

POLITICS OF ASYLUM: SOVEREIGN
CONSIDERATIONS IN THE MULTILATERAL AND
HUMANITARIAN PRACTICES OF REFUGEE
PROTECTION IN POST-APARTHEID SOUTH
AFRICA

Thesis

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Abstract

Most scholars claim that international human rights norms embodied in formal international declarations and treaties have an important impact on domestic political interests and governmental practices. This reasoning about the impact of global human rights is often applied to the post-apartheid South African immigration and refugee policies. While I acknowledge that the ratification of United Nations Conventions on refugees has altered the traditional sovereignty considerations of South Africa towards asylum seekers, I take issue with the claims that South African refugee and asylum policies are primarily motivated and based on humanitarian considerations. Instead, I argue that these policies are based on sovereign considerations and strategic foreign policy interests.

As a result this study has sought to demonstrate that sovereign interests largely explain decisions on the part of South Africa to accept or reject refugees. Although norms diffusion, international advocacy networks, and prestige factors have made a big impact, in practice the refugee policy has continued to reflect South Africa's strategic interests and domestic considerations at all levels. However, I have not argued that South Africa should overlook its national and foreign interests and abide by international human rights norms regardless of the cost of doing so. I have only sought to demonstrate that refugee protection is more likely when powerful national interests find it conducive to manage the destabilizing refugee flows.

Dedication

To **Mayombe** and **Miriam** for their support and
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Chapter One

Introduction

1.1 The Background and Context

The discipline of International Relations, which is mainly concerned with global processes, has recently witnessed a renewed interest in normative studies. The concern in particular here is with studies that attempt to assess the relationship between international norms and their national compliance within the global context. In this study I explore how the increased concern for international norms has been applied to the 'problem' of refugee flows to South Africa after the transformation and normalization of the country's politics in 1994.

During the apartheid era South Africa shunned all international human right conventions and contributed immensely to refugee flows; many students, academics, political-activists and others sought refuge abroad. In addition, over 4,100,000 South Africans experienced massive internal displacements, largely due to domestic policies of forced removals.¹ Regionally South Africa contributed to refugee flows by extensive and deliberate policy of regional destabilisation and overt military aggression notably in Angola and Mozambique. The victims of this destabilisation now comprise a significant proportion of the asylum seekers and refugees resident in South Africa.

¹ Source: US Committee for Refugees, *World Refugee Survey*. 1992

Relative to other policy issues, changes in legislation and institutional mechanisms dealing with immigration have been minimal. The principal legislation governing migration policy has remained largely unchanged and control oriented. As a result, concerns and criticism have been raised over the negative consequences of the Aliens Control Act in regard to refugee rights and foreigners in general. The government response to these concerns has ranged from acknowledgement that serious structural and implementation problems exist in the migration policy, to a more shifty position that this "should not be happening" (Handmaker, 1999: 290-291). However, the government has promoted structural changes first by ratifying all the vital international conventions governing refugee protection and undertaking fundamental changes in domestic policy and legislation dealing with refugee protection.² At the same time, a critical and dynamic crusade spearheaded by humanitarian organizations and academics has not only supported these measures, but has also gone ahead and created a flurry of popular demands for additional legal rights.

As a consequence of these measures and other factors, the country has experienced an influx of asylum seekers. However, the influx has not found extensive normative support among the newly enfranchised South Africans, especially those seeking to enhance their life after decades of deprivation and gross socio-economic inequality. It has led to a number of high profile conflicts between South Africans and foreigners. In such

² South Africa ratified the 1969 Organisation of African Unity Convention on the Rights of Refugees in Africa in 1995 and the United Nations 1951 Convention and the 1967 Protocol in 1996. On April 1, 2000 the new national legislation dealing with refugees (Refugee Act No. 130 of 1998) came into force.

circumstances, asylum seekers by virtue of their "uncertain" legal status, have been most vulnerable to prejudice and intolerance. Despite the hostility, the government has continued to offer asylum to those fleeing persecution and wars.

This study, therefore seeks to understand why South Africa continues to admit asylum seekers when the public mood is ambivalent about refugees. What are the primary reasons for engaging in refugee protection efforts? While I acknowledge the ratification of United Nations Conventions on refugees has altered the traditional sovereignty considerations towards asylum seekers, I take issue with the claims that South African refugee and asylum policies are primarily based on humanitarian considerations. Instead, I argue that these policies are based on sovereign considerations and strategic foreign policy interests. In making the strategic decisions the government is still faced with an arduous task of influencing public opinion through persuasion and negotiation to support its protection measures. In this regard "*politics of asylum*" therefore refers to this act of trying to elevate one public policy over another.

1.2 The Spectrum of Refugee Research in South Africa

The study is timely because the field of refugee research is relatively underdeveloped in South Africa. Much of the extant literature on migration in South Africa is dominated by "illegal"³ (undocumented) immigration concerns and often refugee

³ This research uses the term "undocumented immigrants" to refer to all persons who entered South Africa without notifying the immigration control of their presence. The South African authorities normally refer to such persons

issues secure only a partial mention (Davies, 1995; Fontana, 1997; Minnaar and Hough, 1996; Reitzes, 1995). Recently, a number of legal and human rights scholars have adopted a much broader policy-oriented approach to immigration in South Africa. There include for example, comparative legal analyses that take into account refugees as opposed to international immigration, effectiveness of refugee decision-making procedures, the role of UNHCR and the impact of domestic and foreign policy considerations on the implementation of refugee rights (Crush, 1998; Handmaker, 1999).

Whereas, there is a growing and important literature review on refugees from other academic sources, political scientists and international relations scholars in South Africa have paid insufficient attention to strategic issues in refugee protection that are related to international political transformations. In this study I seek to address these shortcomings by unraveling the complexities of international ethics, politics, and domestic demands. The study is also a reflection of the growing domestic interest in, and indeed paramount concern within, South Africa about the presence of immigrants and refugees. These, in turn, are the products, of the profound changes in South Africa's political landscape and the dynamics of international politics. This study should be considered as an exposition in favour of a *pro-active and prudent* refugee policy because the scholarly analysis wishes to make a rational contribution to the refugee protection programmes and policy.

as illegal aliens, a term that in a way dehumanizes those with irregular

1.3 Methodology

The study is limited to South Africa and the perspective is predominantly on refugee flows originating from continental Africa. However a great deal of attention is given to international developments. In addition the research tries to cover as much as possible the recognized principles and objectives of refugee protection founded in international practice. The study makes use of official documents; published statistics; online sources; interviews with key persons; and published, or on-going research from primary and secondary sources. The methodology is integrative and comparative in order to understand the impact of multilateral practices on national compliance.

1.4 A Summary of the Chapters

In terms of content Chapter Two sets out a theoretical framework for analysis of multilateral humanitarian protection and sovereignty considerations within global transformations. Here, I explore the ambiguity and the competing commitments to humanitarian principles in a world of sovereign considerations.

In Chapter Three I explore in detail what factors are responsible for refugee flows. If for instance, African states are a calamitous reality for their populace. Does the primary responsibility for refugee flow lie with governments, their citizens (or segments of them) or both?

immigration status.

Chapter Four addresses the politics of asylum, the dilemma of reconciling domestic interests of migration control and the protection of refugees. This classical dichotomy between states' claims to national interest and their *bona fide* participation in international cooperation is particularly remarkable within South Africa.

Chapter Five examines whether the implementation and practices of refugee protection comply with international and constitutional instruments. How does the new legislation reconcile the classical dichotomy between sovereign interests and *bona fide* participation in international refugee protection?

The final chapter proposes that sovereign interests largely explain decisions on the part of South Africa to accept or reject refugees. Although the three mechanisms of norm diffusion and influence, trans-national advocacy networks, international organizations and international prestige factors have made a big impact on South Africa's policy, in practice refugee policy has continued to reflect South Africa's strategic interests and domestic considerations.

1.5 Bibliography

Articles

Handmaker, J., 1999. "Who Determines Policy? Promoting The Right of Asylum in South Africa", *International Journal of Refugee Law*, Volume 11, 2.

Reitzes, M. 1995 "Trans-boundary Migration to South Africa: Challenges for Human Rights, Regional Development and Security" Paper Presented at Biennial South African Political Science Association Conference, University of Stellenbosch.

Sinclair, M. R. 1996 "International Refugee Treaties and Their Implications for the South African State". *Southern African Perspectives No. 69*, University of Western Cape: Centre for Southern African Studies, School of Government.

Books

Crush, J. (ed.) 1998 *Beyond Control: Immigration and Human Rights in a Democratic South Africa*. Cape Town: Institute for Democracy in South Africa (IDASA).

Minnaar A and Hough M (eds.) 1996. *Who Goes There? Perspectives on Clandestine Migration and Illegal Aliens in Southern Africa* Pretoria: HRSC.

Reports and Legal Documents

Republic of South Africa: *Aliens Control Act, Act No. 96 of 1991*.

Basic Agreement between the Government of the Republic of South

Africa and the United Nations High Commissioner for Refugees concerning the presence, role, legal status, immunities and privileges of the UNHCR and its personnel in the Republic of South Africa, September 1993.

The Republic of South Africa: Constitution of, Act No.108 of 1996.

Davies, J (ed.) 1995. *Cross Border Migration in Southern Africa: Mission Report*, Public Information Series. Cape Town: Institute for Democracy in South Africa (IDASA).

Dolan, C and Reitzes, M. 1996, "Press coverage of illegal immigrants and refugees", April 1994-September 1995, Research Report no 48 Johannesburg: Centre for Policy Studies.

Draft Green Paper on International Migration 1997. Presented to Minister of Home Affairs, 13th, May 1997.

Fontana, B. 1997 "The State of Migration Research in South Africa" FGD Occasional Paper No. 8, Braamfontein: The Foundation for Global Dialogue.

Hill, L, 1998, "Some remarks on Trans-national Migration and institutional aspects of State-and Nation Building in South Africa" in Bekker, S and Dodds, M. (eds.). "Institutional Dynamics Relating to the Production of the South African Nation: A progress report on work undertaken within the Franco-South African Research Programme" Department of Sociology: University of Stellenbosch. Occasional Paper No.5, 42-46

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

UNHCR. 1979, "Handbook on Procedures and Criteria for Determining Refugee Status - under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", Geneva: Guideline 44.

U.S Committee for Refugees 1992, *World Refugee Survey 1992*
Washington DC: US Committee for Refugees.

Chapter Two

Theoretical Framework: Refugees in International Relations

2.1 Introduction

Recent conflicts in Africa, Central Asia, Latin America and even Europe, have forced millions to flee political persecution or violence at home in search of succour and safety elsewhere. According to estimates by the *US Committee for Refugees*, between 1998 and 2000, over 14 million refugees and asylum seekers crossed international borders in search of safe haven (Salehyan, 2001:2). International norms call on states to provide them with asylum and a safe haven. This call is enshrined in Articles 13 and 14 of the *Universal Declaration of Human Rights*, as well as Article 12 of the *International Covenant on Civil and Political Rights*. Article 14 (1) states: 'Everyone has the right to seek asylum and enjoy in other countries asylum from persecution'.

Although these conventions do not create a right to asylum, they still help to define the status of refugees and accompanying rights, most notably the principle of *non-refoulement*, which remains, "the cornerstone of international refugee protection". States meet their obligations by providing asylum (Hathaway and Dent, 1995). Consequently, the traditional framework remains that asylum seekers at least receive temporary protection in the country of first asylum. Then the search for durable solutions can begin. These latter durable solutions are: repatriation, permanent settlement in the country of

first asylum, or re-settlement in a third country. International Conventions provide an extraordinary 'bill of rights' for refugees whilst the later are awaiting durable solutions. These rights include unfettered access to asylum and non-discrimination and protection from persecution (i.e. denial of life, liberty and personal security).

Many of these rights are in one form or another enshrined in most international human right treaties, such as the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR), the 1984 Convention against Torture and the 1989 Convention on the Rights of the Child. The ICCPR and ICESCR provide broader legal protection than the refugee instruments. They all guarantee equality of treatment to refugees with other non-nationals, while the relevant international human right instruments provide such guarantees 'equally to all persons' without restriction. Apart from variance of scope and application, the overriding difficulty in developing countries is how to enforce the specified refugee rights when most citizens have no access to them.

Democratic and liberal states strenuously defended these virtues during the Cold War. However, with the end of the Cold War, refugee rights have diminished rapidly and what is now on offer is more like "pseudo asylum" (Rutinwa, 1999:1). Providing political asylum has become a hotly contested public issue for a number reasons. First of all, there has been a sharp rise in the numbers of those seeking political asylum (Keely and Russell, 1994: Rutinwa, 1999) Second, most refugee flows now occur in the developing world, where countries face substantial burdens, when large numbers arrive unexpected. Such unexpected and large inflows of refugees have the potential to cause instability. Hence, the ever-conscious security

institutions of sovereignty are normally reluctant to relinquish the right to admit or exclude refugees, but at the same time, seek to utilise refugees as a strategic instrument in their domestic and foreign policies (Weiner, 1993). The ability to do so is now greatly constrained in a "unipolar" world because realigning refugee policies has now become politically contentious and controversial (Keely, 2001:306). In the following section, I am going to explore how and why this situation has come up, and what implications it has for the refugee protection in South Africa.

2.2 Sovereign Interests

The hopes of asylum seekers for a better life and freedom from persecution are equally matched by the fears of states and their citizens that massive refugee flows will impose strains on the economy, weaken national values or cause political upheaval (Weiner, 1993). Providing refugees with basic services and integrating them into the host society can be costly and destabilising. Refugees require food, clothing, shelter, health care and other essential services that the host countries find hard to provide. Refugee flows are also known to upset ethnic relations in the host country leading to regional conflicts (Loescher, 1989:11). For example, the maltreatment and expulsion of Rwandan refugees from Uganda and Congo created deep anxiety about their future. Consequently, it gave impetus to the formation of Rwandan Patriotic Front and a forceful return to Rwanda. As a result, "the devastating ripple-effect of the Rwandan cataclysm" has put the entire Great Lakes region into conflict (Lemarchand, 2001:4).

In addition, the act of accepting and hosting refugees can sour foreign relations. The act of accepting refugees is a tacit acknowledgement that the sending state is a human rights violator. Therefore host countries are often accused of abetting the sending

state's dissidents. This leads to reprisals and cross-border raids. In some cases, military forces of sending countries follow refugees into neighbouring states or the receiving countries interfere into the internal affairs of the sending states to halt refugee flows. During the apartheid era, South Africa made incursions into neighbouring countries to prevent them from offering safe haven to anti-apartheid activists. On 4 May 1978, South African planes dropped poisoned gas on Namibian refugees at Cassinga camp in Angola, before bombing it and killing over 1,000 refugees (Mtango, 1989:93). A more recent example is the on-going acrimonious bickering between Congo and Rwanda that arose out of Congo's decision to arm and incorporate Rwandan exiles and refugees into its army. Many of the Rwandan refugees fighting on the government's side in the Congolese civil war have a desire to overthrow the regimes in Kigali and Bujumbura. The participation of refugees in the Congolese civil war that involves seven African countries has upset regional alliances and diplomatic ties.¹

Given the costs, many states are now keen on keeping refugees away by enforcing strict immigration control measures. However, this approach is problematic. First states are unable to completely seal off their borders and in reality, effective border control is costly and difficult. Second, border control bent on keeping out asylum seekers merely deflects refugees to other states. Such a move can strain regional relations as the cost of hosting refugees is borne by a few. In the long term, it can lead to regional instability. Regional instability normally attracts international interventions. A good example is the conflict in the Great Lakes Region that has drawn in regional countries, multinationals and global powers. Although interventions arise out of genuine humanitarian concerns, these are seldom the sole reasons for intervention. Most of them, ironically,

¹See "Disarmament in the Congo: Investing in Conflict Resolution" A Report released by International Crisis Group on-line at www.intl-crisis-group.org/projects

aim to prevent unacceptable numbers of refugees seeking refuge elsewhere including in the intervening countries.²

However, in liberal democracies where the stress is on the primacy of individuals in the participation and control of public affairs, refugee affairs relate closely to individual and group interests. For example in the United States, ethnic lobbies and coalitions have a powerful influence on party politics and refugee policies (Freeman and Jupp, 1992). In the past, taking in refugees from Cuba and Indochina offered parties and the US Government certain benefits. Taking in refugees from Cuba gave parties a huge popularity and votes from the immigrant Cuban communities. At the same time, it worked as a strategy to weaken the Cuban communist regime by draining its human resources and facilitating the creation of opposition groups in exile. The Indochina refugee program also contained an element of revenge and loyalty to comrades in arms as well as weakening and isolating the communist regime in Vietnam (Keely, 2001:309).

In most cases, having what looks like a generous refugee policy can enhance international recognition and reputation. As Sinclair, observed, a generous refugee policy was one of countering the accusation that South Africa was adopting a "closed door" policy towards the rest of Africa (1997:9).

²In 1995, at the Nairobi Summit involving all the countries of the Great Lakes Region, it was agreed that Rwanda and Burundi create "safe zones" within their countries under the protection of the United Nations to relieve the neighbouring countries the burden of hosting refugees

2.3 Regional Interests

Although domestic interests and foreign policy considerations can determine asylum policy, countries are often in a no win situation. To accept refugees entails certain costs and at the same time, keeping them out entails other. Both scenarios have destabilising effects on regional economies and social ties. Given the costs and threats to regional security, countries often find it in their interests to accept the burden of hosting refugees. Managing a refugee crisis is an international public good that produces clear benefits, as refugee flows are relatively orderly and better contained, preventing mass migrations and conflict spillovers.

Considering that international interventions can escalate regional conflicts, most states remain sceptical about regional arrangements and hence they incorporate regional arrangements into international multilateral practices. First states provide humanitarian relief for example food, temporary shelters, health supplies and logistical expertise to the country that is hosting refugees. Second, multilateral funding and assistance through the United Nations High Commissioner for Refugees (UNHCR) supplement these efforts. Aid coming through the UNHCR is neutral, legitimate and does not side with the refugee sending or receiving countries. Regional efforts are able to access permanent funding organizations and expertise to respond to complex refugee crises offered by UNHCR. Third, regional burden-sharing strategies offer solutions that are more permanent. For example, permanent resettlement and naturalisation in this regard lessens the task of integration, as the language, customs and economic systems are similar as those in the country of origin. However, regional collective refugee management systems remain problematic, regardless of the fact, that all states benefit (although not equally).

