

Integration of refugees in South Africa: a critique of the law and state practice

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DECLARATION BY CANDIDATE

I, Jean Chrysostome Kanamugire, declare that this thesis entitled, "Integration of refugees in South Africa: a critique of the law and state practice," hereby submitted in fulfilment of the requirements for the degree Doctor of Laws (LLD) in Public Law and Legal Philosophy, at the North-West University, has not been submitted by me for a degree at this or any other university, that it is my own work in design and execution and that all materials contained herein have been duly acknowledged.

.....

Jean Chrysostome Kanamugire

November 2019

DECLARATION BY PROMOTER

I, Professor Melvin LM Mbao, hereby declare that this thesis entitled “Integration of refugees in South Africa: a critique of the law and state practice” submitted by Jean Chrysostome Kanamugire for the degree Doctor of Laws (LLD) in Public Law and Legal Philosophy, be accepted for examination.

.....

Prof MLM Mbao

November 2019

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ADP	Acting Deputy President
ART	Anti-Retroviral Treatment
AU	African Union
AWRWC	African Charter on the Rights and Welfare of the Child
CC	Constitutional Court
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COA	Central Agency for the Reception of Asylum Seekers
CoRMSA	Consortium for Refugees and Migrants in South Africa
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
EU	European Union
FGM	Female Genital Mutilation
GNP	North Gauteng High Court, Pretoria

HCR	High Commissioner for Refugees
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Responsibility
ID	Identity Document
IDPs	Internally Displaced Persons
ILJ	Industrial Law Journal
IND	Immigration and Naturalisation Service
IRO	International Refugee Organisation
KZN	KwaZulu-Natal
LC	Labour Court
NGOs	Non-Government Organisations
NSF	National Skills Fund
NSFAS	National Student Financial Aid Scheme

OAU	Organisation of African Unity
PAJA	Promotion of Administrative Justice Act
PEGIDA	Patriotic Europeans against the Islamisation of the West
RAB	Refugee Appeal Board
ROC's	Regional Institutions for Adult Education
RRO	Refugee Reception Officer
RSDO	Refugee Status Determination Officer
SA	South African Law Reports
SACJ	South African Journal of Criminal Justice
SADC	Southern African Development Community
SASSA	South African Social Security Agency
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
T	Transvaal Provincial Division High Court, Pretoria
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

UNRRA	United Nations Relief and Reconstruction Agency
USA	United States of America
USSR	Union of Soviet Socialist Republics
WCC	Western Cape High Court, Cape Town

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ZAMBIA

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GERMANY

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Germany Constitution of 1949.

ABSTRACT

This thesis discusses the integration of refugees in South Africa and evaluates law and state practice in this regard. Refugees continue to exist and constitute a global challenge. They exist due to civil unrests, ethnic conflicts, wars and gross violations of human rights in different countries. Refugees have experienced persecution in their home countries and decided to seek asylum in other countries where they can find safety and a sanctuary.

International and regional instruments contain provisions to protect and address the problem of refugees. They have assisted states parties to enact statutes and adopt policies governing refugee issues to ensure their protection and assistance.

This study found that some protracted refugees cannot voluntarily repatriate or obtain resettlement in third countries. They need to be integrated into the host countries. Tanzania has naturalised some groups of refugees from Rwanda, Somalia and Burundi. Zambia has granted permanent residence permits to certain refugees from Angola and Rwanda. The Netherlands and Germany received refugees and provide opportunities for naturalisation for refugees who have lived for a specific number of years in the country.

South Africa is a refugee receiving country and has adopted international and regional instruments dealing with refugees. It has enacted the Refugees Act to domesticate international conventions and receive refugees in its territory. This study examines the procedure to acquire asylum in South Africa and specific problems experienced by refugees and asylum seekers in this regard. The closure of refugee reception offices in major cities and the unreasonable delays in asylum

process constitute a challenge for refugees and asylum seekers to exercise their rights. There is a limited provision for refugees to apply for and acquire permanent residence permits. Refugees are also entitled to some rights enshrined in the Bill of Rights in the South African Constitution. However, they experience difficulties in accessing and enforcing the rights in the Constitution, such as the right to have access to adequate housing, the right to work, the right to education, the right to health care services and the right to social security.

The study established that the ontological view of *Ubuntu* should be used to welcome and host refugees. In addition, South Africa should extradite or prosecute fugitives who seek for asylum in order to maintain the sanctity of asylum system. Furthermore, the Department of Home Affairs should grant travel documents to former refugees who hold permanent residence permits and register their new born children as permanent residence holders. There is limited access to asylum in South Africa and the Department of Home Affairs should restore the services of the refugee reception offices in the major cities. The Department of Home Affairs should also promote family unit by joining the dependants to the principal applicants recognised as refugees.

In the application for naturalisation, the Department of Home Affairs should waive the requirements from the country of origin for former refugees who acquired permanent residence permits. The study also found that refugee children face challenges in accessing basic education and social grants. Although refugees are entitled to work, the labour market is restricted to citizens and permanent residence permits holders. The study recommends specific amendments to Refugees Act,

South African Citizenship Act and Private Security Industry Regulation Act to promote the integration of refugees in South Africa.

Keywords: Refugees, integration, asylum seekers, persecution, state practice, Ubuntu, refugee rights, permanent residence, naturalisation.

Chapter 1: Introduction

1.1 Background to the Study

The plight of refugees is a worldwide phenomenon that affects every state.¹ Indeed the world's refugee crisis is undoubtedly one of the most pressing social challenges of our time. According to the Office of the United Nations High Commissioner for Refugees, there are approximately twenty-two (22) million refugees in the world,² with Turkey, Pakistan, Lebanon, the Islamic Republic of Iran, Uganda and Ethiopia as the top refugee-hosting nations.³ In addition, Bangladesh also accommodates many Rohingya refugees from the Rakhine State in Myanmar who are persecuted for their ethnic and Muslim identities.⁴ On top of this should be added hundreds of thousands of asylum seekers and internally displaced persons.

The first wave of refugees and asylum seekers were mainly survivors of Jewish Pogroms in Nazi Germany and others escaping persecution in occupied Eastern Europe shortly after the Second World War.⁵ Today's refugee problem has reached an unprecedented scale with millions of people escaping military conflicts and internal wars in conflict-prone countries such as Afghanistan, Iraq and Syria.⁶ Over

¹ R. Boed, "The State of the Right to Asylum in International Law" (1994) 5(1) *Duke Journal of Comparative and International Law* p 31; A.M. Abdullahi, "The Refugee Crisis in Africa as a Crisis of the Institution of the State" (1994) 6 (4) *International Journal of Refugee Law* p. 562.

² UNHCR 19 June 2017 Figure at a Glance <http://www.unhcr.org/afr/figures-at-a-glance.html> (accessed on 1 July 2017).

³ Anon "Ten countries host half of the world's refugees: report" 2016 <http://www.aljazeera.com/news/2016/10/ten-countries-host-world-refugees-report-161004042014076.html> (accessed on 9 September 2017).

⁴ S.N. Parnini, "The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations With Bangladesh" 2013 *Journal of Muslim Minority Affairs* p. 281.

⁵ H. Fassmann, "European East-West Migration, 1945 – 1992" (1994) 28(3) *The International Migration Review* p 521 – 522.

⁶ J. Huggler, "Up to 6.6m migrants waiting to cross to Europe from Africa: report" 2017 <http://www.telegraph.co.uk/news/2017/05/23/66m-migrants-waiting-cross-europe-africa-report/> (accessed on 14 July 2017).

the last several years, thousands of people have been trying to cross the Mediterranean Sea into Europe with Italy, Greece, Spain and Malta as the main points of entry.⁷ In 2017 alone, more than 50,000 refugees and migrants reached Italy by sea, mainly from Sub-Saharan Africa⁸ in search of a better life in Europe.

Whereas the asylum seekers and migrants in the post-war years fled their own countries because of political persecution, today's migrants are vastly different. Although the majority of asylum seekers and migrants arriving in Europe come from states experiencing civil unrest and military conflicts such as Syria, Iraq, Afghanistan and Libya, a significant number of these arrivals are economic migrants.⁹ For instance, some people from the Sahel region of West Africa (Nigeria, Senegal, Mali, Guinea and Mauretania) and Horn of Africa (Eritrea, Ethiopia, Djibouti) have made the perilous journey to Europe in search of better lives.¹⁰ Unfortunately many of these people have lost their lives in the Mediterranean Sea at the hands of human traffickers trying to reach Europe. The United Nations High Commissioner for Refugees (UNHCR) has described the situation as the worst refugee crisis since the Second World War.¹¹ To compound the situation, some of these asylum seekers and migrants are Islamic Jihadists. For instance, in Kenya, Al-Shabaab militants from neighbouring Somalia have infiltrated the Dadaab Refugee Camp from which they

⁷ D. Thym, "The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy" (2016) 53 *Common Market Law Review* p 1547.

⁸ Huggler note 6 above.

⁹ R. Zetter, "The Labels, Few Refugees: Remaking the Refugee Label in an Era of Globalisation: (2007) 20(2) *Journal of Refugee Studies* p 181.

¹⁰ L. Dearden, "Refugee Crisis: more than 100 Asylum Seekers Drown as Boat Sinks in the Mediterranean Sea" 2017 <http://www.independent.co.uk/news/world/europe/refugee-crisis-migrants-asylum-seekers-mediterranean-sea-disaster-boat-sinking-100-rescue-latest-a7527596.html> (accessed 2 July 2017).

¹¹ E. McKirdy, "UNHCR Report: More Displaced Now than After WWII" 2016 <http://edition.cnn.com/2016/06/20/world/unhcr-displaced-peoples-report/index.html> (accessed on 25 August 2017).

have been launching murderous raids on innocent civilian populations in the host country of Kenya.¹² In a similar vein, terrorist organisations have been able to infiltrate the ranks of genuine refugees and asylum seekers in Europe and have been responsible for callous terrorist activities in France, Belgium, Germany and most recently in Spain.¹³ So, apart from overwhelming social services and amenities in the host countries, a new threat has now emerged, of cells of terrorists initially arriving as refugees and asylum seekers.

In Asia, the crisis of Rohingya Muslims coming from North Rakhine State in Myanmar into Bangladesh has attracted the attention of the international community.¹⁴ The majority of Buddhist Rakhines also live in Rakhine State. Burma (now Myanmar) was colonised by Britain and got independence in 1948.¹⁵ Since independence, tensions between the Buddhist controlled government and Rohingya Muslims have escalated. In 1962, the government led by the Burma Socialist Party oppressed and dismantled Rohingya social and political organisations.¹⁶ The military government organised a national census but excluded Rohingya Muslims; as a result, the first group of Rohingya Muslims fled to Bangladesh to escape persecution.¹⁷

¹² S.M. Sweeney, "Conflict and deteriorating security in Dadaab" 2012 <http://odihpn.org/magazine/conflict-and-deteriorating-security-in-dadaab/> (accessed on 19 July 2017).

¹³ J. Huggler, *et al* "Berlin Terror Attack: Tunisian Suspect Was Investigated Over Earlier Terror Plot" 2016 <http://www.telegraph.co.uk/news/2016/12/20/berlin-market-attack-suspect-named-23-year-old-asylum-seeker/> (accessed on 28 August 2017).

¹⁴ A.A. Ullah, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization" (2011) 9(2) *Journal of Immigrant and Refugee Studies* p 142.

¹⁵ Ullah note 14 above, p. 143.

¹⁶ Ullah note 14 above, p. 143.

¹⁷ Ullah note 14 above, p. 143; N. Kipgen, "Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum" (2013) 33 (2) *Journal of Muslim Minority Affairs* p. 300.

In 1982, the government of Myanmar enacted a new citizenship law that created two classes of citizenship: Burmese indigenous ethnic groups and associated or naturalised citizens.¹⁸ This law did not recognise Rohingya as citizens of Myanmar. They were denied citizenship by the military government as it viewed their ethnicity and Muslim religion as contrary to Burmese cultural identity.¹⁹ Therefore they fled to Bangladesh, a predominantly Muslim state, as they were persecuted for their religious beliefs. The issue of Rohingya refugees has become an international concern as they are marginalised and persecuted.

Under customary international law, "sovereign states have the prerogative to decide who to admit and who to exclude from their territories."²⁰ In the case of refugees and asylum seekers, each state possesses the sovereign right to admit people fleeing from their own countries and, in appropriate cases, grant refugee status to such individuals. At the same time, international law recognises the right to seek asylum, for instance, Article 14(1) of the Universal Declaration of Human Rights provides the right of an individual "to seek and to enjoy in other countries asylum from persecutions."²¹ This right to seek asylum has three components; namely the right

¹⁸ C. Gundy-Warr and E. Wong, "Sanctuary Under a Plastic Sheet – The Unresolved Problem of Rohingya Refugees" 1997 *IBRU Boundary and Security Bulletin Autumn* p 84; JM. Arraiza and O. Vonk, "Report on Citizenship Law: Myanmar", 2017, p. 8, http://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 (accessed on 12 January 2018).

¹⁹ U. Palmer, "Analysing Cultural Proximity: Islamic Relief Worldwide and Rohingya Refugees in Bangladesh" (2011) 21(1) *Development in Practice* p 100.

²⁰ Boed note 1 above, p. 28.

²¹ Universal Declaration of Human Rights (1948), Article 14(1). See also Convention on the Rights of the Child (1989), Article 23.

of an individual to seek asylum; the right of a sovereign state to grant or not to grant such a request and the right of an asylum seeker to be granted asylum.²²

The sovereign right of a state to grant or refuse to grant the request for asylum is qualified by an important principle of international law – *non-refoulement*. This principle is now enshrined in Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (1951 UN Refugee Convention) to the effect that a refugee should not be returned to his/her state of origin “where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion.”²³ However, the principle of *non-refoulement* does not apply to a refugee who is a danger to the security of the host country or after conviction of a serious crime, constitutes a danger to the host community.²⁴ Asylum is granted to individuals who are not a danger to the security of the hosting country.

The international community first responded to the refugee crisis in the post Second World War years with the adoption of the 1951 UN Refugee Convention which defined a refugee as any person who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of

²² Boed note 1 above, p. 1.

²³ United Nations Convention Relating to the Status of Refugees (1951), Article 33.

²⁴ United Nations Convention Relating to the Status of Refugees note 23 above, Article 33.

such events, is unable or, owing to such fear, is unwilling to return to it.²⁵

As the UN Refugee Convention itself states, it was adopted to deal with events that happened in Europe before 1 January 1951. The UN Refugee Convention was subsequently updated by the Protocol Relating to the Status of Refugees in 1967 (1967 Protocol) to remove the cut-off date of 1951.

The UN Refugee Convention meaning of the term “refugee” does not include economic migrants currently flooding Europe and to some extent South Africa. The key points of the UN Refugee Convention are:

- (a) A well-founded fear of persecution owing to reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (b) One is outside his or her own country, or owing to such fear, is unwilling to avail himself or herself of the protection of that country.
- (c) In case of stateless persons, that those not having a nationality of their own and being outside countries of their habitual residence, ... are unable or owing to such fear, are unwilling to return to their countries.

The Organisation of African Unity (OAU), the forerunner of the African Union (AU), adopted its own convention in 1969 to deal with specific aspects of refugees in Africa. The first waves of refugees on the African continent were associated with liberation wars against European colonial rulers.²⁶ Thus, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee

²⁵ United Nations Convention Relating to the Status of Refugees note 23 above, Article 1A (2).

²⁶ S.S. Chaulia, “The Politics of Refugee Hosting in Tanzania: From Open Door to Unsustainability, Insecurity and Receding Receptivity” (2003) 16(2) *Journal of Refugee Studies* p. 155.

Convention) defined the terms “refugee” informed by the peculiar circumstances of the continent, as follows:

The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²⁷

The material conditions qualifying one to be a refugee under the OAU Refugee Convention were:

- (a) external aggression, occupations, foreign domination, events seriously disturbing public order,
- (b) either in part or the whole of the country of origin,
- (c) compelled to leave his or her place of habitual residence.

The qualifying conditions of external aggression, occupation, foreign domination in the OAU Refugee Convention referred to the colonial context of different African states when the Convention was adopted. The disturbance of public order in part or whole of the country represented the incidence of civil unrests or wars that characterised some African states.

South Africa has not been immune to the refugee crisis. During the struggle against apartheid, South Africa produced its own refugees by way of members of liberation

²⁷ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Article 1 (2).

movements²⁸ forced into exile in neighbouring countries. Following the political settlement in 1994 and the incessant civil wars in the Great Lakes Region of Central Africa, a number of refugees and asylum seekers fled down South.²⁹ Some of those migrants hoped to move on to third countries in Western Europe and North America.³⁰ Some chose to seek refugee status. The economic melt-down in neighbouring Zimbabwe in the late twentieth and early 21st centuries has exacerbated the problem with economic migrants³¹ and other undocumented people pouring across the country's porous borders.

²⁸ Chaulia note 26 above, p. 155.

²⁹ A.E. Okem and LE. Asuelime, "An Insight into South Africa's Xenophobia: Impacting on Africa's Integration" (2015) 4(2&3) *Journal of African Union Studies* p 44.

³⁰ L. Dobbs, "UNHCR report sees 2017 resettlement needs at 1.19 million" 2016 <http://www.unhcr.org/news/latest/2016/6/575e79424/unhcr-report-sees-2017-resettlement-needs-119-million.html> (accessed on 9 September 2017).

³¹ A. Hammar, J. McGregor and L. Landau, "Introduction. Displacing Zimbabwe: Crisis and Construction in Southern Africa" (2010) 36 (2) *Journal of Southern African Studies* p. 265.

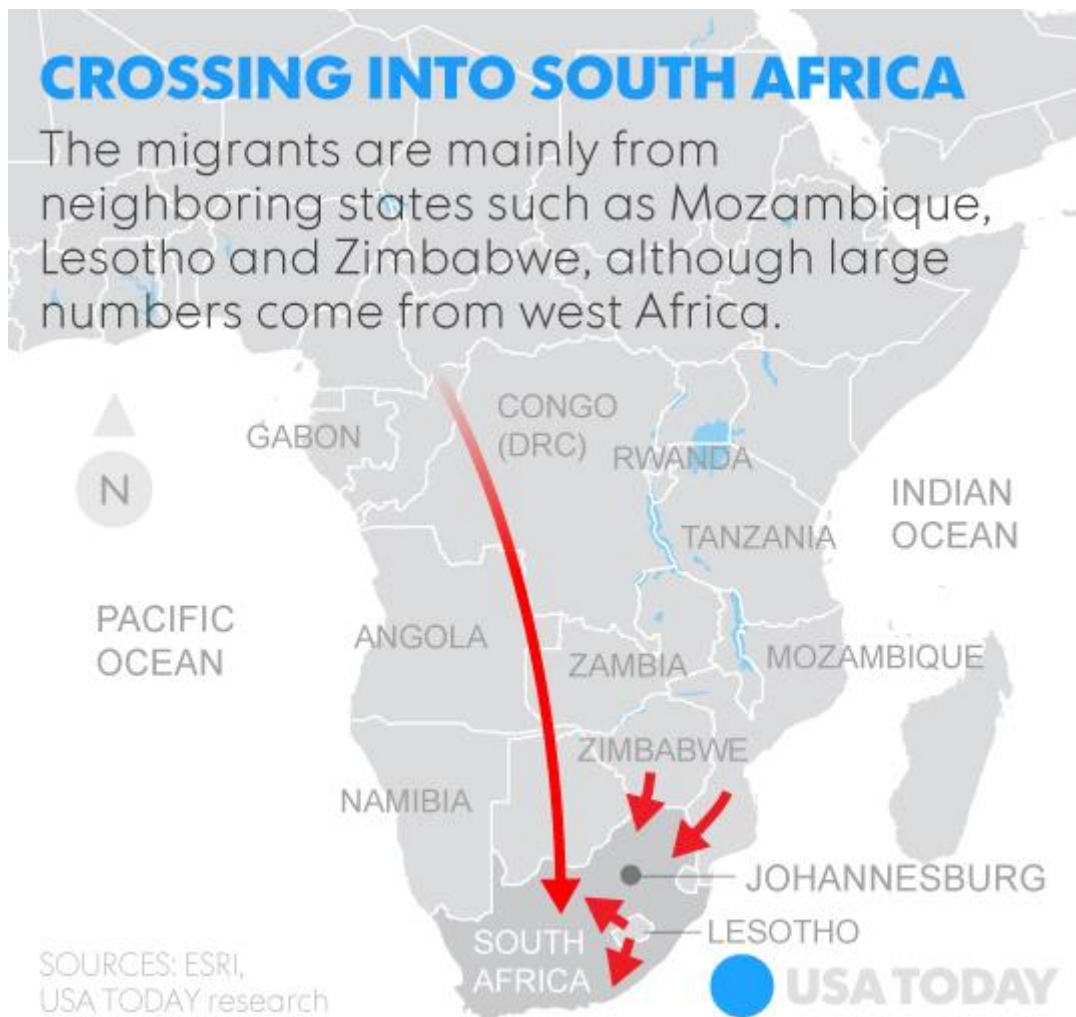


Figure 1: Movement of refugees into South Africa

Available at <https://www.usatoday.com/story/news/world/2015/11/19/migrants-south-africa/74323240/> (accessed on 1 March 2018)

South Africa is a state party to the UN Refugee Convention and its Protocol and the OAU Refugee Convention. It has enacted the Refugees Act³² in order to domesticate its regional and international law obligations with respect to refugees. As a result, South Africa is a major refugee-hosting country in the world. For instance, between

³² Refugees Act 130 of 1998.

2011 and 2015, South Africa received 311 795 applications from asylum seekers and only 32 044 were approved for refugee status.³³ There is a high rate of rejection of applications for asylum. This demystifies the idea that the majority of the people who come to South Africa are economic migrants who are still protected by their home states. However, refugees need special attention as they cannot receive any consular assistance from their home countries.



18. Refugee Status Determination (RSD) Outcomes: 2011-2015

Refugee Status Determination (RSD) Outcomes: 2011 - 2015						
RSD Outcome	2011	2012	2013	2014	2015	Total per RSD Outcome
Manifestly Unfounded	20 275	31 965	35 402	36 958	44 048	168 648
Unfounded	16 875	25 037	25 553	29 545	14 093	111 103
Approvals	6 803	6 226	7 286	9 230	2 499	32 044
Total RSD Outcomes per year	43 953	63 228	68 241	75 733	60 640	311 795

- Following the SCRA process of monitoring the quality of RSDOs adjudication and decisions, RSD figures shifted drastically from approvals and unfounded towards manifestly unfounded decisions; thus, confirming the department's assertion that most new asylum applications are not genuine asylum seekers but rather persons seeking employment or other socio-economic opportunities in the country.
- However, this intervention has since been discontinued given capacity challenges at SCRA to monitor this area of work.

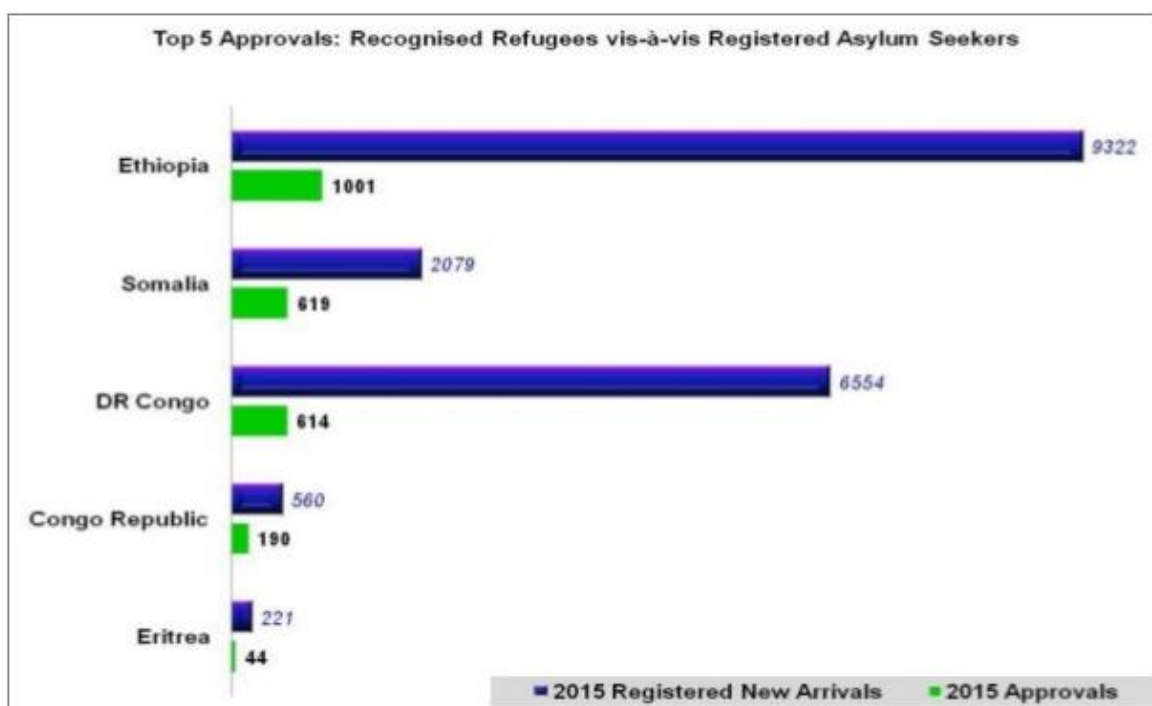
21

Figure 2: Refugee status determination from 2011 – 2015

Available at http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/ (accessed on 1 March 2018)

³³ Scalabrini Institute for Human Mobility in Africa "2015 Asylum statistics: analysis and trends for the period of January to December – presentation to the Portfolio Committee of Home Affairs" 2016 http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/ (accessed on 15 August 2017).

22. Top Five Approvals Vis-à-vis Registered Asylum Seekers



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Figure 3: Top five approval refugee status in 2015

Available at http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/ (accessed on 1 March 2018).

South Africa's record in respect of reception and treatment of refugees has not been salutary,³⁴ a situation worsened by xenophobic attacks on the businesses of refugees who succeeded in integrating with local communities.³⁵ The Department of

³⁴ Consortium for Refugees and Migrants v Minister of Home Affairs 2011 JDR 1868 (GNP) (closure of Refugee Reception Office in Johannesburg); Minister of Home Affairs v Scalabrini Centre 2013 6 SA 421 (SCA) paras 73 – 79; Scalabrini Centre v Minister of Home Affairs 2013 3 SA 531 (WCC) (closure of Refugee Reception Office in Cape Town); Somali Association of South Africa v Minister of Home Affairs 2012 5 SA 634 (ECP); Minister of Home Affairs v Somali Association of South Africa 2015 3 SA 545 (SCA) (closure of Refugee Reception Office in Port Elizabeth).

³⁵ Okem and Asuelime note 29 above, p. 47.

Home Affairs, the lead agency in the handling of asylum seekers and management of the refugee system, has been very intransigent in its attitude towards asylum seekers and refugees, in the process attracting this rebuke from the Supreme Court of Appeal in these words:

The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons more especially state departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the orders nor do they have any discretion to not obey the order.³⁶

It is against this background that this study interrogates the law and state practice on the reception and treatment of asylum seekers and refugees in South Africa with particular reference to the issue of integration of such refugees in the host state. A necessary component of the study evaluates international best practices elsewhere in order for us to recommend reforms in the legislative and policy frameworks.

1.2 Statement of the problem

The issue of refugees is not a new phenomenon. It “has an old ancestry, indeed one as old as the history of human kind itself.”³⁷ From ancient scriptures, we learn that Adam and Eve were the first refugees when God expelled them from the Garden of Eden or paradise.³⁸ Even Jesus Christ once sought asylum in Egypt to avoid persecution in ancient Judea. Prophet Mohammed also had to flee from Mecca to

³⁶ Minister of Home Affairs v Somali Association of South Africa Eastern Cape 2015 3 SA 545 (SCA), para 33.

³⁷ M.R.K. Rwelamira, “Some Reflections on the OAU Convention on Refugees Some Pending Issues” (1983) XVI *CILSA* p 155.

³⁸ Rwelamira note 37 above, p. 155.

Medina due to the hostility in the Qurayshi.³⁹ The enjoyment of asylum from persecution has played a significant part in the lives of the founders of major religions from Moses, Jesus and Mohammed.⁴⁰ They had all experienced the conditions of exile and this was reflected in their teachings to the followers.

As we have pointed out in the background section above, the problem of refugees continues to persist on a global scale due to protracted conflicts and civil wars in many regions of the world, particularly in the Middle East and Africa. In terms of international law and regional arrangements, receiving states are under an obligation not to return or refoule such refugees and asylum seekers to a state where their lives or freedoms would be threatened.⁴¹ Once given refugee status, receiving states are obliged to respect and protect the human rights of such refugees. For instance, refugees have rights to elementary education,⁴² housing,⁴³ property,⁴⁴ access to courts,⁴⁵ freedom of religion⁴⁶ and work.⁴⁷

The international protection system does not provide for a person to remain a refugee indefinitely, but it ensures “the individual’s renewed membership of a

³⁹ S. Cheung, “Religious Foundations of Asylum and the Challenges of Contemporary Practice”, Draft Version for Presentation at the Fifth International Conference on Peace, Human Rights and Religion, Center for Human Rights Studies at Mofid University, 13 – 14 May 2009, p 18. Available at <http://www.ensani.ir/storage/Files/20161207082234-10075-71.pdf> (accessed on 9 January 2018). See also DB. Edwards, “Marginality and Migration: Cultural dimensions of the Afghan Refugee Problem” (1986) 20(2) *The International Migration Review* p 324.

⁴⁰ Cheung note 39 above, p 14.

⁴¹ Convention Relating to the Status of Refugees note 23 above, Article 33; OAU Convention Governing the Specific Aspects of Refuges in Africa note 27 above, Article II (3). See also C. Kavuro, “Refugees, Serious Non-political Crimes and Persecution: Deficiencies in the Criminal Justice System Occasioned by Observance of Principle of *Non-refoulement* in the Context of Refugee and Human Rights Protection” (2017) 2 *SACJ* p 224.

⁴² Convention Relating to the Status of Refugees note 23 above, Article 22.

⁴³ Convention Relating to the Status of Refugees note 23 above, Article 21.

⁴⁴ Convention Relating to the Status of Refugees note 23 above, Article 13.

⁴⁵ Convention Relating to the Status of Refugees note 23 above, Article 16.

⁴⁶ Convention Relating to the Status of Refugees note 23 above, Article 4.

⁴⁷ Convention Relating to the Status of Refugees note 23 above, Articles 17 (wage-earning employment), 18 (self-employment) and 19 (liberal profession).

community and the restoration of national protection, either in the home land or through integration elsewhere”.⁴⁸ One of the ways to restore national protection for refugees is through voluntary repatriation to the country of origin. This occurs when conditions in the refugee producing countries normalise; for instance, Mozambican refugees in South Africa⁴⁹ and Burundian refugees in Tanzania indefinitely went home.⁵⁰ Repatriation is the best durable solution for refugees as they are able to resume the protection of their countries of origin and integrate with their own communities.

In some cases, refugees choose to move on to third countries. This is referred to as resettlement. Some states offer resettlement to selected refugees with special needs from over-burdened countries of first asylum. For instance, states such as Australia, Canada, New Zealand and United States of America (USA) have refugee resettlement programmes as intrinsic components of their national immigration programmes.⁵¹ The refugees, who benefit from resettlement, acquire permanent residence permits and citizenship in the third countries. Therefore, they become naturalised and full citizens of the third new states.⁵² This process allows refugees to acquire the full protection of a new state.

⁴⁸ J.C. Hathaway and R.A. Neve, “Making International Refugee Law Relevant Again: a Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 *Harvard Human Rights Journal* p 156.

⁴⁹ T. Polzer, “Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa” (2007) 19 *International Journal of Refugee Law* p 33 – 35.

⁵⁰ L.A. Ndimurwimo, “Protection of Refugees and IDPS’: a Case Study of Post-Conflict Burundi” 2015 *Obiter* p 447.

⁵¹ J.C. Kanamugire, “Local Integration as a Durable Solution for Refugees in South Africa” (2016) 12(3) *Acta Universitatis Danubius Juridica* p 46; D. Weissbrodt, *The Human Rights of Non-Citizen*, Oxford: Oxford University Press, 2008, p. 167.

⁵² UNHCR “Global Trends Forced displacement in 2015” 2015 <http://www.unhcr.org/576408cd7.pdf> (acceded on 25 August 2017).

The third option is integration in the local communities of the receiving states. This aspect of the law is at the heart of this thesis and applies to refugees who are “unable to return home at the end of reasonable period of temporary protection”⁵³ in the host state. Refugees, under this category, could benefit from local integration in the asylum country. However, this is a decision that depends on the willingness of the host state. For instance, the Republic of Tanzania, in 2014, “granted citizenship to more than 160 000 Burundian refugees.”⁵⁴ This decision was commended by the UNHCR and other international organisations. It is important to emphasise that most of the Burundian refugees who acquired naturalisation certificates fled conflicts in their home country in 1972 and 1993.⁵⁵ They spent significant periods in the host state while Burundi continued to experience civil conflicts.⁵⁶ South Africa has also once granted naturalisation certificates to Mozambican refugees who unofficially came to South Africa during apartheid era and integrated themselves into black communities.⁵⁷ However, local integration is a long and complex process for refugees.

Local integration should be available to refugees who do not desire to repatriate due to protracted conflicts in their own countries and those who have built new lives in their host states.⁵⁸ Some host countries do elect to grant permanent residence status to some refugees who require indefinite status. In South Africa, refugees can

⁵³ Hathaway and Neve note 48 above, p. 172.

⁵⁴ K.F. Tunda, “Refugees in the Great Lakes Region: Challenges to Peace Building” 2016 <http://www.accord.org.za/conflict-trends/refugees-great-lakes-region/> (accessed on 22 May 2017).

⁵⁵ J. Milner, “Can Global Refugee Policy Leverage Durable Solutions? Lessons From Tanzania’s Naturalisation of Burundian Refugees” (2014) 27(4) *Journal of Refugee Studies* p 554; A. Kuch, “Naturalisation of Burundian Refugees in Tanzania” (2016) 52 *FMR* p 63.

⁵⁶ Ndimurwimo note 50 above, p. 443.

⁵⁷ T. Polzer, “This is my home: Mozambique refugees become citizens of South Africa” (2005) 3 *Conflict Trends* p 30.

⁵⁸ Polzer note 57 above, p. 30.

apply for permanent residence permits if they have stayed in the Republic for a continuous period of five years from the date they were granted asylum.⁵⁹ Nevertheless the Standing Committee for Refugee Affairs has to certify that the applicant will remain a refugee indefinitely.⁶⁰ The Refugees Act does not provide the factors to consider for an individual to remain a refugee indefinitely. This failure to specify the objective factors makes it difficult to determine what is it exactly that an applicant needs to do in order to fulfil the prescribed requirements. Furthermore, a person becomes a refugee as soon as he or she fulfils the criteria contained in the definition of the 1951 UN Refugee Convention. Therefore, the recognition of a person as a refugee does not make him/her a refugee but declares him/her to be one.⁶¹ So, the five years waiting period from the grant of refugee status unnecessarily delays the individual from applying for certification and permanent residence permit.

Hathaway and Neve argue that “refugees should benefit from a firm guarantee to make permanent residence in a safe state available at the expiration of the temporary protection period.”⁶² However local integration is a complex and gradual process with legal, economic, social and cultural dimensions. It requires refugees to adapt themselves to the host society’s values and the “readiness of the host communities and public institutions to welcome and meet their needs.”⁶³ The

⁵⁹ Refugees Act note 32 above, section 27(c). See also Immigration Act 13 of 2002, section 27 (d).

⁶⁰ Refugees Act note 32 above, section 27(c).

⁶¹ *A v Chairperson of the Refugee Appeal Board* (194883/2015) [2017] ZAWCHC 19 (28 February 2017), para 7; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1976 Protocol relating to the Status of Refugees *HCR/IP/4/Eng/Rev.1 Reedited* Geneva 1992, para 28.

⁶² Hathaway and Neve note 48 above, p. 184.

⁶³ Ndimurwimo note 50 above, p. 460.

acquisition of nationality of the country of asylum is the final process of local integration.

Many conflicts and violations of human rights are protracted in the states that produce refugees.⁶⁴ As a result, some refugees do not desire to repatriate and need to be locally integrated in the host states. However, many host states do not want to offer local integration to refugees on their territory despite the expiration of reasonable period of protection. Local integration of refugees may be a burden on the economic and social welfare systems in the host state such as housing, schools, health facilities and jobs. Some citizens also have xenophobic attitudes and fear that refugees are taking their jobs and women.⁶⁵ Refugees experience significant challenges as they do not have any state that can ensure their full protection. They do not enjoy all rights, especially political rights, in the host states and they are lost in the system. There is a need to investigate the issue of local integration of refugees in South Africa for the individuals who have lost hope to voluntarily repatriate, or be resettled in a third country, due to the protracted nature of conflicts in their home countries. They need to acquire permanent residence status and enjoy full rights in the host state so that they can participate in the development of the country. Once refugees are integrated, they can make a huge contribution to the economy of the host state.⁶⁶ It is absolutely necessary to assist long-term refugees to become full

⁶⁴ A.L. Purkey, "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations" (2013) 27 (2) *Journal of Refugee Studies* p. 262.

⁶⁵ Mawadza, "The Nexus Between Migration and Human Security Zimbabwean Migrants in South Africa" (2008) 162 *ISS* p 5.

⁶⁶ P. Fabricius, "Learning From Canada's Refugee Policy: Diversity if Good for Business" 2017 <https://www.dailymaverick.co.za/article/2017-08-15-learning-from-canadas-refugee-policy-diversity-is-good-for-business/#.WZ2h89FLem9> (accessed on 23 August 2017).

members of the host states so that they can use their skills to benefit the society in various areas.

Asylum seekers and refugees experience hardships in accessing asylum processes in South Africa.⁶⁷ They face unreasonable delays in the asylum application procedures. In 2011 there were six Refugee Reception Offices in the entire country, namely Johannesburg, Pretoria, Cape Town, Durban, Musina and Port Elizabeth.⁶⁸ Since then, the Department of Home Affairs has closed down three of the six Refugee Reception Offices, specifically Port Elizabeth, Cape Town and Johannesburg, either completely or to new applications for asylum.⁶⁹ The closure of these three Refugee Reception Offices has been scrutinised by the South African courts. They have ordered the Department of Home Affairs to re-open the services of the Refugee Reception Offices to new asylum seekers and refugees in Johannesburg,⁷⁰ Cape Town⁷¹ and Port Elizabeth,⁷² but it has simply ignored court orders.⁷³ Recently, the Johannesburg Refugee Reception Office (Crown Mines) has been closed down indefinitely, Cape Town and Port Elizabeth Offices do not receive applications from new asylum seekers.⁷⁴ The refusal to accept applications for new

⁶⁷ D. Vigneswaran, "A Foot in the Door: Access to Asylum in South Africa" (2008) 25 (2) *Refugee* p.41.

⁶⁸ *Minister of Home Affairs v Somali Association of South Africa* 2015 3 SA 545 (SCA) paras 5.

⁶⁹ *Minister of Home Affairs v Somali Association of South Africa* 2015 3 SA 545 (SCA) paras 5 - 7.

⁷⁰ *Consortium for Refugees and Migrants v Minister of Home Affairs* 2011 JDR 1868 (GNP).

⁷¹ *Minister of Home Affairs v Scalabrini Centre* 2013 6 SA 421 (SCA) paras 73 – 79; *Scalabrini Centre v Minister of Home Affairs* 2013 3 SA 531 (WCC).

⁷² *Somali Association of South Africa v Minister of Home Affairs* 2012 5 SA 634 (ECP); *Minister of Home Affairs v Somali Association of South Africa* 2015 3 SA 545 (SCA).

⁷³ *Minister of Home Affairs v Somali Association of South Africa* 2015 3 SA 545 (SCA); *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017).

⁷⁴ R. Amit and N. Kriger, "Making Migrants 'Il-legible': the Policies and Practises of Documentation in Post-Apartheid South Africa" (2014) 40 *Kronos* p. 278.

asylum seekers amounts to contempt of court and the Department of Home Affairs does not uphold the rule of law.

The Department of Home Affairs simply took no steps to comply with court orders, arguing that the decision of the Director-General to close some of Refugee Reception Offices was cast in stone and that court orders have been overtaken by events.⁷⁵ In the face of this extraordinary intransigence, the Supreme Court of Appeals (SCA) (per Ponnann JA) observed that the principle that “the state must obey the law” was fundamental to any civilised society.⁷⁶ The state, its organs and functionaries could not arrogate to themselves the right not to obey the law or elevate themselves to a position where they could be regarded as being above the law.⁷⁷ The failure of the Department of Home Affairs to respect court orders provides a bad example for the individuals to obey the rule of law. This attitude needs a major change in the services that the government provides to refugees and asylum seekers relating to their rights. The failure to legalise refugees and asylum seekers may attract negative attitudes as they are undocumented in the country. Justice Brandis, in *Olmstead v United States*, observed that “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”⁷⁸ The Department of Home Affairs should learn from this dictum, respect court orders and uphold the rule of law in its activities. This is one of the key issues to be interrogated in this thesis.

⁷⁵ *Minister of Home Affairs v Somali Association of South Africa* 2015 3 SA 545 (SCA), paras 9 and 10.

⁷⁶ *Minister of Home Affairs v Somali Association of South Africa* note 75 above, para 36.

⁷⁷ *Minister of Home Affairs v Somali Association of South Africa* note 75 above, para 36.

⁷⁸ *Olmstead v United States*, 277 US 438,485 (1928).

This study will investigate the issue of local integration of refugees in South Africa as a durable solution. Many refugees aspire for status to live in South Africa in the hope that they will voluntarily repatriate to their home states once there is a fundamental change in circumstances for the better in their countries of origin. As many conflicts and abuse of human rights become protracted, refugees are unable to go back home and continue to stay in South Africa beyond the temporary protection period. Furthermore, they are unable to receive resettlement in third countries where they can continue with their lives. At the time of writing (October – November 2019), many would be refugees and asylum seekers were illegally occupying the offices of the UNHCR in Pretoria and Cape Town, claiming for resettlements in other countries, preferably Europe and North-America.⁷⁹ This research seeks to address the situation that refugees experience on daily basis. The study will investigate the legal framework as well as state practice in relation to the integration of refugees.

1.3 Aims and objectives of the study

1.3.1 Aims

The major aim of this study is to critically analyse the law and state practice on the treatment and reception of refugees in South Africa in relation to the country's international and regional obligations. Specifically, the study will investigate whether

⁷⁹ J. Krige, "Why Refugees Are Demanding to Leave South Africa", 2019. Available at <https://citizen.co.za/news/south-africa/insight/2205392/why-refugees-are-demanding-to-leave-south-africa/> (accessed on 20 November 2019); M. Ntseku, "Refugee Sit-in at UNHCR Office in Cape Town Gains Momentum", 2019. Available at <https://www.iol.co.za/capeargus/news/refugee-sit-in-at-unhcr-office-in-cape-town-gains-momentum-35629605> (accessed on 20 November 2019).

South Africa complies with its international and regional commitments regarding local integration of refugees.

The study will also examine the root causes or factors that force individuals to flee their countries of origin in search for asylum in other countries.

The research aims to contribute to the body of academic literatures dealing with local integration of refugees in South Africa in comparative perspectives. The integration of refugees will be emphasised as one of the most durable solutions to the refugee problem.

1.3.2 Objectives

The study seeks to examine how the South African legal system and state practice conduce to finding a durable solution for refugees who are unable to voluntarily repatriate to their home states or obtain resettlement in third countries after a reasonable period of protection in South Africa. The study will also make recommendations necessary to fill the lacuna in the law so that refugees can end the surrogate protection and acquire the same rights as nationals. This is a significant part of the study.

1.4 Basic hypothesis

The study hypothesises that South African law and state practice are inadequate in providing for local integration of the ever-increasing numbers of people seeking asylum and refugee status in the country.

1.5 Rationale and justification of the study

The main motivation for this study emerged from my earlier works on the refugee problem in Africa.⁸⁰ South Africa is one of the major refugee-receiving states in Africa and has enacted the Refugees Act⁸¹ to domesticate international and regional instruments relating to refugees. South African cities host refugees and asylum seekers from different African states⁸² as well as other regions. Most refugees do not have any opportunity to repatriate as the persecution continues in their countries of origin.

The international community does not encourage individuals to remain refugees indefinitely. This is demystified by the UN Refugee Convention that encourages states parties to facilitate the assimilation and naturalisation of refugees.⁸³ Despite this provision, refugees continue to live in the receiving countries without any opportunity to acquire citizenship. This research will look at how local integration can be used as one of the durable solutions for protracted refugees and contribute to the existing store of knowledge. By protracted refugees is meant those refugees unable or unwilling to voluntarily repatriate to their countries of origin or re-settle in third countries after at least a period of 5 years in exile.⁸⁴

⁸⁰ Kanamugire note 51 above, p. 44; J.C. Kanamugire and A. Shaida, "Deportees in Inadmissible Facility Have Right to Apply for Asylum – *Abdi and Another v Minister of Home Affairs and Others* 2011 3 SA 37 (SCA)" (2013) 4(13) *MJSS* p 171.

