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THE HUMAN SECURITY CONUNDRUM: SOUTH AFRICA'S TREATMENT OF REFUGEES AND ASYLUM SEEKERS

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1. INTRODUCTION, AIM AND SCOPE OF STUDY

The plight of refugees and asylum seekers and the concomitant significant rise in global displacement, continues to dominate our headlines and policy papers and has become a source of major concern for international relations scholars and diplomats. Presently 1 in every 122 humans are either a refugee, an asylum seeker or are internally displaced (UNHCR, 2016). The refugee crisis raises pertinent socio-economic, political and security questions for receiving countries. Although migration is not a new phenomenon having occurred throughout human history, established policies and mechanisms generally appear inadequate to mitigate inflows of displaced people. Migration is a politically contentious issue and at borders international norms such as human rights regularly flounder (Ribas-Mateos 2011: 51). People choose to migrate for a number of reasons, such as better economic opportunities, to escape various insecurities including health insecurity, environmental degradation or food scarcity, to flee persecution in their home countries or the terrible consequences of war. The overarching goal for most, if not all migrants, is the attainment of individual security. The panoptic provision of individual security falls under the human security parasol, which proposes a holistic approach to virtually all threats facing all humans

The focus of human security is the provision of safety nets for vulnerable people. This paper seeks to examine the human security paradigm within the context and against the backdrop of one of the world's most vulnerable groups - refugees and asylum seekers. According to the United Nations High Commissioner for Refugees (UNHCR), in the past 5 years, 15 conflicts (8 of which in Africa) have either been initiated or resumed, causing the internal displacement of 11.4 million people and resulting in 3.7 million refugees. Africa has produced the largest number of refugees and internally displaced people globally (UNHCR, 2016). As a result of these socio-economic and political realities, Southern Africa, more especially South Africa, has emerged as a major migration hub attracting many migrants from Central, East and West Africa and even further afield, from Bangladesh, China, Eastern Europe and Pakistan (Segatti, 2011:11). Migrants chose South Africa for many reasons: South Africa's transition to democracy has seen a shift

from Apartheid to a democracy; stricter European migration controls; commercial farming; the mining and hospitality industries and political instability in other parts of Africa (Segatti, 2011:12).

South Africa's economy began to deteriorate during the early 2000's, culminating in an economic recession in 2008. That greatly impacted key economic sectors such as mining, automotive and retail causing unemployment, high levels of poverty and heightened inequality (Africa, 2015:178-9; Segatti, 2011:18). These insecurities accompanied by the State's failure to adequately provide its citizenry with basic services has been one of the root causes of the animosity directed at foreigners, which has intermittently led to violent xenophobic attacks against the migrant population (Africa, 2015:179). All of these considerations lead inexorably to the following question: **How has the South African government sought to ensure human security for refugees and asylum seekers?**

Following from that main research question, the sub-objectives of this paper include:

- Assessing whether South African national policies on refugees and asylum seekers have shifted towards or away from human security in the 21 years since attaining democracy.
- Examining how legislative provisions and national policy are operationalised.
- Discussing the practical limitations of human security in the South African context.

1.2. METHOD OF RESEARCH

This study will employ a qualitative method. It will be analytic and descriptive and will provide a historical overview of the applicable South African legislation - the Aliens Control Act (1991), the Refugee Act (1998) and the Immigration Act (2002). I have chosen to use a case study because it provides us with "an empirical inquiry that investigates a contemporary phenomenon within its real life context when boundaries between phenomenon and context are not yet

evident" (Miller and Brewer, 2003: 22). As I want to explore the relationship between human security and national policies it is appropriate to use the case study method. I have chosen South Africa for a number of reasons -

- South Africa has increasingly become a popular destination for African migrants (Ethiopia houses the most refugees in Africa, however gathering information in respect of that country is fairly difficult and its government has been criticised for suppressing democratic structures and undermining the rule of law).

- South Africa transitioned to a democracy from a securocratic state based on the system of Apartheid and affirmed its commitment to human security by ratifying various international and regional treaties including the United Nations Convention Relating to the Status of Refugees (1951) and by playing a mediatory role in conflicts in Burundi, Sudan and the Democratic Republic of Congo.

- South Africa is generally considered to be one of the most democratic countries in sub-Saharan Africa and its commitment to human security is evident in its constitutional principles and its progressive social welfare system.

I have chosen to examine a 22 year period, from the dawn of constitutional democracy in 1994 until 2016. Although a lengthy period, it is nonetheless necessary to examine the changing outlook towards refugees and asylum seekers in relation to South Africa's changing socio-economic position.

1.3. ORGANISATION OF SECTIONS

To answer the research question and sub-questions this research essay will be divided into five sections -

Section 1 - will identify the purpose, aims and scope of the study;

Section 2 - will define human security and locate the concept in the current discourse;

Section 3 - will conduct a historical analysis of South African national policies pertaining to refugees and asylum seekers and consider these developments within a human security framework;

Section 4 - will explore the practical manifestations of national policy and legislation.

Section 5 - will provide findings and analysis of the case study

2. HUMAN SECURITY

Human security as a concept has its genesis in the Human Development Report (HDR) of 1994. The report promised that "human security, though simple, is likely to revolutionize society in the 21st century" (1994:22). The United Nations Development Programme (UNDP) claimed that security has been interpreted narrowly and has exclusively focused on threats to the nation state, suggested that a "profound transition" is required in the way that we think about security (HDR, 1994:22). The HDR suggested that territorial security and the protection of national interests have for far too long dominated international discourse and the limited conceptual understanding of security has neglected a range of (in)securities that affect the ordinary person (HDR, 1994:22). For the ordinary person, security means protection from hunger, unemployment, disease, crime, political repression, social conflict and environmental hazards - these being the concerns that they agonise about (HDR, 1994:22). The UNDP proposed that the previous narrow notions of national security be discarded and to look instead to panoptic human security (HDR, 1994:24).

