation in domestic courts in South Africa. In this vein, the paper proceeds on the premise that the relatives of the Mozambican nationals killed during xenophobic violence in 2008 cannot afford costly legal representation in South Africa as well as they cannot support the necessary expenses to move from one country to another in that respect; therefore the need of relying on diplomatic intervention.

Wrongfulness under international law

The Draft Articles on State Responsibility provide that ‘[e]very internationally wrongful act of a State entails the international responsibility of that State.’⁷¹ There is a breach of an international obligation when an act or omission of the state ‘is not in conformity with what is required of it by that obligation, regardless of its origin or character.’⁷² It is said that ‘any violation by state of any obligation of whatever origin gives rise to state responsibility and consequently, to the duty to make reparation.’⁷³ This point is dealt with later on. The consequences resulting from breaching a treaty are deemed matters of customary law of

⁶⁹ See Advisory opinion OC-11/90 IACHR (10 August 1990) ser A/NO 11 para 22. <http://www1.umn.edu/humanrts/iachr/b_11_4k.htm> (accessed 2 October 2010).

⁷⁰ Advisory opinion (n 69 above) para 30.

⁷¹ Draft Articles on State Responsibility, art 1.

⁷² Draft Articles on State Responsibility, art 12.

⁷³ *New Zealand v France (Rainbow Warrior)* 30 April 1990 RIAA 251 para 75. See also D M Chirwa ‘The doctrine of State responsibility as a potential means of holding private actors accountable for human rights’ (2004) <<http://www.austlii.edu.au/au/journals/MelbJIL/2004/1.html>> \ "fn55" > (accessed 10 August 2010).

state responsibility.⁷⁴ In *Spanish Zone of Morocco Claims Case*,⁷⁵ Huber held that 'responsibility is a necessary corollary of a right. All rights of an international character involve international responsibility.' Then, the internationally wrongful act takes place if the state infringes those rights and its obligations.⁷⁶

2.3 State responsibility for injury to foreigners

According to Slomanson since ancient times foreigners were regarded with fear, as suspicious to the extent that the Romans denied them to benefit from *jus civile*.⁷⁷ In the thirteenth century, imperial Spain refused foreigners to exercise their trading rights as well as they had limited access to courts in England.⁷⁸ Infringement of an obligation⁷⁹ imposed on states under international law which gives rise to their responsibility, particularly due to the injury of foreigners are linked to so-called 'modern international human rights violations'.⁸⁰ By law the state and a foreigner create correlative duties and rights since it is expected that the state protects the rights of the foreigner under treaties or conventions and the latter respects *inter alia*, the laws and policies of the former.⁸¹

It is submitted that a breach of an international obligation may arise directly through actions or omissions of state officials or indirectly if the state fails '... to take all reasonable and adequate measures to prevent private wrongs, including the duty to arrest and bring an offender to justice.'⁸² The responsibility of states through private wrongs against foreigners occurs if the state lacks for observing the rule of due diligence.⁸³ The rule of due diligence is also detailed below. In violent crowd directed against foreigners 'if a state consistently

⁷⁴ *Rainbow Warriors arbitration Case* (1991) 82 ILR 499 551.

⁷⁵ 1928 PCIJ ser A/No 17 para 29.

⁷⁶ PM Dupuy 'The international law of state responsibility: Revolution or evolution?' *Michigan Journal of International Law* (1989) 105.

⁷⁷ WR Slomanson *Fundamental perspectives on international law* (2003) 97.

⁷⁸ Slomanson,(n 77 above) 97. See also D Chatur 'Responsibility of states for injury to aliens' <<http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=dchatur>> (accessed 18 August 2010).

⁷⁹ 'The obligation may derive from a treaty, from custom, or from a general principle of law.' See Wikipedia, the free encyclopedia, 'State responsibility' <http://en.wikipedia.org/wiki/State_responsibility> (accessed 26 August 2010).

⁸⁰ D Shelton *Remedies in international human rights law* (2005) 58.

⁸¹ Chatur (n 78 above).

⁸² Shelton(n 80 above),n 31 above, 59.

⁸³ See n 80 above, 59; *Velásquez Rodrigues Case* (n 25 above) paras 166-188. See also for further discussion on duties of states to protect, prevent, investigate and redress in compliance with the rule of due diligence Eagleton (n 68 above) 87-94.

negligent in its duties of prevention and restraint [of mob], it must itself accept responsibility for injuries occasioned by its omissions ...⁸⁴ In addition to that, its responsibility can arise for failure to intervene in a 'notorious danger' against foreigners or in a situation where a warning to take due precautions was given and the state ignored it.⁸⁵

2.4 Treatment of foreigners

There are two opposing views regarding the treatment of foreigners.⁸⁶ The first relates to the "national treatment standard" and another refers to the "international minimum standard."⁸⁷ States have no obligation to admit foreigners in their countries but once they do; they are expected to treat them in civilized manner.⁸⁸ The national treatment standard, primarily receives support from developing countries⁸⁹ and the international minimum standard is supported by developed nations.⁹⁰ In the light of the national treatment standard foreigners 'are entitled to the same treatment granted to nationals and nothing else.'⁹¹ However, this type of treatment is seen as unfavourable to foreign nationals since the state can submit a foreign to unacceptable situations and justify its conduct on its national laws⁹² which is forbidden under international law.⁹³ In this sense, the national treatment standard may not take into account fundamental human rights entitled to foreigners and it can serve as a justification of states to escape international responsibility.⁹⁴

On the contrary, the international minimum standard treatment requires states to treat foreigners by observing the international minimum standards in so far as the application of

⁸⁴ n 68 above, 92.

⁸⁵ n 68 above, 91.

⁸⁶ See Brownlie (n 63 above) 526-527. See also Dugard (n 30 above) 297.

⁸⁷ MN Shaw *International law* (2008) 824. See also 'The Latin American position on State responsibility: Looking into the past for lessons on the future' (2009) 30 <<http://lapa.princeton.edu/uploads/2009-0209%20Montt%20LEGS%20chapter.pdf>> (accessed 11 October 2010).

⁸⁸ Case *Barcelona Traction Light & Power Company Ltd* (Barcelona Traction Case) ICJ (5 February 1970) (1970) ICJ reports 3 para 33.

⁸⁹ DJ Haris *Cases and materials on international law* (2004) 564. See also Latin American position (n 87 above) 4-39.

⁹⁰ Haris (n 89 above) 564. See also Dugard (n 30 above) 297; Chatur (n 78 above).

⁹¹ n 9 above, 45. See also M Dixon, *International law* (2007) 256.

⁹² n 9 above, 45. See also Chatur (n 78 above).

⁹³ *US v Mexico (Roberts Claim)* (1926) 4 RIAA 77.

⁹⁴ n 63 above, 526.

national laws or polices have to comply with the standards of civilization in terms of international rules.⁹⁵

In present days there is an acceptance that the treatment of foreigners with regard to their personal rights should be based on the international minimum standard in which its content is in the 'international human rights instruments and customary international law.'⁹⁶ In relation to the international minimum standard towards foreigners the state of nationality of the individual can intervene diplomatically on behalf of its nationals if they are submitted to rules contrary to international law⁹⁷ by government officials in the foreign state or in a situation of mob violence.⁹⁸ In this vein, the answer to the issue concerning the treatment of foreigners by states is that there are two opposing standards of treatment, namely the national treatment standard and the international minimum standard whereby the international minimum standard seems much more protective to foreign nationals compared to the other provided that it implies that states at domestic levels observe customary international law, international human rights treaties in relation to the treatment of foreigners,⁹⁹ instead of merely relying on the national laws, polices or states' internal rules.

2.5 Conclusion

States can exercise diplomatic protection in direct injury or in indirect injury; in direct injury, they need not meet all the requirements of diplomatic protection, for instance, exhaustion domestic remedies.¹⁰⁰ As a general rule, in indirect injury states are required to meet all the requirements, namely nationality of the individual in relation to the intervening state, exhaustion of local remedies in the defendant state by the individual and existence of an internationally wrongful conduct committed by the defendant state considered as such under

⁹⁵ Dugard (n 30 above) 297. See also Dixon (n 91 above) 256; *US v Mexico* (1926) 4 RIAA 60. The court held that governmental acts of Mexico should conform to international standards regarding the US claim that Mexico had not observed due diligence rule in finding and prosecuting the murderer of the US national. See also *Roberts Claim* (n 93 above), the court of arbitration held that equality was not the ultimate goal to measure the adequacy of treatment of the foreigner but yes, the ultimate goal was to ensure that the foreigner was treated in accordance with international minimum standards of civilization required under international law. This case relates to Harry Roberts a US national who was illegally arrested and held in prison for seven Months without hearing and under intolerable conditions of incarceration.

