

**THE CONTESTED ROLE AND EFFECTIVENESS OF NON
GOVERNMENTAL ORGANIZATIONS [NGOs] IN ASSISTING
REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA:
A CASE STUDY OF THREE LOCAL NGOs**

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Declaration

I, Meron A Okbandrias, declare that this PhD dissertation entitled **THE CONTESTED ROLE AND EFFECTIVENESS OF NON GOVERNMENTAL ORGANIZATIONS [NGOs] IN ASSISTING REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA: A CASE STUDY OF THREE LOCAL NGOs** is my original and independent research. It has not been previously submitted for any degree, and is not being concurrently presented in candidature at any other University. All sources and literature have been duly acknowledged.

Candidate's signature:

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List of Acronyms

CBO: Community Based Organization

CBRC: Coordinating Body of Refugee Communities

CoMRSA: Consortium for Refugees and Migrants in South Africa

DHA: Department of Home Affairs

DOE: Department of Education

DOH: Department of Education

DoJCD: Department of Justice and Constitutional Development

DSD: Department of Social Development

FIC: Financial Intelligence Control

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant, Social and Cultural Rights

ILO: International Labour Organisation

IOM: International Organisation for Migration

LHR: Lawyers for Human Rights

LRC: Legal Resources Centre

NEPAD: New Partnership for African Development

NGO: Non-Governmental Organization

NPA: National Prosecuting Authority

OAU: Organization of African Union

OUHCHR: Office of the United Nations High Commission for Human Rights

PAJA: Promotion of Administrative Justice Act

RAB: Refugee Appeal Board

RDP: Reconstruction and Development Programme

RSS: Refugee Social Services

SADC: Southern African Development Communities

SAMP: South African Migration Project

SAPS: South African Police Service

SASSA: South African Social Security Agency

SC: Scalabrini Centre

SCOB: Somalia Community Board

SCRA: Standing Committee for Refugee Affairs

UNHCR: United Nations High Commission for Refugee

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Abstract

The role of South African NGOs in the protection of asylum seekers and refugees has changed and declined despite their having partnered in the design of liberal refugee legislation. This body of legislation responds to the needs of increasing numbers of asylum seekers and refugees arriving in South Africa – and to their falling victim to violent xenophobic attacks.

Their challenges around the efficient and dignified access to documentation, health, education and other services, have not been effectively addressed. This research therefore focuses on the role of NGOs in assisting these vulnerable groups to access documentation and social services. It investigates to what extent they are successful and highlights the problems that asylum seekers and refugees face. It explores the responses of NGOs to these problems and examines the perceptions of refugees and asylum seekers around the role of NGOs.

The research essentially explores whether refugees and asylum seekers have been able to claim the rights they are entitled to in a substantive manner. It examines the degree to which NGOs working in the area of human rights, and tasked with assisting refugees, have been able to contribute effectively in this regard.

The researcher:

- Collected data from Ethiopian and Congolese refugees and asylum seekers in South Africa to examine their perceptions.
- Interviewed personnel from the three NGOs in this case study because these NGOs are partners of the UNHCR and therefore tasked with implementing refugee/asylum seeker support.
- Uses the interpretive approach - focusing on certain themes in the experiences of asylum seekers/refugees and NGOs, respectively. These themes are explored and interpreted.
- Bases his research on the theoretical foundation of liberal human rights. The work of Hanna Arendt and John Rawls has been incorporated, in conjunction with Agamben's theories of the Nation State and 'the other' in the Nation State. Agamben's concept of "state of exception" is relevant, and has been discussed.
- Looks at the 1951 United Nations Convention on the Status of Refugees and the Refugee Act of 1998 because they form the cornerstone and bedrock of the rights of asylum seekers and refugees.

This research has explored the efforts of NGOs as agents of advocacy for, and protection of, refugee and asylum seekers and their rights.

The research found that NGOs play an integral part, but their relationship with both Home Affairs and Government has weakened to such an extent that their tactics and strategies are increasingly failing to produce results. In addition, most refugees and asylum seekers were found to be unaware of these NGOs and the work they can do on their behalf.

Chapter 1: Introduction

There is no doubt that investigating the issues surrounding asylum seekers and refugees in the context of the 21st century (more especially within South Africa) is extremely timely considering the dynamic nature of this area of international relations and the steady movement of migrants all over the world - and specifically into this country. In the last 25 years, after the transition to democracy in South Africa, this field has seen major legislative changes and faced many challenges.

Xenophobia occurs in both its covert and overt form. Xenophobic attacks, especially those in 2008 and 2015, have brought the issues of asylum seekers and refugees to the forefront of public awareness and discussion.

Despite constitutional and legislative protection for the rights of asylum seekers and refugees; Government's assurances; a robust judicial system; and the activism of civil society, it remains a hugely challenging environment.

These challenges can be explained and articulated on so many levels:

Universally guaranteed rights of refugees and asylum seekers are compromised by structural socioeconomic factors that become the real or perceived reasons for begrudging migrants their presence and/or activities. In South Africa, this especially applies to migrants from other parts of Africa. This chapter looks at the historical context of terminology applied to people who are either Refugee or Asylum seeker.

This study looks at the role expected of civil society and that of NGOs active in refugee protection. Chapter 1 highlights the objectives and research questions of this study and maps out the over-all structure of the dissertation.

1.1 Background and Outline of Research Problem

The violent episodes of xenophobic attacks that unfolded in 2008 resulted in greater public and judicial scrutiny of the status of refugees and asylum seekers in South Africa, and the extent to which they are able to access their legislated human rights.

This sector of society has always been vulnerable as a result of numerous factors. The institutional framework for facilitating refugee rights through the implementation of suitable policies has always been part of the broader human rights discourse in South Africa. Nevertheless, the plight of this community remains a challenging one in light of local dynamics that have increasingly come under the spotlight since these attacks.

The question of why one should focus on the rights of refugees and asylum seekers in a doctoral study, when there are many other marginalized sectors in South African society, is a critical one. It is necessary, however, to engage in a detailed study around this community because there is a prevailing argument in mainstream politics, as well as in academia, that the ability of refugees and asylum seekers to claim any substantive rights while residing in South Africa, is actually limited because they are not citizens [despite national legislation that grants them extensive rights] as Amit¹ and Crush and Ramachandran² stated.

This state of affairs, poses a unique challenge for NGOs who specialize in advocacy for refugee rights and whose task it is to monitor the implementation of policies and processes that are meant to benefit refugees. Furthermore, their role has been altering as changes in Government and DHA occasion changes in policy and approach.

Essentially, what this research intends to explore is:

- Whether refugees and asylum seekers in South Africa are able to claim the rights they are entitled to, in any substantive manner, and
- If and how NGOs working in the area of human rights, and tasked with assisting refugees, are monitoring the implementation of policies and legislation that are meant to assist the refugee community.

¹ Amit, R. (2012). NO WAY IN Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices. ACMS Research Report, University of the Witwatersrand, Johannesburg.

² Crush, J., & Ramachandran, S. (2010). Xenophobia, international migration and development. *Journal of Human Development and Capabilities*, 11(2), 209-228.

The research critically discusses the changing role of NGOs and assesses their effectiveness based on four criteria: Advocacy; Protection; Facilitating Access to Social & Other Services; and Humanitarian Assistance.

It is the assumption of the researcher that most refugees and asylum seekers remain unaware of the existence and purpose of NGOs that are active in the area of refugee issues.

Although some of the issues are beyond the scope of this study, this research aims to illuminate the problems within civil society that limit its protection of refugees. In so doing it will identify areas that require further research. This dissertation provides a range of recommendations, and highlights areas that can be improved upon.

1.2 The History of Refugees and Asylum seekers

The history of the world is full of wars, famine and hardship, and people fleeing from these calamities. Almost all countries in their history have either produced or received asylum seekers to varying degrees. History is full of examples:

Assyrian rulers conquered ancient Israel and expelled 10 of the legendary 12 tribes from these lands. How many there were, and where they ended up, remains the subject of highly contentious historical and religious debate.

The biblical account in Exodus is an account of displacement.

In recent history, Louis XIV of France issued the Edict of Nantes that meant the Huguenots³ risked state persecution if they practised their Protestant faith. He caused one of the first recognized displacements of a people across Nation States. Their exact number is not known, but historians estimate that around 200,000 people fled their homes over the next twenty years. Approximately a quarter fled to England while the rest settled in The Netherlands, Germany, Prussia, Switzerland, Scandinavia, and Russia.

In the last three generations, the world has seen an upheaval like never before. Two world wars and many major conflicts have seen destruction on an escalated scale because of the use of

³Golden, R. M. (Ed.). (1988). *The Huguenot connection: The Edict of Nantes, its revocation, and early French migration to South Carolina* (Vol. 125). Springer Science & Business Media.

modern weaponry. Examples include: the displacement of Armenian communities during the World War1; Forty million refugees were caused by World War2 mainly from Eastern Europe resulting in Jews becoming stateless;⁴ and The Nakba (meaning “catastrophe”) Palestinian displacement.

Contemporary examples of displacement include the '70's and '80's displacement of Afghans - that continues to this day; the Balkan and Great Lakes displacements⁵; and the current displacement of African and Middle Eastern communities.

Ideas about sanctuary, asylum and refuge have an ancient lineage and are found worldwide in both written records and oral tradition. The obligation to protect displaced people, fugitives and those abandoned by their communities of origin, has often been seen as a social priority that is closely associated with the well-being of the wider society. The establishment of sanctuaries has been a marker of general social cohesion: the community that protects others protects its own. This is reinforced by Christianity and other religions.⁶ For millennia, traditions around refuge have remained embedded in religious beliefs and practices. Muslims have experienced flight in the face of danger as have Christians⁷. In the pre-modern era⁸, places of protection were typically sites of cosmological significance – locations sanctified by deities, or by those authorised by them. These sites were inviolable in that conflicts were to be suspended and the use of violence forbidden. Breaches in the regime of protection were considered a challenge to the authority of the gods, and could be punished severely.

This tradition has progressively become eroded, diluted, and has often been abused. The pre 1951 convention on the treatment of refugees has been observed inconsistently and at the whim of receiving countries. Observance has been dictated by internal and geopolitical imperatives that often boded ill for refugees. The two great world wars created an awareness that refugees are in legal limbo when it comes to international protection. Consequently, the evolution of international refugee laws based on a firm commitment to human rights marked a positive

⁴Marrus, M. R. (1985). *The unwanted: European refugees in the twentieth century*.

⁵Marfleet, P. (2007). Refugees and history: why we must address the past. *Refugee Survey Quarterly*, 26(3), 136-148.

⁶ Psalms 16, 27, 36, 51, 52 and Isaiah 8.

⁷ Al Baqarah, Verse 77; Al Tauba, Verse 60; Al Anfal, Verse 41.

turning point. Consequently, the giving of sanctuary, asylum and refuge became an obligation in place of a mere act of charity.

1.3 Historical trend of refugees in South Africa

The movement of black and white people has had a long history. The movement of blacks [Africans] happened before and after the arrival of white settlers. History is particularly rich with accounts of those who migrated because of the mining boom in South Africa. Crush⁹ argues that cross-border migration between South Africa and other African countries dates back to the mid-19th century. During this period, the flourishing diamond and gold industries led to the fast-tracking of a modern industrial economy in South Africa. Crush¹⁰ maintains that many citizens of South Africa's neighbours migrated to South Africa to work in the mines and that cross-border migration has taken different forms: On the one hand a highly regulated and formalized mine contract-labour system was established between 1890 and 1920 [which still continues to date]; coexisting alongside informal unregulated movements across borders. South Africa has received both kinds of migrants over the years. This trend is historically documented:

Many of the ethnic groups in South Africa have links with others in the region and not just because of the imposition of colonial national borders. Wars, particularly at the time of Shaka Zulu pushed people northwards. Indian and Chinese migration to the country (mostly through indentured labour schemes) started in the late 1800.¹¹

According to Crush,¹² despite the fact that the apartheid system generated many refugees, it was not until the 1980s that South Africa began to be a destination for about 350,000 Mozambicans who were fleeing civil war in their own country. Approximately 20 percent of these refugees returned home after the war ended. The others remained and were integrated into South Africa's local communities along the border with Mozambique.

⁹Crush, J. (2008). South Africa: Policy in the face of xenophobia. *Migration information source*, 2.

¹⁰Crush, J. (2008)

¹¹Peberdy, S. (2010). Setting the Scene: Migration and Urbanisation in South Africa. *South African Civil Society and Xenophobia*. P.

¹²Crush, J. (2008)

The Froneman Commission¹³ puts the number of ‘foreign born Africans’ or ‘foreign Bantu’ in 1961 at 836,000, which number declined after the 1970s. Simply put, South Africa is accustomed to having different kinds of migrants and refugees residing in both rural and urban areas¹⁴. In an era where there was a mandatory distinction between opposites such as white and black, friend and foe, refugees - like the rest of the population - were defined in terms of a specific category.

After 1994, there was a greater flow of, and better legislative environment for, asylum seekers and refugees. However, the democratic dispensation changed the discourse about the ‘other’ in South African society. After 1994 refugees were not well received by local communities in South Africa as they were seen as “outsiders”. Their relationship with South Africans deteriorated, resulting in a demonstration by asylum seekers in Johannesburg in 1995 that led to the involvement of NGOs.¹⁵ Perceptions were not unlike those of the apartheid system that considered migrants as a source of labour. This mind set has continued over the years as people from other African countries are discriminated against, and victimized by South Africans. “Outsiders” or African foreigners endure judgment, hostility and insults from South African citizens. People who have migrated to South Africa from non African countries such as the United States of America, Canada and the United Kingdom, have not faced this level of discrimination. They are received by South Africans more or less with open arms.

Crush¹⁶ maintains that since 1994, South Africa has deported 1.7 million undocumented migrants back to their home countries. This includes citizens of neighbouring countries such as Mozambique, Zimbabwe and Lesotho. In 2006 alone as many as 260, 000 migrants were arrested and deported. Crush¹⁷ points out that refugees in South Africa were not recognized until 1993 when a refugee policy was established. This meant that Mozambican refugees who came to South Africa during the 1980s were denied full refugee status.

Until 2000-2001, when the government legalized their status by giving them permanent residence, they lived in South Africa as undocumented migrants.

¹³Froneman Commission. 1962. *Interdepartmental Commission of Inquiry into Foreign Bantu*, Government Printer: Pretoria, p. 165.

¹⁴ Peberdy, S. (2010). P. 5

¹⁵United States Committee for Refugees and Immigrants. (1997). *U.S. Committee for Refugees World Refugee Survey 1997* <http://www.refworld.org/docid/3ae6a8b91c.html> [Accessed 17 October 2015]

¹⁶Crush, J. (2008)

¹⁷Crush, J. (2008)

The researcher looks at migration and refugee movements that occur concurrently because they are closely related, especially in terms of the recent history of South Africa:

Since 1994, South Africa has become a preferred destination for many nationals of other African countries or states. The pre 1994 apartheid-era Aliens Control Act regulated the reception of people who arrived in the 1990s and this meant that refugees and asylum seekers were denied both the right to work and the right to access government services. This meant that refugees received no assistance from the government even though they lived in South Africa (SA). The government effectively neglected them. Now refugees and asylum seekers are permitted to work and study in SA.

1.4 The role of NGOs in assisting refugees and asylum seekers

Since the end of the 90s, the role of NGOs has become increasingly prominent in South Africa: - from their participation in the drafting of the Refugee Act of 1998 - to litigating on behalf of asylum seekers and refugees. The role of NGOs was never more magnified than during the xenophobic attacks of 2008.

To understand the fundamentals of xenophobia in South Africa requires that we examine the longstanding economic and social processes that resulted in uneven capital accumulation patterns within and between the local black populations relative to African immigrants. (Amisi et al¹⁸)

Xenophobia begins under conditions of economic stress. South Africa has experienced some of the world's worst economic disorders and inequalities since the end of apartheid. This was triggered through rising inequality which when measured, reveals SA as having one of the highest Gini coefficients (from .66 in 1994 to .70 in 2008).

This has resulted in progressively higher unemployment levels (from 16% in 1994 to 20% in 2010) and worsening of urban poverty¹⁹. In such severe economic periods, the local people

¹⁸ Amisi, B., Bond, P., Cele, N., & Ngwane, T. (2011). Xenophobia and civil society: Durban's structured social divisions. *Politikon*, 38(1), 59-83.

¹⁹Frye, I., Farred, G., & Nojekwa, L. (2011). Inequality in South Africa. *Tearing us apart: Inequalities in southern Africa*. Rosebank: Open Society Initiative for Southern Africa.

struggled to sell their products within a strongly competitive environment so they jealously protected the production and market processes.

In 2008 and 2015, the world watched in horror as South Africans turned against their African immigrant neighbours, killing, raping, and leaving tens of thousands homeless²⁰.

In response to such violence, civil society organizations (CSOs) played a critical role in organizing resources for the victims and influencing public opinion. In contrast, state agencies seemed unable to respond to this crisis either on an appropriate scale or with speed. According to Everatt²¹, civil society suggested flexible, innovative and creative structures to reinforce social justice networks for immigrants. The immediate response from various NGOs when the violence began in May 2008 was to call for more civic 'education' about human rights, the plight of refugees, and the role that neighbouring societies played in hosting South African exiles during the rough times of apartheid.

Moreover, civil society sought reasons beyond economic grievances. They sought relationships of international solidarity:

The South African Transport and Allied Workers Union refused to offload three million bullets destined for neighbouring Zimbabwe from Chinese ships in Durban harbour.

In May 2008 civil society mobilized several thousand people to march through Hillbrow in Johannesburg to strengthen solidarity within immigrants²².

It is also important to remember the short term but impressive provision and distribution of resources by NGOs to people affected by the 2008 xenophobic attacks. This, while the state opted out of its responsibilities and adopted a posture of denial.

Civil Society Organizations in Durban quickly rose to address the xenophobia crisis when the state did not know what to do²³.

²⁰ Everatt, D. (2010). Xenophobia, civil society and South Africa.

²¹ Everatt, D. (2010).

²² Amisi, B., Bond, P., Cele, N., & Ngwane, T. (2011)

²³ Schwarer, S., & Mwelase, W. (2008). Stepping into the breach: Civil society responses to xenophobia in Durban 2008. *Unpublished Centre for Civil Society Research Report*.

Among these organisations there was a clear division between those providing material assistance to the displaced and those who were doing vital work behind the scenes. Some organizations took on a solidarity role and focused on political and advocacy activities. NGOs such as the Red Cross took on the role of collecting, coordinating and delivering material aid in the form of food, clothes and personal hygiene supplies. Durban NGO Action Against Xenophobia (DAAX) led a “trolley drive”, which placed trolleys at supermarket entrances in major shopping centres around Durban to collect donations for displaced people.

Civil society demonstrated successful creativity in organizing a short-term crisis response to xenophobia in South Africa, but did not continue to offer anything on any long-term basis. This was because of state failure to act and because xenophobic violence was rooted in an interlocking and overlapping market.

The high unemployment rate in South Africa, especially among the youth, will always affect how asylum seekers and refugees are viewed and treated. The narrative that they are competing with the locals for scarce jobs will be there. The inability to create jobs is the failure of market forces and government policies. This is beyond the capacity of civil society organizations to redress, as they are equipped for limited local interventions and for advocacy. In order to reintegrate victims of xenophobia back into communities, civil society encouraged solidarity with immigrants, to demonstrate that South African and non-South African communities can live in harmony. This would require Government and the markets to create environments more conducive to people being able to freely express their concerns in light of their common humanity.

1. 5 Civil Society and the fight for the realization of rights

There is substantial absence of governmental and political enthusiasm for the protection of the rights of refugees in South Africa. Nevertheless, there has been a high degree of empathy on the part of civil society organizations regarding the conditions in which refugees find themselves in South Africa. In order to provide a more inclusive account of how civil society contested for the realization of the rights of refugees in South Africa, it is important to stress

that it was the attitude of denial exhibited by the South African Government that forced civil society to intervene. The South African Government chose to deny reality and avoid dealing with an uncomfortable truth. According to Simeon (1998) cited in Crush²⁴, the South African constitution has been extensively praised as being amongst the most progressive and inclusive in the world as far as the protection of citizens' rights is concerned. These rights do not extend to everyone living within the boundaries of South Africa. There are two sets of rights deliberately reserved for South African citizens: (a) the right to vote; and (b) the right to engage in freedom of trade, occupation and profession²⁵. The exclusivity of the latter has been successfully challenged in court. This ruling means that all rights (other than the right to vote) should be extended to "all persons" in the country.

For this reason, the role of civil society in ensuring refugee rights is substantial, especially that of the UNHCR along with other donors. The UNHCR sponsored national NGOs which acted as lobby groups for refugees. NGOs were therefore able to support individual cases, and attempted to oppose Xenophobia through various channels²⁶. Civil society also supported a variety of NGOs and service providers by providing temporary accommodation and basic food supplies for refugees, to meet their right to dignity; shelter; and access to food in terms of guarantees in The Constitution.

Many challenges emerged in attempts to bring together service providers and refugee communities because of the power of South African dominated NGOs that did not always act in the interests of refugees.

The Refugee Act of 1998 states that refugees are allowed to seek employment and also access education. Palmary²⁷ however argues that in this piece of legislation, nothing is explicitly said about their right to access other basic services such as housing, water, sanitation and safety. This omission means that many of these rights have to be met through service delivery by civil society. The role of civil society in protecting refugees' rights is not supported by either The Refugees Act or in any policy documents. Civil society nevertheless continues to play a major role in protecting, lobbying and advocating for refugees' rights in spite of the absence of

²⁴Crush, J. (2008).

²⁵Crush, J. (2001). The dark side of democracy: migration, xenophobia and human rights in South Africa. *International Migration*, 38(6), 103-133.

²⁶ Amisi, B., Bond, P., Cele, N., & Ngwane, T. (2011)

²⁷Palmary, I. (2002). Refugees, safety and xenophobia in South African cities: The role of local government. *Johannesburg: Centre for the Study of Violence and Reconciliation*.

enabling policies. Civil society has increased pressure on the South African Government to accept increased responsibility for policing to protect the rights of refugees in the country. NGOs show great commitment in fighting for refugees' rights, and they have been willing to offer immediate responses in support of refugees although this is a conventional obligation of the South African Government²⁸.

The role of the UNHCR is to work with host states and channel assistance through state agencies and government budgets.²⁹ The UNHCR also plays a facilitative role when donors try to push governments to take responsibility for refugee rights. In general, international refugee assistance is provided in three ways: on a bilateral basis; through international organizations (primarily UNHCR); and by Non-Governmental Organizations. Most of the assistance is channelled through the UNHCR, which makes arrangements with the host government and with NGOs that are authorised to provide services to refugees.

Jacobsen³⁰ stipulates that, where there are tensions between refugees and the local population, the UNHCR approaches this situation through its "benefiting the local community" approach: improving infrastructure in areas such as water, health, roads, etc. The UNHCR uses this approach to facilitating the delivery of humanitarian assistance, thereby incentivising locals to protect refugees in affected areas.

1.6 The Perception of migrants by South Africans

The Refugee Act of 1998 stipulates that refugees are allowed to seek employment and access education. They are entitled to enjoy the rights enshrined in Chapter 2 of the Constitution (with the exception of political rights and the right to freedom of trade, occupation, and profession, which do not apply to non-citizens). The act does not exclude refugees from accessing housing and other basic needs that South African citizens enjoy.

²⁸Crush, J. (2001).

²⁹ Jacobsen, K. (2002). Can refugees benefit the state? Refugee resources and African state building. *The Journal of Modern African Studies*, 40(4), 577-596.

³⁰Jacobsen, K. (2002).

However refugees in South Africa are resented for the rights they have and are seen as wasting tax payer's money because they are perceived as living off the South African Government and its resources.

People from African countries are seen as competing for resources with South Africa. However, this view does not apply to other foreigners from other continents. According to Palmary, the view that African foreigners are in South Africa to compete with South African citizens for resources, is only reserved for migrants from other African countries and not to, for example, Chinese immigrants. Palmary³¹ argues that "Foreigners from other continents to the contrary, are seen to be in South Africa for legitimate reasons such as tourism or economic investment". This means that the perception is that only non-African foreigners are in South Africa for the right reason, whereas African foreigners are labelled as being in South Africa to "take our jobs". This has become a stereotype that South Africans share about African refugees.

Human Rights Watch (HRW)³² claims that there has been an increase in xenophobia in recent years in South Africa. According to HRW, South Africans perceive foreigners "almost exclusively black foreigners, as a direct threat to their future economic well-being and as responsible for the troubling rise in violent crime in South Africa". South Africans see other Africans as a threat so they victimize them while ignoring or praising foreigners from other continents.

In a study conducted by Crush³³, South Africans were asked to choose between African foreigners and European foreigners; they showed a definite preference for European and North American immigrants.

³¹ Palmary. I (2002).

³²Human Rights Watch. 1998: "*Prohibited Persons*": *Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa*. New York, Human Rights Watch.

³³Crush, J. (2001). The dark side of democracy: Migration, xenophobia and human rights in South Africa. *International Migration*, 38(6), P. 10

1.7 Political economy of the Refugee regime

The influx of refugees is well known for imposing a range of economic, environmental, political and security problems in the host country as well as bringing about innovation, entrepreneurial spirit and skills. Similarly, in South Africa, refugees are responsible for a significant flow of resources in the form of international economic assets, human capital, and humanitarian assistance³⁴. In South Africa, refugees bring human capital in the form of labour, skills, and entrepreneurship to both urban and rural areas. Refugees remain in South Africa for a very long period of time, therefore, these resources, skills and labour become available to the host country for a correspondingly long period of time.

As South Africa is host to a larger number of refugees than any other country in Africa, internal economic stresses might have driven xenophobic attacks and civil conflicts in the country. In 2008 and 2015, South Africa experienced the most traumatic xenophobic attacks, culminating in a high death toll. The informal economy was negatively impacted by the resultant disruption to human and physical capital - both key to profit accumulation.

These events weakened socioeconomic institutions, limited political governance and eroded civil liberties for many refugees in South Africa. The attacks on mainly black migrants have had a negative impact on the political economy of the country as human capital, skills and labour investments were threatened by the social conflicts. There is clear evidence that South Africa derives economic benefit from the existence of refugees in the country.

The large scale violence and social conflict aimed at refugees has brought economic hardship and security problems for refugees. In this context, the South African Government has shown itself reluctant to create an environment conducive for refugees to access services.

According to Forner³⁵, refugee's cultural conceptions and social practices continue to impose economic and cultural forces on the host country. Of course refugees in South Africa have not directly changed any culture, but they have restructured, redefined, and renegotiated new cultural settings. In other words, refugees have not brought new culture into South Africa, but

³⁴ Jacobsen, K. (2002).

³⁵ Foner, N. (1997). The immigrant family: Cultural legacies and cultural changes. *International migration review*, 961-974.

they have brought new cultural meanings and social practices from their home countries and created new structural and cultural forces in their new environments. For instance, due to economic pressures, Congolese refugees have dominated car guarding jobs³⁶, while Somalian and Ethiopian traders have established small neighbourhood spaza shops³⁷ selling household goods. They have, in fact, introduced the practice of selling goods on credit -getting paid in instalments without the involvement of big financial intuitions or companies. African refugees are also heavily represented in service industries. Their entrepreneurial drive has awakened the entrepreneurial spirit in local communities. Local rural communities are increasingly learning and adopting the modus operandi of migrant traders. Of course, this sometimes spills over into jealousy and accusations of lowering of prices to drive other traders out of business. These accusations are based on the reality of competitive business practices. Foreign traders buy as a group in bulk, pool resources to transport their goods and live in the shops to drive down the cost of doing business³⁸.

Ojong³⁹ highlights how West African migrants have been a source of inspiration to local communities because of their hand crafting, and hairdressing skills. Their influence has therefore, on balance, a positive effect.

Refugees or asylum seekers in South Africa have become increasingly involved in the agricultural sector. Large numbers of refugees are currently moving from urban to rural or peri-urban areas in search of opportunities. Because of the intense scarcity of job opportunities and resources; poverty has been a challenge for many refugees in urban areas. According to Rutherford & Addison⁴⁰, refugees have increasingly been participating in the agricultural sector, especially those who come from Zimbabwe who are working on farms in the northern Limpopo Province. These refugees make a major and positive impact within the political

³⁶Christie, S. (2009, July 26). The secrete lives of Car Guards. The Cape Argus. Retrived from <http://www.seanchristie.co.za/articles/the-secret-lives-of-cape-towns-car-guards/> This article interestingly discuss the domination of car guarding industry by the Congolese in Cape Town. this is generally true in other major cities of South Africa as well.

³⁷Charman, A., Petersen, L., & Piper, L. (2012). From local survivalism to foreign entrepreneurship: the transformation of the spaza sector in Delft, Cape Town. *Transformation: Critical Perspectives on Southern Africa*, 78(1), 47-73. It is also the observation of the researcher most neighbourhood spaza shops are owned by migrants that include Somalis, Ethiopians, Bangladeshi in the majority.

³⁸Charman, A., Petersen, L., & Piper, L. (2012).

³⁹Ojong, V. B. (2006). The Socio-Economic Impact of African Migrant Women's Entrepreneurial Activities in South Africa. *Africanus Journal of Development Studies*, 36(2), 142-153.

⁴⁰ Rutherford, B., & Addison, L. (2007). Zimbabwean farm workers in northern South Africa. *Review of African Political Economy*, 34(114), 619-635.

economy of the South African agricultural sector as they become settled and participate in labour relations within agricultural production.

Destruction of livelihoods and political displacement has forced many refugees to benefit South Africa's agricultural sector with their labour because the sector is shaped by neoliberal agricultural policies that rely on refugee labour. These policies have intensified exploitation of refugee labour but refugees seek out survival strategies. Their willingness to offer their labour cheaply has increased productivity through the reduced cost of labour in the sector.

Employing refugee workers in the agricultural sector benefits farmers beyond the simple reduction of labour costs: According to Johnston⁴¹, refugee farm workers are increasingly employed in the agricultural sector. Farmers have suggested that refugees are more willing than South Africans to work at 'acceptable' rates of remuneration. Refugees have largely been considered a competitive advantage for many farmers in the South African agricultural sector simply because they work harder and are willing to work for less. This state of affairs is not without its critics, as migrant workers are often accused of undercutting the rates of pay of local farm labourers and mine workers, respectively. This leads to imbalances in the labour conditions of the unskilled labour force.

Refugee livelihoods have to be examined within a complex set of social networks depending on their country of origin. Many refugee communities have carved out an economic niche for themselves and many of their economic activities are quite unique:

Ethiopian refugees' practice of providing goods on credit without collateral to customers in the townships is a good example. These economic activities depend on networks developed by refugee communities over time. They ebb and flow depending on their viability; the extent of opportunities; and challenges that a particular economic activity poses.

By way of an example, Central African refugees and asylum seekers used to be much more active in security jobs. However, reduced job availability; reduced profitability; and challenges around acquiring security certification and grading, has decreased their numbers in this sector.

⁴¹ Johnston, D. (2007). Who needs immigrant farm workers? A South African case study. *Journal of agrarian change*, 7(4), 494-525.

There is increasingly an overlap of economic activities across different refugee communities: A UK study indicates that ‘refugees with no social networks were the least likely to be employed’.⁴² Therefore, refugee livelihoods have to be looked at within the social network of refugees and asylum seekers and the periodic changes they go through.

Asylum seekers and refugees have a positive net economic effect according to Peberdy and Crush's 1998 survey⁴³ that reported that South Africans employ above average educated refugees (3.5 per South African business, according to Rogerson⁴⁴) and that they plough their incomes back by buying South African goods and services. Hunter and Skinner⁴⁵ have reported similar findings.

1.8 The Refugee Regime/Environment

The refugee regime has seen significant changes in the last six years. The regime has gone through a transition in terms of the different legislations that govern the regime, and the institutions that play an active role in this regime. As a result, the extent and nature of NGOs that work actively in this area, has also changed:

The focus and urgency that gripped this sector after the 2008 xenophobia attacks has subsided, to be replaced with a certain level of apathy despite the occasional flare-up of xenophobic attacks. The sense of urgency returned briefly because of the 2015 xenophobic attacks so one can almost say it has a cyclical trend.

It is in this context that this research undertakes to investigate the role of NGOs that work in the field of trying to assist refugees and asylum seekers in South Africa.

In the prevailing environment the UNHCR continues to be a funder and agenda setter, working in conjunction with those NGOs that assist asylum seekers and refugees. However the UNHCR no longer operates with the urgency displayed in 2008, 2009 and 2010. UNHCR has instead

⁴²Cheong, P. H., Edwards, R., Goulbourne, H., & Solomos, J. (2007). Immigration, social cohesion and social capital: A critical review. *Critical social policy*, 27(1), 24-49.

⁴³Peberdy, S., & Crush, J. S. (1998). *Trading places: cross-border traders and the South African informal sector*. Southern African Migration Project.

⁴⁴Rogerson, C. M. (1998, March). Formidable entrepreneurs. In *Urban Forum*(Vol. 9, No. 1, pp. 143-153). Springer Netherlands.

⁴⁵Hunter, N., & Skinner, C. (2002). *Foreign street traders working in inner city Durban: survey results and policy dilemmas* (No. 49). Durban: School of Development Studies, University of Natal.

been trying to organize refugee NGOs and CBOs to actively organize and lobby for refugee and asylum seeker interests. Resurgence of xenophobia in 2014 and especially 2015 has made this focus even more relevant. Fault lines between and among refugee communities - due to differences in nationality and ethnicity – has made the building of a uniform approach very problematic.

1.9 Research Hypothesis

This research tests the hypothesis that;

‘The relationship of NGOs working for the rights of refugees and asylum seekers with DHA has markedly changed over the years from being that of significant cooperative players in refugee policy to a confrontational one; thereby decreasing their effectiveness.’

This assertion is supported by:

- The literature referenced herein
- The researcher’s documented observations (data) collected from asylum seekers and refugees and NGOs
- Exploration of problem areas identified by the data
- Liberal theories of Human Rights
- International and National legal instruments of law intended to protect the rights of asylum seekers and refugees.

1.10 Research problems, Objectives and Questions

The research focuses on:

- The broader issue of refugee and asylum seeker access to substantive human rights provisions in terms of Liberal Rights Theories
- The status of minority groups and International law within the SA context
- Efforts made by NGOs in the field of refugees’ human rights advocacy
- Grassroots organization of refugee communities and litigation on behalf of the refugees, with special focus on the work of Lawyers for Human Rights (LHR)

- The work of Refugee Social service (RSS); Scalabrini Centre (RMC); and LHR in the form of a case study

The main objective of the research is;

To assess the contested role and effectiveness of South African NGOs in assisting Refugees and Asylum seekers to realize their substantive rights.

Sub-objectives of the research are;

- To understand the kinds of challenges refugees and asylum seekers face in accessing documentation and other social services.
- To understand the role of NGOs in protecting the rights of asylum seekers and refugees.
- To evaluate if NGOs are responsive to the problems that asylum seekers and refugees face.
- To understand the effectiveness of NGOs in the advocacy and protection of refugee rights
- To understand the relationship between Home Affairs [as an important role player and stakeholder in the management of the asylum system] and other government institutions, and NGOs.
- To evaluate the programmes of NGOs in integrating refugees and asylum seekers into society.
- To understand the mechanisms, strategies and tactics employed by NGOs to protect the rights of refugees and asylum seekers.

The study explores and reveals the gaps that exist in current policy frameworks and the implementation of SA government policy relating to refugees.

The study provides recommendations for the alleviation of the current plight of refugees and asylum seekers in South Africa, based on the conclusions of the research.

The core research question is:

How effective are NGOs in South Africa in assisting asylum seekers and refugees, and protecting their rights guaranteed by the constitution and the refugee act?

The study addresses the following sub questions:

- What are the challenges that refugees and asylum seekers face?
- What is the role of NGOs in assisting, protecting and advocating the rights of asylum seekers and refugees in South Africa?
- Are NGO's policies and programmes primarily geared towards advocating and protecting the rights of refugees and asylum seekers based on the problems they face?
- What is the nature of the relationship that NGOs have with the Department of Home Affairs?
- What are the mechanisms, strategies and tactics used by NGOs to protect the rights of asylum seekers and refugees?
- Are they adequately advancing the cause of refugees and asylum seekers?
- Is there cooperation among NGOs Civil Society and refugee communities?

1.11 Theoretical approaches on the Human Rights of Refugees

There are no definite theories when it comes to the human rights of refugees specifically. However, Liberal Rights and Administrative Justice theories give a solid basis for framing the discussion about refugee and asylum seekers' human rights and right to access services. The theoretical approach particularly looks at the Hanna Arendt discussion on 'the right to have rights' concept as a cornerstone of liberal rights theory, and critically looks at John Rawles's discussion on justice and non-citizens in the state. The Convention relating to the Status of Refugees of 1951 is extensively discussed as forming the bedrock of refugee rights and refugee law in South Africa.

The researcher examines the development of international law and frames refugee and migrant rights within the context of international law. Since international laws without the mechanism to implement or uphold them are superficial, the researcher also looks at UNHCR and other institutions. The South African Refugee Act is examined as it governs the implementation of

refugee law in South Africa. All the available instruments of human rights and refugee law provide the theoretical foundation for this research.

1.12 Organization of Dissertation

Chapter One

Introduction of the research topic

The problem stated

Definition of key terms

A brief history of international refugee protection

Contextualization of key concepts: the political economy; and perception of refugees in SA

Research questions and objectives

Introduction of focus areas

Chapter Two

The conceptual framework of political terms “refugee” and “asylum” / “asylum seekers” within the context of liberal rights theory and international laws regarding refugees and asylum seekers

South African legislation, the Department of Home Affairs, UNHCR, South African Civil Society, and the respective case studies

The current state / status of Refugees and Asylum seekers and the human rights challenges they face in SA

Statistics from Home Affairs and UNHCR

Chapter Three:

Liberal rights theory as the theoretical framework basis for the research

Discussion of how Liberal Rights Theories inform the practice and implementation of human rights provisions which relate to refugees and asylum seekers

Classical and modern theorists relevant to this research

International Laws signed and ratified by South Africa, that shape legislation governing refugees and asylum seekers in SA

South African legislation and Home Affairs, as legal instruments that preside over refugees and asylum seekers

The SA Constitution and legislation pertaining to refugees

The UNHCR as main intergovernmental authority mandated and experienced in dealing with refugees and guardian of the 1951 refugee convention

The relationship between local NGOs that deal with refugees, and the UNHCR

Civil society organizations and NGOs – their history, contribution, current programmes and litigation activities

Chapter Four:

Research methodologies, sampling methods and area of study

Sampling methods used and appropriate sampling techniques

Primary data collection (interviews); analysis methodology; and why this methodology is appropriate

Validity and reliability of the field data

How field work was conducted, details of participants and ethical considerations

Methods of data analysis

Chapter Five:

Scope of the case studies of NGOs

Qualitative findings in case study results

Demographics of respondents and correlation of data obtained in the field

Chapter Six:

Evaluation of the data with regard to the objectives of the research

Contextualization of results in terms of theories underpinning this research

Understanding the findings in terms of wider application

Chapter Seven:

Conclusion

Recommendations regarding policy, tactics and strategies to strengthen the role of civil society

Further research possibilities

Recommendations to investigate issues outside the scope of this study

Summary

The environment that asylum seekers and refugees find themselves in is contentious. One of the challenges for the writer is that some of the asylum seekers and refugees are in reality, migrants. In the absence of an easy legal route to legalize their stay, they use the asylum system. In this case, the difference between migrants, and asylum seekers and refugees is blurred. In addition, the treatment of foreigners as a result of xenophobic attitudes, applies almost equally to most foreigners from Africa and to a certain extent to those from Asia. While understanding

the differences between the terms ‘migrant’ ‘asylum seeker’ and ‘refugee’, the researcher acknowledges that they overlap significantly.

Although the above refers to all three categories of people, this research restricts itself to asylum seekers and refugees and to what extent NGOs advocate for and protect their rights. This chapter looked at perceptions, historical trends, and the political economy of asylum seekers and refugees.

It provided a clear picture of what the thesis entails and how the research is structured. Moreover, it has outlined what the study sets out to do and the methodology employed. The theoretical and conceptual foundations of the research are also briefly discussed.

Chapter Two: The asylum regime and its stakeholders

Introduction

Vulnerable people such as refugees and asylum seekers need a champion of their cause in host countries because their presence often evokes hostility from local citizens. Their rights are contested and they usually lack the numbers and capacity to influence policy. That is where the UNHCR and NGOs come in - to supplement, assist, confront and lobby Government on their behalf. In South Africa, there is robust legislation proscribing protection for refugees and asylum seekers, and an active civil society so the issue of protection seems straightforward. The reality is quite different for a variety of reasons:

The social, political and economic reality actually creates problems for refugees and asylum seekers, and the reactions of Society and Government is not always positive.

The Refugee Act renders the structure and capacity of the asylum system inadequate: from the Department of Home Affairs (DHA) as primary implementer; to the societal response to asylum seekers and refugees that sometimes results in violent xenophobic attacks.

This chapter looks at the definition of refugees and asylum seekers and their respective historical contexts. It looks at the role of the UNHCR and its relationship with NGOs that are active in refugee rights protection. Finally, it looks at the nature and activities of NGOs working with asylum seekers and refugees.

2.1. Origin and Definition of Refugees and Asylum Seekers

Throughout history people have sought refuge from their neighbours as a result of political and/or natural upheavals. The term “Refugee” comes from the Latin word *Refugium* (*re-* “back” + *future* “to flee”) and then French *Refugée* meaning “to take shelter, protect”. It meant exactly that until the First World War when the influx of Russian refugees from war in Russia, caused The League of Nations to recognize and assist refugees.

A High Commission for Russian refugees was established and headed by Dr Nansen.⁴⁶The United Nations High Commission for Refugees (UNHCR) was a natural progression of this development but it took the horrors of the Second World War and its aftermath before the 1951 convention was held and the custodian institution, the UNHCR, formed.

The terms “Refugee” and “Asylum Seeker” are legal terms designated for people who are forcibly displaced for a number of reasons and who cannot return to their homes. Within the discourse around refugees and asylum seekers, the definition of these terms has not been that controversial. The accepted definition of “refugee” has always been the one articulated by the 1951 UNHCR convention, which 140 countries have ratified.⁴⁷ Article 1A, paragraph 2, together with the 1967 Protocol,⁴⁸ offers a general definition of the term “refugee”, without a time limit:

Any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of prosecution for reasons of race, nationality, membership of a particular group, or political opinion. Stateless persons may also be refugees in this sense, where country of origin (citizenship) is understood as “country of habitual residence.”⁴⁹

Although this definition is widely accepted, the OAU definition of refugee is much more inclusive since it includes reasons for persecution as a result of, but not excluding, categories cited in the 1951 convention and 1967 protocol:

Generalized violence, foreign aggression, internal conflicts, massive violation of human rights and other circumstances leading to a serious disturbance of public order⁵⁰

It also gives recognition to another group in addition to individuals based on the aforementioned grounds. Asylum seekers are also people who leave their country for the same reason as refugees and ‘have sought international protection and whose claim for refugee status

⁴⁶ Holborn W.L. 1939. ‘The League of Nations and the Refugee Problem’, *Annals of the American Academy of Political and Social Science*, 203: 203

⁴⁷ UNHCR, 1951, *Geneva Convention on the Status of Refugee*, Geneva, 4

⁴⁸ UNHCR, 1967, *Protocol Relating to the Status of Refugees*, Geneva, 2

⁴⁹ UNHCR, 1951

⁵⁰OAU, 1969, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Addis Ababa, 2-3

has not yet been determined'.⁵¹ Usually they are considered illegal, though neither UNHCR nor international law makes provision for people who cannot and do not apply for refugee status in their home country or those who cross the borders of another country illegally. In most cases, seeking asylum is a step towards refugee status.

The prevailing political climate when the UNHCR was formed points to certain contradictions:

On the one hand, there was a need for humanitarian assistance for displaced populations in Europe as a result of the war. The atrocities committed by all parties gave impetus to the call for humanism and humanitarian assistance. The formation of humanitarian organizations and intergovernmental agencies such as the UNHCR was a direct result of such impulses.

On the other hand, the cold war and its aftermath were a physical, ideological and moral battleground for the opposing parties. Western countries used the moral high ground of political and social rights as a political tool to attack the Soviet Union. The UN and the UNHCR in their effort to appeal to both parties were reluctant to give clear points of reference and omitted to define right and wrong - even in definitions in their charters.

