

THE STATUS OF REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA WITH
REFERENCE TO THE IMPLEMENTATION OF THE SOUTH AFRICAN REFUGEES
ACT, No 130 OF 1998



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University of Fort Hare
Together in Excellence

A Mini dissertation submitted in partial fulfillment of the requirements for the degree of
Master of Arts (Human Rights), Faculty of Law, University of Fort Hare

Supervisor: Professor Nasila S Rembe

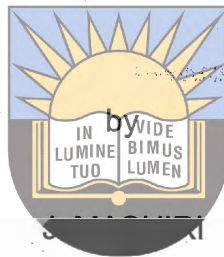
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ABSTRACT

This is an exploratory study on the implementation of the South African Refugees Act, No 130 of 1998 and the role played by service providers in the implementation process.

The study was conducted at East London town in the Eastern Cape. Since this is a qualitative study, in-depth interviews were conducted on a sample of ten refugees/asylum seekers from Zimbabwe, Kenya, Ethiopia, Somalia and Ghana.

The study focused on the status of refugees and asylum seekers in South Africa with reference to the implementation of the Refugees Act, No 130 of 1998. This study aimed at eliciting participants' accounts of their experience or perception in their own spoken words. Further, the researcher had interest in exploring the perceptions and experiences of African refugees and asylum seekers in their places of asylum.

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The findings suggest that refugees and asylum seekers are psychologically, emotionally and physically traumatized because of the predicament in which they find themselves. They are caught in between the unbearable situation at home and the uncertainty of their future in South Africa. Ineffective refugee mechanisms and lack of comprehensive strategies have been cited as some of the reasons. The social networks and service providers assisted these refugees and asylum seekers to some extent. However, public education campaigns should be intensified and directed at reducing the increasing xenophobia and intolerance which violate the human rights of asylum seekers and refugees.

Various recommendations have been put forward. The study indicated a need for the implementation of effective refugee protection strategies at the domestic, regional and international levels.

DECLARATION

I declare that the study on "*The status of Refugees and Asylum Seekers in South Africa with reference to the implementation of the South African Refugees Act, No 130 of 1998*" is my own work and has not been submitted for any degree or examination in any other university. I further declare that all sources used or cited have been acknowledged.

Student Name: Jeslene Mashiri

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Date: January 2010.



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ACKNOWLEDGEMENTS

The dissertation could not have been written without the guidance of Prof N S Rembe to whom I owe special thanks. He not only served as my Supervisor but also encouraged and challenged me throughout my academic program. He and Dr (Mrs) Rembe patiently guided me throughout the process, never accepting less than my best effort.

I am also grateful for my family and friends for their continued support.

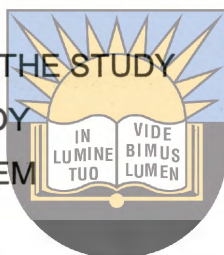
I owe my inspiration and ideas to the Almighty God.



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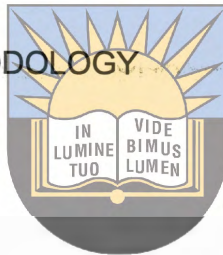
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LIST OF ABBREVIATIONS

ARV	Antiretroviral
DHA	Department of Home Affairs
HIV	Human Immune-deficiency Virus
ID	Identity Document
FNB	First National Bank
JRS	Jesuit Refugee Services
NGOs	Non-governmental Organization
OAU	Organization of African Unity
S.	Section
SADC	Southern African Development Community
SAPS	South African Police Services
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
Vol	Volume
ZANU PF	Zimbabwe African National Union-Patriotic Front



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TABLE OF STATUTES

National Legislation

South African Aliens Control Act, No 96 of 1991

South African Constitution 1996

South African Refugees Act, No 130 of 1998

International Instruments

Universal Declaration of Human Rights (1948)

Convention Relating to the Status of Refugees (1951)

Protocol relating to the status of Refugees (1967)

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

International Convention on Civil and Political Rights (1996)



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CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1 BACKGROUND OF THE STUDY

The advent of democracy in South Africa has not only seen the liberation of the oppressed masses from the apartheid system, but also opened a safe passage for the displaced people of the world to seek asylum or refugee status in the country. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention¹ are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger of persecution. The legal framework has successfully afforded the framework for the protection of refugees from persecution whether from repressive regimes or from the upheaval caused by wars of independence, or ethnic conflicts of the post-Cold War era.² The above instruments, however, reflect a fundamental human right in which global consensus exists. They are the first and the only instruments at the global level which specifically regulate the treatment of those who are compelled to flee their homes because of the conditions obtaining in their country of origin.

In 2004, the United Nations High Commission for Refugees (UNHCR) estimated that South Africa was hosting 27 000 recognized refugees and 85 000 applications were pending for the determination of their status.³ South Africa is a member of the United Nations and of the African Union and has acceded to the 1951 Convention and the 1967 Protocol Relating to Status of Refugees. It has also ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The criteria applied in granting refugee status are based on the two main treaty regimes, namely,

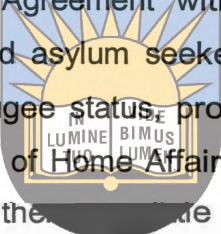
¹ 189 UNTS 150; 606 UNTS 267.

² Feller E. et al. *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge University Press, (2006), pg 4.

³ www.unhcr.org.au/pdfs/SAfrica.pdf.

the 1951 UN and the 1969 OAU Conventions. The UNHCR states that refugees enjoy the right to work and study, and to freedom of movement. In 2004, the government of South Africa lifted the prohibition on asylum seekers right to work and study.⁴ By 2004 only a small number of refugees and asylum seekers received grants from provincial governments. This means that social assistance is not accessible to a large number of refugees.

The Aliens Control Act, No 96 of 1991⁵ was the only piece of legislation regulating the movement of non-nationals into South Africa. According to the Human Rights Watch, South Africa signed the first “Basic Agreement” with UNHCR⁶ in 1993 while the Aliens Control Act dealt with refugees and asylum seekers on an *ad hoc* manner. Without statutory basis for determining refugee status, procedures were instead contained in internal circulars of the Department of Home Affairs (DHA). The procedures could not be readily challenged in court and there was no recourse to either administrative or judicial appeal.



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The ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol⁷ (1951 UN Refugee Convention) and the 1969 OAU Convention Governing the

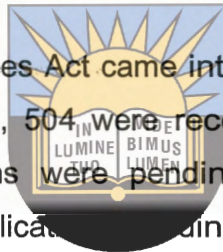
⁴ S27 (f) of the Refugees Act, No 130 of 1998.

⁵ Government of the Republic of South Africa, Aliens Control Act, No 96 of 1991(hereinafter, “Aliens Control Act”). Website:<http://hrw.org/reports/2005/southafrica1105/3.htm> South Africa: Living on the Margins: 111.Background.

⁶ Prior to the government’s signing of the 1951 Convention Relating to the Status of Refugees, South Africa and the UNHCR signed a Basic Agreement (1993) binding the country to observe international refugee norms, such as the right to seek asylum.

⁷ 1951 Convention Relating to the Status of Refugees, 189 UNTS 150: and the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267(hereafter, “1951Refugee Convention”).

Specific Aspects of Refugee Problems in Africa (OAU),⁸ as well as the granting of a large numbers of asylum seekers in the country, necessitated the creation of a comprehensive legal framework for refugees and asylum seekers. South Africa's long debated legislation became the Refugees Act No 130 of 1998.⁹ The Refugees Act and its regulations define the legal standards for determining refugee status; establish South Africa's asylum procedure; and set out the rights and obligations of refugees and asylum seekers. Despite the existence of comprehensive law, many refugees and asylum seekers continue to face significant obstacles to their right to seek and enjoy asylum or protection in South Africa.¹⁰



As of 1999, and before the Refugees Act came into force, 54 759 asylum applications had been lodged.¹¹ Out of this, 8, 504 were recognized as refugees, 25 020 were rejected, and 21 295 applications were pending. According to the UNHCR the provisional number of asylum applications pending was 115 224 by end of 2004 of which 32 600 were new applications.¹² The Department of Home Affairs granted refugee status to 27 683 asylum seeker applications largely from the Democratic

⁸ Organization of African Unity, 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (hereafter, "OAU Refugee Convention").

⁹ See, for example the work of the Southern African Migration Project (SAMP), <http://www.queensu.ca/samp/>; Jeff Handmaker, "No Easy Walk: Advancing Refugee Protection in South Africa," *Africa Today* Vol.48, No.3, 2001, pp.19-113; and Michael Barutciski, "The Development of Refugee Law and Policy in South Africa," *International Journal of Refugee Law*, Vol.10 (1998), pp.700-724.

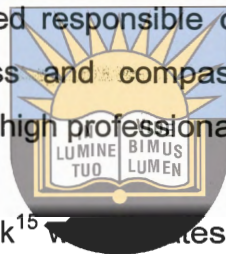
¹⁰ Universal Declaration of Human Rights of 1948, Article 14.

¹¹ Human Rights Watch, *Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg*, 17 November 2005, A1715, available at: <http://www.unhcr.org/refworld/docid/43ba84a54.html> [accessed 29 October 2009].

¹² UNHCR Global Refugee Trends 4 (provisional) (2004). Overview of refugee populations, new arrivals, double solutions, asylum seekers, statelessness and other persons of concerns to the UNHCR, June 2005 pp 5-8. The statistics can be sourced at: <http://www.unhcr.ch/ogi-bin/texis/vtx/events/opendoc.pdf?tbl=STATISTICS> and id=42b2834744.

Republic of Congo, Somalia, Angola and Rwanda. This then brought the total number of asylum seekers and refugee population to 142 907 by end of 2004.¹³ The asylum application backlog makes up a large proportion of this group. Poor planning and inadequate preparations for the coming into force of the Refugees Act has largely been responsible for the backlog of asylum applications.

The Deputy Minister of Home Affairs and Member of Parliament, Mr Malusi Gigaba, said that there were 150 000 refugees and asylum seekers in South Africa and that South Africa's commitment to these refugees is unquestionable and that the Republic takes its obligations very seriously. He urged responsible organizations to treat refugees and asylum seekers with humaneness and compassion and in compliance with all international law, human rights and high professional standards.¹⁴



Malusi Gigaba quoted a recent book¹⁵ which states that South Africa does not maintain refugee camps and refugees get little direct assistance. The country has adopted the rights-based approach, which formally allows refugees to work, move freely within the country and access social services such as education and health. In practice, however, there are problems in accessing these rights. Many asylum seekers claim that they are refused access to government offices if they cannot pay bribes. Others wait for years to be granted refugee status and face difficulties in acquiring identity documents and accessing services. They also experience hostility from the police, government officials, service providers and South African citizens which exacerbate their plight. Some refugees have been deported by overzealous and corrupt immigration control officials. South Africa still faces enormous challenges of corruption and capacity deficit which creates a disparity between the rights of refugees as enshrined in the Constitution, and what is done in practice.

¹³ Ibid.

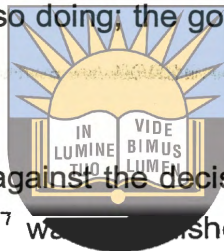
¹⁴ When he was addressing people at the founding meeting of the African Region Chapter of the International Association of Refugee Law Judges on Tuesday, September 26th, 2006 at the Union Buildings, Pretoria, RSA.

¹⁵ Glyncis Clacherty, Diane Welvering. *The Suitcase Stories: Refugee children reclaim their identities*. Storey Book, (2006).

The South African immigration law on Refugees is guided by United Nations policies and the OAU Conventions on Refugees. Nkosana Sibuyi, Home Affairs spokesperson, said

“We do not expect asylum seekers to come here with all the required documents because of the conflicts in their country, when they come here they should go to the nearest refugee reception and apply for asylum. Refugee smart cards printed by Home Affairs will be given to refugees”.¹⁶

This is contrary to what is being practiced. Asylum seekers are being deported by the South African Government and by so doing, the government is violating the principle of *non refoulement*.



To consider all the appeals made against the decisions of the Standing Committee for Refugee Affairs, a Refugee Board¹⁷ was established in terms of Section 12 (1) of the Refugees Act, No 130 of 1998. The Board is mandated to meet the obligations as defined in the Refugees Act, No 130 of 1998 and the terms of the relevant conventions including the 1951 UN Convention on Status of Refugees; the 1967 Protocol to the Convention; the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; or other international conventions.

Due to xenophobia and probably ignorance, some local South Africans perceive foreigners as illegal migrants that have come to take their jobs without understanding that some of those foreigners are legal migrants in possession of all the necessary and valid legal documents. It appears therefore that although the only means of escape for some may be illegal entry and or the use of false documentation, if a person has a well founded fear of persecution, he or she should be viewed as a refugee and not labeled

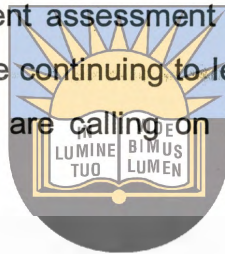
¹⁶ <http://www.southafrica.info/travel/documents/immigration0507.htm>.

¹⁷ An Appeal Board for Refugee Affairs was established following an agreement between the Republic of South Africa and the United Nations High Commissioner for Refugees (UNHCR) to consider all the appeals made against the decisions of the Standing Committee for Refugee Affairs.

an 'illegal migrant'.

1.2 STATEMENT OF THE PROBLEM

In order to determine refugee status, which is necessary for asylum purposes, the differentiation between refugees and non-refugees is crucial. This explains why there is a continuing debate about the definition of a refugee.¹⁸ For example, the influx of a large number of Zimbabweans into South Africa is not a direct result of war in Zimbabwe and this issue raises a lot of controversies as to how their status is determined. There is contention over the reasons why Zimbabweans for instance are leaving their home country. A recent assessment mission in the region by Refugees International found that people were continuing to leave Zimbabwe in large numbers. A wide range of civil society groups are calling on Zimbabweans to be recognized as refugees.¹⁹



1.3 PURPOSE OF THE STUDY

The purpose of the study is to investigate the Refugee Act, No 130 of 1998 in the light of refugee policies and existing municipal law of South Africa and how they are implemented.

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1.4 OBJECTIVES

The study seeks to analyze refugee policies and their implementation in relation to the treatment of refugees in South Africa. This is done by analyzing the Refugee Act, No 130 of 1998, the Immigration policies, Regional and International instruments on refugees, policies, and attitudes of officials as well as the attitudes of ordinary people towards refugees.

1.5 RESEARCH QUESTIONS

- 1) To what extent are refugee policies being implemented in South Africa?

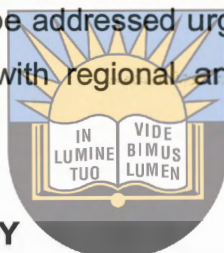
¹⁸ Daniel Warner, 'We are all Refugees', *International Journal of Refugee Law* (Vol. 4, No. 3, 1992), pp.362-72.