2.4 International Interests

States recognise that refugees do not merely happen; they are a result of forced migrations with "a long and sordid world wide history" (Weiner, 1993:5). Refugees are a result of sovereign decisions, "with consequences that extend beyond national borders" exacerbating inter-state conflicts and influencing international trends (Loescher, 1989:8). Recognising the considerable impact of mass movement of refugees on the international political system, the international society of states has specified refugees as a unique category of human rights victims that deserve to get special treatment (Ibid). The principal instruments of international protection have their origins in the post-World War I period when the collapse of the multiethnic empires of Europe threatened the sovereignty and territorial integrity of many European states.

At that time, nationalism "imposed" on the European populace the "awesome" powers of nation-state, common interests, and territorial claims. Nation-states replaced empires with "nationalist energies" that did not allow each ethnic group the free choice to determine their future (Marrus, 1985:51-52). The ruling elites embarked on efforts to strengthen national unity by turning onto groups who they would culturally, ideologically, linguistically or ethnically blend into their new nation states. The dominant ethnic groups suppressed or expelled the non-conforming communities. Later on, differences over the form of political community in the newly established, homogenous nation-states resulted in further uncontrollable conflict, warfare and human flight (Dowty, 1987:143).

Unfortunately, no territorial state was prepared to assume responsibility for those fleeing the mayhem. It was only at the behest of non-governmental organizations led by the International

Committee of the Red Cross (ICRC) that the League of Nations reluctantly agreed to establish the High Commission for Refugees (HCR) in 1921. Reflective of their shallow humanitarianism, the member states, "cobbled together the elements of an international refugee regime" with measures that purposefully safeguarded their national interest. "While modestly coordinating the newly-found but highly defensive desire to protect refugees" (Barnett, 2001:251).

This less-than-charitable attitude towards refugees has continued in countless crises, most tragically in the reaction to Jews in flight from fascism in Germany and during the Rwandan genocide and civil war. States remain sensitive to the possible danger that humanitarianism may violate the sovereign principles of non-interference and then hijack their core national security interests. In this regard, a strong international refugee regime does not present a safe prospect for obtaining both national and international interests. The member states make sure "they do not let themselves get carried away by their noble thoughts" (Barnett, 2001:252). In this regard, they seek to contain the UNHCR, and placing severe restrictions to their humanitarian obligations. They ensure that refugee conventions do not make a direct reference to the responsibilities nor condemn the refugee-producing states (Ibid).

In order to ensure that international refugee instruments do not impose on them the obligation to grant asylum, states consider themselves the "proper subjects of international law" (Sexton, 1985:737-738). The right to grant asylum remains "within the unfettered discretion of a state as an incident of sovereignty" in the absence of a treaty obligation, the member states are under no obligation "to grant or deny political asylum" (Ibid). At most, refugee conventions agree to provide emergency protection against return to persecution but refuse to agree to international instruments that impose on them obligation to grant asylum. It is

therefore the state's prerogative just how much it provides to refugees in terms of assistance to render them self-sufficient and able to "regain a sense of identity and self-respect" (Loescher, 1989:9).

To cap their obligations, member states have established mechanisms of admission and control that recognise that while there are many displaced people, only those who have managed to fall on the other side of the territorial borders are legally entitled to be refugees. Only individuals applying from outside their country of origin for entry are eligible for recognition as refugees. As long as the displaced individuals remain within the borders of their country of origin, there is no question of another country interfering in the internal affairs of another sovereignty or being "confronted with a person outside the bounds of international accountability" (Hathaway, 1991:4). International protection instruments give protection priority to persecution motivated by pro-Western political values. As a result, the practice has no obligation toward the large numbers of persons who flee politically induced poverty and economic hardships. Hathaway argues convincingly that the protection regime is "an incomplete and politically partisan human rights rationale" that neglects global poverty and exploitation as agents of persecution (1991: 7-8).

Strategic concerns remain a priority in the permanent solutions to the refugee problem. In the past most states still required prodding to provide asylum (Keely, 2001:308). However, refugee protection generally received political support from domestic constituencies both in the Western democracies as well as in Africa. It was a crucial component of the foreign policy. In the Western democracies indignation at the evils of communism reinforced internal support for refugees. Similarly in Africa resentments over colonial rule and

apartheid reinforced internal support for refugees fleeing from repression. There was no question of refoulement or repatriation because living under communism or colonialism was persecution enough. In Africa "open door asylum policy" was the norm to those willing to risk all for freedom (Rutinwa, 1999:13). Consequently, refugee protection was a matter of "high politics". Western democracies relied on the refugee regime as a tool of undermining communists and rivals in proxy wars (Keely, 2001:308). In Africa, the refugee regime acquired important status as a tool for containing and controlling the impact of civil wars and state failures. The ideologies of pan-Africanism and anti-colonialism enhanced positive refugee policies, amidst ideological conflicts and superpower proxy wars, often combined with an element of ethnic or national liberation struggles (Ibid).

The refugee regime sought to stabilize situations and provide state like protection and relief to victims of strife. It relied very much on the international aid and multilateral efforts of the UNHCR. The preferred permanent solution was voluntary repatriation and a return to the status quo, in that "citizens went back" to their countries of origin. In the Western democracies, indignation at the evils of communism ruled out voluntary repatriation and a return home. Integration and naturalisation was the permanent solution to the refugee problem. As a result, of two distinct permanent solutions offered in the different regions of the world, two distinct, refugee regimes co-existed mutually (Keely, 2001: 310-311).

They both shunned legal institutionalization and relied more on domestic goodwill and strategic interests. There was no need to create legal provisions and operational procedures. Refugee protection was a matter of "high politics" and sovereign interests. However, with the end of the Cold War, refugees lost their strategic value. The liberal democracies opted to alter and realign the terms

of asylum (Rutinwa, 1999; Crisp, 2000). They have become less committed to asylum and prefer refugees to receive protection in safe zones designated in their countries of origin. Many now routinely refoule refugees back to their countries of origin. Those who manage to enter receive only "pseudo-asylum" with no protection guarantees. What is preferred is "repatriation at the earliest opportunity regardless of the situation in the countries of origin" (Rutinwa, 1999:1). These developments have set a bad precedent for the rest of the world. A remarkable shift has occurred in Africa too. The "hallmarks" of the shift is a preference for containment of refugees in countries of origin over the grant of asylum, refoulement at the earliest opportunity and a disregard of basic refugee rights, "a retreat from durable solutions other than repatriation" (Ibid: 7).

2.5 Protection in the New Order

Refugee scholars (Frelick, 1997; Rutinwa, 1999; Chimni, 2000) concur that hospitality towards refugees appears to have been "progressively dismantled" (Crisp, 2000:6). The trend as Frelick correctly observes, started in Europe and the USA where following the end of Cold War refugees lost their strategic value, "the prosperous Western democracies realized that the new-found freedom to leave the once-enclosed countries raised the spectre that millions would seek to enter the Western countries" (1997:12). Therefore, many countries in the North "introduced a vast array of measures specifically designed" to stem the arrival of refugees (Ibid). In such circumstances, it is hardly surprising that African countries with more pressing economic problems and much larger refugee populations have followed suit.

However, the attempt to alter, renege on or destroy the protection practices built up over years has met resistance from a number of domestic constituents and international lobbies. Phrases like "fortress Europe" and the "end of asylum" have entered the political discourse reprimanding governments for altering asylum policies in

reaction to global transformations (Keely, 2001:306). The pro-asylum lobbies point out that the end of Cold War has increasingly "espoused humanitarian and transcendental values" (Barnett, 2001:245-249).

There is now greater liberty and tolerance for international humanitarian action intervening in the internal-affairs of sovereign states in order to bring relief and protection to individuals regardless of their geographical or political space. In other words, refugees do not need to crawl across borders to access aid and protection as the changing character of sovereignty is allowing the "once shy" international agencies "to strut" into the reserve domain of states: the power to allow or deny entry (Ibid).

As a result, international governance has taken up refugee issues. The UN Security Council and North Atlantic Treaty Organization (NATO) have become key forums for addressing refugee matters. The argument is that specialised humanitarian organizations such as the UNHCR are unable to resolve refugee flows on their own: therefore, the matrix of humanitarianism justifies international interventions (Chimni, 2000:248). The UN Security Council Resolution 929 of June 22, 1994 authorising the controversial *Operation Turquoise* argued, "the magnitude of humanitarian crisis in Rwanda constituted a threat to [regional] peace and security" (Rutinwa, 1999:8). The purpose of *Operation Turquoise* was to provide "security and protection of all displaced persons, refugees and civilians at risk in Rwanda" (Ibid). Likewise, at the height of the civil war in Zaire, the Security Council passed Resolution 1078 of 1996. The Resolution was "concerned at the humanitarian situation and the large-scale movements of refugees and internally displaced persons" and "the obstacles to the efforts of all international humanitarian agencies to provide relief and assistance to those in need". The situation in eastern Zaire constituted a threat to regional peace and security (Ibid). Similar United Nations Security Council Resolutions identified refugee flows

as the cause of intervention in the internal affairs of Iraq, Haiti, Somalia and Yugoslavia (Roberts, 1999:108).

There are two important points about the above interventions. First, the resolutions insisted that international humanitarian organizations be allowed access to all those in need of assistance. Second, the failure to protect refugees threatened the security and sovereignty of the neighbouring states, which in turn threatened the affected states and the entire regions. Rather than identifying human rights as legitimising factor, the resolutions identified interdependence and permeability of borders as the main motivation for intervention (Weiss and Chopra, 1992:3).

2.6 A Critical Perspective on Protection

The new humanitarian interventions on behalf of refugees do not espouse humanitarian and transcendental values as depicted. Instead, they depict continuing strategic interests of the Cold War era. All that has changed is that, the global political transformations have actually "removed" the Cold War "constraints" and allowed the great powers to use the "powerful and effective UN Security Council" to prevent the flow of refugees to their countries at a time when they no "longer possess ideological or geopolitical value" (Chimni, 2000:244).

Thus it is that the new humanitarianism coexists with a wide range of practices that violate its essence. For example, the UN Security Council and regional organizations such as NATO have refugees as a priority on their agenda but instead of burden sharing, these organizations view refugees as a demand on resources and a threat to regional security. Consequently the fact that refugees are now a matter of high politics has considerably reduced the autonomy of the protection regime under the auspices of the UNHCR as the principal agent of refugee protection. During the Cold War era, the major

donors exercised unwarranted influence on the institution but they were unable to seriously constrain its ability because a convergence of bipolar interests upheld the status quo (Keely, 2001). However, now the UNHCR faces financial constraints that prevent it from "taking the initiative to adopt creative measures to implement its mandate" (Chmni, 2000: 256).

Instead, UNHCR is now working closely with the UN Security Council and slowly converting itself from a refugee organization into a humanitarian organization with emphasize on prevention and returnee integration. The former UN High Commissioner for refugees concurred that at the heart of its new strategy is "a preventive and solution-oriented" approach of ensuring everybody remains in the "safety" of their home country. Nobody should be "forced into exile".³ Therefore, the new strategy is to prevent, preclude or at least decrease the chances of displaced civilians fleeing violence or settling permanently in adjacent countries as asylum seekers. Looking critically at who will benefit in this new humanitarian shift, it becomes evident that individual refugees ultimately face a substantially diminished aid system while the UNHCR repositions itself around "the right to remain" in the country of origin (Hyndman, 1996:8).

In fact in this new humanitarianism, legal barriers, visa restrictions and even refolement are justified. For example, the United States was guilty of crude acts of interdicting Haitian and Cuban asylum seekers on the high seas to prevent them from arriving on-shore and getting a chance to present their asylum requests (McBride, 1999). In some extreme cases, military force is applied to prevent refugee flows; exacerbating refugee flows at a time when the global powers are least interested in offering asylum. Military

³ Sadako Ogata, at the Roundtable on Refugees: challenge to solidarity, New York, 9 March 1993

actions, argues Chimni confirm that refugees are now "pawns and not concerns" of the international community.

Human rights violations in the South and 'rogue states' provide an opportunity to the global powers to "justify violence and the naked exercise of power" (2000:252). In a similar analysis of the Kurdish refugee crisis of 1991, Nevzat Soguk provides an exceptional scrutiny of ambiguous and manipulative uses of humanitarianism. He contrasts the humanitarian intervention claims made by the UN Security Council Resolution 688 and the hegemonic interests of the great powers. The intervention was not aimed at relieving human suffering; rather it was guided by fears that the conflict threatened the new geopolitical interests of the great powers. In diplomatic terms the conflict threatened "peace and security in the region" (1996:25).

The new humanitarianism, argues Chimni, has been reduced to an "ideology" of the hegemonic states (2000:252). It "lacks rigid conceptual boundaries" and therefore it facilitates ambiguous and manipulative uses that in the end escape critique by shifting positions. For example the NATO bombing of Yugoslavia lacked legal justification but was justified by the logic of the humanitarian situation (Ibid). In addition, the humanitarian interventions remain arbitrary and selective. The UN Security Council is keen to intervene in Europe, but no such concerted efforts are extended to resolve conflicts in Africa. According to the former US president, Jimmy Carter, this failure gives a "strong impression of racism" (1999). However, Chmni disagrees with the position presented by Carter and other critics because they "fail" to recognise that:

"The objective of selective intervention is to ensure that the legitimacy of the emerging international system is not undermined, whether in Africa through suffering or elsewhere through allowing a challenge to dominant states go unanswered. [Intervention is] to stop

refugee flows to the North while [at the same time] extending and sustaining the reign of trans-national capital in the South" (2000:249).

In a similar analysis, Susan Strange observed that while the Northern states have greater structural power to retain control "over their destinies", trans-national capital determines the fate and destiny of the Southern states. (1996:14). As a result, the relationship between refugees and universal humanitarian values remains inextricably intertwined with these propagations of global inequalities. According to Professor Hathaway, each year the rich states in the North spend at least US\$12 billion to process the refugee claims of about 15% of the world's refugee population, but contribute only US\$1-2 billion to meet the needs of 85 per cent of the world's refugees hosted in the poor South.⁴ Comparatively international donors gave US\$207 for every refugee in need in former Yugoslavia and only US\$8 per head to those in the Democratic Republic of the Congo in 1999.⁵

2.7 Concluding Remarks

States have real interests in orderly and predictable management of refugee flows. For sure, humanitarianism is present in the decision making process. Diplomatic and multilateral efforts often contain or evoke a language of human rights to win popular support for policies concerned with the plight of others. However, humanitarianism cannot be an accurate indicator for understanding refugee protection. States have often looked the other way during countless refugee disasters (Jews in flight from Nazi, Rwandans in flight from Genocide for example). Only when real, conspicuous interests are involved and the costs of assistance are sufficiently low, do states choose to involve themselves in a significant way. The unfortunate reality is that in

⁴Keynote Address; Professor James Hathaway at New Delhi Workshop on International Refugee Law. *Indian Journal Of International Law* 39,1:11

⁵ *Forced Migration Review*, December 2000:48

international relations, what is good for the states determines normative concerns (Frost, 1996). The implication is therefore that, if South Africa does not have material and strategic interests in providing for refugees, it will be unwilling to undertake costly actions to help, despite the dictates of conscience. Given the political realities and limitations described above, what can be done to alleviate the current stalemate, further the resolution of the problem and prepare for the almost inevitable refugee problems of tomorrow? In the next two chapters, I first examine the causes of refugee movements and in the second, what determines policy response in South Africa.

2.8 Bibliography

Articles

- Barnett, M. 2001, "Humanitarianism with a Sovereign Face: UNHCR in the Global Undertow" *International Migration Review* 35, 1:244-277.
- Carter, J. 1999, "As a Peacemaker, America Is Blundering Badly" *International Herald Tribune*, May 28
- Chimni, B.S. 2000, "Globalization, Humanitarianism and the Erosion of Refugee Protection" *Journal of Refugee Studies* 13,3:243-263.
- Chimni, B.S.1998, "The Geo-politics of Refugee Studies: A View from the South" *Journal of Refugee Studies*, 11,4:350-374.
- Crisp, J. 2000, "Africa's refugees: patterns, problems and policy challenges" *Journal of Contemporary African Studies*, 18,2:158-178.
- Hyndman, J. 1996 "International Responses to Human Displacement: Neo-Liberal and Post-Cold War Geopolitics" *Refugee* 15, 3:5-9.
- Hyndman, P. 1986, "Refugees under International Law with a Reference to the Concept of Asylum" *Australian Law Journal* 60,148:153.
- Keely, C.B. 2001, "The International Refugee Regime(s): The End of the Cold War Matters" *International Migration Review* 35,1:303-314.
- Keely, C.B and Russell, S.S. 1994, "Responses of Industrial Countries to Asylum Seekers" *Journal of International Affairs*, 47:461-477
- McBride, J. 1999. "The evolution of US immigration and refugee policy: public opinion, domestic politics and UNHCR" *UNHCR Working Papers.No.3* Geneva: Centre for Documentation and Research.
- Rutinwa, B. 1999, "The end of asylum? The changing nature of refugee policies in Africa" *UNHCR Working Papers.No.5* Geneva: Centre for Documentation and Research.
- Roberts, A. 1999, "NATO'S Humanitarian War over Kosovo" *Survival* 41,3:102-123.
- Salehyan, I. 2001, "Safe Haven: International Norms, Strategic Interests, and U.S. Refugee Policy" University of California-San Diego: *Centre for Comparative Immigration Studies Working Paper No.*

Sexton, R. 1985, "Political Refugees, Non-refoulement and State Practice: A comparative Study". *Vanderbilt Journal of Trans-national Law* 731:737-738.

Sinclair, M. R.1996, "International Refugee Treaties and Their Implications for the South African State" *Southern African Perspectives* No. 69, University of Western Cape: Centre for Southern African Studies, School of Government.

Soguk, N.1996, "Humanitarian Interventions as Practices of Statecraft: Re-crafting State Sovereignty in Refugee Crisis" *Refuge* 15, 3:24-29.

Weiss, T and Chopra, J. 1992, "Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention" *Ethics and International Affairs* 6:92-117.