The UNHCR, as guardian of the 1951 convention,⁵² does not affiliate with any one side in a conflict. The UNHCR works in two ways:

In the event that countries have signed, ratified and enacted legislation compatible with the 1951 convention, it guides and lobbies for their implementation. In this case, it supports the national effort of accepting and hosting refugees.

In cases where countries do not have the will or the capacity to implement the 1951 convention, the UNHCR administers the whole process. Even in such situations, the UNHCR requires the cooperation of the state concerned but has an expanded mandate to provide humanitarian assistance to those displaced and beyond its legal protection.

UNHCR has been criticized for becoming more of a caretaker of displaced communities instead of a strong advocate for their protection.

⁵¹UNHCR, 2009, Statistical Yearbook, <http://www.unhcr.org/4ce531e09.html> Date Accessed [30 May 2011]

⁵²UNHCR, 1951,

The researcher uses the labels migrants, refugees and asylum seekers alternately in some cases. The reason is that most migrants in South Africa apply for asylum, whether they need protection or not, since some are in the country for economic reasons. Whatever the circumstances, it is assumed that they need protection while they await a decision on their application. This process often takes years so applicants invariably remain for long periods in the communities, and become permanent features in the system and the society. The inadequacies of the asylum system and cracks in the immigration framework also make the system attractive for economic migrants seeking documentation. This hinders access for real asylum seekers⁵³. Despite the distinction between migrant, refugee and asylum seeker, is legally clear, in reality it remains blurred. The Constitution and the Refugee Act provide basic protection for anyone in the country regardless of their status.

2.2. The state of refugees and asylum seekers in the world

According to the UNHCR, during 2009 at least 923,400 individual applications for asylum or refugee status were submitted to governments or UNHCR offices in 161 countries. The trend is that the number of asylum seekers has been dropping for the past ten years in industrialized countries. The five main hosts to those seeking asylum are USA, France, Germany, Sweden and Canada.

The top 3 refugee hosting countries in Africa are Kenya (565,000), Ethiopia (376,000) and Chad (374,000) with the number rising for the last three years.⁵⁴ The number of asylum seekers rose worldwide in 2013 for the first time in 20 years. This has been attributed to the Arab Spring; conflicts in the Middle East - particularly in Syria; and instability in several African countries:

War, armed conflict, and human rights concerns in a number of countries – notably the Syrian Arab Republic and Ukraine – are among the principal reasons for the upsurge in the number of asylum-seekers in industrialized countries observed during the first half of 2014. An estimated 330,700 new asylum applications were recorded between

⁵³Polzer, Tara, 2010, Population Movements in and to South Africa, Migration Fact Sheets, FMSP, University of the Witwatersrand,

⁵⁴UNHCR, 2013, Regional Bureau for Africa, <http://www.unhcr.org/526934e89.html> Date accessed [5 March 2015]

January and June 2014, some 64,300 claims or 24 per cent more than during the corresponding period of 2013 (266,300 claims). This figure is almost identical to the figures recorded during the preceding six months of July through December 2013 (328,100)⁵⁵.

This is also true in Africa, which has experienced an increase in its number of asylum seekers in the last two years. The main source countries are Zimbabwe, Somalia, DRC and Ethiopia. A lot of those refugees go to South Africa and neighbouring countries in Africa. Countries in southern Europe such as Italy and France are also the recipients of these asylum seekers.

Southern Italy and Greece have received more refugees as they are geographically nearer to points of transit Europe by sea. HRW reported that 2014 saw the death of 3500 migrants who attempted to use this route by embarking in Libya,⁵⁶ This trend is on the increase, with no end in sight. The years 2015 and 2016 continued to witness the tragic deaths in the Mediterranean Sea of many migrants who attempted this route.

There was a shift from the relatively large acceptance of refugees of the 1980's and 90's to a decline in the numbers of asylum seekers accepted in industrialized countries up to 2012. This was because of the tightening of border controls, generally stricter immigration policies and a decline in the number of major conflicts.

The Syrian and Libyan conflicts have occasioned a flood of asylum seekers in Europe. The presence of unprecedented numbers of refugees in host countries in Europe is frequently perceived as imposing social costs: over-burdening countries' capacity to provide accommodation, schooling and health facilities. Tensions between newcomers and resident host populations are thereby generated.

Since the bombing of the World Trade Centre on 11th September 2001, there have been growing concerns about negative security impacts of immigration and refugee flows across boundaries. The November 2015 terrorist attacks in Paris and other incidents have magnified these concerns

⁵⁵ UNHCR 2015 Asylum Trends, First half 2014: Levels and Trends in Industrialized Countries <http://www.unhcr.org/5423f9699.html> Date accessed [30 May 2011]

⁵⁶ Ward, B 2015, The EU Stands By as Thousands of Migrants Drown in the Mediterranean, HRW <http://www.hrw.org/news/2015/02/25/eu-stands-thousands-migrants-drown-mediterranean> Date accessed [5 March 2014]

to the extent that there is a widespread sentiment that refugees are a security threat to Europe and North America.⁵⁷

These problems are compounded by concerns that allege a lack of capacity to control unwanted immigrant flows. The rise in irregular migration and labour, especially illegal migrant smuggling and trafficking, have exacerbated fears about a loss of state control over the entry and stay of asylum seekers and immigrants. The influx of migrants from conflict ridden Middle Eastern and African countries, especially in 2014 and 2015, has exacerbated fears in European countries of being overwhelmed by asylum seekers.

Widespread fears that ‘non-genuine’ asylum seekers are abusing generous refugee and welfare systems has done much to erode public sympathy for refugees. Under these conditions, governments or political parties perceived to be lax in restricting asylum are likely to pay an electoral penalty. This is evidenced by the increasing prominence of right wing parties in Europe such as Marine Le Pen’s right wing National Front Party in France⁵⁸ and "Brexit" in the United Kingdom. Many right wing parties opposed to the influx of refugees and asylum seekers have made political gains in the past 5 years.

It is therefore not surprising that states have adopted the term ‘exclusionary attitude’ towards refugees, coined by the United Nations Refugee Agency (UNHCR).⁵⁹ Countries in North America, Europe and Oceania increasingly apply these policies. South Africa is not that different on this aspect. This tendency can be seen on how the Department of Home Affairs (DHA) has been classified as a security institution; the closure of Refugee Reception Offices (RROs) in 3 metropolitan areas; and targeted security sweeps such as "Operation Fiela"⁶⁰.

⁵⁷ One of the suicide bombers near the Paris stadium was found with a refugee ID indicating that he entered through Greece. This was seen as a fulfilment of the ISIS promise to infiltrate Europe using the refugee route.

⁵⁸ This party advocates a strict refugee policy in France. The rise of Marine Le Pen have marked the extreme radicalization of the party far from her father’s policy.

⁵⁹ UNHCR, 2015.

⁶⁰ Operation Fiela is an anti-crime operation initiated in response to Xenophobic attack in 2015 that morphed into targeting of asylum seekers. It even targeted asylum seekers that were sheltered in the Central Methodist Church in Johannesburg.

2.3 Refugees and asylum seekers in South Africa

Population movement patterns have changed a lot in South Africa since the apartheid era. During Apartheid, the reason for people coming to South Africa was mostly economic and most came from Lesotho, Malawi and Mozambique. In the late 80s and early 90s, migrants mostly came from Lesotho. After the 1994 transition to democratic rule, citizens of African and Asian countries started to see South Africa as a destination for migration and refuge.

According to Adepoju⁶¹;

The striking disparities in economic development and living standards between South Africa and other African countries, and the remarkable transition to post-apartheid rule attracted migrants of all categories from Africa and beyond, despite the daunting problems of unemployment, crime, widespread poverty. It is estimated that nationals from some 100 countries now live in the Republic of South Africa.

South Africa is an economic hub and has the best refugee protection system in Africa. Refugees and economic migrants arrive mainly from Sub-Saharan countries but also from as far as China and Pakistan. It is therefore the largest refugee receiving country in Africa and one of the largest in the world. According to the UNHCR, South Africa has the world's second largest number of registered asylum seekers, most of them Zimbabwean. The numbers have risen steadily over the past six years. There were 20,000 new applications in 2005; 50,000 in 2007; and 264,000 in 2008. Numbers started to decline in 2012. There are also about 65,500 refugees recognized by the government. They are mainly from Burundi, the Democratic Republic of the Congo (DRC) and Somalia. Despite South Africa's recent attempts to improve its asylum system, there is a backlog of 250,000 cases.⁶²

Despite these statistics, the number of regular and irregular foreigners, especially asylum seekers and refugees, has not been accurately reported. The Green Paper on International Migration indicates that, out of the almost 1.1 million asylum seeker temporary permits (Section 22) and 120 thousand refugee status permits (section 24) issued, almost 90% of the

⁶¹Adepoju, A. 2003, Continuity and Changing Configurations of Migration to and from the Republic of South Africa, *International Migration*, 41(1), 3-28

⁶²UNHCR, 2015. UNHCR country operations profile - South Africa: <http://www.unhcr.org/524d87689.html>
Date accessed [05 March 2015]

former, and 15% of the latter, are inactive.⁶³The irregular status of many former asylum seekers and the poor treatment they receive give them little incentive to reveal their real identities to census-takers.

Because of the gap between wealth and poverty in South Africa, the local poor feel resentment towards refugees and asylum seekers whom they blame for competing with them for scarce resources and jobs.

According to Peberdy quoted in Crush and Ramachandran,⁶⁴ ‘it has to do with the post-independence phenomena of nation-building and the construction of new national identities and idioms of inclusion and exclusion’. Landau⁶⁵ has attributed this phenomenon to what he calls ‘two demons’: the results of the apartheid struggle; and the continuing narrative of nation building. These explanations do not fully cover the situation. Despite the many benefits refugees bring to the economy, the negative perceptions persist. The number of migrants and refugees is continually exaggerated and feeds resentment. Africa check⁶⁶ has questioned the number of asylum seekers; while the DHA claims that South Africa has the highest number of asylum seekers in the world. The extreme xenophobic violence of 2008 and 2015 are clear manifestations of this resentment.

2.4. Xenophobia in South Africa

Hostility towards foreigners is related to the widespread perception in South Africa that there is an influx of illegal asylum seekers and immigrants coming into South Africa. Besides the inflated numbers, there are a number of economic and social perceptions that support this sentiment. What is clear is that xenophobia is not a uniquely South African phenomenon. It is found in virtually every refugee and migrant host country. However, its extent and level of violence differs from one place to another. The xenophobic situation in South Africa:

⁶³Green paper on International Migration (2016). Pretoria. Government Gazette (40088). Vol 738. P. 30

⁶⁴Crush, J., & Ramachandran, S. (2010). Xenophobia, international migration and development. *Journal of Human Development and Capabilities*, 11(2), 209-228.

⁶⁵Landau, L. B. (2010). Loving the alien? Citizenship, law, and the future in South Africa’s demonic society. *African Affairs*, adq002.

⁶⁶Rudemeyer, J. (2013, July 11). Africa Check. Retrived from <https://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>

“combines an extreme degree of violence (62 deaths for the May 2008 events only) with classic migration management “mistakes” observed elsewhere in the world, i.e. a laissez-faire attitude, denial of the gravity, tragic events then forcing government to acknowledge the issue and the usual flourishing of more or less representative, more or less genuine organisations in defence of migrants’ rights”.⁶⁷

Approximately one hundred thousand people were displaced in the 2008 xenophobic attacks⁶⁸. Refugees face an ever present threat of attacks on their residences and businesses. The 2015 attacks cost the lives of 7 foreigners and displaced 5000,⁶⁹ resulting in a huge diplomatic backlash that forced the South African government to send in the army to quell the violence.

What makes South African xenophobia different is the frequency with which it occurs and level of violence that accompanies it. According to the 2011 statistical report from a UNHCR initiative, “there are three serious xenophobic incidents per week, 99 deaths per year and about 1,000 persons displaced permanently or temporarily per annum”.⁷⁰ A lot of cases go unreported. The 2008 and 2015 xenophobic attacks didn’t happen in isolation. Rather, they are the by-product of historical, political, economic and social realities shrouded by perceptions and half-truths as Crush⁷¹, Danso and McDonald⁷², Landau, Ramjathan-Keogh, and Singh⁷³ have indicated.

⁶⁷Sagatti, A. W. K. 2008. A New Twist to the South African Migration Debate: <http://www.sacsis.org.za/site/article/158.1> [Date accessed [01 June 2011]]

⁶⁸Igglesden, V., Monson, T., & Polzer, T. (2009). *Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons learned following attacks on foreign nationals in May 2008*. Forced Migration Studies Programme, University of the Witwatersrand.

⁶⁹Smith, D. (2015, April 21). South Africa sends in army after xenophobic violence leaves seven dead. *The Guardian*. Retrieved from <http://www.theguardian.com>

⁷⁰UN High Commissioner for Refugees (UNHCR), *Protection from Xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes*, February 2015, available at: <http://www.refworld.org/docid/55d2e1be4.html> [accessed 16 October 2015]

⁷¹Crush, J. (1999). Fortress South Africa and the deconstruction of Apartheid’s migration regime. *Geoforum*, 30(1), 1-11.

⁷²Danso, R., and McDonald, D. A. 2001. Writing Xenophobia: Immigration and the Print Media in Post-Apartheid South Africa. *Africa Today* 48(3):115–137.

⁷³Landau, L., Ramjathan-Keogh, K. and Singh, G. 2005. *Xenophobia in South Africa and Problems Related to It*. Forced Migration Working Paper Series, 13. Johannesburg: University of the Witwatersrand, Forced Migration Studies Programme.

Crush⁷⁴, Crush⁷⁵ and Dodson⁷⁶, Crush and McDonald⁷⁷ and other scholars agree that the ability of Government to effectively cope with immigration and refugee issues has not improved much from the days of Alien control legislation.

There is no clear break from the apartheid era hate of Blacks and Africans. It is clear that those targeted in post-apartheid South Africa are mainly black Africans. Dobson asserts the ‘rainbow nation’ has proved to be an ‘exclusionary space’⁷⁸ and that in the ‘new South Africa’ foreigners, especially of African origin, are seen as the new ‘other’.

In the identity - contested space that is South Africa, the ‘other’ is described by Murray⁷⁹ as ‘the ultimate stranger’ and is seen as the new target for politicians and community leaders in their quest to find a scapegoat for a myriad of problems.

The first Minister of Home Affairs⁸⁰ in democratic South Africa blamed migrants and refugees as being a drain on resources. This xenophobic attitude trickles down to the micro-political environment of the township where it gets translated into violent attacks on refugees and migrants. FMSP⁸¹ research on the causes of the extreme xenophobic violence of 2008 found that the main factors and conditions were:

- The spreading of xenophobic attitudes by officials

⁷⁴Crush, J. 1999. 2000.

⁷⁵Crush, J. (2001). The dark side of democracy: migration, xenophobia and human rights in South Africa. *International Migration*, 38(6), 103-133.

⁷⁶Crush, J., & Dodson, B. (2007). ANOTHER LOST DECADE: THE FAILURES OF SOUTH AFRICA'S POST-APARTHEID MIGRATION POLICY. *Tijdschrift voor economische en sociale geografie*, 98(4), 436-454.

⁷⁷Crush, J., & McDonald, D. A. (2001). Introduction to special issue: evaluating South African immigration policy after apartheid. *Africa Today*, 1-13.

⁷⁸Dodson, B. (2010). Locating xenophobia: debate, discourse, and everyday experience in Cape Town, South Africa. *Africa Today*, 56(3), 2-22.

⁷⁹Murray, M. J. (2003). Alien strangers in our midst: the dreaded foreign invasion and “fortress South Africa”. *Canadian Journal of African Studies/La Revue canadienne des études africaines*, 37(2-3), 440-466.

⁸⁰Minister of Home Affairs. (1994) Introductory Speech, Budgetary Appropriation. National Assembly, August 9. The Minister of Home Affairs Buthelezi stated in his first speech to the parliament that South Africa could forget about its reconstruction and development program if it did not stop the flow of migrants.⁽¹⁾ In his 1997 budget speech, Minister Buthelezi returned to this familiar blame game. Other public officials and members of oppositions have also made similar remarks.

⁸¹Misago, J. P., & Landau, L. B. (2008). Tensions, Territory and Terror: Understanding Violence Against Foreigners in South Africa. *Johannesburg, Forced Migration Studies Programme, University of the Witwatersrand*.

- The absence of strong political leadership makes possible self-serving parallel community leadership
- A dearth of effective conflict resolution mechanisms
- A culture of impunity with regard to public violence, especially xenophobic violence

In the 2008 and 2015 xenophobic attacks, Government kept insisting that it was criminal elements that were creating the problem. What was clear from media reports in January 2015 was that communities found it expedient to loot and steal from refugees' and migrants' businesses.

The police were slow to respond and were accused of turning a blind eye. There was also abuse by the police and state institutions that displayed xenophobic attitudes, thus exacerbating the situation. A City press⁸² report in January 2015 stated that in xenophobic attacks in Soweto the police actively participated in the looting of foreign owned shops and in many cases did nothing to stop it. One of those interviewed claimed that they were let into the shops that were being looted in fours to avoid a stampede⁸³.

Language and cultural differences also add to the mix that fuels xenophobic attitudes and violence. South African Africans had little contact with Africans from other African countries because of the policies of the Apartheid government. The previous education system hardly included the history or geography of Africa. Since 1994 South Africans have come into contact with people from different African countries in greater numbers for the first time. The fear of what is unknown magnifies the cultural stereotypes on both sides.

The word 'KwereKwere'⁸⁴ illustrates this. It shows resentment by South Africans to the foreign tongues spoken in their midst. This prejudicial term is applied to black Africans, while other foreigners are seen in a generally positive light. This is dependent on their complexion. Palmary⁸⁵ alleges that that this is a 'gradation of prejudice' similar to the apartheid system that targeted only some South Africans. These prejudices and stereotypes have contributed to social

⁸²'Cops told us to loot' (2015 January 25). City Press. <http://www.news24.com/Archives/City-Press/Cops-told-us-to-loot-20150430> [Accessed June 12, 2015]

⁸³ City Press 25 January 2015.

⁸⁴Kwerekwere is an onomatopoeic term used mostly by black South Africans or in South Africa with reference to mostly black foreign nationals visiting/touring or residing in the country.

⁸⁵Palmary, I. (2002).

friction as migrants are accused as stealing South African women; criminality; and muti killings.⁸⁶ In addition, they are accused of stealing jobs.

It is true that poor black South African nationals see foreign Africans as competing with them for jobs and resources to which they feel exclusively entitled.

Wealthier South Africans, whether black or white, resent them for being a tax burden as Sharp⁸⁷ and Manzi and Bond⁸⁸ articulated. One could conclude that African foreigners in South Africa are everyone's scapegoat because politically speaking, they are soft targets. In order to understand the deeper root causes of xenophobia, it is important to locate immigrants within the socioeconomic landscape of South Africa.

2.5. Socioeconomic conditions in South Africa

Almost all refugees, asylum seekers and economic migrants come to South Africa from countries that suffer from chronic underdevelopment where poverty, instability and corruption reign supreme. Their expectation is to improve their circumstances and have a better life in SA where there is a free market and freedom of movement and thought.

Being in South Africa poses its own problems:

Vast inequalities and mass poverty prevails despite its constitution being one of the most liberal and far reaching in the world insofar as it provides extensive socioeconomic rights and gives legal force to fundamental rights.⁸⁹

Though poverty in general has decreased, the country suffers from a sluggish economy; an HIV/AIDS epidemic; and a racially polarized society.⁹⁰ The political leadership of the ruling

⁸⁶ Nyaka, F. (2014, June 23). Murdering for muti. ANN7 <http://www.ann7.com/article/12510-2306201423-06-2014%E2%80%98murdering-for-muti%E2%80%99.html#.VheBG6MaLIU>. (Accessed 24 June 2015). Muti is a term used in Southern Africa countries in reference to traditional medicine and generally medicine. Muti killing, on the other hand refers to killing people, especially children for the purpose of using their body parts for traditional medicine.

⁸⁷ Sharp, J. (2008). 'Fortress SA': Xenophobic violence in South Africa. *Anthropology Today*, 24(4), 1-3

⁸⁸ Manzi, T., & Bond, P. (2008). Xenophobia and the South African Working Class. *Unpublished paper*. Available at: www.pambazuka.org.

⁸⁹ Achmat, Z. 2004. HIV/AIDS and human rights: new South Africa struggle. Proceedings of the eighth Democracy and Diversity Institute: Master Class (rffpp.1-39). Cape Town: The New School and IDASA.

⁹⁰ Marais, H. (2011). South Africa pushed to the limit. *The Political Economy of Change*.

party, the African National Congress (ANC) is struggling to deliver services because of corruption and poor management. Opposition is increasing as a result.

Valji⁹¹, Adepoju⁹² and Haigh⁹³ and Solomon argue that an increasing number of South Africans perceive asylum seekers and refugees from Africa as a threat to their livelihoods and hold them responsible for the rise in all social ills of the country. Other foreigners in South Africa from Europe, the Americas, Australasia and the Middle East are not perceived in this way.

This is the environment in which the refugees and asylum seekers in South Africa find themselves. Most refugee communities have, however, carved a niche for themselves in this environment. This ability of refugees throughout the world to find opportunities which the local people have not exploited has created resentment in South Africa. The usual complaints are that the refugees are taking jobs and resources meant for the locals and they are involved in crime. Some of this is true, though exaggerated. However, as in the case of developed countries, politicians, looking to score points, have adopted nationalistic attitudes and policies, despite the skills, entrepreneurial spirit and the contribution of the refugees to the tax base.

It is a little discussed fact that a lot of Africans come to South Africa to study and pay hard cash to do so. In addition, citizens in Zimbabwe, Malawi and Mozambique stock a significant amount of daily consumables and luxury items from South Africa that are sent by their relatives in South Africa. The benefits gained by South African companies that operate in those countries, also seems not to be taken into account. This contribution gets sacrificed on the altar of political expediency.

At the Mangaung conference, as a consequence of part perception and part political expediency, the ANC tabled a policy discussion document classifying the Home Affairs Department as a security organ of the state. This meant that refugee and asylum seekers are to be subjected to new restrictions.

⁹¹Valji, N. (2003). Creating the nation: The rise of violent xenophobia in the new South Africa. *Unpublished Masters thesis. York University.*

⁹²Adepoju, A. 2006. Leading Issues in International Migration in Sub-Saharan Africa. In Cross, C. Gelderbloom, D.Roux, N. and Mafukidze, J. (eds.) *Views on Migration in Sub-Saharan Africa: Proceedings of an African Migration Alliance Workshop.* Pretoria: HSRC.pp 25-44.

⁹³Haigh, L. and Solomon, H. (2008). *Xenophobia in South Africa: Origins, Trajectory and Recommendations.* Centre for International Studies. University of Pretoria: n.p.

The document recommends that “high risk” asylum seekers be “accommodated in a secure facility”⁹⁴ but omits to specify what constitutes “high risk”. It questions the right of asylum seekers to work. These sentiments and policy directions of the ruling party have culminated in the proposal to amend the Refugee Act to curtail the rights of Asylum seekers in particular.

Resentment of Black migrants by locals makes no clear distinction between migrants who have a legal status and those who are undocumented. Nor is much consideration given of what they bring or contribute to the economy in terms of tax and skills. On the contrary, there is little discussion around their contribution. Government policies and institutions are a reflection of this attitude.

2.6. The Role of the Department of Home Affairs

Home Affairs is the main government department in South Africa responsible for the implementation of refugee policy and the Refugee Act of 1998.⁹⁵

The department was the main driver in the drafting of the Refugee Act. The refugee system and the immigration system operate in parallel: The Department has separate offices for refugee reception; processing by the Standing Committee for Refugee Affairs (SCRA); and the Refugee Appeal Board (RAB) that provides oversight on the decisions of the department.

According to the Act, asylum seekers can apply at any refugee reception office where their details are taken by a Refugee Reception Officer (RRO). They are interviewed by a Refugee Status Determination Officer (RSDO) and given a Section 22 permit pending the decision by the RSDO. If the asylum request is rejected as being unfounded or fraudulent, the applicant is asked to leave SA.

The SCRA reviews the decision before it is implemented, and the asylum seeker has the option of making a written submission within 14 days. If the decision is unfounded and an appeal has been lodged within 30 days, the RAB has to review the decision.

⁹⁴ African National Congress. (2012). Peace and Stability; Policy Discussion Document. Mangaung

⁹⁵ South Africa. (1998). Refugee Act, No 130 of 1998. Pretoria: Government Printer. [Laws.]

In the meantime, the asylum seeker's Section 22 permit allows him to work and study.

In the event a favourable decision is reached and refugee status is granted, a Section 24 permit is issued. This provides the applicant with a refugee ID and travel document.⁹⁶

In 2012, the SCRA and RAB had a backlog of 66,000 and 74,000 cases respectively.⁹⁷

The Refugee Act is very specific in designating clear lines of responsibility and oversight. Implementation does not occur because of problems of access to refugee reception offices and the xenophobic attitude of officials.

Access has always been problematic because of long queues (that are much better now). Corrupt security officers charge monies in exchange for access to the premises. Facilities are inadequate.

Three reception offices have been closed in three major cities.⁹⁸ The Department has closed the three offices despite a High Court decision, citing problems of noise and the need to finding an appropriate space.⁹⁹ In the case of the Cape Town refugee reception office, the minister decided that there was no need for an office in Cape Town as it is not near places where asylum seekers enter the country.¹⁰⁰

These measures force asylum seekers to travel long distances to apply for asylum, or renew asylum permits, while awaiting the final outcome of their applications.

⁹⁶Refugees Act, Section 3.

⁹⁷ Mentioned in Amit, R. (2012). Briefing by the Department of Home Affairs on full report on the state of ports of entry and refugee reception offices, [http://www.pmg.org.za/report/20120522-briefing-department-home-affairs-fullreport-state-ports-](http://www.pmg.org.za/report/20120522-briefing-department-home-affairs-fullreport-state-ports-entryandre?utm_source=Drupal&utm_medium=email&utm_campaign=Free%20Alerts)

entryandre?utm_source=Drupal&utm_medium=email&utm_campaign=Free%20Alerts [Accessed 22 May 2012]

⁹⁸Amit, R. (2011). Winning isn't everything: courts, context, and the barriers to effecting change through public interest litigation. *South African Journal on Human Rights*, 27(1), 8-38.

⁹⁹Crown Mines office in Johannesburg, shut its doors on 31 May, 2011—Port Elizabeth office, which closed to new applicants on 21 October 2011 and to all applicants on 30 November, 2011. The Cape Town office ceased operations on 28 June, 2012. Asylum seekers in Cape Town for now can renew their permits at a DHA office in Foreshore.

¹⁰⁰ Apleni, M. (2014) Director-General: Decision of Director-General on the future of Cape Town refugee Reception Office. Department of Home Affairs

The great distances between remaining reception offices informs asylum seekers' choices as to where to live. This limits the jobs they can apply for and their ability to fully integrate into South African society¹⁰¹

A UNHCR study indicates that almost a fifth of refugees have paid a bribe to receive documentation¹⁰². This could be a gross underestimation because of under reporting. At some point in the asylum and refugee process, 8 in every 10 asylum seekers and refugees have paid a bribe with little evidence that the bribe advantaged them in terms of the service they received. Although corruption is a wider societal problem, it is a much worse problem for asylum seekers and refugees because of their vulnerable situation. It is not only DHA officials who are implicated in this, but also police and other officials. Since the DHA is the department responsible for providing documentation to enable refugees and asylum seekers to live and work in SA, its impact is much more magnified.

The Marabastad refugee reception office in Johannesburg is considered the most corrupt¹⁰³. Beside corruption, the DHA and its officials find other ways to make the process difficult by creating obstacles in the application or renewal process:

- (a) *Making applicants wait longer to enter the office than the duration of their transit permits allow*
- (b) *Informing applicants of their obligations but not their rights*
- (c) *Interfering in applicants' efforts to fill in forms while not providing help to those who need it*
- (d) *Withholding crucial information from applicants, thereby increasing the likelihood that they will 'slip up' in their interviews with status determination officers.*¹⁰⁴

After travelling long distances, the department usually gives applicants a permit of a few days or weeks while they await the final decision. This forces them to have to stay near the office, sleeping on the streets or spending money on accommodation. In an effort to expedite the

¹⁰¹Amit, R. (2012). NO WAY IN Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices. ACMS Research Report, University of the Witwatersrand, Johannesburg.

¹⁰²Groot, Fredde (2004) 'Challenges of the UNHCR's Programme for urban Refugees in South Africa' in Loren B. Landau (ed.) *Forced Migrants in the New Johannesburg: Towards a Local Government Response*. Johannesburg: Forced Migration Studies Programme: WITS, pp. 37-42.

¹⁰³Amit, R. (2012). 11

¹⁰⁴Vigneswaran, D., Araia, T., Hoag, C., & Tshabalala, X. (2010). Criminality or monopoly? Informal immigration enforcement in South Africa. *Journal of Southern African Studies*, 36(2), 465-481. 476

determination of refugee status, the RSDOs are churning out decisions faster without adequate analysis of the facts of individual cases. The RSDOs often make decisions based not on individual merit but on the country of origin.

In the last few years, the department has been taken to court on many occasions, in which it lost almost 80% of the cases on unfair procedure in status determination, restriction of access to refugee reception offices and unlawful detention and deportation. The legal bills of the department have increased dramatically over the last four years. In general, the attitude of the department can be described as exclusionary and it is trying to make the prospect of seeking asylum in South Africa rather unpleasant.

Considering the DHA approach to law and the courts, Amit asserts:

The DHA's actions reveal a government department that does not approach the law as a fixed and binding set of legal obligations intended to frame its actions. Instead, the DHA has deployed various conceptions of the law to justify actions taken out of expedience. As a result, it has undermined the notion of a strong legal precedent that can enhance the efficacy of legal decisions¹⁰⁵.

Darshan Vigneswaran et¹⁰⁶ al have also underlined in their research that the DHA officials corruptly help some asylum seekers circumvent protocols and procedures to acquire documentation while over-zealously enforcing and overstepping their legal boundaries with others as a manifestation of their power. Furthermore, officials believe that immigrants in general have it easy in South Africa and create soft barriers. The UNHCR in its capacity as a protector of rights has lamented this fact and funds organizations that try to shore up the protection efforts in different ways.

2.7 The Role of the UNHCR in South Africa

The UN refugee agency emerged in the wake of World War II to help Europeans displaced by that conflict and it has since been at the forefront of every refugee crisis in the world. Statistics

¹⁰⁵Amit, R. (2011). 25

¹⁰⁶Vigneswaran, D., Araia, T., Hoag, C., & Tshabalala, X. (2010).

from the UNHCR¹⁰⁷ indicate that more than 243,948 individual asylum claims were awaiting a decision in July 2014, making South Africa one of the largest recipients of asylum-seekers in the world with over 65,668 registered refugees. For this reason, the involvement of the UNHCR in South Africa is inevitable. And with the post-apartheid South African government being a signatory to the major refugee instruments, it has a greater responsibility to meet its obligations to these charters and the UNHCR.¹⁰⁸

UNHCR opened its office in South Africa in 1991, to assist with the return of South African exiles who fled the country during apartheid.¹⁰⁹ On 12 January 1996, the South African Government signed the 1951 UN Convention Relating to the Status of Refugees, the 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. By signing these international laws, the South African government has committed itself and its people to protecting refugees, as required under these treaties. Subsequently, and with the help of the UNHCR and human rights NGOs, the South African Government drafted refugee laws specific to South African conditions that are progressive by any standard. These laws allow asylum seekers and refugees to reside anywhere and to study and work (initially a provision that applied only to refugees). The Refugee Act was passed into law by Parliament in December 1998, paving the way for the national implementation of South Africa's obligation to protect and assist refugees. From that moment on, the UNHCR's role became that of monitor.

The involvement of the UNHCR in South Africa has different facets:

It advocates for the fair treatment and socioeconomic rights of refugees and asylum seekers.

It lobbies both national and local government, and the media.

UNHCR tries to promote the acceptance of refugees and asylum-seekers through spreading public awareness, and media campaigns against xenophobia.

¹⁰⁷UNHCR Global Appeal 2015 Update, South Africa. <http://www.unhcr.org/5461e604b.html> Date accessed [04 March 2015]

¹⁰⁸ UNHCR. (2014). History of UNHCR <http://www.unhcr.org/pages/49c3646cbc.html> Date accessed [03 June 2011]

¹⁰⁹Handmaker, J. (2002). Evaluating Refugee Protection in South Africa.

Capacity building is a core activity - in the area of protection - seeking to help states meet their international legal obligations to protect refugees. Capacity building activities are geared towards strengthening national authorities, laws and policies, to ensure the proper handling of refugee and asylum issues, especially the reception and care of refugees.

The UNHCR provides technical advice, training and support to the Department of Home Affairs in order to increase its asylum processing capacity and thereby reduce the backlog of pending asylum applications.

UNHCR promotes Livelihoods and Self-Reliance of refugees. It helps refugees, refugee returnees and internally displaced people, tap their potential and in so doing, builds a platform for development.

UNHCR assesses the need for, and provides direct material and legal assistance to, the most vulnerable people. Support is in the form of food, shelter, education, health, community services, skills training, and self-reliance projects.

It intervenes and plays a critical role in emergency situations such as during xenophobia attacks – by sheltering, clothing and feeding displaced people.

Permanent solutions for refugees, are not always successful or viable, but for the past 15 years the UNHCR has attempted to provide permanent solutions in three ways: voluntary repatriation; local integration; or resettlement to a third country if the refugee can neither return home nor remain in the host country. The local integration drive was hampered by recurrent xenophobic attacks.

The UNHCR has been using local NGOs as partners to carry out its mandate since its inception. There are two kinds of partnerships: operational and implementation partnerships, respectively.

Implementation partnerships involve financial support for specific projects. In 2012 alone, over a third of the \$2.3 billion dollars spent on protection, was channelled through 760 NGOs, of which 600 are local.¹¹⁰

Operational partnerships involve voluntary cooperation between the partners in achieving a common goal.¹¹¹

Since 2000, the UNHCR has been consulting annually with NGOs in Geneva. This provides feedback on the work being done, and for assessment of its impact. It is an opportunity for NGOs to network, and has resulted in a framework of partnerships between NGOs and the UNHCR. Most developing countries delegate their responsibilities to, and sometimes consider refugees the sole responsibility of, the UNHCR and NGOs. The contribution of the UNHCR is intended to be in addition to the responsibilities that states have under international law.¹¹²

In South Africa, the agency usually works in tandem with the DHA and other NGOs. Currently, there are 10 NGOs and 2 universities working as implementing partners with the UNHCR under contractual agreements that provide legal, social and other services to refugees and asylum-seekers. The working operational partners are government agencies and intergovernmental agencies such as the IOM, UNDP etc. According to the country's UNHCR fact sheet, it has assisted: 2062 to resettle; 17981 with legal assistance; 1029 in self-reliance and livelihood projects; and 9935 with social assistance. All this has been achieved in partnership with NGOs and other¹¹³ agencies.

As an intergovernmental body, the UNHCR has stakeholders that are essential to its purpose and operations, namely, refugees and NGOs. The UNHCR sometimes gets caught between the conflicting priorities/aims of these stakeholders.¹¹⁴ Not surprisingly, NGOs often have concerns

¹¹⁰ UNHCR, 2013 Report on the Annual consultations with NGOs Geneva, Switzerland
<http://www.unhcr.org/ngo-consultations/ngo-consultations-2013/FINAL%20Full%20Report%20of%20the%20annual%20consultations%20Sept%202013.pdf> Date accessed [04 March 2015]

¹¹¹ UNHCR, 2004. NGO partnerships in Refugee protection:
http://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR_and_NGOs_UNHCR_Sep_2004.pdf Date accessed [03 June 2011]

¹¹² Verdirame, G., & Harrell-Bond, B. E. (Eds.). (2005). *Rights in exile: Janus-faced humanitarianism* (No. 17). Berghahn Books.

¹¹³ UNHCR, 2015.

¹¹⁴ Van Mierop, E. S. (2004). UNHCR and NGOs: Competitors or Companions in Refugee Protection?,
<http://www.migrationinformation.org/Feature/display.cfm?ID=200> Date Accessed [2 June 2011]

that the UNHCR's policies are too subservient to the wishes of governments, instead of protecting refugees. The cases of the DRC and Rwanda cited by way of example.

The commission also receives criticism that it spends a lot of money on salaries and administration, thereby short changing those who should be helped. It is also argued that the UNHCR places undue pressure on NGOs not to criticize the agency by threatening to withhold financial support from partners.¹¹⁵

South Africa presents the UNHCR with challenges that differ from those in other African countries:

Since the South African government has very liberal refugee legislation and is willing to integrate refugees and asylum seekers and doesn't put them in camps, the UNHCR cannot directly intervene. Its influence is limited by the diplomatic status it has. Consequently many refugee communities and NGOs complain that the UNHCR is nowhere to be seen on the ground.

UNHCR has one office in Pretoria with approximately 40 staff, one in Cape Town, and a third in Musina with 77 local and international staff¹¹⁶. This is not adequate for rights protection. Despite this, UNHCR has, through the above mentioned mandates, assisted refugees and asylum seekers in many ways.

As mentioned above, the UNHCR enjoys a generally good working relationship with its implementing and operational partners. In the absence of a visible UNHCR footprint on the ground in South African cities, NGOs play a significant role in many ways because they are the points of contact for the refugees and asylum seekers.

2.8 NGOs in refugee rights protection

According to Cameron¹¹⁷ NGOs as civil society institutions, negotiate with market and state agents to ensure their sustainability and in so doing, increase the certainty of livelihoods for

¹¹⁵Verdirame, G., & Harrell-Bond, B. E. (Eds.). (2005)

¹¹⁶UNHCR, 2015.

¹¹⁷Cameron, J. (2000). Development economics, the new institutional economics and NGOs. *Third World Quarterly*, 21(4), 627-635.

the most vulnerable. The most vulnerable in this case are refugees and asylum seekers. NGOs undertake three roles: They are implementers; catalysts; and partners.¹¹⁸

In South Africa, the civic-state engagement can be categorized in the three ways¹¹⁹:

- Participation of civic societies, such as Lawyers for Human Rights (LHR), in the government-driven process of drafting refugee policy. This (sometimes confrontational) cooperation occurred from 1996-1998 and culminated in the drafting of the Refugee act of 1998. It was a two track process in which civil society discussions fed into the government led process. In a nutshell, LHR brought its legal and civic expertise in human rights protection to the discussion and drafting of the legislation.
- Cooperative civic and state interaction, such as that provided by international and local civil society to the South African government, in an effort to regularize the residential status of Mozambican refugees. South Africa hosted hundreds of thousands of Mozambican refugees, some of whom were repatriated with the help of the UNHCR, while others were deported or remained in the country without legal documentation. During 1999 and 2000, civil society made a significant contribution to legalizing their stay.
- Confrontational engagement. Civic advocacy holds the state accountable by taking legal action to challenge the state's decisions and make sure government complies with constitutional and administrative law. The SA state was challenged by many NGOs on the issues of access to social services, fair procedure in status determination, and unfair detention and deportation.

Confrontational civic advocacy was also directed at non-state actors. A case in point is the confrontational advocacy against financial institutions regarding access to banking for refugees and asylum seekers.

Since the founding of the UNHCR, there has been an acute awareness and focus on the rights of refugees as a specific category of vulnerable people. However there is no historical evidence of the presence of NGOs who specifically deal with refugees, before the existence of the UNHCR and its predecessor. The international protection of the majority of the world's

¹¹⁸Lewis, D. (2006). *The management of non-governmental development organizations*. Routledge.

¹¹⁹Handmaker, J. (2009). *Advocating for accountability: civic-state interactions to protect refugees in South Africa*.

refugees has traditionally been the domain of the UNHCR. Since the 1980's, NGOs with a refugee protection and assistance mandate, have started to emerge. This is because they were partly dissatisfied with the role of the UNHCR - magnified in the mid 1990's during genocide in Zaire, Tanzania and Rwanda. According to Van Mierop:

*Humanitarian NGOs publicly questioned how UNHCR could execute its mandate in such a situation. Several of them published reports or made public statements in which they denounced violations of the rights of Rwandan refugees, and there were even a few NGOs that left the camps in Tanzania and Zaire.*¹²⁰

Despite such problems, research indicates that the number of Refugee NGOs and NGOs in general, has increased. Reasons for this could include: an increasing awareness of rights; an increase in the number of refugees and asylum seekers in developing countries; and the extension of their services from those of assistance to those of protection among others. Refugee NGOs are specialized NGOs in a sense because their main focus is refugees and asylum seekers. The number of NGOs working with the UNHCR has also increased in line with this general trend.

There is a negative dynamic at work between the UNHCR and NGOs active in refugee protection in that these NGOs hardly ever challenge the methods of operation of the UNHCR. This can be seen in the cases of global financial institutions like the World Bank. Literature is scarce on NGOs criticizing the work of the UNHCR even though scholars lament the weakening of the UNHCR protection agenda, and the emergence of a mere 'care and maintenance' function.

As mentioned above, the withdrawal of financial support is used as a weapon by the UNHCR. Harral-Bond et al¹²¹ have stated that the UNHCR's flawed assistance record and its disregard for protection, has alienated Somali refugees in Kenya and Uganda from their host countries.

The same can not be said for South Africa where refugee NGOs have increased in number as a result of the influx of refugees and asylum seekers to the country. Since the xenophobic attacks, they have increased their footprint partly because it was a topical issue, and a lot of

¹²⁰Van Mierop, E. S. (2004).

¹²¹Harral-Bond, B., Voutira, E., & Leopold, M. (1992). Counting the refugees: gifts, givers, patrons and clients. *Journal of Refugee Studies*, 5(3-4), 205-225.

funding has emerged as a result. In some cases, NGOs became much more visible as a result of their increased activities after the attacks. However, the last four years has witnessed a sharp decline in funding from philanthropic organizations for refugee NGOs. This has impacted the effectiveness of these NGOs. Some NGOs have had to close down as a direct result while others have specialized in specific niche operations.

There are new voices emerging as refugee community organizations increasingly become active in giving a voice to their communities. Some have set up refugee CBOs to advocate for their communities and to be active in the provision of services to refugees as they are closest to the refugee communities. This development is also about access to resources.

2.9 NGOs active in the refugee sector in SA

Since the 1998 xenophobic attacks, many NGOs shifted their attention and resources to the plight of refugees. As a result, the number of NGOs that deal with refugees has grown exponentially in the past decade and over the last few years. In order to coordinate their efforts in Refugee rights lobbying and protection, they have created an umbrella organization named The Consortium for Refugees and Migrants in South Africa (CoRMSA). This was initially known as the National Consortium for Refugee Affairs. There are 35 local and international NGOs under the umbrella of CoRMSA and a few that are not.

Most of the CoRMSA affiliated NGOs are local and they can broadly be divided into three categories according to their activities: protection; humanitarian assistance and access to social services; and skills provision.

NGOs such as the Wits Law Clinic (WLC) and Lawyers for Human Rights (LHR) focus mainly on the protection of refugee rights largely through lobbying and litigation due to inherent problems within the asylum system.

NGOs that provide humanitarian assistance came to the fore after the xenophobic attacks, since there were many displaced refugees and asylum seekers. Most faith - based NGOs, such as the El Shaddai and United Reform Churches, provide humanitarian assistance in the form of shelter and food.

The Scalabrini Centre, Refugee Social Services (RSS), Sediba Hope (SH) and Sonke Gender Justice (SGJ) focus on skills provision.

Some NGOs provide multiple services either on their own or in partnership with other NGOs, and some overlap in two or three categories since the asylum seekers and refugees that come to their doors often need multiple services. Three NGOs in particular focus on the empowerment of refugee women through education and skills development.

The main challenge facing organizations that assist refugees and asylum seekers, is funding. After the xenophobic attacks, many donors were willing to give funding to this sector. The main funders of this sector are Foundation for Human rights, Atlantic Philanthropies, UNHCR, and National Lottery. The Foundation for Human Rights (FHR) provided a large part of the €210 million the EU donated in a three-year budget to refugee NGOs. Though this was meant to end by 2012, it was extended to 2014. This and other smaller donations from agencies and private individuals helped most NGOs to continue. Some small NGOs and CBOs have closed their doors because they cannot sustain their operations.

This study looked at three NGOs to establish how refugee NGOs lobby and advocate for rights in partnership with the UNHCR. These three NGOs are: Lawyers for Human Rights (LHR), Refugee Social Service (RSS) and Scalabrini Centre (SC).