¹⁹ <http://www.refugeesinternational.org/content/article/detail/10280>.

- 2) To what extent does domestic and international law protect refugees/asylum seekers?
- 3) What steps have the government and other social groups taken to address the refugee situation?

1.6 SIGNIFICANCE OF THE STUDY

The problem of refugees has worsened in recent times. It affected many people and leaves long lasting scars of ill-treatment. This does not only disturb the social and political situation in the regional community but also the free movement of goods, services and trade. This needs to be addressed urgently in order to ensure that states, particularly South Africa, comply with regional and international obligations towards refugees' protection.



1.7 DELIMITATION OF THE STUDY

The research was conducted in East London in the Eastern Cape Province of South Africa. The researcher has chosen this as a case study. The researcher however consulted the office of the South African Human Rights Commission, Zimbabwe Exiles Forum, Department of Home Affairs, South African Red Cross Society and also refugees or asylum seekers themselves concerning the treatment of refugees. The research also looks into the policies that govern refugees and their implementation on the ground, and the challenges faced in the implementation process.

1.7.1 Office of the South African Human Rights Commission

This is a national human rights institution established to promote and protect human rights by monitoring and assessing the observance of human rights. It also addresses human rights violations and seeks effective redress for such violations. It also protects the rights of non-nationals which includes the rights of refugees and asylum seekers.

1.7.2 Non-Governmental Organizations

Two Non-Government Organizations involved in monitoring and assessing the observance of human rights, namely the Zimbabwean Exile Forum and the South

African Red Cross were interviewed. They deal with asylum seeker and refugee issues.

1.7.3 Home Affairs

It is the department that deals directly with the implementation of refugee policies and all immigration issues.

1.7.4 Refugees or asylum seekers

Refugees and asylum seekers are at the centre in the implementation of immigration laws and policies. They flee their country of origin due to conflict, fear of persecution, natural disasters, and increasingly, economic hardships.



1.8 LIMITATIONS OF THE STUDY

The research focuses on a particular group so the study findings cannot be generalized. It may not be easy for refugees or asylum seekers to open up or be identified as such for fear of xenophobic persecution. The researcher had to assuage their fears. She had to travel from Alice to East London at considerable cost, and this limited the number of people she interviewed and the institutions she visited.

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1.9 HYPOTHESIS

Officials' lack of clear understanding of policies and legislation on refugees together with officials' perceptions and public attitudes towards refugees contributes to the poor implementation of policies on refugees and asylum seekers.

1.10 DEFINITION OF CONCEPTS

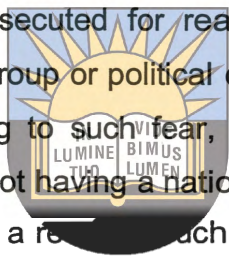
1.10.1 Refugee

The word "refugee" is used to describe a person who is forced to flee his or her home for any reason for which the person is not responsible, be it persecution, public disorder, civil war, famine, earthquake or environmental degradation.²⁰

²⁰ B S Chimni. (eds): *International Refugee Law*. A Reader, Sage Publications: New Delhi/Thomas Oaks/London 2000 p1.p.644.

The definition of refugees should be drawn from the South African Refugee Act, No 130 of 1998 and should not be based on xenophobic tendencies or interpretation by the media. The Act defines “refugee” as a person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his/her country of origin or nationality.

Article 1(2) of the 1951 UN Convention defines a “refugee” as a person who, “owing to, a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” However, the Convention was restricted to events which occurred in Europe before 1951, and mainly relating to the Second World War.



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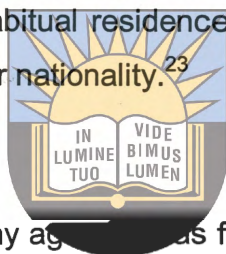
The 1969 OAU Convention defines a “refugee”, as every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²¹

The definition of a refugee in the Refugees Act incorporates terms from both the 1951 UN and 1969 OAU Refugee conventions. This is important since the OAU definition expands the 1951 Refugees’ Convention individualized persecution standard by also including flight caused by amongst others, “events seriously disturbing the public order.” This is widely interpreted to mean civil conflict and war, the situations from which the most successful asylum seekers in South Africa have fled. The OAU definition also

²¹ Article 1(1) of OAU Governing Specific Aspects of Refugee Problems in Africa.

recognizes as refugees people who fled conflict “in either a part or the whole of a country.” This means in theory that, for example, an asylum seeker from the Democratic Republic of Congo would not necessarily have to seek first safety (or what is called internal flight alternative) in Kinshasa before being considered as having a legitimate claim for protection in South Africa.²²

The OAU Convention also states that the term “refugee” shall apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²³



1.10.2 Asylum Seeker

An Asylum seeker is a person of any age who has fled his or her home country to find a safe place elsewhere.²⁴ Under the 1951 Convention on Refugees, an asylum applicant must be able to demonstrate a well founded fear of persecution in his/her country of origin for reasons of political opinion, religion, ethnicity, race/nationality, or membership of a particular social group. Asylum seekers should also demonstrate that they are unable to obtain any protection or assistance from their own national authorities. The United Nations described an asylum seeker as someone who has made a claim that he or she is a refugee and is awaiting the determination of his or her status.

1.10.3 Illegal migrant

An illegal migrant is a foreigner who either has illegally crossed an international border,

²² This policy was challenged by a 2001 draft amendment to the Refugees Act, which sought among other things to eliminate clause “in part” in the definition. The draft amendment is yet to be tabled before the South African Parliament.

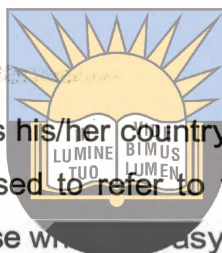
²³ Article 1(2) of the OAU Governing the Specific Aspects of Refugee Problems in Africa.

²⁴ <http://www.savethechildren.org.uk/caris/legal/srandi/sr01.php>.

be it by land, water, or air, or a foreigner who has entered a country legally but then overstays his or her visa. It can also refer to immigration across national borders in a way that violates the immigration laws of the destination country.²⁵ These are people who leave their country or place of residence because they want to seek a better life. They make a conscious decision to leave their country of origin and can return there without a problem. If things do not work out as they had hoped for or if they get homesick, it is safe for them to return home. The term also is often used to refer to those attempting to enter a country without legal permission and or those that seek asylum without a *bona fide* cause.

1.10.4 Economic migrant

This applies to a person who leaves his/her country of origin in order to improve his/her quality of life. This term is often used to refer to those attempting to enter a country without legal permission and or those who seek asylum without *bona fide* cause.²⁶



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1.10.5 Xenophobia

An unreasonable fear, distrust, or hatred of strangers, foreigners or anything perceived as foreign or different.²⁷

1.10.6 Non refoulement

Non refoulement is a principle in international law,²⁸ specifically refugee law that prohibits refugees from being returned to places where their lives and freedoms could be threatened. It is seen as a higher norm of international law (*jus cogens*) that forbids

²⁵ <http://en.wikipedia.org/wiki/Illegal-immigrants>.

²⁶ http://news.bbc.co.uk/1/hi/in_depth/3527123.stm.

²⁷ The American Heritage. Dictionary of the English Language (4th Ed) Houghton Mifflin Company, 2006.

²⁸ The Universal Declaration of Human Rights acknowledged the continuing relevance and resilience of this international regime of rights and principles [comprising the 1951 Convention, its 1967 Protocol, other human rights and regional refugee protection instruments], including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.

the expulsion of a refugee into an area where the person might be again subjected to persecution or the death penalty. The term also refers to the generic repatriation of people, generally refugees, into war zones and other disaster areas.²⁹

1.11 LITERATURE REVIEW

Brij Maharaj³⁰ has posited that while South Africa's political transformation has been lauded internationally, one of the greatest challenges facing the post-apartheid democratic government is undocumented immigration. Malusi Gigaba³¹ states that refugees and asylum seekers should be treated with humaneness and compassion, and in compliance with all international law, human rights and high professional standards. However, some authors³² contend that too often states violate the refugees' human rights. Although South Africa is among states that have recognized the rights of refugees, the latter still encounter problems in accessing these rights.



In the northern border province of Limpopo, South African police officials often assault and extort money from Zimbabwean asylum seekers and fail to verify their identity or legal status before deporting them.³³ Georgette Gragnon, Deputy Africa Director of Human Rights Watch also confirmed these violations and said that these abuses on the part of South African officials violate the country's Immigration Act as well as its obligations under the International Covenant on Civil and Political Rights, which South Africa ratified in 1999.

²⁹ <http://en.wikipedia.org/wiki/Non-refoulement>.

³⁰ <http://www.springerlink.com/content/k6024/07553/880v/>.

³¹ Statement by the Deputy Minister of Home Affairs, at the founding meeting of the Africa Regional Chapter of the International Association of Refugee Law Judges on 26 Sept 2006 at the Union Building, Pretoria.

³² Glynnis Clacherty, Diane Welvering. *The suitcase stories: Refugees Children reclaim their identities*. Storey Book, 2006.

³³ http://www.hrw.org/reports/2006/southafrica0806/7.htm#_Toc142188110.

Recently (2008) there has been a xenophobic wave of attacks on foreign nationals residing in the country. There has also been a tendency to stigmatize immigrants, particularly those from other African countries as criminals or as people who undermine the economic development of the country and take jobs from locals. Brij Maharaj³⁴ states that there are changing policies towards undocumented migration and that the main reason for leaving their home countries is lack of employment opportunities and therefore these migrants could be regarded as economic refugees.

Kenneth Christie³⁵ is of the view that the 'refugee' issue appears to address both domestic concerns and regional development issues. He pointed out that the question remains over the issue of refugees taking jobs away from South African nationals in the post-apartheid period, ironically as regional integration efforts prepares the region for the free flow of labour.



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According to the 1951 Convention ~~On Relating to the Status~~ of Refugees, every person has a right to live free from persecution, or from the fear of persecution, based on their race, religion, nationality, membership in a particular social group, or political opinion. Every state is therefore obligated to guarantee this right. However, many states fail because every year millions of people face persecution for traits they cannot control or for exercising their religious or political beliefs. When the government fails to protect this right, people have the right to move to a country that will protect them, and therefore exercise the right to seek and obtain asylum.³⁶

The refugee concept was expanded by the 1967 Protocol and by regional conventions adopted in Africa and Latin America to include the protection of persons who had fled

³⁴ See above note 30.

³⁵ African Security Review. Vol 16, No; 1 of 1997.

³⁶ <http://en.wikipedia.org/wiki/Refugees>.

wars of liberation or other violence in their home country. For example, the conflict and political instability during World War II led to massive amounts of forced migration.³⁷ Also the war in Somalia and Ethiopia saw an influx of large numbers of people leaving their home country.

1.12 LEGISLATION RELATING TO REFUGEE PROTECTION IN SOUTH AFRICA

Under the Universal Declaration of Human Rights, everyone has the right to seek and enjoy asylum.³⁸ Article 3 of 1951 Convention Relating to the Status of Refugees, states that countries should not impose penalties on individuals coming directly from a territory where their life or freedom is threatened on account of their illegal entry. The South African Refugee Act, No 130 of 1998 provides guidance as to whom a refugee is. The South African Immigration Act, No 19 of 2004 provides the guidelines for its implementation.



1.13 RESEARCH METHOD

The research methodology plays an important role in research study for it refers to the rationale and the philosophical assumptions that underlie a particular study. It is the analysis of the principles of the methods, rules, and postulates employed by a discipline and also refers to a particular procedure or set of procedures.³⁹

1.14 RESEARCH DESIGN

It provides the glue that holds the research project together as it is used to structure the research, to show how all of the major parts of the research project, the samples or groups, measures, treatments or programs, and methods of assignment work together to try to address the central research questions.⁴⁰ The researcher undertook a

³⁷ <http://en.wikipedia.org/wiki/Refugees>.

³⁸ Article 14(1).

³⁹ <http://en.wikipedia.org/wiki/Methodology#cite-note-0>.

⁴⁰ <http://www.socialresearchmethods.net/kb/design.php>.

qualitative approach, she focuses on people's subjective experiences and interpretations of the world, which is how the world appears to others.

1.15 RESEARCH INSTRUMENTS

The researcher conducted face to face interviews using self-administered questionnaires. The researcher interviewed the South African Red Cross Society, Zimbabwe Exiles Forum, and Office of the Human Rights Commission, Home Affairs and 10 refugees and asylum seekers.

The interview schedule was in line with the research objective and research questions. The Office of the Human Rights Commissioner gave the researcher a guide on how refugees' status is determined.



1.16 SAMPLING PROCEDURE

The researcher approached 10 refugees from at least different countries namely Zimbabwe, Kenya, Ethiopia, Somalia and Eritrea. Four organizations were also interviewed, namely, the Office of the Human Rights Commission (East London), Home Affairs Department, Zimbabwe Exiles Forum, and the South African Red Cross Society. The researcher was guided by the self-administered questionnaires.

1.17 DATA ANALYSIS

Data was analyzed according to the themes as they appear in the interview schedule. An interpretive approach was used and it was in line with the problem statement and the research topic.

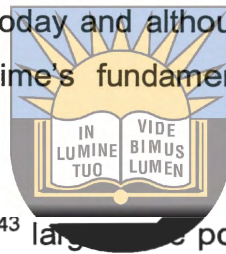
1.18 ETHICAL CONSIDERATIONS

All data collected were coded to protect respondents' identity and privacy. Respondents were informed that they are entitled to a summary of the outcome of the interview. Also the researcher sought informed consent to participate as this is one of the major hallmarks of modern ethical research.

CHAPTER 2: LITERATURE REVIEW

Since the end of Apartheid, South Africa became a destination for refugees and asylum seekers from across the African continent. South Africa enacted a refugee policy intended to maximize their freedom and protection by promoting refugees' temporary integration into local communities. This is in line with its constitutional commitments to human rights and dignity.⁴¹

The United Nations High Commissioner for Refugees does recognize that there are many challenges facing refugees today and although there are gaps in the protection framework, the Convention's regime's fundamental principles are as sound and necessary as ever.⁴²



According to Guy S. Goodwin-Gill,⁴³ large-scale population movements are the source of most of the obstinate refugee-related problems. In some cases, ethnic similarities encourage reception and hospitality, but where the flow is cross-cultural, serious political issues may arise in addition to the usual logistical and economic ones.

In terms of the interpretation of the 1951 Convention itself, a number of States use various complementary forms of protection which have had the effect in some instances of diverting Convention refugees to lesser forms of protection. When the protection afforded by international human rights instruments is also taken into account, it will result in many States having several different procedures for determining international protection needs. This in turn raises questions concerning the inter-relationship between international refugee laws on the one hand, and international humanitarian and human

⁴¹ Section 1(a) of the South African Constitution of 1996.

⁴² Refugee Protection in International Law, *UNHCR's Global Consultations on International Protection*, E. Feller et al. (eds.), Cambridge University Press, 2003, pg xvii.