⁹⁶ Dugard (n 30 above) 297.

⁹⁷ n 9 above, 53.

⁹⁸ See B Sen *A diplomat's handbook of international law and practice* (1988) 335.

⁹⁹ See Dugard (n 30 above) 297.

¹⁰⁰ See Amerasinghe (n 65 above) 145-168; See also Draft Articles on Diplomatic Protection, art 14, comm 9.

international law.¹⁰¹ Scholars and case law, respectively share that in cases of mob violence against foreigners and in situations in which the applicant at the domestic level cannot afford legal representation or proceedings due to his or her indigence the rule is inapplicable.¹⁰²

The responsibility of states for injury to foreigners can arise as a result of their breach of an international obligation with regard to foreigners, directly through actions or omissions of state officials or indirectly if they fail to adopt adequate measures to prevent private wrongs.¹⁰³ In relation to the treatment of foreigners there are two opposing views. The national treatment standard, mainly supported by developing countries is of the view that foreigners are treated in the same circumstances as nationals.¹⁰⁴ The international minimum standard treatment requires states at the national level to comply with certain standards of civilisation as concerns to the treatment of human beings or merely foreigners by observing international rules

¹⁰¹ See n 9 above, 37. See also Trindade (n 30 above) 7.

¹⁰² See Eagleton (n 68 above) 92 and n 69 above, 30.

¹⁰³ See n 80 above, 59.

Chapter three: **Legal obligations and the case for reparation to Mozambican victims of xenophobic violence**

3.1 Introduction

In this Chapter the paper seeks to answer the question whether South Africa is legally obliged at international level to make reparation to Mozambican nationals killed as a result of xenophobic violence in 2008. First, it establishes South Africa's legal obligations to ensure protection of foreigners under its jurisdiction arising at international level and under its constitution. In order to answer the latter question, it looks at South Africa's duties to protect foreigners' rights, namely the right to life, the right to non-discrimination and the right to own property. With respect to the former question, it considers the right to life under ICCPR and ACHPR, treaties in which South Africa is party to in order to ascertain whether it breached them as concerns to the deaths of Mozambicans during the violence. Briefly, the research discusses possible causes behind the outbreak of xenophobic violence against foreigners; the current situation of xenophobia in South Africa; the impact of xenophobia on Mozambican victims; Mozambique's assistance towards its national and finally, it gives an overview of foreigners who are in South Africa lawfully albeit human rights of everyone either lawfully or not in a country are protected by law.¹⁰⁵

3.2 Lawful foreigners in South Africa

Under the migration labour system, many people in Africa have migrated to South Africa for work purposes, primarily in the mining industry.¹⁰⁶ Many of them are black African employees from neighbouring countries.¹⁰⁷ According to Mnyaka citing the South African Government White Paper on International Migration¹⁰⁸ the mining industry in South Africa depends on

¹⁰⁵ See NB Pityana 'Xenophobia: A violation of human rights' (1998)

<<http://www.queensu.ca/samp/Conferences/Agendas/agenda3.htm>> (accessed 20 August 2010).

¹⁰⁶ MMN Mnyaka 'Xenophobia as a response to foreigners in post-apartheid South Africa and post exilic Israel: A comparative critique in the light of gospel and *ubuntu* ethical principles' unpublished PhD thesis, University of South Africa, 2003 10 <<http://0-uir.unisa.ac.za.innopac.up.ac.za/dspace/bitstream/10500/1176/1/Thesis.PDF>> (accessed 20 August 2010).

¹⁰⁷ See 'South Africa's mining sector hit by immigration policy problems' (28 May 2008)

<<http://www.fleetstreetinvest.co.uk/commodities/mining/immigration-policy-problem-hits-sa-mining-sector-00114.html>> (accessed 18 October 2010).

¹⁰⁸ Sec 6:4.4.6

migrant work.¹⁰⁹ Additionally, apart from mining industry there are traders who go to South Africa to buy goods or products; this, one way or another helps to develop South African economy; and others go to South Africa for a visit or study purposes in which for the latter it is believed that the international students contribute to cultivate interest in universities and also benefit South African universities in terms of finance, academia and sharing of cultures.¹¹⁰

In 1998 tourism contributed with 8.2 per cent of South Africa's Gross of Domestic Product (GDP)¹¹¹ and in 2008 foreign business contributed with about 25 per cent.¹¹²

It is emphasised that during discussion session in the joint team meeting,¹¹³ the Minister of Home Affairs, Ms Nosiviwe Mapisa-Nqakula recognized the relevance of foreigners, particularly migrant workers in South Africa in these terms:¹¹⁴

'[W]ith all the current sensitivities, the issues of xenophobia must be considered separately from the issue of migrants. South Africa's economy had always been dependent on migrant labour ...' To this end, the one can say that presence of foreigners in South Africa, particularly those in legal terms contribute to the growth of South African economy; therefore, it should be seen as constructive to South Africa and to the rest of African continent as a whole.

3.3 South Africa's legal obligations to protect foreigners

As already outlined, South Africa is party to ICCPR, CERD¹¹⁵ and ACHPR.¹¹⁶ These instruments oblige state parties to ensure protection of, amongst others, the right to life,¹¹⁷

¹⁰⁹ Mnyaka (n 106 above) 10.

¹¹⁰ n 106 above, 12-14.

¹¹¹ World summit on sustainable development 'Pro-poor tourism: Harnessing the world's largest industry for the World's poor (May 2001) 3 <<http://www.propoortourism.org.uk/Dilys%20IIED%20paper.pdf>> (11 October 2010).

¹¹² C McConel 'Migration and xenophobia in South Africa' (2008)

<<http://www.se1.isn.ch/serviceengine/Files/ISN/101184/...591C.../Chapter+5.pdf>> (accessed 20 July 2010).

¹¹³ Ministerial task team set up on the 14 May 2008 'comprising the Ministers of Health, Education, Safety and Security, Social Development and Home Affairs mandated to visit the area to investigate the nature of the attacks and the reasons ...' <<http://www.pmg.org.za/report/20080529-xenophobia-attacks-ministerial-briefing>> (accessed 20 July 2010).

¹¹⁴ 'Xenophobia attacks: Ministerial briefing (29 May 2008).' (2008) <<http://www.pmg.org.za/report/20080529-xenophobia-attacks-ministerial-briefing>> (accessed 20 July 2010).

¹¹⁵ See n 17 above.

¹¹⁶ See n 18 above.

¹¹⁷ ICCPR, art 2 read with art 6(1) and ACHPR, art 1 read with art 4. See also DHRINCL, art 5(a) and UDHR, article 3.

the right to non-discrimination¹¹⁸ and the right to own property.¹¹⁹ Scholars stress that the right to non-discrimination (on the ground of race) has acquired customary international law status in the UDHR.¹²⁰ In this sense, obligations of states to protect foreigners from discrimination based on race occur not only for being party to international human right treaties but also from customary international law.

According to the CRSA the 'Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people ...'¹²¹ in which 'the state must respect, protect, promote and fulfil the rights in the [Bill] ...'¹²² Further, the interpretation of the Bill must take into account international law.¹²³ The three human rights under consideration for the purposes of establishing South Africa's legal obligations to protect foreign nationals, notably the right to life, the right to non-discrimination and the right to own property are enshrined in the CRSA. The Bill states that '[e]veryone has the right to life,'¹²⁴ '[e]veryone is equal before the law and has the right to equal protection and benefit from the law.'¹²⁵ Section 9(3) & (4) of the Bill states that

[t]he [S]tate may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race ... colour ... and birth. No person may unfairly discriminate directly or indirectly against anyone ... National legislation must be enacted to prevent or prohibit unfair discrimination.

Lastly, the Bill stipulates that 'no one' may be deprived of property ... and no law may permit arbitrary deprivation of property.¹²⁶ In *Khosa v Minister of Social Development (Khosa Case)*,¹²⁷ the CC held that 'everyone' cannot be understood as referring only to South African 'citizens.' Accordingly, the terms above 'all people,' 'everyone,' 'no person,' 'anyone' and 'no one' under the Bill demonstrate clearly that foreigners enjoy rights enshrined in the Bill; and therefore require protection from the South African government. These expressions are

¹¹⁸ ICCPR, art 2(1), ACHPR, art 1 read with art 2 and UDHR, art 2 and DHRINCL, art 5(c).

¹¹⁹ CERD, art 5(d)(v); ACHPR, art 1 read with art 14; UDHR, art 17 and DHRINCL, art 5(2)(d).