2.1. UNDP DEFINITION OF HUMAN SECURITY

At the core of human security is the United Nation's (UN's) founding credo - freedom from fear and freedom from want (HDR, 1994:24). Human security is an offensive concept, which cannot be attained through military force. It is an integrative concept, which acknowledges the universalism of life claims and is embedded in the notion of solidarity among people (HDR, 1994:24). The UNDP defines human security as "first, safety from such chronic threats as hunger, disease and repression and second, it means protection from sudden and hurtful disruptions in the patterns of daily life - whether in homes, in jobs or in communities" (HDR, 1994:24). Various components contribute to human insecurity and the UNDP has listed seven specific categories that threaten human life -

- Economic Security - include threats of unemployment, job insecurity, insecure working conditions and income insecurity;

- Food Security - pertains to the physical and economic access to basic food;
- Health Security - include threats to health, such as infectious and parasitic diseases, HIV and AIDs, diseases or infections related to environmental risks such as air and water pollution, and for women, deaths related to childbirth;
- Environmental Security - include environmental threats such as the degradation of local and global ecosystems, water insecurity, deforestation, air pollution, salinization and natural disasters;
- Personal Security - the most vital aspect of human security, these include, threats from the state and other states, threats from other groups (ethnic tension), threats from individuals or gangs (crime and violence), threats against women, threats against children, threats to self (suicide or drug use);
- Community Security - include threats of ethnic violence;
- Political Security - pertains to political repression and human rights infringements such as threats of systematic torture, ill treatment and disappearance (HDR, 1994:24-33).

In order to combat the many facets of global insecurity, the UNDP maintains that human security must be adopted as a preventative people-centered universal doctrine, which requires the attention of the global population because security threats are not isolated and "when the security of people is endangered anywhere in the world, all nations are likely to get involved" (HDR, 1994:23).

2.2. HUMAN SECURITY IN ACTION

Japan and Canada, more so than other countries, have been at forefront of the human security agenda. Both countries included elements of human security as part of their foreign policy, particularly in the realm of development aid (Remacle, 2008: 7-10). Both have been critical to the instrumentalisation of human security. Canada took a lead role in the Ottawa Convention on

Landmines, the Kimberly Process and the establishment of the International Criminal Court (Chandler, 2008:433). Japan played a seminal role in establishing the UN Trust Fund for Human Security (1999) and the Commission on Human Security (CHS), led by the former UN High Commissioner for Refugees, Sadako Ogata and Nobel laureate Amartya Sen (Remacle, 2008: 7-10). The September 11 attacks slighted the prospects for the first CHS report (published a year earlier) due to a return of traditional notions of security such as the military interventions in Iraq and Afghanistan. The adoption of the *Responsibility to Protect* doctrine (the UN's three step approach to humanitarian intervention) represented a global commitment to human security. However, as a consequence of the 'humanitarian' intervention in Iraq, many UN member states objected to the linking of R2P to human security, contending that it encourages militarisation and undervalues economic and social needs (Chandler, 2008:430, UNGA/11246, 2012)). The human security narrative has permeated all realms of international society. Theoretically it cannot be gainsaid that a shift towards human security would be beneficial for the whole world's citizenry. The human security approach has however come short due to limited practical implementation and a persistent trend towards militarisation.

2.3. HUMAN SECURITY IN AFRICA

Human security was introduced to international discourse in 1994. However, 3 years earlier the Organisation of African Unity (OAU) met to discuss the possibility of a *Conference on Security, Stability, Development and Cooperation in Africa* (CSSDCA). The resultant Kampala Document highlighted four key areas of concern - security, stability, development and cooperation (Africa, 2015: 179). The security 'calabash', like the HDR in 1994, shifted the focus of security from military considerations to the individual. The principles of the calabash foreshadowed the UNDP's later understanding of human security that "the security of a nation must be construed in terms of the security of the individual citizen to live in peace with access to basic necessities of life while fully participating in the affairs of his/her society in freedom and enjoying all fundamental human rights" (African Leadership Forum, 2011). The CSSDCA was rejected by a

number of OAU members but the Kampala document and its notions of human security were central to the founding document of the African Union (AU) and the organisation itself.

Although it does impliedly seek to ensure human security, the Constitutive Act of the AU does not make any direct reference to human security. Article 4(h) grants the right to the AU to intervene against member states in the case of war crimes, genocide and crimes against humanity. Unlike other international treaties, the AU does not require the consent of the member state making it far easier for it to protect the human security of African people (Tieku, 2007:30). The Constitutive Act also provides for a number of human security priorities, such as human rights, sustainable development, gender equality, the eradication of preventable diseases and "the respect for the sanctity of human life" (AU, 2000). The New Partnership for Africa's Development (NEPAD), African Peer Review Mechanism and various other AU documents and treaties allude to human security. The draft - and final - *Non-Aggression and Common Defence Pact* defines human security as -

> *the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development* (2005:3).

The Defence Pact also places national and human security on an equal footing and considers aggression as hostile acts by any actor "...against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this pact" (2005:3). Notably the international definition of human security is substantially narrower than the African understanding.

