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

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# **Chapter Two:** Literature Review and Theoretical Framework

## 2.1 Introduction

This chapter examines the changing scope, scale and dynamics of government policies and their implications on refugee protection in South Africa. The chapter attempts to situate the research in relation to existing studies in the field of refugee regime in South Africa. This chapter also discusses the "compliance based theory" which was used to position this research and form the theoretical framework adopted for the purpose of this study.

## 2.2 Literature Review

### 2.2.1 Refugee Policy Debate

Public policy towards refugees and asylum seekers in South Africa has provoked intense debate as "a result of ongoing economic integration, political instability and endemic poverty"[39] that today characterised the world politics. Understanding the major debates and the controversies surrounding it and its human rights implications are relevant in the current transformation and consolidation of democratic values in South Africa. Crush and Peberdy argue that South Africa's response to refugee protection is not only an issue of practical concern, but reveals how South Africans understand themselves and their relations to a global community in the post-apartheid era.[40] Peberdy also maintains that refugee policies and practice define who should be protected as a refugee or asylum seeker and those that should be excluded from protection and sometimes involves politics of resistance from different quarters.[41]

[39] Landau Loren (ed) Forced Migration in the New Johannesburg: Towards a Local Government Response, University of the Witwatersrand, 2004. p10

[40] Crush J and Peberdy, The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa, International Immigration .2000. 38 (6): 103-131

[41] Peberdy Sally Ann, Selecting immigrants: nationalism and national identity in South Africa's immigration policies, 1910-1998. Queen's University, Kingston, Ontario, Canada, 1999. p.4

Since democratic election in 1994, South Africa has been engaged in a democratisation process to establish a human rights oriented society,[42] which has affected all spheres of South African political culture. Policy debate on refugee protection has mostly centred on the responsibilities and obligations that South Africa can accept in the protection of refugees and asylum seekers in the light of the new democratic development. Sergio identifies three main tasks of state institution in dealing with refugees in their territory, which include political, assistance and protection aspects.[43] According to him, political aspect involves the enactment of national policy through legislation, defining its implications and putting in place implementation strategies by means of regulation. This enables the state to work towards refugee protection that is legal and imposes obligations on the parties involved as well as ensuring that protection is carried out through a well-defined procedure that is in compliance with the principles of international law that establishes the normative instruments. Assistance aspect involves providing the basic needs of refugees, integration and economic self-sufficiency while protection aspect includes status determination, legal protection and issuing of proper documentation including voluntary repatriation where necessary. Ndessomin Dosso in an interview confirmed that "acceptance of responsibilities to protect refugees played a major role in the debate, raised controversies and shaped the post apartheid refugee policy."[44]

Rutinwa observes that "public opinion negatively influenced refugee policy in South Africa"[45] in that refugees like other foreign nationals are portrayed with some element of negativity. This has also received extensive national media coverage and equally inspired social and political debate, which is rooted in the assumption that there is "refugee problem" in the country. The UNHCR has noted "with growing trend towards democratic experience throughout Southern Africa that governments are increasingly sensitive to

[42] Beek, I. Prima Facie asylum determination in South Africa: A description of policy and practice in Handmaker et al (ed) Perspective on Refugee Protection in South Africa, Lawyers for Human Rights, South Aferica.2001. p14
[43] Sergio Ricca, International Migration in Africa: Legal & Administrative Aspects, International Labour Organisation. Geneva.1998. p145
[44] Interview with Ndessomin Dosso, C coordinator, Coordinating Body for Refugee Community (CBRC) Braamfontein, 27th July 2005.
[45] Rutinwa Bonaventure, The End of Asylum? The Changing Nature of Refugee Policy in Africa, Refugee Survey Quarterly, Volume 21 Number 1 & 2 2002. p32

pressure from the local population to implement domestic programmes in favour of the local population rather than assistance to foreigners"[46]

Writing before the enactment of the Refugee Act, Human Rights Watch argues that "treatment of refugees and asylum seekers in South Africa does not fully comply with the international law[47]as South Africa had no legislation specifically for refugee protection. It maintains that in the absence of competent refugee legislation, the system of refugee protection was characterised by irregularities, administrative lapses and lack of institutional capacity to deal with refugee issues with due respect to human rights and human dignity. Human Rights Watch further questioned the constitutionality of the Alien Control Act (ACA) to protect refugees since the said Act contravenes many aspects of international law and standards, and had no provision for refugee protection. The ACA was part of apartheid law that violated human rights and dignity. Scholars such as Crush, de la Hunt and Peberdy emphasised greater push for legislation governing refugee protection, and recognised the inadequacy of the existing refugee determination process.[48]

Asylum seekers are vulnerable and have continued to suffer for lack of proper framework to seek asylum.[49] Lack of specific policies and law have also put refugees at risk of being mistreated and their rights infringed upon with impunity by security agents and other agents who should otherwise protect them.[50] Shacknove has drawn our attention to the fact that "asylum is crucial to the success of the emerging development strategy of good governance[51] as refugees have become part of modern society. This is because the right to seek asylum is human rights and recognised in international law as part of systematic procedure to control unusual human displacement in order to avert the incident of human tragedy.

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[46] Rutinwa Bonaventure, The End of Asylum? The Changing Nature of Refugee Policy in Africa, Refugee Survey Quarterly, Volume 21 Number 1 & 2 2002. p32
[47] Ibid
[48] Peberdy Sally Ann, Selecting immigrants: nationalism and national identity in South Africa's immigration policies, 1910-1998. Queen's University, Kingston, Ontario, Canada, 1999. p25
[49] Wachira GM, Refugee Status Determination in Kenya and Egypt, American University in Cairo Egypt. 2003. www.chr.up.ac.za
[50] Ibid
[51] Shacknove Andrew, From Asylum to Containment, University of Oxford, 1992. p517