⁴³ Guy S. Goodwin-Gill. *The Refugee in International Law*. Clarendon Press Oxford 1996, 2nd Edition pg 195.

rights law, on the other.⁴⁴

In 2004 South Africa was hosting an estimated 27 000 recognized refugees and there were further 85 000 applications pending status determination.⁴⁵ South Africa is a member of the United Nations and of the African Union and has acceded to the 1951 Convention and its 1967 Protocol relating to Status of Refugees, and has also ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The refugee law in the above instruments is implemented domestically through the Refugee Act, No 130 of 1998.

The criteria applied in granting refugee status are based on the two main treaty regimes. According to the Act,⁴⁶ refugees enjoy the right to work and study. However, this has not been fully put into practice and is evidenced by large numbers of the asylum seekers who are denied the right to work and study. In 2004 the government lifted the prohibition on asylum seekers' right to work and study but this was not implemented. By 2004, only a small number of refugees and asylum seekers received grants from the provincial governments, but the latter denied social assistance to many.⁴⁷

The Aliens Control Act, No 96 of 1991⁴⁸ was until 1993, the only piece of legislation regulating the movement of non-nationals into South Africa in. In 1993, South Africa

⁴⁴ See n42 above, pg 5.

⁴⁵ Supra, n3.

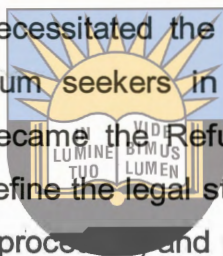
⁴⁶ Section 27 (f) and (g) of the South African Refugee Act 130 of 1998.

⁴⁷ Supra, n3.

⁴⁸ Government of the Republic of South Africa, Aliens Control Act 96 of 1991(hereinafter, "Aliens Control Act").
Website: <http://hrw.org/reports/2005/southafrica1105/3.htm> South Africa: Living on the Margins 111.Background.

signed a first "Basic Agreement" with UNHCR.⁴⁹ The Aliens Control Act dealt with refugees and asylum seekers in an *ad hoc* manner. Without statutory basis for determining refugee status, procedures were instead contained in internal Home Affairs circulars. The procedures could not be readily challenged in court and there was little recourse to either administrative or judicial appeal.

The ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol⁵⁰ (1951 UN Refugee Convention) and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁵¹ as well as the growing number of asylum seekers in the country, necessitated the creation of a comprehensive legal framework for refugees and asylum seekers in South Africa. South Africa's long debated civil society legislation became the Refugees Act, No 130 of 1998.⁵² The Refugees Act and its regulations define the legal standards for granting refugee status, establishing South Africa's asylum process, and setting out the rights and obligations of refugees and asylum seekers.



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As of 1999, before the Refugees Act came into force, 54 759 asylum applications had

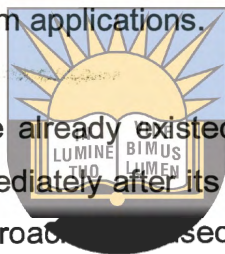
⁴⁹ Prior to the government's signing of the 1951 Convention Relating to the Status of Refugees, South Africa and the UNHCR signed a Basic Agreement (1993) binding the country to observe international refugee norms, such as the right to seek asylum.

⁵⁰ 1951 Convention Relating to the Status of Refugees, 189 UNTS 150; and the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267 (hereafter, "1951 Refugee Convention").

⁵¹ Organization of African Unity, 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (hereafter, "OAU Refugee Convention").

⁵² See, for example the work of the Southern African Migration Project (SAMP), <http://www.queensu.ca/samp/>; Jeff Handmaker, "No Easy Walk: *Advancing Refugee Protection in South Africa*," *Africa Today* vol.48, No.3, 2001, pp.19-113; and Michael Barutciski, "The Development of Refugee Law and Policy in South Africa," *International Journal of Refugee Law*, Vol.10 (1998), pp.700-724.

been lodged.⁵³ Out of this number, 8, 504 were recognized as refugees, 25 020 were rejected and 21 295 applications were pending. According to the UNHCR, the provisional number of asylum applications pending was 115 224 by end of 2004 of which 32 600 were new applications.⁵⁴ The Department of Home Affairs granted refugee status to 27 683 asylum seeker applications largely from the Democratic Republic of Congo, Somalia, Angola and Rwanda. This brought the total of asylum seeker and refugee population to 142 907 by end of 2004.⁵⁵ The asylum application backlog makes up a large proportion of this group. Therefore, poor planning and inadequate preparations for the coming into force of the Refugees Act has been responsible for the backlog of asylum applications.



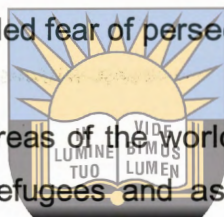
The problem of defining a refugee already existed under the League of Nations and confronted the United Nations immediately after its creation; and it has persisted to the present day. Initially, a group approach was used to determine whether a particular category of persons was a refugee group or not. It would place particular regard to the objective situation existing in the country of origin so as to reach general conclusion as to whether or not the individual members of the group might be exposed to danger or other serious consequences in the event of returning home. But this is not the case today because individual applicants for refugee status has to substantiate their claims by a full and detailed explanation of the reasons why they had to leave and why they do not wish to return to their countries of origin. This has seen many of the asylum seekers being denied refugee status where it is only an individual who is claiming refugee status.

⁵³ UNHCR Statistical Yearbook, 2003, pp 318-9.

⁵⁴ UNHCR 2004 Global Refugee Trends⁴ (provisional). Overview of refugee populations, new arrivals, double solutions, asylum seekers, statelessness and other persons of concerns to the UNHCR, June 2005 pp 5-8. The statistics can be sourced at: <http://www.unhcr.ch/ogi-bin/texis/vtx/events/opendoc.pdf?tbl=STATISTICS> and id=42b2834744.

⁵⁵ Ibid.

According to Guy S. Goodwin-Gill,⁵⁶ a person becomes a refugee at the moment when he or she satisfies the definition, so that the determination of status becomes declaratory rather than constitutive. The author continues to state that a problem always arises where States decline to determine refugee status, or where different determinations are reached by States and by the UNHCR. The contest regarding the standard of proof reveals some of the intrinsic weaknesses of the system of protection. Status determination is not an easy task; the decision-makers must assess credibility and will look to the bearing of the applicant. The applicant's story may seem unduly self-serving since there is no one who can speak on his/her behalf. The onus is therefore on the applicant to establish well-founded fear of persecution.⁵⁷



The refugee problem in different areas of the world has become increasingly complex due to the growing numbers of refugees and asylum seekers. It has also become entangled with a whole series of other issues such as migration, economic and social development and forced internal and external displacement. Addressing the problem of definition of refugee, Albie Sachs gave an example of millions of Mozambicans who have fled across the borders of Mozambique to neighbouring countries. Sachs states that these people are not fleeing persecution from the government on the grounds of race or political affiliation, which is the basis of determining the status of such people as refugees. He posed a question, “---does reality have to correspond with the definition, or should the definition be adapted to correspond to reality?”⁵⁸

However, Ivor C. Jackson⁵⁹ clearly states that persons who flee from armed conflicts, violence or generalized violations of human rights etc., fall into a separate legal category. They are therefore in principle not covered by the 1951 refugee definitions.

⁵⁶ Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press. Oxford 1996, 2nd edition pg 32.

⁵⁷ *Supra*, n39.

⁵⁸ Albie Sachs. *Refugee Voices: Apartheid, Destabilization and Refugees*. *Journal of Refugee Studies*; Vol 2 No 4 1989, pp 494.

⁵⁹ Ivor I. C. Jackson, *Refugees and Human Rights: The Refugee Concept in Group Situations*, Martinus Nijhoff, 1999.

The reasons given are that refugee definitions in the 1951 Conventions are individual in character, and call for an individual examination of refugee status and therefore not applicable in large scale group situations of this type. The causes of flight from such situations cannot be characterized as "persecution" as this notion is presumed to have been understood at the time when the definition was adopted. This is the problem that South Africa is faced with today especially in cases where there is large scale exodus of people from Zimbabwe. It is apparent there is no actual physical war going on in that country.

The restrictive interpretations of the kind mentioned above disregards the various forms which persecution can assume and the various types of situations in which it may exist. This can have the effect of wrongly excluding large numbers of persons fleeing situations of armed conflicts and violence from refugee status under the 1951 Convention and from the High Commissioner's competence under the UNHCR statute. Such situations can in many cases be regarded as having a "persecutory" element justifying the application of the 1951 definitions. If the South African Government was to consider persons fleeing in large numbers from armed conflict, generalized violence etc, as falling outside the 1951 refugee definition, it may be related to the questions of the solutions which should appropriately be envisaged for such persons.

The treatment of refugees and asylum seekers within a state's territory is governed not only by those treaties which address them specifically but also by the broader human rights treaties which set out general standards of either a procedural or substantive nature.⁶⁰

Kenneth Christie⁶¹ is of the view that the 'Refugee' issue appears to address both domestic concerns and regional development issues. He pointed out that the question remains over the issue of refugees taking jobs away from nationals in the post-apartheid

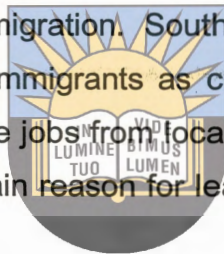
⁶⁰ Return of Refugees, Experiences of Reconciliation in Southern Africa, 7 February 1996-Artis-Amsterdam pg 24.

⁶¹ <http://www.iss.co.za/pubs/ASR/6No1/Christie.html>.

period, as regional integration introduces the requirement for the free flow of labor.

Mr Malusi Gigaba⁶² views that refugees and asylum seekers should be treated with humaneness and compassion, and in compliance with all international law, human rights and high professional standards. However, a recent book⁶³ states that refugees' human rights are being violated as a result of the failure to implement refugee policy.

Maharaj states that while South Africa's political transformation has been lauded internationally, one of the greatest challenges facing the post-apartheid democratic government is undocumented immigration. South Africa has witnessed a wave of xenophobia and stigmatization of immigrants as criminals, as people who undermine the economic development and take jobs from locals. Maharaj views these migrants as economic refugees because the main reason for leaving their home countries is lack of employment opportunities.⁶⁴



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Some authors also supported the view that xenophobia and intolerance towards refugees and asylum seekers have increased in recent years thereby presenting a major problem.⁶⁵ Negative attitudes are attached to black foreigners regardless of whether they are illegal or legal migrants. Media and politicians appear increasingly ready to exploit the situation for their own ends.⁶⁶ It is widely believed that white illegal migrants in South Africa are not labeled names and the police and Home Affairs officials do not even bother to inquire whether they have all the required documents. So it

⁶² MP, Deputy minister of Home Affairs, at the founding meeting of the Africa Regional Chapter of the International Association of Refugee Law Judges on 26 Sept 2006 at the Union Building, Pretoria, RSA.

⁶³ Glynnis Clacherty, Diane Welvering. *The suitcase stories: Refugee Children reclaim their identities*. Storey Book, 2006.

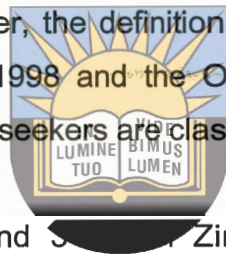
⁶⁴ See n30 above.

⁶⁵ See n42 above.

⁶⁶ Ibid.

seems there is a problem only when it comes to fellow Africans as evidenced by the way they are callously treated recently.

A Human Rights Watch Report states that in the northern border province of Limpopo, South African police officials often assault and extort money from Zimbabwean migrants and fail to verify their identity or legal status before deporting them.⁶⁷ The Report confirms that South African officials violate the country's Immigration Act as well as its obligations under the International Covenant on Civil and Political Rights, which it has ratified in 1999. In South Africa today, Zimbabwean asylum seekers are being referred to as 'economic refugees'. However, the definition of a refugee under both the South African Refugee Act, No 130 of 1998 and the OAU Convention of 1969 should be examined before individual asylum seekers are classified as such.



South Africa hosts between 1 and 3 million Zimbabweans, many of whom have inadequate access to food, shelter and health care.⁶⁸ Although the reasons why Zimbabweans are leaving their home country are contentious, a recent assessment mission in the region by Refugees International found that people were continuing to leave the country in large numbers.⁶⁹ A wide range of civil society groups have been calling for Zimbabweans to be recognized as refugees.⁷⁰ At the same time even if they were to be termed 'economic refugees', that would not justify the treatment they are receiving in South Africa. The law should apply to everyone equally and without discrimination as provided by the equality clause in the Constitution, irrespective of their colour or country of origin. South Africa should comply with its obligations towards refugees according to its commitment under regional and international instruments.

⁶⁷ <http://www.docstoc.com/docs/792178/Human-Rights-Watch-World-Report-2008>.

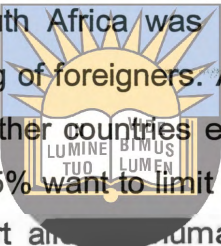
⁶⁸ <http://www.refugeesinternational.org>.

⁶⁹ Ibid.

⁷⁰ <http://www.refugeesinternational.org/content/article/detail/10280>.

The influx of asylum seekers, lack of capacity and inadequate resources to facilitate the registration of asylum seekers have created a backlog of applications that run to over 100 000. These have, in some instances, resulted in unlawful arrests, detention and deportation of legitimate applicants. As a result, the Ministry of Home Affairs established a Departmental Steering Committee to come up with practical sustainable solutions that will ensure that all asylum applications dating back to 1998 are immediately dealt with.⁷¹

Amid growing anti-foreigner sentiment in South Africa, parliament is scheduled to pass legislation granting improved rights to refugees. The Southern African Migration Project found out that xenophobia in South Africa was on the increase. That was mainly because of rumors and stereotyping of foreigners. According to the Project, only 6% of South Africans favor people from other countries entering South Africa freely. Twenty-five percent want a total ban and 45% want to limit their entry. In March, Human Rights Watch published a damning report and human rights abuse in South Africa of foreigners from Africa applying for refugee status.⁷²


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Serious abuses of immigrants have been reported when they are arrested. One example is the abuses of immigrants who were arrested at the Central Methodist church. These immigrants were said to have been denied medical and legal assistance and they appeared to have been physically assaulted; they were allegedly asked for bribes by police. According to Napier, "police action was entirely inappropriate, uncalled for and an unwelcome manifestation of xenophobia."⁷³ He stated that Zimbabweans should be regarded as *prima facie* refugees because under the terms of the 1969 OAU Refugee Convention, they had left their homes because of events seriously disturbing

⁷¹ Statement by the Acting Deputy Director-General: National Immigration Branch, Mr. Gcinumzi Ntlakana on the Refugee Backlog Project at the Court Classique Hotel in Arcadia, Pretoria on 20 April 2006.

⁷² <http://www.queensu.ca/samp/sanpresources/samppublications/pressarticles/1998/Randall.htm>.

