

**SOUTH AFRICA'S DIPLOMATIC STRATEGY
ON MIGRANTS, WITH SPECIFIC
REFERENCE TO THE UNITED NATIONS
REFUGEE REGIME
1994-2009**

By

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ABSTRACT

South Africa is seen as a major destination for refugees and asylum-seekers and is, according to the 2010 Report of the United Nations High Commissioner for Refugees, the world's highest destination country for asylum-seekers, mainly from Sub-Saharan Africa. Following the 1994 democratic elections, there was a transformation in foreign policy, embracing the African Agenda, and South Africa became a major country of destination because of its relative prosperity in Africa. As a State Party to the 1951 United Nations Refugee Convention on the Status of Refugees, South Africa is under a legal obligation to protect refugees and grant them legal rights. At the same time, South African citizens, who had legitimate aspirations that the 1994 democratic government would address their development challenges, opposed the significant flow of refugees into the country by violent acts of xenophobia. The government, seen as a moral authority internationally with human rights being a key principle underpinning its foreign policy, found itself between the promotion of the African Agenda and its commitments to its own citizens. The refugee issue was addressed in the United Nations where the government made multilateral diplomacy a central platform of its foreign policy, a policy embedded in Africa and the South. South Africa is used as a case study to determine how it used multilateral diplomacy in the United Nations refugee regime through its coalition, the African Group, to address the migration issue. The study draws out the weaknesses of the international refugee regime by discussing the roles of two important diplomatic actors: the sovereign states in the United Nations General Assembly, and the international organization mandated to supervise the international refugee regime, the United Nations High Commissioner for Refugees. South Africa's foreign policy objective of promoting the African Agenda at times conflicts with the promotion of its national interest. Its progressive Constitution (1996) provides economic, social, and cultural rights to refugees, to the resentment of its own citizens, who view the refugees as beneficiaries of the United Nations. The study provides a critical analysis of South Africa's multilateral diplomacy, and also provides the following recommendations where South Africa could use this mode more effectively to address the migration issue: Reform the international refugee regime; Allocate funds from the United Nations regularly assessed budget to the United Nations High Commissioner for Refugees; and, Develop an international normative regulatory framework for irregular migrants.

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LIST OF ACRONYMS AND ABBREVIATIONS

ANC	African National Congress
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
DIRCO	Department of International Relations and Cooperation
DRC	Democratic Republic of the Congo
EU	European Union
IDP	Internally displaced person
GCIM	Global Commission on International Migration
G-77	Group of 77 and China
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organisation for Migration
NAM	Non-Aligned Movement
OAU	Organization of African Unity
RSD	Refugee Status Determination
SADC	Southern African Development Community
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNHCR	United Nations High Commissioner for Refugees
UNHCR EXCOM	United Nations High Commissioner for Refugees Executive Committee
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
USA	United States of America

CHAPTER 1: INTRODUCTION

1.1 Context and background

Within the context of globalization¹ and the evolution of the world economy, governments are compelled to ease restrictions on the free movement of goods and capital, globally and within regional arrangements, but the control of the movement of people, especially migrants, including refugees, is a much more sensitive and contentious issue. South Africa is seen as a major destination for refugees and asylum-seekers. The United Nations (UN) Report 2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons (UN 2010:116) reflects the staggering statistics: “With more than 222,000 claims - almost one quarter of applications globally - South Africa was the world’s largest recipient of individual applications, followed by the United States of America (USA) and France”. This is an immense problem for South Africa and it is imperative that the South African government finds a long term and durable solution.

In Africa protracted conflict situations, poverty, and underdevelopment have resulted in the widespread displacement of people. South Africa, a developing country in Africa, often takes on the role of a developed country in terms of international migration (Bernstein 2008:1). Largely due to it being more economically developed than other countries in Africa, South Africa is seen as an attractive destination for migrants mainly from Sub-Saharan Africa, making it a major country of destination. The International Organisation for Migration (IOM) asserts that South Africa receives mixed migratory flows; which refers to population movements that include refugees, asylum-seekers and ‘economic migrants’ (IOM 2004:42), and which strain the capacity of the government to manage. This is likely to

¹ Globalization means that “domestic political concerns reverberate internationally and that international politics becomes more intertwined with local politics” (Muldoon ed. 2004:295). Thus, although globalization augments the importance of multilateral diplomacy, it also increases its complexity (Muldoon ed. 2004:275).

intensify as political instability, poverty, unemployment and grave conflict situations in Africa result in protracted refugee situations, and forced migration (Crisp 2006:11).

A durable and sustainable solution for managing cross-border movement in South Africa must be found. As refugee movements cannot be effectively controlled unilaterally, this question has a foreign policy dimension. Thus, diplomacy, the implementation by states of their foreign policy objectives by peaceful means and by collaborating with each other, could be an important instrument in addressing this problem. The research question of this study is: How did South Africa use multilateral diplomacy in the United Nations to address the problem of migration, with specific reference to refugees, from 1994 to 2009? This would allow for an identification of the limitations of this strategy with a view to enhance South Africa's multilateral diplomacy on migration, with specific references to refugees, in the context of the UN refugee regime².

1.2 Literature review

In this study a literature review was conducted of primary sources and scholarship relating to the research theme which focuses on the multilateral diplomatic mode conducted in the UN as it relates to the problem of migration, with specific reference to refugees. The study was able to draw from the literature data for the research question of this study which deals with South Africa's use of multilateral diplomacy in the UN to address the problem of migration, with specific reference to the UN refugee regime, from 1994 to 2009.

The primary sources reviewed constituted official documents of the South African government on relevant legislation on migration and refugees; and official foreign policy

² International regimes are “complexes of rules and organizations, the core elements of which have been negotiated and explicitly agreed upon by states” (Karns 1994:5).

documents of the South African Department of International Relations and Cooperation (DIRCO)³ which outlines its official foreign policy and strategy. The primary sources reviewed also included the UN official documents on International Law, such as international treaties⁴ on refugees and human rights⁵, and international agreements in the form of resolutions. The resolutions adopted by the UN General Assembly by member states were used extensively to indicate South Africa's diplomatic strategy on refugees in the context of multilateral diplomacy. Secondary sources reviewed include scholarship analyses of South Africa's foreign policy since 1994 in general and on migrants in particular.

As this study examines South Africa's diplomatic strategy on refugees which is based on the international instruments of refugees and human rights adopted by the UN, scholarship which provided an analysis of International Law as a framework for diplomacy were valuable (Henkin 1995:225; Beltramo 2007:347-8). Within the UN refugee regime, the 1951 UN Refugee Convention on the Status of Refugees (hereinafter referred to as the 1951 UN Refugee Convention) and the 1967 Protocol relating to the Status of Refugees⁶

³ Name has changed from Department of Foreign Affairs to the Department of International Relations and Cooperation in 2009.

⁴ The Vienna Convention on the Law of Treaties of 1969 defines treaties as (Article 2): "An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two related instruments and whatever its particular designation".

⁵ The most prominent are the UN Refugee Convention relating to the Status of Refugees (1951); International Covenant on Civil and Political Rights (ICCPR) (1966); International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1989); and the Convention on the Rights of the Child (CRC) (1990).

⁶ The 1967 Protocol relating to the Status of Refugees provides for states to apply the provisions of the 1951 UN Refugee Convention except Article 1 which refers to the limited

(hereinafter referred to as the 1967 UN Refugee Protocol) are pertinent. The provisions of the core international human rights treaties which constitute an extensive framework for the protection of the human rights of refugees were drawn extensively from Weissbrodt and Meili (2009): Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?

In the argument on the role of a hegemon in upholding an international regime scholars vary as to their viewpoints. For instance, it has been asserted that hegemons play a critical role in supplying the collective goods that are needed for international regimes to function effectively and in respect of burden-sharing (Krasner 1982; Keohane & Nye 1985; Surhrke 1998 in Betts 2009). In contrast, scholars such as Stein (in Krasner 1982:15) argue that there will be greater motivation for cooperation as hegemony diminishes, as there will be a convergence of expectations and international regimes can exist without a hegemon (Krasner 1982:155). As will be argued in this study which includes a discussion on the Hegemonic Stability Theory (see 2.7.1), the entire issue of resources is pivotal to the international refugee regime, thus the role of hegemons in an international regime is important.

Historical overviews of the evolution of the international refugee regime at the end of the Second World War in the early 1950s (Crisp 2003:77; Loescher, Betts & Milner 2008:3; Slaughter & Crisp 2009) proved valuable sources of analysis of the conditions under which sovereign states will cooperate in international regime formations. Analysis of the evolution of the African refugee framework which resulted in the (former) Organization of African Unity (OAU)⁷ adopting an agreement in 1969, the Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter known as the 1969 OAU Refugee

geographical scope. The 1967 Refugee Protocol then serves to extend the scope of the Convention globally.

⁷ The OAU has been replaced by the African Union which was established with the adoption of the Constitutive Act of the African Union adopted in 2000 at the Lome (Togo) Summit entered into force in 2001.

Convention) that provided for an expanded definition of a refugee is contained in scholarship by Arboleda (1991); Tuepker (2002); Rankin (2005); Loescher *et al.* (2008); and Slaughter and Crisp (2009).

The study discusses the dynamics between the developed and developing countries (the North and South respectively) in multilateral diplomacy in the UN and the conditions under which states will cooperate. The states of the North constitute important diplomatic actors given their resources and diplomatic power at the international level and promote their strategic interests. (Betts 2008b:174). The states of the South, who do not have the resources, exercise considerable diplomatic leverage as a result of the collective membership of their coalitions and their voting numbers (Muldoon 2004:214). States of the South use the UN as a platform for multilateral diplomacy (Roberts & Kingsbury 1993:445; Rana 2002:35) and enforce their political positions in line with their interests.

The various scholarly discussions of international regimes offer a common idea, that of international organizations facilitating specific agreements because of their knowledge and expertise (Krasner 1982:150; Turk 2002:11-12) and promoting global governance (Keohane & Nye 1985; Karns 1994; Holsti 1995). Others (Archer 2001:36) emphasised the constraints of international organizations such as the UN High Commissioner for Refugees (UNCHR), which supervises the UN international refugee regime⁸, and which cannot take decisions which sovereign states have not agreed to. Analyses of the independence of the UNCHR in influencing state behaviour by moral persuasion (Fonteyne 1983:167; Betts 2008b:175; Loescher *et al.* 2008:1), as well as its constraints given the authority of the General Assembly to make changes to its mandate and work (Loescher *et al.* 2008:3), proved valuable in understanding in a practical manner the role of international organizations in

⁸ As the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was set up in 1949, Palestine refugees were specifically and intentionally excluded from the International Refugee Law regime established in 1951.

multilateral diplomacy, and the opportunities and challenges for South Africa in utilizing multilateral diplomacy to address the migration issue.

Scholars discuss the concept of sovereignty which constrains states but at the same time empowers states to cooperate (Wendt 1992:34; Karns in Claude & Thompson 1994:14; Holsti 1995:72; Muldoon 2004:4). The scholarship is in general agreement that sovereign states are the dominant diplomatic actors in the international system (Muldoon 2004:4), but that sovereignty is restricted as a result of multilateral agreements (Holsti 1995:73). Scholarly analyses contributed to the understanding of state practice and its role in multilateral diplomacy, outlining possibilities and constraints for South Africa in pursuing its foreign policy on refugees through multilateral diplomacy in the UN.

Multilateral diplomacy is described simply as the engagement between three or more states (Roberts & Kingsbury 1993:1; Keohane 1988; Nel, Taylor & van der Westhuizen 2001:9; Berridge 2002:150; Bull 2004:77; Muldoon 2004:237). The addition of Ruggie's "generalized principles of conduct in multilateralism" brings in the element of international actors organizing their interaction according to certain norms (Nel, Taylor & van der Westhuizen 2000:44; Lee, Taylor, & Williams 2006:2) and subscribing to a single set of principles (Roberts & Kingsbury 1993:1). The review of these discussions helped understand the advantages and disadvantages of the multilateral diplomatic mode. Scholarship analyses include as weaknesses of the multilateral diplomatic mode⁹ the cumbersome conference proceedings and the protracted negotiation process to arrive at decisions (Keohane & Nye 1985:155) and the "frenzy" to produce the two-thirds majority to adopt the resolution (Jönsson & Langhorne 2004:61-70), the bloc-oriented¹⁰ behaviour of states (Muldoon 2004:290), and the prolonged consensus decision-making process

⁹ Especially in the United Nations General Assembly which has 193 member states with the admission of South Sudan on 14 July 2011.

¹⁰ A bloc can be defined as a group of states which meets regularly and the members of which normally agree in advance how to vote (Kaufmann 1988:129).

(Kaufmann 1988:27; Barston 1997:6), which may result in an outcome with a very high degree of generalization (Barston 1997:124). Scholarly analyses also argue that multilateral diplomacy in the UN provides opportunities for the advancement of negotiations between several participants simultaneously to find agreement, and a platform where shared norms are developed (Roberts & Kingsbury 1993:19-21).

There is wide agreement that the advantage of multilateral diplomacy in the UN (Muldoon 2004:23) is that it confers legitimacy on international agreements (Claude 1988:152). There is wide agreement also that the UN provides a convenient forum for general diplomatic activity (Berridge 1987:192-193; Claude 1988:153; Fedetov 2004:7) and the development of customary International Law and international normative regulatory frameworks (Beltramino 2007:349).

Scholarship analysing South Africa's foreign policy and diplomatic engagement is generally in agreement that South Africa is considered a traditional middle power at the global level (Nel *et al.* 2000:47; Hamill & Lee 2001) and a hegemon in Africa (Carlsnaes & Muller 1997; Hamill & Lee 2001:41-43; Qobo 2006). Some scholarship emphasised South Africa's domestic law and legal obligations under International Law with regard to refugee protection (Handmaker, de la Hunt & Klaaren 2008:28). Others emphasized balancing these international legal obligations on refugee protection against the national interest¹¹ (Carlsnaes & Muller 1997; Klotz 2000:832-834; Crisp 2006:5); and caution that there is a large expectation from South African citizens, who view significant refugee influxes as economic and security risks, for the government to deliver on its development and service delivery responsibilities (Crush & Williams Undated: 13-14; Weiner 1993:13; Bernstein & Weiner 1999:185; Crush, Peberdy & Williams 2006:4). This raises the dilemma of the international obligation to protect international refugees *vis-à-vis* the obligation of a government to prioritize the pursuit of the national interest.

¹¹ National interest encompasses the "security of the state and its citizens" and the "promotion of the social and economic well-being of its citizenry..." (Van Nieuwkerk 2004:97).

The pressure on South Africa after the democratic transition in 1994 to accept refugees, the majority of whom come from African countries, consistent with the expanded definition in the 1969 OAU Refugee Convention, is not underestimated by many scholars; although they differ as to how South Africa should address this issue. Some scholars drew attention to the link between South Africa's stated commitment to the advancement of the African Agenda and South Africa's official international obligations on the promotion of the human rights of refugees (Muller 1999:69; Landsberg 2005:1). The willingness of South Africa to accept refugees mainly from Africa leads to the expectation that South Africa will be able to solve Africa's problems (Hamill & Lee 2001:49). The view that these expectations are unrealistic and in danger of becoming unsustainable are contained in scholarship by Weiner (in Pécoud & Guchteneire 2005:15); Lee *et al.* (2006:20-21) and Sidiropoulos (2008:108). Also expressed in the scholarship were South Africa's key diplomatic roles since 1994 in advancing the African Agenda: in conflict resolution and mediation (Alden & Le Pere 2010:5) in Africa, and dealing with the root causes (Rutinwa 2002: 34) of forced displacement of persons.

The literature review shows in general that there is a relatively small body of literature on how to use multilateral diplomacy in the UN to address the problem of refugees in general, and to enhance South Africa's strategy on refugees in particular. One of the main weaknesses is that the extensive 'informal' negotiations with the aim of finding agreement, and which constitute an integral part of the multilateral diplomatic process in the UN, are not reflected in official documentation. This presented a limitation in that South Africa's diplomatic engagement in these informal consultations was not available, and thus important and relevant foreign policy statements made by South Africa in these sessions could not be used in this study.

One of the key elements in this study is the examination of the provision of resources for the maintenance of the international refugee regime; as major donors to the regime, generally states of the North, allocate their voluntary funding contributions to specific programs of the

UNHCR consistent with their strategic interests. However, little attention has been given in the international regimes literature to how international regimes are funded and how a diplomatic solution could be provided for the effective functioning of the regime to fulfil its mandate; yet funding can provide strong motivation for member states to comply with an international regime.

This study identifies funding of international regimes as a research gap, and intends to make a modest contribution to the body of literature on multilateral diplomacy by discussing the role of two key diplomatic actors in the UN international refugee regime; the UN General Assembly which outlines the role of sovereign states, and the UNHCR which outlines the role of an international organization. The discussion will point out the challenges of and opportunities provided by multilateral diplomacy to address the issue of migration and refugees in the UN refugee regime.

1.3 Research question and objectives

The objective of this study is to assess to what extent South Africa's diplomatic strategy on migration, with specific reference to refugees, utilizes the multilateral diplomatic mode in the context of the UN. The purpose is to identify the limitations of this strategy with a view to enhance it. In pursuing the objective of this study, the case of South Africa, as a major destination country for refugees globally and in Africa, is used to analyze South Africa's diplomatic strategy on refugee protection from 1994 following the transition to democracy in South Africa, up to 2009. The identification of South Africa for this case study is relevant in that South Africa underwent "historic and radical change" both in its domestic structures and in its foreign policy which are reflected in its diplomatic practice (Muller 1999:60). Although the transformation was essentially normative, that of embracing human rights norms, another aspect of the transformation was that of a relatively secluded country to that of the most favoured destination country in Southern Africa for migrants; in fact, the largest asylum destination country in the world (UN 2010). The pressure on South Africa to meet

its obligations under International Law with regard to refugees impacted on its domestic obligations to protect its national interest.

The study will focus on three main components: First, the study will outline the multilateral diplomatic mode, its particular requirements, advantages and disadvantages, and the key diplomatic actors. This analysis is important in this study as it attempts to clarify under what circumstances cooperation of states is possible; the impact of norms on diplomacy; and the role of sovereign states and international organizations in facilitating an environment conducive for cooperation in the international refugee regime.

Second, the study will highlight the extent of the refugee problem in South Africa, and the impact of the mixed flow of migrants into South Africa on the country's international obligations under the international refugee regime.

Third, the current diplomatic strategy of South Africa and its foreign policy on migrants, with specific reference to refugees, in the context of the multilateral diplomatic mode in the UN, will be considered to ascertain how well this mode is being used, and the limitations experienced by South Africa will be identified. The concluding observations will provide recommendations on how South Africa could use the multilateral diplomatic mode in the UN more effectively.

The study aims to identify key characteristics of the multilateral diplomatic mode to provide an analytical framework in which to examine South Africa's diplomacy on refugees. The study describes the context in which South Africa conducts diplomacy within the UN international refugee regime to illustrate both the independence and constraints of diplomatic actors in the international state system. The main focus of the study is South Africa's diplomacy on the issue of refugee protection; and other aspects of migration, such as international protection of internally displaced persons (IDPs) and illegal migrants will be discussed to the extent that they contribute to the understanding of the international refugee regime. The time period in this study is from 1994 to 2009, as South Africa has experienced

since the democratic elections in 1994, a significant increase in the influx of refugees and asylum-seekers, in relation to the global statistics.

