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

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Chapter Three: International Refugee Law and Standards

3.1 Introduction

The right of an individual to seek and receive asylum from persecution in another country is an internationally recognised right. The 1951 Convention is one of the international instruments that forms part of a whole body of human rights law following the Universal Declaration of Human Rights 1948 (UDHR).[128] Hence, Article 14(1) of the UDHR guarantees the rights of all individuals to seek asylum from persecution in another country.[129] The principle of asylum recognises that when all forms of human rights protection have failed, individuals must be able to leave their country freely and seek asylum elsewhere across international borders. The South African 1998 Refugee Act stipulates the application of the definitions of refugee as contained in both the 1951 UN Convention Relating to the Status of Refugees and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[130]

The aftermath of the Second World War saw thousands of refugees and displaced people in Europe. In response to this situation the United Nations promulgated the 1951 Convention Relating to the Status of Refugees, with a view to handle the situation and to protect refugees. A protocol to the 1951 Convention was adopted by the United Nations in 1967 to extend refugee protection to developing countries and to tackle new refugee situations worldwide. The purpose of the protocol was to expand the 1951 international convention to embrace all refugees in places other than Europe, thus eliminating the temporal and geographical limitations in the scope of the previous convention.[131] In response to the imminent refugee crises that resulted from liberation struggles and internal conflicts apparent in the new independent African states, the Organization of African Unity (OAU) in 1969 adopted the Convention Governing the Specific Aspect of Refugee Problems in Africa. The convention was a regional instrument aimed at complementing the United

[128] Chtwin M, (ed), Immigration, Nationality and Refugee Law Handbook: A User's Guide, Joint Council for the Welfare of Immigrants, 1999. p89
[129] Ibid
[130] Ibid
[131] Blavo E.Q, The problem of Refugees in Africa: Boundaries and Borders, Agshgate Publishing Ltd, England, 1999. p13

Nations Refugee law and to govern the protection of refugees in Africa, looking at African peculiarities and circumstances. South Africa ratified these conventions in 1995 and 1996 respectively. This section discusses the various international instruments that are promulgated to protect the rights of refugees and asylum seekers which set the standards for such protection.

3.2 1951 UN Refugee Convention.

Protection of refugees remained a major political issue on national and international agenda after 1945. This led to the adoption of Convention Relating to the Status of Refugees on 28 July 1951 by the United Nations which set standards and legal obligations of states regarding the treatment and protection of persons granted refugee status in their territories. It embodies principles that promote and safeguard refugees' rights in field of employment, education, residence, freedom of movement, access to court, and naturalisation.[132] The Convention entered into force on 22 April 1954 and Gerrit Jan Van Heuven Goedhart was appointed the first High Commissioner for Refugees under the convention. Turk et al note that "the convention has legal, political and ethical significance that goes beyond their specific terms."[133]

The Refugee Convention reflected states' sense of responsibility and moral obligations towards protecting refugees and asylum seekers.[134] Turk et al also observe that "the convention reflects a fundamental human value on which global consensus exists."[135] States were mandated to adopt appropriate national legislation that guarantees internationally recognised standards as contained in the 1951 Refugee Geneva Convention[136] which will facilitate the protection of asylum seekers and refugees in their

[132] UNHCR, The State of the World's Refugee: 50 Years of Humanitarian Action, Oxford University Press, United Kingdom.2000. p23
[133] Volker Turk and Nicholson Francis, Refugee Protection in International Law: An Overall Perspective in Erika Felleret (ed) Refugee Protection in International Law: UNHCR'S Global Consultation s in International Protection, Cambridge Press. United Kingdom. 2003 .p6
[134] 50 Years On: What Future for Refugees Protection? http://www.hrw.org/campaigns/refugees/text1.htm
[135] Volker Turk and Nicholson Francis, Refugee Protection in International Law: An Overall Perspective in Erika Felleret (ed) Refugee Protection in International Law: UNHCR,S Global Consultation s in International Protection, Cambridge Press. United Kingdom. 2003. p3
[136] 1951 Convention Relating to the Status of Refugees, http://www1.umn.edu/humanrts/instree/v1crs.htm

territories. This was to ensure that refugees gain the widest possible exercise of their fundamental rights and freedoms.[137] The 1951 convention defined refugee as "any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social 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."[138] However, the Bellagio Protocol was adopted in 1967 to remedy the deficiencies in the UN 1951 convention and Article 1 (2) of the protocol removed the restriction that protect only persons that become refugees on events occurring before 1st January 1951. The Protocol expanded the scope of the Convention as the problem of displacement spread around the world.[139] The participants recognised that the world has significantly changed[140] unlike the situation when the 1951 Convention was adopted. As such, the 1951 Convention was no longer sufficient to tackle the problems of refugees as the number of refugees and asylum seekers increased at a larger scale with varying dimensions requiring new approaches and interventions. The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention.[141] The 1951 Convention and its Protocol stipulate three major issues:

1) The basic refugee definition, along with terms of cessation, and exclusion from refugee status;[142]
2) The legal status of refugees in their countries of asylum, their rights and obligations, including the right to be protected against forceful return, or non-refoulement, to a territory or where their lives or freedom would be threatened;[143]
3) States' obligations and corporation with the High Commissioner for Refugees charged with the task of supervising international conventions and providing for the protection of refugees.[144]

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[137] 1951 Convention Relating to the Status of Refugees, http://www1.umn.edu/humanrts/instree/v1crs.htm
[138] Office of the High Commissioner for Refugees, United Nations Convention Relating to the Status of Refugees, http://www.unhchr.ch/html/menu3/b/o_c_ref.htm
[139] UNHCR, The 1951 Refugee Convention: Questions and Answers www.unhcr.ch
[140] Parrish Michael, Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection, 22 Cardozo L Rev. p223
[141] Nartea, A, Compliance with International Human Rights and Refugee rights principles: A case study of Myanmar and its Refugees in Thailand.p15 ttp://www.ep.liu.se/exjobb/eki/2003/impier/006/exjobb.pdf
[142] Ibid
[143] Ibid.

Ratification of a particular convention imposes some obligations to the state. By ratifying the convention South Africa is under obligation to comply with the provisions vis-à-vis protecting refugees according to the standards of treatments specified in the international law document. For instance;

1. Article 17 (1) states that the contracting states shall accord to refugees legally staying in their territories the most favourable treatment accorded to non-nationals in the same circumstance as regards to the right to engage in wage-earning employment.[145] Article 23 (1) states that the contracting state shall accord refugees lawfully staying in their territories the same treatment with respect to public relief and assistance as accorded to their own nationals.[146] and;
2. Article 24 stipulates that the contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees.[147]

Apart from the above prescriptions and standards, the 1951 convention also has some shortcomings. Firstly, the ambiguity on what constitutes a well-founded fear of persecution has left states with the options of given different interpretations and has led to systematic exclusion or abuse of the rights of refugees. Refugees are required in the spirit of the conventions and the guidelines of the UNHCR, to provide proof that their fear of persecution is well founded[148]and must justify individual persecution on specific grounds.[149] In this respect, the UNHCR makes it clear that there is no universally accepted definition of persecution but that does not mean there is no internationally acceptable criterion for determining whether a person has a well-founded fear of persecution.[150] According to Wachira persecution "results where the measures in question harm the integrity and inherent dignity of human being to a degree considered unacceptable under the prevailing

[144] Office of the High Commissioner for Refugees,United Nations Convention Relating to the Status of Refugees, http://www.unhchr.ch/html/menu3/b/o_c_ref.htm
[145] United Nations Convention Relating to the Status of Refugees. article 7 (1)
[146] Ibid
[147] Ibid
[148] Hayter Teresa, Open Borders: The Case Against Immigration Control, Pluto Press, USA.2000. p72
[149] Daniele Joly et al, Refugees: Asylum in Europe? Minority Rights Publications, London.1992. p15
[150] Hussein Solomon, Of Myths and Migration: Illegal Immigration into South Africa, University of South Africa Press.2003. p10

international standards"[151] but apart from these arguments persecution or fear of persecution still remain hard to be pinned down. An interpretation on the criteria depends on the approach of government officials who make the decisions in line with current state policies [152] considering time and space and the situation in the country of origin. The Convention also offers states a lot of flexibility, which may be favourable or unfavourable in limiting or expanding the rights to be enjoyed by refugees and asylum seekers in relation to nationals or other foreign nationals in similar situation.

In addition, crossing international borders is a pre-condition to guarantee protection in the 1951 Convention and results to the exclusion of the internally displaced people. It also neglected women as extremely vulnerable group and "the Executive Committee of the UNHCR programme indicated in 1995 that states are free to grant status to women on the ground that they are persecuted as a particular social group."[153] Such issues include genital mutilation, forced early marriage, rape, domestic violence and tradition that discriminate or dehumanises the dignity of women. Also neither the 1951 convention nor the 1967 protocol considered other elements that can cause threat to life as criteria for seeking asylum such as generalised violence, natural disaster, famine, environmental degradation, drought, epidemics, diseases, and destitution but focus exclusively on persecution apparently committed by the state or its agents and directed to an individual person.