As public debate on refugee protection attracts significant attention, the then Minister of Home Affairs, Mangosuthu Buthelezi, in 1996 appointed Green Paper Task Team headed by Dr.Wilmot James. Handmaker observes that "the Green Paper arrived at a difficult time in South Africa's history, when communities feel threatened by perceptions of rising levels of crime and economic insecurity."[52] This is further compounded by a growing "wave" of immigrants and refugees, leading to wide spread xenophobia manifested in South African public, the media and vitriolic statements against refugees and immigrants.[53] The purpose of the Green Paper was to enable the government initiate the process of formulating policies and the enactment of legislation on three categories of migration, which includes immigrants, refugees and migrant workers in South Africa. The Task Team presented their report on 13th May 1997 and recommending separate self-standing legislation for immigrants and refugees in South Africa. It also recommended "rights-based and solution-oriented immigration and refugee systems"[54] in other words, that the rights of refugees as individuals be highlighted and protected through policy and concomitant legislation.[55] It also recommended temporary protection with commitment from Southern African Development Community (SADC) countries for persons whose basic human rights are at risk in their country of origin, until such a time when they are able to return home in safety"[56] and dignity. It calls for adoption of refugee definition as contained in both the United Nations and the OAU conventions.

The report instigated some reactions from different quarters but there was agreement on the issues of rights-based approach, separate refugee and immigration law, and adoption of UN and regional instruments on refugee protection. Lawyers for Human Rights (LHR) objected the idea of laying much emphasis on temporary refugee protection. According to the organization, the emphasis was absolutely unnecessary since refugee protection was by nature temporary. The organisation maintains that, this scenario creates confusion and

[52] Handmaker Jeff, Immigration Policy: Responses in the Public Domain, Lawyers for Human Rights Refugee Project .1998
[53] Ibid
[54] Wilmot G James, Draft Green Paper on International Migration, 1997, http://www.polity.org.za/html/govdocs/green_papers/migration/migrate.html? rebookmark
[55] Marion Ryan Sinclair, International Refugee Treaties and their Implications for the south African State: Southern African Perspectives, Number 69, Centre for Southern African Studies, South Africa, 1998. p10
[56] Ibid

deterred the rights of refugees. According to LHR, this can make refugees and asylum seekers more vulnerable in the enjoyment of their rights and benefits. Other issues that provoked debate include service delivery, protecting refugees' children and detention of asylum seekers, extradition, and implementation strategies. Some of these issues are said to have being neglected in the Green White Paper that will form the basis and foundation for the debate on refugee and immigration policies in South Africa. There was also disagreement on the issue of collective protection from SADC countries, which was interpreted to mean an attempt by South Africa government to exonerate itself from its obligations and responsibilities to protect refugees. Apart from these shortcomings and concerns raised by some NGOs, the Green Paper not only triggered debates involving major key players on refugee paradigm but extensively increases public awareness and participation in immigration and refugee issues in South Africa. It also facilitated the legislative process for the enactment of the Refugee Act in 1998.[57]

Following this development, the then Minister of Home Affairs in March 1998 appointed a White Paper Task Team headed by Attie Tredoux to concretise government intentions in formulation of a refugee draft bill. The White Paper Task Team published a Draft Refugee White Paper on the 19th June 1998 and the Refugee Bill was passed by the parliament in November 1998. The Task Team emphasised the commitment of the South African government in fulfilling its international obligations towards refugees but reiterate national priorities and interest as of outmost important. According to this report;

> government does not consider refugee protection regime to be an alternative way to obtain permanent immigration into South Africa. It does not consider refugee protection to be the door for those who wish to enter South Africa by the expectation for opportunities for a better life or a brighter future. It does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin

[57] Maltou P, The Creation of Refugee Act: The South African Experience in Majodina Zonke (ed) The Challenges of Forced Migration in Southern Africa. Africa Institute of South Africa.2001. p131

> solely for reasons of poverty or other social, economic or environmental hardships.[58]

The debate on who qualifies as a genuine refugee requiring protection, and how to separate refugees and asylum seekers from economic migrants, who are ineligible under international standards for refugee protection have been going on in South Africa since 1993. It has been difficult to identify genuine refugees considering the deficiencies in international refugee law. An attempt to make such distinctions has sometimes proved abortive as a result of complexities and complications surrounding asylum claims and various reasons that made people to flee their countries. This may have resulted in rejection of genuine refugees in favour of economic migrants who may avert refugee law and use other corrupt means to have their ways. There are also calls for the expansion of the term persecution and well-founded fear as contained in the 1951 international refugee law that seems to interpret persecution as coming from only the government or its agents alone. This made states ensure that those who have been granted protection are genuine refugees. Apart from that "if not convinced that interest of states are taken into account by the international refugee law, then in practice, despite whatever formal standards are proclaimed, international law will not govern the way refugees are treated and protected in their country of asylum."[59]

Hathaway argues that many governments have viewed the admission and protection of refugees as a shortcut to obtaining permanent residence by some fraudulent immigrants. But, Burton concluded that "refugee protection is neither a means to subvert legitimate immigration objectives and purposes, nor to mitigate transgressions or vicissitudes outside the parameter of refugee law."[60] In the case of South Africa, he observes that the debate on the protection and draft of refugee law focused on how South Africa can play a prominent role in international arena with respect to international law as well as pursue and protect

[58] White Paper for Refugee Affairs Task Team, Draft Refugee White Paper http: www. polity.org.za/html/govdocs/white_papers/refugees.html? rebookmark=1
[59] Hathaway, J. Can International Refugee Law be made Relevant Again? Kluwer International, Netherland, 1997.p.xxiv
[60] Burton Joseph, Asylum or Abuse? The Refugee Regime in South Africa in Majodina Zonke The Challenges of Forced Migration in Southern Africa, Africa Institute of South Africa. 2001. p139

national self-interest. In contrast, Jeff Crisp has argued that "respect for the principles of international refugee law is not inconsistent with the pursuit of national interest"[61] He insisted that, the OAU convention was introduced by African governments in order to ensure that cross border population displacement were managed in a predictable manner and in a way that safeguard national security and inter-state interest. Daniele et al state that "safeguarding the right to seek asylum will thus not only protect the people at risk in the short-term, but will harness the self-interest of states so that attention is focused on the conditions which led to their flight."[62] Gurowitz shares this view while pointing out that human rights can be linked to refugee protection to shape the debate on refugee protection and challenged the idea that states have the prerogative to protect or not to protect refugees in their territory.[63] On this ground, Hathaway argues that refugee law is a mechanism by which governments agreed to compromise their sovereign rights to independent action in order to manage complexities, certain conflicts, promote decency and avoid catastrophe.[64] According to him, refugee law was exclusively established to afford states a politically and socially acceptable way of maximizing border control in the face of inevitable involuntary migration. States adopt some restrictive migration control system to avoid influx of refugees and asylum seekers in their countries. This has affected the extent of protection received by refugees and asylum seekers in South Africa while issues of national interest and how refugees can be of good benefit to South Africa still dominate the debate.

