



# Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)

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# **Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)<sup>1</sup>**

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## **Abstract**

This report provides an overview of the provision of social protection to refugees and asylum seekers from Sub-Saharan Africa in the Southern African Development Community (SADC). This includes analyzing the legal framework and levels of implementation, as well as proposing policy directions on the national and regional levels. After giving an overview of the region's historical and legal context, the report focuses on the case studies of Botswana and South Africa to illustrate the wide variation of social protection framework and practices in the region.

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The findings, interpretations, and conclusions expressed in this paper are entirely those of the author. They do not necessarily represent the view of the World Bank, its Executive Directors, or the countries they represent.

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<sup>1</sup> A paper prepared as part of the project on Social Protection And Migration In Sub-Sahara Africa: Case Studies On Access, Portability, and Inclusion.

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# 1. Introduction

This report provides an overview of the provision of social protection to refugees and asylum seekers from Sub-Saharan Africa in the Southern African Development Community (SADC).<sup>3</sup> This includes analyzing the legal framework and levels of implementation, as well as proposing policy directions on the national and regional levels. After giving an overview of the region’s historical and legal context, the report focuses on the case studies of Botswana and South Africa to illustrate the wide variation of social protection framework and practices in the region.

The two case studies of South Africa and Botswana represent very different models for the provision of social protection to refugees and asylum seekers. Some of the key differences are summarized in Table 1. Although both countries arrived at their model of refugee reception through specific historical circumstances, they nonetheless represent two ideal-typical strategies for refugee reception which occur around the world and which have very different implications for the provision of social protection.

**Table 1: Case Study Comparison**

	<b>Botswana</b>	<b>South Africa</b>
<b>Refugee Law</b>	Security and control	Rights-based
<b>Institutional social protection service providers for refugees</b>	Parallel non-governmental	Mainstream governmental
<b>Location of service provision</b>	Concentrated, camp-based	Dispersed, self-settled
<b>Sustainability of social protection</b>	Low, externally funded, based on sufficient numbers of refugees so closed down when numbers fall	High, mainstream government funded, independent of numbers of refugees although stretched with rising numbers

The report’s key findings include:

- The importance of a strong domestic legal framework on civil and socio-economic rights for refugees as the basis for effective and sustainable social protection;
- The benefits of mainstream domestic, rather than parallel external, service providers;
- The importance of continuous independent monitoring of social protection provision to refugees, either through civil society or quasi-governmental monitoring agencies;
- The lack of knowledge about and support for informal social protection mechanisms.

The paper will first briefly review the conceptual challenges, which refugees and asylum seekers pose for the provision of social protection. Section 3 will then summarize the history of refugee flows in Southern Africa as well as the development of different

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<sup>3</sup> Member states of the Southern African Development Community are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

refugee reception regimes, which resulted from this history. Section 4 outlines the legal provisions currently in place regarding the social protection of refugees and asylum seekers, including provisions at the international, regional, bilateral and national levels, with a focus on the Botswanan and South African case studies. Section 5 will describe the institutional frameworks in Botswana and South Africa, which are correlates of the different legal regimes. Section 6 breaks down the experiences of Botswana and South Africa in implementing social protection according to different concrete services. This will be followed by an analysis of key issues arising from the previous two sections, comparing Botswana's camp-based model and South Africa's self-settled model of refugee reception, including legal gaps and implementation challenges (Section 7). Finally, good practices and other policy implications will be considered in Section 8.

The information used to compile this report was drawn from a range of written secondary sources; including laws, reports and presentations, as well as interviews conducted with government officials, representatives of various NGOs, UNHCR, refugees and asylum seekers. It also draws on the personal professional experience of the authors, acquired through working with refugees and refugee service organizations in Botswana and South Africa for many years.

## **2. Social Protection for Refugees and Asylum Seekers – Conceptual Challenges**

Social protection (SP) is defined as “all interventions from public, private and voluntary organizations and informal networks to support communities, households and individuals in their efforts to prevent, manage and overcome risks and vulnerabilities and enhance the social status and rights of the marginalized”<sup>4</sup> There is an extensive and long-standing academic and policy debate on the meaning and ideal extent of social protection, particularly concerning its impact on the relationship between citizens and the state. The discussion on social protection for non-citizens and the implications for the relationship between non-citizens and the host state, however, are more recent. Social protection issues raise three principal questions which impact on practice with regard to refugee and asylum seeker access to social protection. These include: a) what is the basis for an individual's right to social protection?; b) which institution is responsible for providing social protection?; and c) what are the ideal mechanisms through which to provide social protection? A brief consideration of these questions will serve to preface the description of Southern African practices in the report.

Most SP provisions remain within the national realm and have yet few effective international provisions. This has several consequences for a consideration of SP for refugees and asylum seekers (R&AS) and for migrants in general.

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<sup>4</sup> This definition, set out in the proposal for the research project on Social Protection and Migration in Sub-Saharan Africa: Case Studies on Access, Portability and Inclusion, builds on Holzmann and Joergensen (2000), Shepherd (2004), and Devereux and (Sabates-Wheeler 2005).

Firstly, the way in which a state has answered the three questions above for its own citizens impacts on the way in which it conceives of SP for non-citizens. International, regional and national variation in SP mechanisms for R&AS is therefore at least partly a function of variation in SP for citizens of different countries and regions. One of the key differences between refugee protection in Africa compared with more wealthy parts of the world is that many African states have only very limited SP for their own citizens. This either means that they cannot provide SP to R&AS either, or that SP has to come from external actors, such as international or non-governmental organizations.

Secondly, since most of the answers to the above questions rely on a relationship between an individual and a state, the fact that migrants have moved across a national border significantly changes the answers required. For example in relation to questions 1) and 2), although some authors argue that SP should be based on a universal human right to life, dignity and basic physical welfare, and therefore that responsibility for SP provision goes beyond any particular state, most SP provisions are based on an understanding of mutual responsibility between an individual and a particular state. Thus, SP is provided in (implicit or explicit) return for loyalty to the state, payment of taxes, potential future votes, etc. This means that non-citizens, who are by definition outside such a national 'social contract' are also outside the logic underpinning SP.

Third, if question 3) is answered through contributory (pre-saving) schemes which require some resource inputs from the beneficiaries themselves, then recently arrived migrants and R&SA do not have a personal history of contributions or savings to draw on. In many cases migrants may spend their productive years in one place and their SP receiving years in another place and the balance between individual contributions to the general social income and social protection contributions to an individual income (e.g. a pension is paid after a long period of productive work does not work out. It is much more difficult to design mechanisms for the provision or portability of SP which cross national borders, since the institutional frameworks which fund and implement SP mechanisms are almost all national. Some attempts to address this issue are the topic of other reports within this research framework.

In addition to these challenges faced by all cross-border migrants, there are additional issues regarding the provision of SP to R&AS. Even where international, regional or bilateral mechanisms are or could be put in place to manage the provision of SP across borders, refugees have fled their countries of origin precisely because of a breakdown in the 'social contract' with the state, and so SP provisions based on home-state contributions would not apply. Moreover, concerning host-state-based SP provision, refugee flows are often sudden and large, placing an unexpected (and un-budgeted) burden on the host state's public purse. The next paragraph will give an overview on how various countries have dealt with these challenges in the past.

### **3. Historical Overview of Refugee Flows in Southern Africa**

The history of refugee flows in Southern Africa is shaped by several distinct periods: pre-colonial, colonial, independence struggles and post-colonial. Each period led to different kinds of refugee flows and to the development of different institutional and legal responses to refugees. This section will mainly focus on the latter two periods since they have the most impact on current SP practices e.g. by shaping regional institutions such as SADC and provide the current context of migration. After characterizing the regional context, the recent and current refugee situation in each of the SADC member countries will be outlined.

In the pre-colonial context the Southern African region, as was the case in the rest of the continent, was characterized by widespread migration without the limitations imposed by strict territorial borders between states or nations. When borders were imposed during the colonial period, these were drawn through existing communities and kin-groups. The lasting implications of this process today are that many refugee flows across modern borders have nonetheless remained within the same ethnic area, among linguistic and blood kin on the other side of a border. This was the case for Angolans in Zambia in the 1960s, Zimbabweans in Mozambique in the 1970s, Mozambicans in South Africa in the 1980s, and to some extent for Ndebele-speaking Zimbabweans in South Africa today. There was virtually no official state provision of SP in these cases, in practice however, 'social' protection was provided by host communities through the provision of emergency food and shelter, land, work opportunities and integration into existing local social mechanisms for alleviating extreme need and vulnerability.

The colonial period, in addition to displacement caused by colonial conquest wars and, in some cases, extreme exploitation, also entrenched a specific labor migration regime in the region. In particular from the mid-1800s onward, this regime was centered on South Africa and to some extent Zimbabwe as labor magnets, while most other countries in the region became labor suppliers.<sup>5</sup> This labor migration system had two relevant lasting effects for this discussion. Firstly, it established migration routes throughout the region, which also shaped later refugee flows to some extent, but more significantly, it led to the establishment of a series of cross-border arrangements for managing labor migration related 'social protection' payments. While these systems were limited and designed to protect the interests of employers rather than migrant workers they did provide potentially useful institutional models (if appropriately adapted) for bilateral and regional cross-border payments, which were later abandoned. These included partial deferred payment of wages into home-country accounts and the payment of pension and disability payments into home country accounts.

Southern Africa's independence struggles continued for a protracted period, with the first country gaining independence and majority rule being the Congo (then renamed Zaire and now the Democratic Republic of Congo) in 1960, with South Africa being the last in 1994. This meant that there was an important period of overlap between continued colonial or minority rule in some countries (notably Namibia, Zimbabwe and South

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<sup>5</sup> This labor migration system did not include Angola, Botswana, DRC or Mauritius to a significant extent. The greatest impacts were felt in Mozambique, Lesotho, Swaziland, Malawi and Zambia (until the 1970s for the latter two).

Africa), while their neighbors were building post-colonial regimes, as discussed further below.

The decolonization processes led to large-scale displacement in the region. While some countries such as Lesotho and Swaziland were never fully colonized and others had relatively peaceful transitions to self-rule (such as Botswana, Tanzania, Malawi, Zambia, and Mauritius), many countries in the region, especially those with settler colonies, fought bloody wars before gaining independence. These included Angola and Mozambique (1975), Zimbabwe (1980), Namibia (1990) and South Africa (1994).<sup>6</sup> During this period, newly independent neighboring countries generally allowed refugees to enter, remain and work in their countries freely, due to the shared political process of decolonization and the expectation of quick return once independence had been gained. 'Social' protection, as above, was not provided by the state, which in most cases was just starting to plan schemes for its own citizens, but by integration into local communities, even if only temporarily. Another element of the decolonization wars was the large-scale movement of white settlers out of the newly independent countries. While many returned to their countries of origin or moved to other parts of the world, many also remained the region, often re-establishing themselves in the remaining settler colonies South Africa and Rhodesia, where they were welcomed as permanent residents or citizens rather than as refugees.

