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....“We’d Go Home If We Could”.....

Political Xenophobia, Citizenship and Human Rights of Asylum Seekers and Refugees: Cape Town -- A Pilot Study

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A minor dissertation submitted in partial fulfillment of the requirements for the award of the MPHIL degree, Master of Social Science in Justice and Transformation

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: Kristin Anderson Date: January 25, 2011

Abstract

This thesis is concerned with the conceptions of three key and interactive groups -- human rights lawyers/advocacy officers, asylum seekers and refugees, and Department of Home Affairs officials -- who are in different ways involved with asylum seekers and refugees in Cape Town in the dual contexts of the new rights-based Constitution and the recurrence of political xenophobia. More specifically the thesis investigates their respective conceptions of (human / constitutional / legal) rights, citizenship and political xenophobia.

This thesis analyzes the respective conceptions of these three groupings with the following inter-related general research objectives:

- To investigate what the three different groups consider refugee/asylum seekers' human rights and/or status as non-citizens under the Constitution
- To ascertain how conceptions of (non-)citizenship and human rights of all three groups relate to the recurrent problem of political "xenophobia".
- To investigate relevant understandings of the distinctive legal status and transitional situation of refugees/asylum seekers with temporary domicile as distinct from immigrants as prospective citizens.
- To explore how the conceptions of refugee and asylum seekers' human rights and citizenship have consequences for the practice and dealings of Home Affairs.

The research is a qualitative pilot study that analyzes the material generated from in-depth, semi-structured interviews. The respondents -- four human rights lawyers/advocacy officers, ten asylum seekers and refugees, and four Department of Home Affairs officials -- do not constitute representative samples but do illustrate some typical conceptions of from each group. The findings are thus not meant to be generalizations of what all members of these groups believe but aims to identify key issues for further research.

The findings outlined in the study fall into four themes:

1. The paradox of refugee rights: Constitutional provision versus effective rightlessness:

The findings suggest that although the respondents hold the Constitution in high esteem in providing for the rights of everyone they also argue that in practice there is a denial of refugee and asylum seekers' rights under the Constitution, making them effectively rightless. This must raise questions about the general implications, as well as the comparative advantages and disadvantages, of the South African provisions of basic rights to "everyone" rather than these being linked to citizenship. At the same time a central finding of the thesis is that, unlike immigrants, refugee and asylum seekers do not primarily conceive of themselves as prospective citizens. This differs significantly from the self-conceptions of other types of migrants who do think of themselves as potential long-term members of South African society.

2. Statelessness, refugee rights and the problem of agency :

A main theme in our findings concerns the implications of the position of refugees at the practical level of agency: as non-citizens they are not in a position to mobilize themselves to ensure protection

of their rights. The human rights lawyers may inadvertently add to this by taking a paternalist protective role towards asylum seekers and refugees while the DHA officials consider them primarily as objects for policy implementation. To some extent the refugees and asylum seekers tend to look to the international community as a different arena of mobilizing more effective protection of refugee rights in practice, not that of the internal politics of the host society but rather the intermediate sphere of international civil society and legal organizations.

3. The Constitution, changing institutional culture and “implementation” as the key to introducing new refugee rights practices:

All groups of respondents agreed on the significance of the Constitution and applicable legislation for ensuring the rights of refugees and asylum seekers in South Africa. At the same time they also highlighted the practical obstacles to, and constraints on, the effective practice of refugee rights. Generally, these practical obstacles and constraints point to the need for major institutional and structural changes. This raises questions concerning the kind of changes in institutional culture that might further a more professional and rights-based bureaucracy accountable to the Constitution rather than merely following the instructions of their superiors.

4. Rights-based approaches to political xenophobia as the cause and/or consequence of the crisis of refugee rights

On critical analysis it appears that advocacy of a rights based approach to the refugee crisis and recurrent xenophobia tends to be circular in so far as it both looks to the state for the ‘answer’ to the basic problem of entrenched rights abuses but also conceives of the state as the source of the problem itself. Respondents assume that the state should be responsible for curbing xenophobia and for the protection of asylum seekers/refugee rights but also contend that the state is incapable of doing so. A more pragmatic approach to the reoccurring xenophobic violence and political xenophobia could be to foster stronger agency with refugees and asylum seekers. Rather than assuming that the state should take a lead in the recognition of refugee rights it may be more proactive to have other outside agencies taking a stronger role. The historical analogy of the anti-apartheid struggle - which was primarily initiated by non-state and illegal political organizations - could serve as a model for fashioning an alliance of refugees/asylum seekers, NGO’s human rights advocates that might begin to initiate changes in the institutional culture of state institutions.

Table of Contents

Acknowledgements	8
Terms	9
Acronyms	11
Chapter 1 Introduction	
1.1 Introduction	12
1.2 Problem Statement and Research Question(s)	13
1.3 Research Design and Methodology	14
1.3.1 Limitations and Reflexivity on Possible Personal Bias	15
1.3.4 Research Ethics	15
CHAPTER 2 Historical Background and Context: From excluding citizens under apartheid to political xenophobia against refugees in the newly democratic South Africa	
2.1 Exclusionary citizenship under apartheid	17
2.2 Migration and refugees under apartheid	18
2.3 The Department of Home Affairs under apartheid	19
2.4 Migration flows into post-apartheid South Africa	20
2.5 Citizens and non-citizens in the new Constitution	20
2.6 Post-apartheid Refugee and Immigration legislation and practice	21
2.7 Xenophobic violence	23
2.8 South African policy responses to, and debates on, the xenophobic violence.	24
Chapter 3 Literature Review	
3.1 Citizenship, Territorial Sharing and Migration	26
3.2 The origins and development of notions of “refugees”	26
3.3 Hannah Arendt: the Scandal of Human Rights and the Position of Stateless Peoples and Refugees	27
3.4 Civil and social dimensions of citizenship: implications and consequences for refugees and asylum-seekers	29
3.5 Rights and duties of citizens and of refugees/asylum seekers	30
3.6 The status of refugees in the Constitution and Bill of Rights	31

3.7 The development of a new legislative framework for migration and refugees	32
3.8 Conceptualizing Popular and Political Xenophobia	34
3.9 Xenophobia in post-apartheid South Africa	35
3.10 Conclusion	36

Chapter 4 Human Rights Lawyers' Conceptions of Human and Legal Rights and Political Xenophobia in dealing with Refugees and Asylum Seekers

4.1 Introduction	39
4.2 Unpacking the human rights lawyers' conceptions of the rights of refugees and asylum seekers	40
4.2.1 Legal and human rights	41
4.2.2 Constitutional rights of refugees and asylum seekers as non-citizens	42
4.2.3 Differentiating the rights of refugees and asylum seekers from those of Immigrants	44
4.2.4 Civil & political rights versus socio-economic rights	45
4.3 Refugee rights in practice	46
4.4 Immigration and refugee legislation and the legal rights of non-citizens	47
4.4.1 The historical legacy: The Aliens Control Act (1991)	47
4.4.2 The Refugee Act 1998	49
4.4.3 The Immigration Act 2002	49
4.5 Implementation of refugee legislation	50
4.5.1 Defective comprehension of the legislation	50
4.5.2 Lack of Resources	51
4.5.3 Corruption and Accountability	51
4.6 Political xenophobia as cause and/or consequence of the violence to non-citizens	52
4.7 Findings and Conclusions	54
4.7.1 Distinctive features of refugee rights in the South African context	54
4.7.2 Practical obstacles to, and constraints in, the introduction of refugee rights	55
4.7.3 The anomalous treatment of socio-economic versus civil and political rights for refugees in the South African social and political context	56

4.7.4 The focus on “implementation” as the key to introducing new refugee rights practices: assumptions and objectives? 57

4.7.5 The limitations of rights approaches to the problem of political xenophobia 57

Chapter 5 Refugees and Asylum Seekers’ Conceptions of (Human) Rights and Political Xenophobia

5.1 Introduction 59

5.2 Unpacking refugees and asylum seekers’ concerns with their position in terms of rights 60

5.2.1 Rights Conceptions and Discourses: Refugee Perspectives 60

5.2.2 Refugee Conceptions of Human Rights and the International Protection of Rights 62

5.2.3 Refugee Understandings of the Significance and Implications of the South African Constitution 66

5.2.4 Refugee Legislation and the Legal Rights of Non-citizens 67

5.3 Refugees’ Perspective on Rights in Practice 67

5.4 Refugees and Asylum seekers experience of Political Xenophobia 67

5.5 Findings and Conclusions 70

5.5.1 Refugees’ conception of human rights 72

5.5.2 Legal and constitutional rights and the refugees’ experience of rights abuses 72

5.5.3 Refugees’ collective self-conceptions in relation to local communities and South African society 73

5.5.4 The failure of ‘implementing’ refugee rights and the problem of political xenophobia 74

Chapter 6: Department of Home Affairs (DHA) Officials’ Conceptions of (Human) Rights and Political Xenophobia in dealing with Refugees and Asylum Seekers

6.1 Introduction 75

6.2 DHA Officials’ Conceptions of Human, Constitutional and Legal Rights of Asylum Seekers and Refugees 77

6.3 DHA Officials’ Conceptions of the Legal Rights of Refugees and Asylum Seekers 79

6.4 DHA Officials and the Implementation of Legislation 82

6.5 How do DHA officials conceive of political xenophobia as cause and/or consequence of the refugee crisis? 84

6.6 Conceptions of how to deal with political xenophobia as a major factor in the refugee crisis	86
6.7 Conclusion	88
6.7.1 Human and Constitutional Rights	88
6.7.2 Conceptualizing Implementation Problems	88
6.7.3 Political xenophobia versus institutional culture	89
6.7.4 The institutional culture at DHA	89
Chapter 7 Conclusion	
7.1 Introduction	91
7.2 The paradox of refugee rights: Constitutional provision versus effective rightlessness	91
7.3 Statelessness, refugee rights and the problem of agency	93
7.4 The Constitution, Changing Institutional Culture and “Implementation” as the Key to Introducing new Refugee Rights Practices	94
7.5 Rights based approaches to political xenophobia as the cause and/or consequence of the crisis of refugee rights	96
7.6 Conclusion	97
Bibliography	98
Appendices	
Appendix 1: Detailed Research Questions	107
Appendix 2: Refugee and Asylum Seeker Participants Profile	109
Appendix 3: DHA Participant Profile	111
Appendix 4: DHA Demographics of Employment	112

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Lastly, to all refugees, asylum seekers and prospective asylum seekers...May your journey become easier and until it does may you have strength...Bon Chance!

University of Cape Town

Terms

Asylum Seeker: an individual who is seeking international protection. In countries with individualized procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker.” (UNHCR, 2006)

Department of Home Affairs (DHA): The South African government department inter alia responsible for the administration of asylum applications and refugee affairs, immigration and citizenship documents.

Economic Migrant: “Persons who leave their countries of origin purely for economic reasons not in any way related to the refugee definition, or in order to seek material improvements in their livelihood. Economic migrants do not fall within the criteria for refugee status and are therefore not entitled to benefit from international protection as refugees.” (UNHCR, 2010).

Immigration Act 2002: Immigration law that regulates who may enter South Africa and covers deportations

Non-refoulement: The fundamental principle in international law that prohibits states from returning asylum seekers or refugees to countries where their lives freedoms may be under threat

Permanent Resident: In terms of the South African Immigration Act, 2001 : A person who has been given legal permission to reside in South Africa on a permanent basis.

Recognized Refugee: A person who has been granted refugee status in terms of section 24 of the Refugee Act

Refugee: “A person who meets the eligibility criteria under the applicable refugee definition, as provided for in international or regional refugee instruments, under UNHCR’s mandate, and/or in national legislation.” (UNHCR, 2006)

Refugee Act 1998: The Act in South Africa containing the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status;

Refugee Receiving Centre: Centres set up specifically to deal with refugee and asylum seekers (5 offices in South Africa)

Relocation: An internal transfer of a refugee or asylum seeker from one part of South Africa to another

Resettlement: The relocation of a refugee from one country to another refugee receiving country with approval of the UNHCR and the host country

Section 22 temporary asylum seeker permit: Temporary renewable document, under section 22 of the Refugee Act, which is issued to asylum seekers awaiting a decision on their asylum application.

Section 24 permit: Renewable permit, issued in terms of Section 24 of the Refugees Act which allows individuals to reside in South Africa for a period of two years

Stateless Person: “A person who, under national laws, does not have the legal bond of nationality with any State. Article 1 of the 1954 Convention relating to the Status of Stateless Persons indicates that a person not considered a national (or citizen) automatically under the laws of any State, is stateless.” (UNHCR, 2006)

Temporary Resident: Person legally permitted to stay in the country for a limited period of time.

The Standing Committee for Refugee Affairs: A committee appointed by the Minister of Home Affairs that reviews any refugee applications that have been rejected on the basis of being manifestly unfounded and provides certification that a refugee will remain a refugee indefinitely for the purposes of applying for permanent residence.

Unaccompanied minor: A child under 18 without guardians who claims refugee status

Undocumented Migrant: A person not in possession of the requisite documentation to be in South Africa

United Nations High Commission on Refugees: the international organization mandated to provide international protection to refugees and to promote durable solution to refugees and people of concern.

Acronyms

ANC: African National Congress

CoRMSA: Consortium on Refugees and Migration in South Africa

CSVSR: Centre for the Study of Violence and Reconciliation

DA: Democratic Alliance

DHA: Department of Home Affairs

FMSP: Forced Migration Studies Programme

HSRC: Human Sciences Research Council

ICCPR: International Covenant on Civil and Political Rights

IFP: Inkatha Freedom Party

IOM: International Organization on Migration

LRC: Legal Resource Centre

NGO: Non-Profit Organization

NP: National Party

PAC: Pan Africanist Congress

Passop: People against suppression, oppression and poverty

SADC: Southern African Development Community

SAMP: South Africa Migration Project

SAPS: South African Police Services

TAC: Treatment Action Campaign

UDF: United Democratic Front

UDM: United Democratic Movement

UN: United Nations

UNHCR: United Nations High Commission of Refugees

Chapter 1: Introduction

1.1 Introduction

“After years of pretending that it was not part of Africa, Cape Town is finding that Africa is very much part of it...” Christopher Hope, 1998 (cited in Western, 2001:617)

Cape Town has a long history of immigration and has become known as one of the “most cosmopolitan regions of the world” (Sichone, 2008:310). Apartheid as well as resistance against apartheid were centrally concerned with the exclusion and inclusion of South Africans themselves as citizens, and the new post-apartheid South Africa resolutely set about the task of inclusive nation-building (of South Africans). But until recently modern South Africans has not had to think explicitly and seriously about itself as an immigration society. It was assumed that the colonial origins of South Africa could be left behind and that long-established systems of migrant labour no longer posed a major political problem: internal forced migrant labour systems would be discontinued while cross-border migrant labour arrangements could be re-negotiated and modernized. The new Constitution provided the founding document for South Africans as equal citizens of an inclusive South African nation.

Almost unnoticed at the time, though, democracy also brought some major new challenges with regard to the co-existence of citizens and substantial groupings of non-citizens in South Africa. The first decade of post-apartheid South Africa also saw the unanticipated influx of unprecedented numbers of cross-border migrants from neighbouring territories such as Mozambique, Zimbabwe, and Angola as well as substantial numbers of refugees and asylum-seekers from the Great Lakes Area, the Horn of Africa and West Africa. Effectively South Africa acquired a sizable population of migrants, refugees and asylum-seekers, non-citizens whose place and destiny as part of South African society was far from clear, both to themselves and to the host nation.

The new South African Constitution guaranteed basic rights to citizens and non-citizens alike while the 2002 Immigration Act and 1998 Refugee Act sought to provide the necessary legislative frameworks. In practice, though, there have been persistent accusations of maladministration, corruption, human rights abuses and ‘xenophobia’ concerning the treatment of refugees and asylum seekers. These accusations have been aimed both at South African officials and at local communities. More specifically, the systemic corruption and abuses of refugee rights by officials of the Department of Home Affairs (DHA) and sporadic outbreaks of ‘xenophobic violence’ on the part of local communities have been recognized as social and political crisis issues (Crush et al 2007:1-67, Crush et al 2000:103-120). In this context a few human rights lawyers have operated as professional facilitators and activists committed to securing the human, constitutional and legal rights of refugees and asylum-seekers as non-citizens under threat in an inhospitable South African environment. Despite having one of the most progressive constitutions in the world, South Africa has gained a

reputation for conservative, xenophobic and nationalist attitudes and practices in both the state and civil society. Serious incidents of xenophobic violence erupted throughout South Africa in May 2008 and resulted in tens of thousands people displaced from their homes and 62 dead (CoRMSA, 2008:28). Subsequently experts and others engaged in a public debate over the causes of the xenophobic violence and how to prevent it in the future.

This dissertation focuses on conceptions of human rights, citizenship and political xenophobia in relation to asylum seekers and refugees in Cape Town. More specifically it is concerned with the respective conceptions of three key and interactive groups in the dual contexts of the new rights-based Constitution and the experience of recurrent political “xenophobia”, i.e. i) refugees / asylum seekers, ii) human rights lawyers who work with refugees and iii) Department of Home Affairs’ (DHA) officials. It is interested in the respective conceptions of these three groupings of the (legal and human) rights of refugees/ asylum seekers as non-citizens under threat. It sets out to investigate how those conceptions may influence the implementation of immigration legislation and relevant constitutional provisions and so affect refugees/asylum seekers’ lives as well¹.

Previous research in this area has tended to focus on only one of these three groups, mainly the refugees.² Breaking new ground the thesis also looks at these problems in so far as they are manifested in the history and practices of the DHA and are informed by the interpretations of the law by DHA officials. At the same time the thesis is also concerned with the conceptions of human rights lawyers of these same problems. However, not all relevant groupings could be included. Because of the limited scope of the dissertation the case study does not involve fieldwork with community members or engage in new research regarding South African community perspectives on ‘xenophobia’ and citizenship. To some extent, though, these have been covered by previous research³.

1.2 Problem statement and research question(s):

The thesis has the following inter-related general research objectives:

¹ In focusing on conceptions of (human /constitutional /legal) rights and (non-)citizenship the researcher is aware that this pertains to only one dimension of the position of refugees and that there are many other aspects, including their social, economic, cultural and historical affairs and interactions, that are of equal and possibly greater significance. But this is the particular focus of the present investigation.

² Much of the current research focuses on public opinion survey or in-depth interviews with refugee and community members as opposed to DHA officials and human rights lawyers, see Crush, J 2001 “Immigration, Xenophobia and Human Rights in South” Southern African Migration Project, Migration Policy Series No 22 ; Human Rights Watch, 2005 “ Living on the Margins Inadequate protection for refugees and asylum seekers in Johannesburg” Human Rights Watch Journal Volume 17, No.15(A); Human Rights Watch 2001 “To Help Refugees, Fight the Racism Behind Them” The International Herald Tribune; Palmay, I 2006 “Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government” Centre for the Study of Violence and Reconciliation, South Africa; Quint, L 1999. “Refugees in Cape Town” National Association of Democratic Lawyers, Cape Town

³ The study relies on the most recent public surveys executed by SAMP and University of Witswatersrand Forced Migration Studies Programme

- To investigate what the three different groups consider refugee/asylum seekers' human rights and/or status as non-citizens under the Constitution
- To ascertain how conceptions of (non-)citizenship and human rights of all three groups relate to the recurrent problem of political "xenophobia".
- To investigate relevant understandings of the distinctive legal status and transitional situation of refugees/asylum seekers with temporary domicile as distinct from immigrants as prospective citizens.
- To explore how the conceptions of refugee and asylum seekers' human rights and citizenship have consequences for the practice and dealings of Home Affairs.

Taken together these various objectives will be investigated in terms of the following general research question for the thesis:

How do refugees / asylum seekers, human rights lawyers, and DHA officials respectively conceptualize the human, constitutional and legal rights of refugees and asylum seekers as non-citizens under threat in the Cape Town Metropolitan Area, and how do these different understandings contribute to a better understanding of the recurrent problem of political xenophobia? (For detailed list of research questions see Appendix 1)

1.3 Research Design and Methodology:

The research project has been designed as a pilot study investigating conceptions of human rights and citizenship of refugees and asylum seeker, DHA officials as well as human rights lawyers in the context of political xenophobia. In conjunction with a study of the relevant secondary literature, legislation and policy documents the research is a qualitative study using in-depth interviews with three small groups of, respectively, refugees and asylum seekers, human rights lawyers, and DHA officials. The type of sampling employed is purposive non-probability sampling. Singleton et al describe purposive sampling as "a type of sampling based entirely on the judgment of the researcher, in that a sample is composed of elements that contain the most characteristic, representative or typical attributes of the population" (Singleton et al 1988:153 in Devos, 2005:202). Stratified purposive sampling aims to target informants that are likely to provide rich information on specific aspects of this research. The rationale for targeting participants is based on an assessment of their relevant backgrounds and experiences. As such, participants were selected based on the most common countries for asylum seekers to be fleeing from. Another criterion of selection was the length of time they had been in South Africa in order to have a variety of experiences. The human rights lawyers were specifically selected for their expertise. Likewise the DHA officials were selected based on their position at the DHA and their range of experience or time at DHA.

Because of the constraints of the study as a mini-thesis only small samples could be utilized from each of the three groupings. The groups of respondents are too small to make generalizations about the groups that they belong to; it needs to be stressed upfront that is not the intention of this study to come to possible generalizations across these groupings. Rather as a pilot study the sample of respondents are meant to suggest possible further lines of research with a view towards recommendations on how to protect refugees and asylum seekers human rights in South Africa.

1.3.1 Limitations and Reflexivity on Possible Personal Bias:

In principle it is a limitation of this kind of qualitative research that it does not allow representative generalizations on the model of quantitative research. However the research is exploratory in nature so this approach may still be appropriate. A further limitation of this study is the small sample size. Because of resource and time constraints 17 in-depth interviews were the maximum that were possible. The sample size of the 3 groups is not intended to be a representative sample. The conceptions articulated by these respondents should not be taken as representative of their respective group conceptions. Careful attention was made to not generalize about the respondent's responses when analyzing the data. The value of the analysis and conclusions relate to their suggestiveness within a pilot study.

One of the major limitations of this study is the fact that in dealing with the three groupings mentioned above it does not also include the views and conceptions from the local communities. Because of the limited scope of this mini-thesis this was not possible. But it is hoped that later research will encompass this. Prior research dealing with conceptions of communities has been investigated to compensate for the lack of capacity to do fieldwork with community members.

Since 2005 I have worked in advocacy/human rights/development with refugees and asylum seekers, through Foreign Affairs Canada and Legal Resource Centre as well as The South African Human Rights Commission. Although this sparked the motivation for this study, I am also aware that I began this research with certain biases towards the DHA. However I was conscious of this fact and aimed to be professional in dealing with the respondents and to observe standards of objectivity in analyzing the data involved.

This study was conceived before the May and June 2008 xenophobic attacks on non-South African Africans. However before the fieldwork was to begin the attacks erupted. In the circumstances the fieldwork had to be postponed and care was taken in conducting the field work not to traumatize people further. Because all the interviews were conducted on the heels of the violence it is possible that their responses were tainted by the recent happenings. It is difficult to say if their responses would have been the same had the interviews been conducted before the violence.

1.3.4 Research Ethics

All the respondents were involved in the research voluntarily, were informed of the purpose of the study and how the information would be used. The respondents signed consent forms. The human rights lawyers were handled differently than the other two groupings. They agreed to release their names and allow their comments/quotes to be used in the body of the thesis along with their names. They in effect signed release forms. The other two groupings also signed consent forms stating that their names would be kept confidential and pseudonyms were given to protect their identity – the names used throughout this thesis for both these categories are in fact not the participants' real names. In the case of both the refugee group and the DHA group, the interviews were set up in a safe confidential office because confidentiality was of great importance to protect their identity and physical safety. Physical space was negotiated very carefully so that all respondents felt safe. The interviews refugee and DHA respondents were held at various NGO's in Cape Town.

The research was conducted with these considerations applied. The findings of the research are in compliance with the University Of Cape Town Code Of Research Ethics for Human Subjects.

Through the course of the research concerns with personal safety also became a limitation of the study. While conducting interviews on one occasion I observed bribes being taken at DHA, and had my life threatened. On another occasion I was held at knife point outside the DHA. Both incidents were reported to SAPS.

Chapter 2: Historical Background and Context: From excluding Citizens under Apartheid to Political Xenophobia against Refugees in the Newly Democratic South Africa

2.1 Introduction: Exclusionary citizenship under apartheid

Before 1994, South Africa was iniquitous internationally for its racialized policies and systematic attempts to deny citizenship and civil rights to the black majority of its population (Nyamnjoh, 2006:56). While a small educated and propertied black elite qualified for the Cape Colony's franchise provisions in the 19th century the Union of South Africa from 1910 informally and formally consolidated white supremacy and segregation. The 1913 Land Act limited African land claims and residential rights to the territories of ethnic "homelands" and in 1936 Cape Africans, too, were removed from the common roll thus closing the door on extensions of the qualified franchise as a potential route to eventual full citizenship (Peberdy, et al 1998). In 1948 the National Party came to power with the policy of apartheid explicitly committed to exclusionary citizenship for Whites in South Africa. Apartheid legislation marked a new facet of tyranny by systematically limiting and proscribing the rights of movement, residence and association of black people outside the "homelands" so that effectively they were no longer citizens of South Africa. The policy and ideology of "separate development" introduced a new logic of separate nations. The apartheid state constructed a complicated hierarchy of membership whereby residents of each racial category had differential rights and obligations: 'Whites' were full citizens, 'Coloureds' and 'Indians' were partial citizens, and 'Africans' were tribal subjects relegated to 'independent Bantustans' (Klaaren, 2000). The Bantu Homeland Citizenship Act of 1970 deprived the African majority of their South African citizenship henceforth to be vested only in their 'homeland' allegiance. During apartheid the majority of South Africans became subjects only (excluded from full citizenship). South Africa was defined by racially and ethnically differentiated citizenship.

However, the mainstream political leadership of the black majority of South Africans strenuously resisted their ideological, constitutional and legal exclusion from common South African citizenship under apartheid. From its founding in 1912 the African National Congress (ANC) and other black political movements and organizations were committed to achieve full and inclusionary citizenship in South Africa. The National Party government's apartheid legislation called forth the "Defiance Campaign" and mass protest movements in the 1950s; when the ANC and PAC were banned in 1960 following the Sharpeville massacre the resistance movements went underground and turned to strategies of sabotage and political violence as instrumental means to the same objective. During the 1970s and 1980s a more militant Black Consciousness movement and the populist alliance of the United Democratic Front (UDF) prepared the way for an inclusive democracy. Against this backlash of civil disobedience the apartheid government first devised the Tricameral Constitution of 1984 granting parliamentary representation to the 'Coloured' and Indian minorities, and then introduced the

Restoration of South African Citizenship Act of 1986. This Act in principle recognized Africans as South African citizens, though still excluding those who had been deemed citizens of one of the independent homelands (Transkei, Boputhatswana, Venda and Ciskei) as well as the majority of the 9 million Africans that had been denationalized but also had not been permitted special residential rights in urban areas. Only in the 1990s, following the transition from apartheid, would full citizenship rights be recognized on an inclusionary basis in the new South African Constitution.

2.2 Migration and Refugees Under Apartheid

Prior to the 1990s refugees resulting from forced population migrations or political oppression elsewhere were of little consequence in the South African context. (Some exceptions were relatively small numbers of Huguenots in the 1680s and Lithuanian Jews from the 1890s)

Historically migrant labour systems did play an important part in the shaping of the South African economy: the mining and agriculture sectors have long been dependent on migrant labour from other southern African countries. Effectively this introduced substantial numbers of alien non-citizens into South African society. According to census data from 1911, 6 percent of the population was comprised of non-South Africans. In 1961 there were approximately 836 000, non-South African from the SADC region in South Africa (Posel, 2003). As non-citizens these migrant workers were subject to even greater repressions and controls, and had even less legal and civil rights compared to the majority of black South Africans effectively excluded as citizens. In the apartheid racial hierarchy extending from whites as full citizens, Coloureds and Indians as second class citizens and Africans as 'homeland' subjects they thus added a bottom layer of alien non-citizens.