1.4 Research methodology

This study will be conducted as a descriptive single-case study using multiple sources of evidence. This approach is an empirical enquiry that investigates a phenomenon within its real-life context, and addresses a situation in which the boundaries between the phenomenon and context are not clearly apparent (Yin 1984:23; Yin 2009:18). The descriptive case study does not require control of behavioural events, and focuses on contemporary events (Yin 2009:8, 13).

This descriptive single-case study, with South Africa's multilateral diplomatic strategy on refugees as the unit of analysis, examines the characteristics of multilateral diplomacy and specifically the international refugee regime. The descriptive approach in this study allows for an examination of the multilateral diplomatic mode, its particular requirements, advantages and disadvantages, and the key diplomatic actors, to assess South Africa's utilization of the multilateral diplomatic mode in the UN to address the problem of migration, with specific references to refugees.

As construct validity is especially problematic in case study research, Yin (1994, 2009) proposed the use of multiple sources of evidence to maintain construct validity. The primary sources used in this study consist of official documents and reports of the South African government and the UN. The secondary sources will consist of recent articles from scholarship and accredited academic journals to maintain construct validity. The study will further benefit from the insights of the student who spent a period of four years (2007 - 2010) as a South African diplomat posted to the South African Permanent Mission to the UN and the UNHCR (Geneva). Personal experience as a diplomat in the African Group in the UN on issues relating to refugees provides additional insight to examine the dynamics of multilateral diplomacy.

The case study method is most likely to be appropriate for “how” and “why” questions (Yin 2009:27) and are explanatory (Yin 2009:91). This case study attempts to answer a “how” question and the research question of this study is: How did South Africa use multilateral diplomacy in the UN to address the problem of migration, with specific reference to refugees, from 1994 to 2009? As theory development and the review literature are related to specific aspects of the topic (Yin 2009:37) the following specific categories were identified when conducting the literature review, viz., International Law as context for multilateral diplomacy in the UN; UN international refugee regime; Role of sovereign states and international organisations as the diplomatic actors; Multilateral diplomatic mode; and South Africa’s diplomatic strategy on refugees.

The theoretical framework in chapter two provides a basis on which to assess South Africa’s diplomatic strategy refugees, the unit of analysis, to ascertain whether South Africa is using the multilateral diplomatic mode optimally and to make recommendations for more effective use of the multilateral diplomatic mode in chapter four.

1.5 Structure of the research

This introductory chapter introduced the research theme, research question, objectives and relevance of the study, the definition of key concepts, the scope and time frame, and the methodology to be utilized, the key sources, as well as a literature overview.

Chapter two provides an exposition of the multilateral mode of diplomacy and its specific requirements, the actors involved, and the advantages and disadvantages of this mode, thereby outlining an analytical framework in terms of which the research problem will be explored. Three key characteristics of the multilateral diplomatic mode are identified, viz., create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and, develop international normative regulatory frameworks.

Chapter three outlines, against a background of globalization, the scope of migration, with specific reference to refugees, in South Africa and the domestic and foreign policies in existence. The discussion includes the relevant international treaties to which South Africa is a party, and the international and regional agreements to which South Africa has endorsed.

Chapter four will focus on South Africa's diplomatic style or approach in the pursuit of its foreign policies on migration, with specific reference to refugees. South Africa's utilisation of the multilateral diplomatic mode and its engagement in the UN will be analyzed to ascertain whether South Africa is using this mode optimally. This will be done by using the three key characteristics of the multilateral diplomatic mode as defined in chapter two: Create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and, develop international normative regulatory frameworks. This is discussed in the context of the official national policies of the government and the international agreements of the UN, including the international treaties, and the relevant diplomatic actors as identified for this study, the UN General Assembly and the UNHCR.

Chapter five will provide a summary of the study and the main findings and will conclude with a number of recommendations and the identification of aspects that need further research.

1.6 Conclusion

This chapter introduced the research theme and question, the objectives of the study and relevance of the topic. The study aims to use the case of South Africa, as a major destination country for refugees globally and in Africa, and to analyze its diplomatic strategy on refugee protection from 1994 to 2009. The case study aims to identify characteristics of multilateral diplomacy in the context of the UN to provide a framework in which to analyze South

Africa's diplomacy on refugees. The following chapter will outline the main characteristics of the multilateral mode of diplomacy and its specific requirements, the diplomatic actors involved, and the advantages and disadvantages of the multilateral diplomatic mode, thereby outlining an analytical framework in terms of which the research problem will be explored.

CHAPTER 2: ANALYTICAL FRAMEWORK

2.1 Introduction

The purpose of this chapter is to provide an analytical framework in terms of which the research problem will be examined. Chapter one introduced the research theme and question, the objectives and relevance of the topic. As the research theme of the study will focus on the multilateral diplomatic mode conducted in the UN as it relates to the problem of migration, with specific references to refugees, this chapter will provide an analytical framework in terms of which the research problem will be examined. The chapter will outline the multilateral mode of diplomacy in the UN and its specific requirements, the diplomatic actors involved, and the advantages and disadvantages of the multilateral mode, in the context of the international refugee regime. The diplomatic actors identified in this study; the UN General Assembly and the UNCHR, will be discussed. The three main characteristics of multilateral diplomacy identified: Create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and, develop international normative regulatory frameworks, will provide the basis on which to analyze South Africa's multilateral diplomacy on refugees in the UN in chapter four. This chapter includes a definition of key concepts used throughout the study.

2.2 Multilateral diplomacy: the United Nations international refugee regime

The sovereignty of individual states is a key characteristic of the Westphalian order of states and characterizes the current international system. It is generally believed that the Peace of Westphalia in 1648 was the origin of modern diplomacy as an institution, as this event launched the beginning of the European nation-state system and codified the rules of conduct among sovereign states (Muldoon 2004:4). Diplomacy takes place among official agents of the state. Although non-state actors are increasingly becoming active in international relations, sovereign states remain the main diplomatic actors. The current

diplomatic engagement among sovereign states is institutionalized and is characterized by enduring relationships among the parties.

Multilateral diplomacy in the UN gave rise to the international refugee regime as a consequence of the converging interests of states and for the purpose of creating agreements that provide mutual benefit. Given that states can mutually benefit from international cooperation, international organizations can play an important role in facilitating that cooperation. In particular, they can overcome “collective action failures by creating the regulatory framework within which states can be assured that other states will reciprocate over a longer term” (Betts 2009:26). According to Archer (2001:33) international organizations are official structures created by agreement between three or more sovereign states with the objective of “pursuing the common interest of the membership”. This reflects the independence of sovereign states to determine the role of the organization. This study will review the role of sovereign states and the role of international organizations. According to the General Assembly Statute¹² the UNHCR is mandated by the UN General Assembly member states to supervise the international refugee regime. In this regard, the UN General Assembly and the UNHCR are the key diplomatic actors in the international refugee regime.

The international refugee regime was established with the 1951 UN Refugee Convention and the UNHCR following the end of the Second World War in the early 1950s. During this time the main concern of the international community was to address refugee problems in Europe emanating from the Second World War (Slaughter & Crisp 2009:4). When the refugee regime was established (1951), the principles of human rights and justice had played a pivotal role in the creation and formation of international institutions such as the UN

¹² Statute of the United Nations High Commissioner for Refugees. General Assembly Resolution 428 (V) of 14 December 1950, New York, created the UNCHR from 1 January 1951 for the purpose of “providing international protection, under the auspices of the United Nations, for refugees” (Article 1).

(1945) (Loescher *et al.* 2008:3). The right of refugees not to be returned to a country where they risk persecution, the principle of *non-refoulement* (Art. 2.3 of the 1951 UN Refugee Convention) became entrenched.

When the international refugee regime was established, the states addressing the refugee problems had substantial resources (Slaughter & Crisp 2009:4) and the considerable numbers of refugees from Europe were able to find resettlement in other parts of the world. The Cold War, in the period of the 1960s and 1970s resulted in significant refugee flows into the developing world (Loescher *et al.* 2008:25). Newly independent developing countries, former colonial states, were able to absorb the modest size of refugee influxes without much pressure. African countries were sympathetic to those fleeing from armed struggles against colonialism, racial domination and apartheid (racial segregation). During this time, the international community provided generous international aid channelled through the UNHCR and developing countries were able to provide humanitarian assistance to refugees. The strategic interests of the North were to establish friendly relations with developing countries and contain the global communist threat (Crisp 2003:77). But economic hardships and declining international aid made accepting asylum-seekers fleeing from mass displacement progressively difficult for African countries, especially in light of the resentment and xenophobia¹³ from their own citizens.

The root cause of persecution and refugee movements have now evolved significantly, from the European refugees fleeing from genuine or feared persecution by fascist and communist regimes to the present context in which refugees flee from protracted civil war, armed conflict, communal violence, and civil disorder (Barnett 2002:250; Crisp 2003:76) as the Cold War came to an end. This reflects conditions that were not envisaged at the time of the

¹³ Xenophobia is described as “attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity” (IOM 2004:49).

establishment of the international refugee regime after the Second World War, especially in Africa.

After the events of 11 September 2001 (9/11) in New York, USA, the prevailing view following the pronouncement by the USA government on the ‘war on terror’ “exacerbated states’ security concerns and ushered in a new era of restrictions against refugees” (Loescher *et al.* 2008:48). The subsequent actions imposed by the USA and its partners resulted in the enforcement of stricter border controls at times not distinguishing between illegal migrants and those genuinely seeking asylum (Pécoud & Guchteneire 2005:4). These acts are in contradiction to the international human rights treaties and the international norms and standards under which states are obligated to promote and respect the human rights of people, and provide rights to refugees as defined under International Law.

On an increasing number of issues states are obliged to cooperate with others either regionally or internationally and to acknowledge that they are unable to solve problems unilaterally (Rana 2002:264) and must work towards international cooperation and responsibility sharing. This includes issues such as human rights whose impact goes beyond one’s own territory and which necessitate the cooperation of states for a solution (Coolsaet 2004:6). Over the years, a consensus has emerged internationally that gross violations of human rights are “everybody’s business” (Holsti 1995:73). The growth in importance attached to human rights norms in most states is in significant measure a result of the “product of the extensive activity stimulated by the UN” (Roberts & Kingsbury 1993:50)

The UN Charter (UN 1945) in its Preamble reaffirmed the member states’ “faith in fundamental human rights ...” The UN, which proclaims the aspirations of its members, “helps establish the norms that many countries would like everyone to live by” (Muldoon 2004:8). However, these aspirations are not always followed up by action, as sovereign states have not been willing to restrict their sovereignty extensively to protect the human person (Hathaway 2005:16). Sovereignty is restricted as a result of the multilateral

agreements in which states have voluntarily transferred some authority to collective multilateral organizations.

The UN sovereign member states negotiated the 1951 UN Refugee Convention and the 1967 UN Refugee Protocol which provide to refugees distinct status and rights, and an obligation on states to work with the UNHCR which is mandated to supervise the international refugee regime. States are under legal obligation to protect the human rights of refugees and find durable solutions and to respect the right not to expel refugees to a territory where his or her life or freedom would be threatened (*non-refoulement*). The 1951 UN Refugee Convention (and its Protocol) are an integral component of International Human Rights Law (Hathaway 2005:4) and the promotion of human rights, as outlined in the UN international human rights treaties, is at the heart of the object and purpose of International Refugee Law (Hathaway 2005:11).

The protection of refugee rights is enshrined under International Law. Diplomacy, the relations between states by peaceful means (Barston 1997:1; Bull 2004:75-76) and whereby states pursue their strategic foreign policy objectives “without resort to force, propaganda, or law” (Berridge 2010:1) takes place within the context of International Law.

A key element of this study is that in the international refugee protection framework, underpinned by the UN international refugee regime, refugees are entitled to claim the benefit of a calculated and lucid group of rights (Hathaway 2005:4), and the protection of their human rights and social integration rather than exclusion (Pécoud & Guchteneire 2005:5). The question here is: ‘Who provides the rights and benefits and to what extent does this take precedence over other rights?’ The UN Charter and the UN international human rights treaties have entrenched universally accepted human rights norms. The Realist Morgenthau (1979:7) asserted that “the principle of the defence of human rights cannot be consistently applied in foreign policy because it can and it must come in conflict with other interests that may be more important than the defence of human rights in a particular instance”. This is relevant in South Africa where the provision of human rights protection to

refugees by the government appear to conflict with the provision of socio-economic rights to its own citizens, as in service delivery and tangible improvements in the lives of the poor, an essential component of the national interest (see 1.2).

Keohane (1984 in Betts 2009:26) asserts that international regimes can serve a number of functions to enable states to act collectively and thus achieve more together than if they acted in isolation. International institutions can assist in reducing the transaction costs¹⁴ of cooperation and facilitating issue-linkage in negotiations for bargaining for mutual benefits and in the provision of so-called global public goods (Betts 2009:26). John Ruggie makes the point that regime theory has highlighted the degree to which “international behaviour is institutionalized” (Karns in Claude & Thompson 1994:8). Regimes facilitate burden-sharing, establish standards, provide information, and make government policies appear more predictable and more reliable (Keohane & Nye 1985:153; Holsti 1995:368). Kratochwil and Ruggie (in Barnett 2002:238) define a regime broadly as “governing arrangements constructed by states to coordinate their expectations and organize aspects of international behaviour in various issues areas. Thus they comprise a normative element, state practice, and organizational roles.” Governments who wish to receive the benefits of regimes must accept constraints on their domestic or international behaviour (Keohane & Nye 1985:152).

The resilience of regimes is emphasized in the Grotian tradition, which sees regimes as a “pervasive phenomenon of all political systems” (Krasner 1982:8). Krasner (1982:150-153) asserts that the primary function of international regimes is to “facilitate the making of specific agreements on matters of substantive significance within the issue-area covered by the regime” and “help to make governments’ expectations consistent with one another” by

¹⁴ Transaction costs are “all the costs incurred in exchanges, including the costs of bargaining, getting information and enforcement”. These costs increase significantly when states have to “manage their co-operative behaviour solely through bilateral agreements” (Caparaso 1993:61 in Nel *et al.* eds. 2001:14).

providing a “framework of rules, norms, principles and procedures for negotiations and acting collectively”. Regimes may also facilitate multilateral diplomacy by providing information indirectly, e.g., by creating opportunities for government officials, through negotiations and personal exchange, to access each others’ policymaking processes (Keohane & Nye 1985:153). Thus, international regimes contribute to international cooperation among states. Adherence to regimes may impose a “modicum of order” in international interactions (Krasner 1982:86). Regimes offer a service to governments because of their knowledge¹⁵ and expertise and facilitating the negotiation of mutually beneficially substantive (Krasner 1982:150). The international organization, the UNCHR which supervises the international refugee regime, has become a repository of expertise and knowledge in International Refugee Law.

Despite international organizations facilitating an environment conducive to collective agreement, this increasing interdependence created by the resilience of an international regime may produce conflict (Karns in Claude & Thompson 1994:6). Interdependence tends to create the potential for new conflicts as states “use collective devices both against each other and with each other” (Karns 1994:4). Moreover, there are “possibilities for corruption, irresponsibility, and bureaucratic complexity in international institutions” (Karns 1994:17). However, despite these limitations, the international regimes and institutions comprise a means to global governance. As noted by Karns (1994:17), the “patchwork of institutional arrangements – regimes, organizations, agreements, some formalized, some not – represents the cumulating effort to address global, and interstate problems of human survival, development, and well-being. This is not well-organized governance, but the evolution of pieces of ‘governance without government.’”

¹⁵ Knowledge is defined as “the sum of technical information and of theories ... to serve as a guide to public policy designed to achieve some social goal” (Krasner 1982:19).

2.3 African Refugee Convention of 1969

The root causes of the massive influx of refugees in Africa as a result of war, political instability, internal civil strife, economic turmoil, and natural disasters, constitutes circumstances which do not conform to the definition of a refugee, and would not guarantee refugee status under the 1951 UN Refugee Convention (Arboleda 1991:186). Slaughter and Crisp (2009:2-3) assert that “the emergence of pan-African ideologies and the establishment of the OAU in 1963” resulted in the African region “symbolizing this sense of solidarity” in 1969 by establishing its own Refugee Convention. However, when the 1969 OAU Refugee Convention came into force in 1974 the political situation had changed and expressions of solidarity weakened (Slaughter & Crisp 2009:3). It is acknowledged that the 1969 OAU Refugee Convention with its expanded definition will create more responsibility from African states than the 1951 UN Refugee Convention and will thus require more from countries like South Africa. However, it is important to point out that, while the expanded definition in the 1969 OAU Refugee Convention covers a larger category of refugees, the Convention does not extend protection under the refugee regime to illegal immigrants (Solomon 2003:11).

It is unlikely that the African Union (AU), the regional body for the African states,¹⁶ will provide a regional regime to solve the issues of protracted refugee situations in Africa given its lack of resources. To add to this challenge, the AU has no specific institutional framework to deal with refugees and its agenda includes all categories of forced displacement, such as IDPs, stateless persons, refugees, and illegal migrants. The 1969 OAU Refugee Convention is complementary to the 1951 UN Refugee Convention and thus the plight of African refugees is addressed in the context of the overarching international refugee regime, i.e., within the UN General Assembly and the UNHCR. The UNHCR programs are financed from resources from voluntary contributions and thus African refugee programs are dependent on the will of the donor countries, mainly countries of the North.

¹⁶ Except Morocco, which is not a member of the African Union.

The government of South Africa, prior to the transition to democracy in 1994, did not ratify these refugee treaties. The democratic post-1994 South African government acceded to the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention as well as the core UN international human rights treaties which have common provisions that protect refugees, and which provide the international legal context for the obligation of states to protect the human rights of persons, including refugees. South Africa thus has to comply with these binding¹⁷ obligations. So far, human rights groups such as Human Rights Watch and Amnesty International in South Africa and internationally have criticised the government for not providing adequate protection to the migrants and refugees in the country consistent with its international legal obligations.

The critical aspect of South Africa's implementation of the 1951 Refugee Convention and the 1969 OAU Refugee Convention is the definition of a refugee. The definitions of the two Conventions are outlined below:

The 1951 UN Refugee Convention defines a refugee as a person who (Article 1):

“... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country or return there because there is a fear of persecution.”

The 1969 Organisation of African Unity Refugee Convention expanded the definition of a refugee to include (Article 1(1)):

¹⁷ The word ‘binding’ implies that there is an obligation to respect international law and the rules and principles of the international system. The exact definition of ‘obligation’ as it relates to international law is not clear as there is no world power to enforce compliance by sovereign states and to take punitive measures for non-compliance (Marshall 1997:45).

“ ... any person who is forced to leave his or her habitual residence due to aggression, external occupation, foreign domination, or events seriously disrupting public order in a part or the entirety of his or her country of origin or his or her country of nationality.”

The broadened 1969 OAU Refugee Convention definition, favouring mass displacement of persons, as endorsed by the African countries, has significant consequences for South Africa. Compliance with the 1969 OAU Refugee Convention would place immense pressure on the capacity of South Africa to absorb those fleeing even from many situations which could easily be interpreted as: “events seriously disrupting public order” (Rankin 2005:1). This could require South Africa to accept and provide protection for those from failed states such as Somalia (Betts 2008a:2). South Africa, a developing country, with long coastlines and land borders finds it difficult to control the massive mixed migratory flow of migrants. This is despite having taken defensive and deterrent measures consistent with the government’s primary obligation to protect and advance the rights of its citizens.

