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UNIVERSITY OF THE WITWATERSRAND

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LGBT Asylum Claims: The Case of South Africa

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Declaration

I declare that except for the reference to other people's works, which have been duly acknowledged, this report is my own unaided work. It is submitted for the degree of Master of Arts in International Relations at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university, neither has it been published by any other person or organisation.

10 September 2018.

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List of Abbreviations

ACHPR: African Commission on Human and Peoples Rights

ACMS: African Centre for Migration and Society

ANC: African National Congress

AU: African Union

CERD: Convention on the Elimination of all forms of Racial Discrimination

DHA: Department of Home Affairs

EU: European Union

HCWG: The Hate Crimes Working Group

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ILGA: International Lesbians and Gays Association

LGBT: Lesbian, Gay, Bisexual, Transgender

LHR: Lawyers for Human Rights

NGO: Non-Governmental Organisation

OAU: Organisation of African Unity

OLGA: Organisation of Lesbian and Gay Activists

PASSOP: People Against Suffering, Oppression and Poverty

RRC: Refugee Reception Centre

RRO: Refugee Reception Office

RSDO: Refugee Status Determination Office

UN: United Nations

UNHCR: United Nations High Commission for Refugees

ABSTRACT

The idea of protecting human rights is a norm that is accepted and embraced in most modern nations. However, many of these nations still fail to meet certain human rights standards. Even in cases where human rights protections are explicitly stipulated in legislation, those legal protections are often inadequately operationalised. This dynamic is explored using the case of South Africa to investigate the propensity for the South African Department of Home Affairs to protect LGBT asylum seekers. A gap is identified between the South African legal landscape for asylum protection and the realisation of true protection for LGBT asylum seekers on a practical level. A document analysis clearly indicates the human rights obligations that South Africa has agreed to uphold - which equally encompasses the protection of LGBT asylum seekers. The specific challenges in adhering to these human rights obligations are contextualised through interviews with a lawyer that has dealt with several asylum cases as well as a representative from the Department of Home Affairs. This thesis concludes that although South Africa offers protection for LGBT asylum seekers in policy, there is still much work that needs to be done to ensure that true protection is realised in practice. Accordingly, this thesis provides recommendations of critical measures that the South African Department of Home Affairs could take to ensure better protection for LGBT asylum seekers.

Chapter 1: Introduction

In many countries across the world, those who identify as lesbian, gay, bisexual and transgender (LGBT persons) have been vehemently rebuked and condemned not only in civil society but also in national legislation. LGBT persons are biologically and innately human. An LGBT person embodies a non-binary sexual orientation or gender identity. LGBT persons have all the same legal and life issues as a heterosexual person. However, within state boundaries and in the international sphere, they may also face particular additional issues that are directly related to their sexuality. For this paper, I will address one specific issue, which is that of asylum. LGBT persons are often forced to flee their home country and seek asylum in another country as a result of violence and human rights violations perpetrated against them. This research report aims to examine to what extent South Africa offers protection to LGBT asylum seekers on a practical and policy level. This will be done by investigating whether the criteria used by the South African Department of Home Affairs to facilitate the protection of LGBT asylum seekers coincides with the country's broader human rights obligations. This study finds relevance to international relations because of its cross-border consequences. It will become apparent in this paper that laws that are particularly harsh on LGBT persons in one country spur on increased compulsion of LGBT persons to seek asylum in another country.

This introductory chapter explores the key definitions that are used in the study. Thereafter, discussion of the main themes that will be explored in this study will be provided - particularly relating to the politics of movement and sentiments of LGBT identity both globally and in the context of South Africa. A discussion of these themes will provide a backdrop to how the rest of this study should be understood. The research questions along with the rationale for this study are also provided below. Additionally, chapter one outlines the methodology employed in this study. This involves setting the practical steps and parameters that will be used to conduct this study such as the research design, data collection techniques, ethical considerations and reasons for case selection.

1.1. Defining Key Concepts

The concepts of sexual orientation, gender identity and LGBT can each be used differently for different purposes. It is, therefore, necessary to stipulate exactly how these terms will be understood in this particular study in order to ensure that they effectively serve their intended purpose.

Mainstream media have used the terms “sexual orientation” and “gender identity” interchangeably, attributing the same meaning to both terms. However, these terms, in fact, have different meanings. In 2007, a group of renowned human rights experts developed the Yogyakarta Principles. The Yogyakarta Principles is a document that sets out principles on how international human rights law can and should be applied to lesbian, gay, bisexual and transgender people. The document also defines sexual orientation and gender identity as follows:

Sexual orientation:

> *to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.*

Gender identity:

> *to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.*

Additionally, the term LGBT – stands for lesbian, gay, bisexual or transgender, and is used to describe individuals who exhibit non-binary gender identities or form same-sex relationships. The terms lesbian, gay and bisexual refer to a person's sexual orientation. Those who are lesbian and gay are sexually attracted to members of the same sex, while those who are bisexual can be sexually attracted to both men and women at any point in time. The term transgender refers to a person’s gender identity. A person who identifies as transgender does not identify with their biological gender given to them at birth. However, this does not automatically mean those who are transgender are lesbian, gay or bisexual because a transgender man can identify as male but still be attracted to a man.

Another term used to describe a person who embodies a non-binary sexual orientation or gender identity is the term homosexual. The term homosexual has been extensively used in mainstream media and anti-LGBT groups to stigmatize those who do not ascribe to a normative binary sexual orientation or gender identity. Therefore within this paper, the term homosexual will be avoided unless mentioned in direct quotes.

Stigmatisation and persecution of persons based on their sexual identity has highlighted the category of refugee and asylum seeker based on sexual identity. The next section discusses how migration and movement based on fear or persecution is not however a straightforward exercise. Increasingly, migratory movements have been securitised to such a degree that the claiming and upholding of human rights is compromised, whereby refugees and asylum seekers face secondary stigmatisation and persecution

1.2. Global Context of Movement

Globally there have been a number of events that have led to increased efforts to restrict the movement of people across borders. Most notably the Ebola crisis of 2014 in West Africa caused a worldwide tightening of border security. There have also been a large number of immigrants fleeing to Europe through the Mediterranean Sea, some of whom are presumed to be terrorists. The European response to this has been to securitize their borders in an effort to curb the migration crisis (Park 2015). These are just a few examples, but they represent a distinct link between migration and security around the world.

There are a number of risks that arise when a securitized approach is applied to migration which is demonstrated in debates around the securitisation of migration. One should take caution when engaging with such debates because there is a risk of fuelling common misconceptions of migrants. For example, after the 9/11 Twin Tower attacks in the United States, American media promoted the baseless, stereotypical idea that immigrants and particularly Islamic immigrants are terrorists. This was also intensified when Former President George Bush described Iraq, Iran and North Korea as the “Axis of evil” (Brooks 2006). This is not only the case in the United States. In fact most countries in the world mention migration as a potential threat to national security.

One of the biggest risks with a securitised approach to migration is that it hands over the responsibility of managing migration to the state and its military apparatus. This increases the potential risk of having governments justify extremely harsh responses to migration based on a perceived threat to national security. Ultimately, governments could possibly infringe on human

rights under the guise that they are protecting their citizens from foreign terrorist attacks. As a result, in many parts of the world, people seeking asylum run the risk of being sent back to countries where their lives are undoubtedly in danger. These risks are not only probable theoretical speculations but have already been implemented in some parts of the world, namely in Australia and in certain parts of Europe. Particularly in Australia, military operations have been taking place since 2013 in an effort to send boats carrying refugees and asylum seekers who seek protection in Australia back to where they came from or to divert them elsewhere (Dickson 2015). Another manifestation of Australia's securitised approach to migration can be demonstrated by the fact that asylum seekers are kept in offshore detention centres as they wait for their asylum case to be processed. One such offshore detention centre is called Manus Regional Processing Centre and is located on Manus Island. Another offshore immigration detention centre is called the Nauru Regional Processing Centre which is located in Nauru which is a South Pacific island (Dickson 2015). These centres have been criticised for their poor conditions by human rights groups including Amnesty International, who in 2017 released a report describing Australia's immigration policy as a system of "cruelty and neglect". Another example of an extreme response to migration can be demonstrated in Greece where children are placed in adult prisons due to a lack of space for housing refugees and asylum seekers (Tilianaki 2018).

Despite international law obligations for the protection of refugees, the international community, and particularly those in developed countries have not done much to protect those who are in need of protection. It is interesting to note that more than 80% of all refugees are in developing countries (UNHRC 2016). For example, The UNHRC (2016) finds that in 2016 Pakistan hosted 1.4 million refugees coming from Afghanistan; similarly, Kenya hosted 451,100 refugees coming from Somalia and other neighbouring countries. This ultimately has a serious impact on the economies of the host country and in many cases presents a threat to their security. As signatories to several human rights documents, the developed world has a responsibility to support the developing world to cope with a large number of refugees and asylum seekers and also to share the burden by catering to refugees as well since the developed world have the economic capacity to do so.

Moreover, refugees and asylum seekers all over the world risk their lives while entering into a new host country seeking protection. The international community has a responsibility to guarantee that protection. However, the international community has been very reluctant to take meaningful measures towards resolving the global refugee crisis. Instead many countries have tightened their borders, making it more difficult for refugees and asylum seekers to seek protection. For example,

the Australian response to refugees as mentioned above, which involves the detention of those seeking protection, is a complete deviation from international law and humanitarian obligations (Dickson 2015). Australia has employed a securitisation strategy which has resulted in a resettlement program – whereby the Australian government provides economic aid to certain neighbouring countries to host refugees and asylum seekers in order to prevent them from entering Australia (Dickson 2015). Similarly, Canada has been gradually accepting fewer refugees and asylum seekers than they were ten years ago (UNHCR 2016).

All over the world, the debate on immigration has become increasingly racist and prejudiced. There is a growing sentiment that many media outlets have helped to spread the conception that immigrants and refugees are more likely to commit crime. This only serves to escalate xenophobia and in some cases justify attacks on foreigners based on perceived threats to security. Moreover, marginalised groups such as LGBT persons are particularly vulnerable to a securitised and militarised approach to immigration control given the invasive processes of determination, and subjective nature of screening.

1.3. Human Rights Landscape for LGBT Protection

In 2014 the African Commission on Human and Peoples Rights (ACHPR) passed Resolution 275, 'condemning the situation of systematic attacks by state and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity.' Despite the progress made on the recognition and protection of LGBT persons on the African continent, there is still a growing resistance against LGBT human rights recognition. LGBT human rights continue to be violated on the basis of perceived or actual gender identity and sexual orientation.

One might assume that such violations would be treated as human rights violations. However, there are several countries across the world that do not recognise harm on the basis of sexual orientation or sexual identity as a human rights violation – either due to cultural or societal norms or prejudices within such states. Globally, out of 193 countries recognised by the United Nations (UN), same-sex consensual activity is outlawed in 72 countries. In the context of the African continent, according to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), by 2017 out of 55 states recognised by the AU (African Union) and UN, same-sex acts were outlawed in 32 African countries (see Appendix). Furthermore, 4 African countries allow for the death penalty against LGBT persons. Out of the remaining 22 African countries where same-sex acts are not outlawed, same-sex acts has never been recognised in any legislation in 12 of these countries. Therefore there

is insufficient protection offered for LGBT persons within legislation in these countries. It is also necessary to note that, out of 55 African countries only one African nation (South Africa) protects its LGBT citizens constitutionally and provides them with full equal rights. This shows that Africa as a whole still has a long way to go before LGBT rights are fully recognised and properly implemented.

An example of the severe treatment of LGBT persons on the African continent can be demonstrated in Uganda, where the cruel and inhumane realities that LGBT people face are apparent. A report, based on research that Sexual Minorities Uganda (SMUG) conducted with its member organizations namely: 'Breakers Uganda', 'Spectrum Uganda' and the 'Rainbow Health Foundation Mbarara', notes that there were 162 cases of "persecution against" LGBT Ugandans in May 2014, compared to 8 in 2013 and 19 in 2012. Uganda's Minister of Ethics, Simon Lokodo illustrates this by stating that: "We have laws that govern the society and are very clear. Uganda is not a home for homosexuals. These homos are everywhere, in schools, churches, families, government institutions, villages, they are everywhere. Now my commitment is to fight them, even if I remain alone, I will not give up this fight." Therefore, due to sentiments like that of the Uganda Ethics Minister, more and more lesbian, gay, bisexual, and transgender persons are fleeing their countries of origin in fear of prosecution and are seeking refuge in countries with perceived better human rights protection. Therefore it is not surprising that LGBT citizens are fleeing their countries of origins to seek asylum in South Africa.

1.4. The Paradox of South Africa's Approach to LGBT Protection

Contrary to the examples mentioned above, South Africa has not taken an explicitly securitised approach with regards to a policy that allows for extreme measures in managing migrant influxes as there is no mandatory detention policy for refugees or asylum seekers. The details of the South African policy towards LGBT asylum seekers will be discussed in further detail in the coming chapters. However it is notable that South African policy depicts an integration approach to migrants, refugees and asylum seekers that seeks to promote social cohesion between migrants and citizens (Department of Home Affairs 2017). This means that all migrants, refugees or asylum seekers are permitted to work and study in South Africa and enjoy the same freedoms that South African citizens enjoy.

As a result, LGBT citizens on the African continent are increasingly fleeing to South Africa. Under South Africa's Constitution, the country was the first in the world to protect sexual minorities

against human rights violations in legislation. This progressive stance was continued with the establishment of the 1998 Refugees Act which saw South Africa opening their borders to people who fled their country of origin on the premise of 'membership to a particular social group'. The term 'social group' found in the 1998 Refugees Act is inclusive of the category of gender and sexual orientation (Moodley 2012: 4). Following its 1998 Refugees Act, South Africa continued to champion its progressive stance, particularly in 2011 where South Africa led a momentous United Nations resolution. This saw South Africa lobbying the United Nations High Commissioner for the commission of a study that would reveal the unjust laws and violent practices across the world that violently mistreat and discriminate against people based on their gender identity and sexual orientation (Moodley 2012:4). South Africa has also signed and ratified international and regional resolutions, treaties and policy documents in support of LGBT asylum rights. These include: Resolution 275 in the African Charter; the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Covenant on Civil and Political Rights (ICCPR); the Universal Declaration of Human Rights; the Yogyakarta Principles etc.