In practice apartheid oppression caused a significant population of "internal refugees": the apartheid state's systematic efforts to consolidate the demarcated homelands and to eliminate "black spots" outside the homelands resulted in massive forced population removals. Literally millions of people were forcibly relocated and dumped in economically unviable rural settlements and camps. Virtually these "Surplus Peoples" constituted internal refugees though, of course, they continued to conceive of themselves as entitled to South African citizenship (Platzky et al 1985). In practice the workings of the migrant labour system and "influx control" also resulted in a growing number of de facto refugees from neighbouring territories. Despite blanket apartheid restrictions, many economic migrants braved an assortment of repulsions, including dangerous journeys through the Kruger National Park (which borders Mozambique) and a fence that once generated a deadly electric voltage, in attempts to avoid the border control officials to reach South Africa (Klaaren, 2000).

Conversely some South Africans in political exile experienced a quasi-refugee status. However, even if they had fled South Africa and were hosted in other countries, they strictly speaking did not fit the definition of a 'refugee' in so far as they were continuing an underground armed struggle in South Africa. As such they were called, 'guests' of different governments or imbizis (fugitives) (Jobson, 2008:3).

2.3 The Department of Home Affairs Under Apartheid

In the 'new' democratic South Africa the Department of Home Affairs (DHA) is responsible for the administration and governing of citizenship, immigration and refugee status in line with the new 1996 Constitution. Under apartheid the same DHA had been responsible for, inter alia, the application of racial legislation such as the Population Registration Act and associated practices such as that of the 'pencil tests'⁴. The enforcement of these laws was left up to the South African Police Force. As an integral part of the apartheid state it systematically performed institutional, physical and symbolic human rights abuses. During this period immigration policies relied on four pillars, i.e. i) racist policy and legislation; ii) the exploitation of migrant labor from neighboring countries; iii) tough enforcement legislation; and iv) the repudiation of international refugee conventions (Crush et al, 2001)

Under apartheid there was no official refugee legislation⁵. The NP government rejected United Nations and other international refugee conventions. People who came to South Africa seeking protection were deemed illegal aliens. Immigration policy during this period relied heavily on racial and religious criteria (Peberdy, 2009). "All potential immigrants had, by law, to be assimilable by the white population" (Crush et al 2000:3). Non-white migrant workers did not qualify for permanent residence (Crush, et al, 2000). The Aliens Control Act, 1991 – deemed "apartheid's last act" (Crush et al, 2001:461) -- encouraged and governed permanent immigration for Europeans. African migrants from the Southern Africa region seeking legal access to South Africa were subjected to a dual system of control known as the "two gates policy." The normal immigration rules and regulations for Europeans in the Aliens Control Act of 1991 provided one "gate"; specific exemptions from the Act for non-South African workers in the case of bilateral government conventions or temporary employment schemes provided a second "gate" (Gagnon, Human Rights Watch, 2007: 6-8).

2.4 Migration Flows into Post-Apartheid South Africa

⁴ Pencil Test: "type of test used by authorities during the apartheid era in South Africa to "ascertain" a person's race In the absence of any centralized method, this and other subjective tests were used in various places across South Africa as part of the [Population Registration Act](#) of 1950. A pencil would be placed in a person's hair, if it fell through they were classified as "White" (or "Coloured", depending on other subjective classification considerations); if the pencil did not fall through, they were classified differently ("Coloured" or "Black", also depending on other subjective classification considerations)" <http://www.wikipedia.org/wiki/Pencil-test> accessed April 23, 2009

⁵ Despite not having official status available before 1993 100, 000 plus people from Mozambique fled to South Africa during the civil war. In addition white people from the newly independent states of East and Southern South Africa were considered unofficial refugees by the South Africa apartheid state.

During the 1990s a great increase in both economic and forced migration into South Africa took place from neighbouring and other African territories. Existing immigration and refugee legislation and policies were ill-equipped to deal with the unanticipated influx of migrants and refugees. During the transition from apartheid the 1991 Aliens Control Act was implemented. The Act gave extensive powers to authorities (immigration officers and police) concerning entry, search and detention. At the same time a ravaging war was taking place in neighbouring Mozambique and over 300 000 people fled and sought refuge in South Africa. In response the South African authorities imposed a massive countrywide clampdown on informal settlements and deported approximately 47 000 Mozambicans. In 1993 the government also established an Inter Departmental Committee on Illegal Aliens and National Aliens Investigation Unit headed by the South African Police Service (SAPS). In 1991 the UNHCR was finally permitted to establish a presence in South Africa and began addressing "durable solutions" for both the returning South African exiles as well as the influx of forced migrants from neighbouring countries who had never been formally recognized as refugees by the South African government. This laid the basis for Passport Control Instruction No. 63 of 1994 which, together with other instructions and a "Basic Agreement" signed by UNHCR and South Africa, became the basis of South Africa's pre-1998 refugee policy (Handmaker 2001:101). In 1993 the South African government introduced asylum determination procedures for individual applicants and the numbers of cases increased steadily between 1995 and 1998, later leveling off at approximately 20,000 per year. People seeking asylum came primarily from countries such as Angola, DRC, Burundi, Rwanda Sudan, Somalia and Ethiopia (Handmaker 2001:91-113).

2.5 Citizens and Non-Citizens in the New Constitution

As part of its transition to democracy apartheid legislation had to be revoked and de-racialised along with the enactment of the new South African Constitution in 1996. Central to the new Constitution was the provision for common citizenship: "All citizens are a) equally entitled to the rights, privileges and benefits of citizenship; and b) equally entitled to the duties and responsibilities of citizenship" (article 3). This represented a major achievement of the long political struggle against the exclusionary citizenship of the apartheid state in reconstructing citizenship in South Africa so that there was no longer any racial distinction between black and white (Katz, 2004). Significantly, though, the Bill of Rights in chapter 2 of the new Constitution referred not only to citizens but to "all people in our country" (article 7). Similarly article 10 recognized a right to inherent dignity of "everyone". These formulations echoed those of the 1956 Freedom Charter that South Africa belongs to "all who live in it, black and white" (Karis & Gerhard, 1977: III, 205). In effect this meant that the new Constitution recognized its fundamental rights as pertaining also to non-citizens. It is not clear that the framers of the new Constitution introduced the provisions of rights to non-citizens with refugees and asylum-seekers specifically in mind. At the time one of the main debates was how to handle the position of former 'citizens' of the 'independent homelands' under apartheid. In 1993 the

Restoration and Extension of South African Citizenship Act 196 of 1993 was enacted as part of a legislative package along with the Interim Constitution. This Act restored citizenship to those who had lost their citizenship rights during apartheid (Klaaren in Aleinikoff *et al*, 2000). The primary concern was to ensure that denizens of the Transkei, Bophuthatswana, Venda and Ciskei would also fit into the new constitutional dispensation of South Africa. The Citizenship Act of 1995 consolidated the legal determination of citizenship in line with the new Constitution. For our purposes, though, the salient fact is that when the legal and constitutional position of refugees and asylum-seekers became a major public and policy issue from the latter half of the 1990s this occurred in a context where their fundamental rights as non-citizens were explicitly recognized in the new Constitution.

2.6 Post-apartheid Refugee and Immigration Legislation and Practice

Although the Constitution governs rights and freedoms of people living in South Africa, migration legislation and policy dictate procedures in dealing with non-citizens. The comprehensive overhaul of South African immigration and refugee legislation began in 1991, four years before South Africa signed the Refugee Convention, when the United Nations High Commission for Refugees (UNHCR) first arrived in the country to assist with the return of South African political exiles⁶ (Klaaren in Aleinikoff *et al*, 2000). Undoubtedly there was a need to reevaluate the legislation and policies around immigration, especially as these pertained to refugees. At the same time the country was embarking on a nation building project to bring together diverse populations in South Africa including those who had previously been denied citizenship under apartheid (Peberdy, 2009:138).

It was only in September 1993 that South Africa began to formally deal with refugees (Klaaren *et al*, 2007:1). Before the first democratic election, representatives of South Africa and the UNHCR signed an agreement to operate in South Africa with the purpose to facilitate a durable solution through temporary recognition for approximately 300, 000 Mozambicans who had fled civil war. This initial refugee policy benefited only Mozambicans. Passport control was vested in the South African Department of Home Affairs (Handmaker, 2001:91- 113)

Refugee policies throughout the Southern African region during the early 1990's can be classified into three generations. The first dealt with matters relating to refugees as an important part of immigration policy and law but without a need for a refugee-specific laws. The second generation of refugee laws, including the 1991 Aliens Control Act, was largely concerned with controlling selected

⁶ In addition to the UN Refugee Convention, this overhaul of the existing immigration and refugee legislation was also guided by the African Union (1969) Refugee Convention, the International Covenant of Civil and Political Rights (ICCPR), In terms of these Conventions the government has obligations under international refugee and human rights law as well as the South African Constitution. These Conventions are founded on the principles of non-discrimination and dignity, and place a duty on the state to create an enabling environment that allows all persons, including refugees and asylum seekers, to have access to state services. The state has a duty to protect the rights of refugees and asylum seekers. The UNHCR is charged under its mandate with protecting refugees and asylum seekers.).

areas of refugee influx alongside immigration laws . The third generation of refugee law was characterized by comprehensive refugee legislation governing all aspects of refugee protection in accordance with the relevant international legal instruments. This is where the 1998 Refugee Act and 2002 Immigration Acts fall (Rutinwa, unknown: 52).

Prior to 1998, issues relating to refugees were governed by the Aliens Control Act which was primarily concerned with the control of immigration. The Act had two main shortfalls. First, dealing with refugee matters under immigration laws meant that refugee protection could be ignored, e.g. not taking into consideration refoulement or by what standards refugees and asylum seekers were to be treated. Secondly, immigration law tended to deal with the admission of individuals and not mass influxes of people which often became labeled as illegal immigrants. In 1993 when the UNHCR came to South Africa there was no statutory basis for determining refugee status so procedures were ad hoc and left up to the DHA. There was very little administrative or judicial appeal to these procedures. Since 1994 South Africa experienced a steady increase in people seeking asylum in the country. This coupled with the ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol⁵ (1951 UN Refugee Convention) and the Organization of African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU), created the need for a comprehensive legal framework for refugees and asylum seekers in South Africa (Mbelle, 2005, 6).

Prior to the 1998 Refugee Act becoming law, 54,759 asylum applications had been lodged, of which 8,504 were deemed refugees, 25,020 were rejected and 21, 295 were left pending. By 2004 the asylum seeker and refugee population was 142, 907 (Mbelle, 2005:6). The Refugee Act (1998) now makes provision for the definition of a refugee, establishes institutions for refugee status determination and adjudication as well as provides the procedures to be followed and outlines the rights of refugees in South Africa and provides for international protection (Rutinwa, unknown:56, Klaaren, 2007;1-8) The government's obligations under international refugee and human rights law and the South African Constitution, founded on the principles of non-discrimination and dignity, place a duty on the state to create an enabling environment that allows all persons, including refugees and asylum seekers, to have access to services (Klaaren, in Aleinikoff et al 2000: 221-240).

The Aliens Control Act was not removed from the statute books until 2002 when it was replaced by the Immigration Act (amended in 2004). In terms of government policy objectives the Act, and the accompanying regulations, was meant to lessen the obstacles for the entry of skilled migrants. However, except for large employers, the 2002 Act and regulations mostly made the process of entry more complicated and time-consuming and had to be amended to bring it into line with national

policy objectives. The Act generally promotes temporary rather than permanent residence and did not encourage family immigration or unification. The legislation provided for 13 types of temporary residence permit and five types of work permit (Gagnon, 2007:6-8). The Immigration Act was a pragmatic response to the country experiencing brain drain, a skills shortage as well as an increased need for service delivery and development rather than a deliberate move towards a more inclusionary and open immigration policy. It was feared that skills shortages may inhibit development and affect service delivery in the areas of health and education. This prompted the change from the Aliens Control Act to the present Immigration Act. This Act has opened the doors to South Africa for the highly skilled, but not the semi-skilled and unskilled non-citizens (Peberdy, 2009: 149-152). It allows the government to pursue applicants with “due regard to the country’s economic, social and cultural interest” (DHA Annual report 2004/2005 in Peberdy, 2009:151)

Despite the obvious improvements from the Aliens Control Act South Africa’s immigration legislation after 1994 remained problematic suggesting underlying continuities with the past and apartheid. In comparative studies done for Human Rights Watch Georgette Gagnon diagnosed the DHA as a major factor contributing to the refugee crisis. Gagnon argued that in practice the DHA is prolonging the asylum process to an extent that refugees in the area are not able to work, or study. Refugees face harassment, arbitrary arrest and detention, and encounter significant obstacles when attempting to gain access to asylum procedures (Gagnon, 2005: 60-65). In a similar study done for the CSVR Ingrid Palmary also concluded that in practice refugee and asylum seekers are not receiving their rights from the DHA (Palmary, 2006:22-26).

2.7 Xenophobic Violence

Social commentators and analysts contend that growing hostility of local communities against the refugees and asylum-seekers in their midst had been bubbling up for years since the 1990s (Misago *et al*, 2009:3). On the 12th of May, 2008 this hit a boiling point when the township of Alexandra in Johannesburg, Gauteng exploded in violence. The violence soon spread through Gauteng and, on the 22nd of May, Cape Town awoke to this same cloud of violence and despair. By the end of May, 2008 more than 20 000 non-South Africans, mostly from other parts of Africa, were displaced from their homes in the Western Cape Area alone (Powell *et al*, Cape Times May 26, 2008) and nationwide 62 people had been killed. In response there was an outcry by civil society as well as concerted efforts to stop the violence (Treatment Action Campaign, letter to refugees May 26, 2008).

These traumatic events have been commonly referred to as ‘xenophobic violence’ while analysts have conceptualized it as instances of ‘political xenophobia.’ Xenophobia is defined by the South African Pocket Oxford Dictionary of Current English, 1994 as “the hatred or fear of foreigners”. Political xenophobia on the other hand may be defined as:

...The deliberate deprivation of human, legal, political and socio-economic rights and freedoms based on ones nationality or citizenship status in the country. Political xenophobia is carried out on an institutional, policy, and political level. Political xenophobia differs from popular xenophobia which is an act or feeling of othering, fear of the stranger and is acted out by the local community and unofficial groupings...(working definition)

For our purposes this will be adopted as a working definition of political xenophobia pending further discussion (see chapter 3 below).

2.8 South African Policy Responses to, and Debates on, the Xenophobic Violence

Subsequent to the 2008 outbreak of xenophobic violence an ongoing debate about immigration and refugee policies, the legacy of apartheid, crime and poverty have started in many political, academic and social conversations (Crush et al 2008) On many sides the South African government was deeply criticized for their lack of involvement in the simmering conflict. Among the factors claimed as precipitating the xenophobic violence were public anti-foreigner comments, poor immigration policies, poor handling of the Zimbabwe crisis, administrative injustice at the Department of Home Affairs and the police tolerating vigilantism of South Africans against non-South Africans.

The xenophobic violence also prompted more general policy debates on South Africa's 2002 Immigration Act, 1998 Refugee Act and the Department of Home Affairs (DHA) protocol. A South African Migration Program (SAMP) publication concluded that current legislation and policies concerned with immigration, refugees and the displacement of non-South Africans is "incoherent, unimplemented and unimplementable" (Crush, 2008:48). At the same time the DHA has instituted its 2007/2008 strategic plan to combat xenophobia and corruption. In August 2008 the DHA set up a 'turnaround team' to deal with some of these challenges. Likewise the South African government adopted a range of anti-xenophobic policies. In response to the xenophobic violence the UNHCR created a task force, including members of the City of Cape Town, the Western Cape Premier's office and representatives of civil society. This task force meets regularly to discuss policy review, protection and reintegration of non-South Africans, but specifically how to prevent the violence from erupting in the future. Despite these efforts, it is evident especially from the recent alleged xenophobic attacks in Durban on January 4, 2009, and incidents of xenophobic violence after the 2010 World Cup that xenophobia and political xenophobia remains a threat.

In this connection the role of the DHA itself, and especially persistent allegations of maladministration and corruption in its dealings with refugees and asylum-seekers, has remained a constant theme. People who are asylum seekers have to carry a section 22 temporary asylum seeker permit that needs to be renewed by the DHA every three months⁷. Between 2000 and 2006

⁷ This makes it difficult to gain formal employment and secure housing. Asylum seekers and refugees are among the most marginalized people in South Africa, suffering unemployment, inadequate housing, food shortages, and a lack of social security, unjust administration and social exclusion.

approximately 230 200 people applied for asylum in South Africa and only 30 200 people were granted refugee status (UCT Law Clinic/UNHCR public meeting on refugee rights held at The Human Rights Commission, 2007(Fatima Khan)

Since 1994, the DHA has had many court cases and accusations of xenophobia, corruption and human rights abuses. The contentions surrounding the DHA are often associated with abuse or negligence in upholding rights of non-South Africans, especially refugees and asylum seekers. The fundamental questions, for the purposes of this thesis, are how these practices relate to the new South African Constitution's provisions for the fundamental rights of refugees and asylum-seekers as non-citizens, on the one hand, and to the existence of political xenophobia, on the other hand.

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CHAPTER 3: LITERATURE REVIEW

There is a vast, diverse and complex literature dealing with notions of rights in the contexts of migration, refugees and political xenophobia. This chapter will review selected publications, both in general and with specific reference to the South African case, which may be helpful to contextualize and provide a relevant analytical perspective on the topic of (human) rights notions and political xenophobia.. The aim is gaining a deeper understanding of political xenophobia in relation to (human) rights, citizenship and migration with a particular focus on refugees and asylum seekers.

3.1 Citizenship, Territorial Sharing and Migration

Going back to ancient Greece the rights of participant members of local political communities have been differentiated from mere territorial sharing. Aristotle already observed that not all those who live and share in the same place are also citizens:

“... A citizen is not a citizen because he lives in a certain place, for resident aliens and slaves share in the place; nor is he a citizen who has no legal rights except that of suing and being sued...His special characteristic is that he shares in the administration of justice, and in offices...He who has the power to take part in the deliberate or judicial administration of any state is held by us to be a citizen of that state...”(Aristotle, book III chapter 1, 471-472)

Aristotle primarily differentiated the position of citizens from those who are legal subjects, in the sense that they “can sue or be sued”, and from rightless slaves (and, of course, from women and children). But he also referred to the intermediate status of “resident aliens”, thus touching on the political consequences and legal implications of different kinds of cross-border migration. Historically there has been significantly different kinds of human migration and intermingled settlement, whether forced or voluntary, resulting in basic conceptual distinctions being made between “emigrants” / “immigrants”, “settlers”, “residents”, “denizens”, “exiles”, “refugees” etc.

Modern states typically distinguish between two broad categories of immigrants, labour migrants and asylum seekers / refugees. Labour migrants are those who temporarily or permanently relocate in other societies for economic reasons while asylum seekers/refugees are those who are forced to flee their country of birth at the risk of their lives. Immigration laws put economic migrants into a variety of categories, such as those of permanent residents, temporary residents and temporary workers. Application of these laws are often dependent on the host country’s labour needs.

Thomas Hammar like Kivisto and Faist suggest that there are three distinct legal statuses relevant to immigrants: alienship, denizenship and citizenship. Aliens include temporary workers, asylum seekers and those claiming refugee status as well as undocumented individuals. Denizens include migrants with permanent resident status and officially recognized refugee status. Citizens would then include the members of the nation state and naturalized immigrants (Kivisto et al 2010 :225-227, Hammar in

Bolaffi et al 2003:68). For our purposes, though, the main distinction is that between immigrants, who are presumed to be voluntary migrants and asylum seekers / refugees who have been forced to leave their homes to avoid persecution. Asylum seekers and refugees must, of course, convince a receiving nation that the claims of their impending persecution are well founded and justified in both legal and political terms.

3.2 The Origins and Development of Notions of “Refugees”

Historically the notion of a “refugee” derives from the 17th century religious persecutions and wars in Europe. During the Age of Enlightenment the absence of religious persecution became a defining characteristic of ‘civilized’ states prepared to offer protection to victims of religious persecution as “refugees”. Subsequently the typical victim groups qualifying for refugee status shifted from those persecuted for religious reasons to those persecuted for holding certain political opinions and/or being members of particular social groups (Zolberg, et al 1989:9-13).

In the first half of the 20th century the consequences of successive world wars made refugee issues into a major international concern. The League of Nations developed a pragmatic approach to refugees: determination of certain categories of persons, rather than particular individuals, as eligible for refugee status was related to the objective situation in the country of origin and whether people may be exposed to danger or other serious consequences if they returned. World War II again changed the way in which the international system effectively dealt with the problem of refugees. In December 1946 the United Nations General Assembly created the International Refugee Organization (IRO) (later succeeded by the UNHCR). Under this system individuals were required to show “valid objections” to returning to their country of origin in order to be recognized as “refugees”. Adopted into the United Nations Conventions on the Status of Refugees on 28 July 1951 the definition still applies to “any person ... who is outside the country of his nationality... because he has or had a well founded fear of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality” (Zolberg et al, 1989: 4).

3.3 Hannah Arendt: the Scandal of Human Rights and the Position of Stateless Peoples and Refugees

Following the Second World War the United Nations adopted the Universal Declaration of Human Rights in 1947. Article 14 provided that "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (<http://www.un.org/en/documents/udhr/index.shtml> accessed 12/01/2010). The Declaration defined a refugee as someone with a “well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." It might perhaps be expected that the claims to human rights by refugees and

asylum seekers, given their special vulnerabilities as stateless people, would be widely and readily acknowledged. Yet in practice this has proved a complex and contested matter.

Hannah Arendt famously considered the contemporary condition of refugees and stateless peoples as a "scandal" for human rights discourse. With reference to the Universal Declaration of Human Rights Arendt argued that the large numbers of refugees and stateless peoples after World War II should be the main objects of human rights protection but that in practice this amounted to merely wishful thinking precisely because human rights did not yet have effective and concrete status as legal rights. In Arendt's classical discussion (1955) of the unresolved political problems of the new class of contemporary stateless persons, as distinct from those of traditional political refugees, she contended that after World War II, when the League of Nations passport (the precursor of the present day refugee permit) lost its validity, stateless people were increasingly dispensed with and marginalized as undesirable (Heuer, 2007:4).

According to Arendt the nation-state model of citizenship meant that the great increase in stateless peoples and the special vulnerability of asylum seekers and refugees constituted a major contemporary crisis. She argued that "since the peace treaties of 1919 and 1920 the refugees and stateless people have attached themselves like a curse to all newly established states on earth which were created in the image of the nation state" (Arendt in Zolberg et al 1989: 12). In a system of sovereign nation-states only nationals qualified as citizens eligible for full protection from legal institutions. According to Arendt statelessness equated with the effective loss of all rights: "As the world has been completely organized into states, persons who lose a polity find themselves thrown out of the family of nations altogether" (Arendt {1951} in Waldinger et al, 2003:17). She argued that national sovereignty, human dignity and civic responsibility were incompatible, suggesting a need to rethink the "ethical foundations of human rights" (Isaac, 1996:61). Arendt advocated for the "right to have rights" and the right for everyone to belong to a community:

"The right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible" (Arendt 1951, 1968: 296-297 in Benhabib, 2004: 55)

Being a refugee entailed being persecuted, expelled or driven away. A stateless person is one who cannot find another polity to recognize her basic human right to membership of a community.

Arendt's post World War II diagnosis remains relevant. The Open Society Justice Initiative argues that "statelessness is a widespread problem that, though formally recognized by scholars and official bodies, has yet to generate an adequate response on the part of states" (Open Society Justice Initiative, 2004:9-10) . The United Nations High Commission for Refugees has "identified many instances throughout the world in which individuals may be physically present in a country, even for generations, but cannot normalize their stay nor establish lawful residence" (Open Society Justice

Initiative, 2004:9). This suggests that there is a fundamental problem in conceiving how the rights of long term refugees or stateless peoples, as non-citizens who do not or cannot aspire to full integration through naturalization, might be realized in practice as long as the dominant paradigm remains that of nation-state citizenship.

3.4 Civil and Social Dimensions of Citizenship: Implications and Consequences for Refugees and Asylum-Seekers

On the model of nation-state citizenship, membership of the nation is typically conflated with citizenship as such, thus inevitably raising problems regarding the claims to citizenship by subjects of the state who are not members of the nation. As far as refugees / asylum seekers are concerned this may compound their problematic status. In so far as refugees/asylum seekers are neither expatriates (who can rely on their citizenship of another country as grounds of claims) nor prospective immigrants (who need to satisfy the requirements for citizenship of the host country), it is not altogether clear what kind of relationship to citizenship they can have. However citizenship need not be equated with nation-state citizenship only, and certain components of citizenship, especially that of legal, civil and social citizenship as distinguished by T.H.Marshall, may potentially apply to refugees and asylum seekers even as non-citizens or stateless people.

Marshall distinguished the different dimensions of citizenship in terms of civil, political and social rights, On his analysis, civil rights refer to personal freedoms and to individual rights such as the freedom of speech, worship and association; the right to own property, and the right to justice. Political rights involve participation in the exercise of political power and make it possible for citizens to assert their ability to protect themselves from the state (Marshall, 1950: 10-11). Social rights bestow a degree of protection from market forces. Marshall saw the welfare state as the means to compensate for economic and social inequalities under capitalism -- preserving social solidarity within the nation-state. In Marshall's view citizenship provides legal status equality while legitimating the social stratification resulting from other institutions. An important feature of Marshall's theory is the permanent tension or contradiction between the principles of citizenship. (Marshall, 1950: 18-46).

Marshall's conception of the different dimensions of citizenship is of considerable interest in relation to the status and rights of asylum-seekers and refugees. Full citizenship is something that can be acquired by birth, or through immigration and naturalization but is distinct from the rights of those granted asylum and refugee status (Marshall, 1950 18: 46). By definition asylum-seekers and refugees, unlike prospective immigrants, do not aspire to political citizenship. Accordingly they cannot claim rights to participate in the exercise of political power. But that need not mean that as non-citizens they cannot have equal civil and social rights. Compared to the nation-state model of citizenship Marshall's differentiated notion of citizenship also has very different implications for the problem of xenophobia in relation to refugee/asylum seekers. Although Marshall still conceived

citizenship in the context of the nation-state, he also highlighted the impact social exclusion and inclusion can have on differentiated groups in society and how social citizenship might need to be extended to moderate this.

Darren J. O'Byrne and Frank Cass provide an updated and expanded version of Marshall's differentiated rights⁸. In their view there are four essential components to citizenship: membership, rights, duties and participation. The composition of membership of a political community is often contested. Even comparatively inclusive societies inevitably involve some exclusionary processes (O'Byrne & Cass, 2003:1-25). However, membership, rights, duties and participation do not necessarily go together in simple binaries separating citizens from non-citizens. This is particularly true in relation to the position of refugees/asylum seekers. Refugees claim certain rights and recognize correlative duties yet do not aspire to membership of a political community or seek full political participation. Not all issues of citizenship are about the inclusion or exclusion of members of a political community. There are major differences between conceiving citizenship in terms of membership of a nation versus conceiving citizenship in constitutional or democratic terms⁹. Nation-state citizenship distributes affinity through socialized obligations. Traditionally obligations to immediate family and community members are given greater weight than the needs of strangers (Ignatieff, 1984). This hierarchy of concentric circles of duties and obligations is a feature of many traditional moral approaches (reinforced by the correlational linkage of rights and duties). However, in a human rights perspective the claims of, and correlative duties to, strangers or non-members of the political community have equal standing within the context of a common humanity.

3.5 Rights and Duties of Citizens and of Refugees/Asylum Seekers

Conceptually rights are relational and imply correlative duties on the part of others. Thus if citizens have rights to freedom of speech and movement then that implies correlative duties on the part of others (including the state) not to interfere in their free speech and movement (Hohfeld, 1923). In the case of non-citizens (such as refugees and asylum-seekers) their constitutional rights must also imply correlative duties on the part of others, including the state. In practice this means that DHA officials have a constitutional duty to observe and give effect to the constitutional rights also of non-citizens (such as refugees and asylum-seekers).