In response to the independence wars of the 1960s, the newly established Organization of African Unity (OAU) passed a Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969, which extended the definition of who should be recognized as a refugee beyond the still explicitly Eurocentric definition enshrined in the United Nations Convention relating to the Status of Refugees (1951). The OAU Convention, with the 1951 UN Convention, would from then on provide the basic legal framework for the protection of refugees in Africa.

Conflicts in Southern Africa did not end with independence, and Angola (1975-2002), the DRC (Zaire) (most recently from 1997-2002 and ongoing), and Mozambique (1976-1992) became embroiled in civil wars soon after independence, which lasted for decades. In the 1970s and 1980s, apartheid South Africa and, until 1980, white-ruled Rhodesia, played an active role in exacerbating the conflicts in the region, especially in Angola and Mozambique. The apartheid regime also actively pursued South African political exiles into neighboring countries and attacked countries in the region, which harbored members of the South African liberation movements. This was especially the case with Angola, Mozambique, Swaziland, Tanzania, Zambia, and post-independence Zimbabwe. African refugees (e.g. in contrast to the white settlers of the 1960s and 70s) from regional conflicts who fled into South Africa were not recognized as refugees and deported or ignored, as was especially the case with Mozambican refugees in South Africa from 1985-1992. Table 1 shows the main regional refugee flows of the period. Some countries, such as DRC and Tanzania, also hosted (and continue to host) large numbers of refugees from countries outside the Southern African region, especially from Rwanda and

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<sup>6</sup> Even though South Africa's transition to majority democracy is often presented as peaceful, hundreds of thousands of people died in the process of the liberation struggle.



Burundi. In this context, especially the Front-Line States bordering South Africa saw refugee protection as part of the political anti-apartheid project.

**Table 2: Large Refugee Flows in Southern Africa, 1960-2006**

Source Country	Main Host Countries within SADC
Angola (1975-2002)	Zambia The DRC The Republic of Congo (Brazzaville) Namibia South Africa (after 1990)
Mozambique (1976-1992)	Zimbabwe Malawi South Africa (from 1985)
DRC (1997-2002 and ongoing)	Angola Namibia Malawi South Africa Tanzania Zambia Zimbabwe
South Africa (1970s - 1994)	Swaziland Lesotho Mozambique Tanzania Zambia Zimbabwe (from 1980)
Namibia (1966-1988)	Botswana South Africa

The regional institutions which resulted from this period between the 1960s and the introduction of majority rule in South Africa in 1994 include the Southern African Development Community, which grew out of the set of Front Line States (FLS). In 1980, the FLS invited other Southern African countries to join them in establishing the Southern African Development Community.<sup>7</sup> The legal provisions relating to refugees and asylum seekers and social protection resulting from SADC provisions are described further below.

Since 1994, refugee flows in the region have changed once again, with democratic South Africa becoming a host for refugees from around the continent, including within the

<sup>7</sup> The Southern African Development Coordination Conference was established with the Lusaka Declaration in 1980. Original member states were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and newly independent Zimbabwe. The Conference was transformed into the Southern African Development Community (SADC) in 1992 in Windhoek, Namibia. They were later joined by the DRC, Madagascar, Mauritius, Namibia and South Africa.

region from Angola and DRC. While the Mozambican and Angolan conflicts were resolved in respectively 1992 and 2002, the DRC continues to produce refugees to date. Since 2000, the political instability and economic collapse of Zimbabwe have led to a new flow of Zimbabweans into the region (especially South Africa and Botswana, with increasing numbers in Mozambique and Zambia since 2005), although there is little agreement in the region of whether most of these Zimbabweans should be recognized as refugees or not<sup>8</sup>

In the absence of a unifying political goal, whether independence or the fight against apartheid, Southern African governments have joined the rest of the world in viewing migration flows as potential security risks and developmental burdens since the 1990s. On the one hand they aim to control migration flows through more active and codified migration policies than previously. On the other hand, there have been initiatives within the SADC context toward greater regional integration, including freer movement of persons residing in the region. The tug-of-war between the trends toward control and liberalization of movement has meant that so far, there has not been a significant opening of a migration regime in the region, nor has there been any practical harmonization of refugee protection regimes.

As this brief history points out, the member countries of SADC have not only very different experiences of refugee flows but have also responded to refugees in different ways. Furthermore, the regional political context for refugee flows has changed dramatically over time with varying policy results. Therefore the rest of this section outlines the main refugee flows and domestic responses in each of the SADC member states.

### **3.1. Angola**

Angola has been a refugee producing country for decades. Since the end of the civil war in 2002, Angolan refugees have been returning to the country, spontaneously and through organized repatriation programs from neighboring countries. Therefore the country's main displacement challenges today are in relation to internally displaced people and the reintegration of returnees. Despite large-scale spontaneous return of IDP to their home areas since 2002, 1.4 million people remained displaced within Angola with approximately 300,000 living in IDP centers around the country in 2005. Angola is also providing asylum to 15 500 registered refugees and asylum seekers in 2007, of which 14 000 are from the DRC.<sup>9</sup> It is likely that many more refugees from the Great Lakes Region remain unregistered and have self-settled in Angola. The refugee program is managed by UNHCR and its implementing agencies, including the Lutheran World Federation (LWF).

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<sup>8</sup> Polzer, T. (2007). Responding to Zimbabwean Migration to South Africa - Evaluating Options. Johannesburg, Wits Forced Migration Studies Programme, Wits Law School and Lawyers for Human Rights: 29.

<sup>9</sup> U.S. Committee for Refugees and Immigrants (2007). World Refugee Survey.

### **3.2. Botswana**

Botswana's refugee protection regime stems from a history of providing protection to refugees from the white minority governed states (Namibia, South Africa and Zimbabwe) surrounding it until the mid-1990s. Refugees from Namibia at different periods of time included some 1,000 Herero from then-South West Africa in 1904; refugees from the apartheid-era fighting in the 1980s, some whom transited to Zambia; and refugees from Caprivi in the mid-1990s. The majority of each of these groups was repatriated after the end of the respective conflicts. South Africans also fled to Botswana, including waves related to the 1960 Sharpeville massacre and the 1976 Soweto Uprising. Many transited to then-Tanganyika, while others were settled in Dukwi refugee camp or integrated. The numbers of those who remained in Botswana are not known, but many repatriated on South African majority rule. The first Angolan refugees arrived in Botswana in 1965, with continuous new arrivals into the mid-1990s. Many were granted citizenship while others opted to repatriate. Finally, Zimbabwean refugees during the 1970s liberation struggle entered Botswana in large numbers, necessitating the establishment of three refugee camps in Selibe Pikwe, Francistown and Dukwi. Most Zimbabweans were repatriated in 1979/80 while those who did not return were granted citizenship. During the Gukurahundi campaign in southern Zimbabwe, there was another wave of refugees in Botswana. Most recently, Zimbabweans fleeing the political and economic turmoil in their country have entered Botswana in large numbers, but are not being received as refugees.

Other refugee groups in the country since the 1990s include people from the DRC, Lesotho, Malawi, Mozambique and, currently in large numbers, from Zimbabwe. Botswana also shelters small numbers of refugees from Chad, Ghana, Libya, Nigeria, Sudan, Uganda and even Yugoslavia. At the end of 2006 there were 2800 camp-based refugees and approximately 1000 asylum seekers in the country and because it was expected that Angolan and Namibian refugees would repatriate during 2007.<sup>10</sup> Because of the small residual number of refugees, refugee assistance programs have been virtually closed down, with UNHCR planning to withdraw at the end of 2007 or in 2008, although the Dukwi camp remains open under the aegis of the Office of the Presidency.

Botswana's refugee protection system combines UNHCR and government-supported programs, and includes camp-based settlement, the encouragement of voluntary repatriation, and the ad hoc option of citizenship for those who do not wish to be repatriated. As noted above, some groups, notably South Africans, have integrated completely.

### **3.3. Democratic Republic of Congo**

The DRC is also predominantly a refugee producing country, and, although the civil war has formally ended, continued fighting in the east of the country still produces new refugee flows. Internal displacement and the concomitant fast urbanization rates are a major developmental challenge in the country, which has social protection implications.

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<sup>10</sup> UNHCR (2006). Country Operations Plan Botswana - Overview.

The country also hosts 208,500 refugees and asylum seekers half of them from Angola.<sup>11</sup> Extensive rights for refugees and foreigners in general are included in the 2002 Refugee Law and the 2006 Constitution.<sup>12</sup> This includes freedom of movement and most refugees live integrated among Congolese in either rural border areas or urban areas.

### **3.4. Lesotho**

Lesotho's small size and its unusual position of being entirely surrounded by South Africa and economically dependent on it, has shaped its history of refugee protection. Persons fleeing from political unrest within Lesotho generally moved into South Africa in the guise of economic migrants, blending in with the Sesotho-speaking South African population, while South African refugees and freedom fighters used Lesotho as a place of refuge during the anti-apartheid struggle in the 1970s and 80s. Lesotho only hosts c. 60 refugees from other countries.<sup>13</sup>

### **3.5. Madagascar and Mauritius**

Madagascar and Mauritius do not have established refugee policies. Madagascar has provided asylum to 60 refugees from Burundi, Ethiopia, Rwanda, and Sudan. Madagascar's welfare program for refugees was funded by UNHCR. At present its refugee population is not from the SADC region.<sup>14</sup> Mauritius has not granted asylum to anyone.<sup>15</sup>

### **3.6. Malawi**

Malawi hosted thousands of Mozambican and Rhodesian refugees in the 1970s and 1980s. Most of these refugees were repatriated when majority rule was attained in their home countries. It now hosts 9,200 refugees and asylum seekers who are mostly from the Great Lakes region.<sup>16</sup> The refugee program is funded through UNHCR. Refugees are kept in camps where they are provided with basic assistance such as shelter, food, water, relief items, education and health care, but do not enjoy the right to work and move outside and camps.