2.4. OPERATIONALISATION OF AFRICAN HUMAN SECURITY

The establishment of a Peace and Security Council and the African Standby Force evidence a practical commitment on the part of the AU towards the attainment of human security. However, within individual states operationalisation has faltered, largely because many African governments lack the capacity to fulfil human security obligations or corrupt and autocratic

leaders have stalled the promotion or adoption of human security mechanisms because that would affect their influence and power ((Hussein, Gnisci and Wanjiru, 2004: 15; Tieku, 2007:33). African governments have regrettably privileged the protection of "the state, its institutions and frontiers, regime stability and military defence" over human security, consequently the latter is largely donor-driven except in the case of South Africa (Hussein, Gnisci and Wanjiru, 2004: 15). Selfish and inept governance has hindered the application of the human security doctrine on a continent plagued by heightened insecurity (Abbas, 2010:364). Moreover, the AU has largely failed to fulfil its mandate by allowing tyrannical leaders to remain in the Union thus endangering the human security of African people (Tieku, 2007:33)

2.5. HUMAN SECURITY IN SOUTH AFRICA

Primarily as a result of its own liberation struggle for majority rule, human security has been a lodestar of South Africa's fledgling democracy. In an attempt to overturn the racial inequality, economic exclusion and state-sponsored violence of the Apartheid State, the African National Congress (ANC) government prioritised the human security agenda and has avidly embraced the broadest definition of human security in their domestic and international policy (Ferreira and Henk, 2008: 503). Ferreira and Henk (2008:504) postulate that human security perspectives are reflected at all levels of South Africa's state and institutional activities and that "the country's leaders intend that human security be a key end of the synergy gained from the internetworking of all societal institutions". Human and economic development were highlighted as key areas of South Africa's human security strategy. This found articulation in its Reconstruction and Development Programme (RDP), which included the National Housing Programme, Electrification Scheme, an Integrated Nutrition Project and various other initiatives (Africa, 2015:183). As a consequence of poor economic growth, the RDP was replaced by the macroeconomic Growth, Employment and Redistribution (GEAR) initiative in 1996, which promised to uplift the poor and disenfranchised through economic deregulation and trade liberalisation (Ferreira and Henk, 2008: 508). The reality unfortunately was that many

developmental programs failed and the GEAR-required privatization of state institutions resulted in an increase in unemployment and subsequently an upsurge in crime. Many South Africans began complaining that governmental rhetoric did not translate into practicality (Ferreira and Henk, 2008: 508).

But that is perhaps too simplistic an analysis. As evident in its foreign policy, Pretoria's commitment to human security was rather more nuanced. In the post-Apartheid years South Africa "joined, re-joined or acceded to some forty-five intergovernmental organisations and multilateral treaties" (Cilliers in Ferreira and Henk, 2008: 508). Additionally, South Africa led the call for an 'African renaissance'. This found expression in Pretoria's diplomatic efforts in the AU and its developmental engagement in the South African Development Committee (Africa, 2015:178). The national government consolidated this pan-Africanist stance by making regional peace and human security a focal point of its foreign policy. In 1999 a White Paper entitled *South African Participation in International Peace Missions* was published, which paved the way for Pretoria's peace missions in Lesotho, Burundi, the Democratic Republic of Congo, Liberia, Sudan and Ethiopia (Ferreira and Henk, 2008: 509). Ferreira and Henk (2008: 509) point out that "no other country in Africa had made as explicit a commitment to the ideals of human security as South Africa, or committed as high a portion of its resources in the same degree". Over time, however, Pretoria's human security record has become somewhat more chequered. Positively, the RDP encouraged the adoption of a comprehensive social security and welfare system, contrastingly under the Zuma administration, the culture of secrecy, bribery, political repression and police brutality is evidence of a faltering government and pliable rule of law (Africa, 2015:

3. SOUTH AFRICAN NATIONAL POLICIES

3.1. THE APARTHEID ERA

The preservation of a "certain racist society"[1] formed the keystone for all of Apartheid South Africa's legislation and its national policies pertaining to migration were no different (Segatti and Landau, 2011:35). For the highly paranoid Apartheid government, which was isolated in a region with liberation on the horizon, immigration was considered a major national security concern. Accordingly, "immigration was about control and deportation not planning and managed entry" (Crush, 1998:1). The securitization of South African borders was operationalised by three pieces of legislation - the 1950 Population Registration Act, the 1962 Commonwealth Relations Act and the 1955 Departure from the Union Regulation Act (Segatti and Landau, 2011:35). It was however "Apartheid's last act", the 1991 Aliens Control Act that endured as national legislation for 12 years after the fall of Apartheid, which had the greatest impact on migration (Segatti and Landau, 2011:35). The "draconian apartheid throwback" amalgamated half a century of immigration policies into one piece of legislation, and controlled all facets of immigration and migration to South Africa (Crush, 1998:18).

3.2. THE 1991 ALIENS CONTROL ACT

The Aliens Control Act (ACA) was a product of the fall of the Berlin Wall, F.W. de Klerk's presidency and the influx of Mozambican refugees - who were only allowed refuge in the *bantustans* (Segatti and Landau, 2011:38). It replicated an older piece of legislation, the 1937 Aliens Act, which sought to curb the inflow of Jewish refugees fleeing Nazi occupation in Eastern Europe (Segatti and Landau, 2011:38). Both define an alien as "a person who is not

[1] A Protestant, White and Afrikaner society (see Segatti and Landau (2011:35-6)).

South African" (RSA, 1991). As a part of Apartheid's all white strategy, 'Africans' were stripped of their South African citizenship and the inhabitants of the bantustans - Bophuthatswana, Venda, Ciskei and Transkei - were deemed foreigners. The ACA conferred all discretionary power on the Minister of Home Affairs, sans judicial review. It stipulated that "no court of law shall have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any act, order or warrant of the Minister (RSA, 1991). Consistent with other Apartheid legislation, even the most basic of human rights (including the provision of refugee status) were lacking. The deportation, repatriation and detention of 'aliens' was decided at the behest of the Minister and his subordinates (Segatti and Landau, 2011:39)**.**

With a 15 year long civil war (partly a product of its own regional destabilisation efforts) raging on South Africa's border, the Apartheid government was found itself in the throes of a refugee crisis. The ACA was employed as the first step in suppressing the flow of Mozambican nationals into the country. As a result many of them sought asylum in the *bantustans* or in the rural border areas and the Apartheid government found it increasingly hard to ignore them (Handmaker and Schneider, 2002: 2). The refugee crisis forced the pariah state to negotiate with the UNHCR. Even though the South African government had previously disregarded the UN and all of its organs, those negotiations yielded positive results in the form of a Memorandum of Understanding in 1991 - a Basic Agreement which allowed for the establishment of an Office of the High Commission in 1993 and a tripartite agreement between the UNHCR, South Africa and Mozambique (Dugard, 1992: 522; de la Hunt in Crush, 1998:126).

