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Human rights and refugee protection in South Africa (1994-2004)

Enwere, Corlivics Onuoha

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Chapter Four: South Africa and Refugee Protection

4.1 Introduction

International law imposes some obligations on states and has far reaching implications on the protection of refugees and asylum seekers in South Africa. South Africa has ratified international refugee treaties and promulgated Refugee Act in 1998 to give effect, content and integrity to the obligations of protecting refugees in the country. This section discusses the challenges of refugee protection and strategies that have been adopted to achieve compliance with refugee law in the post-apartheid South Africa.

4.2 Compliance with International Refugee Law

In order to access the extent to which South Africa has complied with the international law since 1994, interviews were conducted with two officials of the Rosettenville Refugee Reception Office as representatives of the Department of Home Affairs in the implementation of policies and programmes for the protection of refugees and asylum seekers in the country. They were asked to explain the various ways the government and their departments have adopted to ensure the protection of the rights of refugees and asylum seekers and the main problems and challenges experienced in the accomplishment of such tasks. They started by saying that, the post-apartheid South Africa has gone through many political reforms and the democratic development became a turning point in complying with the international law. This period, they argued, has witnessed a great deal of achievements in signing many international treaties by the government and raised the consciousness to support international law. According to them, South Africa for the first time in her political history has shown support and commitments to international obligations regarding refugee protection and has been working towards complying with such obligations. In effect, after many years of debate and deadlock between government and other stakeholders in refugee protection a substantive refugee law was developed as a benchmark for refugee protection and the legal framework committing government to such obligations. Accordingly, the Department of Home Affairs started admitting asylum seekers into the country in 1993 and issuing appropriate documents required of their status. They also said that, the department has also adjudicated some asylum claimed and issued

refugee status to deserving asylum seekers who fear persecution and human rights violations in their home country and want to remain in South Africa until it is safe for them to return home. One of the respondents insisted that:

> Our democracy has done more than any other government in the history of refugee protection in South Africa in terms of recognising refugees and asylum seekers as well as complying with international obligations. We have succeeded in achieving a lot within a short period of our democracy despite all obstacles. Refugees and asylum seekers cannot completely say that South Africa has not done anything to give them protection and assistance more than the previous administrations.

The respondents said the department has faced a lot of problems and challenges while discharging its duties to protect the rights of refugees and asylum seekers in the country. In the first instance, they mentioned that South Africa inherited no infrastructures regarding refugee protection from the apartheid regime but have put in place policies and implementation mechanisms required for protection. On that note, they said the department previously relied on the instruments and provisions of the Alien Control Act that was not exclusively meant for refugee protection. They said it was quite inevitable to use Alien Control Act since there was no legal framework to that regard and there was need to start with the already existing law that covers immigration issues. This according to them was criticised by numerous NGOs and human rights groups who saw the Alien Control Act as falling below international standards in protecting the rights of refugees and asylum seekers in accordance with the apparent constitutional democratic development. The respondents also acknowledge the assistance of UNHCR, SAHRC and various other human rights and refugee NGOs in facilitating and collaborating with the government in the pursuits and protection of the rights of refugees and asylum seekers in the country, most importantly in the development of South African Refugee Act. The other respondent affirms that:

> The South African refugee law is said to have met internationally acceptable standards in all aspect and incorporated both the UN and OAU Conventions, and other human rights instruments pertinent to protection of refugees and asylum seekers. The same very Act has been criticised by some NGOs who view the regulation that accompanied the Act to have undermined the Act provisions. This they said adopting restrictive measures that limit the rights and protection of refugees. The bone of contention includes the prohibition of the right to work and study to asylum seekers for the first six months of submitting their applications for asylum in the country.

On the problems the Department of Home Affairs has encountered in the implementation of refugee protection policy in the country, one of the respondents acknowledges that:

> due to lack of appropriate infrastructures and mechanisms to ensure adequate protection and accommodate the influx of refugees and asylum seekers by the time South Africa started admitting refugees and asylum seekers into the country, the department lacked the capacity to process applications timely, personnel and the resources to meet the challenges of the new development and as such suffer from administrative inefficiency.

According to the respondents, the first decade of democracy in South Africa vis-à-vis refugee protection was characterised by various administrative and financial crises that cumulated into asylum backlog, which still linger till today. The respondents mentioned policy stalemate on which policy to apply which created confusion on whom, why and how to protect refugees and asylum seekers as well as the *modus operandi* to be followed in such circumstances. On the office equipment, the respondents said the department lacks the equipment necessary in achieving more efficient service and hence the process of processing asylum document was slow and sometimes they experienced total breakdown of some office equipment for days or weeks which kept applicants waiting and vulnerable for weeks or months without papers. The respondents also complained of the department relying on manual filling system and as such data are complied on fills without accurate

data interpretation, analysis and formulation, which lead to unnecessary waste of time in retrieving and making use of the data when necessary. This mars efficiency and constructive efforts in building reputable asylum regime and protection in the country.