These three NGOs are: operational and implementing partners of the UNHCR; give a comprehensive picture of the involvement of Refugee NGOs in the different sectors of refugee protection, humanitarian services and access to social services; and have all been active for some time in the field and are still running several projects.

At the inception of the research process the researcher intended to use the Refugee Ministries Centre as one of the case studies. However, this NGO's main operation (providing interpreters to DHA RROs) was terminated, and its other minor operations ceased. It is no longer a UNHCR implementing partner and is on the verge of closing down. Therefore, accessing data from this organization was problematic. Instead, the researcher opted to use the Scalabrini Centre as a third case study NGO owing to it being a major refugee NGO in the Cape Town Metropolitan area. A brief profile of each of the selected case study NGOs follows below.

2.10 Refugee Civic Organizations in South Africa

There are numerous civic, religious and political organizations that are formed and run by refugees living in South Africa. These are NGOs, CBOs, churches and political parties. They provide a crucial platform for social, cultural and economic inputs as they represent their own communities in their forums. It is doubtful however whether they have a strong and representative structure across the board. In recent years there has been a move towards the organization of refugees for the purpose of advocating for their rights. While not all refugee communities have strong organizations, Somalis seem to have the strongest structures, followed by the Congolese. Both communities have various inherent fault lines that prevent them becoming strong and cohesive.

Somalis have several organizations: the Somali Community Board (SCOB); the Somali Association of South Africa; Al-Bayan Islamic Council Trust; and the Somali Youth Association. The SCOB¹²² annual report describes this CBO's activities in legal, social and material assistance. An example is its awarding of scholarships.

Somali organizations aim to integrate Somalis into SA.

Compared to the Somalis¹²³, the Congolese are very fragmented across ethnic groups and regions. However, churches have been acting as a platform for social gatherings. The Congolese have also formed new political parties and branches of parties that exist in Congo or elsewhere¹²⁴. They have held protests in Johannesburg and Durban in opposition to the current DRC government.

Almost all communities have some form of organization. There are also umbrella organizations, like the KwaZulu Natal Refugee Council, that try to organize different refugee communities. In Johannesburg, there is a Coordinating Body of Refugee Communities (CBRC) active in assisting refugees through various programmes that enable access to social services and banking¹²⁵. People Against Suffering Oppression and Poverty (PASSOP) is an NGO founded by refugees and works on refugee rights advocacy and protection. The strongest community

¹²²Somali Community Board. (2010). 2009 Annual report.

<http://www.somalisouthafrica.co.za/SCOB%20YEARLY%20REPORT%2009.pdf> [Accessed 15 May 2015]

¹²³ The Somalis are 95% of one ethnic group and of one religion.

¹²⁴Amisi, B., & Ballard, R. (2005). *In the absence of citizenship: Congolese refugee struggle and organisation in South Africa*. Forced Migration Studies Programme, University of the Witwatersrand. 26

¹²⁵Amisi, B., & Ballard, R. (2005). 27

organization depending on its footprint is the Somali Association. The UNHCR however doesn't have a formal protocol for working with refugee community based organizations.

The above organizations consistently criticize the UNHCR and other South African civic organizations for not including refugees in the working and decision making of their organizations. There is also a shortage of funding from the UNHCR for refugee organizations. Most civic refugee organizations however lack continuity and proper organizational structures. Despite the importance of refugee organizations, they remain one of the least recognized and researched stakeholders in the refugee regime in South Africa.

2.11 Refugee NGOs selected for the Case Study

The researcher identified three NGOs that play an active role in refugee and asylum rights protection in South Africa, as previously mentioned. These are LHR, RSS and Scalabrini Centre.

2.11.1. Lawyers for Human Rights (LHR)

Lawyers for Human Rights, is a public interest NGO active in the protection of rights of vulnerable groups of people. LHR was founded in 1979 and rapidly achieved a reputation for fighting human rights abuses committed by the Apartheid regime. LHR later made a significant contribution in the transition to democracy through its voter education programme and monitoring the General Election of 1994. It is recognized today as a local NGO that actively participates in advocacy and litigation around key human rights issues.

LHR works for the development and delivery of human rights, with a primary focus on Africa. It is a primary contributor to the clear strategic policy on the delivery of socioeconomic rights to the disadvantaged. To this end, it has several programmes that promote the awareness and protection of, and the enforcement of legal and human rights through the creation of a human rights culture.

The LHR Refugee and Migrant Rights Project was established in 1996, as a specialized programme that advocates, strengthens and enforces the rights of asylum seekers, refugees and

other marginalized categories of migrants in South Africa. This project is currently one of LHR's major projects:

It provides legal advice and representation to refugees, asylum seekers and other migrants in South Africa. The project operates from the project's legal advice offices in Johannesburg, Pretoria, Durban and Port Elizabeth, and a satellite office at Musina on the Zimbabwean border. The LHR has many partners such as the UNHCR, its major funder. It works in tandem with other organizations or as implementing partner, as is the case with the UNHCR.

LHR provides free legal services to indigent asylum seekers, refugees and migrant clients. Litigation is used as a tool to advance refugee and asylum seekers' rights and to develop African jurisprudence in the field of refugee and immigration law. The project's litigation programme focuses on 'impact litigation with precedent-setting value'.¹²⁶

The LHR also undertakes vigorous detention monitoring which documents the human rights abuses suffered by migrants in the detention and deportation process. It advocates for policy reform in this area. One of the stellar achievements of this organization is its role in establishing jurisprudence in refugee law in the South African legal system. Legal assistance is also given to people who have been unlawfully arrested and who are at risk of deportation.

The project has undertaken litigation in the areas of arrest, detention and deportation; refugee status determination; and socioeconomic rights of refugees. All the cases the LHR undertake are of strategic importance to refugees and asylum seekers, and the refugee community. One of the project's important activities is the detention-monitoring programme. This programme monitors immigration officials' detention of people awaiting deportation at the Lindela Repatriation Centre, police stations, international airports, prisons, and the detention facility for non-nationals in Musina.¹²⁷

The programme often uses litigation not only to secure the release of those persons unlawfully arrested and detained, but also to improve conditions in detention. *Lawyers for Human Rights v Minister of Home Affairs, 2004 (4) SA 125 (CC)*¹²⁸ is an example of detention monitoring litigation. This case challenged the constitutionality of the detention and deportation provisions

¹²⁶ Lawyers for Human Rights: <http://www.lhr.org.za/programme/refugee-and-migrant-rights-project/information> Accessed [March 5 2014]

¹²⁷ Lawyers for Human Rights.

¹²⁸ *LAWYERS FOR HUMAN RIGHTS AND ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER* 2004 (4) SA 125 (CC)

of the Immigration Act (Act no 13 of 2002) that gives far-reaching and arbitrary powers to immigration officers. The State maintained that the Bill of Rights does not apply to foreign nationals before they have formally been admitted into South Africa. Although the court only found one section of the provision to be unconstitutional, this case confirms that unless specifically restricted to South African citizens, Bill of Rights provisions do indeed apply to foreign nationals.

Refugee status determination is another area of interest and litigation for the LHR. After asylum seekers are admitted to South Africa, their stay is determined by the process of status determination, and outcome of the decision. The LHR has taken on landmark cases in this regard: *Somali Refugee Forum v Minister of Home Affairs and Others* Case no 32849/05 (TPD)¹²⁹ is a good example.

International law requires that asylum seekers be given immediate legal protection on arrival pending the determination of their status as refugees. This right was denied to asylum seekers in South Africa due to systemic administrative incapacity, thus disallowing newly arrived asylum seekers immediate access to the Department of Home Affairs' asylum-application procedure.

LHR achieved some success in addressing this unsatisfactory situation with two applications launched in the High Court during 2005 and 2006. Pursuant to these applications, in November 2005 the Pretoria High Court ordered the Department of Home Affairs to procure the services of more staff and an independent process engineer to assess and make recommendations to ensure that newly arrived asylum seekers have proper and lawful access to South Africa's asylum procedures. The court also ordered the Department to reopen a refugee reception office in Johannesburg and ensure that asylum seekers are received at this facility. The Department did this and appointed an independent process engineer in December 2006. In February 2007 he produced a draft report incorporating LHR comments with recommendations to facilitate access of asylum applicants.¹³⁰ The Department then closed refugee reception offices, thereby acting against the court's findings, and contrary to needs on the ground. It did so despite

¹²⁹*Somali Refugee Forum v Minister of Home Affairs* (TPD) unreported case no 32489/05 (November 2005).

¹³⁰ Lawyers for Human Rights: Summary of judgment for, [Lawyers for Human Rights v Minister of Home Affairs](http://www.lhr.org.za/judgement/lawyers-human-rights-v-minister-home-affairs-2004). 2004: <http://www.lhr.org.za/judgement/lawyers-human-rights-v-minister-home-affairs-2004>Date Accessed [25 April 2010]

protests by civil society, and left South Africa's biggest refugee host city without an asylum seekers' reception centre. Subsequent to these events, the LHR took on the Department on behalf The Somali Association of South Africa, to secure the opening of a refugee reception centre in Port Elizabeth.¹³¹

The third area in which the LHR is active is in pursuit of socioeconomic rights for refugees. This is important to integrate refugees into communities at large, and give them opportunities to earn a living. An important case is the LHR's challenge to a communiqué from the Financial Intelligence Service directing banks to no longer accept permits issued to refugees and asylum seekers under the Refugee Act.

*LHR brought application on behalf of the Consortium for Refugees and Migrants in South Africa ("CORMSA") and a number of individual clients to the high court in Johannesburg in September. An interim order was granted on 9 September 2010 which allowed clients to access their accounts pending the outcome of the main application.*¹³²

This in effect forced the legislation to change, thereby attracting refugees and asylum seekers to the formal banking sector. However, despite the court order, some banks such as ABSA have refused to provide services to asylum seekers and refugees.

Having humane laws and policies does not automatically translate into humane law enforcement. The project has tried to develop training programmes for government employees who work directly with refugees and immigrants. The LHR undertakes the training of social workers, police officers and refugee communities on the rights and needs of refugees and migrants.

Of the three areas in which the LHR Refugee and Migrant Rights Project is active, the area of socioeconomic rights for refugees is the least developed. The reason for this is that the realization of the rights of refugees and asylum seekers requires a different set of skills and strategies which LHR does not equip its trainees with.

The cases which LHR has taken on are strategic in nature. They have set precedent. Though very important, they do not address case by case, the human rights issues which refugees and asylum seekers face. The LHR Refugee and Migrant Rights Project lacks the resources to deal

¹³¹Somali Association for South Africa and another v Minister of Home Affairs and others 2012 (5) sa 634 (ecp)

¹³² Lawyers for Human Rights: Press Release. 2010. <http://www.lhr.org.za/news/2010/refugees-and-asylum-seekers-again-able-access-bank-accounts> Date Accessed [2 June 2014]

equally well with every case that comes to its door. Most NGOs in this sector identify trends and mount litigation based on these. LHR does however respond to urgent issues like the urgent application [in collaboration with other NGOs] to the South Gauteng High Court, to stop Operation Fiela.

2.11.2 The Refugee Social Services (RSS)

The Refugee Social Service (RSS) is a local NGO operating mainly in Durban. It was part of an international NGO initiative, The Mennonite Central Committee (MCC) Refugee Project. In 2008, it was registered as RSS, an independent SA NGO. Its vision is to help refugees attain a degree of ‘integration and independence’ through ‘holistic, quality and innovative social services’¹³³. The services it provides target children, the elderly, disabled, single parents and newcomers.

It provides different services to three categories of indigent refugees and asylum seekers:

- It provides refugees and asylum seekers, especially new ones, with the necessary skills to live in South African society. Language Training and English Support Workshops for Secondary School Learners are two initiatives in this category. The former equips refugees with the necessary language skills for daily interaction with people in SA. This is to provide a bridge to vocational and skills development programmes offered by the RSS. It helps refugee students cope with the new linguistic environment in their academic world, are imperative for their integration. It helps refugees acquire skills and vocations as a step towards employment and independence.
- The RSS mostly trains women in sewing, gardening, interpretation, and security. It also helps women with ‘Home based Educare,’ a programme that allows women to earn money by creating affordable child care for refugees, asylum seekers and South Africans alike.¹³⁴

¹³³ Refugee Social Services: <http://www.refugeesocialservices.co.za/> Date Accessed [2 June 2014]

¹³⁴ Refugee Social Services http://www.refugeesocialservices.co.za/index.php?option=com_content&view=article&id=48&Itemid=29 Date Accessed [2 June 2014]

- It assists refugees to access social services such as education and health among other services. It provides life orientation by educating refugees in HIV prevention and treatment.

The UNHCR implements its resettlement programme using this centre as one of its referring organizations in Durban. Even though the RSS is a new NGO, its experience with the MCC (its parent organization) and its holistic approach to helping refugees and asylum seekers makes it a candidate for a case study in this research. The fact that it is also an implementing partner of the UNHCR is another reason for its inclusion in this study.

2.11.3 The Scalabrini Centre (SC)

Scalabrini is a local faith-based NGO that was formed in 2003 in South Africa as a branch of the Scalabrini order of the Catholic Church. It was started by John Baptist Scalabrini (1839-1905), Bishop of Piacenza as an order that focuses on ministering to migrants, seafarers, refugees and other displaced persons. It started as a way of maintaining the Catholic faith in migrant Italian families in the New World, and the Americas¹³⁵. Bishop Scalabrini also formed the Missionary Brothers and Sisters of Saint Charles Borromeo with a similar purpose.

The bishop's purpose was however not entirely humanitarian. Vendetta argues that the Bishop, despite believing migration is a neutral act, 'strategically used his connections in the Italian state and the Church hierarchy to obtain support and funds for his missionaries' work' fearing that Italians might abandon the Catholic faith when living in lands full of protestants. It was not until the middle of the 20th century that the Scalabrini humanitarian agenda became universal.

Besides the lay organization that exists in 24 countries, the Federation of Centres for Migration Studies of the Scalabrini Centre is distributed across major cities in the world such as New York, Paris, Rome, Basel, São Paulo, Buenos Aires, Manila and recently, Cape Town.

¹³⁵D'Agostino, P. R. (1997). The Scalabrini Fathers, the Italian emigrant church, and ethnic nationalism in America. *Religion and American Culture*, 121-159.

The Centre works on research, specialized publications - including periodical, monographs and occasional papers, and has a documentation department. Scalabrini support for migrants in South Africa has been ongoing for two decades.

The Scalabrini order started its religious and social welfare activities in South Africa in 1994 when it formed a secular NGO. Development and social welfare activities started in 2003 after the purchase of Scalabrini House offering direct welfare assistance, development, advocacy and outreach.

Direct welfare assistance includes: money for a maximum of three months rental; transport; clothing; and needs - based assistance to indigent refugees and asylum seekers. It refers clients to organizations that can provide access to relevant information. The SC used to provide healthcare, which assistance has been discontinued. It also assists LGBT clients.

SC's English language programme is one of the success stories of the organization: newcomers of different nationalities learn English in an interactive way using a lot of drama and conversational features. 924 students registered for the English language programme and 458 completed their studies in 2014.¹³⁶

SC has an employment programme that equips refugees, asylum seekers, migrants and South Africans (albeit in limited numbers) with the knowledge and skills to find jobs. It also places them in certain jobs both skilled and unskilled categories. Training is tailor made for each group. Skills training includes: basic life skills; literacy; CV writing; access to information; and psychometric assessments to identify clients with the necessary skills set.

The Foreign Professional Desk (FPD) has been very successful in helping and placing educators and nurses. It provides a home to 25 children and youth. According to the SC's 2014 annual report,¹³⁷ the employment desk assisted 1534 clients, with some of them visiting the desk multiple times.

SC runs the Lawrence House child and youth care facility that is partly funded by the Department of Social Development.

¹³⁶ Scalabrini Center. (2015). 2014 annual report of Scalabrini Center. Cape Town.

¹³⁷ Scalabrini Center. (2015).

The outreach programme is no longer operational. It reached schools in and around Cape Town - educating and integrating children using art, and especially drama. SC partnered with other organizations reaching out to communities where migrants live, providing education and information sessions.

SC has an active high level advocacy programme at Scalabrini House that works on a walk-in client basis. Clients seek advice or solutions on issues ranging from access to documentation, to problems relating to accessing services.

SC delivers paralegal services at SASSA offices in Bellville every Wednesday. High level advocacy has seen increased protection for foreign minors. SC has litigated to ensure access to documentation at the Cape Town RRO¹³⁸ since the DHA stopped accepting asylum seeker applications. This litigation is ongoing with the assistance of the Legal Resources Centre (LRC) because the DHA refused to abide by a court order.

Operationally, the SC has a solid structure:

- SC has multiple funders: HCI Foundation; DSD; and Anglo American. It generates additional income by hiring out its conference facilities and by operating a guest house.
- SC owns the building from which it operates, so avoids overheads paid by most NGOs.
- SC's numerous volunteers provide the organization with a strong skills base and this lessens its operating costs.
- SC does not get any funding from the UNHCR, but is an operational partner. The UNHCR, in fact, holds its Cape Town Refugee Forum meetings and resettlement interviews at SC.

SC is involved in all three categories of the refugee regime covered in this Three NGO case study.

All three NGOs qualify for the case study because they have been extensively involved in at least two categories identified above. However, RSS is only active in Durban while SC is only active Cape Town. LHR is active in various ways in multiple key cities.

¹³⁸Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (11681/12) [2013] ZAWCHC 49; 2013 (3) SA 531 (WCC); [2013] 2 All SA 589 (WCC); 2013 (7) BCLR 819 (WCC) (19 March 2013)

It is important to note that the nature of each of the three NGOs involvement with UNHCR, differs.

Summary

A thorough background understanding is important in trying to understand and locate asylum seekers within the society in terms of the social and political environment. That is why this chapter looked at the socioeconomic conditions of asylum seekers and refugees.

In addition, xenophobia and its accompanying violence, is an important marker of the political, economic and social dynamics experienced by asylum seekers and refugees in South Africa. Any discourse about this group of people has to look at the periodic eruptions of xenophobic violence. Equally essential, because of the research case study, is in depth discussion about NGOs and the UNHCR.

The literature on NGOs involved in refugee protection is vast, and documents longstanding efforts to assist and protect refugees and asylum seekers. Different challenges, however, have emerged as a result of the increasing flow of refugees to SA and absence of political will demonstrated by different ideologies and perceptions. The challenges to NGOs are sometimes huge in terms of capacity building, funding needs, and the absence of political will. Despite these, NGOs have been actively working to protect and assist refugees.

The researcher has provided a brief description of the NGOs chosen for this case study. To further understand the need for protection, and the principles and international laws that support it, one has to look at the historical discourse on rights. The following chapter refers.

Chapter 3: Liberal Rights Theory in Refugee Protection

Introduction

Rights based discourse on asylum seekers and refugees is better looked at through the liberal rights theory that encompasses the theories of many scholars. After all, it is this theoretical foundation that gave rise to the recognition of their rights outside their nation-states. However, this discourse needs to look at the theories regarding sovereignty and citizenship in nation states, the subjective interpretation of rights, administrative justice and political and social forces that determine the implementation of refugee systems. Rights can't be seen outside the context of their implementation.

This chapter focuses on refugees and asylum as a concept and it interrogates the theories that speak to this particular discourse. It looks at the liberal rights theory, international laws regarding refugees and asylum seekers, and South Africa's legislation. All of those aspects lay the foundation for a narrative on rights and the protection afforded to refugees and asylum seekers through those rights. In addition, it looks at the mandate of international and national refugee legislation, the UNHCR and the contribution of South African civil society. It will also look at public interest litigation on refugee and asylum cases in relation to international law and local legislation and the liberal rights theory.

3.1 Migrants, Refugees and Asylum Seekers as concepts

These three terms are used interchangeably sometimes. However, legally, an asylum seeker is a person who has applied for asylum and is waiting for a decision on his or her claim. A refugee, on the other hand, has already received a positive decision from the authorities on his or her asylum claim. A migrant is someone who moves from one place to another in search of better opportunities. The idea of seeking refugee or asylum as result of being forced to leave your country of origin because of your rights being trampled upon has been around for centuries. The increase in the influx of refugees during the two world wars has been a significant milestone in the recognition of refugees and their rights within the sovereign territory of receiving states. This is why the organized response to the refugee problem can be attributed to the League of Nations in the 1920s¹³⁹ with the massive displacement of people in the First World War. The basis for this impulse to help people in need of assistance is arguably a natural

¹³⁹ Chimini B. S(ed). 2000. International refugee Law. New Delhi; Sage Publications Ltd.

instinct. It is also guided by liberal impulses based on morality, religion and national and international laws.

However, it is imperative to interrogate the reason why refugees leave their home / country of origin. In addition, the distinction between refugees and migrants and the complex dynamics that exists in reality between these two groups is worth some further investigation.

3.1.1 Reasons for leaving

When one looks at the historical context, people have always moved in search of different things and for different reasons. What makes people leave is not always clear cut. The right to be mobile is more class-specific and selective than ever. Different scholars have argued that the two factors of ‘pull’ and ‘push’ are responsible for the movement of people:

‘Push’ factor encompasses lack of economic opportunity, personal or local disasters, environmental calamity, and lack of political freedom. For refugees, major ‘push’ factors include persecution and threats against life, family, property and dignity.

‘Pull’ factors include economic motives such as better economic opportunities, more jobs, and a better quality of life. Added to this are factors of family links, security, together with political and religious freedom.¹⁴⁰

Migrants often move from areas of relatively low population density and little environmental degradation, to environmentally degraded areas with high population densities. People tend to be increasingly concentrated in crowded places like cities, towns, and thriving agricultural areas.

Despite being crowded, these generally ‘offer better social and economic opportunities in terms of individual freedom, safety, education, health care, paid labour, entrepreneurial activities and

¹⁴⁰Zimmermann, K. F. (1996). European migration: Push and pull. *International Regional Science Review*, 19(1-2), 95-128.

amusement'.¹⁴¹ This illustrates the limitations and potential triviality of “push-pull” explanations.

Massey, Arango, Hugo, Kouaouci, Pellegrino, and Taylor¹⁴² argue in favour of Network Theory that proposes that migrant networks play a key role in lowering the costs and risks associated with relocation. Therefore, the more a particular community has networks in the host country, the more migrants from the same source community will flow into the host country. The reason people migrate is not always clearly defined as in most cases, there are multiple reasons: an asylum seeker could also have an economic motive. Most asylum seekers and refugees do try to secure their future by acquiring some measure of financial security or education.

Despite the different reasons for leaving, there are certain principles and theories that guide the humanitarian response of host communities and states. Reasons were less clear in ancient times but the development of certain principles and theories is clearly traceable. One of these fundamental theories is the Liberal Rights Theory.

3.2 Liberal Rights Theory

People have historically acquired their rights as a result of their collective duties and responsibilities, whether a family, an indigenous nation, religion, community, clan or state. All religions generally look at the individual through the collective lens and not as individuals¹⁴³. All societies have had a system of propriety and justice whether in the form of oral or written outlines for the welfare of their members.

Historically, the collective always surpassed the individual in terms of rights until the end of the 19th century when minority and individual rights started to emerge.

¹⁴¹De Haas, H. (2010). Migration and development: a theoretical perspective1. *International migration review*, 44(1), 227-264.

¹⁴²Massey, D. S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A., & Taylor, J. E. (1993). Theories of international migration: a review and appraisal. *Population and development review*, 431-466.

¹⁴³Jakelic, S. (2012). *Collectivistic religions: Religion, choice, and identity in late modernity*. Ashgate Publishing, Ltd..Religion as nationalism focuses in providing a structured coexistence of society. Therefore, the role of an individual is framed around and in the common good of whole. Therefore, both religion and nationalism tolerate individualism as long it doesn't threaten the church or the state.

Refugee protection as a practice in the 20th and 21st century, comes from the idea, theory and quasi legal grounds that ‘all men are equal and sovereign’ based on the French ‘Declaration of the Rights of Men and Citizens’. This included ‘the natural, inalienable, and sacred rights of man’.¹⁴⁴ The Declaration of Independence of the United States of America¹⁴⁵ also makes reference to such individual rights. It goes further in asserting an individual’s right in ‘the pursuit of happiness’¹⁴⁶ Although happiness is a right, it is not clearly defined and is very subjective.

These two documents are first the first legal documents that afford individuals rights that supersede other rights. However, when these documents were translated into political practice, they undermined the rights of women, peoples of colour and members of certain religious, social, economic and political groups. Hence, there was a call for a comprehensive human rights framework in the 20th century. Nevertheless, oppressed people throughout the world continue to use these documents to fight for their rights.

The Contemporary human rights regime can be summarized by the affirmation made in the Universal Declaration of Human Rights that all rights are “*Interdependent*” and “*Indivisible*” and affirms that how governments treat people within their borders, is a matter of international interest. The Preamble asserts:¹⁴⁷

“Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.”

The UN and international instruments and intergovernmental organizations including the UNHCR, are the direct consequence of WWII - and of human rights abuses that occurred before and after it.

The war because displaced millions of people who were among the most vulnerable so the rights of the displaced, refugees and asylum seekers became of prime importance

¹⁴⁴ National Assembly of France, 1789, Declaration of the Rights of Men and Citizens; Paris.

¹⁴⁵U.S. Declaration of Independence, Paragraph 2 (1776).

¹⁴⁶U.S. Declaration of Independence, Paragraph 2 (1776).

¹⁴⁷ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

Liberal Rights argues that individuals have a sovereign right to rule themselves, but because all are equal, all have this right. In a collective context, this means that all have the right to share power. Rousseau¹⁴⁸ in his Social Contract argues:

... common liberty results from the nature of man. His first law is to provide for his own preservation, his first cares are those which he owes to himself; and, as soon as he reaches years of discretion, he is the sole judge of the proper means of preserving himself, and consequently becomes his own master... social order is a sacred right which is the basis of all other rights. Nevertheless, this right does not come from nature, and must therefore be founded on conventions

Rousseau asserts that since no individual could have sovereignty over another, individuals had to share in government by pooling their sovereignty to avoid any one man dominating and so as to share resources. However, this is not simple in practice because rights are also determined depending on whether one is part of a social group or not. Such laws work for individuals within a community that share common values, ancestry or beliefs. However, individuals who are not part of this social group are excluded or are not entitled to the same rights as community members.

3.2.1 The rights of the individual and citizenship

Present day rights of individuals are clearly defined by international law, conventions and agreements on paper. The capacity of these instruments to enforce these laws is limited since these are agreements between states, and there are limits to the power of the individual within the state. Those who most enjoy these rights, do so mostly by virtue of living in a nation state, provided that state is liberal and that they are citizens.

¹⁴⁸Rousseau, J. J. (1895). *The social contract, or, Principles of political right* (No. 83). George Allen & Unwin.

Even so, there are practical limits:

Liberal states have mostly incorporated the ‘inalienable rights of man’¹⁴⁹ in their constitutions and their legislation. Moreover, they have the judiciary and other institutions that are in place to uphold such rights. The realization of rights is a continuing battle in which the state and the elite try to limit it for different reasons. Even in liberal states, some groups are marginalized owing to a lack of resources or because of racism, tribalism, sexual orientation etc.

Citizenship designates the equality of rights of all citizens within a political community in which institutions guarantee these rights¹⁵⁰. In real terms however, this is hardly true. The concept of ‘equal entitlement’ usually means different things to a variety of groups within a nation state. For instance, women, minority groups, and some race groups, have enjoyed less entitlement than their counterparts. The citizen has generally been defined according to the culture, values and interests of the dominant ethnic group / class (implicitly or explicitly) and gender. These criteria have been central to labour’s efforts to guarantee the working class its political rights.¹⁵¹

Despite having citizenship, there are numerous communities and groups, marginalized within a nation state.

Traditional approaches that are typified by rights-based understandings [such as that propounded by Marshall¹⁵², Black¹⁵³ and Shklar¹⁵⁴] have expanded to accommodate other notions such as “citizen-as-desirable-activity” and “citizen-as-identity,” - group identity and group participation in a multicultural society. This is however still an exception, not the rule. Citizenship remains a form of inclusion of a certain group with certain entitlements. Refugees and asylum seekers do not meet those conditions that would enable them to claim substantive rights.

¹⁴⁹ Rommen, H. A. (2012). *The Natural Law*. Liberty Fund.

¹⁵⁰ Bauböck, R. (1991). Migration and citizenship 1. *Journal of Ethnic and Migration Studies*, 18(1), 27-48.

¹⁵¹ Castles, S., de Haas, H., & Miller, M. J. (2013). p.43

¹⁵² Marshall, T. H. *Citizenship and Social Class* (Cambridge, 1950). *Despite occasional casual uses, the concept of citizenship elaborated by Marshall and its relationship to democracy, to legitimacy and to social class have not been developed in any serious fashion by subsequent scholars*, 209.

¹⁵³ Bosniak, L. (2000). Citizenship denationalized. *Indiana journal of global legal studies*, 447-509.

¹⁵⁴ Shklar J. N, 1991, *American Citizenship: The Quest for Inclusion*. Harvard University Press, Cambridge

Although most liberal states incorporate the rights of refugees and asylum seekers into their legislation, these groups have no political rights, economic clout or the numbers to influence the legislation or favourite interpretations of the legislation. For instance, the Israeli government has refused to accept some East African refugees, especially Eritreans, who do enjoy temporary group protection. Border crossings are illegal and punishable by three years imprisonment.¹⁵⁵ In such instances, asylum seekers do not have any leverage to influence government decisions, despite the state being a democracy.

In the US however the large community of Latin American refugees should be able to influence votes and thereby policy. The many Latinos who are citizens, sympathize with their fellow Latinos to make this viable. Nevertheless, the case of the US is an exception, not the rule.

The ease with which refugees and asylum seekers eventually gain citizenship differs substantially from one country to another. It is getting harder in most countries because of the increased flow of migrants and refugees, security risks, and the divided loyalty of refugees.

Divided refugee loyalties undermine the notion of 'cultural homogeneity which is the nationalist ideal'.¹⁵⁶ The Paris terrorist attack on the cartoonists of the magazine Charlie Hebdo, and subsequent debates about the rights and entitlements of minority citizens of Arab origin, has brought this issue into sharp focus.

In South Africa, the legal road to citizenship is a long process for refugees. After the recognition of their refugee status, they have to wait for 10 years before they may apply for citizenship. Since the permanent residence and citizenship applications takes years, most of the time, the process is takes up to 15 years or more.

Like South Africa and other countries, Canada has made legislative amendments to its permanent residence laws. Refugees need to produce "satisfactory identity documents"¹⁵⁷ before they can be granted permanent residence. Without permanent residence, Refugees

¹⁵⁵Human Rights Watch. (2013). **Israel: Detained Asylum Seekers Pressured to Leave**

<http://www.hrw.org/news/2013/03/13/israel-detained-asylum-seekers-pressured-leave> [Accessed 1 April 2013]

¹⁵⁶Castles, S., de Haas, H., & Miller, M. J. (2013). p.44

¹⁵⁷ Canadian Council for Refugees. (2009). Refugees in limbo: a human rights issue, <http://ccrweb.ca/en/refugees-limbo-human-rights-issue> [Accessed 3 April 2014]

cannot benefit from family reunification. They face discrimination when they try to access education, employment and social assistance, and they may not travel abroad. The question of sovereignty and the rights of non-citizens therefore needs to be interrogated.

3.2.2 The Sovereignty of the Nation State

A nation state-state is the building block of the international system and law. "A State is a legal and political organization with the power to require obedience and loyalty from its citizens"¹⁵⁸ whereas a nation is a "named human population sharing a historic territory, common myths and historical memories, public culture, a common economy and legal rights and duties for all members"¹⁵⁹.

The term nation-state refers to the social, economic and territorial sphere of a legally acceptable political unit. Membership and belonging to a particular nation-state depends on citizenship which delineates rights and duties. Non-citizens such as refugees and migrants are excluded from at least some of these rights, especially political rights that flow from sovereignty.

The idea of sovereignty is based on international law. By virtue of sovereignty and their obligations to their subjects, nation states abide by local and international laws. Nation-states negotiate and sign treaties based on the legitimacy of their sovereignty. Refugees and asylum seekers therefore present a problematic reality that the nation-state can't ignore. It however resists accepting and implementing certain international obligations regarding these groups of people.

3.2.3 Dichotomy of rights

Sovereignty is not a fixed but a politically contested concept. Internally, it relates citizens to the State as the self-determination of people within a contained territory. Internationally, it

¹⁵⁸Watson, H. S. (1977). Nations and States. *An Inquiry to the Origins of Nations and the Politics of Nationalism*, London, Methun. p. 1

¹⁵⁹Smith, A. D. (1991). *National identity*. University of Nevada Press.P.41

circumscribes the territorial borders of a polity defined by its self-determination. Giorgio Agamben argues that the relationship of this inner and outer conception of sovereignty creates a paradox: that they are the factual foundation of each other's potential to sovereign power.¹⁶⁰ In other words, sovereignty is an existing *contradiction per se*: its limits define belonging and vice versa. Stateless people fall in between the sovereigns that make up the world of nation-states. For asylum-seekers, this is important with regard to the detention centres that Agamben writes about. To them, the sovereign is on the one hand the potential guarantor of rights, and on the other, an obstacle because of its protective power over its subjects and territory.

Sovereignty presupposes a solid concept of self-determination with a clear distinction between those who belong and those who do not. It has, however, both a civic foundation, originating from people's self-rule as citizens, and a universal foundation, the universal recognition of people's right to sovereignty. In respect of refugees, however, these two concepts collide because stateless people reveal, *qua* their existence, the fiction of the right to sovereignty. For a state, this means, on the one hand, that it has an obligation to recognize the refugees' universal right to sovereignty, because the State itself is based on this recognition; but on the other, it can do so only under its sovereign powers, which by definition are limited to citizens. With regard to refugees, a state has to be both a sovereign and a non-sovereign power at the same time, thereby undermining its legitimacy.

In his article on 'Perpetual Peace' Kant, according to Seyla¹⁶¹ locates an important node of a paradox. In his treatment of 'hospitality', he states that 'hospitality' is not a question of philanthropy but of right.

It is a right that belongs to all human beings as far as we view them as participants in a 'world republic'. The paradox arises out of the fact that 'hospitality' regulates the interaction between individuals who belong to different civic entities meeting at the margins of bounded communities. It delimits a civic space by regulating interaction between members and strangers. Therefore, it occupies the space between human rights and civil rights; the right of a

¹⁶⁰Agamben, G. (1998). *Homo sacer: Sovereign power and bare life*. Stanford University Press.

¹⁶¹Benhabib, S. (2004). *The rights of others: aliens, residents, and citizens* (Vol. 5). Cambridge University Press. P. 25

person as a human being and the rights afforded to an individual as being a part of a polity. However, Kant acknowledges the right of ‘permanent stay’ as the privilege of a state¹⁶².

The sometimes unique situation of refugees, and especially asylum seekers, creates a problem for the law since laws are an expression of a nation’s will through its elected officials. What is politically unacceptable, despite liberal human right principles, becomes a problem to execute judicially. The current flood of asylum seekers in Europe, and the perception that it has increased incidents of terrorism, creates a unique situation in which politics cannot be reconciled with European laws. The support for the Brexit issue is partially an example of this manifestation, even though the exit of Britain can be dealt with within the law. However, in the event there is a political necessity and the law becomes a hurdle, a situation exists for extraordinary measures. This situation is referred to by Agambien¹⁶³ as the ‘State of Exception’. It is important to examine this concept in relation of Asylum Seekers and Refugees.

3.2.4 The State of Exception

The state of exception partially explains the situation in which asylum seekers and refugees find themselves. In countries where there are no strong liberal democratic values and liberal refugee law, it is easy to deal with. Refugees and, especially, asylum seekers are considered a nuisance and barely tolerated. They are put in camps where the UNHCR ends up caring for them without much input from the host government. In the case of Europe, North America and South Africa, where there is a liberal refugee policy, and in some cases social welfare, the law provides protection.

Yet, public sentiment ebbs and flows depending on a lot of factors such as economic stress, terrorism and social welfare. As a result, there is a lack of political support for asylum seekers and refugees.

The influx of asylum seekers from the Middle East to Europe has created a massive challenge for European countries. In fact apart from the objective reality of the uneven exposure of member states to the problem, the crisis also reveals an enormous diversity in societal attitudes

¹⁶²Kant, I. (1793). *On the common saying: This may be true in theory, but it does not apply in practice* (pp. 61-92).

¹⁶³Agamben, G. (2005). *State of exception*. University of Chicago Press. P. 2

about migration. There are the mainly globalized societies of Western and Northern Europe that have already hosted large immigrant communities, compared with the societies of Central Europe that lived in comparative isolation over decades and were consequently much less prepared to deal with a large influx of foreigners. In Germany, western Germany's initial 'Willkommenskultur', or welcoming culture, clashed with a sceptical attitude in former East Germany.

The moral imperative to welcome and protect refugees enjoyed strong widespread support particularly in Sweden and Germany. Conversely, concern about the dangers and costs of rapid refugee settlement dominated public discourse in France and the UK (leading to Brexit). Xenophobic right-wing parties played a large role in some states and hardly any role elsewhere.¹⁶⁴ This resulted in Euro zone instability resulting in diminished self-confidence and erosion of mutual trust amongst member states. The single currency's slow economic recovery, the weak political leadership of the EU, and the rise of populist anti-EU parties in many member states, exacerbated the situation and resulted in a widespread sense of European malaise and a reassertion of national identities at the cost of support for the EU.

The lack of political support for refugee settlement in many European countries was demonstrated when certain countries refused to let asylum seekers enter. Some have let them enter on condition they pass through to another country - despite agreeing to have open borders as part of the European integration project.

Slovakia, Romania, Poland, the Czech Republic and Bulgaria have either refused entry or enforced strict conditions. Furthermore, they oppose the quota system of relocating asylum seekers.

Some countries have found it difficult to reconcile the liberal human rights approach to asylum seekers, with giving political and public support to such policies. As a result, they have gone beyond the law to restrict asylum rights because certain issues are at the liminal space of the law as Agamben¹⁶⁵ postulates. This refers to either the periphery, or the transitional state of the law.

¹⁶⁴ Lehne, S (2016). Carnegie Europe. <http://carnegieeurope.eu/2016/02/04/how-refugee-crisis-will-reshape-eu/itj7> [Accessed 15 August 2016]

¹⁶⁵ Agamben, G. (2005). *P.* 21-22

In the case of South Africa, the lack of political and public support for large populations of asylum seekers and refugees manifested in xenophobic violence and the ruling party's move towards restricting asylum seeker rights by closing refugee reception centres and changing regulations to restrict access to documentation. The xenophobic violence could be compared to what Agamben¹⁶⁶ provides in an example of 'the state of exception' being the chaos following the death of the emperor, pending the inauguration of a successor. In both cases, there was a tacit nod of approval by the sovereign for the violence to take place. The South African government in fact insisted that these were not xenophobia attacks, but the work of opportunistic criminals.

Ironically, the bare life in the sovereign exception is captured in a specific relation to sovereign power; what Agamben terms a 'relation of exception' or 'relation of ban':

Those who inhabit the state of exception cannot be said to be freed from the juridical order and sovereign rule as bare life is not 'simply set outside the law and made indifferent to it'.¹⁶⁷ Through its own suspension, the 'law encompasses living beings'¹⁶⁸ who are simultaneously bound and abandoned by it.

The state of exception cannot entirely define the situation of asylum seekers and refugees but it defines the space of transition within the South African asylum system that makes it more restrictive. The changes that are happening to the system are being legitimized by amending the Refugee Act and by institutionalizing certain regulations and procedures¹⁶⁹.

Humphreys¹⁷⁰ criticizes Agamben for providing a philosophical interpretation - focusing exclusively on examining the edge of the law and politics without examining the underlying reasons. Agamben doesn't really engage in the discourse around international and national law as being mainly based on the sovereignty of states nor does he engage in the discourse of rights, which is essential to the understanding of conflicts that arise within and among communities, and their effect on the international arena. Yet, he does provide a glimpse of the challenge of precarious excluded space that asylum seekers and refugees occupy.

¹⁶⁶Agamben, G. (2005).

¹⁶⁷Agamben, G. (1998). P. 28

¹⁶⁸Agamben, G. (2005).P.3

¹⁶⁹Humphreys, S. (2006). Legalizing Lawlessness: On Giorgio Agamben's State of Exception. *European Journal of International Law*, 17(3), 677-687.

¹⁷⁰Humphreys, S. (2006). P. 684

3.2.5 Limits of Liberal Rights Theory

Most liberal states have incorporated these or similar provisions in their constitutions or legislation. Yet these standards have been steadily eroded since the late 1970s. While most liberal democratic states have retained nominal support for the principles of refugee protection, they have introduced a range of measures to limit the substance and scope of these commitments.¹⁷¹ Forms of restrictive measures that are typically employed are:

- To limit access to their territory by imposing visa requirements nationals of certain countries, and imposing negative sanctions on companies and individuals found to be transporting people without the required travel documents.
- To limit access to asylum systems by sending asylum seekers back to what are defined as the ‘safe’ countries through which they travelled, or from where they originate.
- To render conditions of stay less attractive to asylum seekers by cutting welfare benefits, replacing financial support with assistance in kind, or dispersing asylum seekers to different locations.¹⁷²
- To make it more difficult for asylum seekers to qualify as refugees. Most countries have narrowed the criteria that qualify applicants to be recognized as refugees.

One way has been to either streamline or accelerate procedures, or to drag them out. In South Africa, procedures are less thorough, or imply limited access to legal assistance and rights of appeal. A second way has been to introduce alternative forms of protection status which accord less generous rights, such as ‘temporary protection’, which encourages return to the country of origin rather than integration into the host country.

All these measures have serious implications for refugees seeking protection everywhere:

Even where they can get access to the territory of these countries and file an application for asylum, refugees are likely to have to put up with harsh living conditions. More importantly, asylum seekers have minimal prospects of having their case recognized.

¹⁷¹Boswell, C. (2005). *The ethics of refugee policy*. Aldershot: Ashgate.

¹⁷²European Council on Refugees and Exiles. (2007). Submission from the European Council on Refugees and Exiles in response to the Commission’s Green Paper on the Future Common European Asylum System. EU. Retrieved from http://ec.europa.eu/dgs/home-affairs/what-is-new/publicconsultation/2007/pdf/contributions/ngo/european_council_on_refugees_exiles_ecre_en.pdf

This raises the issue of the obligation of the state to refugees, and its practical application of obligations. Though the refugee mourns the destruction of the family home, the disintegration of cultural practices, and the loss of communal ties, there is one loss that, according to Hannah Arendt, remains unrecognized: That, as a political being, in a practical sense the refugee ultimately loses the right to have rights. The right to have rights is not so much concerned with substantive rights, such as the above mentioned basic needs, but rather the assumption “that no law exists for [the refugee] ... that nobody wants to ever oppress them”¹⁷³. The refugee becomes existentially transparent. As a political being, the refugee ultimately loses the right to have rights.

This point is particularly important. There are two reasons why migrants, refugees and asylum seekers lose the right to have rights:

Firstly, by virtue of being the ‘other’, they will not be considered “fit” to have rights. This is reflected not only in laws but also in attitudes, behaviour and practice of people in general. Arendt points out how Jews, by being a separate unit that formed the ‘other’, became targets¹⁷⁴.

Secondly, Arendt explains that migrants, refugees and asylum seekers are seen as present without function. In fact, they are seen as parasitic. This perception is partially true in Scandinavian countries, because of their welfare systems. Some citizens are also dependent on social power but unlike the refugees, they have political rights. Arendt argues that the Jews in Western Europe at the beginning of the 20th century lost the power they had,¹⁷⁵ and wealth without political power was seen as useless and contemptible.¹⁷⁶ Ultimately, presence without function is perceived as useless and parasitic. The reality reveals itself in the case of migrants and refugees whose contribution in economic terms to host countries is tremendous. However, the contribution of the “other” is perceived as not so significant in the political arena, in comparison with that of citizens.

Defenders of refugees and asylum seekers against exclusionary policies mostly invoke liberal universalist arguments to defend refugee rights. Liberal Universalist theories are those that give

¹⁷³ Arendt, H. (1973). *The origins of totalitarianism* (Vol. 244). Houghton Mifflin Harcourt.

¹⁷⁴ Arendt, H. 1973.

¹⁷⁵ For centuries, Jews were money lenders as well as advisors later on, to kings and governments. The rise of the nation state and the subsequent dependence on tax and credit from the nobility without political clout rendered most Jews powerless. In addition, their lack of strong nationality to any sovereignty contributed to their lack of political clout. It is few Jews families like the Rothschild than managed to have political power.

