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The Right to Physical Security for Refugees: A South African Perspective

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Contents

Introduction.....	3
The Right to Physical Security for Refugees in South African Law	4
Assessment of the Measures in Place to ensure the Protection of the Right to Physical Security in Practice	8
The Role of the Police.....	8
Direct violations of the right to physical security on the part of the police.....	11
Indirect violations as a result of deliberate Omission.....	11
Capacity related Considerations	12
How can the protection of the right to physical security for refugees be improved?	13
Improved police functioning.....	13
Education	14
Development of the law relating to Hate Crimes.....	14
Conclusion	17
BIBLIOGRAPHY	18

Introduction

The right to physical security is the right to protection from the infliction of physical violence against you. South Africa's high levels of poverty and unemployment¹ and widespread dissatisfaction with the government's failure to deliver on the socio-economic rights enshrined in the Constitution has given rise to a deep animosity towards asylum seekers in South Africa. This is because it is believed by many that a higher number of asylum seekers in South Africa, also seeking jobs and in need of government services, will further exacerbate their plight. At times, such as in the xenophobic attacks of May 2008,² this animosity manifests in physical violence against refugees and asylum seekers. There is also a high incidence of police brutality against foreign nationals because the police themselves share the same xenophobic sentiments as the community.

These circumstances are aptly encapsulated in the following statement from the Human Rights Watch Report on South Africa from 1998:

As in many other countries, immigrants have been blamed for a rise in violent crime, drug dealing and a rise in drug abuse, unemployment, and other social ills. Immigrants from African countries have been the target of attacks, often because they are perceived as being in direct competition with South Africans for jobs or services. In addition, African immigrants are often the target of random violence and robbery, as criminals perceive them as easy targets because they are unlikely to go to the police. The police and Home Affairs officials have shared this antagonism toward foreigners. The generally negative attitude toward foreigners encourages and condones abuses by police, army, and Home Affairs officials not only against those suspected of being undocumented migrants, but also against non-South Africans who are lawfully in the country, who can expect little or no help from the police when they themselves are victims of crime, including violent assault and theft³

Despite the fact that this statement was written fifteen years prior to today, it remains an accurate representation of the current situation. As a result of these realities, it is imperative that the right to physical security of refugees and asylum seekers is protected by adequate measures.

¹ According to the Quarterly Labour Force Survey by the Department of Population and Social Statistics published on 6 May 2013 available at <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2013.pdf>, the unemployment rate based on the Working Age Population (15-64) in South Africa currently stands at 25.2%.

² See Vikki Iglesdon, *Xenophobic Violence in South Africa May 2008*, 1 December 2008, University of Witwatersrand Forced Migration Studies Programme.

³ Human Rights Watch, "VI. Xenophobia And Attacks against Migrants," in *Report on the Situation in South Africa* (March 1998), available at http://www.hrw.org/legacy/reports98/sareport/Adv5a.htm#_1_49.

Strangely, in that “physical security is clearly fundamental to refugee protection”,⁴ the 1951 United Nations Convention Relating to the Status of Refugees (‘UN Convention’)⁵ does not contain a specific provision on the right to physical security. Academics speculate that the reason for this could be that the drafters of the Convention took it for granted that the physical security of refugees should be protected given that the very nature of refugee law lies in the provision of surrogate protection when protection cannot be secured by an individual’s home state.⁶ Since the right to physical security cannot be grounded in the UN Convention, it is necessary to derive the right from “a criss-cross of rules which have some bearing on the subject.”⁷ Through such a “criss-cross” of rights and rules, the protection of the right to physical security is recognised in a number of international, regional⁸ and domestic legal instruments.

This paper examines the legal status of the right to physical security as it pertains to refugees and asylum seekers in South Africa specifically. The legal framework underpinning the right in South Africa will be set out and assessed in terms of its value in theory and its effectiveness in practice. Practical obstacles to the realisation of the right to physical security for refugees in South Africa will be analysed with a view to establishing possible ways in which these obstacles could be overcome.