However, the respondents were asked to react on the various interventions the department has taken to tackle the problems in recent times and the dividends such intervention has yielded in the protection of refugees and asylum seekers. The officials mentioned that the appointment of the new Minister of Home Affairs in 2004 has brought new hope and has rejuvenated the entire system of refugee protection in the country despite the fact that the department still face with accumulated problems and new challenges. On the key issues, the respondents mentioned that the department has witnessed major transformations and has acquired new office equipment in the recent time. These include new computers with high velocity that can capture images and fingerprint, purchase of printers, fax machines and building a data based where the data of all applicants can be stored and captured when needed. Other innovations include employment of more staff, embanking on staff training and internship programme as well as carrying out a Backlog Project with the support of UNHCR. This is to resolve the crisis on pending asylum applications. The department has also introduced refugee smart cards which are similar to drivers' license and valued for two years which can use by refugees to apply and open a bank account in a any bank in the country.

The interviewer observes that the Rosettenville Refugee Reception Office for over six months has stopped receiving applications and issuing asylum permits to new asylum seekers and only refers them to the Pretoria Refugee Reception Office. This has not only made new asylum seekers vulnerable to arrest, detention and abuse but a violation of their right to asylum since Pretoria Refugee Reception Office is already congested and unsuitable for asylum seekers from Johannesburg considering the number of asylum seekers, transportation costs and the risks involved in traveling without proper documents and other inconveniences associated with the department. When asked why the department is not providing services for the new asylum seekers, the officials stated that they are occupying a temporary building at the Rosettenville and as such lack the capacity to

accommodate new asylum seekers hence, their decision to refer them to the nearest reception office in Pretoria. From my investigations, the Rosettenville Refugee Reception Office irrespective of the new interventions recently introduced to improve and ameliorate the problems of refugees and asylum seekers still face numerous problems and challenges. In the first instance, the building presently occupied by the department is in a deplorable condition, lack space and environment conducive for efficient services to forced migrants. There is also security blockage at the entrance of the office making the place inaccessible to the public.

4.3 Rights-Based Strategy

Refugees flee their countries for fear of persecution and seek asylum in the territory of another country. The international community has always embrace tolerance and security as important attributes for the avoidance of conflicts. Article 55 (c) of United Nations Charter provides for the promotion of "universal respect for, and observance of human rights and fundamental freedom for all without distinction such as race, sex, language or religion"[218] as the bases for maintaining world peace and security. Failures of states to protect the rights of refugees have prompted the use of rights-based strategies and exploration of the language of rights to achieve protection. According to the Amnesty International "every single refugee is the consequence of the government neglect to protect human rights"[219] and this involves the government and leadership of states or opposition groups that embark on conflict and violence instead of seeking peaceful means of resolving conflicts. Harrell-Bond has argued that rights-based strategy or what he called "rights-based humanitarianism" goes beyond private charity or governmental largesse.[220] The approach is all about "defending, advocating and securing employment of human rights"[221] in the right manner to effect some positive changes. Rights-based strategy is in contrast with humanitarian theory, which sees refugees as helpless people, and their helplessness makes them vulnerable to all kinds of cruel and inhuman treatment. It is based on the fact

[218] United Nations Charter 1948
[219] Amnesty International, Respect My Rights: Refugees Speaks Out, United Kindom.1997
[220] Harrell-Bond, B.Can Humanitarianism Work for Refugees be Humane? in human Rights Quarterly: A comparative and International Journal of Social Sciences, Humanities and Law. The Johns Hopkins University Press. Volume 24, 2002. p52
[221] Ibid

that states have obligations and responsibilities to protect refugees who should be accorded their rights according to the international law. Rights-based strategies also ensure that broad ranges of actions are taken to secure the rights and needs of refugees and asylum seekers.[222] Such actions include lobbing, conducting researches, persuasions, publications, criticisms, litigations, and demonstrations that put governments under pressure and refugee issues are brought to the spotlight with attempt to attract the much-needed attention to effect protection.

In my view, it is when vulnerable groups in such categories as refugees are adequately protected that a government can satisfactorily claimed to have protected human rights in the broader sense, if not the country will still continue to violate the very principle of human dignity. This embraces all those who are vulnerable including indigenous people, people with disability, migrants, refugees and internally displaced people[223] as they are more affected by any violation of human rights. Weissbrodt et al argue that human rights are the "means of protecting the weak from the strong."[224] The former Director of the UN Human Rights Centre, Theo Van Boven, suggests that the "degree of solidarity of a society can be measured by its attitude towards the vulnerable and the marginalized."[225]