### **3.7. Mozambique**

The Mozambican civil war resulted in approximately two million people fleeing Mozambique into neighboring countries between 1976 and 1992. Most of these were repatriated by the mid-1990s. Today, Mozambique hosts a relatively small number of refugees, who are mostly not from the SADC region but from DRC, Burundi, Rwanda, Angola, and Somalia, and who are in many cases transiting to South Africa. UNHCR is responsible for looking after refugees in Mozambique and there is a policy of encampment. However, significant numbers of refugees are self-settled in the larger

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<sup>11</sup> U.S. Committee for Refugees and Immigrants (2007). World Refugee Survey.

<sup>12</sup> Ibid.

<sup>13</sup> Bureau of Democracy, H. R., and Labor, (2006). Lesotho. Country Reports on Human Rights Practices. U.S. Department of State. <http://www.state.gov/g/drl/rls/hrrpt/2006/78741.htm>.

<sup>14</sup> UNHCR 2001:107

<sup>15</sup> Bureau of Democracy, H. R., and Labor, (2006). Mauritius. Country Reports on Human Rights Practices. U.S. Department of State. <http://www.state.gov/g/drl/rls/hrrpt/2006/78747.htm>.

<sup>16</sup> U.S. Committee for Refugees and Immigrants (2007). World Refugee Survey.

towns and in Maputo. In 2006 Mozambique hosted 6,900 registered refugees and asylum seekers.<sup>17</sup> The most recent development is the movement of Zimbabweans into Mozambique due to the deepening economic crisis in Zimbabwe, although they are not recognized as refugees.

### **3.8. Namibia**

The majority of the refugee population in Namibia is from Angola. Refugees do not have freedom of movement and are confined to the Osire refugee camp. Approximately 500 refugees who have work or study permits live outside the camp. National Refugee Committee conducts status determination. Namibia was hosting 6,600 refugees and asylum seekers in 2006.<sup>18</sup>

### **3.9. South Africa**

South Africa integrated various groups of white settlers from neighboring countries in the 1960s and 70s (especially from Mozambique, Namibia and Zimbabwe), while providing no protection for black refugees from those countries. Most notably, about 350,000 Mozambican refugees fled into South Africa from 1985, who were not granted refugee status until 1993, but who were allowed to settle informally in the black 'homelands' in the South African border areas.<sup>19</sup> Since 1994, South Africa has increasingly hosted large numbers of refugees from around the continent, with large contingents from the DRC, Somalia, Zimbabwe, and Ethiopia. In 2006, there were about 170,000 refugees and asylum seekers, including a backlog of 80,000 unprocessed asylum applications. There were 53,361 new asylum applications, making it the largest host of new individual asylum seekers on the continent.<sup>20</sup> Since 2000 South Africa has been hosting increasing numbers of Zimbabweans, of whom 44,000 have applied for asylum.<sup>21</sup> However, the total number of R&AS remains much lower than smaller and poorer countries such as Tanzania or Zambia. South Africa's current policy framework for refugee protection is based on urban self-settlement with extensive socio-economic rights for asylum seekers and refugees, including the right to work.

### **3.10. Swaziland**

Swaziland has historically assisted refugees fleeing from South Africa to transit to Mozambique. Today, many asylum seekers are from the Great Lakes and the Horn of Africa, and are transiting through Swaziland to South Africa for better opportunities.<sup>22</sup> In 2006, Swaziland was hosting less than 1000 refugees and asylum seekers. The

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<sup>17</sup> U.S. Committee for Refugees and Immigrants (2007). *World Refugee Survey*.

<sup>18</sup> Ibid.

<sup>19</sup> Polzer, T. (2007). "Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa - an Historical Overview." *International Journal of Refugee Law* 19(1): 22-50.

<sup>20</sup> Department of Home Affairs, Refugee Statistics 2006; UNHCR (2006). 2006 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons. Geneva, UNHCR.

<sup>21</sup> Cumulative UNHCR statistics to June 2007. It is estimated that there are currently c. 1 million Zimbabweans in South Africa in total.

<sup>22</sup> Gumedze, S. (2001). *Refugee Protection in Swaziland*

<http://www.sarpn.org.za/CountryPovertyPapers/Swaziland/Refugee/index.php> accessed on 19th May 2007, Southern African Regional Poverty Network.

government of Swaziland through the Ministry of Home Affairs is responsible for the physical and legal protection of refugees. Implementation is administered through a tripartite agreement between the Government, UNHCR and Caritas. The Political Asylum Committee is responsible for determining the refugee status of asylum seekers and UNHCR is accorded observer status.

### **3.11. Tanzania**

Tanzania has a long history of providing protection to refugees. It has sheltered hundreds of thousands of refugees for over four decades. In 2006, Tanzania still had over 485,000 refugees, mostly from Burundi and the DRC, after forcibly repatriating thousands of Rwandans and Burundians since 2002, including many who had lived in the country for 30-40 years. The Refugee Act requires camp-based settlement, and restrictions on movement are enforced,<sup>23</sup> although there are also refugees living clandestinely in villages and urban areas. Refugees are not allowed to work. There are two distinct status determination procedures, with refugees from the DRC and Burundi granted prima facie (group) status, and refugees from other countries screened by a National Eligibility Committee and the Minister of Home Affairs.

### **3.12. Zambia**

In the past, Zambia has provided asylum to refugees from Angola, Mozambique, Namibia, South Africa and Zimbabwe. Today, after a year of extensive repatriation to Angola, Zambia was still hosting 120,000 refugees in 2006, including Angolans who have refused repatriation and persons from the DRC.<sup>24</sup> While Zambia practiced an open reception policy for many years, it has now enacted more restrictive refugee legislation. Refugees are required to live in rural camps in the western and northern regions of the country and cannot acquire Zambian citizenship or obtain permanent residence status.<sup>25</sup> There are, however, c. 50,000 refugees living outside the camps, who are not officially registered as refugees and the UNHCR aims to encourage local integration of some of the remaining refugees.<sup>26</sup>

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<sup>23</sup> U.S. Committee for Refugees and Immigrants (2007). World Refugee Survey.

<sup>24</sup> Ibid.

<sup>25</sup> UNHCR (2007). Global Appeal.

<sup>26</sup> U.S. Committee for Refugees and Immigrants (2007). World Refugee Survey. UNHCR (2007). Global Appeal. p.186

### 3.13. Zimbabwe

Zimbabwe has historically hosted refugees from Mozambique as well as providing sanctuary for South African liberation fighters. More recently, the country has provided refuge to people from the DRC, Angola and Somalia. In 2006 there were 3800 refugees and asylum seekers registered in Zimbabwe.<sup>27</sup> With the political unrest and economic collapse of Zimbabwe in 2002, most of the refugees in the country have since moved elsewhere, especially South Africa.

**Table 3: Domestic Legislation regarding refugees and asylum seekers in SADC member states**

State	Act	Year
Angola	Law on Refugee Status (8/1990)	1990
Botswana	Refugees Recognition and Control Act	1967
DRC	Refugee Status Act (21/2002)	2002
Lesotho	Refugee Act	1983
Madagascar	Decree for the creation of a refugee office within the Ministry for the Interior	1962
Malawi	Refugee Act	1989
Mauritius	No refugee legislation	
Mozambique	Refugee Act (21/1991)	1991
Namibia	Refugees (Recognition and Control) Act	1999
South Africa	Refugee Act	1998
Swaziland	Refugees Control Order	1978
Tanzania	Refugees Act	1998
Zambia	Refugee (Control) Act	1970
Zimbabwe	Refugee Act	1983

**Table 4: Dominant Refugee Reception Model**

Camps	Self-settlement
Botswana	Angola
Malawi	DRC
Mozambique	Lesotho
Namibia	South Africa
Tanzania	Swaziland
Zambia	
Zimbabwe	

<sup>27</sup> U.S. Committee for Refugees and Immigrants (2007). *World Refugee Survey*.

**Table 5: Agency Responsible for Refugee Protection**

Host State	UNHCR
Botswana	Angola
DRC	Mozambique
Malawi	
Namibia	
Lesotho	
South Africa	
Swaziland	
Tanzania	
Zambia	
Zimbabwe	

## **4. Legal Provisions for the Social Protection of Refugees and Asylum Seekers**

This section briefly outlines the legal provisions, which frame the SP of refugees and asylum seekers in Southern Africa. This includes international, regional, bilateral and domestic instruments. In all cases, there are two kinds of legal mechanisms, which apply, namely instruments relating to refugee protection and those relating to social and economic rights and social protection generally.

After describing the main international and regional legal provisions, which apply to all SADC member states, the report will focus on the case studies of South Africa and Botswana. In this section, this involves describing the bilateral and national legal frameworks in the two countries, followed by sections on the corollary institutional frameworks and the ways in which specific SP needs are addressed.

### **4.1. International**

International instruments relating to refugee protection and social protection will only be listed briefly here, as they have been reviewed extensively elsewhere.<sup>28</sup> This section will merely note the extent to which the SADC member countries, and especially Botswana and South Africa, have acceded to these instruments.

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<sup>28</sup> Holzmann, R. and S. Jorgensen (2001). "Social Risk Management: A New Conceptual Framework for Social Protection, and Beyond " *International Tax and Public Finance* 8(4): 529-556, Reid, C. (2005). "International Law and Legal Instruments." *Forced Migration Online Study Guide*.



## Box 1: International Legal Instruments

International instruments regulating the protection of refugees:

- the 1951 UN Convention Relating to the Status of Refugees, and the 1967 Protocol amending this Convention;

Related instruments on the rights of migrants and non-nationals:

- the 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live
- the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Key international instruments outlining the principle rights to social protection:

- The 1948 Universal Declaration of Human Rights
- The 1966 Covenant on Economic, Social and Cultural Rights

While the 1951 Convention is legally binding, the 1985 Declaration is considered a guideline. The 1990 Convention on the Rights of Migrant Workers has entered into force since 2003 through ratification by twenty countries. , As it is not yet widely ratified and, while legally binding, does therefore not have the same weight as the 1951 Convention elements of which have become customary law, even for those countries who have not ratified it.

Botswana acceded to the 1951 UN Convention and the 1967 protocol in 1969. However, it made reservations on Articles 17, 26, 31,32, and 34. These reservations reflect the concerns of the Botswana government due to the refugee context at the time. The reservation of Article 17, conferring upon refugee's favorable treatment with regard to wage earning and employment, was justified on the basis of Botswana's high unemployment rate. Article 26, providing for freedom of movement of refugees, was reserved by the ruling Botswana Democratic Party for reasons of domestic politics and 'security'. This was mainly because many refugees in the 1960s were from liberation movements committed to socialism and were, furthermore, aligned with the Botswana opposition parties, Botswana National Front and Botswana People's Party. Such political reasons also motivated the reservations of Articles 31 and 32 which, respectively, prohibit the imposition of penalties for refugees unlawfully entering a contracting state and prohibit the expulsion of a refugee except on the grounds of national security or public order. Finally, Article 34, requiring a contracting state to facilitate the assimilation and naturalization of refugees, was reserved due to a concern with a potential change in the balance of power between ethnic groups within Botswana, should significant numbers of people from neighboring countries become naturalized.