The Right to Physical Security for Refugees in South African Law

As stated above, there is no specific right to physical security detailed in the Convention. This does not, however, undermine the importance of the right. The relevant articles to look to in this case are Article 7(1) which guarantees refugees to treatment equivalent to that guaranteed to “other aliens” generally⁹ and Article 5 of the Convention which states that:

⁴ J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005 at 448.

⁵ *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, (entered into force 22 April 1954) [*Refugee Convention*].

⁶ Hathaway *supra* (note 4) at 449.

⁷ M. Othman-Chande, “International Law and Armed Attacks in Refugee Camps” [1990] *Nordic Journal of International Law* 153, at 153 cited in Hathaway *supra* (note 4) at 449.

⁸ African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990); African Charter on Human and People’s Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁹ UN Convention *supra* (note 5) at Article 7(1).

“Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to Refugees apart from this Convention.”¹⁰ Under South African law, refugees are granted a number of rights which collectively assist in the fulfilment of the right to physical security.

The Refugees Act,¹¹ enacted in 1998, is the principal refugee legislation in South Africa. The Act details the definition of a refugee and the requirements and rights pertaining to asylum seekers and refugees in obtaining their status and documentation. Section 27(b) of the Refugees Act entitles refugees to the right to enjoy full legal protection including the rights set out in the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa.¹² While the wording of the section refers specifically to refugees, the Constitutional Court has held in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*¹³ that all persons who are physically present within South Africa, including asylum seekers, enjoy the protection of our law.¹⁴

Thus, according to section 27(b) of the Refugees Act the following rights in the Bill of Rights in the Constitution which pertain to physical security apply to nationals and non-nationals alike. Firstly, section 10 states that everyone has the right to have their inherent dignity protected. Violations of one’s physical security will always entail a violation of one’s dignity. Secondly section 11 states that everyone has the right to life. The fact that the unlawful deprivation of the right to life is a violation of the right to physical security is self-explanatory. Thirdly, section 12 which states that everyone has the right to freedom and security of person including: the right to be free from violence from either public or private sources,¹⁵ not to be tortured in any way¹⁶ and the right not to be treated or punished in a cruel, inhuman or degrading way.¹⁷ The wording of these sections of the Bill of Rights directly mirrors that of articles 6, 7 and 9 of the International Covenant of Civil and Political Rights,¹⁸

¹⁰ UN Convention *supra* (note 5) at Article 5.

¹¹ 130 of 1998.

¹² No. 108 of 1996.

¹³ 2004 (4) SA 125 (CC).

¹⁴ *Ibid* at para 79.

¹⁵ Constitution of the Republic of South Africa, section 12(c).

¹⁶ *Ibid*, section 12(d).

¹⁷ *Ibid*, section 12(e).

¹⁸ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976).

which South Africa ratified in 1998. Hathaway describes these articles, when taken together, as providing “a relatively sound foundation for the protection of the physical security of refugees.”¹⁹

The fact that these relevant rights in the Bill of Rights are articulated as pertaining to “everyone” as opposed to “every citizen”²⁰ illustrates that the drafters of the Constitution intended them to apply to both nationals and non-nationals. The applicability of the Bill of Rights to refugees and asylum seekers has been confirmed in a number of cases, including:

In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*²¹, the court stated:

Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why “everyone” in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so.²²

The Supreme Court of Appeal stated in *Minister of Home Affairs v Watchenuka*:²³

Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reasons – it must be respected, and is protected, by section 10 of the Bill of Rights.²⁴

It is thus clear that both legislation and case law have confirmed that the rights of the Bill of Rights apply to refugees and asylum seekers. The right to physical security for refugees is closely linked to other rights in the Bill of Rights and the Convention.

Firstly, since most physical violence against refugees is borne out of xenophobia, the right to equality and not to be discriminated against is closely linked to the protection of the right to physical security for refugees. Nationality is specifically referred to in section 9(3) of the Constitution which contains a list of grounds upon which discrimination is expressly forbidden. The Promotion of Equality and Prevention of Unfair Discrimination Act (‘Equality

¹⁹ Hathaway *supra* (note 4) at 460.

²⁰ Some rights, such as the political rights contained in section 19 of the Constitution are expressed as pertaining to “every citizen”.

²¹ 2004 (4) SA 125 (CC).