2.4 Definition of key concepts

Country of origin/destination

Countries from which refugee flows originate are termed countries of origin, and those towards which refugees move are termed countries of destination.

Legal/illegal migrants

Legal migration takes place within the laws of the country whereby migrants enter the country with the authorization of the government with the required travel documentation (e.g., visas, permits) for purposes of work (labour), tourism, study, business, and family matters. Forced migration refers to those who are compelled to leave their countries. In the UN definition the following are included in the category of ‘forced migration’: Refugees and asylum-seekers who cross international borders, and others in a ‘refugee-like’ situation

(Oucho 2007:74). Those that enter the country and fail to apply for asylum or do not have papers are referred to as undocumented migrants, and are illegally in the country. The current global discourse includes the expectation by states to accept on compassionate grounds those not defined as a refugee under International Law but enter illegally into a country out of sheer desperation. In this regard, the term used by the UN is ‘irregular’ migrants.

Asylum-seekers

Asylum-seekers are people who have entered another country “with the intention to claim asylum, have made an asylum application with the appropriate authorities and await a decision on this application for refugee status under relevant international and national instrument” (IOM 2004:42). According to the IOM (2004), when asylum-seekers enter a country they are permitted to remain in the country until a decision on their claim for asylum is made, even though not every asylum-seeker will ultimately be recognized as a refugee. Since international laws of asylum are not well defined (Weiner 1993:18) individuals who cannot enter a country under existing labour laws may claim political asylum.

Refugees

Asylum-seekers undergo an administrative process by the government of the destination country, together with the UNHCR, to ascertain whether they fulfill the requirements for refugee status, a process referred to as Refugee Status Determination (RSD) in the UNHCR. Once refugee status is determined, States Parties are bound to provide protection to those classified as refugees. In Africa the wider definition of a refugee in the 1969 OAU Convention (definition of refugee in 2.3) creates additional responsibilities for African States Parties, including South Africa, to provide protection to those classified as refugees. Barnett (2002:245) emphasizes that the 1951 UN Refugee Convention does not grant the automatic right to asylum as this is a privilege granted by the destination state. A refugee

not lawfully admitted has only one safeguard under the Convention; the right of *non-refoulement*, i.e., not to be expelled or returned to a territory where his or her life or freedom would be threatened (Art. 2.3). According to Henkin (1995:196): “The closed border remains the ultimate state value – even for refugees – human values penetrate only by consent, by grace, not by compulsion of International Law”. South Africa’s national legislation and diplomatic approach favour the OAU Convention and protection for African refugees under the expanded definition.

Refugee Status Determination (RSD)

RSD is the procedure by which the UNHCR and host states determine the refugee status of the asylum-seeker to decide whether the person falls within the protection obligations of the 1951 UN Refugee Convention. Fontaine (2006:67) and Van der Klaauw (2009:61) outline some of the practical aspects of the international obligations by states under the 1951 UN Refugee Convention as follows: ensure access to asylum; establish efficient asylum procedures; provide humane reception facilities; provide legal and human rights; grant (or not grant) asylum; and respect the norm of *non-refoulement*. The RSD process includes steps that are not outlined in the 1951 UN Refugee Convention, such as processing of applications, providing translation facilities, ensuring family unity, processing assessment reports, adjudicating appeals, and providing notifications of decisions. This entails the establishment of a comprehensive system with offices in all areas to receive asylum-seekers. These processes related to RSD are contained in South Africa’s Refugee Act (South Africa 1988), but implementation is weak.

Internally displaced persons (IDPs)

It is important to note that IDPs are not migrants as they are confined to national territory and have not crossed an internationally recognised border (IOM 2004:8), but are included in the UN debate on international migration and refugees.

Economic migrants

Terms such as ‘economic migrants’ and ‘environmental refugee’ are non-existent in International Law (Solomon 2003:10). The IOM (2004:21) defines this category of migrants as people who leave their “habitual place of residence” to settle outside their country “in order to improve their quality of life”. “This term may be used to distinguish economic migrants from refugees fleeing persecution, and is also used to refer to persons attempting to enter a country without legal permission and/or by using asylum procedures without bona fide cause” (IOM 2004:21). This term is used by the South African government to distinguish this category of migrants from refugees who have distinct legal rights under International Law.

Mixed migratory flow

A mixed migratory flow refers to population movements into a country which include refugees who have distinct legal rights under International Law, asylum-seekers, ‘economic migrants’, and those entering illegally under the guise of asylum-seekers. In these cases it is difficult for the country of destination to distinguish the bona fide refugee and provide him/her with rights under International Law.

Diplomacy

Diplomacy is an instrument of foreign policy and can be defined by drawing a distinction between foreign policy and diplomacy. Berridge (1987:184) emphasizes that diplomacy “is not foreign policy”; foreign policy is the “substance of a state’s relations with other states and agencies and the goals it strives to achieve by those relations” (Watson 1982:10); and the “objectives and actions (decisions and policies) of a state or states” (Holsti 1995:18). Diplomacy refers to the relations between states by peaceful means (Barston 1997:1; Bull 2004:75-76) and the modes whereby states pursue their strategic foreign policy objectives “without resort to force, propaganda, or law” (Berridge 2010:1). The UN Vienna

Convention on Diplomatic Relations (1961) emphasizes the peaceful activities of diplomacy when officially engaging other countries, such as negotiation, promoting friendly relations, and clarifying intentions.

Diplomacy, which is carried out by nation-states “through authorized agents” (Muldoon 2004:4) is the exercise by governments of power in the international component of the national life (Marshall 1997:119; Jönsson & Langhorne 2004:62). Berridge (2002:1) is also of this view and contends that diplomacy, if managed successfully, and provided with the requisite resources and capability, could be a significant source of power for the state. The various components, recognition in the international community as a responsible international or regional player, well trained and highly skilled diplomats, and a high degree of engagement in diplomatic efforts at the multilateral level, serve to augment a state’s diplomatic leverage.

One of the principal functions of diplomacy is negotiation, a function which, as mentioned above, is included in the UN Vienna Convention on Diplomatic Relations. Cardinal Richelieu (in Berridge 2010:1) defined negotiation as the advancement of a state’s foreign policy either by “formal agreement or tacit adjustment”. According to François de Callières’ (in Berridge 1987:184), the aim of negotiation was to identify common and conflicting interests and to find agreement on reconciliation of those interests. In an international conference setting such as the UN, Kaufmann (1988:9) describes negotiation as the “sum total of all talks and contacts” which seeks to pursue the objectives of the conference and is necessary for resolving conflict. This includes informal negotiations by states with the aim of finding consensus, the deliberations of which are not officially recorded. As mentioned in 2.1, a limitation identified in this study is that South Africa’s diplomatic engagement in these informal negotiations is not recorded, and not available in the public domain. Thus important and relevant foreign policy statements made by South Africa in these negotiating sessions could not be used in this study.

2.5 International Law as context for multilateral diplomacy

Diplomacy is defined by Harold Nicholson as “the art of negotiating agreements”, agreements that could be ratified (in Rana 2002:226). The common interests of the various states move towards codification and expansion into a “law among nations”, a responsibility which is seen as a high priority for the UN, the principal lawmaking international body (Marshall 1997:47). Formal international agreements negotiated by states are embodied in treaties (also called conventions or covenants) which create international legal obligations for the States Parties (Berridge 2002:73). The importance of sovereign states as the principal actors in diplomacy is demonstrated by the fact that treaties are developed and ratified by states, and not by non-state entities, with the particular aim of protecting their national interests and addressing their own security concerns. Sovereign states would not endorse a treaty or parts of a treaty if these are contrary to their national interest.

The UN Charter mandated the UN General Assembly to encourage “the progressive development of International Law and its codification” (Article 13(1)). Since then, with regard to the human rights protection of refugees, the UN and specifically the General Assembly have contributed to the formulation and advancement of new international legal concepts such as those of human rights and refugee protection. Besides constituting a common and referential background, International Law provides the foundation of the positions of the negotiator and the implementation of the outcome of the adopted decisions. The diplomat is guided by the norms and standards of both domestic law and International Law (Beltramino 2007:347-8).

International Human Rights Law is grounded on the premise that all persons, by virtue of their humanity, have fundamental rights. Accordingly, International Human Rights Law generally requires the equal treatment of citizens and non-citizens (Weissbrodt & Meili 2009:37) which includes the protection of the human rights of migrants and refugees by governments. The provisions of the core international human rights treaties, which constitute

an extensive framework for the protection of non-citizens and the human rights protection of migrants and refugees, are discussed below (Weissbrodt & Meili 2009: 38-39).

The ICCPR stipulates that States Parties should ensure the civil and political rights of all individuals within its territory and subject to its jurisdiction. The ICESCR provides that States Parties shall, in general, protect the rights of all individuals regardless of citizenship, to work; just and favourable working conditions; an adequate standard of living; good health; education; and other economic, social and cultural rights. The CAT requires States Parties to ensure that torture does not occur within their borders and to prevent the *refoulement* of any person, regardless of citizenship or legality of presence in the host state, to a country where there are substantial grounds for believing that they would be in danger of being subjected to torture. Under the ICERD, States Parties may not discriminate against persons of any particular nationality. The CRC requires States Parties to make efforts to protect and assist a refugee child to trace the parents or other members of the family.

To promote compliance, the international legal obligations of States Parties (who have ratified treaties) are monitored by international committees of the UN, the UN Treaty Monitoring Bodies, in the form of Committees. These Committees, whose primary mandate is to assess implementation of the relevant treaty (Henkin 1995:210), form an international monitoring system for human rights. As experts in International Law, the members of these Treaty Monitoring Bodies have generally interpreted the human rights treaties broadly, and recommended equal protection for citizens and non-citizens, thus setting international standards. Treaty Monitoring Bodies have included in their recommendations to governments the need for human rights protection of non-citizens.

2.6 Multilateral diplomatic mode

Multilateral diplomacy refers to the involvement of official state actors in the practices and institutions that facilitate co-operation between three or more states (Nel *et al.* 2001:9) and may take the form of conferences (Bull 2004:77). Robert Keohane describes multilateral

diplomacy as the “practice of coordinating national policies in groups of three or more states” (Nel *et al.* 2000:43-44). The UN with its universal membership is the principal intergovernmental forum for developing multilateral diplomacy, and occupies a central and distinct place in the global diplomatic arena, even with the proliferation of non-state actors (Muldoon 2004:23). The advantages of multilateral diplomacy are that it allows opportunities for the promotion of negotiations between many states at the same time (Berridge 2002:150) and serves as a platform for the exchange of views for both developed and developing countries (Berridge 1987:192). Thus, multilateral diplomacy can bring together states, international organizations and other diplomatic actors in effective partnerships to negotiate issues which present global challenges with the aim of cooperating and finding agreement (Muldoon 2004:237). In this process, shared norms are developed, which are proclaimed and promoted by the UN to achieve “higher standards” and “a better ordered world” (Roberts & Kingsbury 1993:19-21).

Multilateral diplomacy, which created the international refugee regime, takes place mainly in the UN. The UN fulfils two main diplomatic roles; it legitimizes diplomacy and provides a convenient forum for general diplomatic activity (Berridge 1987:192). The main function of the international refugee regime is to facilitate collective agreements and to engender cooperation, and to promote global governance (Karns 1994:5). The UNHCR is the international organization which is mandated to supervise the international refugee regime, and decide on the “complexes of rules and organizations” which comprise the international refugee regime (Karns 1994:5).

The responsibility for formulating International Law lies with the UN (see 2.5) as mandated by the UN Charter. Multilateral diplomacy gave rise to human rights international standards embodied in the UN human rights treaties. By doing so, states have shown their willingness to surrender state values of independence and impermeability with the objective of promoting human rights. On the other hand, the lack of authority of the UN to enforce compliance illustrates how sovereign states hold on to principles of state autonomy (Henkin 1995:208). Nevertheless, multilateral diplomacy has produced an inspiring collection of international

standards, especially on human rights protection, and created a monitoring system (see 2.5) and developed a “culture of compliance” (Henkin 1995:47).

The disadvantage of multilateral diplomacy in the UN General Assembly is that its resolutions constitute recommendations and thus are not binding on its member states. However, these resolutions have the advantage and can “help to set new norms of international behaviour, can establish new treaties to which states can later adhere, or can imbue declarations with considerable moral force” (Roberts & Kingsbury 1993:445). Those agreements which are in the form of declarations, recommendations, resolutions, and decisions are categorized as soft law and do not have binding status but are important in the development of international norms and standards and could contribute to the development of customary International Law (Beltramino 2007:349).

The advantage of multilateral diplomacy is that the decisions adopted at the UN General Assembly confer collective legitimacy on that international agreement. The UN multilateral mechanisms governed by International Law with universal membership of sovereign states have “undisputed international legitimacy” (Fedetov 2004:7) and documents adopted at the UN will reflect this universality. Claude (1988:152) asserts that the function of collective legitimization “is one of the most significant elements in the pattern of political activity that the UN has evolved in response to the set of limitations and possibilities posed by the political realities of our time”.

John Ruggie in his definition of multilateral diplomacy as “an institutional form that coordinates relations among three or more states on the basis of generalized principles of conduct” introduces the normative foundations of multilateral behaviour (in Lee *et al.* 2006:2). This means that a specific set of norms is applied without prejudice throughout a comprehensive system (Nel *et al.* 2000:44). According to Ruggie, these norms are as follows: “That all actors should relate to other actors according to the same principles and rules of interaction; that costs and benefits are shared between the participants (indivisibility); and that actors refrain from seeking gratification on an individual issue but

rather spread their expectations over the longer term (diffuse reciprocity)” (in Nel *et al.* 2001:10).

The advantage of multilateral diplomacy for developing countries in the UN is that they can increase their bargaining power by joining coalitions. The disadvantage of this approach is that members must adhere to the group position and will have to take the interests of the group into consideration and limit unilateral actions and the pronouncement of individual positions. This reduces the flexibility of states whose own views are not satisfactorily addressed in the group, or if its own individual national interests are not necessarily compatible with collective interests. Muldoon (2004:290) assert that the disadvantage of bloc-oriented behaviour of states is that it impedes the UN’s effectiveness for multilateral diplomacy and its effectiveness as a centre for harmonizing the actions¹⁸ of sovereign states. Coalitions or blocs, with their increased numbers, will exert pressure for adoption of their own common positions or embark on joint action for or against a certain proposal (Kaufmann 1988:135).

The UN General Assembly conducts multilateral diplomacy in parliamentary style of proceeding; plenary debates, pluralism through one-state one-vote, and a large number of resolutions sponsored¹⁹ by various states (Barston 2007:63). The disadvantage of multilateral diplomacy is that the distribution of power, with a significant increase in the developing country membership following decolonisation, makes conference diplomacy “even more unwieldy than before” (Keohane & Nye 1985:155). An example of this is the process of negotiations on an international agreement in a multilateral conference such as the General Assembly. In the pursuit of consensus decision-making (Berridge 2002: 163)

¹⁸ UN Charter Article 1(4) mandates the UN to be “a centre for harmonizing the actions of nations ...”

¹⁹ The delegation taking the initiative for the resolution is called the sponsor, and those associating themselves with that delegation or resolution are called the co-sponsors (Kaufmann 1988:17).

states attempt to obtain the agreement of all the participants, and not to call for a vote which can divide the participants. In the process to build consensus, “frenetic, final phase negotiations” take place (Barston 1997:6) in the pursuit to reach the two-thirds majority vote to adopt a resolution (Jönsson & Langhorne 2004:61-70). An agreement reached by consensus, with recorded reservations by some states, may result in the ‘lowest common denominator’ position, and diminish the commitment for the implementation of the agreement.

A further disadvantage of this process is that considerable areas of disagreement are not resolved as negotiators construct packages for adoption (Barston 2007: 57). Alternatively, the outcome could constitute a collection of commitments with a very high degree of generality (Barston 1997:124). However, Kaufmann (1988:27) asserts that this view does not take into consideration that many decisions are the outcome of informal and intense negotiations in the UN to reach consensus; and which are not recorded and thus not available in the public domain.

From the discussion above, three main characteristics of multilateral diplomacy are extracted: Create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and, develop international normative regulatory frameworks.

2.7 Diplomatic actors

2.7.1 United Nations General Assembly: Role of sovereign states

The UN and other multilateral institutions established throughout the twentieth century provide both a context for diplomacy and constitute important diplomatic actors (Muldoon 2004:9). In this regard, these institutions are “indispensable to the effective practice of diplomacy as well as important actors in their own right in contemporary international relations; and that both are essential for good global governance” (Muldoon 2004:9). The

General Assembly is the major deliberative body of the UN consisting of sovereign states, has universal membership (Article 9 of the UN Charter), and is mandated by the UN Charter to “discuss any questions or any matters within the scope of the ... Charter” (Article 10). The General Assembly is also mandated to promote (Article 13(1)) “the realization of human rights and fundamental freedoms for all ...”

A key element in this study is that sovereign states constitute the main diplomatic actors. According to Ernst Satow (in Berridge 2002:129) international relations are underscored by the concept of the independence and sovereignty of all states, thus comprising a “society” of “civilized nations”. Although sovereignty as the principle of international society may constrain states, sovereignty also allows states to cooperate with one another if they choose to do so (Karns in Claude & Thompson 1994:14). “Only if states are truly sovereign can they delegate meaningful authority to international institutions, and only if those institutions have real authority can they be truly effective. Sovereignty of individual states is the defining characteristic of the international system, and diplomacy that ignores or de-emphasizes this is guaranteed to fail” (Muldoon 2004:280).

In his analysis based on the sovereign state model of international relations, Archer (2001: 36-37) draws attention to three key features; that only states are the subjects of International Law; that sovereign states are equal in their status in International Law; and that sovereign states are “institutionally self-contained” and International Law cannot interfere in the domestic jurisdiction of states. The latter principle is contained in UN Charter Article 2(7).²⁰ Only sovereign states can sign agreements in multilateral bodies and are thus accountable

²⁰ The UN (Article 2(7)) does not permit the UN to “... intervene in matters which are essentially within the domestic jurisdiction of any state ...” Chapter VII (Article 39) provides an exception and authorises the UN Security Council to “... determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to take military and non-military action to “restore international peace and security”.

for implementing them (Holsti 1995:72). These concepts have important considerations for the UNHCR, the international organization discussed in this study as a key diplomatic actor, as the UNCHR cannot take decisions which the membership of sovereign states in the General Assembly have not agreed to (Archer 2001:36-37). Thus sovereign states in the UN confer legitimacy on international agreements created through multilateral diplomacy and endorsed by this intergovernmental body.

The General Assembly is the international organization “capable of bestowing politically weighty approval and disapproval upon their projects and policies” (Claude 1988:152). The endorsement of UN resolutions lends legitimacy to collective agreements reflecting norms (see 2.6). A series of resolutions reiterating an issue or position by states that are considered for adoption in the General Assembly send a firm act of approval or disapproval (Claude 1988:154). The impact of resolutions is viewed with relation to the numbers voting in favour, or preferably being adopted by consensus, and the firmness of the language in the resolution, including its repetition (in successive annual General Assembly sessions). Statesmen weigh the significance of resolutions according to the size and composition of the majorities supporting them and the forcefulness of the language in which they are couched (Claude 1988:154). Multilateral diplomacy develops normative regulatory frameworks, such as the Guiding Principles on Internal Displacement (UN 1998b), which though not binding, serves as an agreement for states. The endorsement of the UN lends collective legitimacy to these international normative regulatory frameworks.