⁸ "Civil rights: rights necessary for individual freedom-liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. Political rights: right to participate in the exercising of power as a member of a governing body or an elector of such a body, allowed for by the nature of the democratic system. Social rights, such as the rights to welfare, education, security and well-being, as befits a member of civil society, and allowed for by the welfare state" (O'Byrne *et al*, 2003:7)

⁹ O'Byrne elsewhere suggests that there are four components of citizenship: "1. Rights as possessions of individuals 2. Duties to others and to the community 3. Membership of a (political) community, defined by identity as well as formal inclusion 4. Participation in that community" (O'Byrne, 2003 in O'Byrne 2008:2)

Membership of a political community also imply reciprocal duties or obligations on the part of rights-bearers themselves. Thus citizens have reciprocal duties to do military service or be called for jury service. Michael Walzer argues that citizens have such moral and political obligations acquired through socialization as members of communities and nations and varying from society to society. Political obligations, unlike relational duties or natural duties, are only really incurred when there is willful membership (in effect a version of social contract theory). Walzer argues that the civic duty to obey the law may in certain circumstances also provide grounds for a duty of civil disobedience (Walzer, 1970:106-110). This has significant implications concerning the possible obligations and duties of non-citizens. Thus slaves may be coerced into military service but cannot be said to have a duty to do that. Slaves may not even have any moral or political obligation to obey the law (and likewise are unable to engage in civil disobedience as distinct from criminal disobedience). As non-citizens refugees and asylum-seekers, too, do not have the political obligations incurred through membership of a political community. Thus they are not liable for military service or for jury duty. However, in so far as non-citizens also have rights these do imply reciprocal duties as well. Thus non-citizens, as much as citizens, have duties to obey the law and to pay applicable taxes, etc. It is a different question whether refugees and asylum-seekers, as non-citizens, have any distinctive duties and obligations not incumbent on citizens.

On Walzer's analysis an alien's level of obligations as well as rights differ from those of a citizen. Typically refugees do not commit themselves to a permanent life in their host country; that fact may then influence their own or others' conceptions of what rights they are entitled to and what they owe the state and local communities (Walzer, 1970: 106-110). This may also have implications for the duties and obligations owed to them by local officials and communities. To the extent that citizens are conceived to have primary obligations to fellow members of their political community, those who are not members of that political community can become quite vulnerable and at risk to abuses of their rights. In that case, Kant's notion of a basic principle of universal hospitality, implying correlative rights and obligations to other humans in conditions of need, acquires special relevance.

3.6 The Status of Refugees in the Constitution and Bill of Rights

As discussed in 2.5 above the Bill of Rights in the 1996 Constitution guarantees basic, political, cultural and socioeconomic rights to everyone, both citizens and non-citizens, that resides in the country. The Preamble of the Constitution inclusively declares that "South Africa belongs to all who live in it, united in our diversity" . However, despite the inclusive language of the Constitution official attitudes towards immigration and forced migration have been very slow to change (Peberdy, 2001: 16). Anton Katz's discussion of South African case law¹⁰ concerning immigration points out that "the courts' attitude to immigration issues reflects the transition [from] a society based on

¹⁰ Katz cites the cases of *Xu v Minister van Binnelandse Sake* / *Naidenov v Minister of Home Affairs* / *Pareh v Minister of Home Affairs*

exclusion and control [to] one based on inclusion and respect for all” (Katz, 2004:109). To begin with the state, in particular the DHA, asserted that non-citizens have no constitutional rights. In cases such as *Xu v the Minister of Home Affairs*, xenophobic attitudes seemed to pervade the approach of the courts. However more recently the highest courts found that the Constitution and the Bill of Rights do in fact apply to non-citizens (including illegal foreigners) (Katz, 2004: 109 -115).

Though protected by the Constitution, non-citizens are excluded from political rights such as the right to vote. Certain rights and freedoms (i.e. those relating to political citizenship) are guaranteed only to South African citizens¹¹. (Gutto, 2001:230). Internationally non-citizens are excluded from democratic political processes. They do not have a voice in the making of public policy and do not enjoy unqualified rights of residency. This reflects their position as excluded from political citizenship. However, it does not follow that they should also be denied civil and social rights. In practice non-citizens often lack access to protective legal mechanisms. The vulnerabilities of non-citizens are increased since many are also members of racial or ethnic minorities. The Open Society links racial discrimination and discrimination against non-citizens (Open Society, 2004: 9-26).

The Bill of Rights requires the state to “...take reasonable legislative and other measures, within its available resources, to achieve the[ir] progressive realization...” (The South African Constitution 1996). This may have considerable significance with regard to extending socio-economic rights to non-citizens. However, the extent to which these constitutional provisions mean that non-citizens are also entitled to rights such as access to adequate housing, health care, food, water, and social security is yet to be adjudicated by the Constitutional Court (Gagnon, 2007:2-9).

3.7 The Development of a New Legislative Framework for Migration and Refugees

In comparison to other countries, the legislative protection of refugees is still a relatively new development in South Africa. Legislation dealing with migration, especially forced migration, still show close linkages with apartheid (Klaaren 2007:1-8). International law provides tools for the management and protection of asylum seekers as well as a framework of principles within which problems can be resolved (Goodwin-Gill, 1986:12). National legislation needs to be complementary to these instruments. As outlined in 2.6 above South African legislation and policies regarding immigration and refugee affairs changed significantly since 1993. Peberdy argues that this shift in

¹¹ Section 19: Rights to form, choose, participate in and campaign and recruit members for a political party, right to free, fair and regular elections; the right to vote and stand for and hold a public office.

Section 3 and 20: The entitlement to common citizenship with equal rights, privileges, benefits, duties and responsibilities, as well as the guarantee against deprivation of citizenship.

Section 21: the right to a passport and freedom to enter, remain and reside anywhere in the republic

Section 22: The right to freely choose a trade, occupation or profession (Gutto, 2001:231)

immigration policy coincided with concomitant changes in the national mode of governance and political balance of power and therefore in the nation-building project of the state (Peberdy, 2009:3).

The 1998 Refugee Act is often characterized as a progressive piece of legislation because the definition of the refugee in it is far more extensive than the definition in the UN Convention¹². As outlined in 3.2 above, the UN Convention only accounts for refugee status on an individual basis, whereas the 1998 Refugee Act provides for refugee status to be granted on the basis of a serious disruption in the country of origin. Handmaker and Parsely argued that the Act did not fit comfortably in the immigration system and was implemented in an ad hoc manner. The authors pointed to capacity-related issues as well as insufficient resources to deal with the increasing numbers of asylum applications (Handmaker et al, 2001: 41-45). Crush and Dodson likewise argued that, notwithstanding the new 1998 Refugee Act and the 2002 Immigration Act, the legal framework governing immigration remained almost unchanged. They contended that the process of reaching a new migration policy in South Africa was deeply flawed and resulted in poor implementation (Crush et al 2001:444-451). Dodson attributed the long delays in developing more progressive immigration policies in South Africa to “national politics, bureaucratic bungling, and the very real dilemma of formulating democratic, rights-based migration in what is a highly xenophobic society” (Dodson, 1999:1). Likewise Harris argues that racism and xenophobia are still key features of South Africa’s immigration legislation and practice (Harris, 2002: 9-12). More generally Loren Landau observed that, while immigration policies are important, “the power of law and influence of policy are minimal throughout much of Africa” (Landau, 2006:235). In South Africa, too, many people tend to live outside state regulation

Similarly, the Forced Migration Studies Programme (Misago et al for FMSP) also concluded that there are major deficiencies in the application of immigration policy in South Africa¹³ and that refugee protection must be “fundamentally re-shaped to recognize that the refugee system is not an immigration control system” (Misago *et al*, 2010:9) . Misago argued that South Africa still needs to

¹² In addition to the UN Refugee Convention, this overhaul of the existing immigration and refugee legislation was also guided by the African Union (1969) Refugee Convention, the International Covenant of Civil and Political Rights (ICCPR), In terms of these Conventions the government has obligations under international refugee and human rights law as well as the South African Constitution. These Conventions are founded on the principles of non-discrimination and dignity, and place a duty on the state to create an enabling environment that allows all persons, including refugees and asylum seekers, to have access to state services. The state has a duty to protect the rights of refugees and asylum seekers. The UNHCR is charged under its mandate with protecting refugees and asylum seekers.)

¹³ They argue that the most serious consequences include the following:

1. Protection: the individuals whom the refugee system was designed to protect, i.e. those who have fled serious rights abuses, are not receiving this protection.
2. Administrative justice: Disregard for the Constitutional guarantee of administrative justice erodes the rule of law in South Africa, undermines public confidence in the institutions of the state, and threatens the vibrancy of democracy.
3. Financial and institutional rationality: Significant state resources are being spent on a refugee status determination system that is failing to fulfill its core function, meaning that these resources are, being wasted. (FMP, 2010:8)

develop its laws, norms and practices to achieve a democratic, rights-based migration policy so that it can capitalize on the contributions of non-South Africans in the country and protect the rights, security and livelihoods of all people living in South Africa.

3.8 Conceptualizing Popular and Political Xenophobia

The term ‘xenophobia’ is generally used by social scientists to describe the prejudicial attitudes and exclusionary rhetoric of local communities towards ethnically differentiated newcomers in their midst. In this sense ‘xenophobia’ has been part of human experience across time and place (Yakushko, 2009: 36-58), and reflects a fundamental human trait “to divide the world into Friends and Foes” (Soldatova, 2007: 105). Serge Moscovici described xenophobia as “a complex, multifaceted system of exclusion that produces social inequality between different ethnic groups. This system is (re)produced by both the social practices of dominant groups, including their discourses, and by shared representations” (Moscovici, 1981 in Montali et al unpublished:1). Moscovici argued that xenophobia refers not only to overt forms of social exclusion, but includes indirect forms. He suggested that xenophobia is a “dynamically changing, ideological dimension of social practices, including discursive practices” (Moscovici (1981 in Montali et al unpublished :1).

Popular xenophobia refers to personal and collective attitudes and prejudices rather than to public policies and institutional culture. Such attitudes and prejudices often divides people into ‘us’ and ‘them’, - ‘us’ being a closed in-group suspicious of ‘them’. In South Africa the derogatory term *makwerekwere*¹⁴ is commonly used as a generic reference in such popular ‘othering’ of (African) foreigners. Francis Njamnjoh argued that the term *makwerekwere* typically refers to a black person who not only cannot speak the local languages, but is also someone who comes from a country that is assumed to be less economically or culturally developed. He suggested that racial hierarchies seen under apartheid come into play: *makwerekwere* are believed to be people with very dark skin. Additionally, such people are thought to come from countries ravaged by civil war, AIDS, dictatorships, corruption, and crime (Nyamnjoh, 2006:39-40).

As distinct from popular xenophobia political xenophobia is concerned with hostility to foreigners at the level of legislation and public policies as well as that of institutional culture. Meredith Watts defined it as “the desire or willingness to use public policy to discriminate against foreigners” (Watts, 1996: 97) Watts argued that political xenophobia is a specific form of hostility toward foreigners that requires a chain of elements: prejudice as a "discriminatory potential," and a two-fold process of motivation and targeting whose elements are ideology and a sense of threat (Watts, 1996: 97-122). Likewise Daphna Canetti-Nisim and Ami Pedahzur argued that political xenophobia is “the desire or

¹⁴ “Makwerekwere” is an onomatopoeic reference to the different languages spoken by non-South Africans as heard by South Africans (Bouillon in Njamnjoh 2006: 39)

willingness to use public policy to discriminate against foreigners” (Canetti-Nisim et al, 2003:317). These distinctions inform the working definition of political xenophobia adopted above (see 2.7)

3.9 Xenophobia in Post-Apartheid South Africa

Since the 2008 xenophobic violence analysts have increasingly looked at the state’s role in precipitating xenophobic attitudes in society. Official immigration policies and legislation may be characterized on a spectrum ranging from open and flexible to more strict and inflexible. One purpose of this research is to investigate political xenophobia and its correlation with popular xenophobic attitudes and violence. The correlation between strict official immigration policies and popular xenophobia may not be a direct one, i.e. a society with strict and inflexible immigration policies limiting the influx of immigrants and refugees and according them a minimum of rights may also experience few instances of actual xenophobia while conversely a society with open and flexible immigration policies and legislation allowing the influx of large numbers of immigrants and refugees may then experience a backlash of xenophobic attitudes and violence from local communities.

South Africa has become known as one of the most hostile countries in the world towards non-citizens (Crush et al, 2009: 15). Already in 1995 it was noted at the Southern African Bishops’ Conference “that there is no doubt a very high level of xenophobia in our country” (Williams, 2008:1). Public opinion surveys conducted by the South African Migration Project (SAMP) in 2006 found that 37 percent of a nationally representative sample wanted a complete ban of non-South Africans in the country. Three out of four supported electrification of borders and 72 percent agreed that non-citizens should carry personal identification with them at all times (Crush et al, 2009:15). In 1999, the UNHCR reported that xenophobic violence was on the rise – from 1997 to 1999 more than 30 refugees and asylum seekers were brutally killed (UNHCR,2006:1). Public opinion surveys confirm that there is a high level of intolerance towards non-citizens whether they are immigrants, migrants, or refugees (Crush 2001, 2008, 2009). Research administrated by SAMP, Human Rights Watch, HSRC and Forced Migration Studies Programme (FMSP) offer similar results suggesting negative conceptions of foreigners without distinction of their status in the country. In the view of analysts “South Africa is a highly xenophobic society which, out of fear of foreigners, does not naturally value the human rights of non-nationals” (Landau et al, 2005: 2).

Such popular xenophobia and xenophobic violence has deep historical roots (Misago, 2009: 3).“The current xenophobic tendencies targeting Makwerekwere are clearly an outcome of a narrowly nation-state-based citizenship” (Nyamnjoh, 2006: 40). Sichone likewise argued that the high levels of xenophobia in South Africa are due to residual trauma and disempowerment stemming from apartheid as well as to poverty and unequal resources (Sichone, 2008: 310). But political xenophobia is not merely a matter of historical heritage; it is also a matter of current official policies and practices. Thus CoRMSA found that the May 2008 xenophobic violence was fueled by various factors that

included disaffection and anger by South Africans during a difficult economic period, lack of service delivery for people living in poor conditions; perceived competition with non-South Africans for jobs and business opportunities; as well as incitement by organized criminal elements. They argued that this was heightened by the government's failure to regularize the presence of large numbers of non-South Africans and their inability to formulate a humanitarian programme addressing the needs of Zimbabweans and other refugees. CoRMSA further argued that the arrest and deportation of non-South Africans has signaled the condoning of violence by the government and was conducive to xenophobic violence (CoRMSA, 2008:8).

In the context of the deep historical roots of xenophobic attitudes as well as the range of factors in post-apartheid society conducive to popular xenophobia and xenophobic violence, analysts have been especially concerned with the role of political xenophobia as a crucial intervening variable. Thus in wider perspective Loren Landau pointed to the influence on public opinion of official policy approaches: in public policy statements international migration is typically framed as a “phenomenon to be prevented, slowed, or stopped” (Landau, 2006: 222). The paradigm of official xenophobia thus codes non-citizens, in particular those who are poor, marginally skilled and from developing countries, as threats to the host country's economic, political and social programs. SAMP also argued that government officials and bodies precipitate xenophobia through their use of policies and language in the media (Crush, 2008:39). In this connection Mazibuko and Peberdy stressed the significance of the ruling ANC as a major determinant of public opinion in South Africa. The authors suggested that when marginal groupings are attacked and the perpetrators remain exempt from punishment it sends a dangerous message to communities (Mazibuko, et al 2010:7). Ansilla Nyar pointed out that during the incidents of xenophobic violence perpetrators were heard singing *umshini wami*¹⁵, the struggle song associated with President Zuma. In the context of the attacks it served as a marker authenticating South Africans and differentiating them from non-South Africans – testing people's knowledge of local idioms (Nyar, 2010: 1-27). Micheal Neocosmos argued more directly for a connection between the role of government and popular xenophobia. He particularly stressed “the role of politicians and state institutions in the making of a culture of xenophobia. However this public culture has filtered down to the whole of society” (Neocosmos, 2006: 2). Neocosmos acknowledged that there are a myriad of factors contributing to xenophobic violence, but highlighted the significance of the political discourse of xenophobia

3.10 Conclusion

The emergence of xenophobic violence targeting refugees and asylum seekers has been an unexpected and darkly ironic feature of post-apartheid South Africa. The anti-apartheid struggle and post-

¹⁵ *Umshini wami* – is an ANC struggle song which can be translated, as “bring me my machine gun”. It was revived and popularised by President Jacob Zuma during his campaign for the presidency

apartheid negotiated settlement involved claims to inclusive citizenship by those who had long been excluded on grounds of race and ethnicity. At an abstract level it might perhaps be expected that those who themselves had been excluded from citizenship and its associated rights and privileges would likely be supportive of others who are excluded and aspire to basic rights of settlement, care and protection. But at a material level this does not necessarily follow: those who have only recently achieved their claims to common citizenship might rather be inclined, rightly or wrongly, to view “outsiders” seeking admission to South African society as competitors threatening their own hard-won civil and social rights, especially at the level of jobs, housing etc.

The particular history of the South African political struggles and especially the ways in which these were centrally concerned with issues of national citizenship may further compound such responses. The majority of South Africans, who have only recently achieved full citizenship, are not themselves immigrant communities who have relocated from elsewhere (and who might accordingly have some solidarity with other immigrant or refugee communities). Rather, they are the indigenous people of the country who under colonial rule and apartheid were subordinated and excluded by “settlers” from elsewhere. In a basic sense the “liberation struggle” and anti-apartheid resistance thus involved an assertion of the prior right to the land of indigenous inhabitants as the legitimate basis of national citizenship. At the same time that same history of political struggle served to challenge the legitimacy of “settlers” and other outsiders seeking access to South African society. Historically South Africa has been a colonial rather than an immigrant society; now that it has become a post-colonial society the burdens of that history cannot so easily be discarded. In particular the close historical association of the indigenous peoples’ right to the land with the grounds of citizenship may make it more difficult to conceive of South Africa as an immigrant society who can accommodate outsiders with claims to citizenship on different kinds of grounds.

At the same time refugees and asylum seekers should not be equated with prospective immigrants aspiring to full citizenship. But precisely that distinction between prospective immigrants and refugees / asylum seekers may be a difficult one to make in terms of South Africa's history of struggles for citizenship. To those who have so long been so passionately concerned with achieving full citizenship in their own country it may be difficult to conceive that others are not necessarily aspiring to full membership of South Africa society as well. Those who historically rejected the notion that they themselves could be aliens or refugees in their own country may find it difficult to understand the claims of others who are only seeking refugee status and not full citizenship of that same country. As Hannah Arendt observed, “sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality, and exclusion” (Arendt in Landau 2006: 236).

While intending to examine the inter-relationships between South African public policy and legislation, conceptions of rights and the influence of political xenophobia on popular xenophobic violence this

thesis will not directly investigate the views and conceptions of local community representatives as such. Instead it will explore the relevant conceptions of three other key groupings involved in these interactions, i.e. those of human rights lawyers, of refugees and asylum-seekers and of DHA officials. It will require another and more substantial research project to address the central topic of local communities' views and conceptions in this regard. Meanwhile a closer critical analysis of the conceptions of the selected three groupings of human rights lawyers, refugees / asylum-seekers and DHA officials may prepare the ground for that enterprise.

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CHAPTER 4: HUMAN RIGHTS LAWYERS' CONCEPTIONS OF HUMAN AND LEGAL RIGHTS AND OF POLITICAL XENOPHOBIA IN DEALING WITH REFUGEES AND ASYLUM SEEKERS

4.1. Introduction

This chapter is the first of three that seek to unravel the rights conceptions of human rights lawyers, of refugees and asylum seekers as well as of Department of Home Affairs Officials along with their respective understandings of political xenophobia. This specific chapter focuses on the relationship between human rights lawyers' and advocacy officers' conceptions of the human and legal rights of citizens and non-citizens and the problem of political xenophobia in dealing with refugees and asylum seekers. The discussion is based on a set of semi-structured interviews conducted in October and November 2008 with 2 advocates of the High Court in Cape Town, one lawyer and one advocacy officer, all specializing in refugee law and human rights.

This chapter seeks to reconstruct how these human rights lawyers conceive of the position of refugees and asylum seekers: to what extent are they concerned with their rights rather than, e.g., their socio-economic conditions, refugee needs or expectations, histories and backgrounds. It also attempts to unpack which rights of refugees and asylum seekers these human rights lawyers are mainly concerned with legal rights in terms of relevant legislation and policy, constitutional and/or human rights? How do they conceive of the relevance and implications of the 1996 Constitution's provision for the rights of refugees and asylum seekers as non-citizens? How do they conceive of the relevant legislation (i.e. the 1998 Refugee Act and the 2002 Immigration Act) as determinations of the legal rights of refugees and asylum seekers: do they consider these legal determinations as clear and consistent with each other and with the Constitution? If not, what do they regard as the significance of the consequent lack of clarity and ambiguity for the position of refugees and asylum seekers? How do they conceive of the problems in applying the legislation and implementing official policy in securing the rights of refugees and asylum seekers: if there are serious problems of implementation, to what are these attributed by the human rights lawyers and what do they conceive as the significance of these problems? Finally, to what extent do these human rights lawyers conceive of a connection between, on the one hand, failures to secure the rights of refugees and asylum seekers and, on the other hand, the recurrence of political xenophobia? In other words, to what extent do the human rights lawyers conceive of the causes of, and solutions to, the problem of political xenophobia in terms of rights?

The four human rights lawyers interviewed were selected for their extensive and varying professional experience with asylum seekers and refugees, human rights advocacy and legislation. This is why in some areas there is sometimes a concentration from one of the respondents versus another, given their expertise. There is a concentration. The four interviewees do not constitute a representative sample

but illustrate some typical conceptions of human rights lawyers. Our findings below are thus not meant to be generalizations of what South African human rights lawyers believe. The four participants were selected for their professional experience of, and differing roles in, human rights advocacy in an attempt to have a small but diverse sample illustrating relevant human rights lawyers' conceptions of the position of refugees and asylum seekers. Two of the participants were selected with a view to their specialized legal knowledge while the other two were chosen based more on their practical experience in advocacy. Two of the participants, Anton Katz and Brendan Adkins, are Advocates of the High Court of South Africa who specialize in Refugee and Immigration law. William Kerfoot is an attorney at the Legal Resource Centre (LRC). Kerfoot has specialized in cases dealing with refugees and asylum proceedings since 1996. The LRC is one of two public interest human rights law firms in Cape Town representing refugees and asylum seekers (the other being the UCT Law Clinic). Duncan Breen is the advocacy officer at the Consortium for Refugees and Migrants in South Africa (CoRMSA), which acts as a networking body to promote and protect refugee and migrant rights. He previously worked at the UCT Law Clinic advocating for refugee rights. Although Breen is not a practicing lawyer, he does act in an advocacy position that entails working closely with refugee and immigration legislation and the DHA.

The informal but semi-structured interviews with these four individuals sought to elicit their conceptions, as human rights lawyers, of the position of refugees and asylum seekers as well as their professional takes on the problem of recurrent political xenophobia. As with any profession, individuals may at times also express personal opinions. The individuals concerned are not only human rights lawyers but also South African citizens with their own material interests as well as social and cultural ties with local communities which may in some circumstances be in tension with their professional views and roles. This research is primarily concerned with their shared conceptions as human rights lawyers in their professional capacities and less with the tensions that arise from the internal turmoil of advocating for Non-South Africans while also being South African citizens.

4.2. Unpacking the Human Rights Lawyers' Conceptions of the Rights of Refugees and Asylum Seekers

For obvious reasons human rights lawyers are in the first instance concerned with the legal rights of refugees and asylum seekers, i.e with the rights that they are eligible for in terms of South African law, as well as with the official policies applied to them. Even so we need to distinguish between different kinds of rights relevant to refugees and asylum seekers. These relate to two different contexts in which their rights need to be considered. The first context is that of their status as non-citizens with special needs entitling them to enter and reside in South Africa. In this context refugees and asylum seekers may have immigration-type rights which focus on their ability to remain in South Africa, leave and come back. The second context is that of their position as residents who have to

carry on with their lives, families, work etc. in a foreign country. In this context refugees and asylum seekers may have civil, political and socio-economic rights which focus on freedom of expression, administrative justice or housing and education. But for human rights lawyers the rights of refugees and asylum seekers will involve more than just their legal rights in terms of South African law. Their position has to be considered also in the light of their human rights as well as the constitutional rights they might be entitled to. Indeed it can be expected that human rights lawyers will be inclined to give particular weight to considerations of human and constitutional rights in their interpretation of the legal rights of refugees and asylum seekers.

4.2.1 Legal and Human Rights:

“...The right to human dignity knows no national boundaries...” (William Kerfoot Sept 26, 2008)

When explicitly confronted in the interviews with the distinction between human rights, on the one hand, and legislated or constitutional rights, on the other hand, the human rights lawyers typically suggested that this was a “philosophical” debate between ethics and law. However, their responses were marked by a certain ambiguity. Katz commented that the Universal Declaration of Human Rights is a ‘wish list’¹⁶, but also insisted on the basic importance of human rights and constitutional rights¹⁷. Like other interviewees he described a tension between what the law is and what is believed to be (morally) right or just. It appears that the conceptions of these human rights lawyers are informed by a ‘humanist’ mindset and a basic belief that all people should be treated the same irrespective of their differences in legal status and nationality¹⁸. For Katz it is difficult to separate one’s view of ethics from law¹⁹. In this sense, then, refugees and asylum seekers’ human rights have more weight than their specific legal rights.

To some extent human rights lawyers can reconcile the tension between ethics and law through the notion that it is the function of the South African Constitution to crystallize the “wish list” of the

¹⁶ “...That’s a philosophic question. The debate I suppose would be when you’re born you’re born inherently with a whole series of rights and all the Constitution does is, it articulates in a particular way certain of those rights... After World War II the United Nations was born and the General Assembly on the 10th of December 1948 adopted the Universal Declaration¹⁶. It’s not law; it’s a statement of wishes. There’s some who say it’s crystallized into law but that’s another debate. But it wasn’t law...” (Anton Katz interview Sept 9, 2008)

¹⁷ “... are human beings all born with the same innate rights, regardless of nationality? What are more important, legislated rights or individual and society’s conception of these rights?... “(Anton Katz, Sept 9, 2008) These rhetorical questions actually imply that in some ways human rights may be more basic than the ‘legislated rights’ which might obtain in a particular time and place.

¹⁸ “...But the principle being [that] there should be in principle no [discrimination] – all human beings are the same...” (Anton Katz, September 7, 2008)

¹⁹ “...A person who [has] been brutalized and tortured and arrives and been here for five years and he says, “I’ve been making a living selling sweets in the corner shop and now I’ve been kicked out [of] my home by some xenophobic thugs,” I think that type of person, morally and legally, may be entitled to different treatment than people [merely] visiting South Africa...” (Anton Katz September 7, 2008)

Universal Declaration of Human Rights as part of law while subsequent legislation could make these into enforceable rights. Adkins articulated this conception of the Constitution and legislation as the ‘embodiment’ of human rights²⁰. Kerfoot and Breen agreed but added that this only applied in a constitutional democracy and not, for example, in the authoritarian setting of apartheid South Africa. Significantly, with respect to socio-economic entitlements there appeared to be some qualification to the human rights lawyers’ assumption of an implicit continuum from human rights to their ‘embodiment’ in legal rights. While arguing that under law all people were entitled to the same rights and that morally all people should be treated with the same standard, some of the lawyers shifted their position when speaking about the socioeconomic provisions citizens should be entitled to, as against the similar entitlements of refugees and asylum seekers as non-citizens.²¹ They seemed to suggest that the socio-economic needs of South African citizens should have priority to the similar claims by non-citizens. However, other lawyers consistently maintained there was no cause for such differentiation in entitlements to socioeconomic resources and/or that there need not be any distinction between citizens and non-citizens in this regard²². We will return to the issue of the differential socio-economic rights of non-citizens at the end of this sub-section.