Books

Dowty, A, 1987. *Closed borders: the contemporary assault on freedom of movement*. New Haven: Yale University Press.

Freeman, G and Jupp, J. 1992, *Nations of Immigrants: Australia, the United States, and International Migration*. Melbourne: Oxford University Press

Frelick, B, 1997. "The Year in Review" in *World Refugee Survey 1997* Washington DC: US Committee for Refugees

Hathaway, J. 1991. *The Law of Refugee Status* Toronto: Butterworths.

Hathaway, J. and Dent, J.1995, *Refugee Rights: Report on a Comparative Survey*, Toronto: York Lanes Press.

Holborn, L. 1975. *Refugees: A Problem of Our Time: The Work of United Nations High Commissioner for Refugees, 1951-1972*. Metuchen NJ: Scarecrow Press.

Loescher, G. and Monahan, L. 1989, (eds.) *Refugees and International Relations*. New York: Oxford University Press.

- Marrus, M. 1985, *The Unwanted: European Refugees in the Twentieth Century*. New York: Oxford University Press.
- Mtango, E, 1989, "Military and Armed Attacks on Refugee Camps" in Loescher, G. and Monahan, L. 1989, (eds.) *Refugees and International Relations*. New York: Oxford University Press.
- Zolberg A., Surkhe, A. and Aguayo, S.1989, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*. New York: Oxford University Press.
- Weiner, M. (eds.) 1993. *International Migration and Security* Boulder Colorado: Westview Press

Reports and Legal Documents

- Lemarchand, R. 2001, "Exclusion, Marginalization and Political Mobilization: The Road to Hell in the Great Lakes" University of Copenhagen: *Occasional Paper*, Centre of African Studies.
- US Committee for Refugees. 2000. *World Refugee Survey 2000*. Washington DC: US Committee for Refugees.

Chapter Three

The Regional Context: The Root Causes Of The African Refugee Crisis

3.1 Introduction

The most logical and natural way of dealing with the refugee crisis is to ensure that refugee flows do not occur. In the past, the international refugee protection has been largely ineffective in dealing with the root causes of refugee flows. However, it is now recognised that the contemporary refugee crisis cannot be resolved without addressing the root causes of displacement (Goodwin-Gill, 2001). As a result the international community has continually been called upon to reduce the incidence of human suffering by averting refugee flows and modifying the underlying causes.

Having discussed in the previous Chapter in detail the changing nature of refugee protection and asylum policies, I now consider in detail why initiatives to prevent root causes have gained prominence. Then I explore further the underlying causes of refugee flows in Africa. If for instance the African states are a calamitous reality for their populace. Does the primary responsibility for refugee flow lie with governments, their citizens (or segments of them) or both?

3.2 The Root Causes Debate

The international protection practice did not concern itself with the question of root causes and prevention. The protection regime was an *ex post facto* arrangement that was limited to dealing with the persons already displaced by World War II (Rutinwa, 1999:15). Not originally designed to deal with that, the regime and international agencies traditionally refrained from examining and dealing directly with refugee producing countries because they wanted to remain strictly humanitarian and non-political (Loescher, 1989:18). Moreover during the Cold War era to have spoken of ethics and international relations as anything other two separate and distinct fields of inquiry was viewed by the international relations mainstream as a proof of a profound, perhaps even dangerous ignorance of the realities of world politics. Questions of ethical behaviour and ethical responsibility were viewed as incommensurable with the doctrine of political neo-realism that dominated the discipline of international relations (Nyers, 1999:5). Reflecting on the meaning of protection during the Cold War, the former UN High Commissioner for refugees acknowledged:

"The UNHCR essentially waited on the other side of an international border to receive and protect refugees fleeing conflicts. This approach was determined by the very concept of international protection of refugees that would come into play only if, victims of persecution or violent conflict fled their homeland. It was, also, dictated by the concept of state sovereignty and consequent reluctance of intergovernmental organizations such as UNHCR, to be seen

as being too involved in the internal conditions of countries of origin that might give rise to refugee movements".¹

3.3 The Root Causes and Africa

All this, did not stop the United Nations from undertaking several initiatives to discuss measures that could address causes rather than treat symptoms. In this regard the UN sought to put in place measures that could prevent conditions that cause mass exodus and make refugee-producing countries accountable (Loescher, 1989:18). The UN General Assembly's Special Political Committee initiated a heated debate on the "root cause" in 1980.² It was followed by a study on mass exodus under the auspices of the High Commissioner for Refugees in 1981.³ In 1983, outside the UN, an Independent Commission on International Humanitarian Issues was established and issued its report on refugees in 1986.⁴ In the same year a Group of Experts established by the resolution of the General Assembly issued a report entitled "International Co-operation to Avert New Flows of Refugees".⁵

The debate has regained currency again, as a result of the nature and the magnitude of the contemporary refugee problem (Chimni, 1998; Goodwin-Gill, 2001).

¹ Sadako Ogata, 1996. "World Order, Internal Conflict, and Refugees" Lecture delivered at Harvard University, October 28.

² UN General Assembly Resolution 24/124, 11 Dec. 1980. The initiative was first taken by West Germany which introduced a resolution that sought to investigate forms of co-operation needed to prevent mass flows of refugees

³ Sadruddin Aga Khan, *Study on Human Rights and Massive Exoduses*, United Nations, ESOSOC, E/CN.4/1503, December 31, 1981

⁴ *Refugees: Dynamics of Displacement. A Report for the Independent Commission on International Humanitarian Issues* London: Zed, 1986

⁵ UN. A/41/324, *International Co-operation to Avert New Flows of Refugees*, May 13, 1985.

3.3.1 Underdevelopment in Africa

The UN reports emphasised economic underdevelopment as a fundamental cause of refugee flows. The 1986, report by the Group of Experts appointed by the UN Assembly was more specific and accusatory. It maintained that economic underdevelopment inherited from institutions of colonialism and aggravated by the world economic order was the root cause of refugee flows. African economies suffer from poorer terms of commodity trade, debt crisis, indebtedness and high inflation. Their situation is further aggravated by environmental degradation and natural catastrophes. The reports further recognised that since most of the refugee flows originate from the developing countries, it is evidence that economic imbalances and the overall poverty creates conditions conducive for political instability. These conditions often compel many to flee (Zolberg, 1989:258-259). Therefore, if we can deal with the problems of poverty and inequity we can strike at the root causes of refugee flows asserted the former High Commissioner for Refugees, Sadrrudin Aga Khan:

"...Unless you really address the problem of development, you are never going to be able to circumscribe movements of people, whether they are refugees for economic, political, or ecological reasons-basically the root causes combine...If we sent proper technical assistance, if there was transfer of appropriate technology, if one focused on rural areas rather than cities, if quality of life and life support

systems were improved, you would begin to address the problem as it should be addressed" (Zolberg, 1989:259).

3.3.2 The After Effects of Decolonisation

Africa anticipated the refugee problem to be a temporary phenomenon related to self-determination: "once Africa was rid of European colonial domination, the refugee phenomenon would automatically become irrelevant" (Bakwesegha, 1994:7). Instead, soon after independence in the 1960s, the emergent nations became scenes of major civil wars and upheavals. "As a result, hundreds of thousands fled the emergent states in search of succour and haven elsewhere" (Kibreab, 1991:20). The number of refugees estimated at 200,000 in the 1950s rose to over a million in the 1960s (CIMADE, INODEP, MINK, 1986:68). Today there are 3.2 million refugees and 9.5 million people living in refugee-like conditions on the continent. Many of those who return home are unable to reintegrate and still require international protection (Crisp, 2000:157-158).

This is contrary to all expectations and many are still bewildered by the magnitude of the crisis and unfolding events. Some social analysts see it as "an inevitable occurrence" because of the colonial legacy of arbitrarily drawn borders that created states out of former rivals and ethnic groups that had generation old grudges to settle. Therefore the emergent multinational states had a weak base from the onset (Kibreab, 1991:20). Dissatisfied groups drawing on ethnicity, regionalism and religion have remained a threat to national unity. The situation has nurtured military and authoritarian regimes as the only way

to sustain sovereignty and territorial integrity (Thomas, 1998:4).

Other analysts see it as a socio-economic problem and are unanimous that one of the key aims of decolonisation was the desire to live a better life by attaining political independence (Maloba, 1995:12). However, the inherited political institutions lacked the capacity to lead to sustained growth and development because they were precisely established to exploit the colonies. Together with the deliberate pre-independence strategies and tactics adopted by the protagonists of decolonisation, the present structure of the international economic system has limited the capacity of the African states to achieve self-determination and full sovereignty (Grovonqui, 1996). Thus most African countries lack a "reliable foundation for a better future" (Davidson, 1974:4). Rather than chart out a new course of action, African leadership, like their Latin American counterparts: "have no interest whatsoever in determining whether patriotism might prove more profitable than treason and whether begging is really the only formula" to solving problems (Galeano, 1973:12 cited by Maloba).

Following the end of the Cold War, there is less dispensation of economic aid, as the super powers no longer have to compete for the allegiance of African leaders. Therefore, the colonial patterns of patronage and plunder modified by independence and foreign aid to absorb the African elites and the subaltern classes have stalled (Moore, 2000:11). With decreased resources, the ability of ruling elites to sustain

those aspiring to enter their class of power and privilege has greatly diminished. Increasing peasant and urban dwellers' poverty has exacerbated discontent, ethnicity, war-lordism and secessionist tendencies (Ibid). Those, locked out by the system have resorted to war and ethnic alliances to access power and privilege. Tribalism and ethnic based political parties are a manifestation of failure, of national politics. Loss of purpose by the ruling parties, suppression of opponents has led to a "retribalization of politics" (Mazrui and Tidy, 1984:272).

In 1999, eleven of the world's twenty-five civil wars were fought in Africa accounting for sixty percent of the world's deaths from armed conflict and twenty eight percent of the world refugees. Yet Africa accounts for only twelve percent of the world population (Crisp, 2000: 157; Moore, 2000:10-11). These wars lack inventive or innovative ways of consolidating sovereignty and citizen representation. "Without a drastic increase in economic growth and the structures for its distribution, the future promises to be much the same" (Ibid: 11-12).

3.3.3 State Failure: Internal Misrule and Decay

The 1994 Addis Ababa Document, adopted by the symposium making the 25th anniversary of the 1969 OAU Convention, concluded that armed conflicts and civil strife are the

principal causes of refugee flows in Africa. In addition other causes of forced migration are,

"Ethnic intolerance; abuse of human rights on a massive scale; monopolization of political and economic power; refusal to respect democracy or the results of free and fair elections; resistance to popular participation in governance; and poor management of public affairs" (Rutinwa, 1999:15).

These adversaries can be attributed to "precipitous decolonisation" (Jackson, 1990:10). The political leadership that took over lacked political maturity at the time of independence. Political maturity required the formation of socio-economic classes "favourable to the reproduction of civil society and constitutional institutions" (Ibid). In the absence of assimilated elites capable of ruling with the required political morals, the ex-colonies have ended up with authoritarian and corrupt leadership. The international community can do little to prevent human rights violations in these countries because such actions depend on overcoming the barrier of national sovereignty. The principles of sovereignty and non-interference deprive the international powers the legal authority to intervene and to prevent irresponsible elites from bringing about decay, death and civil wars. Left unaccountable for their violation of human rights and international conventions, the elites in these countries have neither submitted to the will of their own populations nor to the mandates of the international community (1990:10). The international guarantee of juridical sovereignty has resulted into in substantial and marginal

states that are "quasi-sovereigns" and a "calamitous" reality for their populace (1987; 2000).

To stem refugee flows, instability, misrule and decay the international society should take over the responsibility of restoring genuine freedom and governance in these failed states (Frost, 1991). Analysts suggest a return to a system the UN set up to aid decolonisation and self-governance (Mazrui, 1994; Pfaff, 1995). The system of trusteeship was originally set out in the UN Charter to help promote development for non-self governing territories in political, economic, social, cultural and educational realms. This group of scholars argues that the UN must recognize the inadequacies of its current methods and utilize past trusteeship experience to build a more comprehensive approach to collapsed or failing states. They concur that the reform efforts should maintain that ability to enforce domestic civil conditions and carry out international obligations ought to be the prerequisite for political independence.

States that are unable to meet these standards should surrender their independence until their domestic conditions are restored to minimally acceptable standards (Frost, 1991:183-96). The basic goals and framework that should be implemented must include the restoration of a legitimate, working state that is capable of managing the tasks of governance that include the provision of security for the populace, economic stability, and societal well-being. They advocate for massive intervention by foreign actors to restore the capability of self-governance.

However, they differ on the specific composition of the foreign actors. Mazrui suggests a regional intervention coalition, and Pfaff relegates the responsibility to the previous colonizers, while Helman and Ratner (1992-1993) place the burden on the UN.

3.4 A Critical Re-assessment of the Debate

The debates in the UN and among international scholars underline the political nature of the refugee phenomena. However the debate is coloured by ideological cleavages with the international perspective taking an "internalist" view: the refugee producing countries are to blame. By emphasizing factors internal to the countries and the role of governments in the exercise of persecution, the interpretation follows closely the foundations of international law and the causal implications of the international convention's definition of refugee. The emphasis of international definitions is the state as an agent of persecution (Zolberg, 1989:260).

Consequently, the assumption is that causes of persecution can be located within a particular state, precisely because international law and ethics are founded on the notion that each exclusive sovereign international state is equipped with substantive freedom, equality, and reciprocity (Jackson, 2000:297). Therefore, state failure is a "self-inflicted" malaise, brought about by war and misrule and accompanying refugee flows cannot be attributed to natural

disasters, adverse external pressure, or underdevelopment, "for there are relatively underdeveloped states that are tolerably civil such as Botswana" (Ibid: 295). This discourse rejects any association between the international system and the African crisis (Jackson, 1990:21).

Classical theorists such as Hobbes understood and justified states as places of refuge and not places of danger. Therefore, the expression, failed states is, a "misnomer" and "contradicts the usual normative justifications for sovereign statehood" (Jackson, 2000: 294). How can we expect failed states to contribute to international peace while their domestic nature is armed anarchy? There is "no point" in having states that cannot contribute to the domestic civil conditions because in such a state they can neither contribute to international peace (Jackson, 2000:298).

In order to remedy the situation this discourse has found favour with the international powers. The UN Security Council has become one of the key forums for addressing the root cause of refugee flows: "refugee flows have assumed the heightened significance as potential triggers (even if not always the main causes) of international intervention" (Roberts, 1999:108).

UN Security Council Resolutions have authorized foreign interventions and encroached the domestic jurisdiction of sovereign states to contain refugee flows: for example Resolution 688 on Iraq, 794 on Somalia, 713 on Bosnia and 1244 on Yugoslavia (Kosovo). These principles are guided by the notion that failed states pose a threat to the

international order, therefore the great powers have a right to intervene with or without their consent in order to defend international peace.

Although international law, international refugee instruments and most governments emphasize the internal weaknesses of states rather than the involvement of external powers, certain scholars argue that "until international dimensions of the causes of refugee flows are fully recognised, little headway will be made towards a resolution of refugee problems" (Loescher, 1989:19). In relation to this argument, current public debates about civil strife in Africa point out that the deliberate pre-independence strategies and tactics adopted by the protagonists of decolonisation have contributed to the present crisis and state failure (Grovgongui, 1996). Moreover the present structure of the international economic system has limited the capacity of the African states to achieve self-determination and full sovereignty (Lombardi and Denham, 1996).

By overlooking these shortcomings the internalist discourse wants us to believe otherwise (Grovgongui, 1996:179-180). The internalist discourse does not take into account that the current crisis is a result of external rule. The resultant states are a result of external dictatorship that was imposed by violence and maintained by violence. The colonial administration ruled with utter indifference to the opinions of the governed. It perfected a reign of terror by silencing its opponents through detentions, exile, or even outright extermination. The Colonial

governors ruled without consultation. At the heart of that governance policy was the assumption that the state and the subjects did not have identical aims. Native councils or parliaments even when established had an official majority that voted according to the governor's wishes (Crowder, 1987:15). Colonialism, not only despised Africans but also denigrated their culture and ability to effect change. Under colonial rule, Fanon observed,

"The native is declared insensible to ethics; he represents not only the absence of values, but also the negation of values. He is, let us dare to admit, it, the enemy of values, and in this sense he is the absolute evil" (1963:41).

As independence drew near, the new political leaders had suddenly to unlearn, so as to speak, this inheritance and imbibe at once the Western-style parliamentary democracy with its all integral concepts of human rights, institutionalised opposition, tolerance for dissent, public accountability, free press and transparency. This proved a tall order and most politicians ruefully failed to understand the rules of Western democracy, or if they did at all, some deliberately chose not to follow them. For many, politics was tyranny and plunder as it has been in the past (Bundu, 2000). In this regard, civil strife that has led to heavy refugee flows is not only a consequence of persecution but also a result of deliberate external actions and abstract historical forces.

The call for intervention and trusteeships does not conceal the fact that strategic interests normally dominate interventions. Consequently, interventions have achieved mixed results or in some instances generated further civil

strife (Angola, Somalia, and Sierra Leone are good examples). Interventions in these countries have actually internationalised and expanded civil wars into devastating regional conflicts that continue to produce perpetual streams of refugees. International interventions are further hampered by the fact that very few African countries tolerate outside intervention as a solution to their problem, no matter how serious those problems may be. African states tend to be the strongest supporters of the preservation and strengthening of state sovereignty (Blaney and Inayatullah, 1998:86).

Their recognition of sovereignty (in contrast to colonial relations) takes seriously the idea that the dignity of the political community and its citizenry depends on its right to rule itself despite its normative shortfalls. What is at stake is the dignity of the people and support for the idea that political and social arrangements must be worked out over time, primarily by the citizens themselves. Consequently, African leadership still makes demands in international forums that emphasize independence and fuller recognition of sovereign equality. Many regimes terminated links with progressive and radical international movements that sought to change the international system, preferring to retain their national sovereignty and economic assistance from the North (Grosvongui, 1996:194).