¹⁷⁶ Arendt, H. 1973. 15

equal moral weight to the welfare of all individuals, regardless of nationality. Liberal universalism provides an accessible and cogent grounding for theories of duties to non-nationals. Liberal universalism's assumptions about the moral equality of human beings, pervades moral and political discourse in liberal democratic societies. It is not therefore surprising that theories of liberal universalism hold a virtual monopoly in arguments for admitting greater numbers of refugees, and more generally, for the recognition of moral duties beyond borders.¹⁷⁷

Ramcharan¹⁷⁸ sums up the two theoretical principles underpinning this research;

It is that all human beings, wherever they are, enjoy certain fundamental, inalienable rights stemming from their humanity, which have been recognized and enunciated by the authoritative organs of the international community, most notably the General Assembly of the United Nations. Whatever the historical, philosophical, political, economic, or sociological factors that contributed to this, the international legal system is the source of obligation regarding human rights in the contemporary world. Additional or higher levels of rights may be provided in national legal systems, but they may never reduce the content of rights defined in international law.

It is the question of the supremacy of international legal provisions and how these may conflict with national laws, that constitutes one of the theoretical cornerstones of this study. John Rawls¹⁷⁹, a liberal rights theorist, argues that international conventions give weight to the rights of persons depending on the state they are in. This extends to the social welfare of the individual and compels the state to protect as well as grant social rights to citizens. Rawls however, looks at states as closed, and where rights of citizens are recognized. He fails to recognize the gray area that immigrants, refugees and asylum seekers inhabit within a particular system. Hence, in his discussion of laws and liberties in international law, he hardly discusses the rights of non-citizens as seen by a state.

¹⁷⁷Boswell, C. (2005).

¹⁷⁸Ramcharan, B. G. (2015). *Contemporary Human Rights Ideas: Rethinking theory and practice*. Routledge. (2008). P. 28-27

¹⁷⁹Rawls, J. (1968).

For a person living in an immigrant society like the USA, Rawls fails to understand the precarious position that non-citizens have in law and human rights. Therefore, fair procedure for choosing principles of justice according to Rawls, must not only exclude knowledge of these circumstances and nationality in particular, as it is seen as a major fault line in the 20th century. We should therefore take a global, not a national, view of the original position.¹⁸⁰

Despite his reluctance to engage the issue of migration, Rawls makes 3 points on Migration:

1. It is mainly caused by domestic injustice. This point doesn't consider the complex factors that underline migration.
2. Every "people" should have a qualified right to the limitation of immigration¹⁸¹
3. Every liberal and decent people shall allow for a right to emigration.

The second and third points look at the rights and obligation of people within a politically defined space, to people belonging to a particular territory. They fail to address the extent and nature of rights of immigrants and refugees within this territory.

Rawls assumes that immigrants and refugees will disappear in a 'realistic, Utopian, liberal and law abiding society of people'. Beside the impracticality of Utopia either realistic or unrealistic, for Rawls, immigration, like oppression, famine, war, etc are the product of political management. In fact, these might not have simple causes. It also negates individuals' choice and freedom in deciding their socio-economic status. Nor does it explain the nature of movement across borders.

Reinhardt¹⁸² rightly points out that Rawls' idea of human rights is minimalistic, selective and exclusionary. On the contrary, Beitz's¹⁸³ idea of a cosmopolitan ethical and social world view, maintains that the scope of justice knows no boundaries, and that duties and responsibilities transcend borders.

¹⁸⁰ The original position is a central feature of John Rawls's social contract account of justice, "justice as fairness," set forth in *A Theory of Justice* (TJ). It is designed to be a fair and impartial point of view that is to be adopted in our reasoning about fundamental principles of justice. In taking up this point of view, we are to imagine ourselves in the position of free and equal persons who jointly agree upon and commit themselves to principles of social and political justice.

¹⁸¹ Rawls, J. (1999): *The Law of Peoples*. With "The Idea of Public Reason Revisited", Cambridge, Mass.

¹⁸² Reinhardt, K. No Migration in a Realistic Utopia? Rawls's *The Law of Peoples* and the Topic of Migration. In *Proceedings from The 49 th Societas Ethica Annual Conference 2012 Theme: Ethics and Migration* (p. 173).

¹⁸³ Beitz, C. R. (2005). Cosmopolitanism and global justice. In *Current debates in global justice* (pp. 11-27). Springer Netherlands.

Rawl's version of human rights also fails to consider the conduct and behaviour of people outside the confines of liberal rights and laws motivated by nationalism and other exclusionary impulses. Despite having liberal laws, people can hold and impose prejudicial and harmful practices when implementing laws. This is clearly evident in the South African state in the sphere of administrative justice where migrants, refugees and asylum seekers are perceived as having no, or limited rights, by SA citizens.

Most importantly, sovereign nations and their advocates present salient arguments for the limitation of rights for non-nationals such as refugees:

Advocates of such policies argue that the influx of refugees in large numbers dilutes the national identity and creates fragmentation. Therefore, the identity of a nation is at risk. Of course, the experience of nations on such matters differs widely. Countries like the United States have a culture of accepting refugees and immigrants so mainly see this policy as strength despite some resentment from sections of the population. By contrast, Western European countries have limited experience of migrants. With the dilution of identity, values are questioned or revised. This leads to conflict, which is the second argument for limiting refugees.

In the past 15 years, Western Europe and the USA have experienced major terrorist attacks. This has been partly blamed on the refugee and immigrant populations in these countries. Members of these communities have engaged in terrorist activities either as a result of differences in values, socio-economic conditions (lack of upward mobility for refugee and immigrant families), or in the name of religion. The influx of asylum seekers in France was blamed for the Paris attacks. Such attacks create the impression that the sovereignty of the nation is under attack (from within and without) and this becomes a reason to restrict liberal rights. Restrictive security measures the USA implemented after the 9/11 attack is a clear example.

That asylum seekers and refugees alike are seen as economic parasites is mostly true in many European countries where there is a social welfare system for asylum seekers - especially for recognised refugees. There is a perception in some communities that 'foreigners' are taking much needed resources.

The combination of these factors influences public opinion and government policies as well as the implementation of liberal policies. Asylum seekers and refugees might have the right to

enjoy liberal rights but prejudice and systematic xenophobia might impact the services they access from the state. That is where administrative justice is helpful.

3.3 Administrative Justice

Administrative justice refers to procedural fairness in the process of decision making - the way citizens or non-citizens are treated. It includes substantive justice, which means fair outcomes of decision making regarding the benefits and burdens that are levied on a citizen¹⁸⁴ or a legal resident. These procedures include rules, regulations, applications, licenses, permits, available information, hearings, appeals, and decision-making.

Justice, in this case, refers to legal or normative expectations on the part of a citizen. Administrative procedures differ from one department to another. It may either be codified or established practice. When it comes to refugees, there has been a contention from some states that refugees and asylum seekers cannot claim administrative justice because they are not citizens. The DHA has been challenged on many occasions for breaching administrative justice in status determination matters, the providing of documentation, and for unlawful detention.¹⁸⁵ These are based on the Refugee Act and the Promotion of Administrative Justice Act (PAJA).

The Promotion of Administrative Justice Act (PAJA)¹⁸⁶ was passed in South Africa to give strength to the Bill of Rights' guarantee of administrative justice in Section 33 of the South African Constitution. PAJA lays out the requirements for just administrative action:¹⁸⁷

- Adequate notice of the nature and purpose of the proposed administrative action;
- Reasonable opportunity to make representations;
- A clear statement of the administrative action;
- Adequate notice of any right of review or internal appeal;
- Adequate notice of the right to request reasons
- Additional measures to give effect to the right to procedurally fair administrative action

¹⁸⁴Adler, M. (2003). A Socio-Legal Approach to Administrative Justice. *Law & Policy*, 25(4), 323-352

¹⁸⁵Amit, R. (2011).

¹⁸⁶South Africa. (1982). Promotion of Administrative Justice Act, No 3 of 2000. Pretoria: Government Printer. [Laws.]

¹⁸⁷South Africa. (1982). Section 3

Unless the two acts and the Constitution specifically limit such rights, the three instruments have become the basis for the argument of the protection of the rights of refugees. However, since administrative action in most cases is determined by departmental procedures, the safeguarding of rights based on administrative justice has to be addressed case by case depending on the department. The case for 'the right to have rights' occurs at every juncture in this endeavour. Cases involving access to social welfare, employment, banking and education to asylum seekers, are time and time again taken to a court of law because of the limited rights experienced by asylum seekers and refugees.

3.4 International law regarding Refugees and Asylum Seekers

The origins of refugee rights correspond with the development of international human rights law. According to Hathaway¹⁸⁸, refugee rights started to take shape with the recognition of alien rights and the protection of minority rights. Alien law set standards for the treatment abroad of states' own nationals. Minority treaties provided for external scrutiny of the relationship between foreign citizens and their own governments. This was a critical intersection that created a precedent for international refugee law. Alien law denied an absolute right to states to treat persons under their jurisdiction in whatever manner they deemed appropriate. Furthermore, Minorities treaties shaped a collectivization of international responsibilities for the regulation of human rights.

Like international human rights law, the refugee rights regime is essentially a product of the 20th century. The instrument of this product is the League of Nations where states, for the first time, became accountable to the international community regarding human rights.¹⁸⁹ Given the nature of international law, international conventions and treaties have to be supplemented by regional agreements and national legislation. That is why the position of refugees in international law is established by a multidimensional structure of national, regional and international laws. In addition, case law from regional bodies and from domestic courts, both influence and are influenced, by the international legal framework.

¹⁸⁸Hathaway, J. C. (2005). *The rights of refugees under international law*. Cambridge University Press. p. 81

¹⁸⁹Hathaway, J. C. (2005). p. 83

The main international instrument is the 1951 United Nations Convention on the Status of Refugees and subsequently, the 1967 Protocol relating to the Status of Refugees. Both these treaties have been ratified by 134 states.¹⁹⁰

The 1951 United Nations Convention on the Status of Refugees is by far the most important document when it comes to international law. It is not only important internationally, but also nationally. Most countries derive their refugee legislation from it. In addition, it is the guiding document for the UNHCR. The UNHCR is the custodian of this convention. There are several critiques of this convention among which two are of particular importance:

The word ‘persecution’ is not clearly defined. This was so as not to limit the different forms it might assume. However, this gives states a large measure of discretion and allows for disagreement on what constitutes ‘persecution’.

The convention doesn’t include economic refugees. Very often, political, economic and social problems overlap. In addition, certain groups might be persecuted on religious, ethnic and other grounds and as a result, might be excluded from benefiting from economic opportunity in a particular nation-state. Even though it is a controversial point, economic persecution as an extension of other forms of persecution, makes a viable argument.

It is important to examine the convention in some detail.

3.5. The 1951 United Nations Convention on the Status of Refugees

The 1951 Convention Relating to the Status of Refugees¹⁹¹ is an international refugee law, passed on July 28, 1951, and enacted on April 22, 1954.

According to the United Nations High Commission for Refugees (UNHCR, 2007) nineteen signatories and delegates and other members of the international community, such as observing

¹⁹⁰United Nations. 2013. Treaty Collection.

http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=enDate Accessed [5 April 2013]

¹⁹¹Assembly, U. G. (1951). Convention relating to the Status of Refugees. *United Nations, Treaty Series*, 189, 137.

countries and nongovernmental organizations (NGOs) from twenty-six different countries, participated in the convention. A protocol was added in 1967¹⁹² as a provision to assist global refugees who emerged after 1951. It upholds the basic tenets of human rights for the treatment and safeguarding of refugees against expulsion and discrimination based on race, religion, or country of origin.

These treaties defined refugees as people who have fled their home country and who are afraid to return because of "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." According to the agreements, refugees who can reach a "safe country" have the right to be given shelter and granted asylum in that country. Countries signing the treaties agree never to return a refugee to a country where he or she fears persecution.

The 1951 Convention applies the term "refugee", first, to any person considered a refugee under earlier international arrangements. Article 1A, paragraph 2¹⁹³, read now together with the 1967 Protocol and without the time limit, offers a general definition of the refugee as including any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion. Stateless persons may also be refugees in this sense, where the country of origin (citizenship) is understood as "country of former habitual residence".

People who possess more than one nationality will only be considered as refugees within the Convention if such other nationality or nationalities are ineffective (that is, do not provide protection). The refugee must be "outside" his or her country of origin, and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of a refugee, understood in its ordinary sense. However, it is not necessary to have fled for the reason of fear of persecution, or even actually to have been persecuted.

¹⁹²Assembly, U. G. Protocol Relating to the Status of Refugees (January 31, 1967). United Nations, Treaty Series, vol. 606

¹⁹³Assembly, U. G. (1951). Convention relating to the Status of Refugees. 1A, paragraph 2

The fear of persecution looks to the future, and can also emerge during an individual's absence from their home country, for example, as a result of intervening political change. The Convention requires that the persecution feared be for reasons of "race, religion, nationality, membership of a particular social group (added at the 1951 Conference), or political opinion". Subsequent human rights instruments, give an insight into the characteristics of individuals and groups which are considered relevant to refugee protection. Persecution for the stated reasons implies a violation of human rights of particular gravity. It may be the outcome of cumulative events or systemic mistreatment, but could equally cover a single act of torture. Persecution under the Convention is thus a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental human rights. However, the Convention does not just say who is a refugee.

It goes further and sets out when refugee status comes to an end (article 1C; for example, in the case of voluntary return, acquisition of a new, effective nationality, or change of circumstances in the country of origin).¹⁹⁴ For particular, political reasons the Convention also puts Palestinian refugees outside its scope (at least while they continue to receive protection or assistance from other United Nations agencies (article 1D) and excludes persons who are treated as nationals in their State of refuge (article 1E).¹⁹⁵ Finally, the Convention definition categorically excludes from the benefits of refugee status, anyone whom there are serious reasons to believe has committed a war crime, a serious non-political offence prior to admission, or acts contrary to the purposes and principles of the United Nations.¹⁹⁶ From the very start therefore, the 1951 Convention has contained clauses sufficient to ensure that the serious criminal and the terrorist do not benefit from international protection.

Besides identifying the essential characteristics of the refugee, the states that are party to the Convention also accept a number of specific obligations which are crucial to achieving the goal of protection, and thereafter, to an appropriate solution.

¹⁹⁴Assembly, U. G. (1951). Convention relating to the Status of Refugees. Article 1

¹⁹⁵Assembly, U. G. (1951). Convention relating to the Status of Refugees. Article 1D and 1E

¹⁹⁶Assembly, U. G. (1951). Convention relating to the Status of Refugees. Article 1F

Foremost among these is the principle of non-refoulement.¹⁹⁷ As set out in the Convention, this prescribes broadly that no refugee should be returned in any way whatsoever to any country where he or she would be at risk of persecution.¹⁹⁸ The idea that a State ought not to return persons to other States in certain circumstances is first referred to in article 3 of the 1933 Convention relating to the International Status of Refugees, under which the contracting parties undertook not to remove resident refugees or keep them from their territory “by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)” unless dictated by national security or public order. Each State undertook, “in any case, not to refuse entry to refugees at the frontiers of their countries of origin”.

The 1951 Convention prescribes freedom from consequences for illegal entry, and freedom from expulsion, save on the most serious grounds¹⁹⁹. Article 8 seeks to exempt refugees from the application of extraordinary measures which might otherwise affect them by reason only of their nationality, while article 9 preserves the right of States to take “provisional measures” on the grounds of national security against a particular person, but only “pending a determination by the Contracting State that such a person is in fact a refugee and that the continuance of such measures is necessary ... in the interests of national security”. States have also agreed to provide certain amenities to refugees: administrative assistance (article 25); identity papers (article 27); travel documents (article 28); granting of permission to transfer assets (article 30); and the facilitation of naturalization (article 34).²⁰⁰

Given the further objective of a solution (assimilation or integration), the Convention notion of refugee status thus offers a point of departure in considering the appropriate standard of treatment of refugees within the territory of the Contracting States.

It is at this point where the Convention focuses on matters such as social security, rationing, access to employment, and the liberal professions, that it betrays its essentially European origin. Here, in the articles dealing with social and economic rights, one still finds the greatest number of reservations, particularly among developing States. The Convention proposes, as a

¹⁹⁷Assembly, U. G. (1951). Convention relating to the Status of Refugees. Article 33

¹⁹⁸Assembly, U. G. (1951). Convention relating to the Status of Refugees. Article 3. The 1984 Convention against Torture extends the same protection where there are substantial grounds for believing that a person to be returned would be in danger of being tortured.

¹⁹⁹Assembly, U. G. (1951). Convention relating to the Status of Refugees. Articles 31 and 32

²⁰⁰Assembly, U. G. (1951). Convention relating to the Status of Refugees. Articles 25, 27, 28, 30 and 34

minimum standard, that refugees should receive at least the treatment which is accorded to aliens generally. The most-favoured-nation treatment is called for in respect of the right of association, and the right to engage in wage-earning employment²⁰¹. The latter is of major importance to the refugee in pursuit of an effective solution, but it is also the provision that has attracted most reservations.

Many States have underlined that the reference to most-favoured-nation shall not be interpreted as entitling refugees to the benefit of special or regional customs, or economic or political agreements. Other States have specifically rejected the most-favoured-nation treatment, limiting their responsibility to according only that standard pertinent to aliens generally, while some view article 17 merely as a recommendation, or agree to apply it “so far as the law allows”.

While reservations are generally permitted under both the Convention and the Protocol, the integrity of certain articles is absolutely protected. These include: definition; non-discrimination; religion; access to courts; and non-refoulement.²⁰² Under the Convention, objections are further prohibited with respect to articles 36 to 46 that include a provision entitling any party to a dispute to refer the matter to the International Court of Justice (article 38).²⁰³ The equivalent provision in the 1967 Protocol²⁰⁴ (article IV) may be the subject of reservation, and some have been made to date (August 2008). However, no State has yet sought to make use of the dispute settlement procedure.

The Convention does not deal with the question of admission, neither does it oblige a state of refuge to accord asylum as such, or provide for the sharing of responsibilities (for example, by prescribing which state should deal with a claim to refugee status).

The Convention does not address the question of “causes” of flight, or make provision for prevention. Its scope does not include internally displaced persons, and it is not concerned with the better management of international migration.

At a regional level, notwithstanding the 1967 Protocol, refugee movements have necessitated more focused responses, such as the 1969 OAU/AU Convention on the Specific Aspects of

²⁰¹Assembly, U. G. (1951). Convention relating to the Status of Refugees. Articles 15 and 17(1)

²⁰²Assembly, U. G. (1951). Convention relating to the Status of Refugees. Articles 1, 3, 4, 16 (1) and 33

²⁰³Assembly, U. G. (1951). Convention relating to the Status of Refugees. Articles 36-46 and 38

²⁰⁴Assembly, U. G. Protocol Relating to the Status of Refugees (January 31, 1967). Article IV

Refugee Problems in Africa and the 1984 Cartagena Declaration. In Europe, the development of protection doctrine under the 1950 European Convention on Human Rights has led to the adoption of provisions on “subsidiary” or “complementary” protection within the legal system of the European Union.

Nevertheless, within the context of the international refugee regime, which brings states together, the UNHCR and other international organizations, the UNHCR Executive Committee, and non-governmental organizations, among others, the Convention continues to play an important part in the protection of refugees, in the promotion and provision of solutions for refugees, in ensuring the security of States, sharing responsibility, and generally promoting human rights. A Ministerial Meeting of State Parties, convened in Geneva in December 2001 by the Government of Switzerland to mark the fiftieth anniversary of the Convention, expressly acknowledged this. In many States, the judicial and administrative procedures for the determination of refugee status have established the necessary legal link between refugee status and protection, contributed to a broader and deeper understanding of key elements in the Convention's definition of refugee, and helped to consolidate the fundamental principle of non-refoulement.

The 1951 Convention, initially concluded as an agreement between states on the treatment of refugees, has inspired both doctrine and practice in which the language of refugee rights is entirely appropriate. In 1951 it could not have foreseen how the world would evolve. On the contrary, it may be counted a success that the drafters of the 1951 Convention were in fact able to identify, in the concept of a well-founded fear of persecution, the enduring, indeed universal, features of the refugee, and to single out the essential, though never exclusive, reasons for flight. That certainly has not changed, even if the scope and extent of the definition of refugee has matured under the influence of human rights, and even as there is now increasing recognition of the need to enhance and ensure the protection of individuals still within their own country. Nevertheless, there is current and strong criticism of the measures as many asylum seekers cross into Europe.

There are calls by some governments to review the Convention and other current instruments of international refugee protection. They argue that the problem with the Convention is that it was designed in and for a different era. Some criticisms of the Convention include:

- The Convention's definition of a refugee is outdated, as is its notion of exile as a solution to refugee problems
- It confers no right of assistance on refugees unless and until they reach a signatory country.
- It imposes no obligation on countries not to persecute or expel their citizen
It imposes no requirement for burden sharing between states
- Asylum provisions provide an avenue for irregular migration that is linked to human trafficking and criminality
- Terrorists are using the Mediterranean Sea route to plant their operatives among asylum seekers
- The Convention takes no account of the impact (political, financial or social) of large numbers of asylum seekers on receiving countries
- Unequal outcomes exist for 'camp' and 'Convention' refugees. Priority is given to those present, on the basis of their mobility, rather than to those with the greatest need.
- There is a gross disparity between what Western countries spend on processing and supporting asylum seekers, and what they contribute to the UNHCR towards the world refugee effort
- Asylum seekers do not elicit public sympathy in the way that 'obvious' (as seen on television) recognized refugees do
- The Convention has fostered simplistic and unfortunate perceptions about the characterisations of asylum seekers as being either political, and thus 'genuine' and deserving, or economic, and thus 'to be abused' and undeserving.
- In some cases, the inability of people to sustain themselves as result of political and social factors seems a valid reason for seeking asylum.

3.6 International Mechanisms of Protection

Large scale movement within and across international borders – as people flee persecution, conflict, famine, climate-related disasters and widespread human rights abuses – continues to strain both the willingness and the capacity of the international community to respond. In this context, legal instruments – at both international and regional level – impose important obligations on states regarding the protection and treatment of refugees. They also provide an

important advocacy tool for organizations and individuals seeking to advance the protection in practice.

Under international law, refugees benefit from a wide range of rights provided for by international human rights treaties – notably, the 1966 International Covenant on Civil and Political Rights (ICCPR)²⁰⁵ and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰⁶ This, in addition to regional human rights instruments particularly the 1981 African Charter on Human and People’s Rights (the ‘Banjul Charter’). For the most part, states’ human rights obligations under these instruments pertain to individuals within their territory or jurisdiction and without reference to nationality. This is widely accepted to include refugees. For example, states who are party to the ICCPR, and who host refugees, are obliged to afford them the same rights to life, liberty, freedom of opinion and equal treatment before the law as they afford their own nationals. However this does not always happen.

The primary source of refugee protection under international law is the 1951 Convention relating to the Status of Refugees. This convention led to the establishment and mandate of the UNHCR.

3.6.1 UNHCR

The United Nations High Commission for Refugees [UNHCR] is the guarantor and custodian of the 1951 United Nations Convention on the Status of Refugees and other related conventions. The mandate of the UNHCR, based on its Statute, is to offer international protection to refugees who fall within the scope of the statute (for ‘reasons of race, religion, nationality, and membership of a particular social group or political opinion’²⁰⁷) and pursues durable solutions for the problems of refugees. Its mandate, specified in the Statute and subsequent General Assembly resolutions, is to carry out wide ranging protection and

²⁰⁵[UN Treaty Collection: International Covenant on Civil and Political Rights](#)". United Nations. 6 March 2012. Date Accessed [9 March 2015]

²⁰⁶[International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)". Office of the United Nations High Commissioner for Human Rights. Date Accessed [9 March 2015]

²⁰⁷ 1951 *Convention relating to the Status of Refugees* (1951 Refugee Convention), Art 1A(2).

assistance undertakings for the purpose of improving the protection of refugees and other persons of concern, including Internally Displaced Persons (IDPs) and returnees.

The UNHCR focus on root causes of asylum seeking, rather than symptoms, sounds reasonable. The endeavour to advance human rights and human security as categorical values is admirable. Yet, as a number of critics suggest, the implications of the UNHCR's comprehensive humanitarian agenda are far more ambiguous than the organization concedes. This is partly to appease the conflicting interests that exist among the nations. Barutciski and Warner²⁰⁸ have questioned the prudence of including Internally Displaced Persons (IDPs) in the refugee protection regime thereby conflating international human rights law with refugee law. Goodwin-Gill and Loescher²⁰⁹ have misgivings about the move from legal protection to more generalized forms of humanitarian assistance. Chimni and Hathawa²¹⁰ have challenged justifications for sanctioning repatriation as a durable solution when the UNHCR clearly fails in terms of protection. In fact, the UNHCR in the late eighties, focused more on humanitarian activities than on legal protection.

There are two areas which the 1951 convention and the UNHCR mandate can be seen to have shortcomings. The first shortcoming is in the matter of institutional oversight.

Unlike other international human rights treaties, which include treaty monitoring bodies charged with the supervision and enforcement of states' adherence to their obligations under the treaty, oversight of the 1951 Refugee Convention is left largely to the states themselves. The UNHCR plays a significant role in promoting the Convention among states and in providing concrete assistance to refugees. However, it is not a supervisory organization and does not have the authority or capability to enforce states' adherence to its provisions. Individual refugees affected by a state's failure to provide the requisite rights thus have little chance of redress.

The second shortcoming is the protection gap.

²⁰⁸Barutciski, M. (1998). Tensions between the Refugee Concept and the IDP Debate. *Forced Migration Review*, 3, 11-14

²⁰⁹Goodwin-Gill, G. S. (2003). *Refugee identity and protection's fading prospect*.

²¹⁰Chimni, B. S. (1993). The meaning of words and the role of UNHCR in voluntary repatriation. *International Journal of Refugee Law*, 5(3), 442-460.

There remain a great many people who are forced to leave their homes for safety, but who do not satisfy the fairly narrow definition of a refugee outlined in the 1951 Refugee Convention.²¹¹ For example, the so-called ‘nexus’ requirement, requiring a person’s fear of persecution be for one of five enumerated grounds - race, religion and so on – means that people fleeing more generalized forms of harm - such as famine in Somalia or civil conflict in Libya - may face considerable difficulty in qualifying within the scope of the 1951 Convention. This has privileged civil and political rights at the expense of socio-economic ones and has limited the Convention and the capacity of the UNHCR to respond to the massive influx of refugees from the developing countries.

3.7 Refugee protection in South Africa

The South African Constitution provides refugees and asylum seekers with most basic and direct access to securing their rights. The basic human rights upheld by the Constitution, apply universally and include freedom from unfair discrimination, the right to life, the right to human dignity, and the right to freedom and security of person.²¹²

Chapter 2²¹³ of the Constitution, the Bill of Rights, enshrines these rights for all people who live in South Africa and confers the values of human dignity, equality and freedom. ‘The State has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights’ with the exception of political rights and the rights to freedom of trade, occupation, and profession, which do not apply to non-citizens. The LHR challenge to the detention of a foreigner in a port of entry by the Department of Home Affairs affirmed that the rights of refugees and asylum seekers are guaranteed by the Constitution.²¹⁴

In addition to its very liberal constitution, SA possesses a strong legal framework promoting the rights of asylum seekers and refugees. The Refugees Act 130 of 1998 incorporates protections found in both international and regional African law and expands the category of protected people to include those persecuted on the grounds of gender or sexual orientation.

²¹¹Ibid 28

²¹² Constitution of the Republic of South Africa. 1996 (Act 108 of 1996)

²¹³ Bill of Rights of the Constitution of the Republic of South Africa. 1996 (Act 108 of 1996) SS7-39

²¹⁴ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* ((2002 (8) BCLR 891

3.7.1. South African Refugee Legislation

The adoption of liberal refugee laws marked an important milestone in the history of refugee protection as for the first time in South Africa, the legal protection of refugees was removed from the provisions of the apartheid-era Aliens Control Act of 1991. The government wanted to make an amendment to that act and use it as blanket legislation but because the change would be ‘minor’ and without ‘significant impact’,²¹⁵ at the instance of NGOs, the government agreed to formulate a new refugee policy.

The government through the Department of Home Affairs played a central role in drafting the Refugee Act of 1998. The White Paper Task Team involved a number of external actors, namely an NGO (LHR), and practitioners, together with representatives from the UNHCR, Gender Commission and South African Human Rights Commission.

DHA therefore engaged civic actors and others in forming a new refugee policy, while rightly retaining ownership of the process²¹⁶. Though the relationship with civil society was not always smooth, the government showed great willingness to work with civil society. It is partly to the credit of NGOs that the resultant Refugee Act of 1998 ended up being very liberal.

The single and most important legislation is the Refugee Act of 1998 which governs the refugee regime in South Africa. It is generally considered to be a progressive piece of legislation and has been revised several times. The Act allows for any person to apply for asylum and states that no person should be denied the right to apply for asylum in South Africa. The Act also puts in place a number of procedural protections that ensure that the treatment of asylum seekers accords with the standards of administrative justice.

The Refugee Act provides certain protections to refugees and asylum seekers in South Africa. It sets out South Africa’s asylum claim procedure and the rights and obligations of refugees and asylum seekers in the Republic. Section 27 of the Refugees Act specifically includes full protection of the Constitution’s Chapter 2 Bill of Rights. The Refugee Act did not originally

²¹⁵Klaaren, J., & Ramji, J. (2001). Inside illegality: migration policing in South Africa after apartheid. *Africa today*, 48(3), 35-47.

³⁹ Handmaker, J., L.A. De la Hunt and J. Klaaren (eds) (2008) *Advancing Refugee Protection in South Africa* (Vol. 2). Oxford: Berghahn Books.

delineate the rights of asylum seekers, but only recognized refugees. The Refugees Amendment Act now includes section 27A, wherein the protection and general rights of asylum seekers are stipulated, in addition to the right to formal written recognition as an asylum seeker and the right to remain in South Africa pending finalization of an application for asylum without being unlawfully arrested or detained. Section 27A(c) provides that an asylum seeker is entitled to the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as these apply to asylum seekers.

The drafting of a relatively progressive Refugee Act involved extensive input from both government and civil society. There are however clear limitations to the Act; ‘both substantive and implementation-related.’²¹⁷ Substantive concerns include section 4 of the Act, which creates an excessively broad threshold (judging on the basis of ‘reasons’ rather than by the international standard of ‘serious reasons’) for assessing whether an applicant might be excluded from refugee status.

Implementation-related concerns include the fact that the Department continues to retain unacceptably broad discretion in its ability to over-rule a decision to grant asylum and makes it extremely difficult for refugees to obtain long-term certainty of their situation through a permanent status²¹⁸. In addition, structural problems, corruption and xenophobic attitudes within the Department of Home Affairs (DHA) make implementation difficult.

The Refugee Act does provide for an extended refugee definition that includes definitions contained in both the UN and OAU refugee conventions, and affords refugees the rights enshrined in both international refugee conventions and SA’s progressive national constitution. It furthermore specifies gender persecution as an additional area of persecution, and in so doing, puts South Africa among only a few countries in the world who do so, and the only one in Africa.

The Act makes provision for a three-stage asylum status determination process. The first is a preliminary interview by a Refugee Reception Officer (RRO). This is followed by a ‘first instance’ determination made by a Refugee Status Determination Officer (RSDO) during an oral hearing at one of the regional offices. Applicants have a right to have legal

²¹⁷ Handmaker, J., L.A. De la Hunt and J. Klaaren (eds) (2008). P. 6

²¹⁸ Handmaker, J., L.A. De la Hunt and J. Klaaren (eds) (2008). P. 6

representation²¹⁹ and an interpreter. Finally, with the exception of applications declared ‘manifestly unfounded’, rejected applicants have the right to have their appeals heard by an Appeal Board, an institution that is independent of the Department. This however does not happen in practice.

The progressive trend that resulted in the Refugee Act has not extended to the Act’s Regulations which were passed nearly a year and a half after the Act became law in December 1998. Instead of elaborating on the generally positive aspects of the Act, the Department of Home Affairs published restrictive regulations in April 2000 without any open consultation with civil society except the Immigration and Naturalisation Service (INS) of the United States. The Regulations were, in one sense, welcomed for bringing the Act into force, but they contained prohibitive measures, including a prohibition on asylum seekers being employed or studying - pending the outcome of their applications.

This created an impossible situation for most asylum seekers as South Africa is a costly middle income country where neither the government nor intergovernmental organisations such as the UNHCR provide substantial material assistance and the resources of local NGOs are stretched far beyond their intended capacity.

In the case of *Watchenuka and Another versus the Minister of Home Affairs and Others*,²²⁰ the High Court found technical and administrative grounds to declare the prohibition of work or study contained in the Regulations made by the Minister of Home Affairs to be unconstitutional and the Supreme Court of Appeals upheld that decision.²²¹ In the recent High Court decision of *Zimbabwe Exiles Forum v Minister of Home Affairs*²²² Judge Kollapen confirmed:

The legal regimes that apply to migrants, asylum seekers and refugees have their foundations deeply rooted within the Constitution and in particular within the chapter of the Bill of Rights. Given that what is often at stake is the liberty of an individual,

²¹⁹Few asylum seekers use legal representation. There are several reasons for this. The main one is lack of knowledge. In addition, affordability is a problem since they are not entitled to a legal aid. Thirdly, DHA doesn’t encourage the use of legal representation.

²²⁰*Watchenuka and Another versus Minister of Home Affairs and Others* (1486/02) ZAWC 64 (15 November 2002) unreported

²²¹*Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)

²²² *Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others* (27294/2008) [2011] ZAGPPHC 29 (17 February 2011)

their freedom and security and their right to just administrative action including their right to seek and receive the protection of the stateit is therefore essential that in all such matters the policy and practice followed by the State and its organs are consistent with both the values of the Constitution and the human rights imperativesthe right to dignity, the right to freedom and security, the right to movement and the right to just administrative action all are relevant.

The significance of this finding is that it gave asylum seekers the right to work or study whilst awaiting the final determination of refugee status. It is widely lauded for its practical effects in affording asylum seekers an opportunity to become economically active. This is also evidence of the involvement of the legal system in defense of the rights of refugees and asylum seekers thereby addressing the gap between legislation and implementation.

A persistent gap between the legislation and its implementation is much more evident in the DHA. The department has constantly failed to implement the Refugee Act adequately for structural reasons as well as for lack of political will. In terms of structural problems, beside the lack of and inadequacies of facilities, departmental officials always complain about a lack of resources. The closing of services to newcomers in Cape Town, Port Elizabeth and Johannesburg is attributed in part to inadequate infrastructure.

Inexperienced staff constantly undermine the legislation because they make decisions that are incompatible with the legislation. On many occasions, the RSDOs simply cut and paste decisions from the government website as a basis for rejecting an application. Some RSDOs and RROs cannot locate some of the main refugee producing countries on a map. There is also pervasive and systemic corruption as discussed in the previous chapter. There are accusation that DHA has determined a quota of how many refugees it wants to accept and this that contributes to the 95% average rejection rate. Some RSDOs and office managers are therefore censured for granting a higher numbers of applicants refugee status than the departmental quota allows for.

There is no political will to implement the Refugee Act in full either to the letter or in the spirit of the Bill of Rights. The department constantly challenges the principle that refugees have substantial rights. In many cases, the court affirmed the right of the refugees according to the Bill of Rights as well as the right to administrative justice. The court, observing the reluctance

of the department to implement its decisions in one particular case, had to nominate curator ad litem.²²³ There are a number of court cases that attest to this fact.

3.8 Civic-State Interaction on Refugee Protection

Civic-State interaction ranges from being very cooperative to being adversarial depending on the issues, places and personalities. The relationship is becoming increasingly adversarial. Civil societies are using the justice system as a way of holding government accountable.

The numbers of cases that are in court regarding refugees and asylum seekers in recent years are testimony to this. This situation is rooted in the historical fight by previously disadvantaged communities, and the civic movements that represented them in their struggle against apartheid. Anti-apartheid legal struggles have shown that South Africa has been a place where the law has been effectively employed as both a ‘shield’ against the abuses of the state and as a ‘sword’ to advance individual and collective human rights.²²⁴

Advocating for accountability of government in refugee and asylum matters is particularly suited to examining the relationship between global human rights norms and the national contexts in which they find expression. While the mechanisms and processes of advocating for accountability are principally located at the national level, the realisation of refugee rights is rooted in international enforcement mechanisms and the geopolitics of refugee protection. Civic actors who have sought to promote or enforce refugee rights in South Africa, to some extent have appealed to these international mechanisms, either in international meetings or through the representatives of international organisations. Civic actors have also drawn on international refugee protection norms in making claims through administrative justice mechanisms, both internal (appealing to the administration itself) and external (on judicial review) as they have tested the limits of administrative and judicial review.

Abel’s²²⁵ study of anti-apartheid legal struggles illustrates how South Africa has historically been a place where the law has been effectively wielded as both a ‘shield’ (to protect

²²³Tafira and Others v Ngozwane and Others (12960/06) ZAGPHC 136. (12 DECEMBER 2006). The court appoints curator ad litem meaning a representative of the court to oversee the interest of one party or to make sure the decision of the court is carried out. In this case the court has doubts on the capacity of one party or doesn’t have the confidence on one party to carry out that its decision will not be implemented.

²²⁴Abel, R. (1995). *Politics By Other Means: Law in the Struggle Against Apartheid, 1980-1994*. New York: Routledge.

²²⁵ Abel, R. (1995).

individuals against the abuses of the state, such as unlawful home demolitions and forced removals) and as a ‘sword’ (to advance individual and collective human rights (such as restitution of property). In terms of human rights protection generally and refugee rights protection specifically, civic organizations have played a crucial role.

The capacity of civic actors to promote and impose state accountability is related to structural changes in the normative international and national legal framework. This is the capacity of civil actors in terms of their claim of social justice as a historical progression of the human rights revolution (as stated by Ignatieff²²⁶) in the global sphere, and in its local manifestation.

This is evident from the participation of NGOs and other civil actors in the formation of current refugee policy and constant advocacy of refugee rights. Civil society has gone as far as using litigation to compel the state to abide by national and international human rights instruments and administrative justice.

The boundaries that define the structural relationship between civic actors and the state shift in very specific ways. This must be respected by civic actors (the agents) if they want to be strategic in their efforts to promote or enforce state accountability. This relationship is premised on the Bourdieu²²⁷ structural approach to structure-agency: that no matter how strongly civic institutions want to hold the state accountable and engage with the state when it is amenable, the state, its political structure and the political arena, condition civil actors in their engagement in policy matters. It is important that civic actors recognise and understand this in order for them to be effective. This research looks at the interplay between the state and NGOs in refugee protection.

Civic actors play a crucial role in mediating the translation of international legal norms into the local context. This is based on the socio-legal approach in explaining how civil actors hold states accountable. Legal approaches don’t always help in holding states accountable even though administrative justice has been implemented a lot through this approach. It is imperative

²²⁶Ignatieff, M. (1999). Human rights: The midlife crisis. *The New York Review of Books*, 20, 58-62.

²²⁷Bourdieu, P. (1999). Rethinking the state: Genesis and structure of the bureaucratic field. *State/culture: State-formation after the cultural turn*, 53-75.

that civil actors continue to negotiate the contested space between local politics and perceptions, and to interpret international standards into the local context.

Summary

Despite the international instruments of human rights and the mechanisms to implement these instruments, the state of refugees and asylum seekers is problematic. The reason is that rights are implemented within the context of the nation state. In the absence of political imperatives to uphold human rights, the interpretation of refugee rights falls at the behest and political expediency of political actors. Even though liberal theories have been used to discuss and frame refugee and asylum seekers' rights in this research, any meaningful discussion has to look at ways of enforcing or applying pressure at points determined by civil society and non-state actors. Hence, it is necessary to examine NGOs.

Consequently, the researcher has examined the application of international and national human rights instruments and administrative justice laws by civil society, particularly NGOs. It has focused on the theoretical framework and practical application of this framework to protect the rights of refugees and asylum seekers and their right to access services. It is important to note that political, social and economic factors affect the discourse around what asylum seekers and refugees are entitled to. In the last twenty years alone, we have seen a significant swing towards the limitations of rights as a result of economic turmoil and terror threats.

In South Africa there are other factors, mentioned in previous chapters that contributed to the same trend. This research therefore needs to look at the methodology to really understand the contribution of NGOs in protecting the rights of refugees and asylum seekers.

Chapter 4: METHODOLOGY

Introduction

Understanding and gauging the effectiveness of NGOs in protecting refugees and asylum seekers is challenging. The first question to ask is ‘why do we need to focus on NGOs?’. The answer is that NGOs have been important stakeholders in the refugee regime since the inception of the Refugee Act. They helped draft a liberal refugee act and policy. In addition, they are constantly involved in refugee issues either in cooperation with the state or by holding the state responsible when it fails. They have been particularly active since the violent 2008 xenophobic attacks.

NGOs involved in refugee protection have a distinct nature and are of a different caliber to other NGOs so designing methods to evaluate their quantitative and qualitative effectiveness is problematic. The researcher deemed it best, based on certain themes, that the vivid experiences seen through the eyes of the refugees and three case study NGOs is the best way of understanding the effectiveness of the NGOs.

This chapter focuses on the methodology used in studying the effectiveness of NGOs in protecting the rights of asylum seekers and refugees in South Africa.

The research uses data collected in the form of interviews of asylum seekers and refugees, as well as people who are active in refugee NGOs, especially the NGOs of this case study. This chapter explains the following: the reason for the choice of the case studies, the research methods, and challenges encountered in the field work, as well as the method of analysis, the ethical considerations, and limitations of the study.

4.1 Setting of the study

This study was initiated in Durban, in eThekweni Municipality, situated in KwaZulu-Natal province. Durban has an estimated population of 3.5 million and a municipal area of 2,297 thousand sq m²²⁸. The region is linked to the major commercial hub in the country,

²²⁸ Ulwazi. Durban. <http://ulwazi.org/index.php/Durban>

Johannesburg, and the main national roads, the N1 and N2. It has a varied labour force, well developed infrastructure, world class educational, medical and community services, as well as internationally acclaimed tourist attractions. The Central Business District of Durban has all of the country's major banks and financial institutions. There are also some notable manufacturing industries in Durban, which benefit from the modern and busiest port in Africa. The beaches are also local and international tourist attractions. Therefore, refugees are attracted to the city because of the opportunities that it provides and it has a refugee reception centre that brings asylum seekers and refugees to the city from the surrounding areas and other cities. As was explained in the previous chapter, refugees and especially asylum seekers find it difficult to transfer their file from one centre to another despite living in a different city beside the one from which they accessed their documentation.

Even though the research was initiated in Durban, it encompasses refugees and asylum seekers around South Africa, especially the major metropolitan areas, as they are the primary magnets and areas of settlement for asylum seekers and refugees alike. According to Palmary,²²⁹ compared to other countries in Africa, South Africa has a mostly urban refugee population. The country through its legislation and human rights regime has ensured that refugees are not put in camps as in other African countries.²³⁰ In addition, like the South African poor, refugees and asylum seekers get attracted to the big cities for employment and to make a living, as urban areas provide better opportunities.

South Africa's three largest cities; Cape Town, Durban and Johannesburg are not only magnets for asylum seekers and refugees but also for internal migrants. Moreover the concentration of a population in a limited geographical area is conducive to conducting business.

Since this research looks at the conditions in which refugees and asylum seekers live, and their interaction with NGOs based on these conditions, one needs to understand whether there is a significant difference between the conditions in which refugees and asylum seekers in different cities live.

The conditions of refugees and asylum seekers are similar in three ways:

²²⁹Palmary, I. (2002).

²³⁰Palmary, I. (2002).

- Occupation. Refugees and asylum seekers depend on their ethnic, national and religious networks to get into a particular line of work in most cases. Therefore, one could easily identify to a higher probability the occupation of a refugee or asylum seeker by looking at nationality. For example, many Congolese work as car guards or security guards²³¹when they first arrive in the country. They eventually move on into other jobs or businesses. This is confirmed by the data collected.
- Institutions they deal with. All refugees and asylum seekers deal with Home Affairs and like other residents they interact with other state institutions and private financial institutions.
- Neighbourhoods they live in. Most refugees and asylum seekers live in specific areas within the three cities.

Another major characteristic of asylum seekers and refugees is that they move around frequently, either in the course of conducting business, seeking better opportunities, or in the course of renewing their permits because Refugee Reception Offices (RROs) are located in the major cities.