⁸¹ Refugees Act note 32 above.

⁸² LB. Landau, "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy" (2006) 19(3) *Journal of Refugee Studies* p. 308.

⁸³ Convention Relating to the Status of Refugees note 23 above, Article 34; Kanamugire note 51 above, p. 46.

⁸⁴ D. Presse and J. Thomson, "The Resettlement Challenges: Integration of Refugees From Protracted Refugee Situations" (2007) 24 (2) *Refugee* p. 48; J. Milner and G. Loescher, "Responding to Protracted Refugee Situations – Lessons from a Decade of Discussion", 2011. Available at <https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/8011/Milner-Responding-Brief.pdf?sequence=1> (accessed on 2019).

Case law indicates that applicants for refugee status face insurmountable hurdles mainly at the hands of state functionaries.⁸⁵ They experience unreasonable delays⁸⁶ in their applications for asylum in South Africa. Furthermore, access to some Refugee Reception Offices has been significantly reduced.⁸⁷ It is against this background that there is a need to investigate the issue of local integration of refugees in South Africa.

Local integration of refugees into the host community can make a valuable contribution to the issue of protracted refugees in the South African context. The other motivation for this study is that local integration is underutilised as a permanent solution for refugees. It is hoped that the study will benefit legal practitioners, judges, policy makers in the government, law students, academics and scholars especially in public international law and refugee law, United Nations High Commissioner for Refugees, non-government organisations, refugee communities, asylum seekers and refugees.

1.6 Literature review

According to D'Orsi,⁸⁸ local integration has traditionally been considered the best durable solution for refugees. It has "always represented a guiding principle for

⁸⁵ S.L. Gordon, "Welcoming Refugees in the Rainbow Nation: Contemporary Attitudes Towards Refugees in South Africa" (2016) 35 *African Geographical Review* p. 4.

⁸⁶ *Harerimana v Chairperson, Refugee Appeal Board* 2014 4 SA 550 (WCC), para 43; *Bolanga v Refugee Status Determination Officer* (5027/2012) [2015] ZAKZDHC 11.

⁸⁷ *Somali Association of South Africa v Minister of Home Affairs* 2012 5 SA 634 (ECP); *Minister of Home Affairs v Somali Association of South Africa* 205 3 SA 545 (SCA); *Scalabrini Centre v Minister of Home Affairs* 2013 3 SA 531 (WCC); *Minister of Home Affairs v Scalabrini Centre* 2013 6 SA 421 (SCA).

⁸⁸ C. D'Orsi, "Local Aspects of Asylum in Sub-Saharan Africa: a Deadlock for a Concrete Hope for Better Future?" (2009 – 2010) *Regent Journal of International Law* p 265.

refugee programs in developing countries”.⁸⁹ The UN Refugee Convention encourages states to promote the assimilation and naturalisation of refugees on their territories.⁹⁰ This process can ensure the full protection of human rights of refugees in the host states. In the study about legal aspects of asylum in Sub-Saharan Africa,⁹¹ D’Orsi has found that most refugees managed to integrate themselves into the host communities or states as they had kinship and family members in the countries of asylum.

In a research article on asylum law in South Africa, Olivier opines that the Refugees Act protects the dependants of asylum seekers and refugees and provides opportunities for refugees to acquire South African citizenship by naturalisation.⁹² He recognises that the interpretation and application of the Refugees Act are complicated and fraught with uncertainties. He proposes that developments in other jurisdictions may serve as a guide for South Africa to improve its asylum regime in order to facilitate local integration. However, unreasonable delays in processing of asylum seekers or applications for refugee status and law governing citizenship in South Africa do not assist refugees to acquire certificates of naturalisation. The South African Citizenship Act⁹³ does not include refugees among individuals who qualify for naturalisation.

⁸⁹ D’Orsi note 88 above, p. 265.

⁹⁰ Convention Relating to the Status of Refugees, note 23 above, Article 34.

⁹¹ D’Orsi note 88 above, p. 267.

⁹² W.H. Olivier, “The New Asylum Law in South Africa” 2002 *TSAR* p. 672.

⁹³ South African Citizenship Act 88 of 1995, sections 4 and 5.

Katz⁹⁴ argues that, in terms of the Immigration Act,⁹⁵ there is a limited provision for asylum seekers and refugees to submit applications for residence or immigration permits. He acknowledges that this can “cause hardship to both foreigners and citizens.”⁹⁶ Refugees are unable to change their status and apply for another permit. For instance, a refugee who marries a South African citizen cannot apply for a spousal visa or a permanent residence permit under the current provisions of the Immigration Act. There is a provision for a refugee to apply for a permanent residence permit after five years’ continuous residence⁹⁷ in South Africa from the time he or she was granted asylum. Nevertheless, the Standing Committee for Refugee Affairs has to certify that he or she will remain a refugee indefinitely.⁹⁸ This formulation is vague and uncertain as there are no specific criteria for an individual to become a refugee indefinitely.

Bennet and Strug opine that “refugees are persons seeking sanctuary from persecution suffered in their state of residence or nationality.”⁹⁹ They get surrogate protection from the host states and enjoy limited human rights. For instance, the refugees cannot exercise any political rights as long as they stay in the asylum state. They do not obtain any assistance from the diplomatic mission of the sending country. As the duration of asylum is unknown or uncertain, refugees need to wait

⁹⁴ A. Katz, “Refugees” in J. Dugard, *International Law a South African Perspective* 4th ed., Cape Town, Juta & Co. Ltd, 2012, p. 360.

⁹⁵ Immigration Act 13 of 2002.

⁹⁶ Katz note 94 above, p. 360.

⁹⁷ Refugees Act note 32 above, section 27(c); Immigration Act 13 of 2002, section 27(d); D. Olowu, “Refugees, Asylum Seekers and the Legal Obligations of States for their Protection Critical Reflections on the South African Approach” (2006) 6 *ISIL Y.B Int’l Human. & Refugee L.* p 244.

⁹⁸ Refugees Act note 32 above, section 27(c); *Ruyobeza v Minister of Home Affairs* 2003 5 SA 51 (C).

⁹⁹ T.W.Bennet and J. Strug, *Introduction to International Law*, Cape Town, Juta & Co, 2013, p. 205.

until their country of origin becomes safe for them to repatriate. This circumstance does not depend on them and they may sojourn in the host state for a long period of time.

The Convention on the Reduction of Statelessness¹⁰⁰ sets out the rules for the conferral and non-withdrawal of nationality to individuals who may otherwise be stateless. Although refugees still have the nationality of their home states, they do not enjoy any right from their citizenship as long as they are still in exile. This situation cannot continue forever especially for protracted refugees who need to be actively involved in the activities and development of the host community or state.

Goodwin-Gill¹⁰¹ argues that states do not have any obligation to offer local integration to refugees as a lasting solution to their problems. Host states grant temporary residence to refugees and some limited basic rights to assist them to secure their basic needs, including the right to work and study. However, some states have offered durable local solutions to a great number of refugees on an indefinite basis.¹⁰² In these states, the refugees have finally attained the “full integration and naturalisation in the host community”.¹⁰³ The success of local integration schemes is enhanced by international assistance and reflects the shared responsibility between the international community and the host states to the

¹⁰⁰ Convention on the Reduction of Statelessness (1961).

¹⁰¹ G.S. Goodwin-Gill, *The Refugee in International Law*, Oxford, Clarendon Press, 1985, p. 222.

¹⁰² Goodwin-Gill note 191 above, p. 222.

¹⁰³ Goodwin-Gill note 101 above, p. 222; R. van Der Meeren, “Three Decades in Exile: Rwandan Refugees 1960 – 1990” (1996) 9 (3) *Journal of Refugee Studies* p. 253; C.P. Gasarasi, “The Mass Naturalization and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Prospects” (1990) 3 (2) *Journal of Refugee Studies* p. 88; P. Bevelander and J. Veenman, “Naturalisation and Socioeconomic Integration: the Case of the Netherlands”, IZA Discussion Papers, No. 2153, Institute for the Study of Labour (IZA), Bonn, 2006, p. 4; T. Kuhlman, “The Economic Integration of Refugees in Developing Countries: A Research Model” (1991) 4 (1) *Journal of Refugee Studies* p. 3.

challenges faced by refugees.¹⁰⁴ The study will provide guidance on how the international community (UNHCR) can assist hosting states to implement local integration to protracted refugees in their territories. This is our main point of departure in this study.

Hathaway¹⁰⁵ opines that local integration is the usual solution to the refugee problem. In principle, local integration means that “a refugee is granted some form of durable legal status that allows him or her to remain in the country of first asylum on an indefinite basis, and fully to participate in the social, economic, and cultural life of the host community.”¹⁰⁶ The integration is an on-going process and leads to self-reliance for refugees. Local integration “requires preparedness on the part of refugees to adapt to the host society, without having to forego their own cultural identity.”¹⁰⁷ Harrell-Bond highlights that the integration process does not only happen to refugees, but also to their host communities.¹⁰⁸ The cooperation and mutual respect of both refugees and host communities are required to achieve successful integration. The simplification of integration is “a situation in which host and refugee communities are able to co-exist, sharing the same resources – with no greater mutual conflict than that which exists within the host community.”¹⁰⁹ All the individuals need to have a willingness to live together in harmony and participate

¹⁰⁴ Goodwin-Gill note 101 above, p. 222.

¹⁰⁵ JC. Hathaway, *The Rights of Refugees Under International Law*, Cambridge, Cambridge University Press, 2005, p. 977.

¹⁰⁶ Hathaway note 106 above, pp. 977 – 978.

¹⁰⁷ UNHCR “Local Integration” 2002 <http://www.refworld.org/docid/3d6266e17.html>. (accessed on 19 June 2017).

¹⁰⁸ Hathaway note 105 above, p. 978.

¹⁰⁹ Hathaway note 106 above, p. 978; A. Kuch, “Naturalization of Burundian Refugees in Tanzania: the Debates on Local Integration and the Meaning of Citizenship Revisited” (2016) 30 (3) *Journal of Refugee Studies* p. 473.

in the development activities to promote harmonious co-existence between local communities and refugees.

The UN Refugee Convention provides that it shall cease to apply to any person who “has acquired a new nationality, and enjoys the protection of the country of his new nationality.”¹¹⁰ So, the acquisition of a new citizenship is one of the durable solutions for refugees as they regain full protection of the host state. Article 34 of the UN Refugee Convention obliges states parties to “make every effort to expedite naturalisation proceedings” for refugees. The focus is on the “possibility of moving beyond refugee status towards the acquisition of citizenship in the asylum country.”¹¹¹

Masumbe has examined the process of naturalisation of refugees under international law and South African law and the implication for human rights.¹¹² He observes that there is a considerable political resistance to integrate refugees and their descendants into the South African polity.¹¹³ His study is limited to the process of refugees acquiring citizenship through naturalisation. He does not consider other aspects that are inherent in the local integration of refugees. As this study involves a comparative aspect, lessons will be drawn from other comparable jurisdictions on how South Africa can improve its current laws and policies to provide for the full integration of refugees. Refugees need to regain adequate protection of their human rights and dignity to live a meaningful life.

¹¹⁰ Convention Relating to the Status of Refugees note 23 above, Article 1 (c) (3).

¹¹¹ Hathaway note 105 above, pp. 979 – 980.

¹¹² PS. Masumbe, “The Process of Naturalisation of Refugees Under International and South African Law and its Implication for Human Rights”, LLD Thesis, University of Fort Hare, 2015, p. 301.

¹¹³ Masumbe note 112 above, p. 301.

Dass *et al*¹¹⁴ states that the UNHCR has an ultimate mandate to find durable solutions for refugees, including voluntary repatriation, local integration in the host state and resettlement in a third country. The authors emphasise that local integration allows the refugees to remain in the host country on an indefinite basis with some form of legal status. They are permitted to participate fully in the social, economic and cultural life of the asylum country.¹¹⁵ The indefinite status of refugees leads to the acquisition of permanent residence permits and citizenship by naturalisation in the host state and community. The Immigration Act¹¹⁶ includes refugees among the category of foreign nationals that are eligible to apply for permanent residence. However, refugees have first to acquire certificates from the Standing Committee for Refugee Affairs stating that the applicant will remain a refugee indefinitely.¹¹⁷ The authors do not discuss naturalisation of refugees in South Africa in more detail. This research study will address this gap in the integration of refugees in South Africa.

Manby¹¹⁸ recognises the protracted situation of refugees in many African countries and the urgent need for local integration into the asylum states. According to the UNHCR, approximately 2.3 million people live in sub-Saharan Africa in a protracted refugee situation.¹¹⁹ This means individuals who have been living in the asylum country “for more than five years without immediate prospects for implementation of

¹¹⁴ D. Dass *et al.* “The Civil and Political Rights of Refugees and Asylum Seeker in South Africa” in F. Khan and T. Schreier (ed.), *Refugee Law in South Africa*, Cape Town: Juta & Co. Ltd, 2014, p. 219.

¹¹⁵ Dass note 114 above, p. 218.

¹¹⁶ Immigration Act note 95 above, section 27 (d).

¹¹⁷ Refugees Act note 32 above, section 27 (c).

¹¹⁸ B. Manby, *Citizenship Law in Africa a Comparative Study*, New York, Africa Minds, 2016, p. 128.

¹¹⁹ Manby note 118 above, p. 128.

durable solutions.”¹²⁰ The UNHCR has invoked the “cessation clause” from the 1951 Refugee Convention in trying to solve some of the protracted refugee situations. The cessation clause has been invoked for refugees coming from Sierra Leone, Angola, Liberia and Rwanda.¹²¹ This has occurred as the donor governments and the countries of origin for refugees pressurised the UNHCR to end protracted situations. Once the cessation clause is invoked, the refugees become foreigners and need to regularise their status like any other foreigners.¹²² The local integration of refugees into the host communities can assist to find a durable solution, especially when the cessation clause has been invoked by the UNHCR. This may apply to refugees that have compelling reasons not to repatriate to their countries of origin when faced with cessation clause. The study seeks to promote the integration of refugees, who face the implementation of cessation clause, into the asylum country in the process filling in the gaps in the existing store of legal knowledge.

Kamanga¹²³ argues that Tanzania hosts large numbers of refugees, especially from neighbouring states, namely Rwanda, Burundi and Democratic Republic of Congo (DRC). These countries experience civil or ethnic conflicts and are the major refugee producing countries in the Great Lakes Region. Many asylum seekers feel welcome in Tanzania as they share cultural affinity and ethnic communities with the

¹²⁰ Manby note 118 above, p. 128; J. Crisp, “No Solutions in Sight: the Problem of Protracted Refugee Situations in Africa”, 2003, p. 0. Available at <https://escholarship.org/uc/item/89d8r34q> (accessed on 6 November 2109); J. Milner, “Responding to Protracted Refugee Situations Lessons From a Decade of Discussion”, 2011, p. 3. Available at <https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/8011/Milner-Responding-Brief.pdf?sequence=1> (accessed on 6 November 2019); G. Loescher and J Milner, “The Long Road Home: Protracted Refugee Situations in Africa” (2005) 47 (2) *Survival* p. 153.

¹²¹ Manby note 118, p. 129.

¹²² Manby note 1118 above, p. 129; M.E. Cwik, “Forced to Flee and Forced to Repatriate – How the Cessation Clause of Article 1C (5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice” (2011) 44 *Vanderbilt Journal of Transnational Law* p. 730.

¹²³ K. Kamanga, “The (Tanzania) Refugees Act of 1998: Some legal and Policy Implications” (2005) 18(1) *Journal of Refugee Studies* p. 100.

inhabitants of the host state.¹²⁴ Tanzania also continues to attract many refugees due to its stability in the region and its citizens exhibit a degree of tolerance and hospitality towards foreigners.¹²⁵ Furthermore, the Tanzanian government Open Door Policy has attracted many refugees. This policy was stimulated by the wars of national liberation in Africa as the government felt morally obliged to offer support.¹²⁶ Rashid Kawawa, the former Second Vice President of Tanzania in 1965, stated in Parliament:

The Tanzanian government is convinced that her independence is incomplete before the whole of Africa becomes free. We shall neither give up nor lag behind in supporting the refugees... We cannot help those who run away to seek a luxurious life. We will help those who want to free their countries.¹²⁷

The Open Door Policy consisted of group determination of status, allocation of land, local integration and offer of citizenship to groups of refugees through naturalisation.¹²⁸ The Tanzanian government had sympathy for refugees and considered them as victims and freedom fighters. In addition, Tanzania believed that it had sufficient resources to share.¹²⁹ Many refugees benefited from the Open Door Policy and became Tanzanian citizens.

The Tanzanian policy towards refugees changed since 1990s. The approach for refugees was to ensure that they stayed in the host state on temporary basis.¹³⁰

¹²⁴ Kamanga note 123 above, p. 101.

¹²⁵ Kamanga note 123 above, p. 102. .

¹²⁶ Kamanga note 123 above, p. 103.

¹²⁷ Kamanga note 123 above, p. 103.

¹²⁸ Kamanga note 123 above, p. 103; M. Morel, "The Lack of Refugee Burden-Sharing in Tanzania: Tragic Effects" (2009) 22 (1) *Afrika Focus* p. 111.

¹²⁹ Kamanga note 123 above, p. 103.

¹³⁰ BE. Whitaker, "Refugees in Western Tanzania: the Distribution of Burden and Benefits Among Local Hosts" (2002) 15(4) *Journal of Refugee Studies* p 350.

During this period, African states became less committed to providing asylum to refugees fearing persecution in their own states. Instead African states desired refugees to get protection in safe zones or similar area in their home countries.¹³¹ This was due to the fact that there was no longer colonialism, racial discrimination and apartheid anymore and every country was independent. However, the problem of refugees still persists and states need to find provisions to accommodate them. Tanzanian Refugees Act¹³² makes a policy change and does not provide for naturalisation as a durable solutions for refugees. It provides for voluntary repatriation¹³³ and resettlement¹³⁴ as the appropriate permanent solution for refugees. Despite this attitude, the Tanzanian government, in 2008, decided to offer naturalisation to 220,000 Burundian refugees¹³⁵ who fled to Tanzania since 1972 as part of a comprehensive durable solution.

Zambia has hosted refugees since 1960s. It has established two refugee settlements: Maheba and Mayukwayukwa. The majority of refugees in Zambia came from Angola, Democratic Republic of Congo and Rwanda.¹³⁶ The Zambian government has accepted to locally integrate 10 000 and 4 000 former refugees from Angola and Rwanda respectively.¹³⁷ Zambia has also enacted the Refugees Act¹³⁸ to domesticate its international and regional obligations towards refugees. Section 9 of the Zambian Refugees Act provides for naturalisation of refugees. This

¹³¹ B. Rutinwa, "The End of Asylum? The Changing Nature of Refugee Policies in Africa" (2002) 21(1&2) *Refugee Survey Quarterly* p 12.

¹³² Refugees Act 9 of 1998.

¹³³ Refugees Act note 132 above, s 34.

¹³⁴ Refugees Act note 132 above, s 36.

¹³⁵ J. Milner, "Can Global Refugee Policy Leverage Durable Solutions? Lesson From Tanzanian Naturalisation of Burundian Refugees" (2014) 27(4) *Journal of Refugee Studies* p 554.

¹³⁶ UNHCR Zambia "Refugees in Zambia" <https://ewbchallenge.org/unhcr-zambia/refugees-zambia> (accessed on 11 January 2018).

¹³⁷ UNHCR Zambia note 136 above.

¹³⁸ Refugees Act 1 of 2017.

provision improves the circumstances of protracted refugees in Zambia as they can acquire Zambian citizenship through naturalisation.

From this literature review, it is quite obvious that there exist gaps in the literature. State practice is also fluid with increasing levels of violence and xenophobia against refugees and asylum seekers. A situation worsened by using levels of populism and nationalism in Europe and the USA as well as xenophobia in the Republic of South Africa. This study, therefore, hopes to make a modest contribution to the existing state of legal knowledge in this relatively new area of public international law.

1.7 Research methodology and data collection

There are two kinds of research methods, namely qualitative research and quantitative research. Qualitative research is important to accomplish objectives that cannot be met through alternative methods – that is, questions are not amenable to measurement.¹³⁹ It emphasises “the qualities of entities and on the processes and meaning that are not measured in terms of quantity, amount, intensity and frequency”.¹⁴⁰ This research method is appropriate to specific kinds of questions and must be used to achieve the desired objectives. Galafshani opines that qualitative research “seeks to understand phenomenon in context-specific settings, such as real world settings where the researcher does not attempt to manipulate the phenomenon of interests”.¹⁴¹ Qualitative research seeks illumination, understanding and extrapolation to similar situations.

¹³⁹ I.L. Bourgeault, “Critical Issues in the Funding of Qualitative Research” (2012) 7 *Journal of Ethnographic & Qualitative Research* p 1.

¹⁴⁰ Bourgeault note 139 above, p. 1.

¹⁴¹ N. Galafshani, “Understanding Reliability and Validity in Quantitative Research” (2003) 8(4) *The Qualitative Report* p. 600.

On the other hand, the quantitative research employs experimental methods and quality measures to test hypothetical generalisations.¹⁴² This research involves the “use of standardised measures so that the varying perspectives and experiences of people can be fit into a limited number of predetermined response categories to which numbers are assigned.”¹⁴³ Qualitative method is specific to certain or specific areas of research.

This study examines local integration of refugees in South Africa to improve the current circumstances of protracted refugees as part of the on-going search for durable solutions. The qualitative method is appropriate and will be used in this study. To achieve reliability, the researcher will use credible sources, such as journal articles and books. Galafshani argues that “trustworthiness of a research report lies at the heart of issues conventionally discussed as validity and reliability.”¹⁴⁴ The issue of triangulation will be achieved in this study by engaging with other scholars in the same field. This will be enhanced by attending national and international conferences. The study relies on information and data from journal articles, books, international conventions and cases that deal with the issue of local integration of refugees.

In presenting this thesis, data and information gained from secondary sources will be supplemented by analytical, critical and comparative approaches. The researcher intends to find and analyse the primary and secondary sources from the libraries across North-West University campuses and other library services from other universities. Information communication technology will play a significant role

¹⁴² Galafshani note 141 above, p. 597.

¹⁴³ Galafshani note 141 above, p. 598.

¹⁴⁴ Galafshani note 141 above, p. 604.

in finding relevant materials. The Internet and other online search engines will also serve as a good access point for the relevant legislation, case law, academic writings from journal articles, national or international conferences and other sources of information. The emphasis will be placed on how local integration of refugees can be used as a durable solution for protracted refugees so that they can contribute to the development of the host states. This process allows refugees to regain full protection of their rights by the host state.

The study makes a comparative analysis on refugee integration with other jurisdictions, namely Tanzania, Zambia, Germany and the Netherlands. Tanzania had an open door policy in accommodating refugees on its territory and has naturalised some refugees from Rwanda, Somalia and Burundi. Zambia has also received refugees since its independence and has issued permanent residence permits to some refugees from Angola and Rwanda. Germany has demonstrated generosity in receiving refugees and has a policy to naturalise such persons. The Netherlands also has a policy and practice to accommodate refugees and integrate them into the society by giving them naturalisation. As Tanzania and Zambia are developing countries and Germany and the Netherlands are developed states, South Africa can learn best practice from these countries in integrating refugees into the society.

1.8 Limitations of the study

The study focuses on the local integration of refugees in South Africa. Nevertheless the study attempts to make a comparative analysis with Tanzania, Zambia, the Netherlands and Germany. The research investigates the issues of local integration as a durable solution for protracted refugees. It promotes local integration to assist

individuals to be fully integrated in the host community so that they can use their skills to make a meaningful contribution to the development of the host state. The study does not deal with voluntary repatriation whereby refugees freely decide to go back to their countries of origin with the assistance of the UNHCR, host states and sending states. Furthermore, the study does not deal with resettlement granted to some refugees to continue with their lives in third, mostly developed states.

The study does not mainly deal with asylum seekers as it is a starting point for individuals to be recognised as refugees in the host country. It does not investigate economic migrants, as they are still protected by their countries of citizenship. It is hoped the research will improve the integration of refugees in the South African society.

1.9 Ethical considerations

The study will be conducted in conformity with the North-West University policies on research, such as “Policy on Plagiarism and Other Forms of Academic Dishonesty and Misconduct”,¹⁴⁵ “Faculty of Law’s Charter of Ethical and Professional Conduct” and “Regulations as enacted by the NWU Research Ethics Committee”. The author will always acknowledge all works that belong to others during the course of the study. In this way, the values of academic integrity and accountability will be maintained in this study.

¹⁴⁵ Policy on Plagiarism and other forms of Academic Dishonesty and Misconduct 2013 www.nwu.ac.za. See also “Conduct regarding plagiarism at the North-West University”.

1.10 Definition of technical terms

It is proposed to define a number of technical terms referred to in this study.

1.10.1 Refugee

A refugee is a person who has been granted asylum in a foreign country. Specifically, the term refugee refers to a person, who “owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country”.¹⁴⁶ It also applies to a stateless person who is outside the country of his or her formal residence and is unable or unwilling to return to it due to his/her fear¹⁴⁷ based on the above criteria.

Furthermore, the term refugee also applies to a person who is compelled to leave his or her place of residence in order to seek refuge in another country due to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or the whole of his or her country of origin or nationality.¹⁴⁸

A dependant of a recognised refugee is also a refugee. This includes “the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such a refugee.”¹⁴⁹

¹⁴⁶ Refugees Act note 32 above, s 3 (a).

¹⁴⁷ Refugees Act note 32 above, s 3 (a).

¹⁴⁸ Refugees Act note 32 above, s 3 (b).

¹⁴⁹ Refugees Act note 32 above, s 1.

1.10.2 Asylum seeker

An asylum seeker is a person who is seeking recognition as a refugee in a specific country and has not yet been granted asylum. He or she is entitled to an asylum seeker permit¹⁵⁰ from the relevant authorities of the Department of Home Affairs. An asylum seeker is entitled to basic human rights such as education and employment.

1.10.3 Economic migrants

Economic migrants are individuals who leave their countries of citizenship and go to another state in search of better economic opportunities. They are still protected by the country of their nationality through consular missions in the receiving states. Once they get a remunerated activity, they are entitled to equal treatment with nationals of the state of employment.¹⁵¹ By law, they cannot be discriminated against based on their country of origin.

1.10.4 Illegal migrants

Illegal migrants are persons who leave their country of origin without any documentation and search for better economic opportunities in another country. They do not respect or comply with immigration rules.

1.10.5 Internally displaced persons

According to the Kampala Convention,¹⁵² internally displaced persons (IDPs) “means persons or groups of persons who have been forced or obliged to flee or leave their

¹⁵⁰ Refugees Act note 32 above, s 22.

¹⁵¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Article 55.

¹⁵² African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009.

homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or habitual or human-made disasters, and who have not crossed an internationally recognised state border.”¹⁵³ They also include individuals who have fled their homes or place of residence due to natural disasters. They are people of concern to the international community and need humanitarian assistance as they are still in their home countries.

1.11 Organisation of the study

This thesis consists of seven interrelated chapters as follows: -

Chapter one is an introduction to the study. It contains the background to the study, problem statement, the aims and objectives of the study, basic hypothesis, rationale and justification of the study, literature review, research methodology, limitations of the study, ethical considerations, definition of technical terms and outline of the thesis structure.

Chapter two deals with the historical background and conceptual approaches to refugees. Specifically, the chapter deals with the historical approaches to refugees and their reception in the host communities. It investigates the slave trade, colonialism, religious approaches to refugees and the concept of *Ubuntu* in refugee matters. It also covers the root causes creating refugees, including the push factors in the country of origin and the pull factors in the host state.

¹⁵³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) note 152 above, Article 1 (k).

Chapter three deals with the international and regional responses to the refugees' situations. The international community places a significant response to the presence of refugees in the world. Some international conventions contain provisions that specifically protect refugees in many ways. The chapter also discusses the regional response to refugees' situation. The presence of refugees poses a challenge to different regions of the world. This chapter investigates how different regions have tried to find ways and means to accommodate refugees.

Chapter four discusses local integration of refugees in Tanzania, Zambia, the Netherlands and Germany. Tanzania had an Open Door Policy to welcome refugees from different countries on its territory. It has also naturalised some refugees from Rwanda, Somalia and Burundi. Zambia has welcome refugees since its independence and has issued permanent residence permits to some refugees from Angola and Rwanda. The current refugee regime in Zambia contains a provision for naturalisation of refugees. The Netherlands and Germany receive refugees and have integration courses to facilitate their integration. They both naturalise refugees to ensure that they become citizens with all benefits like any other citizen.

Chapter five deals with the local integration of refugees in South Africa. This chapter discusses the history of refugees and asylum procedure in South Africa. It also covers issues of access to asylum and challenges experienced by refugees, including closure of some refugee reception offices and unreasonable delays in asylum process. Furthermore, the chapter also investigates the issues of family reunification and unaccompanied minor children in refugee matters as well as cessation clause for certain group of refugees. It also deliberates or explores the

issue of access to permanent residence permits for refugees and their naturalisation in South Africa.

Chapter six covers the application of the rights in the Bill of Rights under the Constitution to refugees in South Africa. Specifically, it discusses in much more detail the right of access to adequate housing, right to work, right to education, right to social assistance and right to health care services for refugees in South Africa.

Chapter seven provides the conclusion, general recommendations and specific recommendations to address the gaps in the current situation.

1.12 Summary

This chapter has laid out the foundation upon which the entire thesis has been presented. It outlined the background, identified the problem under investigation, set out aims and objectives, stated basic hypothesis, identified rationale and justification, investigated literature review, presented research methodology, provided limitation and scope of the study, stated ethic and provided definition of technical terms.

The next chapter discusses the genesis of refugees in historical perspectives.

Chapter 2: Genesis of the refugee problem

2.1 Introduction

Refugees have existed from time immemorial as part of human society. Religious institutions have granted asylum to individuals fleeing from persecution.¹⁵⁴ Throughout history, Christian churches have created places of sanctuary to protect refugees from persecution and ensure their integrity. Victims of war and local conflicts as well as fugitives from political upheavals have always benefited from the sanctuaries that the church provided.¹⁵⁵ The slave trade has contributed to the creation of refugees.¹⁵⁶ European, Arab and American states used slavery to take people from Africa to develop their economies.¹⁵⁷ Apart from slavery, colonialism also contributed to produce refugees, especially in Africa. Most African states were colonised by some European states. In the process of fighting for their independence, people fled their countries and engaged in liberation struggles.¹⁵⁸

It is common cause that wars of liberation in general and those against racist minority regimes in Angola, Mozambique, Southern Rhodesia and South Africa spawned many refugees and asylum seekers in neighbouring countries such as

¹⁵⁴ P. Marfleet, "Understanding 'Sanctuary': Faith and Traditions of Asylum" (2011) 24(3) *Journal of Refugee Studies* p. 440 – 441.

¹⁵⁵ Marfleet note 154 above, p. 441.

¹⁵⁶ P. Nobel, "Refugees, Law, and Development in Africa" (1982) 3(1) *Michigan Journal of International Law*, p. 256.

¹⁵⁷ S.R. Cofield, "French-Caribbean Refugees and Slavery in German Protestant Maryland" (2006) 10 (3) *International Journal of Historical Archaeology* p. 282.

¹⁵⁸ Nobel note 156 above, p 273; A. Adepoju, "The Dimension of the Refugee Problem in Africa" (1982) 81 (322) *African Affairs* pp. 28 – 30; S.S. Chaulia, "The Politics of Refugee Hosting in Tanzania: From Open Door to Unsustainability, Insecurity and Receding Receptivity" (2003) 16 (2) *Journal of Refugee Studies* p. 155; M. Meredith, *The Fortunes of Africa – a 5,000 Year History of Wealth, Greed and Endeavour*, London, Simon & Schuster UK Ltd, 2014, pp 625 – 635.

Tanzania and Zambia.¹⁵⁹ Many Africans had to leave their countries and became refugees to avoid persecution due to colonialism.¹⁶⁰ The problem of refugees continued to persist even after the independence of African states due to violation of human rights and wars.¹⁶¹ This chapter deals with the impact of slavery, colonialism, religious institutions' approach towards the protection of refugees, the concept of *Ubuntu* in refugee matters and the current root causes of refugee flows.

2.2 The slave trade

Slavery had adversely affected the African continent as active people were taken from their societies largely from West Africa to the Americas.¹⁶² The slave trade destroyed African civilisations and enriched American, European and Arab states.¹⁶³ It had contributed to the development of economies of the developed states in the West to the detriment of the African continent. Slavery created instability in Africa as people fled to seek sanctuary or safety in different places; for instance, in the 17th and 18th centuries some slaves escaped and found refuge among various indigenous people of the Cape.¹⁶⁴ Netherlands occupied Mauritius from 1638 to 1710 and Malagasy slaves, upon their arrival in 1642, fled immediately

¹⁵⁹ Chaulia note 26 above, pp. 155 – 156; A. Simuchoba, "How did Zambia become the continent-leader in refugee integration?" *African Arguments*, 17 June 2014, <http://africanarguments.org/2014/06/17/zambia-continent-leader-in-refugee-integration-by-arthur-simuchoba/> (accessed on 1 June 2018).

¹⁶⁰ Nobel note 156 above, p. 256.

¹⁶¹ Nobel note 156 above, pp. 276 – 280; I. Salehyan and K.S. Gleditsch, "Refugees and the Spread of Civil War" (2006) 60 *International Organisation* p. 347.

¹⁶² N. Nunn and L. Wantchekon, "The Slave Trade and the Origins of Mistrust in Africa" (2011) 101 *American Economic Review* p. 3221; ON. Bolland, "Colonization and Slavery in Central America" (1994) 15 (2) *Slavery & Abolition* p. 11; C.M. Kusimba "Archaeology of Slavery in East Africa" (2004) 21 (2) *African Archaeological Review* p. 66.

¹⁶³ Nobel note 153 above, p. 256.

¹⁶⁴ E.A. Alpers, "Flight to Freedom: Escape From Slavery Among Bonded Africans in the Indian Ocean World, c 1750 -1962" (2003) 24 (2) *Slavery and Abolition* p. 53.

into the interior and made the island purely impossible to administer.¹⁶⁵ Flights of slaves were also common place in Seychelles¹⁶⁶ and Mozambique.¹⁶⁷ Furthermore, Zambesia (part of modern day Mozambique) experienced slavery and there was a possibility for slaves to escape.

The reasons for flights of slaves were “maltreatment, changes of ownership, and the possibility of overseas sale”.¹⁶⁸ In the north of Zambesia, there existed Mount Morumbala that provided a refuge for escaped slaves and they were welcomed by local African chiefs.¹⁶⁹ In Kenya, escaped slaves managed to create their own communities in the coast area in the last decades of the 19th century.¹⁷⁰ They were commonly known as “*watoro*”, a Swahili noun that means “run away”. *Watoro* also established other strong communities in the southern coast of Kenya.¹⁷¹ Slavery had created a culture for people to flee their villages in order to avoid being captured and sold off to slave traders and become refugees.¹⁷² This was one way to escape slavery and find refuge in neighbouring societies or other areas. Thus, without doubt, the slave trade was one of the original root causes of the refugee problems in Africa.

The African slave trade occurred for almost a period of 500 years, from 1400 to 1900 and affected individuals and communities¹⁷³ along the West Coast and to some extent East Coast as well. During this time, Africa experienced four simultaneous

¹⁶⁵ Alpers note 164 above, p. 53.

¹⁶⁶ Alpers note 164 above, p. 54.

¹⁶⁷ Alpers note 164 above, p. 55.

¹⁶⁸ Alpers note 164 above, p. 55.

¹⁶⁹ Alpers note 164 above, p. 55.

¹⁷⁰ Alpers note 164 above, p. 61.

¹⁷¹ Alpers note 164 above, p. 62.

¹⁷² Nobel note 156 above, p. 256.

¹⁷³ N. Nunn, “The Long-term Effects of Africa’s Slave Trades” (2008) 123 (1) *The Quarterly Journal of Economics* p. 140.

slave trades: Trans-Atlantic, trans-Saharan, Red Sea and Indian Ocean slave trades.¹⁷⁴ The production of slaves arose “through domestic warfare, raiding, and kidnapping” and took active individuals into slavery. The largest slave trade was the trans-Atlantic where “slaves were shipped from West Africa, West-Central Africa, and Eastern Africa to the European colonies in the New World.”¹⁷⁵ Luanda port dispatched the highest number of slaves across the Atlantic.¹⁷⁶ Most slaves from Angola and Kongo went to Brazil to work in the plantations.¹⁷⁷ The states of the North America also benefited from the slave trade as they received a significant number of slaves from Africa. The trans-Atlantic slave trade took nearly 12 million slaves from Africa.¹⁷⁸ Most of these slaves were taken mainly from Benin, Nigeria, Zaire (now Democratic Republic of Congo), Congo, Angola and Ghana.¹⁷⁹ Nigeria and Benin were known as the “Slave Coast”¹⁸⁰ as a great number of slaves were taken from this area.

The Trans-Saharan slave trade took slaves “from south of the Saharan desert to Northern Africa.”¹⁸¹ Other slaves were taken from the interior of Africa to the Middle East and India during the Red Sea slave trade. Furthermore, “in the Indian Ocean slave trade, slaves were also taken from Eastern Africa and shipped either to the Middle East and India or to plantation islands in the Indian Ocean.”¹⁸² It is estimated that 6 million slaves were exported during these three slave trades.¹⁸³ Ethiopia and

¹⁷⁴ Nunn note 173 above, p. 141. The Red Sea slave trade was also commonly known as Arab slave trade.

¹⁷⁵ Nunn note 173 above, p. 141.

¹⁷⁶ Meredith note 158 above, p. 124.

¹⁷⁷ Meredith note 158 above, p. 125.

¹⁷⁸ Meredith note 158 above, p. 194.

¹⁷⁹ Nunn note 173 above, p. 151; Meredith note 155 above, pp. 125 – 126.

¹⁸⁰ Nunn note 173 above, p. 151.

¹⁸¹ Nunn note 173 above, p. 141; Meredith note 155, p. 440.

¹⁸² Nunn note 173 above, p. 142.

¹⁸³ Nunn note 173 above, p. 142.

Sudan were the top exporting slave countries as they supplied most of the slaves that were shipped during the Red Sea and Saharan slave trades.¹⁸⁴ South Africa and Namibia did not experience slavery on a large scale.¹⁸⁵

Slavery in Africa was unique and has detrimentally affected African communities, as people from the same or similar ethnicities enslaved one another.¹⁸⁶ This has resulted or produced social and ethnic disintegration, political insecurity and fading of states as well as corruption of the judiciary.¹⁸⁷ Most of the slaves were captured as villages or states raided one another.¹⁸⁸ Kusimba argues that “insecurity confined people within ethnic boundaries constructing spheres of interaction.”¹⁸⁹ Due to this practice or method, the slave trade can be seen as an important factor to explain the current ethnic fragmentation in Africa.

During slavery, there was apparent insecurity and individuals and states needed “weapons, such as iron knives, spears, swords or firearms, to defend themselves.”¹⁹⁰ They could only obtain the necessary weapons from European slave traders in exchange for slaves who were captured through kidnappings. This stimulated the slave trade and its instability, thus there was a quest to enslave others for the protection of oneself.¹⁹¹ Furthermore, members of one community raided and

¹⁸⁴ Nunn note 173 above, p. 151.

¹⁸⁵ Nunn note 173 above, p. 151; P. Manning, “Contours of Slavery and Social Change in Africa” (1983) 88 (4) *American Historical Review* p. 839.

¹⁸⁶ Nunn note 173 above, p. 142; Meredith note 158 above, p. 78.

¹⁸⁷ Nunn note 173 above, p. 142.

¹⁸⁸ Nunn note 173 above, p. 142. See also P.E. Lovejoy, “Background to Rebellion: The Origins of Muslim Slaves in Bahia” (1994) 15 (2) *Slavery & Abolition* 151.

¹⁸⁹ Kusimba note 162 above, pp. 66 – 67.

¹⁹⁰ Nunn note 173 above, p. 142.

¹⁹¹ Nunn note 173 above, pp. 142 - 143. See also A. Mahadi, “The Aftermath of the Jihad in the Central Sudan as a Major Factor in the Volume of the Trans-Saharan Slave Trade in the Nineteenth Century” in E. Savage (ed.) *The Uncommon Market: Essays in the Economic History of the Atlantic Slave Trade*, London, Frank Cass, 1992, p. 111; W. Hawthorne, “The Production

kidnapped other community members to be sold into slavery.¹⁹² This tactic disintegrated many communities in various ways.

In the 19th century, the slave trade has fragmented many African kingdoms.¹⁹³ For instance, the Kingdom of Kongo in West-Central Africa was highly affected. Many Kongolese citizens were often kidnapped and sold to Portuguese slave traders, in the process threatening social order as well as the King's authority.¹⁹⁴ The King of Kongo, Affonso, complained to Portugal in 1526 and protested that there were too many slave traders in all the corners of his country and they were weakening the country. In addition, every day individuals were enslaved including member of the royal family.¹⁹⁵ Slavery disintegrated the structure of the African communities in various activities including politics.

Slaves were needed in their places of destination for different factors.¹⁹⁶ For instance, African slaves were needed in the West Indies and the southern United States to work on the sugar and tobacco plantations.¹⁹⁷ The climate in these areas facilitated the growing of these commodities that were highly valued and globally traded, thus they attracted good returns for farmers. In Brazil, the demand for slaves was stimulated by the existence of gold and silver mines.¹⁹⁸ The Northern Sahara, Arabia and Persia needed slaves to work in the salt mines. For the Red Sea area,

of Slaves Where There Was No State: The Guinea-Bissau Region, 1450-1815" (1999) 20 *Slavery & Abolition* pp. 108 – 109.

¹⁹² Nunn note 173 above, p. 143.

¹⁹³ PU. Mbajedwe, "Africa and the Trans-Atlantic Slave Trade" in T. Flola (ed.) *Africa volume I: African History Before 1885*, Durham, NC: Carolina Academic Press, 2000, pp. 341 – 342.

¹⁹⁴ Nunn note 173 above, p. 143.

¹⁹⁵ Nunn note 173 above, p. 143.

¹⁹⁶ Nunn note 173 above, p. 160.

¹⁹⁷ Nunn note 173 above, p. 160.

¹⁹⁸ Nunn note 173 above, p. 160.

slaves were wanted to work as pearl dives.¹⁹⁹ Thus, slaves were used as cheap labour to develop different areas of the planet to the detriment of the African continent, including fragmentation and ethnic conflicts.

It is undebatable that the slave trade is an important factor that has contributed to the creation and existence of refugees. During slavery, African communities, states and tribes experienced disintegration and constant divisions. This, in turn, has destroyed social cohesion among different ethnicities and communities. Apart from the slave trade, colonialism has also played an important role on the production of refugees in different parts of the world.

2.3 Colonialism

Colonialism is an important factor in the current refugee problem.²⁰⁰ European states met at the Berlin Conference in 1884 and practically sub-divided the African continent among themselves.²⁰¹ The European states that colonised Africa were Great Britain, France, Germany, Belgium, Portugal, Italy and Spain.²⁰² These countries drew the frontiers for African states and did not consider people who were affected by their decisions. The current political map of Africa indicates that frontiers cut across “tribes, clans and families and split up ecological units, pasture grounds

¹⁹⁹ Nunn note 173 above, p. 160.

²⁰⁰ Nobel note 156 above, p. 256; L. Mayblin, “Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees” (2014) (21 (3) *Journal of Historical Sociology* pp. 427 –428; Chaulia note 155 above, p 148 – 149; O. Bakewell *et al* “South-South Migration and Human Development: Reflections on African Experiences” Human Development Research Paper 2000/07 p. 14. Available at http://www.albacharia.ma/xmlui/bitstream/handle/123456789/31931/HDRP_2009_07.pdf?sequence=1 (accessed on 3 April 2018).

²⁰¹ Nobel note 156 above, p. 256.

²⁰² Nobel note 156 above, p. 287, fn. 6; Meredith note 158 above, p. 393; D. Cogneau, “Colonisation, School and Development in Africa an Empirical Analysis” 2003 *DIAL* p. 10.

and market areas”.²⁰³ These artificial colonial boundaries had deeply affected the tribal system. In some cases, European colonial masters chose chiefs to administer African colonies for their own benefits.²⁰⁴ The colonial masters controlled all the activities in their African colonies; however, African people were aggrieved by this colonial conquest and subjugation and wanted to govern themselves.

In the process of attaining independence, African people ignited anti-colonial struggles and wars of liberation, which in turn spawned refugee flows.²⁰⁵ For instance, prolonged liberation wars in Algeria, Eritrea / Ethiopia, Angola, Zimbabwe, Mozambique and Namibia,²⁰⁶ to just name a few, produced refugees across African countries and beyond. Freedom fighters had to flee from their own countries in order to organise themselves and they were warmly received in independent states. For instance, Tanzania welcomed many freedom fighters from different African states such as Zimbabwe, South Africa, Namibia and Mozambique.²⁰⁷ They formed political parties and secured bases in Tanzania so that they could challenge their colonial masters. Tanzania developed a reputation of having received the largest share of oppressed people on the African continent. In similar vein, Zambia also hosted many refugees and freedom fighters from Angola, Mozambique, Zimbabwe,

²⁰³ Nobel note 156 above, p. 257; B.J. Berman, “Ethnicity, Patronage and the African State: the Politics of Uncivil Nationalism” (1998) 97 *African Affairs* pp. 308 – 309 (pp. 305 – 341).