However, as virtuous as South Africa's refugee regime may seem, there appears to be a disparity between South African policy and reality. Refugees and asylum seekers looking to be protected in South Africa often get deported even though their lives are undoubtedly threatened, and some instances are detained for an indefinite period of time and placed in a detention centre where they face substandard living conditions. One such detention centre is called the Lindela Repatriation Centre and is situated in Krugersdorp. Another is found in Musina and is known as the Musina Detention Centre found on the border between Zimbabwe and South Africa. In 2014 investigations by the Human Rights Commission found that many immigrants were unlawfully detained at the Lindela detention centres and their rights were not properly explained to them (South African Human Rights Commission 2014). The existence of such detention centres is a stark indication that the procedural guarantees and Human Rights obligations specifically stipulated in the South African Immigration Act and Refugee Act are not being followed. It is a contradiction to South Africa's non-encampment policy which is a horrific deviation from the virtuous Constitution that South Africa is so proud of. South Africa has been a global leader in its treatment of refugees. As such, experts have noticed a shift in South Africa's liberal position towards refugees and asylum seekers. This shift can be illustrated by a green paper on international migration published in 2016 by the Department of Home Affairs that proposed, for instance, to set up processing and detention centres for asylum seekers near the borders. The paper also proposed that asylum seekers no longer be granted the right to work, except under exceptional circumstances.

Thus it is apparent that despite the progress made in terms of LGBT rights recognition in South Africa, the reality facing LGBT asylum seekers paints a different, more dismal picture. In South Africa, asylum officers at the Department of Home Affairs regulate asylum claims under heteronormative standards. Therefore these officers have very narrow ideas and expectations of the way that gay, lesbian, bisexual and transgender people act and look (PASSOP 2012). Thus interview questions by determination officers are often very invasive and dehumanising (PASSOP 2012). Furthermore, due to the difficult asylum claims process, many LGBT people are denied asylum and deported back to their home country where many of them get witch-hunted and killed or imprisoned based on their sexual orientation with no attention from the international community (PASSOP 2012). With proposed strategies to clamp down on the number of asylum seekers and refugees that South Africa allows into the country as well as South Africa's poor treatment of LGBT asylum seekers it may seem like South Africa is moving in a backwards direction.

1.5. Research Question

To what extent does South Africa's asylum process uphold human rights guarantees and standards for LGBT persons seeking asylum in South Africa?

Sub-questions:

1. What criteria are used by the South African Department of Home Affairs to facilitate the protection of LGBT asylum seekers?
2. What are South Africa's national and international human rights obligations vis-à-vis protections of sexual minorities?
3. What protections does South Africa offer LGBT asylum seekers who face persecution on the basis of their sexual identity?

1.6. Rationale

This study is important because it addresses a wide range of human rights violations inflicted on LGBT persons, from mental and physical persecution to legal and state-based persecution. Secondly, this study is also particularly significant in revealing the inadequacy of states in adhering to international human rights laws protecting LGBT persons that give rise to basic fundamental human rights. This is especially prevalent in a country like South Africa where LGBT asylum and refugee cases receive little attention at the Department of Home Affairs despite the country's progressive Constitution, which protects LGBT rights under section 7(1) of the Bill of Rights, in the

Constitution. Lastly, this study will be helpful in raising awareness by educating people about the challenges and difficulties LGBT persons face in the asylum process, particularly in South Africa. Therefore by raising awareness of the challenges involved in LGBT asylum claims in South Africa, this paper will assist the Department of Home Affairs to operationalise the specifications in refugee and asylum legislation that protect LGBT persons.

1.7. Methodology

1.7.1. Research Approach

This study will use a qualitative and interpretive research approach. Qualitative research is a descriptive research method used to analyse data. "The word qualitative implies an emphasis on the qualities of entities and on processes and meanings that are not experimentally examined or measured (if measured at all) in terms of quantity, amount, intensity or frequency." (Denzin 2008: 15). Qualitative research focuses on meanings behind phenomena, which are explored and interpreted from the social world (Denzin and Lincoln 1994: 2). However exploring meanings of phenomena for qualitative research can be a difficult task. This is because the collection process of data in qualitative research involves a variety of empirical tools. These tools include case studies, personal experiences, introspections, life stories, interviews, artefacts, cultural texts and productions, observational, historical, interactional and visual texts that describe routine and problematic moments and meanings in the lives of individuals (Denzin and Lincoln 1994: 2). These make up a wide range of interconnected interpretive methods that strive to better understand the subject matter at hand (Denzin and Lincoln 1994). Each research method serves a different purpose. It is common for a researcher to use more than one interpretive method in any study.

This study can be described as interpretive research. The interpretive paradigm asserts that people create and associate their own subjective and intersubjective meanings as they interact with the world around them (Bhattacherjee 2012). Interpretive researchers thus attempt to understand phenomena through accessing the meanings that participants assign to them (Bhattacherjee 2012). This study will interpret the relationship between Human Rights obligations and the social phenomenon of LGBT asylum protection.

1.7.2. Data Collection

This research will study literature from articles, journals and books on LGBT individuals and international refugee and asylum guidelines as set out by the United Nations. Additionally, a case study analyses from South Africa will examine the national and international human rights

frameworks to which South Africa is a signatory and how the South African Department of Home Affairs enforces these human rights obligations in order to protect LGBT asylum seekers. In doing so, this research will study South African refugee and asylum legislation and will be based on objective results and outcomes. This will offer insight into the challenges involved in processing LGBT asylum applications in South Africa. It should, however, be noted that literature on the criteria that facilitates the protection of LGBT asylum seekers in South Africa is limited.

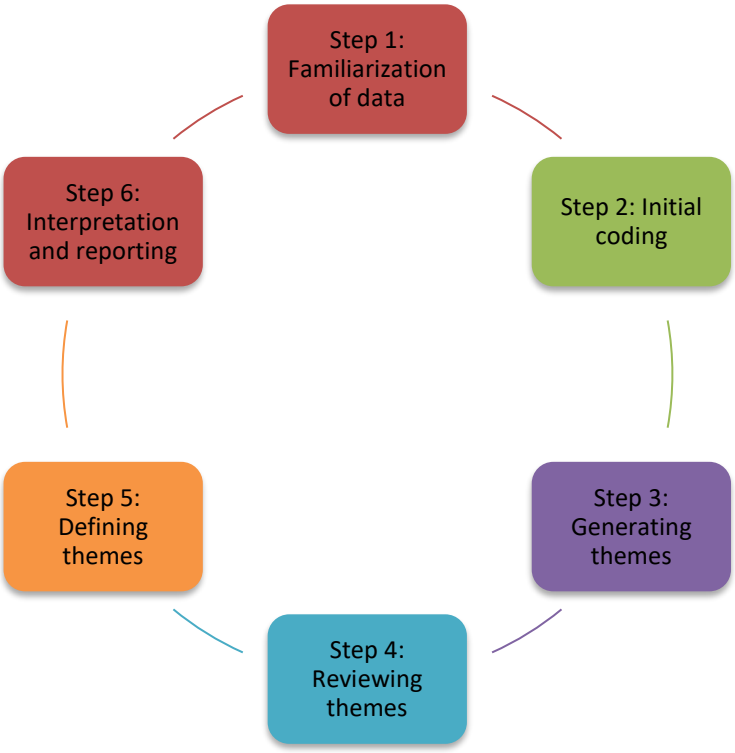
Moreover, although interpretive research tends to rely heavily on qualitative data, quantitative data may add more accuracy and clearer understanding of the phenomenon of interest than qualitative data would. Therefore this research will present numeric data from a study conducted by the South African Hate Crimes Working Group. The study is a first of its kind conducted in South Africa and looks at reported hate crime from 2009-2017. The findings show that foreign nationals followed by LGBT persons have the highest rate of hate crime incidents in South Africa. Subsequently, this statistical interpretation will help to demonstrate the harsh realities faced by LGBT asylum seekers in South Africa and the data will be used to link xenophobia to homophobia in my study, rather than basing this solely on interviewee's subjective perception. Overall, the gathering of the data will be based on past studies as well as international and local data collected about South African LGBT asylum.

1.7.3. Interviews

Interviews are the most common method of data collection used in qualitative research. Oakley (1998) describes qualitative interviews as a tool in which the practices and principles of a phenomenon are not only documented but also reinforced, realised as well as challenged. In this study interviews were the main source of data collection used to relate the research question: "Does South Africa offer sufficient human rights guarantees for LGBT persons seeking asylum in South Africa?" to the social phenomenon of LGBT asylum claims in South Africa. Therefore in order to collect interview data, this paper chose to use a thematic analysis. Thematic analysis is a qualitative approach most commonly used when analysing interviews. This paper makes use of the 6-step thematic analysis guide of Braun and Clarke mentioned in their journal article titled: *Using thematic analysis in psychology*. According to Braun and Clarke (2006, 97), thematic analysis is robust in answering research questions. Moreover, thematic analysis is best suited for 'identifying, analysing, and reporting patterns or themes within the data' (2006, 79).

The 6-step framework of Braun and Clarke (2006) for doing thematic analysis in this paper is described as follows in the diagram below:

Figure 1: Diagram showing Braun and Clarke 6 steps for use a thematic analysis



In this research report, familiarisation with the data was adopted with the transcription of audio recordings. Two interviews were conducted, first at the Department of Home Affairs, Refugee Centre in Pretoria and secondly at the University of the Witwatersrand, Law School Clinic Refugee Unit, both lasting 30 to 60 minutes. It was intended for both interviews to be formal and structured however, due to unforeseen circumstances, the interview conducted at the Department of Home affairs was more informal and unstructured. There are key differences between structured and unstructured interviews which I will highlight followed by a discussion of my own experience of conducting the two interviews. Structured interviews are conducted based on a predetermined set of interview questions that are asked and responded to accordingly (Arksey and Knight1999). They are formal in nature and usually requires a certain level of decorum (Arksey and Knight1999). An unstructured interview takes the form of a free flowing conversation. It is casual in nature and does not necessarily follow any predetermined protocol or official procedure (Arksey and Knight1999).

The first interview I conducted took place at the Department of Home Affairs Head Office in Pretoria. After sending out emails to Home Affairs management, and having delayed responses I

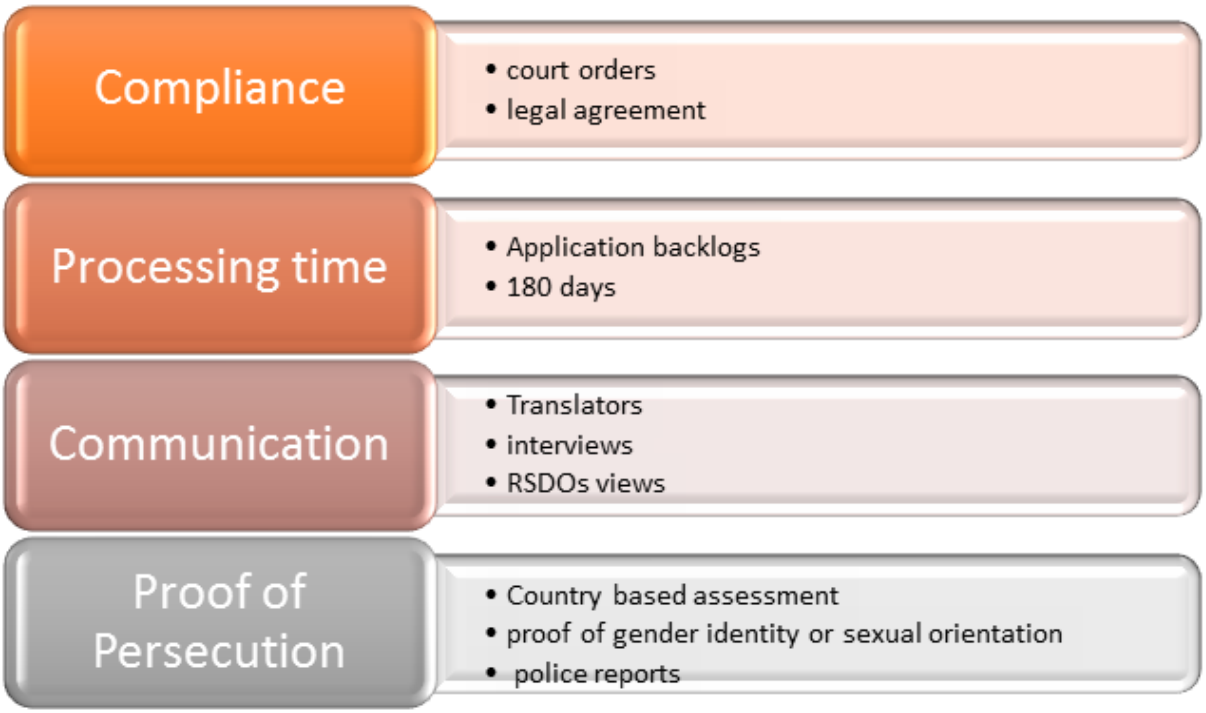
managed to find somebody at the Home Affairs Head Office who was willing to talk to me. I as a researcher arrived at the Department of Home Affairs Head Office with a set of predetermined questions as I had intended for the interview to be structured. However, the person I met with refused to sit down with me to answer all of my questions in a formal setting but still offered tell me whatever I would like to know provided his identity remains anonymous. The interview with the DHA Official took the form of a conversation with comments and responses going back and forth between myself and the interviewee. It was difficult to keep track of my questions and for that reason I did not have all of my predetermined set of questions (As seen in the Appendix) answered. DHA Official did however raise certain topics which I had not thought about before the interview - particularly the topic of country based assessments, which is mentioned later in this paper.

Thereafter, I conducted my second interview with Ms Alicia Raymond at the University of the Witwatersrand Law Clinic. This was a structured interview. Ms Raymond was able to answer each of my questions without hesitation but rather with enthusiasm and careful attention. She is very knowledgeable about the entire asylum process and contributed valuable information. At this point I had already gained much more knowledge on the topic and was able to cross examine the information I was given from Ms Raymond and the DHA official. The interviews I conducted differ in very distinct ways. My interview with Ms Raymond provided a clearer picture to the struggles that are faced by asylum seekers as she had numerous stories about cases she has personally worked on. Ms Raymond was also very open to each question unlike the DHA official who was quite reluctant to answer certain questions directly.

The interviews were audio recorded and stored on an iPhone 6s. The transcription process was carried out on Microsoft Word Office, straight after the interviews took place, lasting an average of 12 hours. The second phase involved organising the transcribed data into understandable codes, in other words reducing large portions of information into smaller meaningful chunks by deleting unnecessary data. Data that could address the research question was kept and coded. This process was done by reading the transcribed interview data on Microsoft Office and handwriting necessary data into a notebook. The third phase involved developing themes. Patterns from the coded data were identified and spilt into themes. The themes identified were as follows: compliance, processing time, communication and proof of persecution (see figure 2). Phase 4 involved a review of the themes, to assess whether the initial themes made sense and were relevant. However at the end of phase 4 it was determined that all the themes worked well enough to answer the research question. Thereafter, phase 5 and phase 6 involved defining and writing a report on the themes. The

above mentioned themes are defined under Chapter 4 of this research report which articulates the research findings, using a descriptive writing style.