Many refugees and asylum seekers live in one city and access documentation in another. Transferring files is often difficult or impossible.

Based on these factors and characteristics one can study refugees in one city and apply the findings to the whole group. In addition, almost 90 percent of the interviewed refugees and asylum seekers have resided in more than one of the major cities in SA.

This study mainly focused on Ethiopian and Congolese asylum seekers and refugees in Durban and other cities. There is no documentation of the exact number of asylum seekers and refugees in the region as refugees and asylum seekers are very mobile and most often reside in a different city from the location of the centre at which they access their documentation. Based on available national statistics,

²³¹Amisi, B. B. (2005). *An exploration of the livelihood strategies of Durban Congolese refugees*. UNHCR, Evaluation and Policy Analysis Unit. There is no comprehensive study done in the number of refugees and what sort of work they engage in. Amisi's study point that most Congolese are engaged car guard and security guard jobs. This also confirms the researcher's observation. In addition, they seem to have more than one job and some also study. This is confirmed in the data collected for this study.

Ethiopian and Congolese asylum seekers rank first and second place in the category of countries seeking asylum in 2015. UNHCR statistics across 10 years shows that they rank second and third respectively after Somalis. They therefore represent a statistically significant portion of the total number of refugees. This is the primary reason that they have been chosen for this study. The second reason is that; they are more easily accessible to the researcher than other nationals.

The researcher estimated that in-depth interviews with 40 asylum seekers and refugees from Ethiopia and 37 from DRC are deemed enough to give a holistic view of their challenges and their interaction with refugee NGOs.

Most of the Ethiopians are self-employed traders. Their main livelihood is selling bedding and clothing to the inhabitants of the townships within the district. Some are street hawkers, while others own small business establishments such as clothing and spaza shops. There are also some who are studying. Congolese on the other hand work mostly as car guards with some involved in other security related jobs. There are also those who are studying and working elsewhere.

The second set of data comes from interviews conducted with three managers of NGOs selected for the case study, and interviews with key informants. The three NGOs identified for the case study are Lawyers for Human Rights (LHR), Refugee Social Services (RSS) and Scalabrini Center (SC).

The three NGOs were identified because of their focus on specific aspects of refugee protection. The LHR for instance, focuses on advocacy, engagement, and as a last resort, litigation to protect refugee rights and it has a track record in establishing jurisprudence in refugee law in South Africa. On the other hand, the RSS works on social assistance in the form of material assistance specifically access to shelter, education, health, and skills development. The SC also plays the same role as the RSS but in Cape Town. It has provided interpretation services for DHA for about three years. It has also worked on giving refugees paralegal experience in helping their respective communities in different cities.

Key informants have been a very crucial part of this research. They have provided information that otherwise would have been difficult to get. Some work in the refugee regime while others have a good knowledge of it.

At the beginning of this research some DHA officers were willing to give interviews but later declined to be interviewed because of institutional policy. The researcher was also told by the manager that the Durban Refugee Reception Office doesn't allow its officers to be interviewed. This is true of all the offices in the major cities.

The researcher asked permission at Head Office in Pretoria and was told that the decision lies with the refugee centre managers. The Cape Town, Johannesburg and Pretoria centre managers also refused their staff permission to be interviewed.

4.2 Methods and data source

This research project's principal method is qualitative. Strauss and Corbin²³² define a qualitative study as "any kind of research that produces findings not arrived at by means of statistical procedure or other means of quantification". This study seeks to understand the individuals' experience from their own point of view.

The research is qualitative in nature and is concerned with collecting descriptive data that can be used to "study human action from the perspective of the social actors themselves" as explained by Babbie and Mouton²³³. The methodology adopted by this research therefore relies on the subjectivity of respondents' beliefs and acknowledges the similarities and differences between participants' views.

Qualitative research uses a naturalistic approach that seeks to understand phenomena in context-specific settings according to Hoepfl²³⁴ and Patton²³⁵. Hoepfl²³⁶ and Welman, Kruger and Mitchell assert that²³⁷ the researcher tries to observe, describe and interpret situations as they are, maintaining empathic neutrality and objectivity, as much as possible. Unlike a quantitative study that focuses on the measurability, quantification and potential to draw general conclusions, a qualitative study looks at the lived experience of the subjects and seeks

²³²Strauss, A., & Corbin, J. M. (1990). *Basics of qualitative research: Grounded theory procedures and techniques*. Sage Publications, Inc.

²³³Babbie, E. and Mouton, J. (2006). *The Practice of Social Science*. P. 17

²³⁴Hoepfl, M. C. (1997). Choosing qualitative research: A primer for technology education researchers.

²³⁵Patton, M. Q. (2002). *Qualitative research*. John Wiley & Sons, Ltd.

²³⁶ Hoepfl, 1997

²³⁷Welman, C., Kruger, F., & Mitchel, B. (2005). Research method.

to illuminate and understand them according to Hoepfl²³⁸. Hence, the experiences of asylum seekers, refugees and refugee NGOs and their perception of the human rights issues, can best be recorded and understood by using a qualitative research methodology. In addition, the effectiveness of NGOs that work in the same field but with different focus areas can best be understood by examining their work through the beneficiaries of their services, and through accounts given by the people who run these NGOs.

As a result, the researcher has used the triangulation method by bringing together data from different stakeholders within the refugee human rights regime. There are different types of triangulation but this research uses data triangulation and to some extent environmental triangulation. This entails the use of multiple sources of data or resources, and it is particularly important when various stakeholders have a vested interest in a particular subject.²³⁹ According to Creswell and Miller²⁴⁰ it is a procedure that confers validity. It is a systematic process of sorting out data from different data sources to identify themes and categories by isolating overlapping areas.

Environmental triangulation in this case has to do with the case study NGOs which operate in at least three major cities in South Africa. Jick²⁴¹ surmises that ‘within-method’ triangulation involves cross-checking to ensure ‘internal consistency and reliability’. Triangulation is helpful in terms of ensuring the reliability and validity of the data.

This research took the form of a case study of three NGOs. Gillham²⁴² defines a case study as a study that explores a unit of human activity embedded in the real world, which can only be studied and understood in a context. The case study method is suitable when investigators desire to cover contextual conditions and when several sources of evidence are required, as

²³⁸ Hoepfl, 1997

²³⁹ Guion, L. A., Diehl, D. C., & McDonald, D. (2011). Triangulation: Establishing the validity of qualitative studies.

²⁴⁰ Creswell, J. W., & Miller, D. L. (2000). Determining validity in qualitative inquiry. *Theory into practice*, 39(3), 124-130.

²⁴¹ Jick, T. D. (1979). Mixing qualitative and quantitative methods: Triangulation in action. *Administrative science quarterly*, 602-611. P. 609

²⁴² Gillham, B. (2008). *Developing a questionnaire*. A&C Black.

discussed by Yin²⁴³. Yin,²⁴⁴ Gillham²⁴⁵ and Gerring²⁴⁶ agree that the use of multiple sources of evidence is one of the key characteristics of case study research. The case study, according to Punch,²⁴⁷ “aims to understand the case in-depth in its natural setting, recognizing its context and complexity, and aims to preserve and understand the wholeness and unity of the case”.

While a case study seems suits this research, it is necessary to point out its limitations as a method. Drawbacks according, to Babbie and Mouton,²⁴⁸ include “its limit of generalisability”. In other words, there might be variations of experience from one community to another. However, in this case study the variations are not very significant because of the similarity of the conditions of asylum seekers and refugees described above, and the coverage of significant NGOs that operate in different cities.

This case study focuses especially on asylum seekers and refugees who residing in Cape Town and Johannesburg, who accessed documentation from refugee reception offices in Cape Town, Johannesburg and Pretoria. This gave the researcher a good understanding of the lived experiences of these individuals in these cities.

The researcher employed an interview schedule. Oppenheim²⁴⁹ states that the function of an interview schedule is to elicit particular information. It is conducted in the belief that respondents have certain information, ideas or attitudes on the subject of the inquiry and the interview method obtains this information with the minimum distortion.

With this purpose in mind, the study used in-depth interviews as a data collection procedure. The interview schedule for refugees and asylum seekers as well as the NGOs was mainly open ended (semi-structured) to elicit in-depth information and allow for probing. Each interview was digitally recorded for subsequent transcription and analysis. The NGOs were mainly asked about the perception of the services they render to refugees and asylum seekers, and how they

²⁴³Yin, R. K. (1994). Discovering the future of the case study method in evaluation research. *Evaluation practice*, 15(3), 283-290.

²⁴⁴Yin, R. K. (1994).

²⁴⁵Gillham, B. (2008).

²⁴⁶Gerring, J. (2007). *The case study: what it is and what it does* (pp. 73-89). na.

²⁴⁷Punch, K. F. (2013). *Introduction to social research: Quantitative and qualitative approaches*. Sage.

²⁴⁸Babbie, E. and Mouton, J.(2006). P. 280

²⁴⁹Oppenheim, A. N. (1992). *Questionnaire design, interviewing and attitude measurement*. Bloomsbury Publishing. P. 121

go about lobbying for their rights. Refugees and asylum seekers were asked about the challenges they encounter, and about NGOs that might assist them with these challenges; specifically the NGOs used as a case study in this research.

While a set of pre-determined questions was provided by the researcher to all the respondents, the researcher noted the responses and probed further to open new avenues of inquiry, if they were related to the overarching research questions. Ethiopia's official language Amharic was used when interviewing Ethiopian refugee and asylum seeker respondents. When interviewing Congolese, French (the official language of the DRC) or local languages were used, with help of assistants who speak all the languages fluently.

The research assistants also helped in transcribing the data. This was to enable the participants to interact with ease and divulge as much information as possible. The interviews took place at different times. Women and men were equally represented in the Ethiopian community while 60% of the Congolese respondents were male. In the case of Ethiopian interviewees, an assistant who speaks the language was used to interview and to transcribe the data from the female interviewees. The author researcher conducted the interviews of males as he is fluent in Amharic. Female respondents felt more at ease speaking to a woman so female assistants interviewed Congolese and Ethiopian female respondents.

Most interviews of migrants took place in the evening after work. Some respondents preferred weekends. The interviews took place in various contexts: in Ethiopian restaurants where a lot of migrants congregate; in their shops; at the roadside where they do their hawking; and some at their residences. The context in which some of the interviews took place affected the clarity of the voice recording. For example, there was too much noise in the background when the interviews were held in the street. This is also true of interviews conducted with Congolese respondents. To counteract this, field notes were taken to accurately reflect the views that were not clearly audible. After translation and transcription, coding was used to organize themes.

4.3 Sampling

Purposive sampling is the leading strategy in qualitative research according to Hoepfl.²⁵⁰ Denscombe²⁵¹ describes purposive sampling as a non-probability sampling method, where subjects are handpicked for research. There is a lack of accurate statistical data on refugees and asylum seekers. Thus, the non-probability sampling method, specifically, purposive sampling, is appropriate for intentionally selecting the subjects. Purposive sampling can be very beneficial for reaching the targeted sample quickly and where sampling for proportionality is not the principal concern. A purposive sample is likely to get the views of the target population, but is also likely to favour subgroups in the population that are more readily accessible.

A problem with purposive sampling according to Welman, Kruger and Mitchell ²⁵² is that “different researchers may proceed in different ways to obtain such a sample. It is therefore impossible to evaluate the extent to which such samples are representative of the relevant population”.

Snowballing according to Hughes and Sharrock, is a sampling technique whereby an individual is identified and interviewed, and asked to name others in his or her social network who in turn name others to be part of the study²⁵³. As Welman, Kruger and Mitchell²⁵⁴ remark, this continues “so that the sample, like a rolling snowball, grows in size till saturated”.

In this study, there were two categories of respondents: NGO personnel as well as Ethiopian and Congolese immigrants. Immigrants who were currently living, or had at some point lived in metropolitan areas, were selected.

The criteria used were the following: subjects should be either asylum seekers or refugees; residing in Durban and surrounding areas at the time of the interview and have been living in SA for a few years. The researcher and other interviewers also targeted individuals who lived in Johannesburg and Cape Town. NGO personnel interviewed were all employees of the three NGOs selected as the case study. NGO managers and staff interviewees were selected based

²⁵⁰ Hoepfl, 1997

²⁵¹Denscombe, M. (1998). *The good research guide*. Buckingham.

²⁵²Welman, C., Kruger, F., & Mitchel, B. (2005). P. 68

²⁵³Hughes, J., & Sharrock, W. (2007). *Theory and methods in sociology: An introduction to sociological thinking and practice*. Palgrave Macmillan.

²⁵⁴Welman, C., Kruger, F., & Mitchel, B. (2005). P. 68

on having worked in the organization for many years. Snowballing was used in selecting migrant respondents. Based on the given criteria, a respondent was asked to recommend other participants from the Ethiopian community who would be willing to be interviewed. This allowed participants to be relaxed as they had been recommended by a friend or acquaintance within their social network.

The drawback to this method is the possibility that the person who recommends the other person may share the same educational, social, cultural and economic background as the person being recommended and this fact may affect the quality of the data. However, the researcher made a determined effort to look for a variety of sources by using Exponential Discriminative Snowball Sampling.²⁵⁵

For the NGO personnel, purposive sampling was used. The researcher acquired permission from the heads of these organizations to conduct the interviews.

Guest, Bunce and Johnson²⁵⁶(2006) state that the sample size of non-probabilistic sampling depends on the notion of saturation. Saturation is a point where there is no new theme emerging from the data collected. The same authors²⁵⁷ found that saturation usually occurs within the first 12 interviews. This is just a general guide and not a rule. Therefore, the researcher deemed it fit to interview 40 in the Ethiopian population and 37 in the Congolese case. With the above sampling method in mind, the study utilized 77 in-depth interviews with refugees and asylum seekers.

Regarding NGO personnel, the researcher interviewed 1 participant from the LHR (they insisted that one individual representing the organization be available for interview) and 2 each from the Refugee Social Services and the Scalabrini Centre, respectively. Two key informants were used as a way of verifying and clarifying the data. In the case of Ethiopians, the researcher speaks the Amharic language and conducted the interviews with males, while a female research assistant interviewed the female respondents. The researcher had to employ 2 research assistants to do the interviews in French and in the local languages of the Congolese. In all

²⁵⁵Etikan, I., Alkassim, R., & Abubakar, S. (2015). Comparison of Snowball Sampling and Sequential Sampling Technique. *Biom Biostat Int J*, 3(1), 00055.

²⁵⁶Guest, G., Bunce, A., & Johnson, L. (2006). How many interviews are enough? An experiment with data saturation and variability. *Field methods*, 18(1), 59-82.

²⁵⁷Guest, G., Bunce, A., & Johnson, L. (2006).

these categories, there was a saturation of information, especially regarding refugees and asylum seekers.

The individuals who assisted in doing the interviews were given the necessary briefing and training to make them familiar with the research as well as the research questions. The researcher explained the objectives of the research and the research questions. In addition, the researcher clarified the sampling logic, the process, and interviewer bias. Several rehearsal interviews were conducted. Before the research assistants started interviewing, they were given the necessary equipment.

4.3.1 Negotiating access

Burton²⁵⁸ stresses that securing access to people, organizations and data is important for the successful completion of any project, especially in research involving case studies where the researcher may wish to spend an extensive amount of time with the study participants. The researcher has worked as an interpreter in the Durban DHA refugee reception office. Therefore, it was easy to access the immigrant community whom he came into contact with. The researcher's role as an interpreter within the reception centre facilitated access and the trust that is needed for respondents to express themselves confidently. It also created an insider status that allowed cooperation both within the refugee community and in the NGOs active in this area.

These advantages also presented challenges as potential sources seemed to think that the interviews might somehow reveal things that might hamper them in their application for documentation. Therefore, it required a lot of reassurance, especially of Ethiopian interviewees.

When it came to the NGOs, access was relatively easier and they were much more open. It was only a matter of finding time with the right person. The main challenge was having access to DHA officers, RROs, and RSDO's. Despite asking the centre managers as well as Head Office, access was restricted.

²⁵⁸Burton, D. (Ed.). (2000). *Research training for social scientists: a handbook for postgraduate researchers*. Sage.

4.3.2. Limitations of the study

One of the limitations of this study was the representivity of the research. Although the researcher made an effort to make the research as representative as possible, generalization that could be inferred from the results might not fully apply to all regions, refugee communities and NGOs. In addition, the relationship dynamics in the refugee regime between refugees and asylum seekers, NGOs, CBOs, DHA, and other institutions, is too complex for this research alone to explain. Since this research started, the DHA has implemented a policy amendment that could possibly affect migrants in general. DHA has also has changed a lot of its procedures and has closed three refugee reception centres. In addition, a major xenophobic attack affected the regime. All in all, this regime is dynamic. Therefore it is possible that this research might fall short in understanding this ever changing dynamic across the time scale it took to undertake the research.

4.3.3 Challenges

Setting up interviews with the respondents was a serious challenge. Interviews had to be rescheduled a number of times, as the refugees and asylum seekers were highly mobile. In addition, they worked long hours, including weekends. Thus, the researcher and research assistants had to build a strong rapport with the participants in order to convince them to partake in the interviews during their work hours and evenings. This is mainly because participants had come from countries where there is limited freedom of expression. They were therefore guarded in providing personal information if they thought it could potentially harm them. This increased the original time frame of the envisaged field work and delayed the research project.

Another challenge was when one of the NGOs, the Refugee Ministries Centre, initially identified as a case study participant, almost ceased its work in 2014. Even though this NGO was important at some point, after it stopped providing interpreters for the DHA, its contribution declined significantly and it was difficult to obtain data from the organization. The researcher therefore had to find another NGO to replace it in the case study. Scalabrini Centre was selected to replace the Refugee Ministries Centre. This was a blessing in disguise because

the SC was found to be quite important since its services cover multiple areas in the refugee protection regime. It also gave a geographic variation to the data from NGOs since it operates in Cape Town. In addition, the closure of Refugee Ministries Centre gave the researcher an additional perspective into the difficulty of funding and operating in this challenging environment.

4.4 Analysis

The analysis of the collected data was mainly qualitative. Bogdan and Biklen²⁵⁹ define qualitative data analysis as “working with data, organizing it, breaking it into manageable units, synthesizing it, searching for patterns, discovering what is important and what is to be learnt and deciding what you will tell others”. Theme identification is one of the main tasks in qualitative research according to Welman, Kruger and Mitchell²⁶⁰. Fereday and Muir-Cochrane²⁶¹ explain that thematic analysis is a “form of pattern recognition within the data, where emerging themes become the categories for analysis”. It minimally organizes and describes the dataset in detail. A theme shows something significant about the data in relation to the research question and represents “some level of patterned response or meaning within the data set” according to Braun and Clark²⁶² (2006:82). Systematic coding and classification of gathered data is vital for analysis.

A central question to ask with regard to coding is: what counts as a pattern or how often does it need to appear to be considered as a theme? As Braun and Clark²⁶³ note, “there is no hard and fast answer to the question of what proportion of the data set needs to display evidence of the theme for it to be considered a theme”.

The researcher's judgment is essential to determine what a theme is. Some flexibility is needed and rigid rules do not work. It is vital that the theme identified capture something important in

²⁵⁹Bogdan, R., & Biklen, S. (1984). *Qualitative research for education: An introduction to theory and practice*. Alien and Bacon, Inc, New York. P. 145

²⁶⁰Welman, C., Kruger, F., & Mitchell, B. (2005).

²⁶¹Fereday, J., & Muir-Cochrane, E. (2006). Demonstrating rigor using thematic analysis: A hybrid approach of inductive and deductive coding and theme development. *International journal of qualitative methods*, 5(1), 80-92. P. 82

²⁶²Braun, V., & Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative research in psychology*, 3(2), 77-101.

²⁶³Braun, V., & Clarke, V. (2006). P. 82

relation to the whole research question. Themes within data can be identified in one of two ways in thematic analysis: either by the inductive approach; or by the theoretical (deductive) approach. The inductive approach means that themes are connected to the data themselves and may bear slight relation to the specific questions that were asked of the participants. They are not driven by the researcher's theoretical interest in the topic. Inductive analysis, as Braun and Clark²⁶⁴ explain it, "is therefore a process of coding the data without trying to put it into a pre-existing coding frame or the researcher's analytic preconceptions". By contrast, theoretical thematic analysis is motivated by the researcher's theoretical or analytic interest in the area and according to Braun and Clark,²⁶⁵ is coded for a specific research question.

Analyzing themes requires that the decision be made on which themes are going to be analyzed. Braun and Clark²⁶⁶ state that themes can be identified at a semantic or explicit level, or at a latent or interpretive level. At the semantic level, themes are identified within the explicit meanings of the data and hence the analyst is not looking for anything beyond the mere description of what the participant has said or what has been written. Thematic analysis at a latent level goes beyond the semantic content of the data and examines the underlying ideas, assumptions and conceptualizations that are authorized as informing the semantic content of the data. Braun and Clark²⁶⁷ suggest that at the latent level of thematic analysis, there is an attempt to theorize the significance of the patterns, their meanings, and expressions through interpretation in relation to previous literature.

This study identified themes through the conceptual or deductive approach. The researcher identified themes relative to the research hypothesis. To support the analysis, the researcher provided some figures and direct quotes from the interviews. The interviews were digitally recorded and later transcribed verbatim. Transcribed data were printed and coded to spot repeated patterns of themes that related to the research question. The themes were developed through the grouping of concepts and ideas that appear to have similar ideas in relation to the research question. The themes were subsequently analyzed through interpretation using previous literature.

²⁶⁴Braun, V., & Clarke, V. (2006). P. 83

²⁶⁵Braun, V., & Clarke, V. (2006).

²⁶⁶Braun, V., & Clarke, V. (2006).

²⁶⁷Braun, V., & Clarke, V. (2006).

The effectiveness of refugee NGOs is assessed through four criteria: advocacy; providing protection; facilitating access to social and other services; and humanitarian assistance.

It is crucial to briefly discuss why these criteria were used to assess the effectiveness of case study NGOs.

4.4.1 Advocacy

Advocacy, in this context, seeks to ensure that people, particularly those who are most vulnerable, are able to have their voice heard on issues that are important to them, can defend and safeguard their rights and have their views and wishes genuinely considered when decisions are being made about their lives. Asylum seekers and refugees, by virtue of being outsiders, lack knowledge and the means to influence policy, so rely on NGOs and UNHCR to do so on their behalf. NGOs therefore need to be assessed in terms of their ability to participate in policy formulation and influence policy. NGOs also litigate to ensure certain rights are protected and upheld. As discussed in previous chapters, some NGOs have played a role in this regard.

4.4.2 Protection

The criterion of Protection requires an assessment of whether NGOs provide protection to people marginalized by state and non-state actors. The literature makes it clear that asylum seekers and refugees are denied access to DHA, police stations, banks and other institutions often because of xenophobia or corruption,

NGOs are expected to address these problems so they need to be assessed on how effective they are in this regard. This role is similar to that of advocacy but for the purpose of the analysis, we are going to look at these two aspects separately.

4.4.3 Facilitating access to social and other services

Because of numerous challenges, asylum seekers and refugees cannot access services to documentation, education, social welfare, banking, etc. Obstacles to access are as a result of legislative, operational, or policy factors. A lot of asylum seekers and refugees, approach NGOs to get assistance in these matters.

NGOs provide skills training and language lessons to help refugees integrate. Therefore, this is also one of the criteria for understanding how effective the NGOs are.

4.4.4 Humanitarian assistance

As a vulnerable group of people, asylum seekers and refugees tend to have no safety net. They particularly need humanitarian assistance when they first enter South Africa, and when violent xenophobic attacks occur. Asylum seekers and refugees also need financial assistance for housing and other necessities either when they first settle or when they fall on hard times.

4.5. Ethical considerations

Social research raises ethical issues. This is because social research is about people and involves collecting data from people. Although all social research to some extent intrudes into people's lives, Punch²⁶⁸ asserts that qualitative research frequently intrudes more. According to Williams²⁶⁹ research that will create harm or distress shouldn't be conducted even if the outcome might be beneficial to a wider group,

Lewis and Ritchie²⁷⁰ emphasize that the in-depth, unstructured nature of qualitative research and the fact that the research raises issues that are not always anticipated, means that ethical considerations are very important.

Prior to the commencement of this study, an ethical clearance application was made during the proposal stage to the University of KwaZulu Natal's Ethics Committee and it was approved. Strict confidentiality and anonymity was assured for the respondents for the entire duration of the study. NGO personnel as well as asylum seekers and refugees participated freely and voluntarily. All of the respondents were informed of the nature of the research and gave their consent before participating in interviews. A copy of the consent form was given to each participant before the interview. Participant confidentiality was assured by using numbers to

²⁶⁸Punch, K. F. (2013).

²⁶⁹Williams, M. (2003). *Making sense of social research*. Sage.

²⁷⁰ Ritchie, J., Lewis, J., Nicholls, C. M., & Ormston, R. (Eds.). (2013). *Qualitative research practice: A guide for social science students and researchers*. Sage.

hide participants' true identities. All the transcriptions are saved as password protected files in the researcher's computer.

Summary

This chapter presented the research methodology used to explore the role of NGOs in the protection of the rights of refugees, and human rights. As the study seeks to understand the individual's experience from the individual's own point of view, the research is qualitative in nature and took the form of a case study of three refugee NGOs. The method of sampling is purposive. The interview schedule for refugees and asylum seekers as well as the NGO personnel was mainly semi-structured to elicit in-depth information and allow for probing. The study utilized twenty in-depth interviews of 77 Refugees and asylum seekers, and 5 NGO officials. The findings could be generalized to most NGOs and migrants to a certain extent. The themes were developed through grouping of concepts and ideas, in relation to the research question. Confidentiality and anonymity were assured for the respondents as part of ethical considerations.

This methodology has produced data that will be broken down and analyzed according to certain themes. The deductive method of thematic analysis was used to draw meaning and theorize. In this case, source triangulation is important as a way of confirming information or identifying any disconnect between what the asylum seekers and refugees perceived, and what NGOs did, and visa versa.

Chapter 5: Analysis of Data

Introduction

This chapter focuses on the analysis of the data collected from refugees and asylum seekers, and NGOs. In the investigation of the relationship, and consequently the effectiveness of NGOs, the relationship has to be seen from the perspective of both groups of participants. Regarding the refugee and asylum seekers, the data analysis profiled them, identified the different problems that they face and determined how they dealt with the problems. In addition, it looked at whether they considered NGOs to be problem solving avenues for them.

The second part of the data analysis focused on the protection of refugee and asylum rights in different areas by looking at the advocacy efforts of NGOs in upholding the rights of refugees and asylum seekers, and the types of litigation undertaken against the DHA and other public and private entities. This chapter therefore covers the two tiers of analysis.

5.1 Analysis of Asylum Seekers and Refugees data

The nationalities of refugees and asylum seekers chosen for interview are Congolese and Ethiopian. The researcher interviewed 40 Ethiopian refugees and asylum seekers, half of whom were women, and 37 Congolese among whom 17 were women. It is important to give a detailed profile of both nationalities.

5.1.1 Profile of Ethiopian Asylum Seekers and Refugees

The researcher made the effort to collect data from Ethiopians of different ethnic groups, religions and genders. Except, for gender, it was difficult to represent all ethnic groups and religions since people of the same ethnic group and religion tend to migrate or seek refuge together in the same place. In South Africa, most Ethiopian refugees and asylum seekers are from the Southern region of Ethiopia, specifically, the Hossana and Kembata ethnic groups. The data reflects this trend as almost 70% of the respondents were of these ethnic groups. In

terms of religion, the number of Muslims in these ethnic groups is negligible, as, there were only three Muslim Ethiopian participants.

Regarding occupation, most of the male Ethiopian respondents worked in the business sector either owning clothing or spaza shops or employed in these shops. There were three students in this category. Some of the women were stay at home moms and others worked in clothing and spaza shops. Sixteen of the female participants were self-employed and at least five of them shared ownership of the businesses with their husbands. Almost 70% of the Ethiopian participants had asylum seeker permits while the rest had refugee status. This was not an exact representation of the national average for refugees and asylum seekers, but it came close to the average of the overall population.

5.1.2 Profile of Congolese Asylum Seekers and Refugees

Congolese refugees and asylum seekers were not willing to disclose their ethnicity therefore it was difficult to know with any certainty who came from which ethnic group. However, the researcher tried to represent Congolese from different regions of the DRC. Another complication regarding the Congolese participants was that some had dual Rwandan and DRC citizenship so some said they were Rwandese but had Congolese citizenship. This is a result of the mass movement of people because of the great lakes conflict. Some had fled to, and stayed in, Congo after the Rwandese genocide then later moved on to SA because of the conflict in DRC. For these reasons the dynamics of ethnicity, citizenship and sense of belonging, are complex among these participants. The research profiled and coded the Ethiopian and Congolese participants in Appendix 1 according to multiple markers. The researcher identified four themes that resonated from the data:

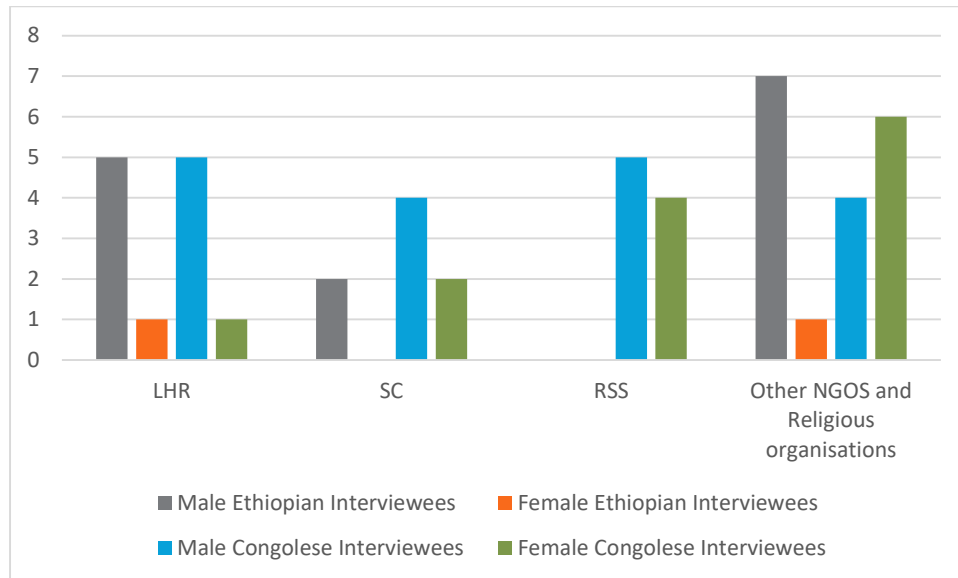
- Vivid experiences of their getting to South Africa and getting documentation
- Interaction with the DHA, Police, hospitals and banks as a way of framing their problems
- Knowledge of NGOs and their experiences in dealing with them as well as the
- Gaps they felt NGOs and other entities were not filling.

It is therefore imperative to look at these themes in detail in light of the data.

5.2 Asylum seekers' and refugees' Knowledge of NGOs

Ethiopian and Congolese asylum seekers and refugees were asked whether they had approached, or know of, the case study NGOs or others. Some of the respondents identified more than one organisation. Their response differed according to nationality and gender. The following chart shows the differences between nationalities and gender.

Figure 1 Knowledge and contact with NGOs



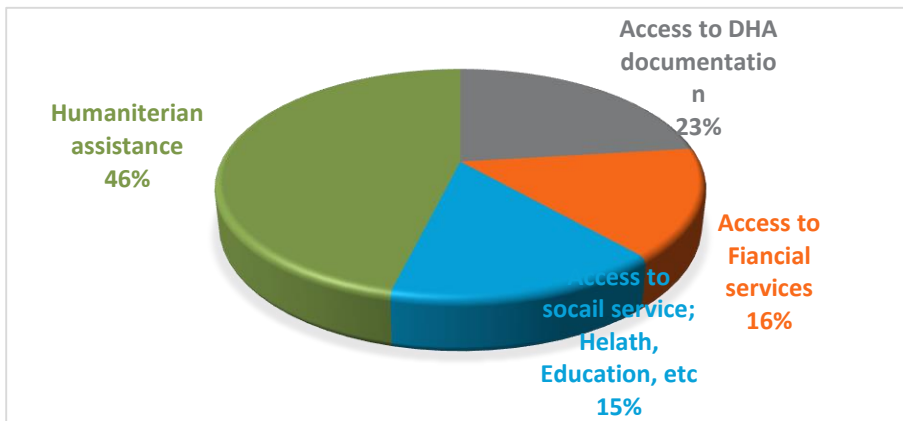
Congolese asylum seekers and refugees had more exposure to NGOs. RSS and SC indicated in their interviews and in their annual report that most of their clients are Congolese and Somali. Men are also almost 35% more likely to approach, or know of, NGOs compared with women. This is across both nationalities. However, we see a higher percentage of Congolese than Ethiopian women knowing of NGOs. This could be because of the general role of men being that of responsibility for the welfare of the family outside the home. Additionally, there are more men asylum seekers and refugees, so women interviewees are drawn from a smaller group. The Ethiopian community rely especially on their social network for social assistance and this could be the reason why not so many of them had approached or knew of the NGOs.

LHR assisted 15% more refugees and asylum seekers than did other NGOs in the case study. However, the other NGOs and religious organizations registered higher collectively in terms of the help that asylum seekers and refugees received from them.

90% of these are religious organizations and 75% of all are affiliated to the Catholic Church. The literature indicates that catholic church affiliated organizations provided the most humanitarian and social assistance to asylum seekers and refugees especially during the violent

xenophobic attacks. Almost 30% of the interviewees didn't know of or had not approached any NGOs despite having challenges with documentation or difficulty accessing social services. Those who had approached NGOs for assistance identified different issues:

Figure 2 Issues which refugees and asylum seekers approached the NGOs with



The pie chart shows 46% of the assistance provided is humanitarian and 23% was about access to documentation. It should be noted that some of them approached these NGOs with multiple issues and in some cases approached more than one NGO.

5.3 Refugees' and Asylum seekers' experience of getting to SA and acquiring documentation

The experience of getting to South Africa and acquiring documentation is a defining moment in the life of refugees and asylum seekers. The research examines the ease of seeking asylum in the spirit of a Refugee Act that is conducive to success for potential asylum seekers.

Perberdy²⁷¹ and Crush²⁷² claim that most of the problems that asylum seekers face are experienced at this stage. Therefore, it was imperative that the researcher examine this aspect as one of the main themes in order to have a holistic understanding of the problem.

²⁷¹ Perberdy, S. (2010).

²⁷² Crush, J. (2008)

The majority of asylum seekers who are either Ethiopian or Congolese crossed the SA border after travelling days, and in some cases months, to reach South Africa. Some entered legally and asked for asylum later. There is a significant difference between men and women:

Almost 90% of Ethiopian and 70% of Congolese men travelled across several countries to reach South Africa. The Ethiopian respondents named Kenya, Tanzania, Malawi, Mozambique, Zimbabwe and sometimes, Swaziland as transit countries. The Congolese transited the all same countries with the exception of Kenya. Congolese also used Zambia in some cases. A Congolese interviewee narrated the story of his transit thus:

So, I spent like a month in Tanzania, I spent like four months in Mozambique, I spent like another three months in the Southern region of Malawi. (Congolese interviewee 01, Male)

Almost 90% of Ethiopian women and 5% of Congolese women use the South African airports as an entry point. What is important to note is that most women come to the country to join their husbands or a close relative. Interviewee 07 and 08 explain;

My brother used to live in South Africa. He told me things about South Africa and he asked me to come to South Africa. (Ethiopian interviewee 07, Female)

I came Following My husband here and he arranged and did everything. (Ethiopian interviewee 07, Female)

Because travelling across several countries is often unsafe, their preferred means of travel was air with departure either from their home country or from neighbouring countries to South Africa or to an SA neighbouring country.

Those who crossed several countries often faced hardship. Even though most had financial help from relatives, some relied on odd jobs and staying in refugee centres in different countries until they reached South Africa.

Another factor related to getting to South Africa was access to documentation. Often, asylum seekers depended on their network, be it their relatives or acquaintances from their country of

origin to give them relevant information. Landau²⁷³ and Kok & Collinson²⁷⁴ stress the reliance of migrants on their social network as a way of easing access into the host country. This is a well-documented way that assists them access institutions, employment and other crucial amenities. Only 5% of all respondents acknowledged getting information or acquiring documentation from NGOs or the police.

Over 90% of respondents did not have a good experience in getting documentation or in dealing with the DHA. Comparatively speaking, women in both nationality groups had better experiences when it came to first seeking asylum, since they had close relatives or husbands who guided them. The main problems of respondents were those of gaining access to the RROs, the treatment given to them by officials, and corruption. The following quotes reflect the experience of participants from both nationalities:

. . . The Department of Home Affairs' long interview process, long days, weeks, even months of waiting for a permit on the queue, all constitute challenges when one needs to survive as a newcomer and asylum seeker in a country. (Congolese interviewee 02, Male)

I always have a challenge with the Department of Home Affairs; they are always asking me a bribe and I have to pay. (Ethiopian interviewee 06, Male)

Basically, the majority of foreigners who come to South Africa. . . face serious problems with the Department of Home Affairs, especially with that refugee reception centre office situated on Moore Road.

They treat people like animals, insulting them, and take advantage of them. You would see someone going into the Home Affairs, and leaving it crying. Although you go Human Rights, it is like they work together. They could just make you walk up and down without producing any change to you. So, there are very challenging problems in that Department and it is getting worse every day. (Congolese interviewee 14, Male)

²⁷³Landau, L. B. (2006). Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy. *Journal of Refugee Studies*, 19(3), 308-327.

²⁷⁴Kok, P., & Collinson, M. (2006). *Migration and urbanisation in South Africa* (pp. 03-04). Pretoria: Statistics South Africa.

I go there (DHA) every six months. The only time I am truly reminded that I am a foreigner is in Home Affairs. (Ethiopian interviewee 03, Female)

The above quoted statements seem to state the obvious. However, it shows the amount of emotional frustration that the experience creates in refugees and asylum seekers who visit the RROs.

It was very difficult; we sometimes used to go to the home affairs and spend the night there due to long queues of people, who waited for papers. It also became difficult to find a job, or walking in the city because of the fear of being arrested by the police. (Congolese interviewee 16, Male)

A few exceptions aside, the experience most participants have at the DHA, either in the first instance of accessing documentation or the subsequent process of renewing permits and filing appeals, is one of frustration and trepidation. This is amply reflected by Landau, Ramjathan-Keogh, & Singh²⁷⁵ as well as Vigneswaran²⁷⁶ on the conditions at the DHA such as violence, corruption, unruly queues and xenophobic officers.

It is important to note that the negative feelings ran across nationalities and genders, even though they were more pronounced for those with Section 22 permits (asylum seekers permits).

This was understandable because their interaction with DHA RRO was much more frequent - either because of the shorter periods between Section 22 permit renewals - or the long appeal process for asylum seekers. Asylum seekers make more frequent visits to RROs to renew their permits compared to recognised refugees with Section 24 permits.²⁷⁷

All in all, most of the respondents seemed to expect certain hardships in getting to South Africa. Overwhelming frustration was evident in some participants who got into South Africa without a relative or someone to ease their entry into the country, and to help them with material assistance and information. Since there are no refugee camps in SA, the initial entry period is

²⁷⁵Landau, L. B., Ramjathan-Keogh, K., & Singh, G. (2005). *Xenophobia in South Africa and problems related to it*. Forced Migration Studies Programme, University of the Witwatersrand.

²⁷⁶Vigneswaran, D. (2008). A foot in the door: Access to Asylum in South Africa. *Refuge: Canada's Journal on Refugees*, 25(2).

²⁷⁷Landau, L. B., & Monson, T. (2008). Displacement, estrangement and sovereignty: Reconfiguring state power in urban South Africa. *Government and Opposition*, 43(2), 315-336.

challenging without any support. For 80% of asylum seekers, there exists a network of support based on blood relationships, friendship or commonality of place of origin. That network has been very crucial in acquiring the necessary information to access documentation and livelihood strategies for most of them.

80% of asylum seekers cross the Zimbabwean and Mozambique borders to get into South Africa. This is also true in many refugee receiving countries. Although the hardship they went through to acquire documentation varies, it is not an easy journey. So, the data gathered regarding crossing many countries and the hardship of accessing documentation confirms the literature. The role of networks is quite clear whether for accessing documentation or jobs. Networks are even more crucial than NGO assistance. In some cases, the availability of networks determines if one gets assistance from NGOs or not. According to Koser and Pinkerton²⁷⁸ networks are vital to the dissemination of information; providing destination information; and in assisting with the majority of migration and integration strategies.

5.4 Refugee and Asylum Seekers' experiences with government and non-government institutions

Asylum seekers approach government and non-government organizations in their quest to access social services. However, this relationship has been fraught with problems. Landau²⁷⁹ asserts “a combination of inadequate documentation, ignorance, and outright discrimination ensures that many refugees are denied rights to critical social services.”

Participants were asked to explain their experience with state and non-state institutions. They were asked about their experiences in dealing with the police and the banks. Participants mostly discussed their experiences with DHA, the police, banks and schools. Almost 70% of male and 40% female respondents reported varying degrees of negative experiences with the police. It is not so much the institution itself, but individual police officers who find excuses to ask for bribes, sometimes demanding it and at other times forcefully taking it, as some of the participants explain:

²⁷⁸Koser, K., & Pinkerton, C. (2002). *The social networks of asylum seekers and the dissemination of information about countries of asylum*. London: Home Office.

²⁷⁹Landau, L. B. (2006). P. 320

. . . Because, as a foreigner in South Africa, the police will never give you a break. They would always find excuses so that they could get something out of you. (Congolese interviewee 15, Male)

My negative experience is crime and Police they are always harassing and asking bribe that's my negative experience. (Ethiopian interviewee 16, Male)

I once went to the police station with my friend because her shop was to be taken. But the police was unjust to her because they were bribed by the fraudsters, my friend was honest and was right but she was taken out of her shop. One time an Indian customer came to return a good I sell to her after she used it for a long time and I refused to return it. So she came back with an Indian policeman. The policeman took everything out on the floor and he told me that she can take whatever she wants and I must not say anything.

Then she took what she wanted and left the old thing. I could not say or do anything because I am a foreigner and nobody listens to me. (Ethiopian interviewee 05, Female)

. . . but one thing happened to my husband; he used to work in an internet café and he was carrying a broken computer to a technician and on his way police men stopped him and asked him where he was taking the computer and he told them what he was up to but I don't know why, may be they wanted a bribe or they don't believe him, any ways they wanted to show him their authority and my husband's temper got over him and he told them he can show them his internet café, that it was not far but the police men beat him up, tore his shirt and took him to the police station and at the police station the other police men interfered and told the police men that they were wrong. My husband was very angry and he wanted to sue them, but this Indian policeman told my husband that he will only waste his time and would not win the case because he is not a South African and my husband calmed down and dropped the idea and left the police station. (Ethiopian interviewee 5, Female)

However, like any experience, it depends on the situation and the interaction between the actors. It is easy to see from the data that students or professionals have less interaction with the police than traders.

They are always asking money. Not all though, and some are very dedicated. (Ethiopian interviewee 5, Male)

Furthermore, there were repeated comments by the participants about how some police officers see them and their vulnerability as a way of soliciting bribes in the form of money or goods, and the feeling of helplessness exhibited was apparent in the following quotes;

Police officers, ask me for papers, “Hey, where is your paper? Are you going to buy us a sweets or bread? Where is your document?” (Congolese interviewee 14, Male)

They are always dragging us asking for permit, even if you show them your permit for no reason at all, they will beat you, they don’t treat us as human beings. (Ethiopian interviewee 5, Male)

But one time some policemen without their uniform knocked on my door, I did not open the door, I just asked them what they wanted and they said that a lady did not appear in court for killing a person with her car; and when I asked them what her name is they said they don’t remember it. Then I asked them how they can forget the name if they come from the court and they don’t have any search warrant. Then I called my husband and he came with his brother and when they asked those policemen, they said that they were only checking and they did not know the flat number. We hear such stories; some opportunist police men go to the Ethiopian business men’s houses without uniform and take money. I knew their faces because I always pass the police station when I go to work. And they did not have any paper and they said the lady did not attend court it made me suspicious because I heard that they say that they are there to investigate and end up taking money. (Ethiopian interviewee 5, Female)

In addition, 5 participants expressed their frustration at the treatment they received in police stations when they went for certification and similar services. In one case the participant had to pay a bribe for the policeman to sign a document. According to him, this is a common occurrence since asylum seekers have to have their appeal documents authenticated by a commissioner of oaths and they go to the police station for this service. It has become the normal practice for the officers to ask for money before they certify documents for asylum seekers in some police stations.