²⁰⁴ Nobel note 156 above, p. 257.

²⁰⁵ Chaulia note 158 above, p. 155; Adepoju note 158 above, p. 22.

²⁰⁶ Bakewell *et al*/note 200 above, p. 14.

²⁰⁷ Chaulia note 158 above, p. 155.

Namibia and South Africa.²⁰⁸ Today, Zambia is still home to thousands of refugees from the civil wars in the Great Lakes Region and other African countries.²⁰⁹

When African countries gained independence, they inherited “unresolved conflicts, territorial disputes, latent and acute economic crises, unnatural frontiers and ethnic combinations”.²¹⁰ In addition, brutal military leaders emerged in the post-colonial era and contributed to the creation of refugees on the African continent. Civil wars occurred in many African states and caused undue sufferings to human beings. For instance, civil wars in Nigeria, Sudan and Somalia forced millions of people to flee across the borders and became refugees in neighbouring countries in Africa over generations.²¹¹ In addition, millions of people left their homes and became internally displaced persons in their countries of origin. This phenomenon of internally displaced people is very common in the Great Lakes Region of East and Central Africa.

Due to oppression by colonial masters, people expected material improvements at independence apart from political freedom.²¹² However, these expectations remain largely unfulfilled as the newly independent states did not have sufficient resources

²⁰⁸ M. Makhema, “Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)”, *Social Protection & Labour the World Bank*, 2009, p. 13; A. Hansen, “Refugee Dynamics: Angolans in Zambia 1966 to 1972”, (1981) 15 (1/2) *The International Migration Review*, p. 183.

²⁰⁹ C. Wachiaya, “UNHCR Chief Applauds Zambia’s Openness to Refugees”, 2019. Available at <https://reliefweb.int/report/zambia/unhcr-chief-applauds-zambia-s-openness-refugees> (accessed on 20 November 2019).

²¹⁰ Nobel note 156 above, p. 257.

²¹¹ Bakewell et al note 200 above, p. 14; S. Adejumobi, “Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa” (2001) 23 (1) *Human Rights Quarterly* p. 163; G Atim, “The Impact of Refugees on Conflicts in Africa” (2013) 14(2) *IOSR Journal of Humanities and Social Science* pp. 7 – 8.

²¹² Bakewell *et al*/note 200 above, p. 14.

to meet the basic needs of their people. Instead the instability and dissatisfaction²¹³ that followed the attainment of political independence created innumerable refugee problems on the African continent. Armed conflicts, civil unrests, massive violations of human rights, resistance to participation in governance, poor management of public affairs,²¹⁴ including corruption often characterise the post-colonial African states and gave rise to refugees in Africa and beyond. Thus colonialism and post-independence political crises are significant root causes of refugees in Africa.

Independent African states met in Addis Ababa, Ethiopia, in 1963 and created the Organisation of African Unity (OAU). One of the objectives of the OAU was to eradicate all forms of colonialism in Africa.²¹⁵ Member states agreed to assist other African states which were still under colonial rule to achieve independence. They received refugees who fled from colonial oppression from other states. Most of these refugees formed liberation movements and fought for their independence.²¹⁶ The United Nations also advocated for colonised states to attain their complete independence and ensure sovereignty over their territories.²¹⁷ Once they achieved independence for their states, refugees could voluntarily repatriate and return to build their countries of origin. This occurred in the case of Angolan refugees in Zambia; Mozambican refugees in South Africa²¹⁸ and Burundian refugees in

²¹³ Bakewell *et al*/note 200 above, p. 14; F. Cooper, "Conflict and Connection: Rethinking Colonial African History" (1994) 19 (5) *The American Historical Review* p 1520.

²¹⁴ E. Rwamatwara, "Forced Migration in Africa: a Challenge to Development" (2005) 8 *Stichproben*, p. 188.

²¹⁵ OAU Charter 1963, Article II (d).

²¹⁶ P.J. Travers, "Legal Effect of United Nations Action in Support of the Palestine Liberation Organisation and the National Liberation Movements of Africa" (1976) 17 *Harvard International Law Journal* pp. 562 – 565; Meredith note 155 above, pp. 625 – 635.

²¹⁷ Declaration on the Granting of Independence to Colonial Countries and People, 1960, para 5 (General Assembly Resolution 1514 (XV)).

²¹⁸ T. Polzer, "Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa" (2007) 19 *International Journal of Refugee Law*, pp. 33 – 35.

Tanzania. In addition, African states adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa²¹⁹ to provide a legal framework for refugees on the African continent. African states were sympathetic to refugees who fled colonialism and had a moral duty to assist them to achieve independence for their countries.²²⁰ However, the problem of refugees continue to exist even after the end of colonialism in Africa. Currently, Africa is one of the largest refugee-producing areas due to civil wars,²²¹ ethnic conflicts²²² and violation of human rights by government officials in some of the African states.

Apart from the African continent, Asia and America (both South and North) had also been colonised by European states. Nationalists and freedom fighters such as Mahatma Ghandi²²³ and Pandit Nehru in India, Sukarno²²⁴ in Indonesia and Ho Chi Minh²²⁵ in Vietnam had to wage wars of independence for their respective countries. During these wars, people had to flee in order to avoid political persecution, resulting in refugees seeking safe havens elsewhere.

Refugee flows have been occurring whenever there are conflicts in any part of the world.²²⁶ In 1984, the Organisation of American States met in Cartagena de Indias

²¹⁹ OAU Convention Governing the Specific Aspects of Refugees in Africa, 1969.

²²⁰ OAU Charter 1963, Article III (6): Member states of the OAU solemnly declare their adherence to the "Absolute dedication to the total emancipation of the African territories which are still dependent".

²²¹ E. Elbadawi, and N. Sambanis, "Why Are There so Many Civil Wars in Africa? Understanding and Preventing Violent Conflict" (200) 9 (3) *Journal of African Economies* p. 244; H. Buhaug, and JK. Rod, "Local Determinants of African Civil Wars, 1970 – 2001" (2006) 25 *Political Geography* p. 332.

²²² Adejumobi note 211 above, p. 149.

²²³ P. Nandi, "Visions of Nationhood and Religiosity Among Early Freedom Fighters in India" in R. Robinson (ed.) *Sociology of Religion in India*. New Delhi, Sage Publications, 2004, p. 38.

²²⁴ T. Abdullah, *Indonesia Towards Democracy*. Pasir Panjang, ISEAS Publishing, 2009, p. 193.

²²⁵ S.C. Taylor, *Vietnamese Women at war: Fighting for Ho Chi Minh and the Revolution*. Kansas, University Press of Kansas, 1999, p. 10.

²²⁶ L. Mayblin, "Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees" (2014) 27(3) *Journal of Historical Sociology* p. 427.

and adopted the “Cartagena Declaration on Refugees”.²²⁷ They extended the definition of “refugee” from the provisions of 1951 Refugee Convention and its 1967 Protocol to include persons fleeing “their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”²²⁸ This definition accommodates the events that occur on the American continent. Briefly, colonialism and resultant wars of independence have contributed to the creation of refugees worldwide.

2.4 Religious approach to refugees

Throughout the history of human kind, religion has played a significant role in providing sanctuary for individuals who fled persecution or oppression.²²⁹ Sacred texts and religious teachings provide the roots of the concept of asylum.²³⁰ From time immemorial, religious traditions have emphasised the sanctity of temples and other sacred places of worship and divine shrines.²³¹ For instance, Christianity encourages its adherents to provide hospitality to individuals in need.²³² In fact, hospitality is a framework for Christian Communities to respond to the needs of

²²⁷ Cartagena Declaration on Refugees, Colloquium on International Protection of Refugees in Central America, Mexico and Panama, 1984.

²²⁸ Cartagena Declaration on Refugees note 227 above, part III, para 3. On the African continent, see OAU Convention Governing Specific Aspects of Refugees in Africa, 1969, Article 1 (2).

²²⁹ G. Hoffstaedter, “Refugees, Islam, and the State: the Role of Religion in Providing Sanctuary in Malaysia” (2017) 15 (3) *Journal of Immigrant and Refugee Studies* p. 295; E.M. Gozdzia and D.J. Shandy, “Editorial Introduction: Religion and Spirituality in Forced Migration” (2002) 15 (2) *Journal of Refugee Studies* p. 129.

²³⁰ S. Cheung, “Religious Foundations of Asylum and the Challenges of Contemporary Practice”, 2009, 14. Available at http://humanrights.mofidu.ac.ir/article_21223_8e2e80dfb29d9a61737887c67e88d840.pdf (accessed on 20 February 2018).

²³¹ Cheung note 230 above, p. 14.

²³² C.D. Pohl, “Responding to Strangers: Insights From the Christian Tradition” (2006) 19.1 *Studies in Christian Ethics* p. 81; L. Bretherton, “Tolerance, Education and Hospitality: A Theological Proposal” (2004) 17.1 *Studies in Christian Ethics* pp. 80 – 103.

refugees and asylum seekers as well as other vulnerable people such as homeless and people with disabilities.²³³ Hospitality can also assist to resolve racial and ethnic differences in a particular community.

Apart from Christianity, Islam inspires its followers to be one's neighbour and grants asylum to non-Muslim people who flee persecution in times of war and take refuge in the country of Islam (*dar al-islam*).²³⁴ Other religions, such as Hinduism and Buddhism, provide the tradition of providing asylum for people fleeing persecution in their own places.²³⁵ Asylum appears in the sacred texts as well as religious teachings that endorse the link between religion and the concept of asylum.²³⁶ The notion of asylum in Christianity and Islam is discussed in much more detail below.

2.4.1 Aspects of asylum in Christian traditions

Christianity provides for asylum in its sacred teachings for people fleeing oppression or persecution ranging from Moses²³⁷ to Jesus.²³⁸ Christianity provides for the inviolability of holy places such as temples and provision of hospitality to strangers. The concept of asylum was not mentioned in ancient scriptures until the reign of King Solomon.²³⁹ Prior to the leadership of King Solomon, the concept of asylum did not exist and the Law of Moses applied. During this period, individual retribution was a reality and there was no recourse to asylum.²⁴⁰ For instance, everyone who committed a crime of murder had to be killed in revenge by the society.

²³³ Pohl note 232 above, p. 83.

²³⁴ Pohl note 232 above, p. 83.

²³⁵ Pohl note 232 above, p. 83.

²³⁶ Cheung note 232 above, p. 15.

²³⁷ Amplified Bible, Exodus 2: 11 – 25.

²³⁸ Holy Bible, Matthew 2: 13 – 23.

²³⁹ Cheung note 232 above, p. 16.

²⁴⁰ Cheung note 232 above, p. 16; King James Version Bible, Matthew 5: 38.

There are incidents in the Bible that indicate that asylum was part of Christianity. For instance, in Deuteronomy,²⁴¹ God commanded His people to set apart three cities where individuals (manslayers) could flee and live. Any individual who committed culpable homicide could flee to one of the refuge cities and live.²⁴² However, any person who committed murder could not benefit from asylum. He or she had to be extradited so that he or she could face justice and be killed.²⁴³ The principle of extradition of criminals that committed murder applied so that the asylum system could not be used to escape from justice. The institution of asylum existed to protect persecuted individuals²⁴⁴ and could not be used by fugitives from justice or criminals.

In the Book of Number 35,²⁴⁵ God commanded Israelites to create some cities for refuge for manslayers to flee to and live in safety. God also instructed Moses to tell Israelites that when they reached the land of Canaan, they should create cities of refuge for themselves so that any person who committed culpable homicide might flee there.²⁴⁶ Thus, wrongdoers could seek asylum in the city of refuge until they had a fair trial before the congregation.²⁴⁷ For the purpose of asylum, six cities had to be set aside.²⁴⁸ The institution of asylum was adopted to ensure the protection of these wrongdoers and to avoid retribution. Outside the city of refuge, a manslayer

²⁴¹ Amplified Bible note 232 above, Deuteronomy 19: 3 – 4; 7.

²⁴² Amplified Bible note 232 above, Deuteronomy 19: 5.

²⁴³ Amplified Bible note 232 above, Deuteronomy 19: 12.

²⁴⁴ R. Boed, "The State of the Right of Asylum in International Law" (1994) 5(1) *Duke Journal of Comparative and International Law* p. 16; *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68.

²⁴⁵ Amplified Bible note 237 above, Number 35: 6.

²⁴⁶ Amplified Bible note 237 above, Number 35: 9 – 11.

²⁴⁷ Amplified Bible note 237 above, Number 35: 12.

²⁴⁸ Amplified Bible note 237 above, Number 35: 13 – 15.

could be killed by an avenger as there was no protection.²⁴⁹ People who were criminals could live and stay in the city of refuge for their safety.

According to the Old Testament, Moses killed an Egyptian who was oppressing a Hebrew slave and fled from Pharaoh's palace to Midian.²⁵⁰ He lived in Midian and returned to Egypt when God instructed him to go and liberate His people from slavery. At this time, it was safe for Moses to return to Egypt. God also commanded Israelites to love strangers as they loved themselves as they were also strangers and exiles in the land of Egypt.²⁵¹ Compassion for refugees is emphasised in the Christian education, literatures and ethics.

In the New Testament, Jesus also fled from Judea (Bethlehem) to Egypt to escape persecution from King Herod as he wanted to assassinate Him.²⁵² Herod sent his soldiers to Bethlehem to exterminate all male children aged two years and below²⁵³ in the belief that Jesus would also perish in the operation. Many people wept for the loss of their children. However, Jesus lived in Egypt as a refugee until King Herod passed away. He then returned to Nazareth²⁵⁴ and lived there as the threat to his life had disappeared.

Christianity has established the institution of asylum and was used to provide protection to individuals who were persecuted. Currently, Christianity still plays a significant role in the management of refugee affairs as it provides for humanitarian

²⁴⁹ Amplified Bible note 237 above, Number 35: 27.

²⁵⁰ Amplified Bible note 237 above, Exodus 2: 15.

²⁵¹ Amplified Bible note 237 above, Leviticus 19: 34; E. Wilson, "Much to be Proud of, Much to be Done: Faith-based Organisation and the Politics of Asylum in Australia" (2011) 24(3) *Journal of Refugee Studies* p. 551.

²⁵² Amplified Bible note 237 above, Matthew 2: 13.

²⁵³ Amplified Bible note 237 above, Matthew 2: 16.

²⁵⁴ Amplified Bible note 237 above, Matthew 2: 23.

assistance. Wilson has identified that faith-based organisations take responsibility for social welfare to assist refugees and asylum seekers in Australia.²⁵⁵ These organisations play an important role in accommodating and promoting refugees in their activities.

Parsitau²⁵⁶ has studied the multiple ways in which religious belief can support individuals displaced by violence and conflict. He opines that faith based organisations have played a critical and humanitarian role in the lives of internally displaced persons (IDPs) in Kenya.²⁵⁷ Religious belief has also assisted IDPs to plan for the future and endure the perilous conditions they are living in. On the humanitarian side, religious bodies support and encourage refugees in various ways such as basic necessities of life, including food, clothes and shelter. Today, states ensure the legal protection of refugees on international, regional and national levels. However, Christianity has initiated asylum even before states were created.

2.4.2 Approach to asylum in Islamic traditions

Islam relates the concept of hospitality to the inhabitants of the desert and requires the believers to provide protection to strangers.²⁵⁸ The humanitarian principles are codified in the Qur'an and they have a link to asylum.²⁵⁹ Firstly, in 615, Prophet Mohammad was persecuted due to his conversion to Islam and had to flee to

²⁵⁵ Wilson note 251 above, p. 560.

²⁵⁶ DS. Parsitau, "The Role of Faith Based Organisation Among Internally Displace Persons in Kenya" (2011) 24(3) *Journal of Refugee Studies* p. 510.

²⁵⁷ Parsitau note 256 above, p. 510.

²⁵⁸ Cheung note 230 above, p. 18; K. Elmadmad, "Asylum in Islam and in Modern Refugee Law" (2008) 27 (2) *Refugee Survey Quarterly* p. 52.

²⁵⁹ Cheung note 230 above, p. 18.

Abyssinian where he received protection by King Negus.²⁶⁰ Secondly, Prophet Mohammad faced persecution or hostility from Qurayshi and had to leave Mecca to Yathrib to seek asylum.²⁶¹ He was well received and protected in his activities. The migration of Prophet Mohammad from Mecca to Medina signifies the movement from the land of oppression to Islam²⁶² to the land of asylum. This demonstrates that the concept of asylum has roots in Islamic teachings from its inception.

Islamic law deals with the institution of asylum and protects asylum-seekers (“*Al mustamin*”) to ensure their dignity and respect.²⁶³ Asylum for believers and non-believers was clearly provided for in the Surah At – Taubah (verse 6) which reads as follows: “and if anyone of the disbelievers seeks your protection then grant him protection so that he may hear the word of Allah, and then escort him to where he will be secure”. The principle of *non-refoulement* was recognised under Islamic law as no asylum seeker or refugee could be repatriated against his or her will.²⁶⁴ The extradition of an asylum-seeker was proscribed and this is a cornerstone or cardinal principle of international refugee law.²⁶⁵ Thus, there is a duty on Islamic states to receive and protect refugees in their territories.

Islamic states have adopted some international conventions to provide assistance and to accommodate refugees. For instance, the Islamic Council of Europe adopted

²⁶⁰ Cheung note 230 above, p. 18; N. Kirmani and A.A. Khan, “Does Faith Matter: An Examination of Islamic Relief’s Work with Refugees and Internally Displaced Persons” (2008) 27 (2) *Refugee Survey Quarterly* p. 42.

²⁶¹ Cheung note 230 above, p. 18.

²⁶² Cheung note 230 above, p. 18.

²⁶³ Statement by Mr Antonio Guterres, United Nations High Commissioner for Refugees to the League of Arab States, Cairo, 4 March 2007. Available on <http://www.unhcr.org/admin/hcspeeches/45ed1ea64/statement-mr-antonio-guterres-united-nations-high-commissioner-refugees.html> (accessed on 19 February 2018).

²⁶⁴ Cairo Declaration of Human Rights in Islam, 1990, Article 12.

²⁶⁵ UN Convention Relating to the Status of Refugees note 23 above, Article 33.

the Universal Islamic Declaration of Human Rights.²⁶⁶ Article 9 of this Declaration provides for the right to asylum and states that “Every persecuted or oppressed person has the right to seek refuge and asylum.” Every human being can seek asylum without any discrimination based on “race, religion, colour and sex.”²⁶⁷ The Cairo Declaration of Human Rights in Islam²⁶⁸ provides for every individual persecuted the right to seek asylum in another country. The receiving country has a duty to protect the asylum seeker until his or her safety can be guaranteed. However, the protection does not extend to a person who has committed “an act regarded by Shari’ah as a crime.”²⁶⁹ The institution of asylum explicitly excludes criminals from being protected. This ensures the availability of asylum to innocent persons who are persecuted in their home countries.

The Arab Charter on Human Rights²⁷⁰ provides that: “Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.”²⁷¹ This Charter also maintains the sanctity of asylum as fugitives are overtly excluded from protection. The principle of *non-refoulement* is also maintained as political refugees cannot be forcibly repatriated to their countries of origin.

²⁶⁶ Universal Islamic Declaration of Human Rights, 1981.

²⁶⁷ Universal Islamic Declaration of Human Rights, 1981, Article 9.

²⁶⁸ Cairo Declaration on Human Rights in Islam, 1990, Article 12.

²⁶⁹ Cairo Declaration on Human Rights in Islam note 268 above, Article 12.

²⁷⁰ Arab Charter on Human Rights, 2004.

²⁷¹ Arab charter on Human Rights note 270 above, Article 28.

The Declaration on the Protection of Refugees and Displaced Persons in the Arab World²⁷² reinforces the principle of *non-refoulement*²⁷³ and calls for the League of Arab States to create and adopt an Arab Convention relating to refugees.²⁷⁴ The Arab Convention on Regulating Status of Refugees in the Arab countries was adopted in 1994 and emphasises the sanctity of asylum by excluding fugitives.²⁷⁵ It also highlights the principle of *non-refoulement*.²⁷⁶ Thus, Islam has respected the institution of asylum over the centuries which system continues to play a significant role in the protection of refugees as well as asylum seekers in Islamic countries.

2.5 Concept of *Ubuntu* in refugee matters

Ubuntu exists in various forms in many African societies, “specifically among the Bantu languages of Eastern, Central and Southern Africa”.²⁷⁷ It means humanness as it applies to the inner core of an individual values²⁷⁸ in his or her activities. *Ubuntu* refers to personhood and morality in its most fundamental sense.²⁷⁹ It manifests itself as *Umuntu ngumuntu ngabantu* (a person is a person through other persons) and describes “the significance of group solidarity on survival issues so central to the survival of communities”.²⁸⁰ Mokgoro J stated that *Ubuntu* enveloped the key

²⁷² Declaration on the Protection of Refugees and displaced Persons in the Arab World, 1992.

²⁷³ Declaration on the Protection of Refugees and Displaced Persons in the Arab World note 272 above, Article 2.

²⁷⁴ Declaration on the Protection of Refugees and Displaced Persons in the Arab World note 272 above, Article 2.

²⁷⁵ Arab Convention on Regulating Status of Refugees in the Arab Countries, 1994, Article 2.

²⁷⁶ Arab Convention on Regulating Status of Refugees in the Arab Countries note 275 above, Article 9.

²⁷⁷ T. Muruthin, “African Approaches to Building Peace and Social Solidarity” 2006 *African Journal on Conflict Resolution* p. 17.

²⁷⁸ R. Dolamo, “Batho / Ubuntu: the Heart of African Ethics” (2013) 112 (1) *Scriptura* p. 2.

²⁷⁹ *S v Makwanyane and Another* 1995 3 SA 391 (CC), para 308.

²⁸⁰ *S v Makwanyane and Another* note 279 above, para 308; C.E. Oppenheim, “Nelson Mandela and the Power of Ubuntu” (2012) 3 *Religions* pp. 369 – 370; T. Bennett, “Ubuntu: An African Equity” (2011) 14 (4) *PELJ* p. 34; M. Metz, “Ubuntu as a Moral Theory and Human Rights in South Africa” (2011) 11 *African Human Rights Law Journal* pp. 536 – 537.

values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity and that in its fundamental sense it denoted humanity and morality.²⁸¹ The need for *Ubuntu* is emphasised in South African post-apartheid constitutional order to reflect the human dignity of every human being that needs to be protected.

Ubuntu is an ancient African world-view based on the values of humanness and compassion to ensure a happy community life in the family.²⁸² It originated in Egypt in 1500 BCE and spread to East, Central and Southern Africa through migration.²⁸³ The concept of *Ubuntu* has been internalised into the lives of African communities and has been used to receive and care for strangers,²⁸⁴ including refugees, in African societies.

African communities accommodate individuals who do not have relatives and ensured that they are integrated into the community.²⁸⁵ They acquire clan names and become members of the community. For example, in Eastern Cape, a refugee from Rwanda, Jean Baptist, was adopted by a community and received a Xhosa name "Thamsanqa".²⁸⁶ The same practice also applied to catholic missionaries in Eastern Cape, South Africa. They felt accommodated into the adoptive communities.²⁸⁷ This highlights that an individual needs a community to find complete fulfilment of his or her life.

²⁸¹ *S v Makwanyane and Another* note 279 above, para 308.

²⁸² Dolamo note 278 above, p. 2.

²⁸³ Dolamo note 278 above, p. 2.

²⁸⁴ M. Mnyaka and M. Motlhabi, "The African Concept of Ubuntu / Batho and its Socio-Moral Significance" (2005) 3. *BT* p. 215.

²⁸⁵ Mnyaka and Motlhabi note 284 above, p. 222.

²⁸⁶ Mnyaka and Motlhabi note 284 above, p. 222.

²⁸⁷ Mnyaka and Motlhabi note 284 above, p. 222.

According to African culture, Africans are tolerant of strangers and makes them feel welcome in the communities.²⁸⁸ Refugees have always been received with compassion and kindness as they are poor and destitute.²⁸⁹ They get special treatment and are allocated land to till so that they can sustain themselves.²⁹⁰ Some refugees assimilate to the culture of the host community and intermarriages become prevalent to ensure their security.

Some African proverbs encourage people to show hospitality and open door to strangers.²⁹¹ For instance, “unyawo alunampumlo (Xhosa) / looto ha lena nko (Sotho) (literally, the foot has no nose).”²⁹² This proverb means that one should not harm another through his or her deeds. Anybody can be a stranger in another land at any time. The proverbs encourages people to be generous to and support strangers.²⁹³ In South Africa, a refugee from Sudan stated:

The manner in which we now look to you for help may be the way you will be looking to others tomorrow. We must realise that whatever we are able to do for people on the move while we have the opportunity, we are not for ourselves as well as others.²⁹⁴

²⁸⁸ Mnyaka and Motlhabi note 284 above, p. 228; B. Nussbaum, “African Culture and Ubuntu – Reflections of a South African in America” (2003) 17 (1) *Perspectives* p. 4.

²⁸⁹ Mnyaka and Motlhabi note 284 above, p. 229; K. Lauterbach, “Religion and Displacement in Africa – Compassion and Sacrifice in Congolese Churches in Kampala, Uganda” (2014) 21 *Religion & Theology* pp. 302 – 303.

²⁹⁰ Mnyaka and Motlhabi note 284 above, p. 229.

²⁹¹ Mnyaka and Motlhabi note 284 above, p. 229.

²⁹² Mnyaka and Motlhabi note 284 above, p. 229.

²⁹³ Mnyaka and Motlhabi note 284 above, p. 229.

²⁹⁴ Mnyaka and Motlhabi note 284 above, p. 229.

From the above, it is clear that African proverbs inculcate a duty to love and care for strangers, a deep reflection of African cosmology and belief systems.

In African cultures, “people are encouraged to be generous to strangers”.²⁹⁵ This means that individuals should be ready to feed, help and protect a sojourner. Travellers brought blessings and children were happy as they knew they would eat the best food.²⁹⁶ Batswana people are always generous to the strangers as they often feast with sojourners.²⁹⁷

The concept of *Ubuntu* has also been interpreted in South African jurisprudence dealing with refugees. In *Union of Refugee Women v Minister of Home Affairs*,²⁹⁸ the right to work for refugees as security guards was under scrutiny. They were refused to seek employment in the security industry as they were neither citizens nor permanent residents in South Africa. Sachs J stated that “the culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves is not something new in our country”.²⁹⁹ In Xhosa culture, as strangers “were defenceless, they were particularly under the protection of the chief and accorded special privileges”.³⁰⁰ Currently, the spirit of Ubuntu is associated with the concept of human

²⁹⁵ Mnyaka and Motlhabi note 284, p. 229: isisu somhambi asingakanani, singaphambili, ngemva ngumhlonzo (literally, the stomach of a traveller is not big, it is only in front; is limited by spine).

²⁹⁶ Mnyaka and Motlhabi note 284 above, p. 230.

²⁹⁷ Batswana people say: Moeng goroga re je ka wena (come visitor so that we can feast through you). See Mnyaka and Motlhabi note 284 above, p. 230.

²⁹⁸ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC); C. Himonga, M. Taylor and A. Pope, “Reflections on Judicial Views of Ubuntu” (2013) 16 (5) *PELJ* pp. 414 – 415.

²⁹⁹ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* note 298 above, para 145.

³⁰⁰ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* note 298 above, para 145.

interdependence and burden sharing.³⁰¹ Thus discrimination against refugees may be seen as amounting to unfair discrimination.

In *Kayabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*,³⁰² the concept of *Ubuntu* was invoked when government officials dealt with foreign nationals. Mokgoro J stated that in a constitutional democracy, officials needed to ensure that public administration was governed by the values of the Constitution.³⁰³ She opined that providing reasons to people whose rights had been adversely affected by administrative decisions was often important in providing fairness, accountability and transparency.³⁰⁴ The principles of *Batho Pele* and the values of *Ubuntu* require people to be treated with respect and dignity by public servants without undue confrontation. The Constitutional Court held that the applicants were entitled to reasons for the decision declaring them illegal immigrants.³⁰⁵ The officials need to use the values of *Ubuntu* in the performance of their duties when dealing with people.

Xenophobia has affected foreign nationals,³⁰⁶ including refugees, in South Africa. It is defined as “an intense dislike or fear of strangers or people from other

³⁰¹ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* note 298 above, para 145.

³⁰² *Kayabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC); Himonga, Taylor and Pope note 298 above, p. 416.

³⁰³ *Kayabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* note 302 above, para 62.

³⁰⁴ *Kayabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* Note 302 above, para 62.

³⁰⁵ *Kayabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* note 302 above, para 62.

³⁰⁶ E. Chinomona and E.T. Maziriri, “Examining the Phenomenon of Xenophobia as Experienced by African Migrant Entrepreneurs in Johannesburg, South Africa: Intensifying the Spirit of Ubuntu” (2015) 2(6) *International Journal of Research in Business Studies and Management* p. 20; A. Hammar, J. McGregor and L. Landau, “Introduction. Displacing Zimbabwe: Crisis and Construction in Southern Africa” (2010) 36 (2) *Journal of Southern African Studies* p. 265.

countries.”³⁰⁷ The most brutal xenophobic attacks occurred in 2015 and brought shame to South Africa globally.³⁰⁸ African immigrants were attacked and experienced violations of their human rights. These attacks indicated that foreign nationals, especially African migrants, were not welcome in South Africa. Unfortunately, the spirit of *Ubuntu* was absent in the treatment of foreigners in South Africa. Ubuntu needs to be internalised and practiced in the African societies to improve the treatment of refugees as well as other foreign nationals.

2.6 Current root causes of refugees

Displacement of people can be caused by four factors: push factors, pull factors, personal factors and intervening factors such as cost of transport.³⁰⁹ Push factors relate to the country of origin while pull factors are present in the state of destination. Circumstances in the home country can force or encourage individuals to flee and seek safety in another state. The causes of flight may include “international wars, internal disturbances, deliberately undertaken change of social structure, and international political tensions”.³¹⁰ Wars are the most root cause of refugee flows as a great number of people flee to escape persecution and atrocities.

The presence of refugees demonstrates crises that affect many societies in Africa³¹¹ and other continents. Armed conflicts and civil strife in countries often cause refugee flights to neighbouring states. In addition, abuses of human rights, ethnic

³⁰⁷ Chinomona and Maziriri note 306 above, p. 23.

³⁰⁸ Chinomona and Maziriri note 306 above, p. 23.

³⁰⁹ T. Kuhlman, “The Economic Integration of Refugees in Developing Countries: a Research Model” 1991 *Journal of Refugee Studies* p. 9.

³¹⁰ Kuhlman note 309 above, p. 15.

³¹¹ The Addis Ababa Document on Refugees and Forced Population Displacements in Africa. Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, 8 – 10 September 1994, p. 5.

intolerance, and monopolisation of political and economic powers also create refugees in different areas of the world.³¹² Furthermore, lack of democracy; refusal to recognise the results of free and fair elections; resistance to popular participation in governance as well as poor management of public affairs are important factors that contribute in forcing people to flee their home countries.³¹³ People can leave their place of residence and cross an internationally recognised border to seek asylum in another country. In this case, they are protected by international refugee law.³¹⁴ This protection does not apply to internally displaced persons as they remain in their own countries.³¹⁵ However, they qualify for and benefit from limited international humanitarian assistance as they need basic necessities of life.

Environmental degradation is also a current root cause of refugees as some people leave their countries of residence to search for a place to live and secure their lives.³¹⁶ Environmental factors that can cause refugee flows include “drought, soil erosion, desertification and deforestations”.³¹⁷ For instance, people who stay in a state or an area that experiences desertification may leave their place of residence and go to a country with good environmental conditions for human beings. The Horn of Africa, Sudan and other states experiencing desertification produce environmental refugees.³¹⁸ Global warming is also a problem that can cause people

³¹² Addis Ababa Document on Refugees and Forced Population Displacements in Africa note 311 above, p. 5.

³¹³ Addis Ababa Document on Refugees and Forced Population Displacements in Africa note 311 above, p. 5.

³¹⁴ Convention Relating to the Status of Refugees note 23 above.

³¹⁵ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) note 152 above, Article 2 (c), (d) and (e).

³¹⁶ N. Myers, “Environmental Refugees: a Growing Phenomenon of the 21st Century” 2002 *Phil. Trans. R. Soc. Lond. B* p. 609; DC. Bates, “Environmental Refugees? Classifying Human Migrations Caused by Environmental Changes” (2002) 23 (5) *Population and Environment* p. 465.

³¹⁷ Myers note 316 above, p. 609.

³¹⁸ Myers note 316 above, p. 609.

to move from one country to another due to sea-level rises in states such as Bangladesh, Egypt, China and India.³¹⁹ Unfortunately environmental factors are not recognised in international law as good cause for refugees.

Some states are unable to perform their critical functions of government such as protection of national sovereignty, maintenance of acceptable infrastructure; governance and maintenance of law and order.³²⁰ Most of these factors contribute to the presence of refugees in many parts of the world. The economic meltdown in Zimbabwe is a good example.

External factors also contribute to the presence of refugees in different parts of the world. They include arming and sponsoring rebel groups by external forces in order to get easy access to mineral resources.³²¹ The sale of weapons, unfair trade practices and unfair international economic system impoverish most African countries to the point that they cannot attend to the basic needs of their citizens.³²² As a result, the people may flee their countries and go to places where they will find safety for their lives.

Once received in the country of asylum, some refugees identify themselves with the majority in their country of origin.³²³ They maintain kinship ties with the people who are still at home. This category of refugees hope for repatriation and may even plan to overthrow the government in their home state so that they can go back home.³²⁴

³¹⁹ Myers note 316 above, p. 611.

³²⁰ Addis Ababa Document on Refugees and Forced Population Displacements in Africa note 311 above, p. 5.

³²¹ Rwamatwara note 214 above, p. 188.

³²² Rwamatwara note 214 above, p. 188.

³²³ Kuhlman note 309 above, p. 8.

³²⁴ Kuhlman note 309 above, p. 9; K. Mills and R.J. Norton, "Refugees and Security in the Great Lakes Region of Africa" (2002) 5 (1) *Civil Wars* p. 1; I. Salehyan and K.S. Gleditsch, "Refugees and the Spread of Civil War(2006) 60 *International Organization* p. 342.

Some refugees belong to a persecuted minority and do not wish to repatriate to their countries of origin.³²⁵ They want to naturalise and become citizens of their asylum state with assimilation or maintenance of their identity.³²⁶ They can regain full protection of their new country. When people fight to overthrow the government of the country they fled from, they also create other new refugees, especially as they commit gross violations of human rights.

2.7 Summary

In this chapter, the genesis of the refugee problem has been discussed. It has covered slave trade, colonialism and their role on the existence of refugees. Religion has played a significant influence on the development of refugee issues. Both Christianity and Islam contain religious teachings on the care and treatment of refugees. They have contributed to the development of refugee laws even before the creation of states.

Ubuntu is an African concept that means humanness and can be used by relevant authorities as well as community members to welcome and show compassion to refugees. The presence of refugees is a manifestation of the failure of leadership in many countries. The current causes of refugees are civil wars, inter-state conflicts, gross violation of human rights, ethnic cleansing, monopolisation of political and economic powers, lack of democracy, refusal to organise or recognise free and fair election, resistance to popular participation in the governance and poor

³²⁵ Kuhlman note 309 above, p. 9.

³²⁶ Kuhlman note 309 above, p. 9; A. Kuch, "Naturalization of Burundian Refugees in Tanzania: the Debates on Local Integration and the Meaning of Citizenship Revisited" (2016) 30 (3) *Journal of Refugee Studies* p. 468; J. M. "Can Global Refugee Policy Leverage Durable Solutions? Lessons From Tanzania's Naturalization of Burundian Refugees" (2014) 27 (4) *Journal of Refugee Studies* p. 554.

management of public affairs. Environmental calamities are also the current causes of refugees. Refugees exist worldwide and pose an international challenge to states. The international and regional communities have adopted some measures to deal with the refugee problem. The next chapter deals with the international and regional responses to the problem of refugees.

Chapter 3: International and regional legal framework on integration of refugees

3.1 Introduction

In the previous chapter, we pointed out that the question of refugees has existed since time immemorial³²⁷ as people were persecuted due to their race, religion and political opinion. The creation of nation states gave birth to refugees on the international plane. During the French Revolution in 1789, the Huguenots and aristocrats were persecuted due to their political opinions and religion.³²⁸ French Protestants were the first refugees to be recognised in the modern state system.³²⁹ Spain and Portugal expelled Jews in the 15th century, and Moslem descent in Spain were persecuted and expelled in the 16th century.³³⁰ However, the legal regime relating to refugees came after the First and Second World Wars and created a framework to deal with refugees.³³¹ The League of Nations adopted international conventions to protect Russian refugees³³² and Jews fleeing persecution in Nazi Germany.³³³ After the Second World War, the United Nations expanded the protection of refugees to other regions of the globe. This chapter traces the development of international and regional refugee law.

³²⁷ L.T. Lee, "Internally Displaced Persons and Refugees: Towards a Legal Synthesis?" (1996) 9(1) *Journal of Refugee Studies* p. 30.

³²⁸ L. Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14 (2 & 3) *International Journal of Refugee Law* p. 239.

³²⁹ Barnett note 328 above, p. 239.

³³⁰ AR Zolberg. "The Formation of New States as Refugee Generating Process" (1983) 467 *The Annals of the American Academy of Political and Social Science* p. 31.

³³¹ Barnett note 328 above, p. 239.

³³² Barnett note 328 above, p. 241.

³³³ Barnett note 328 above, p. 242.

3.2 Protection of refugees after the First World War

The creation of the League of the Nations occurred after the First World War and played a significant part on the development of international refugee law.³³⁴ The Russian Revolution arose in 1917 and resulted in the exodus of many people to flee in search of safety.³³⁵ Between 1917 and 1921, more than one million refugees fled Russia.³³⁶ The League of Nations established the office of the High Commissioner for Refugees (HCR) in 1921, under the leadership of one Fridthof Nansen, to deal with the challenges or problems caused by Russian refugees.³³⁷ The HCR received administrative support from the League of Nations and relied on non-government organisations to perform his activities. However, the USSR and USA were not members of the League of the Nations³³⁸ and this contributed to its failure.

Refugees did not have any legal documents to identify themselves and exercise the right to freedom of movement. The HCR established “Nansen Passports” to facilitate the movement of refugees freely from different states.³³⁹ In 1922, the League of Nations accepted to issue Nansen Passports to Russian refugees alone.³⁴⁰ However, this decision slowly included refugees from other states such as Armenia in 1924. Gradually, in 1928, the same passports were extended to “Turks, Assyrians, Syrians, Assyrochaldeans, and Kurds”.³⁴¹

³³⁴ Barnett note 328 above, p. 241.

³³⁵ Barnett note 328 above, p. 241.

³³⁶ Barnett note 328 above, pp. 241 - 242.

³³⁷ Barnett note 328 above, p. 242; GS. Goodwin-Gill, “International Refugee Law: Where it Comes From, and Where It’s Going.” (2017) 45.1 *International Journal of Legal Information* p. 24.

³³⁸ Barnett note 328 above, p. 242.

³³⁹ Barnett note 328 above, p. 242.

³⁴⁰ Barnett note 328 above, p. 242.

³⁴¹ Barnett note 328 above, p. 242; Goodwin-Gill note 10 above, p. 25.

In 1933, the Convention Relating to the International Status of Refugees³⁴² regularised the existing groups as refugees. Individuals seeking refugee status could be protected based on two principles: lack of “protection and effective non-nationality”.³⁴³ Furthermore, in 1938, states signed the Convention on the Status of Refugees Coming from Germany.³⁴⁴ The definition of “a refugee” was strictly scrutinised to prevent individuals from Germany merely becoming refugees for personal convenience.

The Second World War highly contributed to the displacement of people who benefited from the emerging international refugee law.³⁴⁵ At the end of this war, 30 million people had left their countries, including twelve million ethnic Germans expelled from the USSR.³⁴⁶ The League of the Nations was dissolved and replaced by the United Nations Relief and Reconstruction Agency (UNRRA) in 1944 to cater for the new population flows.³⁴⁷ The UNRRA did not succeed due to “Cold War tensions and Soviet hostility”.³⁴⁸ In 1947, the International Refugee Organisation (IRO) was created to cater for Europeans refugees left in the camps and others coming from Eastern Europe.³⁴⁹

The IRO had a temporary mission to regularise the status of refugees from the Second World War. The IRO Constitution provided the definition of a refugee to

³⁴² Barnett note 328 above, p. 242; Convention of 28 October, 1933 relating to the international status of refugees.

³⁴³ Barnett note 328 above, p. 242; Convention of 28 October, 1933 relating to the international status of refugees.

³⁴⁴ Barnett note 328 above, p. 242.

³⁴⁵ Barnett note 328 above, p. 243.

³⁴⁶ Barnett note 328 above, p. 243; T. Kushner and K. Knox, *Refugees in an Age of Genocide* (London: Franck Cass, 1999), p. 10 and 218.

³⁴⁷ Barnett note 328 above, p. 243.

³⁴⁸ Barnett note 328 above, p. 244.

³⁴⁹ Barnett note 328 above, p. 244.

include “victims of Nazi, fascist, or similar regimes, victims of persecution for reasons of race, religion, nationality, political opinion; and refugees of long standing”.³⁵⁰ The IRO modified the previous definition of refugees and focused on each individual asylum seeker.³⁵¹ Therefore each asylum seeker’s application needed to be decided on its own merit. In December 1949, the General Assembly of the UN used Article 22 of the United Nations Charter to replace the IRO with the United Nation High Commissioner for Refugees (UNHCR).³⁵² The UNHCR has a mandate to provide international protection for refugees and seek durable solutions to their problems.³⁵³ The UNHCR started its work on January 1, 1951 and deals with refugee issues.

3.3 International refugee legal framework

After the Second World War, the international refugee regime played an important role in assisting and protecting refugees. From its inception, the UNHCR had to deal with one million people who fled Nazism and communism in Europe.³⁵⁴ The 1951 Refugee Convention created a global definition of a refugee to include a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.³⁵⁵ The 1967 Protocol³⁵⁶ to the Refugee Convention and other international instruments have contributed to the development of international refugee law.

³⁵⁰ Barnett note 328 above, p. 244.

³⁵¹ Barnett note 328 above, p. 244.

³⁵² E. Feller, “The Evolution of the International Refugee Protection Regime” (2001) 5 *Washington University Journal of Law and Policy* p. 130; Charter of the United Nations, 1945, Article 22.

³⁵³ Feller note 352 above, p. 130.

³⁵⁴ Feller note 352 above, p. 131.

³⁵⁵ Convention Relating to the Status of Refugees, note 23 above, Article 1A (2).

³⁵⁶ Protocol to the Convention Relating to the Status of Refugees, 1967.

3.3.1 Convention Relating to the Status of Refugees, 1951

The Convention Relating to the Status of Refugees³⁵⁷ is the main international legal framework for the protection of refugees. It provides the definition of a refugee³⁵⁸ and establishes the principle of *non-refoulement*,³⁵⁹ duties of refugees and the responsibilities of the states in refugee matters. In this regard, basic human rights for refugees are protected by international law in the host states. The Convention provides specific rights for refugees such as freedom of religion,³⁶⁰ access to court,³⁶¹ gainful employment,³⁶² public education,³⁶³ public relief,³⁶⁴ labour rights,³⁶⁵ freedom of movement,³⁶⁶ identity papers,³⁶⁷ traveling documents,³⁶⁸ rationing³⁶⁹ and housing.³⁷⁰

The principle of *non-refoulement* is the cornerstone for the protection of refugees in international law.³⁷¹ It is clearly stated in the 1951 Refugee Convention as follows:

³⁵⁷ Convention Relating to the Status of Refugees, note 23 above, preamble.

³⁵⁸ Convention Relating to the Status of Refugees, note 23 above, Article 1 (definition).

³⁵⁹ Convention Relating to the Status of Refugees, note 23 above, Article 33.

³⁶⁰ Convention Relating to the Status of Refugees, note 23 above, Article 4.

³⁶¹ Convention Relating to the Status of Refugees, note 23 above, Article 16.

³⁶² Convention Relating to the Status of Refugees, note 23 above, Articles 17. 18 and 19.

³⁶³ Convention Relating to the Status of Refugees, note 23 above, Article 22.

³⁶⁴ Convention Relating to the Status of Refugees, note 23 above, Article 23.

³⁶⁵ Convention Relating to the Status of Refugees, note 23 above, Article 24.

³⁶⁶ Convention Relating to the Status of Refugees, note 23 above, Article 26.

³⁶⁷ Convention Relating to the Status of Refugees, note 23 above, Article 27.

³⁶⁸ Convention Relating to the Status of Refugees, note 23 above, Article 28.

³⁶⁹ Convention Relating to the Status of Refugees, note 23 above, Article 20.

³⁷⁰ Convention Relating to the Status of Refugees, note 23 above, Article 21.