²² *Ibid* at para 27.

²³ 2004 (4) SA 326 (SCA).

²⁴ *Ibid* at para 25.

Act')²⁵ is the implementing legislation of the Section 9 equality clause of the Constitution. Section 1(a) of the Act prohibits unfair discrimination on the grounds of ethnicity and social origin.

Secondly, the courts are the key forum to secure the vindication of legal rights and therefore important to assist in the protection of the right to physical security. Thus the fact that right of access to courts in section 34 of the Constitution is provided to “everyone” as opposed to “all citizens” allows refugees and asylum seekers to utilise legally enforceable mechanisms to claim civil damages for infringements to their right to physical security.

It is clear that South Africa has a solid legal framework in place which buttresses the concept of the right to physical security for all, refugees included. However, a right without enforcement and protection measures holds little value. In practice, refugees are in a highly vulnerable position in South Africa and their right to physical security is often left without significant protection. The largest scale violation of the right to physical security of refugees in South Africa occurred in 2008, in the countrywide xenophobic attacks. In this show of violence and hatred, 62 people were killed, 670 were wounded and more than 100 000 people were displaced as their homes were burnt down and destroyed.²⁶ Since then, there has not been an attack on foreigners on as large a scale; however attacks upon foreigners by South African nationals as well as by the police have continued to occur.²⁷

The question that needs to be asked is what protection measures are in place to ensure that the right is realised and how they can serve to prevent such attacks upon the physical security of individuals who have very often fled violence in their home countries and are in need of a safe haven.

As the focus of this paper is on the assessment of the protection of the right to physical security of asylum seekers and refugees specifically, the emphasis will be on the protection against hate crime, which entails physical violence against refugees triggered by virtue of a negative attitude towards them based on their nationality, rather than on incidents

²⁵ Act 4 of 2000.

²⁶ See Vikki Iglesdon ‘Xenophobic Violence in South Africa May 2008’, 1 December 2008, University of Witwatersrand Forced Migration Studies Programme.

²⁷ United States Department of State, *2012 Country Reports on Human Rights Practices - South Africa*, 19 April 2013, available at: <http://www.refworld.org/docid/517e6dd578.html> [accessed 26 May 2013].

of theft and other non-victim based crime that occurs frequently in South Africa as a country with a high crime-rate.

Assessment of the Measures in Place to ensure the Protection of the Right to Physical Security in Practice

When a refugee faces a violation or a threat of a violation their right to safety or security, the key mechanisms for protection would be to seek assistance from the police or in some cases, to approach the courts for relief. In order to assess the role, viability and effectiveness of these measures, it is necessary to analyse the law which underpins them.

The Role of the Police

In any host-state, which has an integration approach to refugee reception rather than a camp based approach, the physical security of refugees is the responsibility of the government. The police are the bearers of the primary responsibility of the protection of the right to physical security of individuals, including refugees. Section 205(3) of the Constitution of the Republic of South Africa states that the objects of the police service are to “...prevent, combat and investigate crime, to maintain public order, [and] to protect and secure the inhabitants of the Republic and their property...”²⁸

The laws pertaining to the police force and their responsibilities are detailed in the South African Police Services Act (‘Police Act’).²⁹ The Police Act records that its objects are to

... Secure the safety and security of *all persons* and property... to uphold and safeguard the fundamental *rights of every person* as guaranteed by Chapter 2 of the Constitution... ensure co-operation between the Service and the communities it serves in the combating of crime [and] to reflect respect for victims of crime and understanding of their needs...³⁰[Emphasis added]

²⁸ Constitution of South Africa, section 205(3).

²⁹ 68 of 1995.

³⁰ Ibid.

It is thus clear that the Police Act is intended to apply to all persons present within the territory, it makes no mention of any differentiation between citizens and non-citizens, lawfully or unlawfully present. Further significant sections with regard to the duties of the police include section 13(1) which states that police officers should exercise their powers and duties subject to the Bill of Rights and with “due regard to the fundamental rights of every person.”³¹ Section 12(3) (a) further provides that officers should perform their official duties in such a way that is “reasonable in the circumstances.”³²

There are oversight mechanisms in place for the police services. One such mechanism is the Independent Police Investigative Directorate (IPID), formerly the Independent Complaints Directorate, the functions of which are set out in section 206 of the Constitution. At a provincial level, the purpose of the IPID is to monitor police conduct; to oversee the effectiveness and efficiency of the police services, promote good relations between the police and the community and assess the effectiveness of visible policing.³³ Each year, an annual report detailing the performance of the police and the complaints directed to them is release.

