

FINDING REFUGE BETWEEN RHETORIC AND PRACTICE: SOUTH AFRICA'S
APPROACH TO REFUGEE IMMIGRATION

by

ERIN ELIZABETH ARCHER

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THESIS APPROVAL PAGE

Student: Erin Elizabeth Archer

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This thesis has been accepted and approved in partial fulfillment of the requirements for the Master of Arts degree in the Department of International Studies by:

Anita Weiss	Chairperson
Michelle McKinley	Member
Ibrahim Gassama	Member

and

Sara D. Hodges	Interim Vice Provost and Dean of the Graduate School
----------------	--

Original approval signatures are on file with the University of Oregon Graduate School.

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THESIS ABSTRACT

Erin Elizabeth Archer

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This study examines how the South African Department of Home Affairs's asylum policies, laws, and implementation of those policies speak to South Africa's commitment (both legally and socially) to protecting human rights. Specifically, this study analyzes the 2017 policy papers, 2017 Amendment to the Refugees Act, and the Director-General's decision to close the Cape Town Refugee Reception Office.

CURRICULUM VITAE

NAME OF AUTHOR: Erin Elizabeth Archer

GRADUATE AND UNDERGRADUATE SCHOOLS ATTENDED:

University of Oregon, Eugene, Oregon
University of Oregon School of Law, Eugene, Oregon
University of Missouri School of Law, Cape Town, South Africa
University of Florida, Gainesville, Florida

DEGREES AWARDED:

Master of Arts, International Studies, 2018, University of Oregon
Juris Doctor, Law, 2018, University of Oregon School of Law
Bachelor of Arts, Anthropology & Classics, 2011, University of Florida

AREAS OF SPECIAL INTEREST:

Law
Refugee Law
Human Rights
Sub-Saharan Africa
South Africa

PROFESSIONAL EXPERIENCE:

Advocacy Intern, Scalabrini Centre of Cape Town, July – December 2017
Legal Researcher, Office of Oregon State Representative Alissa Keny-Guyer,
January – April 2017
Legal Intern, South African Human Rights Commission, June – December 2016
Legal Intern, U.S. Department of State Office to Monitor and Combat Trafficking
in Persons, 2015 – 2016

GRANTS, AWARDS, AND HONORS:

Raymund Fellow, Global Ethics and Refugee Policy, Oxford Consortium for
Human Rights, 2017

Oregon Law Students Public Interest Fund (OLSPIF) Recipient, University of Oregon School of Law, 2016

John & Eleanor Halderman Scholarship, University of Oregon School of Law, 2014-2017

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CHAPTER I

INTRODUCTION

Statement of Problem

In less than 15 days, 62 people were dead and over 100,000 displaced.¹ In May 2008, violent attacks on foreign nationals started in a Johannesburg township and spread across the country.² South Africans beat, raped, and killed foreign nationals after looting their shops and homes.³ The foreign nationals, almost exclusively from other African countries, were accused of stealing jobs and economic opportunities, raising crime rates, and benefiting from social services.⁴ For the next year, temporary camps continued to shelter hundreds of foreign nationals afraid to re-enter South African society.⁵

In the first 23 years after apartheid, attacks by South Africans against foreign nationals – which we can term xenophobic - resulted in the death of 200 people.⁶ The media has largely portrayed the violence as a result of discontent in the social sector and citizen-driven reactions to economic hardship. The xenophobia, or perhaps more aptly called Afrophobia for its concentration on foreign Africans, seems to be anchored in the disillusionment of democratic South Africa. When apartheid ended in the 1990s, many South Africans believed the new government would usher in a comprehensive social and

¹ Jean Pierre Misago, Tamlyn Monson, Tara Polzer, and Loren Landau, *May 2008 Violence Against Foreign Nationals in South Africa* (Forced Migration and Food Programmes & CoRMSA, 2010), 46; See also South African Human Rights Commission, *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity Arising out of the 2008 Public Violence against Non-Nationals*. (Johannesburg: South African Human Rights Commission, 2010), 21.

² Misago, Monson, Polzer, and Landau, *May 2008 Violence*, 46.

³ Misago, Monson, Polzer, and Landau, *May 2008 Violence*, 52.

⁴ Misago, Monson, Polzer, and Landau, *May 2008 Violence*, 54-55.

⁵ Yazeed Kamaldien and Nivashni Nair, "Cape Town Wants to Evict Refugees," *The Times*, May 11, 2009, web.archive.org/web/20090514060028/http://www.thetimes.co.za/News/Article.aspx?id=996699.

⁶ Charles Kumolu, "S/Africa Xenophobic attacks: 200 foreigners killed, maimed since 1994 – Investigation," *Vanguard*, February 26, 2017, <https://www.vanguardngr.com/2017/02/safrica-xenophobic-attacks-200-foreigners-killed-maimed-since-1994-investigation/>.

economic shift. A little more than 20 years later, however, apartheid's economic legacy is still obvious to the families living in townships,⁷ student unable to pay school fees,⁸ and the majority of South Africans, who live in poverty.⁹

At a workshop on the rights of refugees and asylum seekers I attended in 2016, a woman left the conference in tears, too upset to continue. She said her uncle, exiled during the struggle against apartheid, was mistreated in the African countries that sheltered him.¹⁰ She did not believe that refugees should have the same protections as citizens under the Constitution after the way her uncle had been treated.¹¹ While many sources document the preferential treatment South Africans received while exiled,¹² the discrepancy does not matter. To this woman, that day, her truth was that her family fought against apartheid. Her family had lost their home and country, and been mistreated in another. Now although apartheid has ended, her family still lived in a township and citizens are still fighting over the same few resources. Before she left, she said the Constitution had been drafted when everyone was "crazy about liberation," but now needs to be revised to prioritize protecting citizens.¹³

⁷ Oliver Wainwright, "Apartheid ended 20 years ago, so why is Cape Town still 'a paradise for the few'?", *The Guardian*, April 30, 2014, <https://www.theguardian.com/cities/2014/apr/30/cape-town-apartheid-ended-still-paradise-few-south-africa>.

⁸ Sophia Hyatt, "South Africa's housing crisis: A remnant of apartheid," *Al Jazeera*, October 11, 2016, <https://www.aljazeera.com/indepth/features/2016/09/south-africa-housing-crisis-remnant-apartheid-160929094237631.html>.

⁹ "Poverty on the Rise in South Africa," Statistics South Africa, last modified August 22, 2017, <http://www.statssa.gov.za/?p=10334>.

¹⁰ This information was obtained from a participant during the Dullah Omar Institute's *Civic Education Training Workshop on Refugees and Human Rights in South Africa*, July 14, 2016, in Cape Town, South Africa.

¹¹ *Ibid.*

¹² See generally Lewis Nkosi, *Home and Exile*, London, England: Longmans, 1965.

¹³ This information was obtained from a participant during the Dullah Omar Institute's *Civic Education Training Workshop on Refugees and Human Rights in South Africa*, July 14, 2016, in Cape Town, South Africa.

The narrative that Afrophobia in South Africa is solely a product from public opinion and reactions from citizens ignores the influence of political institutions within South Africa. Government institutions have a responsibility to uphold human rights and provide leadership for its citizenry. One such institution is the Department of Home Affairs (DHA). The DHA is the government department responsible for two main state functions: 1) managing and verifying the “identity and status” of South African citizens and foreign nationals while in South Africa, and 2) managing the immigration and asylum systems.¹⁴ In 2016, the DHA proposed a new amendment to the Refugees Act and a new policy paper that positions refugees as national security risks and includes language that severely limits refugees’ rights to freedom of movement, work, and study. Furthermore, the DHA’s procedural steps to implement these policies have avoided prescribed public engagement, and perhaps violated administrative as well as constitutional law in executive overreach. These proposals, however, are complicated by obligations under domestic constitutional and international laws. This study examines how the DHA’s asylum policies, laws, and implementation of those policies speak to South Africa’s commitment (both legally and socially) to protecting human rights.

Since the transition to democracy in the early 1990s, politically and economically stable South Africa has become a haven for sub-Saharan African refugees seeking protection from political persecution and war. The asylum process, overseen by the DHA, is complicated by limited access to refugee reception offices (which provide documentation and necessary services), an estimated backlog of 260,000 individuals in

¹⁴ “About Us,” Department of Home Affairs, last revised 2018, <http://www.dha.gov.za/index.php/2>.

appeals,¹⁵ and an average processing time of five to ten years before final refugee status is granted or denied. Therefore, the complexity and vulnerability of hundreds of thousands of asylum seekers' daily lives for almost a decade are dependent upon the DHA policies.

Under apartheid (1948-1991), South Africa subscribed to an exclusionary approach to immigration. The apartheid government generally practiced isolationism and closed its borders to most immigrants.¹⁶ When immigrants were accepted, Africans were discriminated against the most, and were sometimes only permitted to enter the country on temporary mining contracts, but were ineligible for permanent resident status.¹⁷ This practice created a separate immigration process for nonwhites (who were barred from naturalized citizenship), which continued after apartheid into the 1990s.¹⁸

After the transition to democracy, South Africa's immigration policies largely did not change. The first post-apartheid immigration legislation, the Aliens Control Act of 1991, carried the moniker "apartheid's final act" until repealed and replaced by the Immigration Act over a decade later.¹⁹ The Aliens Control Act continued apartheid's practice of authorizing police officers to question and detain anyone who did not seem to belong, and placed the burden on the individual to prove otherwise. While the Act has been repealed, the continuation of apartheid immigration policies for over a decade after

¹⁵ Minister of Home Affairs, "Question NW267 to the Minister of Home Affairs," Questions and Replies, Parliamentary Monitoring Group, last modified March 2017, <https://pmg.org.za/committee-question/4690/>.

¹⁶ Jonathan Crush and David A. McDonald, "Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid," *Africa Today* 48, no. 3 (2001), 2, <http://www.jstor.org/stable/4187430>.

¹⁷ Crush and McDonald, "Introduction to Special Issue," 2-3.

¹⁸ Crush and McDonald, "Introduction to Special Issue," 3.; Department of Home Affairs. *Green Paper on the International Migration for South Africa*, June 2016, https://www.gov.za/sites/www.gov.za/files/40088_gon738.pdf.

¹⁹ Crush and McDonald, "Introduction to Special Issue," 1.

the democratic transition speaks to the institutional memory of apartheid priorities. Seven years later, South Africa enacted the Refugees Act No. 130 of 1998, which has been sparingly amended until recently.

The new policy papers and amendment (recently adopted by Parliament in November 2017) seek a risk-based approach to the asylum process and includes xenophobic language that conflates asylum seekers and foreign nationals with criminal activity. A risk-based approach determines the security risk a refugee poses to the South African public. One of the DHA's proposed solutions to reducing risk is the creation of Processing Centres at ports of entry, where high-risk refugees must stay throughout their application process (low-risk refugees would be "released" to organizations or family members).²⁰ These centers, however, would likely violate international law by penalizing refugees for crossing international borders without documentation.²¹

Furthermore, the procedural steps the DHA has taken to implement policies is at best misleading for stakeholders and perhaps violates accepted practices for stakeholder inclusion and public engagement. For example, in 2012 the DHA held a meeting with stakeholders to discuss the closure of the Cape Town Refugee Reception Office, where refugees must apply or renew their application for refugee status.²² During this meeting, the DHA denied a shift in policy to close reception offices and relocate them to the northern provinces. However, less than a month later, DHA announced a shift in policy to

²⁰ Department of Home Affairs, *Green Paper on the International Migration for South Africa*, 65-66.

²¹ Legal Resources Centre, and Lawyers for Human Rights, "Joint Submission by the Legal Resources Centre and Lawyers for Human Rights to the Department of Home Affairs in Respect of Green Paper on International Migration in South Africa" (Legal Resources Centre & Lawyers for Human Rights, 2016), 61, http://irc.org.za/art_external/pdf/2016_09_30_Submission_Green%20Paper_International_Migration_compressed.pdf.

²² *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 134 (SCA).

permanently close the Cape Town office and relocate it to the northern province without notice to stakeholders.

Context of Study

This study is a significant addition to the current body of research surrounding immigration and asylum issues in South Africa. The xenophobic attacks in 2008, 2015, and 2017, as well as negative public perception of foreign nationals (especially African asylum seekers), were extensively researched after each incident by scholars, civil society, and state institutions such as the South African Human Rights Commission. Additionally, the few legislative and policy changes have been studied as well. However, scholarship lacks an in depth legal analysis of the DHA's recent policies, legislation, and administrative decisions, and their impact on South Africa's commitment to human rights.

Globally, South Africa's approach to immigration, specifically refugees, impacts the international response to asylum seekers. South Africa's progressive constitution provides protection for foreign nationals that far exceeds protections offered in many other countries and international law. South Africa's approach to refugees and enforcement (or lack thereof) of these protections may create precedent for other countries facing a refugee crisis to subvert obligations to international agreements and engage in immigration policies lacking critical evaluation of institutional biases.

South Africa is not a superpower, nor is it a particularly influential state in global politics, albeit it is the regional superpower of sub-Saharan Africa. The EU does not, and likely will not, revert its closed border policy towards asylum seekers because South

Africa's constitution offers rights to foreign nationals. If anything, South Africa is following the EU's precedent in managing the influx of asylum seekers by adopting policies of exclusion. The importance of South Africa's asylum policies lies in its own commitment to human rights. If the "Rainbow Nation" cannot temper the xenophobic tone within its own institutions, then the value of incorporating human rights into domestic law will dissipate.

Methodology

This study bases its analysis of the DHA's policies from government texts such as court cases, immigration and refugee laws, policy proposals, parliamentary debates, official publications, civil society's submissions to government policies and reports, speeches, articles, and newspapers. The information gathered for this study include public records shared with me in my capacity as a student working for a civil society organization in Cape Town, and my own observations from court and parliamentary proceedings and working with asylum seekers navigating the asylum process.

This study is limited to laws, policies, and administrative decisions by the DHA from the transition to democracy in the early 1990s to present day. While some international law will be discussed in the study, it is limited to treaties and conventions ratified by and thus binding South Africa. In the context of a post-colonial state, the DHA's policies and decisions should only be measured against the state's self-determined obligations.

CHAPTER II

SOCIAL FRAMEWORK

Increased global migration has furthered “people’s preoccupation with belonging.”²³ The politics of who “belongs” in a country can be complex and influenced by the creation of an identity, pressures of scarce resources, and the role of the state. South Africa’s politics of belonging and context of the refugee and asylum sphere provide a better understanding of DHA’s role in the asylum process.