And sometimes when you go to the police station for some affidavits they ask for money and in some cases, they side with the unlawful if they are bribed by them. There is a lot of corruption with the police. (Ethiopian interviewee 5, Female)

Such poor service and corruption discourage refugees and asylum seekers alike from seeking services from the police. In some cases, the police actively discouraged them from opening cases against corrupt officers in their own precinct. One could generalize that corruption is endemic both within the police services and the DHA.

Harassment of asylum seekers and refugees by the police through soliciting bribes or simply making xenophobic remarks is well documented by Neocosmos,²⁸⁰ Klaaren, & Ramji²⁸¹ and Palmary.²⁸² CoRMSA²⁸³ in its report outlined that the police detain asylum seekers and refugees despite their being in SA legally, and don't give them a chance to fetch documents to verify their status in the event that the permit is not with them at the time.

Some female respondents seemed to have encountered discrimination at hospitals because they did not speak isi Zulu. They were interrogated and asked to produce their asylum permits or simply refused service. Two women participants complained that when they were in labour, the nurses insulted and mistreated them. The following quote reflects an example of such treatment:

The reason why I have to mention this right now is because two days back, I went to help a sister, who had been refused by one of the public hospitals for treatment when she collapsed at work. She was doing car-guard, and she collapsed. Then they took her to one of the public hospital; unfortunately, the hospital refused to give her any service (treatment), because she did not have a section 24 asylum seeker permit. This itself is something, which is discriminating; it is oppressive in its own; because you cannot deny a service to a person, who is in an emergency, a person who is dying. That is unethical to me. (Congolese interviewee 02, Male)

²⁸⁰Neocosmos, M. (2008). The politics of fear and the fear of politics: Reflections on xenophobic violence in South Africa. *Journal of Asian and African Studies*, 43(6), 586-594.

²⁸¹Klaaren, J., & Ramji, J. (2001).

²⁸²Palmary, I. (2002).

²⁸³CoRMSA (2011). Protecting Refugees, Asylum Seekers and Migrants in South Africa. Consortium for Refugees and Migrants in South Africa. pp 54-89.

However, some participants have appreciated the service they received from hospitals;

The first time I went to the hospital when I gave birth to my daughter. It was very nice, they looked after me; I was very happy. (Ethiopian interviewee 3, Female)

Concerning education, the majority of participants were generally happy with schools. A few participants cited some challenges around access. It seems that once they surmounted the problem of access, their experience did not differ much from that of the locals. This could be because the interaction between parents and educators is limited and is mostly through the children. Responses are filtered through the children to the parents. It is only severe problems that reached parents. Stone & Winterstein²⁸⁴ argue that refugees and asylum seekers face significant challenges in accessing educational services.

One of the most problematic non-state institutions which refugees and asylum seekers deal with are the banks and other financial institutions. The FICA requirement for financial institutions and their clients is sometimes too difficult for refugees and asylum seekers to comply with. Even when these criteria are met there are still obstacles to accessing the rudimentary services of banks, such as opening accounts. Other services are almost unthinkable for most refugees and asylum seekers. Almost 60% of the participants, mostly male Asylum seekers, had such problems. The following participants explained:

Yes, especially opening Bank Account is very challenging, they told me that I must provide ID which I don't have, they always ask you to bring a water or an electricity bill which I don't have. (Ethiopian interviewee 02, Male)

. . . But like a bank I cannot get any access because of my document. They do not allow me to open Bank account and cannot get a bank loan either. Not only me, but many refugees have the same problem like me. (Congoles interviewee 16, Male)

In addition, the permit that refugees and especially the asylum seekers use are not commonly accepted and recognized. Even if permits are accepted, the verification process takes longer and this has become a frustration for banks and the DHA.

²⁸⁴Stone, L., & Winterstein, S. (2003). *A Right Or a Privilege?: Access to Basic Education for Refugee and Asylum-seeker Children in South Africa*. National Consortium for Refugee Affairs.

As a consequence, refugees and asylum seekers have difficulty opening bank accounts and sometimes accessing their money since when the permits expire and are reissued, they need to be verified. The following respondents described their experience as follows:

Normally, my refugee's document lasts between one year and two years and the banks need Identity Document each and every time I renew the status. I often have to go to request them, even begging the Home Affairs officials in a letter so that I can produce it at the bank for my account to remain activated. (Congolese interviewee 01, Male)

When I asked FNB to put me in money market they refused. I also asked the bank to increase the amount of money I can withdraw at a time; they said that with my paper, they can't do that. The people who work in the banks sometimes asked me where I got the money; they even said that that is their money, how can a foreigner make such money, etc. You encounter a lot of problems when you are not a South African. (Ethiopian interviewee 07, Female)

The researcher's enquiries revealed that banks have stopped accepting refugee and asylum status permits to open a bank account mostly because of the complications in verifying these documents. When restrictions on opening accounts was waived for people on short contracts in South Africa, banks refused the waiver for asylum seekers who often end up in SA for extended periods of time²⁸⁵. The only banks that are willing to do so are FNB, Bidvest and Capitec Bank. FNB has seen it as a way of increasing its client base and is generally appreciated by refugees and asylum seekers as explained in the following quote:

And really, even if I say that FNB is doing a great job in helping, in assisting asylum seekers and refugees, but they also sometimes have to change policies. . . (Congolese interviewee 02, Male)

Therefore, most refugees and asylum seekers have FNB accounts. But even FNB has scaled down this practice because of the complication of verification and has stopped opening accounts for asylum seekers. It has however continued to give service to those who already have an account.

²⁸⁵Bhamjee, A., & Klaaren, J. (2004). Legal problems facing refugees in Johannesburg. *Forced migrants in the new Johannesburg: Towards a local government response, Forced Migration Studies Programme, University of the Witwatersrand, Johannesburg.*

In general, the experiences of refugees and asylum seekers with state and non-state institutions is rather negative. This is especially so with DHA, the police and to some extent the banks. On the other hand, refugees and asylum seekers have much better experiences with schools, except in gaining initial access.

5.5 Experiences of refugees and Asylum seekers with NGOs and other civic organizations

The number of NGOs working with refugees and asylum seekers in SA steadily increased in the 2000's. The research has therefore tried to gauge asylum seeker and refugee knowledge of NGOs in different ways. Participants were asked if they had received any assistance from any civic organization after they arrived as this is the time when they would most need assistance. Participants were then asked if they had been assisted by any of the three NGOs chosen for the case study.

As explained above, most asylum seekers at first depended mainly on the networks that are based on their nationality or ethnicity. Female asylum seekers and refugees depended on their husbands and other family members for assistance when they first entered SA as the following quotes indicate:

He [Her Brother] helped me to get used to the country, I was not working when he was here, I started to work after he left South Africa. (Ethiopian interviewee 07, Female)

We had one family friend with who was staying with us together in Rwanda we met with him here. He helped us for three days and we moved to our new place. The house in which they were living in was too small and we could not live all together. That friend showed us the DHA and we started doing car guard. This is how we started our lives here in South Africa. (Congolese interviewee 02, Female)

Almost 80% of all participants depended on their network of relatives for assistance, while 20% depended on NGOs and churches for support, as the following quote indicates:

It was in the afternoon when I first arrived in South Africa. So, I had to go to a friend, as I was not familiar with the environment, nor I was not able to reach my brother over the phone. That guy showed me where I could find other asylum-seekers, and explained

me what I had to do about different procedures to follow as well as diverse roads and connections needed to survive. So, that friend of mine had been helpful, she also explained to me some major challenges that people face when they first arrive in South Africa, such as problems of food, shelter and so forth. Later, she took me one NGO called MCC, currently called Refugee Social Services (RSS). I was fortunate to be taken from interviews; they really helped a lot by sending me to do some English courses. Due to them, I had learnt some subjects like effective communication and social relations. They had also introduced to some computer courses. In addition, they had assisted me with shelter for three months. I still am grateful for their assistance, because at that I had place to spend a night.

The same NGO did many more things to help me. They provided me with hampers of food, and had also referred to one South African organization, which assisted people. That organization basically helped South African citizens, however, due to our critical conditions; they became lenient and assisted me by enrolling me in their programs, such as participating in computer course programs, again in doing effective communication in English and social relations within the same organization, which was called South African National Zakah Fund (SANZAF). This is briefly how I had been assisted when I first arrived in South Africa. (Congolese interviewee 02, Male)

Support has to do with material support in the form of shelter and food and assistance accessing documentation. This support system goes further by helping asylum seekers and refugees to access jobs and business opportunities. It is a network that acts as social support as well. The kind of support one gets differs based on how relatively cohesive a group is. Support Ethiopians receive from their support network is greater than that of the Congolese. This could be as a result of cultural factors and other conditions contributing to social cohesion.

The second question that asked what knowledge participants had of the NGOs chosen for the case study, yielded surprising answers. Almost 35% of respondents had no knowledge of these NGOs. The interviewers made it a point to describe the NGOs and what services they offer to refugees and asylum seekers. 45% of the participants had some knowledge. For example, some

of them knew about one or two of the NGOs, others knew that there are NGOs who assist asylum seekers and refugees, but without knowing these specific NGOs. These quotes reflect the different levels of awareness of these NGOs' existence and work:

I have heard of LHR. Apparently, they help refugees with permit problems. I have never visited their offices or been assisted by them. As for RSS, I know of someone who were assisted by them financially and been given some kind of training. I don't know SC. (Congolese Interviewee 02, Male)

I know a lot about RSS. Because of my work, we send a lot of refugees to RSS to get assistance in housing, education and skills. They are very helpful. I also know of LHR. They help refugees that have a problem with their papers. They used to be active. Sometimes they help but most times they don't. . . There are also churches and other NGOs who help refugees. (Congolese Interviewee 02, Female)

Only 10% of participants have received assistance ,besides humanitarian assistance, from the NGOs resulting in positive resolution of problems in favour of the asylum seekers and refugees. Of the three NGOs, LHR is the best known as stated earlier. Most of them referred to it as 'human rights' even though the number of people who had been assisted by this NGO was not high. The kind of assistance they received from the NGOs was material assistance in the form of food parcels and financial assistance for rental; assistance with permit problems; as well as language and skills training. Assistance received during the xenophobic attacks in 2008 is described in this quote:

. . . During the time when xenophobic attacks were recurrent, there was this church called Christian Centre in Johannesburg and they used to provide us with food for about two months, but they did not give us shelter because they didn't have the facility; it was more of a psychological support. (Ethiopian interviewee 07, Female)

Yet again, refugee and asylum seeker knowledge of the existence and work of these NGOs emanates from participants' networks.

It was rarely the case that asylum seekers and refugees had read about or got informed by the DHA to contact these NGOs. This is a major challenge for refugees and asylum seekers. It is difficult for asylum seekers and refugees to seek help if they are not aware of the existence of these organizations. Another reason for the under-utilization of these NGOs could be that since

they have very limited resources, NGOs cannot help all clients who approach them for assistance, let alone advertise their services.

5.6 The gaps that NGOs and other entities are not filling

It is a fact that NGOs cannot replace the government or the DHA. Their role is rather limited. The systemic problems within the asylum system are deeply rooted and beyond the capacity of the NGOs to solve. This is due to lack of capacity; or because asylum seekers do not approach them. Their capacity to address institutional xenophobia is therefore restricted. Whether in banks, police stations or the DHA, asylum seekers and refugees experience xenophobic attitudes. They do not have much recourse for redress outside the institutions. In general, there seems to be a huge gap between what asylum seekers and refugees expect and the ability of NGOs to address the various problems that plague these vulnerable people.

The persistent problems faced when trying to access banking services is an example. These services are crucial to the safety and development of asylum seekers and refugees. Even though the banks were litigated against and a judgment passed against them, NGOs did not follow through in addressing this gap. It is understood that there are structural problems in the process of the verification of permits mainly in the DHA.

Problems accessing banking ebb and flow depending which bank is willing to open accounts for those who need them and depends on which branch one deals with. FICA gives the banks some discretion in make a decision on who constitutes a risk as far as opening an account is concerned. Unfortunately, they have taken a deliberate decision to exclude a group of people whom they deem problematic. As a result, asylum seekers most especially battle to open bank accounts and eventually cease trying. Not one participant in the study, who had encountered problems opening an account, had approached the NGOs.

Annual reports of the three NGOs reveal that some clients have approached the NGOs regarding banking. However, there is no indication that the NGOs took coordinated action to address the issue. Even though SC blamed the DHA for not verifying documents expeditiously, the non availability of a system that would enable banks and other institutions to verify documents has not been addressed. The same could be said about other institutions such as the police services. Nor do we see coordinated action in public spaces to highlight these problems. NGOs have therefore shown weaknesses in not dealing with certain issues.

5.7 Analysis of NGO Data

The researcher identified three NGOs; Lawyers for Human Rights (LHR); the Refugee Social Services (RSS); and Scalabrini Centre (SC). The RSS and LHR are implementing partners of the UNHCR, while SC is an operational partner. There is a tabular profile of all NGO personnel respondents in appendix 2. RSS and SC are similar in their operations and the services they provide. The LHR is different. Each has a sort focus area that reflects its organizational history and area of specialization. There are some overlaps between the three. Thus, it is important to understand the focus area of each organization.

5.8 Focus Area and Capacity of the NGOs

Each NGO has a specific area of focus depending on its area of specialization and background.

Lawyers for Human Rights (LHR)

The LHR focuses almost entirely on advocacy and litigation as a way of protecting the rights of refugees, in the drafting or implementation of laws. This focus is grounded in the history of its formation when it used the law as a stick to realize the socio-economic rights of South Africans against the background of apartheid and its after effects. Hence, the Refugee and Migrant rights project is an extension of this function. Unlike the other two NGOs, the LHR's focus on migrants and refugees is a project within the organization but is not the core function of the organization.

Despite this distinction, the project has grown to become the biggest area of the organization and has significantly contributed to the asylum and refugee regime in South Africa.

LHR also focuses on detention monitoring at deportation centre such as Lindela, and has produced a report on the treatment of detainees at this centre.

LHR has made a significant contribution to the advancement of the jurisprudence of refugee law in South Africa. The number of cases the organization has taken to court, and the numbers of judgments found in its favour, are testament to this. In cases where it is not directly involved, its lawyers are consulted. Interviews with the two other NGOs indicate that the LHR is held in high esteem:

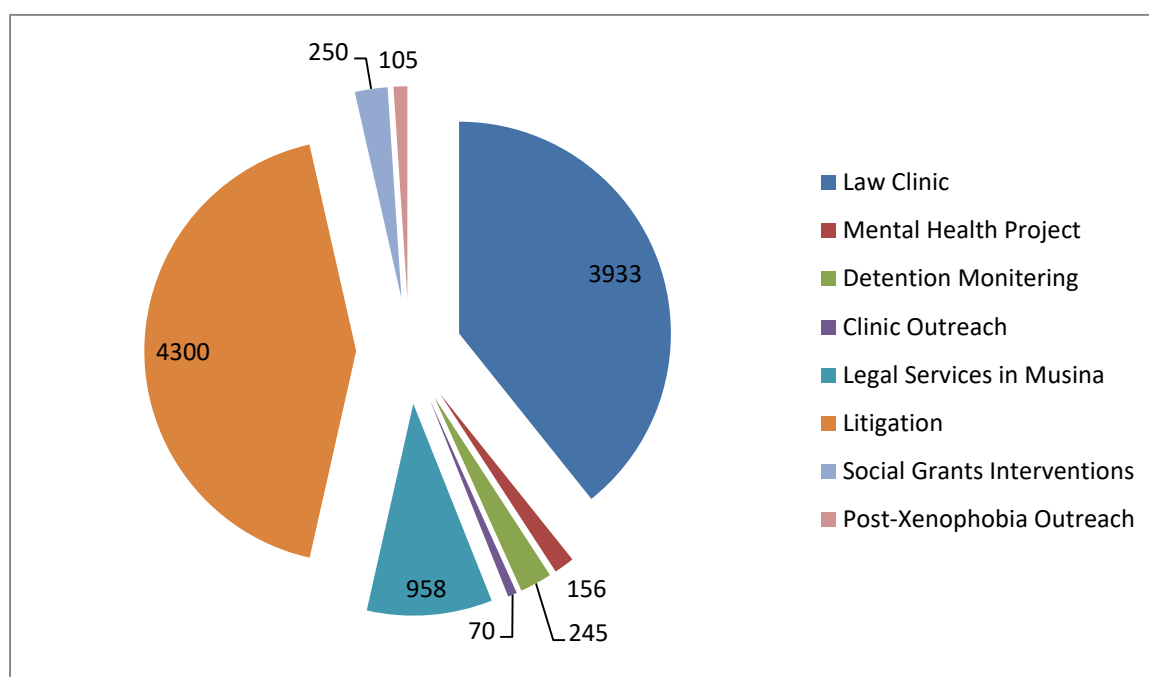
. . . Sometimes refer them [clients] down to LHR when it comes to it. . . (Ms. Khan, RSS Director)

. . . But they [LHR and LRC] are also doing a lot of the leg work. But there would be our name on it (Corey, SC Advocacy officer)

Despite these successes, there is a frustration among asylum seekers and refugees that their own particular cases are not taken on by the organization. LHR makes it clear that the litigation they undertake has to be impactful and precedent setting. Given the magnitude of the problems within the refugee regime, it is unrealistic to expect LHR to address every grievance. They have to be selective. There have even been suggestions that LHR tends to be in cahoots with DHA. Looking at the litigation directed at DHA by LHR, it is hard to imagine this to be the case.

There is a general dissatisfaction with the LHR based on a lack of information on what it does and how it goes about choosing cases. However, when compared with the other two NGOs, it is clear LHR has assisted far more people: 10,000 in 2013; and 7692 in 2014. Out of 10,017 assisted in 2013, over 9000 received legal services - including 4300 cases of litigation. This impact is because of LHR's footprint in four cities.

Figure 3 Issues of clients that LHR dealt with in 2013²⁸⁶



The LHR is mainly funded by the UNHCR since it is an implementing partner. In addition, the European Union, Atlantic Philanthropies and the Sigrid Rausing Trust, the National Lottery Board and other organizations²⁸⁷ provide significant funding.

Refugee Social Services (RSS)

This NGO has been active since 2003 as a project of the Mennonite Central Committee and was known as the MCC Refugee Project. It was registered as an NPO in 2008, with the social welfare of asylum seekers and refugee as its core function. The Mennonite Refugee Project started as a way of addressing humanitarian issues of asylum seekers and refugees. It recognized the need for deeper involvement and became RSS, an organization in its own right. This NGO focuses on providing welfare services such as consultation and advice, mainly to facilitate access to education, health facilities and, to a limited extent, material assistance to asylum seekers and refugees. It is based in Durban with a satellite office in Pietermaritzburg.

²⁸⁶Lawyers For Human Rights. (2014). *2013 annual report*. Pretoria: LHR. P.23

²⁸⁷ Lawyers For Human Rights. (2014). P. 57

RSS main funding agency is the UNHCR as it is an implementing partner of UNHCR. The MCC continues to support RSS by providing trained personnel and significant financial assistance. There is also project based funding from Oxfam and other organizations.

In 2014 the RSS opened 2136 files for different kinds of assistance, apart from ongoing case files from previous years. According to the RSS implementing partner report to the UNHCR, this number excludes people helped or being helped in different programmes that have an impact on 20,000 beneficiaries²⁸⁸. It is however difficult, to verify these figures.

Scalabrini Centre (SC)

Scalabrini Centre (SC) concentrates its work in Cape Town and surrounding areas. It was founded by a religious order of the Catholic Church to assist migrants. Even though its 210 bodies mean it has an international presence all over the world, its character and work is very much localized. It has a significant footprint in Cape Town.

Its focus is on facilitating access to education, health and employment through rendering advice and training. It also houses Lancaster House at its branch. It has advocacy officers that actively participate in lobbying mainly the DHA and other governmental bodies. It also gets involved in litigation as a way of promoting the socioeconomic rights of migrants with the help of other NGOs.

Unlike the other two case study NGOs, SC has its own source of revenue by virtue of owning the building that it operates from. It also has a bed and breakfast business and rents out conference and workshop facilities. By so doing, it avoids carrying a significant operating rental overhead. It generates its own income, and from information gleaned from the interview, has the freedom to decide on the work it wants to pursue.

SC is an operational partner of the UNHCR. Therefore, it cooperates with the UNHCR in some projects. The UNHCR conducts its resettlement interviews within rented premises of the SC. SC has multiple funders such as the mother body ASCS Scalabrini, DBSA, National Lottery, Department of Social Development, US Department of State, other smaller organizations, and private donors.

²⁸⁸ Refugee Social Services. (2014). *UNHCR implementing partner report, Part 2*. Durban: RSS. P. 3

²⁸⁹The SC uses many volunteers, including highly capable international volunteers, to carry out its work, thereby cutting down on significant staffing costs according to the SC manager Ms. Madikane;

. . . We hugely rely on volunteers. If my program staff is 20, half of them are volunteers. . . I don't do anything for my volunteers. I don't get their visas and I don't pay them anything. . . They pay me. They pay me to come and for the honour of being a volunteer. What I have done is that I have hired a low capacity local staff and it was very frustrating. I need people who can understand log frames and I need people who understand program design. In the end it is technical. (Ms. Madikane, Director of SC)

In 2014 SC assisted 1,243 individuals whose primary issues were access to education, banking, expired permits, corruption and need of appeal assistance.²⁹⁰

From a gender perspective, the number of asylum seekers assisted across SC and RSS is skewed in favour of women at 55%-60%. Data is not available for LHR. In terms of nationality, the number beneficiaries that are DRC nationals, far exceeds the number of Somalis and Zimbabweans across all three NGOs. This reflects the cultural dynamics and cohesion within the DRC group. These organizations hardly advertise but asylum seekers and refugees get to know about them through networks. Both LHR and SC deal with undocumented migrants. However, RSS has a clear policy of only dealing with documented migrants.

Analysis of the NGO data focuses on the themes of: advocacy; monitoring implementation; access to Social Welfare; access to documentation and other services; dealing with xenophobia and integration; and cooperation with the UNHCR and other NGOs.

5.9 Advocacy

Advocacy is an influential tool which ensures that all refugees enjoy a meaningful and dignified experience of asylum in South Africa. There is a continuing need for advocacy, as the implementation of the liberal refugee laws has been very flawed. Both LHR and SC actively participate in advocacy whereas RSS hardly participates in advocacy. The LHR has been an active participant in the drafting of the Refugee Act from its inception. At every turn along the

²⁸⁹ Scalabrini Center of Cape Town. (2015). P. 25

²⁹⁰ Scalabrini Center of Cape Town. (2015). P. 23

way, LHR has participated in making submissions on any changes in legislation and procedures. LHR has made great contributions in delivering on access to education, health and other services. For example, it contested the closure of the Port Elizabeth RRO in cooperation with the Somali Association. It litigated for the reopening of this centre and won a favourable judgment:

. . . With education, previously children who were undocumented were unable to access schooling until they regularize their documentation. So last year at the end of 2013, we went to the High Court and we got the procedure overturned. It is known as the Separated Children case. Their names are concealed for... So we got children access to education; all children, which is great. With regard to health care, we brought a couple of cases, especially the case of the Somali child. We call it the Somali Child case. . . So basically that one interpreted the rights of emergency health care and helped a Somali access a heart surgery even if she was undocumented. (Ms. Erasmus, Head of LHR RMRP)

LHR is most often seen in litigation. However, there are media statements and comments about specific issues that LHR makes that are important for highlighting different issues. In addition, LHR carries out awareness campaigns and community engagement. The LHR media liaison officer explained;

What we also do is quite an extensive amount of community training and engagement. We provide workshops for various community groups with the focus on marginalized groups like women and children. (Ms. Erasmus, Head of LHR RMRP)

The SC also engages in advocacy but differently, as SC has 4 advocacy officers with a separate advocacy department. They engage with policy changes that the DHA introduces in the form of making comment and participating in meetings:

We were at that litigation and participated in Gigaba's [Minister of Home Affairs] round table migration policy review. That was last year. There is another one next month. There is also another refugee act amendment bill that is coming soon. We always put submissions on any legislation that goes to parliament on our experience on how it will work and how it won't work and what might be a better solution. (Mr. Jhonson, Advocacy officer of SC)

So then we had this court order consultation here in Barrack Street. LHR came from Pretoria. We tried to bring everybody in. SCMS or Wits University was there. UCT, ourselves LRC and a multitude of other smaller organizations and everybody who was there was against the closure of the office. (Mr. Jhonson, Advocacy officer of SC)

It is clear to see that the SC gets involved in high level advocacy with other NGOs as well as the UNHCR. The advocacy officers also attempt to bring to light the day to day challenges faced by refugees and asylum seekers, by engaging with the appropriate authorities, be they banks or the DHA. This is mainly regarding access to documentation, and protection issues relating to the police. SC deals with cessation as in the case of Angolan refugees, and deportation. According to Mr Jhonson:

So our main priority is helping people realize their rights through the asylum system. I would say kind of promoting the integrity of the asylum system or the migration system generally. (Mr. Jhonson, Advocacy officer of SC)

RSS additionally engages in low level advocacy, in the matter of access to education, health care and social welfare. According to the RSS, they were successful in creating access to social grants for refugees:

We lobby a lot, lobbying around the individual cases. For instance, a school doesn't accept a child. We call the school to check what is happening. We lobby them about who this refugee child is. I am just using it as an example. It might be even in a hospital. We do one on one awareness raising with them so that they can get the service. We also do other lobbying.

We advocate change for policies. We are always talking and raising awareness in South African community to who you [asylum seeker or a refugee] are and why you here. (Ms. Raja, director of RSS)

LHR is the most active and makes the most significant contribution to refugee rights advocacy. In the last 10 years, however, the nature of advocacy has changed from being cooperative to being combative, as the DHA continuously tries to limit the rights of asylum seekers and refugees. The DHA goes as far as ignoring court judgments. Implementation monitoring relative to advocacy, is an integral part of the functions of these NGOs.

5.10. Monitoring implementation and providing protection

The Refugee Act provides asylum seekers and refugees with significant rights that are considered sufficient to ensure their wellbeing. Civil society however laments the lack of proper implementation. Therefore, all three NGOs identified in this research – to one degree or another – monitor implementation. The four main problem areas relating to implementation are: access to the DHA and other services; proper adjudication of asylum cases; detention; and corruption.

5.10.1 Monitoring of Access

Access to the DHA or other services that asylum seekers and refugees are entitled to according to the law, is one of the main problem areas when it comes to the implementation of the Refugee Act. Access to the DHA is important for newcomers as it is the gateway to lawful residence in SA. Any delay, hindrance or obstacle is therefore extremely detrimental as a significant number of asylum seekers and refugees lack any other supporting structure. All three NGOs were asked to identify the main problems that refugees face.

Their responses were:

“The biggest challenge is the documentation itself and access, and the whole range that come with that.” (Ms. Raja, director of RSS)

There are so many problems for people depending on where they are in the system. Maybe they are manifestly unfounded and they can't access the Refugee Appeal Board (RAB) Maybe they are newcomers with the family in Cape Town and they can't access the RRO. Maybe they are ex-office Musina clients; they need to travel with their whole family to Musina to renew their permit. (Ms. Madikane, Director of SC)

There are human rights abuses that take place in the refugee reception offices like the use of sjamboks²⁹¹, protective spray and buttons which is not appropriate. Also, they

²⁹¹*Sjamboks* Is a heavy leather whip. It is traditionally made from an adult hippopotamus or rhinoceros hide. It is also commonly made out of plastic.

have problems with backlog so they have problems with extremely long waiting period for their documents. It takes years and years for them to get a hearing date for example. (Ms. Erasmus, Head of LHR RMRP)

The problems listed by the head of the LHR RMRP and the director of the SC had to do with access. These include corruption, maltreatment by DHA officers, and problems with certain processes of accessing Section 22 (asylum seeker) and Section 24 (refugee) permits. Unfortunately most of the work of these organizations in these matters has been done on a case by case basis. Handmaker²⁹² and Crush²⁹³ underline the challenges for asylum seekers to access services not only in DHA but at other government departments as well. All three NGOs said they had some sort of relationship with the DHA, ranging from good to bad, depending on which office and official they dealt with. The SC believes that they are generally not liked by the DHA because of their court challenge to the closure of the Cape Town RRO.

The SC stresses that individual perceptions and working relationships also matter:

On a problematic level, my advocacy officers do have a good relationship with the director at the RRO. The only problem is that he just resigned and the acting director, we don't have a good relationship with. It is a people thing. Just because on the top level there is a feeling of distrust for this centre's work, it might not work well. On a programme level, on ground level, it moves as people move. Sometimes it is a good relationship and sometimes it is a bad relationship. No, definitely we can pick up the phone and speak to them. At the moment it is difficult. Mr Ndlovu is one of those who doesn't like Scalabrini Centre. In fact, we ask clients not to say that they received advice from the Scalabrini Centre because it prejudices their case against them to have association with us. (Ms. Madikane, Director of SC)

LHR expresses the same sentiments in terms of their ability to engage in a relationship in with the DHA:

There are certain people within Home Affairs that we have a very, very productive working relationship with. We can refer cases for easy dispute resolution and that

²⁹²Handmaker, J. (2009).

²⁹³Crush, J., & Ramachandran, S. (2010).

sort of thing. At other times we are forced to litigate against Home Affairs, you know, because they would be sort of unwavering on a point which we thought was not negotiable. The relationship with Home Affairs is complicated. It is generally definitely one where we prefer to be you know engaging, mediating and negotiating with them. And that is the first port of call. But our second port of call would be to litigate if it becomes necessary. (Ms. Erasmus, Head of LHR RMRP)

The SC advocacy officer Mr. Jhonson and Director Ms. Madikane stressed that closure of the Cape Town RRO severely hampered access to documentation for newcomer asylum seekers, and the renewal of the permits of others, who had to go to other RROs. They cited this as a major challenge of access in Cape Town and surrounding areas as asylum seekers had to travel 1400kms to get to the nearest RRO. Mr. Jhonson explained the difficulty:

The current issue is that the refugee office has closed to new applicants in 2012. A lot of problems stem from accessing the asylum system. That might be just people who have just arrived in the country, and they end up in Cape Town because there is an established community of foreign nationals, whether it be Somali, Ethiopian, . . . come here because they have an acquaintance here or they know that they kind of lean on the community for some support, but then they can't get any documentation because the office is closed. . . So a lot of them will come back to Cape Town and maybe not the first renewal, the second renewal they will kind of see them run out of money and not able to travel back. I mean it is hard enough going to Pretoria, harder to go to Durban and extremely hard to go to Musina. It depends where you lodged your application. . . Now, so we are assisting UCT with a case on the legality of that and also Legal Resource Centre who has another follow up case on the legality of that. (Mr. Jhonson, Advocacy officer of SC)

Despite several engagements with the DHA and a judgment by the High Court that orders the DHA to reopen it, the office remains closed. Taking the DHA to court is a sign of the SC's frustration with the problem. The same could be said about LHR that together with the Somali Association, took the DHA to court regarding the closure of the Port Elizabeth RRO. Again, the court ordered that the RRO be reopened, but to no avail. Out of the three NGOs, the RSS has had the least engagement with the DHA. The Director of RSS stated that they could engage with the centre in Durban and they generally had a good relationship, but she said that the monitoring of implementation was not their 'primary purpose':

If we come across children that are undocumented for instance, it is not a problem for us to pick up the phone and say 'we need this and we need that'. . . Our relationship, sometimes to Home Affairs is not as direct as maybe some other organizations. (Ms. Raja, director of RSS)

Conversely, RSS social workers exhibited frustration at the way the centres operated. She went on to say that it did not mean that they did not cooperate. However, it was obvious that they did not interact much with the DHA.

All in all, the ability of the NGOs to engage with Home Affairs and bring about better conditions for asylum seekers has been weakened by the lukewarm relationship between the DHA and civil society. One might conclude that, the less than ideal relationship hampers the ability of the NGOs to improve access. In some cases, they have been successful, but not in others, such as the closure and the refusal of DHA to open the closed RROs despite court order.

Concerning promotion of access to other services, SC and RSS do engage with schools and banks. In the case of the RSS, the director claimed that they had met with success in acquiring access to social grants:

It is also legislation around social assistance. Previously we lobbied inclusion of refugees in social security. And then when the legislation came out, we monitored (because we gave our clients' information too) if the refugees are getting the grants to those who qualify. We picked up on the challenges and went back to the people in DSD nationally and locally and we said it [raised the issue of grants] on a group basis and brought up the case studies. We said, you know what, there are inherent flaws in the system and this and this has to be changed. (Ms. Raja, director of RSS)

Ms. Raja was referring to the case of the refusal of the DSD to give refugees access to social grants. This was one example of NGOs successfully lobbying and advocating and bringing about a change in how a government department operates, thereby bringing about improved access.

In terms of access to health services, both the RSS and SC do directly approach hospitals and clinics when individuals have a problem:

You should have some time to regularize yourself and get the documents required. That is three months or something. So, we usually have a template letter setting that out and we kind of set forth the person's situation. If it is a newcomer, it is fairly straightforward. If a person has just arrived, they are going to apply as soon as possible. We advise them as much and accept the child in the interim while they are getting these documents sorted. (Mr. Jhonson, Advocacy officer of SC)

LHR has made a significant contribution in terms of gaining access to health services and education for undocumented migrants:

With education, previously children who were undocumented were unable to access schooling until they regularize their documentation. So last year at the end of 2013, we went to the High Court and we got the procedure overturned. It is known as the Separated Children case. Their names are concealed for... So we got children access to education, all children, which is great.

With regard to health care, we brought a couple of cases, especially the case of the Somali child. We call it the Somali Child case because the names are concealed. So basically that one interpreted the rights of emergency health care and helped a Somali child access heart surgery even if she was undocumented. So these two were the cases we brought. (Ms. Erasmus, Head of LHR RMRP)

These two cases created a significant precedent in the granting of health and education services. Access to documents required for education and banking services is problematic. The involvement of the 3 NGOs in these areas was inevitable as they affect the prospects of asylum seekers and refugees making a living as well as their ability to develop themselves.

Most often, asylum seekers become a victim of crime because they keep their savings at their places of residence. The problem exists for two reasons:

As a result of the Section 22 of FICA regulations, a person who wants to open an account has to have a proof of residence. This regulation applies to everyone. Some asylum seekers live in groups to make it easier to afford housing therefore, they are unable to produce the necessary documentation such as utility or municipal bill required for opening an account.

Secondly, because the verification of the asylum status requires resources, banks are reluctant to provide services to asylum seekers, and in some cases, refugees. For instance, ABSA and Nedbank do not provide services either for asylum seekers or refugees. The researcher's enquiries have revealed that some banks such as the FNB, Capitec, and Bidvest have recently shown a willingness to provide financial services to asylum seekers.

All the three NGOs have been involved in addressing these issues either on an individual or group basis. RSS formed a partnership with an FNB branch where the bank sent one of its staff members to open accounts for refugees and asylum seekers:

A couple of years back, I think 2008/9, we helped a whole lot of people open up FNB bank accounts because we managed to get one consultant in and understand what the situation is. She actually came here and opened accounts. But it is up and down. (Ms. Raja, director of RSS)

On the question as to why some banks refuse to open accounts for refugees while others do, Ms. Raja acknowledged that she did not quite understand what the problem was. That seemed to be the case with all NGO personnel interviewed. There also appeared to be a lack of information on which banks open personal accounts for refugees and/or asylum seekers.

SC also assisted refugees and asylum seekers in opening business accounts. According to Mr. Jhonson, the SC used to have a good relationship with FNB, which bank would accept permits that needed to be verified, and wait while the DHA staff did the verification. That used to facilitate the account opening process. However, according to Mr. Jhonson, a local newspaper criticised FNB claiming that the bank was ill-treating asylum seekers and refugees. From then on, FNB decided not to open any new accounts, but continued to maintain the existing ones. He also stated that it had not been as much of an issue lately as it had been two years ago. He speculated that the online verification process that the DHA had set up for the banks to use, might now be facilitating the process. Mr. Jhonson squarely puts the blame on the DHA's inability to verify documents promptly.

LHR did not litigate forcefully on this issue:

Basically, with the banking issue what we have done is to liaise extensively with banks and try to get people to open their account. We had success with a number of cases. But we have not achieved a widespread acceptance of refugee and asylum seeker

banking. It has been more a case by case basis. . . The banking issue remains largely unresolved except on a case by case basis. (Ms. Erasmus, Head of LHR RMRP)

There seems to be a lack of NGO coordination on this problem except for the court case in 2010 when CORMSA, the UCT Law Clinic, and LHR took ABSA, other banks, the FIC, the Ministry of Finance, and the DHA to court regarding the lack of access²⁹⁴ to banking services. The court ordered the banks to allow asylum seekers and refugees on S22 and S24 permits to open accounts if their permits are verified. In addition, FIC was ordered to communicate this decision to all the banks.

However, this problem persisted even after the court order as CORMSA stated in its 2010 report.²⁹⁵ Despite the existence of this problem before and after the court decision, there was no coordinated action by NGOs to tackle it.

Even though the DHA put in place a system enabling banks to check the validity of a permit, banks continued to refuse to open accounts, especially for asylum seekers.

Access to social services ranging from counselling to grants, is important for asylum seekers, as some of these vulnerable people come from troubled pasts and violent conflicts. Both the SC and RSS have social workers and provide counselling:

We do a lot of referrals for specialist services. So, there is in house counselling and there is outsourced counselling with psychologists for which we contribute for the payment too. (Ms. Raja, director of RSS)

In fact, the first few weeks in South Africa is daunting for some asylum seekers and it is then that they need counselling. The RSS even has Congolese social workers able to communicate with clients in their home language. RSS and SC facilitated access to social grants because both NGOs have good relationships with the DSD and SASSA:

DSD, we have a good relationship. We have a good relationship with SASSA, at least the Bellville branch. We have some officials that we can talk with and we had

²⁹⁴ Consortium for Refugees and Migrants in South Africa v ABSA Bank Ltd and others ((2010 (1) 34220/10

²⁹⁵ Consortium for Refugees and Migrants in South Africa. (2011). P. 45

meetings about current problems with home affairs. (Mr Jhonson, Advocacy officer of SC)

Both the SC and RSS have programmes that facilitate employment opportunities. These include language classes, teaching certain skills and CV writing as well as placement in certain job categories (in the case of the SC). The SC as well as RSS give English language classes:

So we run a development program which has an English school. English has about 350 people registered. It is a 13-week programme and five hours a week. There is a huge extracurricular programme that runs around the English school.

Primarily, aimed at offering opportunities for free conversation, but we load in their human rights. We load in their messages that we would like to come across and being a topic of conversation. And then also there is confidence building. It is just life skills, drama, debating, conversation... we call it English Alive and it is quite organic. (Ms. Madikane, Director of SC)

The employment access programme of the SC is the most extensive and successful compared with that of RSS. SC has a good relationship with the Departments of Education and Health for the placement of teachers and nurses respectively. It met with success particularly in placing Zimbabwean teachers. The director reported placing 15-20 teachers per term. It has both skilled (professional) and unskilled refugees and asylum seeker placement programmes:

We also have an employment access programme which has four sub programmes. It is for skilled migrants. . . Employment access programme, we have for the highly skilled. Anybody with a tertiary education with normally course longer than one, are considered in the highly skilled side. There are so many barriers and access problems. So, we work individually with our highly skilled, we call them foreign professionals. Mainly artisans, we have a success. We try to give nurses other ways of accessing employment. We have been running a teacher's programme which has been so successful where we put teachers in internships. We have seen a 50% employment rate from these internships. Now what we find is we are getting less teachers and I think because of the closure. We are getting fewer documented newcomers [related to the closure of the Cape Town RRO]. What we are seeing is that the newcomers are undocumented newcomers (Ms. Madikane, Director of SC)

One of the rather interesting services the SC offers with the help of the US government (State Department) is psychometric testing of clients in the employment access programme. In addition, it offers ‘digital literacy’, and basic life skills programmes.

The three NGOs work at providing access to documentation and other services. Of course, the level of their involvement differs one from another: LHR is most active in ensuring access through high level advocacy and litigation; SC and RSS, focus on helping individual refugees and asylum seekers gain access mostly through advice, information and personal contact with the relevant authority. Access to services is however sought in vain if asylum cases are not adjudicated properly and fairly.

5.10.2 Monitoring the adjudication of asylum cases

The adjudication of cases by the DHA has been one of the most problematic aspects of the refugee regime. The problems that are most often reported are: corruption; deficient skills of RSDOs; excessive caseloads with RSDO; and a broken appeal system where cases from the early 2000s are still not resolved.

Since corruption is so pervasive and damaging in all aspects of the system, the study will discuss it separately. Even though all organizations have identified it as one of the problems, monitoring it is not easy. Clients are assisted if they have a valid case of unfair rejection or of appealing an RSDO decision. As to the skills of RSDOs, it is a wider problem throughout the South African civil service:

Also Home Affairs got a poor understanding of what is happening in African countries. They are unable to place the countries on the map. They are unable to understand what the conditions are like in various countries leading to terribly poor decisions. (Ms. Erasmus, Head of LHR RMRP).

One of the critical skills required of an RSDO is to have a good, if not excellent, understanding of the geography and politics of different regions of the world. Mr. Jhonson indicated some RSDOs could not locate Syria on the map after the conflict had been going on for a year. There have been decisions where RSDOs made mistakes in recording vital information such as nationality, or based their decision on outdated information:

Unfortunately, it [DHA] has systemic problems or poorly made decisions on the high number of applications, limited resources by RSDOs, and blatant corruption. A lot of people get rejected, they shouldn't be. . . Like I was just looking through some this morning of a guy clearly from Brazzaville [Congo] has a passport saying he is from Brazzaville. In his decision, 'here a Congolese from Brazzaville from DRC, you said this. . . You were... None of this makes any sense. One person was a Burundian says he is from India. Another person was clearly a Somali, 'you were born in Harare, Zimbabwe'. It is a manifestly unfounded decision for the Zimbabwean. Somehow it got switched up, and they gave him this decision. 'This isn't me.'

A lot of times, the initial RSDO will say, 'Hey, don't worry. There is an appeal process for you. You can get status if you appeal. The RSDO's just have a lot of decisions to make. They are always kind of copy and paste negative decisions. (Mr. Jhonson, Advocacy officer of SC)

Mr Jhonson claims RSDOs are pressured not to issue many Section 24 Permits (refugee status):

That is also another reason people get rejected because every positive decision you make, if you are RSDO, Home Affairs would look at that to see if it is legitimate. You can't issue too many decisions. Otherwise, you draw attention to yourself. 'Why is this guy giving out so many positive decisions?' I think what they do is say. 'I am not going to give anybody status.' You might get status if you are very vulnerable person with a strong claim. You might sneak through that way. But I think a lot of it is corruption. Of course all this is hard to prove. It kind of seems that way. (Mr. Jhonson, Advocacy officer of SC)

The appeal system is also seriously understaffed considering the number of appeal cases. Almost half of the rejections go to the Refugee Appeal Board (RAB) and the rest to the standing committee. There was only one RAB official for the Cape Town area for a long time:

But I think that might be difficult considering how bad the first instance decisions are. And the appeal board is under resourced. For a long time, the appeal board used to sit as one judge. So there is a guy here in Cape Town and he would do all the cases in Cape Town. So, maybe you go and have the appeal and it takes him two years to write the decision. At some point in time, there was somebody who challenged the legality of having one appeal board member. I don't know whose case that was or who took it

forth. I don't think it was any of our partners. The court ruled you can't have an appeal board if it is one person. All the decisions if he heard it by himself, it has to be reheard. Maybe, in 2011 you had your appeal hearing. But he did not get around to writing the decision, now it has to be heard again. That added to the already big case load of all these people still getting rejected and turned down. Anyhow, a lot of the initial decisions are so bad. (Mr. Jhonson, Advocacy officer of SC)

Despite these chronic problems, there was no concerted effort by NGOs to address them. It seems the inability to address this problem stems from the nature of the problem. The responsibility for decisions on asylum applications solely rest on the RSDO. The system has an inbuilt checking mechanism through managers who sign the issuing of a Section 24. This oversight function is not applied in the process of rejecting an applicant.