3.3 1969 OAU Refugee Convention

The 1969 OAU Convention Governing the Specific Aspect of Refugee Problems in Africa was specifically adopted to complement the 1951 UN Refugee Convention and a response to tackle problems of refugees in Africa. The convention, which came into force in 1974 having been ratified by one-third of the members of OAU, expanded the definition of the United Nations 1951 Convention on refugee protection to suit African context. Most of the refugee movement in Africa have been mass movement and in most cases very difficult to

[151] Wachira, George Mukundi, Refugee Determination in Kenya and Egypt, American University Cairo Egypt.2003 p.12 www.chr.up.ac.za
[152] Daniele Joly et al, Refugees: Asylum in Europe? Minority Rights Publications, London.1992. p12
[153] Ibid. p15

apply and rely totally on individual screening[154] due to some logistics and capacity problems of handling mass influx of people on individual basis. The UNHCR has acknowledged the peculiar circumstances in which mass movement of refugees have occurred in Africa and recognises within her mandate the 1969 expansion definition.[155] Apart from adopting the definition of refugee as contained in the 1951 Geneva Convention, the 1969 OAU Convention added 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 asylum in another place outside his country of origin or nationality.[156] African States felt that "well-founded fear of persecution" was not adequate enough to cover all the situations of refugees in Africa.[157]

The OAU refugee definition broadened the meaning of a refugee to include other factors that are not only well-founded reasons of persecution directed to the victim directly but included other life threatening factors either in a whole or part of the country that generate insecurity and forced people to leave their country of nationality to seek asylum. The convention recognises the obligations of state parties to protect the rights of refugees in their territories and accord them the basic rights in conformity with international standards. The Convention declares that the granting of asylum to refugees is a peaceful and humanitarian act and should not constitute any political tension.[158] It also sets out the principle of burden sharing among the states in event of refugee crisis in the spirit of African solidarity and international cooperation.[159]

Like the 1951 UN Convention, the convention obliged states to refrain from forcefully returning of a refugee to a state where he is likely to suffer persecution or that will

[154] Weis Paul, The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa, Human Rights Journal 111-3-70
[155] Wachira, George Mukundi, Refugee Determination in Kenya and Egypt, University of Pretoria. South Africa.p.19
[156] The 1969 Organisation of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa, Article 1 (2)
[157] United Nations High Commission for Human Rights, http://www.unhch.ch/html/menu6/2/fs20.htm
[158] 1969 OAU Refugee Convention, Article 2, paragraph. 2
[159] Ibid

endanger his/her life or freedom.[160] Refugees can go home under voluntary repatriation when the circumstances that led to their flight have normalised and their lives or freedom no longer at risk. But before then contracting states are to use their best consistent endeavours with their legislation to receive refugees and secure their resettlement where necessary.[161] The convention prohibits the granting of refugee status to a person who:

a. Has committed a crime against peace, a war crime or crime against humanity.[162]
b. Has committed a serious non-political crime,[163]
c. Is guilty of acts that are contrary to the purpose and principles of both OAU and the United Nations.[164]

Despite guaranteeing the fundamental rights and protection of refugees, the convention also imposes some obligations on refugees. It obliges refugees to respect and abide by the laws of the country in which they are admitted, and refrain from any subversive activities against any member of the OAU.[165] Finally, the OAU Convention makes more liberal and innovative provisions[166] for refugee protection in Africa and considers other life threatening issues as war, political instability, human rights abuses, racial discrimination, political opinion or membership of social group and also granting of asylum en masse. By the OAU standards well-founded fear of persecution may or may not necessarily be inflected directly on individual but may apply to situation of anarchy in either whole or part of the country,

3.4 Human Rights Instruments for Refugees

Protecting refugees and asylum seekers is a core human rights issue and 1994 ushered new beginning in the political history of South Africa. South Africa held the first democratic election, adopted a new constitution in 1996 and committed itself to various international