The non-governmental organizations (NGOs) and other stakeholders outside the government have been invoking the language of rights as rights-based strategies to enhance the protection of refugees and to advance their cause. For instance, the global human rights watchdog, the Human Rights Watch has actively involved in identifying areas where the rights of refugees have either being ignored or not fully complied with by states.[226] Okoth-Obbo maintains that a looming crisis of refugee protection is the crisis which "consists of a fierce competition between rights-based strategies on one hand, and on the other hand political and social forces which international refugee law was designed to countervail and

[222] Towle Richard, Human Rights Standards: A Paradigm for Refugee Protection in Bayefsky and Fitzpatrick Joan (ed) Human Rights and Forced Displacement, Martinus Publishers, Netherlands. 2000. p27
[223] Robinson M, A Human Rights Message, Ministry of Foreign Affairs Publishers. Sweden .1998.p10
[224] Weissbrodt, et al. 2001.International Human Rights: Law policy and process. Anderson Publishers. USA. 2001
[225] Quoted in Joly Daniele, Refugee Asylum in Europe, Minority Rights Publications.1992. p36
[226] Bamigboye P.I, International Humanitarian Response to Force Migration: UNHCR's role in protecting refugees in South Africa, University of the Witwatersrand, Johannesburg 2003. p34

in so doing, create and secure the space for the protection of refugees."[227] He sees the competition as involving the application of refugee law based on states'obligations and refugee rights, and the tendency of states to act in accordance with their own policies considering their national interests. In spite of this trend, he concludes that refugee protection deserves to have validity of its own. Hence, effective implementation of human rights and refugee standards is perceived as a precondition in finding durable solution to the entire refugee problems. However, in order to find out the use of rights-based strategy for the protection of the rights of refugees and asylum seekers, interviews were conducted with an official of Lawyers for Human Rights and she was asked to state the major interventions of her organisation in the protections of refugees and asylum seekers in South Africa and what motivated such interventions. The respondent said Lawyers for Human Rights is a non-governmental and non-profit making organization and has played a remarkable role in assisting refugees and asylum seekers in issues relating to legal assistance. The also help refugees and asylum seekers access asylum process, prepare appeals and interven against arbitrary detention and threat of re-foulement as well as other important legal matters. The respondent maintains that:

> our intervention is necessitated by the fact that, there are no service provider that provides such services to refugees and asylum seekers. Generally, refugees and asylum seekers in South Africa are living in cities unlike other African countries where they live in camps and this may be responsible for their choosing South Africa. Every asylum seeker has the right to decide which country he/she would like to seek asylum. We try to assist and ensure that the rights of refugees and asylum seekers are not violated knowingly or unknowingly by authorities.

On this note, she reiterated that Lawyers for Human Rights has instituted much litigation on behalf of refugees and asylum seekers against the Department of Home Affairs and other state institutions and agencies for illegal detention, denial of rights or attempts by authorities to subject refugees and asylum seekers to unconstitutional means. The issues of

[227] Okoth-Obbo, The experience and policy issues in Southern Africa in Majodina, The Challenges of Forced Migration in Southern Africa, Africa Institute of South Africa, 2001. p46

litigations and legal battles are discussed further in the section on the role of courts and refugee protection in South Africa in this research.

One other reasons for their interventions, the respondent said is that the Department of Home Affairs has failed in some respect to protect the rights of refugees and asylum seekers and since there are no service providers or only few of them interested in securing the legal rights of these vulnerable, her organisation has to intervene as a means of ensuring that the rights of refugees and asylum seekers are secured under the context of the law as well as prevent abuse of these rights in the future by authorities. The respondent was also asked to identify what she feels is the major obstacle of refugee protection in South Africa and possible ways of improving the system. The respondent identified long duration for asylum determination, which causes difficulties for the asylum seekers to open a bank account, assess accommodation and other social services as well as gainful employment as some of the problems militating against forced migrants in the country. Secondly, she mentioned that there are incidences of perpetual bribery and corruption in the department, which affects service delivery. The anomaly of corruption according to her is difficult to eradicate since it involves a network of many corrupt officials who benefit from the system and have absolute control of the trend for their own advantage. This includes asking refugees and asylum seekers for money before granting or renewing their permits which ordinarily is meant to be free and if they do not give the bribe either their papers are denied or not renewed, making them susceptible to arrest or detention or they will be staying illegal in the country. She also mentioned administrative problems and lack of necessary equipment to facilitate efficient services. On the possible ways to improve the protection of refugees in South Africa, the respondent recommended;

1. Ensuring that the rules and regulations that are in place are adequately implemented.
2. Refugees are not discriminated against, and elimination of xenophobic attitudes among South Africans.

3. Advocacy and training of government officials having contact with refugees and asylum seekers such as the police and army officials on the rights of refugees and their duties in dealing with this vulnerable group.
4. Information workshop for refugees and asylum seekers to educate them on their basic rights and obligations. This has been organized in Durban, Johannesburg, and Pretoria etc.