4.2.2 Constitutional Rights of Refugees and Asylum Seekers as Non-Citizens:

The interviewees stressed the significance of the fact that in terms of the Constitution of 1996 everyone in South Africa, citizens as well as non-citizens, are entitled to both civil/political rights as well as socioeconomic rights²³. In the formulation of the Constitution and the Citizenship Act of 1995 who was a citizen had been a matter of considerable debate²⁴. The criteria for being a “citizen” were never fully defined by the Constitution. Katz suggested that this was due to the Constitutional

²⁰ “...Constitutional rights are the embodiment of human rights. In other words, they’re inherent human rights to life, to dignity, to freedom, etcetera, which are then simply embodied in [law]– so it’s to give effect to those ... natural human rights which we can aspire to, which are then formalized in a constitutional document or a document which then ... gives them meaning, gives them obligations,[as] rights, etcetera...” (Brendan Adkins, Oct 7, 2008)

²¹ “...Economically I think with the transition to the present government ... there’s a huge backlog to catch up just for citizens, if I can put it that way. And we don’t seem to be making as good inroads into that [backlog] as I think we should be...” (Brendan Adkins Oct 7, 2008)

²² “...Why should somebody who comes from the Eastern Cape – a South African citizen – and arrives in Cape Town and says, “I’m a South African citizen, give me education,” be treated any differently to a Zimbabwean who’s born on the other side of a particular river called the Limpopo, who arrives in Cape Town and says, “Give me education”. Why should they be treated differently...” (Anton Katz, Sept 9, 2008)

²³ “...Well the Constitution says that ‘everyone’ – and that’s the word used – has certain rights such as education... Section 27 of the Constitution says “Everyone has the right to have access to healthcare service, sufficient food and water, social security,” and also “Everyone has the right to have access to adequate housing...” (Anton Katz, Sept. 9, 2008)

²⁴ “...In 1994, when the South African Interim Constitution was being adopted, it wasn’t clear who were citizens. And the debate was: should they have made everybody who lived in South Africa a citizen, or what does it mean to live here, how long, {in order to qualify as a citizen}? {And what about} people [who were not] born in South Africa?... (Anton Katz, Sept 7, 2008)

Assembly being unsure of how to deal with the restoration of citizenship to people from the former “independent” national states of Transkei, Bophuthatswana, Venda and Ciskei. The reason why the Constitution did not tie basic rights to citizenship, was the need to provide for the constitutional rights of people from the designated homelands under apartheid. They could not be regarded as citizens of the new South Africa until such time as their citizenship had been restored, yet they needed to be provided for²⁵. In this way the Constitution came to provide a set of basic rights for “everyone”, citizens and non-citizens alike. At the time, the framers of the Constitution did not necessarily intend to provide such rights also for other non-citizens such as asylum seekers and refugees. But in effect these provisions of the Constitution now determine the constitutional rights of refugees and asylum seekers as non-citizens.

These human rights lawyers were primarily concerned with general civil and political rights. In their view civil and political rights are rights that everyone is entitled to. They especially stressed basic rights and freedoms such as the right to equality; to human dignity; to the security of person; to privacy; to freedom of religion, belief and opinion; to freedom of expression; to freedom of assembly, demonstration, picket and petition; to freedom of association; to freedom of movement; to freedom of trade, occupation and profession; and labour rights. In their view asylum seekers and refugees should be entitled to the same civil and political rights as citizens²⁶.

The human rights lawyers noted the significance of the limitations clause to the Constitution: in situations where the government may try to limit any basic rights it has to make application under section 36 of the Constitution -- which is based on human dignity, equality and freedom -- and would have to show that any such limitation is reasonable and justifiable in an open and democratic society. Accordingly, as Katz explained, under the Constitution non-citizens are entitled to the same general civil and political rights²⁷. Constitutionally aside from those rights pertaining to political participation and citizenship refugee and asylum seekers had the same rights under the Constitution as citizens.

²⁵ “...So the first issue is that it has citizens and others. One of the other factors in that debate was what to do with those persons who were citizens of what was then called the TBVC states – Transkei, Bophuthatswana, Venda and Ciskei – which had become independent homelands and how would those citizens fit in under this new dispensation in which those countries were going to give up their sovereignty and become part of South Africa...” (Anton Katz, Sept 7, 2008)

²⁶ “...I think it must be said that persons who are not citizens should expect no worse treatment than South African citizens in the context of civil and political rights, in as much as it would be hard to argue that a non-citizen could be subject to an unfair criminal trial or be subject to the death penalty or a violation of their dignity because of the fact that they’re not citizens...” (Anton Katz, Sept 26, 2008)

²⁷ “...So if there was a law which said, ‘Citizens may write in the newspaper but non-citizens may only write in the newspaper every second day,’ and if a non-citizen challenged that law as being a violation of their right to freedom of expression, the government [would have] the onus and duty to demonstrate that that limitation of the freedom of expression right was reasonable and justifiable in an open and democratic society - and I think in many instances, when it comes to civil and political rights, the government will be hard pressed to do so...” (Anton Katz, September 7, 2008)

4.2.3 Differentiating the Rights of Refugees and Asylum Seekers from Those of Immigrants:

While South Africa has had extensive experience with different categories of immigrants as well as with migrant workers from neighboring territories on contract employment in the economy, the arrival of large numbers of refugees and asylum seekers, who unlike immigrants do not see themselves as prospective citizens, is a new development. Popular conceptions of ‘refugees’ as distinct from ‘immigrants’ are relatively diffuse and undeveloped. However, for the human rights lawyers who are professionally involved with refugee rights this has become a pressing issue. The interviews sought to probe to what extent they consciously differentiated refugees and asylum-seekers from immigrants, conceived as prospective citizens, and what they regarded as the significance and implications of this distinction.

The lawyers differentiated between citizens and different categories of non-citizens in terms of their respective legal status. They observed that under the 1996 Constitution there are only two classifications of people, citizens and non-citizens. However, in terms of other legislation there are different categories of non-citizens. Some of these categories of non-citizens are closer in line with that of citizens than others²⁸. At the same time they did not seem to differentiate to any great extent between classifications of non-citizens other than to argue that, because of their perceived vulnerable position, refugee and asylum seekers were owed more from the state in terms of protection and socioeconomic resources than immigrants²⁹. In general the lawyers considered asylum seekers and refugees as more deserving of protection from the state than prospective immigrants to South Africa. The lawyers were more ambivalent when it came to the refugees’ entitlement to socio-economic rights, especially compared to South African citizens still in conditions of poverty. They recognized the implications of the fact that refugees do not see themselves as prospective citizens. The immediate needs and vulnerability of refugees require their protection by the state, but this is transitory only and different from having socio-economic rights which would imply having the prospects of longer term membership.

²⁸ “...Within the class of non-citizens there are certain sub-categories of persons and I suppose one starts off with those people who have permanent residence, then there are temporary residents, then refugees, then there are asylum seekers, and then there are those persons who are undocumented...And generally speaking, I think it’s fair to say that holders of permanent residence permits – in other words permanent residents – are persons who are seen as closely aligned to citizens...” (Anton Katz, September 9, 2008)

²⁹ “...I think that somebody who just crosses the border and arrives in Cape Town a day later and says, “I’m here. I’m from Canada. I want all these rights” may appropriately be treated somewhat differently, from somebody who arrived from Angola 12 years ago, having been subjected to torture and brutality on the basis of one of the refugee persecution grounds. I think they’d be entitled to different levels of protection...” (Anton Katz, September 9, 2008)

4.2.4 Civil & political rights Versus Socio-Economic Rights

Significantly, then, these human rights lawyers tend to make a distinction between the refugees and asylum seekers' claims to civil and political rights as against their claims to social and economic rights. While they do not in any way qualify the refugees and asylum seekers' civil and political immigration rights, and indeed very much insist on these, the interviewees placed less emphasis on their socioeconomic rights. This seems to reflect an underlying debate about non-South Africans' entitlements to socioeconomic rights³⁰. There appears to be two different strains to this underlying debate for human rights lawyers. One strain has to do with their commitment to the Constitution which generally provides for the rights of non-citizens as well as citizens. Strictly speaking the implications of these provisions must be that non-South Africans are constitutionally entitled to most rights including socioeconomic rights. However, the lawyers indicated some personal moral conflict over giving scarce socioeconomic resources to non-citizens. Thus Kerfoot illustrated the tension that arises when dealing with socioeconomic rights of refugees in the midst of rampant poverty among South African citizens³¹. Tensions thus arise for these human rights lawyers with regard to providing equal access to scarce socio-economic resources to non-South Africans in a poverty-stricken country while at the same time their professional interest is in upholding the Constitution. On occasion this leads some of them to actually qualify the rights of refugees compared to citizens³². The second strain has to do with underlying notions of the scope of basic human rights as including socio-economic rights, or not. In other contexts the human rights lawyers argued that there was not only a duty on the state to protect non-citizens as well as non-citizens but actually an expanded duty due to the especially vulnerable position of refugees and asylum seekers. The lawyers' differential evaluation of the refugees' civil & political rights versus their socio-economic rights may indicate that they do not so seriously regard the latter, unlike the former, as basic human rights.

³⁰ "... When it comes to economic and social rights ...I think the government has a duty in a country such as South Africa, where there are millions of citizens without proper housing, education, medical care and who are jobless, and a non-citizen comes along and says, "I'm entitled to ...socioeconomic rights" I think it would be difficult for the government to legitimately provide the non-citizen with social relief, compared to the government's duty to its citizens..." (Anton Katz September 7, 2008)

³¹ "...I see here (Constitution 1996) it says "everyone has the right to have access to adequate housing". And everyone means everyone. ... So there are very few human or constitutional rights that don't apply to non-nationals...The difficulty is that obviously there's a big problem [with poverty and inequality] in South Africa... I originally resisted doing asylum seeker and refugee work in the early 90's. Because I said, appalling as the situation [of the refugees] was... our basic mandate, the Legal Resources Centre's, was for poor and marginalized and vulnerable South Africans and South African communities The fact is that there is an enormous measure of poverty and famine amongst South Africans. And it is hard to access South African social services and welfare..." (William Kerfoot, Sept 26, 2008)

³² "...Well, let me put it this way. The government's duty starts because everyone has that right anyway. But, to an extent there could be an argument that the government has a more limited duty [to refugees and asylum seekers] because of the fact that these are non-citizens..." (Anton Katz, Sept 9, 2008)

4.3. Refugee rights in practice

In the interviews human rights lawyers insisted on the huge discrepancy between what rights asylum seekers and refugees are eligible for and what actually happens in practice. Under the 1996 Constitution they are entitled to a range of constitutional rights while the relevant legislation specifies their definite immigration rights. In practice they are often not afforded those rights. The interviewees illustrated a range of defects with regard to refugee rights in practice.

Significantly, the lawyers indicated that the right of refugees and asylum seekers most often abused was the right to liberty³³. A very common instance illustrating the refugees' lack of the right to liberty was their difficulties in receiving and retaining a section 22 temporary asylum seeker permit³⁴. In the view of the lawyers individuals who have their rights abused in this way have their entire personal well-being affected³⁵.

In practice many refugees came from war-torn areas to escape horrendous conditions; as refugees in a foreign country they are put in vulnerable positions, possibly suffering from trauma, lacking economic resources and with little or no social capital in South Africa. Often refugees and asylum seekers may not have a clear conception of what rights are owed to them and therefore feel entitled to fewer rights than citizens. Accordingly asylum seekers and refugees may be less likely to fight for their rights or to report abuses³⁶. The lawyers pointed to the vicious cycle that in practice their lack of rights tends to reinforce the vulnerability of many refugees and asylum seekers making them less likely to report

³³ "... I had a Chinese guy who was literally standing on his lawn watering his garden in a pair of shorts, where two Home Affairs officials, [who] didn't identify themselves, literally grabbed him and bundled him into the back of their van. They told him that they would go into his house in order to get clothes for him. I said to the magistrate, "It wasn't an arrest, it was abduction, it was an assault..." (Brendan Adkins, Oct 10, 2008)

³⁴ This is the first document an asylum seeker receives upon entry into the country. It enables them to be legally in South Africa for a short period of time whilst DHA determines whether they should be classified as a refugee. A section 22 temporary asylum seeker permit enables people to work, to receive education and social resources. In addition it enables people to move somewhat more freely because without a section 22 asylum seeker permit one can be arrested, detained and deported. "...So the implications of not ... being afforded a Section 22 permit ... are appalling. You face arrest, it disrupts your work or means that you work illegally or you can't work and you're forced to rely on charity or crime or, as they say, to work illegally. It makes it extremely difficult to get hospital treatment; it makes it impossible to open a bank account. All of these kinds of things impact on people through Home Affairs simply not coping with new arrivals....." (William Kerfoot, September 26, 2008)

³⁵ "...It would be terrible for people to live under those kinds of circumstances. It's a very difficult thing. I've grown up as a white, male South African. I haven't really experienced a lot of discrimination. I think it must be terrible for people to stand in a queue and [be told] "we can't see you today because you're Zimbabwean, or because you're Angolan, or because you're black or because you're women or because you're under the age of 16. I think everybody has the right to be treated equally; I mean that goes without saying..." (Brendan Adkins Oct 7, 2008)

³⁶ "...I think that asylum seekers are more reluctant to take on government than South African citizens, because they naturally feel more vulnerable and apprehensive, and are concerned that things might turn out badly for them or they may be victimized if they raise objections, or are seen to challenge the government..." (William Kerfoot September 26, 2008)

injustices³⁷. In their accounts of refugee rights in practice the lawyers were especially concerned with the overwhelming amounts of abuses of refugee rights taking place. Each interviewee recounted many narratives of violations of refugee rights by the police, employers and health care providers and listed countless abuses from the Department of Home Affairs³⁸. The lawyers suggested that the lack of access to, and consequent abuse of rights of refugees and asylum seekers, had systemic implications including corruption and ultimately a breakdown in justice³⁹. The lawyers also connected the lack of securing refugee rights in practise with how the community at large views the position of refugees and asylum seekers in society compared to citizens⁴⁰.

4.4. Immigration and Refugee Legislation and the Legal Rights of Non-Citizens

If the 1996 Constitution defines the basic rights of non-citizens and citizens alike, the specific legal rights of refugees and asylum seekers are determined by relevant legislation and its implementation, more specifically the Refugee Act (1998) and the Immigration Act (2002) which replaced previous immigration legislation such as the Aliens Control Act (1991). In practice the human rights lawyers' concern with the rights of refugees and asylum seekers largely focus on the terms of this legislation and the ways in which it is implemented. Interviewees were questioned for their assessment of South African immigration and refugee legislation, its implementation and the consequences for refugee rights in practice. The ongoing 'legislation versus implementation' debate framed much of their conceptions in this regard.

4. 4.1 The Historical Legacy: The Aliens Control Act (1991)

The human rights lawyers explained that current immigration legislation needs to be understood in the context of the historical legacy of apartheid; effectively it represented a move away from previous

³⁷ "...Very few people are prepared to go on record, to go to the prosecuting authorities and to say "this man wants me to pay a bribe for me to get a Section 22 permit; I don't want to do so". Or "I was forced to pay a bribe, or I was victimized, I'm a woman I was victimized by a man who wanted favors from me if I were to get my documentation", that kind of thing. It's unusual for people to take those kinds of complaints further, they raise them with us, but that's it...Whereas South African's I think are clearly less ... circumspect in doing that..." (William Kerfoot, Sept 26, 2008)

³⁸ "...They get abused ... in terms of their rights, from what I've seen. Because I've seen my clients who've been arrested and not informed of their rights properly. I've had experiences where we've gone to court to confirm a detention pending deportation, where my clients have signed forms of which they've got no knowledge of what the content of the form is: " I wish to remain in custody", " I don't wish to appeal my deportation", " I wish to await my deportation at the earliest possible opportunity". It's not uncommon..." (Katz, Sept 9, 2008)

³⁹ "... I suppose the one implication would be that people will probably try and circumvent the laws in order to get those rights. So it would promote corruption, dishonesty, all of those kinds of things, unlawfulness... (Brendan Adkins Oct 9, 2008)

⁴⁰ "...There's an element contributing towards xenophobia, [that] of people knowing or people suspecting or people hearing rumors and anecdotal examples of bribery and corruption and [refugees] getting rights they shouldn't have. And, certainly, that contributes towards it" (William Kerfoot September 26, 2008)

more draconian legislation such as the Alien Controls Act of 1991⁴¹. Apartheid-style immigration legislation essentially focused on control –the primary focus of the Aliens Control Act likewise was to keep people out of South Africa by having very strict control of who was let in.

Against this historical background the interviewees understood the significance of the Refugee Act (1998) and the Immigration Act (2002) as definite attempts to move away from a policy of ‘control’ and towards a new regime of ‘regulating’ migration⁴².

Katz stressed the importance of this philosophical shift from ‘control’ to ‘regulation’ in immigration legislation. ‘Control’ suggests authority exercising power over subjects, imposing limitations and restrictions on them, while ‘regulation’ suggests organizing and adjusting migration flows within an agreed legal framework. Other lawyers also associated the term ‘control’ with the coercive power of the pass laws during apartheid, and with the concomitant human rights violations. In their minds the shift from ‘control’ to ‘regulatory’ legislation represented an important watershed because it marked a cultural mind shift in South Africa as to how policy makers view the purposes of legislation. Taken to its logical conclusions the full implications of this shift could also entail a shift from the traditional nation state model of dealing with immigration, whereby governments guard and defend their borders from transnational movement, to a more human rights oriented regulatory framework. However, it is not clear that anything like this shift actually occurred in practice.

In the view of the human rights lawyers the required philosophical shift from ‘control’ to ‘regulation’ of migration would have significant implications for the changing role of the DHA in the transition from apartheid to post-apartheid democracy. But in their experience such a shift has not been evident in the actual practice of the DHA. Accordingly the interviewees contended that a major issue in understanding the failures and inadequacies in the implementation of post-apartheid legislation relates to the historical legacy that the DHA and other governing bodies have with regard to the persisting mindset of ‘controlling’ immigration. Kerfoot pointed out that there have been very little, if any, efforts since the dawn of post-apartheid democracy to change this ideology which still exists and is evident in the practices of DHA today⁴³.

⁴¹ “...The Aliens Control Act was born in 1991 and it’s been called the act of dying apartheid. It really was that...” (Anton Katz September 9, 2008)

⁴² “The Immigration Act attempted to move from a regime of control to [a] regime of regulation. That’s the only positive in general... It had a whole series of provisions which were control orientated, rather than regulatory and an immigration piece of legislation should be regulatory rather than [seeking to] control. It regulates the movement of people in and out the country...” (Anton Katz, Sept 9, 2008)

⁴³ “...As I’ve said to the point of distraction [and] of driving other people mad for years. You know the parallels between the so-called Department of Bantu Affairs in the past, and the people who implemented the pass laws, and the department now dealing with refugees and asylum seekers are horribly similar and shouldn’t be...” (William Kerfoot, Sept 26, 2008)

4.4.2 The Refugee Act 1998

The human rights lawyers generally considered the 1998 Refugee Act to be a good piece of legislation providing for the rights of refugee and asylum seekers. Kerfoot suggested that the only negative feature of the 1998 Refugee Act is that it did not link to the Immigration Act 2002 in a coherent manner⁴⁴.

Generally the lawyers suggested that the Refugee Act is in line with human rights considerations as well as with the Constitution⁴⁵ and had very little to say about the Refugee Act other than it was a good piece of legislation and, if implemented properly, would lead to good results.

4.4.3 The Immigration Act 2002

Compared to the perceived merits of the 1998 Refugee Act the lawyers considered the 2002 Immigration Act to be confusing and hard to interpret. All the lawyers recounted how they had found themselves explaining the meaning of problematic sections of the Immigration Act to immigration officials as well as to judges. They argued that the link between the Immigration Act and the Refugee Act should be stronger. The fact that there are two pieces of legislation dealing with migration is in and of itself confusing. Katz illustrated how the Act's definition of the term "foreigner" is circular: "an illegal foreigner is a foreigner who is not legal". Katz implied that administrative rulings have been made based on inaccurate interpretations of the legislation by judges, meaning that individuals could have been wrongfully detained or even deported. He gave the wrongful detention of non-South Africans as an example⁴⁶. Katz argued that the ambiguity and red tape associated with the Act have serious negative consequences⁴⁷.

⁴⁴ "...In principle, South Africa's got a very good and welcoming and user-friendly Refugees Act... So the problem is related more to the Immigration Act and the Acts speaking to each other...For instance I had a situation where Home Affairs required asylum seekers or refugees to cancel their permit or status before applying for permanent residence on the basis of a relationship with a South African... So it's that kind of unnecessary complication to the lives of asylum seekers and refugees and non-nationals that one regrets most..." (William Kerfoot Sept 26, 2008)

⁴⁵ "...I think that it does provide for what I would say is administrative fairness in the adjudication process of a refugee claim... I think if it was properly applied [it]would be fair – that's a positive feature..." (Anton Katz September 9, 2008)

⁴⁶ "... There's a Constitutional Court case, the Lawyers for Human Rights versus Minister of Home Affairs, where they deal with the detention of foreigners. The legislation is not clear on how to deal with this... The judge there ruled that three or four earlier judgments were wrong in interpreting how Section 8 was to work..." (Anton Katz Sept 9, 2008)

⁴⁷ "...The negatives are an abundance of red tape, together with – I'm going to say – a lack of clarity in drafting. That's a major defect in a lot of provisions which – I think one could legitimately argue – are ambiguous, not clear exactly what they mean. I think that's got a really negative feature..." (Anton Katz, Sept 9, 2008)

4.5. Implementation of Refugee Legislation:

The human rights lawyers interviewed considered the implementation of the current immigration and refugee legislation as the crux of the problems in securing refugee rights in South Africa, especially in Cape Town. In practice the constitutional and legal rights of refugees and asylum seekers are more often than not limited due to the poor implementation of legislation⁴⁸.

Among their common themes relating to the problems of implementing immigration and refugee legislation were the officials' poor comprehension of the legislation, their lack of resources, corruption and lack of accountability. The lawyers insisted that there could not be proper access to rights without proper implementation. While at one level this is something of a tautology, at another level it suggests an assumption that the practice of rights can and should be achieved through legal provisions rather than through, e.g., social and political struggles. The lawyers also argued that such poor implementation is both caused by xenophobic views on the part of DHA officials and in turn leads to xenophobia in local communities. We will briefly consider the different aspects of poor implementation they highlighted in turn.

4.5.1 Defective Comprehension of the Legislation

The interviewees attributed some of the problems of implementation to good faith failures in understanding, in the sense that many officials fail to understand key aspects of the legislation and therefore do not implement these correctly⁴⁹. They believed that this might be due to lack of training and education on the part of immigration officials and police⁵⁰:

However the lawyers also suggested that the root causes of these prevalent failures in implementation go deeper than just that of failure to understand the legislation. They suspected that some DHA

⁴⁸ "...You know the failure of Refugee Affairs to assist recognized refugees in getting documentation, such as their refugee identity documents, or their United Nations Convention Travel documents, it further impacts on people's lives...It's the implementation which is appalling and has always been poor and which has become dramatically worse over the last few years. And the fact that there isn't a public and, particularly, a governmental effort, to limit or reduce or eliminate hostility and xenophobia towards, particularly, asylum seekers and refugees, that makes them worse off..." (William Kerfoot, September 26, 2008)

⁴⁹ "...Look in some instances I think that officials don't [incorrectly] apply the legislation knowingly, deliberately, [yet] they do so. In other instances I think people just really don't understand the legislation and are not sure. I mean I've had many discussions with officials, at different times, where I've sat down and I've said "now look here, here's the Act, and this is what it says you can do and this is what my client is". And he says "yes", or she says "yes". Now it says here "you must do this". And have you done this? "No". We take them through step-by-step and I've given copies of the regulations and the Act to people [who] suddenly say "oh wow, jeez we didn't know this..." (Brendan Adkins, Oct 7, 2008)

⁵⁰ "...The training for officials is so bad, and there's been no effort to provide trained and independent interpreters... The Act can be implemented absolutely satisfactorily as it stands, it just isn't..." (William Kerfoot, September 26, 2008)

officials deliberately chose not to study the legislation or follow the specifics of the laws. Additionally, they suggested that among the higher echelons in the DHA there was an element of wilful ignorance of the relevant legislation linked to a desire to curb the influx of refugees and asylum seekers in South Africa⁵¹.

4.5.2 Lack of Resources

The interviewees indicated that in their view the DHA was horribly under-staffed and lacking in vital resources which inevitably impacted on implementation⁵². The DHA's lack of resources and adequate training has led to systemic inefficiencies, corruption and frustrations. There is a clear need to capacitate the department by appointing more staff, by training DHA officials in practical procedural skills as well as in cultural sensitivity, and through better IT and administration⁵³. This accords with DHA statements at a recent stakeholders meeting⁵⁴.

Significantly, though, the interviewees maintained that in their view these resource issues within the DHA were also a consequence of underlying attitudes of xenophobia. They suggested that the government had deliberately kept this department under-staffed. The interviewees connected this alleged xenophobic mentality to the history of the DHA and suggested that it could be traced to the predecessor of the current DHA which had managed the Bantu Affairs offices⁵⁵.

4.5.3 Corruption and Accountability

The DHA has been the object of many and persistent anecdotal accounts and accusations of corrupt officials especially in their dealings with refugee and asylum seekers. In the experience of a lawyer like Kerfoot issues like corruption were a consequence of a poorly run department⁵⁶. The lack of

⁵¹ "...But I can't help thinking, and other people can't help thinking [that] ... making life difficult for asylum seekers is one way of trying to reduce the numbers of asylum seekers and it springs from a suspicion of refugees and asylum seekers..." (William Kerfoot, September 26, 2008)

⁵² "... It's just that the department is under-capacitated, under-funded and there isn't complete compliance..." (William Kerfoot, September 26, 2008)

⁵³ "...The training shouldn't be difficult; it should be able to be done by Home Affairs officials. But if not, there should be no shortage of academics or NGO people experienced in refugee matters to provide that training. But certainly along with training must go a better IT and better administrative ability and capacity ... and larger staff..." (William Kerfoot, September 26, 2008)

⁵⁴ The DHA indicated that on any given day up to 3000 people stand outside the DHA refugee reception in Nyanga, waiting to be seen by a DHA official. However the Department has only 10 staff in place to deal with the influx of people (Sept 30, 2008 DHA meeting with Stakeholders).

⁵⁵ "...Traditionally people who work for the Department of Home Affairs were executing terrible apartheid laws, such as race classification. They came with a mindset of control, [of] divide [and rule] and had a real xenophobic attitude to the 'other'. So that was the first challenge. As time has gone on and there's been a transformation of the Department of Home Affairs, that sense continues but for different reasons. The reasons are that the new incumbents are [similarly] xenophobic to the core and they see foreigners very often as taking away their jobs..." (Anton Katz, Sep 9, 2008)

⁵⁶ "...The whole thing [is dysfunctional], even where there's absolutely no malice on the part of Home AffairsIf obtaining a permit is going to take two or three years (which it has taken) the temptation both on the part

resources and of human capacity compounded these issues, making the overall situation at the DHA a cyclical nightmare. Poor implementation at the DHA lead to further victimization and exploitation of non-citizens in various other sectors such as that of employment as well as in the community⁵⁷.

Significantly a common refrain is that of the underlying xenophobic mentality of officials, higher authorities and in the wider society. In the views of the lawyers interviewed the endemic corruption in part stems from how the refugee and asylum seekers are viewed both by the officials and in society. They suggested that the high rates of corruption reflected xenophobic attitudes of officials and higher government authorities⁵⁸. This suggests that there may be an intrinsic connection of official corruption with recent outbreaks of xenophobic violence towards refugees and asylum seekers involving local communities. We now turn to the lawyers' understanding of the causes and consequences of this underlying xenophobia

4.6. Political xenophobia as cause and/or consequence of the violence to non-citizens:

The human rights lawyers tend to understand the official treatment of refugees and asylum seekers as a kind of vicious cycle in which the denial of rights are both cause and consequence of xenophobic attitudes and practices. Historically the race classification policies of apartheid became entrenched in the minds and practices of institutions, politicians and citizens. This then instigated a border control ideology towards immigration that persisted even after apartheid ended. Even though the 1996 Constitution as well as the 1998 Refugee Act and the 2002 Immigration Act stipulate that non-citizens are entitled to almost all the same rights as citizens, basic human rights are denied to non-South Africans, especially refugees and asylum seekers, all the time. The failure to ensure proper implementation of immigration legislation and the Constitution is thus understood by these human rights lawyers as tantamount to political xenophobia. It is important to note that the lawyers describe

of the would-be recipient of the permit and on the part of officials to indulge in corruption becomes all the greater, which leads to inefficiency as well, and people's lives getting dislocated..” (William Kerfoot, Sept 26, 2008).