South Africa acceded to the international conventions governing the protection of refugees and asylum seekers not until after achieving majority rule. Nevertheless, it ratified both, the 1951 UN and the 1969 OAU Conventions, without reservations.

The 1951 UN Convention's Articles 20-24 relate directly to social protection. They provide that:

- Article 20: Refugees should have the same rights as citizens whether a state rationing system exists;
- Article 21: Refugees should be treated as ‘favorably as possible’ and ‘not less [favorably] than ... aliens generally in the same circumstances’ with regard to public housing;
- Article 22: Refugees should receive the same treatment as national regarding access to elementary education and treatment ‘as favorable as possible’ regarding other education;
- Article 23: Refugees should be accorded the same treatment as nations with regard to public relief and assistance.

Article 24 outlines the conditions under which social security should be made available to refugees (see box 2 below). These provisions are extensive and based on the principle of parity with nationals where possible. However, the difficulty associated with contributory schemes and ‘acquired rights’ as noted in the introduction is reflected here in sections 24 (1)(b)(i) and (ii).

Box 2: 1951 UN Convention Relating to the Status of Refugees, Provisions for Social Protection

**Article 24 Labor legislation and social security**

(1) The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension.

(2) The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

(3) The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

(4) The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

The 1985 UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live states in Article 8 (1) (c) that:

1. Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under article 4:<sup>29</sup>

(c) The right to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfill the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State.

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (entered into force in 2003) includes extensive provisions for social protection, including

- Article 27: Equal treatment as nations regarding social security, dependent on fulfilling the legislated requirements, or the reimbursement of contributions made;
- Article 28: The right to urgent medical care for migrant workers and their families;
- Article 30: The right to basic education for the children of migrant workers;
- Article 43: Equal treatment of migrant workers and nationals regarding access to educational institutions, social housing schemes, and social and health services;
- Article 45: Equal treatment of migrant workers' family member and nationals regarding access to educational institutions, social housing schemes, and social and health services;
- Article 54: Equal treatment of migrant workers and national regarding unemployment benefits

None of the SADC member states were among the original 20 ratifying states when the Convention came into force in 2003, nor have any signed the Convention as a move toward ratification.

Concerning social protection in general, including for citizens and non-citizens, article 22 of the Universal Declaration of Human Rights of 1948 states that “everyone, as a member of society, has the right to social security”. Article 9 of the 1966 International Covenant on Economic, Social and Cultural Rights refers to “the right of everyone to social security, including social insurance”. South Africa has signed but not ratified this Covenant, and Botswana has ratified it. In addition, many international conferences and the United Nations Millennium Declaration (2000) adopted by the General Assembly have reaffirmed the right to social protection.<sup>30</sup>

Table 6 gives an overview of... <<put table into context>>

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<sup>29</sup> Article 4 provides that ‘Aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State.’

<sup>30</sup> García, A. B. and J. V. Gruat (2003). Social Protection: A Life Cycle Continuum Investment for Social Justice, Poverty Reduction and Sustainable Development Geneva, International Labour Office.

**Table 6: SADC member states accession to International Legal Instruments and Reservations**

Country	1951/67 UN Convention/ Protocol
Angola	1981 (reservations 7, 8, 9, 13, 15, 17, 18, 24, 26)
Botswana	1969 (reservations 7, 17, 26, 31, 32, 34)
DRC	1965/1975
Lesotho	1981
Madagascar	1967 (Convention only, reservations 7, 8, 9, 17)
Malawi	1987 (reservations 7, 13, 15, 17, 19, 22, 24, 26, 34)
Mauritius	Not acceded
Mozambique	1983/1989 (reservations 13, 15, 17, 19, 22, 26, 34)
Namibia	1995 (Convention only, reservation 26)
South Africa	1996
Swaziland	2000/1969 (reservations 22, 34)
Tanzania	1964/1968 (reservation 4)
Zambia	1969 (reservations 17, 22, 26, 28)
Zimbabwe	1981 (reservations 17, 22, 23, 24, 26)

## **4.2. Regional**

There are two levels of regional instruments: one at the continental level, represented institutionally by the Organization of African Unity/African Union, and one at the Southern African level, represented by SADC.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is a key instrument governing refugee protection in Africa, but it does not, in contrast to the 1951 UN Convention described above, include any provisions relating to social protection. This reflects one of the key differences between European and African refugee protection and social protection for R&AS, namely that most African host states do not have comprehensive social protection systems for their own citizens, and therefore cannot commit to providing them for refugees.

At the SADC level, there are two kinds of provisions, which would impact on the SP of R&AS. The first would relate to a regional agreement on the treatment of all refugees, irrespective of their country of origin, while the second would relate to agreements concerning the treatment of citizens of SADC member states in general, which would also apply if some of those citizens became refugees in another SADC member state. With regard to the first, there is no refugee-specific protocol or harmonization policy in place. The only provision is a very general article (28) within the recently ratified SADC Protocol on the Facilitated Movement of Persons (2005), which merely states that member states ‘reaffirm their commitment to their obligations under international agreements to which they are parties, and which relate to refugees’ and that ‘the management of refugees in the Region shall be regulated by a specific Memorandum of

Understanding (MOU) between State Parties.’ Such an MOU has not yet been drafted, but would have a relatively weak legal purchase.

Significantly, the Protocol also does not provide for any SP rights for citizens of SADC member states while they are in other SADC states. In the absence of other regional mechanisms focusing explicitly on social protection, this suggests that SADC member states are not yet ready to put in place cross-border SP mechanisms for their own citizens, let alone refugees from other regions.

The 2003 SADC Social Charter is another instrument, which deals with social security. As stated in Article 2.1 e, one of its main aims is to “promote the establishment and harmonization of social security schemes.” The Charter is explicitly targeted at workers, and makes no mention of asylum seekers or refugees. Article 10 expresses the member state’s commitments to social protection broadly (see Box 3 below).

### **Box 3: 2003 SADC Social Charter**

#### **Article 10: Social Protection**

1. Member States shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.
2. Persons who have been unable to either enter or re-enter the labor market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.

### **4.3. Bilateral**

Bilateral treaties relating to refugee protection are relatively rare and concern mainly repatriation and resettlement arrangements, or are part of a peace treaty between two countries or two warring factions. Other kinds of bilateral agreement, such as extradition arrangements, can be used in relation to refugee protection, as described below, but these relate more to civil and political rights, such as the right to a fair trial, than to social rights and social protection. Bilateral arrangements in relation to the transferability of social protection (such as pensions) are more common, but they generally relate to migrant workers rather than refugees. This is almost by definition the case, as discussed in Section 2 above, since countries currently producing refugees are either unlikely to be able to uphold an agreement due to internal conflict, or would be unwilling to honor an agreement in relation to individuals who have fled from the state.

Both Botswana and South Africa have had cases where refugees or asylum seekers were faced with a request for extradition. In 1969 Botswana signed an extradition treaty with South Africa. To ensure that Botswana maintained its international obligations to protect refugees Botswana ensured that the treaty had provisions to protect refugees. The treaty provided that “extradition may be refused if the offence in respect of which it is requested

is regarded by the requested party as a political offence or as an offence connected with a political offence.”<sup>31</sup> There is no record of a political refugee who was extradited under this agreement. When Namibia acquired majority government Botswana entered into a similar treaty with them.

Botswana is presently hosting Namibian refugees who are reported to have engaged in violent activities in Caprivi. These were denied refugee recognition by Botswana government but are persons of concern to UNHCR. They have therefore been allowed to stay in the country and UNHCR has been mandated to find them a country of resettlement. Requests by the Namibian Government to extradite these Namibians were turned down. The matter was taken to court and a ruling was passed in favor of the humanitarian community who argued that their acts were a result of discrimination based on political grounds and thus qualified them for protection.

Similarly, South Africa has bilateral extradition agreements with many countries. In a 2005 case, an extradition request for a Libyan national who was in South Africa claiming asylum was delayed, but on the basis of the lack of a bilateral extradition treaty rather than with reference to his asylum status.<sup>32</sup>

South Africa also has a series of recent bilateral treaties which deal directly with social protection issues (see Table 7). It was not possible to gain information on the exact content of these treaties.

**Table 7 South African bilateral treaties relating to social protection**

Country	Year	Treaty
Angola	2005	Agreement of Cooperation in the Field of Social Protection and Re-Integration
Cuba	2004	Agreement on Cooperation in the Fields of Employment, Social Security and Occupational Health and Safety
DRC	2006	Memorandum of Understanding on Co-operation in the Area of Social Development
Mauritius	2006	Memorandum of Understanding on Co-operation in the Field of Social Development
Mozambique	2003	Cooperation Agreement in the fields of Migratory Labor, Job Creation, Training, Studies and Research, Employment Statistics, Social Dialogue and Social Security
Namibia	1994	Agreement regarding payment from 1.3.1994 of benefits in terms of the Unemployment Insurance Act, 1966 (Act 30 of 1966) to Walvis Bay contributors

<sup>31</sup> Polhemus, J. H. (1985). "The refugee factor in Botswana." *Immigrants and Minorities* 4(1): 31.

<sup>32</sup> News24.com, 28 November 2005, [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_1841806,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1841806,00.html)

Netherlands	1997	Memorandum of Understanding in the Field of Social Welfare
Netherlands	2001	Agreement on Social Security
Russian Federation	1994	Joint Statement on Social and Labor Co-operation
Zambia	1996	General Agreement on Cooperation in the Economic, Social, Scientific, Technical and Cultural Fields
Zambia	2005	Agreement on the Establishment of a Commission for the Operation of the 1996 General Agreement on Cooperation in the Economic, Social, Scientific, Technical and Cultural Fields

#### **4.4. National**

##### **4.4.1. Botswana**

Botswana's domestic refugee legislation is inconsistent with the country's international obligations, is focused on national security concerns, and is therefore silent on social protection issues. Despite the Government being a signatory to several international and regional conventions, protocols and agreements, the 1967 Refugee Recognition and Control Act has not been amended to incorporate the OAU Refugee Convention or the more general Human Rights conventions to which Botswana is party. The Act stipulates the processes required for documenting asylum seekers and the establishment of a Refugee Advisory Council and its functions. By excluding any mention of welfare provision, apart from stating that refugees have the same rights to work as visitors (Section 14), it assumes that support for refugees will be the responsibility of the international community. The general public welfare provisions available to citizens of Botswana are only partly accessible to refugees and on an ad hoc basis. For example, with the introduction of free primary education, the small number of refugees who remained in the area of the Dukwi refugee camp was granted access to the public education system after years of receiving parallel schooling provision in the camp.