4.4 Roles of Refugee NGOs in South Africa

Non-governmental organisations (NGOs) are organs of the civil society and "apply to range of bodies which are non-commercial in nature."[228] According to UNHCR they include, in particular, humanitarian organisations and human rights monitoring and advocacy organisations that educate the public on the rights of refugees. Writing about the role of NGOs with regard to human rights Steiner et al argue that they;

> contribute to standard stetting as well as to the promotion, implementation and enforcement of human rights norms. They provoke and energize. They spread the message of human rights and mobilise people to realise that message.[229]

They further argue that NGOs operate on the basis of differing mandates, approaches and each responding to its own priority and method of action, bringing variety of viewpoints on human rights engagements. In this manner, they become partners in the delivery of humanitarian and other forms of development assistance, partners with government in performing several functions such as human rights education, monitoring of voluntary code of conduct and even the delivery of basic social services and partners with businesses and labour unions in various areas.[230] Ogata describe NGOs as "an important democratisation factor in the United Nations international spectrum"[231] and very helpful in the promotion of the rights of refugees and asylum seekers. Both local and international NGOs have played a

[228] UNHCR, The State of the World's Refugees: 50TH years of Humanitarian Action, Oxford University Press, New York. 2000. 194
[229] Steiner & Alston, International Human Rights Concept: Law, Politics and morals. Oxford University Press. New York. 2000.
[230] Ibid
[231] Ogata Sadako, High Commissioner UNHCR.

great role in the post-apartheid era by encouraging South African government to observe the normative standards set out in the international law. They also outspoken critics in monitoring the activities of the government and UN agencies in the implementation of refugee policies and programmes. The table below shows some local refugee NGOs operating in South Africa and the services which they provide for refugees and asylum seekers;

Table 4.1 Some refugee NGOs and services they provide

Name of Organisation	Services Provided
Lawyers for Human Rights	LHR promote advocacy and protect the rights of undocumented migrants, asylum seekers and refugees. They provide advice and assistance in areas such as asylum application procedures, appeals, and review of rejected asylum applications, socio-economic rights, monitoring unlawful detention and repatriation.
Wits Law Clinic	Advice and assistance with asylum application procedures, appeals and reviews in cases of rejected asylum applications, durable solutions, such as voluntary repatriation, family reunification, relocation and resettlement.
Co-ordinating Body for Refugee Communities	Referral to the relevant service providers, emergency accommodation for new arrivals and help for contacts with other refugees and asylum seekers.
National Consortium for Refugee Affairs	Promotion of refugee issues through research, lobbing, advocacy and monitoring at a national level.
Jesuit Refugee Services	Offer limited number of accommodation for new arrivals and vulnerable group, advocacy and tracing, skills training, funerals financial assistance, social counseling, primary school enrolment and medical assistance.

Source: NCRA, Directory of Refugees Service Providers, 2004

There are also international NGOs working to promote human rights and the rights of refugees and asylum seekers. This category includes Amnesty International, Human Rights Watch and International Migration Project, and a host of others NGOs working in partnership with UNHCR and other stakeholders to promote the rights of refugees and asylum seekers in South Africa. While the UNHCR plays a crucial role in creating the enabling environment, the NGOs on the ground create a tangible framework of institutions that refugees and asylum seekers interface with.[232] Where the government is reluctant to act, NGOs take direct responsibility and their involvement has been "positive and offering greater flexibility and commitments."[233] For instance, some NGOs have provided some skills training initiatives to refugees and asylum seekers in order to make them self-sufficient and to provide substance for their families.

National Consortium for Refugee Affairs (NCRA) has provided a forum for dialogue and coordination between government, civil society and UNHCR, to ensure consistency of policies and facilitate the formation of a comprehensive refugee policy in South Africa. The NCRA was formed in 1997 to bringing together various stakeholders within the refugee regime and to promote the fundamental rights of refugees and asylum seekers in South Africa. It also ensures that refugee policies, law and practice conform to international constitutional standards. It creates public awareness on the plight of refugees and asylum seekers and provide conducive environment that will enable refugees and asylum seekers to contribute meaningfully to the socio-economic development of the country. Results are most positive when there is regular liaison among various NGOs and other agencies.[234] NGOs also have a subsidiary role as pressure groups on issues relating to asylum policies, programmes and implementations[235] including refugee protection.