The Politics of Belonging: A Framework

The politics of belonging, defined by John Crowley as “the dirty work of boundary maintenance,”²⁴ was further defined by Yuval-Davis as the boundaries “that separate the world population into ‘us’ and ‘them’.”²⁵ How the world separates, though, is multifaceted and fluid.

Yuval-Davis simplified belonging by cataloguing three levels:

The first level concerns social locations; the second relates to an individual’s identifications and emotional attachments to various collectivities and groupings; the third relates to ethical and political value systems with which people judge their own and others’ belonging/s. These different levels are interrelated, but cannot be reduced to each other, as so many political projects of belonging tend to assume.²⁶

Social locations denote membership to a gender, ethnicity, socio-economic class, age-group, or profession, to name a few.²⁷ Social locations may or may not be fluid, and so

²³ Peter Geschiere, *The Perils of Belonging: Autochthony, Citizenship, and Exclusion in Africa and Europe* (Chicago: University of Chicago Press, 2009), 17.

²⁴ Nira Yuval-Davis, "Belonging and the Politics of Belonging," *Patterns of Prejudice* 40, no. 3 (2006): 204, doi: 10.1080/00313220600769331.

²⁵ Ibid.

²⁶ Yuval-Davis, "Belonging and the Politics of Belonging," 199.

²⁷ Ibid.

Yuval-Davis emphasizes the need for an intersectional approach to social locations.²⁸ Identity is defined as “stories that people tell about themselves and each other” and are reinforced by comparisons between groups.²⁹ These stories can be about the individual or the group, but they often reflect an interplay between the individual and the importance of group membership.³⁰ Importantly, Yuval-Davis links the identity with emotion:

Constructions of belonging, however, cannot and should not be seen as merely cognitive stories. They reflect emotional investments and desire for attachments: ‘Individuals and groups are caught within wanting to belong, wanting to become, a process that is fueled by yearning rather than positing of identity as a stable state.’ Elspeth Probyn, as well as Anne-Marie Fortier, construct identity as transition, always producing itself through the combined processes of being and becoming, belonging and longing to belong. This duality is often reflected in narratives of identity.³¹ (Internal citations omitted.)

Ethical and political values, the third and final level, speak to how the first two levels are “valued and judged.”³² Yuval-Davis argues that this level influences beliefs on where identity boundaries are drawn, and how inclusive or exclusive the boundaries should be.³³ In this way, belonging becomes the politics of belonging.³⁴

The “us” and “them” categories are divided by both identity and citizenship.³⁵ Identity, as stated above, is generally defined as stories about individuals, and are reinforced by comparisons between groups.³⁶ Yuval-Davis contextualizes citizenship as

²⁸ Yuval-Davis, "Belonging and the Politics of Belonging," 199-200.

²⁹ Nira Yuval-Davis, Kalpana Kannabirān, and Ulrike Vieten. *The Situated Politics of Belonging* (London; Thousand Oaks, Calif.: SAGE, 2006), 2. ProQuest Ebook Central.; *See also* Laurent Licata, Margarita Sanchez-Mazas, and Eva G.T. Green, "Xenophobia: Social Psychological Aspects," in *Handbook of Identity Theory and Research*, ed. S.J. Schwartz et al., 895-916 (New York: Springer, 2015), doi: 10.1007/978-1-4419-7988-9_38.

³⁰ Yuval-Davis, "Belonging and the Politics of Belonging," 202.

³¹ *Ibid.*

³² Yuval-Davis, "Belonging and the Politics of Belonging," 203.

³³ *Ibid.*

³⁴ Yuval-Davis, "Belonging and the Politics of Belonging," 203-204.

³⁵ Yuval-Davis, Kannabirān, and Ulrike, *The Situated Politics of Belonging*, 1.

³⁶ Yuval-Davis, Kannabirān, and Ulrike, *The Situated Politics of Belonging*, 2; *See generally* Licata, Sanchez-Mazas, and Green, "Xenophobia."

“full membership” within a society, including all rights and responsibilities as a participant.³⁷ Consequently, politics of belonging creates divisions between the included and the excluded. Determining citizenship and who has the right to belong is especially important when resources are scarce. While citizenship offers the opportunity of, and access to, resources without guarantee of receipt, those designated as strangers are precluded from competing for resources at all.³⁸

Role of the Postcolonial State in the Politics of Belonging

Sara Dorman argues that governments influence belonging by shaping “identity discourses.”³⁹ In postcolonial Africa specifically, political contests are founded on the politics of identity instead of political ideology.⁴⁰ This reinforces the perceptions of “us” and “them”.⁴¹ Dorman reasons that:

Post-independence governments have been faced with the challenge of cementing a national identity within a state container that both divides communities and encloses multiple ethnic groups. This embodies itself in the identification of strangers, usually outside the state borders, through political agitations against foreigners, whose negativity is contrasted to a positive self-image.⁴²

Part of the challenge for post-colonial states, particularly those with a settler colonial history, is that not only must the state contend with a racialized political and identity

³⁷ Yuval-Davis, Kannabirān, and Ulrike, *The Situated Politics of Belonging*, 2.

³⁸ Morten Bøås and Kevin C. Dunn, *Politics of Origin in Africa: Autochthony, Citizenship and Conflict*. (New York: Zed Books, 2013), 9.

³⁹ Sara Dorman, “Citizenship in Africa: the politics of belonging,” in *Routledge Handbook of Global Citizenship Studies*, ed. Engin Isin, and Peters Nyers, 161-171 (Abingdon, Oxon: Routledge, 2014), 161.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Sara Dorman, Daniel P. Hammett and Paul Nugent, *Making Nations, Creating Strangers: States and Citizenship in Africa*, (Leiden: Brill, 2007), 10.

history, but it must also incorporate “previously privileged minority racial groups” in citizenship and the nation’s identity.⁴³

For new democracies with strong leaders, states were able to “seize control and ‘stabilize’ the relationship between states and citizens,” which was an imperative for creating a single identity comprising multiple ethnic groups.⁴⁴ In fact:

In many states, the fear of fissiparous politics and potential state fragmentation created an overwhelming emphasis on ‘national unity’, which rejected discourses of ‘difference’, in theory, if not always in practice. [] Stability trumped representativeness or accountability.⁴⁵

Usually, this suppressed internal citizenship conflicts despite “fragmented multi-ethnic and multi-linguistic populations” and allowed for a new, singular identity to solidify.⁴⁶

Mahmood Mamdani theorized that the bifurcated state during colonialism laid the foundation for how post-colonial states reconciled racialized and tribalized societies.

Mamdani argues that the “native question,” or how a “foreign minority” can “rule over an indigenous majority,” led to the creation of the bifurcated state in colonized areas.⁴⁷ The bifurcated state was comprised of centralized direct rule (which focused on the imported “civilized” laws of Europe and did not recognize “native institutions”) and decentralized indirect rule (where “the tribal leadership was either selectively reconstituted as the hierarchy of the local state or freshly imposed where none had existed”).⁴⁸ Direct rule became the “urban civil power” that excluded “natives from civil freedoms” that citizens enjoyed while indirect rule became a “rural tribal authority” that included “natives into a

⁴³ Dorman, “Citizenship in Africa,” 161-162.

⁴⁴ Dorman, “Citizenship in Africa,” 162.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the legacy of late colonialism* (Princeton: Princeton University Press, 1996), 16.

⁴⁸ Mamdani, *Citizen and Subject*, 17.

state-enforced customary order.”⁴⁹ The urban civil power (under direct rule) promised to protect rights while the rural customary power (under indirect rule) promised to protect tradition.⁵⁰

The bifurcated state of urban civil power and rural customary power is further differentiated by divisions between racism and tribalism. Mamdani writes:

The history of civil society in colonial Africa is laced with racism...for civil society was first and foremost the society of the colons. Also, it was primarily a creation of the colonial state. The rights of free association and free publicity, and eventually of political representation, were the rights of citizens under direct rule, not of subjects indirectly ruled by a customarily organized tribal authority. Thus, whereas civil society was racialized, Native Authority was tribalized.⁵¹

Mamdani defines “Native Authority” as the hierarchy of chiefs appointed by the indirect rule of colonialism which reorganized customary rule (which historically was divided by age groups, religious groups, clans, etc.) into a singular, despotic rule.⁵²

Post-independence, the state held a powerful position conceptualizing identity and citizenship as an authoritative entity.⁵³ The state’s democratization objective, according to Mamdani, required “deracializing civil society [and] detribalizing the Native Authority.” While independence usually deracialized the government, civil society remained racialized without further state action, such as affirmative action and redistribution policies.⁵⁴ However, while affirmative action policies “unified victims of

⁴⁹ Ibid.

⁵⁰ Mamdani, *Citizen and Subject*, 18.

⁵¹ Mamdani, *Citizen and Subject*, 19.

⁵² Mamdani, *Citizen and Subject*, 655.

⁵³ Neville Alexander, “Ten Years After Apartheid: The State of Nation-Building in South Africa,” in *Making Nations, Creating Strangers: States and Citizenship in Africa*, ed. Sara Dorman, Daniel Hammett, and Peter Nugent, 197-219 (Leiden: Brill, 2007), 204.

⁵⁴ Mamdani, *Citizen and Subject*, 20.

colonial racism,” the redistribution process highlighted ethnic divisions, which in turn reinforced the tribalized Native Authority.⁵⁵

Colonial oppression was understood as “an exclusion from civil society, and more generally as alien rule.”⁵⁶ Efforts to redress imperialism and deracialize society did not touch the tribalized local powers, however. “The tribal logic of Native Authorities easily overwhelmed the democratic logic of civil society” as politics combined the two spheres. The successful politician would “represent citizens in civil society, but also dominate other subjects through the appointment of chiefs in the Native Authority.”⁵⁷

Additionally, politicians, intent on consolidating power, place the state in a position to create a new sense of belonging through “strategic and exclusionary nationalism.”⁵⁸ The state’s backing of political identity benefits the state by providing a scapegoat for citizen’s hardships and scarce resources.⁵⁹ Dorman writes:

While political and economic liberalisation constitute the current configuration against which identity politics are played out, the interaction of local and global influences threaten the survival of a state-level national identity and gives urgency to elite attempts to retain power through the moulding of citizenship. As these pressures increase citizens seek, and are encouraged, to rally around a national identity which retrenches the benefits afforded by the state against the external hordes. These political pressures contribute to the emergence of discourses of inclusion and exclusion – the ‘us’ and ‘them’ – which then forms the basis of a strategic and exclusionary nationalism.⁶⁰

The state therefore uses foreign nationals to reinforce its own power, and unite citizens under a shared identity and belonging. Immigration policy is one method to accomplish

⁵⁵ Ibid.

⁵⁶ Mamdani, *Citizen and Subject*, 289.

⁵⁷ Ibid.

⁵⁸ Dorman, Hammett, and Nugent, *Making Nations, Creating Strangers States and Citizenship in Africa*, 8.

⁵⁹ Alexander, “Ten Years After Apartheid,” 204.; See also Dorman, Hammett and Nugent, *Making Nations, Creating Strangers States and Citizenship in Africa*, 10.

⁶⁰ Dorman, Hammett and Nugent, *Making Nations, Creating Strangers States and Citizenship in Africa*, 9.

nation-building because its treatment of immigrants “conveys powerful ideas about the self-image of the destination state.”⁶¹

Politics of Belonging in South Africa

In South Africa, the transition to democracy and a new constitution deracialized the state, but retained the Native Authority system, which continued one aspect of apartheid and colonial rule.⁶² In fact, the African National Congress (the party of Mandela and the forefront opposition to apartheid’s ruling National Party), could only connect the urban and rural spheres (which was required for a successful transition out of apartheid rule) through “tribal logic” and an intertribal alliance with the chiefs of the Congress of Traditional Leaders of South Africa.⁶³ This compromise secured the importance of customary tribalism and ethnic division in the democratic South Africa.

The importance of internal divisions within South Africa, however, is fluid and determined by external pressures. Dorman noted:

The transition to democracy in South Africa challenged the foundation of every aspect of social, political, and economic life in the apartheid period – racial identity. The social hierarchy which ingrained notions of superiority and inferiority, and formed the basis of the inclusion or exclusion of groups economically, politically and spatially supposedly came to an end in 1994. Government policies of redress have sought to mitigate historical inequalities, but...[n]on-racialism, ‘the founding myth of the new South African nation’, has failed and racial identities remain vital in the new South Africa. At the same time, chauvinistic nationalism readily overcomes these differences when perceived threats to the economic and social security of South Africans appear. New and old boundaries of inclusion and exclusion overlap as a latent national identity is expressed against (black) immigrants.⁶⁴

⁶¹ Sally Peberdy, "Imagining Immigration: Inclusive Identities and Exclusive Policies in Post-1994 South Africa." *Africa Today* 48, no. 3 (2001), 16, doi: 10.2979/AFT.2001.48.3.14.

⁶² Mamdani, *Citizen and Subject*, 32.

⁶³ Mamdani, *Citizen and Subject*, 293-294.

⁶⁴ Dorman, Hammett and Nugent, *Making Nations, Creating Strangers States and Citizenship in Africa*, 15.

This “latent national identity” is built on the “divided but shared history” of apartheid, and the shared experience of apartheid has become the tool to “identify true ‘South African.’”⁶⁵ This exclusionary identity is demonstrated by the prevalence of xenophobia displayed by South Africans.⁶⁶

Part of this exclusionary identity originates from the apartheid era and continues in South Africa today. Under the apartheid government, educational institutions and the media did not consider South Africa to be “African”.⁶⁷ Indeed, the perceived separation was promoted through news reports “about ‘hordes’, ‘barbarians’ and the links between immigration, crime and unemployment.”⁶⁸ Since the democratization of South Africa, many South Africans are still reluctant to identify as African, with 28.4 percent of black South Africans considering themselves to be African.⁶⁹ Additionally, South Africans view migrants as “threats to jobs, housing, education and health care” that the relatively new government struggles to provide to citizens.⁷⁰

The state also built on apartheid’s exclusionary laws and implementation of those laws. As Michael Neocosmos states, new laws criminalized migration while continuing apartheid’s practices.⁷¹ This combination “enabled state arbitrariness towards ‘foreigners’ through the excessive power provided to state personnel and the reproduction of racism

⁶⁵ Peberdy, “Imagining Immigration,” 27.

⁶⁶ Dorman, Hammett and Nugent, *Making Nations, Creating Strangers States and Citizenship in Africa*, 15.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Carol Adjai and Gabriella Lazaridis, “Migration, Xenophobia and New Racism in Post-Apartheid South Africa,” *International Journal of Social Science Studies* 1, no. 1 (2013): 194, <https://doi.org/10.11114/ijsss.v1i1.102>.