[160] Katz A, Refugees in Gugard J, (ed) International Law: A South African Perspective, JUTA, 2000, p268
[161] The 1969 Organisation of African Unity Convention Governing the Specific Aspect of Refugee Problems in Africa, Article 11.
[162] Ibid, Ariticle 1 (5)a
[163] Ibid, Ariticle I (5) b
[164]Ibid, Ariticle I (5) c & d
[165] Ibid, Ariticle III (1)
[166] Weis Paul, The Convention of the Organisation of African Unity Governing the Specific Aspect of Refugee Problems in Africa, Human Rights Journal 111-3-70

laws. These include international human rights instruments, the 1951 United Nations Refugee Convention and its protocol, and the 1969 OAU Convention Governing the Specific Aspect of Refugee Problems in Africa. Other international conventions include the 1966 International Covenant on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on economic, social and cultural rights as well as the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[167] among others. Hathaway et al state that the maturation of human rights law over the past four decades has to a certain extent filled the vacuum of protection that necessitated the development of a refugee specific rights regime in 1951.[168]

South Africa did not officially recognised refugees and asylum seekers and has no legislation to ensure the protection of refugees during apartheid. Those who would have qualified as refugees and asylum seekers under international law and entitled to protection were regarded as migrants, illegal or undocumented migrants under the Alien Control Act and were treated in an informal and ad-hoc manner. These migrants, mostly from Mozambique, were settled in the former homelands of Bophuthatswana, Gazankulu, Kwa-Ndebele and northern Kwazulu. They entered South Africa under different disguise such as migrant workers while many of them remain as illegal immigrants without any legal protection or rights in the country. After signing basic agreement in 1993 with the UNHCR, a Passport Control Instruction was issued by the Department of Home Affairs to receive and process applications for political asylum.[169] This procedure was still based on the provisions of the Alien Control Act (ACA) 96 of 1991 and because of the controversies surrounding the Alien Control Act, its provisions was amended in 1995. But the amendments did not fit into the new constitutional development, which entrenched the values of democracy and human rights and critics argues that the Act requires substantial legislative reforms and transformation. The ACA stipulates that a person is an illegal alien if he or she:

[167] Willem H. Olivier, The New Asylum Law in South Africa in Journal of South African law, 2002
[168] Hathaway J. C and Dent J.A, Refugee Rights: Report on a Comparative Survey in Chimni B.S .2000,.p203
[169] Hanmaker et al, Perspective on Refugee Protection in South Africa , Lawyers for Human Rights, South Africa.2001.p9

a. enters South Africa at a place other than a port of entry;
b. remains in the country without a valid residence permit;
c. acts in contravention of his/her residence permit;
d. remain in South Africa after the expiry of a residence permit;
e. is prohibited from entering the country; or
f. become a prohibited person while in South Africa.[170]

According to international refugee law, persons cannot be punished for entering any country illegally as long as they report to the Refugee Reception Office within the stipulated period of time for the purpose of seeking asylum. The ACA was therefore incompatible with international law, and specifically in conflict with the provisions of human rights instruments and international refugee law in all respect and has been described as "draconian apartheid throwback."[171] The ACA of 1991 provided for the control and admission of persons to their residence and departure from South Africa, but does not provide for the protection of refugees. The principles of non-refoulement that prohibits states from forcefully returning person back to the country where they will suffer persecution were not observed and people were repatriated indiscriminately. For instance, thousands of Mozambicans who entered South Africa to seek asylum before 1993 were not granted asylum status under ACA because the Act did not recognise the right to protect refugees and seek asylum in the Republic. Tripartite agreement between UNHCR, South African government and their Mozambican counterpart resulted to the repatriation and implementation of regularisation programme in relation to Mozambicans who fled civil war in their country in 1980s and entered South Africa. In 1993, the Department of Home Affairs, providing the broad guidelines by which the Department of Home Affairs would receive and process applications for political asylum in terms of the Alien Control Act, issued a Passport Control Instruction.[172] The procedure for establishing the refugee status of Mozambicans laid the basis for Passport Control Instruction No.63 of 1994, which together

[170] Alien Control Act 96 of 1991, Article 1-6
[171] Human Rights Watch, "Prohibited Persons." Abuse of Undocumented Migrants, Asylum –Seekers, and Refugees in South Africa, New York, 1998. p160
[172] Handmarker et al, Perspective of Refugee Protection in South Africa, Lawyers for Human Rights, South Africa. 2001. p9

with other instructions and a "Basic Agreement" signed by UNHCR and South Africa, became the basis of South Africa's pre-1998 refugee policy.[173]

The controversies surrounding refugee protection and the ACA was finally settled in 2000 after coming into force of the Refugee Act (103) of 1998 following the publication of the Refugee Act regulation in April 2000 by the Department of Home Affairs. The Refugee Act 103 of 1998 in its preamble stated thus:

> Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the I969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.[174]

Until the recent implementation of its first ever Refugee Act (Act 103 of 1998) in April 2000, South Africa's policy on refugees depended on the ACA, with the Department of Home Affairs (DHA) responsible for its enforcement.[175] 1998-2000 witnessed some crisis and dilemma on the asylum determination procedure and recognition of refugees as the ACA was repealed and the new Refugee Act not been implemented. Hence, the asylum determination regime continued to be administered in terms of the ACA[176] despite the fact that the Act was no longer in existence by then. This could be said to be part of the problems that cumulated into creating a huge asylum backlog and administrative incompetence putting South Africa in asylum crisis. Based on the cumulative statistics of the Department of Home Affairs between 1994 and 2001, South Africa received a total of

[173] Handmaker. Jeff, Who Determines Policy, Promoting the Rights of Asylum Seekers in South Africa. International Journal of Refugee Law 11(2): 290-309
[174] South African Refugee Act 103 of 1998, Preamble
[175] Jonathan Crush and Vincent Williams, Evaluating Refugee Protection in South Africa in Southern African Migration Project, 2002 http://www.queensu.ac/samp/forms/form1.htm1
[176] Klaaren Jonathan, Refugee Policy and Law in South Africa. A Workshop on Forced Migrants in the New Millennium, University of Western Cape, South Africa.2000

64,341 applications for asylum from 126 countries.[177] Out of that number, 79.8% has been finalized.[178] Out of the finalised applications a total of 53.1% has been refused and 26.7% has been approved. According to Busisiwe Mkhwebane-Tshehla the Director of Refugee Affairs in the Department of Home Affairs, Pretoria, South Africa has received a total of 186,000 asylum applications and has granted a total of 28,000-refugee status from (1994-2005).[179]

Recognition or enactment of national legislation may not necessarily mean the same as commitment to the implementation of such rights for the benefit of those whom the legislation was meant to serve. Thus, Hathaway argues that governments increasingly believe that a consented commitment to refugee protection is tantamount to abdication of their migration control responsibilities.[180] According to Hathaway governments sees refugee protection as little more than an uncontrolled "backdoor" route to permanent migration, in conflict with efforts to tailor admission on the basis of economic or other criteria"[181] In essence, refugee protection should be seen within the context of human rights protection and in protection of those who cannot be protected by their national governments. Hathaway further states that notwithstanding the rhetoric of humanitarianism, the hard truth is that refugee law exists because it is a pragmatic and politically acceptable means of maximizing border control in the face of recurrent involuntary migration.[182] By embracing, channeling, and legitimatising essentially unstoppable flows, refugee law sustains and validates the protectionist norms.[183] In essence, refugee law functions as a sluice gate in the dam of immigration control.[184]

[177] Beek Van Ingrid, Prima Facie Asylum Determination in South Africa: A description of policy and practice in Handmaker et al, Perspective of Refugee Protection in South Africa, Lawyers for Human
[178] Ibid
[179] Mkhwebane-Tshehla Busisiwe, The Director of Refugee Affairs, the Department of Home Affairs Pretoria, lecture on Xenophobia Conference held in Sandton Convention Centre on 18 & 19 August 2005.
[180]
[181] Hathaway, J, International Refugee Law, Harvard Human Rights Journal 1 Vol. 10, 1997. p117
[182] Hathaway. J, Temporary Protection of Refugees: threat or Solution in Handmaker et al, Perspective of Lawyers for Human Rights, Refugee Protection in South Africa, , South Africa, 2001. p41
[183] Ibid
[184] Ibid

Promotion and respect for human rights and fundamental freedom for all without discrimination are the cardinal purposes and principles of the 1945 United Nations[185] and these are applicable to refugees as human beings and members of the international community. Also the African Charter on Human and Peoples' Rights (ACHPR) stipulates that human rights, freedom, equality, justice and dignity are essential in the achievement of the aspiration of African people. However, human rights and refugee protection are fundamentally linked and some of the refugee rights are universally guaranteed rights as contained in the Universal Declaration of Human Rights of 1948. These include the right to life, protection from torture, and ill treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one's own and to return to one's country, and the right not to be forcibly returned[186] are all guaranteed in both Universal Declaration of Human Rights and African Charter on Human and People's Rights. Article 12 (3) of the ACHPR states that "every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions."[187] The African Charter on Human and Peoples' Rights therefore provided further protection for refugees, at least in terms of principle, and particularly those fleeing *en masse*[188]which is a significant breakthrough and difference from the UN Convention. As stated earlier, the post-apartheid democratic order has been characterized by various controversies and contestations on the applicability of democracy, which borders among other things on the treatment of refugees and asylum seekers in the country as refugees were perceived a burden to the state.