Figure 2 Codes and themes



1.7.4. Ethical Considerations

Ethical issues are the concerns and dilemmas that arise over the appropriate way to conduct research, to avoid creating harmful conditions for participants during the research process (Bhattacherjee 2012: 137-142). Therefore since the data collection technique in this research project involves interviews, this study has been mindful of the ethical considerations that involve research participants. Before conducting interviews, ethical clearance was applied for at the University of the Witwatersrand, Department of Social Science and on the 28th September 2017 ethical clearance was awarded. (See Appendix)

This research project has ensured the following throughout the study:

(i) An information sheet outlined the aim and objectives of the study as well as the procedure for the interview.

(ii) Participants were made aware of the risks and benefits of participating in the research project.

(iii) It was made clear to the participants that the research was only for academic purposes and their participation in it was absolutely voluntary. No one was forced to participate. Moreover after signing the consent form, participants were still free to withdraw at any time and without giving a reason.

(iv) Confidentiality and anonymity of the participants was granted through assigning code names for participants that were to be used on all research notes and documents. Furthermore notes, interview transcriptions, and any other identifying participant information that was shared were kept in personal possession of the researcher.

(v) Once the information sheet was read and understood by participants, an informed consent form was completed and signed, giving the researcher the permission to conduct interviews on the participant.

1.7.5. Case Selection

According to Bhattacherjee (2012: 107), a case study "is an intensive longitudinal study of a phenomenon at one or more research sites to derive detailed, contextualised inferences and understanding the dynamic process underlying a phenomenon of interest." This is the preferred method of research chosen by researchers doing qualitative research. A case study is based on the understanding that a content analysis of existing literature provides for a more holistic understanding of any given topic (Bhattacherjee 2012). Within this research project, a single case study will be used in an interpretive manner to interpret the procedure for handling LGBT asylum cases in South Africa.

Interpretive researchers use a 'sampling strategy', where cases are selected based on whether they can suit the phenomenon being studied and the theoretical framework (Bhattacherjee 2012: 104). For example, the protection of LGBT asylum seekers in Africa can only be studied in South Africa because South Africa is the only African country that offers legal protection for LGBT persons. Additionally, South Africa was also chosen because the country claims to have a progressive constitutional democracy, a strong Bill of Rights, a strong, vibrant civil society and strong institutions, but the asylum process is in a dire condition. Furthermore, South Africa adheres to international and national human rights frameworks. Thus, one might assume that where national and international human rights frameworks exist there would be a higher degree of protection regarding the criteria used by the Department of Home Affairs to facilitate the protection of LGBT asylum seekers in South Africa. This research aims to prove or disprove that assumption.

However in order to avoid making generalizations, there are key parameters that need to be acknowledged with regards to sampling. The Department of Home Affairs is a South African state department that regulates, monitors and facilitates services for citizens and foreigners. Within the department there are offices that deal with refugee and asylum issues exclusively. Across the country there are 5 Refugee Reception Offices, namely in Port Elizabeth, Pretoria, Musina, Durban and Cape Town. In this study the Refugee Reception office in Pretoria was selected as a small representation of the South African Department of Home Affairs. However, the information collected in Pretoria is not intended to make conclusions about the remaining four Refugee Reception Offices. Rather the information gathered at the Pretoria Refugee Reception Office in Marabastad will serve three key purposes. Firstly, it will allow for a more comprehensive and in-depth analysis of the Pretoria office. It will also contribute to the body of reliable data on individual Refugee Reception Offices which is often difficult to obtain as the information is not always readily available. Lastly, focusing on the Pretoria Refugee Reception office will provide a basis on which future studies can be conducted on a much larger scale.

1.7.6. Limitations

Several challenges arose while conducting this research, particularly in terms of acquiring the information. Many of the staff members whom I spoke to were quite evasive and not very helpful at first. For this reason, I made multiple trips to both the Department of Home Affairs Head Office as well as the Refugee Centre in Marabastad. After several months of waiting for authorisation from the Research and Learning Academy to conduct interviews with staff members responsible for asylum claims, my request was denied. The Department of Home Affairs stated their reasons for denial as follows (also see Appendix):

(a) The proposed research study, “LGBT asylum claims: the case of South Africa” is currently considered to be a sensitive topic to the department and as such, cannot be authorised.

(b) The proposed research study has a potential risk of negatively affecting the reputation of the department in relation to the progress made thus far to protect the sexual minorities against human right violations.

However, I was able to conduct one interview with an employee at the Department of Home Affairs. Unfortunately, this interviewee wanted to remain anonymous and only answered questions considered “unclassified”. This required a long thought process in terms of changing details that might make the interviewee identifiable. This process was quite tedious mainly because of the large

volume of information that I had to go through from the dialogues that took place during the interviews.

Moreover, although the data obtained from the Department of Home Affairs provides significant insight into the handling of asylum cases in South Africa, it is important to acknowledge the limitations that exist with regards to the data collection process. One major limitation to this study is the small sample size – I only conducted one interview at the Department of Home Affairs offices in central Pretoria and not every Home Affairs branch in South Africa. For this reason, this research is limited in its findings due to lack of a representative sample. The work standards and practices may differ in other branches based on political and social biases that the employees from the different cities may have. Furthermore, at the time of conducting this research report, various LGBT lawyers and NGOs were contacted to participate. However all but one were unable to attend. Therefore, the second representative Alicia Raymond from the Wits Law Clinic is a Refugee Lawyer who has represented numerous asylum seekers and is an expert in her field, was interviewed to outline the general procedures and challenges that she has faced as a refugee lawyer dealing with the Department of Home Affairs. Ms Raymond's interviewee data was critical to forming the foundations of this paper, which relates to the state of the South African asylum regime.

1.8. Conclusion

In conclusion, chapter one has provided a comprehensive outline of this study. It started off with some background information on the challenges faced by LGBT persons that causes them to seek asylum in another country. It is apparent that majority the of countries in Africa have criminalised same-sex acts and for those who have not, there are insufficient policy protections for LGBT persons who face persecution. South Africa, however, has been praised for having legislation that protects any individual facing persecution by their sexual orientation and gender identity. The rationale of this study is informed by the inability of South Africa to adequately protect LGBT persons despite having legislation that claims to do so. This chapter has also defined how this study was conducted through a comprehensive research methodology outline.

The following chapter will conceptualise the full scope of this study through a literature review and theoretical framework. A review of the literature will assist in understanding the essential themes, and the key debates or discussions around LGBT asylum that have already been discussed. This will also highlight specific gaps in the literature which my study seeks to fill. The theoretical framework will provide a critical lens through which the rest of this study will be looked at.

Chapter 2: Literature Review and Theoretical Framework

2.1. Introduction

The previous chapter provided a contextual background to this study. The research question, rationale and methodology were briefly discussed. Chapter two will review existing literature relating to LGBT asylum while also describing the theoretical framework that informs this study.

2.2. Literature Review

The following literature review seeks to identify key themes surrounding the issue of LGBT asylum, by analysing existing queer migration literature. The most important arguments that have contributed to academic research in the area of LGBT asylum are discussed, and specific gaps in the literature are revealed. This review assists in intersecting my research with previous studies on the subject matter.

2.2.1. The Development of Sexuality and Gender Identity Research

Issues surrounding sexual politics have long since been a subject discussed in private rather than in public. In an article titled *LGBT Politics, Queer Theory, and International Relations* Markus Thiel (2014) argues that academic research on the politics of sexuality has only recently gained momentum. Writings from Foucault and Butler revealed the first expressions of sexuality studies. However, their work was scarcely recognised in mainstream political science (Thiel 2014). Thus, academic writings on sexuality and gender identity did not advance in the space of International Relations but rather evolved in anthropology, sociology and philosophy literature (Thiel 2014). Nevertheless, Thiel (2014) writes that theoretical schools such as post-colonialism, feminism and critical theory in the field of International Relations which pertain to power dynamics played a significant role in the formation and development of sexuality and gender identity. The study of sexuality and gender identity developed into a theoretical school of thought, known today as queer theory. Queer theory has drawn from concepts that question normative ideologies, particular concepts of positionality and intersectionality in feminist theory as well as ideas around structural marginalisation in post-colonial theory (Thiel 2014). Similar to feminism and post-colonial theory, queer theory challenges established norms in society that place individuals into categories either on

the basis of sex, gender, class or race (Thiel 2014). It places importance on the fluidity of sexuality and gender identity that go against internationally accepted binary orders (Thiel 2014). Subsequently, queer thought in International Relations scholarship is now emerging more strongly than it has in the past.

Although LGBT perspectives did not initially emerge from the intellectual space of International Relations, in recent years LGBT perspectives have increasingly been used, particularly in the subject areas of security, the role of the economy as well as the state. (Weber 2014; Sjoberg 2012; Thiel 2014; Langlois 2014; Puar 2007; and Rao 2012). International Relations scholars have drawn from aspects of traditional liberalism and realism to translate the dynamics between heteronormative understandings and queer realities into academic theory. IR sexuality and gender identity scholars have managed to assert their place in academia by highlighting the importance in understanding LGBT politics within the academic space of IR as it is inextricably linked to the international establishment to which human rights are entrenched (Thiel 2014).

2.2.2. LGBT Asylum

LGBT persons have been fleeing their countries of origin in search of a better life for centuries. As mentioned above, the politics surrounding LGBT persons were not found in academic discourses until the past decade when the field of queer theory emerged (Thiel 2014). Despite its new found position in academic discourse, the field of queer asylum still does not receive as much scholarly attention as many other subject areas. This is particularly reflective of global actions and sentiments of LGBT persons as well as migrants – countries continue to tighten their borders while governments, as well as citizens, continue to have exclusionary heteronormative views which are deemed socially acceptable (Thiel 2014).

Studies on LGBT asylum have focused their attention on what impact gender identity and sexuality have had on people's decisions to leave their home countries as well as how the countries they flee to receive them. Eithne Luibheid introduced one of the first studies on LGBT asylum in her ground breaking journal article from 2005, titled *Queer Migrations: Sexuality, US Citizenship, and Border Crossings.* Luibhéid's article studied the exclusionary nature of the United States immigration system. She wanted to understand how sexuality shaped the United States reaction to queer immigration. Therefore she asked several questions such as: "How do concerns about sexuality shape US immigration control strategies and constructions of citizenship? How has mass migration in the past quarter-century transformed US queer communities, cultures, and politics?" (2005: 2).

Luibhéid's research findings concluded that sexual orientation has historically been an exclusionary category in the United States immigration system. Her study demonstrated that state's favour heterosexuality and patriarchy as governing principles of who is allowed to enter and who is not.

Since the publication of Luibheid's article, scholars such as Canaday (2009), Peña (2007) and Chelvan (2013) have built onto her findings to reveal the connections between sexuality, migration, and citizenship. LaViolette (2010) studied the introduction of the 2008 United Nations High Commissioner for Refugees (UNHCR) '*Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*'. La Violette argues that, although the Guidance Note provides a necessary first step for decision makers handling sexual orientation and gender identity claims, the guidance is not a complete guide for the handling of sexual orientation and gender identity claims. For example, she finds that the guidance note fails to address the question of credible claims. On the other hand Kennan (2011) studied refugee law by examining cases from Australia, the United Kingdom and Canada. Kennan argues that refugee law is used as a means of regulation and reinforcement of norms, which produces a system for the ideal asylum applicant. Moreover, other scholars studying asylum law like Hinger (2010) and Morgan (2006) have found that asylum law has a tendency to maintain narrow western ideas of the essential characteristics of sexual orientation and gender identity. Ou Jin and Brotman's (2011) study titled '*Identity, refugeeness and belonging: experiences of sexual minority refugees in Canada' the experiences sexual minority refugees in Canada*', finds that by maintaining these narrow ideas in asylum law, asylum law becomes exclusionary and disguises the experiences LGBT asylum seekers face in the host-country during the asylum process (246).

Despite the growing literature on Queer Migration, the work on Queer Migration in Africa is still largely limited. Using data collected in 2014-2015, Ali Bhagat´s journal article titled "*Forced (Queer) migration and everyday violence: The geographies of life, death, and access in Cape Town",* studies how LGBT asylum seekers gain access to the city of Cape Town. Bhagat found that LGBT asylum seekers are forced to navigate through spaces of violence. Like Bhagat, Ingrid Palmary (2016) writes about the sexual minorities seeking refuge who face violence and exclusion from the South African state. In her book titled *Gender, Sexuality and Migration in South Africa*, Palmary challenges ideas on gendered migration in South Africa and offers insight into South Africa refugee and asylum regime that is constantly being negotiated to fit into its local and international obligations.

2.2.3. Gaps in the Literature

The recent increase in IR queer scholarship provides evidence that LGBT issues in relation to international politics have begun to be investigated and answered. However several gaps still exist in the literature, for example, the findings of LGBT asylum are largely limited to the Western part of the world. Additionally, the literature on LGBT asylum does not recognise any other popular asylum destinations in Africa, besides South Africa. Furthermore, while there is a growing amount of literature on the experiences of LGBT asylum seekers in South Africa (Palmary 2016, Bhagat 2015), there is however very little focus on the criteria used by the South African Department of Home Affairs to facilitate the protection of LGBT asylum seekers. There are several themes in the arguments surrounding LGBT asylum. The first theme I have identified is the human rights frameworks set out by international/universal views and requirements for asylum based on sexual orientation. The secondly common theme in all the literature is the violence of states on LGBT identities. Lastly, the literature finds that the asylum process is built around heteronormative processes. The literature provided in this literature review intersects with the theoretical framework, where the two main themes of heteronormativity and human rights will be used.

2.3. Theoretical Framework: Heteronormativity and Human Rights

2.3.1. Human Rights as a Framework

Human Rights as a concept have evolved throughout many different periods in human history. The Universal Declaration of Human Rights defines human rights as the "basic rights and freedoms to which all humans are entitled." Human beings cannot be treated on unequal terms in the application of human rights norms. Moreover, human rights can be in the form of shared norms of actual human moralities, as justified moral norms or natural rights (Nickel 2017). They can also be in the form of legal rights either in the local legal system or international law (Nickel 2017). Human rights, as a norm, stem from the interconnected nature of the world order and appeals to the greater good of humanity (Steiner, Alston and Goodman 2008). Therefore the concept of human rights is egalitarian and universal.