¹²⁰ Dugard (n 30 above) 278.

¹²¹ CRSA, sec 7(1).

¹²² CRSA, sec 7(2).

¹²³ CRSA, sec 39(1)(b).

¹²⁴ CRSA, sec 10. According to Mansfield a State has obligation to respect and protect the right to life. See J Mansfield 'Prosecuting sexual violence in the Eastern Democratic Republic of Congo: Obstacles for survivors on the road to justice' (2009) 2 *African Human Rights Law Journal* 375 footnote 49.

¹²⁵ CRSA, sec 9(1).

¹²⁶ CRSA, sec 25(1).

¹²⁷ *Khosa Case* 2004 6 SA 505 (CC) para 47.

similar to those enshrined under Uganda Constitution (CRU),¹²⁸ chapter four ('protection and promotion of fundamental and other human rights and freedoms').¹²⁹ Other African countries exclude protection of foreigners in their constitutions by using terms such as 'all citizens,' 'any citizen,' 'no citizen,' instead of the aforesaid terms, for instance the Constitution of the Republic of Angola (CRA)¹³⁰ under its fundamental rights and duties.¹³¹

In *State v Makwanyane (Makwanyane case)*,¹³² the CC held that the right to life is 'the most important of all human rights, and the source of all other personal rights.' Moreover, in *Kaunda v President of the Republic of South Africa (Kaunda case)*¹³³ Ngcobo J dealing with the issue whether death penalty was constitutional or not said that South Africa '... is committed to a society founded on the recognition of human rights. [It] must give particular value to the right to life.'

In relation to the right to non-discrimination, in *Prinsloo v Van der Linde (Prinsloo Case)*,¹³⁴ the CC held that unfair discrimination comprises 'principally ... treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.' There are illegitimate grounds of differentiation which can result in unfair discrimination under section 9(3) and another based on 'analogous grounds.'¹³⁵ 'Analogous grounds' are those which are 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.'¹³⁶ In this regard, unfair discrimination under section 9(5) of the Bill takes place if one of the grounds or all under section 9(3) or 'analogous grounds' are illegitimate or unfair. Nationality is not mentioned as a ground of discrimination under section 9(3) of the Bill. However, in *Khosa Case*¹³⁷ although it is not a similar matter in

¹²⁸ CRU 1995 <http://www.ugandawiki.ug/images/Constitution_1995.pdf> (accessed 27 August 2010).

¹²⁹ Art 21(1) states that '[a]ll persons are equal before and under the law ... and shall enjoy equal protection of the law'; article 22(1) '[n]o person shall be deprived of life ...' and article 26(1) stipulates that '[e]very person has a right to own property either individually or in association with others.'

¹³⁰ CRA 1992 <http://www.servant.unibe.ch/icl/ao00000_.html> (accessed 27 August 2010).

¹³¹ CRA, amongst other articles, art 18(1) states that '[a]ll citizens shall be equal under the law and shall enjoy the same rights ... without distinction as to color, race ... place of birth ... or social status.' Art 20 uses the term 'every citizen' to refer to the right to life of Angolan citizens in that it shall be protected by law, and arts 23 and 28(2) use the terms '[n]o citizen' and art 25 uses '[a]ny citizen.'

¹³² *Makwanyane case* 1995 3 SA 391 (CC) para 144.

¹³³ *Kaunda Case* (n 42 above) para 206.

¹³⁴ *Prinsloo Case* 1997 3 SA 1012 (CC) para 31.

¹³⁵ See I Currie & J De Waal *The bill of rights: Handbook* (2005) 243-244.

¹³⁶ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 46.

¹³⁷ See *Khosa Case* (n 127 above) paras 70-86. .

consideration the CC held that exclusion of people with permanent resident in South Africa to benefit from social assistance on the basis of non-citizenship was unfair discrimination. In this line of consideration, unfair discrimination of people on the basis of non South African citizenship or merely foreigners is not allowed in South Africa.

With reference to the right to own property under section 25 of the Bill, the CRSA states that it does not only consist of land.¹³⁸ Property is ‘... seen as those resources that are generally taken to constitute a person’s wealth, and that are recognised and protected by law.’¹³⁹ Deprivation of property is a broad designation, encompassing expropriation, thus, it is allowed since the state carries it out in conformity with the law.¹⁴⁰ All forms of dispossession of property other than fair procedures will constitute arbitrariness; and therefore unlawful.¹⁴¹ As such, South Africa being party to ICCPR, CERD and ACHPR has legal obligations to protect foreigners in its jurisdiction. Further, its legal obligations to protect foreigners arises from its 1996 constitution since it uses, *inter alia*, terms such as ‘everyone,’ ‘all people,’ and ‘any one’ to include foreigners in the enjoyment of rights enshrined in the Bill in the similar circumstances as South African citizens.

3.4 Causes of xenophobic violence against foreigners in South Africa

Writers give explanations of what might have caused the outbreak of xenophobic attacks in South Africa.¹⁴² According to the interviews on the research report by Consortium for refugees and Migrants in South Africa (CoRMSA) and Forced Migration Studies Programme

¹³⁸ CRSA, s 25(4)(b).

¹³⁹ Currie & De Waal (n 135 above) 539.

¹⁴⁰ n 135 above, 541.

¹⁴¹ See *First National Bank of SA Ltd/ a Westbank v Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) paras 67-100. See also *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 2 BCLR 204 (T) 221F. The Court held that s 8(5)(a) of the Harmful Business Practices Act 71 of 1998 ‘allowed arbitrary deprivation of property by allowing the Minister of Trade and Industry to seize assets before the completion of proper investigation’ and n 135 above, 543, footnote 40.

¹⁴² For further discussion on possible causes of xenophobia in South Africa, see Wikipedia, ‘causes of xenophobia in South Africa’ (2009) <http://en.wikipedia.org/wiki/Xenophobia_in_South_Africa> (accessed 20 July 2010); and PE Culbertson ‘Xenophobia: The consequences of being a Zimbabwean in South Africa’ unpublished masters’ thesis, American University in Cairo School of Public Affairs, 2009 31 <www.aucegypt.edu.innopac.up.ac.za/ResearchatAUC/rc/cmrs/Documents/Philip%20Culbertson_Thesis.pdf> (accessed 4 August 2010).

(FMSP)¹⁴³ the reasons behind xenophobic attacks towards foreigners in the country included, amongst others, the following:¹⁴⁴

- Increase of unemployment for South Africans due to the presence of foreigners;
- Crimes related issues increased by their undocumented situation;
- House occupation and marriage related issues;
- Business competition with locals and also
- Possible involvement of third 'forces'.

CoRMSA and FMSP concluded that the aforementioned reasons might have contributed to the generalised tensions but they were insufficient to prove the outbreak of the incident in some areas and not in others with relatively similar socio-economic and demographic situations.¹⁴⁵ In this regard, according to the report the causes behind xenophobia were not influenced by third "forces" or 'political parties' or even because of the other aforesaid factors but due to:¹⁴⁶

- Existence of sediment behaviour or conducts of xenophobia amongst South African citizens towards foreigners;
- Lack of concrete or solid political leadership in townships allowing materialization of similar, disturbing and self-governing groups;
- Lack of effective conflict resolution mechanisms to deal with residents' concerns in townships;
- Lack of knowledge of laws, policies, protecting foreigners, mainly in townships, and also
- Continuation of culture of impunity of xenophobic violence instigators or perpetrators.

These possible causes behind xenophobia in South Africa seem credible. Firstly, it appears clear from the report that there existed institutionalised and instigated xenophobic attitudes upon foreigners as concerns to South African citizens. For example, in 1994 a Minister of Home Affairs stressed that '[i]f South Africans are going to compete for scarce resources with the millions of [foreigners] ... then we can bid goodbye to our Reconstruction and Development Programme.'¹⁴⁷ This is just one of the examples entrenching and inciting

¹⁴³ Some of the affected areas are Alexandra, Diepsloot, Olifantsfontein, Tembisa, Thokosa, Kwathemba, Emlotheni and Emandleni, Soweto, Mamelodi, Durban and Cape Town. See n 2 above, 40-46.

¹⁴⁴ See n 2 above, 165-167.

¹⁴⁵ n 2 above, 167-168.

¹⁴⁶ n 2 above, 177-178.

¹⁴⁷ I Palmary 'Refugees, safety and xenophobia in South African cities: The role of local government' <<http://www.csvr.org.za/docs/foreigners/refugeessafteyand.pdf>> (accessed 1 October 2010).

xenophobic behaviour against foreigners in South Africa. Secondly, it seems that there was lack of trust or legitimacy of local leaderships that could represent the interests of all residents provided that the existing ones allowed operation of 'untouchable parallel leadership'.¹⁴⁸ One way or another, it might have contributed to the outbreak of violence.