⁵⁷ *“...It opens people up to exploitation ...– and then when that exploitation is revealed, it probably leads to hostility. One example of this is... in farming areas. Farmers really exploit seasonal workers, on a seasonal basis, undocumented people; they pay them less than they would [local workers]....Even where there isn't violence, the failure by the government to welcome people, the failure by Home Affairs to process applications for asylum properly, means that people are open to exploitation because their employers are quite happy to give people jobs if they can make a profit on paying them less...” (William Kerfoot, September 26, 2008)*

⁵⁸ *“...So the officials believe [the refugees] are taking South African jobs away – and they [themselves] are poorly trained. There is just a xenophobic attitude. In Tantoush⁵⁸, there was a statement {made} that in processing people – status determination of the reception offices were corrupt and subject to bribes; and that was not denied. [The officials] are lowly paid. The foreigners are very vulnerable. So they pay a few dollars – \$100, \$50, whatever it [takes]... (Anton Katz, September 9, 2008)*

(The reference is to Ibrahim Ali Abubaker Tantoush vs the Refugee Appeal Board, case number 13182/06 <http://www.saflii.org/za/cases/ZAGPHC/2007/191.html> accessed August 20, 2010)

political xenophobia in terms of the way legislation and policy is carried out rather than the legislation itself being xenophobic.

Throughout their accounts of the abuses of refugees and asylum seekers' rights the human rights lawyers stressed the significance of the legacy of apartheid legislation and institutional practice as well as of current manifestations of 'xenophobia' towards non-citizens. They consistently made a connection between the race related and exclusionary laws of the apartheid era and the exclusion of non-citizens that takes place presently in South Africa. This connection is complicated and raises further questions. Apartheid was explicitly racist while this is not necessarily the case with xenophobia towards non-citizens. Ironically, some of those who were victims of apartheid racism are now themselves engaging in xenophobic exclusion and violence towards non-citizens though not on the basis of differences in race. Still, the interviewees pointed to the apartheid legacy as responsible for how exclusionary citizenship have been internalized in South Africa. Indirectly apartheid was still responsible for xenophobia and the human rights abuses that have occurred with regard to non-South Africans. Hate, division and classification has been effectively indoctrinated into the minds of DHA officials and the institutional practices of government departments⁵⁹. Although apartheid legislation had been revoked, not a lot was done to change people's racially entrenched conceptions of the 'other'. Immigration and citizenship remains a particularly complicated topic in post-apartheid South Africa while it seemed as though politicians were not motivated to deal with the complications of the Home Affairs Department⁶⁰. Unsurprisingly, some of the discriminatory actions of the DHA echo those of the past⁶¹.

The lawyers thus construed xenophobia towards non-citizens as an ironic mutation of apartheid racism in which the subjects and objects have been transposed. Furthermore they stressed the continuities in the institutional practices of the DHA and of an underlying ideology of 'othering'. In

⁵⁹ "...And to think of apartheid one thinks of two types of nastiness. The one was the division of people on the basis of colour and the second one was that to achieve that division, there had to be oppressive laws... (Anton Katz, Sept 9, 2008)

⁶⁰ "...One of the interesting things for me was that the Minister of Home Affairs was given the portfolio to do with citizenship issues which is a difficult and a complex issue, especially given the exile of many of the ANC people [from the] sixties through to the eighties. Mandela himself made a non-member of the ANC the Minister of Home Affairs which had its own internal dynamics. That was Buthelezi who was an Inkatha Freedom Party member of parliament. So in a sense I saw Mandela as being part of the ANC, pushing the difficult hot potato of citizenship issues to a non-ANC-member for a range of, let's call it, perhaps politically expedient reasons..." (Anton Katz, September 7, 2008)

⁶¹ "...People have been detained simply on the basis of their appearance and because they haven't happened to have their document on them. Which takes one back to the bad old days of the pass laws. There was a very famous case where a South African African persons' ... pass was at his home effectively around the corner from where the policeman arrested him, he was arrested and incarcerated and not given an opportunity to get it. So that's what we are seeing today with non-nationals encountering similar circumstances..." (William Kerfoot Sept 26, 2008)

their view this political xenophobia, coupled with the consequences of a dysfunctional DHA, create the conditions for xenophobic violence in local communities. In the view of the lawyers, Buthelezi as Minister of Home Affairs had been an example of how xenophobia in high positions of government can affect public opinion and institutional practice. They stressed that xenophobia stems from the highest echelons in government and society and trickles down through departmental practice to grassroots behaviour⁶². Kerfoot saw a relationship between the attitudes of ministry, high department officials and the policy tools used to discriminate against non-South Africans. Similarly, he contended that the lack of policies to combat xenophobia is in and of itself a form of political xenophobia⁶³.

4.7. Findings and Conclusions

This chapter is concerned with the human rights lawyers' conceptions of refugees' (human) rights and its relation to political xenophobia. The sample size of this group does not constitute a representative sample and therefore the findings should not be seen as generalizations about the conceptions of all human rights lawyers or their views of political xenophobia. The findings below are based only on these specific respondents' viewpoints. Overall the respondents represent a 'humanist' approach to refugee rights. The findings concerning the respondents conceptions fall into five categories to be discussed in turn.

4.7.1 Distinctive Features of Refugee Rights in the South African Context:

The respondents pointed to some distinctive features of the refugee rights dispensation in the South Africa context. They argue that the South African Constitution is unique in providing basic rights for all who live in South Africa, including non-citizens. However these provisions of the Constitution had not necessarily been introduced with refugees and asylum seekers in mind. This raises some complicated questions. Firstly, what are the comparative disadvantages and advantages of the South

⁶² *"...Comments that get made by not only Minister Buthelezi ... about [refugees] taking jobs and bringing diseases, but the ... Minister of Labour, some years ago, uttered the most blood-curdling threats towards South Africans illegally employing foreigners. I think that adds to xenophobia and makes it more difficult for legitimate asylum seekers and refugees to get work, despite the Wachanuka case and despite the Act, the legislation saying that people can work and study in South Africa..."* (William Kerfoot, September 26, 2008). *"What I do think contributes to xenophobia is the ... lack of ... public acceptance and government acceptance of foreign non-nationals and of asylum seekers and refugees and their [consequent] vulnerability ...Because refugees don't have permits, that makes them both more vulnerable to abuse by xenophobic elements and [by] criminal elements. Because there's kind of a justification in the mind of a criminal, that if he's dealing with someone who's undocumented...Most Somalis have got status and yet they nevertheless are terribly vulnerable. But I do think implementation is a factor, and certainly the failure of the Department of Home Affairs to welcome asylum seekers and refugees, it helps xenophobia..."* (William Kerfoot, September 26, 2008)

⁶³ *"...There have been good studies both internationally and locally on how foreigners and refugees add to the economy, rather than stealing jobs. But this hasn't been taken up publicly, it hasn't been taken up by the government and it's really unfortunate, and it leads to the kind of outbreak that one has had. On the contrary the previous Minister of Home Affairs, I remember vividly saying that foreigners took South African jobs and brought diseases, which is really calculated to inflame emotions about foreigners..."* (William Kerfoot September 26, 2008)

African provisions of basic rights to everyone rather than this being linked to citizenship? What difference would it have made to the rights of asylum seekers and refugees if the South African Constitution did not include these provisions -- would their rights be determined by immigration and refugee legislation only? What are the consequences of the application of these basic rights to large numbers of migrants and refugees which had not been anticipated or intended when constructing the Constitution?

These questions are not answered or considered by the human rights lawyers. Obviously, if the constitution had been constructed differently, linking rights more closely to citizenship, the theoretical landscape of refugee rights would look significantly different in South Africa. In that case it might well have been more in line with the persistent practices of the DHA in implementing refugee rights. We could surmise that the human rights lawyers are only too glad to be able to operate with a Constitution consistent with their liberal rights based philosophy. However, it is possible that the lawyers underestimate the challenges posed by such a liberal Constitution for the transition from the previous authoritarian apartheid dispensation. What is missing is a more practical consideration of the potential problems with introducing a new system of governance without ensuring a suitable transitional period of adjustment or taking into account the tremendous amount of redress that needed to occur with South African citizens. It is possible that South Africa does not yet have the capacity to be as liberal as its new Constitution. The Constitution is widely celebrated and is essentially the sword of a human rights lawyer, while at the same time the country may not yet have the resources to provide for all the rights, especially socio-economic rights, of all people living in South Africa.

4.7.2 Practical Obstacles to, and Constraints in, the Introduction of Refugee Rights:

The respondents highlighted a number of important practical obstacles to, and constraints in, the introduction of refugee rights in South Africa. These include:

- The department (DHA) responsible for the introduction of the new practice of refugee rights in South Africa is the same state agency, and has many of the same structures, procedures and personnel, that had been responsible for systematic human rights abuses in apartheid South Africa.
- The state agency (DHA) responsible for the new approach of “regulating” immigration and refugee policy had long been involved in the opposite approach of “controlling” migrant flows into South Africa.
- DHA officials responsible for the actual application of immigration legislation and official refugee policies are often unfamiliar with, and/or ignorant of, the specific determinations in the Constitution and relevant legislation.

Important legislation, especially the 2002 Immigration Act, is ambiguously worded and not well articulated with other legislation, such as the 1998 Refugee Act, making these difficult to interpret correctly in practice.

Generally, these practical obstacles and constraints seem serious enough to require significant counter-measures and interventions as well as possible major institutional and structural changes. The respondents argue that these practical obstacles and constraints make it difficult, if not impossible, to introduce the new practices of refugee rights. While the respondents are able to argue cases on an individual basis, the problem extends far beyond only one or two instances. They suggest that any counter measures put in place to deal with these problems require major institutional and structural changes. They did not necessarily outline how these changes could take place but rather emphasized that the department (DHA) needed to engage in a philosophical or ideological shift.

4.7.3. The Anomalous Treatment of Socio-economic Versus Civil and Political Rights for Refugees in the South African Social and Political Context:

As we have noted there is a significant inconsistency in these human rights lawyers' views on the socio-economic rights of refugees and asylum seekers. While they confidently insist on the basic civil and political rights of refugees and asylum seekers, they have qualifications and questions when it comes to refugees' entitlements to socio-economic rights. More specifically there are notable differences regarding the relevance of the social and political context to these different kinds of rights:

* With regard to the prospect of extending access to socio-economic rights to refugees the human rights lawyers consider it relevant that large numbers of South African citizens still live in dire poverty and have substantial welfare needs (even if they formally have socio-economic rights in terms of the Constitution).

* With regard to basic civil and political rights of refugees, however, no similar consideration is given to the realities that many South African citizens still experience unequal and ineffective access to civil and political rights (even if they formally have equal civil and political rights in terms of the Constitution).

When it came to socio-economic rights the respondents seemed to have a dilemma which they did not have with regard to the civil and political rights of refugees. These inconsistencies may reflect the lawyers overriding concern with how South Africa tackles the issue of inequality and poverty with its own citizens. But it may also indicate that the respondents did not conceive of socio-economic rights as human or constitutional rights to the same extent as they did civil and political rights. There appeared to be some assumption that people born in a country should have prior access to the

resources of that country. Even for the human rights lawyers there appears to be limits on the extent to which non-citizens could have the same entitlements as citizens.

4.7.4 The Focus on “Implementation” as the Key to Introducing New Refugee Rights Practices: Assumptions and Objectives?

A striking feature of the interviews was the human rights lawyers preoccupation with the “implementation” of legislation as the crucial problem in establishing refugee rights practices. This reflects a certain assumption, i.e. that the state, and the DHA in particular, should be driving the introduction of rights practices. The lawyers see themselves as neutral and impartial experts that can advise or intervene when there are problems. Similarly they conceive of refugees and asylum seekers as beneficiaries and recipients of the state’s care, with little independent agency. Their model of rights practices is thus essentially state driven. In the South African context this may have problematic implications in relation to political xenophobia. The state is expected to provide a solution to political xenophobia but at the same time it is part of the problem. However there are possible alternatives to this model. From the perspective of the human rights lawyers the roles and responsibilities of civil society, NGO’s and international NGO’s in the administration of rights through the implementation of an independent monitoring body would seem especially relevant.

4.7.5. The Limitations of Rights Approaches to the Problem of Political Xenophobia:

Unsurprisingly these human rights lawyers are generally committed to a rights approach in dealing with refugees as well as with the problem of political xenophobia which they identify as both cause and consequence of the refugees’ plight. However, on closer analysis it appears that there is circularity in the human rights lawyers’ espousal of a “rights” approach in relation to the problem of political xenophobia. In schematic form the steps might be set out as follows:

- Historically the apartheid state and society were characterized by long-standing and systematic practices of racist rights abuses while an exclusionary approach sought to ‘control’ migrant flows.
- The ‘solution’ or ‘answer’ to this problem as it applies to refugees and asylum seekers essentially consists in a rights-based approach recognizing the priority of human rights, entrenching basic rights in a Constitution, shifting to a philosophy of ‘regulating’ rather than ‘controlling’ migrant flows, putting appropriate immigration and refugee legislation in place and getting the relevant state agencies to ‘implement’ these.
- In post-apartheid South Africa the new democratic regime has adopted a rights-based approach, shifted to a different approach of ‘regulating’ rather than ‘controlling’

migrant flows, entrenched basic rights for ‘everyone’ (non-citizens and citizens alike) in the Constitution, put new immigration and refugee legislation in place but problems of ‘implementation’ have obstructed and prevented new practices of refugee rights from being effectively established.

- The reasons for these problems of ‘implementation’ should be sought in the legacy of apartheid racism which now take the form of political xenophobia in the relevant state agencies (such as the DHA) as well as in local communities and South African society.

The circular nature of this set of views is evident: a rights-approach is posed as the ‘answer’ to the basic problem of entrenched racist rights abuses but when that approach runs into problems the cause for this is then seen in a new version of the ‘problem’ it was supposed to solve, now termed ‘political xenophobia’. To complete the circle one might ask to what extent the ‘answer’ to the problem of engrained political xenophobia in South African state and society could be provided by a rights-based approach primarily relying on the agency of a state which is itself still riddled with xenophobic practices and mentalities. The respondents do not appear to be aware of their circular arguments which may be a significant reflection of the way human rights are approached in South Africa. It would appear that current approaches to political xenophobia only provide short term solutions and do not address the deep rooted cause⁶⁴.

Looking at our conclusions in d) and e) together, it seems as though the human rights lawyers’ conceptions are characterized by an underlying conflict or even contradiction: On the one hand they assume that state agencies should / will be responsible for ‘implementing’ new refugee rights practices; on the other hand, in the actual historical and political circumstances of post-apartheid South Africa these state agencies turn out to be the DHA, informed from top to bottom by a culture or mentality of ‘political xenophobia’, and incapable of ‘implementing’ the new refugee rights practices effectively. This underlying conflict or contradiction could be resolved in one of two ways: either the human rights lawyers must look to other agencies rather than the state (e.g. in civil society and the NGO sector or among refugee groupings themselves) for establishing new refugee rights practices, or they must look to basic ways of restructuring or educating the relevant state agencies. More generally, these findings raise some basic questions to what extent a practice of refugee rights can be established on the basis of constitutional and legal provisions only.

⁶⁴ “... So unless the government and civil society make a concentrated effort to welcome people, and to say that they have a right to be here, both misconceived hostility – you know hostility for the wrong reasons -- and hostility simply because people are different, or because people’s success is resented, will take place more and more. And that’s a really sad issue...” (William Kerfoot, September 26, 2008)

CHAPTER 5: REFUGEES AND ASYLUM SEEKERS' CONCEPTIONS OF (HUMAN) RIGHTS AND POLITICAL XENOPHOBIA

5.1. Introduction

This chapter is concerned with refugees and asylum-seekers' conceptions of their (human) rights as non-citizens also in view of their experience of political xenophobia. The discussion is based on semi-structured interviews with ten refugees and asylum seekers currently living in Cape Town. It is to be expected that these refugees and asylum seekers have a different shared experience of post-apartheid South Africa from those of South Africans but an experience shared with other refugees and asylum seekers relating to human rights and xenophobia in South Africa. As the struggle against apartheid unfolded, these respondents were in other countries on the African continent, watching from afar the constitutional establishment of a new order of rights in post-apartheid South Africa. Escaping persecution based on their race, religion, nationality, membership of social groups, political opinions or affiliation in their own societies, they found their ways as refugees and asylum seekers to South Africa. How did their own various histories and cultures and their shared experiences as refugees and asylum seekers in South Africa shape their conceptions of South Africa and of their own human, constitutional and legal rights as well as their responses to the xenophobia they encountered here? These refugees and asylum seekers are not legal professionals and so it is to be expected that they would relate to issues of law and rights differently than the human rights lawyers involved in their cases. Similarly they find themselves on the other side of the legal and bureaucratic processes administered by the officials of the Department of Human Affairs who can be expected to have very different views of their status and entitlements as refugees and asylum seekers. Likewise they have found themselves the targets of xenophobic hostility from members of local communities with a different history, culture and shared experience from their own but in whose midst they now reside.

This research thus aims to untangle the question of how refugees / asylum seekers as non-citizens conceive of their position in South Africa: to what extent are they primarily or exclusively concerned with their position in terms of rights, rather than with their socio-economic conditions, needs and expectations? In so far as they are concerned with rights at what level are these conceived: are they more concerned with their legal rights in terms of relevant legislation or with their constitutional and/or human rights? To what extent are they aware of, and how do they conceive of, the relevance and implications of the 1996 Constitution's provision for the rights of refugees and asylum seekers as non-citizens? What are their views of the legislation applying specifically to their position (e.g. the 1998 Refugee Act and the 2002 Immigration Act)? More generally, how do they conceive of the

problems relating to the implementation of the legislation and official policy in securing their rights? And if there are serious problems of implementation, to what do they attribute this or who do they hold responsible for these problems? Finally, to what extent do refugees and asylum seekers conceive of a connection between, on the one hand, failures to secure their rights and, on the other hand, the recurrence of political xenophobia? In short, to what extent do the refugee and asylum seekers conceive of the causes of, and solutions to, the problem of political xenophobia in terms of securing their own rights?

Even though the interviewees articulated a shared understanding of these issues, it should be noted that they do not constitute a representative sample of refugees and asylum seekers living in South Africa. The objective is not to arrive at any generalizations regarding refugees and asylum seekers in South Africa but rather to serve as a pilot study preparing the ground for further research in the area of political xenophobia.

The respondents derive from a range of countries from which South Africa commonly receives refugees (Democratic Republic of Congo, Congo-Brazzaville, Eastern DRC, Somalia, Burundi, Uganda, Rwanda and Zimbabwe). The participants were also selected with a view to their status in South Africa (some have refugee status, others are temporary asylum seekers etc) varied This may provide a range of perspectives on issues of human/constitutional rights and on political xenophobia. For instance JR, who came to South Africa in 1998, was among the first asylum seekers in democratic South Africa under the new refugee legislation while E has been in South Africa for only six months. Appendix, Table 1 below lists the relevant background factors of the participants.

5.2. Unpacking Refugees and Asylum Seekers' Conceptions of (Human) Rights

There is a special disconnectedness and vulnerability associated with the transitory condition of refugees and asylum seekers. Refugees and asylum seekers not only typically come from situations of persecution and human rights abuse but have also been removed from their familiar communities, have lost access to their established support structures and often find themselves without the means to pursue their previous professions or to find similar employment⁶⁵. This disconnectedness is reflected in their need to be legally and officially recognized as refugees and asylum seekers. Because of their special vulnerability refugees and asylum seekers are in urgent need to have their rights recognized and protected but are not themselves in any sort of position where they can effectively demand or assert these rights.

⁶⁵ "...I left Rwanda because [of the] total insecurity at that time. But mainly it was because my wife was killed. She was killed in the violence because she was a Tutsi. Then I said '... if I go back, these people are very dangerous to me'. And then I could lay my life down. So then I decided to continue on my way to South Africa because I didn't have a choice to be nearby Rwanda..." (JR 09/21/2008)

The special vulnerability inherent in the position of refugees and asylum seekers⁶⁶ may best be understood compared to the equivalent positions of immigrants and economic migrants. From the interviews it is evident that the respondents only too well understood how their position differs from that of immigrants and economic migrants. These refugees and asylum seekers differentiate themselves from immigrants in three ways. Firstly, they argue that immigrants chose to come to South Africa and could also return at any time. Thus M emphasized that while asylum seekers and refugees were forced to flee their own countries and had little choice in seeking protection elsewhere this is significantly different from immigrants who, he believes, freely chose to come to South Africa to further their financial and education opportunities⁶⁷. Secondly, immigrants typically aim to take up permanent residence in the new country while refugees and asylum seekers see their position as a temporary one only. Thus M considered his presence as a refugee in South Africa as an essentially transitory condition⁶⁸. Other respondents also insisted that they would go home if they could and saw their residence in South Africa primarily as a temporary alternative to the turmoil they faced at home. Unlike immigrants who come to South Africa on a more permanent basis they do not have vested interests in making this country their new home.

The third way in which these respondents considered their position as refugees to be significantly different from that of immigrants was in view of their lesser freedom of movement and other basic civil/political rights. A observed that as a refugee in South Africa one does not have the right to move freely throughout the country, or to depart from the country⁶⁹. Refugees and asylum seekers have duties of reporting to DHA and to obtain required documentation for various purposes. In addition refugees and asylum seekers are not eligible for travel outside of the country unless they have a special passport approved by UNHCR, which is quite difficult to acquire.

A typical case is that of JR who fled to South Africa in fear of his life. JR described a horrific story of being chased out of Rwanda after the death of his wife and seeking refuge in South Africa. He portrayed himself as very vulnerable and his position in South Africa is defined in terms of needing

⁶⁶ *"I don't like this name of refugee, I am refugee for the circumstance, but God forgive me, because it's not my place..." (A 09/23/2008)*

⁶⁷ *"... An immigrant or economic migrant comes for education [or work]. [They] are not looking for safety. [They] come to have a better life; [they] want a business. [They] are emigrating from [their] country to this country but when you are an asylum seeker you are looking for protection from this community and this country. So that's the difference..." (M 09/22/2008)*

⁶⁸ *"...I would most definitely, yes, return to Somalia... So my short-term [aim] is just to stay here for now but long-term [my objective] is to leave the country and go home..." (M 09/22/2008)*

⁶⁹ *"...The unique difference is between refugee and immigrant, the immigrant has a possibility to travel to other countries, to go there maybe to do business or to do something. The refugee can't just travel here, or go to some other country, but those who are immigrants; [they] can travel to other countries and do anything..." (A 09/23/2008)*

protection. Significantly, he did not really decide to come to South Africa: “I didn’t have a choice”. If he had a choice, he would not be in South Africa, and this is what for him defines his position against citizens or other types of migrants who have the liberty to move around the country, leave South Africa and come back. JR lives with a continuing fear of being made to go back and believes he would be killed in Rwanda. His position is defined as lacking in control over his own destiny. For our purposes the relevant question is to what extent he considered rights as relevant to his position and that of other refugees.

5.2.1 Rights Conceptions and Discourses: Refugee Perspectives:

It cannot be taken for granted that refugees and asylum seekers will primarily conceive of their position in terms of their rights, or their lack of rights. While human rights lawyers are professionally committed to conceive of refugee and asylum seekers’ position in terms of their human, constitutional and legal rights, there are alternative ways in which these individuals themselves might conceive of their vulnerable positions in their new host country. They may rather conceive of themselves in terms of their basic needs, or their particular interests; they may be especially concerned with maintaining their communal solidarity or with expressing their religious and cultural identities. They may derive from societies and cultures where rights discourses do not have the same prominence as in the new democratic South Africa. To what extent do they in fact see themselves as rights-bearing agents in a rights discourse?

The refugees and asylum seekers interviewed certainly expressed strong views that, given their special needs and vulnerability, they could morally expect protection from the host society and state. AN suggested that he had expected refugees to be protected in South Africa because of their vulnerable state. AN saw this as a matter of basic and reciprocal humanitarian duties⁷⁰. Others expected protection to include not only physical safety but also access to health care, employment and economic support. JR thought that refugees and asylum seekers have a right to food, shelter and employment because they have basic needs⁷¹. Some respondents had a definite understanding of the importance of having ‘rights’ in their vulnerable position as refugees⁷². Others were more ambivalent

⁷⁰ “I haven’t grown up in this country but I imagined [that] ... if you run away from somewhere and you come to me, then I will give you protection. If there is anybody doing wrong things to you, I will try to protect you. If there is a criminal activity ... I will defend. Because, when you come, you don’t know the language, you don’t know the system, you don’t know anything...” (AN 09/25/2008)

⁷¹ “All I can tell you is that when a refugee runs away from her or his home country, he’s coming to seek safety, that’s the main point. ... Besides safety, as a human being they need to live, to have rights that will [make] them to feel comfortable...” (JR 09/21/2008)

⁷² “People have legal rights to get asylum seeker or refugee papers, because you cannot chase away someone from the war, or someone from {a country} like Zimbabwe, the people dying, the cholera, with Mugabe killing people, they come here, you refuse to give him a paper, you say go back in

in their basic response to the relevance of 'rights' in their position as refugees. AS conceived her position in South Africa in terms of lacking rights or, as she put it, of being "useless"⁷³. This can be taken as a denial of the relevance of rights to the position of refugees. But AS' formulation that "rights do not exist for us" can be interpreted in two different ways: the respondents do not think of their position in terms of 'rights', or they do not have basic rights at all. The first would imply that as a refugee AS does not have a strong conception of rights while the latter would suggest that she considers rights to be very important to her position as a refugee precisely in that she lacks the necessary rights. In the second case the point is that to define yourself in terms of the lack of rights is still to define yourself in terms of rights - not in other terms such as needs, religion or culture. AS, in her response referred to "us"; other participants also typically defined themselves in relation to a reference group of "us" among non-citizens. This language raises important questions regarding the collective self-conceptions of refugees and asylum seekers. We may note that this is a question of social membership rather than of citizenship precisely because refugees and asylum seekers are non-citizens. Who is included in their "us": all refugees and asylum seekers? How is that "us" related to the new communities and society in which they find themselves in South Africa? What are the consequences in relation to being integrated in local communities and/or maintaining distinct social networks with other refugees? This raises important questions of social membership in relation to issues of citizenship: are there identifiable conceptions of "us non-citizens" in relation to "them" as citizens?

Citizens are typically seen as a model of rights-bearers in society with access and entitlements to permanent residence, employment opportunities, legal protection and political participation which refugees and asylum seekers still have to secure. With this in mind, how do refugees and asylum seekers view their own position in relations to that of citizens and members of local communities? Furthermore do they distinguish between social membership and citizenship as basic categories, i.e. could the respondents see themselves as members of South African society and communities yet still as non-citizens? On closer analysis it appears that terms such as 'us' by the respondents, like AS above, are primarily used to describe collectives of refugees versus South Africans. Thus it would seem that they tend to conceive of their social membership in relation to a refugee community and not as potential members of local communities and/or the greater South African society and nation.

South Africa has an internationally recognized Refugee Act (1998) providing specified rights for refugee and asylum seekers. In fact South Africa is the only country in Africa to have signed the 1951

Zimbabwe -- it's not good, it's not good. It's because they think less of us, they choose not to give us our rights... (F 09/27/2008)

⁷³ "... I feel so frustrated. I do my part but ... it's like you are useless. Why are you talking to us about rights? Rights do not exist for us ...The human rights are there in Cape Town. But for me ... who would I run to about the human rights, to say I'm [not] protected?" (AS 09/27/2208)

Refugee Convention. This is relevant to the conceptions of refugees in that, even if they may not have come to South Africa with preformed notions of rights derived from their societies of origin, these may well be part of their expectations in their new circumstances as refugees in post-apartheid South Africa. With this in mind the respondents find themselves in a complex and ambiguous situation. Firstly, as refugees they are especially vulnerable and in need of legal and human rights protection; secondly, they do not necessarily conceive of themselves primarily as rights-bearing persons with strongly developed notions of rights; moreover in the context of post-apartheid South Africa they find themselves in a state claiming to give priority to human and constitutional rights including those of non-citizens like refugees. The above points may be expected to raise the refugees' expectations of the relevance of rights to their situation. However, as subsequent parts of the discussion will demonstrate, in practice they often find that their constitutional and legal rights in South Africa are not effectively realized. This will raise further questions regarding the refugees' perspective on this inadequate 'implementation' of their ostensible legal and constitutional rights.