³⁷¹ F. Nicholson and J. Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems – Handbook for Parliamentarians* No 27, 2017, p. 27; D. Weissbrodt and I. Hortreiter, "The Principle of *Non-Refoulement*: article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison With the *Non-Refoulement* Provisions of Other International Human Rights Treaties" (1999) 5 *Buffalo Human Rights Law Review* p. 25; N. Coleman, "Non-Refoulement Revised - Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law" (2003) 5 *European Journal of Migration and Law* p. 24; J. Allain, "The *Jus Cogens* Nature of *Non-Refoulement*" 2003 *International Journal of Refugee Law* p. 533.

No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.³⁷²

This principle applies not only within the borders of the state but also when a country exercises its authority beyond its border, for instance when it intercepts ships on the high seas to prevent migrants from accessing its asylum jurisdiction.³⁷³ However, the principle of *non-refoulement* has two exceptions. It does not apply to a refugee in respect of whom there are reasonable grounds for regarding him or her as a danger to the security of the country in which he or she is present, or after having been convicted by a final judgment of a particular serious crime, he or she constitutes a danger to the country.³⁷⁴ The principle of *no-refoulement* under the 1951 Refugee Convention does not exonerate states under international human rights law. The international and regional human rights instruments “prohibit the removal of anyone, whether a refugee or not, to a risk of torture or cruel, inhuman or degrading treatment or punishment.”³⁷⁵

The Convention against Torture prohibits *refoulement* of an individual “to situations where there are reasonable substantial grounds for believing that a person would be in danger of torture”.³⁷⁶ The *non-refoulement* principle under the Convention

³⁷² Convention Relating to the Status of Refugees, note 23 above, Article 33 (1).

³⁷³ V. Stoyanova, “The Principle of *Non-Refoulement* and the Right of Asylum-seekers to Enter State Territory” (2008) 3 *Interdisciplinary Journal of Human Rights* p. 6.

³⁷⁴ Convention Relating to the Status of Refugees, note 23 above, Article 33 (2).

³⁷⁵ Nicholson and Kumin note 371 above, p. 20.

³⁷⁶ Nicholson and Kumin note 371 above, p. 24; *Chahal v The United Kingdom* (Application No. 22414/93), European Court of Human Rights, 15 November 1996.

against Torture is absolute and no derogation from this provision is permissible.³⁷⁷

This principle protects both refugees, asylum seekers and other persons.

The prohibition of refoulement is now part of customary international law³⁷⁸ and is binding on every state in the world. As a result, all states must respect the principle of *non-refoulement* even if they are not party to the 1951 Refugee Convention.³⁷⁹

This principle of *non-refoulement* plays an important role in the protection of refugees.

With regard to freedom of religion,³⁸⁰ states parties are required to accord to refugees in their host countries the same treatment conferred to their nationals with respect to freedom to practice their religion. Refugee parents also have freedom to choose and practice a religion for their children.

Refugees have free access to courts in the hosting states.³⁸¹ They enjoy the same treatments as nationals in the country of habitual residence in matters relating to access to courts.³⁸² They are entitled to legal assistance if it is also provided to citizens of the receiving states.

Refugees have the right to gainful employment,³⁸³ including wage-earning employment, self-employment and liberal professions. They are accorded the same treatment as nationals of a foreign country lawfully staying in the state of asylum

³⁷⁷ Nicholson and Kumin note 371 above, p. 24.

³⁷⁸ Nicholson and Kumin note 371 above, p. 20; T. Molnar, "The Principle of *Non-Refoulement* under International Law: its Inception and Evolution in a Nutshell: (2016) 1 (1) *Cojourn* p. 51; J. Allain, "The *Jus Cogens* Nature of *Non-Refoulement*" (2001) 13 (1) *International Journal of Refugee Law* p. 538.

³⁷⁹ Nicholson and Kumin note 371 above, p. 20.

³⁸⁰ Convention Relating to the Status of Refugees, note 23 above, Article 4.

³⁸¹ Convention Relating to the Status of Refugees, note 23 above, Article 16 (1).

³⁸² Convention Relating to the Status of Refugees, note 23 above, Article 16 (2).

³⁸³ Convention Relating to the Status of Refugees, note 23 above, Articles 17, 18 and 19.

regarding the right to engage in employment matters.³⁸⁴ The restrict measures imposed on the employment of aliens to protect the national labour market does not apply to a refugee who has at least 3 years' continuous residence in the host country or is married to a citizen of the receiving state.³⁸⁵ However a refugee may not acquire the same privilege if he or she has abandoned his or her spouse. A refugee can invoke the same benefit if he or she has a child who is a citizen of the country of asylum.³⁸⁶ Contracting states are required to provide sympathetic consideration to refugees who entered the country via recruitment programmes or immigration schemes.³⁸⁷

For self-employment, refugees enjoy the same treatment as aliens lawfully living in the host state. They can participate in agriculture, commerce and establish companies to perform different activities such as commerce and industry.³⁸⁸

Refugees with necessary qualifications can enter or practice liberal professions and the contracting state is required to accord them the same treatment as aliens lawfully staying in the country.³⁸⁹ In this way, refugees can contribute to the economy of the hosting state and manage to provide for the necessities of their lives.

Refugees are entitled to have access to public education in the country of asylum. They should be accorded the same treatment as "nationals with respect to

³⁸⁴ Convention Relating to the Status of Refugees, note 23 above, Article 17 (1).

³⁸⁵ Convention Relating to the Status of Refugees, note 23 above, Article 17 (2) (a) & (b).

³⁸⁶ Convention Relating to the Status of Refugees, note 23 above, Article 17 (2) (c).

³⁸⁷ Convention Relating to the Status of Refugees, note 23 above, Article 17 (3).

³⁸⁸ Convention Relating to the Status of Refugees, note 23 above, Article 18.

³⁸⁹ Convention Relating to the Status of Refugees, note 23 above, Article 19 (1).

elementary education”.³⁹⁰ Concerning other forms of educations, contracting states are required to treat refugees in the same manner as aliens lawfully staying in their territories.³⁹¹ The host state should recognise the qualifications that refugees have obtained in their countries. Furthermore, refugees have the right of access to higher education, can get the school fees remission and receive scholarships³⁹² to pursue their studies.

The contracting states should accord to refugees the same rights as nationals in matters relating to employment benefits, including remuneration, family allowance, hours of work, overtime, holidays, minimum age, women’s work and young persons.³⁹³ The benefits or privileges should also extend to apprenticeship and training at work as well as collective bargaining.³⁹⁴ Once employed, refugees should enjoy social security regarding work related issues with minimum restrictions. For instance, they have the right of access to compensation in respect of injury at work, “occupational diseases, maternity, sickness, disability, old age, death, unemployment and family responsibilities”.³⁹⁵ The beneficiaries of death benefits for a refugee have the right to receive compensation. These benefits are not affected by the fact that the beneficiaries live outside the country of asylum.³⁹⁶

Refugees have the right to freedom of movement in the host state. They have right to choose their place of residence and freely move within the state of asylum subject

³⁹⁰ Convention Relating to the Status of Refugees, note 23 above, Article 22 (1).

³⁹¹ Convention Relating to the Status of Refugees, note 23 above, Article 22 (2).

³⁹² Convention Relating to the Status of Refugees, note 23 above, Article 22 (2).

³⁹³ Convention Relating to the Status of Refugees, note 23 above, Article 24 (1) (a).

³⁹⁴ Convention Relating to the Status of Refugees, note 23 above, Article 24 (1) (b).

³⁹⁵ Convention Relating to the Status of Refugees, note 23 above, Article 24 (2).

³⁹⁶ Convention Relating to the Status of Refugees, note 23 above, Article 24 (2).

to law applicable to aliens lawfully living in the contracting state.³⁹⁷ Refugees who do not possess travel documents have the right to acquire identity documents from the hosting states.³⁹⁸ However all refugees should receive identity documents as they do not possess visas to stay in the receiving state.

Furthermore, contracting state should issue travel documents to refugees for the purpose of traveling to other countries.³⁹⁹ This right is subject to compelling reasons of national security or public order of the receiving country. The contracting states should issue traveling documents, with sympathy, to refugees who do not have any document to move abroad.⁴⁰⁰ In this way, refugees enjoy the freedom of movement so that they can perform different functions.

Refugees have the right to apply for naturalisation and acquire the citizenship of the asylum state. Contracting states are encouraged to “facilitate the assimilation and naturalisation of refugees”.⁴⁰¹ They should make every effort to expedite naturalisation proceedings and reduce the costs of acquiring citizenship.⁴⁰² Once naturalised, refugees become citizens and enjoy all rights and privileges of nationals in all aspects.

3.3.2 Protocol relating to the status of refugees, 1967

The Refugee Convention covered only individuals who became refugees due to events that occurred in Europe before 1 January 1951.⁴⁰³ However, new refugee

³⁹⁷ Convention Relating to the Status of Refugees, note 23 above, Article 26.

³⁹⁸ Convention Relating to the Status of Refugees, note 23 above, Article 28.

³⁹⁹ Convention Relating to the Status of Refugees, note 23 above, Article 28.

⁴⁰⁰ Convention Relating to the Status of Refugees, note 23 above, Article 28.

⁴⁰¹ Convention Relating to the Status of Refugees, note 23 above, Article 34.

⁴⁰² Convention Relating to the Status of Refugees, note 23 above, Article 34.

⁴⁰³ Protocol Relating to the Status of Refugees, note 356 above.

circumstances continued to materialise after the Refugee Convention came into force and the new refugees did not satisfy the definition of the Convention.⁴⁰⁴ The 1967 Protocol Relating to the Status of Refugees provides equal status for all refugees who complied with the conventional definition irrespective of the cut-off date of 1 January 1951.⁴⁰⁵ The cut-off date and geographical limitation in the provision of refugees no longer apply to refugees worldwide.⁴⁰⁶ The 1967 Protocol has played a significant impact to ensure that all refugees receive equal treatment in the host states.

The UNHCR supervises the application of the Protocol and cooperation with states parties to the Protocol in refugee matters.⁴⁰⁷ It submits periodic reports to the relevant organs of the United Nations and provides information, about the states parties, on the conditions of refugees, implementation of the Protocol, laws and regulations relating to refugees.⁴⁰⁸

3.3.3 Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR) provides that “all human beings are born free and equal in dignity and rights”.⁴⁰⁹ This principle also applies to refugees and asylum seekers in the country of asylum. Furthermore, it also provides a right to everyone to seek and enjoy asylum in other countries from persecution.⁴¹⁰ This right does not extend to individuals who are genuinely prosecuted for non-

⁴⁰⁴ Protocol Relating to the Status of Refugees, note 356 above.

⁴⁰⁵ Protocol Relating to the Status of Refugees, note 356 above, Article 1 (2).

⁴⁰⁶ Protocol Relating to the Status of Refugees, note 356 above, Article 1 (3).

⁴⁰⁷ Protocol Relating to the Status of Refugees, note 356 above, Article 2 (1).

⁴⁰⁸ Protocol Relating to the Status of Refugees, note 356 above, Article 2 (2).

⁴⁰⁹ Universal Declaration of Human Rights, 1948, Article 1.

⁴¹⁰ Universal Declaration of Human Rights, note 409 above, Article 14 (1).

political crimes or acts contrary to the purposes and principles of the United Nations.⁴¹¹ The institution of asylum is one of the fundamental instruments to protect refugees in the host states.⁴¹² It begins with the admission of a person to the sanctuary and culminates when a refugee obtains a durable solution through naturalisation, voluntary repatriation or resettlement in a third country. Although the UDHR is not legally binding, nonetheless it is now widely accepted as an inspirational document, a common standard of achievement for all nations.

3.3.4 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984

The Convention against Torture⁴¹³ has a significant impact on the protection of refugees and asylum seekers. It defines “torture”⁴¹⁴ and prohibits any acts of torture in the jurisdiction of each state party.⁴¹⁵ There are no exceptional circumstances that can be invoked to justify torture in any manner.⁴¹⁶ This also applies to an order from

⁴¹¹ Universal Declaration of Human Rights, note 409 above, Article 14 (2), *Gabric v Refugee Status Determination officer, Cape Town and Others* [2018] ZACC 38; C. Kavuro, “Refugees, Serious Non-Political Crimes and Prosecution: Deficiencies in the Criminal Justice System Occasioned by Observance of Principle of *Non-Refoulement* in the Context of Refugee and Human Rights Protection” 2017 *SACJ* pp. 227 – 228.

⁴¹² Nicholson and Kumin note 371 above, p. 27.

⁴¹³ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984.

⁴¹⁴ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Article 1 (1). “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

⁴¹⁵ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Article 2 (1).

⁴¹⁶ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Article 2 (2).

a superior officer or a public authority to commit torture against another person.⁴¹⁷ Therefore the prohibition against torture is absolute and no restriction or derogation can be allowed against this principle.

The Convention against Torture proscribes *refoulement*, forced return or extradition of a person to a “state where there are substantial grounds for believing” that he or she would be in danger of being subjected to torture.⁴¹⁸ The emphasis is on the situations in the country concerned, specifically if it has “consistent pattern of gross, flagrant or massive violations of human rights.”⁴¹⁹ The Convention provides for the prosecution of suspected individuals as they cannot be extradited to the country where there are reasonable grounds to believe that they will face torture.⁴²⁰ The Convention against Torture applies to refugees and asylum seekers as most of them flee from torture organised and perpetrated by the government in their country of origin.

In *Gabric v Refugee Status Determination Officer*,⁴²¹ the Constitutional Court in South Africa held that no person should be returned to his or her country of origin or nationality where there is a real risk that he or she would be “exposed to the imposition of the death penalty, or be treated or punished in a cruel, inhuman and degrading way or in any way be tortured.”⁴²² A person cannot be deported or

⁴¹⁷ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Article 2 (3).

⁴¹⁸ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Article 3 (1).

⁴¹⁹ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Article 3 (2).

⁴²⁰ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, note 413 above, Articles 5 (2) and 7.

⁴²¹ *Gabric v Refugee Status Determination officer and Others* 2019 1 SA 21 (CC).

⁴²² *Gabric v Refugee Status Determination officer and Others* note 421 above, para 27; *Minister of Home Affairs v Tsebe* 2012 5 SA 467 (CC), paras 67 – 68.

extradited to a state where he or she may face the imposition of the death penalty. The right to life, the right to human dignity and the right not to be subjected to treatment or punishment that is cruel, inhuman or degrading do not have any exceptions.⁴²³ The person excluded from the protection of refugee status could still be protected against refoulement to a country where he or she could be at risk of ill-treatment.⁴²⁴ The prohibition against torture is absolute and crucial as states do not associate themselves with such inhuman treatment.

3.3.5 Convention on the Rights of the Child, 1989

The Convention on the Rights of the Child (CRC)⁴²⁵ contains important protections to all children, including those who are asylum seekers and refugees. The CRC defines “a child” as a person who is under the age of eighteen years, unless he or she has attained majority earlier by a national law.⁴²⁶ The CRC encompasses some basic principles that are aimed at improving the treatment of all children. They include, *inter alia*, the principles of non-discrimination, best interest of the child, right to life, survival, development, and the right to be heard.⁴²⁷ All these rights are necessary to protect the interests of all children.

The principle of non-discrimination ensures that each state party applies the rights set out in the CRC to every child present in its jurisdiction without any

⁴²³ *Gabric v Refugee Status Determination officer and Others* note 421 above, para 38; *Minister of Home Affairs v Tsebe* note 422 above, para 50.

⁴²⁴ *Gabric v Refugee Status Determination officer and Others* note 421 above, para 29; UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 4 September 2003 (Guidelines 5), p. 4, para 9.

⁴²⁵ Convention on the Rights of the Child, 1989.

⁴²⁶ Convention on the Rights of the Child, note 425 above, Article 1.

⁴²⁷ *Nicholson and Kumin* note 371 above, p. 24.

discrimination.⁴²⁸ The CRC encourages states parties to take appropriate measures to guarantee that all children are protected against all forms of discrimination and punishment based on the status or activities of their parents, guardians or relatives.⁴²⁹

The CRC emphasises the principle of the best interest of the child in all circumstances. It states that: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”.⁴³⁰

States parties have an obligation to take all appropriate legislative and administrative measures to ensure the necessary protection and care of children.⁴³¹

They need to consider the rights and duties of the parents, legal guardians and other legally responsible individuals.⁴³² They should also safeguard the care and protection of children in conformity with the relevant standards in terms of safety, health, staff and competent supervision.⁴³³

The CRC recognises that “every child has the inherent right to life.”⁴³⁴ States parties have a duty to maximise the survival and development of all the children. The CRC also provides for children’s right to be heard in all matters affecting their life.⁴³⁵

⁴²⁸ Convention on the Rights of the Child, note 425 above, Article 2 (1).

⁴²⁹ Convention on the Rights of the Child, note 425 above, Article 2 (2).

⁴³⁰ Convention on the Rights of the Child, note 425 above, Article 3 (1).

⁴³¹ Convention on the Rights of the Child, note 425 above, Article 3 (2).

⁴³² Convention on the Rights of the Child, note 425 above, Article 3 (2).

⁴³³ Convention on the Rights of the Child, note 425 above, Article 3 (3).

⁴³⁴ Convention on the Rights of the Child, note 425 above, Article 6.

⁴³⁵ Convention on the Rights of the Child, note 425 above, Article 12.

States undertake to create opportunities for children to express their views and receive due consideration in any circumstances that may relate to them.

The CRC contains other provisions that relate to refugees and asylum seekers. For instance, it prohibits the separation of a child from his or her parents against his/her will, unless it is in the best interests of the child.⁴³⁶ The CRC provides for the right to family reunification and needs to be dealt with in “a positive, human and expeditious manner.”⁴³⁷ It also provides for the right to special protection and assistance provided by the state if the child is temporarily or permanently deprived of his or her family environment.⁴³⁸ Such measures include foster placement, adoption or necessary placement in institutions that care for children. Moreover, the Convention provides for the right to adequate food,⁴³⁹ basic education,⁴⁴⁰ primary health care,⁴⁴¹ prohibition against exploitation, neglect or abuse.⁴⁴²

The CRC applies directly to refugees and asylum seekers who are children.⁴⁴³ States parties are required to ensure that accompanied and unaccompanied refugee children receive appropriate protection and humanitarian assistance by enjoying rights contained in the CRC as well as other binding international human rights or humanitarian instruments.⁴⁴⁴ Furthermore, states parties are required to cooperate with the United Nations and other international organisations to protect and assist refugee children to meet with their parents or other family members for

⁴³⁶ Convention on the Rights of the Child, note 425 above, Article 9.

⁴³⁷ Convention on the Rights of the Child, note 425 above, Article 10.

⁴³⁸ Convention on the Rights of the Child, note 425 above, Article 20.

⁴³⁹ Convention on the Rights of the Child, note 425 above, Article 23 (2) (c).

⁴⁴⁰ Convention on the Rights of the Child, note 425 above, Article 28.

⁴⁴¹ Convention on the Rights of the Child, note 425 above, Articles 23 and 24.

⁴⁴² Convention on the Rights of the Child, note 425 above, Article 39.

⁴⁴³ Convention on the Rights of the Child, note 425 above, Article 22.

⁴⁴⁴ Convention on the Rights of the Child, note 425 above, Article 22 (1).

the purpose of reunification.⁴⁴⁵ Unaccompanied refugee children are entitled to receive special protection from the host states.

3.3.6 International Covenant on Civil and Political Rights, 1966

Most of the rights in the International Covenant on Civil and Political Rights (ICCPR)⁴⁴⁶ protect refugees and asylum seekers. The ICCPR prohibits discrimination⁴⁴⁷ against people under the jurisdiction of a state party. The right not to be subjected to torture, cruel and degrading treatment or punishment prevents the forcible return of refugees.⁴⁴⁸ Refugees also enjoy other rights in the ICCPR such as the right to life (article 6), prohibition of forced labour,⁴⁴⁹ dignity,⁴⁵⁰ freedom of movement,⁴⁵¹ unlawful expulsion,⁴⁵² family rights,⁴⁵³ non-discrimination against children,⁴⁵⁴ liberty and security of the person.⁴⁵⁵ Thus the ICCPR plays an important role in the protection of refugees and asylum seekers in the host states by not only enumerating enforceable rights but also by imposing positive obligations on states parties.

3.3.7 International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁵⁶ contains rights that apply to everyone, including refugees. They include the right to

⁴⁴⁵ Convention on the Rights of the Child, note 425 above, Article 22 (3).

⁴⁴⁶ International Covenant on Civil and Political Rights, 1966.

⁴⁴⁷ International Covenant on Civil and Political Rights, note 446 above, Article 4 (1).

⁴⁴⁸ International Covenant on Civil and Political Rights, note 446 above, Article 7.

⁴⁴⁹ International Covenant on Civil and Political Rights, note 446 above, Article 8.

⁴⁵⁰ International Covenant on Civil and Political Rights, note 446 above, Article 10.

⁴⁵¹ International Covenant on Civil and Political Rights, note 446 above, Article 12.

⁴⁵² International Covenant on Civil and Political Rights, note 446 above, Article 13.

⁴⁵³ International Covenant on Civil and Political Rights, note 446 above, Article 23.

⁴⁵⁴ International Covenant on Civil and Political Rights, note 446 above, Article 24.

⁴⁵⁵ International Covenant on Civil and Political Rights, note 446 above, Article 9.

⁴⁵⁶ International Covenant on Economic, Social and Cultural Rights, 1966.

equality between men and women,⁴⁵⁷ the right to work to secure a living,⁴⁵⁸ the right to adequate working conditions,⁴⁵⁹ the right to organisational rights at workplace (social security, form and join a trade union),⁴⁶⁰ family rights and education of dependent children.⁴⁶¹ Other rights embrace the right to adequate standard of living and food.⁴⁶² Individuals also have right to enjoy the highest attainable standard of physical and mental health.⁴⁶³ In addition, the ICESCR provides the right to education for everyone, including free primary education, secondary and higher educations.⁴⁶⁴ Refugees and asylum seekers benefit from these rights to practice and achieve economic, social and cultural activities in their lives. States parties must fulfil a core minimum obligation contained in the socio-economic rights.⁴⁶⁵ This means that every state party is required to accomplish certain minimum essential levels of each socio-economic right in question.⁴⁶⁶ They have to allocate adequate funds in order to realise the rights under the ICESCR and discharge their obligations. However, these rights can only be achieved progressively subject to availability of resources.

⁴⁵⁷ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 3.

⁴⁵⁸ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 6.

⁴⁵⁹ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 7.

⁴⁶⁰ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 8.

⁴⁶¹ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 10 (1).

⁴⁶² International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 11.

⁴⁶³ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 12.

⁴⁶⁴ International Covenant on Economic, Social and Cultural Rights, note 456 above, Article 13.

⁴⁶⁵ D. Bilchitz, "Giving Socio-economic Rights Teeth: the Minimum Core and its Importance" (2002) 119 *SALJ* p. 485.

⁴⁶⁶ Bilchitz note 465 above, p. 484.

3.3.8 Convention on the Elimination of All Forms of Racial Discrimination, 1965

This Convention⁴⁶⁷ prohibits any kind of discrimination based on race and imposes a duty on the states parties to eradicate such discrimination. They are required to prohibit and eliminate all forms of racial discrimination and ensure that they take positive steps to guarantee all rights to everyone.⁴⁶⁸ The Convention applies to refugees and asylum seekers who are persecuted for their race. Such people qualify for refugee status under the 1951 Refugee Convention.

3.3.9 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

The CEDAW⁴⁶⁹ prevents any type of discrimination against women and girls. It imposes an obligation on states parties to avoid any form of traffic in women and exploitation of women through prostitution⁴⁷⁰ and discrimination against women in education,⁴⁷¹ employment,⁴⁷² health care and family planning.⁴⁷³ CEDAW promotes equality before the law between men and women, and protects marriage and family life.⁴⁷⁴ It protects refugees as some discriminations against women amount to

⁴⁶⁷ Convention on the Elimination of All Forms of Racial Discrimination, 1965.

⁴⁶⁸ Convention on the Elimination of All Forms of Racial Discrimination, note 467 above, Article 5.

⁴⁶⁹ Convention on the elimination of All Forms of discrimination Against Women, 1979.

⁴⁷⁰ Convention on the elimination of All Forms of discrimination Against Women, note 469 above, Article 6.

⁴⁷¹ Convention on the elimination of All Forms of discrimination Against Women, note 469 above, Article 10.

⁴⁷² Convention on the elimination of All Forms of discrimination Against Women, note 469 above, Article 11.

⁴⁷³ Convention on the elimination of All Forms of discrimination Against Women, note 469 above, Article 12.

⁴⁷⁴ Convention on the elimination of All Forms of discrimination Against Women, note 469 above, Article 16.

persecution based on a particular social group.⁴⁷⁵ For instance, Female Genital Mutilation (FGM)⁴⁷⁶ is a ground for recognition for refugee status as women, in certain countries, constitute a particular social group.

3.3.10 International Convention for the Protection of All Persons From Enforced Disappearance, 2006

This Convention criminalises “enforced disappearance”⁴⁷⁷ and states parties are enjoined to prosecute the responsible offenders.⁴⁷⁸ It prohibits extradition if the concerned individual is a refugee and the state intends to prosecute him or her based on his or her status. Furthermore, it applies the principle of non-refoulement if the concerned individual would face forced disappearance in his or her home country.

3.3.11 International humanitarian law on refugees

International humanitarian law contains laws that apply in time of wars or armed conflicts with international and regional aspects. It seeks to minimise the effects of wars and armed conflicts on individuals who are not involved in warfare or have

⁴⁷⁵ *R v Immigration Appeal Tribunal and Another, Ex parte Shah (United Nations High Commissioner for Refugees intervening)* [199] 2 All ER 545 (HL), 563]; *Secretary of State for the Home Department (Respondent) v K (FC)* [20006] UKHL 46; A.C. Helton, “Persecution on Account of Membership in a Social Group as a Basis for Refugee Status” (1983) 15 *Human Rights Law Review* p. 40 – 47, 51 – 52.

⁴⁷⁶ Katz note 94 above, pp. 356 – 357.

⁴⁷⁷ “Enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. (See Article 2 of International Convention for the Protection of All Persons from Enforced Disappearance).

⁴⁷⁸ International Convention for the Protection of All Persons from Enforced Disappearance, Article 3.

ceased to participate in war.⁴⁷⁹ International humanitarian law is found in the four Geneva Conventions of 1949,⁴⁸⁰ two Additional Protocols of 1977⁴⁸¹ and one Protocol of 2005.⁴⁸² During warfare, these legal regimes protect, respect and assist persons who are not involved in fighting regardless of their status.

The Four Geneva Conventions⁴⁸³ prohibit the Detaining Power from treating aliens as enemies based solely on their nationality of a belligerent state. This privilege applies also to refugees who do not enjoy the protection of any country or government.⁴⁸⁴ Furthermore, recognised refugees and stateless persons are protected persons according to parts I and III of the Fourth Geneva Conventions.⁴⁸⁵ They are protected in all circumstances, without any distinction, against the effects of warfare or armed conflicts. As some refugees are often located in war zones, humanitarian law protects them from the adverse effects of armed conflicts.⁴⁸⁶ Humanitarian programmes permeate the post-cold wars or armed conflicts.⁴⁸⁷ Through negotiated access with warring parties, the United Nations and some Non-

⁴⁷⁹ Nicholson and Kumin note 371 above, p. 29.

⁴⁸⁰ I Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; II Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; III Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; and IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

⁴⁸¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, of 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

⁴⁸² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), of 8 December 2005.

⁴⁸³ IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 44.

⁴⁸⁴ IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 44.

⁴⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 August 1949.

⁴⁸⁶ M. Duffield, "NGO Relief in War Zones: Towards an Analysis of the New Aid Paradigm" (1997) 18 (3) *Third World Quarterly* p. 534.

⁴⁸⁷ Duffield note 486 above, p. 534.

Government Organisations (NGOs) have managed to initiate and execute humanitarian interventions to protect or assist refugees as well as asylum seekers in different places such as Sudan, Angola, Ethiopia, Kurdistan, Bosnia and Rwanda.⁴⁸⁸ Therefore, humanitarian interventions assist in the protection of refugees and save their lives in times of war.

3.3.12 Rome Statute of the International Criminal Court, 1998

The Rome Statute of International Criminal Court (Rome Statute)⁴⁸⁹ creates the International Criminal Court (ICC) seated at The Hague in the Netherlands.⁴⁹⁰ The ICC has jurisdiction over heinous crimes such as the crimes of genocide, crimes against humanity, war crimes and crimes of aggression.⁴⁹¹ These crimes affect the international community as a whole and are unacceptable.

The Rome Statute provides detailed definitions of genocide,⁴⁹² crime against humanity⁴⁹³ and war crimes.⁴⁹⁴ Individuals who commit these serious crimes are excluded from the asylum institution or system.⁴⁹⁵ The Rome Statute contributes in

⁴⁸⁸ Duffield note 486 above, p. 534.

⁴⁸⁹ Rome Statute of International Criminal Court, 2002.

⁴⁹⁰ Rome Statute of International Criminal Court, note 489 above, Article 3 (1).

⁴⁹¹ Rome Statute of International Criminal Court, note 489 above, Article 5.

⁴⁹² Rome Statute of International Criminal Court, note 489 above, Article 6.

⁴⁹³ Rome Statute of International Criminal Court, note 489 above, Article 7.

⁴⁹⁴ Rome Statute of International Criminal Court, note 489 above, Article 8.

⁴⁹⁵ Convention Relating to the Status of Refugees, note 23 above, Article 1 (F); J. Bond, "Excluding Justice: the Dangerous Intersection Between Refugee Claims, Criminal Law and Guilty Asylum Seekers" (2012) 24 (1) *International Journal of Refugee Law* p. 39; S. Singer, "Terrorism and Article 1F(c) of the Refugee Convention – Exclusion from Refugee Status in the United Kingdom" (2014) 12 *Journal of International Criminal Justice* pp. 1076 – 1077; J. Bond, "Principles Exclusions: A Revised Approach to Article 1F(A) of the Refugee Convention" (2013) 35 *Michigan Journal of International Law* pp. 29 -30; M. Holvoet, "Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law" (2014) 12 *Journal of International Criminal Justice* p. 1041; N. Djordjevic, "Exclusion under Article 1F(b) of the Refugee Convention – The Uncertain Concept of Internationally Serious Common Crimes" (2014) 12 *Journal of International Criminal Justice* pp. 1061 – 1062; S. Sivakumaran, "Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention" (2014) 26 (3) *International Journal of Refugee Law* p. 350; M.P. Bolhuis

ensuring that the asylum institution remains clean and does not include individuals who have committed specific heinous crimes. Therefore, dangerous criminals cannot hide behind the system of asylum to escape prosecution.

The ICC respects the sovereignty of states and uses the principle of complementarity in prosecuting international crimes.⁴⁹⁶ It has jurisdiction if the state where the international crime has been committed is unwilling or unable to prosecute the alleged perpetrators.⁴⁹⁷ In order to ascertain the jurisdiction of ICC, the Prosecutor makes a determination based on the country's information about the legal system.⁴⁹⁸ The Prosecutor decides whether or not the ICC has jurisdiction based on the principle of complementarity.⁴⁹⁹ The decision of the Prosecutor is subject to review in the Pre Trial Chamber and this decision can then be appealed against in the Appeal Chamber.⁵⁰⁰

The works of ICC Prosecutor play a role in the determination of refugee status for asylum seekers.⁵⁰¹ Officials dealing with refugee status determination also have to look at the country information resources to determine whether the asylum seeker

and J. Van Wijk, "Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands." (2016) 29 (1) *Journal of Refugee Studies* p. 20.

⁴⁹⁶ Rome Statute of International Criminal Court, note 489 above, Article 17; M. Smith, "The Relevance of the Work of the International Criminal Court to Refugee Status Determinations" (2008) 20 (1) *International Journal of Refugee Law* pp. 180 – 181; M.M. El Zeidi, "Principle of Complementarity: A New Machinery to Implement International Criminal Law" (2002) 23 *Michigan Journal of International Law* p. 869.

⁴⁹⁷ Rome Statute of International Criminal Court, note 489 above, Article 17; The Prosecutor v Saif Al-Islam Gaddafi ICC-01/11-01/11 (2011); The Prosecutor v Uhuru Muigai Kenyatta ICC-01/09-02/11 (2011); The Prosecutor v William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11 (2011); The Prosecutor v Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (2009); C.F. Swanepoel, "The Prosecutor v Omar Hassan Ahmad Al-Bashir, International Criminal Court, July 2017" (2018) 51 (1) *De Jure* p. 173.

⁴⁹⁸ Smith note 496 above, p. 181.

⁴⁹⁹ Smith note 496 above, p. 181.

⁵⁰⁰ Rome Statute of International Criminal Court, note 489 above, Articles 53 (1) (b) & 53 (2) (b).

⁵⁰¹ Rome Statute of International Criminal Court, note 489 above, Article 53 (3) (a)

has a well-founded fear of persecution based on the Refugee Convention.⁵⁰² Reliable information on a country can be found in documents made by states (such as annual country reports of the US State Department), inter-governmental organisations (for instance, reports by United Nations Special Rapporteur) and by non-government organisations (reports by Human Rights Watch and Amnesty International).⁵⁰³ The work of ICC organs often provides detailed information on the effectiveness of the judicial systems in a particular country.⁵⁰⁴ This information is crucial in the determination of refugee status. The ICC holds reliable information on the country where an international crime has been committed to ascertain whether the state is unwilling or unable to prosecute the offender.⁵⁰⁵

In discharging its duties, the ICC scrutinises different issues, including the impartiality of the judicial system, the ability and credibility of judicial system to provide a fair trial.⁵⁰⁶ Currently, the ICC has opened investigations in four countries: the Democratic Republic of Congo, Uganda, Darfur in Sudan and Central African Republic.⁵⁰⁷ Asylum seekers from these countries can also rely on the works of the ICC to corroborate their stories and convince the asylum officials that they qualify for refugee status.

⁵⁰² Smith note 496 above, p. 182; R. Gibb and A. Good, "Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures" (2013) 25 (2) *International Journal of Refugee Law* pp. 297 – 298.

⁵⁰³ Smith note 496 above, p. 182.

⁵⁰⁴ Smith note 496 above, p. 182; *The Prosecutor v Saif Al-Islam Gaddafi* ICC-01/11-01/11 (2011).

⁵⁰⁵ Smith note 496 above, p. 182.

⁵⁰⁶ Smith note 496 above, p. 183; *The Prosecutor v Saif Al-Islam Gaddafi* ICC-01/11-01/11 (2011);

⁵⁰⁷ Smith note 496 above, p. 183. *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 (2011).

3.4 European legal regime on refugees

The European Union (EU) has developed the right to asylum to protect refugees and asylum seekers.⁵⁰⁸ It recognises and respects the principles contained in the 1951 Convention relating to the status of refugees, its 1967 Protocol and the Treaty creating the European Community.⁵⁰⁹ The Common European Asylum System (CEAS) complies EU laws that ensure “that all EU member states protect the rights of asylum seekers and refugees”.⁵¹⁰ The CEAS establishes minimum standards for the treatment of refugees and asylum seekers.

3.4.1 Council of European Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011

This Convention prohibits discrimination based on, *inter alia*, refugee status or migrant.⁵¹¹ Gender-based violence can also found a claim for refugee status. Member states are encouraged to take the necessary legislative measures to recognise gender-based violence against women as a form of persecution that enjoys protection under international refugee law.⁵¹² Member states are required to establish gender sensitive reception centres to safeguard the dignity of women who need international protection.⁵¹³ The Convention prevents any form of violence

⁵⁰⁸ Charter of Fundamental Rights of the European Union, 2012, Article 18.

⁵⁰⁹ Charter of Fundamental Rights of the European Union, note 508 above, Article 18.

⁵¹⁰ M. Italiano, “Understanding Migration and Asylum in the European Union”. Available at <https://www.opensocietyfoundations.org/explainers/understanding-migration-and-asylum-european-union> (accessed on 24 September 2018).

⁵¹¹ Council of European Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011, Article 4.

⁵¹² Council of European Convention on Preventing and Combating Violence Against Women and Domestic Violence, note 511 above, Article 60 (1).

⁵¹³ Council of European Convention on Preventing and Combating Violence Against Women and Domestic Violence, note 511 above, Article 60 (3).

against women and ensures that they benefit from international refugee protection when it is necessary.

3.4.2 Dublin Regulation (EU) No. 604/2013

The Dublin Regulation contains laws in the European Union that provide the criteria as well as mechanisms to determine a single state responsible to examine application for an asylum claim.⁵¹⁴ This procedure prohibits “asylum shopping” as no individual can move between different states to seek the best attractive asylum protection.⁵¹⁵ The principle is that individuals should seek asylum in the first safe state they find themselves in the European Union.

Dublin III emphasises family unity and ensures that family members apply for asylum in the same state.⁵¹⁶ There is a special provision and protection for unaccompanied minor children.⁵¹⁷ They need protection and measures to reunite them with their family making them subject to special considerations.⁵¹⁸ A country where a minor child has lodged his or her application for asylum has a responsibility to identify family members or relatives present in any Dublin state where they can be reunited.⁵¹⁹ The best interests of the child constitute the primary consideration in all matters related to the asylum issues.

⁵¹⁴ Dublin Regulation (EU) No. 604/2013 (Dublin III), p. 6.

⁵¹⁵ Dublin Regulation (EU), note 514 above, p. 6.

⁵¹⁶ Dublin Regulation (EU), note 514 above, p. 6.

⁵¹⁷ Dublin Regulation (EU), note 514 above, p. 25.

⁵¹⁸ Dublin Regulation (EU), note 514 above, p. 29.

⁵¹⁹ Dublin Regulation (EU), note 514 above, p. 29, Article 6.

3.4.3 European Union asylum policy or scheme

Individuals can claim asylum in the first country they enter in the European Union. However, asylum seekers move across the EU and claim refugee status in the member states with improved asylum systems. Any EU member state can return asylum seekers to the country of their first entry for asylum processing provided that such country has an effective asylum system.⁵²⁰ Some states may have a heavy burden to bear in refugee numbers as many asylum seekers use southern Europe to enter the EU. Furthermore, all EU members do not have the same functioning asylum system.

In *M.S.S. v Belgium and Greece*,⁵²¹ the European Court of Human Rights found systemic deficiencies in the asylum system in Greece and held that the transfer of an Afghan asylum seeker from Belgium to Greece infringed Article 3 of the European Convention on Human Rights (ECHR). The Court held that no member state in the EU could assume that another member state would treat asylum seekers in conformity with the standards of the ECHR. In *NS v Secretary of State for the Home Department*,⁵²² the Court ruled on the transfer of asylum seekers in the EU. The Court opined that when the systemic deficiencies amounted to a real risk of inhuman and degrading treatment of asylum seekers in a member state, the transfer could not be effective. This meant that a member state needed to ensure the effectiveness of the asylum system before a transfer is carried out.

⁵²⁰ M. Italiano, "Understanding Migration and Asylum in the European Union". Available at <https://www.opensocietyfoundations.org/explainers/understanding-migration-and-asylum-european-union> (accessed on 24 September 2018).

⁵²¹ *M.S.S. v Belgium and Greece*, No 30696/09, judgment (GC) of 21 January 2011.

⁵²² *N.S. v Secretary of State for the Home Department* C-411/10 (21 December 2011).

3.4.4 Responsibility to protect refugees and burden-sharing

The Responsibility to Protect is a new concept adopted in 2001 by the International Commission on Intervention and State Sovereignty (ICISS) to address global concerns on how to react to gross violations of human rights.⁵²³ This principle strove to change the old international rule on non-intervention in the domestic affairs and national sovereignty of an independent state.⁵²⁴ The principle of the Responsibility to Protect states that “sovereignty does not only entail rights for states but also carries with it a responsibility to their citizens that of protecting them against human rights violations.”⁵²⁵ Therefore, if a state is unable or unwilling to protect its citizens, the international community can intervene to do so.⁵²⁶

The international community has a collective responsibility to intervene in the domestic affairs of a state in order to protect people from “the crime of genocide, war crimes, ethnic cleansing and crimes against humanity through diplomatic, humanitarian and other peaceful means in keeping with Chapter VI and VIII of the UN Charter”.⁵²⁷ However, the international community can use force to protect

⁵²³ D. Dagi, “The Responsibility to Protect: Its Rise and Demise” (2017) 2 (3) *Journal of Liberty and International Affairs* p. 75; A. Hahir, “The Responsibility to Protect: ‘Sound and Fury Signifying Nothing?’” (2010) 24(2) *Sage Productions* p. 218; D. Hostetter, “Responsibility to Protect: Development of the Concept, and a Critique” (2010) 28(3) *The Conrad Grebel Review*. Available at <https://uwaterloo.ca/grebel/publications/conrad-grebel-review/issues/fall-2010/responsibility-protect-development-concept-and-critique-0> (accessed on 30 October 2018). For more information on the responsibility to protect, see C. Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm” (2007) 101 *American Journal of International Law* 99; A.J. Bellamy & P.D. Williams, “The New Politics of Protection? Cote d’Ivoire, Libya and the Responsibility to Protect” (2011) 87(4) *International Affairs (Royal Institute of International Affairs 1944 -)* pp. 847 – 850.

⁵²⁴ Dagi note 523 above, p. 75.

⁵²⁵ Dagi note 523 above, p. 75.

⁵²⁶ Dagi note 523 above, p. 75; G. Evans *et al* “Responsibility to protect” December 2001 p. 17 available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed on 30 October 2001).

⁵²⁷ M. Nuruzzaman, “The Responsibility to Protect Doctrine: Revised in Libya, Buried in Syria” (2013) 15(2) *Insight Turkey* p. 60; S.F. Gagro, “The Responsibility to Protect (R2P) Doctrine” (2014) III (1) *International Journal of Social Sciences* p. 74; A.J. Bellamy, “The Responsibility

civilian populations after all peaceful means to prevent atrocities have been exhausted.⁵²⁸ The responsibility to protect applies to refugees as they qualify for refugee status due to atrocities committed against them in their countries of origin or residence. People who flee from their own countries to escape genocide, war crimes, crimes against humanity and ethnic cleansing receive protection in states parties to the 1951 Refugee Convention.

The refugee protection system aims at maximising the number of refugees who receive protection.⁵²⁹ There are criteria for states, regardless of their wealth, to distribute refugees among themselves, including the financial support for refugees in other states.⁵³⁰ Most states fail to comply with refugee obligations, but others cooperate in a burden-sharing according to their abilities.⁵³¹ However, burden-sharing for refugees does not operate in a synchronised manner in the EU. In reality, states of first entry and final destination carry disproportionate and uncompensated burdens.⁵³² This is because some states do not comply with the relocation scheme for refugees and individuals can freely move to their desired destination once they arrive in a Schengen area.⁵³³ There is freedom of movement between states in the Schengen area.

to Protect and the Problem of Military Intervention" (2008) 84(4) *International Affairs (Royal Institute of International Affairs 1944 -)* pp. 622 – 623.

⁵²⁸ Nuruzzaman note 527 above, p. 63.

⁵²⁹ R . Baubock, "Refugee Protection and Burden-Sharing in European Union" (2018) 56 (1) *Journal of Common Market Studies*, p. 141.

⁵³⁰ Baubock note 529 above, pp. 141 – 142.

⁵³¹ Baubock note 529 above, p. 142; E.R. Thielemann, "Between Interests and Norms: Explaining Burden-Sharing in the European Union" (2003) 16 (3) *Journal of Refugee Studies* pp. 261 – 262.

⁵³² Baubock note 529 above, p. 154.

⁵³³ S.C. Colombeau, "Policing the Internal Schengen Borders – Managing the double Bind Between Free Movement and Migration Control" (2017) 27 (5) *Policing and Society* p. 481.

The EU restricts the number of refugees that can come into member states. On 18 March 2016, the EU and Turkey entered into an agreement that all new “irregular migrants crossing from Turkey to Greece would be returned to Turkey as a temporary and extraordinary measure.”⁵³⁴ The agreement was disastrous to the protection of refugees in the EU as it tended to prevent refugees from reaching the EU. It does not safeguard the fundamental rights of asylum seekers in the EU and violates the principle of *non-refoulement*. For asylum seekers and migrants, “there are basically no legal ways to get to Europe.”⁵³⁵ This is one of the reasons why would be refugees and asylum seekers use smugglers and dangerous routes (through the Mediterranean Sea) to reach the EU. However, some states do make exception and still receive refugees into their territories. For instance, Italy and the United Kingdom recognise more Afghan asylum seekers while Sweden accepts more refugees from Iraq.⁵³⁶ Furthermore, the definition of a refugee also encompasses victims of non-State actors.⁵³⁷ Thus, Somalis are more recognised as refugees in Germany as they come from a failed state.⁵³⁸ States have a policy to recognise refugees from specific countries where individuals can easily satisfy the definition of a refugee.

In 2016, the EU and Turkey contracted to deal with asylum seekers for mutual interests. Turkey agreed to receive all deported irregular migrants who arrived in

⁵³⁴ D. Bulley, “Same on EU? Europe, RtoP, and the Politics of Refugee Protection” (2017) 31 (1) *Ethics and International Affairs* p. 51.

⁵³⁵ Bulley note 534 above, p. 64.