There is no legislated basis for the provision of assistance to refugees and asylum seekers, thus public assistance is rendered through Presidential or Ministerial directives. The directives authorize measures for social protection to be provided on a case-by-case basis.

While there is no specific provision in the Refugees Recognition and Control Act for the detention of asylum seekers and refugees before or after their status determination (apart from where they are 'liable to be removed from Botswana under the Immigration Act'), this has, as noted above, become the standard process for the accommodation of R&AS, which impacts on the implementation of SP, as discussed below.

#### 4.4.2. South Africa

In contrast to Botswana, South Africa's domestic legal framework provides for extensive social protection rights for R&AS. South Africa's legal framework for refugee protection has changed radically in recent years, moving from no domestic refugee protection law to the 1998 Refugee Act, which is recognized as one of the most progressive pieces of refugee legislation in the world and which is in line with the provisions of both the 1951 UN Convention and the 1969 OAU Convention. Refugees are entitled to virtually the same rights as citizens, apart from the right to vote, while asylum seekers enjoy wide-ranging rights including the right to basic health services, basic education for children, work and study. Whereas in Botswana the expectation is that most welfare services will be provided by international non-governmental actors, in South Africa, the expectation is that most refugees, just like citizens, will be able to claim access to public services individually and procure other services through working.

The Refugee Act must also be interpreted in the context of the South African Constitution, which guarantees extensive rights, including socio-economic rights, to 'everyone' resident in South Africa, regardless of citizenship or even legal status, therefore also applying to asylum seekers and refugees. The socio-economic rights include basic health care and basic education, as well as the right to adequate housing, sufficient food and water and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Some of these rights, such as housing, are qualified by the need to be 'progressively implemented' by the state, while others, such as access to basic and emergency health care, are absolute. Because these rights are enshrined in the Constitution, the government (rather than the 'international community' or NGOs) becomes responsible for the effective provision of social protection to R&AS along with, rather than separate from, social protection for citizens. This also underpins the general policy of self-settled, urban integration for refugees and asylum seekers, which, as with the camp-based strategy in Botswana, affects all aspects of the implementation of SP.

Other national legislation, which impacts on the provision of SP to R&AS, includes the Social Assistance Act (2004), the Schools Act (1996), and the Children's Act (2007). While most of the social welfare grants provided through the Social Assistance Act are explicitly restricted to citizens and permanent residents (including the old age pension, the child support grant, and the war veterans grant),<sup>33</sup> some are not restricted or have recently been granted to refugees. The Foster Care Grant, which goes to families officially fostering children, is open to foster parents of any formal legal status, including recognized refugees. After years of administrative delays, since May 2006 the Department of Social Development has been processing the foster care grant applications of refugee parents who are caring for unaccompanied children.<sup>34</sup> The Social Relief of Distress grant is a short-term grant (usually no more than three months) available to the destitute and is often disbursed in the form of food parcels. It has no legal status

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<sup>33</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* **CCT12/03 ; CCT13/03**

<sup>34</sup> *Bishogo, C. and Two Others vs. Minister of Social Development and Four Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005.



restriction and does not even require possession of an identity document (ID) and so could, theoretically, even be available to as yet undocumented asylum seekers. In practice, however, as discussed further below, this grant is almost never used to assist R&AS.

In a significant increase of social protection options for a particularly vulnerable group of refugees, eligibility for the Disability Grant was granted to recognized refugees through a legal challenge. In October 2006 the Department of Social Development filed a Social Assistance Plan for Refugees in response to a case by Lawyers for Human Rights.<sup>35</sup> The Plan provides that disabled refugees will receive disability grants to the same value as social grants received by South African citizens and stipulates that the Government make access to disability grants generally available for all disabled refugees within eight months, e.g. by the middle of 2007.

The Disability Grant case illustrates how, in contrast to Botswana, the rights-based South African legal framework can be used to claim greater SP rights for R&AS through the courts. This has also occurred in relation to the rights to work and study, which were restricted for asylum seekers until 2004.<sup>36</sup>

Regarding the right to education, the South African Schools Act states that “no child may be prevented from going to school because their fees cannot be paid” (Section 5(3)(a)) and that school admission cannot be unfairly discriminating in any way. Section 19 of the South African Schools Act explicitly states that the Act applies equally to learners who are not citizens of South Africa and whose parents hold temporary or permanent residence permits.<sup>37</sup> In relation to children’s rights more broadly, a 2004 Pretoria High Court found that the protections for children enshrined in the constitution and the Child Care Act should equally apply to foreign children. In spite of this ruling and other civil society advocacy campaigns, the 2007 The Children’s Act contains no explicit provision for unaccompanied foreign children.

Moreover, regulations and directives from various government departments can also have significant impacts on the access of R&AS to SP. A recent example is a directive by the Department of Health to all its hospitals and clinics to provide antiretroviral treatment (ART) to Refugees and Asylum Seekers, whether they hold documentation or not.<sup>38</sup>

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<sup>35</sup> Scalabrini Centre of Cape Town and Five Others vs. The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another, Case No. 32054/ 2005, Notice of Motion, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.

<http://www.lhr.org.za/projects/litigation/cases.html>

<sup>36</sup> Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA) (28 November 2003), <http://www.lhr.org.za/projects/refugee/judgements.html>

<sup>37</sup> Stone, L. and S. Winterstein (2003). A Right or a Privilege? Access to Basic Education for Refugee and Asylum-Seeker Children in South Africa. Pretoria, National Consortium for Refugee Affairs.

<sup>38</sup> Department of Health (2007). Revenue Directive - Refugees / Asylum Seekers with or without a permit, BI 4/29 REFUG/ASYL 8 2007, 19 September 2007.

# **Institutional Frameworks for the Provision of Social Protection for Refugees and Asylum Seekers in Botswana and South Africa**

This section reviews the institutional arrangements in Botswana and South Africa for providing SP to refugees, which includes those institutions, which provide status and documentation as well as those, which provide the actual welfare services. The nature of these institutions is very different in Botswana and South Africa, reflecting the broader differences between control- and rights-based legal frameworks and between camps-based and self-settled reception strategies.

## **4.5. Botswana**

Refugee matters in Botswana are administered under the Office of the President (OP). As Matlou notes, “the refugee policy process takes place at the highest echelons of Government. Speedy actions (are) undertaken without seeking permission from other Government offices.”<sup>39</sup> The OP coordinates refugee issues by chairing the Botswana Council of Refugees Executive Council (while it still existed), being a member of the Refugee Advisory Council, overseeing the running of the Dukwi refugee settlement through the Settlement Commandant, and authorizing issuance of all refugee documents and change of status. Therefore, all policy decisions pertaining to the social protection of refugees are controlled and authorized by the OP. The location of refugee affairs within the OP, which is responsible for security, exemplifies Botswana’s policy position on refugees as a state security rather than a rights-based issue. For example, the costs incurred by the Botswana Government for running services in Dukwi refugee camp remain a security matter and have not been disclosed by the government.<sup>40</sup>

The Ministry carries out status determination interviews, with advice from the Refugee Advisory Council (RAC). Asylum seekers used to be detained in prisons while awaiting screening for status determination, while today they are kept in the Francistown Detention Centre for Illegal Immigrants pending the outcome of their asylum applications. At the beginning of 2005, the government announced in Parliament that it is planning to build a second centre at Molepolole to be operational by 2006.

Other government departments related to SP for refugees include the Ministry of Home Affairs, which assists refugees with issues pertaining to citizenship, temporary residence permits, and labor. The Ministry of Local Government administers issues pertaining to social welfare for citizens but refugees and asylum seekers are excluded. Therefore, social protection issues of refugees and asylum seekers are today attended to by NGOs. The main NGOs providing these services have been the Botswana Council of Churches (BCC), the Lutheran World Federation (LWF), and the Botswana Refugee Council.

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<sup>39</sup> Matlou, P. M. (1992). Botswana: The Linkage Between State Security and Refugee Policy. **Phd.** p. 60

<sup>40</sup> These services include a primary school, a clinic, a police station, the Settlement Commandant’s office, and the provision of electricity, water and petrol.

The UNHCR's role in the country is to support the government in providing protection to refugees, which it carries out mainly through providing financial support to non-governmental implementing partners (as listed above). Because of significant repatriations of Angolans and Namibians from Botswana in 2006 and 2007, the UNHCR is planning to hand over operations to its implementing partners entirely and eventually exit Botswana.<sup>41</sup>

The provision of welfare services to refugees in Botswana has changed over time. Prior to Botswana acquiring independence, refugees and asylum seekers were assisted by individual churches<sup>42</sup> and by the Botswana traditional chiefs or leaders.<sup>43</sup> In the 1970s, with the escalation of refugee flows to over 35,000, Botswana appealed for both humanitarian support and financial assistance.<sup>44</sup> Responding to the appeal, organizations like the United UNHCR,<sup>45</sup> the Lutheran World Federation (LWF), the African American Institute (AAI), the Otto Benecke Stiftung (OBS), the World Food Programme, Oxfam, the International University Exchange Fund, and the International Committee for the Red Cross opened offices in Botswana and provided the social services support. The Botswana Council for Refugees (BCR) was established in 1975 as an implementing agent of UNHCR, LWF and the World Council of Churches (WCC). BCR was mandated to provide counseling and social welfare assistance as well as facilitating the reception, protection support, settlement, resettlement and repatriation of refugees mainly from Angola, Namibia, South Africa, and Zimbabwe. In terms of welfare, the BCR provided counseling services, facilities for training, education, and medical care as well as food, clothing, accommodation, settling in grants, and subsistence allowances. It also provided services for family reunification, legal representation, documentation, burials, hospital and prison visits.

Most of the international organizations withdrew again when the refugee caseload decreased in the early 1990s. As funding partners pulled out, the BCR increasingly became dependent on UNHCR funding and reduced its staff and activities. The Botswana Council for Refugees was closed, on recommendation from the UNHCR. Since then, welfare services have declined and the refugees remaining in the country have to wait for several months to years awaiting assistance.