### 2.2.2 Acquiring Refugee Status in South Africa.

The right to acquire asylum and refugee status is human rights though humanitarian issues may be taking into consideration while making certain decisions. State may take some security considerations viewing social and economic consequences, with the result that governments make political decisions about refugees, which may not always concur with

[61] Crisp Jeff, African Refugees: Patterns, Problems and Policy Challenge, 2000 http:/www.jha.ac/articles/u028.htm
[62] Daniele Joly et el, Refugee: Asylum in Europe? Minority Rights Publications, London.1992. p.vii
[63] Gurowitz, A. International Law, and Migrant Rights in Reus-Smit, The Politics of International Law(ed) Cambridge University Press, South Africa, 2004. p139
[64] Hathaway, J.C et al, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection, Harvard Human Rights Journal, Cambridge.1997. p116

humanitarian principles.[65] One of respondents interviewed from Lawyers for Human Rights confirmed that apartheid government did not recognize refugee protection and as such had no instruments to effect international standards and law that ensure such protection. During this period, Africans who entered South Africa to seek asylum were not protected irrespective of the fact that they were running away from persecution in their home countries while those from Europe was easily absorbed or assimilated into citizenship. The movement of both black South Africans and migrant workers from the neighbouring countries such as Botswana, Mozambique and other African countries were restricted while black South Africans were confined in the homelands through pass law.

The Department of Home Affairs had put in place an ad hoc administrative procedure for the determination of asylum and refugee status in South Africa in 1993 with a view to comply with international obligations. International refugee law accords full responsibility to whichever state refugees flee to irrespective of state's ability to offer them any meaningful protection, and the development and security implications[66] and states are mandated to meet their responsibilities to refugees. This has raised some debate on policy implication of states to comply with refugee law since states vary in capacity and ability to fulfill their obligations. Although, all states under international law are regarded as equal irrespective of their size and potential. But in practice, states are distinct in nature and their ability differs which invariably affects compliance with their international obligations. Though refugee norms have universal validity, but in reality the content, focus and complexity of national refugee legislation vary from country to country.

When an individual flees his or her country on account of persecution and crosses international borders to seek asylum, the person must report to the government department responsible for granting asylum status. The South African Refugee Act defined an "asylum-seeker" as a person who is seeking recognition as a refugee in the Republic.[67] In South Africa, the Department of Home Affairs grants such a person section 23 permits

[65] Daniele Joly el at, Refuge Asylum in Europe? Minority Rights Publications, London .1992. p32
[66] Daniele Joly el at, Refuge Asylum in Europe? Minority Rights Publications, London .1992. p32
[67] Willem.H. Olivier, The New Asylum Law in South Africa, Journal of South Africa Law 2002-4. p654

while at the port of entry under Immigration Act of 2002 before such a person is allowed into the country. Article 31 of the 1951 UN Convention states that:

> The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from the territory where their life or freedom was threaten …enter or are present in the territory without authorisation, provided they presented themselves without delay to the authorities and show good cause for their illegal entry or presence.[68]

But if they are already in the country they should report to the Refugee Reception Office (RRO) within 14 days of their entry into the country to complete Eligibility Determination Form for Asylum Seekers in duplicates and the Refugee Reception Officer will issue section 22 permits to the applicant. This form contains comprehensive personal data and information concerning the applicant and may affect the outcome of the application. This application is the process through which an asylum seeker may wish to be recognised as a refugee. The application is lodged with the Refugee Reception Officer whose duties include:

a) accepting the application form from the applicant, see to it that it is properly completed and, where necessary, assist the applicant.'[69]
b) conducting an enquiry to verify information furnished by the applicant, if necessary.' and[70]
c) seeing that unaccompanied children and mentally disabled persons who appear to qualify for refugee status are assisted in making an application.[71]

The section 22 permit allows an asylum seeker the right to work and study, and to remain in the Republic. Until they have been granted appropriate asylum seeker's permit or

[68] Article 31, 1951 UN Convention Relating to the Status of Refugees.
[69] Lee Anne de la Hunt, Tracking Progress: Initial Experience with the Refugee Act 103 of 1998.2002. p13
[70] Ibid
[71] Ibid

refugee status according to the South African Refugee Act, they are prone to suffer arrest, detention, and non-access to services or even deportation. Usually adjudication process takes about 180 days after submitting application form to the Refugee Reception Office while the applicant is expected to appear for an interview with Refugee Status Determination Officer (RSDO) on a specified day normally within 30 days of the asylum application being completed with the RRO. This is to allow the applicant the freedom to defend his/her application and claims as well as enable the RSDO the opportunity to interrogate the applicant under which decision may be based for approval or rejection of application for refugee status. The applicant may be allowed to have an interpreter, legal representative or counsel who may assist the applicant substantiate or defend the asylum claims. Refusal of applications is usually communicated to the applicant in writing stating constitutional and fundamental issues for the denial of refugee status. Wachira argues that states have the responsibility to establish:

> fair and efficient status determinations to ensure refugees are identified and granted protection, incorporating refugee rights and protections into national legislation, issuing identity documents, and abiding by international obligations to protect the physical security of refugees and asylum-seekers.[72]

South African is expected to provide a fair, impartial and effective procedure for asylum and refugee determination process. There are five regional Refugee Reception Offices across the country and specifically located in Johannesburg, Pretoria, Cape Town, Durban and Port Elizabeth for the processing of asylum and refugee applications. These cities have officially designated ports of entry and departure from South Africa. From 1993 till the coming into effect of the Refugee Act and the Act Regulation, applications were processed with regard to section 41 of the Alien Control Act of 1991 though not in conformity with the international law. The Refugee Status Determination Officer was responsible for taking decision on the approval or disapproval of applications. He or she makes proper investigation on the application before making recommendation regarding the application

[72] Wachira, George Mukundi, Refugee Determination in Kenya and Egypt, University of Pretoria. South Africa. p.21

to the Standing Committee for appropriate decision on the granting of status. At the initial stage of refugee protection regime in South Africa, the applicant is never granted the right to defend the application or be represented before the Standing Committee though the decision of the Standing Committee could be challenged through the Appeal Board, which is responsible for consideration of appeals by erring applicants. This state of affair has changed over the years as asylum seekers are now granted interviews regarding their applications or have legal representation where necessary.