Prior to 1993, it is estimated that between 300 000 to half a million Mozambican refugees were living in South Africa. Due to their unrecognised status, they were regarded as undocumented migrants and were subject to deportation and arrest (de la Hunt in Crush, 1998: 125). The tripartite agreement "retroactively recognised" the Mozambican nationals as refugees, but only on a group basis (Handmaker and Schneider, 2002: 3). This was because refugee status was a requirement for the UNHCR to coordinate a voluntary repatriation programme, in terms of approximately 65 000 were thereafter repatriated (Handmaker and Schneider, 2002: 3). With more than a hundred thousand Mozambican nationals unwilling to return, the new government

had to immediately engage with a refugee crisis. The repatriation programme ended in March 1995 and in early 1996 President Mandela and his cabinet granted amnesty to approximately 90 000 people. However, approximately 135 000 Mozambicans remained in South Africa without legal status and were subject to deportation (Handmaker and Schneider, 2002:4).

3.3. NEW REGIME, OLD LAWS

As democracy dawned and political isolation waned, South Africa became the 53rd member of the OAU and a party to various regional treaties including the 1969 OAU Convention Governing the Specific Aspects of Refugee Protection in Africa (the OAU Convention). South Africa also signed and ratified the 1951 UN Convention relating to the Status of Refugees (UN Convention) and the 1967 Additional Protocol (de la Hunt in Crush, 1998:126). The ratification of these international instruments was largely illusory as the ACA was in many respects inconsistent with South Africa's international obligations pertaining to refugees and asylum seekers (Human Rights Watch, 1998:4). The UN Convention guarantees that a refugee cannot be penalised for entering the receiving country illegally. In direct contradiction the ACA stipulated that a person was an alien if s/he entered South Africa at a place other than a port of entry. The lack of migratory regulation reform was an indication that a free and democratic society based on a commitment to human rights was reserved for South Africans and that foreigners were susceptible to human rights infringements (Human Rights Watch, 1998:1).

For many onlookers and potential asylum seekers the ANC's ascension to power was expected to usher in an open door policy on migration. But, rather unexpectedly, the ANC government maintained strict border controls and left the ACA in place until it was repealed and replaced by a new immigration act in 2003. In that period, deportation skyrocketed and without comprehensive refugee and asylum programmes, successful applicants constituted a small minority. In June 1996, of the 16 967 asylum seekers, only 1945 were successful (de la Hunt in Crush, 1998:127). Many asylum seekers were denied refugee status as a "matter of course" (de la Hunt in Crush, 1998:128). Moreover, the discretionary powers conferred on the Minister and

immigration officers made decisions impossible to appeal and the ACA itself was not drafted with refugee or asylum seekers in mind (de la Hunt in Crush, 1998:128; Human Rights Watch, 1998:4). Under the ACA, refugees and asylum seekers were considered "prohibited persons" and were treated as undocumented migrants (de la Hunt in Crush, 1998:128). South Africa's unchanged stance attracted criticism. As a Nigerian refugee noted, "when I was young, we always talked about our brothers in South Africa and that we wanted them to be free. If a South African came to Nigeria, we welcomed him as a brother" (Human Rights Watch, 1998:12). Similarly, Chris Landsberg (in Landau and Segatti, 2011:40-1) reminded the government that "there is a crucial moral imperative: the republic is riding a wave of moral legitimacy and it must navigate responses in line with its global standing; it can ill-afford to turn a blind eye to xenophobia and human rights abuses generally".

In the 12 year post-Apartheid lifespan of the ACA, only one amendment was effected in 1995, which removed sections pertaining to judicial non-interference and the power to detain indefinitely. It, nonetheless, still remained inadequate and antiquated in the handling of refugees and asylum seekers (de la Hunt, in Crush, 1998:131). These clearly unsatisfactory migratory provisions led the Department of Home Affairs (the Department) in conjunction with the UNHCR to set up procedures for determining asylum seeker status in South Africa. Those included a Director of Refugees Affairs and a Standing Committee for Refugees Affairs, both tasked with considering applications for asylum in line with the UN and OAU Conventions (de la Hunt, in Crush, 1998:131). Along with the refugee determining bodies, the Department established protocols that required asylum seekers to report to immigration officials and be given an appointment for asylum review. Afterwards the asylum seeker was furnished with a form allowing them to stay in South Africa and seek employment until their application resolved by the Standing Committee. If the application was rejected, the asylum seeker was afforded the opportunity to appeal within a seven day period (de la Hunt, in Crush, 1998:132-3). The establishment of such an administrative system was abstruse and many complaints were lodged against the Department for inconsistent decision making. Many asylum seekers also reported officials for bribe taking (demanding) and unacceptable behaviour (de la Hunt, in Crush, 1998:134). The ACA and the additional protocols established by the Department did little to

secure the human rights of refugees and asylum seekers and as documented in many instances refugees were treated deplorably