The appeal process is broken, at best so the inbuilt mechanism of checking the decisions of the RSDOs does not work. Unless they litigate, NGOs do not have the authority or the cooperative relationship to ask for a review of decisions. Considering the number of problematic decisions, they do not have the resources to take the Department to court on each problematic case. LHR has done so in a few cases based on the high chances of success. That the effectiveness of litigation is also seriously limited can be seen by the non-compliance of the DHA with court decisions that it must reopen Refugee Reception centres, and recommendations that it improve its work. The RSS doesn't deal with such issues at all.

5.10.3 Fighting Corruption

The implementation of the refugee act is seriously compromised by corruption in South Africa. Even when compared to the high levels of corruption in South Africa, the DHA is considered to be particularly corrupt. A report by the African Centre for Migration and Society (ACMS) and LHR, found that almost one-third of those who visit RROs encounter corruption.²⁹⁶ All the

²⁹⁶ Amit, R. (2015). Queue here for corruption: measuring irregularities in South Africa's asylum system. A report by Lawyers for Human Rights and the African Centre for Migration & Society. Pretoria

NGOs identify corruption as a major problem. This scourge starts from physically accessing the institution, to the renewal of permits.

Corruption permeates all aspects of the asylum process.

The SC identified corruption as the main systemic problem why the DHA is not doing well:

I think there is a huge amount of money being made through corrupt practices. Unless corruption is stopped, we will never ever have a system that we can rely on. It is a systemic problem. The bad implementation is directly related to corruption. One wonders how much one pays for refugee status regardless of whether one is an economic migrant. (Ms. Madikane, Director of SC)

RSS Director was guarded and made a vague reference to corruption: “*We know the things... what happens in Home Affairs. I think you know what happens... (Ms. Raja, director of RSS)*”

Since RSS and SC engagement with the DHA around issues of documentation is limited, their interviewees were reluctant to discuss their relationship with the DHA and the problems that arise.

LHR Ms. Erasmus pointed out:

The problems that they face when they try and acquire documentation, unfortunately is corruption. There is a huge amount of corruption at the refugee reception offices to acquire asylum status and refugee status. They are often required to pay money. (Ms. Erasmus, Head of LHR RMRP)

From the above quotes it is clear that all three NGOs recognize that corruption is probably the biggest problem. Despite this acknowledgement, none of the three NGOs have taken substantial steps to combat it. SC has had experience in dealing with corruption inside the DHA but Mr. Johnson explained that a claim of a bribe request or money paid is not enough to take legal action. It requires a witness or witnesses.

Interviewees who were either asylum seekers, refugees, or from NGOs, have also complained that both asylum seekers and refugees don't have the protection or support needed to be whistle blowers.

NGO frustration in dealing with corruption was expressed by SC:

It is so annoying. If the DHA says it is a fake permit, nothing gets done which is odd for me. Why do the verification process? If a person is found holding fake documents to process their business in South Africa, you must conduct an investigation. This is not good for us in any way. You see how they support corruption. There is no intention to find out what that's all about. If you look at corruption as well, when we have a client who has gone through the outrageous corrupt practice and blows the whistle, the full force of the law gets put down on that client. We find it extremely difficult to coax clients into being whistle blowers because we can offer them no protection. Why should they sacrifice their lives and time to take on a fight they are not going to win? If you want to tackle corruption, one of the first things you have to do is protect your whistle blowers. DHA comes up with 'but they are part of the problem'. But the whistle blowers are not part of the system, but they might have used the system. It is very annoying. (Ms. Madikane, Director of SC)

We had cases where people said they would testify and they didn't. We had a case of some individuals who said they are going to testify. So they said they could recognize the RSDO involved in the bribery. They picked them out in a photo array. And there were threats made against them. One of them got beat up out on the public somewhere. It usually involves the interpreters down there. Those communities are small communities. Everybody knows everybody. So, it wasn't like the interpreter and this guy were unknown to each other. They ended up backing out. But because we were involved, we were able to motivate why we brought this forward and why we assisted these people in the internal disciplinary hearing. On that basis, they fired him. But CCMA found against DHA in that instance. Hearsay evidence cannot be grounds for dismissal. That took two years for that whole thing to work out. It was a disaster the whole way. We had a few people in Home Affairs, trustworthy, on top of it and competent. Then, at one point it was handed off to another person and that person actually still hasn't even told me that we lost the case. The other guy, in passing, I saw him for another reason. He is like, 'Oh, by the way, you know, the other case, we lost it.' What? You didn't even contact us to come. Like we could have gone and explained why these people are testifying why we brought it forward and to say I was there when the guy pointed out in the photo array.

There are agents operating outside the office. They are more difficult to deal with. Home Affairs isn't so interested. They say, 'What? Somebody outside the office? They don't have firm evidence.' It seems the police are not that interested. One police officer told one community member that he was trying to motivate them to try to clean it up. He said, 'that Home Affairs staff, you can't get involved in that. Petty games, for petty stakes. The risk is not really worth it.' The office manager in Pretoria actually got shot outside his house. Nobody is clear on why somebody would attempt to murder this guy. People have said, 'well complication with corruption deals, and maybe assisting in cleaning it up.' Who knows! The threat of violence is real in that little. . . A lot of money is being made. (Mr. Jhonson, Advocacy officer of SC)

Dealing with corruption in state institutions has always been difficult and if an institution has no drive to deal with it, this makes it doubly difficult. The above quotes indicate the institution has this problem, and the perception of this institution by other state institutions.

There are agents outside the offices that facilitate corruption. Some interpreters have been implicated in corrupt practices.

SC's Annual Report²⁹⁷ notes that one of the main problems it encountered in 86 cases in 2014 was corruption. The corruption had to do with all state institutions including the police. Strangely enough, the other NGOs did not report it in their annual reports, despite citing it as one of their major problems during interviews. Somehow it is considered a permanent feature of the system. Considering their capacity and their place in this system, NGOs understandably feel helpless to deal with it. After all, the DHA is but one state institution in which corruption takes place within a state-wide system of corrupt practices. This is indicated in the literature.

5.10.4 Monitoring detention

The only institution that does effective detention monitoring is LHR. Other NGOs refer its detention cases to LHR. LHR's focus is on asylum seekers who have been detained for being declared illegal, either because they have exhausted all avenues of the asylum system, or have not legalized their stay in the republic. Sometimes LHR deals with potential asylum seekers

²⁹⁷Scalabrini Centre of Cape Town. (2015). P. 8

detained at different ports of entry. When there is a case of unlawful detention, especially by the police, SC and RSS refer these cases to NGOs that have the legal capacity to deal with such problems such as the Legal Resources Centre (LRC) and LHR. LHR is in an ideal position to act because they deal with legal issues and they have made a concerted effort to have a presence in the only such detention centre at Lindela:

We also assist with quite extensive detention monitoring. So we are frequently at Lindela and at the SAPS holding cells and we check for illegally detained people and bring an application for their release. (Ms. Erasmus, Head of LHR RMRP)

LHR's practice of checking the holding cells is crucial, as asylum seekers and refugees are often unaware of NGOs and are unable to contact them on their own. In addition, refugees and/or asylum seekers are prevented from either fetching their permits from nearby places or contacting family members to help with verification.

LHR has brought to light the mistreatment of detainees and the less than ideal nature of conditions at the Lindela detention centre.

LHR has instituted litigation with regard to all these problems but despite the court cases, judgments and criticisms, the SAHRC²⁹⁸ concluded that conditions have hardly improved. Lindela is the only detention centre that is managed by the private sector so it is a test case. The SAHRC further indicates that government policy has been geared more towards detention and deportation, especially after the 2015 xenophobic attacks, but has not improved conditions at the detention facility.

²⁹⁸ South African Human Rights Commission. (2014). Findings on the Lindela Detention Center. Johannesburg. SHRC Phttp://www.sahrc.org.za/home/21/files/Gauteng%20-%20Investigative%20Report%20-%20Lindela%20-%201%20September%202014.pdf [Accessed 2 October, 2015]. SAHRC investigation revealed that there was a lack of provision for TB testing and isolation of infected persons, and psychological care; availability of condoms and lack of VCT; unavailability of tetanus vaccines; overcrowding in rooms; and time intervals between the serving of the evening meal and breakfast not complying with the time-periods prescribed in the Regulations to the Immigration Act at Lindela. It also recommended that detainees that has been extra judicially detained in excess of 120 days to be released.

5.11. Cooperation with UNHCR and other NGOs

The UNHCR has a close working relationship with various NGOs in South Africa. This is because its core function is that of custodian of the refugee convention of 1951, and monitoring its status in South Africa.

UNHCR however plays a supportive diplomatic role in South Africa that restricts it from being directly involved on the ground with asylum seekers and refugees, as is the case in other African countries. South Africa has an urban integration refugee policy in place of putting refugees in camps. The SA Refugee Act together with the SA Constitution provides sufficient human rights guarantees and protections to justify UNHCR's non-involvement directly. A SA government department manages refugee affairs.

As a result, there remains a gap between the rights guaranteed to refugees and asylum seekers, and their proper implementation. UNHCR is duty bound to operate using relevant SA NGOs in order to fill this gap – hence its partnership with several SA NGOs.

LHR and RSS are implementing partners while the SC is an operational partner of UNHCR. Implementing partners execute programmes that the UNHCR approves, while operational partners cooperate with UNHCR in operations. UNHCR provides significant funding to the RSS and LHR. Both LHR and RSS asserted that UNHCR does not dictate what programs these NGOs should focus on. However, the relationship has to be renegotiated on a regular basis. Ms. Erasmus explains the relationship between LHR and the UNHCR:

I think our relationship is very good. We are implementing partners of the UNHCR. So, part of the UNHCR mandate is to provide legal assistance to refugees and asylum seekers in South Africa and is actually carried out through the offices of the LHR. An amount of our funding comes from the UNHCR as well, making us an implementing partner. The relationship with the UNHCR has an ongoing dialogue. We work together on protection issues. We have referral back and forth. (Ms. Erasmus, Head of LHR RMRP)

The RSS admitted that, despite the relationship with UNHCR being generally good, there seems to be negotiation on a regular basis. It is an indication that the NGOs do challenge the intergovernmental organization. This is unlike the relationship between the UNHCR and local

NGOs in other regions where NGOs are reluctant to challenge the institution, as discussed in the literature.

SC's director emphatically stressed that she did not apply for UNHCR funding as she felt that the UNHCR's role in South Africa is politicized and the decision not to apply for their funding is based on principle. Mr Johnson of SC indicated that funding from the UNHCR might limit their ability to assist any immigrant (refugees and asylum seekers are included here) not just documented immigrants:

The UNHCR mandate is for recognizing refugees. Asylum seekers do fall under their mandate also. They are also persons of concern. They are mainly concerned with refugees. That does limit the operational partners in terms of what they can do. For example, the Cape Town refugee centre cannot really provide a whole lot of assistance to undocumented people whereas we can. That gives us more freedom to not be bound by their criteria, rules or system (Mr. Jhonson, Advocacy officer of SC).

The RSS also does not assist undocumented migrants. Whether this is because of it being an implementing partner of the UNHCR, is unclear. The inability to assist undocumented migrants – if it is a condition of the UNHCR – does make the UNHCR grant conditional.

The UNHCR has access to Government that SA NGOs lack. As indicated by Ms. Madikane and Mr. Jhonson, the diplomatic nature of the UNHCR, unlike NGOs' combatant approach, opens a lot of doors: The UNHCR representative in Cape Town has facilitated conversations between the Cape Town central police station and the SC:

On occasion we have a problem with local police stations not writing affidavits and signing affidavits for people or commissioning things, then we might choose to go the diplomatic channel and ask UNHCR to set up a meeting with a commander: Because they can open doors to government. I think their policy of diplomacy means that they have an easy relationship with government. I don't know how much influence they have over government, but they do have an easy relationship that the government will talk to them. Sometimes we use that. (Ms. Madikane, Director of SC)

This was with Cape Town central. And that was actually Patrick, from UNHCR who brokered that meeting. It was largely about affidavits written by asylum seekers and verification of copies of permits. You are required to submit a copy of your asylum

*seeker permit for whatever reason, try to get a copy certified there, they say no way.
(Mr. Jhonson, Advocacy officer of SC)*

The UNHCR also assisted with humanitarian help and advocacy during the time of xenophobic attacks. In addition, the UNHCR has a forum of NGO and CBO stakeholders in Cape Town that holds meetings in the SC building. Despite SC not being an implementing partner, it enjoys a good relationship with the UNHCR while SC retains its financial independence and its freedom to dictate its own programmes.

The UNHCR, through its partners, does significant advocacy and protection work.

NGOs are much more effective if there is cooperation among them. CORMSA has created a loose affiliation of NGOs to coordinate their activities. The organization has had moderate success in terms of organizing NGOs for the purpose of advocacy. There is also coordination among NGOs when there are emergencies like the xenophobic attacks.

Certain NGOs work well with others. Looking at the three NGOs selected as a case study here, both SC and RSS refer cases to the LHR. The RSS also works closely with Pro-Bono in Durban, while SC refers cases to LRC and the UCT law clinic. NGO cooperation on matters of advocacy was demonstrated in the case of the closing down of the Cape Town office:

You know, in our refugee office closure case, the Supreme Court of Appeal found it unlawful based on consultation. So they didn't consult with us people who are directly affected. Home Affairs said, 'well, we can't consult with asylum seekers because they are not in the country'. The Supreme Court said well, obviously the NGOs, and you consulted with them on certain things before anyway. So it is odd reason well, to not to. So then we had this court order consultation here in Barrack Street. LHR came from Pretoria. We tried to bring everybody in. SCMS or Wits University was there. UCT, ourselves, LRC and a multitude of other smaller organizations and everybody who was there was against the closure of the office. People submitted long documents about why it is a bad idea. (Mr. Jhonson, Advocacy officer of SC)

Some issues clearly unite most NGOs. Those NGOs with legal resources and specialties possess a skills set that enables them to become indispensable to other NGOs. The relationship seems not to be based on mutual recognition of purpose or setting out to work on programmes together, but on a needs basis and operational convenience.

RSS refers clients to other organizations on a needs basis. Ms. Madikane indicated that there is competition among NGOs and that their relationship is not always a smooth one.

One worrisome aspect of this situation is the lack of cooperation between migrant NGOs and CBOs. A logical observation would be that migrant CBOs know their communities well and know that empowering the communities is important, as they will be able to advocate for their rights by organizing and uniting them. However, there seems to be an almost total lack of cooperation between migrant CBOs and NGOs. They are furthermore, politicized:

Well, CBOs tend to be politicized. I have worked with some community organizations, then the politics always comes in . . . We are working with this group [UTRS] and they are completely devoid of politics. UTRS (United Tertiary Refugee Students) completely remove themselves from politics. There was an Angolan group writing a paper and publishing paper in 2003.

They are journalists and they have a political bent. What it means is that people who are not of their political bent are unsafe to come into the building. I try to avoid the politics. . . (Ms. Madikane, Director of SC)

Moreover, she claimed that SC supports the Somali association to provide English classes in Bellville (Cape Town), where a lot of the Somali community members reside.

The director of the RSS was asked if she cooperates or provides for migrants to participate in solving their problems. Her response was that she has some foreigners on her staff. In fact, the RSS social worker is originally from Rwanda. The SC centre also has significant foreign staff. However, this is not the same as cooperating with migrant CBOs.

In responding to criticism that most people who seek services from either the SC or RSS are Congolese, both NGOs responded that they do not put any restrictions on the accessing of services from their organization. It is interesting to note that Congolese refugees access material assistance in high numbers. Conversely, despite their high numbers, Somalis do not require much material assistance. Rather, Somalis access legal services more frequently. This fact was also confirmed by the director of the SC.

5.12 Dealing with Xenophobia and Integration

It is imperative to understand the perception that NGOs have of xenophobia before discussing their contribution to integrating asylum seekers and refugees into South African society. Almost all NGO personnel agree that there is deeply ingrained xenophobia among South Africans, and that it is rooted in the country's history. The following quote aptly sums up the xenophobic attitudes in South African society;

I think South Africans have still a world view that is governed by our historical context. We do see matters in terms of groupings. I think South Africans do identify there is a foreigner and there is a Zimbabwean, 'That one is so dark. Have you seen that he is from Sudan'. We do kind of class people, we put people into groupings. Are we naturally hostile to these groupings? I don't think that is necessarily so as a nation.

I think the groupings itself is already quite frightening. It allows people to make generalizations and into forming stereotypes. . . I think Migrants come with a huge amount of resilience and determination and I think that sets them apart. That allows them to then succeed. That invokes envy. I don't believe South Africa is a nation of haters. I think it is history as well. We automatically go. 'Oh yeah, did you see that coloured guy. Oh yeah, whitey oh yeah'. . . We class people. We class the foreigners around us too. We put them into groups. That is a dangerous thing because it becomes so easy to split into a knee-jerk reaction and resentments to become expressed in a nation class. (Ms. Madikane, Director of SC)

However, Ms. Raja feels that, as in any society, there are some people who are xenophobic and others who are not and that ultimately it is about perceptions. The following quote brings a different perspective to the issue of xenophobia:

You understand, it is very difficult to say South Africans are welcoming or not welcoming. They are made of so many different groups. Even within our communities, we come from difficult history. Whether it is based on race, religion or class, you are either welcomed or not. I have seen a lot of people that are very welcoming. When we go out to certain communities and organization, people are very welcoming and they know what is going on, and they empathize. On the other hand, I have been in situations where I have spoken to staff in a particular organization. Among those staff, there will be 2 or 3 people would be saying 'no they are criminals. They are bringing drugs into

the country. They are involved in crimes.' then you see with the looting that are happening now, you see certain sections of the community saying 'leave these people alone, we want them and we welcome them.' Others say 'No, we are going to do this'. So it is a difficult question to answer. . . You know when you ask questions if people are welcoming, often I get refugees coming and saying 'oh... We get treated so badly at Addington Hospital. For instance, let's use that. My question would be... One of the things is there is equality of poor treatment in public institutions. Because when you wait 6 or 4 hours for treatment, it is the same for your South African neighbours. There is equally poor treatment. It is important to look at in the context. Sometimes, your refugee will come here and think 'ah... I am being treated like this because I am a foreigner'.

Home Affairs for instance, when it comes to ID documents, maybe it is not as bad, but if you think about what happens in Home Affairs in general with South Africans... ask a South African about Home Affairs, and see what the perception is about Home Affairs. And you might realize then, actually it is equally bad across the institution. It is not about because I am a foreigner [that] I am being treated like this. (Ms. Raja, director of RSS)

The above quotation highlights the points that a positive attitude as well as an understanding that not all people are xenophobic, will help a refugee integrate. This is because integration depends on the refugee and the asylum seeker doing their best. However, it does not negate the fact that the violence that accompanies xenophobic sentiments is extreme.

Despite the general public's acknowledgement of poor service from public institutions, asylum seekers and refugees are denied access in some cases simply for being foreigners. This goes further than the usual sub-standard service of public institutions like the DHA, as citizens do not pay bribes to get services on a day-to-day basis or just to gain access to the DHA. These people are victims of unprofessional public servants but victim also to their xenophobic attitudes.

All three case study NGOs claimed they had contributed to the integration of asylum seekers in three main ways: creating awareness of the rights of asylum seekers and refugees; by equipping them with the necessary tools to integrate; and by bringing locals and asylum seekers and refugees together to create understanding.

LHR creates awareness:

Through quite an extensive amount of community training and engagement. We provide workshops for various community groups with the focus on marginalized groups like women and children. These are the main ways in which we assist. We would also assist on an ad hoc basis when things happen. (Ms. Erasmus, Head of LHR RMRP)

However, the strength of the LHR is in legal issues.

The SC has an awareness programme that uses art and has released three short films:

We run programmes like cultural host programs. We have South Africans meeting socially with two of our students and going to the museum for the day and climbing mountains for the day. We make movies. We got a movie on the cessation which won an award. It is online. We also made a movie about LGBTI refugees and asylum seekers. We made three movies. We use movies, media in the form of interviews... (Ms. Madikane, Director of SC)

SC also creates awareness by bringing together children of both communities, mainly through art:

...also in the school project, we are working with 500 South African school kids looking at critical thinking, stereotyping, multiculturalism and using the art. . . It is about examining the way we classify people and the huge amount of conjecture in a lot of our thoughts and the huge logical jumps that we tend to make. We all do it. Adults make it and children specifically. We start examining that mental discourse and we do it through using art. We use music, poetry and visual arts to engender conversations. It is quite a safe place. Sea Point High has a huge amount of foreign nationals in their school and they came to us and said ' please '. So we are working with that programme. It is based on the grade 10 curriculum includes stereotyping, xenophobia and multiculturalism. So we have aligned it to the curriculum standards. (Ms. Madikane, Director of SC)

RSS tried to follow up on cases from the xenophobic attacks as part of the hate-crime working group. He admitted though that this was difficult as dockets kept disappearing or interpreters did not show up. The RSS hardly organises activities within communities, but according to its director

In some respects, we have been effective. Some of our programmes, for instance the home based child care, where we train for home based child care, it helps in integration. While our training refugees run these child-care centres, what we are also doing is... We encourage their kids that are not only refugees. They need to work with people that are more than just refugees. They look at children that are South Africans. That one on one level develops an opportunity for you to get to know your South African neighbour.

In another way, where we encouraged integration, we have peer educators. We work with women and issues around domestic violence. No only issues that impact refugees, but refugees that impact on people. We also work with organizations for instance on project empowerment. They also have similar programmes. What we have done is that we have connected with them in a way where the women that they work with and we work with have had a chance meet each other and discuss things that have got nothing to do with the fact that they are refugees; similarities of experience, and to work and learn together. (Ms. Raja, director of RSS)

This is crucial because, as people get to know each other, they understand the similarities they share. Both the RSS and SC provide important skills to help asylum seekers and refugees integrate. These include language classes, as well as placing people in formal jobs like nursing and teaching. Even though none of these NGOs have as a core function, the creating of awareness or the integration of asylum seekers and refugees, they have made contributed in these areas.

5.13 Correlation of both Sources of data

Data from refugee and asylum seekers, and data from NGOs, agree on three issues:

- The initial entry period is when asylum seekers are most vulnerable and when they really require assistance in two forms: Those who do not have a support network require shelter and food. According to the data from asylum seekers and refugees, churches, mosques and some NGOs have been instrumental in providing that kind of assistance. The RSS and SC provide limited support in this regard.

Asylum seekers require help accessing documentation. Data from asylum seekers and refugees indicates that they rarely received help from these NGOs. Similarly, if one looks at the cases that have been handled by the NGOs, it is difficult to find one NGO that has adequately addressed this issue. The reason again could be that new asylum seekers do not know that these organizations exist.

- Access to services, either in the DHA or other departments is hampered by corruption primarily, and by xenophobic attitudes. Both data sources agree that corruption is endemic in the DHA and both felt helpless to deal with the problem. In addition, asylum seekers and refugees stress that the police are very corrupt. This has not been reflected in the NGO data even though there is mention of it in the data from the SC as well as LHR.

Access to banking is still problematic even though there is less focus on it by the NGOs. The NGOs are used to this lack of access and instead use their network to find out which banks offer the service. Despite having an online verification process, most banks do not open accounts for either refugees or asylum seekers. Either the NGOs are not aware of this development or some are not sure if this verification process works.

The researcher, through a source, obtained the contact numbers of all of the major bank managers responsible for the verification process. The researcher contacted each officer but received a response only from the Bank of Athens, which informed the researcher that their bank allows refugees to open accounts and that they use the online verification process. Even though, there is an online verification process, most banks with the exception of one or two do not use it.

- Xenophobic sentiments exist in the society and in the DHA in particular. The data shows that xenophobia is ingrained in the system to a certain extent and prevalent in state institutions such as the DHA and the SAPS.

The three NGOs have minimally influenced the integration of asylum seekers and refugees into local communities. The data from asylum seekers and refugees shows that little effort is made by NGOs except in terms of equipping them with language skills and job placement in the formal economy.

Ignorance of their existence undermines the effectiveness of these NGOs as a large percentage of asylum seekers and refugees are unaware of them or do not have sufficient knowledge of what they do. Those who access NGOs depend on their own network for information about these NGOs.

This ignorance is despite the claim by NGOs that they are accessible to everyone. Moreover, people who access these NGOs are mostly of specific nationalities. This is not to say there is a bias in providing services. In general, NGOs have been successful in high level advocacy, to a certain extent. They have made sure, through litigation, that the DHA does not detain unsuccessful asylum seekers and undocumented migrants for extended periods without due judicial process. DHA has been prevented from unlawfully returning people to countries where they are in danger of persecution; and restricting asylum seekers' freedom of movement; only re-evaluating refugee status every two years; and implementing the country of first asylum rule²⁹⁹.

However, refugees and asylum seekers are increasingly encountering resistance from the DHA. Litigation is proving to be minimally effective, as can be seen by the continued closure of RROs in three cities despite two judgments against the closures that have failed to bring about any change in the situation.

NGOs have weak relationships with migrant CBOs. At least, these organizations would have been a gateway to the dissemination of information on the services they offer. The director of the SC explained that lack of technical management and financial skills excludes CBOs from getting adequate funding. They battle to be relevant either inside or outside of the community. However, further research is needed to determine the reasons for the low visibility and low levels of activism of refugee CBOs.

²⁹⁹Rutinwa, B., Handmaker, J., de la Hunt, L. A., & Klaaren, J. (2001). Perspectives on refugee protection in South Africa. *The challenge of forced migration in Southern Africa*. Pretoria: Africa Institute of South Africa.

Summary

The distinctive advantages of triangulation can be seen in this chapter where information about a specific issue converges from different sources. In some cases, there is consensus among the sources of data whereas they differ in others.

In some cases, there is a disconnection between what NGOs are actively working on, and the needs of asylum seekers.

This chapter has provided detailed analysis of two data sources.

The first part provided analysis on the data from refugee and asylum seekers and the second part provided analysis of NGO data. Lastly, it has examined similarities and differences on specific issues.

The researcher used a source triangulation method to verify and examine commonalities and differences across sources to gauge the effectiveness of the protection and assistance provided by NGOs. This ensures, to a certain extent, the validity and reliability of data.

The next chapter examines the data in light of the literature on the topic and the theories outlined in this research.

Chapter 6: Advocacy and protection Agenda

Introduction

In a quest to understand the role of NGOs in protecting refugees and asylum seekers, the researcher has collected data from both. The previous chapter analysed the perceptions of refugees and asylum seekers on the contribution of NGOs, specifically three NGOs identified as a case study. The chapter also analysed the contribution of the NGOs seen through their own eyes. This analysis would not be comprehensive without looking at the data in light of the available literature, and the theory underpinning this research. This chapter interrogates the findings in terms of liberal rights and other theories.

Advocacy and protection do not exist in isolation but are carried out within a broader environment comprising the international and national socio-political systems. That is why this chapter begins with an analysis of the protection and advocacy agenda; especially the effectiveness of litigation as an advocacy and protection tool. It compares advocacy and protection in SA with experience in other countries. It importantly examines the changing environment of the asylum system both globally and locally.

6.1 Assessment of the effectiveness of NGOs in advocacy and protection agenda

Chapter 2 pointed out that the contribution of NGOs in advocating for and protecting refugees and asylum seekers has had a varied history in South Africa. NGOs such as LHR contributed to the formulation of the Refugee Act. Looking at their comprehensive protection of the rights of refugees and asylum seekers, their contribution to the process has been stellar. However, circumstances have changed so much as to warrant a comprehensive analysis of this contribution.

The past 10 years have witnessed several developments:

- A significant increase in the numbers of asylum seekers in South Africa
- The increasingly combative relationship between the DHA and NGOs
- Closure of 3 reception centres
- The occurrence of two major xenophobic attacks

What makes the NGOs work of advocacy and protection more important is the absence of the UNHCR. In other countries, in the absence of a policy for the integration of refugees into the local population, the UNHCR steps in to provide advocacy and protection. In South Africa, the role of the UNHCR is that of an enabler. In other words, it lobbies for better legislation and implementation of the Refugee Act. The UNHCR uses South African NGOs to engage with asylum seekers and refugees as protection is more productive when one works at the grassroots level and in close quarters with those who need it.

The data and the literature have shown that NGOs have been effective in some respects. They have made it possible for refugees to access social grants. A combination of consultation and litigation with different stakeholders has brought about certain results. The right to access employment by asylum seekers is an example of this achievement. The three NGOs used as a case study negotiated the access of refugees and asylum seekers to education, health services and other social services. Besides, they constantly work in realizing access to documentation; because a document is a key to other services. Despite these gains, refugee and asylum seeker protection is on the back foot. Their rights and ease of access to services are generally worsening especially when it comes to the DHA.

In addition to its closure of RROs, the DHA has drafted a bill to make asylum seekers' entry and stay in South Africa difficult. Refugees and asylum seekers can access financial services at only 2 or 3 banks despite a court decision and the existence of an online verification system. Ultimately, advocacy and protection have become confrontational.

NGOs are much more effective when they deal with co-operative actors. In reality they are in a peripheral niche that gives them a place to make an input but they have relatively little power to push through their agenda.

Handmaker³⁰⁰ states that the ability of civil society to hold government accountable is 'structurally conditioned' and 'actively informed by specific historical events'. This indicates 'the potential of legal and other forms of civic advocacy to hold states accountable through cooperatives or confrontational interactions within the framework of both national and

³⁰⁰Handmaker, J. (2009).

international institutions'. They are especially effective when they have wide public support or when their particular agenda has strong public support.

To put this in perspective, one has to look back at the civic and state environment just after the democratic transition. With the drafting of the constitution and the dispensation of rights during the mid-90s, there was an explosion of human rights awareness. In the post-apartheid South Africa era of identity-based and individual rights, the issue of refugee rights found great sympathy. In such an environment, where civil society was seen as a partner in the anti-apartheid struggle, the civic-state relationship was very good. As a result, civil society was instrumental in translating the international human rights instruments to local ones in the form of legislation.

Civil society played such a role in translating the 1951 Refugee Convention into the Refugee Act. The UNHCR as well as local NGOs like LHR, participated actively in this endeavour. Civil society played an important role legitimizing the post democratic government. In such an environment, cooperation was the norm.

Increasingly however, in the sphere of policy making, civic societies that could be co-opted, participated, while others were side-lined. As Lodge³⁰¹, Schneider³⁰² and Jansen³⁰³ critically outline, in the hollow cooperative policymaking processes in the spheres of macroeconomics, AIDS and Education, the ANC - led government has increasingly become hawkish at the expense of public and civil society participation. That is why there have been challenges from the tripartite alliance with GEAR macroeconomic policy; backlash and challenges in the policy of AIDS denials and the failure to provide antiretroviral drugs in the Mbeki era; and with the OBE education policy.

Communities have turned to invented spaces³⁰⁴ to express their frustration. Therefore, the transition from a cooperative to a combative relationship between Government and civil society

³⁰¹Lodge, T. (1999). Policy processes within the African National Congress and the tripartite alliance. *Politikon*, 26(1), 5-32.

³⁰²Schneider, H. (2002). On the fault-line: the politics of AIDS policy in contemporary South Africa. *African Studies*, 61(1), 145-167.

³⁰³Jansen, J. D. (2002). Political symbolism as policy craft: Explaining non-reform in South African education after apartheid. *Journal of Education Policy*, 17(2), 199-215.

³⁰⁴Piper, L., & Nadvi, L. (2010). Popular mobilisation, party dominance and participatory governance in South Africa.

was inevitable. Although there was cooperation among civic and state actors in some areas, we have seen a multitude of court challenges on the grounds of individual and group rights and administrative justice issues.

According to the UCT Refugee Case Law Reader, 96 cases were brought against Home Affairs from 1996-2013 with some cases featuring in the three upper courts.³⁰⁵ This number could come down to almost 75 cases in the High Court. As a result, the legal expenditure of the DHA mushroomed to R 46.3 million in the 2011/12 financial year, double the previous year's expenditure. To put this into perspective:

of the R1.34 billion in pending legal claims against it [DHA] (as of March 2013), claims against Immigration Affairs amounted to R503.3 million, which is 37.5 per cent of the total. The majority of the claims arose from 'unlawful' arrests and detention of illegal foreigners as well as damages³⁰⁶

With the increase in litigation, the defiance of the DHA has increased. There is no good will on the part of the DHA to abide by the decisions of the courts as was seen in the RRO closure cases. Therefore, litigation as an advocacy and protection tool has to be questioned.

6.2 Effectiveness of Litigation

There is no doubt litigation combined with other advocacy and protection tools has served NGOs well, as judgments in 90% of the cases mentioned above were in favour of NGOs and those they represent. As mentioned above, civil society gets frustrated trying to effect change either through consultation or other forms of advocacy. Society therefore turns to public interest lawyers to hold government accountable. South Africa is a fertile ground for public interest lawyers as there is a liberal constitution with a formidable Bill of Rights.

In addition, there is a strong and independent judiciary in SA. Consequently, public interest lawyers stand a good chance of holding Government accountable. This creates a feeling of frustration as the ruling party comes from a liberation struggle where decisions are mainly taken by the central leadership. Thus, challenges to policy and administrative issues do not sit

³⁰⁵ University of Cape Town. (2013). Refugee case law reader. UCT <http://www.refugeerights.uct.ac.za/case-law-reader>

³⁰⁶ Mthembu-Salter, G., Amit, R., Gould, C., & Landau, L. B. (2014). Counting the Cost of Securitising South Africa's Immigration Regime.

well with such a dispensation. Since rights are contested in most cases and are situated in a complex set of social and political environments, they need to be realized in cooperation with all stakeholders.

As a result, NGOs need to examine if litigation, in the long run, is productive. An NGO director, Ms. Raja expressed this sentiment. Shirin Rai³⁰⁷ has underscored that, to be effective, civic actors wishing to modify their social environment need to be more ‘deliberative’, reflecting on both the risks and the potential of a particular intervention. This author argues that in light of weak public support and lack of political will, litigation is rather counterproductive. This particular issue predates the adversarial nature of the relationship between the DHA and civil society. Amit argues;

Many of the legislative and constitutional protections for asylum seekers and refugees have not been implemented because they are embedded in an environment of weak political and public support, combined with bureaucratic mismanagement and inefficiency³⁰⁸.

Despite the government paying lip service to better refugee protection and condemning the xenophobic attacks, it seems to lack interest in upholding its international and national obligation to protect refugees. This is clearly demonstrated by government's lack of interest in fixing the asylum system and its failure to invest more resources into it. Government's launch of Operation Fiela in major cities after the June 2015 xenophobic attacks in Durban and Johannesburg reflected its attitude to asylum seekers. In addition Government came up with a draft amendment to the Refugee Act that would seriously limit the rights of asylum seekers³⁰⁹.

This draft legislation will be challenged by civil society every step of the way. This rolling back of rights does not bode well for the rights of the asylum seekers in particular.

This attitude of Government is not happening in a vacuum but is reflective of the attitude of a significant part of the South African population that sees black African migrants as a burden and blames them for various social ills. They have been blamed for stealing jobs, for crime,

³⁰⁷ Rai, S. (2008). Civic Driven Change: Opportunities and Costs. *Civic Driven Change: Citizen's Imagination in Action*, 103-117.

³⁰⁸ Amit, R. (2011).

³⁰⁹ South Africa. (2015). Refugee Amendment Bill (Draft), Notice 806 of 2015. Pretoria: Government Printer. [Laws.]

and for bringing diseases. Crush³¹⁰, Peberdy³¹¹ and Crush et al³¹² hold the view that South Africans of all races and social strata have these stereotypes despite most of them not coming into contact with migrants. Both data sources confirm this.

Macdonald³¹³ claims that the print media, in particular, have been instrumental in perpetuating these stereotypes. In addition, politicians across the spectrum have either denied xenophobic attacks labelling them criminal acts while it is clear only foreigners were targeted. Politicians further fuelled xenophobic sentiments with their statements. Davis³¹⁴ in her Daily Maverick article provides proof of xenophobic statements from ANC and EFF politicians, and the Zulu king, who gave his infamous speech saying foreigners need 'to pack and leave'. All these examples point to a social and political environment that lacks support for the protection of the rights of refugees and asylum seekers. Even opposition parties do not use this issue as a way of garnering support, as the public is not positively behind the protection of refugee and asylum seeker rights.

The ANC and its allies believe that the Constitution and other human rights obligations are an obstacle to social and economic gains. This is particularly true for issues like land and privatization. In addition, the party oriented elite begrudge the powers of the constitutional order to check their power. This can be seen in the challenges to the recommendations of the Public Protector in the Nkandla case.

Certain individual rights, such as gay rights, have recently become controversial. The recent snub of the judiciary by the government in the case of the Sudan president is another case in point. Melber³¹⁵ puts this eloquently:

³¹⁰Crush, J. (2001).

³¹¹Peberdy, S. (2001).

³¹²Crush, J., McDonald, D., Williams, V., Lefko-Everett, K., Dorey, D., Taylor, D., & La Sablonniere, R. (2008). *The perfect storm: The realities of xenophobia in contemporary South Africa*. Idasa.

³¹³Danso, R., & McDonald, D. A. (2001).

³¹⁴ Davis, R. (2015, 12 April). Xenophobic violence: Government walks the walk, but will it talk the talk? Daily Maverick <http://www.dailymaverick.co.za/article/2015-04-12-xenophobic-violence-government-walks-the-walk-but-will-it-talk-the-talk/#.VhTrb6MaLIU> [Accessed 4 October 2015]

³¹⁵Melber, H. (2014). Constitutionalism in democratic South Africa: celebrations, contestations and challenges. *Strategic Review for Southern Africa*, 36(2), 203.

constitutionality seems to have not yet been deeply and firmly anchored in public awareness or ingrained into a social fabric guiding the fundamental values, ethics and norms as reflected by ordinary public perception and opinion. Nor have policy makers in the government seemingly internalized an unconditional respect for and recognition of the governance principles enshrined in this Constitution, as some recent examples seem to suggest. The current controversy around the "spy tapes", but even more so the contested role of the public protector and her stance with regard to Nkandla and the obligations of the head of state to respond to her recommendations are obvious tips of the iceberg

This mindset of many South Africans and their representatives in government means that international and national migrant rights, obligations, and the values associated with them, are not even on the list of priorities.

NGOs operate in an environment that even if it is not hateful, gives off a sense of disinterest or frustration on the part of government and the wider public. Though the courts have proved their independence and mettle, they cannot effectively force government. Roa & Klugman³¹⁶ have identified four conditions for litigation to work as an advocacy and implementation tool;

(1) an existing rights framework; (2) an independent and knowledgeable judiciary; (3) civil society organizations with the capacity to frame social problems as rights violations and to litigate; and (4) a network to support and leverage the opportunities presented by litigation.

South Africa only lacks the fourth condition, as that network has to extend to the socio-political network. This condition also includes effective communication on how the case is relevant and should contain key messages on why the issue matters to the general public. As for refugee issues, this is the kernel of the problem: The message is not popular with the general public. NGOs therefore need to seek socio-political networks that support their advocacy and protection agenda. This is problematic as the rights of asylum seekers increasingly come under attack.

³¹⁶Roa, M., & Klugman, B. (2014). Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia. *Reproductive health matters*, 22(44), 31-41.

6.3 Effectiveness of facilitating access to social services and humanitarian assistance

NGOs RSS and SC provide numerous social services: RSS provides counselling, language lessons, and other potentially income generating skills training. It provides limited humanitarian assistance in cases of people who could not afford to pay rent or their children's school fees for a few months. SC engages in similar activities but reaches more people and has a wider application. SC cooperates with the DOE and DOH to find employment for refugee teachers and nurses. LHR offers very little social welfare assistance.

The three NGOs play a crucial role for those who have difficulty accessing social services from government departments of health and education. As previously discussed, NGOs addressed this problem by approaching these departments, or in extreme cases, by litigating. An example of litigation against the Department of Health is The Somalian Girl case.³¹⁷

In terms of access to services, NGOs have made significant gains but with one exception: They have not been able to make significant progress with regard to asylum seekers, and sometimes refugees, being able to open bank accounts at most major banks.

In the sphere of humanitarian assistance, faith based organisations and churches have shouldered these responsibilities, with only limited help from Government in times of crisis:

Central Methodist Church in Johannesburg opened its doors to Zimbabwean and other asylum seekers and refugees during the 2008 and subsequent violent attacks of xenophobia...The church was a place of refuge and humanitarian assistance.³¹⁸ Churches and faith based organisations played a significant role in providing humanitarian assistance at this time. UNHCR underlines this role in its 2014 report³¹⁹. The three case study NGOs, even though SC and RSS have faith based origins, have not contributed as much. The NGOs' personnel repeatedly stress that they are resource constrained as far as being able to provide humanitarian relief is concerned.

³¹⁸Pausigere, P. (2013). Education and Training Initiatives at the Central Methodist Church Refugee House in Johannesburg. *Perspectives in Education*, 31(2), 42-53.

³¹⁹ UNHCR, (2014). ON FAITH-BASED ORGANIZATIONS, LOCAL FAITH COMMUNITIES AND FAITH LEADERS. [Accessed 25 October 2017]

As discussed above, the effectiveness of these three NGOs differs when measured across different criteria. For instance, advocacy was much more successful in the past. Changes in effectiveness reflect the changing role of these NGOs. Despite playing a role in drafting refugee policy in the 1990's and 2000's, NGOs have become confrontational since they have lost their voice in influencing policy.

NGOs have been effective in monitoring implementation and access to documentation. However, as a result of increasingly restrictive government policy, they are now not as effective in this regard.

NGOs have been largely successful in facilitating access to social services, discussed above.

In summary though, their effectiveness is declining over-all and their role is changing.

6.4 The globally changing Asylum regime

The number of people seeking asylum worldwide has greatly increased in the last two years. In Europe, over in 2014/15, countries such as Syria, Afghanistan and Iraq have become a source of significant numbers of refugees as a result of the conflicts that continue in these places.

The absence of a government in Libya has opened the gates for other Africans crossing into Europe through Libya.

Eastern European countries such as Albania also contribute a significant number of asylum seekers because of poverty. European countries are increasingly under pressure to host these asylum seekers. According to European statistics, the number of people seeking asylum has increased from 60 thousand in the first quarter of 2015 to 213 thousand in the second quarter of 2015.³²⁰ It is not at this scale, but this trend is apparent in all refugee receiving countries in other regions such as the USA. The UNHCR³²¹ has stated that 2015 has seen the biggest year to year jump in the number of asylum seekers, topping the highest number of displaced during any time in history. In spite of the humanitarian tragedies and hardships that the world has seen in the Mediterranean Sea, countries are becoming more restrictive.

In a Europe coming out of a recession, the influx of asylum seekers was not a welcome event. Consequently, many far right groups and parties have gained increased public support.

³²⁰ Eurostat. (2015). First time asylum applicants in the EU-28 by citizenship. EU. http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_time_asylum_applicants_in_the_EU-28_by_citizenship,_Q2_2014_%E2%80%93_Q2_2015.png[Accessed 1 October 2015]

³²¹ UNHCR. (2015, 18 June). Worldwide displacement hits all-time high as war and persecution increase. Geneva. Retrieved from <http://www.unhcr.org/558193896.html>[Accessed 10 October 2015]

European governments have become much more alert to security risks. The combination of these factors has pushed governments to become wary of granting refuge or accepting asylum seekers. In many countries, there is a public discourse about limiting the rights and numbers of asylum seekers coming into their country.

Australia has undertaken to settle East Asian asylum seekers, arriving by boat, in the outer islands. Similar measures are being taken in several other countries. The Republican Party in the USA is pushing for a stricter immigration policy partly because of a fear of demographic changes affecting party support. Canada has added to the legal criteria determining who qualifies for refugee status.

Arbel & Brenner³²² state:

If the provision of protection for refugees is its central goal, then the system of asylum offered in Western states is currently in deep crisis. Over the last few decades, liberal democratic states have put in place barrier after barrier to prevent the arrival of rising numbers of refugees. ³²³

What is certain is that the norms and ideals that were ingrained in Western societies is being eroded either because of the sheer number of asylum seekers, the return to nationalism as a result of economic recession, or security fears. It could also be a combination of these factors.

The rise of nationalism is a critical factor. Citizens of Western countries have increasingly been looking inward for salvation from the economic downturn. Given that economic crises in the Euro-zone badly affected Greece, Spain, Portugal and Italy, young people are joining the ranks of right wing groups and parties. Even though the economic crises have nothing to do with immigrants, they have been used as scapegoats. In addition, there is a tendency for people to retreat into national, ethnic and religious enclaves in times of difficulty. This is so, because the conception and narrative of rights is firmly rooted in nationalism.