The Refugee Act came into effect on 1 April 2000 to govern the rights and obligations of asylum seekers and refugees.[73] According to Handmaker, "ensuring adequate protection of refugees in South Africa has been no easy walk"[74] as both the Act and its regulation came with promises and many deficiencies. Handmaker acknowledges that development and implementation of workable structure for administrating the regime of refugee status has been complicated with numerous factors including capacity building, lack of qualified staff and resources, administrative lapses, corruption and fraudulent asylum claims which have undermined the system of asylum process and created backlog of application in the whole progression. These are part of the ongoing challenges of democratic transformations since apartheid did not leave any legacy for refugee protection.

An effort to establish a credible asylum procedure in the post-apartheid era is sometime complicated and in conflict with other national priorities and government has been unable to address refugee problems. The government faces the challenges of ensuring proper balance between the need for fairness and for efficiency. There have been important questions whether the victims of violence and persecution by non-state actors should be protected under refugee law. These actors include militias, paramilitary groups, separatist rebels, bandits, mafias, violent husbands etc. According to UNHCR Handbook on Procedure and Criteria for Determination of Refugee Status "while persecution is normally

[73]Howie et al, Judgment in Home Affairs v. Watchenuka, Supreme Court of South Africa, 2003 http: www.lhr.org.za/refugee/decisions.php

[74] Handmarker Jeff, On Easy Walk: Advancing Refugee Protection in South Africa in Crush and McDonald Africa Today: Evaluating South African Immigration Policy after Apartheid, Africa Today Consultants INC. south Africa.2002. p91

related to the action by the authorities of the state, it may also emanate from some section of the population, if the acts are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."[75]

When a refugee status is granted to an applicant which valid for two years though renewable, the individual or her dependents "enjoys various rights as specified in section 27 of the Refugee Act, which include the right to seek employment, and the right to receive basic health services, primary education"[76] and other services which government provides for its citizens from time to time. Refugee status also allows a refugee to apply for identity card within 14 days as well as United Nations Convention Travel document (UNCTD) if required. If the application for refugee status is rejected the applicant is entitled to lodge an appeal to the Appeal Board for redress. In case the appeal is rejected, the applicant is forwarded with a letter to leave the country within a specified period of time after which he/she may be declared a prohibited person and may be removed from the Republic.

A recognised refugee can apply for permanent residence five years after being recognised as a refugee but must apply for certification to the Standing Committee for Refugee Affairs (SCRA) showing good cause that he/she will remain a refugee indefinitely and cannot return to his country of origin in foreseeable future. Approval of certification by the SCRA gives the refugee a formal authorisation to lodge an application for a permanent residence to the Department of Home Affairs. The SCRA considers the application and look at the authenticity and reasons why the applicant wants to reside permanently in the country as well as political condition in his/her home country and what is expected to happen on return. The greatest challenge facing South Africa is how to establish credible and effective asylum determination procedure that guarantees respects for asylum standards, human rights and prevent incidence that will put refugees and asylum seekers in indeterminate state without require permits for a long period of time.

[75] Volker Turk and Nicholson Francis, Refugee Protection in International Law: An Overall Perspective in Erika Felleret (ed) Refugee Protection in International Law: UNHCR'S Global Consultation s in International Protection, Cambridge Press. United Kingdom. 2003. p59

[76] Wachira, George Mukundi, Refugee Determination in Kenya and Egypt, University of Pretoria. South Africa. p.23

### 2.2.2 South African Refugee Law

Since the coming into effect of the new constitutional dispensation, South Africa has become a refugee-receiving country.[77] Rights of refugees and asylum seekers have been legally recognised and enshrined in the national legislation. The South African Refugee Act is meant to:

> give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers, to regulate applications for and recognition of refugee status, to provide for the rights and obligations following from such status, and to provide for matters connected therewith.[78]

Post-apartheid South Africa has witnessed a difficult task in formulating refugee law and proactively being a country without a refugee background, policies and programmes but undermined refugee protection and human rights. According to Smith Timothy "the making of Refugee Act in South Africa was a battleground in which there were many players."[79] These involve the Executive, the Parliament, the Department of Home Affairs, and United Nations High Commissioner for Refugees, educational institutions and civil society and other shareholders, which played a central role in the whole process. According to Handmarker, Lee Anne de la Hunt, and Klaaren "the policy process of formulating refugee law in South Africa, has been controversial, both in making, the final product and its implementation.[80]"The government Green Paper, the Draft Refugee White Paper and the Draft Refugee Bill are the precursor and resulted in passing of the Refugee Act by the parliament on November 1998 and "becoming an Act when the president signed it into law on 2 December 1998."[81]

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[77] Willem H. Olivier, The New Asylum Law in South Africa, Journal of South African Law, 2002-4. p650
[78] Republic of South African, Refugee Act 130 of 1998.
[79] Smith Timothy R, The Making of the 1998 Refugee Act, Consultation, Compromise and Controversies, University of the Witwatersrand, 3003
[80] Handmarker, de la Hunt, and Klaaren, (ed) Perspective on Refugee Protection in South Africa, Lawyers for Human Rights. South Africa .2001
[81] Maltou P, The Creation of Refugee Act: The South African Experience in Majodina Zonke (ed) The Challenges of Forced Migration in Southern Africa. Africa Institute of South Africa.2001. p131