#### **4.6. South Africa**

In South Africa, the Department of Home Affairs is responsible for determining refugee status and providing the relevant documentation for asylum seekers and recognized refugees. This is done at five Refugee Reception Offices in the main urban areas (Johannesburg, Pretoria, Cape Town, Durban and Port Elisabeth). Since South Africa has a self-settlement and urban integration policy regarding R&SA, there is no specified area

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<sup>41</sup> UNHCR (2006). Country Operations Plan Botswana - Overview.

<sup>42</sup> The Anglican Church and Catholic church were extremely active in assisting refugees.

<sup>43</sup> Matlou, P. M. (1992). Botswana: The Linkage Between State Security and Refugee Policy. **Phd.**

<sup>44</sup> Botswana at the time did not have qualified professionals to deal with such huge influxes of traumatized persons.

<sup>45</sup> Polhemus, J. H. (1985). "The refugee factor in Botswana." *Immigrants and Minorities* 4(1): 31.

or place in which R&AS are required to live, and so social protection services also have to be provided in a dispersed and decentralized way.

Most basic rights to welfare services are guaranteed through the Constitution and the Refugees Act, and it is therefore the primary responsibility of the various government departments to provide the respective services in this decentralized fashion. This includes the Departments of Health, Education, Social Development, Labor and Housing. In practice, as discussed below, this is often not fully implemented. Apart from national departments and their local outlets (e.g. clinics and schools), local governments are increasingly starting to develop their own mechanisms and programs for social protection for R&AS. This is especially the case for the large metropolitan municipalities, for example Johannesburg established a migrant help desk, which provides wide-ranging advice to foreigners on how to access basic services in the city, and Cape Town drafted its own refugee policy.

As in Botswana, the non-governmental provision of welfare services has changed over time, including important contributions (to this day) from rural traditional leadership (especially in the cases of Mozambican refugees in the 1980s and Zimbabwean migrants today) and churches. However, the large-scale international refugee welfare NGOs have never been active in the country, or only to a limited extent. This is due to a combination of reasons, namely South Africa's pre-1994 isolation from the UN and the international community, its post-1994 position as a semi-developed, rather than poor, country, its well-developed indigenous civil society and the lack of a sudden and large-scale influx of refugees which would have constituted a clear 'disaster' in need of humanitarian intervention (at least until the current Zimbabwean crisis). Currently, international NGOs such as the Jesuit Refugee Services and the Mennonite Central Committee provide some direct welfare assistance with housing, food, counseling and advice, but these services only reach a small minority of the total number of R&AS' in South Africa.<sup>46</sup>

In addition to such NGO welfare service providers, some of whom are UNHCR implementing partners as in Botswana, there is also a strong independent civil society, which monitors government services to refugees. This includes legal NGOs (notably Lawyers for Human Rights) and several University law clinics (University of the Witwatersrand and University of Cape Town), which have refugee and migrant rights programs. These legal organizations have carried out strategic litigation which has expanded R&AS rights, for example by granting asylum seekers the right to work and study and access to disability grants, as described above. Other organizations such as the Consortium for Refugee and Migrant Affairs in South Africa (CoRMSA) and the Wits University Forced Migration Studies Program focus on monitoring government service provision and social protection.<sup>47</sup> Government institutions such as the South African

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<sup>46</sup> Because of the self-settled nature of R&AS in South Africa, there are also no clear statistics on the numbers in any particular city in South Africa, making it difficult to estimate the percentage of the total who are receiving such direct NGO welfare services.

<sup>47</sup> The Forced Migration Studies Programme of the University of the Witwatersrand, for example, has a Migrant Rights Monitoring Project which systematically documents the extent to which the South African government is fulfilling R&AS basic rights, including rights in relation to documentation, arrest and detention, education, health care, social welfare, employment and housing. This information is then

Human Rights Commission (SAHRC) have a mandate to monitor refugee rights as well, but have not been fulfilling this mandate effectively.<sup>48</sup>

## **5. Implementation of Social Protection for Refugees and Asylum Seekers in Botswana and South Africa**

### **5.1. Botswana**

The provision of different kinds of SP for R&AS in Botswana is a function of the camp-based policy, the ad hoc legal and institutional framework, and the dependence on externally funded NGOs. When the caseload of refugees declined dramatically in the 1990s, the main international NGOs pulled out of the country, and the BCR lost much of its funding and ended most of the services described below. Nevertheless, it is important to assess these measures—even if currently not provided—to better address future needs and measures.

#### **5.1.1. Freedom of Movement**

Asylum seekers do not have freedom of movement in Botswana. In the past, the restriction of movement was not strictly enforced, especially when there were larger numbers of asylum seekers in the 1970s and 80s. However, when overall security systems were strengthened in Botswana in the aftermath of the 2001 terror attacks on the USA, the practice was reintroduced and asylum seekers were again restricted to a detention centre to await Refugee Advisory Committee (RAC) interviews. Those who are granted refugee status are released and those who are rejected are detained until UNHCR secures them a country for resettlement or they are repatriated to their countries of origin. It has recently been reported that some asylum seekers have been in the detention camp for over five years. When the policy of detaining asylum seekers was first enforced, women and children were also detained. This practice has since been amended to allow women and children to await RAC interviews in Dukwi refugee camp.

#### **5.1.2. Documentation**

Recognized refugees are provided with refugee identity cards. Asylum seekers are not entitled to any documentation, apart from the exit permits issued by the Dukwi Settlement Commandant. Refugees and asylum seekers are required to register births and deaths and in return are issued with the relevant documents.

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provided to interested civil society organisations to support advocacy efforts to improve service provision. See [www.migration.org.za](http://www.migration.org.za) for more information.

<sup>48</sup> CRMSA, D. Cote, et al. (2007). Protecting Refugees and Asylum Seekers in South Africa - 2007. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.

### **5.1.3. Employment**

Although Botswana made reservations with regard to the article on employment when acceding to the 1951 UN convention, skilled refugees whose services are required in the labor market can acquire the necessary documentation for employment. While the BCR was operational, refugees were assisted by BCR to secure employment, but after BCR's closure employment seems to be a grey area and refugees wait long periods to have their documents renewed or new documents issued.

Recognized refugees were provided with all the necessary documentation such as work permits, special residence permits, references, and recommendation letters. However as in the case of Tanzania, an employer is required to prove that he or she failed to get a qualified local person to do the work. It is only then that a refugee can be issued with a temporary work permit. Those who cannot secure wage employment are encouraged to engage in self-employment. In Botswana refugees who opt for self-employment are assisted to acquire the necessary documentations (registration of their businesses, self employment work permits, residence permits), issued with loans and grants<sup>49</sup> (depending on the type of business) and assisted to secure markets for their produce.

Should need arise, recognized refugees were assisted to have their certificates translated. In cases where certificates were lost or they were not able to bring them along, special arrangements were made by BCR to have them tested and certified. In some cases, church organizations were asked to help in securing their certificates from their countries of origin through their sister churches in those countries.

Some of their businesses have been extremely successful. Typical examples are businesses related to taxi services, garages, horticulture, poultry, fisheries, construction, textile, knitting, and carpentry. Asylum seekers awaiting status determination and those whose applications are rejected by the government are restricted to operating income-generating projects inside the refugee camp. Nevertheless, they are assisted by the camp authorities to market their products outside the camp.

### **5.1.4. Education**

Education is a basic human right and refugee children, youth and adults are assisted to acquire placements in primary, secondary and tertiary institutions subject to availability of funds. In Botswana refugee children are assisted to secure school placements regardless of their parents' refugee status. Children of primary schooling age are schooled at the refugee camp. Those of secondary level are either educated in the Education Resource Centre at the camp or in schools outside the camp which have boarding facilities. Their clothing, school uniforms, toiletries and travel costs are paid for by UNHCR. Students with language problems are assisted to acquire language lessons as part of the integration program, subject to availability of funds.

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<sup>49</sup> these were funds from the international community used as revolving funds

In the past, refugee students—mostly South Africans and Namibians—were offered scholarships to study in Germany, Kenya, or the United States, due to limitations of tertiary placements in Botswana. Nigeria was the only African country to offer scholarships for South African refugees in Botswana.

### **5.1.5. Health**

Health is a basic human right and public medical treatment is free in Botswana. The government runs a refugee clinic at Dukwi camps, which is adequately equipped with facilities, staff, medicines and medical supplies. Patients requiring urgent referral are transported to the District and National Hospitals. In some cases, through the assistance of UNHCR and the government, refugees have been medically evacuated or sent for treatment to neighboring countries, which were not their countries of origin. For example, there have been cases where specialized plastic surgery was performed to help scarred refugees restore their dignity and lived normal lives.

Refugees are currently not provided with Anti Retroviral Treatment (ART) for HIV/AIDS. A government official justified this with reference to the UNHCR's failure to commit itself to continue the treatment after recipients had been repatriated. ART protocols stipulate that it would be better for such cases to be debarred from the treatment if it could not be sustained. This is the practice in spite of pressure from the United States government, which is funding a large portion of the HIV program in Botswana, to extend refugees in the ART program. Since 2004 the Roman Catholic Church in Francistown has filled the gap by offering assistance to refugees and foreigners requiring treatment for HIV/AIDS.<sup>50</sup>

### **5.1.6. Safe Drinking Water**

Since refugees are sequestered in a camp and Botswana is a dry country, the issue of safe drinking water is a service, which must be guaranteed by the government. Water supplied to Dukwi is taken from boreholes and treated before being piped to the refugee camp. The refugees get their water from standpipes. The cost of providing water is borne by the government.

### **5.1.7. Shelter/Housing**

In Dukwi refugees and asylum seekers are allocated basic shelter (two roomed brick houses). These houses of the same standard as those provided to poor Botswana or low-income earners or domestic workers living in residence. Those refugees in urban areas are provided with housing allowances to pay for their house rentals. In the past refugees resident in Dukwi were provided with temporary accommodation in town to attend to appointments for medical or official reasons, family reunification, interviews for

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<sup>50</sup> PlusNews (2007). The effect of migration on HIV rates [IRIN](#). Francistown. 13 September

employment and school placements. With the reduction of the refugee caseload, this service was stopped and refugees and asylum seekers are now required to look for their own accommodation at their own expense.

### **5.1.8. Right to own property**

Refugees in Botswana are allowed to own property. When they repatriate they are free to transport their goods. However, the repatriation agreement determines the quantity and type of movable assets refugees are allowed to transport to their countries of origin. In some cases refugees were assisted by BCR to secure property such as land to build themselves houses or farms as a way of normalizing their lives.