5.2.2 Refugee Conceptions of Human Rights and the International Protection of Rights

To what extent did these refugees articulate notions of human rights as relevant to their position in South Africa? From their responses it appears that some of the individuals interviewed did differentiate human and legal rights.⁷⁴ Thus AS said that refugees "want to be treated as human beings", suggesting human rights as an ideal of how people should be treated.⁷⁵ AS went on to suggest that these ideals amount to respect and empathy, and an understanding that people are not radically different⁷⁶. Other participants suggested that there are rights that all humans are born with, such as the rights to safety and protection, and to have access to employment and education⁷⁷. These notions are not entirely clear or unproblematic. Thus E's conception of human rights included the provision for basic human needs but also a more problematic right to membership of a community. AS, on the other

⁷⁴ "...You can differentiate between legal rights and human rights. ... Human rights are rights you have as a human being..." (M 09/22/2008)

⁷⁵ "...I think refugees ... must first be considered as human beings. Refugees need shelter, they need food and they need to be integrated, ... in a community ... I think it's the right of refugees to be integrated somewhere..." (E 09/28/2008)

⁷⁶ "...I think human rights should apply [here] like {in} Europe [they] already do. There needs to be a meeting for the European Union and the US to come and commit to South Africa, to look after our human rights here..." (AN 09/25/2008)

⁷⁷ "...Because actually I'm talking about global economy, we are all a village, you know, where people have to come together from across the world to help us. Especially America, they have a responsibility towards us, to stand together with us..." (AND 09/26/2008)

hand, conceived human rights in one abstract terms such as the right to be treated with dignity. From these responses it can be concluded that the refugees interviewed have incipient notions of human rights.

At another level the respondents indicated an awareness of the implications for countries which are officially committed to human rights ideals. They argued that the South African government had a responsibility to ensure that refugee and asylum seekers' rights were respected because South Africa agreed with the UNHCR to be a refugee receiving country. Respondents argued that as a recipient of UNHCR funding the government had a duty toward refugees and asylum seekers that it did not have for economic migrants or immigrants. Some respondents mistakenly thought that international human rights conventions have the status of positive law in South Africa, indicating some confusion between their human and legal rights⁷⁸: Even so this indicated an awareness of the importance of international human rights conventions and instruments for the position of refugees as well as a sense of South Africa's inadequacies in giving effect to these.

In the view of some refugees the international human rights declarations represented a type of global protection. Thus AN implied that there should be a bigger international force in place to protect refugees' human rights⁷⁹. Other respondents also pointed to the level of human rights provided in Europe and North America, suggesting that those countries have a responsibility to police human rights for refugees in South Africa. This suggests an important difference in the positions of refugees versus citizens or immigrants, i.e. that refugees conceive of a global responsibility for their protection in that the international community, and not only the host country, should be responsible for their well-being⁸⁰. This raises interesting questions with regard to refugees' membership of community / society / nation / global community in relation to citizenship and the state. There are also some potential implications for community integration of refugees when refugees and asylum seekers look to the broader international community for their protection rather than to local communities?

⁷⁸ "...From Congo we see South Africa has the most beautiful constitution and we travel here thinking our rights, our human rights, will be taken care [of], and that we will have peace and finally be safe.." (C 09/30/2008)_

⁷⁹ "...In the constitution there [are] rights for refugees...They say that South Africa belong{s} to all people, all people that live in it... If I follow that statement, it means even refugees must be very well in South Africa, because South Africa belongs to him also...But it's just a statement..." (JR 09/21/2008)

⁸⁰ "...The South African Constitution is one of the more powerful. It allows everybody freedom of speech, which is good, and also freedom of movement. Wherever you stand there are things that are a claim for everyone: it's the shelter, it's the water ... and also health....,And so the South African Constitution also has to ensure the economics of everyone..."(AND 09/26/2008)

5.2.3 Refugee Understandings of the Significance and Implications of the South African Constitution

From the interviews with these refugees and asylum seekers it is clear that they have an understanding of the significance of the Constitution in providing for their rights as non-citizens. The respondents understand the South African Constitution to be the instrument which ensures their human rights in South Africa their responses suggested that while they may not know the Constitution in detail, they did know that it applied to non-citizens. C's response indicated that he came to South Africa because he felt that as a refugee he would be protected under this "beautiful" Constitution⁸¹. Even so, the question remains: how do the refugees and asylum seekers understand their constitutional rights in South Africa in more specific terms? Which constitutional rights did the respondents think refugee and asylum seekers have a claim to, and how are these related to the constitutional rights of citizens?

Significantly, the participants interviewed had a good basic understanding of the South African Constitution and how it provided for refugee rights. They certainly were aware that refugees have most of the same rights in South Africa as citizens⁸². They also understood that the Constitution provided for socio-economic rights as well and that there are very few differences between a refugee and a citizen under the constitution⁸³.

Significantly the participants also disclosed that one of the reasons they chose to come to South Africa versus another African country was because of the South African Constitution and the human rights it provided. On the other hand, many of the respondents also indicated that in practice they did not experience the rights provided by the Constitution. Thus JR qualified his positive account of the Constitution by adding: "but it's just a statement". In the actual experience of the participants there was a dichotomy between their constitutional rights and what they could expect to receive in practice. This brings us back to AS' skepticism regarding the relevance of such constitutional rights to her actual position as a refugee cited at the beginning of section 2a above. In practice AS saw the position of refugees and asylum seekers as equivalent to that of rightless persons; even though she knows that under the 1996 Constitution they have constitutional rights similar to citizens.

⁸¹ "...Yes, I know my rights in South Africa. My knowledge is that you have every right that a South African has except for voting. Because of the Constitution I am protected in South Africa, but as for the other ones {The Refugee Act 1998, Immigration Act 2002} I am not clear on [them], but I think they are good pieces of legislation..." (M 09/22/2008)

⁸² "...We must be dealt with by DHA within three months, that is the law! The fact that we sit here with section 22 permits for years is unconstitutional..." (M 09/22/2008)

⁸³ "...Home Affairs must have interpreters for the people who cannot speak the language, it is in the Constitution..." (AS 09/27/2008)

5.2.4. Refugee Legislation and the Legal Rights of Non-Citizens

Previous sections considered the refugees and asylum seekers' understandings of their human and constitutional rights in South Africa. In this section we turn to their conceptions of their legal rights as determined by the laws applicable to refugees and asylum seekers in South Africa, in particular the 1998 Refugee Act and the 2002 Immigration Act. The interviews were meant to solicit what the participants understood, and how they interpreted, the significance and relevance of these laws as applied to them.

In general the respondents believed that they knew what their rights were in South Africa. On closer investigation, though, it turned out that they actually did not have an informed understanding of the specific legislation applying to them. They most often referred to the South African Constitution and said very little about either the 1998 Refugee Act or the 2002 Immigration Act⁸⁴. Perhaps when the respondents referred to their rights they primarily had their basic constitutional rights in mind rather than their more specific legal rights as determined in the Refugee and Immigrations Acts. However in the course of their interviews the respondents did refer to various procedures in the legislation.⁸⁵ Thus M acknowledged that he did not know what the legislation stipulates but clearly articulated a specific condition under the Refugee Act – although mistakenly believing that this is covered in the Constitution. Likewise AS made statements suggesting that she knew her legal rights though under the impression that they were constitutional rights⁸⁶.

5.3. Refugees' Perspective on Rights in Practice

The respondents agreed that the Constitution is excellent and provides well for their constitutional rights as non-citizens in South Africa. However their experience of the laws in practice often amounted to a lack of protection or even actual abuse of their rights⁸⁷. Each person interviewed

⁸⁴ "... If you look at the Constitution and refugee bill, you will find that the protection is there, is written. But it's not put into practice..." (JR 09/21/2008)

⁸⁵ "...The police tell you: "Show me your green book, and I'll open a case for you. Oh, you don't have a green book and now you are reporting a matter? Go back, bring your green book".

"I don't have a paper."

⁸⁶ "...Me, I was two years or three years. Other people even have a wife and kids, the kids were born here, still they have not got this paper. It's no good ... when you go to Home Affairs, if you want to extend something or if you want to do something {and you don't have the papers}." (E 09/29/2008)

⁸⁷ "At DHA you can see a doctor, a professor, a great man, but because he went there to seek the asylum paper, the people treat him like a little child or [as if] he's sleeping on the street, it's not good. You can see security push you, gossip and shouting and even the ladies working there, treating the people not well... I don't like to go there, because you can go there to see the way people treat

recounted injustices they had suffered and outlined many breaches of the Constitution they had experienced. The injustices ranged from repeated instances of harassment by the police as well as verbal and physical abuse from the authorities, in particular from DHA officials, to lack of access to medical care and lack of access to employment to having been a victim of the May/June 2008 xenophobic violence. While the Constitution may provide the same constitutional rights to citizens and to non-citizens, vulnerable refugee and asylum seekers feel that, compared to citizens, they are less likely to have their rights protected.

Obtaining the required official documentation is crucial to any foreigner's existence in another country; without the necessary documentation an individual is open to arrest, detention and deportation. On the accounts of these respondents the injustices typically experienced by refugees in South Africa are closely bound up with their difficulties in obtaining access to the official documentation required by the DHA. M vividly recounted his frustrations in dealing with officials in South Africa without South African citizenship (green book)⁸⁸. In M's view his right to liberty is violated because he cannot report a crime without himself risking arrest as a non-citizen. Consequently he is fearful of notifying the police or others in positions of authority when something terrible has happened. This puts him at further risk of being a target of violence and victimization

The biggest problems reported in the interviews relate to the persistent difficulties refugees and asylum seekers encountered in obtaining the required refugee and asylum seeker documentation. E waited years for his refugee documentation⁸⁹. The humiliation involved in getting documentation extends beyond long lines and waiting periods. E observed that even professional people were treated disrespectfully⁹⁰. E went on to report further situations of abuse and xenophobia. In many of the interviews stories of robberies, stabbings and physical abuse by DHA security officials were common.

Even with proper documentation refugee rights are precarious and refugees risk victimization. M observed that refugees, as non-citizens, are not in a position to fight for their rights because no one

other people. Maybe you want to ask even someone question to come to you, they shout "suka wena"- Suka lapha wena weqath'izwe" (E 09/29/2008)

⁸⁸ *"...Where's your fight going to take you? When you know you're losing, where [are] you going to take the fight? What are you going to do? ... You know the things are not going to happen. It is just not normal." (M 09/22/2008)*

⁸⁹ *"...They (officials) don't understand that you have a right at all and that's because they don't know. And so they don't give you your right. They are not educated in that at all..." (C 09/30/2008)*

⁹⁰ *"They don't understand that you have a right at all and that's because they don't know. They are not educated in that Maybe they are also learning and so they are not where they are supposed to be. They are [still] learning the process.... The constitutional rights – South Africa's Constitution and human rights, there is a gap...." (F 10/01/2008)*

will listen.⁹¹ Other respondents indicated that their problems were often due to the DHO officials' lack of respect for rights as well as their deficient understanding of refugee rights⁹². C suggested that there is a severe lack of understanding of refugee and immigration legislation, and more specifically of refugee and asylum seeker rights, from DHA officials. F similarly claimed that the officials in charge of the implementation of legislation often do not themselves understand the legislation⁹³.

In the circumstances `refugees and asylum seekers were often exposed to corruption in their dealings with officials. Many of the respondents acknowledged that they had used bribes in order to get the necessary documentation and some believed that this was the only way one could receive refugee status in South Africa⁹⁴. JU testified that there are high levels of corruption at the DHA, especially with regard to obtaining refugee papers. He provided a telling account of some of the processes involved⁹⁵. He reported that entrance past security cost R50, a section 22 temporary asylum seeker permit R500, obtaining an interview with a status determination officer R300, and refugee status cost

⁹¹ *"People ask you money, they start to make things difficult ...Now you need to go undercover, the short way, to seek, to find someone to help you to give him money to get something, even for status or this kind of thing..."* (E 09/28/2008)

You know that you've got a reason for coming to South Africa, you've got a valid reason, but we're not being given a chance to go and explain this reason, and ... then there's no other way. [Or] you can just do it. So once you give money, then you know this money is gone but anyway I [can] work and we'll get other money. ... They take this money, even if it's my right to be served ..." (JU 10/02/2008)

⁹² *"...I was stamping all the time I'm going there; sometimes they give you only a [permit for a] month period of time. Some people told me: 'Look, we can in just a few days have a status'? So what have you done? I was asking them. 'You have to pay money, you don't have money then you can't be served' I investigated it, then I found out that the money has been given. So then I took money and I went to Home Affairs with a certain guy then we gave money then I was served...They cooperate with one another. It's not that you just go to give the person money straight – but you know that to let you in and to give you that appointment is something that these people have to cooperate together. ... The person who takes you there is the person that you give an envelope but the envelope is handed on to the DHA person; you can see the money is going to her. So also we have to make sure that this money is not going in the wrong way and that you're not paying for nothing. So that's why you had to follow to know exactly where the money is going. And the response, in the way you are being received, it was the special treatment, you see. And you can see that long queue there and they are taking you behind and you are going in, you're being received immediately. So you can see that there is a change because you give something..."* (JU 10/02/2008)

⁹³ *"...You see even my heart is not yet quiet...Because you see ... similar things happen .Let's compare this. You see in Rwanda, Hutu was killing Tutsi ...when this [xenophobic] violence started I found a group of people with sticks and the machete and all the tools.... Then the one guy say "Langamunye Langamunye makwere kwere" which means "there's another foreigner..."* (JR 09/21/2008)

⁹⁴ *"Xenophobia is a conception which creates someone to have hatred and not wanting you to be here... (They think) you are taking something that belongs to them! You are here to create problems for me. 'You come from that place' and you are here to take their land and their women, their wives, their money...It's just hatred..."* (M 09/22/2008)

⁹⁵ *"...Racism is because of your colour; there is a difference. It is related, but xenophobia is because of the land you come from. It is a landscape issue rather than a race issue. If you are seen as a foreigner...you are more vulnerable...We are more targeted than locals..."* (M 09/22/2008)

R1500-R2000. JU argued that the feelings of desperation of many asylum seekers actually helped to perpetuate this corruption and abuse of their rights because so many refugees are willing to do anything to obtain the appropriate papers.

5.4 Refugees and Asylum Eeekers Experience of Political Xenophobia

The topic of xenophobia was a very emotional issue for the refugees and asylum seekers interviewed. When prompted about their experiences of xenophobia their stories ranged from name-calling to detailed accounts of the May/June 2008 xenophobic attacks. One respondent recounted how the xenophobic violence he experienced in Cape Town mirrored his escape from the genocide of the Tutsis in Rwanda⁹⁶.

This section is concerned with the extent to which refugees and asylum seekers identify recurrent political xenophobia as a cause and/or consequence of the present crisis of refugee rights, and to unpack in what terms they describe it. What does “xenophobia” mean to the refugees themselves in the South African context? In the interviews respondents were asked to describe what “xenophobia” meant to them. They readily responded with vivid accounts based on their own experiences. For M “xenophobia” meant a hatred of outsiders who are seen as a threat because they come from a different place.⁹⁷ Significantly M stated that xenophobia is different from racism; it is not based on racial differences but on different territories of origin.⁹⁸ Above all the respondents insisted that in their experience xenophobia has deep roots and severe and lasting consequences. In JR’s words: “...Seriously the hatred among the foreigners and the citizens is intense! It’s not something we make up ... Xenophobia is not just an event, it’s something that builds up in the heart of the people since before...” JR’s statement primarily concerns social xenophobia in relation to the attitudes and behavior of members of local communities. It would not have been surprising if this had been the

⁹⁶ “...the government has grown this xenophobia into what we see today, by denying the rights of refugees... (JR 09/21/2008)

⁹⁷ “Maybe we cannot say those [officials themselves] are xenophobic. But from them the citizens learn the power to discriminate, to stigmatize the refugee or the foreigner. I can tell you if you go to the townships to ask the citizens about the foreigners, they are going to tell you all the foreigners are illegal in South Africa. And that [they are] learning from the government. That is in their minds ..., they know only South Africa is the best country, it’s the big country in Africa, and South Africa is USA in Africa...” (A09/23/2008)

⁹⁸ “[After] the [previous] xenophobic attacks in 2006 the government didn’t do anything to those who killed 26 people. So, the people thought - they still think -- [that attacks on refugees is] OK , since the government did nothing. So we can do it again. If the government could put those [responsible for the attacks] in justice, according to the law,[it would be a different message]: you kill somebody, you need to be punished.[In that case] I think the people could see we are worth something. What happened recently, have you ever heard what happened to the people that they arrested? Nobody, nobody [has been arrested]. ...So we believe that the government is responsible and that’s why we say [that] xenophobia is politically motivated...” (AS 09/27/2008)

main focus of the refugees and asylum seekers' views of the xenophobia they experienced. However this not the picture that emerges from these interviews.

Significantly, the respondents hold the government, rather than local communities themselves, responsible for the xenophobia they experience in South Africa. Thus JR believed that official practices of denying their rights is the root cause of the refugee crisis⁹⁹. Other respondents agreed that officials, even if they are not personally xenophobic, prepare the ground for popular xenophobia by their actions towards refugees¹⁰⁰. AS cited the lack of criminal prosecution or other state action against those involved in previous xenophobic attacks and violence on refugees¹⁰¹. In his view the actions of the government towards refugee and asylum seekers instigated xenophobia throughout local communities resulting in social xenophobia.

Many of the respondents believed that ostensibly xenophobic behaviour by DHA officials may actually stem from inadequate understanding of their job, legislation and frustration rather than hatred toward non-South Africans. These respondents argued that the lack of training for DHA officials and the SAPS, their inadequate understanding of the laws, the corruption and abuse of power was responsible for the denial of rights to refugees. Even so the actions and inactions of government officials, their abuse of power and exclusion of rights of refugees, created and perpetuated xenophobia in communities¹⁰².

Other respondents contended that the government actually contributes to xenophobia by denying its existence, for instance by declaring that part of the violence toward non-South Africans during May/June 2008 was criminal rather than xenophobic. M argued that ignoring and denying xenophobia in this way actually serves to perpetuate it and causes it to fester. He was adamant that this was an example of a xenophobic denial of non-South Africans' rights. AS argued that the lack of justice for refugees and asylum seekers makes them even more at risk to violence. He implied that if refugees are denied justice, and even more so when the very existence of xenophobic attacks is denied and blamed on ordinary criminal violence, then this very denial actually perpetuates xenophobia

⁹⁹ "...It is not as though they mean it, the hatred...in fact maybe I think they are not xenophobic, that comes from the government. In my mind it is clear, they don't understand their role, their job ...They are confused -frustrated. The government must give them training so they understand the legislation and what the constitution says so that they give the rights to the refugees...If they just understood maybe we would not see the hatred..." (A 09/23/2008)

¹⁰⁰ "Denials, denial...the system denies [xenophobia] ...and when you deny, the system of xenophobia can be allowed to exist...How can you say a murder is criminal when nothing has been taken...It is xenophobia...not a crime...It's the denial that is the obstacle of the system..." (M 09/22/2008)

¹⁰¹ "...and this lack of justice - it leaves us vulnerable- it makes it easier for those who hate us, for those who want to see us out of the country.." (AS 09/27/2008)

¹⁰² "...Once the government recognizes the rights of the refugee then things will be better. It will trickle down to the DHA and then to the community and our lives will be better..." (09/30/2008)

From these interviews it is evident that the participants perceived political xenophobia to be a major contributing factor to the current crisis of refugee rights. They argued that the South African government needs to establish refugee and asylum seekers' rights as a means to deal with xenophobia.

5.5 Findings and Conclusions

This chapter is concerned with asylum seekers and refugees' conceptions of their (human) rights in view of their experience of political xenophobia. As stated the sample size is too small and not representative and therefore the findings should not be seen as generalizations about the conceptions of all asylum seekers and refugees and their views of political xenophobia. The findings below are based only on these specific respondents' views.

5.5.1 Refugees' Conception of Human Rights

The interviews suggest that even though the refugees and asylum seekers did not necessarily have a strong understanding of human rights, they evinced an awareness that rights could provide protection and security in their vulnerable situations. The respondents articulated general moral notions of basic reciprocal duties though these did not necessarily involve conceptions of 'rights'. At best the respondents can be said to have an incipient notion of human rights.

At the same time their experience of their position as refugees was one of extreme vulnerability implying a need for protection and for rights. Moreover their position as refugees in South Africa involves inherent constraints on their basic rights, such as their freedom of movement, and thus a lack of personal autonomy. Their self-conceptions as refugees in South Africa suggest that they have little agency. Thus, they effectively conceive themselves to be beneficiaries of support and look to the state for protection of their rights. They stressed that in practice they were effectively rightless - though this could be taken as implying that they should have rights and so conceive of themselves as potential rights bearers.

Given their circumstances the refugees and asylum seekers evinced nascent conceptions of human rights which could be significant in terms of mobilizing around protection of their rights in the future. In this regard it is notable that they often express the need to secure protection of their rights by the international community. The respondents did seem to have an orientation towards the international community – in terms of expecting more effective protection of their rights from that quarter. At the same time they still had little confidence in their own agency and assumed themselves as potential beneficiaries of rights mobilization by the global community.

5.5.2 Legal and Constitutional Rights and the Refugees' Experience of Rights Abuses

The refugees and asylum seekers interviewed primarily looked to the Constitution when conceptualizing their rights in South Africa. The respondents also demonstrated an informed understanding of their Constitutional rights, but did not have a good understanding of the applicable legislation. The respondents spoke about their actual experiences in South Africa being contradictory to the rights owed to them under the Constitution. In reality the respondents' experiences in South Africa have been one of rightlessness and rights abuse. Yet they have not become disillusioned about the South African Constitution which may suggest its significance for the development of a human rights discourse.

The respondents significantly tended to rely more on the South African Constitution rather than on their legal rights. Obviously the refugees and asylum seekers had prior perceptions of the new Constitution in relation to the history of, apartheid, the apartheid struggle and post apartheid before coming to South Africa. However this positive view of the Constitution may have caused unrealistic expectations of the actual South African state. At the same time their positive perceptions of the South African Constitution may also help mediate potential problems and conflicts in relation to official bureaucracy and local communities. Depending on the circumstances this could be particularly significant in relation to xenophobic violence in local communities.

5.5.3. Refugees' Collective Self-Conceptions in Relation to Local Communities and South African Society

The respondents had a definite conception of themselves as refugees, not prospective immigrants. Their conception of being refugees stressed the involuntary nature of the condition forced on them; they conceived of their presence in South Africa as an essentially transitory position while awaiting a more permanent resolution which would not necessarily involve their temporary host country. While they denied any prospect of making South Africa their permanent home their use of terms such as 'us' indicated a conception of social membership differentiating them from local South African communities. This social membership is rather conceived in relation to a collective of refugees versus other non-citizens and South Africans. In some ways the respondents express greater interest in possible membership in the global community (who they also seek protection from) than becoming integrated in local South African communities.

This distinctive collective self-conception on the part of the refugees and asylum seekers may have significant implications and consequences especially in the context of ongoing xenophobic conflicts and violence. At a policy level it is not obvious how, or to what extent, migrant policy could make

provision for substantial numbers of non-citizens who are not committed to long term integration into society yet entitled to equal constitutional rights. At the level of interpersonal and community relations the perceived collective self-conception of refugees could also serve to reinforce their social exclusion from local communities. This is significant in terms of dealing with serious outbreaks of xenophobic violence and those who are displaced by it. Housing people in segregated safety sites may reinforce this collective 'othering' and promote further xenophobic conflict or violence. On the other hand integrating people into local communities may shift their self-identification with a collective of refugees.

5.5.4. The Failure of 'Implementing' Refugee Rights and the Problem of Political Xenophobia

The refugees and asylum seekers perceived the DHA officials as being directly responsible for their rightlessness and for the abuse of their rights. The respondents also recounted experiences of xenophobia. However they clearly distinguished between xenophobia and racism. Significantly the respondents did not view the local community as the primary agents in the xenophobic violence they experienced but rather the state. Even though the respondents had been victims of social xenophobia from the local community as well as rights abuses from DHA, the respondents blamed the South African government for both. This is indicated a conception of political xenophobia. It may also be interpreted as an indication of their assumptions regarding the agencies that are able to deal with the underlying causes of the irruptions of xenophobic violence. For this they did not look to either the DHA officials or the local communities but to the protective institutions of the state in general. This could be related to their basic positive conception of the South African Constitution and their constitutional rights. Furthermore it could represent their passive relation to the state and account for the tendency of evincing a lack confidence in their own agency.

CHAPTER 6: DEPARTMENT OF HOME AFFAIRS (DHA) OFFICIALS' CONCEPTIONS OF (HUMAN) RIGHTS AND POLITICAL XENOPHOBIA IN DEALING WITH REFUGEES AND ASYLUM SEEKERS

6.1. Introduction

Under apartheid and until 1994, as we saw in Ch.2, the Department of Home Affairs (DHA) was responsible for implementing racialized apartheid policies and practices which entailed human rights abuses of different kinds, personal as well as institutional and symbolic. Today the 'new' DHA is responsible for the administration of formally de-racialized citizenship, immigration and refugee legislation and policies subject to the basic rights entrenched in the new Constitution. Despite the department's change in mandate and leadership, however, the present day DHA remains at the centre of persistent allegations of the abuse and neglect of rights, administrative injustice and xenophobia. This chapter aims to delve into the rights conceptions of some of the officials who work at the current DHA. More specifically, it will address the relationship between the DHA officials' conceptions of the human and legal rights of citizens and non-citizens and the problem of political xenophobia. This discussion is based on an analysis of a set of semi-structured interviews in October and November 2008 with four DHA officials working in the Refugee Receiving Office in Cape Town, South Africa. The names given below for the DHA officials are pseudonyms in order to protect their real identity

Chapters 4 and 5 of this thesis dealt with the respective rights conceptions of refugees / asylum seekers and of human rights lawyers. This chapter similarly seeks to unpack DHA officials' conceptions of human and legal rights also with a view to the problem of political xenophobia. Compared to the human rights lawyers, as well as to the refugees and asylum seekers, the DHA officials have a different professional experience relating to human rights and xenophobia in South Africa. The DHA officials apply the refugee legislation in South Africa and have been at the centre of criticisms from academics, politicians, as well as NGOs and human rights organizations, but they are also residents of South Africa with their own individual conceptions that may be in line, or not, with their professional functions and the current laws and the new Constitution of South Africa. These respondents' conceptions have been informed by their experiences of working directly with refugee and asylum seekers in a very different capacity to that of the human rights lawyers. They have also been influenced by successive changes in the legislative framework and of official policy. Our investigation will explore to what extent their views may still be in line with the earlier Apartheid mindset and/or the 1991 Aliens Control Act which focused on border control and the mandate of keeping people out of South Africa, or to what extent they have come to express an approach more closely in line with new Constitution and the 1998 Refugee Act that changed the official focus to one of regulating immigration.

This chapter highlights the conceptions of the DHA officials interviewed as a snap shot of how their conceptions shape the way human and legal rights of refugees and asylum seekers are applied in South Africa. They cannot be regarded as representative of DHA officials generally. As Nazeema, one of the DHA officials interviewed, pointed out the DHA is a huge bureaucracy composed of hundreds of people with different functions and varying conceptions of the rights of refugees and asylum seekers.¹⁰³ Unlike the other two groups of respondents interviewed, the DHA officials did not have a shared conception of human rights or understanding of xenophobia in relation to migration. Instead their conceptions were divided, two of the respondents (Nazeema and Rex) had quite ‘humanist’ conceptions of migration and two had very authoritarian viewpoints (Jacob and Soka). The sample size is far too small to draw any conclusions about DHA officials more generally (see the demographic profile of DHA personnel in the appendix to this chapter).

The goal of this chapter is simply to flesh out the conceptions of these four DHA officials in relation to their understanding of political xenophobia in South Africa. This will be attempted by unpacking the implications of their personal experiences, perceptions, beliefs as well as prejudices. The manner in which this is outlined below is through a comparison of the ‘humanist’ DHA respondents’ perspective with the authoritarian respondents’ perspective. It is hoped that a preliminary examination of this kind may serve as a basis for possible further research.

The DHA officials interviewed were two women and two men. The sample was purposeful based on the positions held at the DHA, however the specific respondents were chosen randomly from officials who were willing to participate in the research. The demographic make-up of the respondents was purely accidental. (See the participant profile in Appendix 3). The two respondents who expressed more ‘humanist’ conceptions were relatively veteran DHA employees and also relatively less educated. These two individuals (one woman and one man) were similar in age (middle aged), identified themselves as ‘coloured’ and were in more senior positions, managing and overseeing other officials. The other two respondents who had a more authoritarian view of migration were both young (20s and early 30s) and identified themselves as ‘black’, one South African and the other from Ghana. They occupied entry level positions at the DHA, both as status determination officers. Both have law degrees. All respondents interviewed provide direct service delivery to refugees and asylum seekers and are stationed at the Refugee Reception Nyanga office in Cape Town¹⁰⁴. Appendix 4 outlines the national demographic profile (2008/2009) of the DHA; unfortunately the demographics are not broken down by province so it is difficult to know to what extent the overall demographics hold true

¹⁰³ “...Look ... you get a range of responses depending on who you talk to. My take on it is that you have a department that is responsible for every citizen of the country, from birth to death...”(Nazeema 17/12/2008)..