The 1998 Refugee Act incorporated the 1951 UN, 1969 OAU Conventions and 1948 Universal Declaration of Human Rights instruments as stipulated in Chapter 1, section (6) of the Act. It state thus, this Act must be interpreted and applied with due regard to-

a) The Convention Relating to the Status of Refugees (UN, 1951);
b) The Protocol Relating to the Status of Refugees (UN, 1967);
c) The OAU Convention Governing Specific Aspect of Refugee Problems in Africa (OAU, 1969);
d) The Universal Declaration of Human Rights (UN, 1948); and
e) Any other relevant convention or international agreement to which the Republic is or become a party.[82]

The Act was seen as an expression of government legal and policy framework on forced migration that formed the foundation for the protection of refugees and asylum seekers in democratic South Africa. Ralph highlights that "the Refugee Act is a product of a particular historical process, and articulates various concern of South African nationhood and some fears in the new democratic culture"[83]

In a nutshell, the enactment of the Refugee Act means that South Africa has officially accepted refugees and asylum seekers into the country. It also provides for the reception of asylum seekers into the country, regulate application for and recognition of refugee status, and provide for the rights and obligations, which emanate from such status.[84] The paradox is that refugees and asylum seekers still continue to suffer in South Africa even when the Act was enacted to protect their rights. Many writers and critics alike have commented on the outcome of the Refugee Act and its accompanied regulation that came into effect in 2000. According to Hunt "the drafters of the Act seems to have been unable to move away from a paradigm based on outdated notion of state sovereignty within which immigration is

[82] Republic of South African, Refugee Act 130 of 1998.
[83] Inlde Ralph, Refugee Convention at 50: Forced Migration Policy at the Turn of the Century in Journal of Refugee Studies. Oxford University Press. Volume 14. (14) 2001. p141
[84] Majodina Zonke,(ed) The Challenges of Forced Migration in Southern Africa, African Institute of South Africa, South Africa.2001p7 ( Also see Sisulu, L.N,2001)

seem as a threat to state security."[85] She argues that by acceding to the international refugee treaties and other human rights instruments, South Africa in effect surrendered a small measure of its sovereignty. She therefore emphasised the need for South Africa to move away from immigration control to immigration management in relation to refugee protection.

Legal recognition not only forms an integral part of ensuring that refugees can claim their basic rights but also become the basis for an awareness and the pursuit of rights which refugees can enjoy in accordance with the international law. Okoth-Obbo argues that development of national refugee legislation should be judged in practice in terms of how it advances or fails to advance the expansion of refugee rights in relation to other national priorities.[86] Okoth-Obbo further maintains that the enactment of Refugee Act has a strong imperative implication in promotion of human rights and democratic values as to give refugees a humane treatment in South Africa.

Chapter five of the South African Refugee Act stipulates the rights and obligations of refugees; thus refugee-

a) is entitled to formal written recognition of refugee status in the prescribed form;
b) enjoys full legal protection, which includes the right set out in Chapter two of the constitution and the right to remain in the Republic in accordance with the provisions of the Act;
c) is entitled to apply for an immigration permit in terms of the Alien Control Act, 1991, after five years continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.
d) is entitled to an identity document referred in Section 30;

[85] Lee Anne De La Hunt, Refugee & Immigration Law in South Africa in Crush. J. (ed) Beyond Control: immigration and Human Rights in a Democratic South Africa, IDASA & Queen's University. Canada .1998. p140
[86] Okoth-Obbo, The experience and policy issues in Southern Africa in Majodina, The Challenges of Forced Migration in Southern Africa, Africa Institute of South Africa, 2001

e) is entitled to South African travel document on application as contemplated in Section 31;
f) is entitled to same basic medical services and basic primary education which inhabitants of the Republic receive from time to time.[87]

The National Consortium for Refugee Affairs and the South African Human Rights Commission called for "public education and awareness campaigns in order to foster acceptability with regard to refugee protection and understanding of their plight and rights."[88] According to this view, there is need to reduce the incidence of xenophobia and intolerance in the new South Africa against refugees and other immigrants. This is to ensure that South Africans understand and appreciate people from other countries despite cultural and racial differences. There is also need to integrate refugees and asylum seekers in the country to enable them contribute in the development of South African society.

The issue of the so-called refugee producing countries and non-refugee producing countries has created dichotomy in terms of asylum and refugee determination by the Department of Home Affairs. Many analysts believe that such practice is contravening the principle of asylum as applicants from the said refugee none producing countries are denied right to seek asylum out-rightly and without proper examination of their claims as whether they are well founded. For instance the submission of Zimbabwe Solidarity Forum to the Department of Home Affairs indicates that|

> South Africa is denying access to political asylum to thousands of Zimbabweans seeking to escape persecution. Of the 5,000 applications for political asylum filed till August 2005, fewer than 20 Zimbabweans have actually received political asylum in South Africa. There is estimated backlog of more than 180 000 asylum seekers.[89]

[87] South African Refugee Act 108 of 1998.
[88] Geddo Bruno, Durable Solution to the Refugee Problems: UNHCR'S Regional Strategy for Southern Africa in Handmaker et al, Perspective of Refugee Protection in South Africa, Lawyers for Human Rights, South Africa, 2001. p67
[89] Zimbabwean Refugee Forum, August 2005

Though this allegation has been denied by the Minister of Home Affairs, Mapisa-Nqakula on the question and answer forum organised by the Department of Home Affairs to address NGOs and forced migrants on the concerns and problems of the refugee communities on the 5th of October 2005 at Metropolitan Centre in Johannesburg. The minister said that though South Africa is facing many challenges regarding protection of refugees and asylum seekers in the country but her administration is working hard to see that refugees and asylum seekers get proper protection. This according to her was part of her department's decision to organise the forum which was meant to hear directly from refugee community on their major worries and concerns in the country regarding protecting their rights. This activity said will help her department know how to improve their services to the public.