To Aristide Zolberg, both perspectives of the debate are coloured by ideological cleavages because the root causes of

refugee flows are constituent elements of social change and historical developments. Therefore deep disagreements should be expected (1989:262). A more realistic approach must therefore take note of the fact that the roots debate has a "conservative-preventive implication". Refugee flows are a "product of social change, and only one item on a much broader canvas of suffering and progress" (Ibid). When analysing the fate of refugees our orientation:

"Must be tempered by an awareness of this larger picture. A revolution for instance should not be judged merely by the tragic but historically necessary fact that it produces refugees" (Ibid).

Therefore the arguments emphasising economic underdevelopment as a cause of refugee flows, and the need for international intervention in order to get at the roots of the current refugee crisis call for correction. Underdevelopment by itself may not be a major cause of refugee flows. First, the notion that poverty causes refugee flows is inconsistent with the fact that situations of extreme economic deprivation have not generated population outflows claiming international refugee status from the poorest African nations (Mali or even the conflict prone Comoros are good examples). Sustained, extreme and systematic economic deprivation in the first place causes helplessness. Later on, when migration takes place, it is most likely to occur in the form of internal movement that requires fewer resources. In short, if it is international flight to asylum, the poorest will be the last to leave (Ibid: 260-261).

However in special situations, economic hardship may directly contribute to refugee flows especially where external punitive measures generate internal pressures for the population at large to leave the country in the face of widespread economic deprivation or radicalisation of the revolution as seen in Mozambique. These flows occur in highly politicised situations and asylees can claim and often obtain refugee status on the basis of the prevailing security situations. Under the prevailing international definitions of refugees, victims of poverty are unlikely to be given refugee status. It is only when the internal conditions are so appalling that people have to seek basic safety elsewhere that refugee status is granted (Ibid, 261).

Therefore I concur with Zolberg that underdevelopment and restructuring of a international economic relations might not be a precise instrument to reduce conflict and refugee flows. In fact, most reforms demanded may well escalate, rather than reduce, conflict by contributing to uneven development. A key feature of the contemporary order is transfer of economic sovereignty from states to international organizations such as International Monetary Fund (IMF), the World Bank and WTO prescriptions. These prescriptions are designed to open up states to foreign investment, trade and capital flows. As recent events indicate, these measures adversely affect the capacity of nations to muster sufficient resources for survival. Structural Adjustment Programmes (SAPS) drain the continent of its resources and capital (Shaw, 1996:103-119).

The end result is often short-term economic upheaval, political and social destabilisation leaving elite factionalism, political, social decay and civil wars behind

(Denham and Lombardi, 1996: 11). The recent return to multi-party democracy and the rise of a "new breed" of African leaders so welcomed in 1990's also "seems headed for disaster amidst the crushing problems of debt, urbanization, capital drain and of course ubiquitous structural adjustment programs" (Denham and Lombardi, 1996:7). This is not to deny that international redistributive and liberal aid policies are desired. They should however be supported for many reasons, but not because they are likely to avert refugee flows, especially in the short run. The postcolonial mismanagement and corruption that is cited by Jackson and others has only compounded the African condition-giving rise to politically and economically decayed states.

3.5 Concluding Remarks

Factors internal to the countries predominate conventional interpretations with exception of the OAU Convention that recognised the role of colonial powers in accelerating refugee flows during the decolonisation struggles (Hathaway, 1991). This internalist emphasis has therefore influenced public perceptions to an extent that external action or inaction hardly features in the refugee debates. It has fostered the view that refugees are merely a result of persecution by governments or state agents obscuring the fact that such governments and states exist within a "structure of international support" (Zolberg, 1989:264).

This state of affairs is a result of the concept of sovereignty and non-interference. The international community has little ability to take preventive measures in countries of origin because the root causes of contemporary refugee

situations require interventions against governments that violate human rights, preferably before people need to flee. In most cases, UN institutions and refugee legal instruments are unable to either punish human right violations or punish those responsible. These measures depend on states overcoming the barriers of national sovereignty, something international arrangements have not accomplished "consistently" (Loescher, 1989:19).

International law upholds the principle of non-intervention and interference as a fundamental principle of international order. More direct military intervention is only justified to terminate an extremely chaotic situations and shorten the agony of change. Furthermore the institution mandated to protect refugees cannot intervene to protest against the cause of refugee flows because its "mandate takes effect only after the flight has occurred" (Ibid).

Therefore the organisation is inclined to avoid raising delicate political questions such as the external roots of the refugee crisis. Such questions can easily sour relations with the global powers who also happen to be top donors to relief efforts. UNHCR must also get permission from the national government to mount operations and raise money from donors to undertake its tasks. Decisions on asylum and the quality of care remain the prerogatives of the host state. In the next chapter I explore the politics of asylum that shape refugee admission to politically tolerable levels in South Africa.

3.6 Bibliography

Articles

Chimni, B.S. 2000, "Globalization, Humanitarianism and the Erosion of Refugee Protection" *Journal of Refugee Studies* 13,3:243-263.

Chimni, B.S.1998, "The Geo-politics of Refugee Studies: A View from the South" *Journal of Refugee Studies*, 11,4:350-374.

Crisp, J. 2000, "Africa's refugees: patterns, problems and policy challenges" *Journal of Contemporary African Studies*, vol. 18,2:158-178.

Galeano, E. 1973, "Open Veins of Latin America" New York: *Monthly Review Press*.

Goodwin-Gill, G. 2001, "Refugees: Challenges to Protection" *International Migration Review*, 35,1:130-142.

Jackson, R. 1987, "Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World", *International Organization*, 41,4-22.

Keely, C.B. 2001, "The International Refugee Regime(s): The End of the Cold War Matters" *International Migration Review* 35,1:303-314.

Keely, C.B and Russell, S.S. 1994, "Responses of Industrial Countries to Asylum Seekers" *Journal of International Affairs*, 47:461-477

Helman, G.B and Ratner, S.R. 1992-1993. "Saving Failed States", *Foreign Policy* 89,4:4.

Mazrui, A. 1994. "Decaying Parts of Africa Need Benign Colonization" *International Herald Tribune*, August, 4:6.

Moore, D. 2000, "Humanitarian agendas, state reconstruction and democratisation processes in war-torn societies" *UNHCR*

Working Papers. No.24, Geneva: Centre for Documentation and Research.

Nyers, P.1999, "Emerging Identities? Refugees and Transformations in World Order". *Millennium: Journal of International Studies*. 28,1:1- 26.

Pfaff, W. 1995. "A New Colonialism? Europe Must Go Back into Africa", *Foreign Affairs* 74,1:6.

Rutinwa, B. 1999, "The end of asylum? The changing nature of refugee policies in Africa" *UNHCR Working Papers.No.5* Geneva: Centre for Documentation and Research.

Roberts, A. 1999. "NATO'S Humanitarian War over Kosovo" *Survival* 41,3:102-123.

Sinclair, M. R.1996, "International Refugee Treaties and Their Implications for the South African State" *Southern African Perspectives* No. 69, University of Western Cape: Centre for Southern African Studies, School of Government.

Books

Akinrinade, S.and Sesay A. (eds.) 1998, *Africa: In the Post-Cold War International System*. London: Pinter.

Bakwesegha, C. 1994, "Forced Migration in Africa and the OAU Convention" in Adelman, H. and Sorenson, J. (eds.) 1994, *African Refugees: Development Aid and Repartition*. Boulder: Westview Press.

Blaney, D.L and Inayatullah, N. 1996. "The Third World and a Problem with Borders" in Denham, M. and Lombardi, M. (Eds.) 1996. *Perspectives on Third-World Sovereignty: The Post Modern Paradox*. London: Macmillan Press Ltd.

Davidson, B. 1974, *Can Africa Survive?* Boston: Little Brown and Company.

- Frantz, F. 1963, *The Wretched of the Earth* London: Penguin Books.
- Frost, M. 1996. *Ethics in International Relations: A Constitutive Theory* Cambridge: Cambridge University Press.
- Frost, M. 1991. "What ought to be done about the Condition of States?" In Navari, C. (ed.) *The Condition of States*. Buckingham: Open University Press.
- Grovogui, S.N. 1996. *Sovereigns, Quasi sovereigns and Africans: race and self-determination in international law*. Minneapolis Minnesota: University of Minnesota Press.
- Jackson, R. 2000, *The Global Covenant: Human Conduct in a World of States*. New York: Oxford University Press.
- Jackson, R. 1990, *Quasi-States: Sovereignty, International Relations, and the Third World*. Cambridge: Cambridge University Press.
- Loescher, G. and Monahan, L. 1989, (eds.) *Refugees and International Relations*. New York: Oxford University Press.
- Maloba, W. 1995, "Decolonisation: A Theoretical Perspective" In Ogot, B. and Ochieng, W. *Decolonisation and Independence in Kenya, 1940-1993*. Nairobi: Eastern African Studies (EAEP).
- Marrus, M. 1985, *The Unwanted: European Refugees in the Twentieth Century*. New York: Oxford University Press.
- Mazrui, A. and Tidy, M. 1984, (eds.) *Nationalism and New States in Africa* Nairobi: Heinemann Books.
- Thomas, S. 1998. "Africa and the End of Cold War: an Overview of Impacts" in Akinrinade, S. and Sesay A. (eds.) 1998, *Africa: In the Post-Cold War International System*. London: Pinter.
- Zolberg A., Surkhe, A. and Aguayo, S. 1989, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*. New York: Oxford University Press.

Weiner, M, (eds.) 1993, *International Migration and Security* Boulder Colorado: Westview Press

Reports and Legal Documents

CIMADE, INODEP, MINK 1986. *Africa's Refugee Problem: What is to be done?* London: Translated by Michael John. London: Zed Books.

Kibreab, Gaim. 1991. *The State of Art Review of Refugee Studies in Africa* Uppasala: Research Report No.26, Department of Economic History.

Lemarchand, R. 2001, "Exclusion, Marginalization and Political Mobilization: The Road to Hell in the Great Lakes" University of Copenhagen: Occasional Paper, Centre of African Studies.

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

The Universal Declaration of Human Rights, Proclaimed and adopted by the UN General Assembly resolution 217A (III), December, 10, 1948



Chapter Four

Politics Of Asylum: Public Opinion and Policy Response

4.1 Introduction

Whether people are fleeing the kinds of persecution that trigger conventional refugee status or dangers like politically induced poverty or environmental disaster that do not, the human needs are still staggering while the political will to relieve the suffering is often hesitant. It is becoming common to observe that in recent years few issues have been as wrenching or as intractable as the refugee crisis. The competing values that receiving nations all over the world have to balance are now familiar.

On the one hand, is the ideal that protection of refugees is a humanitarian obligation designed to relieve terrible human suffering. In addition engaging in refugee protection is a normative act that symbolizes and promotes fundamental human rights. In many instances the protection of particular groups can also be an instrument of foreign policy. And, of course, protection is often a matter of international legal obligation.

On the other hand, the world we inhabit consists of sovereign states that jealously guard their territories and their wealth. Admission of refugees requires resources, and resources are often limited. Also refugees often come from cultures far different from those of the host nations and

real frictions can result. Moreover there can be both domestic political reasons and foreign policy reasons not to welcome particular groups. Therefore refugee-receiving states often impose strict rules to limit their intake to politically tolerable levels. Such rules are substantive in form; they include set annual numerical maximal amnesties; exceptions on humanitarian grounds or accomplishing the same by narrowing the definition of "refugee." Other rules are often procedural. They eliminate procedural safeguards present in status determination settings. Their practical effect can discourage applications, reduce approvals, or lower the administrative costs of adjudication.

This chapter therefore explores the politics of asylum and procedures that shape admission to "politically tolerable levels" in South Africa. Gary Freeman has argued that asylum policy is an integral part of the overall migration policy and lies at the intersection of national and international politics (1992:1144). Therefore asylum policies reflect national politics: coalitions committed to one policy or another, beliefs and principles of policy makers in state institutions, strategic and historical ties, accession to international accords and membership to regional organisations (Ibid: 1145).

In order to understand the South African response to the unparalleled refugee flows in recent years, we examine the above-mentioned issues in relation to the national political dynamics, regional and international constraints facing the government. In this regard, how general is the trend towards restrictive admission policies? What is the prospect for either moderate or orderly reforms of existing policies or

more radical back lashes? Should we take the prospect of multilateral responses to refugee outflows seriously? How effective are institutional arrangements within SADC in regulating migration and coordinating admission policies?

4.2 Post Apartheid Normative Shift

The "normalisation" of South African politics after the demise of apartheid fostered "a democratic culture" and the extension of tangible socio-economic benefits to the wider population (Hill, 1998:42). At the same time, it led to the "gradual reclamation of South Africa as a bona fide member of the international community" (Ibid). In 1991 the transitional government signed an agreement with the United Nations High Commission for Refugees to repatriate anti-Apartheid exiles to South Africa (Clark, 1991). In 1993, South Africa began to abide formally by international refugee conventions by signing a tripartite agreement with UNHCR and the Mozambican government to repatriate its nationals from South Africa. The agreement allowed the United Nations to establish an Office of the High Commissioner for Refugees in Pretoria ending a thirty-year hiatus in official relations; thereby allowing the UNHCR to focus on Mozambican refugees. The transitional government also agreed to establish procedures for determining asylum and refugee status. The staff at the office of the UN High Commission for Refugees undertook to provide training courses for officials in the Department of Home Affairs on how to deal with asylum seekers. Later, South Africa ratified the Organization of African Unity (OAU) and United Nations (UN) refugee instruments in 1995 and 1996, respectively. In the same year the government announced a

decision to grant amnesty from persecution and deportation to Mozambicans refugees who returned or were unwilling to repatriate (Hunt, 1998:126).

4.3 Public Response to New Influx

South Africa continued to receive asylum seekers other than those from Mozambique. Most asylum seekers came from elsewhere in Africa, exacerbated by the post-Cold War political uncertainty and economic global decline. These events modified origins of refugee flows to South Africa. The bulk of the asylum seekers came from regions other than Southern Africa. The bulk of the asylum seekers came from three regions, namely the Great Lakes Region in Central Africa, India and Pakistan and the Horn of Africa in the North East (see Table 4.1). From 3, 644 in May 1995, the number of asylum seekers had risen to 64, 341 by April 2001 (Beek, 2001:12).

Table 4.1

Principal Sources of Asylum
Applicants (April 2001)

	Received	Percentage
Great Lakes Region	10911	17%
India and Pakistan	11721	18%
Horn of Africa	9766	15%
Angola	6859	11%
Nigeria	5302	8%
Others	19782	31%
Total	64341	100%

Source: adopted from Beek, 2001.

4.4 Negative Perceptions

Apparently, the outcry that asylum seekers are swamping South Africa seems erroneous, compared to the number of asylum seekers South Africa hosted in the past. In 1985, at the height of the civil war in Mozambique, South Africa was home to an estimated 300,000 Mozambican refugees and asylum seekers. In fact the number of asylum seekers has actually 'levelled out', in the last two years, with slightly over 4,000 applications being received between April 2000 and April 2001 (see Table 4.2) Out of this number, 79.8% had their refugee status applications finalised. Out of the finalised applications a total of 53.1% were declared "refused" meaning the applications were either rejected, cancelled, expired, withdrawn or declared manifestly unfounded; only 26.7% were approved.

Table 4.2

Overview of Asylum Applications 1995-2001

Source	Dated	Received	Approved	Refused	Outstanding
UNHCR**	May-95	3,644	383	517	2,744
DHA/UNHCR***	Jun-96	16,967	1,915	5,649	9,403
DHA/UNHCR	Aug-97	32,510	4,202	6,118	22,390
DHA****	Nov-98	47,612	7927	19031	20,654
DHA/UNHCR	Jun-99	54,759	8504	25020	21,235
DHA/UNHCR	Apr-00	60,278	15006	29219	16,053
DHA/UNHCR	Jun-00	60,515	15116	29899	15,500
DHA/UNHCR	Apr-01	64,341	17,198	34,184	12,959

Refused includes, rejected, cancelled, expired, withdrawn and manifestly unfounded applications

**State of the World's Refugees, UNHCR, 1995

****DHA/UNHCR Recorded figures

**** Speech by Deputy Minister for Home Affairs to Parliament, November, 5 1998

Source: Beek, 2001.

4.4.1 Revival of International ties

However one cannot deny the fact that certain events that accompanied the end of apartheid has made South Africa an attractive destination for asylum seekers. The end of travel restrictions and boycott has made it accessible. Second, the accompanying democratic transition to constitutional rule that upholds individual liberties is another motivating factor. Third, the newly found culture of constitutionalism has created a flurry of popular demands for legal protection and additional rights for asylum seekers and refugees (Klotz, 1997).

This accelerated influx has remained a source of tension. While quite a number of the applicants to asylum can be regarded as founded, many can also be regarded as fraudulent and unfounded. In addition there is a problem of quantification. First, the statistics represented do not account for those who have not applied for asylum. Not all asylum seekers apply for refugee status on arrival. Many "operate through informal networks in registering with the Department of Home affairs and obtaining shelter and work" (Hunt, 1998:127). The spontaneous arrival of asylum seekers who apply for asylum independently and at their own convenience has led to a perception that asylum seekers are in fact economically motivated immigrants that are using the asylum system as a surrogate immigration channel (Toolo and Bethlehem, 1994:5).

4.4.2 A Halt in Labour Recruitment

South African exiles and anti-apartheid activists received asylum in the neighbouring countries. It was therefore expected that a post-apartheid South Africa would extend a gesture of goodwill to its neighbours and Africa in general by initiating a generous refugee policy. However this has not happened as envisioned, instead the public has remained ambivalent about refugees. In explaining their fears and resentment, the public response to the recent surge of asylum claims can be understood in the context of other factors. First, recent decisions by mining companies have reduced the active recruitment of regional contract migrant labour. Overall employment levels of foreign contract labour have declined since the 1987 miners' strike and retrenchments in the 1990s (Davies, 1995:4). Perhaps public response to the arrival of a large number of migrant workers response would have played out differently if the country was suffering from less parlous economic circumstances. Temporary labour recruitment reduction and the gradual exhaustion of secondary immigration through labour networks has left asylum as the only significant legal entry into South Africa. Having minute chances of entry through visa, work or residence permits, many now enter clandestinely and then claim refugee status to regularise their stay.