3.4. THE SOUTH AFRICAN CONSTITUTION AND THE RIGHT OF ASYLUM

The much vaunted South African Constitution adopted in 1996, is considered one of the world's most progressive and inclusive governing documents. It, however, makes no explicit provision for refugees or asylum seekers, but stipulates that national law must be consistent with international law. It contains a Bill of Rights[2], which is described as "a cornerstone of democracy in South Africa" that "enshrines the rights of all people in our country and affirms the democratic values of human rights, dignity, equality and freedom" (RSA, 1996: Chapter 2). The inclusion of "all people in our country" is the clearest indication that the Constitution does not discriminate on nationality, and that most of the broad array of rights contained in Chapter 2, such as freedom and security, health care, access to information, just administrative action, access to courts and rights of the arrested, detained and accused persons (all of particular importance to asylum seekers) are rights accorded to "everyone" who find themselves within South Africa's borders not just South African citizens (de la Hunt, in Crush, 1998: 135; RSA, 1996: Chapter 2). Importantly, section 36 of the Constitution provides that the rights contained in the Bill of Rights may only be limited in terms of a law of general application and to the extent that such limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (RSA, 1996: Chapter 2). Self-evidently non-nationality and non-citizenship are not exclusionary categories. Accordingly, the ACA, which enshrined national control mechanisms over human dignity, was starkly at odds with a Constitution premised on universality, equality and human rights.

[2] The achievement of equality and the advancement of human rights are foundational constitutional principles. As such, it may well be unconstitutional for government to explicitly prioritise the provision of specific rights and services for nationals over non-nationals or even undocumented persons.

Acknowledging the need for reform, a Draft Refugee Bill and a Second Draft Bill was prepared by the Department of Home Affairs in 1996. These were accessible to civil society, academic institutions, human rights NGOs and a variety of other interested parties, for review and workshop. However, following criticism of the proposed second draft, the Department under then Minister Buthelezi assembled a task team to address the numerous voids in South Africa's asylum system (Handmaker, 2001: 96; Landau and Segatti, 2011:42). The task team produced a Green Paper on International Migration in 1997, which focused on temporary protection, regional burden sharing and separate policies for migration and refugees (Handmaker, 2001: 97). Following disapproval from civil society,[3] a Draft Refugee White Paper (1998) was circulated for public review and after many workshops and extensive consultation, a Draft Bill was introduced in the National Assembly in September 1998. Following a series of amendments by the portfolio committee, President Mandela signed the Refugee Act (No. 130 of 1998) into law in December 1998 (Smith, 2003: 34).

3.4. THE REFUGEE ACT

The process for the final implementation of a new functional migration regime was long and arduous. Although the Refugee Act (RA) was signed into law in 1998, it only came into force 16 months later in April 2000 (Smith, 2003: 34). It was South Africa's first piece of legislation that recognised the universal right of asylum. It draws on the UN Convention and the OAU Convention in defining a refugee in the broadest, internationally compliable terms. According to section 3, a person qualifies for refugee status if -

> *(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or*

[3] The process culminating in the Refugee Act of 1998 was opened to response from public and civic society. Many organisations including Human Rights Watch, the Human Rights Commission, the Refugee Rights Consortium (a loose affiliation of organisations and individuals), Lawyers for Human Rights and Black Sash did do so. See Smith (2003) for a full discussion on the consultation process.

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b) (RSA, 1998: Section 3).

As enjoined by the Constitution, section 6 of the RA, which deals with the interpretation, application and administration of the Act, requires that due regard be paid to the UN Convention, the Additional Protocol, the OAU Convention, the Universal Declaration of Human Rights and any other relevant convention or international agreement to which South Africa is or becomes party. The RA provides a panoptic understanding of all matters pertaining to refugees, including the establishment of administrative organs such as Refugee Reception Offices, a Standing Committee and Appeal Board. Section 21 sets out the process to be followed by an applicant for asylum. It is vital for all people who qualify for asylum, because until the asylum seeker reports to a Refugee Reception Office and submits an application to the Refugee Status Determination Officer and is issued with an Asylum Seeker Permit, (which allows temporary sojourn in South Africa whilst the asylum application is pending), the asylum seeker is considered an illegal foreigner and is subject to arrest, detention and deportation in accordance with the Immigration Act 13 of 2002. Section 26 affords rejected applicants a full right of appeal and outlines the appeal process including the option for legal representation. Once the asylum seeker has completed all the necessary requirements, s/he is granted refugee status in accordance with the RA and is entitled to full legal protection and the rights set out in Chapter 2 of the Constitution.

3.5. IMMIGRATION ACT

The ACA governed South Africa's borders until the passage of the Immigration Act (No 13 of 2002) (IA). The IA was passed after a seven-year consultative process, and was only actually finalised in 2005. Segatti (2011:45) describes the policy process as the "most cumbersome legislative and policy-making process of the new era of South Africa". The IA was consistent

with the old Apartheid Act and served to securitise national borders and made entry procedures more burdensome. The immigration controls contained in the IA attempt to suppress illegal immigration and regulate the "influx of foreigners" to promote economic growth (RSA, 2002: Section 2-8). Although the IA primarily focuses on illegal foreigners, it directly impacts the refugee regime. There is facially and textually a tension between the RA and the IA. The latter stipulates that no person may employ, aid, abet, assist, enable or in any manner help an illegal foreigner. Importantly, therefore, in terms of the IA an asylum seeker qualifies as an illegal foreigner until the attainment of an asylum seeker permit and is subject to apprehension, detention and deportation (RSA, 2002: Sections 38-42). The IA represented a setback for refugee protection. The outcome being the refugee regime came to be nestled between a want to protect fundamental human rights and a perceived need to securitise national borders (Handmaker et. al., 2008:56).

It is evident that national policies and legislation did change to reflect the ideals of a democratic country. Further, the ratification of international treaties, the adoption of a progressive Constitution and the establishment of a more liberal asylum system evidence a commitment to the human security model. The RA and the Constitution both serve to fulfil the 'freedom from want and fear' norm. In particular the Bill of Rights enshrines personal security (s12), food security, health security (s27) and commits to providing social security safety nets to the most vulnerable (s27). Human dignity for all regardless of citizenship is a founding value of the Constitution.[4]However, although South Africa has made significant strides legislatively, the practical reality as I shall endeavour to show, is that all too frequently there is a marked disjuncture between those lofty ideals and the adoption and application of policies within that legislative framework by Departmental officials.