⁷⁰ Adjai and Lazaridis, “Migration, Xenophobia and New Racism in Post-Apartheid South Africa,” 198.

⁷¹ Michael Neocosmos, *From 'foreign Natives' to 'native Foreigners' Explaining Xenophobia in Post-apartheid South Africa: Citizenship and Nationalism, Identity and Politics* (Dakar: CODESRIA, 2010), 72.; See also Beth Whitaker, “Citizens and Foreigners: Democratization and the Politics of Exclusion in Africa,” *African Studies Review* 48, no. 1 (2005): 118.

<http://www.jstor.org.libproxy.uoregon.edu/stable/20065047>; See also Peberdy, “Imagining Immigration.”

in a modified form.”⁷² The “inherited racism” of the state is demonstrated by the selective nature of the most extreme forms of xenophobia only targeting Africans and not Westerners.”⁷³ The state’s actions reinforces and focuses the exclusion of who is “allowed” to be called “them” – black African immigrants.⁷⁴

⁷² Neocosmos, *From ‘Foreign Natives’ to ‘Native Foreigners,’* 72; *See generally* Adjai and Lazaridis. “Migration, Xenophobia and New Racism in Post-Apartheid South Africa.”

⁷³ Neocosmos, *From ‘Foreign Natives’ to ‘Native Foreigners,’* 72.

⁷⁴ Dorman, Hammett and Nugent, *Making Nations, Creating Strangers States and Citizenship in Africa,* 16.; *See generally* Neocosmos, *From ‘Foreign Natives’ to ‘Native Foreigners.’*

CHAPTER III

LEGAL FRAMEWORK

South Africa is a member of the United Nations and the African Union. As a member of these two international bodies and as a signatory to treaties, conventions, and protocols concerning refugees, the country has a legal commitment to protect and uphold refugees' rights. Furthermore, South Africa has a body of domestic law advancing the rights of everyone within the country's borders as well as the rights and responsibilities of asylum seekers and refugees.

International Definitions of Refugee

The United Nations (UN) first defined the term "refugee" in the 1951 Convention Relating to Status of Refugees. The UN defines a refugee as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is forced to flee his or her country.⁷⁵ This definition requires that the individual seeking refugee status must prove that his or her flight was directly caused by imminent fear of persecution. Additionally, a refugee cannot rely on their country of origin to provide protection, and requires a second country to ensure his or her basic human rights.⁷⁶

The Organization of African Unity⁷⁷ (OAU) expanded on the United Nation's definition of a refugee in the 1969 Convention Governing Specific Aspects of Refugee Problems in Africa (Refugee Convention). The OAU kept the UN definition of a refugee

⁷⁵ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 1.

⁷⁶ *Id.*

⁷⁷ The Organization of African Unity was replaced by the African Union in 2002. "AU in a Nutshell," The African Union Commission, <http://www.au.int/web/en/au-nutshell>.

as someone fleeing his or her country of origin to escape persecution as a member of a certain group, but extended the definition to include other motivations as well. These motivations include “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin.”⁷⁸ The OAU’s expanded definition of refugee came from a strong sense of solidarity with freedom fighters who were fighting against colonial rule during liberation movements across Africa.⁷⁹ In practice today, however, the term “disruption of public order” has been applied most often to circumstances “of internal security or stability of society.”⁸⁰

International Principles of Refugee Law

The first international principle discussed in this paper is progressive realization, which hinges on available resources. Progressive realization is defined as “the obligation to progressively and constantly move towards the full realisation of economic, social and cultural rights, within the resources available to a State, including regional and international aid.”⁸¹ This requires countries to “implement a reasonable and measurable plan, including set achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party.”⁸² Countries do have an obligation to “take concrete and targeted steps to realise economic,

⁷⁸ *African Union Convention Governing the Specific Aspects of Refugee Problems in Africa*, Sept. 10, 1969, 1001 U.N.T.S. 45, art. 1. <http://www.achpr.org/instruments/refugee-convention/>.

⁷⁹ George Okoth-Obbo, "Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa," *Refugee Survey Quarterly* 20, no. 1 (2001): 111.

⁸⁰ Alice Edwards, "Refugee Status Determination in Africa," *African Journal of International and Comparative Law* 14, no. 2 (2006): 217.

⁸¹ African Commission on Human and People’s Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, Oct. 24, 2011, art. 2, ¶ 13, <http://www.achpr.org/instruments/economic-social-cultural/>

⁸² *Id.*

social and cultural rights” with “the essential needs of members of vulnerable and disadvantaged groups [...] prioritized in all resource allocation processes.”⁸³

While the AU Charter does not explicitly include progressive realization, the doctrine is implied and widely used when interpreting social-economic rights.⁸⁴ The South African Constitutional Court famously applied the progressive realization doctrine in *Government of the Republic of South Africa and Others v Grootboom and Others*.⁸⁵ The Grootboom case held that as long as “reasonable legislative and other measures within its available resources” had been taken to “achieve the progressive realisation of the right”, then the country had fulfilled its obligations.⁸⁶ In determining if the country’s actions were reasonable, the question should not be “whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent.”⁸⁷ Instead, the country could take a range of actions that would be considered reasonable, as there is no one correct course of action that would be reasonable.⁸⁸ This gives immense discretion to the government in deciding when a shortage of resources exists and the best way to allocate those resources.

The second international principle is non-refoulement, which protects refugees against forced return to the country or region of persecution. Article 33 Section 1 of the 1951 United Nations Convention Relating to the Status of Refugees forbids States to

⁸³ *Id.* at ¶ 14.

⁸⁴ *Id.* at ¶ 13.

⁸⁵ The *Grootboom* case was a landmark decision in South Africa concerning the positive right to housing. In this decision, the South African Constitutional Court held that although the government had the positive duty to ensure housing, the government did not have to fulfill this promise if it had taken proactive steps towards progressive realization.

⁸⁶ *Government of the Republic of South Africa and Others v Grootboom and Others*, 2001 (1) SA 46, at ¶ 14.

⁸⁷ *Id.* at ¶ 41.

⁸⁸ *Id.*

“expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”⁸⁹ The principle’s purpose is to protect refugees and asylum seekers (until determined to not hold a genuine refugee claim) from continued exposure to persecution, but it alone does not create a responsibility on the members to accept or provide additional rights or resources to the protected individuals.⁹⁰

Similarly, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 adheres to the principle of non-refoulement. Article II Section 3 states that:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in [the definitions of a refugee].⁹¹

While the Convention does not explicitly discuss non-refoulement, the document does bind members to the commitment not to return vulnerable persons to persecution.

South African Constitution of 1996

The *Constitution of the Republic of South Africa, 1996* established democratic South Africa. The constitution, and in particular the Bill of Rights in Chapter 2, is the cornerstone of South Africa’s strong human rights foundation. The commitment to human rights is demonstrated in the first founding provision in Chapter 1, which states

⁸⁹ *Convention Relating to the Status of Refugees*, July 28, 1951, art. 1A(2), 189 U.N.T.S. 137; See also *Protocol I Relating to the Status of Refugees*, Jan. 31, 1967, art. 1, 606 U.N.T.S. 267.

⁹⁰ James Hathaway, "Leveraging Asylum," *Texas International Law Journal* 45, no. 3 (2010): 504-505.

⁹¹ *African Union Convention Governing the Specific Aspects of Refugee Problems in Africa*, Sept. 10, 1969, 1001 U.N.T.S. 45, art. 1.

that South Africa is founded on “human dignity, the achievement of equality and the advancement of human rights and freedoms.”⁹²

Furthermore, Chapter 2 of the Republic of South Africa Constitution of 1996, also known as the Bill of Rights, details a list of human rights protected by the constitution. Section 7(1) states that the bill of rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."⁹³ The bill of rights generally applies to and protects all persons physically within the borders of South Africa, not just citizens.⁹⁴ However, the bill of rights can be limited within the individual sections and by Section 36.

The first right listed in the Bill of Rights and relevant to asylum law is equality. Subsection 9(1) states that "everyone is equal before the law and has the right to equal protection and benefit of the law."⁹⁵ The provision continues to specifically state that the government "may not unfairly discriminate directly or indirectly against anyone" based on race, ethnic or social origin, or color, among other grounds.⁹⁶ The following section protects human dignity, stating that "everyone has inherent dignity and the right to have their dignity respected and protected."⁹⁷ This language is not limited by Section 36 or elsewhere in the Bill of Rights, nor does it restrict protection to only citizens. These constitutional protections extend to anyone physically present within the country.

The second relevant right is found in Section 21, which provides freedom of movement and residence.⁹⁸ Subsection (3) provides that every citizen has the additional

⁹² S. Afr. Const., 1996 § 1(a).

⁹³ Id. at § 7(1).

⁹⁴ Id. at § 7(3).

⁹⁵ Id. at § 9.

⁹⁶ Id. at § 9(3).

⁹⁷ Id. at § 10.

⁹⁸ Id. at § 21(1).

right to enter and reside anywhere in the country.⁹⁹ While this right is specifically given to citizens, it is not an exclusionary right stating only citizens have the right to enter the country or reside in South Africa. Instead, its existence is to ensure all citizens, regardless of race, have the freedom to enter and move around the country freely as citizens, without restrictions as many lived with under apartheid.

The fourth relevant right grants everyone access to food, water, and social security.¹⁰⁰ However, subsections 27(2)-(3) provides for the state to progressively realize these rights, as resources allow, with the exception of access to emergency medical care.¹⁰¹ Section 27 is not limited to citizens, as everyone physically within the country has the right to access. However, these rights are limited in that only access is ensured, and not the actual services. The section also specifically states that these rights are limited by progressive realization and the availability of resources. This means that hospitals and healthcare providers may charge for their services and services can be withheld until payment is rendered (other than emergency medical services). However, treatment cannot be withheld based on other grounds (such as citizenship status). Therefore, money may be a barrier to treatment, but access itself is protected.

The fifth right provides all persons the right to “a basic education, including adult basic education.”¹⁰² Subsection 29(1)(b) limits the right to “further education” based on the availability and accessibility of resources as per progressive realization. While non-basic education is therefore limited, basic education, regardless of the student’s age or availability of resources, is guaranteed to everyone.

⁹⁹ Id. at § 21(3).

¹⁰⁰ Id. at § 27(1).

¹⁰¹ Id. at §§ 27(2)-(3).

¹⁰² Id. at § 29(1)(a).

The sixth relevant right is just administrative action found in Section 33. Subsection 33(1) provides that administrative action must be “lawful, reasonable and procedurally fair.”¹⁰³ Additionally, any person whose rights have been “adversely affected” by administrative action has the right to a written explanation.¹⁰⁴ This right is not limited by progressive realization.

Section 36 permits rights within the Bill of Rights to be limited in some instances. The rights may only be limited “in terms of law of general applications” if “the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹⁰⁵ Furthermore, the limitation must consider “all relevant factors” which include:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.¹⁰⁶

Therefore, while rights may be limited, the constitution requires the limitation meet a high reasonableness standard.

Finally, the constitution confirms that when interpreting the Bill of rights, one “must promote the values” that found South Africa “based on human dignity, equality and freedom.”¹⁰⁷ Additionally, one must “consider international law” when interpreting the Bill of Rights.¹⁰⁸ Thus, the highest law in South Africa requires the interpretation of

¹⁰³ Id. at § 33(1).

¹⁰⁴ Id. at § 33(2).

¹⁰⁵ Id. at § 36(1).

¹⁰⁶ Id. at § 36(1).

¹⁰⁷ Id. at § 39(1)(a).

¹⁰⁸ Id. at § 39(1)(a).

rights provided to all persons within the country to regard human rights and international law.

South African Refugee and Immigration Law

The South African domestic legislation governing the asylum application process and refugee rights is the Refugees Act No. 130 of 1998 (Refugees Act) and the Immigration Act No. 13 of 2002 (Immigration Act). The Refugees Act was amended in 2008 and again in 2017. The 2017 amendment will be analyzed later in this study, and the text of the Refugees Act will not be analyzed in full in this section.

The Refugees Act preamble refers to South Africa's commitment to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The Act itself also reconfirms the country's commitment to international law and human rights, in particular refugee rights.

Similarly, the Refugees Amendment Act No. 33 of 2008 inserted a new section, Section 1A, to the Refugees Act. This section states:

- 1A. This Act must be interpreted and applied in a manner that is consistent with –
- (a) the 1951 United Nations Convention Relating to the Status of Refugees;
 - (b) the 1967 United Nations Protocol Relating to the Status of Refugees;
 - (c) the 1969 Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa;
 - (d) the 1948 United Nations Universal Declaration of Human rights; and
 - (e) any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party.¹⁰⁹

¹⁰⁹ Refugees Amendment Act 33 of 2008 §1A.

This section again reaffirms the two conventions and the protocol that the original Act affirmed, but also recognizes South Africa's commitment to the UN Declaration of Human Rights of 1948. Again, this is consistent with legal obligation to protect refugees and abide by international law.

The Immigration Act does not legislate the asylum system in South Africa. However, the act does provide that an asylum transit permit may be issued "to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of fourteen days only."¹¹⁰ Though rarely enforced, this measure allows for an individual who enters South Africa at a formal point of entry without a valid immigration document to inform the authorities that he or she has an asylum claim and receive a temporary transit permit. This permit grants legal stay within the country while the individual reports to a refugee reception office. Once the individual reports to the refugee reception office to lodge his or her asylum claim, the Refugees Act of 1998 replaces the Immigration Act as the governing legislation of that individual's continued presence in South Africa.

¹¹⁰ Immigration Act 13 of 2002 § 21(3).

CHAPTER IV

THE SOUTH AFRICAN ASYLUM PROCESS

Asylum Overview

The DHA is the South African institution that implements the country's refugee laws and manages the asylum process. In 2016,¹¹¹ the DHA reported 35,377 total new asylum applications made at Refugee Reception Offices (RROs) throughout the country.¹¹² This number is consistent with a continuing trend of declining applications in the country since 2009.¹¹³ In 2010, the DHA reported a sharp drop to only 124,336 applications (almost 100,000 applications fewer than 2009).¹¹⁴ By 2012, new applications dropped below 100,000 applications.¹¹⁵ The next sharpest drop occurred between 2015 and 2016, when applications declined almost by half from 62,159 to the current 35,377 new applications.¹¹⁶

The DHA presents its data for new applications by the asylum seeker's country of origin, gender, and age group. According to the DHA's 2016 statistics, the majority of new arrivals were from Zimbabwe (22.5 percent), the Democratic Republic of Congo (15 percent), Ethiopia (13.4 percent), Nigeria (9.2 percent), Bangladesh (8 percent), Somalia and Malawi (both 4.6 percent), Burundi (3.3 percent), Pakistan (3.1 percent), and Ghana

¹¹¹ 2016 is the most recent publication of asylum statistics. The DHA defines the 2016 year as the calendar year from January to December.