Furthermore, it appears comprehensible from the report that there was lack of knowledge of laws in townships which entitle foreigners rights to be, live, work, possess property or engage in another lawfully activities in South Africa;¹⁴⁹ since most of South African citizens believed that whatever foreigners possessed, *inter alia* houses, business institutions, identity cards was through illegal means.¹⁵⁰ Further still, lack of conflict resolution mechanisms in townships could have led natives to think that resorting into violence could solve their problems, for instance community leaders failed to solve problems of residents in some of the informal settlements of Alexandra before the incident in May 2008.¹⁵¹ Finally, the fact that acts of xenophobia against foreigners had taken place in the country since 1994 having reached the peak in May 2008 their instigators remain unpunished.¹⁵²

3.5 Post 2008 xenophobic violence

In July 2008 once again in Ramaphosa, East of Johannesburg foreigners who tried to reintegrate in that area were attacked by South African citizens though the government had

¹⁴⁸ n 2 above, 173.

¹⁴⁹ There might be lack of knowledge of South African legislation, such as Aliens Control Act 96 of 1991 as amended by Act 3 of 1993 and Act 76 of 1995) in which sec 32 prohibits employers to employ illegal foreigners; lack of knowledge of South African citizenship Act 88 of 1995, enabling foreigners to acquire South Africa citizenship after five years in South Africa through naturalisation by virtue of permanent residence (see secs 4 & 5); lack of knowledge of Refugee Act 130 of 1998, including 2008 bill for its amendment, protecting the rights of refugees and asylum seekers (see chapters 3 & 5); lack of awareness of Immigration Act 13 of 2002, including its amendments (Act 19 of 2004; Act 3 of 2007), providing rights to foreigners, amongst others, the right to acquire temporary and permanent residences in South Africa, rights to have study permit, business permit, corporate permit, visitor's permit and work permit. It also imposes obligations on foreigners and regulates treatment of unlawfully foreigners in South Africa.

¹⁵⁰ n 2 above, 172.

¹⁵¹ n 2 above, 64 & 175.

¹⁵² n 2 above, 178. See also Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals (2009) 68

<<http://www.sahrc.org.za/home/21/files/Reports/Non%20Nationals%20Attacks%20Report.pdf%201-50.%202008.pdf>> (accessed 1 October 2010).

said affirmatively; again a Mozambican national was killed in the incident.¹⁵³ From January to May 2010, 11 violent xenophobic attacks towards foreigners took place in South Africa, having had their property looted, mainly that of Somalis and Ethiopians.¹⁵⁴

3.6 Impact of xenophobic violence on Mozambican victims

Mozambique and South Africa have long agreements in operation since 1964 in so far as the former country should make available its people for labour in South Africa, mainly in the mining sector and commercial agriculture.¹⁵⁵ The first agreement was signed between South African government and Mozambique former colonial master, Portugal which was amended in 1971; in 2003 ministries of labour of both Mozambique and South Africa signed a cooperation agreement aiming to protect the rights of thousands of Mozambican nationals working in the mining branch and others on the farm in South Africa.¹⁵⁶ The agreement extends to other areas, such as studies and research, training, job making, social security and social dialogue.¹⁵⁷

In the mean time, the president of Mozambique addressing to the returnees, victims of xenophobic attacks at the transit centre mentioned that xenophobic violence opposed to regional integration in Southern Africa nevertheless he urged all Mozambicans to refrain from retaliating against foreigners, particularly South Africans in the following terms:¹⁵⁸

‘We shall continue on the path of solidarity and unity ... but we must never opt for violence, since we know ... what ... the price of violence [means].’

Acts of xenophobic violence in South Africa forced about 39235 Mozambicans to live the country,¹⁵⁹ including about 1069 children.¹⁶⁰ Seventeen Mozambican nationals were

¹⁵³ *Vítima de xenofobia: Mais um Moçambicano morto na África do Sul* (July 2008)

<http://www.tvn.co.mz/index.php?option=com_content&task=view&id=5418&Itemid=78> (accessed 28 July 2010).

¹⁵⁴ F Jonathan ‘After the party, the hangover: Xenophobic violence & post-world cup South Africa’ (11 July 2010) <<http://www.mg.co.za/article/2010-07-06-xenophobia-and-the-world-cup>> (accessed 2 September 2010).

¹⁵⁵ A Wa Kabwe-Segatti ‘*Les oubliés de la croissance: Les migrants mozambicains dans l’Afrique du Sud de Mbeki (1999-2008)*’ (2009) 68

<<http://docserver.ingentaconnect.com/deliver/connect/brill/12570273/v16n1/s4.pdf?>> (accessed 1 October 2010).

¹⁵⁶ As above.

¹⁵⁷ Wa Kabwe-Segatti (n 155 above) 68, footnote 2.

¹⁵⁸ B Vally ‘Xenophobia Impacts on Mozambique’ (2008) <<http://ipsnews.net/africa/nota.asp?idnews=42784>> (accessed 20 July 2010).

¹⁵⁹ n 21 above, 2.

confirmed dead.¹⁶¹ It is believed that the number might be higher than the one abovementioned since many dead bodies were in morgues in South Africa but without any identification.¹⁶² One of the memorable and shocking events was the burning of Ernest Nhamuave by South African citizens.¹⁶³ This is just one of the horrifying examples against foreigners, particularly towards Mozambicans. Such acts are inhuman and must not be tolerated either in South Africa or elsewhere. The table below shows the names of the dead victims of Mozambican nationality and the place of occurrence in South Africa.¹⁶⁴

N	Deaths-2008	
	Names	Location in South Africa
1	Alberto José Zalane	Germiston
2	Alberto Nhatsave	Alexandra
3	Alfredo Salvador Fumo	Bosburg
4	Alfredo Tualufo Cumbane	Vosloorus
5	Armando Mucache	Ramaphosa
6	Ernesto Alfabeto Nhamuave	Ramaphosa
7	Ernesto Joaquim	Germiston
8	Geraldo Mathe	Johannesburg
9	José Albino	Germiston
10	Horácio Lino Saide	Germiston
11	Lucas Simango	Secunda
12	Moséis Domingos Maboi	Germiston
13	Octávio Cardoso M'baze	Johannesburg
14	Orlando Samuel Siteo	Germiston
15	Rodrigues Cumbe	Germiston
16	Salvos Augusto Nhamweve	Springs
17	Zacarias Chitlango	Germiston

¹⁶⁰ See CENOE/INGC (n 31 above).

¹⁶¹ n 21 above, 2.

¹⁶² Discussion with Larindo Lampião, 3^o Secretário, *Direcção dos Assuntos Jurídicos Consulares*, Ministry of Foreign Affairs and Cooperation of Mozambique (20 July 2010). E-mail: llampião@msn.com.

¹⁶³ See Nyar (n 22 above).

¹⁶⁴ See n 21 above, 3.

The government of Mozambique noticing acts of xenophobic violence against its nationals in South Africa started registering its nationals victims of such violence¹⁶⁵ and also reopened its transitory unit support in Beluluane (*Centro Transitório de Beluluane*) and other units in South Africa, for instance in Germiston¹⁶⁶ where the affected waited their chance to be taken back to their place of origin in Mozambique. The government used its means in the operation to help about 4363 victims return home.¹⁶⁷ It sent buses to South Africa and also made available trains in order to carry the victims willing to go back to Mozambique.¹⁶⁸ The government brought to Mozambique seven deceased from South Africa until their place of origin¹⁶⁹ and followed all the burial process according to each victim's culture or belief.¹⁷⁰ The possible expenditure¹⁷¹ of the government in its intervention on behalf of its nationals affected by xenophobia in South Africa is worth 7 906 005.97 MT.¹⁷²

3.7 South Africa and due diligence

The duty of states to protect requires adoption of measures to ensure protection of the beneficiaries of rights against any interference, such as political, economic or social.¹⁷³ It entails creation and maintenance of a framework so that all people can be able to freely realise their human rights.¹⁷⁴ In addition, it is the duty of states to harmonise their domestic laws and machinery in accordance with international standards in order to ensure protection or enjoyment of rights entitled to everyone whereby their obligations to prevent any harmful conducts towards foreign nationals are assessed by compliance or not with the rule of due diligence.¹⁷⁵ In the light of international human rights instruments states have obligations to

¹⁶⁵ MAE/CCGC *Informação Especial número 3 5* (26 May-1 June 2008).