One of the multilateral means to promote a country’s positions is the membership of groups and coalitions in the UN (see 2.6) which reflect the shared ideals, values, or ideology of members in that group. South Africa is a member of the UN African Group, which includes members of the AU²¹ which implements the AU decisions in the UN. Within coalitions such as the UN African Group the members “prepare their initiatives and positions, particularly

²¹ Morocco is not a member of the African Union but is included in the UN African Group. Thus, all the African countries are members of the UN African Group.

with respect to international economic and social issues” (Muldoon 2004:25). Groups such as these can serve as a principle-based connection and promote the interests of the developing countries (Rana 2002:35). In these ways the developing countries found a way of overcoming their disadvantage of size and economic and political leverage (Muldoon 2004:26). These groups have emerged as important diplomatic actors, and build support around the great numbers of developing countries who garner more votes.

As the states of the South do not exercise significant leverage in the multilateral system, the states of the North constitute important diplomatic actors given their resources and diplomatic power at the international level and their ability to contribute financially to the international refugee regime (Betts 2008b:174). Any solution to the international refugee issue must take these actors into account.

Neo-realists are of the view that international cooperation will take place only when there is hegemony (Betts 2009:25). Thus, under the assumptions of this perspective, the potential for international cooperation to provide refugee protection or durable solutions is diminished. Krasner (1982:15) asserts that: “Under certain conditions, the provision of these regimes is a function of the distribution of power, and hegemons play a critical role in supplying the collective goods that are needed for regimes to function effectively”. For instance, in the late 1940s, the USA had a strong interest in addressing the refugee crisis created in Europe because of its strategic interest in a stable Europe. The USA had unparalleled exclusive power to create international rules and organizations (Keohane & Nye 1985:148). Thus, the USA made significant financial contributions in respect of burden-sharing (Surhrke 1998 in Betts 2009:25) to the international refugee regime.

According to the Hegemonic Stability Theory, conditions of decreasing power from hegemons that supported existing international regimes will result in the undermining of regimes, which will weaken their rules (Keohane 1988:388). “Without leadership, principles, norms, rules, and decision-making procedures regimes cannot easily be upheld”

(Krasner 1982:15). Realists such as Joseph Grieco argue that the existence of a strong hegemon is the foundation of a durable regime.

In contrast, some scholars such as Stein (in Krasner 1982:15) argue that there will be greater motivation for cooperation as hegemony diminishes, as the hegemon will no longer be providing the collective goods. Regimes are resilient in that they are built on well-founded negotiating structures (Krasner 1982:155) and rely on a “convergence of expectations” and can exist without a hegemon. Even though some scholars argue that the Hegemonic Stability Theory is not that influential, Hurrell (in Rittberger 1993:55) asserts that the role of “power and coercion in the implementation of rules remains fundamental”. This is pertinent in the UN international refugee regime where the powerful industrialized states of the North, as major donors to the regime, influence refugee policy and programs by earmarking their voluntary financial contributions to specific UNHCR programs consistent with their strategic and security interests (Betts 2009:25). One of the key elements in this study is that the provision of funding and resources to uphold the refugee regime is dependent on the powerful states, with a major impact on the funding of the UNHCR and the efficiency of the regime.

In the late 1970s increasing state cooperation was not credited to the role of a hegemon (Betts 2009:25). Liberal Institutionalism ascribed this increasing cooperation to the proliferation in international organizations where states experienced mutual benefits from international cooperation (Keohane 1984 in Betts 2009:25). The Liberal Institutional approach espouses the view that states create and maintain international institutions relating to refugees for reasons of mutual self-interest. States cooperated to draft and adopt the 1951 UN Refugee Convention in view of the conviction that the treaty would serve their own interests (Betts 2009:27). There was a recognition that, despite the cost imposed on an individual state though providing asylum, the establishment of a regime would produce benefits. If states are willing to cooperate for mutual benefit then international regimes can play a significant role in facilitating that cooperation (Krasner 1982:3). In particular, they can overcome collective action failures by creating the regulatory framework within which

states can be assured that other states will reciprocate over a longer term time horizon (Betts 2009:26).

Krasner (in Rittberger 1993:141) argues that the compliance of sovereign states to hold fast to the norms and principles of an international regime is relative to the willingness of powerful states in the system to enforce its principles and norms. Donor governments to the international refugee regime, mainly developed countries, are powerful diplomatic actors, and can use their financial contributions to an international regime to enforce changes in its operations. As an example, in 1994 the USA Congress withheld USA\$ 1 billion from the World Bank until it adopted extensive reforms.

2.7.2 United Nations High Commissioner for Refugees: Role of international organizations

On international refugee matters the principal specialized agency is the UNHCR which is mandated by the UN to supervise the international refugee regime. The Statute of the UNHCR mandates the international organization (see 1.1) “acting under the authority of the General Assembly” to “assume the function of providing international protection, under the auspices of the UN, to refugees” and to seek “permanent solutions for the problem of refugees by assisting Governments” ... “to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities”.

The 1950 UNHCR Statute mandates the international organization to focus on two principal areas: to ensure refugees’ access to protection, and to ensure that refugees have access to durable solutions. The protection of refugees consists functionally of two discrete phases: short-term measures of humanitarian assistance and long-term activities in providing durable solutions (Fonteyne 1983:167). The long term durable solutions are: Voluntary repatriation (to be reintegrated within their country of origin); local integration (to be integrated into the host country); and resettlement (permanently integrated within a new country (Loescher *et al.* 2008:1).

According to Constructivism, non-state actors such as international organizations can influence the actions of states through “persuasion and argumentation” (Betts 2009:33). Krasner (1982:3) believes that it is “the infusion of behaviour with principles and norms that distinguishes regime-governed activity in the international system from conventional activity”. Claude and Thompson (Karns 1994:1) emphasizes this important feature: “International organizations has distinguished itself most notably by creating a record of persistence, flexibility, and ingenuity in the development and exploitation of devised for inducing compliance²² by consent rather than compulsion”. The UNCHR is not able to enforce its views. However, the UNHCR has sought to influence state behaviour by providing guidance to states on RSD (see 2.4 for definition) and by providing knowledge and expertise concerning International Refugee Law, in the form of advisory services, technical assistance, and training to state authorities on the interpretation and practical application of the provisions of the international refugee instruments, as well as providing standard setting and promotion activities (Turk 2002:11-12).

Constructivism espouses the view that states’ identities and interests are not fixed but can be changed through their interactions with one another brings, and introduces the concepts of norms and ideas in world politics. Norms and international organizations constrain states, viewed as rational, self-interested actors, by constituting and shaping the perceptions of states relating to how they view their interests. What the states recognize is that their compliance represents their political capital in the international system. This explains why, despite having no enforcement mechanism, the core norms of the 1951 UN Refugee Convention, such as *non-refoulement*, are generally upheld.

Article 35 of the 1951 UN Refugee Convention reflects the obligations of UN member states to cooperate with the UN. The Statute (Chapter 1.3) also instructs the High

²² For international regimes to be effective, their rules must be obeyed; “yet sovereignty precludes hierarchical enforcement” (Keohane 1988:387).

Commissioner to “follow policy directives given him by the General Assembly”. The provision in the Statute which grants the member states in the UN General Assembly authority to make changes to the core mandate of the UNHCR and expand its scope of work is indicative of the independence of member states. Only states in the UN General Assembly can adopt resolutions on aspects relating to refugees, and endorse the UNHCR annual report.

The UNHCR Executive Committee (EXCOM), the management body of UNCHR, plays a key role in taking decisions on the direction of the body. The dynamics of the ‘North-South divide’ in which the North makes voluntary funding contributions to the refugee regime, and the South hosts the largest share of refugees and are beneficiaries of the funding, plays itself out in the Committee meetings (Loescher *et al.* 2008:77) where decisions on budgets and programs are made. South Africa’s membership of the UNHCR EXCOM immediately after it re-entered the UN in the 1990s reflects a strong commitment by the government to address refugee matters and to increase the voice of Africa in the refugee management body.

One of the main problems weakening the international refugee regime is that the programs of the UNHCR, as the main UN refugee regime, are influenced by those with resources. Krasner (in Rittberger 1993:140) is of the view that international regimes are created to promote the interests of particular actors; regime creation and maintenance are a function of the distribution of power and interests among states. This is particularly pertinent in the funding of the UNHCR. The UN agencies, including the UNCHR, receive a marginal amount from the assessed or regular budget of the UN and many are thus highly reliant on voluntary contributions for its field operations and programs. The UNHCR Statute (Article 20) declares that the Office of the High Commissioner “shall be financed under the budget of the UN. Unless the General Assembly subsequently decides otherwise, no expenditure other than administrative expenditures ...” of the Office shall be from the budget of the UN and “... all other expenditures relating to the activities of the High Commissioner shall be

financed by voluntary contributions”. Thus the significant operations²³ of the UNHCR of finding durable solutions are being funded by voluntary contributions.

The states of the North, who exercise a certain extent of border control, have adopted selective approaches to support refugees in the South, either through funding or resettlement, consistent with their own priorities and national interests. States of the North do not see the need to contribute to projects not related to their own interests (Betts 2008b:159). Such an approach makes it challenging to pursue a commitment to burden-sharing by the North for refugee protection. For instance, the USA, the largest paying member, is unwilling to bear the costs for multilateral organizations or initiatives that it cannot have sufficient management over. Other members are not willing to have the UN actions dictate their interests (Muldoon 2004:22).

There are opportunities for quasi-executive leadership in the UN system (Claude 2004:373-373). The heads of UN bodies (e.g., High Commissioners) influence the development of international norms and standards at the UN and lead the organization in a specific direction and become important diplomatic actors. Thus the UN High Commissioner for Refugees is an important diplomatic actor and can play an important role in guiding, channelling, and reconstructing states’ interests into enhanced refugee protection or solutions to mass influx or protracted refugee situations (Betts 2008b:175). The disadvantage is that the organization’s development and choice of initiatives have been highly contingent upon the personality of the High Commissioner. Each High Commissioner has brought his or her own unique perspective on refugee protection (Betts 2004:18) and a new incumbent may change the direction of the organization. For instance, the current High Commissioner for Refugees (2005-2015), Antonio Guterres, is trying to use the international refugee regime to address the situation of illegal migrants, a move opposed by many member states of the UN, including South Africa, who believe this would undermine the refugee regime which is already under stress due to increased refugees and asylum-seekers.

²³ The UNHCR has field offices in 125 countries.

2.8 Conclusion

The discussion in this chapter on the multilateral mode of diplomacy in the UN illustrated under what conditions sovereign states, as the principal diplomatic actors, will cooperate in the international refugee regime which was created to protect refugees. This was done against a background of Neo-realism, Liberal Institutionalism and Constructivism. Discussion of the diplomatic actors; the UN General Assembly and the UNCHR demonstrated the constraints and independence of these actors. At the end of this theoretical discussion, this chapter was able to extract three main characteristics of multilateral diplomacy that will provide the basis on which to analyze South Africa's multilateral diplomacy on refugees in the UN in chapter four, which are: Create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and develop international normative regulatory frameworks. An analysis of South Africa's multilateral diplomacy on refugees needs to be embedded in an overview of the country's refugee problem. The following chapter will discuss the scope of migration, with specific reference to refugees, in South Africa, and the policies in existence. The discussion includes the relevant international treaties to which South Africa is a party, and the African regional agreement on refugees which has influenced South Africa's foreign policy since 1994.

CHAPTER 3: SCOPE OF PROBLEM OF MIGRATION AND REFUGEES IN SOUTH AFRICA

3.1 Introduction

The previous chapter examined the multilateral diplomatic mode as an instrument which South Africa could use to address its refugee protection. Del Valle and Polzer (2002:3) believe that the South African government has failed in its legal obligations to prevent *refoulement* under the 1951 UN Refugee Convention and to uphold basic rights defined in the South African Constitution (South Africa 1996). The extent and seriousness of the refugee problem in South Africa cannot be underestimated and is of immense political and security importance. This chapter outlines the scope of the migration problem, with specific reference to refugees, in South Africa and the policies in existence. The chapter also discusses South Africa's national policies and foreign policy in the pursuit of its foreign policies on migration, with specific reference to refugees.

3.2 The migration and refugee problem in South Africa

As mentioned in 1.1, the UN report on migrants (UN 2010:116) reflects the staggering figures on refugee and asylum-seekers into South Africa and globally: During 2008 at least 839,000 individual applications for asylum or refugee status were submitted to governments or UNHCR offices in 154 countries. This constitutes a 28 percent increase compared to the previous year (635,800) and the second consecutive annual rise. According to the UNHCR report, this was the result of a dramatic increase in the number of asylum applications in South Africa (more than 207,000), and a significantly higher number of populations such as Somalis and Zimbabweans, seeking international protection. The same UNHCR report stated that South Africa was the world's largest recipient of individual applications, followed by the USA and France (see 1.1). Compounding this problem was the fact that the largest number of undecided cases at the first instance and on appeal was reported by South Africa (309,800). Given these statistics, South Africa's efforts at managing migration, with

special reference to refugees, are criticized as being largely unsuccessful, and a durable solution must be found.

The international refugee regime (see 2.2) confers distinct rights to a refugee under International Law. The particular problem faced by South Africa is that it experiences an influx of mixed flows of migrants (see 2.4 for definition) mainly from African countries, which include asylum-seekers, and other migrants that do not fulfill the requirements of a refugee under International Law. Yet states tend to view these movements of migrants and asylum-seekers as illegal migrants and thus enforce restrictive asylum policies. UNHCR Deputy High Commissioner Erica Feller (in Van der Klaauw 2009:60) asserts that refugees should be distinguished from migrants for “legal, conceptual, and moral reasons”. The Deputy High Commissioner states that by categorizing them together “refugees are at risk of being considered unwelcomed irregular movers who do not deserve the rights they are conferred under international instruments” (in Van der Klaauw 2009:60).

The difficulty states experience in separating migrants and determining the status of asylum-seekers to ascertain whether they are refugees, leads to the abuse of asylum by those who enter South Africa illegally. Since laws of asylum are often imprecise and the policy that states will admit refugees with a “well-founded fear of being persecution”²⁴ is subject to varied interpretations, individuals who wish to enter a country but cannot do so under existing guestworker and migration laws may resort to claiming political asylum (Weiner 1993:19). This is acknowledged with concern by the South Africa government. The former South African Minister of Home Affairs, N Mapisa-Nqakula, in her address to the UNHCR (2006), stated that: “In South Africa, the increase of mixed flows is placing a burden on our asylum system, which in turn undermines our ability to provide protection to those who are genuinely in need of it” (Mapisa-Nqakula 2006a). According to the UN Special Rapporteur

²⁴ Definition of ‘refugee’ in the 1951 UN Refugee Convention (Article 1).

on the human rights of migrants²⁵, Jorge Bustamante, the South African national asylum system continues to be burdened by large numbers of migrants who lodged applications for refugee status as their only option to legalize their stay in the country (UN 2011:4). The challenge of a significant influx of asylum-seekers is that it creates many unknowns for the host country as no proper records can be kept of the migrants' presence and identity (Waller 2006:1). Thus, determining the refugee status (see 2.4) of an asylum-seeker in a timely manner by South Africa is essential to alleviating the problem.

Moreover, many African states have long and porous borders and restricted or no capacity for border control. As populations have close ethnic and linguistic links, crossing borders for economic or social reasons is a daily part of life for many on the continent. The Global Commission on International Migration (GCIM) asserts that Africa's nomadic tradition and the fact that many African citizens have no proof of their nationality also make it challenging to determine their refugee status (GCIM 2005:6). Waller (2006:5) contends that South Africa's history and its position in the regional labour market have contributed to the current increase in foreigners. South Africa, until the 1970's, had concluded agreements with its neighbouring countries to permit migrant labourers to enter the country to work on its mines and it became a natural destination for 'economic migrants' (see 2.4).

But South Africa is an attractive destination not only because of its economy. As explained by the Regional Representative of the UNHCR based in South Africa, Sanda Kimbimbi: "In many respects South Africa is a model asylum country". This is because "the South African government does not establish refugee camps, and allows refugees and asylum-seekers the freedom to work and live in the country" (Redden 2007:15). This perception may be due to the lack of a coherent migration policy by the South African government and can result in migrants perceiving the government as having little control of who enters the country. It is

²⁵ United Nations Special Rapporteurs are mandated to investigate the human rights violations in various countries under specific mandates provided to him/her by UN member states, and report to the UN; and have no enforcement powers.

imperative that South Africa develops a coherent migration policy to identify refugees and asylum-seekers qualifying for protection under International Law. This would allow the identification of criminals who should be deported²⁶.

Another challenge for South Africa is that there was no previous comparable large-scale migration flow in democratic South Africa's institutional experience. The government was "caught unaware" (Alden & Le Pere 2010:6) in May 2008 when xenophobic attacks against migrants erupted with considerable material damage and resulting in the loss of lives and the displacement of thousands. South Africa's general policy of urban self-sufficiency and self-settlement for refugees means that there are no institutions in place to provide large-scale shelter and welfare assistance. Thus, institutional factors have played an important role in delaying and undermining effective coordinated responses (Del Valle & Polzer 2002:6).

The international refugee regime is framed in the context of the protection and promotion of human rights of refugees. At the same time, the concept of sovereignty is that the state is the legitimate provider of welfare to its population. South Africa is a developing country and needs to address its own domestic developmental challenges as promised by the government following the democratic transition in 1994. This includes the provision of economic and social rights to its own citizens, attending to the security of its citizens, and addressing the high crime rate (Crush *et al.* 2006:4) and matters of development. Any significant influx of persons seeking refuge in South Africa will only serve to strain the capacity of the state to provide these rights to its own citizens. However, globalisation results in the state coming under concurrent pressures towards internal fragmentation and external integration (Klotz 2000:833). In South Africa the global economic demands will certainly make addressing its domestic developmental challenges more difficult. Significant inflows of refugees are likely to lead to political and social unrest in the host country where citizens feel that refugees receive benevolent treatment and access to economic and social human rights such as access

²⁶ Article 1(F) of the 1951 UN Refugee Convention allows for the exclusion of persons who have committed serious crimes.

to jobs, health care, housing and social welfare services from the international community and the host country, to their detriment (Crisp 2006:5).

This is evident in South Africa where South Africans lash out against foreigners through violent acts of xenophobia and these incidents are likely to be a major source of destabilization in the country if not addressed (Klotz 2000:832-834). South Africans believe that the rising costs and unemployment occurs as a result of economic competition between themselves and asylum-seekers in South Africa (Crush & Williams Undated:13-14). Many South Africans believe that a one-way flow of migrants into the country will negatively affect social welfare systems and jobs. As South Africa does not have an encampment policy, refugees are free to integrate in the South African society and seek work and social services (Handmaker *et al.* 2008:28). This impacts on the lives of South African citizens and has resulted in severe xenophobic attacks against foreigners. Furthermore, asylum-seekers who are undetected by law enforcement agencies can lead to a significant breakdown of law and order (Crush & Williams 2005:17). So far South Africa has not been successful in managing this phenomenon satisfactorily. The major challenge for South Africa is to have the systems to determine the eligibility of asylum-seekers as defined by the 1951 UN Refugee Convention, through the process of RSD (see 2.4 for definition).