4.4.3 Conspicuous Immigrant Communities

At the same time labour recruitment halt has left South Africa with a large residual and effectively permanent immigrant populations that the previous apartheid immigration policy excluded and ignored (Perbedy and Crush,

1998). Formally excluded, the immigrant communities have grown gradually through natural increase, family reunions and illegal entry. The absence of integration measures has not obscured the reality of expanding immigrant communities. The expanding and conspicuous immigrant communities contradict the official closed-door policies. Public concern is therefore heightened by the gap between official closed-door immigration policies and the reality of expanding immigrant communities living among their midst.

4.4.4 A Problem of Quantification and Definition

The situation is further complicated by the fact that a large proportion of the estimated asylum seekers are always in a "constant state of flux and this exacerbates the problem of quantification" (Reitzes, 1995:14). Many re-enter the country for family reunion, temporary employment, cross-border trade petty trade, exit to take remittances home, and then re-enter again (Ibid). Also as a result of the apartheid legacy, the status and definition of undocumented immigrants as opposed to asylum seekers has historically been ambiguous and problematic. During the apartheid era, the Aliens Control Act labelled refugees "illegal aliens", a tag name they have continued to bear and distorts public opinion and attitude to real refugees. The ambiguity is particularly problematic for Mozambicans. Mozambican asylum seekers in rural areas were granted 'political refugee' status by the "homeland governments", whereas those found in urban areas were defined as illegal aliens-'economic' immigrants. Consequently Mozambicans in

rural areas were voluntarily repatriated while those in urban areas were forcibly deported further reinforcing the divide. This distinction remains arbitrary because many Mozambicans arrived as asylum seekers, but because resources in rural areas were scarce, they were forced to move into urban areas (Dolan, 1995:30; Reitzes 1995:14; De la Hunt, 1998:125).

4.4.5 Mixed Motives

In general, it is also common for large-scale refugee inflows to be accompanied by economic motivations. The level of economic deprivation that gives rise to emigration also gives rise, in many cases, to protest or resistance against the system of government that perpetuates, tolerates or is powerless to correct conditions of deprivation. Therefore the distinction between political refugees and undocumented immigrants is normally hard to sustain. A majority of those who flee to South Africa come from countries where poverty is also perpetuated by corrupt political systems. For example India and Pakistan accounted for 18%, and Nigeria accounted for 8% of asylum seekers in South Africa in the year 2001 (see Table 4.1).

Mixed motives make the distinction between refugees and economically motivated undocumented immigrants quite difficult. The process of determining "genuine refugees" has caused considerable delays at the Department of Home Affairs. It has overwhelmed the administrative capacity of the processing system and the Department of Home Affairs is unable to respond appropriately to the rising applications and growing backlogs. In June 2001, 12, 959 were pending

(see Table 4.2). Consequently, the refugee determination process is not working as planned; delays are still a problem and immigration officials are convinced that many claims are bogus, especially applicants from SADC countries. Some officials therefore express personal anger or weary bemusement towards those they believe are making fraudulent claims:

"I told my boss that according to the UN principles, they had a right to be heard. But my boss said there was nothing going on in Tanzania. We are not going to accept Tanzanians here. "I've made my decision", he said, "These people are not going to fuck us around". Now the problem is with Mozambicans, Zimbabweans, Malawians, and Batswana. We never accept any of these¹"

In addition to the bureaucratic overload, hasty decisions and widespread failure to remove rejected asylum seekers has fostered a sense of cynicism towards the asylum system. Press commentaries are filled with the language of invasion. Images of unending waves of asylum seekers strike terror in the hearts of many and there are worries over the incapacity of the government to take command of the situation,

"Only those ones among us with particularly short memories would gainsay the need to continue giving accommodation to genuine refugees. But what is to be done about other people who come here in such of jobs and better life. Give them

¹Cited in "Arbitrary, Uninformed Decisions" *Human Rights Watch Report*,

RDP houses and free schooling, as well as much-needed jobs?" (Cited in Dolan and Reitzes, 1996:22).

4.4.6 The Press and Transition Politics

Reflecting the press pose, vacillating and confused politicians have remained ambivalent towards refugees, but at the same time not put a complete halt to their arrival. Frustrated by official measures the public mood has increasingly become nationalistic and xenophobic. Reports of violent attacks against asylum seekers and foreigners are common (Handmaker, 1999:308).

However while the media has clearly been instrumental in placing the abuse of the "asylum bandwagon" in national limelight (Gifford, 2000), Hill argues, "It would be misleading to present the issue as a media phenomenon" (1998:42). Various political factors have also put asylum issue in the limelight. First, an acid test for the new normative order was the manner in which it was going to address the challenges posed by immigration. The previous regime and immigration framework was inclined towards a "steady expansion of state powers in the formulation and implementation of immigration policy" without much regard for "accountability, transparency and due process" (Perbedy and Crush, 1998: 19).

Second, in a young democracy, trans-national migration issues relate directly to the vexing issues of national identity and cohesion (Reitzes, 1995a; Hill, 1998). As experience shows, migration issues cut deep into any

democratic politics (Freeman, 1992).

It is no surprise that relative to other policy matters, institutional operations and legislative changes related to immigration control have remained nominal. The principal legislation dealing with migration in the new era, the Aliens Control Act (No. 96 of 1991), and the 1995 amendment remain preoccupied with stemming "illegal immigration" and therefore their overall effect has been to enhance immigration control. Although the same legislation has included a generous amnesty provision to nationals of the regional body, Southern African Development Community (SADC), among them Mozambican refugees who fled to South Africa during the Apartheid era. Its intention has remained the same. The Minister for Home Affairs stressed,

"South Africa has extended a gesture of goodwill to its neighbouring countries by granting these exemptions. This gesture should not be construed as a softening of our approach to illegal immigrants. To the contrary, it provides the moral high ground, after a period of discrimination, to deal with the problem stricter according to the Aliens Control Act".²

4.5 Political Response.

The issue of strict immigration control invokes the troubling issue of human rights and international obligations. The high moral ground that the minister refers

² The Minister stressed in his Parliamentary Media Briefing, of February 13, 1997 that amnesty was not a relaxation of immigration controls

to holds "that all human beings, including the illegal immigrants are entitled to claim certain universal human rights, such as security of life, property and person" (Reitzes, 1995b:8). But who is the guarantor of these rights? Do states have responsibilities towards non-citizens? Does the moral responsibility of South Africa extend beyond its borders into the international realm? These normative concerns highlight the dilemma for South Africa (ibid).

South African exiles and anti apartheid activists received asylum in the neighbouring African countries. Many of the countries that continue to generate refugees suffered from apartheid's systematic destabilisation, for example Angola. The civil wars and economic decay of countries that suffered destabilisation raises the issue of "compensatory justice" (Reitzes, 1995b:8). Arguing that South Africa has a duty to redress the past injustices the Minister for Education Kader Asmal recently articulated:

" It is not something we must forget in current debates over regional cooperation... and when faced with xenophobic calls for the expulsion or demonisation of "illegal aliens from the next door. The culpability of the old South Africa, its continuing responsibility for ongoing suffering on our cross-border door step, cannot be so easily evaded³"

Acknowledging this fact, President Mbeki condemned the hostility towards refugees and immigrants from these countries, urging South Africans to remember the

³ Cited in "Destabilisation of Frontline States by the Apartheid Regime"

hospitality they enjoyed:

"Tanzania, Zimbabwe, Botswana and other countries to which we fled in the 1960s did not call us illegal aliens. They said we are going to support our brothers and sisters from South Africa so that they can go home" (Ibid).

Similarly, the African National Congress (ANC) Department of International Affairs discussion paper on 'Foreign Policy in a New Democratic South Africa' articulated clearly that,

"While South Africa's people experienced discrimination and repression at home, the people of other countries fell victim to barbaric destabilisation policies which left nearly two million people dead, displaced millions more, and inflicted damage estimated at \$ 65 billion on the economies of neighbouring countries" (Ibid: 9).

The continent sustained us during the struggle, "our destiny is intertwined with the region: our people belong with each other" (Ibid).

4.5.1 The ANC and Refugee Rights

Despite its higher normative indication of commitment to refugee issues (See, Table 4.3), critics observe that the ANC led government "has been noticeably reticent and ambivalent on migration issues" (Hill, 1998:43). Opinion polls confirm that there is a significant level of anti-

foreigner sentiments among its rank, perhaps only "muted" by the fear of being labelled xenophobic (ibid). There are indications also that the African 'solidarity' that revolved around the anti-apartheid struggle is under serious strain. There is an overwhelming sense of betrayal as immigrant African communities see their earlier solidarities with ANC and Black South Africans disintegrate. The actions of the immigration department are interpreted in party political terms as a campaign waged by Inkatha Freedom Party (IFP) against former ANC supporters,

"Living like this is not good. There are many Mozambicans [who voted] for Mandela, so we could have freedom of access to South Africa. Now they are not considering this. We voted so that our situation would improve, but we are still being arrested...our votes have no value" (Johnston and Simbine, 1998:164).

Table 4.3

Political Parties Response

Percentage positive response of opinion leaders to refugees and undocumented immigrants

	(Negative response in parentheses)	
	Refugees	Undocumented immigrants
ANC	68,9 (6.7)	18,5 (63.0)
NP	6,4 (70.9)	3,6 (95.2)

IFP	16,7 (66.6)	8,3 (75.0)
FF	2,0 (88.2)	2,0 (98.0)
DP	28,8 (38.2)	8,2 (81.4)
Other	20,6 (57.4)	5,7 (88.2)

Source: Hill, 1997

The weakening of political solidarity within ANC can be attributed to the competition for jobs, resources and status between immigrant communities and South Africans. However one cannot rule out the fact the situation is related to the need to win elections. This probably accounts for the aroused hostile tendencies and calls for control among the ANC politicians in response to the expectations of their constituents (Hill, 1997:195; 1998:43). The ANC members of parliament who have given voice to calls for strict immigration controls fear on one hand being labelled xenophobic, but on the other, there are aware of 'rights based approach' in favour of immigrants means, 'lost votes'. It can probably explain why the ANC party leadership has on many occasions condemned the use of violence on the refugees and asylum seekers, but also at the same time anti-immigrant sentiments clamouring for a crackdown have also come from its members.

The former Minister for Defence, Joe Modise linking immigrants to the rising levels of crime lamented:

"As for crime, the army is helping the police to get rid of crime and violence in the country. However, what can we do? We have one million illegal immigrants in our country who commit crimes and who are mistaken by some people for South African citizens. That is the real problem. We have adopted a strict policy and have banned illegal immigration in order to combat criminals from neighbouring states so that we can round up the criminals residing in South Africa"⁴.

Another thorny issue has been the informal sector of hawking. Many asylum seekers and refugees who are unable to find employment in the formal sector because of either high unemployment levels, their temporary status, or employer prejudices resort to hawking. In so doing, they sometimes enter into direct competition with locals selling the same goods or would like to sell those goods. The conflict is further heightened by the fact that many asylum seekers have hawking experience while South Africans were only allowed to engage in informal hawking trade after apartheid restrictions were lifted in 1991.

Whatever competitive edge foreigners have in terms of experience, the local traders have increasingly resorted to a different weapon, to increase their market share vis-à-

⁴ "Xenophobic Statements by Officials" See Part VI, *Human Rights Watch Report, 1998*

vis the foreigners: violence and intimidation. Local hawkers have organised protest marches and on several occasions viciously attacked foreign hawkers. Confronted by the situation, the ANC Member of Parliament and former Deputy Minister of Home Affairs, Ms. Lindiwe Sisulu in a media release dated August 19, 1997 pointed out that asylum seekers and refugees were trading illegally. South African hawkers should be given preference:

"South Africa's immigration policy, is premised upon the notion that no immigrant should be employed at the detriment of a South African citizen...As the Department of Home Affairs does not issue immigration or work permits to foreigners permitting them to become informal traders, those foreigners with immigration or work permits issued to them for employment other than hawking, have in fact illegally entered the hawking business"⁵.

In general the ANC leadership has remained ambiguous on the aims of the violence against hawkers and foreigners in general. In 1995, the ANC Gauteng Deputy leader Obed Bapela, commenting on riots against foreigners in the Alexandra Township of Johannesburg emphasised that all undocumented immigrants who did not have refugee status should be removed from the country, although in a "humane manner".⁶

⁵ "Attacks Against Foreigner Hawkers" See part VI of the *Human Rights Report 1998*

⁶ "Go Home, ANC Tells illegals" *Star*, January, 26, 1996

4.5.2 The Opposition Parties and Refugee Rights

However the most blatant and significant opposition has come from members of the opposition parties and some government officials. Like elsewhere, in Western Europe and Australia, some politicians feel that the rights-based approach in favour of immigrant's means lost votes. It appears the opposition and White dominated conservative parties: National Party (NP) and the Freedom Front (FF) advocate the adoption of far more tougher measures towards refugees than their African National Congress counterparts

Opposition party members have questioned the ability of the government to support a large population of refugees and undocumented immigrants in the face of unfulfilled post-apartheid reconstruction programmes. In 1997, the Minister for Home Affairs in the Government of National Unity and leader of the opposition party Inkatha Freedom Party (IFP) in his budget speech cautioned South Africans that, "with an illegal population estimated at between 2.5 and 5 million, it is obvious that the socio-economic resources of the country" are under heavy "strain". The cost of this strain "becomes even clearer when one makes a calculation suggesting that if every illegal alien costs our infrastructure (US \$40) per annum, then multiplied with whatever number you wish, it becomes obvious that the cost becomes billions of rands per year".⁷

⁷ Minister of Home Affairs, Introductory Speech: Budget Debate, National Assembly April 17, 1997.

In reaction to a study co-authored by the Human Sciences Research Council and the Institute for Security Studies which revealed that 80 per cent of South Africans supported stronger government efforts against undocumented immigration,⁸ The Freedom Front Party and the National Party both criticised the African National Congress (ANC) led government for encouraging undocumented immigration. Both parties urged the government to take stern action against undocumented immigrants. The National Party spokesperson, Darly Swanepoel, pointed out the cost of immigration cannot be sustained in the face of enormous pressure to provide "our own citizens with basic services". The Freedom Front pledged to support "all measures" aimed at controlling the influx.⁹

Officials of the Inkatha Freedom Party maintained that there was need to protect the interest "of the poorest of the poor who are black and jobless". The open door asylum policy extended to South African refugees during the liberation struggle "should not be a pretext for turning a blind eye" to the inflows (Reitzes, 1995b: 10-11). Other critics maintained that refugee flows couldn't be wholly attributed to South Africa's destabilisation campaign, "destabilisation has been a contributing factor to migration, but there are other substantive reasons for migration, such as self-inflicted "economic decline", argued an official from the Ministry of Foreign Affairs (cited in Reitzes, 1995b: 10).

⁸ Most South Africans Hostile to Illegal Aliens, *SAPA*, June 10, 1997

⁹ "FF will support steps against illegal immigration" *SAPA*, January 4, 1998.

However, not all politicians support clampdown on refugees and undocumented immigrants. For example the former Mpumalanga Premier, Matthews Phosa spoke out against narrow nationalism that "could easily lead to some Bantustan mentality, undermine national unity and cohesion, or lead to some form of xenophobia". He added that any solutions that ignore the historical factors, are "superficial and will not stand a chance of succeeding".¹⁰

4.6 Policy Response

The balance has begun to tilt away from those who call for strict immigration controls towards their critics as migration scholars have increasingly begun to link immigration to labour productivity. Immigration has been touted as one way of increasing foreign competitiveness and creating jobs (Bernstein, 1997). Official discussion of these issues has generated interest in the economic benefits of immigration, escalating the debate considerably.

Joining the debate, human right activists, scholars and general critics have pointed out that the post apartheid migration legislation has failed to make a decisive break with the apartheid policy framework: migration legislation remains control-oriented. However, migration policy based on active border patrols and repatriation is inconsistent

¹⁰"Apartheid Created Southern Africa Refugee Crisis" *SAPA*, June 10, 1997

with norms of the new dispensation (Reitzes, 1997).

The Aliens Control Act is at odds with the new constitution and inconsistent with the internationally accepted human rights norms and ratified refugee instruments. Refugees and asylum seekers; by the nature of their legal status under the Aliens Control Act, remained more vulnerable to violence and discrimination. Ratification of international instruments without corresponding domestic legislation was therefore potentially disastrous. There was need to build confidence amongst the public that the process of protection was legitimate and effective against uncontrollable influxes.

The situation, therefore, called for adoption of a separate Refugee Act on the basis that refugees are migrants with special concerns and problems. The "situation ultimately demanded, as the government itself recognised in 1996, a complete overhaul of the existing policy and legislation" (Handmaker, 1999:292).

In 1996, the government appointed a Task Team on International Migration to analyse and deliberate on issues pertaining to international migration. The task team was to listen to proposals and formulate a new migration policy covering all aspects of immigration including the refugee policy. The Task Team presented its *Draft Green Paper on International Migration* to the Minister of Home Affairs in 1997. The green paper proposed that the refugee policy should be contained in a separate legislation, aimed at asylum seekers and refugees. It should be de-linked from other aspects of immigration control. For refugee

legislation is predominantly a human rights issue and it should not be subject to other immigration concerns. The new legislations should allow for timely determination of asylum claims based on international definitions of UN and OAU refugee conventions. Furthermore an independent body should determine the asylum requests and appeals. The body should follow clear administrative and just due process, allowing the right to appeal. The envisioned legislation should take into consideration the apartheid legacy of discrimination and destabilization of regional countries. The task force also recommended that the government should pursue regional-based solutions to refugee problems. Burden-sharing mechanisms should be created under the auspices of Southern Africa Development Community (SADC).

As a result of the proposals, South Africa signed a Memorandum of Understanding with the SADC Secretariat and the UNHCR, putting refugee issues on the "SADC agenda" (Sinclair, 1997:9). The Memorandum highlighted the need for "collaborative" and "regional" efforts in addressing refugee issues (Ibid). However, South Africa's true intentions became clearer when it declined to ratify the 1995 Southern African Development Cooperation (SADC) Draft Protocol on "Free Movement" of Persons (Hill, 1997: 193). The scepticism towards abolition of border controls was a true indication of South Africa's intentions. It brought into the open the common practice of whereby states "enforce strict measures [that] can externalise their asylum problems onto more generous or weaker neighbours" (Freeman, 1992:1158). By joining the regional multilateral efforts South Africa pre-empted the chances of being an asylum "dump" in the event of enacting a generous refugee

policy envisioned in the *Draft Green Paper on International Migration*.