¹⁶⁶ See n 21 above, 4-5.

¹⁶⁷ n 21 above, 2.

¹⁶⁸ MAE/CCGC (n 165 above) 5.

¹⁶⁹ See n 21 above, 2.

¹⁷⁰ n 165 above, 5.

¹⁷¹ n 165 above, 7.

¹⁷² It is about USD 316240.2.

¹⁷³ *Social and Economic Rights Action Centre and Another v Nigeria (SERAC Case)* (2001) AHRLR 60 (ACHPR 2001) para 46.

¹⁷⁴ As above.

¹⁷⁵ See n 68 above, 86. The rule of due diligence requires States to prevent harmful conducts to an individual either by public officials or private entities, carry out investigations in order to find out the truth and punish the perpetrators and also compensate the victims. See Committee on the Elimination of Discrimination against Women General Recommendation No 19 (11th session, 1992) para 9 <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> (accessed 10 May 2010). See also Velásquez case (n 25 above) para 166.

ensure safety of all people in their territories, including acts from privates; failure to do so can lead the state to the violation of its duty to protect human rights.¹⁷⁶

According to Eagleton the rule of due diligence was first dealt with in *Alabama Claims*.¹⁷⁷ The rule requires states to use all 'the means at [their] disposal.'¹⁷⁸ Eagleton citing *Wipperman Case*¹⁷⁹ states that there is no inobservance of the rule of due diligence when a state was unable or beyond its capacity to control or if the situation could not have been envisaged.¹⁸⁰ However, if the government did not intervene in a situation where there was warning in advance to take precautionary steps and the danger was so notorious and recurrent,¹⁸¹ it fails to observe the rule.¹⁸² It also falls short to observe it if consistently neglect or ignore '... its duties of prevention and restraint' of violent crowd against foreigners.¹⁸³

Meanwhile, acts of xenophobia were not new in South Africa; they had taken place in the country since 1994.¹⁸⁴ For example, in 1994 an armed group of individuals attacked and destroyed houses of foreigners in Alexandra, Gauteng Province.¹⁸⁵ From 1998 to April 2008, foreigners were beaten up by South African citizens and chased from their shacks, shops, having resulted in dozens of raped foreign women;¹⁸⁶ more than 39 people killed; 34 seriously injured; 312 shops looted.¹⁸⁷ In March 2008 in a series of attacks against foreigners

¹⁷⁶ See Centre for Human Rights research report 'The nature of South Africa's legal obligations to combat xenophobia' (2009) 58.

¹⁷⁷ See n 68 above, 89, footnote 38. See also *Alabama Claims* (1898) 1 Moore's international arbitration 453.

¹⁷⁸ See n 68 above, 89.

¹⁷⁹ *Wipperman Case* Moore arbitrations.

¹⁸⁰ See n 68 above, 91.

¹⁸¹ *US v Venezuela (Wipperman Case)* (5 December 1885) Moore's arbitrations 3042. The Court held that '[i]f the acts done are undisguisedly open or of common notoriety, the state ... is obviously responsible for not using proper means to repress them.'

¹⁸² See n 68 above, 91.

¹⁸³ See n 68 above, 92. 'Where the government authorities have acted in good faith and without negligence, the general principle is one of non-liability for the actions of rioters ... causing loss or damage.' See Shaw (n 87 above) 791. See also *Home Missionary Society Case* 1920 6 RIAA 42 & 44.

¹⁸⁴ N Nkealah 'Commodifying the female body: Xenophobic violence in South Africa' (2008) 6 <http://www.codesria.org/IMG/pdf/Naomi_Nkealah.pdf> (accessed 7 October 2010). See also Human Rights Watch, 'Prohibited persons: Abuse of undocumented migrants, asylum seekers and refugees in South Africa' (1998) <http://www.hrw.org/reports98/sareport/#_1_7> (accessed 7 October 2010) and n 2 above, 38.

¹⁸⁵ Duponchel (n 8 above) 3. See also n 2 above, 38.

¹⁸⁶ N Beeby 'Double jeopardy: female and foreign in South Africa.' (2009) <<http://www.ngopulse.org/category/defined-tags/human-rights/xenophobia>> (accessed 20 July 2010). See also Duponchel (n 8 above) 3.

¹⁸⁷ n 2 above, 38-40.

for more than a week took place in Atteridgeville, Gauteng province where about 150 shacks and shops were burnt down and destroyed.¹⁸⁸ Acts of xenophobia reached their peak in May 2008 having resulted in death 41 foreigners, 342 shops looted and 213 burned down.¹⁸⁹

The African Peer Review Mechanism (APRM)'s country report in 2007 revelled and warned South Africa that xenophobia against foreigners, primarily against black people was on the increase in the country;¹⁹⁰ however the South African government through its programme of action refused and excluded the recommendation.¹⁹¹ Additionally, a report by the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance¹⁹² had highlighted existence xenophobic acts against other black Africans in South Africa, having recommended the South African government in 1999 the following:¹⁹³

To broadcast and teach the Constitution and human rights in all schools and through the mass media; to conduct a parallel campaign of civic education among the population with the aim of combating xenophobia and encouraging greater tolerance, in view of the increase and frequency of the xenophobia directed towards [b]lacks from other regions of Africa. In particular, immigration officials (police officers, civil servants) should receive instruction in human rights.

In March 2008 human rights organizations condemned the spate of xenophobia attacks on foreigners in Pretoria which resulted in four people dead and hundreds displaced.¹⁹⁴

It is recalled that violence against black foreigners started on 11 May 2008; on the fourth day due to the intensity of the violence, the opposition party DA urged the government to organize the army and intervene in order to support the police.¹⁹⁵ However, only on the eleventh day the government did deploy the army around Gauteng province; by that time about 40 '... people had died, hundreds ... injured, and thousands more displaced.'¹⁹⁶

¹⁸⁸ n 2 above, 40.

¹⁸⁹ n 2 above, 46.

¹⁹⁰ See J Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2001) 106 <<http://onlinelibrary.wiley.com/doi/10.1111/1468-2435.00145/pdf>> (accessed 20 October).

¹⁹¹ n 2 above, 38.

¹⁹² From 24 February-5 March 1998.

¹⁹³ Report of the UN Commission on Human Rights 55th session/provisional agenda item/6 E/CN.4/1999/15/add1 Glele-Ahanhanzo <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/ca16910ffd5c6e568025673c00402ec6?Opendocument>> (accessed 20 July 2010).

¹⁹⁴ Culbertson (n 142 above) 31.

¹⁹⁵ Citizenship report (n 6 above), 12.

¹⁹⁶ As above.

Some political parties welcomed the government's decision to send the army, such as United Democratic Movement and Inkatha Freedom Party.¹⁹⁷ So did DA but considered it delayed in these terms:

It is a pity that this decision was not taken earlier. Many lives could have been saved if the army had been brought in last week when the DA first called for it.¹⁹⁸

To this point, had the government indeed acted quickly into the violence by deploying the army to support the police lives of foreigners and their property would have been saved but, unfortunately, the government remained silent on the matter. It is said that the government's response towards the violence '... was disorganised and lacking in leadership. [First] ... it was slow in declaring the violence a crisis;' secondly, only on the eleventh day of violence, it decisively intervened to stop the incident¹⁹⁹ and finally, only by 26 May 2008 declared it under its control.²⁰⁰

It is emphasised that a state also has duty '... to pursue the individual through whose act [a foreigner] has suffered injury, and to give to the [foreigner] the reparation which is provided by municipal law.'²⁰¹ It must on its own initiative investigate and punish the perpetrators of criminal acts against foreigners.²⁰² It falls short to meet its duties towards other states, specifically foreigners if it does not provide them same means to them as its citizens to reach justice or if local means refuse to deal with an action brought on behalf of the victim.²⁰³

Since the violence broke out the perpetrators or instigators of xenophobia against foreigners remain unpunished.²⁰⁴ No reparation has been given to the victims killed up to date.²⁰⁵ In this

¹⁹⁷ n 6 above, 12, footnote 25.

¹⁹⁸ n 6 above, 12.

¹⁹⁹ n 6 above, 12, footnote 25.

²⁰⁰ Duponchel (n 8 above) 4. See also Igglesden (n 8 above) 6.

²⁰¹ n 68 above, 92.

²⁰² As above.

²⁰³ n 68 above, 93 footnote 54.