The security concerns by South African citizens are not unfounded. Political and security challenges to South Africa as a result of a large influx of asylum-seekers is acknowledged by the UNHCR (UNHCR 2010): “Criminality remains a matter of grave concern in South Africa and is more prevalent in the bigger cities due to the lack of job opportunities, large disparities in income and the inability of the criminal justice system to cope with these challenges. There is continuous migration from rural areas and from other countries to South Africa’s major urban areas. It is estimated that foreign migrants in the country number between three to five million. As a result, competition for jobs, housing and social services is particularly intense in the urban areas”. Moreover, the UN Security Council has adopted

resolutions on the mass displacement of refugees following armed conflict as threats to regional peace and security²⁷.

3.3 National policies of South Africa

The policy of South Africa towards Africa since 1994 has been the realization that it cannot progress in a wider Africa that is underdeveloped. However, increased flows of refugees and economic migrants, including illegal migrants, will have a negative impact upon South Africa's own well-being (Hamill in Lee *et al.* 2006:120).

The question is whether the general South African population sympathizes with the notion that South Africa owes a debt of honour to Africa for the support and solidarity received by the leaders of the ruling party, the African National Congress (ANC), in exile (Crush *et al.* 2006:9). South African Cabinet Minister Kader Asmal noted: "There is not a corner of the vast continent where our people were not received with affection and fraternal support. Our integration into the affairs of the continent, as a result will be a joyous homecoming, because we are of the same flesh. Not surprisingly, therefore, we believe that all the policies of our country should reflect the interests of the entire African continent" (Hamill in Lee *et al.* 2006:120). Because the government has acknowledged this debt of honour to Africa, it may explain why the post-apartheid South African Constitution (1996) and relevant domestic refugee legislation entrench progressive rights consistent with international standards of the international refugee regime (Alden & Le Pere 2010:6).

The South African Constitution, Act No.108 of 1996

The South African Constitution (South Africa 1996) mandated the state to commit itself to the progressive realization of socio-economic rights within its available resources. The realization of socio-economic rights is a very difficult matter in South Africa given its limited resources.

²⁷ For example, Security Council Resolution S/RES/918/1994 relating to Rwanda and adopted on 17 May 1994.

The South African Constitution and its Bill of Rights (Chapter Two) (sections 26 and 27 dealing with Socio-Economic rights such as housing, health care, food, water and social security) stipulates that “everyone has the right to have access to” these rights and thus they are not restricted to South African citizens but covers everyone in the country.

Once migrants enter South Africa, under domestic legislation, the South African Constitution (Chapter Two: Bill of Rights) entitles migrants to socio-economic rights. This creates major challenges regarding the country’s obligations to its own citizens in their realization of socio-economic rights. South Africa’s particular development needs as a developing country mean that it cannot become a donor country in the near future (Solomon 2003:126). This is evident in South Africa where South African citizens view migrants as security threats who undermine the provision of services to citizens. Violent acts of xenophobia against foreigners prevalent in the country demonstrate the resistance of South Africans citizens to the increasing influx of migrants without apparent control by the government, and are likely to be a significant source of destabilization if not addressed (Klotz 2000:832-834).

So far South Africa has not been successful in managing this refugee inflow satisfactorily which is seen to be undermining its national interest; the advancement of security and wellbeing of its own citizens. In 2008 the grave and violent xenophobic attacks in South Africa prompted severe rebukes from both the UN High Commissioner for Human Rights and the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, especially as it occurred in South Africa. This is because South Africa’s global standing since 1994 has been linked to its image as a model of conflict resolution and the protection and promotion of human rights, given its unique history. The history of South Africa has a bearing on this study as it relates to the radical change in foreign policy since 1994 (Muller 1999:60) with the commitment to the promotion of human rights being one of the principles underpinning South Africa’s policy on international relations (South Africa 2003a; 2004b; 2005a; 2006a; 2008a; 2009a; 2010b) and the expectations of the African continent and the international community.

The expectations by the UN on the post-1994 democratic South African government are high. Thus, its treatment of migrants from the African continent is under international scrutiny. This is because of the historical significance that the UN has for South Africa. It was the UN that became the international platform to address and denounce South Africa's domestic policy of racial segregation and human rights violations against its Black population. Largely as a result of the African member states and countries of the South, the UN General Assembly suspended South Africa's membership in the UN²⁸. This is one of the reasons why South Africa's foreign policy reflects a debt of honour to African countries, and the reason why African countries expect South Africa to provide asylum for destitute people that migrate to South Africa. But international efforts to protect forcibly displaced persons are entirely insufficient. Developed countries of the North view refugee influx in relation to the political and security consequences of "unwanted population" (Weiner 1995:164) and potential terrorists, and are reluctant to contribute to meaningful international burden-sharing. This places a great deal of stress on host countries such as South Africa who have a more open refugee system.

The need for a comprehensive approach to address the serious pressure brought by the massive influx of asylum-seekers is acknowledged by the South African government. According to the former Minister of Home Affairs of South Africa, N Mapisa-Nqakula: "The protection of the human rights of foreigners is central to comprehensive and balanced migration management. They are not lesser beings who are less worthy of human rights protection. In South Africa, our Constitution applies extensively to foreigners. The challenge that confronts us as government and civil society is to give effect to these rights" (Mapisa-Nqakula 2006b). Thus the

²⁸ The UN General Assembly decided to suspend South Africa from participation in the work of the Assembly's 29th session on 12 November 1974. South Africa was not formally suspended under Article 5, and following further General Assembly resolutions since then, the suspension was lifted on 23 June 1994, following its successful democratic elections in 1994.

government is committed to providing human rights protection for migrants, but not able to achieve this satisfactorily given the lack of meaningful international burden-sharing by the developed countries of the North.

What makes the situation more challenging is that the information available to refugees, which raises awareness regarding the rights and resources, places enormous pressures on the South African government (Klotz 1997:8) to amend its policies. Refugees are knowledgeable and demand their social and economic rights as demonstrated in the following case (Crush *et al.* 2006:11): “In a recent court case, in which Mozambican migrants applied for court intervention after they were denied access to social welfare on the grounds that they were not South Africa citizens, judgment was handed down in favour of the migrants (South African Constitutional Court, 2003). The judge found the denial of grants to be unconstitutional. By extension, this judgment will become established jurisprudence and would apply to all social and welfare services provided by the State”. Such judgments will entrench migrants’ rights, especially socio-economic rights, in South Africa, and could result in further tension between South Africans and migrants.

Post 1994 legislation: South Africa Refugees Act No. 130 of 1988

The immense changes in the country with regard to the increase and nature of migration since 1990 have generated intense policy challenges which resulted in a protracted process of migration policy reform (Crush & Williams 2005:5). Prior to 1994 and the democratic transition, South Africa did not recognize the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention. Once South Africa acceded to these Conventions after 1994, its first ever domestic refugee legislation in 1998 (which came into force in 2000) was a landmark event, and broke with the past and demonstrated acceptance of membership in an African community (Tuepker 2002:412). The protection of refugees is accorded distinct legal rights by the 1951 UN Refugee Convention and South Africa, as a State Party, thus has to comply with these binding obligations (see 2.3). The South African refugee legislation, South African Refugee Act (South Africa 1998) entrenched progressive rights for non-

citizens. It is believed (Crush & Williams 2005:13) that the creation of a new and more open refugee system in South Africa could have contributed to the unprecedented rise in migration (Crush & Williams 2005:13).

The South African Refugee Act (1998) which includes statutory protection mechanisms for refugees gave equal legal credence to the UN and OAU definitions of a refugee (see 2.4) (Handmaker *et al.* 2008:278). However, it is clear that the government was totally unprepared for the continual mixed flows of migrants since 1994 (Alden & Le Pere 2010:6). With the current significant mass mixed migratory flows into South Africa, it remains difficult for the government to identify and consider the asylum application of many genuine refugees and provide residence permits (UN 2010:4).

As South Africa believes in a non-encampment policy, a major protection challenge in South Africa is to reach out to the huge population of refugees and asylum-seekers residing in urban areas and spread throughout the country. According to the Minister of Home Affairs of South Africa, NC Dlamini-Zuma, South Africa's efforts at managing asylum-seekers has been largely unsuccessful and this responsibility falls within the purview of the South African Department of Home Affairs, whose mandate is "to regulate migration, in the national interest, and to facilitate the movement of persons across international borders through the country's 72 Ports of Entry" (Dlamini-Zuma 2009). The Department of Home Affairs, responsible for migration issues, clearly lacks the administrative capacity to effectively manage migration and does not have sufficient monitoring systems in place. In a mixed flow of large numbers of people seeking asylum in South Africa, the Department of Home Affairs finds it is extremely challenging to identify each individual and determine their refugee status and provide rapid access to documentation and complete the RSD process for those who meet the legal requirements. The UN (UN 2010:117) reports that the significantly high number of asylum-seekers is overstressing the capacity of the Department of Home Affairs to comply with the government's obligations under the international refugee regime.

Post 1994 legislation: South African Immigration Act No. 13 of 2002; South African Immigration Amendment Act No. 19 of 2004; and South African Immigration Amendment Act No. 13 of 2011

Immigration laws are determined by states to regulate legal into their countries. The post 1994 government inherited legislation which was developed to control and avert migration, and not to facilitate it. The 2002 South African Immigration Act (South Africa 2002a), amended in 2004 by the Immigration Amendment Act (South Africa 2004a), designed to actively smooth the progress of temporary immigration at the upper end of the labour market (Crush and Williams 2005:5). It is clear that the government neither anticipated nor could they address an influx of unskilled or semi-skilled workers into the country in the 1990s. Although South Africa has deported a significant number of illegal migrants, mainly in the Southern African region, this deportation policy does not seem to be sustainable as many return to South Africa. At the same time the Southern African region is moving towards increasing regionalization²⁹ which in general undermines the ability of individual states to enforce unilateral immigration policies (Williams & Carr 2006:5). This will oblige South Africa to adopt a more open migration policy. Like other states, South Africa finds it difficult to deal with irregular migrants, those that are not refugees, in the context of a mixed migratory flow as there is no international legal framework addressing this category of migrants.

However, unfettered movement of people is not an option for South Africa, and border management is of fundamental importance for the protection of national security. Weiner (in Pécoud & Guchteneire 2005:15) states that “Unilateral openness is not only unlikely, it is also potentially damaging: Any country, rich or poor, which opened its borders, might soon find other states taking advantage of its beneficent policies.”

²⁹ South Africa has signed the Southern African Development Cooperation (SADC) Protocol on the Free Movement of Persons in 2005 which was created for the purpose of “... encouraging the free movement of persons ...” in the SADC region.

A further amendment of the South African Immigration Act (South Africa 2002a) by the 2011 Immigration Amendment Act (South Africa 2011) was an acknowledgement of the severe scarcity of critical skills in South Africa. While the porous largely unguarded borders are allowing into the country illegal and undocumented migrants, (see 3.5 for definitions), the government's priority of drawing highly skilled migrants legally into the country is not prioritised. The Immigration Amendment Act of 2011 was designed to provide easy access to those with critical skills to obtain immigration permits (Dlamini-Zuma 2011). Immigration legislation relates to the legal movement of people into a country with the requisite permits, and legislation is at the discretion of the national government. Although human rights organisations have criticised the 2011 Immigration Amendment Act, there is recognition that the South African government is finally acknowledging the need to create a coherent migration system.

3.4 South Africa's foreign policy

When assessing South Africa's foreign policy it must be taken into account that the democratic political transition in South Africa and its re-emergence into the global diplomatic system coincided with the end of the Cold War (1989) which was characterized by the confrontation between East and West and by a bipolar world (with the USA and Russia being the two superpowers) (Muller in Melissen 1999:xxi). During this time multilateral diplomacy was conducted between two ideological blocs. The end of the Cold War presented a thawing of international relations and international cooperation evidenced by the many international conferences in the UN on social and economic issues in the 1990's (Coolsaet 2004:16). South Africa thus re-entered the international community in a context of international cooperation. However, as mentioned in 2.7.2, the end of the Cold War also diminished the strategic importance of Africa to the developed countries of the North. This point is relevant with respect to refugees, as the North paid less attention to the plight of refugees and the burden of hosting refugees fell to the destination countries, mainly from Africa.

A further constraint is that in recent years, the UNHCR, donor states and other international actors have tended to focus their attention and resources on high-profile crises in which people are either fleeing in large numbers to countries of asylum or repatriating in large numbers to their country of origin. Protracted situations, like those in Africa, which drag on for years and where there is no immediate prospect of a durable solution for the refugees concerned, have consequently been neglected. As a result, assistance programs in Africa have been deprived of resources (Crisp 2006:18). Slaughter and Crisp (2009:5) make a comparison with armed conflicts in Northern Iraq, Bosnia, Kosovo and East Timor which produced a resolute response from the developed countries in addressing refugee movements. The reason is that the USA and its allies had strategic interests to defend in these areas, whereas in Africa the geopolitical and economic stakes are much lower. As a result, refugee movements in Africa have not been addressed decisively, and thus become protracted, burdening the developing countries in Africa which are destination countries for the large-scale refugee movements.

The peaceful change in South Africa with the transition to democracy in 1994 gave South Africa a certain moral authority and prestige to play critical roles in conflict resolution and mediation; and its great “soft power” attributes have been the attraction and power of its post-apartheid transition (Alden & Le Pere 2010:5). South Africa was seen as a moral leader on human rights protection and it was under great pressure to deliver in light of this expectation from the international community. The main focus of South Africa’s foreign policy according to the DIRCO Strategic Plans (South Africa 2003a; 2004b; 2005a; 2006a; 2008a; 2009a; 2010b) is the African continent. Lee *et al.* (2006:18) believe that, given the extent of poverty and underdevelopment at home, South Africa’s initiatives in advancing the African Renaissance could seriously undermine its ability to generate a South African Renaissance.

To promote the African Renaissance South Africa interacted with African member states within the AU. South Africa ratified the 1969 OAU Refugee Convention and is under obligation to provide protection under the expanded interpretation (see 2.2) One prominent characteristic of the OAU definition as compared to the UN definition is an unambiguous

recognition of the mass persecution that generates many contemporary asylum claims (Tuepker 2002:409). South Africa's Refugees Act (1998) (Section 3(a-b)) gives equal legal weight to the UN and OAU definitions of a refugee. In practice, however, South Africa privileges the OAU definition (see 3.3), and it is those who are victims of generalized persecution, generalized violence, or violence on the basis of generalized ethnic persecution (in the cases of Burundi and Rwanda), whose claims are most readily accepted (Tuepker 2002:417).

The issue of refugee protection is seen in the international community as one of protection of human rights. One of the principles underpinning South Africa foreign policy is the promotion and protection of human rights, as reflected in the DIRCO Strategic Plans (South Africa 2003a; 2004b; 2005a; 2006a; 2008a; 2009a; 2010b). South Africa has incorporated into its domestic legislation the provisions of the core international human rights treaties that it has ratified and which it is under obligation to implement. As indicated in 2.5, the human rights treaties constitute an extensive framework for the protection of non-citizens and relate to the human rights protection of refugees. However, the inability of South Africa to manage the significant influx of migrants and protect their human rights reflects a disjuncture between these policies and their implementation.

One of the weaknesses of South Africa's foreign policy relating to refugees is that the migrant issue is not viewed as a security issue. DIRCO's Strategic Plan (South Africa 2005a) includes security issues such as drugs, human trafficking terrorism, climate change, weapons of mass destruction and small arms. The 2010 White Paper on Foreign Policy (South Africa 2010a) in assessing trends, warns that migration will present a "source of tension between states and communities" and that "States will be challenged to cope with the demands of economic growth, xenophobia and insecurity". However, the DIRCO Strategic Plans and the 2010 White Paper on Foreign Policy do not single out refugees, or irregular migrants, as specific causes of tension or security, preferring to deal with migrants as a homogenous category.

South Africa has focused on security in multilateral diplomacy and played a pivotal role especially on multilateral security regimes and arrangements. South Africa's initiative in mobilising the African states to support the African Nuclear Weapon Free Zone Treaty³⁰ in 1996; the Convention on Landmines³¹ (Ottawa Process) in 1997; and the Kimberley Process³² in 2003 which entailed collaboration with both North and South, are reflective of this position.

3.5 South Africa's obligations under the UN refugee regime

As mentioned in 1.2, the primary function of international regimes is to provide a “framework of rules, norms, principles and procedures for negotiations and acting collectively” (Krasner 1982:150-153). The principle of *non-refoulement* which is the principal norm of International Refugee Law, has been developed in International Human Rights Law, and has become a norm of international customary law. As mentioned in 2.7.2, on international refugee matters the principal specialized agency is the UN High Commissioner for Refugees, which is mandated by the UN to supervise the international refugee regime.

South Africa ratified the 1951 UN Refugee Convention and as a State Party is bound by its provisions which entitles protection to refugees. Under the international refugee regime, states have certain legal obligations with regard to RSD, which is an essential aspect of the

³⁰ The African Nuclear Weapon Free Zone Treaty, also known as the Treaty of Pelindaba, establishes a Nuclear-Weapon-Free Zone in Africa, signed in 1996.

³¹ United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, signed in 1997.

³² Kimberley Process Certification Scheme (KPCS) is the process designed to certify the origin of rough diamonds from sources which are free of conflict funded by diamond production, thus regulating ‘conflict diamonds’ which have funded many of Africa's most atrocious armed conflicts, launched in 2003.

governance of the international refugee regime. As mentioned in 2.7.2, international organizations such as the UNCHR have become a repository of expertise and knowledge in International Refugee Law. This provides an opportunity for South Africa to utilize the expertise of the UNHCR with regard to RSD. Furthermore, refugees become beneficiaries of the international community; in this regard, the role of the UNHCR is to “provide immediate basic assistance in food, health, education, and shelter to the most vulnerable groups among refugees and asylum-seekers” (UN 2008c:117).

Despite South Africa’s commitments to ensuring refugee protection, a number of impediments remain; millions of undocumented citizens; regional migration patterns that take place outside an effective legal framework; and a severe lack of capacity by South African agencies responsible for migration management (Handmaker *et al.* 2008:27-28). When combined, these impediments result in a migration and asylum regime that does not protect either the rights of non-citizens (including refugees and asylum-seekers) or the interests of South African citizens (Handmaker *et al.* 2008:27-28). The significant lack of processes on RSD indicates that much more attention should be provided by the UNHCR to this important process in light of the high number of undocumented cases in South Africa.

As stated in 2.4, IDPs are not migrants as they are confined to national territory and have not crossed an internationally recognised border. In the context of multilateral diplomacy, the UN General Assembly has over the years mandated the UNHCR to facilitate situations involving displaced persons over and above its mandate on refugees (Fonteyne 1983:164), including the funding of the protection of IDPs. States of the North have become reluctant to accept refugees; and prevented the outflow of refugees from potential countries of origin by influencing and funding the UNHCR in an apparent effort to contain the displaced populations in the country of origin (Kanakano 2006:99).