The South Africa government was confronted with lack of policy framework and it held "consultations with UNHCR and relied on NGOs specialists in the field of migration to

[232] Chesang G K, Refugee, International Citizen or Trans-Territorial Citizen? University of the Witwatersrand, 2002. p29
[233] Joly Daniele et al, Refugee Asylum in Europe? Minority Rights Publications. London.1992. p51
[234] Ibid. p52
[235] Ibid

develop a coherent and progressive domestic refugee law."[236] NGOs fully and actively participated in the discussions, debate and negotiations during the drafting of Immigration and Refugee Act in South Africa as well as raised concerns with some key issues. For instance, the Amnesty International and Lawyers for Human Rights criticised some government policies that give temporary protection to refugees and asylum seekers. They also raised agitation on the issue of SADEC collective protection of refugees and asylum seekers as contained in the Green Paper on Immigration Project. In essence, NGOs in the post-apartheid era have played a fundamental role in promoting the rights of asylum seekers and refugees in South Africa. They have helped in the formulation of policies and legislation and engaged in the monitoring of the implementation of the Refugee Act, and take appropriate interventions strategies through litigation, lobbying and advocacy where this is needed.[237]

According to Chesang "the gap between policy and actual practice create the rationale for the intervention of NGOs"[238] and lead to public awareness on the plight of refugees and in pursuit of their rights. He argues that for NGOs, this intervention is based on the gap between policy and implementation but some time NGOs would like to liaise with the government to see that refugees enjoy their minimum rights.

The researcher conducted interviews with officials of the Lawyers for Human Rights and the Wits Law Clinic to find out their activities and assistance to refugees and asylum seekers. According to an official of the Wits Law Clinic they have:

> been monitoring illegal detention and deportation of asylum seekers in South Africa and employed litigation as a necessary intervention mechanism.

The Human Rights Committee South Africa also monitored the activities of Refugee Reception Office in Braamfontein in the year 2000 leading to the establishment of Refugee

[236] Smith TR, The Making of the 1998 Refugee Act: Consultation, Compromise and Controversy, University of the Witwatersrand, 2003. p14
[237] NCRA, Network to Promote Refugee Issues in South Africa www,ncra.org.za
[238] Chesang G K, Refugee, International Citizen or Trans-Territorial Citizen? University of the Witwatersrand, 2002. p65

Project in 2001. The Refugee Project received about 700 complaints from refugees and asylum seekers a week. These complaints range from welfare, police harassment, official maltreatment, lack of administrative justice, and xenophobia among others. Like other NGOs, the intervention may be attributable to government failure to address the problems of refugees and asylum seekers as well as lack of capacity to do so.[239] For instance, Agency for Refugee Education, Skills Training and Advocacy (ARESTA), Catholic Welfare and Development (CWD), Scalabrini Refugee Service, Trauma Centre, Refugee Disabled People in Development (RDPD), Place of Hope, Refugee Pastoral Care and The Ark Shelter was all established to assist refugees and asylum seekers. These refugee NGOs have been providing basic services, training, counseling and assistance to refugees and asylum seekers. Warner describes the state as providing "cursory and inadequate services to refugees and that basic right are not afforded to refugees."[240] This includes the inability of the government to provide financial and material assistance to refugees and asylum seekers who are in desperate need of such assistance to be able to survive in the country. NGOs therefore respond to the "obligations of observing the normative standards set out in the international policies on refugees, human rights and democracy."[241]

The South African NGOs have been in the front line against xenophobia and have embarked on various campaigns and programmes to deter the incidence of xenophobia among South Africans. The South African Human Rights Commission in partnership with National Consortium for Refugee Affairs engaged in a programme tagged "Roll Back Xenophobia" to reveal the dangers of xenophobia and encourage South Africans to be more open and accept new socio-cultural divergences. President Thabo Mbeki has be outspoken and described it as "fundamentally wrong and unacceptable that South Africans should treat foreign nationals as enemies."[242]

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[239]Chesang G K, Refugee, International Citizen or Trans-Territorial Citizen? University of the Witwatersrand, 2002. p65

[240] Warner Lisa is a Human Rights Lawyer and an intern at the Human Rights Committee assigned to Refugee Project.

[241] Chesang G K, Refugee, International Citizen or Trans-Territorial Citizen? University of the Witwatersrand, 2002. p119

[242] Crush J, (ed) Immigration, Xenophobia and Human Rights in South Africa, Southern African Migration Project, Canada .2001. p1

Apart from the roles NGOs have been playing in the South African democratic project as regards to refugee protection, they also faced problems. These include capacity constraints, lack of finance and human resources, duplication of activities and sometimes poor service delivery and lack of coordination. It is imperative to mention that NGOs source for funds both nationally and internationally from other bodies or government which may limit their operations and capacity in providing sustainable assistance to refugees. Parlevliet observes that "civil society network and organisations enjoy some degree of autonomy vis-à-vis the state, but are not necessarily fully independent."[243] These have become an impediment to NGOs working in the field of refugee regime in South Africa.

In order to tackle the problems confronting refugees and asylum seekers, some refugees decided to organise themselves into organizations which are registered as NGOs and one of such bodies is Coordinating Body for Refugee communities (CBRC). In an interview, the coordinator of (CBRC) Dosso admits that the body was established by refugees themselves as a result of "the failure of Guateng Refugee Forum and other refugee NGOs to address the concerns of refugees."[244]

> we decided to form the organization in order to have direct access to some decision making process on some policies affecting our lives in South Africa and to be able to help new refugees and asylum seekers as well as the most vulnerable within our circle. This has helped the refugee community to participate in the debate and decision-making processes on the problems concerning refugees and asylum seekers since most personnel of NGOs may not have experienced some of our trauma and ordeals in real practical life.