### **5.1.9. Unaccompanied Minors**

The authorities in Botswana established special programs to assist refugee children who came from Zimbabwe and South Africa in the 1970s and 80s. In most cases, these children were taken to foster homes run by the Young Women's Christian Association (YWCA); others were sent to Dukwi. Adult refugees from their countries of origin were identified to look after them whilst efforts to unify them with their parents were made. Through bilateral negotiations with the assistance of UNHCR, parents of Zimbabwean children came to visit their children and some opted to repatriate. But this arrangement was not extended to the South African children while the country was still governed by the apartheid regime.

## **5.2. South Africa<sup>51</sup>**

In the South African case, the implementation of SP for R&AS within the self-settled model is largely dependent on the expectation of strong government institutions, which follow and respect the progressive laws of the country. While in theory this is a more stable basis for service provision than externally funded NGOs like in Botswana, such strength and consistency is often lacking in South Africa once evaluated in practice. Furthermore, non-governmental service providers have not adequately filled the resulting gaps in public service provision.

Some kinds of service provision are not as relevant in a self-settled context as in a camp-based context. For example, while the provision of water to refugees is necessary in a camp, self-settled refugees use the same water provision as South African citizens wherever they are settled. Still, most services are relevant in both practices as the following part shows.

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<sup>51</sup> Much of the information in this section is drawn from the most recent report by the Consortium for Refugees and Migrants in South Africa (CoRMSA), which outlines the state of refugee and migrant rights in the country. CRMSA, D. Cote, et al. (2007). *Protecting Refugees and Asylum Seekers in South Africa - 2007*. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.



### **5.2.1. Freedom of Movement**

R&AS have complete freedom of movement within South Africa, as it is enshrined in the Constitution as a basic right. Freedom of movement is, moreover, the basis of the self-settlement policy with regard to R&AS. However, in practice, there are two issues that constrain true freedom of movement. First, asylum seekers who have not been able to access documentation (see below) are in danger of being arrested by the police as illegal immigrants, so that many express fear of moving freely in the streets until they have been able to secure documents. Second, as a related point, because asylum seekers have to renew their asylum seeker permits at least every three months (sometimes every month) at the same Refugee Reception Office where they made their original application, they must in practice remain in the vicinity of the respective RRO to avoid high travel costs.

### **5.2.2. Documentation**

In the South African self-settled context, documentation is a crucial pre-requisite to accessing any public welfare provisions such as health care and education, as well as formal employment or housing. It is also one of the greatest implementation challenges currently facing the South African asylum system.

If an asylum seeker declares his or her intention to apply for asylum when entering South Africa through an official port of entry, they are entitled to a 'Section 23' transit permit,<sup>52</sup> which gives them 14 days leave to remain in the country, in which time they are intended to travel to a Refugee Reception Office and lodge a formal asylum claim. Once asylum seekers have presented themselves to the Department of Home Affairs and lodged a claim, they are entitled to an asylum seeker permit, known as a Section 22 permit. Recognized refugees receive a Section 24 permit and may then apply for a Refugee ID, which resembles a South African citizenship or permanent resident ID, apart from having a maroon rather than a green cover. Refugees may also apply for travel documents.

In practice, there are a series of difficulties with the implementation of the documentation system. First, not all asylum seekers declare themselves at a point of entry and most therefore do not receive a Section 23 transit permit. This means that many asylum seekers are undocumented, and therefore vulnerable to arrest and deportation, until they can access a Refugee Reception Office. Second, access to the RROs has for many years been problematic, with long queues and days to months of waiting until an asylum seeker can even enter the RRO building. During this waiting period, the asylum seekers again remain undocumented and vulnerable. Third, high levels of corruption in the access process have been well documented.<sup>53</sup> Fourth, once the asylum seeker has received a Section 22 permit, these must be renewed regularly, as noted above, requiring renewed waiting and often bribes. Delays in the processing of claims, currently at least a backlog of 80,000 cases, mean that asylum status can last for many years rather than the maximum of 180 days foreseen in the Refugees Act. The Department of Home Affairs is

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<sup>52</sup> The 'Section' titles of the permits refer to the relevant sections of the 1998 Refugees Act.

<sup>53</sup> CRMSA, D. Cote, et al. (2007). *Protecting Refugees and Asylum Seekers in South Africa - 2007*. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.

aware of these issues and has instituted a 'turn-around strategy', yet it remains to be seen to what extent this will bear fruit.

Finally, even when R&AS have the relevant documentation, there are still many actors, public and private, which do not recognize them or do not understand that they confer rights to services. Employers often do not know that the asylum seeker permit includes the right to work, or are concerned about the three-month duration of the permit. There are regular reports of hospitals refusing emergency treatment or demanding high 'foreign' payments for people with asylum or refugee documents, because these documents are not recognized. Government databases, which manage applications for public housing, do not recognize refugee ID numbers.<sup>54</sup>

### **5.2.3. Employment**

Both recognized asylum seeker and refugees have the right to work in South Africa, including taking up formal employment and self-employment. Labor legislation and minimum labor standards are applicable to all legally employed workers in the country, including non-nationals. As a state party to the International Committee on the Elimination of Racial Discrimination (ICERD), South Africa has committed itself to ensuring that employers must pay the prescribed minimum wages and incur responsibility for work-related injuries of even undocumented workers, including those whom the government seeks to deport.<sup>55</sup> In spite of this strong legal framework, there are many practical barriers for refugees and asylum seekers searching for employment.

Access to employment for professional refugees and asylum seekers is limited by the long waiting periods for documentation, difficulties in certifying foreign qualifications, affirmative action policies which are interpreted to only include 'previous disadvantaged' South African citizens, and xenophobic attitudes from employers. Even those asylum seekers and refugees who possess skills which are in short supply in South Africa, such as in health care, education, engineering, and IT,<sup>56</sup> face difficulties in finding jobs for which they are qualified.

Because of the difficulty of securing formal employment, many asylum seekers and refugees have taken up work in the informal sector. The insecurities inherent in the informal sector affect citizens and non-citizens alike, such as exploitation by employers or the need for trustworthy supply networks, but there are regular reports that refugees and asylum seekers face additional challenges, such as victimization by police and difficulties in accessing street trading and business permits.

In the experience of South Africa, programs intended to improve conditions in formerly informal sectors have had unintended negative impacts on foreigners. Recently

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<sup>54</sup> National Consortium of Refugee Affairs (2006). Summary of Key Findings: Refugee Protection in South Africa. Pretoria.

<sup>55</sup> Human Rights Watch (2007). 'Keep your head down'; Unprotected Migrants in South Africa.

<sup>56</sup> Manuel, T. (2006). "Speech delivered by the Minister of Finance, Mr Trevor A Manuel, MP, at the Institute of Personnel Management." Retrieved 29 May 2006, from <http://www.info.gov.za/speeches/2006/06101114151003.htm>.

formalized sectors include the security industry, street trading, the hospitality industry and farm work, all of which are common employment areas for R&AS. As noted above, refugees and asylum seekers often work in informal employment sectors because they face difficulties accessing formal employment. As soon as these sectors become more formalized, they require formal identity documentation or permits particular to the industry, which are difficult for refugees and asylum seekers to access.

Employment formalization may mean that non-citizens working in these sectors lose their jobs or that new entrants may find it more difficult to find jobs in the sector. This is especially the case for as yet undocumented asylum seekers, but also includes legally working refugees and asylum seekers whose documents may not be recognized as legitimate by employers. Alternatively, refugees and asylum seekers are pushed into the most marginal jobs or parts of the employment sectors, often with employers who try to circumvent or ignore the new formal minimum standards. Some sectors, specifically the security industry, are explicitly discriminatory. The Private Security Industry Regulatory Authority (PSIRA) has recently enforced the requirement that only citizens or permanent residents can access the obligatory registration process for all security-related jobs.<sup>57</sup> Since c. 25% of asylum seekers and refugees previously worked in the security sector, this has had a significant impact on their livelihoods.<sup>58</sup>

#### **5.2.4. Work-related benefits**

South African law does not specifically exclude refugees from unemployment insurance, but many do not obtain payments even after having made contributions to the fund.<sup>59</sup>

As a member of the International Labor Organization (ILO), South Africa has obligations to comply with the organization's aims regarding the provision of "decent work" and has a duty to comply with the ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration). This includes giving "special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers," and lists the elimination of discrimination in respect of employment and occupation as one of the "fundamental rights," which all ILO members have an obligation to protect. Provision of appropriate remedies for work-related accidents and disability are among the standard conditions of 'decent work.'

#### **5.2.5. Education**

R&AS children attend the mainstream public schooling system in South Africa and have the same rights to participate in school programs such as feeding schemes or school fee exemptions as South African children. While in the past, some schools did not recognize

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<sup>57</sup> Lawyers for Human Rights has challenged the explicit exclusion of non-citizens and specifically refugees from the security industry in court since 2003, but the case remains pending. *Shabani Midemis Rutimba and Others vs. Director: Private Security Industry Regulatory Authority and Others*, Applicants' Replying Affidavit, Case. No.35986/03, High Court of South Africa, Transvaal Provincial Division, 22 June 2005.

<sup>58</sup> FMSP (2003). Human Displacement, Survival and the Politics of Space: Joburg Study Final Results, Forced Migration Studies Programme, University of the Witwatersrand.

<sup>59</sup> U.S. Committee for Refugees and Immigrants (2007). World Refugee Survey.

the documentation of R&AS or did not grant the children of refugees fee exemptions if they were unable to pay, such discrimination has recently improved in the main urban areas, as reported by various NGOs.<sup>60</sup> Nonetheless, a significant proportion of refugee children are not in school, with parents often not being aware of the possibility of a fee exemption or not being able to cover the additional costs of uniforms and transport.

Some schools with large numbers of refugee children offer additional language classes in home country languages (usually French), but this is at the discretion of the school or is done with the support of NGOs such as the Refugee Children's Project (RCP) in Johannesburg or the Durban Refugee Service Providers Network in Durban.

Pre-school education such as crèche and Grade R are not considered part of the legally mandated 'basic education' and are not subsidized by the state. Tertiary education is also not considered part of basic education and access is therefore not a right, but refugees and asylum seekers are allowed to study. In both cases, the main access difficulty faced by R&AS is financial, mirroring the access problems faced by citizens. There are a very small number of university scholarships offered to refugees by UNHCR in South Africa.

#### **5.2.6. Health**

As with other basic social protection services, R&AS in South Africa access health care through the mainstream public health care system of clinics and hospitals. The challenges of accessing health care services in practices therefore combine general access problems experienced by poor or marginal South Africans, such as understaffing, lack of medication and long waiting times, with those particular to R&AS.