¹⁰⁴ This office has since been moved to Maitland, Cape Town.

for the Western Cape¹⁰⁵. However, the differences are bound to be significant even in the regional case. Nationally, African women occupy 47% of all the positions at the DHA followed by African men at 36%. Coloured men account for 0.02% and Coloured women 0.03% and according to the 2008/2009 DHA Annual Report there are only two “foreign workers” employed in the entire country meaning that Soka would be the only RSDO officer, since the other position is an administrative function (2008/2009 DHA Annual Report). This research is not aimed at any generalizations regarding DHA officials’ conceptions but only aims to illustrate the different conceptions held by the officials interviewed.

6.2 DHA Officials’ Conceptions of Human and Constitutional Rights of Asylum Seekers and Refugees

The interviews were designed to elicit the DHA officials’ conceptions of the human, legal and constitutional rights of asylum seekers and refugees. The goal was to discover to what extent the respondents conceived of the position of refugees and asylum seekers in terms of their rights. In what sense, if at all, did these officials conceive of refugees and asylum seekers as having human rights? How did they interpret the significance and relevance of the Constitution’s provision of basic rights to non-citizens as well as to citizens?

More specifically, this section attempts to establish which human and constitutional rights the DHA officials considered refugees and asylum seekers to be eligible for, or have a claim to, while the next section will be concerned with the conceptions of their legal rights. As we saw in chapter 4, some human rights lawyers considered the distinction of human rights and legal rights a ‘philosophical’ (rather than a strictly legal) issue. It is evident in the responses from the DHA officials that they were even more uncertain about the significance of these distinctions.

The respondents all acknowledged that DHA officials should be aware of both the human and constitutional rights of asylum seekers and refugees. Rex believed that many DHA officials chose to work with refugees because they have a humanitarian calling and want to help people by promoting human rights.¹⁰⁶ However, this is contrary to his comments about DHA officials who, he suggested,

¹⁰⁵ The demography of the Western Cape province differs from the rest of the nation. For instance traditionally the Western Cape has had a high portion of ‘coloured’ residents compared to other provinces.

¹⁰⁶ “...I am a religious man, ne, and I can’t help but believe that the majority of people that fill out applications here are doing so because they want to do good by people that side of Africa...” (Rex 03/12/2008).

deliberately denied human rights to both refugees and asylum seekers¹⁰⁷.

The DHA officials interviewed differed among themselves in the extent to which they recognized human rights as distinct from legal rights. The two 'authoritarian' DHA respondents, Jacob and Soka, conceptualized the rights of refugees and asylum seekers primarily in terms of the legal rights provided for under the Refugee Act 1998 and Immigration Act 2002 rather than as human and constitutional rights¹⁰⁸. Unlike the human rights lawyers and refugee/asylum seekers who distinguished human rights (those rights which people should have) and legal rights (rights in practice and legislation), Soka and Jacob did not see a difference between the two. The 'authoritarian' DHA officials did not consider the Constitution to have much relevance for the rights of refugees and asylum seekers¹⁰⁹. For their part the two 'humanist' officials, Rex and Nazeema, were more aware of issues relating to refugee and asylum seekers' human rights although they also seemed somewhat confused about the difference between human and legal rights. When probed about human rights both respondents spoke emotively about practices they felt were in violation of human rights. For instance, Rex suggested that individuals from Zimbabwe and other parts of Africa should be accommodated even if they did not qualify for refugee status but are in desperate need¹¹⁰. Similarly Nazeema suggested that poverty is one of the main reasons why people migrate to South Africa but that this was not provided for in any immigration legislation.¹¹¹

Nazeema expressed an understanding of the circumstances people come from when they are refugees and asylum seekers. Both these respondents suggested that there is a need to recognize a shared humanity and to understand why people flee other countries. Nazeema exclaimed, "Its survival" (Nazeema, 17/12/2008). This is a telling expression of her understanding of what being a refugee means. These two respondents evidently view refugees and asylum seekers as rights-bearing non-citizens that should be treated equally to citizens. In fact some of their comments suggested that there is a moral duty that refugees and asylum-seekers should be treated as guests in South Africa and taken

¹⁰⁷ "...Really what they (DHA officials) are telling me is that they just simply comply with what they are told from the top. Because you want to satisfy the bosses, you don't want to be in their bad books... For me it's a clearly xenophobic attitude [being transmitted] from the top to the bottom, they just follow orders...(Rex 03/12/2008)

¹⁰⁸ "...Rights of refugees, those are what we give them when they get their status, they can legally work, study and so on, legally they can be in South Africa. I don't know what human rights they think they want more than this.." (Jacob 15/12/2008).

¹⁰⁹ "...No, the Constitution has nothing to do here, I operate under the department guidelines...If the department says we aren't accepting Zimbabweans then that's the law..." (Soka 7/12/2008).

¹¹⁰ "...South Africa is contrary to those human rights. And that's why I'm telling you, what's happening right now is that the office are rejecting across the board Zimbabweans who desperately need our help to ensure their human right, ne..." (Rex 03/12/2008).

¹¹¹ "...You know the onus is on [asylum seekers] to prove ...that [they] face persecution in [their] country of origin for whatever [reasons] - whether its [their] religious beliefs Now again that is restrictive, it excludes ... the kind of poverty, the economic facts.... And that's actually the biggest issues which drive people to move, it's survival..." (Nazeema 17/12/2008)

care of by the South African state.¹¹²

One of the aspects that Rex highlighted as a matter of human rights for refugees and asylum seekers is that of access to information. Lack of the necessary information exacerbated their vulnerable situations. For example, not knowing where to obtain one's section 22 temporary asylum seeker permit may result in detention. Rex considered this not merely as gaps in procedure or defects of legislation but as human rights issue.

Overall Rex and Nazeema believe that in principle current Refugee and Immigration legislation make sufficient provision for the human rights of refugees. They did not believe that refugees and asylum seekers should have rights over and above what the Acts provide but agreed with the Constitution that refugees and asylum seekers should have almost all the same rights as citizens.

Despite their differing conceptions it can be concluded that all the DHA officials interviewed seemed somewhat confused about the distinctions between human and constitutional rights, socioeconomic rights and legal rights. The responses varied from being in line with the values associated with the 1948 Universal Declaration of Human Rights to more illiberal and authoritarian positions. Rex and Nazeema had a more humanist understanding of refugee rights informing their more sympathetic approach to the position of refugees and asylum seekers in South Africa. In comparison Soka and Jacob's more legalist conceptions were focused on the refugee and immigration legislation as well as the DHA policy which they implemented at the DHA.

6.3 DHA Officials' Conceptions of the Legal Rights of Refugees and Asylum Seekers

This section focuses on the extent to which DHA officials conceive of asylum-seekers as non-citizens with different legal rights and claims than citizens, and to what extent DHA officials consciously differentiate between refugees and asylum seekers compared with immigrants as prospective citizens and if so, what the significance of this is. This section will examine how they understand and interpret the significance and relevance of the 2002 Immigration Act and the 1998 Refugee Act for the position of refugees and asylum seekers in South Africa.

¹¹² "...I think basically .. they should [be able to] expect, that you treat them with respect, that you listen to them, that whatever they ask or whatever they tell you, that you listen and give them the right information. If a person seeks asylum you would [admit] him to the process, you would not avoid it. Should he get sick, you would refer him to hospital, he will have access to hospital and all the same rights citizens get. If he's got any other need which ... becomes a necessity for him to have at that particular moment, which might determine the crisis or a medical condition or whatever he needs, if the person qualifies in that regard, he [should] be accepted in direction..." (Rex 03/12/2008)

Understandably the DHA officials interviewed tended to speak more readily in terms of the legal rather than the human rights of refugees and asylum seekers. The routine role of a DHA official on the ground is to implement the relevant legislation and DHA policies. For this purpose DHA officials primarily rely on the 1998 Refugee Act and / or the 2002 Immigration Act in their work. The four respondents spoke quite confidently about the legislation they utilize during their work but when probed there seemed to be some confusion even on key aspects. Thus both Jacob and Soka claimed that they had authoritative knowledge of the 1998 Refugee Act and the 2002 Immigration Act. However when probed on their understandings of these Acts it became clear that there was some uncertainty. At times the respondents confused DHA policy with the 1998 Refugee Act and 2002 Immigration Act¹¹³.

In general the respondents were able to articulate the legal rights of refugees and asylum seekers, whether or not they were in agreement with these rights. The two ‘humanist’ officials, Rex and Nazeema, considered the 1998 Refugee Act and the 2002 Immigration Act as good pieces of legislation but had a difficult time articulating both positive and negative aspects of the legislation.¹¹⁴ When probed deeper about the specifics of refugees’ legal rights in terms of the applicable legislation these DHA officials would speak about implementation challenges reflecting underlying conflicts between DHA policy and practices, on the one hand, and statutory legislation on the other hand.¹¹⁵ Nazeema suggested that there is a disconnect between the legislation and the institutional culture and argued that the DHA still operate with the ethos of border control versus regulation.

In contrast the other two DHA officials had a far less ‘humanist’ and more ‘authoritarian’ approach to the position of refugees and asylum seekers. They argued that the 1998 Refugee Act and 2002 Immigration Act were good pieces of legislation but were actually too permissive and liberal. In Jacob’s opinion refugees and asylum seekers have too many rights in South Africa and he believed that they should not be treated equally to citizens whose needs and interests should be given

¹¹³ When speaking of the confusion between DHA policy and legislation, it could be that they are referring to regulations which govern administration of legislation, because legislation often provides leeway for the practice of policy.

¹¹⁴ “.. I mean the legislation is very good, but we officials do not know our rights...And this is maybe what I’m trying to say: there is actually ambiguity with regard to the legislation...” (Rex 03/12/2008).
¹¹⁵ “...Post - ’94 you had a situation where the internal borders were broken down; so you had internal migration ... to the urban centres, and at the same time [we had external] borders opening up, and we were ... signing all the international [treaties] protecting asylum seekers and refugees as well. By ’98 the new Refugees Act was developed. So [you have] all of this - [but] you have an institution that hasn’t changed, that’s still based on exactly the same methodology and approach that existed previously: Keeping people out! So you’ve got your policies [and] your legislation going in one direction, and your practices and your institution [remaining rooted in the past]; So you’ve [got] state-of-the-art legislation, ... you’re going to the moon with your legislation, but you’re driving a pedal-powered vehicle. And that’s really what still exists, unfortunately...” (Nazeema 17/12/2008)

priority¹¹⁶.

All four DHA officials argued that there are too many people applying as refugee and asylum seekers but they differed in how they thought the legislation should effectively deal with this. The ‘humanist’ officials, Nazeema and Rex, argued that the legislation should allow for economic migrants and that South Africa should open up its borders to people from other African countries. Contrary to this the two ‘authoritarian’ officials, Soka and Jacob, argued that South Africa needed to tighten up its immigration legislation and have tougher border controls.¹¹⁷

Significantly the DHA officials interviewed did not distinguish clearly between refugees and prospective immigrants. These officials seem to conceive of refugees and asylum seekers in two ways, as temporary residents seeking shelter and/or as economic migrants seeking to become citizens. Thus Jacob believes that there are very few actual refugees in South Africa and that the others are ‘tricksters’ claiming refugee status in an attempt to get citizenship in South Africa.¹¹⁸ This is revealing about his approach to refugees and asylum, in that from the outset he does not believe that the majority of people who apply for asylum are in fact refugees.

For their part, the ‘humanist’ officials Rex and Nazeema seemed to have ambivalent views as to whether refugee and asylum seekers could expect the same socioeconomic rights as citizens. Thus Rex contended that refugee and asylum seekers should have the same access to socio-economic rights, including access to hospitalization, as citizens, but in relation to housing his opinion changed. Interestingly it was only with regard to housing that he referred to refugees and asylum seekers as ‘outsiders’ (Rex 3/12/2008). This could be consistent with a distinction between asylum seekers who have urgent needs like hospitalization as against those with refugee status and longer term needs such as housing suggesting they are prospective immigrants.

With regards to the correlative duties of refugees and asylum seekers the DHA respondents affirmed that refugee and asylum seekers are morally indebted to South Africa and to local communities. In return for living in the country they need to show gratitude and respect towards the country and its citizens and to respect the rules of the country.¹¹⁹

¹¹⁶ “...Look, housing is basically a problem ne? It is difficult to say outsiders should have access to houses, when so many South Africans do not...” (Jacob 15/12/2008)

¹¹⁷ “...this whole thing it’s too welcoming to people who just want to come and make money here...” (Jacob 15/12/2008).

¹¹⁸ “...Ya, ok...for those guys who come here fleeing something horrific, my heart feels open to them and they are here for a short time, but many only come this side to make money and lie about their circumstance at home so they can live forever like South Africans...” (Jacob 15/12/2008)

¹¹⁹ “...For me it’s a question of mutual respect ...It’s like you go into someone’s home, you respect the rules of that home and that’s what I think should be the case of anyone who comes into any country, including South Africa. You come in here; there are rules; included in those rules are yours to protection and so you have an obligation to respect the rules of the country. It’s as simple as that..” (Nazeema 17/12/2008)

In general the DHA officials had difficulties in discussing the specifics of the legislation. In all four interviews when questioned about the legislation and legal rights the respondents would drift towards issues of implementation, or the policies and ethos at the DHA. In terms of Nazeema's revealing metaphor the DHA is the vehicle that drives the legislation; presumably this implies that the respondents are behind the wheel so perhaps it would stand to reason that they would be more concerned with issues of implementation rather than of law. Instead of responding to critical questions regarding their interpretation of the legislation the metaphor suggests that the legislation can simply be implemented without doing anything else (Nazeema 17/12/ 2008)

6.4 DHA Officials and the Implementation of Legislation

This section aims to unpack how DHA officials assess the implementation of the Immigration and Refugee Acts, and try to ascertain to what or to whom any problems are attributed. If there are problems with the implementation of this legislation, what are their conceptions of how these problems should be addressed and resolved, and to what extent do these involve the recognition of rights?

The DHA officials typically explained the current problems with implementing refugee legislation by invoking the legacies of apartheid: from their responses it appears that they are very aware of the significance of the institutional and historical context in which the legislation is applied.¹²⁰ Nazeema recalled that prior to 1994 the ethos of the DHA was not primarily to serve people; effectively apartheid institutions, including the DHA, were set up as adversaries against the people they dealt with. Presently, under the 1998 Refugee Act and the 1996 Constitution, refugees and asylum seekers are accorded basic rights. However, actual implementation depends on DHA officials who are not capable of giving effect to these. Nazeema claimed that many officials do not understand the laws or the rights of refugees and asylum seekers.¹²¹ Significantly, Nazeema diagnosed the problem as compatible with good intentions on the part of the DHA officials, if not the institution.

Nazeema suggested that while the constitutional and legislative framework may have changed since the end of apartheid, the DHA as an institution did not change in accordance with the new constitutional and legislative standards. In practice the DHA is still operating in the same manner that it had under apartheid. At that time the ideology was to keep people out of the country, especially

¹²⁰ "...You're dealing with an institution, like all other government institutions pre-'94, that were designed not to serve the masses of people of the country, let alone people from elsewhere..." (Nazeema 17/12/2008)

¹²¹ "...I think it is more a case of [officials] not understanding., And understanding legislation doesn't mean being able to recite the Act, which most [officials] can do, it's the interpretation and application of that Act and that legislation. So, for me it's more of a case of [officials] not understanding sufficiently how to implement..." (Nazeema 17/12/2008)

black non-citizens. Subsequently there has been no concerted effort to change DHA officials' mindsets about migration and to educate them about the shift in the underlying frameworks of the legislation. This may account for some of the confusion in implementing the legislation.

Both the 'humanist' officials argued that the DHA's problems with implementation were due to political and leadership problems. Rex believed that many of the DHA problems in the Western Cape stem from what he calls a local leadership crisis.¹²² Interestingly, for an official, Rex referred to "their people" when talking about the Home Affairs head office. This may indicate that in some sense he saw himself as an outsider. Rex defined himself as 'coloured' and indicated in his interview that he had been politically active during apartheid in the Western Cape. Although he did not disclose his political affiliation in the interview, he may have been part of the non-racial United Democratic Front (UDF)¹²³. There may thus be some underlying ideological dynamics in his critical views of the DHA leadership.

The 'authoritarian' DHA officials Soka and Jacob viewed the challenges of implementing the legal framework at the DHA quite differently to Rex and Nazeema. They suggested that the problems of implementation had little to do with the legislation but were due to non-South Africans trying to take advantage of the system. They argued that this was not only an injustice to South African citizens, but also to 'genuine' refugees and 'real' asylum seekers. Thus Soka argued that the problems stemmed from capacity issues at the DHA coupled with opportunists trying to exploit the system.¹²⁴ In her view some of the people coming to South Africa and claiming refugee status are not legitimate refugees, but are able to afford high bribes to officials. This was at the expense of those who are legitimately seeking refuge, and cannot afford to bribe officials.

Taken together these comments suggest that in their own view DHA officials are in part victims of the system. Rex argued that many DHA employees were primarily following orders from their superiors. Their primary concern was with doing their job the way they were instructed to, and to maintain the status quo so as to not put their employment in jeopardy. He maintained that xenophobic attitudes

¹²² "... There was a definite leadership crisis at that office (Nyanga DHA) ... It was a political attempt, I think since 2001, from Home Affairs head office to put in their own people here and others out, okay..." (Rex 03/12/2008)

¹²³ UDF: "Launched on August 20th 1983, the UDF was a front of some 700 civic, workers, women's, student, youth, faith-based, sporting and cultural affiliates. Its initial objective was to organise a massive boycott of the apartheid regime's constitutional reform measures, designed to include Coloured and Indians in junior parliaments within a "tricameral" system, and to provide for some dummy representation for urban Africans at the township level. The boycotts in 1984 succeeded dramatically, putting the regime's "reformist" agenda completely off-balance". (<http://www.anc.org.za/ancdocs/history/udf/umsebenzi20030820.htm>)

¹²⁴ "... You know, I look out [of] my window at the sea of people standing outside... You know, three quarters of them are fraudsters, they aren't any more refugees than you or I... They create even bigger delays for us, a department with such severe capacity issues and you know what? That affects the real refugee that really really needs help..." (Soka 07/12/2008).

stemmed from the top, while lower level employees only carried out their assigned roles at the DHA. Even so this still implies that it was inconsequential to them whether they were accurately applying the legislation or respecting the rights of asylum seekers and refugees.

6.5 How do DHA Officials Conceive of Political Xenophobia as Cause and/or Consequence of the Refugee Crisis?

Unsurprisingly the issue of political xenophobia is a particularly sensitive one for DHA officials. The DHA is the site where legislation, policy and rights affecting immigrants, refugees and asylum-seekers, typically with different cultural and ethnic origins than those of local communities and citizens, are officially administered. In this connection the conceptions, views and attitudes of DHA officials regarding the treatment of non-citizens, including refugees and asylum-seekers, are of considerable significance. The May 2008 xenophobic attacks occurred in townships across South Africa. The targets of violence were most often newcomers to South Africa awaiting documentation from DHA or who had been denied access to the DHA. In working with the Legal Resource Centre in Cape Town it was found that the majority of people living in safety sites after the violence had experienced mal-administration from the DHA¹²⁵. The final part of the interview schedule was intended to elicit the DHA officials' conceptions of political xenophobia. The goal was to unpack to what extent the respondents identified recurrent political xenophobia as a cause and/or consequence of the refugee crisis, and in what terms they described it, or to what extent it was attributed to other kinds of reasons and factors.

The respondents did not explicitly distinguish between political and social xenophobia. However the 'humanist' DHA officials, Nazeema and Rex, were much concerned with matters of institutional culture at the DHA. Rex and Nazeema, were very concerned with the problem of xenophobia even though they may not be familiar with the term 'political xenophobia'. The 'authoritarian' officials, Jacob and Soka, resolutely denied the existence of xenophobia, both at the DHA and in South Africa. It is difficult to assess why the views of these DHA officials are so polarized. It is unlikely that Rex and Nazeema's conceptions are held by many other staff at the DHA, but with such a small sample size it is impossible to estimate how prevalent such views are at the DHA.

For Nazeema xenophobia was a major concern. She argued that xenophobia involves more than merely the fear or dislike of the 'other' and is incited by the official denial of rights and institutional policies that effectively excludes refugees¹²⁶. In her view the problem is that institutions, by

¹²⁵ July/August 2008: The author worked with the Legal Resource Centre documenting all residents of the safety sites after the xenophobic violence and correlating it with their Refugee/immigration documentation

¹²⁶ "...the dislike of the other – the exclusion of the other and ... the kind of ... institutional practices, for me ... that's where I would locate Xenophobia. You know it's through those institutional practices where refugees are treated as the other. ... That to me has tremendous negative spin-offs which result in the kind-of violence that we've seen here..." (Nazeema 17/12/2008)

effectively denying refugee and asylum seekers their rights, encouraged popular attitudes and practices which eventually resulted in the May 2008 xenophobic violence. Throughout her interview Nazeema contended that the refugee crisis stems from the politicians and their political agenda. In her view the local perpetrators of the xenophobic violence had little understanding of what they were doing and the root cause should be sought in deliberate xenophobic messages and policies from higher levels of government.¹²⁷ Nazeema stressed the significance of the fact that while the DHA department office that deals with South African citizens is situated in central Cape Town, two blocks from a police station, the City of Cape Town in agreement with the Ministry of Home Affairs in 2006/07 decided to move the DHA refugee reception office from the city centre to Nyanga. Nyanga is a poor black township with both formal and informal settlements. It is one of the most dangerous areas in South Africa and is popularly referred to as the “murder capital” of South Africa. Nazeema considered this an example of political xenophobia because the location of the refugee reception centre in this area inevitably put refugee and asylum seekers at risk.¹²⁸

Rex also believed that xenophobia is quite pervasive at the DHA. In his view institutional practices such as not allowing Zimbabweans to apply for refugee status amounted to the deliberate denial of their human rights as refugees. He believed that xenophobia had become more overt in the DHA since the May 2008 violence¹²⁹. Both ‘humanist’ officials, Nazeema and Rex, considered that the 1996 Constitution, 1998 Refugee Act and the 2002 Immigration Act adequately provided for the legal and human rights of refugees and asylum seekers, but they attributed the increasing prevalence of xenophobia to the messages and policy decisions of those in the highest positions in government. Rex actually called for the Minister of Home Affairs to be removed because he saw his actions as one of the major problems contributing to the refugee crisis.¹³⁰

On the other hand both ‘authoritarian’ officials, Soka and Jacob, denied that xenophobia is a serious problem and suggested that refugee and asylum seekers had too many rights in South Africa. They believed that the Constitution could have negative consequences. The Constitution protects the rights of everyone, including non-South Africans. In Soka and Jacob’s views this could create expectations that the state will provide houses, jobs and other social benefits to everyone. Soka and Jacob argued that unrealistic expectations generated by the Constitution have exacerbated social conflicts around

¹²⁷ “...Xenophobia and the poor, the ugly face of South Africa, it starts at the top you know...” (Nazeema 17/12/2008)

¹²⁸ “Now you know to me that smacks of Xenophobia. So that’s why I’m saying for me ...that’s the ugly face of Xenophobia which starts at the top. So you pitch them out in a place where they can get mugged and murdered...” (Nazeema 17/12/2008)

¹²⁹ “After the xenophobic attacks, the thing of xenophobic utterance has become even more open. [It] is [no longer in] what I call the closet of Home Affairs...” (Rex 03/12/2008)

¹³⁰ “...I’m tempted to say to you that the minister (DHA) must be removed as a matter of urgency...” (Rex 03/12/2008).

scarce resources and also encouraged a criminal element that people mistakenly call ‘xenophobia’.¹³¹ Jacob likewise postulated that poor communities are being pitted against each other in conflicts over scarce resources. He believed that this is caused by refugee and asylum seekers having too many human and legal rights.¹³² Soka’s explanation of xenophobia is that it is actually due to the insular nature of South Africans.¹³³ Interestingly Soka used “Nigerians” as a generalized term for non-South Africans. In South Africa there are many negative stereotypes aimed at Nigerian nationals even though they make up a very small portion of the non-South African population. Ironically Soka is herself non-South African, from Ghana.

Despite the small sample size the views of these DHA officials reflect something of the broader public debate about the nature and causes of the xenophobic crisis, with one side believing that there was a ‘third force’ at play and the other conceiving it in terms of competition over scarce resources. The ‘humanist’ officials, Rex and Nazeema, viewed political xenophobia as the major contributing factor to the refugee crisis while the ‘authoritarian’ officials, Jacob and Soka, vehemently denied the very existence of xenophobia. Again it is difficult to know to what extent these conceptions are in line with DHA officials’ conceptions more generally, but on all accounts the ‘humanist’ views of Rex and Nazeema are unlikely to be widely shared among their colleagues.

6.6 Conceptions of How to Deal with Political Xenophobia and the Refugee Crisis

Dealing with political xenophobia must confront a complex range of issues. In the last part of the interview schedule the officials were asked to reflect on their own conceptions of how to deal with political xenophobia as it relates to the current refugee crisis.

As already noted, both the ‘humanist’ officials, Rex and Nazeema, considered political xenophobia as a major factor contributing to the refugee crisis. They were very concerned with the institutional culture at the DHA as well as with the mind-sets or xenophobic attitudes of the top officials at the DHA as contributory factors towards the current refugee crisis. Nazeema suggested that an essential requirement in order to begin addressing political xenophobia is through institutional reform.¹³⁴

¹³¹ “...Under the pretext of xenophobia, the government is giving so many rights to non-citizens. It is exploiting [the] locals... and all the while this so-called xenophobia .. is just a criminal element trying to exploit the situation...” (Soka 07/12/2008)

¹³² “You sit with the problem of internal migration as well, and poor resources and a structure of service delivery that doesn’t really speak to the poor of the country...Because there’s that competition for scarce resources. That is the challenge at the level [of] local communities – it’s not Xenophobia...” (Jacob 15/12/2008)

¹³³ “...It’s very hard to say that South African’s don’t like Nigerians, they don’t like anyone...” (Soka 07/12/2008)

¹³⁴ “... Part of that problem is the urgent need for institutional transformation. ...This is exactly the same department that excluded people pre-’94, it’s the same institution, it’s run in the same way ... So unless you change the entire system ...” (Nazeema 17/12/2008).

Nazeema believed that in practice the DHA still operates with the philosophy of the 1991 Aliens Control Act which fostered an ideology of ‘control’ rather than ‘regulation’ of migration. As already noted above Rex proposed that the Minister of Home Affairs should be replaced. They both suggested that political xenophobia is embedded in the fabric of the DHA and its systemic commitment to limiting the rights of refugees and asylum seekers.¹³⁵ Nazeema believed that there is a great need for a mind shift towards embedding a human rights culture where people are treated fairly and equally at the DHA and also more generally in South Africa. While the Constitution and the legislative framework such as the Constitution have changed at an ideological level and are in line with human rights philosophies, the institutional culture at the DHA has not changed. Nazeema suggested that one way the problem of xenophobia can be addressed is for the government to openly recognize the benefits refugees bring to South Africa¹³⁶. Nazeema believed that South Africans need to shift their thinking about refugees and asylum seekers. There should be a focus on the integration of refugees and asylum seekers into South African communities with a big emphasis on promoting the benefits of people migrating into South Africa.¹³⁷

Similarly, Rex believed that the problem of political xenophobia stems from the senior management of the DHA and would require an overhaul of staff in an effort to counter the embedded political xenophobia and ensure that the rights of refugee and asylum seekers are observed. Additionally he argued that there should be a form of accountability to ensure that the DHA is complying with legislation and approved policies.¹³⁸ Overall the humanist DHA officials had few recommendations to offer on how to alleviate political xenophobia in comparison with their diagnoses of what the problems were.