⁷³ [http://www.news24.com/News24/South Africa/News/South Africa News](http://www.news24.com/News24/South%20Africa/News/South%20Africa%20News). Titled "Refugees physically mistreated". Johannesburg 02/02/2008 -19:39-(SA).

public order. About 1, 200 people were sheltered at the Central Methodist Church while another 500 lived in the street outside the church.

In terms of section 22 of the Refugees Act, newly-arrived asylum seekers are registered and issued with a temporary residence permit. The permit allows the holder to sojourn in South Africa while his or her claim is under consideration by the Refugee Status Determination Officers who are based at Refugee Reception Centers throughout the country.

Under the Universal Declaration of Human Rights, everyone has the right to seek and enjoy asylum from persecution.⁷⁴ Article 3 of 1951 Convention Relating to the Status of Refugees states that countries should not impose penalties on individuals coming directly from a territory where their life or freedom is threatened on account of their illegal entry. Some governments impose other measures such as visa restrictions and fines on transport companies with whom asylum applicants arrive, in order to stop people travelling to their territory. The more obstacles placed on entry the more likely an immigrant will have to resort to using false documents or enlist the help of human smugglers. The increase in irregular migration can be viewed as a result of restrictive immigration policies in many industrialized states, which oblige economic migrants and refugees alike to use irregular channels. This is irrespective of whether they are in search of a better life or, more fundamentally, freedom from persecution.⁷⁵

An asylum seeker told Human Rights Watch, that “without money (bribe), I cannot get a paper (asylum seeker permit).”⁷⁶ The asylum seeker claimed to have paid R400 to a person not in uniform at the Johannesburg reception office in order to gain access to the Status Determination Office. When the Human Rights Watch asked about the

⁷⁴ Article 14 (1).

⁷⁵ See above note 42 pg 5.

⁷⁶ Human Rights Watch interview, asylum seeker, Johannesburg, July 14.2004.

allegations of corruption the Head of the Office would not confirm or deny such allegations.⁷⁷ Since corruption is difficult to prove, asylum victims may be reluctant to come forward with their complaints since they are dependent on the very people for their status determination. Regardless of the truth or falsity of the above - most asylum seekers and service providers interviewed by Human Rights Watch, various reports by the National Consortium for Refugees Affairs, the Human Rights Committee⁷⁸ and the Public Protector (an independent statutory body) - all contend that corruption within the Department of Home Affairs as a whole is a problem.

The Refugees Act regulations provide for government-funded interpreters at all stages of asylum process "where practicable and necessary".⁷⁹ UNHCR also makes clear that interpreters are key components of a fair refugee status determination procedure, and stress that those asylum applicants should "be given the necessary facilities, including the services of a competent interpreter, when submitting their case to the authorities concerned."⁸⁰ The competence of interpreters is not only a matter of their technical linguistic ability but also a matter of their impartiality, and training in the context of refugee status interviewing.

Despite the provisions in the UNHCR's guidelines, there are no officially recognized interpreters at the Johannesburg Refugee Reception Office. Due to lack of professional official interpreters, refugees and asylum seekers who are unable to understand

⁷⁷ Human Rights Watch interview, Mr. Ngozwana, head, Johannesburg Refugee Reception Office, September 9, 2004.

⁷⁸ Human Rights Committee (South Africa), Access to Justice: Focus on Refugees and Asylum Seekers, Human Rights Committee Quarterly Review, March 2001, pp.73-5.

⁷⁹ Refugees Regulations No R366 under Refugees Act, regulation 5(1).

⁸⁰ UNHCR Handbook on Procedures and Criteria for Determining Refugees Status (Geneva: UNHCR), revised 1992, Part Two (A), para.iv. The UNHCR Handbook sets out guidelines on evaluating the substance of refugee claim based on interpretation of the 1951 UN refugee Convention.

interviews in English are obliged to use the services of informal networks. The Department of Home Affairs (DHA), acknowledges that these networks are facilitating bribes and accepting monies for services that should be rendered free by the office itself.⁸¹ In September 2004, a DHA official told Human Rights Watch that DHA planned to employ officially recognized interpreters by 2005⁸², but as of August 2005, the Johannesburg Refugee Reception Office did not have official interpreters.

South Africa does not grant asylum seekers access to financial support or assistance with food and shelter. Denying them the right to work can threaten the health and life of particularly destitute asylum seekers. Following a legal challenge on the prohibition to work in *Wachenuka v Minister of Home Affairs*⁸³, the Standing Committee for Refugee Affairs ruled on March 30, 2004 that asylum seekers should be allowed to work and study.⁸⁴ Therefore the failure to implement the legal right to work and study uniformly and the prohibition on work and study of asylum seeker permit holders over a prolonged period prevents asylum seekers from engaging in legitimate economic activity to provide for their basic welfare needs. An asylum seeker from Burundi who arrived in South Africa in 2001 told the Human Rights Watch:

“I am looking for a loan to start a small business, but I cannot because the permit says I cannot work. Jesuit Refugee Services (JRS) cannot give me a loan because they say my goods will be confiscated. Now I do not work, I do not know where to get food.”⁸⁵

⁸¹ Public Protector, op. cit., p.7, section 1.2.1.2; p. 14, section 2.8.

⁸² Human Rights Watch interview, Mr. Ngozwana, Johannesburg refugee reception office, September 9, 2004.

⁸³ 2004 (4) SA 326 (SCA).

⁸⁴ Refugees Act, section 11(h) makes provision for the determination by the Standing Committee for Refugee Affairs of conditions relating to work and study in South Africa under which a permit can be issued. The Standing Committee for Refugee Affairs' decision was issued in a policy decision dated March 30, 2004.

⁸⁵ Human Rights Watch interview, asylum seeker, Johannesburg, 14 July 2004.

Under the South African law⁸⁶, asylum seekers are permitted to work and study during the refugee status determination period. DHA officials are required to issue asylum seekers with Section 22 permits that clearly indicate the bearer's entitlement to work and study.

The law guarantees freedom of movement, access to social services, and the right to compete in labour and housing markets. On the contrary, refugees and asylum seekers are effectively unable to convert these legal entitlements into effective and realizable rights. Therefore, it can be concluded that South Africa has failed to meet its domestic and international obligations. There has been expressed concern over institutional failure in determining refugee status and issuing recognizable identity documents; denial of essential social services, and abuse at the hands of the law enforcement agents. A positive obligation is needed for the state to counter the full range of obstacles that prevent asylum seekers and refugees from securing effective protection.

University of Fort Hare

By deporting asylum seekers ~~and ignoring the harsh~~ reality faced by hundreds of thousands of asylum seekers on its territory, South Africa is in breach of international law which calls for the protection of refugees. Since South Africa recognizes that political repression and economic deprivation has forced Zimbabweans to flee their country, then it should stop deporting them and give them the protection they deserve. Gerry Simpson⁸⁷ states that Zimbabweans in South Africa have no option but to turn to their South African neighbors for help to survive. However, the South African government call them 'economic migrants' and deports them because that title does not afford them any protection.

South Africa is characterized by an ineffective asylum system; many of asylum seekers' claims are not examined adequately and other applicants are not able to lodge their claims at all. Because of deportation practices that are arbitrary and haphazard, many

⁸⁶ Section 27 (f) and (g) Refugee Act, No 130 of 1998.

⁸⁷ Human Rights Watch, Johannesburg, June 19, 2008.

registered asylum seekers in South Africa are at the risk of *refoulement*, which is a fundamental breach of international refugee law. South Africa being a party to the refugee conventions it is bound by the principle of *non refoulement* and may not send people back to be persecuted. Albie Sachs⁸⁸ stated that refugees have a basic and fundamental right not to be deported to the country from which they flee persecution. He further stresses that the principle is a great gain to humanity and an important humanitarian principle which must *not* be compromised.

The implementation of the principle of *non refoulement* in general requires an examination of the facts of each individual case. However, the denial of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of *refoulement*.⁸⁹ Developments in human rights law also place an absolute prohibition on *refoulement* where there is a real risk that the person concerned may be subjected to torture or cruel, inhuman or degrading treatment or punishment.⁹⁰

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Detention of asylum seekers and refugees should be seen as an exceptional measure to be applied in individual cases. It should be determined by an appropriate authority and it must be necessary in light of the circumstances of the case. However, such determination needs to be on the basis of criteria established by law and in line with international refugee and human rights law.⁹¹

Asylum seekers and refugees in South Africa do not have adequate shelter, food and health facilities. Agencies including Human Rights Watch, *Medecins Sans Frontieres* and *Oxfam* have reported overcrowding, poor shelter and deteriorating health conditions

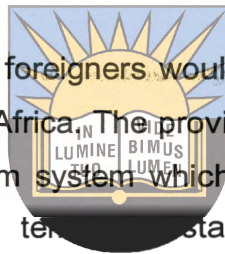
⁸⁸ http://scholar.google.co.za/scholar?q=journal+of+Refugee+Studies%3B+vol+2,+No+4+1989,+pp+500&hl=en&lr=&scoring=r&as_ylo=2003.

⁸⁹ See above note 62 pg 118.

⁹⁰ Article 7 of the 1966 International Convention on Civil and Political Rights.

⁹¹ See above note 42 pg 15.

in camps.⁹² South African NGOs, like Treatment Action Campaign (TAC), which is a national activist organization founded by HIV-positive activist Zackie Achmat in 1998, also lobbies for better access to ARV treatment by asylum seekers. It has recorded cases where HIV-positive immigrants have started ARV treatment in their home countries but were unable to continue with their regimen because they were unlawfully refused treatment in South African clinics by nurses and doctors who are not aware of the law. TAC spokesperson pointed out that the displacement of people carries high risk especially for people with chronic illnesses of not being able to access the medication they need.⁹³



The regularization of the status of foreigners would also help to protect them against exploitation and violence in South Africa. The provision of temporary status would also unburden the South Africa's asylum system which is now clogged with thousands of pending applications. By granting temporary status to foreigners who are asylum seekers South Africa will be sending the message to its citizens that those attacking foreigners will be held accountable and those foreigners should not be seen as targets.

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After all has been said this can lead to the conclusion that the South African Immigration Act, No 19 of 2004 is not being implemented properly. What the law says is not what is being practiced. The definition of refugees in terms of South African Refugees Act, No 130 of 1998 is being ignored. Some of the refugees in South Africa, for example Zimbabweans, are referred to as economic or illegal migrants rather than "refugees". Many Asylum seekers are denied access to government offices if they cannot pay bribes; others wait for years to be granted refugee status or face difficulties in acquiring identity documents in order to access services. This has resulted in unlawful arrests, detentions⁹⁴ and deportations of legitimate asylum seekers and refugees. Corruption in

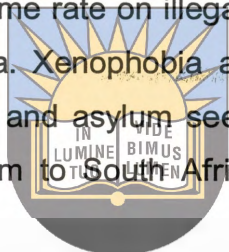
⁹² http://www.brookings.edu/opinions/2008/0617_south_africa_koser.aspx.

⁹³ <http://allafrica.com/stories/200807020002.html>.

⁹⁴ 77 UNHCR, 'Revised Guidelines on the Detention of Asylum Seekers- Revision', 26 Feb. 1999. See also, UNHCR, 'Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice',

the Refugee Reception Office and the failure by officials to restrict the activities of brokers and unofficial interpreters further hinders the ability of asylum seekers to gain access to refugee status determination procedures and protection.

Hostility from the police, the government, service providers and xenophobic tendencies from South African citizens is reported to be on the increase. This makes life difficult and has resulted in some refugees being deported by overzealous and corrupt immigration control officials. In some instances, the increase in the number of refugees in the country has created tension between refugees and South African citizens. The latter has blamed the escalating crime rate on illegal immigrants and refugees and this in turn has heightened xenophobia. Xenophobia and intolerance towards foreigners, and in particular towards refugees and asylum seekers, has also increased in recent years and present a major problem to South Africa in particular, and the region in general.⁹⁵



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The present century's greatest achievement has been the development and acceptance of the principle that the refugee problem is a matter of concern to the international community. The international community under the League of Nations and thereafter under the United Nations and the OAU has endeavored to define minimum standards for the treatment of refugees and to provide appropriate solutions for successive refugees' problems.⁹⁶ These standards should be implemented at the national level if the plight of refugees and asylum seekers is to be eased.

UN doc.EC/49/SC/CRP.13. 4 June 1999; UNHCR, 'Detention of Asylum Seekers in Europe', Vol.1 (4), *European Series*, Oct. 1995.

⁹⁵ <http://catdir.loc.gov/catdir/samples/cam034/2002034944.pdf>.

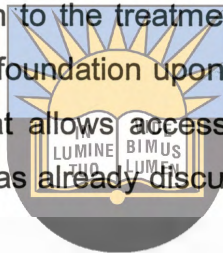
⁹⁶ Op.cit, n59.

CHAPTER 3: RESEARCH METHODOLOGY

3.1 INTRODUCTION

The purpose of this Chapter is to introduce the research instruments used in this study. The Chapter presents the research methodology, data used in the inquiry and the criteria used to ensure objectivity of the findings.

When considering the most appropriate method for a study of this nature, the choice is ultimately guided by the objective of the study which is to investigate refugee policies and their implementation in relation to the treatment of refugees in South Africa. The principle of *non refoulement* is the foundation upon which all rights of refugees/asylum seekers stand. It is a gateway that allows access to other rights within the state of asylum.⁹⁷ The preceding Chapter has already discussed the importance of not violating the above principle.



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This research was intended to analyze the status of refugees under the South African legislation and its implementation. The literature review section described and outlined the treatment of refugees in South Africa and the problems they face. These range from xenophobic tendencies to abuse by immigration officers who deal with asylum seekers in the process of obtaining asylum papers. Lastly, the international community admits that there is a problem concerning the protection of refugees and it has therefore defined minimum standards for their treatment.

3.2 RESEARCH DESIGN

A research design can be defined as a plan or blue print of how the researcher intends to conduct the research.⁹⁸ It therefore provides a plan that may specify how the research is going to be executed in such a way that it answers the research questions. It may also involve multiple decisions about the way data will be collected and analyzed.

⁹⁷ Malawian Law Society Workshop Sun N Sand Holiday Resort 6th-7th November 2006.

⁹⁸ <http://upetd.up.ac.za/thesis/available/etd-09112007-120727/unrestricted/01chapter1.pdf>.

It provides the means on how to investigate the research hypothesis or questions in the most economic manner.

This research was informed by the qualitative research methodology. It is highly useful in policy and evaluation research; understanding why and how certain outcomes were achieved is as important as establishing what those outcomes were.⁹⁹ This study utilized the qualitative approach as its primary aim was to elicit participants' accounts of their experience or perception in their own spoken words.