As stated above, South Africa privileges the OAU definition rather than the UN definition of a refugee. African countries do not have an intensive regional framework for the protection of refugees; neither do they have the resources to protect refugees. As a member

of the AU, South Africa is bound by the decisions of the AU which focuses on all types of displacement. As the phenomenon of IDPs developed and increased in Africa, IDPs began to compete seriously with refugees and asylum-seekers for the funding of the UNHCR (Fontaine 2006:76). A review of the DIRCO Strategic Plans (South Africa 2003a; 2004b; 2005a; 2006a; 2008a; 2009a; 2010b) and the DIRCO Annual Reports (South Africa 2001; 2002b; 2003b; 2004b; 2005b; 2007; 2008b) demonstrate a lack of definitional clarity with regard to refugees who have distinct rights under International Law and other categories of migrants, including IDPs. The DIRCO Strategic Plan 2010-2013 (South Africa 2010b) articulates South Africa's foreign policy as working with the UNHCR to address the challenges of "displaced persons" particularly in Africa, and "interact on issues related to migration," in the UN. There is no emphasis in the Strategic Plans on dealing with the refugee issue in the international refugee regime with its distinct legal provisions.

The lack of definitional clarity or clear parameters on the term migrant also persists in the UN; as the resolution outlining the mandate of the UN Special Rapporteur on the human rights of migrants defines a migrant as: "all non-nationals of varying ages and in all situations and conditions of stay, including, inter alia, migrant workers and members of their families (both regular and undocumented or those in an irregular stay), asylum-seekers, migrants intercepted at sea, smuggled migrants, and victims of trafficking" (Lesser 2009:146). Comprehensive migration policies in South Africa also need to respect the human rights of migrants, which although not governed by a specific instrument comparable to the 1951 UN Refugee Convention, have been codified in a number of international human rights treaties.

It is important for South Africa to develop a coherent migration policy (see 3.2) to protect refugees and asylum-seekers qualifying for protection under International Law, and to distinguish this category from those migrants who are illegal and should be deported. As stated in 3.2 above, the difficulty in determining refugee status leads to the abuse of asylum by those who enter South Africa illegally for reasons not associated with asylum. The challenge for multilateral diplomacy is that there is currently no international normative

regulatory framework in the UN to deal with illegal or irregular migrants (see 2.4 for definitions) who are not covered by International Refugee Law.

3.6 Conclusion

Despite being a critical diplomatic actor in the formulation of multilateral agreements South Africa has not used multilateral diplomacy on the issue of refugees and migrants with the same intensity it demonstrated with the multilateral security regimes. South Africa views the issue of refugees largely within the framework of human rights protection, and not as a security issue. This is a weakness in South Africa's migration policy, especially as it is the world's largest recipient of individual applications for asylum, as the serious security implications of a significant number of undocumented persons in South Africa have been borne out by the 2010 UNHCR report.

The protracted refugee situations in Africa and the potential of escalating armed violence and instability, including regional instability, will no doubt increase the movement of migrants into South Africa. The AU is not able to assist given its own lack of resources, and Africa will continue to rely on the UN international refugee regime and its resources. The specific challenge to South Africa's protection activities towards asylum-seekers consistent with its obligations in International Law, is that those not categorized as refugees, especially irregular migrants, are received by South Africa together with asylum-seekers in mixed migratory flows. This is exacerbated by the fact that there is no definitive normative regulatory framework on the human rights protection of irregular migrants at the global level.

Moreover, the perception by potential asylum-seekers that South Africa is a country that allows asylum-seekers the freedom to work and live in the country and does not have an encampment policy, will inevitably invite those who wish to enter the country illegally. Furthermore, the perception by South African citizens that the government has very little control over who enters the country, and that the national interest, is being subsumed under

the grander vision of the African Renaissance, is a prescription for national insecurity. This situation is exacerbated by the current climate of a lack of service delivery by the government to the poor and vast numbers of unemployed. It is imperative that South Africa formulates a coherent policy and heeds the advice of the recent White Paper on Foreign Policy (South Africa 2010a) which warns that migration will present a “source of tension between states and communities” and that States will be challenged to cope with the demands of “economic growth, xenophobia and insecurity”. A coherent migration policy should facilitate the immigration of persons who have scarce skills in identified sectors, and establish mechanisms to address asylum-seeking and illegal migration.

CHAPTER FOUR: SOUTH AFRICA'S DIPLOMATIC STRATEGY

4.1 Introduction

Chapter three provided an overview of the refugee problem of South Africa, which is the foremost destination country for asylum-seekers globally, and the country with the largest number of undecided cases of RSD. The significant influx of asylum-seekers since the onset of the 1994 transition to democracy has led to violent acts of xenophobia from South African citizens towards refugees who are seen to be beneficiaries of the international community and the UN. The international problem relating to refugees is that the countries of the North exercise disproportionate influence on the programs of the UNCHR as they are major funders of the organization. This underscores the difficulty of reforming the regime to benefit African countries that experience protracted refugee situations and the need for South Africa to work in multilateral diplomacy in the UN to address this issue.

This chapter will firstly discuss South Africa's diplomacy on the African Agenda, its strategic foreign policy objective, and the prism through which the government approached issues related to migrants in the UN refugee regime. Then the chapter will outline the steps taken by South Africa in multilateral diplomacy to address the problem, in the context of the three characteristics of multilateral diplomacy as identified in this study: Create and strengthen international regimes to promote global governance; formulate international agreements and confer collective legitimacy; and develop international normative regulatory frameworks. While the focus of the study is on the international refugee regime, it is important to deal with the issue of irregular migrants who, under the guise of asylum-seekers, apply for refugee status and impact negatively on South Africa's capacity to comply with its international legally binding obligations to protect refugees as outlined in the international refugee regime.

4.2 South Africa's African Agenda

South Africa's diplomatic style or approach on refugees has to be viewed through its role as a traditional middle power at the international level and its hegemonic status at the regional level given its economic power on the continent. As stated in 3.3, the post-1994 South African democratic government ratified the 1951 UN Refugee Convention and as a State Party is bound by its provisions which entitle protection to refugees. The post-1994 South African democratic government has used multilateral diplomacy in the UN to address the refugee problem. As stated in 3.4, South Africa's Refugees Act (South Africa 1998) gives equal legal weight to the UN and OAU definitions of a refugee (see 2.3). In practice, however, South Africa privileges the OAU definition (see 3.3), which means that South Africa accepts more displaced persons from Africa consistent with the broader OAU definition than the UN international refugee regime allows, given the UN Convention's narrow definition on refugees and persecution. This is consistent with South Africa's commitment to the African Agenda. Moreover, as mentioned in 3.3, the government has acknowledged the debt of honour to Africa, and it may explain why the domestic refugee legislation entrenches progressive rights consistent with international standards of the international refugee regime (Alden and Le Pere 2010:6).

South Africa's foreign policy on the continent underwent a complete transformation (see 3.3) following the transition to democracy in 1994, and, during the first decade of post-apartheid rule, Africa was gradually elevated to the number one priority of South Africa's policy (see 3.4). South Africa asserted itself as an African state and an African power, which makes African renewal, African peace and security, and African development the main priorities of its foreign policy (Landsberg 2005:1). This strategic objective of African renewal in South Africa's foreign policy was articulated by former President Nelson Mandela in the first OAU Summit attended by the post-1994 democratic government. Since 1994 the Strategic Plans of DIRCO consistently declare that the promotion of the African Agenda remains the key strategic objective of DIRCO and the government. The government firmly believes that the "future of South Africa is inextricably linked to the future of the

African continent and that of our neighbours in Southern Africa” (South Africa 2005a; 2006a).

The accommodating refugee policy of South Africa, especially in the context of the OAU broadened definition, is also related to South Africa’s policy of human rights. The former Minister of Foreign Affairs of South Africa, N Dlamini-Zuma, explained how the history of South Africa and the struggle against apartheid had made the “commitment to the promotion of human rights” (South Africa 2003a; 2005a; 2008a) a key principle underpinning South Africa’s foreign policy since 1994: “Our struggles and tribulations, our challenges and traumas and our own history demands that we make a meaningful contribution for the creation of a better world for all. The abuse of human rights in South Africa demanded that our new democracy protects and promotes ... human rights ... of all our people” (South Africa 2003a).

Scholars (Nel *et al.* 2000; Hamill & Lee 2001; Landsberg 2005; Alden & Le Pere 2010) believe that South Africa has developed an international respectability and a measure of moral authority in world affairs given its negotiated peaceful transition to democracy in 1994, and its conflict resolution and mediation diplomacy in Africa. Thus, South Africa exercises some diplomatic leverage and has developed a significant ability to influence global affairs consistent with its commitment to the principle of human rights. However, South Africa’s role on the continent seems to yield different results and the role of moral leader is not accepted by African leaders. On the continent South Africa’s engagement is characterized by the need to maintain a balance between leadership and domination. It has frequently been accused of being either too assertive, or too reserved in dealing with the continent’s challenges, given its economic, military, and diplomatic influence. This is largely because South Africa’s complex engagement with Africa since 1994 has impeded its role as a middle power at the regional level (Hamill and Lee 2001:49).

The following events in 1995 represented a turning point in South Africa’s diplomacy. In 1995 following a failed attempt at quiet diplomacy, President Nelson Mandela unilaterally

and publicly criticized the Nigerian military government of Sani Abacha for the execution of a human rights activist, Ken Saro-Wiwa, and called on the Commonwealth to expel Nigeria, a move which is unknown from one leader of a developing country with regard to another (Black 2003:40). Although Mandela's call was welcomed by the European Union (EU), not a single African country supported South Africa as this unilateral pronouncement was perceived as an affront and as bypassing the traditional consultations among African leaders. Following this, President Thabo Mbeki warned in Parliament in 1996 not to overestimate South Africa's strength and noted the failure of the West to impose sanctions on the oil producing country even though they had the power to do so. It is believed (Black 2003:35; Adebajo 2008:127) that this incident was decisive in that it would change South Africa's future policy on the continent.

Mbeki's subsequent approach of quiet diplomacy with neighbouring Zimbabwe bears this out. Despite pressure for sanctions from the North, President Mbeki continued with quiet diplomacy. Doing otherwise could result in South Africa's diplomatic marginalization and loss of influence with Zimbabwe and also in Africa (Adebajo 2008:127). Van Aardt (in Black 2003:42) explains that this action by South Africa contradicted African Solidarity: "... the unwritten law ... that African states do not turn on each other in international fora, such as the UN, but close ranks when attacks are made against them." This is problematic in the refugee issue where the root causes such as armed conflict are largely a result of the African leaders' failure to protect the human rights of their citizens, resulting in mass exoduses of displaced and vulnerable persons to South Africa.

Since the Nigerian incident, South Africa had to navigate a "steep learning curve" when speaking out on human rights in Africa (Alden & Le Pere 2010:5). The situation in Zimbabwe and the inability to effectively resolve the problem demonstrate the constraints of South Africa's regional power as a result of SADC's principle of non-interference in the internal affairs of member states (Soko 2008:64). Since 1996 South Africa has been wary of being outspoken on violations of human rights by African leaders and governments especially in the UN. Black (2003:35) asserts that this experience resulted in more

importance given to “cautious multilateralism in foreign policy, particularly, though not only, with regard to human rights issues, and a diminished inclination towards outspoken leadership attempts”. Since the Nigerian event, South Africa’s diplomacy had focused on a more comprehensive conflict resolution and development strategy.

Since 1996 South Africa, according to Qobo (2006:143), has tended to play down its role as a regional power and relies on non-coercive instruments of policy, such as diplomacy, trade and economic cooperation (Carlsnaes & Muller 1997:75-76; Hamill & Lee 2001:37; 41-52). The foreign policy of South Africa focuses on diplomacy, dialogue, and mediation, as the main means of conflict resolution in the African region, with the aim of finding political solutions to conflicts and sponsoring initiatives designed to promote African regional stability and security. South Africa has promoted in its diplomacy with countries in Africa initiatives on conflict prevention and conflict resolution, and technical assistance and capacity building, for instance by providing assistance in monitoring elections which have a bearing on regional stability (Soko 2008:57). These diplomatic initiatives are important in that they could contribute to addressing the root causes of forced displacement, armed conflict is recognized by the African Group in the UN as one of the “principal causes of forced displacement in Africa” (UN 1996a; 1997a; 1998a; 1999a; 2000a; 2001a; 2002a; 2003a; 2004a; 2005a; 2006a; 2007a; 2008a; 2009a).

The change in diplomatic strategy from outspoken custodian of human rights to promoting technical and financial assistance to Africa took place in 2000 with the establishment of the African Renaissance and International Cooperation Fund Act (South Africa 2000). Although not regarded as a donor country, under former President Thabo Mbeki (in 2000) South Africa’s diplomatic strategy was to promote development cooperation to Africa countries. Some see development cooperation as one means to create greater diplomatic leverage and use diplomacy as a source of power. Alden and Le Pere (2010:5) believe that South Africa’s emergence as an aid donor is an extraordinary achievement for a middle-income country with its own socio-economic and development challenges and South Africa’s aid flows to

Africa have been impressive. By one estimate, in 2002, aid flows amounted to about USA\$ 1.3 billion, increasing to about USA\$ 1.6 billion by 2004.

South Africa's foreign policy includes a stated commitment to security in Africa by the peaceful resolution of conflicts on the continent and promoting the continent's economic and social development (South Africa 2010). The Strategic Plans of DIRCO unambiguously state that "Africa is our key focus" and thus commands the "highest priority for our Department's foreign relations activities" (South Africa 2003a; 2005a; 2006a; 2008a).

In Africa, South Africa has made considerable progress in many countries such as Angola, Burundi, Comoros, Democratic Republic of the Congo (DRC), Lesotho, Liberia, Madagascar and Rwanda (South Africa 2004b) and has remained diplomatically engaged in the post-conflict phases. This commitment was demonstrated by the South African high-ranking mediators who have expended considerable efforts and resources in achieving these objectives in Africa. South Africa has significant diplomatic initiatives in these virtually intractable conflicts violent armed conflict (Sidiropoulos 2008:110).

Although violent armed conflict is one of the leading causes of the forced displacement of refugees and migrants in Africa, South Africa has limited resources and is not able to address all the root causes in Africa, and multilateral diplomacy in the UN must be utilised effectively with the international community playing a meaningful role with the protection of refugees. South Africa's diplomacy in Africa has changed since the dramatic post-1994 incidents in Nigeria, to that of leader in the African Renaissance. The 2010 White Paper on Foreign Policy (South Africa 2010a) acknowledges this role: "Post-apartheid South Africa took the initiative in pioneering the African Renaissance and actively engaging the international system, crafting solutions to African challenges".

South Africa has played a pivotal role especially on multilateral security regimes and arrangements such as the Kimberley and Ottawa Processes (See 3.4) which entailed collaboration with both North and South.

South Africa's foreign policy initiatives, declarations and its position on the continent as the economic, military and diplomatic powerhouse has created anticipation that South Africa would be able to solve Africa's problems, and led to condemnation that the country has been too reserved in this regard (Hamill & Lee 2001:49). The African Renaissance debate (see 3.4) raised expectations across the continent and globally but failed to deliver tangible changes for ordinary Africans. The limitation of this foreign policy approach for the post-1994 government, which embraced an African identity and African notions of solidarity and pan-Africanism, is that South Africa is expected to commit itself to significant resources. The challenge is that South Africa lacks both the human and financial resources to play a leading role in managing all of Africa's crises, which are mainly armed conflict and result in the displacement of refugees.

South Africa is a democracy under severe socio-economic stress. The country faces significant development challenges; poverty, inequality, and unemployment. Sidiropoulos (2008:108) is of the view that challenges created by the African Renaissance and South Africa's leadership role could result in "impossible expectations which are bound not to be realized". South Africa has to ensure that it is not overstretched with its stated commitments in Africa, and has to ensure that its national interest, which is "underpinned by the values enshrined in the Constitution, which encompass the security of the state and its citizens, the promotion of the social and economic well-being of its citizenry..." (Van Nieuwkerk 2004:97) is protected. But how does the South African government view its national interest? According to the DIRCO Strategic Plans, South Africa's foreign policy reflects recognition of its being an "integral part of the African continent", and its national interest as being "intrinsically linked to Africa's stability, unity, and prosperity" (South Africa 2003a; 2004b; 2006a; 2008a; 2009a).

As mentioned in 3.3, the question is whether the general South African population sympathizes with the notion that South Africa owes a debt of honour to Africa for the support and solidarity received by the leaders of the ANC in exile and the overwhelming

support by African countries in the UN by adopting resolutions against apartheid³³. This does not seem to be accepted by the majority of South African citizens who see the post-1994 government as the provider of their legitimate aspirations for a development program and access to services that will address the negative legacies of the past. The violent spate of xenophobia in 2008 (see 3.2) against foreigners testified to the opposition of citizens to the progressive legislation (see 3.3) such as the 1996 South African Constitution and the 1998 South African Refugees Act, and the progressive policies of the government towards migrants.

4.3 South Africa's multilateral diplomacy on migrants in the UN refugee regime

In 2.4 it was mentioned that the one of the main functions of diplomacy is negotiation, with the aim of identifying common and conflicting interests and finding agreement on reconciliation of those interests. This includes informal negotiations by states with the aim of finding consensus, the deliberations of which are not officially recorded. Multilateral diplomacy in the UN consists largely of negotiation, and South Africa's use of multilateral diplomacy in the UN refugee regime to address the problem of migration is discussed below under the three main characteristics of multilateral diplomacy identified in this study: Create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and, develop international normative regulatory frameworks. South Africa negotiated in its coalition, the UN African Group, the following annual UN General Assembly Resolutions relating to refugees: Assistance to refugees, returnees and displaced persons in Africa; General Assembly Resolutions relating to migrants: Protection of migrants; and General Assembly Resolutions relating to IDPs; Protection of and assistance to internally displaced persons.

³³ In 1961 the UN General Assembly adopted its first resolution condemning apartheid, and in 1974 adopted a resolution that denied South Africa participation in the UN General Assembly.

4.3.1 Create and strengthen international regimes and promote global governance

The first of the three core characteristics of multilateral diplomacy, as identified in this study, is to create and strengthen international regimes and to promote global governance (see 2.2). Multilateral diplomacy in the UN created the international refugee regime; the 1951 UN Refugee Convention and the UNHCR Statute, and it is in the UN, which provides a forum for multilateral diplomacy (see 2.6), that the strengthening of the international refugee regime should take place.

South Africa views the UN as an important forum for multilateral diplomacy. The post-1994 government, following its re-acceptance into the UN in the 1990s has actively sought to increase its profile by assuming leadership positions in various bodies³⁴ in line with its aspirations to become a global player. The UN, which provides a platform for multilateral diplomacy for both developing and developed countries, constitutes an important element of South Africa's multilateral policies. South Africa has taken steps to raise the profile of the eradication of poverty and underdevelopment, and human rights, including the human rights of migrants, on the UN agenda. Countries of the South view the UN as a forum where the North can be challenged (see 2.6). However, it is also the forum where the North, with their significant resources, could be engaged. The states of the North (see 2.7.1) constitute important diplomatic actors given their resources and any solution to the international refugee issue must take these actors into account. The Hegemonic Stability Theory discussion (see 2.7.1) makes it clear that the North are powerful diplomatic actors and cannot be ignored in the refugee regime.