[4] The Constitution entitles everyone without discrimination to the full protection of all rights contained in Chapter 2, with the exception of Political Rights (s19) and Citizenship (s20) which are explicitly reserved for citizens.

4. LEGISLATIONS VERSUS OPERATIONALISATION

A small minority of people entering South Africa meet the legal definition of a refugee. Many seeking refuge are attracted by South Africa's commitment to human rights. Although legally obligated to ensure the safety and security of refugees and asylum seekers, South Africa has encountered a number of challenges and has found it increasingly difficult to meet its legal mandate (Landau et.al. 2005:11). A major obstacle to human rights protection has been the failure of the Department to effectively operationalise the RA.

4.1. DEPARTMENT OF HOME AFFAIRS - FAILURE TO IMPLEMENT

The Department has continuously demonstrated a failure to adequately operationalise its human rights obligations. Segatti states it "lacks the capacity to honor its commitment to refugee protection" (in Segatti and Landau, 2011:48). This is evidenced by the largest backlog of pending asylum applications globally - 9 000 of 364 638 applications were approved in 2010 and 131 961 were rejected (in Segatti and Landau, 2011:48). This is the product of "widespread administrative irregularities, illegalities, and exploitation. These range from systematic under-resourcing of government refugee and asylum related activities; poor training and administrative integration; unviable or contradictory regulations and outright discrimination" (Landau et.al., 2005:17-8). The ineptitude of the Department is at the core of human insecurity for many asylum seekers. In 2011 the Department began applying the *first safe country principle.*[5] The implementation of this principle contravenes provisions of the RA and runs counter to international law (Ramjathan-Keogh et.al., 2011). South Africa may also lack procedural guarantees in the form of bilateral agreements with those other "safe" countries and the practice violates a 2001 court order (Amit, 2011:2). Moreover, the practice flouts the principle of *non-refoulement.* All told it exponentially increases the potential for human insecurity.

[5] If the route taken between the country of persecution and the country offering protection leads through other countries considered 'safe', the asylum seeker can be sent back to the first safe country to apply for asylum there. See Ramjathan-Keogh et.al. (2011) for further discussion.

The broad range of operational inadequacies constitute a serious impediment to the fulfilment of the refugee protection mandate. The national borders are staffed by incompetent officers, most of whom lack training. Many of them exploit desperate immigrants for money. Some have also been accused of physically abusing and wrongfully detaining immigrants(Amit, 2012:33-4). Asylum seekers have reported that many of them did not receive an asylum transit permit and many more were not even informed about its existence (Amit, 2012:33-4). Further in breach of international law some were turned away at the border even after indicating an intention to apply for asylum (Amit, 2012:33-4). This experience is replicated at the Refugee Reception Offices (RRO), where corruption appears rampant. Asylum seekers are regularly extorted for money. "Refugees", said one, "are anyone who can pay the officer" (Amit, 2012:56). Due to incapacity and large backlogs, the refugee reception centres are unable to provide the necessary services thereby placing asylum seekers in danger. As one noted, "this is my third time to be here and I can't afford the transport every time, only to be told to come next Monday. The police don't understand this and they'll just arrest me. I am afraid" (Amit, 2012:38).

All asylum seekers entering South Africa are required to report to an RRO for the processing of their applications. In accordance with the RA, Refugee Reception Centres were established in five of South Africa's major cities - Johannesburg, Cape Town, Durban, Port Elizabeth and Pretoria. In 2007 South Africa was named as the world's largest recipient of asylum applicants and two more centres were opened (Amit, 2012:16). In 2011, the Department reversed its stance and made the alarming decision to close down the Johannesburg, Port Elizabeth and Cape Town RROs, forcing asylum seekers to travel much further to alternative centres to submit their applications. The closure of RROs, so suggested the Department, was part of its plan to move the centres closer to the borders. The original date for construction and opening of centres at the border was 2012. That however did not happen. As a result asylum seekers are forced to endure unnecessary hardships and refugees, who are required to renew their permits every 2 years, had to travel longer distances, restricting where they can live and work and "their ability to fully integrate into South African society" (Amit, 2012:7). Subsequently, the Department's decision to close the RROs was subject to a series of court challenges. In finding that the Department's

conduct was unlawful, the Supreme Court of Appeal[6] (SCA) stated, "the refugees and asylum seekers encountered here are amongst those who are most in need of protection. They do not have powerful political constituencies and their problems, more often than not, are ignored by government" (*Minister of Home Affairs & others v Somali Association of South Africa* 2015 (3) SA 45 (SCA)).

Recently, whilst acknowledging his department's shortcomings and defunct operational mechanisms, the Minister of Home Affairs, Malusi Gigaba, outlined his vision for refugee protection in South Africa. This includes a proposed amendment to the Refugee Act (a Draft Bill has been gazetted for public comment) and a Green Paper on International Migration, which has been published and opened for public comment in June 2016. These represent a significant rollback for refugee protection. In terms of the Draft Bill, asylum seekers will face deportation if they fail to apply for refugee status within 5 days. Moreover, applications for asylum will be assessed on the applicant's ability to sustain him/herself and any dependants (with the assistance of family or friends) for a 4 month period (Dludla, 2016). The Green Paper proposes the withdrawal of the right to work or study whilst awaiting adjudication and advances plans to create Asylum Seeker Processing Centers at the borders where asylum seekers are to be accommodated until the determination of their status.[7] The proposed changes have attracted serious criticism. In a submission to the Department, the Scalabrini Centre (2016)[8] states, "overall we believe the tenor of the bill is negative and many of the new provisions are overly restrictive and in many cases contrary to the Constitution as well as the 1951 Convention relating to the status of Refugees and the 1969 Organisation of African Unity Convention governing the Specific Aspects of Refugee Problems in Africa." The People's Coalition Against Xenophobia (PCAX) have launched a major campaign against the Draft Bill becoming law.