This researcher also utilized an exploratory research using a qualitative method so as to explore a relatively unknown area. It employed an open, flexible and inductive approach in order to research and to gain insights into the phenomena.¹⁰⁰



The qualitative method is often used in the social sciences and it differs from quantitative research in many ways. In qualitative research, sampling is purposive; the choice of cases is based on the way that they typify or do not typify certain characteristics in a certain class. The other difference is that the researcher plays a key role since he/she must make it clear in the analysis of his/her role in the research process. Lastly, data analysis differs considerably and data must be carefully coded and themes must be discerned in a consistent and reliable way.

The qualitative approach can yield useful insights about program implementation in a given situation; it is typically used to answer questions about the nature of a phenomenon, with the purpose of describing and understanding the phenomenon from participants' point of view. Its aim is to gather an in-depth understanding of how human behavior takes place and the reasons that govern behavior. Qualitative researchers typically rely on four methods of gathering information: (1) participating in the setting, (2) direct observation, (3) in depth interviews, and (4) analysis of documents and

⁹⁹ http://en.wikipedia.org/wiki/Qualitative_methods.

¹⁰⁰ <http://etd.unisa.ac.za/ETD-db/theses/available/etd-09122007-100123/unrestricted/thesis.pdf>.

materials.¹⁰¹ The use of focus groups and key informant interviews are other methods that can be used.

The researcher used a sample of subjects rather than the full population (10 refugees/asylum seekers and 4 institutions). The sample is a representative of the population in that there is use of random selection procedure and stratified random sampling procedure to ensure proportional representation of population subgroups. The researcher used the 'sample approach' in data collection. A sample of East London refugees/asylum seekers was used and it was done through a sampling selection procedure. East London was chosen because it is close to where the researcher resides. The refugee community is not too far apart and it will help the researcher get the dimension of the problem. The stratified random sampling procedure was used and refugees from Zimbabwe (4), Kenya (1), Somalia (1), Ghana (2) and Ethiopia (2) were interviewed. The above sample is small to get in-depth feelings and perceptions of interviewees. More Zimbabweans were chosen due to the fact that the number of Zimbabwean refugees and asylum seekers are almost double compared to the number of other cluster of refugees. Refugees and or asylum seekers from different countries were chosen so as to come up with a balanced conclusion of their treatment in the context of their plight here and in the country of origin. Further, the researcher had interest in exploring the perceptions and experiences of African refugees and asylum seekers in their places of asylum.

3.3 RESEARCH SITE

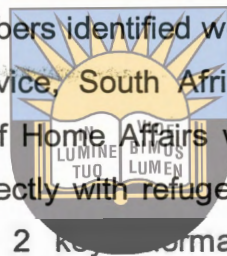
This research was carried out in the East London area. East London is a city within the Eastern Cape province of South Africa and it was chosen due to its closeness to where the researcher resides. Data collection was done in East London on refugees and asylum seekers who reside in East London. The South African Red Cross Society in East London was chosen for interview because it is an NGO that helps displaced people and plays a key role in providing them with the support they need. DHA was

¹⁰¹ http://www.kultt.co.za/awik/mediawiki/qualitative_research.html.

chosen because it deals directly with the implementation of refugee policies and all immigration issues. An NGO based in Pretoria (Zimbabwe Exiles Forum) was also interviewed because it entirely deals with asylum seeker and refugee issues. The researcher interviewed the Office of the South African Human Rights Commission based in the Eastern Cape Province, East London, since it is a National Human Rights Institution that has oversight over human rights.

3.4 RESEARCH POPULATION

In May 2008 a total of 4 organizations were identified from East London town as potential key informants. The members identified were the following; the Head of Home Affairs, South African Police Service, South African Red Cross Society. Two Key informants from the Department of Home Affairs were used as data source because they are professionals working directly with refugees and asylum seekers in terms of issuing of asylum papers. The 2 key informants were also persons who are knowledgeable about the rights of refugees and the applicable law and procedures. The value of using key informants is that it helps the researcher better understand the immigration laws when it comes to their implementation. In this study, the key informants offered expertise beyond that of the researcher.



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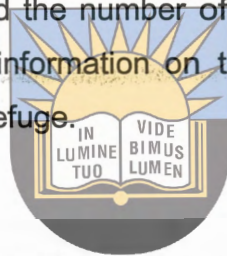
3.5 SAMPLING PROCEDURE

Sampling as part of statistical practice concerned with the selection of individual observations intended to yield some knowledge about a population of concern for the purpose of statistical assumption. The term 'sample' implies the existence of a population or universe of which the sample is a smaller section or a set of individuals selected from a population.¹⁰² The logic and power of purposive sampling lay in selecting cases that are rich in information for in-depth study. Information-rich cases were those from which the researcher could learn a great deal more about issues of central importance to the purpose of the research which is to analyze the South African

¹⁰² Gravetter, F. J. & Forzano, L.B (2003). Research methods for the behavioural sciences, Belmont California: Thomson/Wadsworth.

legislation on refugees and how it is implemented. The rationale of purposive sampling was to select information-rich cases whose study would illuminate the critical questions under study.

The sample in this study was therefore made up of refugees and asylum seekers who stay in East London. The researcher also was able to find out that the respondents in this study explained, justified and interpreted their accounts differently but with similar trends. The researcher is also aware that although the findings of this study would contribute to knowledge on the treatment of refugees and on how refugee status is obtained, the sampling method and the number of subjects used may have restricted the researcher in obtaining more information on the perceptions and experiences of African refugees in their places of refuge.



3.6 RESEARCH PROCEDURE

3.6.1 Research Instrument and Data Collection

Qualitative interviewing was used as an instrument for data collection. Interviewing is the predominant mode of data or information collection in a qualitative research.¹⁰³ Kvale¹⁰⁴ defines qualitative interviews as the attempt to understand the world from the participant's point of view, to unfold the meaning of people's experiences and to uncover their lived world prior to scientific explanations. This study used in-depth interviews as these assisted in gaining a better insight into the situation that refugees face in the implementation of the legislation that determines their status.

An interview schedule was used which comprised of a list of questions that the researcher asked the interviewees, with follow up questions prepared prior to embarking on an interview. Asking questions is one of the most common research methods in the

¹⁰³ <http://etd.rau.ac.za/theses/avail:blc/etd-08162005-111211/restricted/VICTIMSOFTJUVENILECRIME.pdf>.

¹⁰⁴ Steinar Kvale. *Qualitative Inquiry: Dominance Through Interviews and Dialogues*, 2006; 12; 480.

social sciences.¹⁰⁵ The researcher has a choice either to ask questions in a structured or unstructured way depending on type and context of the research. This may take the form of face to face interview and the self administered questionnaire. This also involves a lot of planning and it is done by way of a survey. In some cases, the respondents are given the questions to answer themselves but it is more appropriate to have the interviewer ask the questions and record the answers given. The latter can be used in face to face or over the telephone interviews.

A face to face interview was used as a tool to gather information from informants.¹⁰⁶ This involved outlining the set of questions that were to be explored with each respondent. Follow up questions were also made. The interview questions were determined in advance. The set standard interview questions presumed that there was common information that should be obtained from each person interviewed. All the interviews were conducted in English. The interviewer was thus required to adopt both the wording and the sequence of questions for all respondents in the context of the actual interview. The interview questionnaire contained the themes from the research questions that illustrate how refugees' status is acquired, for example in Appendix 1. Refugees and asylum seekers were asked questions pertaining to the procedures they followed in acquiring refugee status.

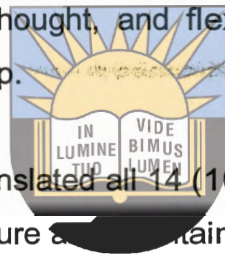
The advantages of face to face interview lie in the quality of data obtained and it exceeds that of mailed questionnaires. There is high return of responses with interviews compared to posted questionnaires. The guided interview was used and while the structure of the topic was known, the answers could not be anticipated. The face to face interview was ideal for obtaining comprehensive and comparable data. Because all respondents were asked the same questions, their responses were used to examine the data relationships during data analysis. The interview questionnaire forms the topics

¹⁰⁵ <http://www.qmu.ac.uk/psych/RTrek/foundation/f10.htm>.

¹⁰⁶ Except for the Zimbabwe Exiles Forum, an NGO based in Pretoria whose members were given questions to answer themselves.

that the interview covered, but it allowed the interviewer to adapt the sequencing and wording of the questions to each particular interview. Thus the interview questionnaire ensured focus on the same pre-determined topics and issues, while at the same time remaining conversational and free to probe into unanticipated circumstances and responses.

The use of interviews also permitted the researcher to secure a completed return. The researcher managed to interview all the participants that agreed to be interviewed. The other advantages were a natural conversation flow, freedom for the respondent to explore unpredicted avenues of thought, and flexibility of the interview in selecting aspects of the discourse to follow up.



The researcher transcribed and translated all 14 (10 for refugees/asylum seekers and 4 for organizations) interviews to ensure and maintain confidentiality and anonymity of the respondents. The 14 interviews comprised of the four institutions that were interviewed i.e. Home Affairs, South African Human Rights Commission, South African Red Cross Society and Zimbabwe Exiles Forum. Ten refugees and asylum seekers from different countries were interviewed.

3.6.2 Scope and Limitations of the Procedure

The findings of a policy implementation assessment research can provide ammunition to a program's supporters or opponents. This is because intense national political pressure can be introduced into the program evaluation process. In this instance, vested interests might impede the atmosphere for free scientific inquiry. In trying to get information on the selected case, this research encountered a number of bureaucratic problems that were beyond the researcher's control. In an attempt to gain access, the process of approval from the Department of Home Affairs from East London took an average of two months between the time of application and the time of data collection. Since this is an issue that directly involves policy, interviewing the South African Police Services would have been advantageous. However, this research had to proceed without their participation. There was limited time for the researcher to complete the

work while the Police Office in East London took a long time to give its approval despite frantic attempts by the researcher to obtain the approval timely. However, to offset these limitations, this study made use of media report analysis. The reports were obtained from online newspapers and television.

3.7 ETHICAL CONSIDERATIONS

All professionals have a primary ethical responsibility to perform in a competent manner. They are also accountable to their professional commitments and the means by which they attain these commitments. The following were the ethical considerations that the study took into account.



3.7.1 Gaining access

In May 2008 an application was made to the Department of Home Affairs in East London for permission to do a study with the Department at the East London DHA Office. The application was approved in July 2008 and permission was granted by the Immigration Manager. Two officials were appointed to assist the researcher with answering the questionnaire. Data collection commenced in September 2008. In June 2008, an application was made to the South African Police Services in East London but the researcher was referred to the Headquarters in Zwelitsha. Due to failure to meet the officials in charge and after several attempts, the researcher had to look for an alternative because time was of essence. She had to rely on the refugees and asylum seekers' reports on how police officials treated them and media reports on arrests and deportations.

3.7.2 Informed consent

Informed consent is a vital part of the research process, and as such, entails more than obtaining a signature on a form.¹⁰⁷ Informants' consent to participate in the research was obtained after the latter were informed on the nature of their participation in the

¹⁰⁷ <http://healthcare.partners.org/phsirb/infcons.htm>.

study.¹⁰⁸ The key informants were given a brief description of the study and the purpose and aim of the study. They were further informed that there would be no financial or other benefits and assurances of confidentiality were made. The key informants were assured that their participation was voluntary and that they could withdraw at any time.

3.7.3 Voluntary participation

This principle prohibits securing consent to participate in research through compulsion, which is, forcing participation by the exercise of the social dominance of the researcher. The researcher informed the key informants that their participation was voluntary and that no force or coercion or bribery would be used or enforced upon them to ensure their participation.



3.7.4 Privacy and confidentiality

It is the ethical responsibility of the researcher to seek only the information that is relevant to the research. The obligation to confidentiality is met by protecting the identity of the research subjects by maintaining subject anonymity.¹⁰⁹ To make sure that this was adhered to, there was no disclosure of identity in the report in order to protect the privacy and confidentiality of all the participants. Finally, direct identifiers would be destroyed as soon as the dissertation is submitted.

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3.8 DATA ANALYSIS

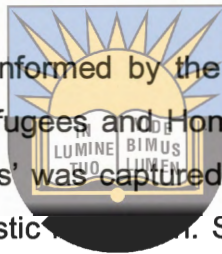
Data analysis can be described as a process of bringing order, structure and meaning to the mass of collected data. The data collected in the field was analyzed using qualitative thematic data analysis. Descriptive analysis covers the following basic areas, namely, the treatment of asylum seekers and refugees and the procedures followed in the granting of refugee status. Interpretation involves explaining the findings and interpreting the Refugees Act and the Immigration Law, answering the 'why' questions, attaching significance to particular results and putting patterns into an analytic

¹⁰⁸ Courmoyer, D. and Klein, W. (2000) *Research Methods for Social Work*, London, Allyn and Bacon.

¹⁰⁹ Ibid.

framework.

Strategy for analyzing the interviews was cross case analysis which means that answers from different people were grouped together under common questions and an analysis of different perspectives or answers on central issues was done.¹¹⁰ This took place using two methods of analysis which were the descriptive analysis and the interpretation of the data. Because an interview questionnaire was used, answers from different people were grouped. The interview guide constituted a descriptive analytical framework for data analysis.



Data organization is going to be informed by the inductive type of analysis. In this instance, variations of what the refugees and Home Affairs Officials mean when they speak of 'granting of refugee status' was captured in the form of indigenous concepts taking into consideration the domestic context. Sensitizing concepts that the analyst brought to the data, were also used. Verbal categories used by the participants were analyzed so as to break up the complexity of reality into parts. Labels were identified from an analysis of what the key informants said.

The analysis began by looking for recurring regularities in the facts. These regularities represented patterns that were sorted into categories. The analysis then reiterated between the data and the classification system to verify the meaningfulness and accuracy of themes and the placement of data in categories. When several different classification systems have been developed, some priorities will be established to determine which category systems will be more important than others. Prioritizing was done according to the salience, credibility, uniqueness, feasibility, special interests and materiality of the classification schemes.¹¹¹ Closure was brought to the process when the sources of information were exhausted, when sets of categories were saturated so that new sources led to redundancy, or when the analysis begins to overstretch beyond

¹¹⁰ Michael Quinn Patton 1990, *Qualitative Evaluation and Research Methods*, 2nd ed. Getz et al 2004.

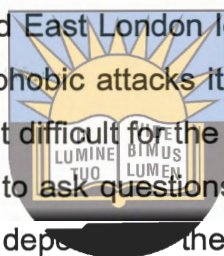
¹¹¹ Ibid.

the boundaries of the issues and concerns guiding the analysis.

By definition, interpretation involves going beyond the descriptive data. This involved attaching significance to what was found, offering explanations, drawing conclusions, making inferences, building linkages, attaching meanings, imposing order and dealing with rival explanations, disconfirming cases and data irregularities as part of testing the viability of an interpretation.

LIMITATIONS OF THE STUDY

The researcher had to travel around East London looking for refugees/asylum seekers to collect data. Due to recent xenophobic attacks it was not easy for the researcher to talk to those people and this made it difficult for the researcher to interview people from other countries. It was also difficult to ask questions with regard to their refugee status because they felt they might be deported if they disclosed this. As a result, the researcher had to firstly establish friendship with the respondents for them to open up. This resulted in spending a lot of time and money.