¹¹² Immigration Services, *2016 Asylum Report for UNHCR*, Department of Home Affairs, 2017.

¹¹³ The DHA reported a peak number of applications totaling 223,324 in 2009. See Immigration Services, *2016 Asylum Report for UNHCR*.

¹¹⁴ *Ibid.*

¹¹⁵ This is partially due to the creation of the Zimbabwean Documentation Project, which created a pathway to regularized documentation for Zimbabweans without proper documents. There were few requirements and applicants only needed to possess a valid passport. See Roni Amit, *All Roads Lead to Rejections: Persistent Bias and Incapacity in South African Refugee Status Determination* (Johannesburg: African Centre for Migration Studies, 2012), 14.

¹¹⁶ Immigration Services, *2016 Asylum Report for UNHCR*.

(3 percent).¹¹⁷ Of the 35,377 new asylum seekers, 72.4 percent were men and 27.6 percent were women. The majority (74 percent) of the new applicants were “young adults”, defined as ages 19-35.¹¹⁸ The remaining 25 percent of new applicants were almost evenly split between minors and adults aged 36-65.¹¹⁹

While the DHA reports the number of new applications and the number of initial status decisions each year, not all of the decisions in a yearly report correspond to a new application in the same year. This is largely due to delays in the decision process or submission timing of new applications at the end of a year. Therefore, the statistics for new applications and decisions made in a year are not consistent. The initial decision is made by a Refugee Status Determination Officer (RSDO) after an interview. The DHA reported 41,241 RSDO decisions in 2016. Nationwide, RSDOs approved and granted refugee status to 7.6 percent of asylum applications.¹²⁰ Conversely, RSDOs decided 52.6 percent applications were “Unfounded” and 40 percent were rejected as “Manifestly Unfounded” and “Fraudulent.”¹²¹ Comparatively, the United States and the European Union granted refugee status to asylum applicants at rates of 11.3 percent and 61 percent, respectively, in the same year.¹²²

The RSDO must make a status determination following an interview with the asylum seeker. During the decision process, the RSDO must consider the asylum seeker’s credibility, country of origin information, and relevant international and domestic law.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Nadwa Mossaad and Ryan Baugh, “Refugees and Asylees: 2016,” U.S. Department of Homeland Security, 2018; European Asylum Support Office, *Annual Report on the Situation of Asylum in the European Union 2016*. EASO, 2017.

An Unfounded decision means that the RSDO determines that the asylum seeker's claim does not fully meet the required elements of refugee status. The Unfounded decision is a rejection, however it is a "soft" rejection in that the decision is not accompanied with an order to leave the country. A Manifestly Unfounded decision means that the RSDO determines the asylum seeker's claim does not comprise any elements of a refugee claim (e.g., the asylum seeker voluntarily left his or her country in order to find a better paying job or study at university). A Fraudulent decision means that the RSDO believes the asylum seeker lied or engaged in fraud when lodging his or her asylum claim.

If an asylum seeker receives a Manifestly Unfounded or Fraudulent decision, the application is sent to the Standing Committee for Refugees Affairs (SCRA) for automatic review. In 2016, SCRA reviewed 31,426 RSDO decisions. SCRA Upheld 75 percent of the RSDOs' decisions; Final Rejections and orders to leave the country are issued to the failed asylum seeker. For the remaining 25 percent, SCRA Set Aside or Referred the decision back to the RSDO.¹²³ These applications effectively re-enter the asylum process¹²⁴, and the asylum seeker may then lodge an appeal with the Refugee Appeal Board (RAB).

The RAB is currently facing a very large backlog. The backlog is the consequence of several factors including a court-ordered change in procedure (resulting in many invalid decisions that now require new hearings),¹²⁵ the high number of applications

¹²³ Immigration Services, *2016 Asylum Report for UNHCR*.

¹²⁴ One third of all RSDO decisions are Unfounded decisions. See Immigration Services, *2016 Asylum Report for UNHCR*.

¹²⁵ The court in *Harerimana v Chairperson of the RAB and others* held that the RAB must sit in quorum to hear and decide cases. The DHA (although contested by some members of civil society) this order to mean that the majority of the Board nationally (no less than three) must be present for each hearing. This prevents the DHA from creating an RRO-specific RAB, because each hearing must have a majority of all members nationally, regardless of location. Therefore, there is only one RAB nationwide, and they hear every case. See *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 (5) SA 550 (WCC) (Saflii).

whose status determination is essentially deferred by the RSDO, and the inoperable status of the RAB due to personnel shifts.¹²⁶ The resulting backlog, according to the Minister of Home Affairs in March 2017, consists of 258,232 asylum seekers waiting for an appeal hearing with the RAB.¹²⁷ In 2016, the RAB heard a total of 63 appeals, and finalized 1,296 decisions.¹²⁸ However, as the Minister noted, these numbers are impacted by the RAB's inability to hear any cases since May 2016 and an unknown number of hearings in which the "RAB was improperly constituted."¹²⁹ The estimated wait time for an appeal hearing is 5-10 years, but it is important to note that some asylum seekers have been waiting for as long as 18 years for a hearing.¹³⁰ Relying on the backlog numbers and estimated hearing schedule from the Minister's response and assuming the RAB can sit for hearings 50 weeks out of the year, the RAB will clear the backlog in 103.3 years.¹³¹

Challenges in the System

Asylum seekers face many barriers throughout the asylum process. Asylum seekers report a variety of difficulties in not only procedural aspects in applying for asylum, but also substantive challenges in completing the application. The DHA's internal policies relating to RSDOs and initial decisions creates barriers to just administrative action for asylum seekers. Finally, administrative decisions and procedures of the RROs result in violations to just administrative action as well.

¹²⁶ The RAB chairperson's contract ended and three Board members resigned in mid-2016. The RAB did not begin operations until February 2017. See Minister of Home Affairs, "Question NW267 to the Minister of Home Affairs."

¹²⁷ Minister of Home Affairs, "Question NW267 to the Minister of Home Affairs."

¹²⁸ Immigration Services. *2016 Asylum Report for UNHCR*. Department of Home Affairs, 2017.

¹²⁹ Minister of Home Affairs, "Question NW267 to the Minister of Home Affairs."

¹³⁰ According to client data from the Scalabrini Centre of Cape Town.

¹³¹ Minister of Home Affairs, "Question NW267 to the Minister of Home Affairs."

As previously mentioned, the first step in the asylum process is lodging an asylum claim at an RRO. Many asylum seekers, however, are not aware of asylum laws or policies, and instead make their way to cities to reunite with friends, family, and other asylum seekers.¹³² Without proper documents, asylum seekers are vulnerable to arrests and deportation proceedings. For example, a group of 19 Ethiopians recently arrived in South Africa after fleeing political persecution (they were members and supporters of an opposition party) and ignorant of asylum law, traveled to Johannesburg.¹³³ They never encountered an immigration official at the Mozambique-South African border.¹³⁴ There, they met a Somali national with whom they shared a language, and he offered them shelter and food.¹³⁵ While at the Somali's house, an unrelated fight broke out which brought the police.¹³⁶ The police arrested the Ethiopians for not having proper immigration documents, and the DHA began deportation proceedings.¹³⁷ The DHA argued before the Supreme Court of Appeals that the Ethiopian's reluctance to discuss the specifics of their persecution and refusal to seek asylum in another country before entering South Africa should be held against the would-be asylum seekers.¹³⁸ Additionally, the DHA asserted that the department had no "legal obligation... to transport any person being detained, pending deportation, to a refugee reception office, to enable an application for asylum to be made."¹³⁹ While the Court disagreed and ordered

¹³² Information reported during confidential client consultations.

¹³³ *Bula and Others v Minister of Home Affairs and Others* 2012, (2) SA 1 (SCA) at ¶ 4-5.

¹³⁴ *Id.* at ¶ 4.

¹³⁵ *Id.* at ¶ 5.

¹³⁶ *Id.*

¹³⁷ *Id.* at ¶ 6.

¹³⁸ *Id.* at ¶ 18.

¹³⁹ *Id.* at ¶ 20.

the DHA to allow the group to apply for asylum, this case demonstrates the DHA's opinion of its role and obligations to assist would-be asylum seekers.

Furthermore, asylum seekers report challenges when applying for asylum at the RRO. These challenges include gaining access to the RRO itself. The few RRO locations, combined with the large numbers of asylum seekers and refugees requiring services at the RROs, results in very long lines. These lines can be so long, that 75 percent of responding asylum seekers in a 2012 study reported spending at least two nights outside the RRO to secure a spot in the line.¹⁴⁰ Once in the line, 19 percent reported that he or she was asked by an employee (usually a security guard) for money to move up in the line, and some were turned away from the RRO if he or she refused to pay.¹⁴¹ Towards the end of the calendar year, new applicants are sometimes turned away with the explanation that the RRO is "fully booked" and no longer receiving new applications until the following year.¹⁴²

Once the asylum seeker successfully enters the RRO, however, he or she often face substantive challenges to applying for asylum. The application form is only available in English, and RSDOs and interpreters do not always provide assistance or inform asylum seekers of their rights as the Refugees Act stipulates.¹⁴³ In fact, almost 50 percent of asylum seekers reported that the RSDO never explained the process, and 40 percent reported they did not understand what information the RSDO expected the asylum seeker

¹⁴⁰ Roni Amit, *No Way In: Barriers to Access, Service and Administrative Justice as South Africa's Refugee Receptions Offices* (Johannesburg: African Centre for Migration Studies, 2012), 42.

¹⁴¹ Amit, *No Way In*, 56.

¹⁴² This information was reported during confidential client consultations and through communications with RRO personnel.

¹⁴³ See *A v Chairperson of the Refugee Appeal Board and Others*, No. 19483/2015, 2017 ZAWCHC (Saflii).

to provide or prove.¹⁴⁴ The RSDO's failure to provide asylum seekers with this information jeopardizes the asylum seeker's ability to provide all relevant information, either because he or she does not understand the import of such information, or because the asylum seeker is reluctant to freely share information he or she fears will make its way back to his or her persecutor(s).¹⁴⁵ Some asylum seekers knowingly refrain from disclosing relevant information because he or she is afraid to disclose certain facts of his or her claim. For example, some LGBT asylum seekers are afraid to disclose their sexual orientation in front of an interpreter from their country of origin and connected to the asylum seeker community in South Africa, and some asylum seekers who have experienced sexual violence are too traumatized to discuss their experiences with strangers.¹⁴⁶

DHA's internal policies for RSDOs also create barriers. First, there is no standardized set of qualifications to become a RSDO.¹⁴⁷ This means that RSDOs do not have a uniform minimum education or even background in refugee issues before hiring. In addition to a lack of qualifications, the DHA created an internal review policy (intended to combat corruption) that only initiates an automatic review on decisions granting refugee status.¹⁴⁸ The lopsided review process encourages RSDO to reject asylum seekers to avoid reviews, and one asylum seeker reported that when he received his Unfounded decision, the RSDO advised him that he qualified for refugee status and

¹⁴⁴ Amit, *No Way In*, 65.

¹⁴⁵ In confidential client consultations, asylum seekers reported hearing rumors that information asylum seekers give in interviews and on the application form is shared with state agents from the asylum seeker's country of origin. Others reported not knowing their applications are kept confidential.

¹⁴⁶ Information reported in confidential client consultations.

¹⁴⁷ See *Gavric v Refugee Status Determination Officer, Cape Town and Others* 2016, (2) SA 777 (WCC).; See also Amit, *All Roads Lead to Rejections*, 42.

¹⁴⁸ Amit, *All Roads Lead to Rejections*, 17.

the RAB would grant him status.¹⁴⁹ Another asylum seeker, a Somali, fleeing the war back home, received a Fraudulent decision from the RSDO who reasoned that because he had never heard of any conflict in Somalia, the asylum seeker's claim could only be an attempt to fraudulently gain a work permit in South Africa.¹⁵⁰

Moreover, RSDOs, whether through a lack of training or incentive properly assess claims, also frequently fail to correctly apply law when determining refugee status. When determining status, RSDOs must consider international law, the South African Constitution, the Refugees Act, and the Promotion of Administrative Justice Act No. 3 of 2000 (which ensures administrative justice). RSDOs often consult the UNHCR's *Handbook on Procedures and Criteria for Status Determining Refugee Status* as well as refugee law scholars such as James Hathaway for interpretations of the legal definitions, burden of proof (which primarily falls upon the applicant to prove he or she has a refugee claim, but the examiner shares some responsibility to gather and evaluate all of the evidence),¹⁵¹ credibility of the asylum seeker, standard of proof, among other guidelines. RSDOs also consider country of origin information, which includes background research on the country of origin's safety and stability.

An example of an RSDO's failure to correctly apply the law is laid out in *Mwamba v Chairperson of the Refugee Appeal Board and Others*. Mr. Mwamba Mununga Armand, a Congolese asylum seeker in this matter, was a social worker for the Democratic Republic of Congo's government.¹⁵² Mr. Mwamba was transferred to Goma,

¹⁴⁹ Information obtained during confidential client consultations.

¹⁵⁰ Information obtained during confidential client consultations.

¹⁵¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (Geneva: United Nations, 1992).

¹⁵² *Mwamba v Chairperson of the Refugee Appeal Board and Others*, No. 19483/2015, 2015, ZAWCHC (Saflii).

the center of First Congo War, to assist with orphaned children from the war (which ended around the time of the transfer).¹⁵³ Mr. Mwamba split his time working in Goma and a nearby village until anti-Kabila rebels occupied the village.¹⁵⁴ He was held in the village until managing to escape to Goma six months later.¹⁵⁵ However, Mr. Mwamba was repeatedly arrested by government agents under suspicion of involvement with the rebel group, and alleged he was assaulted while detained and fellow detainees disappeared.¹⁵⁶ Eventually, he escaped detention with the help of one of the state agents, and made his way to South Africa. In his application, Mr. Mwamba said he “in insecurity at any time and anywhere on my own country (sic).”¹⁵⁷ He testified that he was not offered an interpreter or assistance to complete the application form or during the interview, and that during the interview the RSDO did not seem interested in his reasons for leaving his country.¹⁵⁸ Furthermore, Mr. Mwamba, who was not advised on the asylum process, testified he was afraid his “capture, imprisonment and assault at the hands of government forces” would “jeopardise his application” and so did not disclose it to the RSDO.¹⁵⁹

The reasons for the RSDO’s Unfounded decision follow:

You claimed that you were born in Sadoa village in Katoa province and you were studying in Lubumbashi from 1987 to 2003. You also mentioned that you were working in Goma from 1998 to 2008. You have decided to leave your country because you were arrested by the rebels for six months 30Km from Goma. You again mentioned that after fleeing the rebels you were than accused of working for the rebels by the secret service. After considering all the relevant fact into your application I have come into conclusion that you claim does not call to question any material fact and

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Id. at ¶ 33.