²⁰⁴ The government of South Africa promised 'tougher penalties' against the instigators or perpetrators of xenophobic violence against foreigners in 2008 in South Africa. A senior researcher of human rights watch welcomed the decision but she said 'we ... would like to see further prosecution for those who actually committed xenophobic attacks and killings in 2008, we have seen very few prosecutions ... of those who attacked foreign nationals at that time ... from our experience in 2008 ... there has been huge delay in prosecutions than investigations ...' RFI news: 93.7 station 16:00 GMT Kampala/Uganda (27 September 2010). See also causes of xenophobia (n 142 above).

way, considering the aforesaid, South Africa failed to protect human rights of foreigners, victims of xenophobic violence in South Africa since it delayed to intervene in order to protect lives and property of victims in a situation where there was warning in advance to take precautionary steps²⁰⁶ against xenophobia in the country; the danger was so notorious and recurrent,²⁰⁷ and the state consistently ignored²⁰⁸ ‘... its duties of prevention and restraint’ of mob violence.²⁰⁹ Further, the victims of violence, particularly those who were killed by South African citizens have not received any reparation,²¹⁰ if any and the instigators of the violence remain without punishment.²¹¹

3.8 Legal obligations to make reparation

In the light of Draft Articles on State Responsibility there are three forms of reparation which a state is obliged to make in case of committing an internationally wrongful act, notably, restitution,²¹² compensation and satisfaction.²¹³ Each of the forms can be met separately or joined.²¹⁴ Restitution in a narrow sense under article 35 of Draft Articles on State Responsibility ‘... may have to be completed by compensation in order to ensure full

²⁰⁵ See McConel (n 112 above) 34. See also Amnesty International USA ‘Human rights concerns in South Africa during the world cup’ (2010) <<http://www.amnestyusa.org/document.php?id=ENGUSA20100608001&lang=e>> (accessed 21 October 2010).

²⁰⁶ In 1999 South Africa was warned by the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to take measures against acts of xenophobia against other black Africans in South Africa (see report of the UN Commission on Human Rights, n 193 above). South Africa was also warned by APRM in 2007 that acts of xenophobia in South Africa were on the increase and should dissuade them, however, South Africa rejected the recommendations (see, n 2 above, 38)). Further, on the fourth day of xenophobic violence in May 2008 due to its intensity, DA urged the government to organize the army and intervene in order to support the police but the government only deployed it on the eleventh day while many lives and property of foreigners had been lost (see n 6 above, 12).

²⁰⁷ n 181 above.

²⁰⁸ Acts of xenophobia were not new; they had taken place since 1994 up to their peak in May 2008. See Nkealah (n 184 above) 6. See also Human Rights Watch (n 184 above) and n 2 above, 38.

²⁰⁹ See n 68 above, 91-92.

²¹⁰ Victims of any violence deserve award of reparation. See n 68 above, 92.

²¹¹ See Report on the SAHRC (n 152 above). See also causes of xenophobia (n 142 above).

²¹² Art 35 of Draft Articles on State Responsibility defines restitution as

‘... [re-establishing] the situation which existed before the wrongful act was committed, provided and to the extent that restitution (a) is not materially impossible; [and] does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.’

²¹³ Draft Articles on State responsibility, art 34. Art 37(2) of the same instrument defines ‘satisfaction’ as ‘... an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.’

²¹⁴ Draft Articles on State responsibility, art 34.

reparation for the damage ...²¹⁵ The UN basic principles and Guidelines apart from the earlier forms of reparation include 'rehabilitation and guarantees of no-repetition' as other forms allowed under international law.²¹⁶ For the reasons already explained in chapter one the study concentrate on compensation.

The general rule under international law is that a responsible state for breaching an international obligation is under obligation '... to make full reparation for any injury, including any material or moral damage caused by the wrongful act.'²¹⁷ This principle is stated under article 31 of Draft Articles on State Responsibility in these terms:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

According to Shelton in matters involving reparation, although the Draft Articles on State Responsibility apply to conflicts between or among states they give an exception²¹⁸ in so far as it can be sought by states on behalf of the individuals.²¹⁹ The Permanent Court stressed the general principle of the consequences of commission of an internationally wrongful act in these terms:²²⁰

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparation, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.

As stated earlier, the Permanent Court clarifies that in the international sphere obligation to make reparation arises due to a failure to apply a treaty even in a case of absence of a provision in that way. It is stressed that the treaties enshrining the right to life under consideration in this chapter in which South Africa is party to, comprise ICCPR and ACHPR.

²¹⁵ Crawford (n 28 above) 213.

²¹⁶ UN GAR(A/60/509/Add1) 18 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>> (accessed 20 October 2010). See also Zarifis, IN 'The realization of victim' rights to reparations: Assessing the need for a comprehensive reparations program in Uganda' unpublished masters' thesis, Faculty of Law, Makerere University 2009 40.

²¹⁷ See n 80 above, 87-88.

²¹⁸ Draft Articles on State Responsibility, art 33(2).

²¹⁹ See n 80 above, 85.

²²⁰ See n 28 above.

The UN OHCHR's Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity stipulate that

[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation.²²¹

In *Von Abo v President of the Republic of South Africa (Von Abo Case2)*,²²² the CC dealing with compensation held that '... remedy is, indeed, part and parcel of the right. *Ubi ius, ibi remedium.*' Stated differently, "[w]here there is a right, there is a remedy."²²³ Hence, the right and remedy are linked in the sense that when there is an infringement of a right, consequently, there is an obligation to make a remedy.

In addition, article 36(1) & (2) of Draft Articles on State Responsibility states that

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

'Financially assessable damage' includes, *inter alia*, those damages suffered by the state, for instance its property, personnel or in relation to its expenses in trying to solve the matter and also by damages to its nationals abroad, either natural or legal persons.²²⁴ Compensation for personal harm involves material loss which includes, loss of income and also non-material which entails, among others, 'pain ... loss of enjoyment of life ...; this latter usually qualified on the basis of an equitable assessment.'²²⁵ '... [V]alue of property taken or destroyed as a result of internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost.'²²⁶

In *Factory at Chorzów*, the Permanent Court stressed that the amount of compensation for an internationally wrongful act includes²²⁷

... payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it ... are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

²²¹ OHCHR's Principles (n 13 above) 16, principle 31.

²²² *Von Abo Case* 2009 5 SA 345 (CC) para 62.

²²³ n 222 above, para 63.

²²⁴ Crawford (n 28 above) 220.

²²⁵ Crawford (n 28 above) 224.

²²⁶ Dugard (n 30 above) 278. See also Crawford (n 28 above) 224-225.

²²⁷ 1928 merits PCIJ ser A/No 17 47.

It is submitted that the aim of compensation is to redress the losses as consequence of an internationally wrongful conduct but not to discipline or punish the defendant state.²²⁸

As said by Shelton, article 2 of ICCPR 'imposes both positive and negative obligations to ... State ... Parties, including an obligation to provide redress for violations by private [entities] as well by State agents.'²²⁹ The Human Rights Committee (HRC)'s general comment on article 2(3) of ICCPR foresees that state parties to the covenant have legal obligations to make reparation to the victims.²³⁰ Circumstances in which the South African government failed to protect foreigners victims of xenophobic violence in South Africa have been determined above so they need not be reiterated. Thus, the answer to the question whether South Africa has legal obligations under international law to make reparation to Mozambican nationals killed during xenophobic violence in South Africa is that South Africa as party to ICCPR and ACHPR, treaties in which oblige the state to protect the right to life of everyone in its jurisdiction; its failure to prevent or protect the deaths of Mozambicans killed by South African citizens during xenophobic attacks breached ICCPR and ACHPR, though the latter treaty does not envisage any provision dealing with reparation and ICCPR does,²³¹ considering the explanation already aforesaid the answer is in affirmative.

3.9 Conclusion

This chapter has shown that South Africa failed to protect human rights of foreigners victims of xenophobic violence in its country since it delayed to intervene in order to protect lives and property of the affected in a situation where it was warned in advance to take precautionary steps²³² against acts of xenophobia; the danger of the occurrence was so notorious and recurrent,²³³ and the fact that the state consistently ignored²³⁴ '... its duties of prevention and restraint' of violent crowd.²³⁵ In addition to that, the victims of violence, particularly those who were killed by South African citizens have not received any reparation,²³⁶ and the instigators

²²⁸ See n 80 above, 86. See also *VR v H IACHR (Velásquez Rodríguez Case)* (21 July 1989) ser C/No 7 para 38.

²²⁹ n 80 above, 117.

²³⁰ HRC General Comment No 31 'The nature of the general legal obligation imposed on state parties to the covenant' (adopted 21 April 2004) <<http://www.unhcr.org/refworld/docid/478b26ae2.html>> (accessed 1 October 2010).