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[6] See *Minister of Home Affairs & others v Somali Association of South Africa* 2015 (3) SA 45 (SCA)

[7] See Green Paper on International Migration 24 June 2016.

[8] A centre that offers development and welfare programmes to the migrant and local communities of Cape Town.

There remains an evident discord between practice and theory. It is clear that whilst current national legislation enshrines human security, departmental policies and practices ensure that the practical manifestation of this doctrine falls woefully short. The administrative and access issues make the operationalisation of the asylum system impossible to attain and has given rise to serious human rights violations and resulted in heightened insecurity for asylum seekers and refugees. In order for South Africa to meet both its international and domestic obligations to refugee protection, these challenges must of necessity be overcome and the human security of asylum seekers and refugees must be prioritised. Moreover the more recent trend of a regression in human rights protection and a disregard for international law has to be reconsidered if the Department is serious about ensuring human security for refugees and asylum seekers.

4.2. XENOPHOBIA, A BARRIER TO HUMAN SECURITY

Since 1994 South Africans have become increasingly distressed by the presence of foreigners in their country, resulting in rising tide of xenophobia. This disdainful attitude stems from the perception that foreigners threaten the rights and interests of citizens (Crush and Williams, 2005:4). These perceptions have been reinforced by members of the Executive and political elite. The then Minister of Home Affairs, Mangosuthu Buthelezi proclaimed, “if we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme” (IRIN, 2008). Recently Zulu King Zwelithini said that foreigners “should pack their bags and go” as they are taking jobs from citizens (Karimi, 2015). The intolerance of foreigners by all levels of society, manifested in waves of xenophobic violence, most significantly in 2008 when 62 people were killed, 670 were injured and more than 150 000 displaced, and more recently, the targeted attacks, killing and looting of stores of foreign nationals in 2015 (Segatti and Landau, 2011:10; Karimi, 2016).

In the aftermath of the looting of foreign owned shops, South Africa’s Small Business Development Minister, Lindiwe Zulu, urged foreign shop owners to share their trade secrets with

people in South African townships where they operate to curb violence and looting. She is reported to have said, “foreigners need to understand that they are here as a courtesy and our priority is to the people of this country first and foremost. A platform is needed for business owners to communicate and share ideas. They cannot barricade themselves in and not share their practices with local business owners" (Magubane, 2015). She also said that, “Black people were never part of the economy of South Africa in terms of owning anything, therefore when they see other people coming from outside being successful they feel like the space is being closed by foreigners” (Magubane, 2015). Minister Zulu’s comments are unfortunate and underscore government’s mistrust of foreigners. It ignores the fact that many foreigners are not only in the country legally, but are conducting legitimate businesses and are a vital part of the economy and the communities within which they live. Their continuing to conduct businesses in those communities can hardly be conditional on any disclosure of trade secrets - a duty, I daresay, which is not imposed on South African shop owners.

Even though migration to South Africa has steadily risen in the post-Apartheid years, foreign nationals number approximately 2.2 million (in 2011),[9] constituting only 4.2 percent of the entire population (Wilkinson, 2015). The erroneous assumption that South Africa is being “swamped or infested with foreigners” and the accompanying xenophobia has hindered efforts towards rights-based reform of immigration policies (Landau, 2005:16). As such, some South African legislation replicates the general anti-foreigner attitude. Whilst the IA explicitly condemns xenophobia in its preamble, it does make South African citizens responsible for reporting illegal immigrants. Reitzes (2009:13) argues that the executive has acted irresponsibly by taking a hardline populist stance on migration which reinforces xenophobic attitudes. She states “calls for greater fortification of South Africa breed a siege mentality and exacerbates xenophobia, rather than being a solution to the problem”.

Xenophobia has been a major barrier to the protection of human security for all immigrants but most especially refugees and asylum seekers. The discrimination and violence experienced as a

[9] According to the last national census in 2011, which is designed to count every person in South Africa, documented and undocumented. Loren Landau and Stats SA in Wilkinson (2015) suggest that the vast majority of immigrants would have been recorded.

result of xenophobic attacks violated human security norms, specifically personal security and community security. The South African government has acted shamefully in not taking decisive steps to remedy xenophobic attitudes and has been criticised by a number of human rights organisations internationally and domestically for failing to appropriately protect the safety of immigrants. The South African Human Rights Commission was one such organisation, stating, "If a society's respect for the basic humanity of its people can best be measured by its treatment of the most vulnerable in its midst, then the treatment of suspected illegal immigrants . . . offers a disturbing testament to the great distance South African must still travel to build a national culture of human rights" (*Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism).*

4.3. ADVANCING HUMAN SECURITY

THE ROLE OF CIVIL SOCIETY

The South African government has generally been praised for its strides towards refugee protection and the adoption of national legislation consistent with its international obligations. Contrastingly, and in reality, an uncomfortable truce continues to exist between international human rights law and the executive's longing for the maintenance of a sovereign state, as evidenced by attempts on the part of the Department "to implement the most regressive parts of the act and to amend it to make it more restrictive" (Segatti and Landau, 2011:48). Fortunately, human rights groups have admirably sought legal recourse through the courts to overturn any prohibitive amendments, such as the creation of refugee camps (Segatti and Landau, 2011:48). Civil society[10] organisations, such as the Lawyers for Human Rights, the Legal Aid Clinics and Human Rights Commission have been at the forefront of advancing refugee protection and have attempted to hold government to its international law and Constitutional legal obligations. They

[10] Which includes the Consortium for Refugees and Migrants in South Africa (CoRMSA), Awethu!, the Wits Centre for Applied Legal Studies, the Nine Plus Unions, Treatment Action Campaign and many more NGOs, trade unions and individuals.

have thus played a key role in upholding and furthering the human security doctrine in South Africa. Smith (2003:29) acknowledges that tension has existed between government and civil society right from the beginning - for example, in the drafting phase of the RA, government and civil society bodies emphasised different priorities. Government representatives fought for a limitation of refugee freedom, whereas civil society bodies advocated a broad based rights approach to refugee protection.