¹⁵⁸ Id.

¹⁵⁹ Id. at ¶ 40.

country of information is not consistent on this matter because it is unlikely that you can study in Lubumbashi from 1987 to 2003 (sixteen years) and again to be able to work in Goma from 1998 to 2008 (ten years) even though it is fact that the political instability and insecurity in Goma. You could also go back to your place of birth Katanga which is peacefull and under government control. Inlight of the above well founded fear does not apply. (sic)¹⁶⁰

The judge in the *Mwamba* case noted the RSDO failed to give Mr. Mwamba the benefit of the doubt as well as to “properly undertaken an inquisitorial role.”¹⁶¹

Even after completing the application, asylum seekers continue to experience barriers throughout the asylum process, specifically in terms of family joining and application processing. Family joining refers to the process of joining dependents (usually children under 18 years old and spouses, but in exceptional cases an infirm parent) to a primary file held by an asylum seeker or refugee. Joining files can be beneficial in that it streamlines the application process for a family, allows children to receive asylum permits (children cannot legally lodge an independent claim for asylum until the age of 18, yet every foreign national, regardless of age, requires immigration or asylum documents), and all dependents receive the same legal benefits as the primary file holder. This means that if the primary file holder is a refugee, then every dependent also has a refugee permit (which is valid for four years at a time, instead of a few months), access to social grants and travel documents, and is eligible for Permanent Residency after five years. To determine dependency relationships, the DHA relies on family members listed in the original application, DNA test results, biometrics, and government issued documents such as birth and marriage certificates.

¹⁶⁰ Id. at ¶ 38.

¹⁶¹ Id. at ¶ 39.

The DHA relies most heavily on the original application. The DHA is highly suspicious of applications for dependents who do not appear on the primary file holder's application:

Where a recognised refugee did not specify on his or her [Application] that he or she was married or had children, this raises a *prima facie* concern about the validity of the claim of his or her purported spouse or child...the Department cannot grant dependents, refugee status in the absence of sufficient information, particularly, in respect of those who are alleged to be children of recognised refugees. The Department must always be alert to the risks of child trafficking.¹⁶²

However, the DHA is also highly suspicious when names are spelled differently (a common occurrence for illiterate asylum seekers) or birth and marriage dates are incorrect.¹⁶³ Additionally, sometimes family members are left out of the applications because of communication errors or incorrect beliefs that a family member is deceased.¹⁶⁴

The DHA's concerns for trafficking, while understandable and in line with international law, also causes children to become undocumented. For example, a refugee reported that the DHA refused to join his child, born in South Africa and possessing a South African birth certificate, to his file because the DHA questioned the refugee's marriage certificate to his wife.¹⁶⁵ While the DHA did not question the validity of the birth certificate (which was issued by the DHA) and thus the child's parentage, the DHA reasoned concerns for child trafficking prevented the DHA from joining the child to his father's refugee file.

¹⁶² Filing Notice at ¶ 33.3-33.4, *Scalabrini Centre of Cape Town and Others v The Minister of Home Affairs and Others*, No. 5242/16, 2017 WCHC.

¹⁶³ Information obtained during confidential client consultations.

¹⁶⁴ Information obtained during confidential client consultations.

¹⁶⁵ Information obtained during confidential client consultations.

Furthermore, the DHA will not consider an application for family joining if the dependent did not specify that he or she intended to apply as a dependent. According to the Cape Town RRO manager:

In addition, if a recognised refugee who had applied for asylum at the CTRRO, declared in his [Application] that he or she was married, but his or her spouse submits an independent application for asylum under section 3(a) or (b) of the Act [these sections correspond to the UN and OAU definitions of refugee], the Department requires that application to be process to finality...If an applicant is permitted to apply for asylum under section 3(c) [this section allows for dependents to join a family member's file] whilst his or her application under section 3(a) or (b) is pending, this would result in an unwarranted waste of resources spent dealing with the application submitted under section 3(a) or (b) of the Act.¹⁶⁶

This is problematic not only because the DHA assumes an asylum seeker is knowledgeable about the Refugees Act (especially when many asylum seekers have language barriers and do not receive proper assistance from the DHA when completing the application), but also because the application form never calls for the applicant to identify which definition his or her claim satisfies. While a dependent could use the asylum seeker permit until his or her claim is finalized (and if rejected then reapply as a dependent), the dependent will not have access to the benefits outlined above if the dependent is trying to join a refugee's file.

The barriers to family joining are particularly burdensome for children. Many children do not have an independent asylum claim because they were too young to have been persecuted while still in their country of origin. In the cases where a child arrives in South Africa without an adult (because she was either separated from a parent during flight or is following a parent to South Africa) and whose parents either gave incorrect

¹⁶⁶ Filing Notice at ¶ 33.7, *Scalabrini Centre of Cape Town and Others v The Minister of Home Affairs and Others*, No. 5242/16, 2017 WCHC.

details about the child or did not include the child in the application,¹⁶⁷ are often left undocumented. However, even if the parent included the child in the original application, children are still at risk of being undocumented when department officials refuse to accept family joining applications (without giving reasons) or lose the application because applicants are not given a receipt or proof of application while awaiting a decision.¹⁶⁸ Undocumented children are in a precarious legal status for deferred deportation, struggle to access healthcare, and are being turned away from schools as the DHA pressures all education institutions to require proof of legal status for all non-citizens, despite the entitlement to a basic education provided by the Constitution.¹⁶⁹

Finally, asylum seekers report difficulties in receiving documents and decisions within a reasonable timeframe. Asylum seekers and refugees are not granted access to an RRO unless renewing a permit or completing an application for travel documents or passports, permanent residency, etc.¹⁷⁰ This results in long delays (especially for refugees who only renew permits once every four years) in receiving decisions and documents. Some asylum seekers and refugees report receiving decisions months or years after a decision was written, and many refugees report not receiving a passport until after it expired.¹⁷¹ Additionally decisions, especially from the RAB, are often written long after the interview or hearing occurred. Asylum seekers reported receiving a RAB decision that was written ten years after the hearing took place.¹⁷²

¹⁶⁷ This is also an issue when the father left the country of origin before the child's birth.

¹⁶⁸ Information obtained during confidential client consultations.

¹⁶⁹ Information obtained during confidential client consultations.

¹⁷⁰ Information obtained during confidential client consultations.

¹⁷¹ Information obtained during confidential client consultations.

¹⁷² Information obtained during confidential client consultations.

The various challenges in the asylum process have serious impacts on asylum seekers in South Africa. Many asylum seekers struggle to receive a permit in the first place and therefore are living in uncertainty. Almost two thirds (165,697) of asylum permits were expired as of March 2017.¹⁷³ Many asylum seekers want to follow the law and keep their permits up to date, especially considering the negative implications of an expired permit (such as fines, invalid rights to work or study, and no proof of legal status within South Africa), but they find the hurdles insurmountable.¹⁷⁴

¹⁷³ Minister of Home Affairs, “Question NW267 to the Minister of Home Affairs.”

¹⁷⁴ Information obtained during confidential client consultations.

CHAPTER V

EVIDENCE

This study explores the DHA's approach to asylum through published policy papers, the 2017 amendment to the Refugees Act, and a Supreme Court case regarding the Cape Town RRO closure. First, the policy papers provide insight into the DHA's understanding of its role in serving South Africa, the threats posed by international migration generally, and the inadequacies of the previous version of the Refugees Act. Throughout the papers, the DHA creates and reinforces ideas of who belongs in South Africa, and who should be excluded, all of which justify the need for the new amendment. Second, the new amendment, informed by the new policies, is the enforceable legislation managing the asylum system and creating legal means to act on the DHA's policies. The new amendment, however, contains provisions that potentially violate international law and curb human rights protections. Third, the closure of the RRO and ensuing litigation demonstrates the DHA's lack of commitment to human rights in its execution of legislation and policy. Supporting documentation providing context and clarification authored by officials within the DHA will be analyzed along with the main evidence.

Policy Papers

Policy papers published by the DHA are the driving force behind legislation relating to immigration and asylum. The DHA first published its immigration policy framework in the 1997 Green Paper on International Migration and the 1999 White Paper

on International Migration.¹⁷⁵ These papers influenced the Immigration Act and the new direction for immigration under a democratic government. Similarly, the 1998 Refugee White Paper became the basis for the Refugees Act later that same year. Importantly, the papers contend that apartheid era legislation could be kept, so long as parliament passed amendments that adapted the legislation to comply with the new constitution.¹⁷⁶ The discriminatory policies benefiting white Europeans over Africans remained in place.

The DHA did not publish another finalized¹⁷⁷ policy paper until the Discussion Paper on the Repositioning of the Department of Home Affairs (Repositioning Paper) in May 2017. The Repositioning Paper contextualizes the DHA's wider mandate to manage identity and migration functions within the South African government. Two months later, The DHA published the White Paper on International Migration (WPIM) which outlines the DHA's intentions for policy and legislation implementation regarding immigration and refugee frameworks.¹⁷⁸ Both papers herald the DHA's shift to securitization.

The Repositioning Paper does not focus solely on migration issues because the DHA is responsible for more than managing the immigration and asylum systems. The department also serves South African citizens by maintaining identity records (for example, birth and death certificates, marriage registrations, etc.). As such, the Repositioning Paper seeks to correct the DHA's perceived role within the government

¹⁷⁵ Green Papers are the preliminary policy papers published by the DHA. Once a green paper is published, other branches of government and civil society may respond via formal submissions during a comment period. The DHA publishes the finalized white paper once revising the green paper according to civil and government input.

¹⁷⁶ Department of Home Affairs, *White Paper on the International Migration for South Africa* (July 2017), 10.

¹⁷⁷ The DHA published the Green Paper on International Migration in June 2016.

¹⁷⁸ The WPIM creates a split timeline for implementing the policies: the DHA will immediately implement administrative actions and will defer implementation for actions requiring parliamentary approval (Department of Home Affairs, *White Paper on the International Migration for South Africa*, vi)

from the “periphery” as merely an administrative and non-strategic department resulting from a lack of previous policy.¹⁷⁹ In her Foreword, Minister of Home Affairs Hlengiwe Mkhize contextualizes the DHA’s role in South Africa in relation to national identity, economy, and migration:

All South African citizens are dependent on the Department of Home Affairs (DHA) because of its sole mandate to secure and manage official identity and status. The DHA affirms our unique identity and our nationality... Over the past ten years the DHA has gone through a robust transformation process, which included re-thinking its mandate and the critical role it must play in building a capable state. The mandate of the department is now clearly understood as the use of its identity and migration functions to empower citizens; to enable economic development and efficient government; and to secure our country.¹⁸⁰

Additionally, the Repositioning Paper acknowledges the likely increase in mass migration due to wars and climate change, which will only result in increased pressures on the immigration branch of the department.¹⁸¹ Therefore, the Repositioning Paper’s broader focus on the DHA’s full mandate influences the department’s view on immigration, including the asylum system.

The WPIM includes much of the 1999 White Paper on International Migration, but the new WPIM improves the policy’s relevancy and addresses gaps in the policy.¹⁸²

As Minister Mkhize states in her forward, the WPIM was published to provide:

[A] comprehensive review of the policy framework that can inform systematic reform to the legislation. Essentially, and despite significant changes in the country, region and world, the country’s formal international migration policy has remained in place since 1999. The policy is outdated and has serious limitations that affect the country’s ability to adequately embrace global opportunities while safeguarding our sovereignty and ensuring public safety and national security.¹⁸³

¹⁷⁹ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 12.

¹⁸⁰ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 5.

¹⁸¹ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 13

¹⁸² Department of Home Affairs, *White Paper on the International Migration for South Africa*, iii.

¹⁸³ *Ibid.*

Thus, the WPIM updates the DHA's official policy towards international migration.

In the papers, the DHA explains its founding philosophy for realizing its mandate and identifies challenges in the immigration system generally (which influences the asylum system), as well as the need for changes to the asylum system. Specifically, the DHA contextualizes the policy through the need to protect South Africa's sovereignty, protecting against external criminal threats, and ensuring the proper use of the asylum system. Further evidence of the DHA's intent and reasoning come from speeches and presentations by department officials.

Protecting South Africa

A main concern for the DHA is protecting South Africa's sovereignty and thus national identity. In 2016, Minister of Home Affairs Malusi Gigaba addressed civil society at a Dialogue on the Green Paper on International Migration on the need for new policy. He stated:

South Africa has a sovereign right to manage international migration in its national interests... South Africa's international migration policy must contribute to nation building and social cohesion. As mentioned earlier, the migration policy shapes the future composition of the South African population.¹⁸⁴

¹⁸⁴ Department of Home Affairs "Address by the Minister of Home Affairs, Malusi Gigaba MP, at the Policy Dialogue with Civil Society on the Green Paper on International Migration, 16 September 2016," Statements, Department of Home Affairs, published September 2016, <http://www.dha.gov.za/index.php/statements-speeches/857-address-by-minister-of-home-affairs-malusi-gigaba-mp-at-the-policy-dialogue-with-civil-society-on-the-green-paper-on-international-migration-16-september-2016>.

As a sovereign state, South Africa does have a right to manage migration and legislate the asylum system. Minister Gigaba also points out the DHA is integral to building South Africa as its duties include determining who will become South African.

The Repositioning Paper places the DHA as the protector of South African sovereignty through its role in managing identity. The paper emphasizes the need for the secure management of identity as an important tool to protect and determine citizenship. As DHA reasons, proper management protects South Africa from “threats to its people, systems, institutions and capacity to provide for the nation”¹⁸⁵ An example of a threat would be the criminal use of false identities, which would have adverse effects on South African citizens and potentially the economy.¹⁸⁶ Furthermore, identity is crucial to affirming citizenship and civil status. As the only institution mandated to “guard” citizenship, the DHA reasons that citizenship is paramount to maintaining national sovereignty:

If there is no nation, populated by citizens as defined by law, then logically there can be no sovereign state. If South Africa loses its sovereignty, then everything else is lost, since decisions will be made elsewhere, as in the colonial era.¹⁸⁷

Strong legal constructs of who is South African therefore determine the country’s success as a political entity.