⁵³⁶ C. Levy, “Refugees, Europe, Camps/State of Exception: ‘Into the Zone’, the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice)” (2010) 29(1) *Refugee Survey Quarterly* pp. 106 – 107.

⁵³⁷ Levy note 536 above, p. 107.

⁵³⁸ Levy note 536 above, p. 107.

Greece from 20 March 2016 onwards.⁵³⁹ The deportation was implemented even if the concerned individuals came from conflict zones such as Afghanistan, Iraq and Syria.⁵⁴⁰ However, every deported Syrian who was a recognised refugee by the UNHCR would be resettled from Turkey to the EU.⁵⁴¹ This practice constitutes an unfair discrimination against other refugees from other countries as it only applies to Syrian refugees. The EU-Turkey Deal aims at keeping refugees away from EU territory and does not promote the protection of refugees.

Germany demonstrated solidarity with refugees in September 2015 and opened its borders to undocumented persons or migrants.⁵⁴² In one day, approximately seven thousand asylum seekers arrived in Munich.⁵⁴³ Hungary was aggrieved by the humanitarian decision to welcome asylum seekers as it became a transit state for individuals who wanted to reach the EU illegally.⁵⁴⁴ In order to curtail illegal movements to EU, “Hungary increased border control and erected a razor-wire fence along its border with Serbia to stop further arrivals”.⁵⁴⁵ The EU had clearly abandoned its policy to receive asylum seekers and ensure the protection of international refugee regime.

EU asylum policy is a paradox: on one hand, it contains commitment to human rights; on the other hand, it has introduced, since the mid 1980s, relatively non-arrival or non-entrée policies creating barriers for the new influx of asylum

⁵³⁹ Bulley note 534 above, p. 65.

⁵⁴⁰ Bulley note 534 above, p. 65.

⁵⁴¹ Bulley note 534 above, p. 65.

⁵⁴² Bulley note 534 above, p. 64; B. Vollmer and S Karakayali, “The Volatility of the Discourse on Refugees in Germany” (2018) 16 (1 & 2) *Journal of Immigrant and Refugee Studies* p. 118; E.F. Thomas, “When and How Social Movements Mobilize Action Within and Across Nations to Promote Solidarity With Refugees” (2019) 49 *European Journal of Social Psychology* p. 216.

⁵⁴³ Bulley note 534 above, p. 64.

⁵⁴⁴ Bulley note 534 above, p. 64.

⁵⁴⁵ Bulley note 534 above, p. 64.

seekers.⁵⁴⁶ There are legal norms preventing refugees from having access to asylum procedures.⁵⁴⁷ For instance, the Schengen regime imposes heavy fines on airline carriers that bring passengers to Europe without visas and legal documentations.⁵⁴⁸ The mechanisms of non-arrival include the imposition of a visa requirement on the citizens of states that produce or generate genuine refugees, deportation procedures by the first country of arrival and the designation of some countries as safe countries of origin and therefore undeserving for consideration for international protection.⁵⁴⁹ The designation of some areas at airports as international zones where no law applies also constitutes a barrier for individuals striving to access the asylum system.⁵⁵⁰ Additionally, “some Member States of the EU have been planning to deport asylum seekers to new regional processing areas or transit processing centres.”⁵⁵¹ However, this programme has not materialised at the moment.

The EU took steps to address the roots cause of irregular migration in order to avoid the continued arrival of asylum seekers on its territory. For instance, in 2015, the EU made available an “Emergency Trust Fund for Africa” of over € 1.8 billion in development aid for states in the regions producing refugees such as “North Africa, the Horn of Africa, the Sahel and Lake Chad”.⁵⁵² This Fund is designed for projects that hope to eradicate the root causes of irregular migration, promote economic

⁵⁴⁶ J. Pirjola, “European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language” (2009) 11 *European Journal of Migration and Law* p.359.

⁵⁴⁷ Pirjola note 546 above, p. 359.

⁵⁴⁸ Pirjola note 546 above, p. 359.

⁵⁴⁹ Pirjola note 546 above, pp. 359 – 360; J. Hathaway, *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press (2005) 291 – 297.

⁵⁵⁰ Pirjola note 546 above, p. 360; *Umuur v France* ECHR (application 19776/92), para 52. Despite its name, international zone does not have extraterritorial status.

⁵⁵¹ Pirjola note 546 above, p. 360.

⁵⁵² Bulley note 534 above, p. 65.

opportunities, security and development.⁵⁵³ In this way, the EU participates in burden-sharing as it eradicates the root causes of asylum seekers in the countries of origin and create development opportunities for states to address the wellbeing of their citizens.

The EU offers limited resettlement opportunities as a durable solution for refugees who are located in developing countries. For instance, from 2004 to 2008, EU member states only accepted 434 refugees from Tanzania.⁵⁵⁴ Moreover, they have also resettled 204 refugees from Eastern Europe in the same period.⁵⁵⁵ The EU does not offer many resettlement opportunities to protracted refugees as a burden-sharing principle under international law. It needs to improve its resettlement policy to ensure the protection of refugees.

Some member states of the EU experience anti-refugee sentiments from far-right factions that are also opposed to immigration.⁵⁵⁶ For instance, Denmark welcomed immigrants, but it changed this policy in the early 1980s and started regarding immigrants as outsiders from the society in general.⁵⁵⁷ The Danish media also, in 1997, started publishing negative stories on how refugees abused the welfare system.⁵⁵⁸ Turkey had generously received refugees from Syria, but since 2012 the “growing anti-refugee sentiments have led to sporadic clashes between Turkish

⁵⁵³ Bulley note 534 above, p. 65.

⁵⁵⁴ Bulley note 534 above, p. 64.

⁵⁵⁵ Bulley note 534 above, p. 64; European Resettlement Network, Regional Protection Programmes. Available at www.resettlement.eu/page/regional-protection-programmes. (Accessed on 26 September 2018).

⁵⁵⁶ H.F. Moore, “Immigration in Denmark and Norway: Protecting Culture or Protecting Rights?” (2010) 82(3) *Scandinavian Studies* p. 355.

⁵⁵⁷ Moore note 556 above, p. 361.

⁵⁵⁸ Moore note 556 above, p. 362.

citizens and Syrian refugees.”⁵⁵⁹ Furthermore, Turkish citizens had often protested against the presence of Syrian refugees specifically in the areas where refugees were concentrated.⁵⁶⁰ Currently, Turkey still experiences anti-refugee sentiments among its population that wants to maintain its identity.

Although Germany has welcomed a great number of refugees, some of its citizens demonstrate anti-refugee sentiments.⁵⁶¹ Since Germany opened its borders to refugees in 2015 to alleviate the refugee crisis, the city of Cottbus received 3 000 asylum seekers.⁵⁶² Due to an economic crisis, the influx of refugees in Cottbus has created anti-refugee sentiments among the local population and the city experiences right-wing extremist activities.⁵⁶³ As a result, Cottbus has since imposed a ban on refugees; other cities in Germany such as Salzgitter, Delmenhorst and Wilhelmshaven have also implemented similar prohibitions.⁵⁶⁴ Authorities justify their decision to ban refugees on lack of capacity and resources to integrate newcomers.

Sweden received more than 160 000 refugees from Syria, Afghanistan and Iraq in 2015.⁵⁶⁵ However, Sweden had also experienced anti-refugee or immigrant

⁵⁵⁹ S. Ahmadoun, “Turkey’s Policy Towards Syrian Refugees: Domestic Repercussions and the Need for International Support (SWP Comments, 47 / 2014). Berlin: Stiftung Wissenschaft Und Politik – SWP – Deutsches Institut für Internationale Politik Under Sicherheit. P. 3 . Available at https://www.ssoar.info/ssoar/bitstream/handle/document/41145/ssoar-2014-ahmadoun-Turkeys_policy_toward_Syrian_refugees.pdf?sequence=1 (accessed on 2 November 2018).

⁵⁶⁰ Ahmadoun note 559 above, p. 3.

⁵⁶¹ B. Woolsey, “German City Bans New Refugees as Anti-Migrant Mood Increases”. 20 January 2018. Available at <https://www.telegraph.co.uk/news/2018/01/20/german-city-bans-new-refugees-anti-migrant-mood-increases/> (accessed on 31 October 2018).

⁵⁶² Woolsey note 561 above.

⁵⁶³ Woolsey note 561 above

⁵⁶⁴ Woolsey note 561 above.

⁵⁶⁵ D. Hinde, “Refugees in Sweden Adjust to Anti-Migrant Sentiment and Tougher Asylum Laws”. 20 June 2017. Available at <https://www.pri.org/stories/2017-06-20/refugees-sweden-adjust-anti-migrant-sentiment-and-tougher-asylum-laws> (2 November 2018).

sentiments from its own population. Right-Wing gangs have attacked asylum homes where newcomers were accommodated throughout the country.⁵⁶⁶ Sweden has changed its asylum laws to restrict asylum seekers' rights by only allowing them to claim temporary residence rights.⁵⁶⁷ This law restricts asylum procedures and rejected asylum seekers can be deported to their country of origin.⁵⁶⁸ The Swedish government has a policy to reduce the number of refugees and the Moderate Party wants to cut refugee welfare.⁵⁶⁹

Norway has changed its debate on refugees from sympathy and compassion to zoom on the problems brought by refugees and immigrants.⁵⁷⁰ It has enacted laws tightening asylum rules to restrict the number of refugees who can be accepted in response to the anti-immigration sentiments among the electorate.⁵⁷¹ Parliamentarians agreed that asylum seekers with a criminal record should be deported to their countries of origin.⁵⁷² Furthermore, asylum seekers can be arrested and detained if the authorities decide not to process their applications.⁵⁷³ Norway has sent back people to Afghanistan and Somalia when their applications for asylum

⁵⁶⁶ Hinde note 565 above.

⁵⁶⁷ Hinde note 565 above.

⁵⁶⁸ J. Henley, "Anti-Migrant Feeling Fuels Swedish Far Right as Election Looms". 2 September 2018. Available at <https://www.theguardian.com/world/2018/sep/02/sweden-democrats-far-right-anti-migrant> (accessed on 2 November 2018)

⁵⁶⁹ Henley note 568 above.

⁵⁷⁰ Reuters "Norway Tights Asylum Rules as Anti-Migrant Sentiment Strengthens". November 2015. Available at <https://www.reuters.com/article/us-europe-migrants-norway/norway-tightens-asylum-rules-as-anti-migrant-sentiment-strengthens-idUSKCN0T91IG20151120> (accessed on 2 November 2018)

⁵⁷¹ Reuters note 570 above.

⁵⁷² Reuters note 570 above.

⁵⁷³ Reuters note 570 above.

failed.⁵⁷⁴ There are stringent measures generated to deal with asylum seekers in Norway.

3.5 Legal framework of refugees in Africa

Africa recognises that the 1951 Refugee Convention and its 1967 Protocol constitute the basic international instruments relating the status of refugees.⁵⁷⁵ They contain the common standards for the treatment of refugees and indicate a commitment for states to receive refugees.⁵⁷⁶ However, the specific regional aspects of refugees require the development of regional laws to accommodate and protect the rights of refugees. Africa has adopted or crafted regional laws to promote the rights of asylum seekers and refugees, taking into consideration the peculiar circumstances of the continent.

3.5.1 Convention Governing the Specific Aspects of Refugees in Africa, 1969 (OAU Refugee Convention)

The OAU Refugee Convention provides for the reception and protection of refugees in Africa. It states that the problems of African refugees must be solved in an African context.⁵⁷⁷ In this framework, the OAU Convention approves the definition of a “refugee” under the 1951 Refugee Convention and includes the African specific issues. It expands the term “refugee” to embrace any person who is compelled to

⁵⁷⁴ F. Nelson, “Norway’s Thought-Love Approach to the Refugee Crisis – The Country’s Outspoken Immigration Minister, Sylvi Listhaug, on the Best Way to Help Genuine Refugees.” Unknown date. <https://www.spectator.co.uk/2017/11/norway-is-hard-on-migrants-but-tough-love-works/> (accessed on 2 November 2018).

⁵⁷⁵ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, preamble (9) and (10).

⁵⁷⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, preamble (9).

⁵⁷⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, preamble (8).

leave his or her country of origin or nationality to seek refuge in another country due to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality.⁵⁷⁸ This legal framework was inspired by the events that occurred in many African states after they gained independence from their colonial masters. Article 1 (4) of the OAU Refugee Convention provides for cessation of refugee status and indicates the criteria that need to be considered.⁵⁷⁹ Furthermore, Article 1 (5) excludes from asylum those individuals who have committed specific serious crimes and ensures that offenders do not use asylum provisions to escape justice.

The OAU Refugee Convention obliges member states to use legislative measures to receive refugees and secure their settlement on their territories.⁵⁸⁰ It also states that “the grant of asylum to refugees is a peaceful and humanitarian act and should not be regarded as an unfriendly act by any member states”.⁵⁸¹ Article 2 (3) of the OAU Refugee Convention contains the principle of *non-refoulement* for refugees, including the fact that no refugee should be refused entry at the border of any state

⁵⁷⁸ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 1 (2); G. Bekker, “The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System” (2013) 13 *AHRLJ* p. 7.

⁵⁷⁹ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 1 (4): “This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or, (b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.” See also J. Fitzpatrick, “The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection” (1999) 13 *Geo. Immigr. L.J.* p. 348.

⁵⁸⁰ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 2 (1).

⁵⁸¹ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 2 (2).

party. Additionally, Article 2 (4) provides for burden-sharing responsibility whereby a state party, overburdened by the granting of asylum status to refugees, can appeal to other states parties for assistance in the spirit of African solidarity and international cooperation. States parties have a duty to settle refugees, as far as possible, at a reasonable distance from the border of their country of origin for security reasons.⁵⁸² This ensures that the sending country is protected against refugees who may attack it from the asylum state. Simultaneously, refugees and the host state are also safeguarded as the sending state can attach such refugees to ensure its security.

Refugees have duties to obey and respect the laws, regulations and measures for the maintenance of public order in the asylum state.⁵⁸³ They are prohibited from performing “any subversive activities against any member state”.⁵⁸⁴ Asylum states have the duty of preventing refugees from attacking any member state through the use of arms, press or radio.⁵⁸⁵ Other principles confined in the OAU Refugee Convention include non-discrimination,⁵⁸⁶ voluntary repatriation⁵⁸⁷ and issuance of travel documents⁵⁸⁸ for refugees. Thus, the OAU Refugee Convention creates conducive measures for refugees and asylum seekers in Africa. However, it

⁵⁸² Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 2 (6).

⁵⁸³ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 3 (1).

⁵⁸⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 3 (1).

⁵⁸⁵ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 3 (3).

⁵⁸⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 4.

⁵⁸⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 5.

⁵⁸⁸ Convention Governing the Specific Aspects of Refugee Problems in Africa, note 219 above, Article 6.

emphasises voluntary repatriation and does not provide for protracted refugees who are unable to go back to their countries of origin. This is the single and sore gap in the African context of refugee regime. Furthermore, the OAU Refugee Convention does not address the root causes and factors generating refugees, such as civil unrests, poverty, underdevelopment, genocide, corruption and failure of good governance.

There is jurisprudence in Africa for the protection and promotion of refugee rights. In *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*,⁵⁸⁹ the rights of refugees were violated after the Guinean President Lansana Conte broadcasted on the national radio that Sierra Leonean refugees should be arrested and confined to refugee camps. Serious crimes were committed against Sierra Leonean refugees in Guinea, including looting of properties, assaults, widespread rapes, murders, arrests and detentions without a just cause and forced return to their country of origin.⁵⁹⁰ The complainant alleged that President Conte, on the 9 September 2000, through his speech delivered on radio, violated the non-discrimination principle of international law when he instigated soldiers and civilians to commit violence against Sierra Leonean refugees.⁵⁹¹ The African Commission held that when countries ratify or sign international instruments, they voluntarily recognise their obligation to comply with

⁵⁸⁹ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea v Guinea* 2004 (ACHPR).

⁵⁹⁰ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea v Guinea* note 589 above, paras 6 – 8.

⁵⁹¹ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea v Guinea* note 589 above, para 46.

their provisions. Therefore, the Republic of Guinea undertook the obligation to protect the rights of refugees who request asylum in its territory.⁵⁹²

The Commission further opined that large scale expulsions of people from one country to another is a special threat to human rights. Consequently, if a state targets “specific national, racial, ethnic or religious groups, this is then generally qualified as discriminatory in this sense as it has no legal basis”.⁵⁹³ The African Commission held that the respondent state had violated some provisions of the African Charter and Article 4 of the 1969 OAU Refugee Convention.⁵⁹⁴ It recommended that the governments of Sierra Leone and Guinea establish a Joint Commission to evaluate the losses of the victims and compensate them. In arriving at this decision, the African Commission relied on the African Charter. Although the outcome is commendable, the African Commission should have discussed the provisions of the OAU Refugee Convention in more detail since the complainants were refugees.

3.5.2 African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child (ACRWC)⁵⁹⁵ contains rights applicable to all children, including refugee children. It provides that the best interests of the child are the primary consideration in all matters or actions concerning the child.⁵⁹⁶ Every child has the right to education,⁵⁹⁷ health care

⁵⁹² *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea v Guinea* note 589 above, para 68.

⁵⁹³ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea v Guinea* note 589 above, para 69.

⁵⁹⁴ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea v Guinea* note 589 above, para 70.

⁵⁹⁵ African Charter on the Rights and Welfare of the Child, 1990.

⁵⁹⁶ African Charter on the Rights and Welfare of the Child, note 595 above, Article 4.

⁵⁹⁷ African Charter on the Rights and Welfare of the Child, note 595 above, Article 11.

services,⁵⁹⁸ parental care⁵⁹⁹ and family protection.⁶⁰⁰ Other rights necessary for the development and wellbeing of the child are also included in the ACRWC.

The ACRWC has a specific provision for refugee children. States parties have an obligation to take all appropriate measures to ensure that a child who is an asylum seeker or a recognised refugee, whether accompanied or unaccompanied, receives appropriate protection and humanitarian assistance to enjoy the rights in the ACRWC and other binding international human rights and humanitarian instruments.⁶⁰¹ States parties have a duty to cooperate with international organisations working with refugees and trace parents as well as other legally responsible individuals to facilitate an unaccompanied refugee child achieve his or her family reunification.⁶⁰² Where there is no responsible person to care for unaccompanied refugee child, he or she receives the same protection accorded to any other child deprived of his or her family environment.⁶⁰³ The protection of unaccompanied refugee children also applies to children who are internally displaced through any reason, including “natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order”.⁶⁰⁴ The ACRWC accommodates all children in protecting their rights regardless of their status or social background.

⁵⁹⁸ African Charter on the Rights and Welfare of the Child, note 595 above, Article 14.

⁵⁹⁹ African Charter on the Rights and Welfare of the Child, note 595 above, Article 19.

⁶⁰⁰ African Charter on the Rights and Welfare of the Child, note 595 above, Article 18.

⁶⁰¹ African Charter on the Rights and Welfare of the Child, note 595 above, Article 23 (1); D.M. Chirwa, “The Merits and Demerits of the African Charter on the Rights and Welfare of the Child” (2002) 10 *International Journal of Children’s Rights* pp. 158 – 159, pp. 168 – 169; D. Olowu, “Protecting Children’s Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child” (2002) 10 *International Journal of Children’s Rights* p. 129.

⁶⁰² African Charter on the Rights and Welfare of the Child, note 595 above, Article 23 (2).

⁶⁰³ African Charter on the Rights and Welfare of the Child, note 595 above, Article 23 (3).

⁶⁰⁴ African Charter on the Rights and Welfare of the Child, note 595 above, Article 23 (4).

3.5.3 African Charter on Human and Peoples' Rights, 1981

The African Charter on Human and Peoples' Rights (ACHPR)⁶⁰⁵ provides for the right of every individual to seek and obtain asylum from persecution in other countries according to their national laws and international conventions.⁶⁰⁶ It prohibits states parties from carrying out mass-expulsions of non-nationals.⁶⁰⁷ Peace, solidarity and friendly relationships are encouraged among states parties. ACHPR prevents refugees from engaging in subversive activities against any state party or their country of origin.⁶⁰⁸ The institution of asylum is established for humanitarian reasons and for maintaining the sanctity of the protection of refugees.

In *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo*,⁶⁰⁹ Mr Jean Simbarakiye was a Burundian citizen who managed to obtain his political refugee status in Zaire in 1974. He acquired his university degree and worked as a civil electrical engineer in ONATRA since 1989. On 31 October 1996, the government of the Democratic Republic of Congo (DRC) adopted a resolution to terminate all work contracts for citizens or nationals of

⁶⁰⁵ African Charter on Human and Peoples' Rights, 1981.

⁶⁰⁶ African Charter on Human and Peoples' Rights, note 605 above, Article 12 (3).

⁶⁰⁷ African Charter on Human and Peoples' Rights, note 605 above, Article 12 (5); *East African Law Society v The Secretary General of the East African Community Reference No 7 of 2014 2016* (EACJ); *Rencontre Africaine pour la Defence des Droits de l'Homme (RADDHO v Zambia 71/92 1997* (ACHPR); *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 Others) v Republic of Angola 294/04 2008* (ACHPR); *Doebbler v Sudan 235/00 2009* (ACHPR); *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan 279/03-296/05 2009* (ACHPR), para 190; G. Bekker, "Mass Expulsion of Foreign Nationals: A 'Special Violation of Human rights' – Communication 292/2004 Institute for Human Rights and Development in Africa v Republic of Angola" (2009) *African Human Rights Law Journal* pp. 268 – 270.

⁶⁰⁸ African Charter on Human and Peoples' Rights, note 605 above, Article 23 (2) (1).

⁶⁰⁹ *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo* (2003) AHRLR 65 (ACHPR 2003).

Rwanda, Burundi and Uganda.⁶¹⁰ On 3 January 1997, Mr Jean Simbarakiye was unfairly dismissed for the sole reason that he was a Burundian national.⁶¹¹ He fled to Togo and applied to the African Commission to have his rights protected.

The African Commission stated that for communication to be considered, Article 56 (5) of the ACHPR required the complaint to first exhaust local remedies, if any, unless it was obvious that this procedure was unduly prolonged.⁶¹² However, the complainant did not attempt to exhaust local remedies that were available in the DRC before referring the matter to the African Commission.⁶¹³ It ruled the communication inadmissible as the complainant had not exhausted local remedies.⁶¹⁴ The requirement of non-exhaustion of local remedies is crucial as it allows states to investigate and remedy the alleged violation of human rights. However, it was not reasonable to expect Simbarakiye to exhaust local remedies in the circumstances of his case and the African Commission should have accepted the communication.

In *Organisation Mondiale Contre la Torture and Others v Rwanda*,⁶¹⁵ the government of Rwanda expelled four Burundian refugees and gave them one month

⁶¹⁰ *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo*, note 609 above, para 5.

⁶¹¹ *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo* note 609 above, para 6.

⁶¹² *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo* note 609 above, para 24.

⁶¹³ *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo* (2003) AHRLR 65, para 30.

⁶¹⁴ *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo* note 609 above, para 32. See also *Chinhamo v Zimbabwe* (2007) AHRLR 96 (ACHPR 2007); *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008); *Mouvement des Refugies Mauritanien au Senegal v Senegal* 162/97 1997 (ACHPR); *Rights International v Nigeria* 915/98 1999 (ACHPR); G. Bekker, "The Protection of Asylum Seekers and Refugees Within the African Regional Human Rights System" (2013) 13 *AHRLJ* p. 10 – 14.

⁶¹⁵ *Organisation Mondiale Contre la Torture and Others v Rwanda* 27/89 – 46/91 – 99/93 1996 (ACHPR).

to leave the country. The reason for their expulsion was that they were a national security threat as they were involved in subversive activities.⁶¹⁶ They could not use due process to defend themselves before a competent court or tribunal. There were allegations of violation of human rights of refugees.⁶¹⁷ The African Commission analysed Article 12 of the ACHPR and argued that once a non-national was legally admitted in a territory of a state party he or she could only be expelled in accordance with the legal decision taken in due process. This provision also applies to refugees who are persecuted in their countries of origin and cannot be arbitrary expelled from the hosting country.⁶¹⁸

The African Commission ruled that this group of Burundian refugees had been expelled on the basis of their nationality.⁶¹⁹ This was contrary to the principle against mass expulsion of foreign nationals targeting national, racial, ethnic or religious groups.⁶²⁰ The government of Rwanda violated the principle of due process by expelling Burundian refugees without providing them an opportunity to be heard.⁶²¹ The African Commission held that Rwanda had violated the provisions of the ACHPR relating to refugees and contended that the Rwandan government had to adopt measures to comply with the protection of refugees.⁶²² The decision is commendable as it encourages states parties to promote and protect the rights of refugees. The African Commission has extensively used the ACHPR to ensure that refugee rights are protected.⁶²³ However, the communications need to be

⁶¹⁶ *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 1.

⁶¹⁷ *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 1.

⁶¹⁸ *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 31.

⁶¹⁹ *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 33.

⁶²⁰ *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 32.

⁶²¹ *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 35.

⁶²² *Organisation Mondiale Contre la Torture and Others v Rwanda* note 615 above, para 36.

⁶²³ *Ouko v Kenya* (2000) AHRLR 135.

admissible before the African Commission can entertain a communication and the complaints must first exhaust local remedies before they can seek further assistance.

3.5.4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

The Protocol⁶²⁴ to the ACHPR on the Rights of Women in Africa has specific provisions that apply to refugee women. States parties have a duty to ensure equality of treatment between men and women in access to refugee status determination. They should accord women refugees full protection and benefits available under international refugee law such as identity and other documents.⁶²⁵ In addition, they also have an obligation to take necessary measures to increase the participation of women who are asylum seekers and refugees in the decision-making structures in matters relating to asylum issues.⁶²⁶ States parties are required to protect women in armed conflicts and ensure that asylum seekers and refugees who are women are protected against all forms of violence, such as rape or sexual exploitation.⁶²⁷ They have to criminalise such acts as heinous crimes and punish the offenders before a competent criminal court.⁶²⁸ This provision aims to eradicate

⁶²⁴ Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2003; Y.K. Brian Sang, "The Approach of African Human Rights Treaty Bodies to International Humanitarian Law: Normative Basis and Institutional Practice" 2017 *AYIHL* pp. 13 – 14.

⁶²⁵ Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, note 624 above, Article 4 (2) (k).

⁶²⁶ Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, note 624 above, Article 10 (2) (c) and (d).

⁶²⁷ Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, note 624 above, Article 11 (3).

⁶²⁸ Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, note 624 above, Article 11 (3); Brian Sang note 624 above, p. 14.

systemic violence against women in general, including refugees and asylum seekers.

3.6 Legal framework of refugees in Latin America

Latin American countries have been experiencing the problem of refugees and recognise the 1951 Refugee Convention and its 1967 Protocol as international instruments dealing with refugees. In 1984, states in Latin America met in Cartagena (Colombia) and agreed on the “Cartagena Declaration on Refugees”.⁶²⁹ The Declaration confirmed the principle of *non-refoulement* “as a corner-stone of international protection of refugees”.⁶³⁰ It approved the definition of the term “refugee” in the 1951 Refugee Convention and extended it to include individuals “who have fled their countries because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other events which have seriously disturbed public order.”⁶³¹ These criteria represented the real circumstances of refugees in the Latin American region.

The Cartagena Declaration emphasises the humanitarian nature of asylum and stipulates that the grant of asylum to refugees should not “be interpreted as an unfriendly act toward the country of origin of refugees.”⁶³² In addition, receiving states have to settle refugees at a reasonable distance from the border in order to improve their protection, facilitate their self-sufficiency and integration into the host

⁶²⁹ Cartagena Declaration on Refugees, 1984.

⁶³⁰ Cartagena Declaration on Refugees, note 629 above, III (5).

⁶³¹ Cartagena Declaration on Refugees, note 629 above, III (3).

⁶³² Cartagena Declaration on Refugees, note 629 above, III (4).

country.⁶³³ In this way, refugees can be able to satisfy their basic needs and participate in the development of the host society.

Some countries in Latin America have incorporated the provisions of Cartagena Declaration on Refugees into their national laws in order to receive refugees on their territories.⁶³⁴ Although the Declaration is not binding, it has had a significant influence in the development of refugee law in Latin America.

Latin American countries have proclaimed other declarations⁶³⁵ to improve the circumstances of refugees in the region. For instance, the Brazil Declaration and Plan of Action⁶³⁶ contains local integration programme to assist refugees to settle in the host country. One of the recommendations includes policies designed to promote inter-cultural integration between refugees and host communities, and appreciating the contribution that refugees make to the development of the community.⁶³⁷ Furthermore, there is a need to facilitate naturalisation of refugees at low-cost procedures.⁶³⁸ This is one of the durable solution for refugees that needs some improvements to alleviate challenges faced by refugees.

3.7 Summary

This chapter examined and explicated the genesis and development of international and regional refugee laws. The UN adopted the 1951 Refugee Convention as a legal instrument or framework to assist refugees who were displaced in Europe due

⁶³³ Cartagena Declaration on Refugees, note 629 above, III (6).

⁶³⁴ Nicholson and Kumin note 371 above, p. 21. States that have included Cartagena Declaration on Refugees into their national laws include Argentina, Belize, Bolivia, Brazil, Chile, Colombia, el Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

⁶³⁵ Central and Latin America have adopted three declarations since 1984.

⁶³⁶ Brazil Declaration and Plan of Action, 2014, p. 12.

⁶³⁷ Brazil Declaration and Plan of Action, note 636 above, p. 12.

⁶³⁸ Brazil Declaration and Plan of Action, note 636 above, p. 12.

to events that occurred before 1 January 1951. The 1967 Protocol to the UN Refugee Convention removed the cut-off date and geographical limitations to accommodate all refugees worldwide. The 1951 Refugee Convention contains the obligations of host states, rights and duties of refugees. The UN has also adopted other international legal instruments to improve the circumstances of refugees. Most of these instruments provide for specific persons such as children and women. Asylum is a sacred institution and excludes fugitives who have committed serious violations of human rights such as genocide, war crime and crime against humanity. On regional level, the European Union, African Union and Latin American states have created their regional instruments, policies and declarations to respond to the problem of refugees on their territories. The next chapter deals with comparative study in refugee regimes in Tanzania, Zambia, the Netherlands and Germany.

Chapter 4: Integration of refugees in Tanzania, Zambia, the Netherlands and Germany in comparative perspectives

4.1 Introduction

The problem of refugees is now a global phenomenon and “it is not getting smaller”.⁶³⁹ As a result, states have enacted statutes and adopted policies to accommodate refugees in their own territories. Under international law, every state has a duty to protect its citizens and its failure to do so can lead some of its people fleeing and seeking asylum in other states.⁶⁴⁰ The country of asylum should offer protection to refugees and asylum seekers and the United Nations High Commissioner for Refugees intervenes to ensure that the rights of such refugees and asylum seekers are protected.⁶⁴¹ Some states have warmly welcomed refugees in their territories, including Tanzania, Zambia, the Netherlands and Germany.

This chapter makes a survey of the law and state practices in selected countries with a view to generating international best practices which could be adopted and adapted to the South African situation. The reason for focusing on Tanzania is that it has demonstrated best practices in welcoming refugees and its former President, Mwalimu Julius Nyerere, received a Nansen Medal in recognition of his policies and activities with regards to refugees.⁶⁴² Zambia has exhibited a culture of cordiality in

⁶³⁹ C.M. Peter, “Rights and Duties of Refugees Under Municipal Law in Tanzania: Examining a Proposed New Legislation” (1997) 41 *Journal of African Law* p. 81 quoting Julius K. Nyerere, former President of the United Republic of Tanzania (1961 – 1985) in his inaugural speech to the Arusha Conference on the African Refugee Problems of May 1979.

⁶⁴⁰ Peter note 639 above, p. 84.

⁶⁴¹ Peter note 639 above, p. 84; G.S. Goodwin-Gill, “Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees” (1982) 3 *Michigan Yearbook of International Legal Studies* p. 292.

⁶⁴² S.S. Chaulia, “The Politics of Refugee Hosting in Tanzania: From Open Door to Unsustainability, Insecurity and Receding Receptivity” (2003) 16(2) *Journal of Refugee Studies* p. 147; C.P. Gasarasi, “The Mass Naturalisation and Further Integration of Rwandese in Tanzania: Process,

receiving and accommodating refugees into its territory, especially individuals fleeing wars, since it gained independence.⁶⁴³ The Netherlands also adopted a humanitarian approach in accommodating and integrating refugees in its own territory and provides basic necessities of life to refugees.⁶⁴⁴ Germany is one of the countries in Europe that welcomes refugees and provides them with integration courses.⁶⁴⁵ It is submitted that South Africa can borrow some lessons on the best state practices in receiving refugees from the above countries. In this chapter, the diverse experiences of these selected countries in accommodating and integrating refugees are discussed.

4.2 Integration and protection of refugees in Tanzania

The United Republic of Tanzania is well known for its historical generosity towards refugees.⁶⁴⁶ It obtained its independence in 1961 and subsequently started experiencing an influx of refugees into its territory.⁶⁴⁷ As Tanzania was the only independent country in the region in the early 1960s, it received refugees from Southern Africa who fled from colonialism and racial segregation.⁶⁴⁸ Freedom fighters from Mozambique, Angola, Southern Rhodesia, South West Africa and

Problems and Prospects" (1990 3(2) *Journal of Refugee Studies* p. 108; P. Ongpin, "Refugees in Tanzania – Asset or Burden" (2008) 5 *Journal of Development and Social Transformation* p. 13.

⁶⁴³ O. Bakewell, "Repatriation and Self-settled Refugees in Zambia: Bringing Solutions to the Wrong Problems" (2000) 13(4) *Journal of Refugee Studies* p. 358.

⁶⁴⁴ H. Ghorashi, "Agents of Change or Passive Victims: the Impact of Welfare States (the Case of the Netherlands) on Refugees" (2005) 18(2) *Journal of Refugee Studies* pp. 181 – 182; M. Korac, "Integration and How We Facilitate It: A Comparative Study of the Settlement Experiences of Refugees in Italy and the Netherlands" (2003) 37(1) *Sociology* pp. 54 – 55.

⁶⁴⁵ N. Funk, "A Spectre Germany: Refugees, a 'Welcome Culture' and an 'Integration Politics'" (2016) 12(3) *Journal of Global Ethics* p. 291.

⁶⁴⁶ T.D. Mendel, "Refugee Law and Practice in Tanzania" (1997) 9(1) *International Journal of Refugee Law* p. 35.

⁶⁴⁷ Peter note 639 above, p. 85.

⁶⁴⁸ Peter note 639 above, p. 85; R.R.J. Akarro, "Population Issues in Refugee Settlements of Western Tanzania" (2001) 8 (1 & 2) *Tanzanian Journal of Population Studies and Development* p. 28.

South Africa sought asylum in Tanzania that practically became their second home.⁶⁴⁹ In addition, Tanzania also received an influx of refugees fleeing from ethnic discrimination from Rwanda and Burundi.⁶⁵⁰ Due to the generosity displayed towards refugees, the UNHCR awarded the Nansen Medal in 1983 to President Julius Nyerere in recognition of his service to refugees.⁶⁵¹ The Nansen award is presented to an individual or organisation that exhibits a distinguished degree of tolerance and hospitality towards refugees.⁶⁵² Tanzania enacted statutes and adopted policies to accommodate and manage refugees in its own territory. Below is a brief overview of these statutory interventions.

4.2.1 War Refugee (Control) and Expulsion Ordinance, 1946 (chap 40)

The first legislation dealing with refugees in Tanzania was the War Refugee (Control) and Expulsion Ordinance.⁶⁵³ This law was enacted in 1946 and administered by the colonial government until it was repealed in 1966.⁶⁵⁴ Tanzania enacted a new statute in 1966 to accommodate new refugee situations, especially from neighbouring countries in the Great Lakes Region.⁶⁵⁵

⁶⁴⁹ Peter note 639 above, pp. 85 – 86; C.A. Williams, Practicing Pan-Africanism: an Anthropological Perspective on Exile-Host Relations at Kongwa, Tanzania” (2014) 37 (3 & 4) *Anthropology Southern Africa* p. 223 – 238.

⁶⁵⁰ Peter note 639 above, p. 86.

⁶⁵¹ Mendel note 646 above, pp. 35 – 36; P. Hartling, “Nansen Medal Award Ceremony: Statement by Mr. Poul Hartling, United Nations High Commissioner for Refugees, on the occasion of the award of the Nansen Medal for 1983 to His Excellency Mwalimu Julius Kambarage Nyerere, President of the Republic of Tanzania, 3 October 1983”. Available at <https://www.unhcr.org/admin/hcspeeches/3ae68fcf3c/nansen-medal-award-ceremony-statement-mr-poul-hartling-united-nations-high.html> (accessed on 22 April 2019).

⁶⁵² Anonymous, “Nansen Refugee Award - The 2018 Ceremony”. Available at <https://www.unhcr.org/nansen-refugee-award.html> (accessed on 22 April 2019).

⁶⁵³ War Refugee (Control) and Expulsion Ordinance, 1946, cited in C.R. Mahalu, “The Legal Regime for Refugees in Eastern African States” 1988 *Africa and International Law* p. 39.

⁶⁵⁴ Mahalu note 653 above, p. 39.

⁶⁵⁵ Mahalu note 653 above, p. 40.

4.2.2 Refugees (Control) Act, 1966

The Refugees (Control) Act⁶⁵⁶ did not entirely comply with the international refugee regime, but it aimed at making provisions for controlling and administering refugees in Tanzania.⁶⁵⁷ Peter argues that the Refugees (Control) Act “has been characterised as the most comprehensive and detailed refugee legislation in Africa”.⁶⁵⁸ Section 3 (1) gave the Minister of Home Affairs the power to declare, by order published in the Government Gazette, any class of persons who were, or prior to their entry into Tanzania had been, ordinarily resident outside Tanzania to be refugees for the purpose of the Act.⁶⁵⁹ This provision assisted in dealing with the mass influx of refugees where it was not possible to make individual determinations or assessments for asylum. Reception areas and refugee settlements were provided for by the statute.⁶⁶⁰ Section 4 (1) gave the Minister the power to declare any part of Tanzania to be an area for the reception or residence of any refugees or category of refugees. Furthermore, the competent authority had power to establish in any reception area a refugee settlement for refugees or any category thereof, and could appoint a settlement commandant to be in charge of such a settlement.⁶⁶¹ All these measures ensured the control and management of refugees in Tanzania.

⁶⁵⁶ Refugees (Control) Act 2 of 1966.

⁶⁵⁷ Mahalu note 653 above, p. 40.

⁶⁵⁸ Peter note 639 above, p. 86; P. Novel, “Refugees, Law and Development in Africa” 1982 *Michigan Yearbook of International Legal Studies* p. 269.

⁶⁵⁹ In some circumstances, the Minister of Home Affairs has invoked this provision. For instance, in the Refugees (Declaration) order, 1968 (Government Notice No 433 of 1968), he declared every person who has entered Tanzania from Malawi after 7 September 1965, and who is a Malawi national, and equally every South African national having entered Tanzania after 21 March 1961, as a refugee under the Refugees (Control) Act, 1966.

⁶⁶⁰ Refugees (Control) Act note 656 above, s 4.

⁶⁶¹ Refugees (Control) Act note 656 above, s 4 (2).

The Minister or competent authority could designate places of entry or departure and routes for refugees to use.⁶⁶² Specifically, the authorities could direct any refugee entering or leaving Tanzania to use specified routes or places.⁶⁶³ Thus the movement of refugees within Tanzania was also highly controlled as they were requested to use specified routes.⁶⁶⁴ Failure to comply with these stipulations was an offence.⁶⁶⁵

However, refugees experienced challenges with regard to their properties brought in Tanzania.⁶⁶⁶ For instance, they had to surrender any arms or ammunitions in their possession to authorised officers.⁶⁶⁷ This provision was for security reasons to prevent refugees from attacking their own countries or any other country. The detention and slaughter of animals that belonged to refugees were common practice.⁶⁶⁸ Competent authorities could order that any animal imported into Tanzania by a refugee be kept in a specific area or slaughtered or otherwise disposed of.⁶⁶⁹ The competent authority had to compensate refugees for their animals sold and they could receive the proceeds of the sale minus the expenses.⁶⁷⁰ If the purchase price was not paid to the owner of the animal, it was deposited into a fund for the benefit of refugees.⁶⁷¹ The competent authority or an authorised officer could possess or detain vehicles belonging to refugees and use them to move refugees

⁶⁶² Refugees (Control) Act note 656 above, s 5.

⁶⁶³ Refugees (Control) Act note 656 above, s 5 (1) (a).

⁶⁶⁴ Refugees (Control) Act note 656 above, s 5 (1) (b).

⁶⁶⁵ Refugees (Control) Act note 656 above, s 5 (3).

⁶⁶⁶ Refugees (Control) Act note 656 above, ss 6, 7 and 8.

⁶⁶⁷ Refugees (Control) Act note 656 above, s 6 (1).

⁶⁶⁸ Refugees (Control) Act note 656 above, s 7.

⁶⁶⁹ Refugees (Control) Act note 656 above, s 7 (1).

⁶⁷⁰ Refugees (Control) Act note 656 above, s 7 (2).

⁶⁷¹ Refugees (Control) Act note 656 above, s 7 (3).

or any stores or equipments for their use.⁶⁷² Therefore, the authorities did not respect the ownership of properties belonging to refugees.

The Minister, or any competent authority appointed by the Minister, could order any refugee to return to the territory from which he or she entered Tanzania.⁶⁷³ A court could also order the deportation of a refugee to the country from which he or she entered Tanzania.⁶⁷⁴ However, the Minister, the competent authority or the court could not make any order if they were of the opinion that such a refugee would be tried or punished for an offence of a political character or would likely be the subject of physical attack in the territory he or she came from.⁶⁷⁵

Refugees needed permits to remain in Tanzania.⁶⁷⁶ Every refugee who came into Tanzania had to apply for a permit to stay within seven days of his or her arrival.⁶⁷⁷ Authorised officers had to deal with applications to remain in the country and grant it to qualifying individuals with annexed terms and conditions that such a refugee had to respect.⁶⁷⁸ A refugee who failed to obtain a permit to stay in the country was subjected to immigration law and his or her presence became unlawful.⁶⁷⁹

Refugees were required to reside in a reception area or refugee settlement.⁶⁸⁰ The competent authority could order any refugee under his or her jurisdiction to reside within a specific reception area or refugee settlement.⁶⁸¹ Any refugee who did not

⁶⁷² Refugees (Control) Act note 656 above, s 8.

⁶⁷³ Refugees (Control) Act note 656 above, s 9 (1)

⁶⁷⁴ Refugees (Control) Act note 656 above, s 9 (2).

⁶⁷⁵ Refugees (Control) Act note 656 above, s 9 (4).

⁶⁷⁶ Refugees (Control) Act note 656 above, s 11.

⁶⁷⁷ Refugees (Control) Act note 656 above, s 11 (1).

⁶⁷⁸ Refugees (Control) Act note 656 above, s 11 (1).

⁶⁷⁹ Refugees (Control) Act note 656 above, s 11 (3).

⁶⁸⁰ Refugees (Control) Act note 656 above, s 12.

⁶⁸¹ Refugees (Control) Act note 656 above, s 12 (1).

comply with the order of the competent authority was guilty of an offence.⁶⁸² The Minister or the competent authority could make rules or issue directives for the control of refugee settlements.⁶⁸³ These rules and directives included the organisation of such settlements; the reception and well-being of refugees; the handling of disciplinary offences and payments of fines; establishment of settlement lock-ups and custody of persons; the power of settlement commandants and the delegation of such powers.⁶⁸⁴ Freedom of movement for refugees was restricted as any refugee who left or attempted to leave, a refugee settlement without permission, where he or she had been required to reside committed a disciplinary offence.⁶⁸⁵ However, the entire Refugees (Control) Act was repealed by the Refugees Act 1998.

4.2.3 Refugees Act 9 of 1998

The Refugees Act⁶⁸⁶ provides and governs the treatment of refugees in Tanzania. It creates a committee with responsibility to consider all the applications for refugee status and recommend to the Minister the granting of refugee status and asylum or denial of such status.⁶⁸⁷ In addition, the committee considers applications for family reunification with recognised refugees and makes recommendations to the Minister.⁶⁸⁸ Furthermore, the committee considers requests for resettlement in Tanzania from refugees and makes recommendations to the Minister.⁶⁸⁹ These

⁶⁸² Refugees (Control) Act note 656 above, s 12 (5).

⁶⁸³ Refugees (Control) Act note 656 above, s 13 (1).

⁶⁸⁴ Refugees (Control) Act note 656 above, s 13 (1).

⁶⁸⁵ Refugees (Control) Act note 656 above, s 13 (3).

⁶⁸⁶ Refugees Act 9 of 1998.

⁶⁸⁷ Refugees Act note 686 above, s 7 (a).

⁶⁸⁸ Refugees Act note 686 above, s 7 (b).

⁶⁸⁹ Refugees Act note 686 above, s 7 (c).

provisions accommodate family unity and ensure that members of the family stay together in one country.