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3.10 CONCLUSION

In this chapter, the researcher reported on the methods utilized for collecting data. The study being exploratory and qualitative, utilized in-depth interviews, with a sample of ten refugees/asylum seekers. Ten refugees/asylum seekers were chosen due to the difficulty of locating refugees/asylum seekers in East London since the town is located far from the borders where they cross into South Africa. Because of the limited time and resources that the researcher had, she had to interview those who were willing. Interview questionnaires were used. Face to face interviews were also held and they were conducted in English.

This study was conducted in East London. Data was collected from key informants who are the members of the Department of Home Affairs, the Office of the South African Human Rights Commission, South African Red Cross Society, and Zimbabwe Exiles Forum. Data was gathered using an interview questionnaire. The key informants were

debriefed on the requirements of the study and they gave their consent. The researcher wrote down the informants' answers. The researcher also made use of existing documents as sources of data and information on the plight of refugees and asylum seekers. Chapter Four will focus on the presentation and interpretation of the findings.



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CHAPTER 4: DATA ANALYSIS

This Chapter analyzes the implementation of South African refugee policies and provides an account of recent developments in refugee protection. The intention is to ascertain how they have affected asylum seekers and refugees in South Africa. In doing so, this research employed a sample of refugees residing in East London in order to find out the impact that the implementation of refugee law and policies have had on the refugees and asylum seekers. Today, the world is faced with a challenge of dealing with the protection of refugees. This Chapter hopes to make an analysis of the extent to which domestic, regional and international instruments have offered protection to refugees. The Chapter also discusses the findings from a study conducted in East London that has self-settled refugees (those refugees that have decided not to stay in refugee camps). The findings are coupled with a brief reflection and analysis of the refugee/immigration policies. The shortcomings of the South African government refugee policy implementation and the dilemmas that have emerged in the process of policy evolution are discussed. It is hoped that the findings would make a contribution by analysing the policies regulating refugees and, in particular, how the policies have affected refugees or conversely, how refugees have responded to these policies.

Qualitative interviewing was used as an instrument for data collection purposes. Qualitative data analysis is a range of processes and procedures whereby the data is collected into some form of explanation, understanding or interpretation of the people and the situations that are being investigated.¹¹² It is usually based on an interpretive philosophy, the idea being to examine the meaningful and symbolic content of qualitative data. An example is that by analyzing interview data, the researcher may be attempting to identify people's interpretation of the world; their point of view and how they came to that conclusion; what they have been doing; how they conveyed their view of their situation and how they identify or classify themselves and others in what they say.

¹¹² http://onlineqda.hud.ac.uk/Intro_QDA/what_is_qda.php.

Seeking to establish common standards for the treatment of refugees, South Africa endorsed and adopted the 1951 Convention definition. It is a signatory to the Convention and in this regard, it is bound by its obligations. But the definition of the Convention is lacking in its protection mandate. According to these definitions, elaborate protection is afforded only to a limited number of people. These definitions are not congruent with the Charter of the United Nations and the Universal Declaration of Human Rights;¹¹³ both of which affirm the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. The definition of 'a refugee' fails to answer pertinent questions like what caused an individual to flee. The South African Act is 'controlling' in nature and has failed to protect refugees in a convincing manner.



The asylum and refugee policies of South Africa can be described as policies that involve three generations.¹¹⁴ The first generation refugee policies are characterized by the absence of refugee specific laws, in this category, refugee matters are addressed under general immigration laws. The second generation refugee policies were marked by the introduction of refugee specific laws mainly intended to control rather than protect refugees. According to Rutinwa, the third generation of asylum and refugee policies was characterized by the introduction of protection oriented refugee legislation which approximated the international instruments on refugees.¹¹⁵ However, the third generation of refugee policies coupled with the advent of democracy in South Africa and the intensification of wars around Africa made a number of foreign nationals to view the country as a safe haven.

In trying to deal with a significant increase of incoming foreign nationals, South Africa is

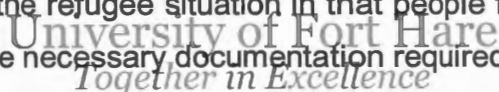
¹¹³ The 1969 OAU Convention's preamble adopted terms of the Charter of the United Nations and the Universal Declaration of Human Rights of 1948.

¹¹⁴ Rutinwa, April 2002, <http://www.lhr.org.za/projects/refugees/publications/seminars/hsrc>.

¹¹⁵ Ibid.

in a process of tightening its immigration laws, a move that has seen fewer and fewer people being given refugee status. The use of restrictive and complex measures in granting refugee status ignores the fact that globalization causes change to the political environment and the need to review refugee status determination. There is therefore a need to put in place effective refugee mechanisms and comprehensive strategies.

The restrictive measures include border patrols by armed soldiers. A Zimbabwean asylum seeker said, "we had to bribe the soldiers too because they are the ones who control the Beitbridge border. Sometimes you hear they even shoot illegal migrants. They are always patrolling the border." Also all refugees interviewed indicated that without a valid visa one cannot be allowed entry through the border despite the fact that one is an asylum seeker. A refugee from Zimbabwe said, "at first I went to immigration officers at the Beitbridge border and told them my story that I was fleeing persecution. They refused me entrance so I had to resort to illegal means to gain entrance into South Africa". This complicates the refugee situation in that people fleeing persecution cannot be expected to have all the necessary documentation required for legal entry.



In the case of asylum seekers and refugees, flight is often prompted by difficult circumstances like conflict or extreme poverty but what determines 'life after' is the protection that the host country affords them. States, particularly South Africa, should respect the principle of *non refoulement* which states that individuals should not be returned to places where their lives are threatened. But to the contrary, people are being deported everyday without thorough investigations into their plight.

The researcher discovered that 80% of the people interviewed indicated that they have been caught and deported at least once. This is because South Africa uses strict immigration measures and it fails to acknowledge that 'fear' needs to be evaluated on a subjective basis if there is to be a fair system. A person is compelled to leave his/her country of origin due to 'fear' of persecution; therefore, the officials should objectively assess the plight of these refugees, with consideration of their individual circumstances. The principle of *non refoulement* requires an examination of facts of each individual

case. Therefore, the denial of protection in the absence of review of each individual circumstance would be inconsistent with the prohibition of *refoulement*.

The researcher having interviewed an asylum seeker from Zimbabwe learnt that when the latter and his friends were deported, two of them could not come back because they were killed by the ZANU PF supporters for being active supporters of the opposition. The asylum seeker said, "We were shocked when we learnt that two of the boys have been killed by ZANU PF thugs. If they had not deported them, they would have been alive today. I blame the South African government for these deaths". Zimbabwean asylum seekers should be treated just like any other asylum seeker and be granted refugee status. The officials when deporting them stated that there is no war going on in Zimbabwe and that they do not fit in the refugee category, therefore they are economic migrants. Despite the fact that many applicants may not acquire refugee status in the end, it is misleading and unhelpful to characterize the majority of asylum seekers as economic migrants seeking to exploit asylum seeker status.

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Of all asylum seekers and refugees interviewed, 90% of them used illegal means to gain entry into South Africa. Only a young man from Ghana indicated that he ran away from a chieftaincy dispute in his country and at that time, he already had a valid visa. When it expired he had to seek asylum because it was not safe for him to return to his country, he said, "Things are not going right in the village, the Chief would force you to do anything and this leaves one with the only option of fleeing."

The findings suggest that most applicants for asylum seeker status are never afforded the provisional protection of a transit permit. Even though informal border crossings are allowed under South African refugee law and do not limit an entrant's right to apply for asylum, asylum seekers become immediately vulnerable to unlawful deportation and denial of refugee protection the moment they cross the border. From the interviews it shows that many asylum seekers are deported everyday.

The government needs to avoid a situation whereby refugees are put in a dilemma of

returning to their countries which are already marred by political conflict, violence and economic instability. Therefore, they are forced to either choose voluntary repatriation or deportation. Ultimately, the foreigners are psychologically, emotionally and physically traumatized because of the predicament in which they find themselves. They are caught in between the unbearable situation at home, and the uncertainty of their future in South Africa.

The problems and challenges that refugees and asylum seekers face today are a result of failure in the implementation of refugee policies. The DHA in response to a question on the implementation of refugee policies posed by the researcher, it was clearly revealed the department is not well versed with the immigration policies in general and refugee policies in particular. DHA has limited knowledge of South African asylum laws and its responsibility to offer protection to asylum seekers. The officer said, “we do not have copies of the Act¹¹⁶ but when the need arises we request one from the superiors”.

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The Department also states that another sign that indicates the need for refugee protection is the ‘exodus of multitudes of people from the same country’. They prefer group situations rather than individual plights, “because a situation like that clearly indicates that there is really a problem in their country of origin.” The above indicates that with the combination of the two circumstances above, one can therefore successfully get refugee status. Due to pressure from organizations like Zimbabwe Exiles Forum and the South African Human Rights Commission, Home Affairs is granting refugee status to some of the people from these countries even though many others are turned down daily. These independent organizations are playing a vital role in making sure that the plight of those in need is taken care of. The Zimbabwe Exiles Forum indicated that they do investigations, litigations and advocacy on the human rights violations of asylum seekers and refugees.

In terms of treatment of asylum seekers and refugees, there are complaints that are

¹¹⁶ Refugees Act, No 130 of 1998.

brought before the courts on a daily basis. The research found out the existence of high levels of corruption in the refugee determination process. South Africa violates its obligations under international law in its treatment of refugees. There are a lot of cases that go unreported; these range from corruption, bribery and abuse by government officials. In fact, all refugees interviewed mentioned to the researcher that they were asked for a bribe or a "fee", when they approached Home Affairs Officials for documents. They often had an earlier interview date for a "fee," the translators also demand money in exchange for a speedy resolution of their application. The process of applying for refugee status was explained as follows by one asylum seeker interviewed by the researcher:

"We had to go to Home Affairs for more than two months to Port Elizabeth Reception Centre. There would be more than 1000 people and police would want to arrest you if they catch you without documents. Because of this pressure, you end up bribing the security officers who could not even offer help sometimes. Normally the bribe is R100 but it also depends."

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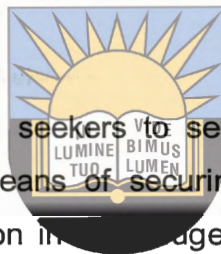
Many other similar accounts of bribery by the Home Affairs are illustrated by the following comments;

An Ethiopian refugee told the researcher: "The Home Affairs people are money-makers. If you do not have the papers, it is very bad. The first day I went to Port Elizabeth, I was told to come back after 7 months for the papers. During that period I had to go there 5 to 6 times to check my papers but they did not give me. I then got the papers. If it is backdoor you get them on the same day, but I did not have the R2000 to bribe them, that is why it took long."

A Kenyan woman had this to say "The Home Affairs people are making good money out of us and they do not even consider that we are poor and with them at least they have food, a place to stay and a salary at the end of the month. If you cannot buy them "a cool drink" then they tell you "you are not serious". Many ladies end up resorting to prostitution to get money to bribe them."

According to a Zimbabwean male asylum seeker "I only went to Home Affairs once and as I was listening to people's stories of bribery and extortion. I decided to resort to using faked documents which I made for myself. This worked for me because the police cannot see that they are forged papers. Another Zimbabwean asylum seeker indicated that he does not have any papers "If police deport me, I just makes sure that I come back".

A Zimbabwean refugee said: "They never interview you if you do not pay, especially in Johannesburg, even if your papers do expire they do not renew them."



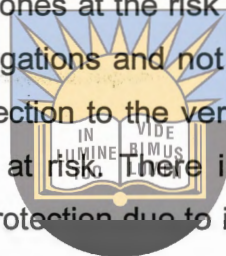
Difficulties experienced by asylum seekers to secure legalized documentation have caused them to opt for illegal means of securing that documentation. There is a systemic and widespread corruption in the refugee determination process. Research done by the Human Rights Watch in 1997 indicated that only places like Johannesburg and Pretoria are characterized by corruption but the researcher discovered that it is pervasive in other areas as well.

The victims often find it difficult to report these abuses because the 'abusers' are the very people upon whom they are looking to secure asylum papers. They end up not reporting these cases fearing that reporting them would cause denial of access to asylum papers. One asylum seeker from Somalia indicated that he was using forged asylum papers. This was a result of difficulties in acquiring those papers because the officers were demanding bribery which he could not afford. He said, "As an asylum seeker or refugee, you are destitute and demanding bribes from such persons is a mockery given the fact that many ran away from their homes to escape death."

The police officials on the other hand, use excessive force against refugees. They deport them on the ground that they do not have valid documents that permit them to stay in South Africa or that there is no war going on in their country of origin.

The representative of East London Home Affairs indicated that they issue asylum seekers with a Section 22 permit that legalize them and that it is renewable after 30 days. However, none of the asylum seekers or refugees interviewed indicated that they were issued with such a permit.

It was confirmed in the media that foreigners without valid documents were being deported daily. Amongst these were asylum seekers and refugees who were in the process of registering as refugees. A Zimbabwean refugee who was interviewed described the situation at the camps as “survival of the fittest” because those who do not have money for bribery are the ones at the risk of being deported. The government should uphold its human rights obligations and not forcibly return asylum seekers and others in need of international protection to the very countries they have fled from. By deporting them, their lives are put at risk. There is really a critical problem in South Africa when it comes to refugees’ protection due to ineffective refugee mechanisms and lack of comprehensive implementation strategies.



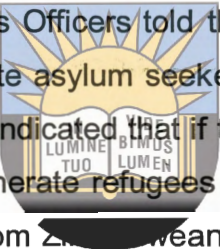
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The researcher interviewed a 22 year old Ethiopian man who narrated his story that it was just hours after he had crossed the South African border when he was caught by police and deported because he did not have any documents to stay in the country. They could not listen to his story that he had escaped death and that he was on his way to the refugee offices to seek asylum.

To this day, South Africa administers its refugee policy according to improvised procedures under the Refugee Act, No 130 of 1998. The improvised nature of these procedures and the lack of clear guidelines have allowed an unacceptable degree of bureaucratic indiscretion and abuse, as the research findings indicate.

Due to ineffective refugee mechanisms, asylum applications are not determined properly. From the research undertaken, the immigration officers do not have copies of the Refugees Act and have no knowledge of the rights and duties of refugees or how their status should be determined. One Immigration Officer indicated:

“Yes we do not have copies of the Act but when the need arises we look for one. Sometimes when you are doing your work you do not need ‘a paper’ but only ‘orders’ from your superiors.”