THE ROLE OF THE JUDICIARY

The South African judiciary has played a seminal role in the advancement of human security, in general and for refugees and asylum seekers. The national judiciary, as constitutionally mandated, operates independently from the executive. The judiciary has often enough ruled against the government. For instance in the *Bulambo Miakimboka Mubake v Minister of Home Affairs* the court upheld the Constitutional right to a primary education and issued an interim order stating that asylum-seekers and refugee children must be permitted to attend public schools even without a study permit. The SCA judgment in the case *Minister of Home Affairs & Others v Watchenuka & Another* 2004 (4) SA 326 (SCA) is an admirable example of the judiciary's commitment to human security. The court ruled that it was unconstitutional for the Department to prohibit work and study for asylum seekers for their first 180 days in the country. The court stated "the freedom to engage in productive work - even where that is not required in order to survive - is an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association". Likewise in *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others* 2015 (1) SA 151 (SCA), the SCA considered the rights of refugees and asylum seekers lawfully present in South Africa to earn a living by way of self-employment in the form of trading in spaza or tuck shops. The court, whilst decrying what can only be described as a hardened bureaucratic perspective held: 'to sum up, there is no blanket prohibition against

asylum seekers and refugees seeking employment. There appears to be no restrictive legislation or conditions in place that we could discern that prohibit foreign nationals from being granted spaza or tuck-shop licences". In both of these cases the court acknowledged that if asylum seekers and refugees were restricted in their employment as the Department sought to do and unable to earn a living, this would substantially impact on their ability to live a dignified life that is guaranteed by the Constitution and would accordingly exacerbate the economic, physical and food insecurities of an already vulnerable group.

These and other cases represent a clear commitment by South African courts to human rights, refugee protection and human security. Thus absent proper mechanisms to uphold international, regional and even national obligations, it has generally fallen to civil society organisations and the judiciary to fill an important void in the human security regime.

5. CONCLUSION

The establishment of an asylum system was of particular importance to the national government, consisting of many who themselves sought asylum in neighbouring countries and further afield, whilst fleeing persecution from the Apartheid State. The adoption of the RA represented a seismic shift away from the previous archaic legislative regime and its unconstitutional mechanisms of border control. That however, is not to suggest that all obstacles that hitherto stood in the way of asylum seekers have been eliminated by the passage of that legislation. The IA falls to be read in conjunction with the RA and although primarily concerned with controlling illegal movement, is in many respects antithetical to South Africa's international law obligations. For, the application of the IA means in effect that refugee and asylum seeker rights must often, of necessity, yield to the securitization of South Africa's porous borders. The inconsistency in migratory legislation does not detract from the strides made towards ensuring human security for refugees and asylum seekers in national policy. Yet, all of the changes in national legislation can only be rendered meaningful through proper operationalisation because not being able to realise guaranteed rights is tantamount to the denial of those rights.

The South African government has been confronted with various challenges, including inadequacies in infrastructure, untrained staffers and rampant corruption. Much it must be said of its own making and in practice it has found it increasingly difficult to fulfil its legal mandate. Furthermore, due to infrastructural deficiencies basic tenets of international law were flouted, including that most important universally held principle of non-refoulement. Unbridled xenophobia proliferated at all levels of society, spurring attacks around the country. The profound intolerance of the foreigner made human security even less attainable as refugees and asylum seekers found themselves directly in harm's way. Moreover, the Department's proposed reforms indicate a worrying shift away from human security and refugee protection, towards the securitisation of national borders and more stringent immigration controls. Fortunately, there is a silver lining - principally through civil society initiatives and the judiciary, human security for refugee and asylum seekers has gained significant traction. But it is ultimately to the South

African government, principally in the form of the Executive, that one must look for a vindication of the rights of refugees and asylum seekers. After all, it is to them that we look for the operationalisation of human security values and in that respect they have come up astoundingly short, prompting Amit to observe, "A system that fails to protect those most in need of refuge cannot be characterised as an adequate refugee protection framework. By failing to fulfil its core protective purpose, South Africa's refugee system has become superfluous" (Amit, 2011a:488). Thus, whilst South Africa's commitment, on paper at least, to human rights and human security resonates with the animating principles enshrined in an array of international instruments, for many of the most vulnerable who find themselves within her borders it matters not.

One does have to realise that the greatest barrier to the realisation of human security for refugees and asylum seekers is far more nuanced than the defunct operationalisation of legislation. Rather, it is indicative of wider systemic problems. The South African government has not only failed to ensure human security for the most vulnerable but has failed to provide for the majority of South Africans. Economic inequalities continue to permeate South African society – dividing it into the haves and haves-not. Communities have vastly different living conditions including access to health care, education, housing and personal security. The changes since 1994 have not entirely eliminated those divisions. Refugees are usually cast adrift with little to no resources in informal communities characterised by poor infrastructure and high levels of unemployment and violence. The pre-dominate worldview usually determines whose voices are heard and what socio-economic problems receive priority. These articulations of intersectional power not only shape how South African citizens engage with refugees and asylum seekers but also what policy choices are made. The plight of refugees thus cannot be addressed in isolation. Existing hierarchies and power matrices must be challenged to ensure the meaningful social and economic integration of refugees into South African society. This requires an appreciation that the different policy responses for refugees as compared to citizens that has hitherto informed our thinking is short sighted. But that is a formidable challenge both at a policy and operational level and would demand a new found sophistication from those who control the levers of power.

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