Apart from the influx of refugees into Tanzania, a person lawfully staying in Tanzania can apply for refugee status before the expiry of his or her permit.⁶⁹⁰ An asylum seeker or a refugee needs a permit to remain or stay in Tanzania.⁶⁹¹ The Refugees Act also contains provisions for detention and slaughter of animals belonging to refugees⁶⁹² as well as possession of vehicles of asylum seekers or refugees.⁶⁹³ Thus the Refugees Act does not protect property rights for refugees.

Section 15 (a) of the Refugees Act gives power to the Minister to establish a Refugee Trust Fund in Tanzania. It has eight members, including a Director, a representative from the UNHCR Branch in Tanzania; a representative from Tanzania Red Cross; two refugees, and any other two persons with interests in refugee matters.⁶⁹⁴ The Refugees' Trust Fund has legal capacity and can manage its affairs by being able to sue or be sued.⁶⁹⁵ However, the Refugees Act does not provide guidance on how the Refugee Trust Fund is to be used. It is submitted that such fund should be used in the projects or activities that benefit refugees. The Refugee Trust Fund can raise funds and request donations from any persons regardless of their location.⁶⁹⁶ It also has the power to utilise this fund or any property received in accordance with the recommendations of the trustees.⁶⁹⁷

⁶⁹⁰ Refugees Act note 686 above, s 9 (2).

⁶⁹¹ Refugees Act note 686 above, s 12.

⁶⁹² Refugees Act note 686 above, s 13.

⁶⁹³ Refugees Act note 686 above, s 14.

⁶⁹⁴ Refugees Act note 686 above, s 15 (a).

⁶⁹⁵ Refugees Act note 686 above, s 15 (b).

⁶⁹⁶ Refugees Act note 686 above, s 15 (d) (i).

⁶⁹⁷ Refugees Act note 686 above, s 15 (d) (ii).

The Minister of Home Affairs has the power to declare as a designated area any part of the United Republic of Tanzania by notice in the Government Gazette.⁶⁹⁸ The Director of Refugee Services appoints a settlement officer to manage the refugee settlement where asylum seekers or refugees reside.⁶⁹⁹ Section 17 (1) of Refugees Act provides that refugees or asylum seekers are required to reside in a designated area organised by the competent authority in consultation with the Minister of Home Affairs or the Director of refugee matters. Asylum seekers and refugees are prohibited from leaving designated areas unless they obtain permits from the Director or a Settlement Officer allowing them to go outside the refugee camp or settlement area.⁷⁰⁰ However, they have to comply with the terms and conditions of their permits. Refugees and asylum seekers are also prohibited from staying outside a designated area for more than fourteen days unless the Director of Refugee Affairs allows them a long period to stay outside the designated area.⁷⁰¹ Thus there is a restriction on freedom of movement for refugees and asylum seekers.

Section 20 of the Refugees Act contains restrictions on persons who want to enter a designated area or address asylum seekers or refugees in this area. Such persons need to acquire permission from “the Minister, the competent authority, the Director or the settlement officer”.⁷⁰²

⁶⁹⁸ Refugees Act note 686 above, s 16 (1).

⁶⁹⁹ Refugees Act note 686 above, s 16 (2).

⁷⁰⁰ Refugees Act note 686 above, s 17 (5) (a).

⁷⁰¹ Refugees Act note 686 above, s 17 (5) (b).

⁷⁰² Refugees Act note 686 above, s 20 (1).

Every refugee child and every refugee adult have right to primary education and adult education respectively in accordance with Tanzanian education law.⁷⁰³ Every refugee is entitled to post primary education and there is a provision for refugees to enrol at colleges or universities to further their studies.⁷⁰⁴ Policies can be made to ensure effective and implementation of education for refugees.

Refugees can get work permits if they qualify for such.⁷⁰⁵ A refugee commits a criminal offence if he or she works or engages in any activity without such a permit.⁷⁰⁶

The Refugees Act promotes family re-union among refugees.⁷⁰⁷ This is a significant development in refugee law as many families can be separated during conflicts leading to exile in other countries. A refugee who wishes to join or be joined by any member of his or her family outside or within Tanzania respectively can apply for family re-union to the Minister of Home Affairs.⁷⁰⁸ A committee examines the application and makes a recommendation to the Minister that allows or does not allow family re-union.⁷⁰⁹ The permission is necessary for family re-union to materialise and failure to follow the correct procedure is a criminal offence.⁷¹⁰ Family members include only husbands or wives lawfully married and their children under the age of 18 years and any dependant.⁷¹¹

⁷⁰³ Refugees Act note 686 above, s 31 (1).

⁷⁰⁴ Refugees Act note 686 above, s 31 (3).

⁷⁰⁵ Refugees Act note 686 above, s 34 (1).

⁷⁰⁶ Refugees Act note 686 above, s 34 (4).

⁷⁰⁷ Refugees Act note 686 above, s 35.

⁷⁰⁸ Refugees Act note 686 above, s 35 (1).

⁷⁰⁹ Refugees Act note 686 above, s 35 (1).

⁷¹⁰ Refugees Act note 686 above, s 35 (1).

⁷¹¹ Refugees Act note 686 above, s 35 (4).

A refugee has the right to apply for resettlement in another country outside Tanzania.⁷¹² Equally, a refugee who resides outside Tanzania can apply to the Minister through the UNHCR or OAU (Refugee Bureau) for resettlement in Tanzania.⁷¹³ It is prohibited for such a refugee to enter Tanzania before his or her resettlement has been approved.⁷¹⁴ The provision for resettlement in Tanzania covers burden-sharing⁷¹⁵ as refugees recognised in other countries will be accommodated in Tanzania.

4.2.4 Naturalisation of refugees in Tanzania

Tanzania is one of the countries that host many refugees in Africa.⁷¹⁶ This is due to its tolerance and hospitality towards refugees as well as among its citizens.⁷¹⁷ Tanzania is a relatively peaceful country and refugees feel safe there. In addition, it has allocated considerable resources towards assisting refugees in different ways.⁷¹⁸ As the situation of refugees became protracted, Tanzania opted for durable

⁷¹² Refugees Act note 686 above, s 36 (1).

⁷¹³ Refugees Act note 686 above, s 36 (2).

⁷¹⁴ Refugees Act note 686 above, s 36 (2).

⁷¹⁵ P.H. Schuck, "Refugee Burden-Sharing: A Modest Proposal" (1997) 22 *Yale Journal of International Law* pp. 272 – 277.

⁷¹⁶ K. Kamanga, "The (Tanzania) Refugees Act of 1998: Some Legal and Policy Implications" (2005) 18 (1) *Journal of Refugee Studies* p. 101.

⁷¹⁷ Kamanga note 716 above, p. 102.

⁷¹⁸ Kamanga note 716 above, p. 101.

solutions by naturalising groups of refugees from some countries, namely Rwanda,⁷¹⁹ Somalia⁷²⁰ and Burundi.⁷²¹ These examples are discussed below.

4.2.4.1 Naturalisation of Rwandan refugees in Tanzania

In the 1960s, many Rwandans fled their country and sought asylum in neighbouring states, including Tanzania.⁷²² Tanzania, in turn, created three settlements for Rwandan refugees at three sites, namely Muyenzi, Kimuli and Mwese.⁷²³ The Kimuli settlement had about 3 000 Rwandan refugees who had been moved from the Kivu Province (Zaire) to Tanzania by the UNHCR in 1964.⁷²⁴ They had to be resettled in Tanzania as the Zairean government was hostile towards them by alleging that they supported the Mulele Movement that was against the government.⁷²⁵

The Department of Refugee Affairs in the Ministry of Home Affairs proposed collective naturalisation of Rwandan refugees rather than the formal procedure of individual applications.⁷²⁶ The President approved the mass naturalisation of Rwandan refugees in 1978 and issued a directive to implement this policy.⁷²⁷ The acquisition of Tanzanian citizenship allowed ex-refugees and their descendants to fully function and participate in the social, political, economic and cultural activities

⁷¹⁹ C.P. Gasarasi, "The Mass Naturalisation and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Prospects" (1990) 3(2) *Journal of Refugee Studies* p. 88; G. Kibreab, "Local Settlement in Africa: a Misconceived Option" (1989) 2(4) *Journal of Refugee Studies* p. 471.

⁷²⁰ B. Rutinwa, "Identifying Gaps in Protection Capacity Tanzania" p. 59. Available at <https://www.unhcr.org/uk/429b19982.pdf> (accessed on 1 April 2019).

⁷²¹ A. Kuch, "Naturalisation of Burundian Refugees in Tanzania: the Debate on Local Integration and the Meaning of Citizenship Revisited" (2016) 30(3) *Journal of Refugee Studies* p. 468.

⁷²² Gasarasi note 81 above, p. 89; R.V.D. Meeren, "Three Decades in Exile: Rwandan Refugees 1960 – 1990" (1996) 9(3) *Journal of Refugee Studies* p. 259.

⁷²³ Gasarasi note 719 above, p. 89.

⁷²⁴ Gasarasi note 719 above, p. 92.

⁷²⁵ Gasarasi note 719 above, p. 92.

⁷²⁶ Gasarasi note 719 above, p. 94.

⁷²⁷ Gasarasi note 719 above, p. 98; A.A. Chol, "The Influence of Law and Related Factors in the Integration of Refugees in Tanzania" (1992) 4 (2) *International Journal of Refugee Law* p. 185.

of the new country.⁷²⁸ The prospects to naturalise Rwandan refugees were good. The refugees sought integration, the state had the necessary political will and the indigenous population did not oppose the policy to naturalise Rwandan refugees.⁷²⁹ This policy of naturalisation of refugees is commendable as it brings a durable solution to protracted refugees.

4.2.4.2 Naturalisation of Somali refugees in Tanzania

Although Tanzanian government prefers repatriation as the most desirable and durable solution, it also offers local integration to certain categories of refugees.⁷³⁰ For instance, in 2003, approximately 3 000 Somali refugees of Bantu origin living in the Chogo settlement in Tanga Region had acquired permanent settlement and could apply for naturalisation.⁷³¹ To facilitate the process, the Tanzanian government reduced naturalisation fees from 800 US\$ to 50 US\$.⁷³² The UNHCR assisted these Somali refugees to apply for naturalisation.⁷³³ This was another strategy to provide a durable solution to Somali refugees as there were still insecurity and violation of human rights in their own country of origin.

4.2.4.3 Naturalisation of Burundian refugees in Tanzania

In 2007, the Tanzanian government together with the Burundian government and the UNHCR took a decision to find durable solutions for Burundian refugees who

⁷²⁸ Gasarasi note 719 above, p. 101.

⁷²⁹ Gasarasi note 719 above, p. 103.

⁷³⁰ Rutinwa note 720 above, p. 59.

⁷³¹ Rutinwa note 720 above, p. 59; B. Manby, "Statelessness and Citizenship in the East African Community" 2018 p. 66. Available at <https://community.namati.org/t/new-report-statelessness-and-citizenship-in-the-east-african-community/49604> (accessed on 27 March 2019).

⁷³² Rutinwa note 720 above, p. 59.

⁷³³ Rutinwa note 720 above, p. 59.

fled to Tanzania in 1972.⁷³⁴ It offered naturalisation to Burundian refugees who wanted to become Tanzanians.⁷³⁵ Tanzania wanted to naturalise 220 000 Burundian refugees it had hosted since 1972.⁷³⁶ 79 per cent of these refugees chose to acquire Tanzanian citizenship and the remaining 21 per cent opted to go back to Burundi.⁷³⁷ This was a strategy to end some of the protracted refugee situations.

Some characteristics of the Burundian refugee population contributed to the willingness of the Tanzanian government to consider naturalisation.⁷³⁸ For instance, 82 per cent of these Burundian refugees were born and raised in Tanzania.⁷³⁹ They spoke Swahili and English and had followed the Tanzanian School Curriculum.⁷⁴⁰ They had integrated economically, culturally and socially in the host communities; therefore, the Minister of Home Affairs observed and indicated that “these people have no other home other than Tanzania”.⁷⁴¹ Other factors that influenced Burundian refugees to acquire Tanzanian citizenship included lack of sustainable peace in Burundi, access to land, better employment and livelihood opportunities.⁷⁴² They perceived Tanzanian citizenship as a symbol of peace and they could plan for the future.⁷⁴³

⁷³⁴ Kuch note 721 above, p. 468.

⁷³⁵ Kuch note 721 above, p. 468.

⁷³⁶ J. Milner, “Can Global Refugee Policy Leverage Durable Solutions? Lessons From Tanzania’s naturalisation of Burundian Refugees” (2014) 27(4) *Journal of Refugee Studies* p. 553.

⁷³⁷ Kuch note 715 above, p. 468; M. Felleson, “From Roll-Out to Reverse: understanding Tanzania’s Withdrawal From the Comprehensive Refugee Response Framework (CRRF)” 2019 *Journal of Refugee Studies* p. 7.

⁷³⁸ Milner note 736 above, p. 562.

⁷³⁹ Milner note 736 above, p. 562.

⁷⁴⁰ Milner note 736 above, p. 562; T. Waters and K. Leblanc, “Refugees and Education: Mass Public Schooling Without a Nation-State” (2005) 49 (2) *Comparative Education Review* p. 142.

⁷⁴¹ Milner note 736 above, p. 562.

⁷⁴² Kuch note 721 above, p. 481.

⁷⁴³ Kuch note 721 above, p. 481.

4.2.5 Forced repatriation of refugees in Tanzania

In mid 1990s, many refugees fled to Tanzania due to atrocities or conflicts in Burundi and genocide in Rwanda.⁷⁴⁴ The Tanzanian government responded by changing its open door policy for refugees and closed its border with Burundi in March 1995 to prevent new arrivals.⁷⁴⁵ In addition, Tanzania forcibly repatriated Rwandan refugees and asylum seekers from its territory in 1996.⁷⁴⁶ It also adopted restrictive policies such as the 2003 National Refugee Policy to indicate a clear departure from the open door policy.⁷⁴⁷ The 2003 National Refugee Policy emphasises the protection of national interest, limits economic opportunities for refugees, and identifies voluntary repatriation as the only durable solution for refugees.⁷⁴⁸ In 2005, the Tanzanian ruling party (CCM) election manifesto pledged to expel all refugees from Tanzania by 2010.⁷⁴⁹ Refugees and asylum seekers were regarded as “a threat to national security”⁷⁵⁰ and needed to be closely monitored.

In 2008, the Tanzanian government announced its decision to close all Burundian refugee camps.⁷⁵¹ It communicated to the UNHCR that it would close Mtabila Camp

⁷⁴⁴ Milner note 736 above, p. 558.

⁷⁴⁵ Milner note 736 above, p. 558.

⁷⁴⁶ P. Ongpin, “Refugees in Tanzania – Asset or Burden” (2008) 5 *Journal of Development and Social Transformation* p. 14; B.E. Whitaker, “Changing Priorities in Refugee Protection: the Rwandan Repatriation From Tanzania” (2002) 21 (1&2) *Refugee Survey Quarterly* p. 334.

⁷⁴⁷ Milner note 730 above, p. 558. See also M. Makhema, “Social Protection for Refugees and Asylum Seekers in the Southern Africa Development Community (SADC)” 2019 p. 13. Available at

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=22&ved=2ahUKEwjtp6Djh-bfAhVJL1AKHYQFCj04FBAWMAF6BAgIEAI&url=http%3A%2F%2Fsiteresources.worldbank.org%2FSOCIALPROTECTION%2FResources%2FSP-Discussion-papers%2FLabor-Market-DP%2F0906.pdf&usg=AOvVaw2GAeDFWFKvxjw9SqCITMSf> (accessed on 11 January 2019).

⁷⁴⁸ Milner note 736 above, p. 558.

⁷⁴⁹ Milner note 736 above, p. 558.

⁷⁵⁰ Kuch note 721above, p. 471.

⁷⁵¹ Ongpin note 746 above, p. 14. See also M. L’Ecluse, “Refugee Politics in Tanzania: Receding Receptivity and New Approaches to Asylum”, LLM Dissertation, Universiteit Gent, 2010, p. 23.

hosting Burundian refugees.⁷⁵² There was a tripartite agreement between Tanzanian government, the UNHCR and the Burundian government to address the issue of repatriation of Burundian refugees in Tanzania.⁷⁵³ Thus, the agreement to repatriate refugees occurred without their involvement and participation.

4.3 Protection of refugees in Zambia

Zambia is a refugee-hosting country and it currently accommodates refugees from Angola, Burundi, Democratic Republic of Congo, Rwanda, Somalia, Uganda and others.⁷⁵⁴ The first wave of refugees arrived in Zambia in 1966 from Angola and these were required to live in Meheba and Mayukwayukwa settlements.⁷⁵⁵ However, some Angolan refugees did not live in the designated settlements, the majority chose to stay in the villages along the Angolan border.⁷⁵⁶ They settled themselves and maintained a very little contact with Zambian authorities.⁷⁵⁷ The government of Zambia has also established other camps and settlements for refugees including “Kala, Mwanje, Nangweshi and Ukwimi.”⁷⁵⁸ Refugees are required to live in the designated areas and need permission to leave such places should they desire to go somewhere else.⁷⁵⁹

⁷⁵² Milner note 736 above, p. 559.

⁷⁵³ Milner note 736 above, p. 559.

⁷⁵⁴ C. Darwin, “Report on the situation of refugees in Zambia” p. 6. Available http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/20_10_2014_09_30_27_Report-Refugees-Zambia.pdf (accessed on 24 April 2019).

⁷⁵⁵ O. Bakewell, “Repatriation and Self-Settled Refugees in Zambia: Bringing Solutions to the Wrong Problems” (2000) 13(4) *Journal of Refugee Studies* p. 358.

⁷⁵⁶ Bakewell note 755 above, p. 360.

⁷⁵⁷ Bakewell note 755 above, p. 358.

⁷⁵⁸ Darwin note 754 above, p. 6.

⁷⁵⁹ Bakewell note 755 above, p. 368.

The abundance of land encouraged the Zambian government to receive refugees.⁷⁶⁰ Zambian villagers welcomed the arrival of refugees as “they turned the bush into villages”.⁷⁶¹ Refugees cultivated the land to satisfy their needs and participated in the development of the country. For instance, refugees in Meheba settlement produced “surpluses of sweet potatoes, vegetables and other crops.”⁷⁶² They supplied the provincial town and expanded the market.

4.3.1 Refugee legal framework in Zambia

Zambia is a state party to the 1951 UN Refugee Convention and its 1967 Protocol⁷⁶³ as well as the 1969 OAU Refugee Convention. These international conventions relating to refugees require the Zambian government to welcome, receive and accommodate refugees on its own territory. In this regard, it has enacted statutes to regulate and manage refugees.

4.3.1.1 Refugees (Control) Act 40 of 1970

The main purpose of the Refugees (Control) Act was to make provision for the control of refugees in Zambia.⁷⁶⁴ It gave the Minister the powers to establish reception areas and settlements where refugees could live.⁷⁶⁵ The Minister declared four reception areas (Nyimba, Mayukwayukwa, Lwatemba and Meheba) and five settlements (Nyimba, Mayukwayukwa, Lwatemba, Meheba and Ucwimi).⁷⁶⁶ The

⁷⁶⁰ Bakewell note 755 above, p. 362.

⁷⁶¹ Bakewell note 755 above, p. 362; A. Hansen, “Refugee Dynamics: Angolans in Zambia 1966 to 1972” (1981) 15 (1/2) *The International Migration Review* p. 179.

⁷⁶² Bakewell note 755 above, p. 367.

⁷⁶³ Darwin note 754 above, p. 13.

⁷⁶⁴ Refugees (Control) Act 40 of 1970, long title.

⁷⁶⁵ Refugees (Control) Act note 764 above, s 4.

⁷⁶⁶ Refugees (Control) Act note 764 above, subsidiary legislation, schedule (paragraph 2).

Minister also had power to appoint a refugee officer to administer each settlement.⁷⁶⁷

A refugee is required to apply for a permit to remain in Zambia within seven days of his or her entry into the country.⁷⁶⁸ Refugees are required to reside in the designated reception areas or refugee settlements.⁷⁶⁹ Individuals are restricted to enter, work or reside in the refugee settlements without a general or special permission from the relevant authorities.⁷⁷⁰ The Minister also has the power to order a refugee to enter or leave Zambia by using specific routes or places.⁷⁷¹ This also applied to refugee movement inside Zambia.⁷⁷² Every refugee is required to register and obtain an identity card that he or she had to possess at all times.⁷⁷³

The right to property was restricted as refugees could not use their vehicles in Zambia without the written permission from an authorised officer and had to comply with specific terms.⁷⁷⁴ One of the conditions for granting permission to use vehicles was that an authorised officer could take possession of such vehicles at any time and use them for refugee transport, or move any stores or equipments for refugees.⁷⁷⁵ This was a violation of the right to property for refugees living in Zambia as provided for under the UN Refugee Convention.

⁷⁶⁷ Refugees (Control) Act note 764 above, s 4 (2).

⁷⁶⁸ Refugees (Control) Act note 764 above, s 11 (1).

⁷⁶⁹ Refugees (Control) Act note 764 above, s 12 (1).

⁷⁷⁰ Refugees (Control) Act note 764 above, s 14 (1).

⁷⁷¹ Refugees (Control) Act note 764 above, s 5 (1) (a).

⁷⁷² Refugees (Control) Act note 764 above, s 5 (1) (b).

⁷⁷³ Refugees (Control) Act note 764 above, s 6 (1) and (2).

⁷⁷⁴ Refugees (Control) Act note 764 above, s 9 (1).

⁷⁷⁵ Refugees (Control) Act note 764 above, s 9 (2).

Under the Refugees (Control) Act, a refugee in Zambia remained a refugee as refugee status was passed from one generation to another.⁷⁷⁶ This Act did not provide for naturalisation of refugees in order to acquire Zambian citizenship. It was repealed by the Refugees Act 1 of 2017 to bring refugee matters in line with the current policy developments.

4.3.1.2 The Refugees Act 1 of 2017

The Refugees Act 2017 domesticates the 1951 UN Refugee Convention, its 1967 Protocol and the 1969 OAU Refugee Convention into laws of Zambia.⁷⁷⁷ It ensures Zambia's commitment to implementing and respecting international refugee law for the protection and benefit of refugees. The Act provides for the reception of refugees and outlines specific rights⁷⁷⁸ in their favour.

The Act establishes the office of Commissioner of Refugees and provides his or her functions.⁷⁷⁹ There is also the establishment of the Refugee Status Determination Committee to receive and consider applications for asylum from individuals present in Zambia.⁷⁸⁰ The Minister may designate refugee reception areas and refugee settlements where all refugees, as well as their dependants, are required to reside.⁷⁸¹ The Minister has the power to make rules and the Commissioner can issue directions for the control of refugee settlement.⁷⁸² There is a restriction on non-

⁷⁷⁶ Bakewell note 755 above, p. 367.

⁷⁷⁷ Refugees Act 1 of 2017, long title.

⁷⁷⁸ Refugees Act note 777 above, Part IV, sections 25 – 54.

⁷⁷⁹ Refugees Act note 777 above, sections 3 and 4.

⁷⁸⁰ Refugees Act note 777 above, s 6 (a).

⁷⁸¹ Refugees Act note 777 above, s 9 (1).

⁷⁸² Refugees Act note 777 above, s 9 (3).

refugees from entering or residing within the refugee settlements unless they receive permission from the Minister, the Commissioner or a refugee officer.⁷⁸³

An asylum seeker in Zambia, who wants to be recognised as a refugee, can apply to the Commissioner or an authorised officer within seven days of his or her arrival.⁷⁸⁴ The Committee considers the application for refugee status within sixty days and makes a recommendation to the Commissioner.⁷⁸⁵ An applicant can be recognised as a refugee if he or she fulfils specified requirements.⁷⁸⁶ An applicant, whose application for refugee status has been rejected by the Commissioner, can appeal, in writing, to the Minister within fourteen days after receipt of such decision.⁷⁸⁷ The Minister has the power to declare a class of persons to be recognised as refugees and may amend or revoke such declaration.⁷⁸⁸

Recognised refugees in Zambia have rights and duties contained in the Refugees Act subject to limitations imposed by the Constitution and other laws.⁷⁸⁹ For instance, refugees are entitled to various rights such as the right to life,⁷⁹⁰ non-discrimination,⁷⁹¹ freedom of person,⁷⁹² security of person and protection from inhuman treatment,⁷⁹³ protection from slavery, servitude and forced labour,⁷⁹⁴ and protection of privacy of person, home, property and communication.⁷⁹⁵ Other rights

⁷⁸³ Refugees Act note 777 above, s 10 (1).

⁷⁸⁴ Refugees Act note 777 above, s 11 (1).

⁷⁸⁵ Refugees Act note 777 above, s 12 (1).

⁷⁸⁶ Refugees Act note 777 above, s 13.

⁷⁸⁷ Refugees Act note 777 above, s 15 (1).

⁷⁸⁸ Refugees Act note 777 above, s 16 (1).

⁷⁸⁹ Refugees Act note 777 above, s 25 (1).

⁷⁹⁰ Refugees Act note 777 above, s 28.

⁷⁹¹ Refugees Act note 777 above, s 29.

⁷⁹² Refugees Act note 777 above, s 30.

⁷⁹³ Refugees Act note 777 above, s 31.

⁷⁹⁴ Refugees Act note 777 above, s 32.

⁷⁹⁵ Refugees Act note 777 above, s 33.

include freedom of expression⁷⁹⁶ and freedom of conscience, belief and religion.⁷⁹⁷ Refugees also have the right to acquire moveable and immoveable properties.⁷⁹⁸ They have right of access to courts,⁷⁹⁹ employment and education,⁸⁰⁰ practice of professions⁸⁰¹ and rationing of supplies.⁸⁰² They can acquire identity documents⁸⁰³ and travelling documents⁸⁰⁴ to facilitate their freedom of movement within and outside Zambia.

There is a special protection for vulnerable groups such as individuals who suffer from physical and mental disability as the Commissioner has to take specific measures to ensure their safety.⁸⁰⁵ Refugee women and children also have specific measures to ensure their safety and protection.⁸⁰⁶ Family reunification for children is encouraged⁸⁰⁷ and unaccompanied refugee children receive special protection.⁸⁰⁸

Refugees Act establishes a Refugee Fund that can be used to provide relief aid for refugees, establish refugee settlements and finance programmes for the general welfare of refugees.⁸⁰⁹ The Fund receives monies from Zambian government, donations and grants from any source.⁸¹⁰ Every year, the Auditor-General has to audit the Fund to ascertain that it has been used for refugee purposes.⁸¹¹

⁷⁹⁶ Refugees Act note 777 above, s 35.

⁷⁹⁷ Refugees Act note 777 above, s 34.

⁷⁹⁸ Refugees Act note 777 above, s 39.

⁷⁹⁹ Refugees Act note 777 above, s 40.

⁸⁰⁰ Refugees Act note 777 above, s 41.

⁸⁰¹ Refugees Act note 777 above, s 43.

⁸⁰² Refugees Act note 777 above, s 44.

⁸⁰³ Refugees Act note 777 above, s 51.

⁸⁰⁴ Refugees Act note 777 above, s 50.

⁸⁰⁵ Refugees Act note 777 above, s 54.

⁸⁰⁶ Refugees Act note 777 above, s 53 (1) and (2).

⁸⁰⁷ Refugees Act note 777 above, s 53 (3).

⁸⁰⁸ Refugees Act note 777 above, s 53 (4).

⁸⁰⁹ Refugees Act note 777 above, s 55 (1).

⁸¹⁰ Refugees Act note 777 above, s 55 (2) (b).

⁸¹¹ Refugees Act note 777 above, s 57 (2).

The Refugees can acquire Zambian citizenship through naturalisation.⁸¹² The Minister has the powers to facilitate the assimilation and naturalisation of individuals who have ceased to be refugees.⁸¹³ This applies to persons whose circumstances leading to their refugee status have ceased, but have compelling reasons, arising from the previous persecution, for refusing to avail themselves to the protection of their country of nationality.⁸¹⁴ The Commissioner has a duty to assist a refugee who meets the conditions for the acquisition of Zambian citizenship to acquire citizenship.⁸¹⁵ This is a significant development in finding durable solutions for refugees as they acquire a new country where they can exercise all the rights of a citizen.

4.3.2 Local integration of refugees in Zambia

The Zambian government has offered limited local integration to certain groups of refugees.⁸¹⁶ On 30 June 2012, it invoked the cessation clause for Angolan refugees and they lost their refugee status.⁸¹⁷ As all Angolan refugees would not repatriate, the Zambian government and UNHCR, in April 2014, created a strategic framework to locally integrate former refugees in Zambia.⁸¹⁸ They planned to integrate 10 000

⁸¹² Refugees Act note 777 above, s 49.

⁸¹³ Refugees Act note 777 above, s 49 (1).

⁸¹⁴ Refugees Act note 777 above, s 20 (1) (g) and (2).

⁸¹⁵ Refugees Act note 777 above, s 49 (2).

⁸¹⁶ L. Kambela, "Angolan Refugees in Zambia: Reflecting on Local Integration as Justifiable Solution" 2016 *ACCORD* p. 1.

⁸¹⁷ Kambela note 816 above, p. 4.

⁸¹⁸ Kambela note 816 above, p. 4.

former Angolan refugees who lived in Mayukwayukwa and Meheba settlements into Zambian society.⁸¹⁹

Local integration has legal, economic and socio-cultural elements.⁸²⁰ On the legal issue, former refugees need to acquire residence permits; however, they had first to possess identity documents and passports from their country of origin.⁸²¹ To facilitate the process, the Government of Angola agreed to freely issue National Registration Cards (identity cards) and passports to its refugees.⁸²² Officials from Angola came to refugee settlements to facilitate the processing and issuance of the necessary documents.⁸²³ Zambia screened and accepted 6 000 Angolan refugees for local integration.⁸²⁴ The programme applied to refugees from Angola who arrived in Zambia between 1966 and 1986.⁸²⁵ They received permanent residence permits and will be able to apply for citizenship by naturalisation after ten years.⁸²⁶

Local integration packages also included the allocation of land to former refugees and access to basic services such as education and health.⁸²⁷ Zambian authorities also provided local development and infrastructure to refugee affected areas.⁸²⁸

⁸¹⁹ Kambela note 816 above, p. 4; UNHCR, "Implementation of the Comprehensive for the Angolan Refugee Situation, Including UNHCR's Recommendations on the Applicability of the 'Ceased Circumstances' Cessation Clauses" 2012 p. 3. Available at <https://www.refworld.org/docid/4f3395972.html> (accessed on 29 March 2019).

⁸²⁰ Kambela note 816 above, p. 4; H. Pinson and M. Arnot, "Local Conceptualisations of the Education of Asylum-seeking and Refugee Students: from Hostile to Holistic Models" (2010) 14(3) *International Journal of Inclusive Education* p. 248; T. Polzer, "Invisible Integration: How Bureaucratic, Academic and Social Categories Obscure Integrated Refugees" (2008) 21(4) *Journal of Refugee Studies* p. 476.

⁸²¹ Kambela note 816 above, p. 5.

⁸²² Development and Training Services, Inc. (dTS), "Field Evaluation of Local Integration of Former Refugees in Zambia" 2014 p. 27. Available at <https://www.state.gov/documents/organization/235057.pdf> (accessed on 1 April 2019).

⁸²³ Development and Training Services, note 822 above, p. 27.

⁸²⁴ Development and Training Services, note 822 above, p. 27.

⁸²⁵ Development and Training Services note 822 above, p. 26.

⁸²⁶ Development and Training Services note 822 above, p. 26.

⁸²⁷ Kambela note 816 above, p. 5.

⁸²⁸ Kambela note 816 above, p. 5.

Former Angolan refugees have achieved economic integration and they are self-reliant as they provide for their own needs and enjoy freedom of movement in Zambia.⁸²⁹ They are fully integrated socially and economically with Zambians as they attend schools, churches, play sports, celebrate holidays together and engage in intermarriages with the host population.⁸³⁰ Economic and social integrations have succeeded due to shared cultural, ethnic and linguistic ties, and the Zambian nature to welcome refugees.⁸³¹

The Government of Zambia has also offered to locally integrate 4,000 former Rwandan refugees in June 2013.⁸³² This programme only applied to Rwandan refugees in Zambia who fled between 1959 and 1998 according to cessation clause declared by the UNHCR.⁸³³ Rwandan refugees needed to have passports in order to acquire residency permits and they refused to acquire such documents from the government of Rwanda⁸³⁴ as they did not want to claim the protection of their country of origin. Passports are necessary for former refugees to acquire residence permits

⁸²⁹ Kambela note 816 above, p. 6.

⁸³⁰ Kambela note 816 above, p. 6.

⁸³¹ Kambela note 816 above, p. 7.

⁸³² J. Osmers, "Challenges to Rwandan Former Refugees' Integration in Zambia" 2015 International Refugee Rights Initiative. Available at <https://reliefweb.int/report/zambia/challenges-rwandan-former-refugees-integration-zambia> (accessed on 11 January 2019).

⁸³³ L.N. Kingston, "Bringing Rwandan Refugees 'Home': The Cessation Clause, Statelessness, and Forced Repatriation" (2017) 29(3) *International Journal of Refugee Law* p. 417; UNHCR, "Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, Including UNHCR Recommendation of the Applicability of the 'Ceased Circumstances' Cessation Clauses", 2011, p. 6, para 30. Available at <https://www.refworld.org/topic,50ffbce40,50ffbce4f,4f33a1642,0,,,RWA.html> (accessed on 13 May 2019); Times Reporter, "Rwandans Lose Refugee Status as Cessation Clause Comes Into Force" 2018. Available at <https://www.newtimes.co.rw/section/read/226701> (accessed on 13 May 2019). For more information on cessation clause, see M.E. Cwik, "Forced to Flee and Forced to Repatriate – How the Cessation Clause of Article 1C(5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice" (2011) 44 *Vanderbilt Journal of Transnational Law* pp. 724 - 726; J.R. Tarwater, "Analysis and Case Studies of the Ceased Circumstances Cessation Clause of the 1951 Refugee Convention" (2001) 15 *Georgetown Immigration Law Journal* pp. 564 – 568.

⁸³⁴ Osmers note 832 above; Kingston note 833 above, p. 433.

and the absence of such documents constitutes an impediment to locally integrate refugees. To resolve this conundrum, the Zambian government needs to decide to issue residence permits to former Rwandan refugees without their passports.

4.4 Integration of refugees in the Netherlands

Over the past few years, the number of people seeking asylum in Europe has increased exponentially.⁸³⁵ In the twentieth century, many people fled their countries of origin due to wars, political conflicts, economic inequalities and natural disasters.⁸³⁶ Some of these asylum seekers managed to arrive in European states, including the Netherlands. The Dutch government admits and protects persons who qualify as refugees in terms of the Geneva Convention on Refugees⁸³⁷ and European Convention on Human Rights.⁸³⁸ These international conventions provide for the protection of every refugee and prohibits any person to be subjected to torture or inhumane or degrading treatment or punishment.⁸³⁹ The Netherlands receives and protects immigrants who would be in danger if they returned to their countries of origin.⁸⁴⁰ The next section outlines the reception and integration of refugees in Dutch society.

⁸³⁵ L. Bakker, J. Dagevos and G. Engbersen, "Explaining the Refugee Gap: a Longitudinal Study on Labour Market Participation of Refugees in the Netherlands" (2017) 43(11) *Journal of Ethnic and Migration Studies* p. 1775.

⁸³⁶ H. Ghorashi, "Agents of Change or Passive Victims: the Impact of Welfare States (the Case of the Netherlands) on Refugees" (2005) 18(2) *Journal of Refugee Studies* p. 185.

⁸³⁷ Convention Relating to the Status of Refugees, note 23 above.

⁸³⁸ European Convention on Human Rights / Convention for the Protection of Human Rights and Fundamental Freedom, 1950.

⁸³⁹ Anonymous, "Asylum Procedure". Page – unknown. Available at <https://www.government.nl/topics/asylum-policy/asylum-procedure> (accessed on 9 February 2019).

⁸⁴⁰ Anonymous note 839 above, page – unknown.

4.4.1 Reception of refugees in the Netherlands

The Netherlands has a generous policy of receiving refugees and did not have any asylum seeker centres at the beginning of 1980s.⁸⁴¹ So, refugees became part of the Dutch society upon their arrival in the country.⁸⁴² However, the reception policy was gradually restricted and asylum seeker centres were established from 1987.⁸⁴³ Asylum seekers had to spend some time in the centres ranging from a few months to several years.⁸⁴⁴ The Dutch government introduced the asylum seeker centres due to the growing negative public perception of refugees “as bogus and a threat to the asylum system”.⁸⁴⁵ The restrictive entry policy aimed to discourage more asylum seekers to come to the Netherlands and it also applied to other European countries.⁸⁴⁶ Nevertheless some people continue to come to the Netherlands in the quest for asylum.

There are two procedures to apply for asylum in the Netherlands: foreign nationals inside the country and asylum seekers who come by plane.⁸⁴⁷ Individuals seeking asylum in the Netherlands must report to the Immigration and Naturalisation Service (IND) at ter Apel for identification and registration.⁸⁴⁸ Thereafter, they are transferred to a reception centre which is often located near the application centre that will process their asylum application.⁸⁴⁹ Asylum seekers who come to the Netherlands

⁸⁴¹ Ghorashi note 836 above, p. 182.

⁸⁴² Ghorashi note 836 above, p. 182.

⁸⁴³ Ghorashi note 836 above, p. 182; P. Smets and S.T. Kate; “Let’s Meet! Let’s Exchange! LETS as an Instrument for Linking Asylum Seekers and the Host Community in the Netherlands” (2008) 21 (3) *Journal of Refugee Studies* p. 328.

⁸⁴⁴ Ghorashi note 836 above, p. 182.

⁸⁴⁵ Ghorashi note 836 above, p. 182.

⁸⁴⁶ Ghorashi note 836 above, p. 182.

⁸⁴⁷ Anonymous note 839 above, page – unknown.

⁸⁴⁸ Anonymous note 839 above, page – unknown.

⁸⁴⁹ Anonymous note 839 above, page – unknown.

by plane have to report to the Royal Netherlands Marechaussee at Schiphol Airport.⁸⁵⁰ They remain in the application centre at Schiphol Airport for the duration of their application for asylum.⁸⁵¹ There is a special accelerated asylum procedure for individuals from countries appearing on the list of safe countries of origin and those who already enjoy protection in another EU member state.⁸⁵² In the asylum application centres, the individuals receive welfare assistance from the government to satisfy their basic needs.

The Central Agency for the Reception of Asylum Seekers (COA) has a responsibility to receive and guide asylum seekers in the Netherlands.⁸⁵³ The Centre ensures that asylum seekers receive or obtain a place to stay, meals and healthcare insurance.⁸⁵⁴ The COA does not decide on the application for asylum as it is an independent organisation assisting asylum seekers to receive their basic needs.⁸⁵⁵ Healthcare for Asylum Seekers assists individuals who are sick and any questions about their health.⁸⁵⁶

Asylum seekers receive the necessary information regarding the General Asylum Procedure.⁸⁵⁷ For instance, the Dutch Council of Refugees informs them about the asylum procedure and medical reports.⁸⁵⁸ An interpreter is available to facilitate communication between an asylum seeker and a person from the Dutch Council for

⁸⁵⁰ Anonymous note 839 above, page – unknown.

⁸⁵¹ Anonymous note 839 above, page – unknown.

⁸⁵² Anonymous note 839 above, page – unknown.

⁸⁵³ Engels, "Before your asylum procedure begins", 2018, p. 3. Available at https://ind.nl/Documents/RVT_Engels.pdf (accessed on 10 February 2019).

⁸⁵⁴ Engels note 853 above, p. 3.

⁸⁵⁵ Engels note 853 above, p. 3.

⁸⁵⁶ Engels note 853 above, p. 3; M. Galloway, M. Smit and M. Kromhout, "Between Control and Support. The Protection of Unaccompanied Minor Asylum Seekers at Risk: the Dutch Case" (2015) 53 (4) *International Migration* p. 53.

⁸⁵⁷ Engels note 853 above, p. 3.

⁸⁵⁸ Engels note 853 above, p. 3.

Refugees.⁸⁵⁹ Every information is treated with strict confidentiality and the services of the Dutch Council for Refugees are free of charge.⁸⁶⁰ In addition, a nurse is made available to perform a medical examination on asylum seekers.⁸⁶¹

A lawyer assists every asylum seeker during their asylum procedure.⁸⁶² The Legal Aid Board has a duty to assign or appoint a lawyer to an asylum seeker in good time due to the strict time limits for asylum procedure.⁸⁶³ Lawyers receive payment for assisting asylum seekers and are independent from the Dutch government.⁸⁶⁴ An interpreter is available to facilitate communication between the asylum seeker and the lawyer.⁸⁶⁵ Therefore, asylum seekers can confidently prepare and present their asylum applications.

4.4.2 Cultural integration

The Dutch government has policies to provide for the basic needs of refugees and gradually facilitate their integration into Dutch society.⁸⁶⁶ Applications for asylum have three stage procedures: an individual has to stay in an investigation centre for 48 hours, several months in an asylum centre and three years for persons who are granted provisional permits to stay.⁸⁶⁷ During these stages, the government only

⁸⁵⁹ Engels note 853 above, p. 3.

⁸⁶⁰ Engels note 853 above, p. 3.

⁸⁶¹ Engels note 853 above, p. 3.

⁸⁶² Engels note 853 above, p. 4; M. Reneman and Y.A. Tamini, "Identification of Asylum Seekers with Special Reception and Procedural Needs in the Dutch Asylum Procedure", 2018, p. 31. Available at https://acmrl.org/wp-content/uploads/2018/09/Reneman_Migration-Law-Series-No-16-Final-version.pdf (accessed on 20 November 2019).

⁸⁶³ Engels note 853 above, p. 4.

⁸⁶⁴ Engels note 853 above, p. 4.

⁸⁶⁵ Engels note 853 above, p. 4.

⁸⁶⁶ M. Korac, "The Role of the State in Refugee Integration and Settlement: Italy and Netherlands Compared" (2002) 14 *Forced Migration Review* p. 30.

⁸⁶⁷ M. Korac, "Integration and How we Facilitate it: a Comparative Study of the Settlement Experiences of Refugees in Italy and the Netherlands" (2003) 37(1) *Sociology* p. 55.

provides housing and an allowance to individuals to satisfy their basic needs.⁸⁶⁸ Korac argues that the majority of refugees stayed for several months and sometimes over a year in asylum centres.⁸⁶⁹ In these periods, they experience isolation and humiliation as they have limited rights of access to education, professional language training, work and retraining.⁸⁷⁰ It may take several years for an individual to continue with his or her profession.

The fact that individuals stay for a long time in the reception centres negatively affects their social integration in the Dutch society.⁸⁷¹ For instance, it limits the opportunity for refugees to learn, attend school and develop contacts with members of the community.⁸⁷² In addition, it increases the physical and mental health problems in some asylum seekers in the Netherlands, such as those from Iraq.⁸⁷³ A prolonged stay in the refugee reception centre has a negative impact on the social and cultural integration of refugees in the Netherlands.⁸⁷⁴

Integration courses are one of the tools that assist refugee to adjust to the Dutch society.⁸⁷⁵ They include language courses for Dutch as a second language and were initiated in the 1970s and 1980s by volunteers.⁸⁷⁶ Regional institutions for adult education (ROC's) professionalised and offered the integration courses between the

⁸⁶⁸ Korac note 867 above p. 55.

⁸⁶⁹ Korac note 867 above p. 55.

⁸⁷⁰ Korac note 867 above p. 55.

⁸⁷¹ T. de Vroome and F. van Tubergen, "The Employment Experience of Refugees in the Netherlands" (2010) 44(2) *International Migration Review* p. 382.

⁸⁷² De Vroome and van Tubergen note 871 above, p. 382.

⁸⁷³ De Vroome and van Tubergen note 871 above, p. 382; C.J. Laban *et al*, "Impact of a Long Asylum Procedure on the Prevalence of Psychiatric Disorders in Iraqi Asylum Seekers in the Netherlands" (2004) 192(12) *The Journal of Nervous and Mental Disease* p. 849.

⁸⁷⁴ De Vroome and van Tubergen note 871 above, p. 382.

⁸⁷⁵ De Vroome and van Tubergen note 871 above, p. 382.

⁸⁷⁶ De Vroome and van Tubergen note 871 above, p. 382.

second half of the 1980s and early 1990s.⁸⁷⁷ In this period, the Dutch government expanded the integration courses to contain Dutch language course, societal and labour market orientation.⁸⁷⁸ Since 1998, all newcomers are compelled to participate in integration courses.⁸⁷⁹ These courses include language training, societal orientation, labour market orientation and societal guidance in order to support newcomers.⁸⁸⁰ The learners do tests on language proficiency and societal orientation and obtain diplomas upon completion.⁸⁸¹ All these activities assist refugees to integrate in the Dutch society so that they can satisfy their basic needs and communicate with other members of the host community.

4.4.3 Economic integration of refugees

Economic integration of refugees is necessary as they are received into the host states or societies.⁸⁸² The education system in the country of origin and in the host state presents skills that stimulate economic integration.⁸⁸³ As many refugees come from states with less advanced educational systems, refugees who study in the Netherlands and obtain their qualifications have better chances of obtaining employment.⁸⁸⁴ In addition, language skills are necessary for entering the labour market as most professions in the host country require adequate knowledge of the

⁸⁷⁷ De Vroome and van Tubergen note 871 above, p. 382.