Refugee organisations have also helped to maintain a link with their home countries and monitor situations at home for eventual return when condition is favourable. It has sometimes become a link through which government and stakeholders may reach out to

[243] Parlevhet Michelle, Containment or Change? Civil Society' Role in Conflict Prevention in Africa in Sidiropoulos Elizabeth (ed) A Continent Apart: Kosovo, Africa and Humanitarian Intervention, South Africa Institute of International Affairs, South Africa.2001. p65

[244] Dosso Ndessomin, The African Diaspora: Loose we lose, together we stand, let's love each other for a better South Africa, CBRC Journal Issue 1.no1 March/ April 2005. p10

refugees and asylum seekers. UNHCR summarize the roles played by refugee organizations in five areas: help the new arrivals with practical matters relating to integration; provide psychological and material support; help refugees maintain their cultural identity; promote a positive image among nationals of the host countries through cultural presentation; and provide an opportunity for meaningful activity that enhances self-image of refugees.[245] The refugee organizations denotes dynamic network and occupies a social space in South Africa that cuts-across social, cultural and ethnic realities.

However, despite the challenges and constraints confronting NGOs in South Africa in the last ten years, it could be argued that South Africa NGOs have made a remarkable breakthrough in assuring the effectiveness of refugee protection and reinforcing the broader push towards respect for and promotion of the rights of refugees and asylum seekers in the country. These have been achieved by making appropriate submissions, recommendations and researches, lobbying and influencing government polices and implementation strategies. They have also made publications, organised seminars and embarked on constructive campaigns, litigations and actions. Finally they have helped to provide substantive and normative norms for domestic legislation to protect refugees. But, there still remain numerous challenges requiring attention in our collective efforts to build a free and equitable society where substantive potentials of democratic values can adequately be ultilise and realised.

4.5 Courts and Refugee Protection in South Africa

South Africa has the duty to observe both constitutional and international obligations[246] with regard to refugee protection. The 1996 South African constitution as an embodiment of democratic values establishes a close and harmonious relationship with international law. In effect, section 233 of the constitution requires an interpretation of a court with regards to South African legislation to be consistent with international law provided that such interpretation is "reasonable over any alternative interpretation that is inconsistent

[245] UNHCR, Report of Social Services Workshop, Europe, Geneva, 18-21/6/84, p.4.
[246] South Africa signed the International Covenant on Economic, Social and Cultural Rights on 3, October 1994.

with international law."[247] Katz observes that "chapter two of the Bill of Rights in the South African constitution is not reserved in general for citizens, but available to all persons"[248] and as such provides protection to all individuals who reside within South Africa borders. The Bill of Rights contained in the South African constitution is anchored on the principles of the Universal Declaration of Human Rights which have no boundary and bridge across all nations of the world. According to section 36(1) of the South African constitution, any limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all relevant factors."[249] Section 7 (2) of the same constitution imposes four different types of obligations on the state with regard to the Bill of Right which include the obligations to respect, protect, promote and to fulfill[250] the constitutional rights as contained in the Bill of Rights. The South Africa Refugee Act of 1998 incorporated to a large extent the principles of international and regional conventions pertaining to refugee protection[251] and the rights refugees are entitled to.

Courts have played a dominate role in South Africa since the democratic dispensation and have established viable constitutional jurisprudence towards refugee regime by pronouncing landmark verdicts. Refugee protection in the post apartheid era has witnessed various conflicting issues and the courts have become the legal ground in resolving these contentious issues and have made several rulings in that regard. This has facilitated the consolidation of the new South African Refugee Act. Previously, asylum seekers were prohibited from working or studying pending the determination and completion of the asylum status procedure within 180 days as stipulated in the Refugee Act Regulation. According to this regulation, an asylum seeker with section 22 permits can apply for

[247] Willem.H. Olivier, The New Asylum Law in South Africa, Journal of South Africa Law 2002-4. p653
[248] Katz Anton, Immigration and the Court: From Xu to Ruyobeza in Plessie du Mix and Pete Stephen (ed) Constitutional Democracy in South Africa (1994-2004): Essay in Honour of the Howard School of Law. LexisNexis Butterworth. South Africa. 2004
[249] South African Constitution, Act 108 of 1996
[250] SAHRC, 4th Economic & Social Rights Report 2000/2002
[251]Katz Anton, Immigration and the Court: From Xu to Ruyobeza in Plessie du Mix and Pete Stephen (ed) Constitutional Democracy in South Africa (1994-2004): Essay in Honour of the Howard School of Law. LexisNexis Butterworth. South Africa. 2004

permission to work or study after six months of applying for refugee status, if they did not receive approval of their applications. The court declared this regulation unconstitutional.