4.7 Concluding Comments

Although it appears South Africa had real interests in orderly and predictable management of the refugee flows, providing asylum and relief was not going to be sustained by moral arguments and explained through humanitarianism. As one observer predicted,

"Human rights advocates in South Africa have a heavy lobbying task ahead of them...it appears the drafters of the bill have no appreciation of the fact that, by acceding to international refugee treaties and other human rights instruments, South Africa had in effect surrendered a small measure of its sovereignty" (De la Hunt, 1998:138).

At a time when the global trend is systematically diluting responsibility, was a refugee legislation prorogued as a compromise in national interests going to provide relevant, effective and sensitive protection? This answer is sought in the next chapter.

4.8 Bibliography

Articles

- Bernstein, A. 1997. "People on the move: A new approach to cross-border migration in South Africa". *Center for Development and Enterprise*. Policy Paper No.7
- Carim, X. 1995. "Illegal Migration to South Africa" *Insight* 25, 4:221- 223.
- Dolan, C. 1995, "Aliens Abroad: Mozambicans in the New South Africa" *Indicator South Africa* 12,3:29-32
- Freeman, G.P.1992 "Migration Policy and Politics in the Receiving States" *International Migration Review*, 26 (4): 1144-1167.
- Gifford, G.2000. "End to asylum bandwagon'" *Saturday Star* June 17:1.
- Handmaker, J. 1999. "Who Determines Policy? Promoting The Right of Asylum in South Africa", *International Journal of Refugee Law*, Volume 11, 2.
- Hill, L, 1998, "Some remarks on Trans-national Migration and institutional aspects of State-and Nation Building in South Africa" in Bekker, S and Dodds, M. (eds.).
- "Institutional Dynamics Relating to the Production of the South African Nation: A progress report on work undertaken within the Franco-South African Research Programme"
- Department of Sociology: University of Stellenbosch.
- Occasional Paper No.5, 42-46
- Hill. L. 1997. "Democracy and Human Rights: A Paradox for Migration Policy". *Africa Insight* 27:188-199.
- Klotz, A. 1997, "International Relations and Migration in Southern Africa" *African Security Review* no.6, 3

- Reitzes, M.1995a. "Insiders and Outsiders" Johannesburg: *Centre for Policy Studies, Social Policy Series.*
- Reitzes, M.1995b. "Trans-boundary Migration to South Africa: Challenges for Human Rights, Regional Development and Security" Paper Presented at Biennial South African Political Science Association Conference, University of Stellenbosch.
- Reitzes, M. 1994. "Alien Issues," *Indicator South Africa.* Vol. 12. No. 1.
- Sinclair, M.1996. "International Refugee Treaties and Their Implications for the South African State". *Southern African Perspectives No. 69*, University of Western Cape: Centre for Southern African Studies, School of Government.
- Toolo, H. and Bethlehem, L. (1994). "Labour Migration to South Africa." Paper presented to the Workshop on Labour Migration to South Africa. Hosted by the National Labour and Economic Development Institute (NALEDI). 31 August 1994. Johannesburg.

Books

- Beek, I. 2001. "Prima Facie Asylum Determination in South Africa: A Description of Policy and Practice". (Eds.) In *Perspectives on Refugee Protection in South Africa*
- Crush, J. (ed.) 1998 *Beyond Control: Immigration and Human Rights in a Democratic South Africa.* Cape Town: Institute for Democracy in South Africa (IDASA).
- Davies, J (ed.) 1995. *Cross Border Migration in Southern Africa: Mission Report,* Public Information Series. Cape Town: Institute For Democracy in South Africa (IDASA).
- De la Hunt, L. A.1998. "Refugees and Immigration in South Africa" In Crush, Jonathan (ed.), *Beyond Control:*

Immigration & Human Rights in A Democratic South Africa
Cape Town: Institute for Democracy in South Africa (IDASA).

Dolan, C.1997. *The changing status of Mozambicans in South Africa and the impact of this on repatriation to and re-integration in Mozambique*, Norwegian Refugee Council, No.2.

Dolan, C and Reitzes, M 1996. "The Insider Story? Press coverage of illegal immigrants and refugees, April 1994-september 1995" Research Report no. 48 Johannesburg: Centre for Policy Studies.

Johnston, N. and Simbine, C. 1998, "The Usual Victims: The Aliens Control Act and the Voices of Mozambicans" In Crush J. (eds.), *Beyond Control: Immigration and Human Rights in a Democratic South Africa* Cape Town: Institute for Democracy in South Africa (IDASA).

Peberdy, S and Crush, J. 1998. "Rooted in Racism: The Origins of the Alien Control Act" In Crush J. (eds.), *Beyond Control: Immigration and Human Rights in a Democratic South Africa* Cape Town: Institute for Democracy in South Africa (IDASA).

Toolo, H. and Bethlehem, L. 1995. "Problems, Issues and Positive Approaches for Organised Labour" In De Villiers, R. and Reitzes, M. (eds.) *Southern African Migration: Domestic and Regional Policy Implications* Workshop Proceedings, Centre for Policy Studies, Johannesburg, pp. 13-48.

Reports and Legal Documents

Aliens Control Act, Act No. 96 of 1991.

Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for

Refugees concerning the presence, role, legal status, immunities and privileges of the UNHCR and its personnel in the Republic of South Africa, September 1993.

Constitution of the Republic of South Africa, Act No.108 of 1996

Draft Green Paper on International Migration 1997.
Presented to Minister of Home Affairs, 13th, May 1997.

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

Handmaker, J. 1998. *The Bill of Rights and the Aliens Control Act*, Lawyers for Human Rights. South Africa.

South African Human Rights Commission, "Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act", March 1999.

Public Protector Act, Act No. 23 of 1994.

Refugees Act, Act No. 130 of 1998 (Gazette No. 19544).

Chapter Five

Refugee Protection in South Africa: Legislation, Policy and Practice

5.1 Introduction

As a result of the deliberations commenced by the Task Team on International Migration in 1996, the South African Parliament promulgated a new Refugees Act in 1998 that came into force in April 2000.¹ The purpose of this chapter is therefore, to analyse and clarify how the Aliens Control Act (ACA) and the new Refugee Act are meeting the challenges of refugee protection. First, the chapter examines the definition of refugees in relation to the South African legislation and practices based on the international conventions, particularly the 1969 OAU Convention.

Second, I examine, whether the application of the asylum determination procedure in South Africa is in compliance with constitutional law and international refugee law as recommended by the task force. Finally, I highlight prominent issues in the current asylum determination procedure in the context of the South African asylum politics. This section therefore wishes to contribute to a better understanding of the refugee policy and practice. In this regard the section attempts to find out whether the

¹ Refugees Act, 1998, No.130 of 1998.

new legislation is in compliance with constitutional law and international conventions as recommended by the task force or is (wittingly or unwittingly) a system of containment.

5.2 Refugee Definitions in South Africa

The South African refugee Act defines a refugee as a person fleeing individual persecution, generalised human rights violations and/or armed conflict in the country of origin. The definition is based on both the 1951 UN and the 1969 OAU refugee conventions. The 1951 UN Convention provides an "individual oriented" definition. The term refugee shall apply to any person who,

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

Mendel describes the 1951 Convention in general as guaranteeing extensive benefits, for example such rights include residence and naturalisation. But these rights are only for a narrowly defined class of individuals that can qualify as refugees under this convention. The OAU Convention on the other hand may generally be described as

granting a small package of entitlements but allowing a wider category of persons, for example the possibility of group based protection (1997:54-57).

It contains what is generally perceived to be an "expanded" definition of the term *refugee*, as African states, which ratified the Convention, felt that "well founded fear of persecution" was not sufficient to cover all aspects of refugee protection in the decolonisation struggle. The Convention includes the UN 1951 Convention definition, but widens it by adding that,

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

The OAU refugee-definition successfully translated the "core meaning of refugee status to the reality of the developing world". The definition captured the emerging realities of a continent where political instability and man-made calamities interacted with the natural catastrophes to threaten the survival of entire communities (Hathaway, 1991:17). The de-colonisation struggles and civil wars made it imperative to include "foreign intervention" and "events seriously disturbing public order" as grounds for according refugee status. Victims of such processes are "equally worthy of special

consideration" as those facing state persecution (Zolberg, 1992: 29).

The OAU definition left open the possibility that the basis for the harm could be indeterminate, unlike the UN definition which clearly linked refugee status to the prospect of abuse *resulting from* some personal or group characteristic ('persecuted for reasons of race, religion...' or *personal political views*). It further provided that so long as people are compelled to seek refuge, the impending harm or impending disruption of public order is 'cause' enough than motives for flight. The definition covers those who escape the impending or serious disruption of public order "in either part or the whole" of their country of origin. Unlike under the 1951 UN Convention, the OAU Convention provides that a person is **not** compelled to make reasonable efforts to seek protection within a safe part of her own country before fleeing abroad (Hathaway, 1991:17-18).

Although the UN definition can be applied to the refugee situation in Africa, it is claimed that this definition has little relevance to many of today's refugee problems, because these problems are not of an "individual" but of a "group" character (Mendel, 1997:54-57). Refugees, particularly, in Africa and Asia, are persecuted as an ethnic or regional group and therefore they end up seeking asylum in large groups. The new South African legislation took note of this and made provisions for *prima facie* or group recognition,

"There may be crisis situations in other countries whereby considerable numbers of refugees arrive at South Africa's borders, or cross the borders within a relatively short period of time. In these situations, the Minister must be empowered to determine refugee status on a group basis."²

Therefore, prima facie is ideal in most developing countries, constrained by the high costs of determining refugee status because of large numbers. In most cases these countries also lack resources that would put in place national refugee legislation to easily satisfy the stringent requirements of definition and protection under the UN Convention (Jackson, 1999:6-7). Compliance with the OAU Convention is more ideal for the South African situation.³

² "Mass Influx of Refugees," *Draft Refugee White Paper* 1998

³ On December 21st 1998 prima facie asylum determination was applied when over 4000 Lesotho nationals fled to South Africa due to political unrest at home. The sudden arrival and the prevailing sectarian violence in Lesotho influenced the conferment of prima facie status.

5.3 The Process of Status Determination

The international refugee conventions articulate clearly that South Africa like other host states has the right to grant asylum and, likewise, to refuse or prescribe the conditions in which the asylum will be enjoyed (Hyndman, 1986; Schuster, 1998). However, the same international conventions request host countries to offer "appropriate solutions" (Goodwin-Gill, 1998:204). In this regard South Africa has adopted prima facie status determination approach as an appropriate solution to asylum requests.

5.3.1 The Application of Prima facie

A distinct feature of prima facie determination is that all asylum seekers, are considered refugees, when under normal circumstances they should have been determined on an individual basis.⁴ Here, prima facie asylum is based on the assumption that the individual members of the group will be exposed to sectarian violence or violation of their human rights if they return home (Jackson, 1999:3).

However, it appears South Africa applies prima facie asylum determination that is discriminatory, arbitrary and not related to a mass-influx. From the way it is defined and applied, there is a contradiction and mixed understanding of prima facie. The government perceives South Africa to be experiencing a mass-influx, but statistics and the situation on the ground indicate otherwise.

⁴ See guideline 44, Handbook on Procedures and Criteria for Determining

Currently asylum seekers come in one by one and not as members of a particular group (Beek, 2001:5).

In South Africa, prima facie status determination applies only to asylum seekers from 'war-torn' and 'refugee generating countries'. Applicants from war-torn states are perceived to be prima facie refugees (also called "genuine refugees") because of the overall unsafe situation in the country of origin. As a result the asylum seekers are granted refugee status on the basis of 'country of origin', rather than sources of persecution and conflict. Asylum seekers from these countries are viewed as "manifestly founded" cases of persecution because they fall within the "OAU definition"; escape from 'external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality' (Beek, 2001:7).

By April 2001, applicants from these war-torn and refugee generating countries accounted for 98% of the approved applications (see Table 5.2). These countries are Somalia with the (31% of total approvals), Zaire / Democratic Republic of Congo (DRC) (28.4%), Angola (26%), Burundi (5.4%), Congo-Brazzaville (3.8%), Rwanda (3.5%), Liberia (0.7%), Sudan (0.4%). The country-based figures reflecting applications rejected indicate that applicants from certain nationalities, namely applications from countries not at war, are unlikely to be approved (see Table 5.1).

Table 5.1

Approved asylum Applicants by April 2001

	Approved	Percentage
Somalia	5330	31%
Congo DRC	4886	28%
Angola	4471	26%
Burundi	941	5%
Congo Brazzaville	661	4%
Rwanda	604	4%
Others	305	2%
Total	17198	100%

Source: Adopted from Beek, 2001

From these statistics we can conclude that, the Department of Home Affairs grants prima facie status based on its list of 'refugee generating countries', which are Somalia, Angola, the DRC, Burundi, Rwanda and Sudan. According to Beek, asylum seekers from Somalia are 'virtually' guaranteed of refugee status: "their approval rate stands at about 89.5%" (2001:12).

Applicants from non-refugee generating countries are determined on an individual basis. Officials from the Department of Home Affairs look at each case on an individual rather than on prima facie basis. Applicants who do not originate from the so-called 'refugee generating countries' find it more difficult to get their application approved. The Department of Home Affairs argues that applicants from non-refugee producing countries are not

"within the OAU definition" and "for that reason, only the UN Convention is applicable to" their request for asylum. Refugee status definition and determination under the UN Convention "involves a harder onus of proof of subjective fear" (Ibid: 7).

As a result, only a handful of applicants from 'non-refugee generating countries' receive approvals, with a few exceptions in the case of a very small number of applicants from Afghanistan (5), Bosnia (20), Croatia (7), Cuba (1), Egypt (1), Ethiopia (4), Ghana (2), Iran (2), Iraq (7), Kenya (1), Macao (1), Nigeria (7), Pakistan (6), Senegal (1), Tanzania (1), Yugoslavia (27) and Zambia (1). The remaining applications are either rejected, or remain outstanding (Ibid). Therefore it seems the Department of Home Affairs hardly grants refugee status on the basis of individual persecution. As a result, applicants from countries termed 'non-refugee producing countries' account only for 2% of the approved applications (See Table 5.2 below).

Table 5.2

Principal Sources of Rejected Asylum Applications by April 2001

India	5625
Nigeria	4338
Pakistan	4174
Senegal	3686
Ethiopia	1934
Bulgaria	1217
Ghana	1076
Bangladesh	946
Tanzania	868
Others	6695
Total	32199

Source: Cumulative figures from DHA/UNHCR adopted from Beek, 2001

It appears the issue of granting asylum based on the prima facie determination procedures results in very few positive decisions. Not all grounds for persecution are considered by the procedure. For example the notion of 'refugee generating countries' means asylum is denied on the basis of 'country of origin'. As a result of contradictory application of prima facie, there is room for the Department of Home Affairs to manipulate and apply restrictive measures. Before elaborating further on these manipulative and deterrent measures, it is important to have a clear picture of how the process applies.

5.4 Refugee Status Application Procedures

The Refugee Act currently has provisions for a three-stage asylum determination process. First, the applicant makes a preliminary interview appearance with a Refugee Reception Officer. Then follows a first instance determination oral interview with the Refugee Status Determination Officer at any of the regional offices. At this stage the asylum seeker has a right to legal presentation but in reality few can (access or afford this service). Finally, with the exception of applications that are at this stage considered manifestly unfounded, the rejected asylum seekers have a right to appeal to the Appeals Board, which is considered independent of the Department of Home Affairs.⁵

5.4.1 Application for Asylum

According to the 1998 Refugee Act any person who seeks asylum must apply for refugee status at the Department of Home Affairs on entry or as soon as possible. The application may be made at the Department of Home Affairs or at the five, regional "Refugee Reception Offices", which may now receive asylum applications.

After making a request for asylum at the reception office, the applicant receives a date for an appointment for the first interview. A standard form letter which reads "appointment for interview: political asylum" confirms this arrangement. At this stage the asylum seeker is vulnerable. The asylum seeker is unable to work, and is susceptible to arrest and detention as a prohibited person since the 'appointment-letter' does not prove the legality of the applicant. As a prohibited person the asylum seeker may be held in detention pending deportation. If the detention exceeds 30 days it can be challenged in the high court for justification and reasons. A majority of the asylum seekers are unable to access or afford such legal representation (Handmaker, 1998:7; Beek, 2001:5).

5.4.2 First Interview and Nationality Check

Under the Refugee Act, the interviewing officer is a refugee reception officer, and not an immigration officer as in the past.⁶ The applications are received at the four regional offices of the Department of Home Affairs in Cape Town, Durban, Johannesburg and Pretoria. The applicant

⁵ *Draft Refugee White Paper, 1998*

⁶ *Regulation 4 (1) of the Refugee Act*

shows a passport or an identity document and the DHA determines whether it is fraudulent or genuine. The receiving officer also records the fingerprints of the applicant to eliminate 'asylum shopping'. The refugee reception officer further completes an *Aliens Nationality Questionnaire* and an *Eligibility Determination Form*. This is a process in which the applicant is required to respond to a series of questions relevant to the situation in the country of origin and application for asylum. In the event that an applicant has no passport, he is immediately submitted for an interview with an immigration officer and a status determination officer. On the basis of this nationality check, applicants proven to be from "refugee generating" countries are considered to be *prima facie* refugees. The Eligibility Determination Form and the applicant's statement are used as the basis for making a decision based on reports from other sources such as diplomatic missions, international humanitarian organisations and institutes. Sometimes at this stage the application for asylum and refugee status comes to end if it is determined that the application is "manifestly unfounded".

Here, there are three issues of concern that fall short of international standards. First, the process is discriminatory: only applications from "refugee generating countries" such as Angola, Somalia and Democratic Republic of Congo) are decided upon by the Regional Offices. Applications from so called "non-refugee countries" are sent to Department of Home Affairs Head Office in Pretoria to be determined by the Standing Committee (Handmaker, 1999:296). Second, in some cases where applicants have no

passports or Identification papers, the Department of Home Affairs has approached the UNHCR office to provide "referral letters", to assist in determining nationality. The UNHCR is reluctant to accede to such "ad hoc arrangements because the government should be responsible for the determination of an applicant's nationality". In the absence of these "referrals letters", some applicants have been turned away. This action does not take into consideration circumstances leading to flight may not allow one to obtain Identification or carry a passport, or in most cases where the state is the persecution agent it will definitely deny the 'dissident' travel documents.