In addition, the Human Rights Commission, established under section 184 of the Constitution can serve a role in police oversight as they are empowered to investigate and report on the observance of human rights and to take steps to ensure redress where there have been violations of human rights. The Commission has further powers under the Human Rights Commission³⁴ which states that the Commission “shall maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices and to promote cooperation in relation to the handling of complaints in cases of overlapping jurisdiction.”³⁵ The Human Rights Commission can therefore play a role in the monitoring of police conduct in terms of investigating their handling of cases involving possible xenophobia and their treatment of foreigners when reporting cases.

Despite these measures, violations of the physical security of refugees remain common-place.³⁶ In determining whether or not the conduct by the police services constitutes

³¹ Ibid at section 13(1).

³² Ibid at section 12(3)(a).

³³ Constitution of the Republic of South Africa, section 206.

³⁴ Act 54 of 1994.

³⁵ Ibid at section 1(b).

³⁶ *2012 Country Reports on Human Rights Practices - South Africa*, *supra* (note 28); See also “ANC, Cosatu slam xenophobic violence”, 30 May 2013, available at

<http://www.news24.com/SouthAfrica/Politics/ANC-Cosatu-condemn-xenophobic-violence-20130530>.

an unlawful infringement of the right to physical security of a refugee, the following enquiry established by Hathaway is a useful starting point. Although this formulation was intended by Hathaway to apply to the right to life, it can also be used to apply to the right to physical security in a more general sense:

‘The right to life is not... infringed simply because refugees die... ...The relevant enquiry is whether the authorities of the *asylum state intend to kill the refugee – either directly, or indirectly* as by starvation or exposure to illness or violence or whether they show *a lack of determination effectively to respond to known risks to life, or to pursue and prosecute those responsible for risk to, or loss of, life.* Because the right to life can be infringed by either act or omission and because it focuses broadly on whether death results from *situation characterized by “elements of unlawfulness and injustice, as well as those of capriciousness and unreasonableness,* is an important means of holding governments accountable for intentional or foreseeable threats to refugees.³⁷[Emphasis added]

This formulation illustrates that failure on the part of the police not only occurs in incidents of police brutality where they themselves inflict harm upon refugees (direct commission), but also in demonstrating a lack of determination to intervene and respond to known threats to the lives and well-being of refugees (omission to act). It is in these circumstances that it can be said that state authorities have failed to protect the physical security of refugees. It was affirmed under South African law in the case of *Carmichele v Minister of Safety and Security*³⁸ that police can be held liable both for the commissions and omissions to act.

The key enquiry as to whether there has been a failure on the part of the state is therefore whether the death or harm resulted from a situation characterised by unlawfulness, injustice, capriciousness and/or unreasonableness. A further factor that must be noted in the case of South Africa is that sheer lack of capacity can be a major problem in protecting the physical security of the inhabitants of the Republic. These enquiries will each be examined in turn.

³⁷ Hathaway supra (note 5) at 453.

³⁸[2004] (3) SA 305 (SCA)

Direct violations of the right to physical security on the part of the police

There are examples of direct violations of the right to physical security by the police themselves. Police brutality is a reality in South Africa. According to the Independent Complaints Directorate Annual Report,³⁹ between March 2011 and April 2012, there were 4930 complaints received regarding police conduct. Of these, 720 were deaths while in police custody, 88 were non-compliance in domestic violence cases, 2320 were allegations of criminal offences and 1795 were misconduct cases. Precise statistics as to the percentage of these which were foreigners are not readily accessible however there have been a number of reports in the media of police violence against foreigners.⁴⁰ The most recent case of police brutality against a foreigner which aroused shock and mistrust of the police service took place in February 2013 where a Mozambican taxi driver was tied to the back of a truck and dragged along the road. The man was found dead in his cell that evening.⁴¹ The South African Human Rights Commission undertook to investigate the matter however the report has not yet been released. It is blatant in such a case that the man's death was the result of "capriciousness or unreasonableness" as referred to in Hathaway's formulation and therefore constitutes a violation of the right to physical security at the hands of a state agency. This constitutes failure to adequately protect the right to physical security on the part of the state.