²³¹ ICCPR, art 2(3).

²³² See Report of the UN Commission on Human Rights (n 193 above); n 2 above, 38 and n 6 above, 12.

²³³ n 181 above.

²³⁴ See n 193 above.

²³⁵ See n 68 above, 91-92.

²³⁶ See n 68 above, 92.

of the violence remain with impunity.²³⁷ As concerns to international law a state has legal obligations to make reparation as a result of its failure to apply a treaty even if the treaty itself does not contain any provision in that regard.²³⁸ An infringement of a right implies an obligation to make a remedy.²³⁹ In this vein, South Africa having failed to ensure protection of the right to life of foreigners, particularly its failure to avoid the deaths of Mozambicans killed by South African citizens during xenophobic attacks breached ICCPR and ACHPR; therefore legal obligations to make reparation occur.

²³⁷ See Report on SAHRC (n 152 above) 68. See also causes of xenophobia (n 142 above).

²³⁸ See n 28 above.

²³⁹ See n 222 above, para 63.

Chapter four: **Mozambique and diplomatic protection on behalf of the victims of xenophobia**

4.1 Introduction

Diplomatic protection and its requirements have been dealt with in chapter two so they need not be detailed herein. Unless other circumstances are required, '... [a]ny intervention ... at inter-State level on behalf of a national *vis-à-vis* a foreign State ... [is considered] diplomatic protection ... [once all the requirements are met] ...'²⁴⁰ It is recalled that the study works on the assertion that the requirements needed for a state to exercise diplomatic protection are met. Then, the question to be answered relates to the available mechanisms which Mozambique can, diplomatically rely on in order to ask for reparation to its nationals who were killed in 2008 as consequence of xenophobic violence towards foreigners in South Africa from the South African government.

4.2 Mozambique and mechanisms for reparation

One of the important mechanisms that can be used to protect and promote international human rights thus remains the right of [S]tates to make diplomatic [protection] on behalf of their nationals to other [S]tates which ... have infringed the internationally recognised human rights of the nationals.²⁴¹

As already outlined, diplomatic protection in its broad sense includes negotiation, mediation, conciliation, enquiry, consular relations, arbitration and judicial proceedings.²⁴² The UN Charter urges state parties to solve disputes in a peaceful way by means of 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'²⁴³ Article 55(3) of the UN Charter envisages UN's commitment to promote universal respect and observance of human rights without discrimination in the following terms:

²⁴⁰ Seventh report on diplomatic protection by John Dugard, /special rapporteur/UNA/CN4/567 58th session Geneva 1 May-9 June and 3 July-11 August 2006

<http://untreaty.un.org/ilc/documentation/english/a_cn4_567.pdf> (accessed 21 August 2010).

²⁴¹ See n 42 above, para 216 *in fine*.

²⁴² See n 42 above, para 27. See also Seventh report on diplomatic protection (n 240 above) 7.

²⁴³ UN Charter, art 2(3) read with art 33(1).

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights ... the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

As aforesaid, considering the that diplomatic intervention is a relevant mechanism and can be used to protect interests or human rights of individuals by states in other states; bearing in mind the UN Charter's encouragement on states to solve matters peacefully by resorting to any of the methods abovementioned, henceforth due to the word limit, the paper discusses negotiation, conciliation and consular relations as means in which the government of Mozambique should tactfully adopt in order to seek reparation to its nationals.

4.2.1 Negotiations and consular relations

The term negotiation²⁴⁴ is derived from the latin word, *negotiatius*, "past participle of *negotiare* which means to carry on [discussions]." ²⁴⁵ It involves parties or countries willing to solve a dispute²⁴⁶ by engaging into discussions so that they understand each one's position and also reconcile them.²⁴⁷ As general rule there is no third party in the negotiation process but it can be involved if it is needed in order to listen '... to each side's arguments and attempts to help craft an agreement between [themselves] ...'²⁴⁸ '... [P]arties decide amongst themselves how best to resolve their differences; ... [negotiations] do depend on a certain degree of mutual goodwill, flexibility and sensitivity.'²⁴⁹ They must be conducted in good faith.²⁵⁰ To this point,

²⁴⁴ Negotiation 'is a dialogue intended to resolve disputes, to produce an agreement upon courses of action, to bargain for individual or collective advantage, or to craft outcomes to satisfy various interests...' See Wikipedia, the free encyclopedia 'Alternative dispute resolution' (February 2009) <<http://en.wikipedia.org/wiki/Negotiation>> (accessed 13 September 2010).

²⁴⁵ Alternative dispute resolution (n 244 above).

²⁴⁶ See *Mavrommatis Palestine Concession Case* (n 45 above) 11. In this case the Permanent Court defined dispute as 'a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons.' The American heritage dictionary of the English language defines dispute as '[t]o engage in discussion or argument ... [over an issue]' <<http://www.thefreedictionary.com/dispute>> (accessed 14 October 2010). The paper handles dispute and conflict as synonyms and uses them interchangeably. A dispute or conflict is viewed as an existing problem to be engaged in discussion or solved between South Africa and Mozambique.

²⁴⁷ See Shaw (87 above) 1014-1015.

²⁴⁸ See n 244 above.

²⁴⁹ Shaw (n 87 above) 1015. Notes on short course in international law, 'diplomatic means for settlement of disputes,' Michelo Hansungule/Professor in human rights law, university of Pretoria, Centre for Human Rights. E-mail: michelo.hansungule@up.ac.za. (Pretoria 18 -29 January 2010).

Mozambique can offer discussion with the South African government with regard to Mozambican nationals who were attacked and killed by South African citizens in May 2008. As already aforesaid, the aim of reparation is not to punish the South African government but it seeks to help or compensate the victims through their next-of kin.²⁵¹ 'Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law ...'²⁵²

In relation to consular relations, according to Vienna Convention on Consular Relations (VCCR)²⁵³ consular relations require mutual consent between states;²⁵⁴ it is exercised by both consular posts²⁵⁵ and diplomatic missions;²⁵⁶ and unregulated situations are governed in accordance with customary international law.²⁵⁷ Consular relations' functions are established under article 5 of VCCR which include, *inter alia*

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law ... [and] (c) ascertaining by all lawful means conditions and developments in the ... economic ... life of the receiving State, reporting thereon to the Government of the sending State ...

Article 3(2) of Vienna Convention on Diplomatic Relations (VCDR) states that '[n]othing in the present Convention shall be construed as preventing the performance of consular functions by the diplomatic mission.' Diplomatic mission consists of representing, protecting the interests of the sending state and negotiating with the receiving state on behalf of the sending state.²⁵⁸ It is noted that consular functions under article 5(b) of VCCR coincide with those of diplomatic mission in terms of article 3(b) of VCDR aiming to protect the interests of the sending state and its nationals in the receiving state. Then, considering the fact that diplomatic mission can perform consular functions the paper makes no distinction between the two; and therefore treats diplomatic mission's tasks as consular functions. Accordingly, taking into account the existence of consular relations between Mozambique and South

²⁵⁰ Case Democratic Republic of the Congo v Uganda (19 December 2005) (2005) ICJ reports 168 para 261. See also Shaw (87 above) 1104.

²⁵¹ See n 80 above, 86. See also *Velásquez Rodríguez Case* (n 228 above) para 38.

²⁵² *Velásquez Rodríguez Case* (n 228 above) para 38.

²⁵³ United Nations 'Treaty series' (24 April 1963) 1 596 261. Entry into force 19 March 1967.

²⁵⁴ VCCR, art 2(1).

²⁵⁵ Consular post, 'means any consulate-general, consulate, vice-consulate or consular agency.' VCCR, art 1(a).

²⁵⁶ VCCR, art 3. The functions of diplomatic missions under article 3 of Vienna Convention on Diplomatic Relation (VCDR, 1961) include protection, investigation and representation of the interests of the nationals of the sending State.

²⁵⁷ See VCCR, preamble, para 6.

²⁵⁸ See VCDR, art 3(a)(b) & (c).

Africa; the former state's consular functions operating in South Africa can as already aforementioned, 'negotiate' or offer discussions with the South African government highlighting the need of making reparation to the Mozambicans killed by South African citizens during xenophobic violence in May 2008. In so doing, consular functions act in the concern or under orders of Mozambique's central government in the protection of its nationals.