5.4.3 Manifestly Founded Cases: Refugee status

After the interview, Department of Home Affairs provides the 'manifestly founded' applicant with a 'section 22' temporary residence permit (formerly 'section 41' under the Aliens Control Act). This permit is usually granted for a period of 3 months and is automatically renewed while the application is being processed. However, every three months, the applicant has to queue at the DHA for many hours to get the permit renewed. Under the new legislation, temporary residence permit holders cannot take up employment or study. Previously, under the Aliens Control Act temporary residence permit holders would take up employment or study. The permission to study and work enabled asylum seekers to be self-sufficient and active members of the society. The prohibition on work and study in the new legislation has been justified as a deterrent measure that will stem new arrivals. However, the

prohibition has made it difficult for asylum seekers to meet their basic needs.

5.4.4 Rejected Asylum Seekers

If an application for asylum is rejected, the applicant gets a standardized letter stating: "you have not proved that you have a well-founded fear of persecution". Asylum-seekers who receive letters of rejection must therefore leave the country, usually within a period of thirty days. If they do not leave within that period, they are subject to deportation to their countries of nationality. While there is a provision in the South African law to challenge the decision or deportation by way of judicial review, in practice this rarely happens as asylum seekers have little resources or access to legal aid.

Human right activists lament that the letters invoke a general description of the situation in the country of origin rather than examining the individual merits of each case. Normally the letters refer to the situation in the country of the applicant as stable, by usually referring to international and national law provisions of that country, (such as whether a country has a constitution). This assertion is often not related and relevant to the applicant's claim. It involves a "statement of law, not of fact, and certainly not whether the country is actually enforcing good governance" (Bhamjee and Ramji, 1999:8).

5.4.5 Appeal Against Rejection

A rejected asylum seeker is normally given the opportunity to appeal the "rejection decision" within 30 days. Prior to the Refugee Act, the Appeals Board was a one-man show, an advocate employed by the Department of Home Affairs whose decision was treated as final and binding. The Appeals Board was often criticised for lacking independence as the advocate was directly employed by the DHA.⁷ Now the Refugee Act provides for a rejected asylum seeker to apply to the Standing Committee and the Refugee Appeal board for a review of the decision.⁸

However, it appears from the minutes of the Standing Committee that the Appeal Board does not investigate each and every individual case as expected under the new legislation. The Standing Committee is able to determine about 1000 cases in a meeting of about one hour. The minutes from meetings held by the Standing Committee refer not to individuals but to countries of origin. Recommendations by Home Affairs' Regional Offices are grouped in countries and are submitted to the Standing Committee in a kind of *pro forma* checklist based on either 'refugee generating country or 'safe country of origin'.

In such circumstances the Appeals Board is unable to consider every appeal on an individual basis. In most cases, the Standing Committee determines appeals on the basis of recommendations by determination officers at DHA

⁷ "Treatment of Refugees and Asylum Seekers" *Human Rights Watch Report*, 1998

who present the case without looking at the merits of each case or meeting the applicant in person. If the appeal happens to succeed, the applicant is granted refugee status by the DHA (Beek, 2001:10).

5.5 Calculated Kindness: Sovereign Interests

The positive international trend articulated in the Refugees Act has not been extended in practice and policy. Instead of dwelling on the positive aspects of the Refugee Act the Department of Home Affairs has undertaken restrictive regulations to exclude applicants from refugee status. The Department has made its intentions clear to adopt more restrictive measures to limit the perceived influx and "abuse" of the asylum system. To achieve this the legislation has created "an unacceptably broad threshold" of reasons rather than international standards of assessing whether an asylum seeker should be excluded from protection (Garderen and Jaichand, 2001:1).

In the next section we look at how the Department of Home Affairs continues to retain broad discretion to over-rule a decision to grant asylum and make it exceedingly difficult for refugees to obtain "long-term certainty" of refugee status (Ibid)

⁸ In terms of section 26 of the Act

5.5.1 Visa Requirements

Immigration regulations demand that non-citizens hold entry visas, especially those from conflict prone countries. However visa conditions also apply to countries that are not conflict prone. Applicants from conflict prone countries and non-conflict prone countries that are likely to produce asylum seekers have to meet stringent requirements to qualify for a visa. South Africa has strict visa conditions for travellers originating from these countries (see Table 5.3). It imposes sanctions in the form of heavy penalties and fines on carriers. These measures are aimed at discouraging carriers from bringing in passengers who can't meet the stringent entry visa requirements. These non-arrival or non-entrée mechanisms prevent asylum seekers from gaining access to the refugee status determination. These measures keep away the asylum seeker from what Vested-Hansen has termed the "procedural door" (1999: 10). Such measures reinforce border control at the expense of protection, deterring genuine refugees.

Table 5.3

**Principal Applications for Asylum by Nationality
(1995-2001)**

Congo DRC	7677
Angola	6859
India	6385
Somalia	5952
Pakistan	5336
Nigeria	5302
Senegal	4507
Ethiopia	3239
Burundi	2031
Congo Brazzaville	1618
Tanzania	1473
Bulgaria	1441
Ghana	1400
Bangladesh	1310
Rwanda	1203
Others	8608
Total	64341

Source: adopted from Beek, 2001.

5.5.2 Safe Country Notion

The Department of Home Affairs has also designated certain countries of origin as "safe". Safe countries are those that are found not to engage in persecution themselves or to return refugees to other countries that engage in persecution. The premise is that asylum claims filed by those fleeing countries on the safe list are generally unfounded and therefore it makes sense to discourage unfounded applications, thus saving on the delays and expenses of determining each case individually. Although these advantages are significant in weeding out bogus applicants, the dangers in this approach are significant. The most obvious is the complexity of deciding whether a country is safe. The decision may be based on foreign policy pressures to include countries whose human rights records are marginal. However, the difficult question is who decides which countries are put on the list? And even if the list is perfect at the time it is drawn up, rapid changes in human rights conditions may destroy its accuracy well before its use is discontinued. Apart from these conditions, there is always the fundamental issue of international instruments that demand that individual asylum applications must be given a full consideration, as for, no country is 100% per percent free of persecution. Therefore under the 'safe country of origin' rule, a certain number of applicants are definitely genuine refugees. Savings on time and resources must be balanced against human error.

5.5.3 Safe Third Country of Asylum.

Agreements have arisen out of regional arrangements, whereby states have decided that asylum applications of individuals whose flight to asylum took them through one or more signatory states may be sent back to a member state for status determination. This arrangement is now common in Europe. South Africa also checks on whether the applicant for asylum travelled through a safe country (that could have offered asylum) on the way to South Africa. For example a stay in the neighbouring countries, Mozambique, Zimbabwe, Namibia or Zambia for at least 90 days before coming to South Africa to apply for asylum is considered safe enough. Admissibility criteria based on this notion has increasing resulted into further rejections at the border for asylum seekers deemed to be arriving from "safe" third countries (De La Hunt, 1998:132). The Department of Home Affairs argues the applicants had the opportunity to get "protection" in these countries. In the absence of regional asylum policies, the neighbouring countries normally return the refouled asylum seekers back to South Africa (Beek, 2001:7). The situation is complicated because the Department of Home Affairs is unable to define what amounts to "protection". And at the same time, the Department of Home Affairs is unable to "maintain a list of countries it considers safe enough" to offer asylum to refugees headed for South Africa. As a result, the whole exercise is defective and a contradiction of protection measures.

In its application of the third safe country rule, South Africa does not take into consideration the exceptions to the use of the safe third country. According, to the UNHCR⁹, an asylum seeker is allowed to seek protection elsewhere-including South Africa, if there is an element of fear, persecution, and threat to physical safety or freedom in the current country of asylum. Moreover an asylum seeker can challenge the decision to leave a safe country on the basis that the particular country uses a more restrictive interpretation of the international conventions. For example most African countries other than South Africa cannot be perceived to be safe for persons fleeing sexually oriented persecution (homosexuals or lesbians). Such a situation would need South Africa to re-consider its application of safe third country rule.

Therefore I wish to summarise that deterrent measures based on non-arrival and safe country notion expose asylum seekers to risk. They block the initial flight from the country of origin and force asylum seekers to transit through unsafe countries from which the asylum seeker may be forced to return to persecution. Efforts of desperate asylum seekers eager to evade barriers to protection, and those of traffickers eager to exploit their desperate situation can trigger off a whole industry in irregular trafficking of persons, that can undermine border control efforts. Over time, this has potential for distracting attention from protection needs.

⁹ See EXCOM Conclusion 58(g).

5.5.4 Diminished Residence Rights

Ratification of international instruments demands certain self-restraints in the exercise of power to exclude refugees. The provisions of the 1951 Convention, articles 31, 32, and 33 stipulate that a contracting States has an obligation not to impose penalties on asylum seekers or refugees. At the same time the member state should provide appropriate solutions (Hyndman, 1986:153). However it appears the South African government is keen on preventing asylum seekers and refugees from applying for permanent residence. Prior to the enactment of the Refugees Act, the government released a policy document preventing temporary permit holders from applying for permanent residence in 1998.

This particular setback was reversed by the new legislation. Section 27 of the Refugees Act states that refugees are "entitled to apply for" an immigration permanent residence permit in terms of the Alien Control Act of 1991, "after five years of continuous residence in the republic", however, the standing committee must certify that the refugee "will remain a refugee indefinitely" (Handmaker, 1999:299). Still, the possibility for permanent residence has been eroded by the practice of the Department of Home Affairs withdrawing refugee temporary permits and reassessing refugee status every two years (Minnaar, 2001).

5.5.5 Renewal of Refugee Status

Prior to the enactment of the Refugees Act (130 of 1998), section 28(2) exemptions (from the provisions of section 23(b) Aliens Control Act 1991) bestowed refugee status and permitted the recognised refugee to stay in the Republic for a period of two years before the "status would be reassessed". The recognised refugee, after the expiry of the two-year period had to apply for extension of refugee status (to be granted another two-year period). On making application for extension, the refugee obtained a section 41(temporary) permit in terms of the Aliens Control Act. The permit stated the refugee was a "prohibited person" and had 90 days to leave the country or have the permit extended. However the section 41 permit allowed the refugee to work and study while awaiting the Standing Committee for Refugees' decision on whether he/she will be recognised as a refugee again. It was expected that the new legislation would do away with this uncertainty.

The new Refugee Act (enacted on 1 April 2000) has continued to perpetuate the 'uncertainty' replacing the section 41 permit with the section 22 permit. Under the new permit, asylum seekers are not allowed to work and study while awaiting the result of their applications. Recognised refugees seeking renewals/extensions of their section 28(2) exemptions or section 41 permit given in terms of the Aliens Control Act are now issued with a section 22-asylum seeker permit with the words "Employment and Study Prohibited". This prohibition is however scratched out and

replaced with the words "Review of Status". The practice of "scratching out" of the work prohibition is not followed in all cases, either intentionally or by oversight, neither is it provided for in the Refugees Act or in the accompanying regulations. Contrary to Regulation 17(1), a refugee is not provided with a written notice, or given reasons or invited to make a written submission on change of status. This procedure and practice turns a recognised refugee into an asylum seeker. A previously recognised refugee now holding a temporary 3 months permit is technically an asylum seeker again. This has a big impact on a refugee's life,

"For example, banks might want to cancel their bank accounts and employers may prefer to employ a person who they are certain will stay in South Africa for more than three months. On top of that, it presents another psychological defeat for refugees in their struggle for protection and safety" (Beek, 2001:9).

The idea that a refugee's status can lapse or expire is a contradiction of the protection objectives. The change in status is tantamount to withdrawal of refugee status. Moreover this is now achieved "at the mere omission of a Department of Home Affairs (DHA) official" (Minnaar, 2001:1). Under international conventions, refugee status can only cease due to one of the reasons set out in a cessation clause,

"By reason of voluntary acts by the individual; by reason of change of circumstances in the country of origin; by reason of protection by other States or international

agencies; and in case of criminals or other undeserving cases" (Ibid: 2).

The official response to this serious structural and implementation deficiency is that, the anomaly arose under the Aliens Control Act and was not properly dealt with in the drafting of the Refugee Act. This shouldn't be happening and the Department is the process of taking measures, only that their situation has been worsened by the prevailing backlog in decision-making and lack of resources and capacity at the DHA (Ibid).

All these reasons can hardly conceal the true intentions of the Department of Home Affairs. It appears the whole process is aimed at frustrating recognised refugees from acquiring permanent residence and settling in South Africa. The effect of suspending refugee status in the manner employed by the Department of Home Affairs is that a refugee cannot meet the stipulated five years of continuous residence. Under Section 27(c) of the Refugees Act, a refugee needs a continuous period of five years of residence to qualify for residence. Moreover it remains unclear whether a person is a refugee from the time he enters the country or is only "recognised" to be a refugee at the time he or she receives Refugee Status. By being ambiguous on commencement and having refugee status suspended every two years, then waiting for months or years to be reinstated, the DHA has wide powers and discretion to reject application for permanent residence.

5.5.6 Red Card: The Refugee ID

"One of the positive aspects of the Refugees Act of 1998" argues Jacob Garderen, was "the provision of identity documents to recognised refugees". The purpose of the refugee identity document was to identify "recognised refugees" and thus protect them against unlawful arrest, detention and expulsion during police swoops on 'aliens'. Furthermore, the identity cards were essential to access a wide range of services and functions such as the registration of births and deaths, contracting marriage, obtaining employment, housing, hospital care or rations, qualifying for social benefits and registering at educational institutions.¹⁰

However in early 2001, human right groups have received complaints from refugees who are unable to realise the benefits flowing from the refugee ID card mainly because of the distinct difference in colour from the South African ID and the lack of awareness in institutions about the refugee ID. Various private and government institutions do not accept the ID card as a legal document. The South African Banking Council stated that, in terms of the Identity Act, the green ID is the only valid recognised document. There is also concern that the different looking refugee ID will expose refugees to xenophobic sentiments. There is need for the refugee ID to look similar to the existing South African identity document. Human rights and refugee organisations have lobbied the government unsuccessfully to issue green identity documents that looks similar to the

¹⁰ "Red Cards for Refugees" *Botshabelo Sanctuary Volume, 4 issue 1*

South African identity document. Although the refugee ID was created for the purpose of enhancing protection, it seems "it cannot fulfil that function in its current red format" (2001).

5.6 Proposed Amendments to the Refugee Act

The Department of Home Affairs presented a draft Refugees Amendment Bill¹¹ to the Parliament in February 2001, seeking amongst other issues, to enhance the principles of internal flight alternative, confirm that application for asylum must be made within South Africa and authorise the Minister of Home Affairs to designate areas for temporary reception and accommodation for all asylum seekers and refugees inside South Africa (Jenkins, 2001:1).

5.6.1 Restrictive Interpretation

Amendment of section 2 of the Refugee Act seeks to water down the OAU Convention that qualifies a person for refugee status if that person flees events seriously disrupting public order "in either part or whole" of the country of origin. The amendments seek to reinforce that if parts of the country are free from the aggression or persecution, then the asylum seeker or refugee should seek refuge in those parts of the country instead of fleeing from that country to South Africa. This amendment will considerably reduce the chances of asylum even for asylum seekers from war-torn "refugee generating countries". For example

¹¹To amend the Refugees Act, 1998, 50 as to further clarify the reception of refugees, their rights and obligations and to provide for matters connected therewith.

refugees from Angola, Congo DRC, Somalia will be denied asylum on the pretext that they should have sought sanctuary in other parts of the country that is little affected by the conflict.

5.6.2 Diminished Rights to Protection

Currently the asylum debate in Europe is taking place within an increasingly hostile and xenophobic environment¹². European governments are more concerned with protecting themselves than with protecting refugees. In June 2000, the UK Home Secretary proposed that individuals seeking asylum in the UK should be allowed to apply for asylum from their countries of origin or abode. By insisting that any application for asylum must be within the country, South Africa is pre-empting any precedent that will be based on this proposal. This proposal is to be achieved by amending section 3 of the Act.

5.6.3 Mandatory Detention

Frankie Jenkins observes the proposal to designate areas for temporary reception and accommodation for all asylum seekers and refugees is a "step closer to realising a general detention policy for all asylum applicants in South Africa, a policy at times denied and then affirmed by the Department since 1997" (2001:1). The rationale behind the proposed detention policy is primarily aimed at discouraging unfounded asylum claims and ensuring the removal of rejected asylum seekers. Taking into account the perceived "malaise" of asylum seekers, there has been some

¹² "Western Europe Weakening Protections" *Human Rights Watch* Tuesday, 12

support for the detention centres on socio-economic grounds (Ibid). Here I would argue that among the advantages, mandatory detention could provide include a saving on the expense of individual hearings. Also the prospect of automatic detention is a more powerful deterrent measure than the mere prospect of possible detention for unfounded asylum seekers. Additionally, it can provide adequate provisions for monitoring the whereabouts of asylum seekers.

However human right activists have criticized the proposal and remain sceptical about its advantages. Citing the UNHCR regulations, they argue that mandatory detention can only be justified by special circumstances.¹³ Detention in refugee camps within the constitutional imperatives must recognise the special rights of the "vulnerable groups like women, children, disabled persons, victims of trauma, elderly persons and so on" (Jenkins, 2001:2). Consistent with the international requirements is the human cost of detention. These include deprivation of liberty, inability to work, study, travel, or interact with others and sometimes family separation. Detention can also impair access to legal representation, interpreters, witnesses, and other evidence needed to present a case for asylum. The economic costs include the loss of opportunities and income for the detainee's dependants who may be South African citizens or lawful residents. Public costs could include expenditures for detention facilities and personnel, loss of revenue

December 2000.