Indirect violations as a result of deliberate Omission

Many refugees are too afraid to report incidents to the police, either because they are too afraid as many of the police themselves are xenophobic⁴² or because they do not speak any of

³⁹ ICD Annual Report 2011-2012 available at

[http://www.ipid.gov.za/documents/report_released/annual_reports/2010-2012/ICD_Annual_Report_-_Inside\[1\].pdf](http://www.ipid.gov.za/documents/report_released/annual_reports/2010-2012/ICD_Annual_Report_-_Inside[1].pdf) [accessed 17 May 2013].

⁴⁰ See Amnesty International, Annual Report 2012: South Africa available at <http://www.amnesty.org/en/region/south-africa/report-2012> [accessed 28 May 2013].

⁴¹ See Amnesty International, *Brutal reign by South African police claims another victim*, 1 March 2013, available at: <http://www.refworld.org/docid/5135c17f2.html> [accessed 4 May 2013]; Mail and Guardian "Taxi driver killed after alleged police brutality" available at <http://mg.co.za/article/2013-02-28-taxi-driver-killed-after-alleged-police-brutality>.

⁴² See *Amnesty International News, South Africa: Police repeatedly turn on asylum-seekers amid xenophobia spike 29 May 2013* available at <https://amnesty.org/en/news/south-africa-police-repeatedly-turn-asylum-seekers-amid-xenophobia-spike-2013-05-29>.

the South African languages. There are many reports of foreigners simply being turned away by the police when attempting to report a case. There are also allegations that the police failed to employ their resources and discharge their duties during the xenophobic attacks of 2008. Following the attacks, the UCT Refugee Rights Clinic brought two claims to the Equality Court based on section 1(a) of the Equality Act, namely *Said and others v the Minister of Safety and Security*,⁴³ and *Osman v Minister of Safety and Security*.⁴⁴ In these cases, the Clinic argued that the police had discriminated against the victims of the xenophobic attacks by failing to intervene and do their duty by them based on their nationality. In *Osman*, the complainant testified that the police simply looked as shops were looted and rights were violated. The cases were ultimately dismissed as there was not sufficient evidence to support the Complainants version however it illustrates the way in which refugees are often treated by the police.⁴⁵ The cases also resulted in the order that the South African Human Rights Commission should provide attitudinal training to the police⁴⁶ thus it is clear that the court acknowledged that the attitude of police towards foreigners must be improved.

Capacity related Considerations

A relevant factor in considering the right to physical security is the fact that, since the majority of refugees and asylum seekers are unable to obtain meaningful employment by virtue of the fact that the duration of their sojourn in the country is most often uncertain, they cannot afford to pay rent in suburban areas and are thus indirectly forced to live in the townships on the outskirts of the cities. A direct consequence of this is that areas in which refugees are living are poorly policed due to lack of capacity on the part of the police force. Taking Khayelitsha as an example, on average in the Western Cape, the ratio of police

⁴³ (EC13/08), unreported judgement handed down on 7 December 2011.

⁴⁴ [2011] JOL27143 (WCC).

⁴⁵ See J de Jager, 'Addressing Xenophobia in the Equality Courts of South Africa', *Refuge* Volume 28 No. 2 (2011); See also J. Hornberger 'From General to Commissioner General – On the Popular of Policing in South Africa' *Law & Social Inquiry: Journal of the American Bar Foundation* (published 7 May 2013) at 12.

⁴⁶ *Ibid* at 114.

officers to people is 1:259 while in Khayelitsha, the ratio is 1:1143 people.⁴⁷ It is clear that with ratios such as this, the police would not be able to significantly curb crime in the area.