The international refugee regime has been providing legal rights and human rights protection to refugees since 1951. States will cooperate within the international refugee regime as, despite the cost imposed on an individual state though providing asylum, the establishment of a regime is expected to produce benefits (see 2.7.1). However, African

³⁴ For instance, Non-Aligned Movement (NAM), UN Conference on Trade and Development (UNCTAD), Group of 77 and China (G-77).

countries which are burdened by the significant mass influx of refugees, mainly as a result of armed conflict, are not the recipients of adequate benefits from the regime, as the root causes of the contemporary mass refugee flow in Africa are not outlined in the 1951 UN Refugee Convention as grounds for protection (see 2.3). Thus, the UN refugee regime is failing dismally to address the refugee problems for developing and African countries. Relatively prosperous countries such as South Africa are compelled to apply the principle of *non-refoulement* to the thousands of asylum-seekers.

The failure of the UN to re-evaluate the definition of a refugee, in relation to the current root causes of mass forced displacement in the developing world and especially in Africa, is a major weakness of the international refugee regime. It is clear that the UN international refugee regime needs to be reformed to enhance international protection for migrants and refugees. This is only possible through a comprehensive multilateral process in the UN which will review the 1951 Refugee Convention; in other words, strengthen the regime through International Law (see 2.5) which creates legally binding obligations for states. The international regimes and institutions comprise a means to global governance.

The strengthening of multilateralism is consistent with South Africa's policy. The former Minister of Foreign Affairs of South Africa, N Dlamini-Zuma, asserted that South Africa should strive for "a strong UN that represents the best interests of all peoples and nations of the world" (South Africa 2003a); this is indicative of the aspiration by the government to be a global player. In this regard the UN becomes a crucial international platform (see 2.6) for South Africa to address the international refugee regime. At the international level South Africa has moved in the post-apartheid era to pursue a diplomatic approach as a middle power. Cooper (Nel *et al.* 2000:45) asserts that the "concept of middle power diplomacy signified a certain content of foreign policy based on an attachment to multilateral institutions and a collaborative world order". Hamill and Lee (2001:33) describe middle powers as those states pursuing diplomacy seeking to be "good international citizens primarily through mediating initiatives and brokering deals thereby securing the benefits which have traditionally flowed to states with the capacity to assume such as international posture". Nel *et al.* (2000:47)

characterise a middle power as a state whose engagement goes beyond the region; to include those like South Africa seeking to become global players.

South Africa sees itself as a middle power playing a reformist role in multilateral diplomacy. The former Minister of Foreign Affairs of South Africa, N Dlamini-Zuma, declared in 2003 that: “As South Africans, we must become a positive global influence and an agent for progressive change” (South Africa 2003a). South Africa’s White Paper on Foreign Policy asserts the “current multilateral system is highly skewed in favour of the developed countries and is in serious need of reform” (South Africa 2010a). South Africa’s reformist stance is premised on its commitment to an international order in which “multilateralism and International Law prevail” (South Africa 2003a). A commitment to “justice and International Law in multilateral diplomacy” is seen as a significant means of achieving global political and economic stability and security (South Africa 2003a; 2004b; 2005a; 2006a; 2008a).

Consistent with South Africa’s foreign policy strategic objective to advance the African Agenda, during 1994 to 2009 South Africa negotiated the annual resolutions on refugees within its coalition, the African Group, in the UN General Assembly. The advantage of multilateral diplomacy for the developing countries in the UN is that they can increase their bargaining power and leverage by joining coalitions (see 2.6). South Africa promotes its foreign policy interest of taking African issues to the UN in its coalition, the African Group.

South Africa, within the coalition of the African Group, emphasised the weakness of the refugee regime with regard to its restricted definition (see 2.3) and the changed conditions of contemporary forms of forced displacement in Africa. The General Assembly Resolutions relating to refugees: Assistance to refugees, returnees and displaced persons in Africa highlighted the fact that the definition of refugees is not sufficiently broad to include the root causes of refugees in Africa by consistently drawing attention to the changing conditions of forced displacement. In these resolutions these are listed as “political instability, internal strife, human rights violations and natural disasters such as drought”

(UN 1994a; 1995a; 1996a; 1997a; 1998a; 1999a; 2000a; 2001a; 2002a; 2003a; 2004a; 2005a; 2006a; 2007a; 2008a; 2009a).

In the same African Group annual General Assembly Resolutions on refugees, South Africa from 1994 to 2009 recognized the negative impact of increased flows of “refugees and displaced persons” resulting in “general deterioration of socio-economic and environmental conditions and overstretched national resources” (UN 1994a; 1995a; 1996a; 1997a; 1998a; 1999a; 2000a; 2001a; 2002a; 2003a; 2004a; 2005a; 2006a; 2007a; 2008a; 2009a).

The African Group does not treat the category of refugees as a separate group deserving rights, as stipulated under International law, as the 1969 OAU Convention broadened the definition of refugees. Even the title of the annual African Group General Assembly Resolutions relating to refugees: Assistance to refugees, returnees and displaced persons in Africa indicates and that issue of ‘displaced persons’ is of great concern to Africa, regardless of whether they are bona fide refugees as defined under the international refugee regime. Mostly African countries are largely host countries, but also countries of origin from which forced displacement of mass migrants take place, and look to the UN and especially prosperous countries to provide protection for their displaced citizens. South Africa is largely a host country and has to utilize diplomacy to reduce the number of refugees entering the country. By co-sponsoring the African Group General Assembly Resolutions in the UN, South Africa demonstrates its commitment to the advancement of the African Agenda. This is consistent with its foreign policy aim of taking African issues to the UN. However, by supporting the refugee resolutions South Africa is also contributing to the development of soft law (see 2.6) which entrenches the notion that prosperous countries like South Africa itself have to shoulder the responsibility of harbouring and providing funding for an increasing number of refugees as well as non-refugees, such as displaced persons. This demonstrates the limitations of multilateral diplomacy where a country within a coalition (see 2.6) is compelled to follow the group position and take the interests of the group into consideration and limit unilateral actions and the pronouncement of individual positions. On migration matters the African Group does not promote South Africa’s specific

interests. By being a major host country, in fact the largest for asylum-seekers (UN 2010), South Africa's interests on migrants seem closer to the North than that of Africa. This makes collaboration with other countries of the North with similar refugee problems imperative.

One way of promoting global governance is to develop institutional procedures, such as RSD, the administrative procedures required by the 1951 UN Refugee Convention to ascertain the eligibility of asylum-seekers, are not outlined in the Convention. South Africa has recognized the role of the UNHCR in contributing to EXCOM policies by providing knowledge and expertise (see 2.7.2) to states. As mentioned in 3.2, one of the major challenges experienced by South Africa is determining the eligibility status of the significant number of asylum-seekers entering the country. To assist countries with RSD procedures, South Africa, in the UNHCR EXCOM, negotiated the Procedural Standards for Refugee Status Determination (UN 2003e) which was adopted by the universal body, the General Assembly, in 2003. South Africa's involvement in the drafting of the EXCOM agreement contributes directly to alleviating its own challenges of addressing the significant outstanding significant number of asylum applications. This example illustrates that South Africa has effectively used multilateral diplomacy in the UNHCR EXCOM to negotiate institutional procedures, which are not legally binding but provide guidelines to promote its own interests in multilateral diplomacy; that of formulating institutional procedures to assist in determining refugee status.

It is clear from the above that South Africa from 1994 to 2009 in the annual African Group resolution on refugees, at the UN General Assembly, utilised multilateral diplomacy within its coalition, the African Group and EXCOM, on resolutions and agreements aimed at strengthening the UN refugee regime. The African Group General Assembly Resolutions on refugees highlighted the changing root causes of displacement in Africa; the main root cause in Africa of armed conflict; and the increasing refugee flow in Africa. However, despite the efforts by South Africa in the African Group coalition to draw attention to the changing nature of forced displacement and to the irrelevance of the definition of refugee in the 1951

UN Refugee Convention, South Africa has not called for the strengthening of the international refugee regime by reforming the regime and amending the definition of refugee to reflect the contemporary situation. Moreover, there is little indication that South Africa has engaged the countries of the North on the refugee issue, yet their role in the UN international regime is critical. If the international refugee regime is to be reformed to serve the interests of the developing world, especially Africa, then the founding treaty, which outlines the definition of a refugee as a victim of individualised persecution, has to be amended.

4.3.2 Formulate international agreements and confer collective legitimacy

The second core characteristic of multilateral diplomacy is that it formulates international agreements and confers collective legitimacy on these agreements. The General Assembly formulated the international agreement, the General Assembly Resolution establishing the UNCHR Statute in 1950, which mandates the UNHCR to supervise the international refugee regime (see 2.7.2) and provide protection to refugees and to find permanent solutions. The universal body, the General Assembly, conferred collective legitimacy to this international agreement in that all states should abide by the Statute provisions. This is still the case, even though the UN itself has changed, as the member states in 1950 (50) has now increased to 193, mainly developing countries.

The function of an international organization in a regime (see 2.2) is to pursue the common interest of the membership. This cannot be done unless the UNCHR is provided with a reliable source of funding. The UNHCR Statute (Article 20) provides that only the administrative expenditures of the UNHCR should be financed under the budget of the UN (see 2.7.2), and that all other expenditures are to be financed by voluntary contributions. The international organization is thus compelled to utilize its capacity and resources for fund raising and fostering partnerships with potential donors; resources which could be better spent on its core mandate of providing protection for refugees and seeking permanent solutions. The UNCHR experiences severe constraints as a result of inadequate resources,

and of reliance on voluntary donations and fund raising. Voluntary funding is unpredictable and subject to manipulation by powerful states (see 2.7.1).

One of the key elements in this study is that the provision of funding and voluntary resources to uphold the refugee regime is dependent on the powerful states, with a major impact on the funding of the UNHCR and the efficiency of the regime (see 2.7.1). States of the North as leading donors to the UNCHR, exercise considerable influence on the budget and programs of the UNCHR in line with their strategic interests, yet are unwilling to demonstrate serious international burden-sharing (see 2.7.2) on a global matter that is increasing rapidly and where millions of vulnerable people's lives are at stake. States of the North prefer repatriation of migrants to countries of origin and promote containment policies, i.e., IDPs are restricted within the borders of their own countries so that they do not become asylum-seekers, especially to countries of the North. These approaches are inconsistent with the 1951 UN Refugee Convention and the UNHCR Statute, which emphasize states' obligations to find sustainable solutions.

The UNHCR Statute (Chapter 1(3)) grants the member states in the UN General Assembly authority to provide "policy directives" to the UNHCR (see 2.7.2), which illustrates the independence of member states. South Africa plays a specific role in taking African issues to the UN, consistent with its key foreign policy strategic objective of advancing the African Agenda and taking African issues to the UN, worked within the African Group to negotiate the annual General Assembly Resolutions on refugees to influence the funding of the UNHCR in particular to benefit African countries. From 1994 to 2009, South Africa engaged in coalition building (see 2.6) within the African Group on the General Assembly Resolutions relating to refugees: Assistance to refugees, returnees and displaced persons in Africa in the UN General Assembly to request more funding for UNHCR African programs and emphasized the "increasing requirements in that region" (UN 1994a; 1995a; 1996a; 1997a; 1998a; 1999a; 2000a; 2001a; 2002a; 2003a; 2004a; 2005a; 2006a; 2007a; 2008a; 2009a). South Africa has reflected in the same annual African Group General Assembly Resolutions on the need for the UN High Commissioner for Refugees to "review the general

programs in Africa” (UN 1995a; 1997a; 1999a; 2003a; 2006a), in light of the burden experienced by African host countries.

In general the burden undertaken by African countries and their compliance with the norms of *non-refoulement* go largely unrecognized by the North. The High Commissioner for Refugees paid tribute to the AU for its protection of refugees in Africa, and said that in many ways, the 1969 OAU Convention required more of States Parties than the 1951 UN Convention (Guterres 2006). It is unlikely though that the AU will solve the issues of protracted refugee situations in Africa given its lack of resources (see 2.3). The OAU Convention has no funding and implementation procedures; therefore, the African countries will have to rely on the funding of the international refugee regime of the UN (see 3.5). In this regard, South Africa in the same annual African Group General Assembly Resolutions on refugees called on the international community to “fund generously” the UNHCR programs and to ensure that “Africa receives a fair and equitable share of the resources designated for refugees” (UN 1996a, 1997a, 1999a, 2000a, 2001a, 2002a, 2003a, 2004a, 2005a, 2006a, 2007a, 2008a, 2009a).

From 2001 South Africa in the African Group supported a firmer approach by declaring the “inadequacies of existing assistance arrangements” (UN 2001a, 2003a, 2004a). This move to stronger language in the resolution could reflect the increasing frustration of Africa and the developing countries on the lack of international burden-sharing failure of the UN and countries of the North to provide tangible resources.

As mentioned in 2.2, international regimes can facilitate international burden-sharing. The normative framework for the protection of human rights of refugees is well established, yet the norm of burden-sharing is not yet established. The international refugee regime relies on external funding, and depends entirely on voluntary contributions for its field operations consistent with the UNHCR Statute (see 2.7.2). The Statute specifically states (Article 20) that the situation of voluntary funding is the case “unless the General Assembly decides otherwise”. So far the General Assembly has not decided otherwise, and the UN has not

sought to implement Article 20. The UNCHR receives just two percent of its funds from the UN regularly assessed general budget, while the remaining 98 percent of an annual budget exceeding USA\$ 1 billion must be raised through appeals to UN member states and other donors (Whitaker 2008:243). This constitutes a meagre amount from the UN regularly assessed budget for an international organization whose scope covers the entire world, whose persons of attention, refugees, are increasing daily to unmanageable proportions, and whose mandate has been extended to cover IDPs. The absence of an autonomous and government-assessed resource base continues to erode the work of UNHCR.

One of the characteristics of multilateral diplomacy is to formulate international agreements and confer legitimacy (see 2.6) by the General Assembly of universal membership. Consistent with South Africa's foreign policy strategic objective to advance the African Agenda, South Africa negotiated the African Group annual General Assembly Resolutions on refugees between 1994 and 2009 to draw attention to the need for international burden-sharing mainly from the North (see 2.7.2) to mitigate the burden of host countries, largely in Africa. The General Assembly Resolutions relating to refugees Assistance to refugees, returnees and displaced persons in Africa called on the international community, "within the context of burden-sharing" to "fund generously the refugee programmes of the Office of the High Commissioner" and to "increase its material, financial and technical assistance to the countries affected by refugees, returnees and displaced persons (UN 1996a; 1997a; 1998a; 1999a; 2000a; 2001a; 2002a; 2003a; 2004a; 2005a; 2006a; 2007a; 2008a; 2009a).

However, the disadvantage of multilateral diplomacy is that the UN General Assembly Resolutions constitute recommendations and are categorized as soft law, and are not binding on its member states (see 2.6).

The fact that the African Group General Assembly Resolutions are adopted by consensus attests to the negotiating skills of the African Group and its wider coalition, the developing countries in the UN. It also signifies that the countries of the North agree that the current situation of minimal funding from the UN regularly assessed budget and reliance on

voluntary contributions is not sustainable, and does not alleviate the African refugee problem. However, there is little progress if the powerful countries of the North decided to maintain the status quo. This supports the proposition of scholars of the Hegemonic Stability Theory (see 2.7.1) that international regimes will only be effective when powerful countries supply the collective goods that are needed for international regimes to function effectively.

South Africa promotes itself as a bridge-builder between North and South, while at the same time advocating the values of the weaker Southern states in general and of an African Renaissance in particular (Lee *et al.* 2006:6). This role is likely to continue, as the recent White Paper on Foreign Policy (South Africa 2010a) asserts that: “South Africa will continue to pursue strategic partnerships with the North, bilaterally and multilaterally, to mobilize support for Africa’s development”. The credentials of South Africa as bridge-builder between North and South is significant for the refugee question, as there are opportunities in multilateral diplomacy to engage the North.

Although the UN General Assembly with universal membership of states confer collective international legitimacy on its resolutions (see 2.6), the General Assembly Resolutions calling for additional funding have not kept pace with the increase in refugees, and the UN has yet to provide the requisite resources for the UNCHR African country programs. This indicates that developing country coalitions in multilateral diplomacy may increase their voting power, but this does not necessarily translate into tangible action, given the opposition of the powerful countries to address issues not in their strategic interests. While the OAU generously expanded the definition during a time of solidarity and pan-Africanism (see 2.3) and fewer refugees, the UN regime has not caught up with providing protection to all those included in the expanded OAU definition.

It is clear from the above that in the African Group annual General Assembly Resolutions on refugees, South Africa has drawn attention to the increasing requirements in Africa; and urged the international community to provide more resources for African refugee programs. However, South Africa has not called for a predictable and regularised allocation of funds

for the UNCHR from the regularly assessed UN budget. South Africa in the African Group has made little attempt to change the UNHCR Statute to ensure a reliable funding source for the UNCHR, despite the provision in the UNHCR Statute (Article 20) that the General Assembly could decide on the budget. As mentioned in 2.7.1, in the UN international refugee regime the powerful industrialized states of the North, as major donors to the regime, influence refugee policy and programs by earmarking their voluntary contributions to specific programs consistent with their strategic and security interests (see 2.7.1). Whitaker (2008:255) believes that the international regime needs to be reformed to provide UNHCR with a definite budget for its global field operations where it assist states with its knowledge and expertise (see 2.7.2), and provides durable solutions. Donor governments need to work towards a “strengthened multilateral regime which has the mandate, capacity and resources to meet refugee needs in a more impartial and effective manner” (Loescher & Milner 2005: 166).

Despite the recent pronouncement by South Africa’s White Paper on Foreign Policy (South Africa 2010) on engagement with the North, a review of the DIRCO Strategic Plans indicate that South Africa’s foreign policy is embedded in Africa and the South. South Africa was eager to move away from the pre-1994 government’s positioning as part of the West. Thus the Strategic Plans after 1994 referred to the African Agenda, as the strategic priority, followed by South-South Cooperation, and North-South Dialogue. DIRCO’s Strategic Plans reflects the national interest, as broadly defined (see 1.2), as being “intrinsicly linked to Africa’s stability, unity, and prosperity” (South Africa 2003a; 2004b; 2006a; 2008a; 2009a). However, a review of the Strategic Plans since 2008/2009 indicates a foreign policy embedded in Africa and the South, with the accent on North-South engagement diminishing, signalling an apparent change in the foreign policy trajectory. Having a foreign policy that is entrenched in Africa and the South will severely restrict South Africa’s aspirations to become a global player. Moreover, it is clear that with the lack of resources in the AU, a solution to equitable funding for refugees as requested by the African Group will only be achieved if the North is engaged. South Africa does not have the capacity, and should not be expected to, fund refugees from Africa on its own.

4.3.3 Develop international normative regulatory frameworks

A third core characteristic of multilateral diplomacy is that it develops international normative regulatory frameworks. Although South Africa does not experience a problem with IDPs, since 1995, South Africa effectively utilised multilateral diplomacy in the UN within its coalition, the African Group, to negotiate resolutions on those displaced persons who are not bona fide refugees under International Law. South Africa negotiated the African Group General Assembly Resolutions relating to IDPs: Protection of and assistance to internally displaced persons to request the UNHCR to “extend its assistance to other groups, such as internally displaced persons” (UN 1995b).