Article 3 of the UN 1951 Refugee Convention and Article 4 of the 1969 OAU Convention specify non-discrimination in the determination procedure and that individual cases should be examine on their own merit without discrimination as religion, race, sex or country of origin.[90] The Southern African Migration Project (SAMP) in 2002 reports that 85 per cent of positive decisions on application are being decided in favour of three countries which until recently are in a state of war and these include Angola, Democratic Republic of Congo and Somalia.[91]

**Table: 2.1 Approved Applications 1995-April 2001**

| **Country** | **Number** | **% Total** | **% Applications Approved** |
|---|---|---|---|
| Somalia | 5,330 | 31.0 | 89.5 |
| DRC | 4,886 | 28.4 | 63.6 |
| Angola | 4,471 | 26.0 | 65.2 |
| Burundi | 941 | 5.8 | 46.3 |
| Congo-Brazzaville | 661 | 3.8 | 40.9 |
| Rwanda | 604 | 3.5 | 50.2 |
| Others | 305 | 1.5 | |
| **Total** | **17,198** | **100.0** | **26.7** |

[90] Timngum D A, Socio-economic Experience of Francophone and Anglophone Refugees in South Africa: A Case Study of Cameroonian Urban Refugees in Johannesburg, University of the Witwatersrand. 2001. p18
[91] Southern African Migration Project, Evaluating Refugee Protection in South Africa, Migration Policy Brief, 2002. No.7

**Source: UNHCR/Department of Home Affairs**

Hence, Govender observes some contradictions between South African refugee policy/legislation/regulation, and the implementation and practices, give room to violation of the provisions of the Refugee Act with impunity.[92] Neither South African Refugee Act nor the regulation made any distinction between refugee producing and non-producing countries as purported to be practiced by the Department of Home Affairs. The refugee law stipulates treatment of all asylum seekers and refugees equally with regard to the authenticity of their asylum claims. In the same report, majority of rejected applications are from four countries namely India, Senegal, Pakistan and Nigeria.

The study of Hunt shows that South Africa should "provide for consistent treatment of asylum seekers and protect the rights of refugees.[93] This according to her must reflect a growing human rights culture and respond to forced migration. Hunt argues that South Africa has been unable to achieve adequate protection of refugees and asylum seekers due to lack of political will as South African government faces the tension between meeting the needs and expectations of its citizens and its obligations towards refugees. This has raised a serious debate considering government attempt to alleviate poverty and unemployment in the post-apartheid dispensation and the fulfillment of its commitment to international law. In conclusion, as South Africa work towards building a free and democratic society capable of maintaining international commitments, there is need to have a new look on South African's perception of refugees and asylum seekers in the country which will go a long way to influence the protection of the rights of refugees.

### 2.2.3 Refugees and Human Rights

Wilson describes human rights as "the most globalise political values of our time"[94] which can be applied in all spheres of human endeavour. Human rights have no nationality; they

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[92] Govender V, Law and Socio-Economic Development with Special reference to Force Migration and Refugee in South Africa, seminar presented to the Forced Migration Studies of the Graduate School for the Humanities and Social Sciences, University of the Witwatersrand, 2000

[93] Hunt, Refugee and Immigration Law in South Africa in Crush (ed) Beyond Control: Immigration and Human Rights in a Democratic South Africa, IDSA &Queen's University, Canada. 1998. p126

[93] United Nations Charter 1948

[94] Wilson Richard, (ed) Human Rights, Culture and Context, London, Plut Press. 1997

are universal, indivisible and inherent in people because they are human.[95] The Universal Declaration of Human Rights was adopted as common standards to secure effective recognition and observance of human rights.[96] Melvin Weigel correctly draws our attention to the fact that:

> in the post-war and postcolonial eras, there have been a variety of international human rights instruments. For most part, they do not distinguish between citizen and non-citizens with respect to the most fundamental rights. Once again there is a balance, since it is inherent in the nation-state system that some persons will be citizens and others will not.[97]

South African democracy has "experienced serious challenges with regard to honouring the democratic ideals set out in the constitution,"[98] and defending international human rights standards specified in the government policies documents relating to migration and refugee protection. These debates have focused on human rights and constitutionality of the statutory framework concerning immigration, refugee status and citizenship, and how to share the dividends of democratic struggle and at the same time protect the vulnerable groups including refugees. Human rights paradigm which forms the benchmark for South African constitution provide an objective, coherent and consistent regime in granting international protection to those who should be accorded refugee status. Rendel noticed that history of rights "is struggle to gain rights, struggle to retain rights and struggle to regain rights"[99] and continues to be a struggle without ending. Mayotte argues that "a basic awareness and understanding of human rights among displaced populations can be empowering."[100] In the same vein, Bayefsky and Fitzpatrick assert that "invoking the language of human rights by victims of displacement can help bolster prevailing protection

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[95] Howie et al, The Supreme Court of Appeal of South Africa, The Minister of Home Affairs & others v Watchenuka & others. Case no: 10/2003 http: www.lhr.org.za/refugee/decisions.php

[96] Robinson M, A Human Rights Message, Ministry of Foreign Affairs Publishers. Sweden .1998. p10

[97] Weigel Melvin, South African Immigration Law in a Democratic South Africa in J. Crush, (ed), Beyond Control: Immigrant and Human Rights in a Democratic South Africa, Cape Town: South African Migration Project.1998. p93

[98] Crush, (ed), Beyond Control: Immigrant and Human Rights in a Democratic South Africa, Cape Town: South African Migration Project.1998. p118

[99] Rendel, M, Whose Human Rights.Rrentham Books Limited, England. 1997.