3.5 Role of UNHCR in South Africa

The need for effective protection of refugees and asylum seekers in the territory of a sovereign state is widely recognised.[189] The United Nations High Commissioner for

[185] United Nations Charter 1945, Article 1 paragraph 3
[186] Wallenberg R, Human Rights and Humanitarian Law, United Nations Centre for Human Rights, Lund, 1994 p316
[187]African Charter on Human and People's Rights, adopted June 27,1981, OAU Doc. CAB/LEG/67/3 rev.5,21 I.L.M 58 (1982)
[188] Sergio Ricca, International Migration in Africa: Legal & Administrative Aspects, International Labour Organisation. Geneva .1998.p141
[189]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. p30

Refugees (UNHCR) is mandated to coordinate international action to protect refugees and resolve refugee problems worldwide.[190] The tasks of UNHCR include ensuring that refugees are given adequate legal protection in accordance with internationally acceptable standards, disseminate appropriate information, engage in humanitarian interventions and promote the development of appropriate national legislation for treatment of refugees with effective practice. It also strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, with the option to return home voluntarily, integrate locally or to resettle in a third country"[191] where the need arises. Goodwill-Gill has argued that making the task of UNHCR work goes beyond the adversarial and the supervisory, to the creation of a culture of protection, to the point at which human rights and the rights of refugees are naturally integrated into both policy-making and front-end individual cases.[192] In theory UNHCR is an independent, humanitarian and non-political organisation[193] but its financial dependency has influenced and subjected its activities to state control, while states contribute for refugee outflow. In summary, the tasks of the High Commissioner for Refugees as set out in the statute adopted by the General Assembly as an annex to resolution 428(V) of 14 December 1950 include:

a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments;[194]
b) Promoting measures to improve the situation of refugees and to reduce the number requiring protection;[195]
c) Assisting in making efforts to promote voluntary repatriation or assimilation within new national communities;[196]
d) Promoting the admission of refugees to the territories of states;[197]

[190] Wachira GM, Refugee Status Determination in Kenya and Egypt, American University in Cairo, Egypt, 2003 .p17
[191] UNHCR, The State of the World's Refugee: 50 Years of Humanitarian Action, Oxford University Press, United Kingdom.2000. p2
[192] Goodwell-Gill Definition and Description in Refugee International Law, 1999
[193] Daniele Joly et al, Refugees Asylum in Europe? Minority Rights Publications, London.1992. p11
[194] Office of the High Commissioner for Human Rights http://www.unhcr.ch/htm1/menu6/2/fs20.htm
[195] Ibid
[196] Ibid
[197]Ibid

e) Facilitating the transfer of the assets of refugees; obtaining from Governments information concerning the number and conditions of the refugees in their territories, and the relevant laws and regulations;[198]
f) Keeping close touch with governments and Intergovernmental organisations;[199]
g) Establishing contact with private organisations dealing with refugee questions; [200]
h) Facilitating the coordination of private efforts.[201]

The UNHCR resume work in South Africa in 1991 and entered into basic agreement with the South African government concerning its presence, role, legal status, immunities and privileges of its personnel in South Africa.[202] UNHCR presence coupled with the South African democracy could be said to have caused a drastic increase in the number of refugees and asylum seekers in the country. Belvedere et al argue that "the number of refugees and asylum seekers entering into South Africa, particularly from other African countries, has increased steadily since the advent of democracy in 1994 and this could be explained to be as a result of the proliferation of conflicts in some countries in the continent,[203] and relatively political and economic stability in the country. UNHCR set to achieve some target in "creating conducive atmosphere for the integration of refugees, supporting local arrangement to effectively handle refugee matters through the provision of advice to government departments and coming up with a lasting solution to personal and collective problems of refugees"[204] Tripartite agreement between UNHCR, the South African government and the government of Mozambique was signed in 1993 for the repatriation of Mozambique citizens who flee their country and have been residing in South Africa as a result of political instability. It also facilitated the local integration of refugees leading to the granting of amnesty to some Mozambicans who were issued with identity documents in 1994 by the South African government in compensation for the violation of their right to seek asylum in South Africa by the apartheid government, and their many