Human rights have evolved in many societies and traditions over many centuries. The concept of human rights has been addressed in some of the oldest written texts such as the Christian Bible that considers all human beings to be made in the image of God and because of this man has dominion over all other creations (Genesis 1:26-27). Additionally, the Quran emphasises basic rights that are essential to humanity, including the right to life (Al-Ma’idah 5:32), the right to respect (Al-Ahzab

33:72), and the right to freedom (Surah 2: Al-Baqarah: 256). Moreover, other religious and cultural sources containing similar text regarding human rights, responsibilities and duties also exist. These texts include the Hindu Vedas, the Babylonian Code of Hammurabi, the Analects of Confucius, and the Inca and Aztec codes of conduct and justice to name a few.

However, in recent times, the concept of human rights has evolved from religious and cultural texts to now receiving strong international support following the Holocaust and World War II. After the events of World War I and II, and in order to protect future generations from a repeat of these horrors, the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948 and invited states to sign and ratify it. The Universal Declaration consisted of 30 articles that set out the fundamental rights and freedoms shared by all human beings. Since the creation of the UDHR, human rights have become a dominant discourse and have been very useful in inciting a global response to violations of human rights.

2.3.2. Human Rights and Evolution of Refugee Protection

Refugee protection and human rights law gained relevance after the end of World War II, and as such, several key conventions have been formed and ratified by many countries all over the world. The following will describe some of the human rights conventions and treaties which relate to LGBT asylum and refugee protection. Understanding the obligations that come with being a signatory to these international conventions will assist in the analysis of the South African response to LGBT asylum seekers later in this paper.

The international legal framework for human rights includes the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (UNDHR) adopted in 1948, the International Covenant on Civil and Political Rights, first adopted in 1966, as well as the International Covenant on Economic, Social and Cultural Rights, also adopted in 1966. The protection of refugees was first stipulated in the 1948 United Nations Declarations of Human Rights. The 1948 UNDHR articulates the rights of all human beings to seek asylum from persecution in another country. This is the bases from which the 1951 Convention Relating to the Status of Refugees was formed.

The 1951 Convention was created after World War II at a time when millions of people across Europe found themselves displaced. Today the Convention is the most central document guiding the legal status and protection of refugees in 150 countries across the world. In line with the 1948 UNDHR, the Convention vowed to protect refugees by providing standards for which states should

adhere regarding the treatment and safeguarding of persons seeking refugee status in their territories. The 1951 Convention defined refugees as:

> *any person who is owing to a 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.*

However, the convention was restricted to providing refuge to Europeans in and around Europe, for events occurring before 1st January 1951. Therefore because of these restrictions and as the world entered a new world order with Cold War proxy wars, the issue of displacement was no longer a European problem alone but rather a global problem. Thus in 1967 the Refugee Protocol was adopted, created to expand the scope of the 1951 convention that was at the time no longer sufficient to tackle the refugee issue on a global scale.

On the other hand, Africa was experiencing liberation struggles and civil wars, resulting in a mass influx of migration, movement and refugees. The OAU adopted the 1969 OAU Convention Governing the Specific Aspect of Refugee Problems in Africa. This Convention was adopted to specifically address the refugee problem in Africa that was not relatable and mentioned in the 1951 UN Convention. The OAU Convention was an expansion of the UN Convention and contained all the basic elements of the 1951 convention. The OAU took a humanitarian and African solidarity approach to refugee protection. Unlike the UN Convention which is state-centric, the OAU Convention considers the rights and responsibilities of individuals in the refugee process. Moreover, the OAU Convention considers more progressive grounds for refugee protection such as human rights abuses, the difference in political opinion or membership of a particular social group, racial discrimination, war, natural disaster and political instability. According to the OAU Convention, a refugee can be said to refer:

> *to every person who is 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.*

The OAU's expanded definition is important for asylum seekers applying for asylum based on their sexual orientation or gender identity because it removes the narrow qualifications of race, religion,

nationality, political opinion, or membership of a particular social group. Therefore opening up the definition and allowing a lot more ambiguous qualifications (Kremin 2017: 7).

Despite the OAU's positive expansion of what qualifies one to be considered a refugee, the framework for refugee protection remained largely heteronormative and failed to directly mention the people who may be seeking asylum based on their sexual orientation or gender identity. Subsequently, in 2007 the Yogyakarta Principles was created to address this gap in international refugee law. The principles set out guidelines which positioned sexual orientation and gender identity rights within the already recognised agenda of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The principles highlighted the obligations and responsibilities that states have to protect sexual orientation or gender identity individuals from discrimination. The Yogyakarta Principles (principle 19) state that:

> *Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.*

Subsequently, in 2008 a set of guiding standards on sexual orientation and gender identity asylum claims were released by the United Nations High Commissioner for Refugees (UNHCR) and updated again in 2012. In line with the Yogyakarta Principles, the UNHCR guidance note acknowledged that although the claims based on sexual orientation or gender identity were not included in the 1951 Convention and 1967 Protocol, these claims are fundamental to recognise. Moreover the UNHCR's 'Guidance Note' argues although physical persecution such as violence from war is easily understood in the 1951 Convention and 1967 Protocol, while other non-visible persecution such as the inability to access basic services like health care, education or a state's legal protection may cause insecurity and fear for persons going through these experiences (Kremin 2017). Therefore the Guidance Note suggest that asylum claims based on sexual orientation or gender identity claims is important to realising the basic rights of all humans. Moreover as Kremin (2017) states because "one's SOGI can also amount to persecution if public identification as a non-conforming SOGI minority may bring severe consequences such as criminal penalties or employment dismissal."

2.3.3. Shortcomings

Several shortcomings arise when considering the Human Rights framework for LGBT asylum. It is difficult to secure a guarantee of compliance with globally accepted human rights obligations because the international law system is primarily based on consent. Western governments have invested heavily in their determination systems, and defend their processes as fair and just. However, the interpretation of the Convention's vaguely worded grounds and criteria varies widely.

With the exception of the Universal Declaration of Human Rights and Yogyakarta Principles which are not legally binding and are instead commitments by the international community to uphold human rights. The International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, and all Refugee Conventions mentioned above are legally binding to the states that ratify them. However, although these international documents are legally binding, interpretations may differ. For example, in Canada and the United States of America, individuals persecuted under the one-child policy of China are grouped under 'membership of a particular social group', however this is not the case in Australia. (Aleinikoff 2001). This means the protection of human rights in international law is based on interpretation. Moreover, there is no mechanism to monitor compliance. Therefore it is not possible to punish those states that do not abide by their obligations.

Additionally, the international human rights framework is fundamental to the domestic application of refugee law in a state. Therefore, in theory, local refugee law is built upon ratified human rights treaties that promote a core set of refugee rights, and that afford protection to refugees in any state party to the 1951 Refugee Convention or 1967 Protocol and OAU Refugee Convention (Meili 2014: 635). Therefore the role of refugee law is to act as a system for the protection of human rights of persons who face human rights violations. It also offers protection in cases where the authorities in the applicants' country of origin are unwilling to protect them from persecution or where the state itself is the perpetrator of the persecution (Meili 2014: 635). Therefore based on the above mentioned human rights conventions and guidelines, this research will make use of a human rights approach which is best suited to this study because this approach will assist in clearly demonstrating the human rights obligations that South Africa as a receiving state is required to follow in determining the protection of LGBT asylum seekers.

2.3.4. Heteronormativity

Heteronormativity is a paradigm that regards heterosexuality as the only viable or acceptable sexual orientation (Kitzinger, 2005; Nielsen, Walden, & Kunkel 2000). Heteronormativity was first used in 1991 by Michael Warner in a journal article titled *Fear of a Queer Planet.* The theory works to critique feminist theory. Heteronormativity asserts that the gender identity of people is categorised into distinct gender binaries (male and female) and that these binaries are fixed and biological (Warner 1991). This paper argues that such a narrow idea of normalcy is an institutionalised method of maintaining the status quo. This serves to keep marginalised groups of people oppressed in subtle and sometimes explicit ways. Heteronormativity concludes that there are no "other" sexual orientations outside of heterosexuality (Warner 1991). Therefore non-heterosexual identities such as gay, lesbian, bisexuality, transgender etc. are marginalised (Luibhéid 2008). Moreover heteronormativity asserts that the marginalisation of non-heterosexual identities is due to the fact that structures in "everyday" life are regulated by heterosexual norms (Jackson 2006): "there is no homo-, bi-, trans-, intersexuality etc. without the reference to heterosexuality and gender as a binary category" (Connely 2013: 4).

Moreover, ideas of heteronormativity are maintained and perpetuated by social institutions in everyday life. One example of these heteronormative institutions is marriage. Marriage is an institution in which laws ban and discriminate against same-sex relationships in some parts of the world. Moreover, heteronormativity is often championed in the media, with the under-representation of LGBT in advertising and entertainment media. Heteronormative standards are also demonstrated by the meanings attached to the toys of children that entrench gendered characteristics and ways of thinking into the minds of children, e.g. Barbie's are designed and advertised for girls and toy cars are designed for boys.

Additionally, King (2012: 17) states that the "English language itself creates the expectation that sex ought to be a binary construct through the use of "he" or "she" to describe human beings." This usage leaves no room for any deviations from the norm which makes it difficult for English speakers to regard any alternative form of sexual orientation or gender identity (King 2012: 17). While this may not significantly affect sexual orientation individuals, there have notable implications for gender non-conformists (e.g. transgender) (King 2012: 17). As such, gender non-conforming individuals are limited in their ability to express their identity using the English language (King 2012: 17). Such language limits and excludes alternative gender identities while

imposing heteronormative gender binaries on all people. These limitations take greatly stifle autonomy and self-actualisation.

2.3.5. The Intersection between Human Rights and Heteronormativity

The concept of human rights becomes problematic when identifying who decides on the standard for human rights. Although globalisation has become increasingly widespread, the world is still extremely diverse. Cultural norms and traditions often come into conflict with Universal Human Rights which tend to take on a Western standard of normativity.

Moreover, using a human rights framework to determine the worthiness of an asylum seeker serves to promote difference, making LGBT persons 'the other'. These differences are often based on heteronormative principles. Thus, the asylum process illustrates that it operates as a system that sets up a special category of human rights, differentiating treatment and contradicting the principle that all human rights are equal. Subsequently, Palmary (2016: 13) states that "the creation of refugees as a deserving category of people can only take place through the exclusion of other groups rendered not deserving." It is from this that a heteronormative theoretical framework will be used to understand how heteronormativity constructs itself in everyday life. This will be done in a context in which human rights principles, language, values and the formation of exclusionary categories are being negotiated.

Heteronormative theory has emerged in LGBT asylum literature to highlight that nation-states have historically viewed asylum within two normative sexualities and identities: "Male" and "Female" (Luibhéid 2008). Therefore heteronormative theory will assist this study in examining the regulation of asylum seekers, whose gender identity fall outside of their country-specific norms (Ou Jin Lee and Brotman 2011). Essentially, this examination will provide insight into "how sexualities both shape and are shaped by migration."(Connely 2013: 4).

2.4. Conclusion

Chapter two has presented an overview of the existing literature on LGBT asylum. It was revealed that LGBT asylum has increasingly gained significance in International Relations scholarship. The literature review exposed specific gaps in existing literature particularly pertaining to the criteria used by the South African Department of Home Affairs when deciding who gets asylum and who does not. A lot of the literature on LGBT asylum and LGBT migration are written from a Western perspective whereas African perspectives on this subject matter are very limited. These gaps form

the motivating factors of my study. Moreover, the importance of understanding LGBT asylum through a human rights perspective was discussed in this chapter. This human rights perspective will be helpful in assessing to what extent the South African Department of Home Affairs protects LGBT asylum seekers later in this study. The heteronormative theory has also been discussed in this chapter, and it will be helpful in portraying to what extent the South African Department of Home Affairs exhibits limiting binary sexual standards when dealing with asylum applicants. The next chapter will provide debates around homophobia and xenophobia which will help demonstrate the differences between policy and social discourse in South Africa.

Chapter 3: Past Debates and Formation of Current Policy

3.1. Introduction

In the context of South Africa, disparities of race, class, gender and space seem to have plagued the country for many years both during and after Apartheid. Today, remnants of the Immorality Act of the Apartheid regime can be seen through attitudes of intolerance in South African society. This chapter will explore how disparities of race, class, gender and space manifest in the context of queer foreigners who seek asylum in South Africa but are met with sentiments of xenophobia and homophobia. Debates around LGBT rights formation, refugee policy, homophobia and xenophobia will also be discussed to demonstrate the differences between policy and social discourse in South Africa.

3.1.1. Lead up to the implementation of LGBT rights policy in the South Africa

The history of hostility towards LGBT persons in South Africa has been notably shaped by Christianity. Homophobic sentiments were first found in the Christianity Bible, which deems same sex acts as unnatural and a sin as illustrated in Leviticus 18:22 of the New Testament "do not lie with a man as one lies with a woman; that is detestable." Therefore with the arrival of Dutch Christian missionaries in South Africa in the 1700s along with the formation of British Christian missionary schools, the Dutch and British were able to spread Christianity and its message of sexual purity (Thompson 1990). The presence of Christian missionaries in South Africa also altered cultural norms and created new ideas about sexuality for South African people (Sanders 1997). Therefore, missionaries were able to shape the discourse around sexual morality, in South Africa.

Moreover, with the formation of the Afrikaner nationalist movement in the 1900s, Christianity became a major foundation of apartheid and nationalist Afrikaner ideology. The apartheid government believed it was they responsibility to enlighten South Africa with Christianity (Thompson 1990). "The main objective of the nationalist movement was to establish an Afrikaner state that would be seen as defender of civilization, grounded on Afrikaans culture, Afrikaans language and Dutch Reformed Calvinism, separated from English influence and isolated from perceived dangerous races and ideologies" (Pushparagavan 2014). Therefore in line with

Christianity and Afrikaner nationalism, the Immorality Act of 1957 was passed as legislation. It was one of the first pieces of legislation that tried to control the type of relationships people have with one another. The Immorality Act outlawed sexual intercourse between people of different ethnicities and same sex relationships, deeming them as 'unnatural/immoral sexual acts' (Thompson 1990).

Anti-Homophobic laws and discrimination such as the 1957 Immorality Act prevailed in pre-democratic South Africa under the Apartheid regime. However with the strength of the Anti-Apartheid movements, this changed in 1994 when the South African Constitution promised to protect all its citizens regardless of any differences they may exhibit. Section 9 of the South African Constitution in particular centres on the right to be treated equally and prohibits any kind of discrimination, including discrimination on the basis of sexual orientation and identity (Constitution 1996). In 2006, after a ruling by the Constitutional Court that same-sex marriage should be allowed, the Civil Union Act was passed which allowed gays and lesbians to be legally married (Bonthuys 2008, De Vos and Barnard 2007). Thus on paper South Africa has done an excellent job at preventing the recurrence of the tragedy caused by discrimination experienced during Apartheid particularly in this case by ensuring that LGBT persons receive the same rights as heterosexuals.