This clearly indicates that officials cannot make informed or consistent decisions on refugee applications. The researcher’s interviews and observations suggested that the refugee officers who were responsible for making the initial evaluation of an asylum application were not provided with the necessary resources to form an informed opinion about the authenticity of asylum claims, or about the actual human rights situation in a particular country. The Home Affairs Officers told the researcher that their information about various countries that generate asylum seekers to South Africa is obtained from the media. The officers interviewed indicated that if the superiors feel that the country in question is stable and does not generate refugees then they order them to turn down asylum applications. Applications from Zimbabwean asylum seekers were being turned down simply because the  tival parties signed an agreement,¹¹⁷ and the situation was regarded as ‘stable’. Officials overlooked the fact that there is need to assess the nature of changes in the country of origin, including the general human rights situation, particularly the cause of fear of persecution. This is essential in order to objectively make sure that the situation which justified the granting of refugee status has ceased to exist.

A Home Affairs officer interviewed by the researcher indicated that he strongly feels that Zimbabweans do not need asylum.

“Really these people are not refugees because there is no open warfare in the country at present. There is peace in Zimbabwe and these people run away from poverty, but in South Africa there is poverty too.”

The researcher conducted another interview at the Office of the Human Rights

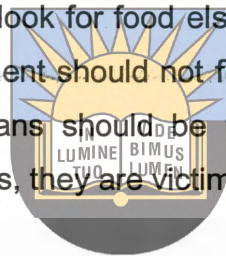
¹¹⁷ <http://www.nation.co.ke>. Ketsepile Nyathi Nation Correspondent; SA turning away Zimbabwe refugees as crisis rages on. Posted Monday, October 20 2008 at 20:57.

Commission, East London and the interviewee said:

“Zimbabweans are purely economic migrants, they come to seek better lives, and if we give them asylum then every country that is poverty stricken will demand that. They should stay in their countries and look for a plan and not to consider crossing the borders. All African countries are poor. The resources are not even enough for the locals and so we do not need any more burdens.”

However, a respondent from the South African Red Cross Society gave a different view.

“A human being should be treated as such, if you do not have food in your country you have a right to look for food elsewhere even if it means one has to cross borders. The government should not forget that the right to life is inherent and inalienable. Zimbabweans should be treated as refugees just like other refugees from other countries, they are victims too.”

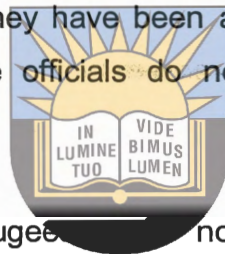


The above views indicate that the definition of a refugee is still unclear even to responsible organizations which directly work with asylum seekers and refugees. The programme manager for the Zimbabwe Exiles Forum expressed concern about the denial of refugee status,

“Denial to accept asylum seekers from certain countries because they are believed to be stable is inconsistent with the UNHCR agreement and international law which require an individual determination of refugee status. Time is required to allow improvements to consolidate before refugee status denial.”

From the interviews conducted by the researcher, Zimbabweans and Kenyan refugees indicated that they had problems in acquiring refugee status and a lot more people were deported at a time when serious allegations of human rights abuses and massacres were being raised by the opposition parties in their countries. This raises serious concerns about the violations of asylum seekers' rights under domestic, regional as well as international law.

Some asylum seekers who had been at some point denied asylum indicated that Home Affairs officials did not furnish the reasons for rejecting their applications. The officials just told them that “the situation in your country is fine”. This made it difficult for them to appeal against these decisions. Asylum seekers and refugees do not know the procedures that should be followed after refugee status denial. A Zimbabwean asylum seeker states: “they never explained the existence of such a thing to us, the officials say you cannot have rights in a foreign land because in your own country you do not have rights”. The Constitution provides that every person has the right to administrative action that is lawful, reasonable and procedurally fair. And that they have a right to be given written reasons in the case that they have been adversely affected.¹¹⁸ However, this means that practically the above officials do not know or they do not take the Constitution into consideration.



Most of the asylum seekers/refugees do not speak or understand the local languages. So they encountered problems in narrating their stories for status determination purposes. An Ethiopian refugee said, “There was an old man from Zaire who could neither speak any of the local languages nor English. I heard the officer shouting at him and directing him to a small office to wait for his deportation”. Some of these interpreters charge for their services. This would seem to suggest that the process inadvertently discriminates against the poorer applicants. Therefore the quality of the interpretation assistance and its impact on the confidentiality of applicants’ claim is a cause for concern. A refugee from Ghana complained, “I believe I have a right to privacy but at the Marabastad Refugee Reception Centre I was questioned in a public area and other people could overhear our conversation. I am sure this is why I was turned away the first time because I could not say everything with everyone’s eyes on me.” So this follows that applicants whose concerns about confidentiality inhibited their answers were less able to fully justify their asylum claims.

It is the duty of the Department of Home Affairs to provide a competent interpreter for

¹¹⁸ S 33 (1) and (2) of the South African Constitution of 1996.

applicants at all stages of asylum processes.¹¹⁹ Failure to do so amounts to unfair treatment of asylum seekers and deviates from the principles of status determination. The government should employ interpreters so as to provide a fair system. While the refugee reception officers do provide asylum seekers with explanations about the application forms and the opportunity to tell their own stories, they fail to provide:

- 1) Information about the application process;
- 2) Information about the status determination and appeal processes; and
- 3) Translation services.

Like undocumented migrants in South Africa, refugees and asylum seekers often suffer abuse at the hands of an increasingly xenophobic public and police force. Xenophobia in South Africa is on the increase as evidenced by the recent xenophobic attacks on foreigners. Asylum seekers face more abuses than undocumented migrants since they are easily identifiable because of physical appearance, mode of dress and language. Some authors¹²⁰ have indicated that xenophobia and intolerance towards refugees and asylum seekers have increased in recent years thereby presenting a major problem.¹²¹ If this situation is not carefully handled or monitored, it can lead to another wave of xenophobic violence against non-nationals because locals are under the illusion that they are assisting the government to force the vulnerable foreigners back to their countries by inflicting violence on them. An Ethiopian refugee who once stayed in Johannesburg said "police officers and the local people treat us like dogs, as if we are not human beings". Another Kenyan refugee interviewed said:

"The police officers arrested me together with my five friends in a night club and took us in a police van despite the fact that we showed them our valid asylum documents. We were illegally detained in police cells for the whole week in a prison mixed with local criminals. The police repeatedly insulted us calling us

¹¹⁹ Section 5 of the South African Refugee Act, No 130 of 1998.

¹²⁰ See footnote 42 above, pg 4.

¹²¹ Ibid.

“*kaffir* (a racial term used by the apartheid regime against blacks), *makwerekwere*” (a derogatory name for foreigners) and they even beat us telling us to go home. They treated us like criminals.”

The refugees and asylum seekers complained about the rude and aggressive manner in which they were treated by the police and their unwillingness to identify themselves. One refugee from Ghana said, “police officers kicked me after I asked them to identify themselves before I could show them my asylum documents.” Police officers have a duty to identify themselves under certain circumstances, especially when asked to do so.



Most refugees and asylum seekers in South Africa live in private housing though they are expected to live in refugee camps. There are also church sponsored refugee camps especially in the Gauteng region. The researcher interviewed some refugees and asylum seekers in the East London area who indicated that they lived in shacks since they could not afford to rent houses. All of the refugees interviewed were self employed; some sold ornaments along East London beach and others did part-time jobs. They got little money which is enough only for their survival. It seems the government is not willing to assist them with loans or offer them employment. An asylum seeker from Zimbabwe said:

“I am an educated man with a degree in Education, but I am struggling and without proper housing. I stay in a plastic shack. FNB refused me to open a bank account because I am an asylum. A tall guy who was serving me told me that there are many banks in Zimbabwe and I am sure they will be willing to assist you. This was a response to my statement that I have a right as an asylum to open a bank account.”

Another Zimbabwean refugee said that the same bank (FNB) denied him access to a loan citing that he did not have an ID. These refugees and asylum seekers indicated that the police often came to their shacks even late at night to check if they had valid documents. A Somali refugee said: “The other day the police came around midnight to

check our documents. They told us that they know all the shacks that belong to foreigners in the area and that someone tipped them off.”

In light of the above, the Department of Home Affairs continues to struggle to process applications for asylums. There is need to empower the reception offices and streamline the reception process through improvements in infrastructure, human resources and case-flow management. Applicants wait for extended periods in queues, increasing their vulnerability to humiliation, exploitation, job-loss and deportation.

International law imposes an obligation on the receiving state to provide protection and assistance to refugees. This has obviously proved to be problematic practically as the South African government has not fully lived up to what the international community expects of it. Equally, South African policies fail to recognize and plan for actions against the reality of xenophobia and racism that commonly accompany relations between locals and foreigners. It is therefore necessary that South Africa seriously consider itself as a member of the global community. This can be realized by, amongst other things, eradicating discrimination and ensuring that its policies and laws are in line with modern international trends and developments within the human rights sector.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

5.1 GENERAL OVERVIEW

The refugee crisis needs to be addressed both at the regional and international level. Regional groupings, such as the Southern African Development Community (SADC) will need to increasingly address the root causes of refugee movements. This would entail a political and economic agenda aimed at eliminating ethnic strife and conflict; curtailing the arms trade; developing respect for human rights; establishing a firm foundation for democratic institutions and governance, a drive towards promotion of economic development and social progress. Domestic initiatives will also be necessary in the quest to find meaningful and durable solutions to problems relating to refugee movements. Meaningful solutions to the refugee problem should include initiatives aimed at enhancing international regional burden-sharing not only in emergencies but also to provide assistance to improve the environmental and other long-term impacts experienced by countries hosting large refugee populations.

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After the attaining of independence in 1994, South Africa signed international agreements on refugees and enacted its own Refugees Act. Since then, the DHA has always struggled to process applications for asylum. Currently the Department is transforming its refugee reception systems in an attempt to develop the reception offices through improvements in infrastructure, human resources and case-flow administration.

However, this research feeds into the above reforms by presenting preliminary findings of a sample survey of conditions at reception offices. The research counters the argument that an accelerating influx of refugees is the main driver of poor service delivery at these offices. The data suggests that the implementation and procedural problems at the reception offices on the part of Home Affairs are the major barriers to access services. It is in this context that the research suggests a range of improvements in South Africa's refugee system.

The above report provides preliminary results from the clear and independent overview of the state of South Africa's refugee reception system. Drawing only on data collected, the researcher can already identify key problems and begin to critically evaluate proposed solutions and recommendations. The findings suggest a need for greater attention on the implementation of refugee policies. This is what ultimately determines the status of refugees in South Africa.

Many of the problems identified could be significantly alleviated by improving on the implementation of refugees' policies and making efforts to better communicate with potential applicants about their rights and the necessary procedures to access and navigate the system.



5.2 RECOMMENDATIONS

In a study on undocumented migrants, asylum seekers, and refugees in South Africa, the Human Rights Watch¹²² made some very pertinent recommendations, some of which are highlighted below. Given that DHA has been identified as the department responsible for refugees and asylum seekers, the research recommends that in the interests of improved service delivery and protecting human rights, the Department should broaden its agenda to include a number of activities and programmes. Below is a list of some of the initiatives that can be undertaken.

- The number of appropriately trained staff and facilities at refugee reception offices has to be increased and this would result in increased efficiency in processing of asylum documents. Officials with special responsibility for refugees and undocumented migrants should receive specific training on the rights of refugees, asylum seekers and undocumented migrants and the human rights of all persons.
- The asylum seekers who have been arrested should have their status determined in a timely manner. This can only be possible if all the staff having contact with migrant populations are trained to easily identify

¹²² Human Rights Watch, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa*. New York: Human Rights Watch, (1998).

asylum seekers and apply the asylum procedure.

- Education and awareness directed at reducing xenophobia, and enhancing tolerance and respect for the human rights of asylum seekers, and refugees should be intensified.
- The DHA should develop and strengthen partnership with members of the government, traditional leaders, NGOs, civil society and the refugee community in order to monitor human rights; combat intolerance and xenophobia; and protect refugees with specific needs. They must shame and publicly condemn harassment or attacks on foreigners and should call for tolerance, understanding and respect for the human rights of all those living in South Africa.
- The media should portray refugees in a more positive light and educate the public about their plight. They should also assist by providing educational programmes on the radio and TV discussing refugee issues, including rights and obligations of asylum seekers and refugees.
- Law enforcement officials should be required to wear visible and readable identification badges which state their name and identification number. They should also be required to identify themselves by name, rank, and identification number when asked to do so.¹²³ There must be an assurance that these complaints should be considered without prejudice to refugee status claim, and those engaged in fraud, corruption and maltreatment of refugees should be prosecuted.
- It must be publicly announced that abuse of undocumented migrants, asylum seekers and refugees are inconsistent with South African and international law and that they will not be tolerated. Therefore thorough investigations should be made on allegations of abuse by government officials and those responsible should be brought to justice.¹²⁴ The

¹²³ Ibid.

¹²⁴ Ibid.

government, particularly police officials and other security forces should recognize undocumented migrants as a particularly vulnerable group and should therefore develop and adopt specific policies for the protection of foreigners from violent attacks.

- In the process of status determination, the applicant should be given an opportunity to make his or her case directly to the persons who will make the first instance decision whether or not to grant refugee status. In case of rejection, reasons must be granted. Appeals should be heard by a properly constituted body with independent status. Also the right to an interpreter, to submit documents in any language, to use legal representation and to present a case in person should all be specified.
- South Africa should recognize the especially vulnerable position of women and children by including gender-based persecution, sex-specific abuse, as grounds for asylum.
- The state institutions supporting constitutional democracy, for example, the Office of the Human Rights Commission, Commission for Gender Equality, and the Youth Commission should come up with strategies on the protection of refugees and asylum seekers. They should declare refugees and asylum seekers as especially vulnerable groups in South African society and in keeping with their mandate, they should conduct campaigns to inform and educate the public about the rights of non-nationals and refugees.
- To prevent exploitation of migrant labor state authorities should develop and implement integrated policies to end the use of coercive labor practices by employers. This includes investigations into such allegations and prosecution of such employers. Reasonable steps should be taken to ensure that employees are paid for work performed prior to their deportation. The recommendations that came up from public hearings on farm workers should inform policy.
- The Independent Complaints Directorate which is responsible for investigation of complaints against the police, should pay special attention

to complaints against the abuse of foreigners by the police, and should take note of particular vulnerability of those with irregular immigration status in investigating on allegations of abuse.¹²⁵

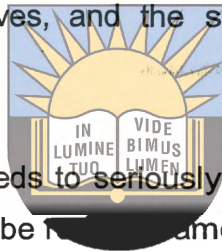
- SADC and member states should seek regional solutions to the problem of asylum seekers and refugees in the region and promote teamwork among member states in the area of migration policy. A permanent committee should be appointed to monitor the treatment of refugees and asylum seekers in the SADC member states. The refugee issue should be addressed on a regional basis and encourage burden-sharing among member states in this area. In particular SADC Member States should protect refugees against *refoulement*, encourage voluntary repatriation and reinsertion into society.
- The government needs to ensure that refugees and asylum seekers enjoy social and economic rights including education, health services and other government assistance. Increased cooperation between DHA and other stakeholders or government departments would facilitate access to social services for asylum seekers and refugees.
- The border fence between South Africa and Zimbabwe should no longer be electrified, since there are many reports of electricity-related injuries at the border fence.
- Government should protect detained asylum seekers and refugees ensuring that the detained conditions conform to international and domestic standards, including the UN Minimum Standards Rules for the Treatment of Prisoners. Asylum seekers and refugees in detention are entitled to clean and adequate bedding, prompt access to medical treatment, adequate washing facilities and three meals a day at regular intervals. In order to ensure compliance with international and domestic standards, places of custody for deportees should be subjected to

¹²⁵ See footnote 120 above.

inspection by an independent authority.¹²⁶

5.3 CONCLUSION

The research advocates that the problem of illegal immigrants be attended to. This refers to the refugees and asylum seekers that are in the country already (whether legal or illegal) and those that have stayed for a long period. The latter should be given opportunities to regularize their status with legal documents. Once this has been done, they will have access to and claim rights due to them. There is need to adopt policies sensitive to refugees' needs. Refugees need to be afforded special protection because of the position they find themselves, and the special and unique challenges and experiences that they go through.