[198]Office of the High Commissioner for Human Rights http://www.unhcr.ch/htm1/menu6/2/fs20.htm
[199] Ibid
[200] Ibid
[201] Ibid
[202] Katz Anton, Refugee in Dugard John (ed) International Law: A South Africa Perspective, 2nd edition, JUTA Law, South Africa. 2000. p269
[203] Belvedere et al, National Refugee Baseline Survey: Final Report. Johannesburg: Community Agency for Social Enquiry (JICA), Japan International Cooperation (IJCA) & UNHCR. 2003. http: www.case.org.za
[204] UNHCR, Strategies and Programmes: Global Appeal, 2003. p156

years of stay in South Africa without protection. It has been established that many white migrants who entered South Africa during apartheid period under fear of persecution in their home countries were either absorbed or assimilated into South African society while black migrants were segregated and treated as undesirables without any right. The granting of amnesty to these Mozambicans elevated their status and had positive impacts on their socio-economic affairs since acquiring refugee status gives them some rights in the country. Generally, protection includes ensuring that refugees and others in need of international protection are recognised and granted asylum or refugee status, and that their basic human rights are respected in accordance with international standards.[205]

UNHCR also ensured the return of South African citizens who lived in exile as refugees during the apartheid era. In the absence of refugee legislation, the government in collaboration with UNHCR set up a procedure for determining the status of those who seek asylum in South Africa. Since the South African government has signed a basic agreement with the UNHCR to apply internationally accepted standards pertaining to the protection of refugees and asylum seekers, the UNHCR continued its quest towards creating conducive working atmosphere that will enhance the relationship between the South African government and the UNHCR with the aim of improving the protection of refugees.[206] UNHCR as well played a greater role in the formulation of refugee law best suited for the new democratic South Africa and also sponsored some seminars and workshops to generate constructive debate involving all the stakeholders. UNHCR role is to support and assist governments, civil society and other stakeholders in protecting refugees in their country and welcoming them into the society.[207] In 2000, asylum applications witnessed a major backlog and UNHCR provided both logistics, financial, technical assistance to the Department of Home Affairs and also engage some NGOs, and provide training to officials of respective departments and organisations including lawyers who helped in sorting out the problems. Further, UNHCR has also assisted some NGOs in capacity building, funding and advocacy.

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[205] UNHCR's Protection Mandate, UNHCR 2002 Global Appeal. p21

[206] Bamigboye Patrick, International humanitarian Response to Forced Migration: UNHCR's Role in Protecting Refugees in South Africa, University of the Witwatersrand, Johannesburg. 2003. p6

[207] Belvedere et al, National Refugee Baseline Survey: Final Report. Johannesburg: Community Agency for Social Enquiry (CASE), Japan International Cooperation (IJCA) & UNHCR. 2003. http: www.case.org.za

UNHCR cannot be said to be without shortcomings in South Africa. Critics identify lack of sustainability, financial insecurity, and internal and external interference as the major problems confronting UNHCR in South Africa. The UNHCR functional role and institutional responsibilities are dependent upon the resources and the political will of states to work out the practical problems of protection, assistance and solution.[208] It has been observed that UNHCR has been using quiet diplomacy and negotiation in resolving some issues with the South African government instead of openly criticising the state for unsatisfactory implementation of policies and provision of services to refugees. One commentator has observed that "the UNHCR in South Africa is much more engaged in a political agenda rather than a humanitarian one."[209] Irrespective of these criticisms, the role of the UNHCR in South Africa over the first decade of democracy has been quite impressive and has assisted the government and the civil society in alleviating the problems confronting refugees and asylum seekers in the country since refugee regime in South Africa is still evolving. UNHCR has major challenges and responsibilities to accomplish and part of these challenges is how to deal with the present refugee crisis and how governments can observe and protect human rights as a way to end escalation of violence and insecurity. Unfortunately, the fact that the world still finds a need for UNHCR should serve as a sobering reminder of the international community's continuing failure to prevent prejudice, persecution, poverty and other root causes of conflict and displacement[210] which the United Nations was established to resolve.