⁸⁷⁸ De Vroome and van Tubergen note 871 above, p. 382; F. van Tubergen, "Determinants of Second Language Proficiency Among Refugees in the Netherlands" (2015) 89 (2) *Social Forces* p. 516.

⁸⁷⁹ De Vroome and van Tubergen note 871 above, p. 382.

⁸⁸⁰ De Vroome and van Tubergen note 871 above, p. 382.

⁸⁸¹ De Vroome and van Tubergen note 871 above, p. 382.

⁸⁸² De Vroome and van Tubergen note 871 above, p. 376.

⁸⁸³ De Vroome and van Tubergen note 871 above, p. 378; A. Kanas and F. van Tubergen, "The Impact of Origin and Host Country Schooling on the Economic Performance of Immigrants" (2009) 88(2) *Social Forces* p. 893; B. Bratsberg and J.F. Regan Jr, "The Impact of Host-Country Schooling on Earnings: a Study of Male Immigrants in the United States" (2002) 37(1) *The Journal of Human Resources* p. 73.

⁸⁸⁴ De Vroome and van Tubergen note 871 above, pp. 378 - 379.

language.⁸⁸⁵ Therefore proficiency in the Dutch language positively assists refugees achieving economic integration.⁸⁸⁶

Labour market experience obtained in the Netherlands has a positive effect on the economic integration of refugees.⁸⁸⁷ Such experience assists individual refugees to obtain future employment as employers need workers with experience.⁸⁸⁸ Therefore, job experience in the host country contributes positively to the economic integration of refugees.⁸⁸⁹ Social networks and contacts with important persons in the Dutch communities can also facilitate economic integration.⁸⁹⁰

4.4.4 Naturalisation of refugees in the Netherlands

The Netherlands has a policy to naturalise refugees as it is demonstrated in the 1990s when many refugees from former Yugoslavia and Somalia obtained their naturalisation certificates.⁸⁹¹ For instance, in 1998, the number of refugees who naturalised accounted for 45% of all naturalisations in the Netherlands.⁸⁹² Once naturalised, former refugees obtain a new country where they can exercise their rights and duties as citizens. International protection is no longer necessary as they have acquired a new country.

⁸⁸⁵ De Vroome and van Tubergen note 865 above, p. 379; B.R. Chiswick and P.W. Miller, "A Model Destination-Language Acquisition: Application to Male Immigrants in Canada" (2001) 38(3) *Demography* p. 391.

⁸⁸⁶ De Vroome and van Tubergen note 871 above, p. 379.

⁸⁸⁷ De Vroome and van Tubergen note 871 above, p. 379.

⁸⁸⁸ De Vroome and van Tubergen note 871 above, p. 379; B.R. Chiswick and P.W. Miller, "The International Transferability of Immigrants' Human Capital" (2009) 28 *Economics of Education Review* p. 162.

⁸⁸⁹ De Vroome and van Tubergen note 871 above, p. 379.

⁸⁹⁰ De Vroome and van Tubergen note 871 above, p. 379.

⁸⁹¹ P. Bevelander and J. Veenman, "Naturalisation and Socio-economic Integration: The Case Study of the Netherlands" 2003 p. 4. Available at <https://ideas.repec.org/p/iza/izadps/dp2153.html> (accessed on 14 March 2019).

⁸⁹² Bevelander and Veenman note 891 above, pp. 4 – 6.

The acquisition of a Dutch citizenship has many advantages, including the possibility of obtaining Dutch passports and travel freely within the European Union.⁸⁹³ In addition, every Dutch citizen is entitled to vote in general elections.⁸⁹⁴ With regards to labour market, naturalised individuals are no longer foreign nationals and can be employed in jobs reserved for Dutch nationals such as civil service, police, justice system and military.⁸⁹⁵ Therefore naturalisation has the effect of increasing job opportunities for the new citizens.⁸⁹⁶ There is a huge possibility to naturalise for persons who came to the Netherlands for political, war reasons or family reunions.⁸⁹⁷

4.5 Integration of refugees in Germany

Germany is the most popular destination for refugees and immigrants in Europe.⁸⁹⁸ For instance, in 2015, the European Union received more than 1.3 million asylum seekers and more than a third of these people applied for asylum in Germany.⁸⁹⁹ Most of the refugees came from countries experiencing wars such as Syria, Afghanistan and Iraq.⁹⁰⁰ The majority of German civil society demonstrates a high degree of openness and willingness to assist refugees.⁹⁰¹ In addition, the German Federal Minister of the Interior emphasised at the beginning of 2016 that newcomers

⁸⁹³ Bevelander and Veenman note 891 above, p. 6.

⁸⁹⁴ Bevelander and Veenman note 891 above, p. 6.

⁸⁹⁵ Bevelander and Veenman note 891 above, p. 6.

⁸⁹⁶ Bevelander and Veenman note 891 above, p. 6.

⁸⁹⁷ Bevelander and Veenman note 891 above, p. 19.

⁸⁹⁸ C.S. Czymara and A.W. Schmidt-Catran, "Refugees Unwelcome? Changes in the Public Acceptance of Immigrants and Refugees in Germany in the Course of Europe's Immigration Crisis" (2017) 33(6) *European Sociological Review* p. 735.

⁸⁹⁹ Czymara and Schmidt-Catran note 898 above, p. 737.

⁹⁰⁰ Czymara and Schmidt-Catran note 898 above, p. 735.

⁹⁰¹ Czymara and Schmidt-Catran note 898 above, p. 738.

should respect the values and culture of the host state.⁹⁰² Germany continues to receive refugees and allow them to achieve their potentials.

The increasing applications for asylum in Germany attracted violent “protests against the German immigration and asylum policy”.⁹⁰³ The Patriotic Europeans against the Islamisation of the West (PEGIDA) led the protests across Germany against the continued reception of refugees.⁹⁰⁴ Holmes and Castaneda postulate how the media reported challenges associated with refugees, including the attack on politicians for supporting refugees and terrorist activities.⁹⁰⁵ For instance, some European politicians have connected Syrian refugees to Muslim extremists who carry out terrorist attacks in European Union countries.⁹⁰⁶ This has had a significant impact in Germany as the Minister of Finance for the State of Bavaria indicated a change in asylum policy.⁹⁰⁷ Despite the challenges associated with the influx of refugees, Germany continues to receive refugees into its territory.

4.5.1 Legal framework for the problem of refugees in Germany

The Germany Constitution of 1949 carried asylum provisions stating that “politically persecuted persons enjoy the right to asylum”.⁹⁰⁸ This right included asylum procedures such as the right to enter the country and apply for asylum, to have an interpreter and to present one’s case to the relevant authorities.⁹⁰⁹ Asylum seekers

⁹⁰² Czymara and Schmidt-Catran note 898 above, p. 738.

⁹⁰³ Czymara and Schmidt-Catran note 898 above, p. 737.

⁹⁰⁴ Czymara and Schmidt-Catran note 898 above, pp. 737 - 738.

⁹⁰⁵ SM. Holmes and H. Castaneda, “Representing the ‘European Crisis’ in Germany and Beyond Deservingness and Difference, Life and Death” (2016) 43(1) *American Ethnologist* p. 13.

⁹⁰⁶ Holmes and Castaneda note 905 above, p. 18.

⁹⁰⁷ Holmes and Castaneda note 905 above, p. 18.

⁹⁰⁸ Article 16a of the Germany Constitution of 1949; C. Pross, “Third Class Medicine: Health Care for Refugees in Germany” (1998) 3(2) *Health and Human Rights* p. 41.

⁹⁰⁹ Pross note 908 above, p. 41.

could also obtain legal assistance and had access to courts if the authorities rejected their applications.⁹¹⁰ Upon arrival in Germany, asylum seekers were accommodated in refugee camps, received food, clothes and welfare payment every month.⁹¹¹ This policy allowed many people all over the world to seek asylum in Germany.⁹¹² In 1992, Germany hosted two-thirds of all asylum seekers in the European countries.⁹¹³

However, after the German reunification in 1990, there was an increase in xenophobia and slogans indicating that “the boat is full”.⁹¹⁴ These incidents instigated the German parliamentarians to amend the Constitution in 1993 to tighten the asylum system.⁹¹⁵ The amendment introduced the “third country rule” which prevented any individual who had passed through a safe third country on their way to Germany from a home country to apply for asylum in Germany.⁹¹⁶ Many asylum seekers in Germany fell under this category as they had passed through its neighbouring states which were safe.⁹¹⁷ Only persons who came from their countries directly to Germany were entitled to apply for asylum in Germany. In contrast, Germany exempted Bosnian refugees from the third country rule as they were victims of war in the former Yugoslavia.⁹¹⁸ As a result, it hosted many Bosnian refugees more than any other country in Europe.⁹¹⁹ However, under the Dayton Peace Accord of December 1995, Bosnia refugees had been encouraged to

⁹¹⁰ Pross note 908 above, pp. 41 - 42.

⁹¹¹ Pross note 908 above, p. 42.

⁹¹² Pross note 908 above, p. 42.

⁹¹³ Pross note 908 above, p. 42.

⁹¹⁴ Pross note 908 above, p. 42.

⁹¹⁵ Pross note 908 above, p. 42.

⁹¹⁶ Pross note 908 above, p. 42; W. Bosswick, “Development of Asylum Policy in Germany” (2000) 13 (1) *Journal of Refugee Studies* p. 51.

⁹¹⁷ Pross note 908 above, p. 42.

⁹¹⁸ Pross note 908 above, p. 42.

⁹¹⁹ Pross note 908 above, p. 42.

voluntarily repatriate.⁹²⁰ The Federal Ministry of Interior took a decision to discourage the admission of refugees in Germany.⁹²¹

In 2015, Germany alone received over one million asylum seekers and accepted an integration politic.⁹²² Between 2015 and 2016, Germany introduced the policy of care for refugees and integration.⁹²³ It opened its borders to refugees and allowed them to apply for asylum. In this way, it violated the EU Dublin III Agreement requiring refugees to apply for refugee status in the first EU country they entered.⁹²⁴ Some asylum seekers were rejected as they came from safe countries.⁹²⁵ In order to prevent refugees from reaching the EU through Greece, it entered into an agreement with Turkey.⁹²⁶ In principle, Turkey would control its coastline and admit refugees rejected by Greece, in compensation for some money to care for refugees and free visa for Turks to travel to EU.⁹²⁷ As a result, very few refugees are now able to go to Germany and apply for asylum.

For an individual to qualify for asylum or protected refugee status, it requires a “well-founded fear of persecution in his country of origin, on account of his race, religion, nationality, political opinion or membership of a particular social group”.⁹²⁸ Successful applicants are granted either asylum or protected refugee status for

⁹²⁰ The General Framework Agreement for Peace in Bosnia and Herzegovina, 1995: Annex 7: The Agreement on Refugees and Displaced Persons, Article IV (repatriation assistance) and Article XIV (Refugee and Displaced Persons Property Fund).

⁹²¹ Pross note 908 above, p. 43.

⁹²² N. Funk, “A Spectre in Germany: Refugees, a ‘Welcome Culture’ and Integration Politics” (2016) 12(3) *Journal of Global Ethics* p. 289.

⁹²³ Funk note 922 above, p. 290.

⁹²⁴ Funk note 922 above, p. 290.

⁹²⁵ Funk note 922 above, p. 290.

⁹²⁶ Funk note 922 above, p. 290; I. Sirkeci, “Turkey’s Refugees, Syrians and Refugees From Turkey: a Country of Insecurity” (2017) 14 (1) *Migration Letters* p. 136.

⁹²⁷ Funk note 922 above, p. 290; N.A, Eralp, “Challenges of the German-Led Refugee Deal Between Turkey and the EU” (2016) 17 (2) *CESifo Forum* pp. 21 – 22.

⁹²⁸ Funk note 922 above, p. 290.

three years, or subsidiary protection for one year.⁹²⁹ People who are protected under the subsidiary clause are those for whom there are substantial grounds for believing that they would face a real risk of suffering serious harm in their country of origin, including risk emanating from armed conflicts.⁹³⁰ Germany summarily rejects individuals who come from a safe country and arranges their deportation. However, the deportation can be suspended for one year if it would endanger their life due to their health or conditions existing in their home country.⁹³¹ Refugee status has an impact on one's family as members of the family can be reunited.⁹³² It also brings access to benefits as individuals recognised as refugees have priority for job training and language courses.⁹³³

Before the asylum is granted, applicants receive government funded housing both in large cities and small towns.⁹³⁴ However, these refugees are distributed proportionally across the country and have their benefits reduced if they do not stay where they have been placed.⁹³⁵ Refugee policy in Germany is an important model that allows refugees to enter into Germany, and provide relevant conditions that enable refugees to live with dignity as full and equal members of the society.⁹³⁶ The host state provides basic needs such as housing, health care and minimum living

⁹²⁹ Funk note 922 above, p. 290; J. MacAdam, "The European Union Qualification Directive: the Creation of a Subsidiary Protection Regime" (2005) 17 (3) *International Journal of Refugee Law* pp. 468 and 498.

⁹³⁰ Funk note 922 above, p. 290.

⁹³¹ Funk note 922 above, p. 290.

⁹³² Funk note 922 above, p. 290; T. Heinemann, U. Naue and A.M. Tapaninen, "Verifying the Family? A Comparison of DNA Analysis for Family Reunification in Three European Countries (Austria, Finland and Germany)" (2013) 15 (2) *European Journal of Migration and Law* p. 189.

⁹³³ Funk note 922 above, p. 291.

⁹³⁴ Funk note 922 above, p. 291.

⁹³⁵ Funk note 922 above, p. 291.

⁹³⁶ Funk note 922 above, p. 291.

expenses.⁹³⁷ Recognised refugees need to take language and job training courses at the expenses of state.⁹³⁸ Upon completion of the courses, they can acquire permanent residency permits after five years.⁹³⁹ However, individuals who fail to take the courses or drop out receive reduced benefits.⁹⁴⁰ In 2016, Germany passed an integration law to allow refugees to take workfare jobs and employers who hired refugees for regular jobs had no obligation to indicate that no Germans were qualified for the jobs.⁹⁴¹ The Germany Refugee Policy had two objectives: to integrate individuals permitted to remain and provide a needed labour pool.⁹⁴² There is also a policy to minimise the number of people who enter Germany and remain as refugees.⁹⁴³

4.5.2 Social and economic integration of refugees in Germany

Recognised refugees who are employed in Germany receive the same cover, in terms of health care, as workers born in Germany.⁹⁴⁴ However, unemployed refugees obtain federal health care. Applicants can wait their decisions from the asylum authority or the asylum court for several years due to inadequate equipments and lack of staff.⁹⁴⁵ In the first year of their stay in Germany, asylum seekers are granted health care only for severe pain or acute illness.⁹⁴⁶ Since 1997, asylum seekers and tolerated refugees receive limited welfare payments and health

⁹³⁷ Funk note 922 above, p. 291; M. Meyer, "Germany's Response to the Refugee Situation: Remarkable Leadership or *Fait Accompli*?" 2016 *New Politik* p. 6.

⁹³⁸ Funk note 922 above, p. 291; S. Juran and P.N. Broer, "A Profile of Germany's Refugee Populations" (2017) 43 (1) *Population and Development Review* pp. 154 – 155.

⁹³⁹ Funk note 922 above, p. 291.

⁹⁴⁰ Funk note 922 above, p. 291.

⁹⁴¹ Funk note 922 above, pp. 291 - 292.

⁹⁴² Funk note 922 above, p. 292.

⁹⁴³ Funk note 922 above, p. 292.

⁹⁴⁴ Pross note 908 above, p. 47.

⁹⁴⁵ Pross note 908 above, p. 47.

⁹⁴⁶ Pross note 908 above, p. 47.

care for the first three years of their stay.⁹⁴⁷ Refugees obtain only third class health care and care providers are failing to protect refugee patients.⁹⁴⁸ The treatment of refugee patients needs to be improved to ensure more protection of sick refugees.

Refugees and asylum seekers face restricted entitlements in terms of health care.⁹⁴⁹ In the first 15 months of their stay in Germany, they are entitled to care only for acute conditions during pregnancy and childbirth.⁹⁵⁰ Both the states of Bremen and Hamburg have reduced health vouchers to asylum seekers.⁹⁵¹ There are also inequalities in entitlements between unaccompanied minors and children living with their parents.⁹⁵² Unaccompanied minor children have access to full health care while asylum seeker children living with their families face regular restrictions in terms of health care.⁹⁵³ All children should have full access to health care to satisfy their medical needs if they fall sick as parents may not have sufficient income to cover for their medical bills.

Refugees are entitled to work and a certain level of proficiency in the German language is necessary as the applicants need to read the adverts and participate in job interviews.⁹⁵⁴ Social networks such as family members, friends and acquaintances play a significant role in obtaining jobs in Germany.⁹⁵⁵ Language and integration courses have an impact on the acquisition of a job in Germany.⁹⁵⁶

⁹⁴⁷ Pross note 908 above, p. 48.

⁹⁴⁸ Pross note 908 above, p. 50.

⁹⁴⁹ O. Razum, "Restricted Entitlements and Access to Health Care for Refugees and Immigrants: the Example of Germany" (2016) 16(3) *Global Social Policy* p. 322.

⁹⁵⁰ Razum note 949 above, p. 322; sections 4 and 6 of the Asylum Seekers Benefit Act of 1993.

⁹⁵¹ Razum note 949 above, p. 322.

⁹⁵² Razum note 949 above, p. 322.

⁹⁵³ Razum note 949 above, p. 323.

⁹⁵⁴ P. Philipp and D. Schacht, "Half of the Refugees in Germany Found their First Job Through Social Contacts" 2016 *Econstar* p. 418.

⁹⁵⁵ Philipp and Schacht note 954 above, p. 414.

⁹⁵⁶ Philipp and Schacht note 954 above, p. 420.

Deserving refugees are more welcome in German society.⁹⁵⁷ They include individuals and families from Syria who fled their country due to the ongoing civil war and the involvement of the international community such as United States of America and Russia.⁹⁵⁸ They get employment to sustain themselves and ensure their basic needs.

German civil society organisations often intervene to assist refugees and reduce their pain, isolation and confusion.⁹⁵⁹ They implement the welcome culture and the volunteers assist refugees with everything they need.⁹⁶⁰ They ensure that refugees are accepted and their safety guaranteed, including the arrangement of personal contacts with German friends.⁹⁶¹ They help refugees in the asylum process and provide crucial services such as accompanying them to do interviews and making translation.⁹⁶² Volunteers also assist refugees to pay their rent and arrange their accommodation.⁹⁶³ In addition, they also welcome refugees in their homes and communities. Refugee women get assistance in their pregnancy and mother-child groups.⁹⁶⁴ There is a limited right for refugees to participate in community discussions on refugee issues.⁹⁶⁵

Despite welcoming refugees in Germany, there is also evidence of growing hostilities towards refugees and widespread criticism of the refugee policy.⁹⁶⁶ Some of the criticisms include the inability to continue receiving refugees in the future and

⁹⁵⁷ Holmes and Castaneda note 905 above, p. 15.

⁹⁵⁸ Holmes and Castaneda note 905 above, p. 15.

⁹⁵⁹ Funk note 922 above, p. 292.

⁹⁶⁰ Funk note 922 above, p. 292.

⁹⁶¹ Funk note 922 above, p. 292.

⁹⁶² Funk note 922 above, p. 292.

⁹⁶³ Funk note 922 above, p. 292.

⁹⁶⁴ Funk note 922 above, p. 292.

⁹⁶⁵ Funk note 922 above, p. 293.

⁹⁶⁶ Funk note 922 above, p. 293.

the threat of Muslim refugees to German cultural identity.⁹⁶⁷ Violence against refugees constitutes a threat to social cohesion and peace.⁹⁶⁸ The cost of maintaining the refugee policy and programmes is also another challenge.⁹⁶⁹ In addition, the rise of ultra-nationalist political parties and right wing organisations engenders negative perceptions and reactions on the reception of refugees.

4.5.3 Naturalisation of refugees in Germany

Germany is a country of immigrants and naturalised foreign residents constitute a significant part of the total population.⁹⁷⁰ In 1999, parliamentarians amended the German citizenship law of 1913 and introduced the birth right for the first time in Germany.⁹⁷¹ This policy allows a person born in Germany to a foreign parent who lawfully resides in Germany for eight years to automatically acquire German citizenship.⁹⁷² The same applies to individuals born in Germany to foreign parents who have held an unlimited residence permit for at least three years.⁹⁷³ However the persons who acquired citizenship by birth can have dual citizenship with the option to choose which one to retain at the age of 23.⁹⁷⁴ The persons benefiting from naturalisation by birth also include refugees.

Citizenship is based on the principle of *jus soli* (citizenship by place of birth) and *jus sanguinis* (citizenship according to parents' nationality) and naturalisation of specific

⁹⁶⁷ Funk note 922 above, pp. 293 - 294.

⁹⁶⁸ Funk note 922 above, p. 294.

⁹⁶⁹ Funk note 922 above, p. 294.

⁹⁷⁰ M. Anil, "Explaining the Naturalisation Practices of Turks in Germany in the Wake of the Citizenship Reform of 1999" (2007) 33(7) *Journal of Ethnic and Migration Studies* p. 1365; M, Anil, "No More Foreigners? The Remaking of German Naturalisation and Citizenship Law, 1990 – 2000" (2005) 29 (3/4) *Dialectical Anthropology* p. 462.

⁹⁷¹ Anil note 970 above, p. 1364.

⁹⁷² Anil note 970 above, p. 1364.

⁹⁷³ Anil note 970 above, p. 1364.

⁹⁷⁴ Anil note 970 above, p. 1364.

people who fulfil the requirements to become full members of the state.⁹⁷⁵ As a general rule, most states provide opportunity for foreign residents to naturalise after a continued period of residence in the country.⁹⁷⁶ In Germany, foreign residents must have lived there for a period of 15 years (eight years for individuals between 16 and 23) to qualify for naturalisation.⁹⁷⁷ Furthermore, applicants must pass a language test and be of good character.⁹⁷⁸ Absence of a criminal conviction is a crucial element.

The acceptance of many refugees in a country can have an impact on naturalisation depending on the period of residence.⁹⁷⁹ In general, refugees prefer to naturalise and do not wish to keep their previous citizenship as any communication with their country of origin could endanger themselves or their family members.⁹⁸⁰ For instance, Iranian refugees in Germany required the consent of their government to naturalise.⁹⁸¹ The Iranian authorities took time to check the identities of such refugees, addresses and harassed their relatives who stayed at home.⁹⁸² Refugees have generally a high propensity to naturalise and acquire a new citizenship even if they have to renounce their original citizenship.⁹⁸³ With regard to family reunification, the intended recipient needs to prove sufficient income and the applicant has to pass a language test.⁹⁸⁴ It is unlikely for applicants to satisfy the requirement of

⁹⁷⁵ J. Clarke, E.V. Dam and L. Gooster, "New Europeans: Naturalisation and Citizenship in Europe" (1998) 2(1) *Citizenship Studies* p. 45.

⁹⁷⁶ Clarke, Dam and Gooster note 975 above, p. 48.

⁹⁷⁷ Clarke, Dam and Gooster note 975 above, p. 48.

⁹⁷⁸ Clarke, Dam and Gooster note 975 above, p. 49.

⁹⁷⁹ Clarke, Dam and Gooster note 975 above, p. 54.

⁹⁸⁰ A. Bocker and D. Thranhardt, "Multiple Citizenship and Naturalisation: An Evaluation of German and Dutch Policies" (2006) 7(1) *Journal of International Migration and Integration* p. 89.

⁹⁸¹ Bocker and Thranhardt *op cit* note 980 above, p. 89.

⁹⁸² Bocker and Thranhardt *op cit* note 980 above, p. 89.

⁹⁸³ Bocker and Thranhardt *op cit* note 980 above, p. 91.

⁹⁸⁴ Bocker and Thranhardt *op cit* note 980 above, p. 91.

language test as such applicants are still in their home countries. It is submitted that refugees should not be required to contact the authorities in their country of origin as they have experienced persecution from their home countries.

4.6 Summary

This chapter has discussed, assessed and interrogated laws and best state practices in dealing with refugees in Tanzania, Zambia, the Netherlands and Germany respectively. From its independence in 1961, Tanzania has exhibited generosity in receiving refugees from its neighbouring countries and Southern African states. Tanzania has enacted statutes to control and administer refugees in its own territory. Refugees have to live in designated areas with limited freedom of movement. Tanzania has naturalised refugees from Rwanda, Somalia and Burundi who fled from their countries on specific times. Zambia started welcoming refugees since its independence and granted permanent residence permits to 10 000 Angolan refugees and 4 000 Rwandan refugees to end their protracted situations. Zambian law provides for naturalisation of refugees to become citizens of Zambia.

Both Netherlands and Germany accept and welcome refugees into their territories. They assist refugees to acquire their basic needs such as shelter, food, clothes and health care. They provide integration courses for refugees to facilitate their integration or assimilation in Dutch and German societies respectively. The Netherlands and Germany provide for naturalisation of refugees after a certain period of residence in their respective country. The next chapter deals with the integration of refugees in South Africa.

Chapter 5: Integration of refugees in South Africa

5.1 Introduction

South Africa has developed a refugee policy to accommodate individuals who flee their countries of origin.⁹⁸⁵ It has enacted the Refugees Act⁹⁸⁶ to domesticate international legal instruments, principles and standards relating to refugees. In addition, the Refugees Act provides for the reception of asylum seekers, recognition of refugee status, and for the rights and obligations of refugees.⁹⁸⁷ The principle of *non-refoulement*, recognised in international law, is also incorporated into the Refugees Act and prohibits states from refusing entry to asylum seekers and potential refugees and return them to their countries where they can be persecuted or risk their lives.⁹⁸⁸ This principle is the fundamental precept and cannot be ignored.⁹⁸⁹ Procedurally, the Director – General, after consultation with the Standing Committee, may establish as many refugee reception offices as he or she regards necessary for the purpose of the law.⁹⁹⁰ The constitutional rights of administrative justice must be observed in the asylum process.⁹⁹¹ This chapter deals with the history of refugees in South Africa, exclusion from refugee status, access to asylum

⁹⁸⁵ J. Handmaker, "No Easy Walk: Advancing Refugee Protection in South Africa" (2001) 48(3) *Africa Today* p. 92.

⁹⁸⁶ Refugees Act note 32 above.

⁹⁸⁷ Refugees Act note 32 above, long title.

⁹⁸⁸ Refugees Act note 32 above, section 2; G. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*" (2011) 23 (3) *International Journal of Refugee Law* p. 444; A. Duffy, "Expulsion to Face Torture? *Non-Refoulement* in International Law" (2008) 20 (3) *International Journal of Refugee Law* p. 373; S. Trevisanut, "The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection" (2011) 12 *Max Planck Yearbook of United Nations Law* p. 208.

⁹⁸⁹ R. Amit, "No Way In – Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" 2012 *ACMS Research Report* p. 17. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274020 (accessed on 7 August 2019).

⁹⁹⁰ Refugees Act note 32 above, section 8 (1).

⁹⁹¹ Refugees Act note 32 above, section 24 (2).

in South Africa, cessation clause for refugee status, family reunification, unaccompanied minor refugees, access to permanent residence, naturalisation of refugees, institutions and NGOs involved in refugee matters. All these factors play important roles in the integration of refugees in South Africa.

5.2 History of refugees in South Africa

Before 1994, South Africa generated refugees due to its destabilising policy of apartheid.⁹⁹² South African refugees and exiles lived in many African countries⁹⁹³ and elsewhere. They included different categories of people such as students, political activists, academics and members of liberation movements who spent many years in exile.⁹⁹⁴ Due to the political violence and domestic policies, South Africa also experienced massive internal displacements and forced removals.⁹⁹⁵ Individuals and communities had to live in designated areas to respect the strategy of separate development.⁹⁹⁶ This policy had an impact on refugees who came to South Africa during the apartheid era.

Prior to the democratic era in South Africa, Mozambican refugees fled the civil war in that country and came to South Africa where they were allowed to live in the semi-autonomous Bantustans of Gazankulu, KaNgwane, Lebowa and KwaZulu.⁹⁹⁷ However, they were not formally recognised as refugees in South Africa, but the then government agreed with the authorities in Gazankulu to accommodate and

⁹⁹² J. Handmaker, "Who Determines Policy? Promoting the Rights of Asylum in South Africa" (1999) 11(2) *International Journal of Refugee Law* p. 291.

⁹⁹³ L.B. Landau, "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy" (2006) 19 (3) *Journal of Refugee Studies* p. 312.

⁹⁹⁴ Handmaker note 992 above, p. 291.

⁹⁹⁵ Handmaker note 992 above, p. 291.

⁹⁹⁶ Handmaker note 992 above, p. 291.

⁹⁹⁷ Landau note 993 above, p. 311; J. Steinberg, "A Mixed Reception: Mozambican and Congolese Refugees in South Africa" (2005) 117 *Institute for Security Studies Monographs* p. 3.

treat them as visiting relatives.⁹⁹⁸ In addition, Angola experienced a civil war in the mid-seventies and 16 000 Angolan refugees fled to Namibia.⁹⁹⁹ The South African government classified these refugees as aliens, even though it had a policy to accommodate people who fled to save their lives and treat them with humanity.¹⁰⁰⁰ Most of these Angolan refugees had Portuguese citizenship and could be repatriated to Portugal.¹⁰⁰¹ Thus the South African government did not recognise refugees before the democratic era in 1994.

South Africa started acknowledging obligations under international refugee law in the 1990s and agreed to respect international instruments for the protection of refugees.¹⁰⁰² On 2 October 1991, the South African government entered into an agreement with the United Nations High Commissioner for Refugees (UNHCR) regarding the legal status, privileges and immunities of the UNHCR office and its personnel in South Africa.¹⁰⁰³ The purpose of this agreement was to invite the UNHCR to establish and maintain an office in South Africa in order to facilitate the voluntary repatriation and reintegration of South African refugees who chose to return home.¹⁰⁰⁴ In 1993, the South African government signed a Tripartite

⁹⁹⁸ C. Murray, "Mozambican Refugees: South Africa's Responsibility" (1986) 2 *SAJHR* p. 154.

⁹⁹⁹ Murray note 998 above, p. 163; J.A. Feris, "The Angolan Refugees and South Africa (1976) 2 *SAYIL* p. 176.

¹⁰⁰⁰ Murray note 998 above, p. 163.

¹⁰⁰¹ Murray note 998 above, p. 163.

¹⁰⁰² M. Barutciski, "The Development of Refugee Law and Policy in South Africa: A Commentary of 1997 Green Paper and 1998 White Paper / Draft Bill" (1998) 10 (4) *International Journal of Refugee Law* p. 701.

¹⁰⁰³ Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees (UNHCR) Governing the Legal Status, Privileges and Immunities of the UNHCR Office and its Personnel in South Africa, 1991.

¹⁰⁰⁴ Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees (UNHCR) Governing the Legal Status, Privileges and Immunities of the UNHCR Office and its Personnel in South Africa, 1991, preamble.

Agreement¹⁰⁰⁵ with the UNHCR and the Mozambican government to voluntarily repatriate Mozambican refugees. In 1995, South Africa became a party to the 1969 OAU Convention Governing the Specific Aspects of Refugees in Africa.¹⁰⁰⁶ Furthermore, it became a party to the 1951 UN Refugee Convention and its 1967 Protocol relating to the status of refugees.¹⁰⁰⁷ By acceding to international instruments dealing with refugees, South Africa has assumed obligations to receive and accommodate refugees on its territory. In this regard, it has enacted the Refugees Act¹⁰⁰⁸ to domesticate or incorporate international instruments for refugees in municipal laws.

5.2.1 Asylum procedure before the Refugees Act, 1998

Before the Refugees Act came into effect on 1 April 2000, the procedure regarding refugees was dealt with under the Aliens Control Act.¹⁰⁰⁹ This Act provided for the admission and control of persons who came to South Africa, but did not contain any provisions dealing with refugees and asylum seekers.¹⁰¹⁰ The Aliens Control Act generally prohibited foreigners from coming to and residing in South Africa without the necessary residence permit to remain in the country.¹⁰¹¹ Individuals who contravened this rule were classified as illegal foreigners.¹⁰¹² Every asylum seeker who applied for refugee status received a temporary permit issued to prohibited

¹⁰⁰⁵ Tripartite Agreement Between the Government of the Republic of South Africa, the Government of the Republic of Mozambique and the UNHCR for the Voluntary Repatriation of Mozambican Refugees from the Republic of South Africa, 1993.

¹⁰⁰⁶ South Africa acceded to the 1969 OAU Refugee Convention on 15 December 1995.

¹⁰⁰⁷ South Africa acceded to the 1951 UN Refugee Convention and its 1967 Protocol on 12 January 1996.

¹⁰⁰⁸ Refugees Act note 32 above, preamble.

¹⁰⁰⁹ Aliens Control Act 96 of 1991.

¹⁰¹⁰ Katz note 94 above, pp. 457 – 358.

¹⁰¹¹ Katz note 94 above, p. 358.

¹⁰¹² Katz note 94 above, p. 358.

persons and was valid for a particular period between three and six months.¹⁰¹³ Immigration officers received applications for asylum and referred them to the Refugee Affairs Standing Committee for consideration.¹⁰¹⁴ During this period, the Refugee Affairs Standing Committee considered all the applications and granted refugee status to successful applicants.¹⁰¹⁵ If the Committee rejected the application for refugee status, it informed the outcome to the unsuccessful applicant and advised him or her of the right to appeal to the Appeal Board for Refugee Affairs.¹⁰¹⁶ The Committee started giving reasons in writing for any adverse decisions from 10 December 1996 when it was ordered to do so by the High Court in Cape Town.¹⁰¹⁷ Asylum seekers had the right to work and study in South Africa pending the finalisation of their applications.

In *Kabuika and Another v Minister of Home Affairs and Others*,¹⁰¹⁸ the applicants were citizens of the former Zaire (now Democratic Republic of Congo) who came to South Africa in 1992 and 1994 respectively. They applied for asylum unsuccessfully to the relevant departments, the Director of the Department of Home Affairs and Appeal Board for Refugee Affairs.¹⁰¹⁹ They brought an application to court for an urgent order directing the Department of Home Affairs to extend their temporary residence permits pending the finalisation of their applications for judicial review of their applications.

¹⁰¹³ Katz note 94 above, p. 358.

¹⁰¹⁴ Katz note 94 above, p. 358. Refugee Affairs Standing Committee was a body established to give effect to the Tripartite Agreement between South Africa, Mozambique and the UNHCR, 1993.

¹⁰¹⁵ Katz note 94 above, p. 358.

¹⁰¹⁶ Katz note 94 above, p. 358.

¹⁰¹⁷ *Pembele and Others v Appeal Board for Refugee Affairs and Others*, case number 15931/96 (C), unreported judgment delivered on 10 December 1996.

¹⁰¹⁸ *Kabuika and Another v Minister of Home Affairs and Others* 1997 4 SA 341 (C).

¹⁰¹⁹ *Kabuika and Another v Minister of Home Affairs and Others* note 1018 above, p. 342.

Van Niekerk J acknowledged that, in making their decisions, the Department of Home Affairs did not consider the relevant factors such as reports from Amnesty International, other international bodies on the state of affairs in Zaire and the movement of the applicants in their own home country before the flight.¹⁰²⁰ The court held that the Department of Home Affairs had misinterpreted the facts and arrived at a capricious and incorrect decision.¹⁰²¹ The court granted the order sought and instructed the Department of Home Affairs to extend the temporary residence permits of the applicants pending the finalisation of judicial reviews of the asylum decisions.¹⁰²² This decision ensured that asylum seekers were protected while they waited for judicial review of their applications.

The case of *Baramoto and Others v Minister of Home Affairs*¹⁰²³ was also decided before the Refugees Act was enacted. The three asylum seekers from the former Zaire who were military officers applied to the High Court in Johannesburg for an order to be recognised as refugees in South Africa and compelling the relevant authority to extend their temporary residence permits.¹⁰²⁴ They argued that there was no statutory institution to deal with applications for asylum¹⁰²⁵ and the Minister of Home Affairs had expressed his opinion to refuse their asylum. The court found that the government of South Africa was bound by international instruments dealing with refugees such as the Basic Agreement between South Africa and UNHCR, the

¹⁰²⁰ *Kabuika and Another v Minister of Home Affairs and Others* note 1018 above, p. 344.

¹⁰²¹ *Kabuika and Another v Minister of Home Affairs and Others* note 1018 above, p. 344.

¹⁰²² *Kabuika and Another v Minister of Home Affairs and Others* note 1018 above, p. 345.

¹⁰²³ *Baramoto and Others v Minister of Home Affairs* 1998 5 BCLR 562 (W).

¹⁰²⁴ *Baramoto and Others v Minister of Home Affairs* note 1022 above, p. 563.

¹⁰²⁵ *Baramoto and Others v Minister of Home Affairs* note 1022 above, p. 564.

1951 UN Refugee Convention and its 1967 Protocol as well as 1969 OAU Refugee Convention.¹⁰²⁶ The Department of Home Affairs implemented the obligation to receive refugees through administrative procedures involving Immigration officers, Refugee Affairs Standing Committee and Refugee Affairs Appeal Board.¹⁰²⁷ The court refused the application and advised the applicants to use administrative processes¹⁰²⁸ to apply for asylum before coming to court for a relief.

5.2.2 Asylum procedure after the Refugees Act, 1998

The Refugees Act came into effect on 1 April 2000 and aimed at domesticating relevant international legal principles, instruments and standards into South African law.¹⁰²⁹ As a State Party to international conventions dealing with refugees, South Africa has an obligation to receive asylum seekers and recognise refugees on its territory.¹⁰³⁰ In interpreting the Refugees Act, South Africa must rely on the 1951 UN Refugee Convention, the 1967 Protocol to the UN Refugee Convention, the 1969 OAU Refugee Convention, the 1948 Universal Declaration of Human Rights and any other relevant international conventions or agreements to which it is a state party.¹⁰³¹ The institutions dealing with refugee matters and courts have to use these international instruments to promote the rights and obligations of refugees.

¹⁰²⁶ *Baramoto and Others v Minister of Home Affairs* note 1022 above, p. 572.

¹⁰²⁷ *Baramoto and Others v Minister of Home Affairs* note 1022 above, p. 573.

¹⁰²⁸ *Baramoto and Others v Minister of Home Affairs* note 1022 above, p. 577.

¹⁰²⁹ Refugees Act note 32 above, preamble; Katz note 94 above, p. 358; *Minister of Home Affairs and Others v Watchenuka and Another* 2004 4 SA 326 (SCA), para 2; F. Jenkins, "Coming to South Africa: an Overview of the Application for Asylum and an Introduction to the Refugees Act" (1999) 24 *SAYIL* p. 193.

¹⁰³⁰ Refugees Act note 32 above, preamble; *Abdi and Another v Minister of Home Affairs and Others* 2011 3 SA 37 (SCA), para 22.

¹⁰³¹ Refugees Act note 32 above, section 6. See also section 39 (1) and (2) of the Constitution of the Republic of South Africa, 1996 for the interpretation of the Bill of Rights.

The Refugees Act contains the definition of a refugee and provides that a person qualifies as a refugee if that person –

owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her habitual residence is unable or, owing to such fear, unwilling to return to it.¹⁰³²

This provision imports or incorporates into South African law the definition of a refugee as it appears in the 1951 UN Refugee Convention.¹⁰³³ However, South Africa has added “tribe” as a category of individuals who can qualify for refugee status. The Refugees Act does not contain the definition of “tribe”¹⁰³⁴ and courts still have to develop and concur on its meanings. For a person to claim a refugee status, he or she must cross an internationally recognised border to find himself or herself in another country. This means that no one can be a refugee in his or her own country or in the country of his or her habitual residence in the case of a stateless person.

The Act defines “social group” to include “a group of persons of particular gender, sexual orientation, disability, class and caste”.¹⁰³⁵ In *Tshiyombo v Refugee Appeal*

¹⁰³² Refugees Act note 32 above, section 3 (a); W.T. Worster, “The Evolving Definition of the Refugee in Contemporary International Law” (2012) 30 *Berkeley Journal of International Law* p. 95.

¹⁰³³ Convention Relating to the Status of Refugees, note 23 above, Article 1 A (2);

¹⁰³⁴ Refugees Act note 32 above, section 1.

¹⁰³⁵ Refugees Act note 32 above, section 1.

Board and Others,¹⁰³⁶ Binns-Ward J held that a rebel group constituted a particular social group in the Democratic Republic of Congo (DRC) as its members could be persecuted.¹⁰³⁷ Similarly, in *Jacob van Garderen NO v Refugee Appeal Board*,¹⁰³⁸ the North Gauteng High Court held that “young females” in the DRC constituted a particular social group as they face a real risk of persecution due to the insecurity in their home country. However, in *Fung v Refugee Appeal Board*,¹⁰³⁹ the High Court in Pretoria held that individuals who had violated the one child policy in China did not constitute a particular social group as they had taken a conscious decision to violate the law. Other categories that constitute a particular social group include female genital mutilation (FGM),¹⁰⁴⁰ gender, linguistic background and sexual orientation.¹⁰⁴¹ The list of groups making a particular social group is not exhaustive and other grounds may emerge from time to time.

The Refugees Act provides that a person also qualifies as a refugee if, “owing to external aggression, occupation, foreign domination, or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality; is compelled to leave his or her place of residence in order to seek

¹⁰³⁶ *Tshiyombo v Refugee Appeal Board and Others* 2016 4 SA 469 (WCC).

¹⁰³⁷ *Tshiyombo v Refugee Appeal Board and Others* note 1036 above, para 29.

¹⁰³⁸ *Jacob van Garderen NO v Refugee Appeal Board* Case no. 30720/2006 (T), unreported judgment delivered on 19 June 2007.

¹⁰³⁹ *Fung v Refugee Appeal Board and Others* 2007 2 SA 447 (T).

¹⁰⁴⁰ Katz note 94 above, p. 356 – 357; A. Helton, “Persecution on Account of Membership of a Social Group as a Basis for Refugee Status” (1983) 15 *Columbia Human Rights Law Review* p. 39, 40 – 47, 51 – 52; L.A. Malone, “Immigration – Refugee Act of 1980 – Resistance to Female Circumcision as Grounds for Political Asylum in the United States” (1997) 91 *The American Journal of International Law* pp. 140 – 141; *In Re Kasinga* File A73476695 Elizabeth (1996), judgment delivered on 13 June 1996, p. 357.

¹⁰⁴¹ *R v Immigration Appeal Tribunal and Another, Ex Parte Shah (United Nations High Commissioner for Refugees Intervening)* [1999] 2 All ER 545 (HL), 551 - 552.

refugee elsewhere.”¹⁰⁴² This definition mirrors the provision of the 1969 OAU Refugee Convention and contains events that are specific to the African continent.¹⁰⁴³ Dependants of a refugee are also refugees.¹⁰⁴⁴ They include a spouse, any unmarried dependant child or any destitute, aged or infirm member of the family of a refugee.¹⁰⁴⁵

In *Mubake and Others v Minister of Home Affairs and Others*,¹⁰⁴⁶ Makgoka J held that separated children were dependants of their primary caregivers in terms of the definition of the dependant in section 1 of the Refugees Act. This order complies with Article 22 (1) of the Convention on the Right of the Child¹⁰⁴⁷ and Article 23 (1) of the African Charter¹⁰⁴⁸ which create an obligation on states parties to take appropriate measures to ensure that a child who seeks refugee status receives protection and humanitarian assistance, whether accompanied or unaccompanied by their parents or by another person.¹⁰⁴⁹ The decision promotes the interests of children as they are often separated from their parents during the flight and find caregivers who support them to ensure their wellbeing. Therefore, separated children who live with their primary caregivers can easily be documented as asylum seekers or refugees.

¹⁰⁴² Refugees Act note 32 above, section 3 (b); J.A. Klinck, “Recognising Socio-Economic Refugees in South Africa: Principled and Rights – Based Approach to Section 3 (b) of the Refugees Act” (2009) 21 *International Journal of Refugee Law* p. 654.

¹⁰⁴³ OAU Convention Governing Specific Aspects of Refugees in Africa, note 219 above, Article 1 (2).

¹⁰⁴⁴ Refugees Act note 32 above, section 3 (c).

¹⁰⁴⁵ Refugees Act note 32 above, section 1.

¹⁰⁴⁶ *Mubake and Others v Minister of Home Affairs and Others* 2016 2 SA 220 (GNP), para 28.

¹⁰⁴⁷ Convention on the Rights of the Child, 1989.

¹⁰⁴⁸ African Charter on the Rights and Welfare of the Child, 1990.

¹⁰⁴⁹ *Mubake and Others v Minister of Home Affairs and Others* note 1048 above, para 9.

5.3 Exclusion from refugee status

Certain categories of persons do not qualify for refugee status in South Africa.¹⁰⁵⁰ They include a person whom there is a reason to believe that he or she has committed an international crime such as a crime against peace, a war crime or a crime against humanity.¹⁰⁵¹ A person who committed a non-political crime, before coming to South Africa, that would attract imprisonment as a punishment had the crime occurred in South Africa is also excluded from refugee status.¹⁰⁵² Furthermore, an individual who has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the African Union cannot be recognised as a refugee.¹⁰⁵³ Exclusion from refugee status also extends to any person who enjoys the protection of any other country.¹⁰⁵⁴ The Refugees Act domesticates and extends the international legal provisions on exclusion from refugee status contained in the Article 1 (F) of the UN Refugee Convention and Article 1 (5) of the OAU Refugee Convention.