The DHA equates strong management of identity and thus citizenship with South Africa’s independence and success as a sovereign state. While the DHA refers to identity and citizenship as legal constructs, the policy papers influence the philosophical

¹⁸⁵ Department of Home Affairs, *Discussion Paper on the Repositioning of the Department of Home Affairs* (May 2017), 6.

¹⁸⁶ Ibid.

¹⁸⁷ Department of Home Affairs, *Discussion Paper on the Repositioning of the Department of Home Affairs*, 12-13.

understanding of who belongs in South Africa. By placing such a high importance on citizenship, the DHA reinforces the idea of “us” versus “them”, and creates the perception that legal status must be highly regulated and evaluated, or else the country will fail. Furthermore, by comparing the loss of a strong citizenry to a return to the colonial era, the DHA creates a sense of fear that blurring rights to citizenship in South Africa will revert the young democracy into a submissive and oppressed entity of foreign powers.

Criminality and Fraud

Throughout the policy papers, the DHA’s xenophobia is further demonstrated as it equates foreign nationals and migrants to criminal activity and fraud. While it cannot be denied that some foreign nationals engage in criminal and fraudulent behavior (in both the immigration and asylum contexts), the DHA repeatedly conflates non-citizenship with criminal intent. In fact, the DHA explicitly situates foreign nationals within a context of crime and burden on the economy. This is an important connection because it delegitimizes the individual’s purpose in South Africa, and creates a social and political enemy threatening South Africans.

First, the DHA adopts language in its policy papers that are politically charged and connote (if not explicitly accuses) criminal activity. In fact, the WPIM bluntly uses the definition:

Irregular migrants (or undocumented/illegal migrants): these are people who enter a country, usually in search of income-generating activities, without the necessary documents and permits.¹⁸⁸

¹⁸⁸ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 73.

Additionally, the WPIM states:

South Africa has become an attractive destination for illegal immigrants (undocumented migrants, border jumper, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country.¹⁸⁹

The term “illegal” is strongly politicized and emphasizes criminality as well as a status of not belonging. Furthermore, the DHA explicitly identifies these populations as “threats” not just to the economy, but also to the very identity of South Africa.

Second, the DHA associates international migration with criminals and undesired persons. The Repositioning Paper and WPIM reject isolationism, noting that globalization and international law have made it “neither desirable nor possible” to end international migration.¹⁹⁰ However, the DHA does state that the fast movement of people and information caused by globalization can create “serious threats, such as terrorism and a high level of transnational crime.”¹⁹¹ The DHA further states that:

South Africa has not been successful in attracting and retaining sought-after international migrants, such as skilled and business persons. Instead, the majority of international migrants are either low-skilled, asylum seekers or those who are granted residence on the basis of relationships (relative’s visas).¹⁹²

By dividing migrants into desirable and undesirable categories (and placing asylum seekers in the latter), the DHA vilifies a portion of the population, and effectively says these individuals are unworthy of South African support.

¹⁸⁹ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 67.

¹⁹⁰ Department of Home Affairs, *White Paper on the International Migration for South Africa*, v and 1.

¹⁹¹ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 15.

¹⁹² Department of Home Affairs, *White Paper on the International Migration for South Africa*, 30.

In the Repositioning Paper, the DHA not only highlights potential criminal threats, but also adverse economic impacts of foreign nationals manipulating South African services when migration is not properly managed:

Levels of corruption and fraud are high and there is serious exposure to transnational crime. Just a few high-profile foreign criminals based in South Africa can result in costs to the state and society that are greater than the annual operating budget of immigration. The overall loss to the economy is much higher. Factors are inefficiencies impacting on trade, investment and gaps in critical skills; foreign migrants without legal documentation accessing services; and the high cost of social unrest. Gaps in policy relating to asylum seekers and irregular labour flows have been particularly costly.¹⁹³

Deputy Minister Fatima Chohan repeats the allegation that foreign nationals use and abuse social services in her article *Refugee Rulings Undermine Policy*, stating:

[I]rregular (or illegal) migration... is not benign to a mixed economy such as ours, and the strain on the Health Department's resources is evident in Gauteng, where most undocumented migrants are concentrated... Our Bill of Rights reserves the right to enter and reside in the country only to citizens... If [non-citizens] enter illegally, [non-citizens] should surely not have an automatic right to remain in and have equal access to state resources.¹⁹⁴

Deputy Minister Chohan recognizes the importance of South Africa's commitment to human rights and that this perspective "does not sit comfortably with the notion that poor people looking for a better life should be dealt with as criminals."¹⁹⁵ However, she notes, the DHA must still enforce South African laws and the Constitution.

Deputy Minister Chohan's language is similar to that in the policy papers, with a strong basis in terms of threats and criminality, threats to the security and the safety of

¹⁹³ Department of Home Affairs, *Discussion Paper on the Repositioning of the Department of Home Affairs*, 19.

¹⁹⁴ Fatima Chohan, "Refugee Rulings Undermine Policy," *IOL*, October 16, 2017, www.iol.co.za/pretorianews/refugee-rulings-undermine-policy-11589438.

¹⁹⁵ *Ibid.*

South Africans, and threats to the economy. She lodges an accusation that migrants deplete social services such as health resources. Importantly though, her statement misleads readers to think that migrants receive free health care and are in effect stealing resources by failing to acknowledge payment policies that prevent foreign nationals from accessing free health care.¹⁹⁶ Additionally, while the Deputy Minister is rightly concerned with upholding the Constitution, her interpretation of the Bill of Rights leads to the conclusion that foreign nationals should be barred from state services, despite the Constitution stating “everyone has the right to have access to health care services.”¹⁹⁷

Another important detail missing is that asylum seekers do not always have proper travel documents as a consequence of their flight from persecution. Asylum seekers therefore cannot always enter a country regularly. Additionally, many asylum seekers pay into social services, such as the Unemployment Insurance Fund. Despite these critical details, the DHA uses these accusations to justify the abandonment of a rights-based approach to migration.

Third, the Repositioning Paper announces the department will begin to use a risk-based approach to better address alleged criminal activity by foreign nationals generally and in the asylum system specifically. The rights-based approach centered on the formal rights afforded to foreign nationals by international and domestic laws.¹⁹⁸ This approach meant that immigrants (and more relevantly asylum seekers) were afforded rights as a matter of course regardless of individual immigration status. However, the DHA

¹⁹⁶ For a migrant to receive a visa, he or she must provide proof of insurance coverage. All foreign nationals (except those with Permanent Residency and asylum permits) are charged high “international” fees regardless of documentation. Permanent Residents and asylum seekers/refugees may access health care at the same cost as citizens, but most health providers still require payment for non-emergency services.

¹⁹⁷ S. Afr. Const., 1996. § 27(1).

¹⁹⁸ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 2.

determined that the “biased” approach was “limited to compliance” with legislation and international treaties, and thus failed to protect South Africa from corruption, terrorism, drug smuggling, and labor practices harmful to the economy.¹⁹⁹ These risks, the WPIM warns, result in increased social xenophobia and instability.²⁰⁰

Instead, risk assessment is the sole and proper method to secure immigration management.²⁰¹ Neither paper defines risk, or clarifies how risk will be assessed. However, in a presentation before the parliamentary Portfolio Committee on Home Affairs regarding progress on the WPIM in October 2017, Acting Director General Jackie McKay²⁰² distinguished high risk migrants from low risk migrants as those likely to engage in criminal activity and/or serve time in prison.²⁰³ McKay reasoned that the DHA had limited resources for deportations, and consequently the DHA must decide which foreign nationals would require the most expenditure.²⁰⁴

McKay’s definition of high versus low risk migrants operates on the assumption that the DHA will have to deport every foreign national. This assumption that every foreign national will commit a crime or fraud in South Africa not only conflates foreign nationals with criminal activity, but it also creates and reinforces the belief that foreign nationals cannot be trusted and will eventually betray South Africa.

New Policy Regarding Asylum System

¹⁹⁹ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 2-4.

²⁰⁰ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 4.

²⁰¹ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 6-7.

²⁰² Deputy Director General McKay was the Acting Director-General for a brief period in 2017 during a labour dispute involving Director General Apleni.

²⁰³ S.A. Parliament. Portfolio Committee on Home Affairs. *White Paper on International Migration Progress Update*. October 24, 2017.

²⁰⁴ *Ibid.*

The DHA identifies the asylum system as a casualty of abuse and fraud by foreign nationals. This abuse is in part because of gaps in policy, but partly because of the liberal nature of the Refugees Act. In the WPIM, the DHA discusses the need for changes in the asylum system and proposes new policies (which influenced the new amendment). However, the identified causes for abuse rely on unsupported assumptions of fraud and therefore the proposed changes to the system create unfair burdens on asylum seekers.

At the Regional Conference of the International Association of Refugee Law Judges in October 2016, Minister Gigaba explained the necessary balance between immigration and asylum policies:

[I]f States determine that generosity in refugee policy is used to subvert its sovereignty, they may feel compelled to withdraw refugee protection politically, legally, and in practice. So it is important that we recognize this conceptual relationship between immigration management and protection of asylum seekers and refugees. Arguably, when South Africa adopted new policy and legislation on refugees in the late 1990s, we did so with insufficient consideration for its relationship with immigration policy more broadly... By failing to anticipate, manage and accommodate the large number of migrants from our neighbouring countries, who could not get mainstream immigration visas to work and reside in South Africa, our immigration policy undermined our refugee policy.²⁰⁵

Minister Gigaba continued on to declare that South Africa's immigration system, which does not include a low-skill work visa, failed to manage economic migrants from southern Africa and thus undermined the refugee policy.²⁰⁶

²⁰⁵ Department of Home Affairs, "Keynote Address by the Minister of Home Affairs, Malusi Gigaba MP, at the National Conference on International Migration in Sandton, 17 March 2017," Statements, Department of Home Affairs, published on March 2017, <http://www.dha.gov.za/index.php/statements-speeches/944-keynote-address-by-the-minister-of-home-affairs-malusi-gigaba-mp-on-the-occasion-of-the-national-conference-on-international-migration-in-sandton-on-17-march-2017>.

²⁰⁶ Department of Home Affairs, "Address by the Minister of Home Affairs, Malusi Gigaba MP, at the Regional Conference of the International Association of Refugee Law Judges in Pretoria, 26 October 2016," Statements, Department of Home Affairs, Published October 2016. <http://www.dha.gov.za/index.php/statements-speeches/877-address-by-the-minister-of-home-affairs-malusi-gigaba-mp-at-the-regional-conference-of-the-international-association-of-refugee-law-judges-in-pretoria-on-26-october-2016>.

The DHA claims that the liberal asylum system invites abuse by economic migrants and asylum seekers alike. According to the DHA, 90 percent of asylum seekers in South Africa are really economic migrants²⁰⁷ fraudulently applying for asylum to take advantage of South Africa's relatively strong economy, lax application of rules, and access to services and work permits.²⁰⁸ As South Africa has the strongest economy in southern Africa, the DHA claims the asylum system affords a "de facto long-term work-visa" to economic migrants who cannot enter South Africa through the restrictive immigration system.²⁰⁹

The "principle of inclusion" allows a person to apply for asylum at any time. When an asylum seeker first arrives in South Africa, he or she has the responsibility to report to a Refugee Reception Office (RRO), and to present his or her claim for refugee status. Legally, according to the Refugees Act of 1998, he or she is supposed to do this within fourteen days of arriving, but this is not enforced. The DHA argues this practice results in applications for asylum in most cases where an individual has overstayed his or her visa in order to "legitimise" his or her stay in South Africa.²¹⁰ The DHA goes on to cite:

For instance, in 2011 while more than 12,3 million movements were captured in the enhanced Movement Control System (eMCS) in respect of

²⁰⁷ This number originates from the over 90 percent rejection rate for asylum applications. However, applications are also rejected if the threat to the individual ends. Considering the long wait for application processing, it is improper to conflate a rejection with a fraudulent application.

²⁰⁸ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 59-60.; See also Department of Home Affairs, "Address by the Minister of Home Affairs, Malusi Gigaba MP, at the Regional Conference of the International Association of Refugee Law Judges in Pretoria, 26 October 2016," Statements, Department of Home Affairs, published October 2016.

<http://www.dha.gov.za/index.php/statements-speeches/877-address-by-the-minister-of-home-affairs-malusi-gigaba-mp-at-the-regional-conference-of-the-international-association-of-refugee-law-judges-in-pretoria-on-26-october-2016>.

²⁰⁹ Ibid.

²¹⁰ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 24.

foreign arrivals; only 10,8 million departure movements were captured in respect to foreigners (sic).²¹¹

However, the DHA does not provide any proof to support these claims. The DHA does not even provide data or explanation to ensure the 1.5 million difference in “movements” excludes longer term visas or visits extending into the next calendar year. Moreover, the DHA fails to support its claims that the 1.5 million foreign nationals applied for asylum.

The proposed policy changes to the asylum system begin with the admission policy. While the DHA argues that the previously discussed “principle of inclusion” should continue, the department notes that the principle should be limited to ensure national security and rights of citizens. Therefore, the department intends to establish Asylum Seeker Processing Centres at ports of entries “to profile and accommodate asylum seekers during their status determination process.”²¹² Minister Gigaba identified the three goals the DHA must accomplish while an asylum seeker is detained at a Processing Centre:

Firstly, we must definitively establish their identity, as often they may not have identity documents. Secondly, we must determine whether they should be recognized as refugees, within a prescribed period of weeks or months. Finally, we must ensure they are provided with food, shelter, and any required health care or social services.²¹³

Asylum seekers will be detained with possible restrictions on their movement depending on a determination of low or high risk. While detained, the DHA, other government departments (such as Social Development, Health, and Energy), and the UNHCR will

²¹¹ Ibid.

²¹² Department of Home Affairs, *White Paper on the International Migration for South Africa*, 61.

²¹³ Department of Home Affairs, “Address by the Minister of Home Affairs, Malusi Gigaba MP, at the Policy Dialogue with Civil Society on the Green Paper on International Migration, 16 September 2016,” Statements, Department of Home Affairs, published September 2016, <http://www.dha.gov.za/index.php/statements-speeches/857-address-by-minister-of-home-affairs-malusi-gigaba-mp-at-the-policy-dialogue-with-civil-society-on-the-green-paper-on-international-migration-16-september-2016>.

provide asylum seekers with services. In addition to the creation of the Processing Centres, the DHA announced the elimination of the automatic right to work and study. The DHA reasons that because asylum seekers' basic needs will be provided for in the Processing Centres, asylum seekers will not have the automatic opportunity to work or study.