[100] Moyette.J, Disposable People? The Plight of Refugees, Orbis Books, Maryknoll.1992. p5

efforts."[101] According to Singh "rights are essential for the adequate development of human personality and human happiness and progress."[102] The 1951 Geneva Convention guarantees the obligations of states, which grant refugee status to assist refugees including providing employment, housing, education, public relief and all aspects of health and social security.[103] The UN Universal Declaration of Human Rights also states what constitute satisfactory living condition in Article 25 (1):

> everyone has the rights to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his/her control.[104]

Human Rights NGOs like Amnesty International and Human Rights Watch have made governments know that refugee protection is as important as other national priorities and have always called on states to protect and uphold their obligations to refugees. According to Amnesty International "refugee rights and basic human rights are inextricably linked."[105] They argue that all aspects of the refugees experience are of central importance to the core mandate of the UNHCR[106] and that violation of human rights necessitated refugee movement and consequently imposed some obligations on the receiving countries to protect the fundamental rights of refugees. Guys Goodwin-Gill has further highlighted that the 1951 refugee convention "is a regime premised upon a particular strong context of human worth, on the individual's entitlement to respect for his or her dignity and integrity

[101] Bayefsky A. and Fitzpatrick J, Human Rights and Forced Displacement, Martinus Nijhoff Publishers, Hogue.2000.
[102] Singh. Nagrendra. Enforcement of Human Rights in peace & war and the Future of Humanity. Nartinus Publishers. India. 1986.
[103] Joly Daniele et al, Refugee Asylum in Europe? Minority Publications. London 1992. p47
[104] Universal Declaration of Human Rights http://www.un.org/Overview/rights.html
[105] Amnesty International, Refugees: Human Rights Have No Borders, Amnesty International Publications, United Kingdom. 1997.p29 ( see also Volker Turk and Nicholson Francis in Erika Felleret, 2003)
[106] Towle Richard, Human Rights Standards: A paradigm for Refugee Protection? In Bayesfsck and Fitzpatrick (ed), Human Rights and Forced Displacement, Martinez Publishers, Netherlands. 2000.

as a human being."[107] Amnesty International also maintains that though there may be divergence of interest by various groups working for refugees "yet the struggle for the rights of refugees is an integral part of the broader campaign for human rights, and international human rights standards provide authoritative tools and powerful mechanisms to support the protection of refugees.[108] Both Amnesty International and Bayefsky saw human rights as "central across the spectrum of the refugee problem, from departure, through refuge, to solution."[109] Bayefsky further elucidates that enjoyment of human rights are crucial to the survival of refugees and asylum seekers in their countries of refuge while Fitzpatrick observes that refugees have problems accessing their rights due to "lack of awareness and understanding of various human rights principles and structural problems, such as reaching individuals or institutions with the ability to provide the necessary assistance"[110]

In effect, Towle believes that the attempt to separate the bond between human rights and refugee protection will be extremely difficult because human rights have become the major strategy to secure the rights of refugees. He maintains that refugee protection "is suited within a coherent, principled and legal framework based on human rights principles."[111] Refugee protection is therefore not in isolation from human rights but form an essential part of human rights and should be integrated within the politics of rights and democracy in South Africa.

There have been contestations between the Department of Home Affairs and NGOs on the applicability of the international law ratified by South Africa in terms of refugee protection. These debates include issues relating to 1998 Refugee Act and the constitution,

[107] Guys Goodwin-Gill, The International Protection of Refugee: What Future: International Journal for Refugees Law. Volume 12. 2000. p3
[108] Amnesty International, Refugees: Human Rights Have No Borders, Amnesty International Publications, United Kingdom. 1997.p29 ( see also Volker Turk and Nicholson Francis in Erika Felleret, 2003)
[109] Bayefsky Anne F., Human Rights and Forced Displacement, Martinus Publishers, Netherlands. 2000. (ix) ( see also Amnesty International, 1997)
[110] Fitzpatrick J, Human Rights Protection for Refugees, Asylum Seekers and Internally Displaced Persons: A Guide to International Mechanisms and Procedures. Transnational Publishers, Inc. Ardsley. 2002.
[111] Towle Richard, Human Rights Standards: A paradigm for Refugee Protection? In Bayesfsck and Fitzpatrick (ed), Human Rights and Forced Displacement, Martinus Publishers, Netherlands. 2000. p27

international refugee standards and human rights instruments. Undoubtedly, a clear distinction needs to be made between policy documents, implementation mechanism and the implications of these documents and their effects in practice on the lives of refugees and asylum seekers. These divergences have attracted sentiments from different quarters raising arguments because its interpretations are elusive and still evolving. The South African Human Rights Commission has observed that Immigration Law and policies including the Refugee Act are not appropriately applied. According to the Commission, people are wrongly detained and the law enforcement agencies have not fully assimilated the implications of the new democratic order.[112] Majodina argues that|

> human rights protect every individual both national and non-nationals as uphold in the South Africa constitution and the Bill of Rights in the present constitutional order. South African Refugee Act provided full legal protection as demanded by the international instruments namely, the 1951 UN convention and its 1969 OAU counterpart but the main problem is meeting these obligations.[113]

According to her, the post-apartheid government in respect to police and security service has not fully embraced the new constitutional and political realities that the transformation process is making in the country but do still operate similar to apartheid government. For instance, South African Security Services and police in particular are still based on immigration control rather than management and uses force in their operations. She also acknowledges remarkable progress made in the formulation of policies and law meant to protect refugees and asylum seekers but regrets that implementation has always been the problem resulting in the abuse of the rights of refugees and asylum seekers in the country. According to Daniele, the right to seek asylum has come under threat from the actions of states in the past decade, but has been defended by concerned individuals and organisations and, in particular, by those concerned with the relationship between democratic rights,

[112] Bhengu Charity, Illegal Immigrants: A dilemma for South Africa, Sowetan. 2002
[113] Majodina Zonke, Deputy Commissioner, South African Human Rights Commission in an interview on 11 August 2005

human rights and the rights of asylum.[114] Human rights should therefore not only be recognised in law but also respected in practice[115] in South Africa.

## 2.3 Theoretical Framework

### 2.3.1 Compliance based-theory

One of the major problems facing the international community is how states can effect compliance with various international laws in their operations. Aldrich argues that "compliance in practice continues to fall short of reasonable expectations, and the law itself is less developed with respect to the promotion of compliance."[116] He maintains that non-compliance with the standards of international law brings the law into disrepute. The United Nations recognizes the importance of compliance with the rules of international law and respect for human rights as a prerequisite for maintaining international peace and security. It has always called on states to work individually and cooperatively for greater compliance with the standards of international law.