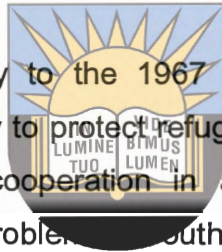
The South African Government needs to seriously consider itself as a member of the global community and this need to be reflected amongst other things, by eradicating or bringing discriminatory laws in line with modern international trends and developments within the human rights sector. Such a drive would require that South Africa recognizes and employs UN and regional instruments to realize such a crucial aspect of people's lives. International obligations ought to be respected in recognizing and respecting human rights. The international human rights law accords human rights to all human beings be they citizens or foreigners.

South Africa has become a destination and transit point for migrants from Africa and Asia. There has been a growing awareness of the gap between the rights which foreigners theoretically enjoy and their practical access to these rights. Those working to counter these problems are faced with a shortage of information about who are the affected people, how they interact with South African institutions, the specific rights violations they face and the specific reasons behind these violations. Without such insights, neither the government nor advocacy groups can effectively promote the rights and welfare of asylum seekers and or refugees. The findings of the research suggest a

¹²⁶ Supra no 120.

need for greater attention on how the reception process is publicized and how asylum applicants are received.

Ultimately, foreigners are psychologically, emotionally and physically traumatized because of the predicament in which they find themselves. They are caught in between the unbearable situation at home and the uncertainty of their future in South Africa. A person is compelled to leave his/her country of origin due to 'fear' of persecution. Therefore, the officials should objectively assess the plight of the refugees, having due consideration for the circumstances of each individual.



Since South Africa is a signatory to the 1967 Protocol relating to the Status of Refugees, it should respect its duty to protect refugees and this can only be enhanced through committed international cooperation in a spirit of solidarity and effective responsibility. There is a critical problem in South Africa when it comes to refugees' protection due to ineffective refugee mechanisms and lack of comprehensible strategies. It is the duty of the South African government and UNHCR to implement effective ways for the protection of refugees. Civil Society and NGOs, on the other hand, should help monitor the situation on the ground; while academics can raise the consciousness to society. Together they can unite to fight the spirit of intolerance towards foreigners and, in particular, towards refugees and asylum seekers.

Globalization, rapid change in political environment, complex mixed migration movements and new forms of persecution are the major causes of the increase in the movement of people across borders. The world is therefore faced with a challenge of dealing with the protection of growing number of refugees. Vera Gowlland-Debbas¹²⁷ supported the above position when he stated that the problems of refugees have not changed but the refugee problem has. People often run away from their homes because of the upheavals caused by wars or the tensions of inter-ethnic nature and this is often

¹²⁷ Vera Gowlland-Debbas. *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers 1994. Vol 12. Pg xix.

exploited by populist politicians. There is therefore need to implement appropriate strategies at the domestic, regional and international level for refugee protection, while at the same time building a more tolerant civil society.



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APPENDICES

APPENDIX 1: QUESTIONNAIRE ADMINISTERED ON REFUGEES AND ASYLUM SEEKERS

I am conducting a research on the topic: The status of Refugees and Asylum Seekers in South Africa with reference to the implementation of the South African Refugees Act, No 130 of 1998. Please be informed that all the data collected would be coded to protect respondents' identity and privacy and those respondents are entitled to the summary of the outcome of the interview.

Basic information on;

- age
- gender
- nationality
- ethnic group



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1. Briefly why did you leave your country?
2. Who were you with when you left your country?
3. How did you come to South Africa?
4. When you arrived in South Africa what did you do?
5. Who received you?
6. What process followed to register as refugee?
7. What problems did you encounter?
8. What were your first experiences in South Africa as a refugee?
9. What are your rights as a refugee/asylum seeker?
10. Are they being followed?
11. Have you ever hosted refugees in your country, if yes how was the treatment?
12. What type of housing do you stay in?
13. How long have you been in South Africa?
14. Are you still an asylum seeker?
15. When did you declare refugee status?
16. After how long?

17. What did you have to prove to get refugee status?
18. What is your highest educational qualification?
19. Are you employed, if yes what type of employment, are you skilled? If no how do you sustain yourself?
20. Were you working in your country, if yes why did you leave your work?
21. Why did you choose South Africa as your refuge and not any other African country?
22. Were you at any time detained in South Africa? If yes, for how long?
23. What did you do to prove your case?
24. Would you say refugees in general are welcome in South Africa?
25. What was your own personal experience in this area?
26. Are the locals aware that you are a refugee?
27. How do they treat refugees/asylum seekers in general?
28. What is the situation as compared to your home country?
29. What is your feeling about recent xenophobic attacks?
30. Do you feel safe in South Africa as compared to your home country (ask whether they are being abused by police/government officials, even locals)?
31. Do you intend going back to your home country if situation becomes better?
32. How would you improve the situation regarding refugees?

Thank you for your time and cooperation.

APPENDIX 2: QUESTIONNAIRE ADMINISTERED TO THE DEPARTMENT OF HOME AFFAIRS

I am conducting a research on the topic: The status of refugees and Asylum Seekers in South Africa with reference to the implementation of the South African Refugees Act, No 130 of 1998. Please be informed that all the data collected would be coded to protect respondents' identity and privacy and those respondents are entitled to the summary of the outcome of the interview.

1. May I please know the position you hold in your organization.
2. The number of years in service.
3. What services do you provide in general?
4. How are they given to refugees (the means, whether you support them legally and how and what sorts of complaints do you receive from refugees/asylum seekers and how many have you helped so far, what are the issues)?
5. Do you have an idea about the Refugees Act, No 130 of 1998 and do you think it is necessary to know it regarding *Your position?*
6. Do you have access to copies of the Act?
7. Who (individuals/organizations) do you work closely with in relation to the guidelines when it comes to the practical application of the Act?
10. What procedures you think should be followed when registering refugees (entitlements)?
11. How do you categorize refugees?
12. In your view, who is a refugee?
13. What do you think should be the measure to determine refugee status?
16. How long does it take to register as refugees?
17. May I know the total/estimated number of refugees in South Africa?
18. What are the measures taken to educate people and other officials on the rights of refugees?
19. What measures have you taken in making sure that the rights of refugees/asylum seekers are recognized?
20. Does your organization give instructions/guidelines to peace officers when it comes

to protection of refugees?

21. What procedures are followed when there is a report on asylum seeker abuse?

22. Do asylum seekers/refugees know their rights?

23. How does your office make follow ups concerning treatment of refugees and making sure government officials know the guiding principles?

24. There are reported cases of people who are being deported, waiting for long to get refugee status, refugees being abused by government officials particularly South African Police Services, has this come to your attention? And how do you think these problems may be addressed?

25. What have you done about it? And

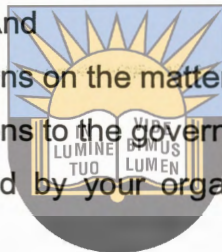
26. Have you made any investigations on the matter?

27. Have you made recommendations to the government to improve?

28. What are the challenges faced by your organization in trying to implement the immigration policies?

29. What is your view about The Act (the practical limitations)?

30. How would you improve the situation regarding refugees?



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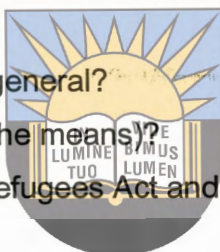
Situation regarding refugees?

Thank you for your cooperation.

APPENDIX 3: QUESTIONNAIRE ADMINISTERED ON THE OFFICE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

I am conducting a research on the topic: The status of Refugees and Asylum Seekers in South Africa with reference to the implementation of the South African Refugees Act, No 130 of 1998. Please be informed that all the data collected would be coded to protect respondents' identity and privacy and that respondent are entitled to the summary of the outcome of the interview.

1. May I please know the position you hold in your organization.
2. The number of years in service.
3. What services do you provide in general?
4. How are they given to refugees (the means)?
5. Do you have an idea about the Refugees Act and do you think it is necessary to know it regarding your position?
6. Do you have access to copies of the Act?
7. Who do you work closely with in relation to the guidelines when it comes to the practical application of the Act?
8. What procedures you think should be followed when registering refugees (entitlements)?
9. How do you categorize refugees?
10. What do you think should be the measure to determine refugee status?
11. What are the measures taken to educate people and other officials on the rights of refugees?
12. Do you think asylum seekers/refugees know their rights?
13. What measures have you taken in making sure that the rights of refugees/asylum seekers are recognized?
14. Does your organization give instructions/guidelines to peace officers when it comes to protection of refugees?
15. What procedures are followed when there is a report on asylum seeker abuse?
16. How does your office make follow ups concerning treatment of refugees and making sure government officials know the guiding principles?



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17. There are reported cases of people who are being deported, waiting for long to get refugee status, refugees being abused by government officials particularly South African Police Services. Has this come to your attention?

18. What have you done about it? And

19. Have you made any investigations on the matter?

20. Have you made recommendations on the government to improve?

21. What is your view about the Act (the practical limitations)?

Thank you for your cooperation.



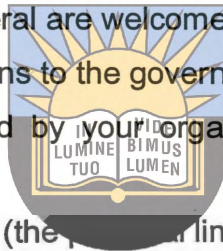
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APPENDIX 4: QUESTIONNAIRE ADMINISTERED ON ZIMBABWE EXILES FORUM

I am conducting a research on the topic: The status of Refugees and Asylum Seekers in South Africa with reference to the implementation of the South African Refugees Act, No 130 of 1998. Please be informed that all the data collected would be coded to protect respondents' identity and privacy and those respondents are entitled to the summary of the outcome of the interview.

1. May I please know the position you hold in your organization.
2. The number of years in service.
3. What services do you provide in general?
4. How are they given to refugees (the means, whether u support them legally and how and what sorts of complaints do you receive from refugees/asylum seekers and how many have you helped so far, what were the issues)?
5. Do you have an idea about the Refugees Act, No 130 of 1998 and do you think it is necessary to know it regarding your position?
6. Do you have access to copies of the Act?
7. Who (individuals/organizations) do you work closely with in relation to the guidelines when it comes to the practical application of the Act?
10. What procedures you think should be followed when registering refugees (entitlements)?
11. How do you categorize refugees?
12. In your view, who is a refugee?
13. What do you think should be the measure to determine refugee status?
16. How long does it take to register as refugees?
18. What are the measures taken to educate people and other officials on the rights of refugees?
19. What measures have you taken in making sure that the rights of refugees/asylum seekers are recognized?
20. Does your organization give instructions/ guidelines to peace officers when it comes to protection of refugees?
21. What procedures are followed when there is a report on asylum seeker abuse?

22. Do asylum seekers/refugees know their rights?
23. How does your office make follow ups concerning treatment of refugees and making sure government officials know the guiding principles?
24. There are reported cases of people who are being deported, waiting for long to get refugee status, refugees being abused by government officials particularly South African Police Services, has this come to your attention? And how do you think these problems may be addressed?
25. What have you done about it? And
26. Have you made any investigations on the matter?
27. Would you say refugees in general are welcome in South Africa?
28. Have you made recommendations to the government to improve?
29. What are the challenges faced by your organization in trying to implement the immigration policies?
30. What is your view about the Act (the limitations)?
31. How would you improve the situation regarding refugees?



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Thank you for your cooperation.

APPENDIX 5: QUESTIONNAIRES ADMINISTERED ON SOUTH AFRICAN RED CROSS SOCIETY

I am conducting a research on the topic: The status of Refugees and Asylum Seekers in South Africa with reference to the implementation of the South African Refugees Act, No 130 of 1998. Please be informed that all the data collected would be coded to protect respondents' identity and privacy and those respondents are entitled to the summary of the outcome of the interview.

1. May I please know the position you hold in your organization.
2. The number of years in service.
3. What services do you provide in general?
4. How are they given to refugees (the means, whether u support them legally and how and what sorts of complaints do you receive from refugees/asylum seekers and how many have you helped so far, what were the reasons)?
5. Do you have an idea about the Refugees Act 130 of 1998 and do you think it is necessary to know it regarding your position?
6. Do you have access to copies of the Act?
7. Who (individuals/organizations) do you work closely with in relation to the guidelines when it comes to the practical application of the Act?
10. What procedures you think should be followed when registering refugees (entitlements)?
11. How do you categorize refugees?
12. In your view, who is a refugee?
13. What do you think should be the measure to determine refugee status?
16. How long does it take to register as refugees?
18. What are the measures taken to educate people and other officials on the rights of refugees?
19. What measures have you taken in making sure that the rights of refugees/asylum seekers are recognized?
20. Does your organization give instructions/guidelines to peace officers when it comes to protection of refugees?

21. What procedures are followed when there is a report on asylum seeker abuse?
22. Do asylum seekers/refugees know their rights?
23. How does your office make follow ups concerning treatment of refugees and making sure government officials know the guiding principles?
24. There are reported cases of people who are being deported, waiting for long to get refugee status, refugees being abused by government officials particularly South African Police Services, has this come to your attention? And how do you think these problems may be addressed?
25. What have you done about it? And
26. Have you made any investigations on the matter?
27. Would you say refugees in general are welcome in South Africa?
28. Have you made recommendations to the government to improve?
29. What are the challenges faced by your organization in trying to implement the immigration policies?
30. What is your view about the Act (the practical limitations)?
31. How would you improve the situation regarding refugees?



Thank you for your cooperation.

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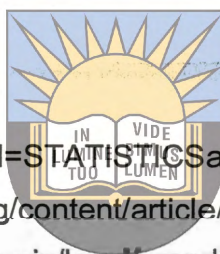
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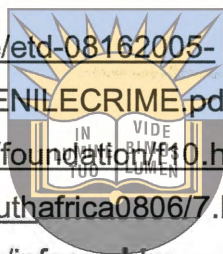
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