The risk-based approach will not mitigate xenophobia as the department suggests in the WPIM, but rather increase social xenophobia.²¹⁴ The DHA's solution to high-risk asylum seekers is to detain them in the Processing Centres. While the DHA argues that this does not violate its non-encampment stance,²¹⁵ the DHA's encampment policy only specifically refers to refugees. The fact that the DHA will detain asylum seekers for months at a time is synonymous with camps. Furthermore, as detainees, asylum seekers must be provided with food and other basic necessities by the government and organizations.

Refugees Act Amendment 2017

In addition to the policy papers, the DHA pushed an amendment to the Refugees Act through parliament. The Refugees Amendment Act 11 of 2017 (the Amendment) was passed by Parliament and signed into law by former President Jacob Zuma in late 2017. The Amendment includes several new regulations for that negatively affect asylum seekers. These new provisions, founded in the new policies from the Repositioning Paper

²¹⁴ Scalabrini Centre of Cape Town, *Submission on the Green Paper on International Migration* (2016), 26-27, <https://scalabrini.org.za/wp-content/uploads/2016/10/SCCT-Green-Paper-Submission.pdf>; Bobby Jordan, "Refugee Camp Move 'Will Add to Xenophobia'," *Business Day*, March 7, 2017, <https://www.pressreader.com/south-africa/business-day/20170307/281646779931995>.

²¹⁵ Department of Home Affairs, *White Paper on the International Migration for South Africa*, 60.

and WPIM, create restrictions for applying for an asylum and the rights associated with an Asylum Seeker Permit.

Minister Gigaba addressed the need for a balance between moral concerns for human rights with political concerns for citizens. He outlined the balance as:

Morally we are obliged to consider whether we, as the African and world community, are responding sufficiently to the human crisis of the millions of Africans fleeing conflict and deprivation as refugees and economic migrants... Politically, a country's ability to determine who may enter and exit its territory, and on what terms, is a core aspect of national sovereignty which all of the 200 or so countries in the international state system retain.²¹⁶

In doing so, the Amendment shortens the mandated time period open to an asylum seeker to report to an RRO to apply for asylum, and creates a new prohibition on applications after that time period lapses. Section 4, entitled "Exclusion from refugee status" includes a new subsection that states:

4. (1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she –

...

(i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.²¹⁷

During parliamentary deliberations, Deputy Minister Fatima Chohan explained that the reporting does not necessarily mean lodging an application. Officials at an RRO

²¹⁶ Department of Home Affairs. "Keynote Address by the Minister of Home Affairs."

²¹⁷ Refugees Amendment Act 11 of 2017 § 4(1)(i).

may turn away an asylum seeker wishing to apply for asylum if it is not the correct day for asylum seekers with that nationality to apply.²¹⁸ There was no discussion on whether the appointment slip would be well documented,²¹⁹ nor was a further detailed definition of “compelling reasons” offered.

This new provision also fails to take into account an asylum seeker’s limited understanding of asylum and immigration laws. Often, asylum seekers come to South Africa to join family, friends, or a community network from their country of origin. This means that they are entering the country with a specific destination in mind, to rejoin these groups. Therefore, they are not stopping at the border and immediately reporting their asylum claim and getting documented, they are going to join these networks. Once they reach their destination, their community network advises them on the process they must follow to receive documentation.

Legally, the new limitation on asylum seekers to report to an RRO within five days of arriving in South Africa also creates a very serious potential risk for violating the principle of non-refoulement, which South Africa is compelled to uphold under the UN and OAU conventions. The resulting exclusion from applying for asylum once the five days has lapsed assumes that newcomers are aware and understand the asylum process and domestic law. The new restriction also sets a very high burden for the newcomer to lodge a complaint after the five days considering he or she must satisfy the "compelling reasons" standard, which is at once vague and demanding. Additionally, there is a high

²¹⁸ Given the prevalent need for interpreters, nationalities and languages are allotted certain days of the week each is allowed to enter the RRO and apply for asylum.

²¹⁹ Asylum seekers and refugees requesting services from the RRO, such as Family Joining Applications, report they are frequently turned away without documentation of their applications. See *Scalabrini Centre, Cape Town and Others v. The Minister of Home Affairs and Others*, No. 5242/16, 2017 ZAWCHC (Saflii).; See also *De Saude Attorneys and Others v. The Director-General of the Department of Home Affairs and Others*, No. 22797/2016, 2017 ZAWCHC.

risk that many newcomers who do not reach the RRO in time will be returned to their country of origin and persecution they were fleeing.

Additionally, the new amendment also states that an individual on an immigration visa, governed by the Immigration Act, may apply for asylum and forfeit his or her immigration visa.²²⁰ However, the amendment does not provide a time period in which the *sur-place refugee*²²¹ must report to an RRO once events creating the *sur-place refugee* transpire. This omission leaves a potential *sur-place refugee* vulnerable to conflicting application of the amendment and prohibition from applying for asylum.

The Amendment also restricts how an asylum seeker may lodge his or her claim.

Subsection 21(1B) states:

An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.²²²

Furthermore, Section 21(6) provides:

An application for asylum, which is found to contain false, dishonest or misleading information, whether by a Refugee Status Determination Officer, when considering the application, the Standing Committee, when reviewing, monitoring or supervising a decision or the Refugee Appeals Authority, when adjudicating an appeal, must be rejected.²²³

Subsection 21(1B) does not take into account that many asylum seekers running from persecution do not have a passport or fear to travel on documents provided by a persecuting government. Furthermore, the section does not include guidelines as to what

²²⁰ Refugees Amendment Act 11 of 2017.

²²¹ A *sur-place refugee* is an individual who becomes a refugee "due to circumstances arising in his country of origin during his absence" and may result from the individual's own actions. See United Nations High Commissioner for Refugees. UNHCR. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. Geneva: United Nations, 1992, 16.

²²² Refugees Amendment Act 11 of 2017 § 21(1B).

²²³ Id.

an appropriate response would be, and no clarification as to what would or would not qualify as a valid reason. Moreover, the stipulation in subsection 21(6) that an immigration officer will conduct the interview, as opposed to an official specifically trained on refugee law, poses a risk of improper application of refugee law.

The Amendment also restricts the Asylum Seeker Permit in terms of rights (specifically the rights to work and study) and its administration. Section 22 of the new amendment, entitled “Asylum seeker visa,” provides rights and restrictions prescribed to asylum seekers holding the proper visa. Specifically, subsections (6)-(14) provide the relevant requirements pertaining to work and study rights:

- (6) An asylum seeker may be assessed to determine his or her ability to sustain himself or herself, and his or her dependents, either with or without the assistance of family or friends, for a period of at least four months.
- (7) If, after assessment, it is found that an asylum seeker is unable to sustain himself or herself and his or her dependants, as contemplated in subsection (6), that asylum seeker may be offered shelter and basic necessities provided by the UNHCR or any other charitable organisation or person.²²⁴

These two subsections formally enact the WPIM’s intention to remove the automatic right to work and study. The DHA places a large administrative burden on itself to conduct assessments on every asylum seeker and conscripts charitable organizations to support asylum seekers. The UNHCR objected to the DHA explicitly naming the organization in the new amendment as a possible source of funding and assistance to asylum seekers who are not able to provide for themselves. The UNHCR’s objection to its inclusion in the amendment stems from the UNHCR’s stance that “the

²²⁴ Refugees Amendment Act 11 of 2017 § 22.

right to work is a fundamental human right, integral to human dignity and self-respect, and that reliance on assistance is not conducive to self-sufficiency.”²²⁵

Subsections (8)-(10) provide the administrative details for endorsing the right to work and study:

- (8) The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who –
 - (a) is unable to sustain himself or herself and his or her dependants, as contemplated in subsection (6);
 - (b) is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person, as contemplated in subsection (7); or
 - (c) seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.
- (9) In the event that the right to work or study is endorsed on the asylum seeker visa, the relevant employer, in the case of a right to work, and the relevant educational institution, in the case of a right to study, must furnish the Department with a letter of employment or of enrolment at the educational institution, as the case may be, in the prescribed form within a period of 14 days from the date of the asylum seeker taking up employment or being enrolled, as the case may be.
- (10) An employer or educational institution contemplated in subsection (9) who or which fails to comply with the duty imposed in that subsection, or fraudulently issues the letter contemplated in that subsection, is guilty of an offence and liable upon conviction to a fine not exceeding R20 000.²²⁶

The fine is a huge deterrent to employ and educate asylum seekers, which compounds the existing hesitancy to employ asylum seekers due to their seemingly temporary status.²²⁷ Asylum permits, typically granted for one to six months at a time, give the impression that the asylum seeker will only have temporary legal status in the

²²⁵ Bobby Jordan, “Not in our name, UN body tells SA,” *Sunday Times*, March 12, 2017, <https://www.pressreader.com/south-africa/sunday-times/20170312/281840053470410>.

²²⁶ Refugees Amendment Act 11 of 2017 § 22.

²²⁷ Information obtained during confidential client consultations.

country, and many employers unfamiliar with the prolonged nature of the asylum process avoid hiring asylum seekers on the misconception that asylum seekers will not be able to work on a permanent basis.

Subsection (11) allows for the right to work or study to be revoked:

- (11) The Director-General must revoke any right to work as endorsed on the asylum seeker visa if the holder thereof is unable to prove that he or she is employed after a period of six months from the date on which such right was endorsed.²²⁸

The requirement that the asylum seeker must prove employment within six months places a high burden on the asylum seeker. The unemployment rate in South Africa is 26.7 percent, the likelihood that an asylum seeker, especially one new to South Africa, will not secure work within six months is high.²²⁹ The Amendment also fails to provide what will happen to an asylum seeker who loses the right to work and does not have friends, family, or an organization to assist him or her.

Subsections (12)-(14) provide regulations for expired asylum permits:

- (12) The application for asylum of any person who has been issued with a visa contemplated in subsection (1) must be considered to be abandoned and must be endorsed to this effect by the Standing Committee on the basis of the documentation at its disposal if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker provides, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason.
- (13) An asylum seeker whose application is considered to be abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.
- (14) Any person who fails to return a visa in accordance with subsection (2), or fails to comply with any condition set out in a

²²⁸ Refugees Amendment Act 11 of 2017 § 22.

²²⁹ “Work and Labour Force,” Statistics South Africa, last modified March 27, 2018, www.statssa.gov.za/?page_id=737&id=1.

visa issued in terms of this section, or is in possession of an expired visa, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.²³⁰

As previously mentioned, hundreds of thousands of asylum seekers currently do not have valid permits.²³¹ Due to insufficient funds from a lack of right to work, it will only be harder for asylum seekers to travel. The prohibition on reapplications for lapsed or "abandoned" claims poses an immense risk of violating non-refoulement. The provision allowing for imprisonment therefore allows for an asylum seeker who lost the right to work due to his or her inability to secure employment within six months and yet does not have assistance from a charitable organization, could be imprisoned for holding an expired visa if he or she does not have the required funds to travel across the country within a month and a day of his or her visa expiring.

Cape Town Refugee Reception Office Closure

Administrative decisions taken by the DHA demonstrate its lack of concern for asylum seekers while it limits their rights and access to services. One such decision was Director General (DG) Mkuseli Apleni's decision to close the Cape Town RRO in 2012 and again in 2014.

RROs are the nexus of the asylum process's administration. Asylum seekers lodge asylum claims, attend interviews with RSDO and RAB officials, and receive (and renew) asylum permits as well as other documents. Asylum seeker permits do not have legislated time periods for validity, but most are issued for three to six months. However, when

²³⁰ Refugees Amendment Act 11 of 2017 § 22.

²³¹ Minister of Home Affairs, "Question NW267 to the Minister of Home Affairs."

officials expect a decision to be issued soon, permits may only be valid for one month at a time. The number and nature of RRO services and the frequency of permit renewals means asylum seekers frequently attend an RRO. Considering that an asylum claim can take over a decade to process and that RROs also manage refugees, RRO accessibility is crucial for asylum seekers.

South Africa only had at most six RROs, with varying levels of functionality. Currently, the Port Elizabeth and Cape Town RROs are closed to newcomers and only serve existing file holders. Pretoria, Musina, and Durban RROs are fully operational and serve existing and new asylum seekers. The number, location, and varying functionality of the RROs requires many asylum seekers to travel great distances, costing money and time (a particular concern for employed asylum seekers). Additionally, fines to renew expired permits, bribes, and service delivery barriers at the RROs themselves (such as frequent computer system crashes and long queues) increase the difficulty of maintaining valid documents. Thus, the DG's decision to close the Cape Town RRO carried strong impacts.

Between May 2011 and June 2012, three of the six RROs in South Africa were closed.²³² The DG first decided in May 2012 to close the Cape Town Refugee Reception Office (CTRRO) to new applications, effective June 30, 2012.²³³ Following years of logistical challenges resulting from zoning and capacity issues, the DG announced in

²³² Johannesburg was closed for all newcomers, asylum seekers, and refugees. Port Elizabeth and Cape Town were closed for newcomers, leaving Musina, Pretoria, and Durban RROs to process all new applications for the country.

²³³ Mkuseli Apleni, "Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office" Department of Home Affairs, February 2014, <http://www.scalabrini.org.za/wpcontent/uploads/2012/11/Decision-of-Director-General-on-future-of-Cape-Town-Refugee-Reception-Office.pdf>

early June 2012 that the CTRRO would permanently close at the end of the month, and only offer continuing services²³⁴ to asylum seekers and refugees whose physical files were housed in the RRO.²³⁵ Members of civil society brought the closure before the Western Cape High Court seeking the reopening of the RRO because the DHA did not follow proper procedure when it failed to consult with SCRA, civil society, and other interested parties as mandated under the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA).²³⁶ The matter was eventually heard before the Supreme Court of Appeals, which ordered the DG to make a new decision by November 2013.²³⁷ The new decision and reasons provided, discussed below, were also litigated before the Supreme Court in 2017.

In December 2013, the DHA hosted a single meeting in Johannesburg²³⁸ for stakeholders to submit comments.²³⁹ The UNHCR, Legal Resources Centre, Lawyers for Human Rights, UCT Refugees Rights Unit, and others submitted comments.²⁴⁰ None of the stakeholders supported the CTRRO's closure.²⁴¹ Despite these comments, the DG announced in January 2014 the CTRRO would remain closed permanently and a Cape Town Temporary Refugee Facility would remain open until all asylum files in Cape Town were finalized.²⁴² This barred asylum seekers from lodging new applications in

²³⁴ These services include permit renewals, processing asylum applications, interview asylum seekers, schedule appeal hearings, and process applications for refugee travel documents. The office does not accept family joining applications.

²³⁵ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) 2017, (4) SA 686 (SCA) at ¶ 6.

²³⁶ *Id* at ¶ 7.

²³⁷ *Id* at ¶ 8.

²³⁸ Normally, stakeholder meetings are held in every province to ensure participation.