3.6 Compliance Based-theory and Refugees in South Africa

South Africa has pledged to maintain compliance with international and constitutional standards for refugee protection. Marion Ryan Sinclair explains that the main reasons why South Africa ratified the refugee treaties and other international law were for the common good of the country.[211] According to this view compliance has practical effects on South

[208] Wachira GM, Refugee Status Determination in Kenya and Egypt, American University in Cairo Egypt. 2003. p21
[209]Kamanda J K, The African Diaspora, Loose We Lose, Together We Stand: Let's Love Each Other for Better South Africa. A CBRC Journal. Issue 1 No. 1 March/ April 2005. p06
[210]UNHCR, The State of the World's Refugee: 50 Years of Humanitarian Action, Oxford University Press, United Kingdom.2000. p.x
[211] Marion Ryan Sinclair, International Refugee Treaties and their Implications for the South Africa State, South African Perspective, Centre for Southern African Studies, South Africa. 1998. p7

Africa within and outside its territory and determines its international relations and reputation. He maintains that South Africa government has considered it wise to engage in humanitarian treaties because it has something to gain, which can serve national interest in the apparent looming political instability in the continent and the need to manage in constructive and coherent manner the influx that can generate.

On this view he argues that, first, South Africa has an explicit political and economic agenda including its pursuit for the position of permanent seat in the Security Council, which requires international recognition in the light of its track human rights records. Secondly, it needs to show her willingness to accede to international treaties on the issues relating to refugees and human rights, and to display a high standard of commitment in the domestic scene.[212] In this respect, Down and Jones conclude that states generally comply with international obligations because of their broader concern with their reputation as reliable partners, and their interest in the rule that governs international system.[213] Also Tarzi has identified international law as a learning process that occurs at various levels and ways:[214] (1) modeling after other successful states, (2) rewarding conforming behaviour through recognition and praise conferred on states that comply with the law by other members of the international community, (3) ridiculing states for non-compliance, (4) applying a diplomatic and economic pressures on states that break the law. He argues that states that complied and those that do not comply shows a distinctive characteristics of compliance or non-compliance by their actions and norms which are either supportive or deviates from the principles of the law. In both circumstances, changes are possible which include political leadership, regime change, change in ideology and domestic system[215] and could shift the state position either towards higher or lower compliance levels.

As South Africa shifted from apartheid policies to democratic principles, it wants to be seen as an important figure within SADC regional and in the continent as a driving force in

[212]Marion Ryan Sinclair, International Refugee Treaties and their Implications for the South Africa State, South African Perspective, Centre for Southern African Studies, South Africa. 1998. p7
[213] Downs G.W and Jones M.A, Reputation, Compliance and International Law, Journal of Legal Studies, University of Chicago.vol.xxxi.2002.
[214] Tarzi S.M, International Norms, Trade and Human Rights: A New Perspective on Norm Conformity, The Journal of Social, Political and Economic Studies, Bradley University, Volume .27,no.2, 2002, p187-202
[215]Ibid

the championing of democratic model of the new era. This is to create the impression that South Africa has totally rejected the past blockage of border control and repressive policies that did not recognise and give protection to refugees. Apartheid embraced and pursued an aggressive immigration policy that had no respect for tolerance and human dignity particularly among African migrants. Though states are not unified actors as they have many differences and contradictory agendas but compliance theory allows states to negotiate the content of the international law, their level of commitments and obligations. The theory also provides when and how such can be terminated and its implications on state interest. It is necessary to recognise that international law comes in various forms with varying degrees of compliance which determine states actions. Gerhard argues that "states measure the costs and benefits of compliance and makes a decision about its level of compliance given those costs and benefits."[216]

According to Rudge "refugee symbolises in so many ways the forces of good and evil in our global society."[217] This is viewed in the light of the problems uncontrolled and disorganised migration movement can cause to a particular country if not handled in more palatable manner as such movement can harbour insurgence group that can destabilise and threaten the region. He maintains that the institution of asylum has sometimes involves conflict between state power and civil society. To him, state compliance and interest implies the obligation of the government and the civil society in saving lives and the regaining of dignity of refugees and asylum seekers in their precarious situation. The obligation to protect refugees is inextricably linked with the obligations to take positive actions by the state to fulfil their obligations and failure to comply with such obligations constitutes violation. Though refugee protection may be seem as a burden to the state considering its budgeting and cost implications but it is that aspect of inevitable responsibility, which states collectively agreed to commit it selves and undertake in international law. It is therefore important that states, which failed to adhere to refugee standards, be held accountable for their actions and this will ensure systematic monitoring

[216] Gerhart P.M, Reflection: Beyond Compliance Theory-TRIPS as a Substantive Issue, Case Western Reserve Journal of International Law, Volume 32.Issue 2,2000, p357-386
[217] Rudge Philip, Reconciling State Interest with International Responsibilities: Asylum in North America and Western Europe in International Journal of Refugee Law, Volume 10 1998. p8

of human rights and the pursuance of international standards that will maintain state integrity.