However it is important to note that, unlike the women's movement or the anti-apartheid movement in South Africa, the LGBT movement did not engage grassroots populations before being introduced into policy (De Vos 2007). The rights of LGBT persons were introduced to policy with the help of organisations such as the Organisation of Lesbian and Gay Activists (OLGA) formed in 1989. OLGA was an LGBT organisation that was affiliated with the United Democratic Front (UDF) which was politically aligned with the African National Congress (ANC) (De Vos 2007). Therefore, by affiliating with political alliances, OLGA managed to attach gay rights to the broader struggles of the anti-apartheid movement within the country (De Vos 2007). Thus, at the end of Apartheid and once the ANC came into power, gay rights were introduced into policy for the first time. The implementations of gay rights were framed as an end to oppression and discrimination as a whole along with the fact that OLGA contributed to the anti-apartheid struggle (De Vos 2007). The case for gay rights inclusion was automatically a favourable decision that did not require any form of lobbying or negotiations unlike the women's movement and anti-Apartheid movements mentioned above. It is arguable that this easy victory for the gay movement has had a negative impact on how LGBT rights are practised in South Africa. These issues will be discussed below

after an assessment of the lead up to the implementation of the rights for LGBT asylum seekers found in the South African constitution.

3.1.2. Lead up to the implementation of Refugee Policy in the South African Constitution

Before 1998, the Aliens Control Act governed refugee and immigration matters in South Africa. The Act was mostly concerned with control of immigration into South Africa and did not distinguish between movement categorised as immigration and asylum (Rutinwa 2002). The aim of the Aliens Control Act was 'to provide for the control of the admission of persons to, their residence in, and their departure from, the Republic' (Aliens Control Amendment Act 1995). The Aliens Act was an Apartheid law that was designed to maintain the Apartheid state's policies of racial segregation and discrimination. The Act broke many international laws and standards and was marked with irregularities. Moreover the Act had no provisions for refugees, particular those coming from the African continent (Rutinwa 2002).

In 1996 the newly democratic South Africa adopted the Constitution. The Constitution is the highest legal document that provides a set of principles for the existence of the Republic of South Africa. Rights set out in the Constitution are for all those who resided in South Africa, including no citizens. Moreover, in 1996 South Africa signed the Refugee Convention and Protocol. Therefore with international pressure and in order to maintain the values highlighted in the Constitution, the South African government set out to adopt specialist legislation on refugee protection. Thus with the help of civil society organisations, in 1998 the Refugee Act was adopted. The Act protects all those who seek refuge in South Africa, regardless of race, gender orientation, sexuality, religion, age etc. Moreover, today the Act is considered one of the most progressive and inclusive refugee legislations in the world.

On the contrary, it took eight years for the adoption of the 2002 Immigration Act. This was because the Dr Buthelezi leader of the Inkatha Freedom Party and Home Affairs Minister during that period, believe the Immigration Act would jeopardize South Africa's reconstruction and development programme (Crush 199). However after long negations the Immigration Act was adopted and today along with the Refugee Act governs the movement of people into and out of South Africa.

3.2. Debates around South African Migration Policy and growing anti-migrant and Homophobic sentiments as well as politics of space

In order to analyse and understand South Africa's approach to assessing asylum seekers, particularly LGBT asylum seekers, it is necessary first to understand the different debates and challenges involved in South African immigration as a whole. South Africa is a constitutional democracy, and therefore it is understood that every national decision made should emanate from the Constitution. Given South Africa's history, in post-1994 there was a strong sense of gratitude from South African leaders towards the rest of the African continent for their solidarity and support during the freedom fight against the Apartheid regime. This can be regarded as one of the reasons for South Africa's progressive policy on immigration that seeks to embrace foreigners and diversity, particularly within the African continent. However, with growing anti-migrant and homophobic sentiments, it seems South Africa is struggling to implement these progressive policies. Politics of space also become important in the historical context of South Africa. All of these issues are relevant when trying to understand the state of South Africa's Asylum Policy and the extent to which it protects LGBT asylum seekers in particular. It will become apparent that both homophobic and xenophobic sentiments, as well as the historical legacy of spatial segregation all play a role in the way that LGBT asylum cases are handled.

3.2.1. Anti-Migrant Sentiments in South Africa

Some may argue that the numerous xenophobic attacks throughout the years are an indication of weakness or failure of South African policy (Bhagat 2017). In South Africa, increased anti-immigration sentiments have led to the loss of many lives during several xenophobic attacks throughout the years. This creates a national and global dilemma of how to protect the human rights of immigrants. Although South African policy claims to protect the rights of all immigrants, in practice there has been little or no effort to resolve the xenophobic crisis whether at the skilled or unskilled level. The South African government explicitly condemn xenophobic attacks in the media during press conferences however there has been a reluctance to take action towards a lasting peaceful settlement and a change towards pro-migration sentiments. Thus one might argue that the anti-foreigner sentiments by many South Africans are a result of a failure in governance.

There is also the risk that these anti-migration sentiments and tightening of borders can, in fact, manifest itself in other parts of the continent. An example of this is the 2017 retaliation attacks in Abuja Nigeria on *MTN*, which is a South African telecommunications enterprise operating in Nigeria and several other countries across Africa. Similar attacks also occured in 2015 on South

African businesses in Nigeria (Mabena 2017). Despite efforts from South Africa's Home Affairs ministry to reassure all African countries that the xenophobic attacks should not strain intra-African relations, the repeated attacks pose a major threat to South African diplomacy within Africa (Mabena 2017). The amount of control that the South African government has on the xenophobic crisis is questionable because when dealing with human emotion, it is not possible to control how people react to an influx of foreigners. Historically, South Africans found that the most effective way to fight the apartheid system was through violent means. This violent approach seems to have permeated into the new democratic society post-apartheid. Youth unemployment is at the centre of the anti-immigrant sentiments in South Africa (Charman and Piper 2012). This suggests that there needs to be a shift in focus towards labour-intensive growth as a possible long-term solution.

3.2.2. Homophobic Sentiments in South Africa

The progressive LGBT rights in the South African constitution mentioned above have done little to change deeply held personal and socially accepted views that condemn same-sex relationships and maintain hatred towards the LGBT community. A survey released by the Other Foundation in 2016 found that 51% of South Africans believed LGBT citizens should have the same human rights as every citizen. However, the survey also found that 72% of South Africans think that same-sex activity is morally wrong. Additionally, in a study conducted by the Pew Research Centre in 2013, South African citizens were asked if LGBT identity should be accepted in society, to which 61% of the respondents answered that it should not (Kohut 2013). This has led to widespread explicit and violent acts of contestations against LGBT identity. Corrective rape has become a common form of gender-based violence that seeks to force lesbians to change their sexual orientation to a heteronormative standard which is deemed socially and culturally acceptable (Mkhize et al. 2010). Lesbians often get brutally raped and killed, and such cases are seldom exposed in the media (Mkhize et al. 2010).

It is not surprising that South African citizens are opposed to LGBT rights when many influential political and traditional leaders have publically made contentious and hostile statements towards LGBT persons in the past. In 2006 for example, former President Zuma labelled same-sex marriage as "A disgrace to the nation and God" (IOL 2006). Another South African leader who publicly insulted the LGBT community is the Zulu King Goodwill Zwelithini, defining LGBT persons as "rotten" (Mdletshe 2012). In 2017, Mayor of Johannesburg Herman Mashaba essentially blamed foreigners for the high level of crime in South Africa (Mathebula 2017).

Additionally, one of the most widespread debates about homophobic sentiments refers to the idea that LGBT identity is un-African. According to Sylvia Tamale (2011), a Ugandan academic who has researched the history of same-sex relationships in pre-colonial Africa, LGBT identity has been practised in Africa for centuries and historically was not condemned the way it is today. Tamale (2011) argues that homophobic sentiments and the culture of intolerance in Africa were brought to Africa by outside forces and it is homophobia that is un-African rather than LGBT identity. In fact, anti-homophobic sentiments are consistent with the sentiments of right-wing American fundamentalists, British and all European colonisers as well as Christian missionaries who came to African countries and demonised same-sex relations (Tamale 2011). Therefore it is essential to acknowledge that culture is dynamic, meaning it changes with time.

3.2.3. Politics of Space in South Africa

In South Africa, there is an apparent segregation of space which seems to be a remnant of the Group Areas Act of the Apartheid regime. The Apartheid regime separated space in South Africa according to race. Today this spatial separation translates into differences in socio-economic status and class divides. Due to inequalities in access to resources and space, a lot of the LGBT spaces in South Africa tend to be dominated by white gay identities and hyper-masculine narratives, ignoring the diverse embodiments of queer identity which cannot be separated from race and class relations (Bhagat 2017) In the South African context, the struggle for space is complexly connected to race, class and heteronormative gender struggles because access to space which includes access to structures of education, work, protection and social inclusion tends to privilege heteronormative bodies in the fight and negotiation of these spaces (Bhagat 2017). This has created a pyramid of privilege where white males are at the top, followed by white women, black men and ending with black women at the bottom. In some spaces it is safer for homosexuals to render themselves invisible than to openly express their sexuality. This is demonstrated by the higher levels of crime against homosexuals in township areas as opposed to suburban areas, which will be depicted in the example below. In this way higher socio-economic status privileges white LGBT persons and marginalises those who do not have privilege in these spaces, i.e. the black, LGBT community from lower socio-economic environments. As such, challenges regarding access to spaces of protection are heightened when black, poor, foreign and non-normative bodies are interlinked, therefore leading to increased violence and hate crimes. Such violence is illustrated in a study conducted by PASSOP (2013):

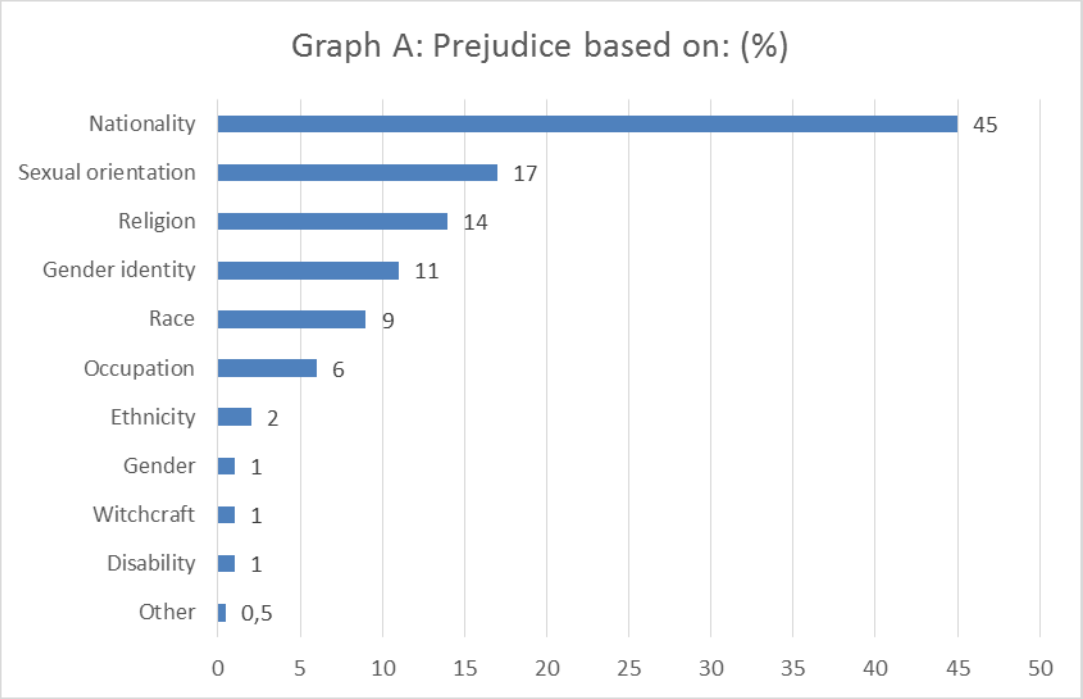
> *Lesbian asylum seeker Cleopatria twice suffered violent assaults in South Africa. One night, as Cleopatria and her friends left a township bar to return home, two men attacked them. The men yelled, "You are stealing our women, we will show you how to be a real woman." In another incident, four men beat and raped Cleopatria. She recalled, "The men dumped my body and left me to die." Although Cleopatria informed the police of the attack, the officials did not investigate further into the case. Her perpetrators were never prosecuted.*

Similarly, another LGBT asylum seeker interviewed in the PASSOP study stated:

> *When I got beat up, I went to the police. They laughed at me but arrested the person who attacked me. The next day after I had gone to the hospital, they had already released the man that attacked me.*

The frequency of such hate crimes is illustrated in the graph below. The graph represents findings from a study released in February 2018 by the Hate Crimes Working Group (HCWG). The study is a first of its kind conducted in South Africa and looks at reported hate crime in the period of 2009-2017 from 5 different provinces in South Africa. The findings show that foreign nationals followed by LGBT persons have the highest rate of hate crime incidents in South Africa. This is indicated by 45% of hate crime incidents relating to people based on their nationality and 17% of hate crime incidents on people based on their sexual orientation. While this study does not indicate the percentage of hate crimes committed on LGBT foreign nationals, the following numbers are still sufficient in painting a picture of the realities faced by LGBT foreigners in South Africa, which is negative overall.

Figure 3: Graph from The Hate Crimes Working Group on prejudice in South Africa



3.3. Conclusion

Chapter four has revealed that South Africa has one of the most liberal sexual preference laws in the World. Moreover, under the South African constitution, LGBT persons have the same rights that heterosexual people have. However, these sexual preference laws might not always adequately protect LGBT persons, especially those seeking asylum. One can argue that the placing of LGBT rights into the South African Constitution without a proper movement attached has done little to challenge deeply held homophobic views of South Africans. Moreover, the fact that the LGBT movement was historically underpinned by whiteness, has resulted in severe violence in township areas to non-whites who are often victimised due to their sexual orientation, which is believed to be influenced by white "culture" (De Vos 2007). In this regard, putting LGBT rights into policy did not help to challenge the heteronormative state. The following chapter will investigate the extent to which this is true or false in practice by studying whether the South African Department of Home Affairs live up to South Africa's human rights obligations, mainly when dealing with LGBT persons once they arrive in South Africa, after fleeing their home country due to threats of homophobic bias and persecution.

Chapter 4: Current Debates, Trends and Policy Implication

4.1. Introduction

South Africa is the only African country where LGBT rights are protected in the Constitution. Thus it portrays itself as the ideal place for members of the LGBT community who seek refuge. Once an individual is granted asylum, they are allowed to live as a legal immigrant in South Africa. This means that with asylum status, an individual cannot be deported back to their country of origin. In order to receive this asylum status, immigrants are required to provide evidence that they are in fact in danger of persecution in their home country.