The lack of identity documents for newly arrived asylum seekers who have not been able to access the asylum process (as described above) limits their access to health care, while xenophobia within the health care system, especially by frontline administrative staff, affects both documented and undocumented R&AS. Refugees are formally exempt from higher hospital charges aimed at 'foreigners', but the current guidelines are ambiguous for asylum seekers. Finally, many refugees and asylum seekers are not aware of their rights to access basic health care and so do not seek it in time or prefer to use private or traditional health care providers.

#### **5.2.7. Shelter/Housing**

Asylum seekers and refugees are in practice excluded from government-funded housing programs for vulnerable groups. This is mainly the case due to a lack of clarity in the housing codes, which distinguish between citizens and 'illegal immigrants' without specific mention of refugees or asylum seekers. This means that decisions regarding even documented migrants are made arbitrarily. This is the case for the National Housing Subsidy Scheme, the National Housing Programme for the Upgrading of Informal Settlements and the Emergency Housing Programme and subsidized rental of Council

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<sup>60</sup> CRMSA, D. Cote, et al. (2007). Protecting Refugees and Asylum Seekers in South Africa - 2007. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.

Housing.<sup>61</sup>

There is very little targeted non-governmental provision of housing for R&AS in South Africa, with the beds mainly available for women with children (who make up a small proportion of the mainly single male refugee population in the country) and only for short periods of time (3-6 months). There have been repeated reports that that some shelters set up for the homeless or abused South African women and children refuse to accept foreigners, independently of whether they have documentation or whether they are refugees or asylum seekers.

Accessing the private housing market in urban areas is also difficult for R&AS on several counts. Some challenges are shared with poor South Africans, including a dearth of low cost housing and high rents, while some are specific to foreigners, including xenophobia among landlords, landlords and housing agents who do not recognize asylum and refugee documents, and the lack of fall-back options if faced with eviction.

In practice, most R&AS therefore depend on private networks of family, friends and countrymen to find accommodation, often sharing and subletting overcrowded apartments.

#### **5.2.8. Right to own property**

The law allows refugees to own property and businesses and a few refugees own land and obtain bank loans. However, refugees and especially asylum seekers often encounter problems when banks do not recognize their identification documents, hindering them in opening accounts and accessing private or business loans.

#### **5.2.9. Social Welfare Grants**

The rights of non-citizens to social security in the form of state welfare grants have been slowly but steadily extended over the last few years. The experience of the 2004 case granting permanent residents access to social grants has been that implementation of such extensions has generally been smooth once technical problems concerning documentation have been addressed. Similarly, the rights of refugees to access Foster Care Grants were initially stalled due to problems with the ability of the database system to recognize refugee ID numbers. Such technical problems are now less likely to arise again when refugees apply for the newly granted disability grant. Now, implementation effectiveness will depend on the ability of refugees to access documentation from the Department of Home Affairs and on the streamlining of the foster care and disability grant systems in general, which are also severely backlogged for South African applications. NGOs have expressed the need for the government to consider making refugees eligible for child support grants and old age pensions from the state as well.

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<sup>61</sup> For a detailed description of each of these subsidies, please refer to Housing Code: User-Friendly Guide available at <http://www.housing.gov.za>. Housing Code, Part 3, Chapter 2: "The Housing Subsidy Scheme – General Rules", Section 2.2: "Who is Eligible for a Housing Subsidy?", available at <http://www.housing.gov.za/Content/The%20Housing%20Code/Part%203/Part%203%20-%20Chapter%202.htm>, accessed 21 May 2006.

While the options for refugees have been expanding, there are no sources of social assistance from the South African government for asylum seekers. The Department of Social Development has proposed a Refugee Relief Fund, which would provide short term relief to newly arrived asylum seekers as well as recognized refugees, yet the establishment of this fund has been stalled for many years. Even when the Refugee Relief Fund becomes functional, the short-term nature of this assistance is unlikely to address longer-term needs of recognized refugees.

The Social Relief of Distress Grant is currently not legally limited to citizens and permanent residents and so provides an option for assistance to destitute asylum seekers and refugees. On the initiative of the NGO Lawyers for Human Rights, Somali asylum seekers and refugees who had been displaced from their houses due to xenophobic violence were provided with this grant.<sup>62</sup> It remains to be seen whether this constitutes a precedent, which will be implemented more widely in future.

#### **5.2.10. Unaccompanied Minors**

Based on the law, if a foreign child is found in need of care they must be provided with a place of safety, their circumstances investigated by a social workers and an inquiry opened in the children's court. Despite these obligations, reports have found that in almost all cases, unaccompanied minors coming to South Africa face the risk of exploitation and receive almost no protection from the government.<sup>63</sup> Unaccompanied children often find it difficult to reach the urban-based Refugee Reception Offices and so remain in the rural border areas, where there are few resources and few organizations with appropriate knowledge to assist them. This means that the children remain without documentation and therefore are vulnerable to arrest and deportation (even though foreign children, including undocumented ones, should not, by law, be deported without an assessment by a social worker).

When children do manage to reach Home Affairs offices, there is a lack of clarity concerning whether Home Affairs or the Department of Social Development have responsibility for assisting them through the asylum application process. Social workers are often unwilling to deal with cases of foreign unaccompanied minors, especially in assisting them to receive documentation. This is especially difficult in cases where the child is close to 18 years old, since the Department loses authority when the children reaches the age of majority. Furthermore, unaccompanied children are seldom provided with emergency accommodation and must find accommodation through informal networks.

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<sup>62</sup> <http://www.lhr.org.za/projects/refugee/judgements.html>

<sup>63</sup> CRMSA, D. Cote, et al. (2007). Protecting Refugees and Asylum Seekers in South Africa - 2007. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.

## 6. Main Problems in Providing Social Protection for Refugees and Asylum Seekers in Botswana and South Africa

The two case studies provide very different legal and institutional contexts for the provision of social protection, leading to different kinds of challenges. While some of these challenges are specific to the histories of the countries and the region, others are general characteristics of the camp- or self-settlement-based reception strategies or of problems that concern all residents in the country.

The Botswanan case illustrates social protection issues common to countries, which treat refugee issues as essentially external and threatening to their citizenry. These include:

- The *lack of a domestic legal framework*, which grants and protects the social and economic rights of refugees and asylum seekers. Even where international instruments apply, they are less likely to be applied and enforced than domestic law, especially when they clash with domestic legal provisions.
- The *dependence on external agencies* and funding for the provision of basic social protection activities, including education and health care. While this may lead to good provision while these organizations are well funded, the provision is driven by external factors, such as funding, rather than by the rights of the individual R&AS. When funding declines, or when refugee numbers become too low to justify investment by external institutions, the rights of the remaining individual refugees are ignored.
- The *constraint of independent and informal social protection mechanisms* by R&AS themselves, due to restrictions on freedom of movement and work. Many studies have shown that refugees rarely depend entirely on goods and services provided by formal governmental or non-governmental institutions to fulfill their basic needs, and that informal mechanisms for social protection, including family and social networks and informal work, are crucial for survival.<sup>64</sup> The more free movement is restricted and informal work is constrained, the more difficult it is for refugees to fill the inevitable service gaps.

As a result of all these factors, and due to the assumption that refugees and asylum seekers pose a threat rather than an opportunity for the host country, the twin bases for social protection are undermined: that social protection is a human right and that it is also a relationship of mutual benefit between the state and the receiving individual. Where there is no mutuality, it is difficult to construct or maintain the political will to protect social protection rights, whether by government or the population at large.

In the South African case, which has a strong legal framework and where social

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<sup>64</sup> Harrell-Bond, B. E. (1986). *Imposing Aid: emergency assistance to refugees*. Oxford, Oxford University Press, Verdirame, G. and B. E. Harrell-Bond (2004). *Rights in Exile: Violations of Refugee Rights in Camps*. 9th IASFM, Sao Paulo, Brazil, 9-12 January 2005.

protection is the mandate of mainstream public institutions, the challenges in implementing effective social protection are different but no less severe. They include:

- The exposure of R&AS to *general problems in gaining access to services* which mirror problems *experienced by vulnerable citizens*, including high access costs; inconsistent application of access assistance by service providers such as school fee exemptions or free emergency health care; insufficient resources and staff among service provider institutions leading to poor service and long queues; and limited supplies of medication, classrooms or housing units.
- The *expectation that R&AS can fend for themselves*. In a system based on self-supporting integration, public social protection mechanisms are in place only for emergencies and cases of exceptional hardship, while the everyday provision of food, shelter and basic necessities are assumed to be the responsibility of each individual, based on income from work or informal social support networks. While many refugees are able to support themselves financially, this is not always the case. Where R&AS struggle to access income generation activities, whether formal or informal, and where informal social networks are missing, there are few support structures which provide a social safety net for the most vulnerable among refugees and asylum seekers.
- The *lack of knowledge of refugee and asylum seeker rights among public service providers* leading to refusal of services and abuse. In contrast to dedicated non-governmental service providers, whose main task is to work with refugees, public sector services rightly focus mainly on citizens and therefore consider R&AS at best a marginal constituency and at worst competitors for scarce public resources. The dispersed nature of public sector service provision also means that it is much more difficult to train service providers in refugee rights, since it would be necessary to target all teachers, nurses, social workers, etc. in the country.

## 7. Good Practices and other Policy Considerations

The main implications from national practices in the case study countries include:

- Effective social protection needs a strong national legal framework granting civil and socio-economic rights to refugees.
- Domestic service providers have proven to be more effective, though should be well informed about the legal framework and special case of refugees.
- It is important to continuously monitor the social protection provision by the civil society or quasi-governmental monitoring agencies.

Altogether the debate about social protection of refugees is rather weak as the international and regional frameworks and its implementations show. On the global level one (financial) suggestion has been to introduce a compulsory global social protection fund, paid into by states, from which social protection for refugees, asylum seekers and other displaced persons could be financed. Regionally, further discussion has centred on including social protection into institutional models that facilitate movement within the



SADC. Despite the urgent need to solve the issue, the results of this research show that countries are far from action in this respect due to many other problems in their countries—some of them being the very cause for refugee flows in the first place—and that there is little evidence that refugee protection will be at the top of their agenda in the near future.

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### Summary Findings

This report provides an overview of the provision of social protection to refugees and asylum seekers from Sub-Saharan Africa in the Southern African Development Community (SADC). This includes analyzing the legal framework and levels of implementation, as well as proposing policy directions on the national and regional levels. After giving an overview of the region's historical and legal context, the report focuses on the case studies of Botswana and South Africa to illustrate the wide variation of social protection framework and practices in the region.

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