4.2.2 Conciliation

Conciliation is an active process; it involves a third party, investigating the source of a conflict or problem and preparing a report in which he or she suggests how a settlement could be reached.²⁵⁹ In other words, '[w]hen conciliation is used; a commission of inquiry is introduced to investigate and report on the facts surrounding a particular ... [problem].'²⁶⁰ The fact that conciliation is 'extremely flexible and by clarifying the facts and discussing proposals may stimulate negotiations between the parties.'²⁶¹ Thus, Mozambique can suggest creation of a commission consisting of Mozambican and South African representatives to deal with the matter, including assessment of the impact of xenophobic violence on the lives of the victims' relatives.²⁶²

4.3 Mozambique's current situational steps towards the victims

The researcher approached the government of Mozambique in July 2010, specifically the 'Ministry of Foreign Affairs and Cooperation' in order to get insight of the current situation of the government with respect to its nationals who were affected by xenophobic violence in South Africa, primarily those who died as a result of the incident. The answer given was clear and direct in the sense that the matter was being dealt with at the political level. The impression was that there existed a joint committee consisting of representatives of both countries to deal with the issue of xenophobic violence. However, it was unclear to determine the position or what actually; the government of Mozambique has done or has been doing up to date with respect to reparation purposes on behalf of its nationals victims of xenophobic violence in 2008.

²⁵⁹ Shaw (87 above) 1022 and Short course (n 249 above).

²⁶⁰ 'West's encyclopedia of American law' (2008) <<http://legal-dictionary.thefreedictionary.com/Conciliation%2c+International>> (accessed 13 September 2010).

²⁶¹ Shaw (87 above) 1023.

²⁶² It can be in terms of financial means, education or health concerns.

4.4 Conclusion

In summary, the question relating to the mechanisms in which the government of Mozambique should adopt in order to ask for reparation to its nationals killed as result of xenophobic violence in South Africa from the South African government include exercise of diplomatic protection in its broad sense by resorting to negotiation, conciliation or by turning to consular functions already accredited and performing activities in South Africa to engage in discussions with representatives of the South African government. In other words, Mozambique can offer discussion with the South African government by referring to the abovementioned means highlighting the need to make reparation to those who were killed by South African citizens in May 2008. It could enable the victims through their relatives to be compensated.

Chapter five: **Conclusions and recommendations**

5.1 Conclusions

The research focused on diplomatic protection, xenophobic violence against foreigners in South Africa in May 2008 and the issue of reparation with respect to Mozambican victims who were killed as a result of the incident. In this regard, brief statements of the main points are highlighted in turn.

Defining diplomatic protection was not easy. However, an attempting and working definition in its broad sense which includes, amongst others, negotiation, conciliation and consular relations has been adopted. Meanwhile, a state can be held responsible for an injury towards foreigners if it breaches an international obligation with regard to their protection, directly through actions or omissions of the state personnel or indirectly if it fails to adopt due diligence in relation to private wrongs.

States share different points of views as concerns to the treatment of foreigners. Some of them defend the national treatment standard and the others are for the international minimum standard. The former type of treatment requires that both foreigners and nationals receive the same treatment. Stated differently, laws, polices of a state apply in the same circumstances to foreigners and non-foreigners under its jurisdictions regardless of being advantageous or not. The latter position implies that states in their territories have to comply with standards of civilised treatment in relation to foreigners by observing customary international law, international human rights treaties or their commitment in the international sphere. Additionally, in case of mistreatment of a foreigner in a manner that contradicts with those standards the state of nationality of the individual may intervene on his or her behalf.

It is categorically stated that the presence of foreigners in South Africa is useful. Looking at the mining sector, it primarily consists of foreign workers contributing along tourism and foreign business to develop South Africa as well as the continent of Africa. In this sense, South Africa's legal obligations to protect the aforesaid people arise as being party to international human rights treaties, specifically to ICCPR, CERD and ACHPR. In brief, these instruments oblige South Africa to ensure safety of everyone in its territory. On the other hand, its legal obligations to protect foreigners occur in terms of its 1996 constitution which includes foreigners in the enjoyment of rights enshrined therewith by referring to terms *inter alia*, 'everyone' and 'all people.'

In relation to the causes of the outbreak of xenophobic violence against foreigners in South Africa they are indecisive. Attitudes and conducts of xenophobia towards foreigners are entrenched amongst South African citizens; looking at their instigators since 1994 up to its peak in May 2008 they continue without punishment. In addition to that, lack of knowledge or ignorance of laws governing foreigners and inefficient conflict resolution mechanisms within leaderships in townships constituted a weakness which might have contributed negatively for the spate of violence. As a result of the incident 17 Mozambican nationals were killed by South Africans during the violent crowd towards foreign nationals. The government of Mozambique assisted about 4363 Mozambican nationals return to their places of origin from South Africa.

Then, taking into account South Africa's delay in deploying the army to end the occurrence; looking at the warnings in 1999 and 2007 to take precautionary steps against acts of xenophobia towards black foreigners; considering the fact that the degree of the attacks was violently notorious and persistent but the government postponed declaring it a crisis and finally, bearing in mind the loss of foreigners' property and lives, including the death of Mozambican nationals in its territory, it is submitted that, South Africa failed to protect foreigners in its jurisdiction, breaching therefore, CERD, ICCPR and ACHPR treaties in which is party to. Accordingly, in the light of international law it failed to apply the aforesaid treaties, arising thus, legal obligations to make reparation as a corollary of those breaches.

As such, tactfully stating the government of Mozambique can through diplomatic protection in its broad sense request reparation to its nationals killed during xenophobic attacks in 2008 from the South African government by offering discussions or resorting to negotiations, conciliation or by turning to consular functions, accredited and performing activities in South Africa in order to deal with the matter.

5.2 Recommendations

The recommendations are based on the findings and actions in which South Africa should adopt or implement in order to mitigate or eliminate attitudes and conducts of xenophobia against foreigners in its territory. Fact that entities other than states play a significant role in the protection and promotion of human rights; they are also directed to the civil society operating in South Africa, the international community and also to the government of Mozambique as concerns to what should diplomatically do to seek reparation or specifically

financial compensation to its nationals killed as a result of xenophobic violence in May 2008. No further, it is recommended that:

5.2.1 The government of South Africa

- Adopt measures to end discriminatory xenophobic attitudes amongst South African citizens against foreigners, mainly black people;
- Avoid and condemn publically any type of insinuation of xenophobia by any person, primarily government officials or politicians;
- Train police officers and other government agents involved in the observation of laws, policies governing human rights of foreigners in South Africa;
- Train community leaders in townships in the need for respect of foreigners' human rights so that they can disseminate the knowledge to other residents;
- Reinforce the system of conflict resolution in townships by involving police officers or other representatives of the government in all conflict resolution matters within residents;
- Investigate the instigators or perpetrators of xenophobia in general, particularly in the most affected areas in May 2008;
- Prosecute, punish instigators and perpetrators of xenophobic attacks and ensure safety of witnesses, if any;
- Facilitate complaints or actions against perpetrators ('criminals') of xenophobic violence in domestic courts;
- Draw policies to address the relationship between natives and foreign nationals in townships;
- Encourage and support emergence of movements that can advocate against xenophobia in South Africa;
- Increase the number of personnel at borders with neighbouring countries to avoid entrance of unlawfully foreigners and take tough measures against acts of corruption, if any at borders;
- Create and publicise a system of 'free telephone line' at the police stations to receive calls or complaints of xenophobic conducts towards foreign nationals;
- Create and enable 'intelligence police officers' to monitor, identify and report on the instigators and perpetrators of xenophobic conducts against foreigners;
- Criminalise acts of xenophobia in the country;
- Take prompt measures to dissuade and stop acts of xenophobic attacks against foreigners in future incidents and

- Cooperate with the government of Mozambique to compensate the victims killed in May 2008 xenophobic violence keeping in mind that compensation does not imply any kind of punishment.

5.2.2 The civil society

- Condemn acts of xenophobia against foreign nationals and recall the government to do more in order to meet its international commitments by ensuring protection of human rights of all people in South Africa;
- Conduct campaigns in the affected areas to explain and educate the residents on human rights entitled to foreigners in the country and
- Dissuade and report attitudes or acts of xenophobia towards foreigners through the media.

5.2.3 The international community

- Continue condemning xenophobia in South Africa since it is inconsistent with South Africa's commitment at international (global, regional and sub-regional) and national levels.

5.2.4 The government of Mozambique

- Propose and explain the need for discussion with the South African government as concerns to compensation of the Mozambican nationals killed in May 2008 xenophobic attacks by offering negotiations to solve the issue or suggest an establishment of a commission of enquiry to work on the matter and then gives its report on how the victims through their next-of-kin should be financially compensated. It is always necessary to bear in mind that reparation does not seek to discipline or punish the South African government but merely for compensation purposes.

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