Several authors have attempted to provide explanations for compliance with international law. Prominent among them and relevant to this research are Aldrich (1993), Dugard (2000), Guzman (2002) and Gurowitz (2004). According to Guzman "states are rational and act in their self-interest, and are aware of the effect of international law on their behaviour."[117] Guzman's theory claims that by entering into an international agreement, the state offers its reputation as collateral and therefore there should be appropriate mechanisms that sanction states for violating or not complying with international law. This theory explains why states obey international law in some instances and undermine or violate the same in other. This explains why states comply with international law despite the weakness of enforcement mechanisms. Its importance derives from the position it assumed between the international law theories and those of international relations, and an

[114] Daniele Joly, Refugee Asylum in Europe? Minority Rights Publication.1992. p36
[115] Segale Tebogo, Forced Migrants and Social Exclusion in Johannesburg in Landau Loren (ed) Forced Migrants in the Johannesburg: Towards a Local Government Response, University of the Witwatersrand. 2004. p46
[116] Aldrich, GA. Compliance with the Law: Problems and Prospects in Hazel Fox et al (ed) Effecting Compliance: Armed Conflict and the new law, volume 11, 1993. p3
[117] Guzman A.T, A Compliance –Based Theory of International Law: California LAW Review , University of California, Vol.90, 2002, p1823-1887

understanding of the relationship between international law and state actions.[118] This theory emphasises the need for states to comply with their obligations once they have entered into international agreements, as that will have far reaching implications on their reputations and future engagements. It thus argues that by developing and preserving a good reputation states are able to extract greater concession for future engagements.[119] Countries are keen not to tarnish their international image and colour world opinion on their deficiencies in complying with their agreements. Guzman sustains that the compliance-based theory is built upon the institutionalist theory and has certain elements that are consistence with neo-realism and liberal theory. Compliance-based theory therefore saw national law as those promises and obligations that make it materially more likely that a state will behave in a manner consistent with those promises and obligations than would otherwise be the case."[120]

According to Dugard, international law is "essentially made up of treaties, reflecting the express agreement of states and custom, which comprise those rules of international conduct to which states have given their tacit consent.[121] He contends that states acting through their governments recognise and comply with international law for a wide range of reasons. These include an interest, either selfish or altruistic, in the maintenance of peace and good order. Secondly, an acceptance of the legitimacy of the rule of international law and country's reputations both at home or abroad and thirdly, the realisation for the need for co-existence and fear of diplomatic, economic, political, cultural and sport isolation. In conclusion, he maintains that states comply with international law for reasons unrelated to sanction. In this respect, he argues that "international law is not binding because it is enforced, but that it is enforced because it is already binding"[122] In my view, I differ a bit with Dugard as sanction has been widely recognised as one of the reasons that motivate states to comply with the international law when they realises its implications.

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[118] Nartea Alexandru, Compliance with International Human Rights and Refugee Rights Principles. A Case of Myanmar and its Refugees in Thailand, Linkoping University, Sweden.2003. p9
[119] Nartea Alexandru, Compliance with International Human Rights and Refugee Rights Principles. A Case of Myanmar and its Refugees in Thailand, Linkoping University, Sweden.2003. p9 1 ttp://www.ep.liu.se/exjobb/eki/2003/impier/006/exjobb.pdf
[120] Ibid. p10
[121] Dugard John, International Law: A South African Perspective, JUTA, South Africa.2000. p47
[122] Ibid. p10

Aldrich focuses on three main factors responsible for non-compliance of states with international law.[123] First, insularity and ignorance of the law that make states ignore the law or not knowing they are violating the law. Second, skepticism and cynicism engendered by the belief that compliance with international law cannot be effectively enforced and that violation cannot be effectively punished. Third, concern absence of effective monitoring, reporting, and mechanism that effect compliance and as well assess what states are doing.

On his presentation, Gurowitz uses rationalist and neo-liberal approaches of international law to interpret compliance to international law. According to Gurowitz, an examination of international refugee law on the protection of the rights of refugees "illustrates some shortcomings of the rationalist perspective of international law and domestic politics."[124] States recognise relevant international law for refugees and reconcile it with their national interest with regard to the traditional notion of state sovereignty. Therefore, refugee protection in post-apartheid South Africa cannot be understood outside the historical and social context that shaped apartheid and the post-apartheid political realities.

These debates have critical implications on compliance with the international instruments and refugee protection in particular in democratic South Africa. Actors within and outside these debates have used these contestations to determine, undermine or shape immigration policies and practices including refugee legislation that governs the rights of refugees and the right to seek asylum in South Africa. The neo-liberal approaches to international law beg the question of why states recognise international law. According to neo-liberal approach, South Africa has recently recognised international refugee law not because it is seen as inherently good for its national interest but as a necessary step to gain legitimacy as a member of the international community after many years of isolation. This indicates in

[123] Aldrich, GA. Compliance with the Law: Problems and Prospects in Hazel Fox et al (ed) Effecting Compliance: Armed Conflict and the new law, volume 11, 1993. p3
[124] Gurowitz, A. International Law, and Migrant Rights in Reus-Smit, The Politics of International Law(ed) Cambridge University Press, South Africa, 2004. p132

the larger extent how refugee protection is perceived and understood in the post-apartheid milieu irrespective of the international standards and the forces that shaped it.

Peberdy argues that "interrogation of the relationship between immigration policy, notion of citizenship and nation-building suggest that both immigration policy and citizenship legislation including refugee legislation have yet to make significant breakaway form the past policies and practice."[125] Hathaway argues that "while governments proclaimed to be willingness to assist refugees as a matter of political discretion or humanitarian goodwill, they appear committed to a pattern of defensive strategies designed to avoid international legal responsibilities towards involuntary migrants"[126] and as such use asylum as a political leverage or as a public relation tool. Some governments see this shift away from a legal paradigm of refugee protection as a means of enhancing operational flexibility in the face of changing political circumstances.[127] As South Africa strives to be seen as democratic and legitimate state, complying with the international refugee law and standards demonstrate its commitment to the international community.

[125] Peberdy Sally Ann, Selecting Immigration: Nationalism and National Identity in South Africa's Immigration Policies,1910 to 1998, Queen's University Kingston, Canada. 1999. p28
[126] Hathaway, J.C et al, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection, Harvard Human Rights Journal, Cambridge.1997. p116
[127] Ibid