In contrast both the ‘authoritarian’ officials, Soka and Jacob, argued that the solution would actually be for further controls to be put in place to curb the amount of asylum seekers entering the country¹³⁹. As noted above, these authoritarian officials tended to dismiss or deny the existence of xenophobia at the DHA or in South Africa. Ironically, the fact that the authoritarian officials, like Jacob, showed such little concern for xenophobia as a current South African problem may actually be an expression of xenophobia.

¹³⁵ “... With a mind shift you’d expect that kind of treatment of people...where you can see beyond this person as a foreigner, as a refugee and as a human being...” (Nazeema 17/12/2008)

¹³⁶ “...So to be able to incorporate the best in this movement of people, where the benefit is optimal for both the incomers and the residents of this country...” (Nazeema 17/12/2008).

¹³⁷ “...So in terms of [the] integration of [refugees] into the communities; it’s about how one can see the human potential of people entering a space and how you can turn that around...” (Nazeema 17/12/2008)

¹³⁸ “...We have to do something with regard to senior management...maybe you need an official at Parliament to make sure that Home Affairs complies with the principles here... accountability...” (Rex 03/12/2008)

¹³⁹ “...This so-called problem of xenophobia...hah...we can start by stopping the sea of people from flowing in...” (Jacob 15/12/2008).

6.7 Conclusion

This chapter is concerned with the investigation of DHA official's conceptions of refugee and asylum seekers (human) rights and its relation to political xenophobia. The four officials interviewed had significantly different conceptions and perspectives on human rights and xenophobia of refugees and asylum seekers. Rex and Nazeema have quasi-humanitarian attitudes to the victims of forced migration and in general spoke compassionately about refugee and asylum seekers' rights. Yet the 'authoritarian' officials, Soka and Jacob, both spoke quite aggressively about the consequences of mass migration, suggesting that many of the problems were simply the result of too many non-South Africans coming to South Africa. As such we found two opposing sets of views, one with certain affinities with that of the human rights lawyers and concerned to regulate migration, and another concerned with border control and keeping people out of South Africa. It seems more likely that Soka and Jacob's 'authoritarian' conceptions are more dominant at the DHA and that Rex and Nazeema's more 'humanist' views may be exceptional cases. The findings below are based only on these specific respondents' viewpoints.

6.7.1. Human and Constitutional Rights

While the DHA officials interviewed knew what human and constitutional rights were afforded to refugees and asylum seekers, there still was some uncertainty about the difference between human and constitutional rights versus legal rights when it came to applying these in practice. This is complicated when the 'humanist' and the 'authoritarian' officials have opposing viewpoints on what in practice is 'right', and what is not. Rex and Nazeema both thought that human and constitutional rights were being withheld from refugees and asylum seekers and that the right thing would be to accord these to them in practice. Soka and Jacob focused on the legal rights of refugees rather than on human rights, and believed that refugees were actually granted too many legal rights. Although they did not explicitly reject human rights, this is what their position in practice actually amounted to.

6.7.2 Conceptualizing Implementation Problems

Problems of implementation were conceptualized differently by the respondents. Soka and Jacob argued that the DHA had capacity issues stemming from too many individuals clogging the system by applying for asylum when they did not qualify. Rex and Nazeema suggested that the severe implementation problems were a consequence of the deep rooted xenophobia within the department itself.

The respondents also agreed that there is an implementation crisis at the DHA. However their sense of this implementation crisis was completely different. What should be implemented according to Jacob and Soka is more effective immigration controls, while what should be implemented according to Rex and Nazeema are the basic rights in the Constitution and relevant legislation. It is tempting to

conclude that such opposing views on implementation may itself be blocking institutional change at the DHA.

6.73 Political Xenophobia Versus Institutional culture

Again the respondent's views varied on political xenophobia at the DHA. The 'humanist' officials contended that the institutional culture of the department was exclusionary and imbued with deep rooted racism. They suggested that political xenophobia was the root cause of the recent xenophobic attacks. Tellingly Soka and Jacob at times seemed to highlight this diagnosis of political xenophobia at the DHA by themselves articulating xenophobic rhetoric in denying the very existence of xenophobia. For their part, Rex and Nazeema argued that the history of exclusion at the DHA has not been adequately addressed and deconstructed and that this was responsible for current problems. However the DHA officials notions of a deliberate xenophobia agenda on the part of the top DHA management and politicians transmitted by officials willing to follow instructions as mere functionaries should not necessarily be taken at face value. They suggest that other officials are incapable simply follow directions. These may be taken to suggest significant underlying conceptions of professionalizing the role of officials as well as a need to de-politicize the DHA as an institution. It may be that currently the role of a DHA official is not seen as a professional career and rather as a function in service delivery. By emphasizing the professionalism the officials may be in a better position to think and act more critically about their work.

6.7.4 The Institutional Culture at DHA

The 'humanist' officials argued for the need to change the institutional culture of the DHA in ways consistent to human rights principles and as counter to the threat of political xenophobia. Rex characterized other DHA officials as mere functionaries following instructions imparted by top management whether properly based on the Constitution and relevant legislation, or not. On the other hand he implied that as a DHA official he would not do the same. His self-conception as an official is that he does not automatically follow instructions by top management or as defined in official departmental policies. As a professional official he is guided by the Constitution and relevant legislation. This articulation of a professional self-conception raises important questions for transforming the institutional culture at the DHA. According to Rex the motivation of other officials are material incentives, such as not putting their employment in jeopardy. But what then would the incentive be for the professional official like Rex whose actions might put his employment in jeopardy? Rex implies that the unprofessional institutional culture of mere functionaries promotes the dissemination of xenophobic attitudes and behaviour at lower levels of the DHA while significant changes to the professional and critical institutional culture would prevent the spread of xenophobic attitudes. The question remains how to incentivize non-xenophobic attitudes and to persuade mere functionaries that they would not put their employment in jeopardy if they are guided by the Constitution and do not simply follow all the instructions and policies of the department.

It is clear the DHA is a complicated institution with a long history of imposed racial legislation as well as inclusive legislative reform. It is also understandable that the transition from apartheid to democracy for South African institutions is challenging in having to overcome the dichotomy between the new Constitution and legislation, on the one hand, and the entrenched legacies of institutional practices and individual mind sets, on the other hand.

CHAPTER 7: CONCLUSION

7.1 Introduction

This mini-thesis sought to describe and analyze the conceptions of refugees / asylum seekers, of human rights lawyers who work with refugees and of DHA officials in the dual contexts of their protection by the new Constitution and their experience of recurrent political “xenophobia”. More specifically it was interested in their respective conceptions of the (legal and human) rights of refugees/ asylum seekers as non-citizens under threat. Taken together, the respective findings from chapters 4, 5 and 6 seek to describe how the conceptions of refugees, asylum seekers, DHA officials and human rights lawyers may influence the implementation of immigration legislation and relevant constitutional provisions and so affect refugees/asylum seekers’ lives as well. As pointed out in the data analysis chapters the groups of respondents interviewed are far too small to make up a representative sample and so this thesis does not seek to make generalizations. However, the intention is to point towards where further research in the area should be aimed.

7.2. The Paradox of Refugee Rights: Constitutional Provision Versus Effective Rightlessness

Taken together the findings regarding the respective conceptions of refugee rights on the part of these three groups of respondents suggest a basic paradox: the 1996 South African Constitution is exemplary in providing for their rights but in practice refugees and asylum-seekers conceive of their position as effective rightlessness. The respondents all agree that the South African Constitution is unique in providing basic rights for all who live in South Africa, including non-citizens. The human rights lawyers, asylum seekers and refugees as well as the humanist DHA officials also agreed in their conception of refugees and asylum seekers as rights-bearing non-citizens in need of protection. Although some notions of reciprocal duties were articulated the position of refugees and asylum seekers was primarily conceived in terms of their special vulnerability and need for protection. Each group cited the South African Constitution as potentially a strong tool for the protection of refugees. But each of the three groups of respondents (aside from the more authoritarian DHA officials) also agreed that in practice there are major constraints on the basic rights of refugees and asylum seekers. While some of these constraints, such as limitations on their freedom of movement, may be inherent in the position of refugees and asylum seekers others amount to an effective denial of their constitutional rights. In effect refugees and asylum seekers conceive of their position as one of being effectively rightless.

The findings from our various interview groups suggest some possible ways in which this paradox might be explored. One of these concerns the historical background of the Constitution’s remarkably progressive provisions for non-citizens including refugees and asylum seekers. As some of the human

rights lawyers pointed out these provisions in the Constitution were not necessarily introduced with refugees and asylum seekers in mind. This must raise questions about the general implications, as well as the comparative advantages and disadvantages, of the South African provisions of basic rights to “everyone” rather than these being linked to citizenship. From the findings of our interviews it is clear that this problem is particularly troubling with regard to refugees and asylum seekers’ access to socio-economic rights. While our respondents agreed that refugees and asylum seekers, as non-citizens, should have access to general civil and political rights the issue of non-citizens’ entitlement to socio-economic rights tended to cause inconsistencies and anomalies in all the respondents’ positions, including even that of the human rights lawyers. In general the tension and disparity between the Constitution’s provision of all basic rights, including socio-economic rights, to non-citizens as well as to citizens, on the one hand, and participant conceptions, on the other hand, may be resolved in two alternative ways. The disparity could be resolved by constitutional means, e.g. by litigation with the Constitutional Court determining the procedures through which the rights of refugees as non-citizens, including their access to socio-economic rights, may be realized consistently with the rights and expectations of citizens. Alternatively, political pressures may be brought to bear to amend the Constitution in ways that link basic rights more specifically to citizenship. Evidently the latter option may have grave consequences for the constitutional rights of refugees as non-citizens. We may conclude that it could be a relevant objective of future research to devise ways of exploring i) the options and prospects for strategies of litigation that might seek to determine the general constitutional rights of non-citizens, including their socio-economic rights, in more specific terms; and ii) the possible ways in which the Constitution might be amended to link rights, and especially socio-economic rights, more closely to citizenship, and the implications and possible consequences of that for non-citizens like refugees and asylum-seekers in particular.

A second way in which the disparity between the Constitution and the effective practice of refugee rights might be explored is comparatively, i.e. in relation to the position of other migrant groups such as immigrants. A central finding of the interviews with the refugees and asylum seekers is that, unlike immigrants, they do not primarily conceive of themselves as prospective citizens. This differs significantly from the self-conceptions of other types of migrants who do think of themselves as potential long-term members of South African society. Refugees and asylum seekers need the state to protect their rights, and they are potential beneficiaries of such support in South Africa, but as non-citizens. This must play an important part in how they conceive of their rights and duties in post-apartheid South Africa. This fits with Walzer’s suggestions that (lack of) commitment to a new country influences conceptions of what we owe the state and what rights the state owes us (Walzer, 1970: 46-48). At a policy level this must have significant implications for the ways in which refugees are settled and administered as a distinctive grouping or on the basis of (eventual) full integration in local communities. Again there appears to be two basic alternative ways in which these tensions and

disparities may be resolved. One coherent approach might be to require of refugees and asylum seekers to commit themselves to eventual membership of the host society as a condition of their longer term residence. This would be consistent with linking basic rights to citizenship. Alternatively, a different coherent approach might be for South African society to reconceptualise itself as a host society to a range of migrant groups, from immigrants to refugees, rather than as an exclusive nation-state. This would be consistent with providing basic rights for non-citizens as well as citizens. We may conclude that it could be a relevant objective of future research to devise ways of exploring, i) the feasibility of requiring some form of commitment to possible future membership of the host society on the part of refugees and asylum seekers as a condition of their longer term residence; ii) the underlying conceptions of and models for South Africa as an actual and potential immigrant society as distinct from historical notions of inclusive nation-building among local citizens.

A striking feature across the various groups of respondents (apart from the ‘authoritarian’ DHA officials) was the special significance attached to the 1996 Constitution. Unsurprisingly the Constitution was the basic point of departure for, and final arbiter on, all issues relating to refugee rights for the human rights lawyers. Significantly, despite their many and persistent frustrations in claiming their rights in practice the refugees and asylum seekers retained a highly positive conception of the South African Constitution and tended to rely on this more than on the actual legislation such as the 1998 Refugee Act and the 2002 Immigration Act. The ‘humanitarian’ DHA officials likewise relied heavily on the Constitution to inform their professional approach. Given the dismal record of refugee rights in practice this common high regard for the Constitution within different relevant groupings is of considerable significance – but it evidently cannot be taken for granted. The question must be how it can be harnessed so as to ensure a better linkage to the actual practice of refugee rights. We may conclude that it could be a relevant objective of future research to devise ways of exploring what the perceptions and expectations of the Constitution among relevant groupings are and how positive perceptions and expectations may be brought to bear more effectively in the actual practice of refugee rights. This should also include an investigation of the possible implications and consequences of the continuing frustration of these positive impressions and expectations among relevant response groups.

7.3. Statelessness, Refugee Rights and the Problem of Agency

A main theme in our findings concerning the conceptions of the respective groups of respondents relate to the implications of their position as non-citizens or stateless people at the practical level of agency. Despite the formal recognition of their human, constitutional and legal rights the refugees and asylum seekers conceived of themselves as effectively rightless. This raises important questions surrounding the agency of refugees and asylum seekers: as non-citizens they are not in a position to mobilize themselves to change their own circumstances. The human rights lawyers may inadvertently

add to this by taking a paternalist protective role towards asylum seekers and refugees rather than empowering them to advocate for their own rights. The DHA officials, notwithstanding the differences between the ‘humanitarian’ and ‘authoritarian’ approaches, all essentially conceived of refugees and asylum seekers as objects of policy implementation and/or administering the law, and not as constituencies to which they are politically accountable. In these ways the conceptions of these other respondents reinforced the relative lack of agency of refugees and asylum seekers over their lives and rights while in South Africa.

This is congruent with Hannah Arendt’s diagnosis of the dilemmas of ‘statelessness’ which she equated to the effective loss of all rights notwithstanding the prevailing discourses of human rights. Although refugees and asylum seekers do have formal constitutional and legal rights in South Africa they lack the agency to engage with those rights in the same ways that citizens do. Arendt argued that the loss of citizenship effectively amounts to the loss of human rights (Heuer, 2007:4). Although she did not specifically speak to agency her analysis suggested that perhaps the rights of asylum seekers and refugees are not actualized in practice also because they, unlike citizens and other types of migrants, do not believe they have the right to have rights. However the refugees and asylum seekers did express some awareness that rights could provide protection in vulnerable situations and demonstrated a nascent conception of human rights. Significantly, though, this did not so much relate to possible commitment to a permanent life in South Africa as a host society. Instead the refugees and asylum seekers tended to look to the international community for the protection of their human and legal rights. This could perhaps be taken as a further expression of their lack of independent agency. With regard to possible future research this suggests the need for further investigation at a theoretical level the problem is how to secure the human rights of those stateless people most in need of that without conceiving of them primarily as objects of legislation and policy implementation, thus inadvertently denying them independent agency.

7.4. The Constitution, Changing Institutional Culture and “Implementation” as the Key to Introducing new Refugee Rights Practices

Both the human rights lawyers and the DHA officials emphasized the basic significance of the Constitution and applicable legislation for ensuring the rights of refugees and asylum seekers in South Africa. Both sets of respondents also highlighted the practical obstacles to, and constraints on, the effective practice of refugee rights. Generally, these practical obstacles and constraints point to the need for major institutional and structural changes. As such the introduction of the 1996 Constitution along with the new legislative framework of the 1998 Refugee and 2002 Immigration Acts did not suffice to undo the continuities between apartheid ideologies and continuing policies of “controlling” the influx of migrants. Moreover the continuities in the actual personnel and practices of the DHA in a post-apartheid context confronted with an unexpected influx of migrants and asylum seekers further

reinforced long-established institutional culture. The human rights lawyers suggested that any counter measures designed to put in place new practices of refugee rights would first require major institutional and structural changes within the DHA. Significantly the 'humanist' DHA officials likewise suggested a strong need for a shift in the institutional culture at the DHA. This fits with much of the literature from The Forced Migration Studies Programme which highlights huge deficiencies within the DHA and its policies and practices of refugee receiving (Misago *et al*, 2010). Interestingly the 'humanist' DHA officials not only argued for a need to change the institutional culture at the DHA but also suggested that this culture had been deliberately inculcated in the Department by political xenophobia at the highest levels. This kind of conspiracy theory is probably more revealing of the assumptions of these 'humanist' officials than informative of the motivations of top officials. (It also undermined their diagnosis of the need for changing the institutional culture of the DHA by suggesting that what is needed is significant change in the top management of the DHA and then the institutional culture at the DHA would also eventually change). In this regard it may be more pertinent to consider the implications of their observations that the lower level officials were acting as mere functionaries following instructions imparted by top management. This raises questions concerning the kind of change in institutional culture that might further a more professional and rights-based bureaucracy accountable to the Constitution rather than merely following the instructions of their superiors. We may conclude that it could be a relevant objective of future research to devise ways of exploring how the professionalisation of the DHA bureaucracy, premised on notions of accountability to the Constitution and not only to line-managers and superior officials, might transform the institutional culture of the DHA.

All the respondents seem preoccupied with the problem of the "implementation" of refugees' rights practices. The human rights lawyers and refugees especially hold the assumption that the DHA or the state must be driving the introduction of rights practices through better implementation of key legislation. Their model is thus essentially state driven. This may be problematic in relation to political xenophobia. The state is assumed to provide the solution to political xenophobia but at the same time it is also demonstrably part of the problem. The issue is that the respondents pose a rights-approach to deal with to the problem of entrenched racist rights abuses. However when this approach runs into problems the cause for this is then seen in a new version of the 'problem' it was supposed to solve, now termed 'political xenophobia'. The difficulty is how this problem is dealt with effectively by relying on the agency of the state which is itself accused of harboring xenophobic practices and mentalities.

With this in mind it seems as though the respondents' conceptions are characterized by an underlying conflict or even contradiction: that state agencies with alleged xenophobic tendencies should / will be responsible for 'implementing' new refugee rights practices. In the actual historical and political circumstances of post-apartheid South Africa these state agencies turn out to be the DHA, informed

from top to bottom by a culture or mentality of ‘political xenophobia’, and incapable of ‘implementing’ the new refugee rights practices effectively. The research suggests that there are some basic questions to what extent a practice of refugee rights can be established on the basis of constitutional and legal provisions only. We may conclude that it could be a relevant objective of further research in this area to explore the prospects for civil society-based agencies to take on specified public roles in the administration of refugee rights as independent monitoring bodies as well as in fostering changes in the institutional cultures of state agencies.

7.5. Rights Based Approaches to Political Xenophobia as the Cause and/or Consequence of the Crisis of Refugee Rights

The circular nature implicit in advocating a rights based approach as a solution to political xenophobia is problematic in theory as well as in practice. Under apartheid, South Africa was characterized by racist rights abuses that included an exclusionary approach to immigration that sought to control migrant flows. The solution to this problem was essentially supposed to consist in the rights based approach recognizing the priority of human rights and basic rights entrenched in the Constitution which was adopted by a ‘new’ post-apartheid and democratic South Africa. This was supposed to include moving towards a philosophy of ‘regulating’ migrant flows and putting the appropriate legislation in place for the relevant state agencies to implement -- only this has in practice come up against an entrenched institutional culture which has obstructed and prevented new practices of refugee rights from being effectively established. The cause of these implementation problems are sought in the legacy of apartheid racism, now termed ‘political xenophobia’ of the relevant state agencies like the DHA as well as local communities. Thus, a rights–approach is proposed to solve the basic problem of entrenched racist rights abuses, but when it runs into problems the cause for this is seen as a new version of the very problem it was supposed to solve, i.e. ‘political xenophobia’. The question remains, to what extent the answer to the problem of engrained political xenophobia in South Africa could be solved by a rights-based approach relying on the agency of the state which is itself riddled with xenophobic practices and mentalities. According to the human rights lawyers and the refugee respondents the solution to political xenophobia lies outside the state but all the respondents expect the state – in effect the DHA -- to solve this problem whilst they also imply and assume that the state is effectively incapable of doing so. We may conclude that it could be a relevant objective of future research to investigate i) to what extent specific forms of official xenophobia can be identified as embedded in the institutional culture of state structures such as the DHA; ii) possible strategies and programmes for changing the institutional culture underlying these forms of official xenophobia, including that of professionalizing the bureaucracy; and iii) the possible involvement of alternative civil society-based non-state agencies in preventing and countering manifestations of social xenophobia in local communities.

7.6. Conclusion

In conclusion it may be warranted to stand back and take a larger view of some of the possible implications of this pilot study especially with regard to the basic dilemmas inherent in a rights-based approach dealing with refugees and asylum seekers as non-citizens. The paternalist assumptions underlying key interactions of state agencies, representatives of the international community, human rights lawyers and activists with the asylum seekers and refugees themselves may tend to inhibit refugee and asylum seekers' abilities to advocate for their own rights. Certainly their relation to DHA officials is determined by huge power imbalances – they need assistance by the DHA officials (likely hoping for the 'humanist' officials but more likely at the mercy of authoritarian and corrupt officials) but as non-citizens they have little or no countervailing forces at their disposal. This is however exactly why refugee rights are significant -- if their 'rights' mean anything it must be that their relationship to officials is not just one defined by power. Thus the question is how refugees and asylum seekers can mobilize even as non-citizens around their refugee rights. On the other hand the relationship to the human rights lawyers and/or human rights NGO's, is different and more complex. Even though it is not an adversarial relation it still has large power imbalances which may be masked by paternalist forms - the refugees and asylum seekers become clients or are otherwise disempowered. A key question is how human rights lawyers or NGOs can assist, represent and champion the refugees and asylum seekers without inadvertently also disempowering them. This is further exacerbated if their investment in South Africa as refugees rather than immigrants are relatively small, in that that they see their presence here as temporarily only.

This research has raised many questions around the conceptions of rights (both human and legal) of refugees and asylum seekers in relation to political xenophobia. It has suggested that the application of rights and the outbreak of xenophobia are intertwined; however this thesis is based on a small sample of each grouping of respondents. Further research into the institutional culture of DHA and the correlation to political xenophobia is necessary to gain a fuller understanding of political xenophobia in South Africa. Additionally, further research into agency and refugees in South Africa could help develop preventive strategies of xenophobia.

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Appendices:

Appendix 1 Detailed Research Questions

Analytically this general research question can be spelled out with a number of more specific research sub-questions. The following is a list of the full range of questions which informed the original interview schedule but which in practice could not all be completely followed through on.

(Human / constitutional) rights:

To what extent, and how, do human rights lawyers, refugees/asylum seekers and DHA officials respectively conceive of the position of refugees and asylum-seekers in terms of their rights?

What are their conceptions, if any, of the human rights of refugees and asylum-seekers, and how do they conceive the significance and implications of these?

How do they respectively understand and interpret the significance and relevance of the Constitution's provision of basic rights to non-citizens (including refugees and asylum-seekers) as well as to citizens?

Which specific (human and/or constitutional) rights do they think refugees and asylum-seekers are eligible for / have a claim to?

How do they conceive of possible correlative duties (to the state and/or the host society) on the part of refugees /asylum-seekers arising from their recognized rights?

What is their conception and assessment of the significance of these human / constitutional rights in actual practice, and how are possible defects understood or explained?

Legal rights of non-citizens:

How, or to what extent, do human rights lawyers, refugees/asylum seekers and DHA officials respectively conceive of refugees and asylum-seekers as non-citizens with different (legal) rights and claims than citizens?

To what extent are refugees and asylum-seekers consciously differentiated from immigrants conceived as prospective citizens, and what is the significance and implications of that?

How do they respectively understand and interpret the significance and relevance of the Immigration and Refugee Acts for the position of refugees and asylum-seekers?

Which legal rights do human rights lawyers, refugees/Asylum seekers and DHA officials think refugees and asylum-seekers are eligible for / have a claim to?

Implementation of legislation:

How do human rights lawyers, refugees/asylum seekers and DHA officials respectively assess the implementation of the Immigration and Refugee Acts, and to what extent are any problems in that regard attributed to the legislation as such?

How are the main problems with the implementation of this legislation identified and described, and to what or whom are they attributed?

To what extent do the respective conceptions of non-citizens' (human / constitutional / legal) rights influence the implementation of immigration and refugee legislation?

If there are serious problems with the implementation of this legislation, what are the respective conceptions of how these should be addressed and resolved, and to what extent do these involve the recognition of rights?

Political xenophobia as cause and/or consequence of the refugee crisis:

To what extent do human rights lawyers, refugees/asylum seekers and DHA officials respectively identify recurrent political 'xenophobia' as a cause and/or consequence of the refugee crisis, and in what terms do they describe it?

To what extent do they conceive of any connections between the (human / constitutional / legal) rights of non-citizens under threat, and/or the terms and implementation of the relevant legislation, on the one hand, and the recurrence of political 'xenophobia', on the other hand, or to what extent is the latter attributed to other kinds of reasons and factors?

If political ‘xenophobia’ is perceived as a major factor contributing to the refugee crisis, what are the respective conceptions of how this should be addressed and resolved and to what extent would this involve the recognition of rights?

Appendix 2

Table 1. Refugee and Asylum Seeker Participants

Alias	Country of origin	Status	Length in South Africa	Occupation in South Africa	Occupation in country of origin	Reason for leaving	Level of Education	Short term plans in South Africa	Communities inhabited since leaving home	Gender
M	Somalia	Refugee	7 yrs	Businessman	student	political	High school	To leave	Tanzania, Kenya, every major city in S.A. Now in Green Point	Male
A	DRC	Asylum seeker permit	2.5 yrs	Pastor	Pastor	political	High school/ additional ministry training	Work hard and wait for peace in Congo	Cape Town city centre	Male
AN	Burundi	refugee	5 yrs	NGO director	United Nations Human Rights worker	Political prisoner	University degrees from DRC and UCT	Advocate for refugee rights in SA, make a nice living	Gugulethu, Mitchell's Plain, Cape Town central	Male

AS	DRC	refugee	5 yrs	unemployed	teacher	Was asked to kill Tutsi sister in law	Teacher training college	To be safe	Gugulethu, Bon Esperance (shelter) Crawford and Johannesburg	Female
AND	Congo-Brazzaville	refugee	7yrs	waiter	accountant	political	University degree	To earn some money	Muizenberg, Fish Hoek, Plumstead	Male
E	Eastern DRC	asylum seeker	6 months	unemployed	doctor	Political war	/MD	To wait till it's safe to go home	Pinelands	Male
JR	Rwanda	refugee	10	Unemployed/ was business owner but business destroyed in attacks	Business owner	Wife was Tutsi and killed	High school	To leave South Africa	Maitland, Khaylesht ha, Bluewaters camp	Male
JU	Uganda	refugee	5 yrs	Employed at Refugee NGO	N/A	War	University Degree	Help refugees in S.A	Zambia Eastern Cape, Cape Town, Parow	Male
C	Congo Brazzaville	refugee	3yrs	Security guard, and photographer	Journalist	Upset the govt as a human rights journalist	University degree	Make some money to go home and send home to family	Ivory Coast, Cameroon, Gabon, Angola, Claremont	Male
F	Zimbabwe	Asylum seeker	1 year	student	student	Political / economic	Presently in university	Make some money to send home, make situation better at home	Rosebank	Male

Appendix 3

DHA Participant Profile:

Alias	Position	Yrs at DHA	Social background	Race-Self Identified
Nazeema Humanitarian Conceptions	Provincial Manager for the Cape Town Dept Back Log Project	3	Activist	Coloured
Soka Authoritarian conception	RSDO	2	Lawyer	Non-south African Ghana
Rex Humanitarian conception	RSDO manager	10	Pastor	Coloured
Jacob Authoritarian perspective	RSDO	1	Lawyer	Black

Appendix 4

The Department of Home Affairs Demographics of Employment

Occupational Band	African Male	Coloured Male	Indian Male	White Male	African Female	Coloured Female	Indian Female	White Female	Total
Top Management	1	1	0	0	2	0	0	0	4
Senior Management	23	4	0	9	17	1	0	4	58
Professionally qualified and experienced specialists and mid-management	202	13	10	43	136	5	6	35	450
Skilled technical and academically qualified workers, junior management, supervisors, foremen and superintendents	1809	107	22	131	2387	183	30	496	5165
Semi-skilled and discretionary decision making	539	49	1	30	531	51	2	95	1298
Unskilled and defined decision making	170	15	0	2	257	19	0	2	465
Contract	361	13	3	4	706	25	1	7	1120
Total	3105	202	36	219	4036	284	39	639	8560