¹³The Executive Committee to the United Nations High Commissioner for Refugees (EXCOM) is opposed to detention of asylum seekers unless special circumstances demand for it (See guidelines in EC/49/SC/CRP.13).

from taxes that would have been levied on the detainee's incomes. Frankie Jenkins and Lee Anne de la Hunt (200) in a research paper published by the National Consortium for Refugee Affairs argue that complying with these obligations is more likely to be too cumbersome for the Department of Home Affairs.¹⁴

Moreover the general inability of the Department of Home Affairs to comply with the minimum standards of protection "does not encourage optimism about a general detention scheme aimed at improving socio-economic conditions of asylum seekers and refugees" (Jenkins, 2001:2). The fundamental principles of the new dispensation, constitutionalism and civil liberties, provide that all persons in South Africa enjoy a fundamental right to liberty and "limitation to the right not to be deprived of liberty must be the exception, not the rule" (Ibid, 2001:2).

5.7 Concluding Comments

While some researchers argue that international norms greatly influence the government decision to grant asylum (Klotz, 1997; Handmaker, 1999), I concur with Sinclair (1997) that the South African policy has more to do with sovereign strategic interests than global norms. Moral approaches alone cannot account for continued availability of asylum space in the face of unreceptive public. Despite the public remaining ambivalent towards refugees, South

¹⁴ Jenkins F and Hunt, L. "Detaining Asylum-Seekers: Perspectives on Reception Centres for Asylum-Seekers in South Africa", *National Consortium for Refugee Affairs*. September 2000

Africa has a desire to maintain a positive international reputation. South Africa has expressed a desire to be considered for a permanent seat on the UN Security Council. To be considered, South Africa needs to accede to international treaties and show concern at national level. Such concerns include political and economic strategies that depend "closely on international recognition of its new human rights record for success" (Sinclair, 1997:7).

It is also important to remember that the UN and other international organizations have developed procedures and mechanisms that allow pressure to be brought against governments that do not comply with recognized standards of conduct. Noteworthy in this regard are the two measures: application of pressure and mobilization of shame. The multilateral treaties, particularly those in the human rights field, require states to report on their compliance and to send representatives to appear before treaty-monitoring bodies to explain how they have complied or why they have not. This procedure allows the monitoring bodies to apply pressure for compliance informally or sometimes formally in writing (Landgren, 1999: 31). Furthermore, the international organizations have a club like atmosphere for the national representatives. If the home government behaves in such a way as to hinder the attainment of the organisation's goals, "other members can make club membership uncomfortable" (Ibid: 31-32).

At the same time, given that South Africa had ratified the international refugee conventions, the government had to

"reconceptualise the rights of refugees in line with" international standards in order to access the resources and the expertise of the UN to deal with issues such as repatriation of Mozambicans and establishing legal frameworks (1997:10).

A generous refugee policy on paper was needed to counter suggestions that South Africa was adopting an increasingly 'closed-door' policy towards the rest of Africa. The country has recently built up a "reputation" of being xenophobic towards African foreigners. Acceding to international instruments of refugee protection and developing a sympathetic, generous looking refugee policy was one way of countering claims that South Africa was now "rejecting people from the continent" (Sinclair, 1997: 9).

However, it did not mean South Africa was going to be an "asylum dump". It adopted counter measures. It signed the Memorandum of Understanding between SADC and the UNHCR putting refugee issues on regional agenda in 1996. The Memorandum of Understanding advocated "collaborative" and "regional" efforts should be undertaken to address refugee protection. Regional structures would prevent large flows of refugees reaching its borders. Being geographically at the extreme end of the continent, and surrounded by natural barriers such as the Indian Ocean and the Atlantic Ocean. South Africa would likely remain inaccessible to large continental refugee flows. In case of large flows the neighbouring countries in the SADC countries would absorb most of them. Therefore the adoption of a generous refugee policy was unlikely to translate into a costly venture. The setting up a generous standard of protection would

definitely bring South Africa international approval and set off positive effects on policies across the region, but at a minimal cost, to South Africa itself (Ibid:8).

This is not intended to suggest that only sovereign considerations are the sole motivation for granting asylum. Moral issues still matter. By granting asylum South Africa is able to lay a claim to liberal democratic values enabling its nationals to occupy the moral high ground by claiming to embody principles of tolerance, justice and liberty. As Schuster observes,

"Those denied free speech, free association and political freedom go to a country where such freedoms are fundamental rights" (Schuster, 1998: 15).

Abandoning the refugee regime and the new tradition of offering asylum "would call into question those values which underpin this important aspect of the nation's self-image" (Ibid). However 'self-image' is not enough to motivate the compliance with international refugee instruments because "external inducements to comply with international human rights law are remote and not readily felt" (Steiner and Alston, 1996: 350-351). Probably that is why the new legislation so welcomed, as a progressive step by the pro-asylum lobby, has not materialised in practice. Intentional policies of discouraging refugees from becoming permanent residents, prohibition on employment and study while awaiting outcome on asylum request, and rejecting asylum seekers on the basis of "country of origin" have legitimatised existing deficiencies instead of guaranteeing requisite protection of international standards.

Some critics therefore maintain that the refugee system remains dysfunctional. The Department of Home Affairs appears ambivalent about implementing the new legislation in accordance with the constitutional and international laws. The introduction of restrictive regulations to limit the number of people who can claim and enjoy asylum is a manifestation that South Africa considers refugees to be a liability (Garderen and Jaichand, 2001:1) Yet, given the unwillingness of South Africa to allow the refugees in the country to resettle elsewhere,¹⁵ there must be other motives why South Africa continues to grant asylum.

¹⁵ Confirmed in an interview with Joyce Tlou, Coordinator, National Refugees Consortium. South Africa is very reluctant to let refugees resettle elsewhere, because it amounts to an admission that it has failed to provide protection and meet its international obligations Pretoria, 25/7/2000.

5.8 Bibliography

Articles

Barutciski, M.1998. "The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill", *International Journal of Refugee Law*, 10.

Bhamjee, A and Ramji, J. 2000 "The Right to a Fair Asylum Procedure: The Case of the Ethiopian Asylum Seekers" *Botshabelo Sanctuary*, 3,1:8-9.

Crush J. and McDonald, 1999. "Still Waiting For The Barbarians: SA Attitudes to Immigrants and Immigration" *Migration Policy Series No. 4. : Cape Town Institute for Democracy in South Africa (IDASA)*.

Freeman, G.P.1992 "Migration Policy and Politics in the Receiving States" *International Migration Review*, 26 (4): 1144-1167.

Garderen, J. 2001. "New identification Document: Red Cards for Refugees" *Botshabelo Sanctuary*, On-Line Publication at: www.lhr.org.za/refugee/refugeesnav.htm

Handmaker, J., 1999. "Who Determines Policy? Promoting The Right of Asylum in South Africa", *International Journal of Refugee Law*, Volume 11, 2.

Hill. L. 1997. "Democracy and Human Rights: A Paradox for Migration Policy". *Africa Insight* 27:188-199.

Hyndman, P. 1986 "Refugees Under International Law with a Reference to the Concept of Asylum" *Australian Law Journal* 60,148:153.

Jenkins F. 2001 "Refugee Camps in South Africa: Panacea or Protuberance"? *Botshabelo, Sanctuary* 4,1. On-Line

Publication at: www.lhr.org.za/refugee/refugeesnav.htm

Jenkins F and Hunt, L.2000. "Detaining Asylum-Seekers: Perspectives on Reception Centres for Asylum-Seekers in South Africa", *National Consortium for Refugee Affairs* September 2000.

Landgren, K. 1999. "Deflecting International Protection By Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests" *UNHCR Working Papers.No.10* Geneva: Centre for Documentation and Research.

Mendel, Toby D. 1997. "Refugee Law and Practice in Tanzania", *International Journal of Refugee Law*, Vol. 9,1.

Reitzes, M. 1995 "Trans-boundary Migration to South Africa: Challenges for Human Rights, Regional Development and Security" Paper Presented at Biennial South African Political Science Association Conference, University of Stellenbosch.

Sinclair, M.1997. "International Refugee Treaties and Their Implications for the South African State". *Southern African Perspectives* No. 69, University of Western Cape: Centre for Southern African Studies, School of Government.

Schuster, L. 1998. "Why do States Grant Asylum?" *Politics* 18,1:11-16.

Solomon, H 1993. "In Search of Canaan: A Critical Evaluation of the Causes and effects of Migration within Southern Africa, and Strategies to Cope with them," *Southern African Perspectives*. No. 24. Centre for Southern African Studies, University of the Western Cape.

Vedsted-Hansen, J 1999 "Responding to the arrival of asylum seekers: control and protection in asylum procedures" *UNHCR Working Papers.No.6* Geneva: Centre for Documentation and

Research.

Books

- Beek, I. 2001. "Prima Facie Asylum Determination in South Africa: A Description of Policy and Practice". (Eds.) In *Perspectives on Refugee Protection in South Africa* Handmaker, J. Hunt, L and Klaaren, J. An LHR On-Line Publication at: www.lhr.org.za/refugee/book/contents.htm
- Crush, J. (ed.) 1998. *Beyond Control: Immigration and Human Rights in a Democratic South Africa*. Cape Town: Cape Town: Institute For Democracy in South Africa (IDASA).
- Davies, J (ed.) 1995. *Cross Border Migration in Southern Africa: Mission Report*, Public Information Series. Cape Town: Institute For Democracy in South Africa (IDASA).
- De la Hunt, L.1998. "Refugees and Immigration in South Africa" In Crush, Jonathan (ed.), *Beyond Control: Immigration & Human Rights in A Democratic South Africa* Cape Town: Institute For Democracy in South Africa (IDASA).
- Garderen, J. and Jaichand, V. 2001. "Preface: Perspectives on Refugee Protection in South Africa". In *Perspectives on Refugee Protection in South Africa* (eds.) Handmaker, J, Hunt, L. and Klaaren, J. An LHR On-Line Publication at: www.lhr.org.za/refugee/book/contents.htm
- Handmaker, J. 1998. *The Bill of Rights and the Aliens Control Act*, Lawyers for Human Rights. South Africa.
- Hathaway, J. 1991. *The Law of Refugee Status*, Butterworths Canada Ltd
- Jackson, I. 1999. *The Refugee Concept in Group Situations*, The Hague: Kluwer.
- Minnaar, A. and Hough, M (eds.) 1996. *Who Goes There?*

Perspectives on Clandestine Migration and Illegal Aliens in Southern Africa Pretoria: HRSC.

UNHCR, 1993. *The State of the World's Refugees*. New York. Penguin Books. New York: Penguin Books.

Reports and Legal Documents

Aliens Control Act, Act No. 96 of 1991.

Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees concerning the presence, role, legal status, immunities and privileges of the UNHCR and its personnel in the Republic of South Africa, September 1993.

Constitution of the Republic of South Africa Act No.108 of 1996

Draft Green Paper on International Migration 1997.
Presented to Minister of Home Affairs, 13th, May 1997.

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

South African Human Rights Commission, 1999, "Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act".

Public Protector Act, Act No. 23 of 1994.

Refugees Act, Act No. 130 of 1998 (Gazette No. 19544).

Chapter Six

Analysis and Conclusion

Most international scholars claim that international human rights norms, often embodied in formal international declarations and treaties, have an important impact on domestic political interests and governmental practices (Donnelly, 1986; Finnemore and Sikkink, 1998). Likewise, social-constructivist scholars in international relations have outlined causal mechanisms through which global human rights and humanitarian norms influence the state. Countries normally undergo a process of "socialization" that eventually results into norm "institutionalisation" and "habitualisation" (Salehyan, 2001:3). According to Salehyan three modes of norm diffusion and socialisation are often mentioned. First, non-governmental organizations and trans-national advocacy networks actively pressurise governments to comply with international human rights standards. As a result these non-state actors "operate domestically to effect change from within the state, as well as internationally as an external pressure on norm-violating countries" (2001:4). Second, international and UN based organisations such as the Human Rights Commission exert additional external pressure by mobilising information and resources that shame human rights abusers and lobby governments to abide by international norms (see also Landgren, 1999). Third, in the wake of human rights declarations and instruments being widely acknowledged, "states may abide by these norms to maintain a positive

international reputation and because their leaders wish for a favourable image" (Salehyan, 2001:4).

This reasoning about the manifestation and the impact of global human rights can be applied to South Africa. I acknowledge that ratification of United Nations Conventions on refugees, racial discrimination and equality has altered traditional sovereignty considerations of South Africa towards migrant rights. The former Minister for Justice Dullah Omar concurred with this observation "we are also signatories to various international conventions and are committed to enshrining these in domestic law" (cited in Crush, 1998:IV).

As a result, most refugee and migration scholars (Klotz, 1997; Handmaker, 1999) argue that international norms—through a combination of pressure from the domestic civil society and the desire to enhance human rights in a new dispensation, have gradually produced significant changes in refugee policy. Similarly, Jonathan Klaaren (1998) has also shown that advocacy groups in South Africa have frequently invoked international treaties such as the UN Refugee Convention to challenge South African refugee and migration policies in court. Maxine Reitzes observed that human rights agreements have strengthened the role of civil society in debates over refugee and immigration policies. She writes,

"These rights cannot be claimed from the state as they are not the state's to give, and all human beings are entitled to resist any agent, including the state, if it violates these rights...human rights cannot depend either on majority

opinion or on particular state's conception of its 'national interest'" (1998:43).

While I cannot deny that international norms are important and have played a great role in policy formulation, I take issue with the claims that South African asylum policies are primarily motivated and influenced by humanitarian considerations. Instead, I tend to concur with Sinclair (1997) that refugee policy in South Africa is based upon sovereign considerations and strategic foreign policy interests. Of course international norms about refugee protection and human rights are present in the decision-making and policy formulation process; however sovereign-interest based analysis offers a better explanation to why South Africa is actively engaged in the refugee regime.

As a result this study has sought to demonstrate that sovereign interests largely explain decisions on the part of South Africa to accept or reject refugees. Although the three mechanisms of norm diffusion and influence, transnational advocacy networks, international organizations and international prestige factors have made a big impact on South Africa's policy, in practice the refugee policy has continued to reflect South Africa's strategic interests and domestic considerations.

First, in this study, I have not argued that South Africa should overlook its national and foreign interests and abide by international human rights norms regardless of the cost of doing so. I have only demonstrated that refugee protection is more likely when powerful national interests find it conducive to manage destabilising refugee flows.

Such disregard for international refugee protection standards is not inconsistent with policies elsewhere. Although many countries have ratified the UN Refugee Conventions, they have frequently disregarded them. This does not apply only to authoritarian regimes, but it also to the Western liberal regimes. European countries have been increasingly reluctant and selective in offering protection (Roberts, 1998).

Second, although my research findings clearly indicate that international norms do not delegitimize national interests or sovereign prerogatives in policy making to the extent that human right activists claim. It is important to note, there is need for further research on how constitutional courts and refugee law jurisprudence are challenging sovereign prerogatives. Refugee law jurisprudence emerging from the state litigation has provided a high level of human rights protection, such as the right to apply for asylum and protection against refoulment.¹ It is possible "judicial activism" will continue to reinforce human rights of refugees and non-nationals in situations that are directly relevant to state discretion.

¹ Chris Watters Attorneys, in collaboration with the Lawyers for Human Rights obtained a court order directing the Department of Home affairs to reinstate the Refugee status of three clients who had their status removed after expiry of their section 28 (2) permits.

Bibliography

Articles

- Donnelly, J. 1986. "International Human Rights: a Regime Analysis". *International Organization* 40,3:599-642.
- Finnemore, M. and Sikkink, K. 1998. "International Norms Dynamics and Political Change" *International Organization* 52,4:887-917.
- Handmaker, J., 1999. "Who Determines Policy? Promoting The Right of Asylum in South Africa", *International Journal of Refugee Law*, Volume 11, 2.
- Hill. L. 1997. "Democracy and Human Rights: A Paradox for Migration Policy". *Africa Insight* 27:188-199.
- Jenkins F. 2001 "Refugee Camps in South Africa: Panacea or Protuberance"? *Botshabelo, Sanctuary* 4,1. On-Line Publication at: www.lhr.org.za/refugee/refugeesnav.htm
- Landgren, K. 1999. "Deflecting International Protection By Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests" *UNHCR Working Papers.No.10* Geneva: Centre for Documentation and Research.
- Reitzes, M. 1995 "Trans-boundary Migration to South Africa: Challenges for Human Rights, Regional Development and Security" Paper Presented at Biennial South African Political Science Association Conference, University of Stellenbosch.
- Roberts, A.1998. "More refugees, Less Asylum: A Regime in Transformation". *Journal of Refugee Studies* 11,4:375-395.
- Salehyan, I. 2001, "Safe Haven: International Norms, Strategic Interests, and U.S. Refugee Policy" University of

California-San Diego: *Centre for Comparative Immigration Studies Working Paper No. 40*

Sinclair, M.1996. "International Refugee Treaties and Their Implications for the South African State". *Southern African Perspectives No. 69*, University of Western Cape: Centre for Southern African Studies, School of Government.

Schuster, L. 1998. "Why do States Grant Asylum?" *Politics* 18,1:11-16.

Books

Crush, J. (ed.) 1998. *Beyond Control: Immigration and Human Rights in a Democratic South Africa*. Cape Town: Cape Town: Institute For Democracy in South Africa (IDASA).

Davies, J. (ed.) 1995. *Cross Border Migration in Southern Africa: Mission Report*, Public Information Series. Cape Town: Institute For Democracy in South Africa (IDASA).

Garderen, J. and Jaichand, V. 2001. "Preface: Perspectives on Refugee Protection in South Africa". In *Perspectives on Refugee Protection in South Africa* (eds.) Handmaker, J, Hunt, L. and Klaaren, J. An LHR On-Line Publication at: www.lhr.org.za/refugee/book/contents.htm

UNHCR, 1993. *The State of the World's Refugees*. New York. Penguin Books. New York: Penguin Books.

Reports and Legal Documents

Aliens Control Act, Act No. 96 of 1991.

Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees concerning the presence, role, legal status, immunities and privileges of the UNHCR and its personnel in the Republic of South Africa, September 1993.

Constitution of the Republic of South Africa Act No.108 of 1996

Draft Green Paper on International Migration 1997.

Presented to Minister of Home Affairs, 13th, May 1997.

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

South African Human Rights Commission, 1999, "Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act".

Public Protector Act, Act No. 23 of 1994.

Refugees Act, Act No. 130 of 1998 (Gazette No. 19544).