A further consequence of the fact that refugees are forced to live in the townships and fringes of urban areas is that they live amongst the most poverty stricken individuals in the country. These people have nothing themselves and they resent any foreigners present in the country as they believe that they are there to steal their jobs and that the presence of foreigners in the country affects the government's ability to provide for them. Thus xenophobia is at its most rife in these areas. The combination of shortage of police protection and high levels of xenophobia results in a large amount of violence committed against refugees living in poor areas with impunity for the perpetrators and no remedy for the victims.

How can the protection of the right to physical security for refugees be improved?

There are a number of measures, which have been employed in other jurisdictions, which would have the potential to better the protection of the right to physical security for refugees. Broadly, these include: Improved police training, education to promote tolerance in youth from an early age and the imposition of stricter sanctions for discriminatory crimes through the implementation of anti-hate crime legislation.

Improved police functioning

In line with the aforementioned categories of failure to protect on the part of the police services, there are a number of steps which could be taken to improve police performance. Building the capacity of the police and deploying them to areas identified as having a high violent crime rate could serve to reduce incidences of violence in so-called "hot-spots". Since many refugees cannot speak any of the official South African languages, it could be of value for translators to be employed at police stations in areas with a high refugee population, this would serve to encourage refugees and asylum seekers to report violence against them. The attitudinal training for the police that was ordered in the *Osman* case should be a compulsory part of police training. As refugees in South Africa are in need of protection, it is essential

⁴⁷ See Campaign for Safer Communities, available at <http://safecommunities.org.za> [Accessed 1 April 2013].

that tolerance is fostered in the police force so that police protection is provided in a non-discriminatory manner.

Education

Tolerance training is not only necessary for the countries police officers, but also for the citizens of South Africa as a whole. Since South Africa continues to receive a high number of refugees from other African nations and does not have a camp system, integration of refugees into society is essential. There could be value in tolerance workshops forming a compulsory part of school curricula. This would serve to educate children about acceptance and to see foreigners as a part of our country rather than as a threat to their livelihood from an early age. Over time, this could have a positive impact in improving the attitude of South Africans, particularly those who are indigent, towards foreigners and thereby lead to a reduction in acts of violence committed against them.

Development of the law relating to Hate Crimes

One possible mechanism which has the potential to curb violent acts against refugees would be through the enactment of Hate Crime legislation. Hate crime concerns activity which is simultaneously criminal and discriminatory and thus necessarily encompasses the limitations and requirements of both branches of law.⁴⁸ It thus involves an overlap between human rights law and criminal law. It is arguable that South Africa is in fact in breach of its international obligations in its failure to enact anti-hate crime legislation. This flows from South Africa's signing and subsequent ratification of the International Convention on the Elimination of all forms of Racial Discrimination ("CERD")⁴⁹ which calls upon state parties to take measures to combat hate crime in domestic law. CERD makes use of the term "racial discrimination" which is defined as "distinction, exclusion or preference based on race, colour, descent or national or ethnic origin" which is aimed at or has the outcome of impairing the enjoyment or exercise of human rights in the "political, economic, social, cultural or any other field of

⁴⁸ K Williams, Legal Brief on Hate Crimes in South Africa, Webber Wentzel Attorneys, 2010 available at <http://www.cormsa.org.za/wp-content/uploads/2010/07/cormsa-hate-crimes-legal-brief.pdf> [accessed 10 May 2013] at para 2.1.

⁴⁹ Adopted and opened for signature and ratified by General Assembly Resolution 2106 (xx) on 21 December 1965.

public life.”⁵⁰ Thus discrimination based on national origin as is the case in discrimination against refugees and asylum seekers falls neatly into the definition of racial discrimination for the purposes of CERD. Article 4(a) of CERD states as follows:

“State parties... undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination, and to this end... inter alia:

- a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such act against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racist activities including the financing thereof...”