However as mentioned in chapter four, the South African immigration system has become an increasingly relevant topic since the onset of xenophobic attacks in the country as well as global stimulus from growing anti-migrant sentiments across the world. Similarly, the topic of South Africa's Queer protection has also gained relevance due to the high statistical indicators of hate crimes perpetrated against LGBT persons in the country. Chapter four provides the empirical findings from the study that was conducted about the LGBT protection capacity of the South African Department of Home Affairs through a policy analysis where specific details relating to asylum protection are assessed. This chapter also offers important details from the interviews that were conducted with a lawyer and lecturer from the Wits Law Clinic as well as a representative from the South African Department of Home Affairs. Chapter four concludes by highlighting the specific challenges faced by the South African Department of Home Affairs when dealing with LGBT asylum cases.

4.2. South African Department of Home Affairs Procedure Asylum Claims

South Africa adopted its democratic Constitution in 1996 after the end of Apartheid. It is aimed at guiding the actions and standards of humanity for all in South Africa. It is geared towards safeguarding human rights, dignity, freedom and equality for all. This Constitution laid the foundation for many of the progressive laws passed since the attainment of democracy.

In 1993, South Africa signed a memorandum of understanding with the UNHCR and thereafter formulated the South African Refugee Act which was formalised in 1998. In South Africa, refugees and asylum seekers are managed under the Refugee Act while other foreign nationals are managed through the Immigration Act. Therefore, since this paper is focused on LGBT asylum claims, I will

unpack specific policy details within the Refugee Act that are particularly relevant to asylum seekers. The Refugee Act provides the procedure for management of refugees and asylum seekers. It is necessary to specify and differentiate the meanings of the two categories. People who are given refugee status are understood to have provided a well-founded claim that they have either fled their home country on the basis of human rights violations or any possible threat to their life. Asylum seekers, however, constitute those whose claims are still under investigation and thus need to provide evidence that they are indeed facing an imminent threat of persecution or any kind of danger to their lives (Department of Home Affairs 2017). While awaiting their verdict, asylum seekers are striving to be granted refugee status. Refugee status will be granted if an asylum seeker is found to have a well-founded fear of persecution on one of the convention grounds, namely religion, political opinion, social group membership. The above-mentioned definitions can be found in section 3(a) as well as 3(b) of the Refugees Act.

Moreover, there are several steps in the asylum and refugee claims process. Firstly an individual who is fleeing their country due to a threat on their lives will arrive at a border entry port in the country whether by land or sea. Thereafter, the individual will be given a section 23 permit or otherwise known as a transit permit which is valid only for a period of 5 days (previously 14 days) and is non-renewable. Within those five days, an individual will be categorised as an asylum seeker and will need to avail themselves to the Refugee reception office where they will be interviewed by a determination officer of the Department of Home Affairs. If the Home Affairs official deems the applicants claim to be manifestly well-founded, the applicant will be provided with a section 22 permit allowing them to stay in South Africa for the duration of 6 months. This permit is renewable and is a way of legalising one's stay in the country while awaiting refugee status. Once refugee status has been granted, an individual will be permitted to stay in the country for four years after which it will expire. However, such individuals can then apply for permanent residence and eventually be naturalised as a South African citizen.

However, according to a report released by the United Nations Commissioner of Refugees in 2014 South Africa has the highest rejection rate of refugees in the world at over 90%. In fact, the report finds that in 2014 South Africa rejected between 90% and 100% of all the asylum applications processed from Mozambique, Lesotho, Malawi, Bangladesh, Nigeria, Pakistan, Ghana, India, Zimbabwe, Cameroon, Burundi and Uganda. Therefore the asylum process is not easy, and often asylum seekers' claims are rejected as either unfounded or manifestly unfounded. When an asylum seeker gets rejected as having an unfounded claim, they have an opportunity to appeal to the

Refugee appeal board, and when an asylum seeker gets rejected as having a manifestly unfounded claim, the case will be automatically reviewed by the standing committee for Refugee Affairs. When appealing to the Refugee appeal board, an asylum seeker needs to submit a notice of appeal, and get all the information from the file from the Reception Office to understand the reasons for rejection. Alicia Raymond of the Wits Law Clinic, Refugee Unit says that getting the required documents from the reception office and getting a date from the appeal board can take several years. For example, in 2017 alone she had five appeal hearings, and after a year she still has not received any decisions. However, as flawed as it may be, it is a step in the right direction because prior to this, in 2014, there was no Refugee board in existence. Essentially, while there is currently a system for asylum seekers to appeal rejected cases as stipulated in the Refugees Act, four years ago such a board did not even exist.

Subsequently, when an asylum seeker gets rejected by the appeal board, they have to do a high court review, where an asylum seeker argues that the Refugee Appeal Board made the wrong decision. If the case is successful the high court can overrule the decision of the Refugee Appeal Board and grant an asylum seeker the protection they are seeking or refer them back to the Refugee Appeal Board arguing that they did not abide by what they were required to do. This then requires that the entire procedure be repeated. However, the problem lies in the fact that many of these asylum seekers who have been referred back to the Appeal board have been in the country waiting for their appeal to be processed for more than ten years. Ms Alicia Raymond encountered cases were clients had already had two appeal hearings and where they were on their third hearing. She explains that this is because in some cases an adjudicator may leave in the middle of a hearing and thus cases would have to be reheard by a new adjudicator.

However, if an asylum seeker manages the asylum process successfully, there are some benefits that come along with being a refugee or asylum seeker in South Africa. Under the Refugee Act (1998), refugees, who consist of those who have been granted a section 24 refugee permit which is valid for four years, have all the same rights as South African citizens do. These include the right to receive education, the right to shelter, social welfare grants and the right to work among others. The only exception would be the right to vote, which refugees and asylum seekers are not entitled to. Asylum seekers, which consists of those who have been given a renewable section 22 permit which allows them to stay in South Africa for six months, are allowed to study and work in South Africa, however they do not have access to social welfare grants or the right to vote because their cases are still pending. In addition to being allowed to remain in South Africa, another benefit to having

asylum-seeker and refugee status is the possibility of citizenship in the future. Asylum and refugee status also allows one to petition for a spouse or children to receive derivative asylum after they have been granted asylum. (Department of Home Affairs 2017) Nevertheless, the rights mentioned above are guaranteed under the Bill of Rights and stated in Section 7 of the South African Constitution. This is an indication that South African policy does indeed respect the standards of Human Rights. The 1998 Refugee Act details the domestic framework for managing refugees and asylum seekers in South Africa.

Despite the privileges mentioned above, there are still some challenges that arise when managing refugees and asylum seekers in particular. The primary challenge pertains to processing time. In the regulations for the Refugee Act which sets outs the procedures for the Refugees Act legislation, the regulations state that the asylum process is supposed to take 180 days. This is from the time an asylum seeker enters South Africa and applies for asylum to the time a decision is made on their case. However, when one considers that South Africa has one of the highest rates of asylum seekers in the world who seek protection in the country, it is easy to see that 180 days is not sufficient. According to Ms Alicia Raymond, it is difficult to gage how long the asylum process can take because once an asylum seeker has made an application, had an interview with the Refugees Status Determination Officer (RSDO) and has received their rejection be it manifestly unfounded or unfounded, the process of reviewing or appealing their decisions can take several years.

Secondly, another challenge pertains to documentation. It is extremely difficult for all refugees and asylum seekers to obtain either a section 22 or section 24 permits (Middleton 2009: 44). This is a very serious problem because it affects access to jobs, education, healthcare and all other services that such permits can provide. Another challenge refers to the section 22 permit for asylum seekers who are by law permitted to stay in South Africa for six months after which they can renew this permit. The problem is that in many cases, when asylum seekers go to the Department of Home Affairs to renew their permit, they are granted a shorter stay in the country, for example, two months and sometimes even a week. In that time they are expected to present their case to the Refugee Appeals Board where a second interview will be conducted to determine whether their claim is valid or not. In many cases, this does not happen on time, and such individuals would face deportation or detention while awaiting their trial before the Refugee Appeals Board (Middleton 2009).

Although South Africa has signed onto various conventions and protocols to protect foreigners seeking protection, the Department of Home Affairs claims that they face a challenge when dealing

with people who abuse the asylum system and who do not fall into the asylum seeking category but rather constitute as economic migrants (Amit 2012).

In the Refugee Act, there is no written policy that explicitly guarantees protection for those who are seeking asylum based on threats of persecution due to their sexual orientation and gender identity. Instead, those who fit into this category would have to apply for asylum on the grounds of the threat of persecution based on membership to a particular social group. Moreover, under the Acts definitional section, it is emphasised that sexual orientation and gender identity may constitute a "social group".

4.3. Criteria Used For LGBT Asylum Claims

While the 1951 Convention Relating to the Status of Refugees does not explicitly mention sexual orientation as a reason for protection of refugees since the 1990s, countries like South Africa have placed sexual orientation-based asylum under 'membership of a particular social group'. Furthermore, the South African Constitution sets provisions for the protection of all persons living in South Africa that includes asylum seekers. Thus while sexual orientation based asylum has been recognised in South Africa , sexual orientation based asylum applicants still face additional challenges when applying for asylum in the country.

According to international law, it is the responsibility of an asylum-seeker to prove their case for asylum (LaViolette 2013). In this sense, providing proof for sexual orientation-based asylum means that an applicant must prove that they have faced persecution in the past and are likely to face more persecution in the future (Thomas 2006: 81; Sweeny 2009: 700). "Claims can be proven by personal accounts, witness testimony, expert testimony and/or documentary evidence" (Coonely 2014: 6).

When considering LGBT asylum applicants in South Africa, applicants are required to firstly prove that they are gay, bisexual, lesbian, or transgendered. Once they have proven their sexual orientation, LGBT asylum applicants in South Africa must prove that they face persecution because of their sexuality. In doing so, they are required to provide proof that their government is not able or not willing to protect them from harm in their home country. In cases where an LGBT person is being harassed by somebody in the country, it would be categorised as a domestic case which should be handled by the police of that country. However, this becomes challenging because, in more conservative countries, LGBT persons are often afraid to report their harassment to the police out of fear of further harassment and corruption, thus making it very dangerous for an LGBT person

to report their abuse. In countries where the government and police are the ones perpetrating harm, it becomes difficult to provide evidence of harm especially when persecution of the LGBT community is not explicitly part of that country's policy (Amit 2012).

Therefore, if an LGBT applicant fails to meet the above requirements, request for asylum will be denied. A study conducted by Kizitos Charloz Okisai (2015) found that the Department of Home Affairs rejected LGBT asylum claims because RDSO's questioned the credibility of applicants and if applicants did not physically appear the way one might perceive the mentioned sexual orientation or gender identity.

Additionally, according to PASSOP (2012) the standard explanation given to unsuccessful LGBT asylum applicants in South Africa is that if these applicants' sexual orientation is not visible and unknown in their communities, they could return to their country of origin and avoid harm by relocating to another part of the country. This means that these asylum seekers would have to return to their countries of origin and hide their sexuality or as Wessels (2013) terms it "act discreetly" to avoid any further persecution. Wessels (2013) finds that as long as sexuality remained in the bedroom or in private spaces, LGBT persons would be safe from harm. However, this is problematic as it violates a number of human rights, such as the right to freedom of association mentioned in the South African Constitution and the Universal Declaration of Human rights, as well as the right to human dignity specified stipulated in Article 26 of the International Covenant on Civil and Political Rights which South Africa is party to. Moreover, Millbank (2005) argues that suppressing LGBT identity is a way of forcing them into 'the closet' for the purpose of protection. Therefore, although LGBT people have the right to enjoy all human rights, if they are forced to suppress their identity one has to question who benefits from human rights. Given that human rights appear to benefit heterosexual identities, can human rights be described as heteronormative?

According to a representative from the Department of Home Affairs, nobody who applies for asylum will be rejected based on their sexual orientation. However it was also stated by the representative that a verbal testimony is not always enough to build a case; rather each asylum applicant needs to provide tangible evidence to why and how their lives are in danger in their home country. This is despite an assertion by the United Nations High Commissioner for Refugees (UNHCR), which forms part of a UN branch, that sets out to oversee refugee and asylum seekers internationally, explicitly stating in their 2008 Guidance Note that personal testimony alone should be enough to prove a claim for asylum. The UNHCR states that this is due to the fact that many

asylum seekers will be unable to produce any other independent evidence, such as describing their sexual activity with past partners etc. (UNHCR Guidance Note).

Moreover, PASSOP's report (2012) finds that many LGBT people seeking asylum are not likely to openly state that they are gay or lesbian out of fear of being prosecuted. Many of them are used to having to hide their sexual orientation and thus are ashamed and find it difficult to disclose that they are in danger because they are gay, lesbian, transgender etc. The fear by LGBT asylum seekers in disclosing their sexual orientation is illustrated in an interview conducted by PASSOP, where a transgender refugee stated (PASSOP 2012: 16):

> *No, I did not [seek asylum on the grounds of sexual orientation] because I could not speak English at the time and I was afraid of the Somali interpreter. He could spread the news and hate me. I applied on the grounds of civil war. I was not aware that I could get refugee status because of my sexual orientation.*

Moreover, despite sexual orientation being a ground on which to seek asylum in South Africa, many LGBT asylum seeker's interviewed by PASSOP where unaware of this. (PASSOP 2012: 16). PASSOP (2012: 16-17) finds that immigration officers often have very heteronormative ideas and expectations of the way gays, lesbians' transgender etc. act and look. PASSOP finds that interview questions done by RSDO officers in South Africa are often very invasive and dehumanising and when the applicants' answers do not match the expectations of the immigration officers, they are assumed to be lying about seeking asylum by their sexual orientation and ultimately get denied. This is problematic because: "What if Columbian lesbians do not look like Canadian lesbians? Alternatively, what if most lesbians do not look like lesbians?" (Millbank 2003: 121). Furthermore, there is no 'universal' standard for what constitutes lesbian or gay (Ou Jin Lee and Brotman 2011). Moreover, Adafo (2011) implies that prejudice due to lack of understanding of LGBT persons becomes a significant factor in understanding the LGBT asylum claims process and the state structures that carry out these processes. Therefore it is arguable that the asylum process is regulated by heteronormative ideas and expectations.

4.4. Refugee Status Determination Officers (RSDO)

Ethical debates arise when personal politics come into conflict with one's profession. This is a challenge faced by people working in immigration departments. Migration has become a concept that causes people to be increasingly conflicted. Particularly in the case of South African immigration, breaking through African cultural beliefs presents a challenge to officiators processing

LGBT asylum seeking applicants. The UNHCR encourages asylum officiators to take a gender-sensitive approach to each applicant. However, without the correct training, it is easy for officials to exert their own biases that might be insensitive or ignorant of specific types of gendered persecution.