In Home Affairs v. Muriel Millie Watchenuka before Justice Howie of Supreme Court of South Africa the court upheld the judgment of H.J. Erasmus of Cape High Court and setting aside the prohibition of work and study for asylum seekers by the Department of Home Affairs. The judge questioned the authority of the Minister of Home Affairs to prohibit employment and study for asylum seekers for the first 180 days after the asylum permit was issued since the South Africa government offers no support or assistance to asylum seekers. He therefore declared the restriction on employment and study *ultra vires* as it contravenes the constitution, Bill of Rights, principles of constitutional democracy, human dignity and international law, by denying people access to self-fulfillment and freedom to engage in productive life. Up until its suspension at the end of 2002, the regulation accompanying the Refugee Act had direct negative impact on the ability of asylum seekers who arrived on or after 1st of April 2000 to sustain themselves financially [252] because their right to work and study were denied and the government on the other hand failed to provide material and financial assistance within the period.

Secondly, UNHCR standards require that all applicants should receive a written decision including reasons for any decision, particularly where claims are rejected.[253] This standard also entails that, at all stages of the procedure, including the admissibility stage, asylum seekers should receive guidance and advice on the procedure and have access to legal counsel.[254] Lee Anne de la Hunt observes that "an asylum seeker was not given reason for an adverse decision, but after litigation, this was remedied and few years later, the Department of Home Affairs started issuing written document to asylum seekers to that effect. Appeal Board started allowing refugees the right to appear in person and/or be represented at appeal hearing."[255]

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[252] Belvedere et al, National Refugee Baseline Survey: Final Report. Johannesburg: Community Agency for Social Enquiry (CASE), Japan International Cooperation (IJCA) & UNHCR. 2003.p1 http: www.case.org.za
[253] Wachira GM, Refugee Status Determination in Kenya and Egypt, American University of Cairo Egypt. 2003. p45
[254] Ibid
[255] Ibid

Also, in Pembele v. Home Affairs in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) on 10th December 1996 before Justice Desai, the court stated that the Department of Home Affairs "shall ensure that asylum seekers are given the reasons in writing for any adverse decision by the Standing Committee for Refugee Affairs."[256] This gives the asylum seeker whose applications are rejected the opportunity to know the reasons against their applications and to prepare for appeal. Michael Moran argues that the principle of administrative justice demands that:

> compliance with a fair procedure should require that (a person) is informed of the case against him, to the extend that there is one, so that he can tailor his submissions accordingly and, where appropriate, refute some of the allegations, correct mistakes, or explain away otherwise damaging evidence…clearly the more that is at stake for the applicant, the greater the obligations to give notice of the case to be met.[257]

In another matter, Mohammed Musa brought a case against the Department of Home Affairs in the High Court of South Africa challenging the circular issued by the DHA that 'sent back' recognised refugees to asylum seeker status on the expiration of their refugee permit. According to LHR "this practice had serious implications on a refugee's ability to apply for permanent residence which is only possible for a refugee after five years of continues residence as a refugee"[258]in the country. In a judgment delivered on 27 February 2001, Justice Smit ordered the reinstatement of the applicant's refugee status as granted in terms of section 24 of the Refugee Act 103 of 1998 pending the finalisation of the review/evaluation of the refugee status. This could be said to be a victory for democracy and human rights and a negative right since it prevents the state from interfering with the constitutional rights of refugees. Similarly, the Lawyers for Human Rights have challenged the Department of Home Affairs regarding circular 59 of 2000, which "prevented asylum

[256] Honourable Mr. Justice Desai, Supreme Court of South Africa (Cape of Good Hope Provincial Division) 1996.http: www.lhr.org.za/refugee/decisions.php
[257] Moran Michael, Administrative Law,2nd ed, Old Bailey Press, London. 1999. p136-7
[258] Lawyer for Human Rights,http://www.lhr.org.za/refugee/decisions.php

seekers transiting to safe neighbouring countries from entering into South Africa."[259] The High Court of South Africa in May 2001 withdrew the circular issued by the Department of Home Affairs preventing asylum seekers from transitory from South Africa and as such granted asylum seekers the right to transit to other countries through South Africa.

In the process of consolidating democracy and as an authoritative apex court, the Constitutional Court has made many constitutional pronouncements, which have implications for refugee protection in South Africa. The court's emphasis on substantive equality and dignity for the "weak and marginalised groups and individuals"[260] is well established. Stammers argues that, in social practice "rights claims do challenge existing power relations"[261] and the Department of Home Affairs and other government bodies dealing with immigration and refugee issues have been successfully challenged in the courts on a variety of counts which have far reaching implications on refugee protection.