²³⁹ *Id* at ¶ 9.

²⁴⁰ These organizations provide legal services and other assistance to asylum seekers and refugees across South Africa.

²⁴¹ *Id* at ¶ 11.

²⁴² *Id* at ¶ 12.

Cape Town and existing asylum seekers and refugees who did not have their physical file housed in Cape Town from accessing services at the CTRRO. Asylum seekers and refugees in the latter category would now have to travel to the RRO where they first applied for asylum, unless he or she could prove “exceptional” circumstances.²⁴³ The RROs in Musina, Pretoria, and Durban would be expected to serve all asylum seekers and refugees whose physical files are housed in the office and all future applicants.

In February 2014, the DG published his reasons for deciding to keep the CTRRO closed. The DG cited three main possible solutions stakeholders had proposed to continue the CTRRO’s operations: using the current location of the CTRRF as a fully functional RRO, establishing satellite offices, and establishing an RRO outside Cape Town’s city limits. The DG ultimately decided that the solutions were not viable. The DG’s procedural and substantive actions illustrate the DHA’s implementation its xenophobic framing.

Procedurally, the DHA’s refusal to receive input from stakeholders and civil society members who provide advice and support to asylum seekers highlights the DHA’s bad faith in managing the asylum system. Furthermore, at the stakeholder meeting, the DHA denied any intention to close the Cape Town RRO.²⁴⁴ The misrepresentation of the meeting’s purpose shows the DHA’s unwillingness to properly provide a system of protection to asylum seekers.

Substantively, the DG gave two main reasons why the first proposed solution, running the CTTRF as an RRO, was impractical. The DG stated that the current location

²⁴³ Id. at ¶ 12.; The “exceptional circumstances” burden is extremely hard to prove. This is widely understood as meaning hospitalization, but even then, file transfers are rare.

²⁴⁴ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (11681/12) 2013 (3) SA 531 (WCC) at ¶ 26.

(known as Customs House) is not suitable for a full RRO because the DHA had already been threatened with legal action for nuisance complaints and the premises are too small to “accommodate large numbers of people” or persons with disabilities.²⁴⁵ However, by this logic, the DHA expects a significant number of asylum seekers and refugees to attend the RRO for services. The DHA cannot deny a need for a fully functional RRO in Cape Town, and thus it is inappropriate that the DG and the DHA expect the RROs in Musina, Pretoria, and Durban to not only adequately serve the nation’s asylum seekers and refugees, but all future applicants as well.

The second proposed solution, the satellite offices, was rejected for three reasons. First, the DG misinterpreted a Court decision to read that satellite offices were prohibited by law.²⁴⁶ Second, the DG claims satellite offices would be pose “logistical difficulties” in that the file transfers between the satellite offices would “complicate any fast-tracking of status determination.”²⁴⁷ Third, the DG states that conducting surveys to identify possible locations would be “time-consuming.”²⁴⁸

The reasons provided by the DG fall short of persuasive. The fact that it would take time and resources to find a suitable location is not a legitimate reason to sever services to a vulnerable population such as asylum seekers. The 2017 Court determined that the DG’s reasons did not meet the rational standard to allow for the limitation of

²⁴⁵ Apleni, “Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office,” 4.

²⁴⁶ In fact, the Court stated the opposite, allowing for satellite offices to fulfill the duties of a single RRO. See *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) 2017 (4) SA 686 (SCA) at ¶ 59.

²⁴⁷ Apleni, “Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office,” 6.

²⁴⁸ Ibid.

rights.²⁴⁹ Additionally, the Court noted in the 2017 matter, the DG offered conflicting testimony regarding the timeline for surveys.²⁵⁰

Regarding the third proposed solution, a fully functioning RRO outside Cape Town's boundaries, the DG stated that the many applications for asylum in Cape Town have led to "logistical difficulties" and that:

Re-opening/maintaining a fully functional RRO in Cape Town would require the Department to deploy substantial additional resources to ensure that the RRO is free from the nuisance and disturbance concerns that have previously arisen.²⁵¹

The search for suitable premises must be conducted in conjuncture with the Department of Public Works (DPW) in a "complex and time-consuming" process.²⁵² The DHA and DPW had already searched for suitable premises yet were unsuccessful. The DG estimates that a successful search could take up to two years to complete.²⁵³

Again, the high number of asylum applications is indicative of a strong need for a fully operational RRO in Cape Town. While the DHA must consider budgetary and resource constraints, the fact that the search for new premises would take time and resources does not outweigh the limitation of constitutional rights. The DG's extreme imbalance of concerns for resources compared to the severe limitations of constitutional rights is irrational, unlawful, and demonstrates the DHA's xenophobic attitude.²⁵⁴ The acute bias was perpetuated before the Supreme Court. In oral arguments, the Court

²⁴⁹ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) 2017 (4) SA 686 (SCA).

²⁵⁰ *Ibid* at ¶ 56.

²⁵¹ Apleni, "Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office," 8.

²⁵² *Ibid*.

²⁵³ *Ibid*.

²⁵⁴ The SCA found that the DG's decision was irrational and unlawful. The Court ordered the CTRRO to be reopened and for the DHA to provide a report detailing the center's reopening. The DHA has failed to do so at the time of publication.

questioned the DG's high regard for the DHA's resources relative to the rights of asylum seekers. The DHA's advocates argued that the long commute for the DHA officials staffing the RRO outside of Cape Town would be an unfair burden on the employees. It is important to note that the closest RRO to Cape Town is 1,500 kilometers away. Placing such a high value on the personal effects this proposed solution would have on compensated employees rather than providing services to a vulnerable population that is not South African exemplifies the DHA's xenophobia.

The DG goes on to state he also considered other factors when deciding whether to re-open the RRO, including that:

The majority of asylum seekers who previously applied at the CTRRO were not genuine asylum seekers, but economic migrants who came to Cape Town in search of work. This is borne out by a comprehensive audit of files at the CTRRO prior to my decision of 30 May 2012. This audit revealed that approximately 77% of the applications adjudicated from 2008 to the date of the audit were rejected.²⁵⁵

The DG's statistics not specify if the decisions were made by RSDOs, however it is important to note that the RSDOs are poorly trained and often do not make accurate status determinations. A study of RSDO decisions found that RSDOs often err in their application of refugee law and fail to consider details of claims, resulting in "a bureaucracy that mass produces rejection letters."²⁵⁶ Regardless of the accuracy of the decisions, the statistics still demonstrate that almost 25 percent of applications are genuine, and therefore by law are entitled to services.

²⁵⁵ Apleni, "Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office," 9.

²⁵⁶ Amit, *All Roads Lead to Rejections*, 16; See also *Akanakimana v Chairperson of the Standing committee for refugee Affairs and Others*, No. 10970/13, 2015 ZAWCHC (Saflii).

The DG cites the government's entitlement to "control the asylum application process" and even "restrict access to RROs in urban areas where access to RROs has historically been abused by economic migrants."²⁵⁷ While the DG concedes that this policy may place a burden on genuine asylum seekers, "this hardship must be considered in light of Government's legitimate need to regulate the asylum application process and access to RROs."²⁵⁸ Again, the DHA determines the asylum seeker population as an acceptable casualty when considering government resources.

Geographically, the DG reasons that because the majority of asylum seekers using the CTRRO did not enter South Africa through a Cape Town point of entry, an RRO is not needed in the city. The DHA's records show that from 2008 to 2012, fewer than ten asylum seekers entered through Cape Town each month.²⁵⁹ His logic demands the conclusion then that asylum seekers should only access RROs where they enter the border, not where they are able to live and work. This clearly suggests the DHA is of the opinion that asylum seekers should stay on the periphery of South Africa, near the borders, and not enter into the rest of the country.

It is important to note that the DG's reasons for not re-opening the RRO were published in early 2014, a few years before the policy papers. At the time, there were rumors that the DHA was going to adopt a policy of relocating RROs to the northern borders and de facto remove asylum seekers from urban centers. However, no formal

²⁵⁷ Apleni, "Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office," 10

²⁵⁸ Ibid.

²⁵⁹ Ibid.

policy existed to support the DG's reasoning that RROs should only exist where asylum seekers enter South Africa.

Finally, the DG argues that the remaining three RROs "are sufficient to serve the needs of asylum seekers and refugees" in the country.²⁶⁰ Furthermore, he gives assurances that he has:

[C]onsidered the view of the stakeholders that there are backlogs at the above RROs and that these backlogs will increase with the closure of the CTRRO. To the extent necessary, additional resources and measures will be deployed in order to meet any increased flow of asylum seekers at these RROs... While I take cognisance of stakeholders' views that RROs should be maintained and opened in urban or metropolitan areas where there are more job opportunities, I do not regard this as a sufficiently compelling basis for re-opening/maintaining a fully functional CTRRO...²⁶¹

The DG acknowledges that there will be a higher burden placed on the other RROs following the closure of the CTRRO, and has planned the reallocation of resources accordingly. This contradicts the DG's argument that the DHA lacks resources to maintain the CTRRO. The DG does not cite progressive realization as an impediment to re-opening the CTRRO, and so it is unclear why these resources could not be used in Cape Town. The only logical conclusion one may draw is that this is an attempt to remove asylum seekers from urban areas and place them into a more manageable location.

²⁶⁰ Department of Home Affairs. "Re: Reasons for the decision of the Director-General of the Department of Home Affairs made on January 2014 in respect of the future of the Cape Town Refugee Reception Office." 11

²⁶¹ Ibid.

CHAPTER VI

CONCLUSION

South Africa's colonial and apartheid past created a noteworthy dynamic within South African identity. Racial divisions, shared experiences, and nation-building interact to form a new South African identity dependent on excluding foreign nationals. The government plays a critical role influencing identity through the nation-building process, particularly in post-colonial African states. In South Africa, the DHA's mandate to protect national sovereignty and manage the immigration and asylum systems situates the department on the front lines of nation-building and conceptualizing identity. The DHA crafted asylum policies with the knowledge and intent that the policies will dictate the future of South African identity. The DHA's emphasis on the importance of citizenship in maintaining sovereignty means that the division between citizens and non-citizens is crucial for South Africa's very existence.

The DHA's approach to the asylum system is successful in addressing some human rights concerns, especially its activities associated with human trafficking, as well as fulfilling its mandate to serve South African citizens. Furthermore, the DHA is appropriately concerned with the safety and security of South African citizens and with managing the agency's assets effectively, especially given the realistic limitations on the country's resources.

However, the DHA's approach to the asylum system engages in xenophobic language, conflating foreign nationals with criminality. It marginalizes asylum seekers within society by severely limiting their access to rights and opportunities. It also violates

international law in number of ways. The actions of the department demonstrate its de facto retraction of South Africa's self-determined commitments to human rights.

The language of criminality and fraud creates a fear and mistrust of the accused asylum seeker population. Restrictive legislation that physically removes asylum seekers from economic and social centers prevents integration and reinforces fears of the unknown. Administrative decisions that severely limit rights and place clear priority on non-asylum seekers further burdens an already vulnerable population and is a clear indication to all that asylum seekers are a low priority in the expenditure of resources. These policies and actions demonstrate the department's xenophobia, which unfairly harms asylum seekers to a point which potentially violates international law.

Government messages that equate foreign nationals with criminals reinforces and normalizes xenophobic attitudes within society and subverts the human rights and inclusive spirit of the Constitution. Keeping asylum seekers separate from the general population will preclude any understanding of the complicated reasons for asylum, thus dispelling the threat of the unknown. Politically, subverting the Constitution weakens the rule of law specifically regarding human rights in South Africa.

The Processing Centres both hurt asylum seekers' ability to integrate into society and will stir South African resentment towards asylum seekers. While the DHA is technically continuing its policy of non-encampment for refugees, detaining asylum seekers will overburden a department already struggling with service delivery and asylum backlog challenges. Therefore, it is likely that status determination will become a protracted process during which asylum seekers must live physically and psychologically separate from the rest of South Africa along the northern borders. While this does not

strictly violate the DHA's non-encampment principle or rights to freedom of movement, it does subvert the spirit of these principles. Moreover, the policy to detain requires the government or the UNHCR to provide free basic services. This will only exasperate existing perceptions that asylum seekers receive special treatment from the government while citizens suffer in poverty.

The DG's decision to close the CTRRO exhibits the DHA's indifference to increasing burdens on asylum seekers while restricting rights. While the DG should consider available resources when making administrative actions, this irrational decision did not appropriately weigh the limitations of rights on asylum seekers. Furthermore, the CTRRO's closure penalizes asylum seekers for the DHA's own maladministration of the asylum system. The DHA should manage RROs in a manner consistent with international law, the South African constitution, and human rights instead of creating unnecessary barrier for a vulnerable population.

Several Amendment sections raise serious concerns regarding proper application of international refugee law. Subsection 21(1B) unfair penalizes asylum seekers without travel documents or passports. Without regular travel documents, asylum seekers may fear authorities at the border and bypass border crossings when entering South Africa. Asylum seekers should not be penalized or barred from lodging an asylum claim because their fear of persecution forced them to flee without a passport. This provision risks subjecting asylum seekers to unfair legal proceedings and potentially violate non-refoulement.

Additionally, the mandatory language requiring a rejection for false information is very concerning given some asylum seekers knowingly and/or unknowingly provide false

or incomplete information. Some reasons for this include language barriers, poor comprehension of the asylum process (and thus what is being asked),²⁶² continuing concerns for his or her safety, or the inability to process and discuss trauma.²⁶³ The requirement that the application *must* be rejected without room for discretion is extremely prejudicial and also risks violating non-refoulement.

While it is understandable that the DHA would want to manage the closure of expired permits, the quick finalization of permits expired for a month is an extreme provision that unnecessarily harms asylum seekers. Considering that half of the RROs are closed or only half-functioning, it is understandable that many asylum seekers have invalid documents.

As the DHA stated in the policy papers, South Africa is entitled to legislate the asylum process to guard national security. Some of the provisions in the new Amendment will achieve this goal. However, the severe limitations and restrictions that the new provisions in the Amendment create breach the balance between rational legislation and harmful practices. Closing the Cape Town RRO creates undue burdens for asylum seekers based in Cape Town as they follow through every stage of the asylum process but must travel long distances to do so. The DHA should be mindful in its efforts to securely manage the asylum system. It undermines the DHA's effectiveness when it legislates policies that prevent asylum seekers from integrating into South Africa and places them in a highly precarious financial and legal situation. The DHA is also on the precipice of crossing the line of violating international law.

²⁶² 68 percent of asylum applicants do not receive an explanation of the asylum process by RSDOs; See Amit, *All Roads Lead to Rejections*, 36-37

²⁶³ Ibid.

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