This article obliges state parties to declare the commission acts of violence grounded in racial discrimination, which encompasses violent hate crime committed against refugees, to be a specific criminal offence. South Africa ratified CERD on 10 December 1988, thereby agreeing to implement this obligation.⁵¹ The introduction of hate crime legislation, modelled on that adopted in other jurisdictions, would comply with the obligation imposed by Article 4(a) of CERD. Foreign jurisdictions which have incorporated hate crime legislation into their law include the European Union and the United States. Both jurisdictions provide that for the criminalisation of offences motivated by discriminatory attitudes and both provide for enhanced sentencing for such crimes. Article 4 of the European Union Framework Decision (‘EU Framework Decision’) ⁵² provides that “racist and xenophobic motivation” shall be considered “an aggravating circumstance, or alternatively that such motivation may be taken into consideration by the courts in the determination of penalties.” The United States has hate crime legislation at both a state level and a federal level. At a federal level the Federal Hate Crimes Sentencing Act (“FHCSA”) enacted as part of the Violent Crime control and Law Enforcement Act⁵³ required that harsher sentences be imposed on violent crime which was committed based on discrimination on the basis of race, religion, national origin, ethnicity, gender disability or sexual orientation,

Hate Crime legislation, incorporating enhanced sentencing, would at the very least convey to the public that hate crimes are taken seriously by government authorities. The requirement of having a register to record the amount of hate crime committed would

⁵⁰ Ibid, Article 1(1).

⁵¹ Supra (note 48) para 2.8.

⁵² 2008/913/JHA of 28 November 2008.

⁵³ Violent Crime Control and Law Enforcement Act of 1994 18 USC §§ 3591-3598.

contribute to research in this regard and to the identification of areas in which hate crime is rife and preventative measures are particularly necessary. The issue of no record being kept of the number of crimes committed against foreigners, as illustrated by the fact that no conclusive statistics could be found regarding police brutality committed against foreigners specifically is problematic as it means that the true gravity of the issue cannot be ascertained.

Another US enactment with regard to hate crimes is the Hate Crime Prevention Act⁵⁴ which came into force in 2009. The Act authorises the Department of Justice to investigate and prosecute crimes motivated by the victim's actual or perceived sexual orientation, gender, gender identity or disability. It also provides for the possibility of training programmes for police officers and other enforcement officers to in the identification, prosecution and prevention of hate crimes.

Another step taken by the US was to enact the Federal Hate Crimes Statistics Act.⁵⁵ This Act provides that data is to be collected from law enforcement agencies as to the number of hate and bias crimes that occur. The aims of the Federal Hate Crime Statistics Act include:

- i) Monitoring any fluctuations in the incidence of hate crimes, ii) assessing the effectiveness of current legislation, iii) increasing public awareness of hate crimes and iv) assisting law enforcement officials to determine when and where racial tension is reaching critical levels that may require intervention.

A similar requirement of recording hate crime statistics as a category of crime would be of value in South Africa for these reasons. The requirement of having a register to record the amount of hate crime committed would contribute to research in this regard and to the identification of areas in which hate crime is rife and preventative measures are particularly necessary. The issue of no record being kept of the number of crimes committed against foreigners, as illustrated by the fact that no conclusive statistics could be found regarding police brutality committed against foreigners specifically is problematic as it means that the true gravity of the issue cannot be ascertained.

Hate crime legislation could serve a valuable purpose in providing guidance to the police force, the IPID, prosecutors, and to the courts as to how crimes of this nature are to be

⁵⁴ S909 IS.

⁵⁵ 28 U.S.C 534 (1994).

handled with a view to deterring conduct of this kind in the future. Legislation would have stipulate minimum sentencing for hate crimes and therefore provide for the development of hate crime jurisprudence.

Conclusion

The South Africa Constitution provides a strong foundation for the right to physical security. It does so through the rights in the Bill of Rights applicable to all persons present within the Republic and the implementation legislation flowing therefrom, its demarcation of police duties and its establishment of oversight mechanisms. However, with regard to enhancing the protection of the physical security of refugees, focus and development are required. It has been illustrated that the United States and the European Union have developed a body of law pertaining to the punishment and prevention of hate crime. Although this is not the only answer, South Africa, it is submitted that, as one of highest refugee receiving nations in the world, would benefit from laying out guidelines to handling violence against refugees specifically. Promoting a cohesive nation is in line with the founding values of the Constitution of dignity, equality and freedom for all and the eradication of discrimination based violence would be a positive step towards reducing South Africa's crime rate.

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