In Khosa and others v Minister of Social Development concerning certain provision of the social assistance Act 59 of 1992 which disqualifies non-citizens living in South Africa from receiving welfare grants on the basis of being a foreign national despite the fact that immigrants have permanent resident status and contribute to the development of the country. The court confirmed the ruling by Claasen J.A of the Pretoria High Court and set aside the Act on the grounds that the Act infringes on the right to equality since it discriminates against non-nationals. Pronouncing the judgment, Justice Mokgoro held that the constitution gives the right to social welfare to 'everybody" which by implication extended to permanent residents as bearers of the right since they are permanently living in the country. According to her, any denied of such right amounts to discrimination and unfair treatment which contravenes the constitution and the Bill of Rights.

Another case determined by the Constitutional Court was Booyson v Minister of Home Affairs and others, challenging the constitutionality of two sections of the Alien Control

[259]Lawyer for Human Rights,http://www.lhr.org.za/refugee/decisions.php.
[260] Huyssteen, E, The Constitutional Court, Human Rights and Democracy in South Africa: A Sociological Perspective. University of the Witwatersrand, South Africa. 2003. p18
[261] Stammers Neil, Human Rights and Power. Political Studies, 1994. p77
South Africa,1998

Act 96 of 1991 dealing with application for work permit by foreign spouses of South African citizens or permanent residents. These sections prevented non-citizens seeking to work in South Africa from applying for work permit while in the country or pursuing occupations for which a sufficient number of persons are available in South Africa. This employment restriction was declared unconstitutional by the Cape High Court on the basis that it infringes on the right to dignity, cohabitation and financial support. The Constitutional Court confirmed the ruling and in unanimous decision, Justice Sachs maintained that the provisions in question infringe on the right to human dignity of the spouses.

The Union of Refugee Women and twelve refugees represented by the Lawyers for Human Rights (LHR) are challenging the Security Industry Regulatory Authority (SIRA) in the Pretoria High Court on the prohibition of the right of refugees to work in private security companies and by extension in all fields regulated by trade and professional bodies. Since 2002, the Private Security Regulation Authority has been implementing the Private Security Act 59 of 2001, which barred refugees from working in the security industry.[262] The reason is to give preference to South African citizens in employment scale while possession of identity document becomes part of the prerequisite for the employment. Since many refugees have no South African identity documents, they are automatically disqualified and denied employment in the security companies despite possessing adequate refugee documentation, trainings and qualifications. This also buttress the fact that some employers of labour in South Africa did not recognised the permits issued to refugees by the Department of Home Affairs and their right to gainfully employment in the country. The Act only allows South Africans or permanent residents the right to register and work in private security companies and imposes a fine of (one thousand rand) R1, 000 per a day on any company found guilty of violating the rule. According to a respondent interviewed who is an official of Lawyers for Human Rights:

> the enforcement of this Act is discriminatory and has inflicted injuries on those granted refugees status by the Refugee Act of 1998.

[262] Kretzmann Steve, Refugees' Rights to Work Goes to Court, Mail & Guardian, September 19-24 2005. p13

In doing so, it therefore contravenes the South African constitution, the Bill of Rights and international law by unfairly discriminating against the refugee community and preventing them from engaging in productive life. This case if determined in favour of refugees will go a long way in creating employment for refugee community which will have positive impacts on their livelihoods and also be a source of empowerment and integration.

In another development, the Scalabrini Centre of Cape Town, the Coordinating Body for Refugee Communities and four disabled refugees represented by the Lawyers for Human Rights have taken legal actions against the Minister of Social Development, Minister of Finance, Minister of Home Affairs and Director General Department of Social Development in Pretoria High Court challenging the constitutionality of section 3 (c) of the Social Assistance Act, 59 of 1992 which discriminates against disabled refugees from receiving disability grants. The applicants want the court to declare unconstitutional the section of Act which excludes disabled refugees to apply for, and receive social disability grants. The applicants want the court to set aside section 3 (c) of the Social Assistance Act, 59 of 1992 insofar as it prohibits disabled refugees from applying for social grants and not recognising the rights of disabled refugees to enjoy such grants. We can therefore recognise the argument by Huyssteen that "however limited, the law and courts have protected and furthered the interest of the marginalised and the powerless."[263] In summary, South African courts have rejected attempts by the Department of Home Affairs to:

a. detains failed asylum seekers and undocumented migrants for extended periods without judicial consent;[264]
b. unlawfully returning people to countries where they are in danger of persecution and prevent restriction of asylum seeker's freedom of movement;[265]
c. re-evaluate successful refugee's status every two years; [266]and to
d. implement a country of first asylum policy. [267]

[263]Huyssteen E, The Constitutional Court, Human Rights and Democracy in South Africa: A Sociological Perspective, University of the Witwatersrand, South Africa. 2003. p11
[264] Garderen and Jaichouth and, Perspective of Refugee Protection in South Africa, Lawyers for Human Rights, South Africa .2001. p7
[265] Ibid
[266] Ibid