³²²Arbel, E., & Brenner, A. (2014). *Bordering on failure: Canada-US border policy and the politics of refugee exclusion. Harvard Immigration and Refugee Law Clinical Program, Harvard Law School (Cambridge, MA: 2013).*

³²³Gibney, M. J. (2004). *The ethics and politics of asylum: liberal democracy and the response to refugees.* Courier Corporation.

If a conception of human rights is rooted in the nation state, not in common humanity, a distinction is made between ‘us and them’. This creates the space for inclusion and exclusion. Most often, rights are rationed depending on who is a citizen. In addition, citizens tend to resent the claim to rights by non-citizens. The development of the nation state has created the conditions for this to emerge. The Second World War resulted in greater sympathy for the plight of non-citizens and in a normative empathy for non-citizens that spread across the Western world. This was rooted in the belief that human beings, whether citizens or not, are entitled to certain rights. The sheer suffering and humanitarian crises that followed the two world wars were sufficient grounds for this normative consciousness to take root.

Now that the memory of that suffering is stale and not present in the minds of this generation, there is once again a question of the ‘right to have rights’ that Arendt³²⁴ has identified as having been the main problem for European refugees after the Second World War. Again and again, those who resent liberal humanitarian and refugee rights demand that rights be apportioned according to membership in the nation state. They also claim that the obligation of the state is exclusively to its citizens and believe that states have no obligation to care for asylum seekers or refugees. Recently, the European Union member states held intensive negotiations around who should accept asylum seekers from Asia and Africa and what the quota of asylum seekers for each member state should be. Recent terrorist attacks in Paris and other European countries have further fuelled this attitude.

The increasing unwillingness of Western countries to shoulder their responsibilities widened the UNHCR’s mandate to provide humanitarian assistance and to assist internally displaced persons. According to Harvey,³²⁵ Western countries increasingly fund the UNHCR to keep asylum seekers away from their borders and limit them to their respective regions. For instance, as a result of the DRC and the Somali conflicts, neighbouring countries have had to shoulder the responsibility for hosting refugees. This is why there are huge refugee camps in Kenya, Ethiopia, Burundi and Rwanda. The number of resettlements has not increased with the increase of refugees.

³²⁴Arendt, H. (1951). *The burden of our time*. London; printed in USA.

³²⁵Harvey, C. J. (2000). Dissident voices: Refugees, human rights and asylum in Europe. *Social & Legal Studies*, 9(3), 367-396.

The influx of large numbers of asylum seekers is a threat to liberalism according to Hanna Arendt³²⁶. As discussed in chapter 3, the concept of the nation state does not go well with liberal ideas of widely inclusive rights. Liberal theorists endorse the idea of inclusive human rights and they also take sovereignty for granted. However, when a large number of people petition a state for asylum, these two ideas undeniably come into conflict. Liberalism would advocate no refugee is turned away, but being sovereign means states have to control their borders.³²⁷ Ultimately, states in their quest to limit the number of people coming across their borders will violate the right of asylum.

All the above sentiments are also evident in South Africa.

6.5 Shifts in the South African asylum system

Ironically, the number of asylum seekers in South Africa has decreased despite massive increases globally. Since asylum seekers seek a path of least resistance, the difficulty of lodging asylum claims and the limited prospect of success in these claims must have reverberated across migrant networks. The South African government has been increasingly reluctant to accept refugees. Even though the number of asylum seekers has always been high, the number of recognized refugees since the enacting of the Refugee Act is not more than 66 thousand according to the UNHCR³²⁸.

To reiterate an important point, the South African Refugee Act and The Constitution are not based on a normative belief in fundamental human rights of the wider society. Race and ethnicity based politics, together with political mobilization, are a clear indication of this. Therefore, rights are based on membership of a national group. Within the national group, there is further apportioning of rights based on race and ethnicity. For instance, black South Africans claim more rights based on historical injustice. Affirmative action is an example of this. This is not to say it is wrong, but it is a reflection of the national psyche.

Civil society does not have enough traction to effectively advocate and protect the rights of asylum seekers and refugees because there is no widespread public support. As a result, the

³²⁶Arendt, H. (1951).

³²⁷Lamey, A. (2012). A liberal theory of asylum. *Politics, Philosophy & Economics*, 11(3), 235-257.

³²⁸ UNHCR . (2015). 2015 UNHCR country operations profile - South Africa. <http://www.unhcr.org/pages/49e485aa6.html>[Accessed 4 October 2015]

government, taking its cue from the sentiments of the wider public, has increasingly tightened the asylum system.

The analysis of both data sources and the literature, indicate that access to RROs has been severely curtailed by the DHAs closure of three RROs. In many court submissions, DHA claimed that asylum seekers do not have rights. This is contrary to the word and the spirit of the Refugee Act.

In a court case the tested the DHA's argument of the absence of rights for asylum seekers, Judge Dennis Davis expressed his concern when a state advocate said: 'these people have no rights' and the judge said the closure violated the rights of a particularly vulnerable group of people.³²⁹

The number of asylum seekers successfully getting refugee status in SA has decreased significantly. The shorter turnaround time for a decision on an asylum application and of any appeal decision, gives the impression on the surface that Home Affairs is improving the system. However, incorrect decisions abound as the interview with the SC advocacy officer indicated. Mthembu-Salter et al³³⁰ admit that the DHA is being used as an immigration control institution rather than as the implementer of the Refugee Act.

Furthermore, the socio-economic conditions that gave rise to the huge wealth gap in SA do not make it easy for asylum seekers and refugees to claim socio-economic rights. As data sources indicate, asylum seekers and refugees come across xenophobia when they live and work closer to where there is competition for resources.

That their spaza shops were targeted in the recent 2015 xenophobia attack was partly as a result of migrant workers being perceived as having taken over the spaza shop trade in informal settlements and in peri urban areas where the poor live. The perception of the local poor that migrants are doing better than the locals translates into a loss of political support for asylum seekers and migrants.

Beside the many stereotypes, there are however criticisms of the asylum system that should be taken seriously: There is a belief that most asylum seekers are in fact economic migrants. Since

³²⁹ Scalabrino Centre Cape Town v Minister of Home Affairs and Others (11681/2012) [2012] ZAWCHC 147; (25 July 2012)

³³⁰Mthembu-Salter, G., Amit, R., Gould, C., & Landau, L. B. (2014).

the system does not make it easy for them to apply for business or other permits, they use the asylum system to access documentation.

In addition, there are fraudulent asylum applications like the cases of *COMRSA v the President of the Republic*,³³¹ of [known criminal] Donovan Krejcir and *Lukombo v Minister of Home Affairs and Others*.³³² However, it is the implementation of the Act and related immigration policies of the country that are responsible for creating the gaps that allow for the system to be abused.

Both data sources confirm that corruption has severely affected the effectiveness of the institution of DHA and compromises the rights of asylum seekers and refugees alike.

6.6 Gap between policy and practice

There is a glaringly apparent gap between the management of the asylum regime prescribed by law, and its actual management. The Refugee Act as a document based on international human rights instruments is meant to protect asylum seekers and refugees. However, the practice has been altogether different. To begin with, the DHA has not put adequate resources in the asylum system to manage the influx of asylum seekers. There are not enough RSDOs, RAB officials and other supporting structures. In addition, the DHA implements a course of action that resides outside the existing legislation.

The 2012 53rd ANC Conference in Mangaung gave clear indication of a policy shift in asylum management when it lamented that South Africa had adopted international conventions without due consideration.³³³ It classified the DHA as a security apparatus and made recommendations. However, this was not followed by policy documents towards amending the Refugee Act yet the DHA proceeded to implement changes in the asylum management system.

³³¹ *CoRMSA v the President of the Republic of South Africa & Others*, Case No. 30123/11. CoRMSA argued that the Rwandan general, Faustin Kayumba Nyamwasa doesn't deserve refugee status. However, CoRMSA lost this case and subsequent attempts to overturn the decision to give him a refugee status by DHA. Mr. Nyamwasa is wanted for war crimes in Spain and France. He also survived an assassination attempt allegedly by Rwandan government while in he was in SA.

³³² *Lukombo v Minister of Home Affairs and Others* (2013/13552) [2013] ZAGPJHC 142 (13 June 2013). Mr. Lukombo applied for asylum 3 times with different names.

³³³ African National Congress 53rd National conference. (2012). Peace and Stability Policy Discussion Document. Manguang.

These changes to the asylum management system by DHA consisted of:

- Closure of RROs
- Statement of their intention to move RROs to the border
- Application of a '1st country of safety' principle in status determination procedures
- Refusal to renew section 24 permit after 10 renewals

These measures were neither accompanied by policy nor authorized by legislative changes. The DHA's official statements were unclear as to whether these measures constitute a policy change. Court submissions on the closure of the RROs indicate that the DG submitted an affidavit that the Cabinet had made a decision to move the RROs to the border. However, other documents showed that the offices were closed because of administrative difficulties.

The DDG for Immigration services, Mr. McKay, when consulted on the RRO closure in December 2013, stressed that there was no policy change.³³⁴ A month later the DG sent out a statement to the effect that besides administrative difficulties, there was no need for a RRO office in Cape Town as most asylum seekers enter through the northern borders.³³⁵

Confusion remains over what the actual policy is. The DHA has come up with an amendment to refugee policy in order to address the changes mentioned above. The gap between policy and practice is accompanied by incompetence and maladministration that clog the asylum system [as is the case in most government institutions].

6.7 Incompetence and maladministration

The DHA has always been considered the problem child of the public sector. Poor service delivery, corruption and financial misadministration are longstanding features of the department. Service was not only bad for migrants but for locals as well.

³³⁴ Minutes of the Stakeholder Consultation in Cape Town over future of CT RRO – 05 December 2013

³³⁵ Director General of the Department of Home Affairs. (2014, January 31). Reasons for the decision of the Director General of the Home affairs in the future of the Cape Town Refugee Reception Office. Pretoria, DHA.

National Identity [ID] cards used to take an extremely long time to process. An individual, frustrated with waiting for an ID, took a DHA staff member hostage.³³⁶ Another person traded sexual favours to get an ID that had taken years to be finalized³³⁷. Many such incidents occurred at Home Affairs. The introduction of new systems and a turnaround strategy have really improved service delivery at DHA offices. As a result, the management of RROs has improved. Significant challenges however remain.

The Department of Home Affairs has paid out R1.4 billion in claims as a result of incompetence on the part of its officials. 65% of these are not related to immigration services. A frequently heard complaint about Home affairs is that officials do not have the necessary skills in customer care even though it is a service oriented institution that deals with the public. Handmaker³³⁸ states: “The inefficiency of the bureaucracy inherited from the various apartheid jurisdictions has been legendary”. The asylum system is also a victim of the systemic problems in the Public Sector.

In an effort to make the asylum system efficient, the adjudication of cases is fast tracked without really examining asylum cases to the fullest extent for the benefit of asylum seekers. The amendment to the Refugee Act and the green paper on international migration do not deal with the problems in RROs in terms of access, processes and corruption. For instance, Mkuseli Apleni the Director General of DHA, in directive 21 of 2015³³⁹ ordered that asylum seekers could not have a status change. This means they cannot apply for temporary or permanent residence permits. This directive negates the 2003 Dabone³⁴⁰ court case in which the parties consented to abide by the 2003 ruling that asylum seekers could change their status and did not necessarily need a passport to do so.

³³⁶ Sukhraj, P. (2005, December 1). IOLnews. ID delay drives man to take a hostage.

<http://www.iol.co.za/news/south-africa/id-delay-drives-man-to-take-a-hostage-1.260229#.VhfCi6MaLIU>[Accessed 1 October 2015]

³³⁷ De Waal, M. (2011, September 11). Daily Maverick. Ntomboxolo Nyendwana's Home Affairs torment

<http://www.dailymaverick.co.za/article/2011-09-14-ntomboxolo-nyendwanas-home-affairs-torment#.ViEdnqMaLIU>[Accessed 1 October 2015]

³³⁸ Handmaker, J., De la Hunt, L. A., & Klaaren, J. (2008).

³³⁹ Department of Home Affairs, Directive 21 of 2015

<http://www.vfsglobal.com/dha/southafrica/pdf/Immigration-Directive-No-21-of-2015-Asylum-Seekers-Temporary-Reside.pdf>[Accessed 12 September 2016]

³⁴⁰ Dabone & Others v Minister of Home Affairs and Another 2003 (11) 11 (WHC)

Despite promises of a court challenge, NGOs seem powerless to deal with the changes in practice and departmental policies.

The findings of this study do therefore confirm the hypothesis that the role and effectiveness of NGOs is increasingly hampered as the relationship that they have with the DHA has become increasingly confrontational. The three NGOs used as a case study indicated that in one form or another, they have cooperated in drafting the Refugee Act (LHR); training RSDOs (RSS); and facilitated access (SC) in the 90's and the 2000's. However in the past 5 years, with the closure of RROs and limitations of access, the relationship has changed from cooperation to one of litigation with limited success. Therefore, their role and effectiveness has declined.

Summary

The work of the NGOs and the place which asylum seekers and refugees occupy in the international and national context is beset with contention and contradictions. The chapter argues that the claim of rights for asylum seekers and refugees are contested and conditioned by negotiation between the state, civil society and intergovernmental organizations like the UNHCR which are guided by international and national instruments of human rights.

The researcher recognizes the influence of organizational culture and bureaucracy in general, on the conduct of NGOs and on how effective they are or could be. However, that is not the focus of this research.

It is significant to understand the role and effectiveness of NGOs not only from the data gleaned from the response of the asylum seekers and refugees but by looking at the data in its entirety. High level advocacy and litigation carries as much importance as the social and other services they provide. Both these services categories complement each other in most cases.

This chapter has examined the relevant issues in light of the theories underpinning this research with regard to the role and effectiveness of NGOs to carry out their mandate. NGOs are increasingly being side-lined when it comes to asylum seeker and refugee issues and the implementation of the Refugee Act within the DHA.

This is in stark contrast to their previous role of consulting on and steering refugee policy. Asylum seekers are especially having their rights curtailed despite some of them staying over 10 years on Section 22 permits. The NGOs seem to be losing this battle.

There are, however, recommendations that could address these issues. The next chapter concludes the discussion and recommends possible solutions to these challenges and looks at policy implications of these recommendations.

Chapter 7: Conclusion and Recommendations

Introduction

Currently, there is a dramatic surge in voluntary migration across international borders in pursuit of better lives or due to force of circumstances such as political instability, wars, and natural disasters. Immigrant receiving countries are faced with an overwhelming number of people and this may cause controversy because of the perceived fears that the migrants may compete unfairly with their hosts for jobs, housing and other welfare services.

Hence, migrants are increasingly exposed to racism, xenophobia and discrimination (IOL, IOM, OHCHR³⁴¹; Adepoju³⁴²; UNHCR³⁴³) and require advocacy to constantly focus the attention of international and national bodies on migration and asylum issues and on the protection of their socioeconomic rights.

South Africa's transition to democracy meant it opened its doors to migrants and asylum seekers who arrived mostly from Asia and other African countries. The backlash that emanated from the local population as a result of the influx of immigrants gave rise to concerns in local NGOs and the UNHCR on the need for a formal policy to manage immigrants and asylum seekers.

Hence, South Africa's refugee policy came into existence with the help of UNHCR and local NGOs. In comparison to other countries, the asylum system in South Africa is, in many ways, young. The Refugee Act is also one of the most liberal of its kind in the world as it guarantees fair and procedural status determination processes. In addition, The Constitution guarantees comprehensive socio-economic rights for refugees and asylum seekers.

The contribution of NGOs in helping to formulate the asylum policy and legislation was substantial. However the relationship between civil society and government has swung from one of cooperation to confrontation. This applies to NGOs inputs to the managing,

³⁴¹International Labour Office, International Organisation for Migration, Office of the United Nations Higher Commissioner for Human Rights (2001). *International Migration, Racism, Discrimination and Xenophobia*. ILO, IOM, OHCHR. Geneva: pp1-25.

³⁴²Adepoju, A. (2003). Continuity and changing configurations of migration to and from the Republic of South Africa. *International Migration*, 41(1), 3-28.

³⁴³United Nations Higher Commissioner for Refugees (2011). *Global Trends*. UNHCR. Geneva. pp1-25.

implementation, and monitoring of the Refugee Act's provision of socioeconomic rights for refugees and asylum seekers. The reasons for this change in relationship include: a lack of political will and public support; operational deficiencies in DHA the other implementing institutions; and corruption.

The UNHCR is unable to intervene directly as its local refugee policy does not allow it to operate directly. Instead, it supports NGOs and other partners in carrying out its mandate. Therefore, the contribution of NGOs in advocating and protecting the rights of refugee and asylum seekers is crucial. It is for this reason that the researcher set out to investigate the contribution of NGOs to the advocacy and protection of refugee and asylum seeker rights.

In the quest to do so, the researcher identified three NGOs and interviewed the personnel of these NGOs. In addition, the researcher interviewed Ethiopian and Congolese refugees and asylum seekers to gauge the problems they face and their perceptions of the contribution of NGOs. The previous chapters analysed and discussed the data in light of the literature and in light of liberal theories that underpin the research. The following chapter summarizes the salient points based on the objective of the research.

7.1 Summary

The research has critically discussed the changing role of NGOs that work with refugees and asylum seekers, and assesses their effectiveness based on four criteria: Advocacy; Protection; Facilitating access to social and other services; and Humanitarian assistance given.

We will therefore look at the research objectives in light of these criteria:

The first objective of this research was to investigate whether the organizations' policies and programmes are primarily geared towards advocating and protecting the rights of refugees and asylum seekers. The three case study NGOs in this research pursue goals that are primarily geared towards protecting the rights of refugees and asylum seekers. As for LHR, even though the organization has the wider objective of maintaining public interest, if one looks at its operations in past years, it has identified migrants as vulnerable and orientated most of its resources to this area. Therefore, the Refugee and Migrant Rights Project is the most active project of LHR.

Even though all three NGOs focus adequately on refugee and asylum seekers, they have different ways of approaching this mandate. While LHR focuses on lobbying government and litigating if need be, the SC and RSS have worked to secure access to documentation on a case by case basis. The RSS focuses on access to socioeconomic rights by facilitating access to health, education, banking and skills development. While the SC does this as well, they also actively work on facilitating access to documentation which work is not undertaken by the RSS. The issue of adequate resources is an important factor in this regard. The SC has a stable and varied funding mechanism compared to the RSS.

The second objective was to examine whether the NGOs are effective in dealing with government departments in terms of guaranteeing refugees social services. Fortified by the comprehensive rights of refugees and asylum seekers in South Africa, the NGOs feel empowered to approach state and non-state institutions. Examining their role in dealing with institutions to facilitate social services is complex as it depends on the institution, the case involved, and the personnel in these institutions.

I conclude that they are generally effective, with the exception of their dealings with the DHA, which will be discussed separately below. In the effort to guarantee access, the NGOs have dealt with issues such as social grants, the right of asylum seekers to work, access to health, and access to education. All three NGOs seem to have a good relationship with the department of Health (DOH), Education (DOE) and Social Development (DSD). In most of the areas that these departments are responsible for, the NGOs have been effective by using mostly cooperative, but also confrontational tactics when necessary. For example, the SC has provided teachers and nurses for the DOE and DOH respectively, and takes care of minors for which the DSD provides significant funding. The issue of access to banking has not been successful. On balance, NGOs have been effective, except in their work with the DHA. The relationship with DHA has devolved into one of confrontation.

The third and fourth objectives have to do with the mechanisms that NGOs use to assist refugees and asylum seekers to access documentation, and when dealing with the DHA. These mechanisms apply to monitoring the implementation of the Refugee Act. This is the most important aspect of the NGOs' work because without documentation, both refugees and asylum seekers are liable to be arrested and abused. In addition, without documentation, they cannot access other services. The ability of NGOs to effectively facilitate access to documentation is dependent on their relationship with the DHA.

The relationship between the DHA and NGOs in general, has been deteriorating steadily. As cooperation on issues of mutual interest has decreased, the relationship has increasingly become confrontational. Recently, the relationship has been very strained following the closure of three RROs. However, this has not deterred NGOs from approaching RRO offices on a case by case basis. The relationship is either good or bad depending on the individual personnel involved. The SC and LHR have reported that their relationship depends partly on the centre manager of a particular RRO. The engagement of the RSS with the DHA is very limited. This also speaks to the absence of proper policy implementation on the part of DHA.

One mechanism for engaging with the DHA and facilitating access to documentation is approaching a specific RRO with a particular issue. NGOs also approach RROs and have meetings to address pressing issues. The DHA holds sporadic stakeholder meetings when there are issues of importance to the Department. NGOs have questioned the effectiveness of these meetings.

This approach is bearing fruit according to NGO personnel.

NGOs have used litigation as an advocacy tool and for rights protection with some degree of success. In some cases, successful litigation has failed to produce the desired results. One example of this is the closure of RROs: Despite repeated court rulings that the Department reopen the reception centres, they still remain closed. Increased litigation occurs largely because the DHA is increasingly moving towards limiting the rights of asylum seekers by limiting access to documentation in particular. Chapter six discussed the reasons for this.

A criticism that could be labelled at the NGOs is that they rarely cooperate with each other unless problems reach crisis point. They rarely run any joint programmes nor do they pool resources to minimize operational costs. The director of the SC explained that competition between NGOs for funding limits their effectiveness.

NGOs lobby for the rights of refugees and asylum seekers in different ways. In some ways they depend on the UNHCR to carry out high level lobbying. Its diplomatic status gives the UNHCR some leverage. However, organizational level lobbying by NGOs of different government departments is much more effective. This was seen in efforts to access health and education. SC and RSS have successfully lobbied non-state organizations like banks, and have engaged with some FNB branches to open accounts for refugees and asylum seekers.

The integration of refugees and asylum seekers is not an easy task. Despite the best efforts of civil society, changing attitudes and perceptions is a long term project. There are language and skills programmes offered by the SC and RSS that will increasingly assist refugees and asylum seekers to integrate into the broader society. Furthermore, all the NGOs claimed to have outreach programmes. Some have wider reaching projects than others.

Despite these claims, a look at the deep-seated xenophobia that still exists within SA society and the number of refugees and asylum seekers in SA shows that their reach is limited. Their outreach programmes are a small part of their overall operations so it is safe to conclude that this is not their primary focus.

One of the objectives of this research is to examine the adequate involvement of refugee communities in the NGOs' problem solving efforts. Unfortunately a lack of refugee community involvement weakens NGOs' effectiveness.

Refugee communities which have formal Community Based Organizations (CBOs) or individual community representation are almost non-existent. It is evident that community organizations are not co-opted and empowered to solve their own problems. This should have been one of the key objectives of NGOs as minorities do well when they are empowered.

This is not to say that they do not have any relationship with the NGOs. For instance, the SC assists the Somali Association in some respects. However, there are no joint programmes. There seems to be an uneasy relationship in which migrant CBOs criticize NGOs for monopolising funding for this sector. NGOs look down on the CBOs for their lack of capacity.

All in all, civil societies and NGOs play a significant role in advocating and protecting the rights of refugees and asylum seekers. In other countries – in the absence of a local refugee policy – the UNHCR steps in to advocate and protect refugees and asylum seekers. In fact, most African countries do not consider that this is their responsibility, despite ratifying the 1951 convention. They leave it to the UNHCR to administer the asylum system in their countries.

In South Africa, there is a very liberal refugee policy and legislation. Therefore, the UNHCR is effectively on the periphery and has only diplomatic status. Despite the NGOs advocating for and protecting refugees and asylum seekers, they cannot fill the vacuum that is left by

shortfalls in the implementation of the Refugee Act. That is the primary responsibility of the government. Thus, the limited capacity of NGOs should be recognized.

Despite their limited capacity, either through cooperation, consultation, or litigation, NGOs have made important gains. Some of their achievements are: the liberal elements within the Refugee Act; the right of asylum seekers to work and study; access to social grants; access to health; access to education and banking; and access to documentation. These achievements were made despite Government's continuing unwillingness to improve access to documentation, xenophobia, corruption, an inefficient public service, and a lack of political will. These challenges persist. The tactics and strategies employed by NGOs have been fruitful to some extent. However, the continued use of litigation as a tool is proving to be problematic.

In addition, there seems to be a disconnection between what refugees and asylum seekers perceive and the actual work that NGOs do. NGOs are not very visible on the ground and the majority of refugees and asylum seekers do not know about them. What refugees know about the NGOs is acquired through their networks. It is unfair to expect NGOs to advertise their services, as this adds to their operating costs. However, they can work with migrant CBOs to better inform communities of their work.

There are wholesale changes to the asylum system that are being proposed by Government: to curtail the right of asylum seekers to work and study; and procedural amendments to status determination that would give the DHA and satellite institutions (RAB, SCRA) greater discretion to reject asylum applications. Most importantly, Government wants to move RROs to the border and modify the urban refugee policy to hold asylum seekers in camps. In the bid to make the necessary changes and reinforce immigration control, Government plans to circumnavigate the courts. In such an environment, it is highly doubtful to what extent litigation will be successful.

Thus, NGOs have to mobilize political and public support to effectively stand against these changes. The National Assembly, the ANC and its union allies, and other parties, are their primary lobbying and advocacy targets. Strategic deployment of soft power is imperative in this respect. Litigation should be a secondary and last resort. After all, despite their intentions, the courts are proving to be limited in their capacity to enforce judgments.

Therefore, the findings of this research affirm the hypothesis that the relationship of NGOs working for the rights of refugees and asylum seekers with DHA has markedly changed over

the years from being that of significant cooperative players in refugee policy to a confrontational one; thereby decreasing their effectiveness.

7.1 Policy recommendations

The complex socio-economics of the country are mostly structural and this makes it difficult to propose a simple fix. When it comes to dealing with refugees and especially asylum seekers in policy terms, the priorities of Government need to be looked at. The South African government's priority is its citizens. That is not to say international obligations are not important. However, politics demands that priority be given to the issues of citizens.

The liberal Refugee Act and the rights enshrined in The Constitution demand that Government make the asylum system better. Yet, pouring more resources into the system is not politically acceptable to the ruling party. There is pressure at local community level to control the influx of asylum seekers. Again, the xenophobic attacks have shown that the locals increasingly resent foreigners living and working among them. Locals especially resent their ownership of small businesses in townships. This has been contentious because, as previously discussed, foreigners are simply highly competitive and they dominate the spaza shop business.

On the other hand, South Africa enjoys a better economy amidst the sea of African poverty. It is natural for migrants to seek economic opportunities. In the absence of easier access to SA they tend to use the asylum system to stay and work in the country. The reason is that the asylum system, either through the procedurally long process or inefficiency, is unable to clear those rejected asylum seekers out of the system or out of the country quickly enough.

The borders are also porous. The asylum system therefore needs to be efficient without disadvantaging genuine asylum seekers. To address these issues, the Department of Home Affairs has implemented some measures to streamline its internal processes. There is criticism by civil society that the rights of asylum seekers are being infringed upon in the procedurally fair adjudication of cases.

Looking at the above factors, the DHA has the unenviable task of addressing these issues. The Minister held several round table discussions with academics, multilateral agencies like the UNHCR and IOM, and NGOs. Yet, despite a slight amendment to the Refugee Act and a green paper on international migration, there is no concrete solution. The issues are complex and

require political consensus that might not be forthcoming. Yet, the researcher makes certain observations:

Firstly, the immigration policy and refugee policy need to speak to each other in consideration of the demands and realities of access to the country and its economy. Whether people like it or not, the movement of people across borders is a permanent feature of globalisation. In the absence of a way for people to enter the country legally and work, they will continue to use the asylum system. The special dispensation for Zimbabweans enabled Zimbabweans to legally work and reside in the Republic and this eased the pressure on the asylum system.

The DHA needs to build onto this precedent and create such a system for citizens of other neighbouring countries and further extended to include citizens of other non-neighbouring countries. However, political support for such an idea might be difficult to attain.

Secondly, the status determination process should be made efficient and corruption free. Here, the investment of more resources is important. If the claim that most asylum seekers are in SA for economic reasons is true (literature suggests it is) then resources that might be put into the system might decrease later after asylum seekers have been cleared out of the system. However, the effort of government departments to make the administrative process restrictive in terms of access and fair adjudication of cases might lead to more court challenges and the undermining of the law. This translates into more resources being spent.

Thirdly, the department should have a cooperative relationship with civil society. Unlike other issues that the government deals with, the issue of asylum seekers and refugees creates high levels of interest in civil society. Although NGOs were instrumental in the drafting of the Refugee Act together with Government, most of the court challenges that Government faces come from civil society organizations. Besides having a rich knowledge of the environment, NGOs could be instrumental in better implementing the policy.

The interviews with the three NGOs show that they support the Refugee Act and have ideas for improving the DHA processes. The special dispensation for Zimbabweans, for instance, was proposed by NGOs. Moreover, cooperation should not only be with NGOs, but with other departments and financial institutions as well. These and other departments affect the wellbeing of asylum seekers and refugees.

This research consistently makes the point that what makes it difficult for policy to be properly implemented is a combination of structural, socio-economic, and political factors. This is true

for all stakeholders: the DHA, Government, and NGOs involved in the protection of the rights of asylum seekers and refugees.

7.2 Recommendations for NGOs

This research used the case study of three NGOs. However, they are representative of NGOs on the whole and one could generalize the results to a certain extent based on the work of these three NGOs. This assessment is based on the nature of the work they undertake, on the size of the NGOs, and on their contribution to advocacy for, and protection of, asylum seeker and refugee rights.

Three recommendations come from these findings. If implemented, these would help NGOs to be better placed to protect and advocate for the rights of this group of people:

1. NGOs need to cooperate with each other and pool resources, as doing this minimizes duplication and lowers operational costs. In addition, donors are keen to see cooperation among different NGOs in a particular sector. This might increase their donor appeal. Moreover, advocacy and protection is more effective if there is a united force. Even though CoRMSA provides some sort of cooperation, it is not enough.
2. NGOs need to be visible to refugees and asylum seekers. Thus, NGOs need to run awareness programmes among refugee communities. They also need to find operational partners within refugee communities, be it community leaders or migrant CBOs. Related to this issue is the lack of cooperation between refugee CBOs and NGOs. There has to be a better relationship among them. Most importantly, NGOs need to empower refugee communities to advocate for their own rights.
3. The Government and the DHA are thinking of introducing changes to the asylum system. Therefore, the tactics and strategies of the civil societies and particularly NGOs in this sector need to be adjusted in such eventualities, as litigation alone cannot guarantee success. In addition, the drive to curtail the rights of asylum seekers is a greater movement within Government to roll back liberal rights in South Africa. The bid to withdraw from the International Criminal Court (ICC) and the constant undermining of the judicial system and institutions supporting constitutional democracy such as the Public Protector are some cases among many. Therefore, the NGOs in this sector should align their strategies with those of other civil society

organizations to counter the rolling back of liberal rights. It is about finding common ground with other NGOs as some NGOs work on other issues as well.

Internal management of NGOs and their funding both play a big role. However, the internal dynamics of NGOs were not really interrogated in this research. Therefore, it is important to do further research on this aspect.

7.3 Recommendations for further research

Many migrant CBOS have emerged in recent times. They have differing objectives: religious; ethnic; or nationalistic. However, they offer some kind of community organization and representation despite the claim that there are formed along ethnic, religious or political lines. The extent of the contribution of migrant CBOs has not been researched adequately.

In addition, there are asylum seekers who have been waiting for decisions on their applications for a long time. They have built an attachment to SA through the establishment of businesses, education and culture. In some cases, there are children of asylum seekers who have been born here and have no knowledge of their supposed home country. Furthermore, some of these asylum seekers come from countries that are still experiencing conflict. In such cases, refolement is not an option. Considering all these factors and the trend of the RAB to reject most cases, and in the event most of them are rejected, it will cause large scale hardship. There is little discussion of what their fate will be, and research to document their experiences and their expectations is needed.

Lastly, there are a lot of incorrect statistics that are spread by government officials and the media regarding: the number of asylum seekers; the contribution of refugees and asylum seekers in actual monetary terms and skills; and the number of crimes committed by migrants.

Research on asylum seekers and refugees might result in factual information to counter the stereotypes that hype up xenophobia. Those who work in refugee and asylum rights advocacy and protection might benefit from this research as well.

It is the belief of the researcher that this research has looked at an important issue that affects asylum seekers and refugees. In addition, it points out weaknesses in the asylum system and the NGOs that protect the rights of asylum seekers and refugees. It also provides policy

recommendations. All in all, I believe it has contributed to the general body of knowledge and does provide original knowledge on the state of NGOs that are active in the protection of refugees and asylum seekers, and in meeting their challenges.

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Appendix 1: Ethiopian and Congolese respondents profile

Gender, age, marital status, education, employment type and current occupation of Ethiopian respondents

	Gender	Marital Status	Nationality	Age	Education Level	Employment Type	Current Occupation
Male							
1	Male	Single	Ethiopian	28	Secondary	Self-Employed	Clothing Store
2	Male	Single	Ethiopian	35	Secondary	Self-Employed	Clothing Store
3	Male	Single	Ethiopian	36	Tertiary	Unemployed	Doing odd jobs
4	Male	Single	Ethiopian	24	Secondary	Self-Employed	Hawker
5	Male	Single	Ethiopian	26	Secondary	Self-Employed	Spaza shop
6	Male	Married	Ethiopian	30	Primary	Self-Employed	Clothing Store owner
7	Male	Single	Ethiopian	24	Secondary	Self-Employed	Hawker
8	Male	Single	Ethiopian	31	Secondary	Wage-employment	Pastor
9	Male	Single	Ethiopian	33	Secondary	Self-Employed	Spaza shop

10	Male	Single	Ethiopian	21	Primary	Self-Employed	Hawker
11	Male	Married	Ethiopian	40	Secondary	Self-Employed	Clothing Store
12	Male	Single	Ethiopian	23	Secondary	Wage-employment	Shop assistant
13	Male	Single	Ethiopian	28	Secondary	Self-Employed	Clothing Store
14	Male	Single	Ethiopian	26	Secondary	Self-Employed	Spaza shop
15	Male	Single	Ethiopian	30	Secondary	Self-Employed	Street Vendor
16	Male	Single	Ethiopian	25	Primary	Self-Employed	Restaurant
17	Male	Married	Ethiopian	32	Tertiary (Lawyer)	Self-Employed	Law firm
18	Male	Married	Ethiopian	30	Tertiary	Self-Employed	Spaza shop
19	Male	Single	Ethiopian	28	Secondary	Self-Employed	Spaza shop
20	Male	Single	Ethiopian	25	Secondary	Self-Employed	Street Vendor
Female							
1	Female	Married	Ethiopian	26	Secondary	Self-Employed	Take Away
2	Female	Single	Ethiopian	27	Secondary	Self-Employed	Restaurant

3	Female	Married	Ethiopian	33	Secondary	Self-Employed	Photo Shop
4	Female	Single	Ethiopian	26	Secondary	Self-Employed	Spaza Shop
5	Female	Single	Ethiopian	36	Secondary	Self-Employed	Hair Salon
6	Female	Married	Ethiopian	29	Secondary	Self-Employed	Take Away
7	Female	Married	Ethiopian	27	Primary	Self-Employed	Restaurant
8	Female	single	Ethiopian	25	Tertiary	Un-employed	_____
9	Female	Married	Ethiopian	24	Secondary	Un-employed	Home executive
10	Female	Single	Ethiopian	36	Tertiary	Wage-employment	Church assistant
11	Female	Married	Ethiopian	27	Tertiary	Self-Employed	Clothing shop
12	Female	Married	Ethiopian	33	Secondary	Self-Employed	Restaurant
13	Female	Married	Ethiopian	24	Tertiary	Self-Employed	Spaza Shop
14	Female	Single	Ethiopian	21	Secondary	Wage-employment	Kitchen assistant
15	Female	Married	Ethiopian	31	Secondary	Self-Employed	Spaza shop
16	Female	Single	Ethiopian	25	Secondary	Self-Employed	Clothing Shop
17	Female	Single	Ethiopian	29	Secondary	Self-Employed	Spaza Shop
18	Female	Married	Ethiopian	28	Tertiary	Self-Employed	Spaza Shop

19	Female	Married	Ethiopian	32	Secondary	Self-Employed	Clothing shop
20	Female	single	Ethiopian	27	Tertiary	Wage-employment	Shop Assistant

Gender, age, marital status, education, employment type and current occupation of Congolese respondents

	Gender	Marital Status	Nationality	Age	Educational Level	Employment Type	Current Occupation
Male							
1	Male	Single	Rwandan/Congolese	30	Tertiary	Un-employed	Student
2	Male	Single	Congolese	33	Tertiary	Un-employed	Student
3	Male	Single	Congolese	27	Secondary	Wage employment	Delivery
4	Male	Single	Congolese	29	Secondary	Wage employment	Driver
5	Male	Single	Congolese	30	Tertiary	Un-employed	-----
6	Male	Single	Congolese	34	Tertiary	Self employed	Clothing factory shop
7	Male	Single	Congolese	25	Tertiary	Wage employment	Shop assistant

8	Male	Married	Congolese	28	Secondary	Self employed	Clothing store
9	Male	Single	Congolese	25	Tertiary	Un-employed	Student
10	Male	Single	Congolese	28	Tertiary	Self employed	Car Guard
11	Male	Single	Congolese	26	Secondary	Self employed	Car Guard
12	Male	Single	Congolese	30	Tertiary	Wage employment	Technician
13	Male	Single	Congolese	23	Secondary	Wage employment	Security Guard
14	Male	Single	Congolese	26	Secondary	Wage employment	Shop Assistant
15	Male	Married	Congolese	41	Secondary	Wage employment	Manager in Solar company
16	Male	Single	Congolese	25	Tertiary	Part-time Wage employment	Waitron/ Student
17	Male	Single	Congolese	24	Tertiary	Wage employment	Delivery
18	Male	Single	Rwandan/Congolese	28	Secondary	Self employed	Car Guard
19	Male	Single	Congolese	33	Secondary	Self employed	Car Guard
20	Male	Married	Congolese	35	Tertiary	Self employed	Electrician

Female

1	Female	Single	Congolese	27	Tertiary	Un-employed	Student
2	Female	Married	Congolese	40	Tertiary	Wage employment	Social worker
3	Female	Married	Congolese	37	Tertiary	Wage employment	Finance officer
4	Female	Married	Congolese	28	Tertiary	Self employed	Car Guard
5	Female	Married	Congolese	25	Secondary	Un-employed	-----
6	Female	Married	Rwanda/Congolese	24	Secondary	Un-employed	Home executive
7	Female	Single	Congolese	23	Tertiary	Un-employed	Student
8	Female	Married	Congolese	29	Secondary	Wage employment	Cleaner
9	Female	Single	Congolese	24	Tertiary	Un-employed	Student
10	Female	Single	Congolese	22	Secondary	Un-employed	-----
11	Female	Married	Congolese	38	Tertiary	Un-employed	Student
12	Female	Single	Congolese	27	Tertiary	Self employed	Car Guard
13	Female	Married	Congolese	31	Tertiary	Un-employed	-----
14	Female	Married	Congolese	25	Tertiary	Un-employed	Student

15	Female	Single	Congolese	25	Secondary	Self employed	Hair stylist
16	Female	Single	Congolese	30	Secondary	Wage employment	Hair Stylist
17	Female	Single	Congolese	28	Secondary	Self Employed	Spaza Shop

Appendix 2: NGOs Personnel respondents profile

Name	Organization	Position
Yasmin Raja	RSS	Director
Consolee Kanamugire	RSS	Social Worker
Miranda Madikane	Scalabrini Center	Director
Corey Jhonson	Scalabrini Center	Advocacy Officer
Patricia Erasmus	LHR	Head of LHR RMRP
Patrick Male Kawuma	UNHCR	Cape Town Office

Appendix 3: Interview Schedule

Basic profile

Gender:

Age:

Highest education achieved:

Residence status:

Occupation:

Interview guide for NGO Officials

Semi-Structured Interview

Name: _____(Optional)

Position in Organisation: _____

Nature of Tasks and Functions Performed: _____

1. How would you describe / characterise the work that your organisation does?

2. Is your organization's policies and programmes primarily geared towards advocating and protecting the rights of refugees and asylum seekers?
3. What is your relationship with other bodies such as UNHCR and the SA Dept. of Home Affairs?
4. Does UNHCR provide adequate support to the civic society active in refugee protection and assistance?
5. In what ways do you assist refugees / asylum seekers?
6. What are the most frequent problem / challenges that refugees are faced with as they try and acquire documentation and integrate into broader society?
7. How would you describe the SA legislative framework that is meant to protect refugee rights?
8. Do you think the legislation and its implementation is effective? Why?
9. Do you monitor the implementation of the legislation? How?
10. Do you think the protection / implementation framework adequately protects refugees and asylum seekers in SA? Why?

11. Do you think that South African citizens are generally welcoming towards foreign migrants, refugees and asylum seekers? Why?

12. Do you think your organisation has been instrumental and effective in integrating refugees into the society? If yes, How?

13. Did the Xenophobia attacks bring the problems that refugees and asylum seekers face to the fore? If it did, in what way?

14. Refugees and Asylum seekers have a challenge in terms of accessing certain services like Banking. What has been your role in addressing this challenge?

Interview guide for Refugees / Asylum Seekers

Semi-Structured Interview

Name : _____ (Optional)

1. What is your present status ?

Employment

Place that you are staying

Married / Related to a South African?

2. What is your country of origin?

3. When did you arrive in SA and how long have you been in the country?

4. Have you been adequately assisted by the Dept of Home Affairs or any other organisation? Yes / No? Why?

5. Have you heard of the LHR and have you gone to them for assistance? If yes, what was your experience like?

6. What challenges have you faced while in SA?

7. Do you feel that you have been able to access the basic human rights / social services that are guaranteed to refugees under International Law and SA Law while in SA? Yes / No? Why?

8. Are you involved in any refugee assistance programs? Yes / No? Please provide more information.

9. What has your general experience been like while in SA?

10. Do you think South Africans are generally welcoming to foreign migrants / refugees / asylum seekers? Yes / No? Why?

11. What are your future plans?

N.B. Research assistants were given very detailed breakdown of questions that they could ask with detailed explanation of what is expected in each question to enable to effectively conduct interviews.

Appendix 4: Informed Consent form

Informed Consent Form

This informed consent form is for Refugees, NGO personnel, Department of Home Affairs' employees and Key Informants.

Dear Participant,

I am currently conducting a PhD study of *“An examination of the role of NGOs in monitor in and policy implementation with regards to the human rights of refugees and asylum seekers in*

the South African context: A comparative case study of Human Rights NGOS serving as implementing partners of the United Nations High Commissioner for Refugees (UNHCR)”

The purpose of this interview is to gather data regarding the role of NGO's, specifically the Lawyers for Human Rights, Refugee Social Services and Scalabrini Center in assisting refugees and asylum seekers in getting the appropriate protection of their rights as refugees as well as human beings in the pursuit of a safe and productive life in the Republic of South Africa. It will also explore the relationship these NGOs have with the United Nation's High Commissioner for Refugees (UNHCR). The participation of the interviewee in this research is highly appreciated.

You are kindly requested to consider and respond to the interview questions to the best of your abilities. Details of the project appear below. Information provided by you will be treated with

the strictest conditions of anonymity and your identity will not be revealed to anyone, unless you give consent. Participation in this survey / interview is voluntary and you may withdraw if you should choose to do so, at any time. Your time and effort in participating in this project are greatly appreciated.

Researcher,

Meron A. Okbandrias

PhD Candidate

UKZN

For further information please contact the supervisor

Dr. Lubna Nadvi

UKZN

Tel : 031 260 2627 / 7124 / 7336

nadvis@ukzn.ac.za

Reason for Selection as Participant: Participant is a Refugee, NGO personnel, Department of Home Affairs' employee or Key Informant.

I _____ (full name) hereby confirm that I understand the contents of this document and the nature of the research project. I have read the foregoing information, or it has been read to me. I have had the opportunity to ask questions about it and any questions I have been asked have been answered to my satisfaction. I consent voluntarily to be a participant in this study. I understand that I am at liberty to withdraw from the project at any time, should I so desire.

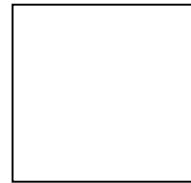
Signature: _____ Date: _____

If illiterate

I have witnessed the accurate reading of the consent form to the potential participant, and the individual has had the opportunity to ask questions. I confirm that the individual has given consent freely.

Print name of witness: _____ Thumb print of participant

Signature of witness: _____



Date: _____

Day/month/year

Statement by the researcher/person taking consent

I have accurately read out the information sheet to the potential participant, and to the best of my ability, made sure that the participant understood its contents.

Name: _____

Signature: _____

Date: _____