As set out in the Refugees Act, No 130 of 1998, Refugee Status Determination Officers (RSDOs) hold the responsibility for deciding on the validity and credibility of all asylum applications in South Africa. "The first step for asylum seekers is to fill out an application form at a Refugee Reception Office, assisted by a Refugee Reception Officer. The asylum seeker then returns for an interview with a RSDO, before a decision is made by the RSDO" (Middleton 2009: 32). Therefore the RSDOs are the most crucial actors in the asylum claims process because they decide the fate of asylum seekers. Therefore, when dealing with LGBT asylum seekers, it is crucial that RSDOs understand gender-related persecution and how these cases can be evaluated, before making a decision. However, this is often not the case, as illustrated in a report conducted by PASSOP (2012: 16) to determine the kind of difficulties faced by LGBTI Refugees entering South Africa. One lesbian in the study explained her experience dealing with RSDO officers stating:

> *Sometimes they laughed at me with the interpreter and tried to persuade me to cease being gay. They wanted to know more about how I felt being attracted to people of the same sex as me." Another gay asylum seeker from DRC said: ''they gave me a form to fill out. I said I left my country because I faced persecution in my country for being gay. The woman questioned this; she was looking at me like, 'Why is this gay Congolese coming to South Africa?' She did not give the papers to me; she threw them at me. Another girl was there told me that she wanted me to change because she likes me. I cannot change.*

This shows us that when it comes to LGBT asylum seekers, the Refugee Reception Office of the DHA does not treat them like they are actual human beings because of their non-heteronormative identities, which are often unfamiliar to them. Alicia Raymond finds that when a client comes to her, they often arrive at her office angry and aggressive because before they come to her, they have not been treated like a human being.

Moreover, once an asylum seeker receives a rejection, the Reception Office is required to communicate the appeal process to them. This is stipulated under section 3 (A) of the Promotion of Administrative Justice Act, a piece of legislation that says that any kind of decision or anything that

materially or adversely affects an individual needs to be communicated with them in writing. Thus in order for an asylum seeker to go through a fair asylum process they are supposed to be aware of what the process is and the reasons as well as what options they have and guarantee that they will not be persecuted for being honest about their realities. However, in the Reception Office of the Refugee Centre, this is often not the case. There is a lack of communication of the applicants' rights, and as such asylum seekers often do not understand what an asylum seeker permit means and what it entitles them, they do not understand that they are entitled to have an appeal if their case is initially rejected. Alicia Raymond finds that many of her clients assume that they will get a decision eventually, not realising that they have to physically go to the Appeal board and have an appeal hearing. She explains that asylum seekers will often come to her after eight years of not understanding what is going on because the asylum process was never explained to them. This reveals that there is a lack of communication to asylum seekers by RSDO.

4.5. Department of Home Affairs: Challenges

On average, Ms Alicia Raymond explains that the success rate of her unit is almost 100%. She states that this is attributed to the fact that there is no reason for the court not to grant her a decision on the cases of her clients – this is the procedure in terms of litigation. However when one observes the success rate of asylum seekers who get granted asylum after applying, the outcome is more problematic. It has been much more difficult for new asylum seekers to get the protection they need due to efforts by the Department of Home Affairs to mitigate occurrences where people abuse the asylum system. In Chapter 12 of the 'White Paper on International Migration for 2017', the policy regarding the asylum process in South Africa is defined. Chapter 12 also suggests possible solutions to addressing the misuse of the asylum process by dishonest applicants. The white paper states that over 90% of asylum applications get rejected due to persons who seek to migrate for economic reasons but face no threat of persecution or harm. This is largely because the South African Immigration policy favours economic migrants who are highly skilled, leaving lower-skilled economic migrants with insufficient opportunities. Thus, it is prevalent for lower-skilled economic migrants to apply for asylum as they will be entitled to the same rights as South African citizens. Such occurrences have compromised the asylum system and caused many genuine asylum seekers to have their cases rejected as a result of harsher screening processes. The harshness that LGBT face can be highlighted by the case of Ghana for example where in 2018 a report released by Human Rights Watch, titled *No Choice but to Deny Who I Am: Violence and Discrimination Against LGBT People in Ghana,* found that LGBT people in Ghana are increasingly attacked by mobs or even by their family members. There are many other similar cases all across the African

continent. Therefore is it justified for the DHA to claim that over 90% of asylum seekers and refugees who are coming to South Africa have no merit for their fear of prosecution and are instead coming into South Africa to seek employment or reasons not specified in the Refugees Act? Thus with South Africa's high rejection rate, one can argue that the Department of Home Affairs largely rejects several cases without making a fair assessment of their merits.

Alicia Raymond explains that some of her clients come to her because there is no freedom of speech or freedom of political opinion and yet any asylum seeker coming to South Africa with these types of claims would not only be rejected as unfounded but rather manifestly unfounded, why? According to Alicia Raymond this is because there is an assumption that most asylum seekers are simply entering South Africa to find a job and that is the misconception. Raymond states that she has had clients who have been kidnapped and if they were to be returned to their countries of origin they would disappear. These types of cases are far less spoken about in mainstream media, unlike a case in a war-torn country where one can physically see conflict, persecution and destruction. While in countries like the Democratic of Congo where it is illegal to be an LGBT person, persecution is a lot more subtle. Therefore a RSDO may reject a claim despite LGBT asylum seekers from the DRC experiencing persecution from both the state and communities in their countries.

Subsequently, the representative from the DHA who was interviewed for this research project states that RDSO's use a country based assessment to judge the validity of claims. However, even when these assessments are done and claims are proven to be valid cases can still be rejected. This is illustrated by a study conducted by the African Centre for Migration and Society (ACMS) titled *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* found that (Amit 2012: 64):

> *A Ugandan claimant who fled persecution on the basis of sexual orientation. The RSDO claimed there was no Ugandan legislation criminalising homosexuality and no persecution of homosexuals (4Z). Country information confirmed the persecution of homosexuals and the fact that the state was considering a Bill proposing the death penalty for homosexuality.*

Therefore South Africa is choosing to turn a blind eye to the realities of human rights violations emanating from other African countries and in doing so violating human rights themselves.

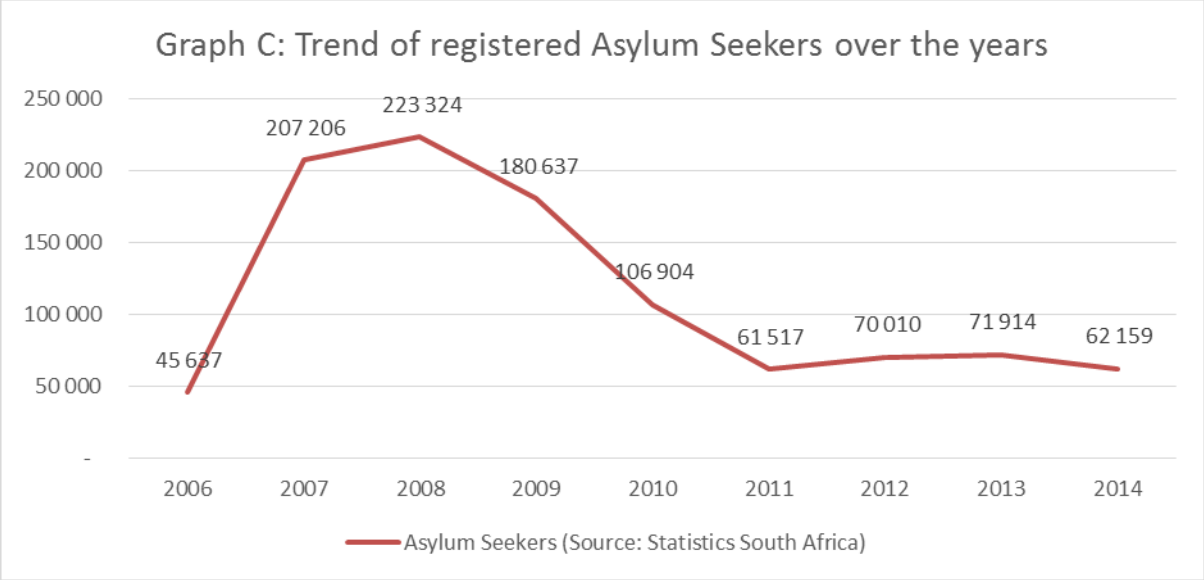
Moreover, as mentioned above, applications at the DHA can take several years to be processed. Some reasons for such delays could be attributed to a lack of resources. Furthermore, there is a

large backlog of applications and not enough RSDO's to process them. For example, according to Department of Home Affairs records in May 2015, there was a backlog of some 100 000 files which had not yet been decided on by a refugee status determination officer; and a backlog of more than 100 000 cases which had not been decided on by the Refugee Appeal Board (The Supreme Court of Appeal of South Africa Judgment 2016). Many of those who enter the Reception Office, where English or one of South Africa's other ten official languages is not their first language, find it difficult or impossible to correctly fill in a form and answer interview questions effectively (Amit 2012). Therefore, there are often a lot of baseless rejections due to miscommunication by both the asylum seekers and RSDO's (Amit 2012). This means that many asylum claims that have been rejected are often for reasons that should not have been valid.

This means asylum seekers are often stuck with temporary asylum seeker permits for many years. More challenges arise when temporary permits are kept for extended periods of time because these permits have to be renewed every six months. This leaves asylum seekers vulnerable to abuse of their rights while in South Africa if. This is because asylum seekers on temporary asylum permits have no specific rights afforded to them, meaning there are no rights that are specifically provided to them in the Refugees Act. Thus when an applicant has been granted asylum, and are thereafter given refugee status, there are specific provisions that will protect them. The Refugees Act states that refugees have all the same rights as South African citizens do. However the same is not true for an asylum seeker to whom fewer rights are afforded. Within the South African Constitution, which is an overarching piece of legislation which applies to everyone who is within the country, it is mentioned that asylum seekers are entitled to certain rights, such as the right to study and the right to work because often the reality is that asylum seekers do end up staying in South Africa for longer than 6 months on temporary permits and need to work for survival. However, it is very difficult to guarantee compliance with day to day basic needs for asylum seekers. Nevertheless, someone who makes an application for asylum and it is considered to be a well-founded claim, they will be required to fill in administrative forms, answer interview questions from the Refugee Status Determination Officers (RSDOs), and within a reasonable period of time they will get a decision of whether they have been granted refugee status or not. Where they are not granted refugee status, and where the applicant either did not have an interview with the RSDO or where the applicant had an interview but the case was rejected, they could be obliged to hold a temporary permit (issued regarding section 22 of the Act) for a long period of time.

Another big challenge facing the DHA is the issue of compliance. The DHA often struggles to comply with court orders. Lawyers like Alice Raymond handling cases of asylum seekers, will go to court, get a court order and the Reception office will refuse to comply with the court order. Alice Raymond argues that is because of the politics of bureaucracy and hierarchy within the Department itself. She explains that nobody can take any decision without instruction and obtaining instruction is often nearly impossible. For example, when dealing with court orders, the DHA's legal office is supposed to instruct the Reception office. However, this often does not happen and getting a hold of the legal office to provide the instruction is another process all on its own. Therefore, this results in the lawyers having to go back to court to argue that the DHA is not complying with the court order. NGOs and civil society organisations like Lawyers for Human Rights and the Wits Law Clinic are important promoting the human rights of refugees and keeping states accountable to they are domestic and international human rights frameworks. These organisations have been successful in fighting to reform Aliens Act to the Refugees Act in the 90's, fighting for refugees to have the right to work in South Africa and take the DHA to court when they fail to comply with they obligation. Alicia Raymond states that as a pro bono institution the resources needed to continuously go to court is taxing and gives the impression to her clients that they are not doing the job, when in fact her unit has done everything they can possible, they have gotten a court order and for the most part have been successfully, however the DHA is just not complying.

Figure 4: Graph showing the trend of registered asylum seekers in South Africa from 2006-2014



While there are generally several problems with the DHA, however, that is not to say that they have not been improvements. For example in 2017 the DHA introduced a new refugee travel document, this document will help to improve the management of refugees coming into and leaving South Africa. Moreover, from a peak of over 200 000 refugees and asylum seekers coming into the country in 2008 and 2009, the numbers have decreased drastically to 71 914 in 2014, 62 159 in 2015 and 35 377 in 2016. The department has been trying to be more organised and has been tried to implement new positive procedures. It is only with the volume of refugee and asylum seekers and with the volume of people who have specific issues that cannot be dealt with by putting you into a specific line the Department of Home Affairs still has a long way to go.

4.6. Conclusion

In conclusion, chapter four has presented a descriptive account of the findings from the policy analysis as well as interviews that were conducted. The policy analysis provided a deeper understanding of the South African policy landscape relating to asylum seekers. Additionally, the policy analysis helped to situate LGBT persons in the space of the South African refugee regime. The interviews sought a more contextualised explanation of the details provided by policy documents as well as information about the practicalities of handling LGBT asylum cases.

Chapter 5: Conclusion

5.1. Concluding remarks

In conclusion, it is apparent that written policy is not sufficient for providing human rights guarantees for LGBT persons. Preferably it is necessary for those in positions of power to actively implement existing policy. This paper has managed to highlight the manner in which South Africa handles asylum claims of LGBT individuals who are fleeing persecution from African countries where their gender identity or sexual orientation has been criminalised. Such individuals often apply for asylum with the hopes of obtaining refugee status which would allow them to legally stay in the country for 4 years and receive the same rights as South African citizens as well as the possibility of eventually gaining citizenship in the country. LGBT asylum seekers are often victimised and discriminated against based on their sexual orientation and find that even the police or higher authorities are unable or unwilling to protect them. This is particularly true in countries where it is illegal to be an LGBT individual. South Africa, having one of the most inclusive and protective laws in the world, presents itself as a safe-haven to those who face persecution in their home country. In South Africa, persecution based on sexual orientation and sexual identity is a legal basis for asylum, this is because the LGBT community falls into the category of a social group. It is stipulated in the Refugee Act that people can apply for refugee or asylum status based on "membership to a particular social group".

Despite its progressive laws, this paper finds that South Africa is not doing enough to ensure the protection of LGBT persons who face persecution in their home country. In many cases, it is dangerous to seek asylum by sexual orientation and gender identity because if the application is unsuccessful, the LGBT person will be sent back to their home country and be faced with imprisonment and sometimes death.

Moreover, it has been a lot more difficult for new asylum seekers to get the protection they seek due to the misconception by the Department of Home Affairs that persons applying for asylum seek to migrate to South Africa for economic reasons but face no real threat of persecution or harm. However, although an asylum seeker is permitted to work in South Africa for survival, the fundamental reasons for seeking asylum is based on safety and not work. These reasons are very

different to that of immigrants who may be entering South Africa to study, for business or medical reasons to name a few as opposed to someone who is forced to flee to South Africa for protection from persecution in their home country.