South Africa used multilateral diplomacy in the UN General Assembly to create an international regulatory framework for IDPs. The international refugee regime does not include IDPs and irregular migrants in its definition of refugees (see 2.3). However, increasingly, IDPs in Africa became a priority for the African governments, who placed this on the agenda of the UN in 1995. The General Assembly adopted by consensus in 1998 the Guiding Principles on Internal Displacement which seeks to “... address the specific needs of internally displaced persons” (UN 1998b). While not a legally binding treaty, the value of the Guiding Principles on Internal Displacement is that it consolidates the existing provisions on International Human Rights Law and International Humanitarian Law, as an instrument for states to deal with IDPs.

The countries of the North were willing to adopt the African Group IDP General Assembly Resolutions even though it meant expanding the role of the UNCHR to include the funding of IDPs. It would seem that there is an attempt to by the North to restrict IDPs within their respective borders and not allow them to cross an international border and become asylum-seekers, adding to the already substantial number of asylum-seekers seeking international protection. South Africa supported the resolutions on the protection of IDPs mainly in Africa as many African countries have IDPs. This is not in the interests of South Africa as

IDP protection increases the demand on the budget of the UNHCR, which is mandated to protect refugees. Any opposition from South Africa however would have undermined its credibility to pursue the African Agenda. Once again, this illustrates the disadvantage of multilateral diplomacy where members of a coalition (see 2.6) have to follow the group position even though it is not compatible with the country's interests.

Despite the adoption of the Guiding Principles on Internal Displacement in the General Assembly by consensus, the countries of the North are not willing to develop an international normative regulatory framework for irregular migrants, who are included in the category of mixed migratory flows, of people that migrate to various countries, including South Africa. Over the years the General Assembly, recognizing the limitations of the 1951 UN Refugee Convention, has allowed the UNHCR to extend its protection to those outside the official 1951 UN Refugee Convention largely due to the resolutions of the African Group and developing countries who are major countries of origin for migrants wishing to enter prosperous countries of the North. However, much of the problem lies in the lack of a coherent international legal regime for the protection of illegal migrants (Betts 2008a:11) at the UN.

The human rights protection of non-citizens is generally regarded as falling within the provisions of the UN human rights treaties. In chapter two it was mentioned that the UN Treaty Monitoring Bodies Committees in their interpretation of International Human Rights Law, recommend to States Parties that the core human rights treaties include the protection of the human rights of migrants. This is challenging for even a prosperous country such as South Africa which finds its citizens opposing migrants entering the country by violent acts of xenophobia. The human rights of African migrants are most severely affected by the lack of international protection. South Africa, in promoting the African Agenda, worked within its coalition in the UN, the African Group, on the annual refugee General Assembly Resolutions to expand the role of the UNHCR to more than refugees. A key principle underpinning South Africa's policy since 1994 (see 3.4) has been the "commitment to the promotion of human rights" (South Africa 2003a; 2005a; 2008a). South Africa has since

1994 increased attention to the issue of poverty and development on the UN agenda, and promoted stability and security on the African continent, which includes the protection of the human rights of migrants.

South Africa used multilateral diplomacy in the African Group annual General Assembly Resolutions relating to migrants in the General Assembly: Protection of migrants to draw attention to the plight of migrants who do not fulfil the requirements of definition of a refugee under International Law, but are forcibly displaced from their countries and in need of international protection. The General Assembly Resolutions on migrants declared that protection should be provided to all persons regardless of their “migration status” (UN 2007b; 2008b; 2009b) or “regardless of their legal status” (UN 1999b; 2000b; 2001b; 2002b; 2003b; 2004b; 2005b; 2006b). This is not in the interests of South Africa, as it will compel South Africa to provide protection for those not categorized as refugees under International Law. This is likely to increase the opposition from South African citizens. This again demonstrates the limitations of multilateral diplomacy where a country within a coalition (see 2.6) has to follow the group position even if it does not promote its specific interests.

One of the challenges is that multilateral diplomacy has failed to clearly define what constitutes an irregular migrant (see 3.5). This lack of definitional clarity persists throughout the UN system on migration matters. The General Assembly Resolutions of the developing countries on the mandate of the Special Rapporteur on the human rights of migrants (see 2.7.2) does not provide a definition. Although General Assembly Resolutions on migrants refer to “other persons of concern” there is no definitional clarity on what this means.

By being a major host country, South Africa’s interests seem closer to the North than that of Africa. This makes collaboration with other countries of the North with similar refugee problems imperative.

Scholars are of the view that South Africa has used multilateral diplomacy since 1994 as a source of power in the UN in a way few other middle-income countries have done (Landsberg 2005:1; Alden & Le Pere 2010:3). In this regard South Africa has demonstrated its credence as a ‘norm entrepreneur’” on the continent, and has managed to “punch above its weight” (Landsberg 2005:1) and has proved “its principled commitment and activism as a ‘norm entrepreneur’” (Alden & Le Pere 2010:3), and demonstrated its middle power status (Nel *et al.* 2000:54), especially on multilateral security regimes and arrangements (Kimberley and Ottawa Processes) (see 3.4) which entailed collaboration with both North and South.

However, South Africa has not engaged the North on the refugee regime with the intensity that it did on the multilateral security regimes. This is a major weakness for a country that is (UN 2010) the highest destination country in the world for asylum-seekers. South Africa could engage countries that are high on the list of asylum-seeking destination countries, such as the USA and France, whose interest on migrants are closer to the interests of South Africa than those of the developing countries, who are mainly countries of origin and who negotiate resolutions in the General Assembly calling for prosperous countries to accept migrants originating from developing countries. This creates expectations that South Africa has the capacity will address the African refugee problem.

South Africa has made far-reaching attempts to have more focus placed on Africa within the UN³⁵ consistent with its foreign policy that the promotion of “the African Agenda” which “...serves as a point of departure in our engagements with the international community” (South Africa 2003a; 2005a; 2006a; 2007; 2008a). The White Paper on Foreign Policy

³⁵ During its chairship of the UN Security Council in 2011 South Africa under Chapter VIII of the UN Charter placed on the agenda the enhancing of relations between the UN and the AU (UN 2012).

(South African 2010a) continues to view the need to “maintain the relevance of the UN as one of the strategic multilateral institutions for advancing Africa’s interests”.

Although some scholars as indicated in Weiner (in Pécoud & Guchteneire 2005:15); Lee *et al.* (2006:20-21) and Sidiropoulos (2008:108) believe that the expectations imposed by the international community on post-1994 South Africa are unrealistic, there is little indication that the government has rejected these expectations. The declarations of South Africa with respect to its foreign policy and the importance of multilateral diplomacy are clear from the declarations of government (South Africa 2003a): “South Africa supports a multilateral approach to global issues, especially those affecting Africa, because it offers the best opportunity for African states to achieve their objectives”. There is recognition by the government that “The real challenge for South African foreign policy is to be able to ... play the role that is expected of us, in dealing with the vast plethora of international issues that engage us and the international community at large” (South Africa 2003a). This serves to confirm South Africa’s aspirations towards becoming a global player.

4.4 Conclusion

This chapter focused on South Africa’s current multilateral diplomacy and engagement in the UN, using the three main characteristics of multilateral diplomacy as identified in chapter two: Create and strengthen international regimes and promote global governance; formulate international agreements and confer collective legitimacy; and, develop international normative regulatory frameworks. The chapter demonstrated South Africa’s engagement in multilateral diplomacy in the UN which has been consistent with its foreign policy of promoting the African Agenda, multilateralism and International Law. South Africa in the context of multilateral diplomacy, and utilizing diplomacy as a source of power, engages in coalitions with countries of the South to negotiate resolutions in the UN General Assembly. During 1994 to 2009 the African Group General Assembly Resolutions relating to refugees sought to strengthen the international refugee regime and emphasized the root causes of African forced displacements; the negative impact on African host

countries; and the need for international burden-sharing. There is little indication that South Africa has engaged the North, important diplomatic players in the UN, on the international refugee issue.

As a means to promote global governance South Africa with the countries of the South, has developed institutional procedures on RSD, the operationalisation of which is not outlined in the 1951 UN Refugee Convention, but which serves to strengthen the implementation of the 1951 UN Refugee Convention. The agreements in the General Assembly on funding have been a priority of the African Group as the most protracted refugee situations are on the continent, and little international burden-sharing is evident. The developing country resolutions also called for the protection of other vulnerable persons beyond the international refugee regime, such as IDPs and irregular migrants. While South Africa utilized multilateral diplomacy in an effective manner, there are many avenues that South Africa is well placed to pursue more forcefully in light of its middle power reformist agenda and its capacity as a bridge-builder between North and South. In the concluding chapter attention is paid to these recommendations.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The research question this study attempted to answer is: How did South Africa use multilateral diplomacy in the UN to address the problem of migration, with specific reference to refugees, from 1994 to 2009? The preceding chapter demonstrated that South Africa uses multilateral diplomacy in the UN in an effective manner to address the refugee issue within the context of the international refugee regime. However, it was also demonstrated in the study that multilateral diplomacy in the UN provides opportunities for much more to be done to address the plight of African refugees, and to mitigate the impact of the large influxes of asylum-seekers to African countries, and especially to South Africa.

The study explored the role of two key diplomatic actors in the UN international refugee regime: the UN General Assembly which outlined the role of sovereign states, and the UNCHR which outlined the role of this international organization, and highlighted the independence and constraints of both diplomatic actors. It also discussed the dynamics between the developed and developing countries (the North and South respectively) in multilateral diplomacy in the UN and the conditions under which states will cooperate.

In this final chapter the key findings of the study are highlighted, and the following three recommendations are made: Reform the international refugee regime; allocate funds from the UN regularly assessed budget to the UNHCR; and develop an international normative regulatory framework for irregular migrants. It is argued that South Africa is in a position to lead on these issues based on its human rights foreign policy and its status as a middle power; its track record of addressing problems of the South and Africa in the UN; its credence as a bridge-builder between North and South; and its record of seeking to reform the multilateral system and creating international normative regulatory frameworks.

5.2 Recommendation one: Reform the international refugee regime

It is recommended that South Africa use its position as an international middle power and its declared foreign policy commitment to “become a positive global influence and an agent for progressive change” (South Africa 2003a) to reform the refugee system. There is an acknowledgment by the government that progressive change is necessary to correct the imbalances of the current multilateral system which “is highly skewed in favour of the developed countries and is in serious need of reform” (South Africa 2010). As multilateral diplomacy in the UN General Assembly created the international refugee treaty in the form of the 1951 UN Refugee Convention which created legally binding obligations on states, it is this forum that could serve as a platform for negotiating an international instrument amending the 1951 UN Refugee Convention. South Africa is well placed to use multilateral diplomacy on this matter as its foreign policy underlines that a commitment to “justice and International Law is the most appropriate means of achieving global political and economic stability and security” (South Africa South Africa 2003a; 2004b; 2005a; 2006a; 2008a). The task will be to draft an Amendment Protocol to the 1951 UN Refugee Convention which redefines a refugee to reflect the current international situation of mass forced displacement.

It will be recalled that the 1967 UN Refugee Protocol amended the 1951 UN Refugee Convention by removing the geographical limitations to include all parts of the world and not restrict its scope to Europe. The advantage of an Amendment Protocol, as a treaty which creates legally binding obligations for states, is that the fundamental norms and principles of the original treaty that guarantee human rights protection for refugees remain intact. This will not be an easy task as there will be resistance from the states of the North whose participation in multilateral diplomacy in the UN on the refugee issue is consistent with their own strategic priorities and national interests. They have not demonstrated the willingness to contribute to serious burden-sharing on an international matter that is increasing rapidly and where millions of people’s lives are at stake. The international refugee problem is an enormous one, and one which Africa and the developing countries who are mainly host countries should not be expected to bear alone.

South Africa has an exceptional record of taking African issues to the UN and playing a key role in mobilising African countries in multilateral security regimes such as the Kimberley and Ottawa Processes in the short term since its democratic transition in 1994 which resulted in a remarkable revolution in its foreign policy from suspended UN member to internationally respected middle power. Its credence as a bridge-builder between North and South in multilateral diplomacy would contribute to initiatives to reform the 1951 UN Refugee Convention, and which would pave the way for African states, overburdened by the influx of the mass displacement of refugees, to obtain benefits under the 1951 UN Refugee Convention and its expanded definition (as outlined in the proposed Amendment Protocol), and contribute to mitigating the significant burden of hosting migrants for South Africa.

5.3 Recommendation two: Allocate funds from the United Nations regularly assessed budget to the UNHCR

The status quo does not contribute to alleviating the situation in Africa and it is recommended that South Africa works within its developing country coalitions to amend the UNHCR Statute to allocate equitable resources to the UNCHR from the UN regularly assessed budget. Although the UNCHR Statute is a General Assembly Resolution and does not constitute International Law which creates legally binding obligations for states, the resolutions adopted (even if by a vote) by the universal membership of the General Assembly comprise soft law and confer legitimacy on these international agreements. This would compel the UN to review the allocations of the UN assessed budget to allocate realistic and equitable resources from its assessed budget to the UNCHR for the protection of the human rights of refugees.

A key principle underpinning South Africa's policy since 1994 has been the "commitment to the promotion of human rights" (South Africa 2003a; 2004b; 2005a; 2006a; 2008a; 2009a; 2010b) and South Africa with its credible international track record of promoting human rights would be in an influential position to use multilateral diplomacy in the UN

within the developing country coalitions to negotiate a resolution in the UN General Assembly which will amend the UNHCR Statute. The challenge is that the North would oppose any increase in allocation from the UN regularly assessed budget to the UNHCR as this will inevitably decrease budget allocations to other programs, which may be of strategic interest to the developed countries. South Africa has been able to leverage diplomacy to bring together in partnership the countries of the North and South on issues such as the multilateral security regimes, given its declared foreign policy stance as a bridge-builder between North and South. It is this capacity of South Africa that makes it an appropriate country to lead on such as issue.

Issue-linkage could be used in multilateral diplomacy. One of the important steps for South Africa itself is to underscore the multidimensional nature of the refugee problem which includes a serious security element, and not only view it as the protection of human rights. In refugee camps expatriate communities without jobs have been found to assemble arms; organize attacks on the country of origin for political reasons; and are likely targets for recruitment by terrorist organizations. This demonstrates that refugee problems cannot be seen in isolation from security issues. This is recognized by the African Group annual General Assembly Resolutions on refugees which emphasize the “security implications on the host country”.

South Africa could engage with the North on refugee issues in the UN. One multilateral diplomatic option could be to collaborate with the countries of the North, the highest asylum-seekers such as France and the USA, the second and third destination countries respectively, to establish a Working Group in the UN to determine the terms of reference for funding the international refugee regime by the UN regularly assessed budget.

Countries of the North are not unaware of the security risks of undocumented asylum-seekers. South Africa should promote a greater sense of awareness in this debate, so as to persuade the international community that permanent solutions to the problems of refugees

could be in their strategic interests as the resolution of this issue could mean fewer targets for terrorism, some aimed at their own countries.

5.4 Recommendation three: Develop an international normative regulatory framework for irregular migrants

One of the challenges identified in this study is that there is no definitive normative framework on the human rights protection of irregular migrants at the global level. Yet protection for irregular migrants is already enshrined in International Human Rights Law, which generally requires the equal treatment of citizens and non-citizens, and the norms for protection already exist. The challenge is that the North opposes the inclusion of the protection of migrants on the UN agenda, and sees admission of migrants into a country as a sovereign and national issue. The international agreements adopted in the form of resolutions at the UN General Assembly, which serves as a platform for the exchange of views for both developed and developing countries, confer collective legitimacy on these international agreements. This is the forum that South Africa should use to address the issue of irregular migrants.

As the main strategic foreign policy objective of the South African government is the promotion of the African Agenda, and African countries are struggling with the significant influx of irregular migrants, it is recommended that South Africa becomes a key player in the development of an international normative regulatory framework for irregular migrants. South Africa's initiative in mobilising support for the multilateral security regimes such as the Ottawa and Kimberley Processes, and the Pelindaba Treaty, demonstrates its capacity to establish and consolidate normative regulatory frameworks, especially those that enhance human rights. Furthermore, South Africa's reformist diplomatic stance and declaration to be an agent for progressive change, and its support for a multilateral approach to global issues, especially those affecting Africa, stands in it good stead to lead in this matter.

It is recommended that South Africa work within the African Group and its developing country coalitions in the UN (such as the G-77 and NAM), and engage the developed countries, to negotiate an international normative regulatory framework for irregular migrants based on the institutionalized UN Guiding Principles on Internally Displaced Persons (UN 1998b). This is an agreement adopted by the General Assembly which consolidates the existing provisions on International Human Rights Law and International Humanitarian Law, and is an instrument for states to deal with IDPs. Similarly, the proposed outcome document constituting guidelines on the protection of irregular migrants would consolidate the existing provisions on International Human Rights Law and International Humanitarian Law related to migrants. South Africa exercises considerable diplomatic leverage and has developed a significant ability to influence global affairs especially in relation to its commitment to the promotion of human rights. The UN agencies are key diplomatic actors and provide knowledge and expertise and remain a source of competence in International Human Rights Law. The current High Commissioner for Refugees stated the commitment of his Office to contribute to the protection of irregular migrants and it is important that the momentum created by the High Commissioner for Refugees (see 2.7.2) should be used by South Africa.

One of the weaknesses in protecting irregular migrants is that there is a lack of definitional clarity of the term migrants, even in the mandate of the UN Special Rapporteur on the human rights of migrants. The UN Treaty Monitoring Bodies, the UN Special Rapporteur on the human rights of migrants, as well as the UN Special Rapporteurs with related mandates, could be important resources for the drafting of the international normative regulatory framework. The UN experts could assist in defining irregular migrants and clearly distinguishing this category of migrants from the beneficiaries of the international refugee regime. South Africa's established credibility and immense capacity and experience as bridge-builder between North and South would allow it to establish a strengthened multilateral migration framework and contribute to the creation of, as declared in its foreign policy, "a strong United Nations that represents the best interests of all peoples and nations of the world" (South Africa 2003a).

The study concludes that South Africa has effectively used multilateral diplomacy in the UN and negotiated international agreements, mainly in form of resolutions, within its developing country coalitions, especially the African Group, to address the issue of refugees. The study proposes that multilateral diplomacy in the UN provides further opportunities for South Africa to address the refugee problem effectively and mitigate the burden on South Africa which receives the highest number of asylum-seekers in the world, mainly from Africa. This chapter outlined three recommendations for South Africa to utilise multilateral diplomacy in the UN on the question of refugees consistent with its foreign policy objectives on reforming the multilateral system, and promoting human rights, as well as its particular diplomatic position as a middle power.

This study intends to make a modest contribution to the body of literature on multilateral diplomacy having discussed the role of two key diplomatic actors in the UN international refugee regime: the UN General Assembly which outlined the role of sovereign states, and the UNHCR which outlined the role of an international organization; as well as the conditions under which sovereign states will cooperate. The study points out the challenges of and opportunities provided by multilateral diplomacy to address the issue of migration, with specific reference to refugees, which may be applied to other international regimes. One of the key findings is that little attention has been given in the international regimes literature to how international regimes are funded and how a diplomatic solution could be provided, yet funding can provide strong motivation for member states to cooperate within an international regime. It is recommended that further study be conducted on the impact of funding on the international refugee regime. Such findings could also be applicable to efforts to build other international regimes.

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