This paper also finds that the threshold for a true asylum case is too high when dealing with LGBT persons. The Department of Home Affairs requires that the applicant provide clear evidence to prove their persecution. This is often an unrealistic request because in countries where same-sex conduct is criminalised it is not possible to ask the police for documents showing their assault. Sexual orientation and gender identity are also not homogenous, meaning it exists in different people in different ways, for example, a gay man can appear feminine or masculine, making the standard for sexual orientation and gender identity very ambiguous. Often there is an aspect of disbelief that somebody is LGBT when he or she did not explicitly look a certain way. As such, personal bias of determination officers at the department of home affairs becomes a threat to the outcome of an LGBT asylum case.

South Africa has been considered a global leader in its treatment of refugees and asylum seekers. The Constitution provides leverage for asylum seekers and refugees despite attempts from the South African state to suppress them. Moreover, while South Africa is a signatory to several conventions and resolutions and these documents are based on compliance and consent. What makes South Africa different to other countries is that South Africa has an overarching binding Constitution that protects the rights of asylum seekers and LGBT persons.

The limitation of this study is exposed by the relative lack of representative data that may be attributed to different socioeconomic characteristics among LGBT asylum seekers. Therefore, the lack of accurate data on asylum seekers and refugees undermines a comprehensive understanding of the difficult experiences of asylum seekers when seeking protection. It is difficult to accurately gauge to what extent are the challenges faced by LGBT asylum seekers due to the lack of a comprehensive registration of LGBT as a sampling frame stipulating their economic status. Similarly, it is challenging to acquire accurate representative data about the sexual orientation of asylum seekers because they do not always disclose such information for fear of being exposed. Instead, it is common for LGBT asylum seekers to practice self-censorship when it is not clear what consequences full-disclosure would have. Thus in order to encourage open and honest dialogue, it is important for determination officers at the Department of Home Affairs to be patient with applicants and ensure that they know that their right will be protected.

An additional limitation in this study relates to the inadequacy of the sample size to represent the whole of South Africa. Instead, the findings of this research are based on qualitative statements from two interview respondents, one at the Pretoria branch of the Department of Home Affairs and another from the University of the Witwatersrand. Nevertheless, the statements collected from the interviews provide reliable evidence that serves as a small representation of the current state of South African LGBT asylum protection. This paper has found that South Africa does not live up to its human rights obligations to protect LGBT asylum seekers despite having one of the most progressive refugee policies in the world. In future, similar research studies should place more emphasis on minimising sample bias by having a more representative sample size and substantiating it with quantitative data.

5.2. Recommendations

After a careful assessment of the procedure for handling asylum cases at the Department of Home Affairs in South Africa, this report can make a few recommendations that would contribute to ensuring equal treatment for LGBT persons as specified under immigration policy. This paper has revealed that policy does not always translate into reality. Therefore the following recommendations will address aspects regarding the implementation of existing policy concerning the protection of LGBT persons seeking asylum in South Africa. South Africa's Refugee Act is an excellent piece of legislation that recognises international standards and conventions, therefore on paper, there is nothing that needs to be changed about the Refugees Act. However the implementation of the Act is problematic. This in part is due to the lack of awareness and the lack of action on this issue by the DHA. Additional, to ensure careful gender-sensitive attention, there needs to be a separate international desk that deals with LGBT asylum cases at the department of home affairs as opposed to the current systems that deal with LGBT persons using heteronormative standards of assessment.

Subsequently, the South African government has a responsibility to all asylum seekers. Therefore, they have the responsibility to ensure that xenophobic attacks do not happen in South Africa. They have the responsibility to make sure South Africans are aware that asylum seekers are not here to take their jobs, asylum seekers are not criminals, and the Constitution does not only apply to South Africa's but to all who enter South Africa. Narratives need to change if the government continues to label acts on African foreigners as crime and not xenophobia nothing will change. The government needs to acknowledge xenophobia in South Africa and work on it. Moreover, in response to the increased homophobic and anti-immigrant sentiments in South Africa, the Department of Home

Affairs could pioneer an awareness campaign in communities, offering educational training that will make the public more sensitive to the needs of those who find themselves in vulnerable situations, particularly LGBT asylum seekers. Additional, the general public needs to educate themselves by understanding what a refugee permit looks like and understand that people with that permit can work. This will also help the public to understand better the responsibility that South Africa has in protecting those who cannot defend themselves.

The Department of Home Affairs could enhance their screening process if they worked more closely with NGOs that deal with LGBT asylum cases, for example Lawyers for Human Rights or PASSOP. Such organisations could provide information that will help Home Affairs to understand the very specific needs required in vulnerable cases. This means the right questions will be asked during the screening process and the asylum applicants would be properly briefed on their rights and what options they have.

Lastly, the Department of Home Affairs should release regular statistics detailing the amount of LGBT asylum claims, rejection and acceptance rates. The lack of such data hinders several policy areas that may assist the concerned groups. For instance, the lack of data prevents a view on the relative performance of LGBT asylum seekers in the labour market, including their potential contribution to the economy.

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Appendix

UNIVERSITY OF THE WITWATERSRAND

DEPARTMENT OF INTERNATIONAL RELATIONS

LGBT Asylum Claims: The case of South Africa

Nancy Hakizimana

Student Number: 750334

Interview Questions: Department of Home Affairs

1. Does South Africa recognize asylum claims on the basis of sexual orientation?
2. What are SA obligations to LGBT asylum seekers according to our Bill of Rights/Constitution?
3. What are the department's obligations to LGBT asylum seekers?
4. Does South Africa record asylum based on sexual orientation/how is this data captured?
5. How many sexual orientation based claims are received yearly?
6. How many sexual orientation based claims are denied yearly?
7. What are the reasons for denial?
8. What are the criteria for sexual orientation based claims?
9. How are sexual orientation based claims assessed?
10. Is appeal possible and, if so what is the success rate? And are LGBT asylum seekers told of the appeal process?
11. Are case workers trained in dealing with sexual orientation based claims? If so what type of training do they receive?
12. LGBT advocacy groups and scholars have reported negative experiences from the DHA. What are some of your experiences in processing LGBT asylum seekers?
13. While we know that LGBT persons are protected in South Africa's constitution, we also know that more than 50% of South Africans are homophobic. Do you believe this homophobic rhetoric effects how case workers perceive and handle LGBT asylum seekers? Why?

UNIVERSITY OF THE WITWATERSRAND

DEPARTMENT OF INTERNATIONAL RELATIONS

LGBT Asylum Claims: The case of South Africa

Nancy Hakizimana

Student Number: 750334

Proposed Interview Questions

1. On average, how long does it take to complete the asylum seeking process?
2. What are some reasons for delays in processing asylum applications?
3. What is the success rate of cases?
4. What are some reasons given by the Department of Home Affairs for unsuccessful cases?
5. Is appeal possible and, if so what is the success rate? And are asylum seekers told of the appeal process?
6. Refugee advocacy groups and scholars have reported negative experiences from the DHA. What are some of your experiences?
7. In your opinion, does government have any responsibility towards asylum seekers? If so, what?
8. Do you think South Africa is in need of changing its current refugee regime? If yes, how?
9. Since the 1998 Refugee Act, what do you believe are some of the successes of the DHA, in terms of protecting asylum seekers?
10. What are some challenges?
11. Is there anything else that you would like to add regarding this topic?

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DEPARTMENT OF INTERNATIONAL RELATIONS

Information Sheet

TITLE OF STUDY
LGBT Asylum Claims: The case of South Africa
Researcher
Nancy Hakizimana
Department of International Relations
University of the Witwatersrand
0712623718
750334@students.wits.ac.za or nancyhakizimana12@gmail.com

Dear Participant, My name is Nancy and I am currently a full time Masters student in International Relations at the University of the Witwatersrand. I am inviting you are to take part in a research study, as part of a Master's thesis. Before you decide to participate in this study, it is important that you understand why the research is being done and what it will involve. Please read the following information carefully. Please ask the researcher if there is anything that is not clear or if you need more information.

PURPOSE OF STUDY

The purpose of this study is to investigate the criteria used by the South African Department of Home Affairs to facilitate the protection of LGBT asylum seekers. South Africa has a progressive constitutional democracy, strong Bill of Rights, strong vibrant civil society and strong institutions but the asylum process is in a dire condition. Furthermore South Africa adheres to international and national human rights frameworks that protect LGBT asylum persons. Thus, one might assume that where national and international human rights frameworks exist there would be an advantage in terms of the criteria used by the Department of Home Affairs to facilitate the protection of LGBT asylum seekers in South Africa. My research aims to prove or disprove that assumption by looking at whether the criteria used by the South African Department of Home Affairs to facilitate the protection of LGBT asylum seekers, coincide with South Africa's larger human rights frameworks/obligations.

STUDY PROCEDURES

Data collection will be done through interviews. The interview will be a one-to-one conversation in English with the researcher and will be about the criteria used by the Department of Home Affairs to facilitate the protection of LGBT asylum. The interview will be carried out by telephone or face to face. The interview will last between 30 and 60 minutes.

RISKS

There are no known risks or disadvantages of taking part, as we strive to protect your confidentiality. If you are taking part in the interview, we will send you the transcript of the interview before the analysis to allow you to ensure that you have not been misrepresented.

BENEFITS

There will be no direct benefit to you for your participation in this study. However, we hope that the information obtained from this study may help us understand the challenges and difficulties LGBT persons face in the asylum process, in South Africa.

CONFIDENTIALITY

Your responses to the interview will be anonymous. Every effort will be made by the researcher to preserve your confidentiality including the following:

- Assigning code names for participants that will be used on all research notes and documents
- Keeping notes, interview transcriptions, and any other identifying participant information in a locked file cabinet in the personal possession of the researcher.]

Participant data will be kept confidential except in cases where the researcher is legally obligated to report specific incidents. These incidents include, but may not be limited to, incidents of abuse and suicide risk.

CONTACT INFORMATION

If you have questions at any time about this study, or you experience adverse effects as the result of participating in this study, you may contact the researcher whose contact information is provided on the first page.

If you have questions regarding your rights as a research participant, or if problems arise which you do not feel you can discuss with the Researcher, please contact: Michelle Small, Lecturer in International Relations at michelle.small@wits.ac.za

VOLUNTARY PARTICIPATION

Your participation in this study is voluntary. It is up to you to decide whether or not to take part in this study. If you decide to take part in this study, you will be asked to sign a consent form. After you sign the consent form, you are still free to withdraw at any time and without giving a reason. If you withdraw from the study before data collection is completed, your data will be returned to you or destroyed.

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DEPARTMENT OF INTERNATIONAL RELATIONS

Interview Consent Form

Research project title: LGBT Asylum: The case of South Africa

Research investigator: Nancy Hakizimana

The interview will take 30 to 60 minutes. We don't anticipate that there are any risks associated with your participation, but you have the right to stop the interview or withdraw from the research at any time.

Thank you for agreeing to be interviewed as part of the above research project. This consent form is necessary for us to ensure that you understand the purpose of your involvement and that you agree to the conditions of your participation. Would you therefore read the accompanying information sheet and tick the boxes below to certify that you approve the following:

	YES	NO
● I give consent to have this interview audio – recorded.	☐	☐
● I give consent to have the Researcher use direct quotations.	☐	☐
● I will be sent the transcript and given the opportunity to correct any factual errors.	☐	
● I understand that any summary interview content, or direct quotations from the interview, that are made available through academic publication or other academic outlets will be anonymized so that you cannot be identified, and care will be taken to ensure that other information in the interview that could identify yourself is not revealed.	☐	
● I understand that any variation of the conditions above will only occur with your further explicit approval.	☐	

All or part of the content of your interview may be used;

- In academic papers, policy papers or news articles.
- On our website and in other media that we may produce such as spoken presentations.
- On other feedback events.
- In an archive of the project as noted above.

CONSENT

I have read and I understand the provided information and have had the opportunity to ask questions. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving a reason and without cost. I understand that I will be given a copy of this consent form. I voluntarily agree to take part in this study.

_____	_____	_____
Name of Participate	Date	Signature
_____	_____	_____
Principal Investigator	Date	Signature

school of SOCIAL SCIENCES

SOSS Human Research Ethics Committee

Clearance Certificate

Protocol Number:	**INTR/17/08/01**
Project Title:	**'LGBT Asylum Claims: the case of South Africa'**
Investigator's Name:	**Nancy Hakizimana**
Department:	**International Relations**
Date Reviewed:	**1 August 2017**
Decision of Committee:	**Approved / Unconditionally**
Expiry Date:	**1 August 2019**
Date:	**28 September 2017**

Head of School

Professor Mucha Musemwa

UNIVERSITY OF THE WITWATERSRAND School of Social Sciences 2017 -09- 28 14 JOHANNESBURG

CC supervisor: **Ms Michelle Small**

Declaration of Investigator

To be completed in duplicate and one copy to be returned to Ms. Rita Kruger in the School of Social Sciences, Room 152, 1st Floor, Robert Sobukwe Block.

I fully understand the conditions under which I am authorised to carry out the abovementioned research and I guarantee to ensure compliance with these conditions. If any departure from the research procedure as approved, I undertake to resubmit the protocol to the committee.

Student Signature **Date**

EXUAL ORIENTATION LAWS IN THE WORLD - OVERVIEW

ILGA, THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION

MAY 2017
ILGA.ORG



TION

ates (or parts of)	14 Y - life (prison)	14 States
5 States	Up to 14 Y	57 States
gside	'Promotion' laws	3 States
	No penalising law	

In green, yellow and orange countries, same-sex sexual acts were decriminalised or never penalised: 123 States

PROTECTION

85 States

Many States run concurrent protections

Constitution	9 States
Employment	72 States
Various	63 States
Hate crime	43 States
Incitement to hate	39 States
Ban on 'conversion therapy'	3 states

RECOGNITION

47 States

A small number of States provide for marriage and partnership concurrently

Marriage	24 States	Joint adoption	26 States
Partnership	28 States	2nd parent adoption	27 States

Separate detailed maps for these three categories are produced alongside this Overview map.

The data represented in these maps are based on *State-Sponsored Homophobia: a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, an ILGA report by Aengus Carroll and Lucas Ramón Mendos. The report and these maps are available in the six official UN languages: English, Chinese, Arabic, French, Russian and Spanish on ILGA.org. This edition of the world map (May 2017) was coordinated by Aengus Carroll and Lucas Ramón Mendos (ILGA), and designed by Eduardo Enoki (eduardoenoki@gmail.com).