South African courts have had occasions to interpret the meaning of commission of a non-political crime as a basis to exclude a person from refugee status.¹⁰⁵⁵ In *Tantoush v Refugee Appeal Board and Others*,¹⁰⁵⁶ the authorities rejected an

¹⁰⁵⁰ Refugees Act note 32 above, section 4; For more information on this topic, see T. Schreier, "Exclusion From Refugee Status" in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa*, Cape Town, Juta & Co Ltd, 2014, p. 92.

¹⁰⁵¹ Refugees Act note 32 above, section 4 (1) (a). For the disqualification of criminals from refugee status in South Africa for non-political crimes, see C. Kavuro, "Refugees, Serious Non-Political Crimes and Prosecution: Deficiencies in the Criminal Justice System Occasioned by Observance of Principle of *Non-Refoulement* in the Context of Refugee and Human Rights Protection" (2017) 2 *SACJ* pp. 227 – 228.

¹⁰⁵² Refugees Act note 32 above, section 4 (1) (b).

¹⁰⁵³ Refugees Act note 32 above, section 4 (1) (c).

¹⁰⁵⁴ Refugees Act note 32 above, section 4 (1) (d).

¹⁰⁵⁵ *Tantoush v Refugee Appeal Board and Others* 2008 1 SA 232 (T); *RAB and Others v Mukungubila* 2019 3 SA 141 (SCA); *Okoroafor v Minister of Home Affairs and Another* 2017 3 SA 290 (ECP).

¹⁰⁵⁶ *Tantoush v Refugee Appeal Board and Others* note 1055 above.

application for an asylum in South Africa as the applicant had allegedly committed theft of gold in Libya. Murphy J held that the provision of section 4 (1) (b) of the Refugees Act did not explicitly introduce a requirement of seriousness beyond the condition that the crime had to warrant a sentence of imprisonment.¹⁰⁵⁷ After considering international instruments in refugee matters, section 39 (1) (b) of the Constitution and expert evidence on refugee issues, the court held that theft did not fall into the category of serious crimes.¹⁰⁵⁸ During the deliberation, the court realised that violence characterised serious crimes, thus excluding the perpetrator from asylum protection.¹⁰⁵⁹ For instance, armed robbery could justify exclusion from refugee status. Finally, the court concluded that the applicant was a refugee in South Africa.¹⁰⁶⁰

In *Gavric v RSDO and Others*,¹⁰⁶¹ the applicant was an asylum seeker from Serbia and was disqualified as he had committed murder, was convicted in absentia and sentenced to 35 years' imprisonment. The court discussed the relationship between sections 3 and 4 (1) of the Refugees Act which dealt with refugee status and exclusion from refugee status respectively. Theron J held that a flexible approach should be favoured to allow the relevant authorities to exclude a person from refugee status irrespective of whether he or she has been declared a refugee.¹⁰⁶² This meant that a person seeking refugee status could be excluded before he or

¹⁰⁵⁷ *Tantoush v Refugee Appeal Board and Others* note 1055 above, para 112.

¹⁰⁵⁸ *Tantoush v Refugee Appeal Board and Others* note 1055 above, paras 112 and 115.

¹⁰⁵⁹ *Tantoush v Refugee Appeal Board and Others* note 1055 above, para 114; J.C Hathaway. *The Rights of Refugees under International Law*. Cambridge, Cambridge University Press, 2005, p. 349.

¹⁰⁶⁰ *Tantoush v Refugee Appeal Board and Others* note 1055 above, para 139.

¹⁰⁶¹ *Gavric v RSDO and Others* 2019 1 SA 21 (CC).

¹⁰⁶² *Gavric v RSDO and Others* note 1061 above, para 44.

she had applied for refugee status or after he or she had been granted asylum.¹⁰⁶³ The flexible approach is consistent with reality as the information about the exclusion factors can appear at any time in the asylum process. The standard employed in the exclusion proceedings was merely whether there was a reasonable belief that a crime had been committed.¹⁰⁶⁴ Theron J concluded that there was a reasonable likelihood that the applicant committed murder and it was not politically motivated.¹⁰⁶⁵ The court declared that the applicant was excluded from refugee status¹⁰⁶⁶ as there were reasons to believe that he had committed serious non-political crimes. However, the process of extradition had to be initiated to return the applicant to his country of origin (Serbia) in order to face prosecution.

In *Minister of Home Affairs v Tsebe and Others*,¹⁰⁶⁷ the applicants allegedly murdered their partners in Botswana and fled to South Africa to avoid prosecution. They applied for an order restraining the relevant authorities from extraditing or deporting them to Botswana without the written assurance that the death penalty would not be imposed, or, if imposed, it would not be carried out.¹⁰⁶⁸ Zondo AJ reiterated that as a principle the government had no power to extradite, deport or remove any person from South Africa to another state knowing that such person would face the real risk of the imposition and execution of the death penalty.¹⁰⁶⁹ Government officials had a duty to respect the Constitution and could not knowingly send a person to a country where he or she ran the real risk of a violation of his or

¹⁰⁶³ *Gavric v RSDO and Others* note 1061 above, para 44.

¹⁰⁶⁴ *Gavric v RSDO and Others* note 1061 above, para 110.

¹⁰⁶⁵ *Gavric v RSDO and Others* note 1061 above, paras 110 and 113.

¹⁰⁶⁶ *Gavric v RSDO and Others* note 1061 above, para 120.

¹⁰⁶⁷ *Minister of Home Affairs and Others v Tsebe and Others* 2012 5 SA 467 (CC), para 6.

¹⁰⁶⁸ *Minister of Home Affairs and Others v Tsebe and Others* note 1067 above, para 2.

¹⁰⁶⁹ *Minister of Home Affairs and Others v Tsebe and Others* note 1067 above, para 43.

her right to life, the right to human dignity and the right not to be treated or punished in a cruel, inhumane or degrading way.¹⁰⁷⁰ In the English case of *DD and AS v Secretary of the State for Home Department*,¹⁰⁷¹ the applicants did not qualify for refugee status due to their involvement in terrorist activities but they could not be returned to Libya because of the *non-refoulement* obligation and protection of human rights.¹⁰⁷² There is a problem for persons who are excluded from refugee status but cannot be returned to their country of origin as they face the real risk of their right to life and other human rights violations. It is submitted that the state of asylum has to prosecute such individuals to ensure the integrity of administration of justice and judicial system.

5.4 Access to asylum in South Africa

The Director-General in the Department of Home Affairs has powers to establish Refugee Receptions Offices in South Africa, but he or she has to consult with the Standing Committee.¹⁰⁷³ Every Refugee Reception Office must at least have one Refugee Reception Officer and one Refugee Status Determination Officer who has the necessary qualification to allow him or her to perform his or her duties in refugee matters.¹⁰⁷⁴ From the enactment of the Refugees Act, South Africa created five refugee reception offices in the major cities: Johannesburg, Pretoria, Cape Town, Durban and Port Elizabeth.¹⁰⁷⁵ In August 2008 and April 2009, the Department of Home Affairs opened two other refugee reception offices in Musina and Pretoria

¹⁰⁷⁰ *Minister of Home Affairs and Others v Tsebe and Others* note 1067 above, para 43.

¹⁰⁷¹ *DD and AS v Secretary of State for the Home Department* (Appeal Nos SC/42 and 50/2005, 27 April 2007).

¹⁰⁷² *DD and AS v Secretary of State for the Home Department* note 1071 above, paras 430 and 433.

¹⁰⁷³ Refugees Act note 32 above, section 8 (1).

¹⁰⁷⁴ Refugees Act note 32 above, section 8 (2).

¹⁰⁷⁵ Amit note 988 above, p. 16.

respectively.¹⁰⁷⁶ Subsequently, the Cape Town and Port Elizabeth Refugee Reception Offices ceased their services for new asylum seekers, and the Johannesburg Refugee Reception Office closed down.¹⁰⁷⁷

Any person can apply for asylum in South Africa provided that he or she attends in person to any Refugee Reception Office to get the necessary assistance.¹⁰⁷⁸ An applicant who claims for asylum at a port of entry receives an asylum transit visa valid for five days to allow him or her to approach any Refugee Reception Office in order to apply for his or her refugee status.¹⁰⁷⁹ However, asylum seekers experience challenges when they try to access the services of the Refugee Reception Officers.¹⁰⁸⁰ (See Figure 4 on page 148 below). A research conducted by the Forced Migration Programme at Wits University indicates that just over half of the asylum seekers with a transit visa manage to apply for asylum prior to the expiry of the visa.¹⁰⁸¹ The average asylum seeker has to return to the Refugee Reception Office at least 3 times and have to wait 3 weeks before they get assistance in respect of refugee issues.¹⁰⁸² There are also applicants who approach the Refugee Reception Offices without asylum transit permits. No person can be prosecuted for illegal entry

¹⁰⁷⁶ Amit note 988 above, p. 16.

¹⁰⁷⁷ Amit note 988 above, p. 16.

¹⁰⁷⁸ Refugees Act note 32 above, section 21 (1); W. Kerfoot and T. Schreier, "Application for Asylum: Reception" in F. Khan and T. Schreier *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, 2014, p. 137.

¹⁰⁷⁹ Immigration Act 13 of 2002, section 23 (1).

¹⁰⁸⁰ D. Vigneswaran, "A Foot in the Door: Access to Asylum in South Africa" (2008) 25 (3) *Refugee* p. 42.

¹⁰⁸¹ FMSP, "Barriers to Asylum: the Marabastad Refugee Reception Office" MRMP Report August 2008, p. 8. Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwis4IX33_jAhVMJIAKHbjKAY8QFjAAegQIAxAC&url=http%3A%2F%2Fwww.migration.org.za%2Fwp-content%2Fuploads%2F2017%2F08%2FBarriers-to-asylum-the-Marabastad-refugee-reception-office.pdf&usg=AOvVaw3wu2dsO1a-qnC2kLoROTHw (accessed on 8 August 2019).

¹⁰⁸² FMSP note 1081 above, p. 9.

in a country if he or she has applied for asylum.¹⁰⁸³ In *Abdi v Minister of Home Affairs*,¹⁰⁸⁴ the court held that individuals in an inadmissible facility or those who arrive at any port of entry without the necessary documentations have the right to apply for asylum.



Figure 4: Refugees and Asylum seekers queue at Marabastad Refugee Reception Office, Pretoria. This indicates that access to asylum is still a big challenge in South Africa.

Available at <https://rekordeast.co.za/59073/marabastad-corruption-being-dealt-with/> (accessed on 20 October 2019)

¹⁰⁸³ Refugees Act note 32 above, section 21 (4); *Kiliko and Others v Minister of Home Affairs and Others* 2006 4 SA 114 (C), para 27; *Arse v Minister of Home Affairs and Others* 2010 7 BCLR 640 (SCA), para 22.

¹⁰⁸⁴ *Abdi and Another v Minister of Home Affairs and Others* 2011 3 SA 37 (SCA), para 22.

The confidentiality in the asylum process must be safeguarded and comply with the provisions of the Constitution. In *Mail and Guardian Media Ltd v Chipu NO*,¹⁰⁸⁵ the Constitutional Court dealt with the absolute confidentiality in asylum applications and information. Zondo J concluded that the absolute confidentiality in section 21 (5) of the Refugees Act was inconsistent with the right to freedom of expression in the Constitution to the extent that it precluded members of the public and the media from attending any proceeding of the Refugee Appeal Board and failed to confer a discretion to allow access to its proceedings in appropriate cases.¹⁰⁸⁶ Parliament rectified the defect to ensure that refugee law complies with the provisions of the Constitution. The current section 21 (5) of the Refugees Act provides for absolute confidentiality of asylum applications, but confers an option upon the Refugee Appeal Authority to allow members of the public and the media to attend its proceedings.¹⁰⁸⁷ In exercising its discretion, the Refugee Appeal Authority considers the consent of the asylum seeker; or the public interest in allowing any person or media to attend or report on its proceedings.¹⁰⁸⁸ In making a decision, the Refugee Appeals Authority considers relevant facts to ensure the integrity of the asylum system and the protection of the asylum seeker.¹⁰⁸⁹ Thus the members of the public and media can have access to asylum information in certain circumstances and this may strengthen the protection of genuine refugees. There are government institutions or personnel that deal with refugee issues.

¹⁰⁸⁵ *Mail and Guardian Ltd and Others v Chipu NO and Others* 2013 6 SA 367 (CC).

¹⁰⁸⁶ *Mail and Guardian Ltd and Others v Chipu NO and Others* note 1085 above, para 115.

¹⁰⁸⁷ Refugees Act note 32 above, section 21 (5).

¹⁰⁸⁸ Refugees Act note 32 above, section 21 (5) (a) and (b).

¹⁰⁸⁹ Refugees Act note 32 above, section 21 (5) (b).

5.4.1 Institutions involved in refugee matters

5.4.1.1 Refugee Reception Officer (RRO)

A Refugee Reception Officer has a duty to accept the application form from the asylum seeker, check whether the form is properly completed and provide assistance in this regard.¹⁰⁹⁰ He or she has an option to make the necessary enquiry to ascertain the correctness of the information appearing in the application.¹⁰⁹¹ Furthermore, he or she must submit all applications to the Refugee Status Determination Officer together with any other information obtained that will assist to make a decision.¹⁰⁹² The Refugee Reception Officer must issue an asylum seeker permit to the applicant to regularise his or her stay in the country for a temporary period.¹⁰⁹³ In *Minister of Home Affairs and Others v Watchenuka and Another*,¹⁰⁹⁴ the court held that an asylum seeker has the right to study and work. The asylum seeker permit, procedure and refugee status legalise the sojourn of the asylum seeker in South Africa.¹⁰⁹⁵

The asylum seeker permit ceases to exist if the holder departs from South Africa without the consent of the Minister of Home Affairs.¹⁰⁹⁶ The Minister can withdraw an asylum seeker permit if the applicant contravenes any condition endorsed on it

¹⁰⁹⁰ Refugees Act note 32 above, section 21 (2) (a) and (b).

¹⁰⁹¹ Refugees Act note 32 above, section 21 (2) (c).

¹⁰⁹² Refugees Act note 32 above, section 21 (2) (d).

¹⁰⁹³ Refugees Act note 32 above, section 22 (1); F. Jenkins, "Coming to South Africa: An Overview of the Application for Asylum and an Introduction to the Refugees Acts" (1999) 24 *SAYIL* p. 190.

¹⁰⁹⁴ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 4 SA 326 (SCA), paras 35 and 36.

¹⁰⁹⁵ Refugees Act note 32 above, section 21 (4) (a) and (b).

¹⁰⁹⁶ Refugees Act note 32 above, section 22 (5).

or the application for asylum has been found to be manifestly unfounded, abusive or fraudulent.¹⁰⁹⁷ In addition, the asylum seeker permit can be withdrawn if the application has been rejected; or the applicant falls under the category of persons who are excluded from refugee status or whose situations are ceased circumstances.¹⁰⁹⁸

5.4.1.2 Refugee Status Determination Officer (RSDO)

The RSDO receives and considers applications for asylum. He or she may request further information necessary to make a decision from the applicant or Refugee Reception Officer.¹⁰⁹⁹ Sometimes the RSDO may consult with a UNHCR representative on specific matters related to refugee issues.¹¹⁰⁰ In arriving at a decision, the RSDO must follow the correct administrative procedures contained in the Constitution and other laws.¹¹⁰¹ The RSDO must make a decision to grant asylum; or reject the application as manifestly unfounded, abusive or fraudulent; or reject the application as unfounded; or refer the question of law to the Standing Committee.¹¹⁰² The RSDO must furnish written reasons to the applicant for any adverse decision.¹¹⁰³ The applicant can review¹¹⁰⁴ or appeal¹¹⁰⁵ any decision to reject his or her application for asylum.

¹⁰⁹⁷ Refugees Act note 32 above, section 22 (6) (a) and (b).

¹⁰⁹⁸ Refugees Act note 32 above, section 22(6) (c) and (d).

¹⁰⁹⁹ Refugees Act note 32 above, section 24 (1) (a).

¹¹⁰⁰ Refugees Act note 32 above, section 24 (1) (b).

¹¹⁰¹ Refugees Act note 32 above, section 24 (2).

¹¹⁰² Refugees Act note 32 above, section 24 (3).

¹¹⁰³ Refugees Act note 32 above, section 24 (4).

¹¹⁰⁴ Refugees Act note 32 above, section 25; L.A. de la Hunt, "Refugee Status Determination: Review and Appeal" in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, p. 176 - 180.

¹¹⁰⁵ Refugees Act note 32 above, section 26; LA de la Hunt, "Refugee Status Determination: Review and Appeal" in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, pp. 180 - 192.

5.4.1.3 Standing Committee for Refugee Affairs (SCRA)

The Standing Committee has a duty to review any adverse decision taken by the RSDO in terms of section 24 (3) (b).¹¹⁰⁶ This section relates to applications for asylum rejected as manifestly unfounded, abusive or fraudulent. The Standing Committee uses an inquisitorial system in reviewing rejected applications to ascertain any other information that can be used to reach an appropriate decision. In this regards, it may invite the UNHCR representative; request the attendance of any person who can provide relevant information; investigate and make further enquiry on its own accord into the relevant matter under discussion; and request the applicant to appear before it and provide other necessary information.¹¹⁰⁷ Finally, the Standing Committee may confirm or set aside any decision it reviews.¹¹⁰⁸ However, it must inform the RSDO of its decision on the applications it has reviewed.¹¹⁰⁹ The Standing Committee also has a duty to decide any question of law referred to it in terms of section 24 (3) (d) of the Refugees Act.¹¹¹⁰ In this regard, the Standing Committee refers the application back to the RSDO with the necessary directives that he or she must follow in deciding the application.¹¹¹¹ The Standing Committee is the only office that has the powers to declare a person to be a refugee indefinitely in order to apply for an immigration permit.¹¹¹² People who apply to the Standing Committee experience delays as it is the only office located in Pretoria for

¹¹⁰⁶ Refugees Act note 32 above, section 25 (1).

¹¹⁰⁷ Refugees Act note 32 above, section 25 (2) (a) – (d).

¹¹⁰⁸ Refugees Act note 32 above, section 25 (3) (a).

¹¹⁰⁹ Refugees Act note 32 above, section 25 (4).

¹¹¹⁰ Refugees Act note 32 above, section 25 (3) (b).

¹¹¹¹ Refugees Act note 32 above, section 25 (5).

¹¹¹² Refugees Act note 32 above, section 27 (c) and Immigration Act 13 of 2002, section (d).

the whole country.¹¹¹³ It is submitted that this office has to improve its services in order to avoid unreasonable delays when responding to the applicants. The Standing Committee plays a crucial role in the finalisation of applications for asylum. The decisions of the Standing Committee are subject to judicial review.

5.4.1.4 Refugee Appeal Board (RAB)

Any asylum seeker whose application has been rejected in terms of section 24 (3) (c) of the Refugees Act can appeal to the Appeal Board in the prescribed period.¹¹¹⁴ The Appeal Board hears the appeal and may confirm, set aside or substitute any decision of the RSDO.¹¹¹⁵ In the course of its works, the Appeal Board has an option to invite the UNHCR representative; refer the matter to the Standing Committee for further investigation; request the attendance of any person who is in a position to provide relevant information; make further enquiry or investigation on its own; and the applicant has to appear in person and provide other necessary information.¹¹¹⁶ The Appeal Board has an obligation to allow legal representation if the applicant requests such services.¹¹¹⁷

It is submitted that legal representation must be allowed in all the stages in the application for asylum. This can ensure that the rights of refugees and asylum seekers are protected. However, most refugees and asylum seekers are destitute and unable to afford the services of an attorney. It is submitted that the state should

¹¹¹³ In *Akanakimana v Chairperson of the Standing Committee for Refugee Affairs and Others* Case no: 10970/13 (WCC), para 2, unreported judgment delivered on 18 February 2015, the Standing Committee almost took 4 years to reject the asylum application. However, Ndita J declared the applicant to be a refugee and directed the Minister of Home Affairs to issue written recognition of refugee status to the applicant within 21 days from the date of the judgment (see para 29).

¹¹¹⁴ Refugees Act note 32 above, section 26 (1).

¹¹¹⁵ Refugees Act note 32 above, section 26 (2).

¹¹¹⁶ Refugees Act note 32 above, section 26 (3) (a) – (e).

¹¹¹⁷ Refugees Act note 32 above, section 26 (4).

provide free legal services to assist individuals to lodge appeals or apply for reviews of their rejected applications. The Refugee Appeal Board is located in Pretoria for the whole country. As a result, applicants experience undue delays in getting decisions from the Refugee Appeal Board.¹¹¹⁸ All decisions of the Refugee Appeal Board are subject to judicial reviews.

5.4.1.5 Judicial review in asylum decisions

The decisions of the RSDO, Refugee Appeal Board and Standing Committee are subject to judicial review.¹¹¹⁹ Section 33 (1) of the Constitution provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” Parliament enacted the Promotion of Administrative Justice Act (PAJA)¹¹²⁰ to give effect to the right to just administrative action. The aim of PAJA is to “promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.”¹¹²¹

The relevant authorities involved in the administration of asylum process exercise public power and are subject to the PAJA. Section 3 of PAJA provides for a procedurally fair administrative action and indicates that “a fair administrative procedure depends on the circumstances of each case”.¹¹²² With regard to refugee

¹¹¹⁸ Christian Balonga, a pastor from the Democratic Republic of Congo was granted asylum after 10 years of battle against the administrative authorities. See C. Richard, “Refugee Wins Asylum After 10 Years in Legal Limbo”. 27 February 2015. Available at <https://mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo> (accessed on 9 August 2019).

¹¹¹⁹ C. Johnson, “Failed Asylum Seekers in South Africa: Policy and Practice” (2015) 1 (2) *AHMR* p. 217.

¹¹²⁰ Promotion of Administrative Justice Act 3 of 2000.

¹¹²¹ Promotion of Administrative Justice Act note 1120 above, preamble.

¹¹²² Promotion of Administrative Justice Act note 1120 above, section 2 (a).

status determination, it contains: (a) adequate notice of the nature and purpose of the proposed administrative action; (b) a reasonable opportunity to make representations; (c) a clear statement of the administrative action; (d) adequate notice of any right of review or internal appeal, where applicable; and adequate notice of the right to request reasons.¹¹²³ This procedure applies to refugee matters and needs to be respected to ensure efficient administration.

Section 6 of PAJA provides grounds for judicial review of administrative action.¹¹²⁴ They include instances where the administrator who took a decision lacked jurisdiction to do so;¹¹²⁵ or was biased or reasonably suspected of bias.¹¹²⁶ Action which is procedurally unfair, or materially influenced by an error of law are also subject to judicial review.¹¹²⁷ The way the action was taken can also attract judicial review. This comprises incidents where the action was taken “for a reason not authorised by the empowering provision; for an ulterior purpose or motive, because irrelevant considerations were taken into account or relevant considerations were not considered; because of the unauthorised or unwarranted dictates of another person or body; in bad faith; or arbitrarily or capriciously”.¹¹²⁸

There are appropriate remedies for judicial reviews.¹¹²⁹ A court or tribunal can make any order that is just and equitable including setting aside the decision of the

¹¹²³ Promotion of Administrative Justice Act note 1120 above, section 3 (2) (b) (i) – (v); LA. de la Hunt, “Refugee Status Determination: Review and Appeal” in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa* p. 193.

¹¹²⁴ G. Quinot and PJH. Maree, “The Puzzle of Pronouncing on the Validity of Administrative Action on Review” (2015) 1 *CCR* p. 42); D. Freund and A. Price, “On the Legal Effects of Unlawful Administrative Action” (2017) 1 *SALJ* p. 193.

¹¹²⁵ Promotion of Administrative Justice Act note 1120 above, section 6 (2) (a) (i); *AOL v Minister of Home Affairs* 2006 2 SA 8 (D), 12H.

¹¹²⁶ Promotion of Administrative Justice Act note 1120 above, section 6 (2) (a) (iii).

¹¹²⁷ Promotion of Administrative Justice Act note 1120 above, section 6 (2) (c) and (d).

¹¹²⁸ Promotion of Administrative Justice Act note 1120 above, section 6 (2) (e) (i) – (vi).

¹¹²⁹ Promotion of Administrative Justice Act note 1120 above, section 8.

administrator and remitting the matter for reconsideration to the same administrator with or without directions.¹¹³⁰ In exceptional circumstances, the court can substitute its own decision for the one made by the administrator.¹¹³¹ This occurs where the end result is a foregone conclusion; where further delay would cause unjustifiable prejudice; where the court is as well qualified as the original authority to make the decision and where the initial decision maker has exhibited bias or shown incompetence.¹¹³²

Applicants for asylum or refugee status whose applications have been rejected by the Refugee Appeal Board or Standing Committee for Refugee Affairs regularly approach the courts for assistance.¹¹³³ The Department of Home Affairs had a policy for voluntary return process whereby it gave 30 days to the failed asylum seeker to make his or her own arrangements to depart from South Africa.¹¹³⁴ However, any asylum seekers who received 30 days' notice to leave South Africa did not usually comply with it and disappeared into the society.¹¹³⁵ The Department of Home Affairs started implementing forced return for failed asylum seekers through detention and deportation systems. Upon receiving the rejection letter, the asylum seeker was immediately arrested and detained for the purpose of deportation.¹¹³⁶ The policy to deport failed asylum seekers was unreasonable and unlawful as such applicants had right to review the outcomes of their applications in courts.

¹¹³⁰ Promotion of Administrative Justice Act note 1120 above, section 8 (1) (c) (i).

¹¹³¹ Promotion of Administrative Justice Act note 1120 above, section 8 (1) (ii) (aa).

¹¹³² L.A. de la Hunt, "Refugee Status Determination: Review and Appeal" in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, pp. 198 – 199.

¹¹³³ C. Johnson, "Failed Asylum Seekers in South Africa: Policy and Practice" (2015) 1 (2) *AHMR* pp. 216 – 217.

¹¹³⁴ Johnson note 1133 above, p. 216.

¹¹³⁵ Johnson note 1133 above, p. 217.

¹¹³⁶ Johnson note 1133 above, p. 218.

In *Said and Others v Minister of Home Affairs and Others*,¹¹³⁷ the applicants were asylum seekers whose applications for asylum had been rejected by the Standing Committee for Refugee Affairs and Refugee Appeal Board. They instituted proceedings in court to review the decisions of the relevant authorities to reject their asylum applications. The Refugee Reception Officer maintained that she did not have powers to extend their asylum seeker permits since they had been rejected.¹¹³⁸ The Constitutional Court held that, in a majority judgment, the Refugee Reception Officer had powers to extend the asylum seeker permits and was obliged to do so pending the outcome of the judicial reviews on the rejected applications.¹¹³⁹ The officer did not have any discretion to extend the asylum seeker permit pending judicial review and the applicants could stay in the country pending finalisation of their applications.

In judicial reviews, the court can confirm or set aside the decisions of the relevant authorities in refugee matters.¹¹⁴⁰ When the court sets aside the decision of the administrator, it refers back the application to him or her with directives to reconsider the decision.¹¹⁴¹ However, in exceptional circumstances, the court may make a substitution and provide a final decision on the application.¹¹⁴² For instance in *ON v Chairperson of the SCRA and Others*,¹¹⁴³ Holderness AJ declared the applicants to be refugees and directed the relevant authorities to issue them with the written

¹¹³⁷ *Said and Others v Minister of Home Affairs and Others* 2018 4 SA 333 (CC).

¹¹³⁸ *Said and Others v Minister of Home Affairs and Others* note 1137 above, para 4.

¹¹³⁹ *Said and Others v Minister of Home Affairs and Others* note 1137 above, paras 43 and 48.

¹¹⁴⁰ Promotion of Administrative Justice Act note 1120 above, section 8 (1) (c).

¹¹⁴¹ Promotion of Administrative Justice Act note 1120 above, section 8 (1) (c) (i).

¹¹⁴² Promotion of Administrative Justice Act note 1120 above, section 8 (1) (c) (ii) (aa); *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another* 2015 5 SA 245 (CC), para 47.

¹¹⁴³ *ON v Chairperson of the RSCA and Others* Case no: 15376/16 2017 (WCC), unreported judgment delivered on 16 May 2017.

recognition of refugee status within fourteen days of the order.¹¹⁴⁴ If the court confirms the decision rejecting the failed asylum application, the applicant can still appeal the judgment until he or she exhausts all judicial possibilities including appeals to the Constitutional Court.

5.4.1.6 Interpretation services

A Refugee Status Determination Officer has a duty to ensure that the applicant for asylum “fully understands the procedure, his or her rights and responsibilities and the evidence presented”.¹¹⁴⁵ In order to comply with their obligations, Refugee Status Determination Officers may need an interpreter to facilitate communication between the applicant and relevant authorities. This is crucial as asylum seekers and refugees come from different countries and speak various languages. Regulations 5 (1) provides that the Department of Home Affairs will provide appropriate interpretation services to the applicant at all stages of the asylum process where it is practicable and necessary.¹¹⁴⁶ If the interpretation is required and the Department of Home Affairs is unable to provide an interpreter, the applicant has a duty to find and provide his or her own interpreter who is not an employee or representative of his or her country of origin.¹¹⁴⁷ The fact that the applicant needs to find his or her own interpreter is a challenge as he or she may not have the necessary means and skills to afford the interpreter.

¹¹⁴⁴ *ON v Chairperson of the RSCA and Others* note 1143 above, para 91. See also *Akanakimana v Chairperson of SCRA and Others* Case no: 10970/13 2015, unreported judgment delivered on 18 February 2015.

¹¹⁴⁵ Refugees Act note 32 above, section 24 (2); J. de Jager, “Refugee Status Determination in South Africa” in F. Khan and T. Schreier. *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, 2014, p. 160.

¹¹⁴⁶ Refugee Regulations (Forms and Procedure), 2000, Regulations 5 (1).

¹¹⁴⁷ Refugee Regulations (Forms and Procedure), note 1147 above, Regulations 5 (2).

The interpretation services must be respected in all stages of the asylum application to ensure the integrity of the asylum system.¹¹⁴⁸ The absence of a good interpretation undermines the outcomes of the proceedings. In *Akanakimana v Chairperson of the SCRA and Others*,¹¹⁴⁹ the applicant received inadequate interpretation services and it influenced the negative outcome. Furthermore, in *ON v Chairperson of the SCRA and Others*,¹¹⁵⁰ an (incompetent) interpreter did not allow the applicant to provide for details of her persecution in the Democratic Republic of Congo and she was not afforded a fair hearing. Finally, in *Katshingu v Chairperson of the SCRA and Others*,¹¹⁵¹ Bozalek J lamented the absence of an interpreter competent in French and English and indicated that the hearing should not have happened. Thus, interpretation services are crucial to ensure the appropriate outcomes in the asylum applications. As the asylum decisions are subject to appeals and reviews, it is submitted that the asylum proceedings should be recorded.

Interpreters are used in many Department of State institutions.¹¹⁵² They must be able to translate languages spoken and understood by all the parties in the proceedings.¹¹⁵³ In refugee matters, interpreters have to translate or communicate accurately and honestly with the asylum applicants and relevant authorities or institutions.¹¹⁵⁴ Interpreters have to be regulated in South Africa to ensure that they

¹¹⁴⁸ F. Khan, "Interpreting for Refugees: Where Practicable and necessary" (2011) 28 (2) *Refugee* pp. 97 – 98.

¹¹⁴⁹ *Akanakimana v Chairperson of the SCRA and Others* Case no: 10970/13 (WCC), unreported judgment delivered on 18 February 2015, para 12.

¹¹⁵⁰ *ON v Chairperson of the SCRA and Others* note 1149 above, para 75.

¹¹⁵¹ *Katshingu v Chairperson of the SCRA and Others* Case no: 18726/2010 (WCC), unreported judgment delivered on 9 November 2011, p. 12.

¹¹⁵² Khan note 1148 above, p. 93.

¹¹⁵³ Khan note 1148 above, p. 99.

¹¹⁵⁴ Khan note 1148 above, p. 99.

provide appropriate and relevant services in the course of their works. The interpretation services play a huge role in all stages of the asylum proceedings and need to be beyond reproach to ensure efficiency in all matters relating to refugees.

5.4.2 Barriers to access asylum in South Africa

Asylum seekers experience problems when they attempt to access refugee reception offices to apply for asylum.¹¹⁵⁵ The Department of Home Affairs has implemented unlawful policies and procedures to reduce the number of persons who can have access to asylum process.¹¹⁵⁶ They include accepting a certain number of applicants per day, appointment systems and pre-screening procedures.¹¹⁵⁷ Furthermore, persons from certain countries are simply denied an opportunity to apply for asylum. For instance, officials of the Cape Town Refugee Reception Office advised applicants from Nepal and Fiji that they could not be asylum seekers as such countries were safe.¹¹⁵⁸

Officials from the Refugee Reception Offices often fail to observe procedural fairness in ensuring access to asylum.¹¹⁵⁹ In *Bula and Others v Minister of Home Affairs*,¹¹⁶⁰ the applicants entered South Africa illegally and were arrested before they applied for asylum. The court held that once a foreign national indicated his or

¹¹⁵⁵ D. Vigneswaran, "A Foot in the Door: Access to Asylum in South Africa" (2008) 25 (2) *Refugee* p. 42; W. Kerfoot and T. Schreier, "Application for Asylum: Reception" in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, pp. 140 – 141.

¹¹⁵⁶ Kerfoot and Schreier note 1155 above, p. 140; MF. Belvedere, "Insiders but Outsiders: The Struggle for the Inclusion of Asylum Seekers and Refugees in South Africa" (2007) 24 (1) *Refugee* p. 60.

¹¹⁵⁷ Kerfoot and Schreier note 1155 above, p. 139.

¹¹⁵⁸ T.H. Schreier, "An Evaluation of South Africa's Application of the OAU Refugee Convention Definition" (2008) 25 (2) *Refugee* p. 55.

¹¹⁵⁹ *Bula and Others v Minister of Home Affairs and Others* 2012 4 SA 560 (SCA); *Ersumo v Minister of Home Affairs* 2012 4 SA 581 (SCA).

¹¹⁶⁰ *Bula and Others v Minister of Home Affairs and Others* note 1159 above.

her intention to apply for asylum such person was protected by the Refugees Act and entitled to receive an appropriate permit valid for 14 days to allow him or her to lodge a claim for asylum.¹¹⁶¹ In *Ersumo v Minister of Home Affairs*,¹¹⁶² an applicant was arrested after he unsuccessfully tried to gain access to different Refugee Reception Offices in the country. This clarifies the predicament faced by individuals who live in South Africa before they can receive an asylum seeker permit.

The Cape Town Refugee Reception Office introduced a policy in 2006 to accept only 20 applications per day.¹¹⁶³ As a result, many applicants could not apply for asylum. In *Kiliko v Minister of Home Affairs*,¹¹⁶⁴ Van Reenen J held that the policy of receiving a limited number of asylum seekers per day was inconsistent with the fundamental rights to dignity, freedom and security of illegal foreigners as enshrined in the Constitution. The court also held that the state had a legal duty under international instruments, Refugees Act and the Constitution to provide adequate facilities to receive, consider and issue asylum seeker permits.¹¹⁶⁵ In order to resolve the problem, the court granted a structural interdict¹¹⁶⁶ whereby the Cape Town Refugee Reception Office had to take specific measures to promote access to its facilities and services.

In Gauteng, the Refugee Reception Offices introduced an appointment system and pre-screening procedure in order to deal with the increasing number of asylum

¹¹⁶¹ *Bula and Others v Minister of Home Affairs and Others* note 1159 above, paras 72 and 78.

¹¹⁶² *Ersumo v Minister of Home Affairs* note 1159 above, para 18.

¹¹⁶³ *Kiliko and Others v Minister of Home Affairs and Others* 2006 4 SA 114 (C).

¹¹⁶⁴ *Kiliko and Others v Minister of Home Affairs and Others*, note 1063 above, paras 31 and 35.

¹¹⁶⁵ *Kiliko and Others v Minister of Home Affairs and Others*, note 1163 above, para 28.

¹¹⁶⁶ *Kiliko and Others v Minister of Home Affairs and Others*, note 1163 above, para 32.

seekers.¹¹⁶⁷ Applicants who visited Marabastad and Rosettenville Offices received appointment slips ranging from 6 months to 1 year to come and lodge their applications for asylum.¹¹⁶⁸ The appointment slips had no legal effect as they were not provided for under refugee law. Concerning the pre-screening procedures, the officials dealing with refugee matters asked asylum seekers few questions and advised them on the appropriate permit that they had to apply for.¹¹⁶⁹ The court held that the use of appointment systems and pre-screening procedures at the Marabastad and Rosettenville Refugee Reception Offices was unconstitutional and unlawful.¹¹⁷⁰ The court also granted a structural interdict to allow the Refugee Reception Offices in Gauteng to find procedures and strategies to improve access to asylum applications.¹¹⁷¹ In addition, the court appointed an Advocate of the High Court to ensure that the rights of asylum seekers were protected and respected.

5.4.3 Closure of refugee reception offices

The Department of Home Affairs took a decision to close the Refugee Reception Offices in Johannesburg, Port Elizabeth and Cape Town in 2011 and 2012.¹¹⁷² This policy has become a serious impediment to applicants who want to access asylum in South Africa.¹¹⁷³ Currently asylum seekers have to travel to Pretoria, Durban and Musina in order to lodge applications for refugee status.¹¹⁷⁴ This has had a negative impact on the financial resources of asylum seekers and refugees in South Africa.

¹¹⁶⁷ *Tafira and Others v Ngozwane and Others* Case No: 12960106 (T), unreported judgment delivered on 12 December 2006.

¹¹⁶⁸ *Tafira and Others v Ngozwane and Others*, note 1167 above, p. 5.

¹¹⁶⁹ *Tafira and Others v Ngozwane and Others*, note 1167 above, pp. 30 – 38.

¹¹⁷⁰ *Tafira and Others v Ngozwane and Others*, note 1167 above, p. 46.

¹¹⁷¹ *Tafira and Others v Ngozwane and Others*, note 1167 above, pp. 45 – 50.

¹¹⁷² Amit note 989 above, p. 16.

¹¹⁷³ Kerfoot and Schreier note 1155 above, p. 145.

¹¹⁷⁴ Kerfoot and Schreier note 1155 above, p. 145.

The Crown Mines Refugee Reception Office in Johannesburg was the first to close its doors to refugees and asylum seekers on 31 May 2011.¹¹⁷⁵ The Department of Home Affairs took this decision due to a Johannesburg High Court order as the local business sector had complained that refugees created a public nuisance and defecated on the streets.¹¹⁷⁶ Before this incident, similar events occurred at both Braamfontein and Rosettenville Refugee Reception Offices which led to their closure.¹¹⁷⁷ Refugees and asylum seekers had to go to the Tirro Refugee Reception Office located in Pretoria to get assistance.¹¹⁷⁸ They had to pay the costs for their transport in order to exercise their rights under the Refugees Act.¹¹⁷⁹ Finally, Tirro also ceased its activities and they had to access the Marabastad Refugee Reception Office as it was the only office located in Gauteng (Pretoria) that provided assistance to refugees and asylum seekers in refugee matters.

On 21 October 2011, the relevant authorities in the Department of Home Affairs took a decision to close the Port Elizabeth Refugee Reception Office.¹¹⁸⁰ This policy was subjected to litigation and Peckering J set aside the decision as unlawful as the Department of Home Affairs did not consult with the Standing Committee for

¹¹⁷⁵ Amit note 989 above, p. 16.

¹¹⁷⁶ A. Sege, "Joburg Office Closure an Asylum Seeker Nightmare. *The Star*. 7 June 2011. Available at <https://www.iol.co.za/the-star/soweto/joburg-office-closure-an-asylum-seeker-nightmare-1079909> (accessed on 29 July 2019).

¹¹⁷⁷ K. Ramjathan-Keogh *et al* "LHR Dismayed at Closure of Refugee Reception Office in Johannesburg". Available at <https://www.lhr.org.za/news/2011/lhr-dismayed-closure-refugee-reception-office-johannesburg> (accessed on 29 July 2019).

¹¹⁷⁸ Ramjathan-Keogh *at al* note 1177 above.

¹¹⁷⁹ Ramjathan-Keogh *at al* note 1177 above.

¹¹⁸⁰ *Somali Association of South and Another v Minister of Home Affairs and Others* 2012 5 SA 634 (ECP), 637.

Refugee Affairs.¹¹⁸¹ They consulted with the Standing Committee and validated their decision, but it was set aside as they failed to consult with interested parties.¹¹⁸² The SCA held that the decision of the Department of Home Affairs to close the Port Elizabeth Refugee Reception Office did not comply with the principle of legality.¹¹⁸³ They did not consult with the interested parties who had knowledge in refugee matters and ignored relevant facts.¹¹⁸⁴ Ponnann JA ordered the relevant authorities to restore the service of the Port Elizabeth Refugee Reception Office to new asylum seekers.¹¹⁸⁵ Unfortunately, the Department of Home Affairs did not comply with court orders as it argued that its decision was cast in stone¹¹⁸⁶ and currently new asylum seekers cannot access asylum services in Port Elizabeth.

The Department of Home Affairs took a decision to close the Refugee Reception Office in Cape Town on 30 June 2012.¹¹⁸⁷ This policy was judicially reviewed on the ground of rationality as the relevant authorities failed to consult with interested parties, including the Standing Committee for Refugee Affairs and affected persons.¹¹⁸⁸ Rogers J set aside the decision to close the Cape Town Refugee Reception Office and ordered the relevant authorities to restore the asylum services

¹¹⁸¹ *Somali Association of South and Another v Minister of Home Affairs and Others*, note 1180 above, pp. 639 – 640.

¹¹⁸² *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 3 SA 545 (SCA), para 11.

¹¹⁸³ *Minister of Home Affairs and Others v Somali Association of South Africa and Another*, note 1182 above, paras 14 and 17.

¹¹⁸⁴ *Minister of Home Affairs and Others v Somali Association of South Africa and Another*, note 1182 above, para 17.

¹¹⁸⁵ *Minister of Home Affairs and Others v Somali Association of South Africa and Another*, note 1182 above, para 40.

¹¹⁸⁶ *Minister of Home Affairs and Others v Somali Association of South Africa and Another*, note 1182 above, paras 16 and 32.

¹¹⁸⁷ *Scalabrini Centre and Others v Minister of Home Affairs and Others* 2013 2 SA 531 (WCC), para 4.

¹¹⁸⁸ *Scalabrini Centre and Others v Minister of Home Affairs and Others* note 1187 above, paras 2 and 6.

in Cape Town.¹¹⁸⁹ The SCA partly agreed with the decision of the Cape Town High Court. Nugent JA held that the Director-General could not achieve the purpose without consulting the affected parties on the reasonableness and nationality of having the Refugee Reception Office in Cape Town.¹¹⁹⁰ However, the SCA disagreed with the High Court order to reopen the Refugee Reception Office and allowed the Director-General time to consult with the interested parties before making an appropriate decision on the issue.¹¹⁹¹ In a subsequent appeal against this decision, Schippers AJA set aside the decision to close the Cape Town Refugee Reception Office and ordered the relevant authorities to reopen and maintain the full services of the Refugee Reception Office in Cape Town by 31 March 2018.¹¹⁹² The court also ordered a structural interdict for the Department of Home Affairs to indicate the necessary steps they took to restore the services of Refugee Reception Office in Cape Town.¹¹⁹³ Despite this order, currently the Department of Home Affairs has not opened its doors to new comers to apply for asylum. The closure of Refugees Reception Offices in the major cities has had a serious impact on refugees and asylum seekers accessing asylum services.¹¹⁹⁴ The relevant authorities must comply with court orders and restore the services of Refugee Reception Offices in

¹¹⁸⁹ *Scalabrini Centre and Others v Minister of Home Affairs and Others* note 1187 above, para 122.

¹¹⁹⁰ *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 6 SA 421 (SCA), paras 69 – 73.

¹¹⁹¹ *Minister of Home Affairs and Others v Scalabrini Centre and Others* note 1190 above, paras 76 – 79.

¹¹⁹² *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 4 SA 125 (SCA), para 73.

¹¹⁹³ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 4 SA 125 (SCA), para 73. Previously, the Department of Home Affairs has struggled to secure an appropriate area to establish a Refugee Reception Office in Cape Town. In *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 4 All SA 414 (WCC), the Department of Home Affairs operated a refugee reception office in an area contrary to the land use and zoning regulations. The Cape Town High Court interdicted Home Affairs to continue operating the refugee reception office in Maitland and unless the relevant authorities amend the land use restrictions to allow a lawful function of the refugee reception office in the area.

¹¹⁹⁴ Kerfoot and Schreier note 1155 above, p. 143.

the major cities to improve the current situation of refugees and asylum seekers in South Africa.

The Department of Home Affairs intends to establish Refugee Reception Offices at the ports of entry, mostly northern borders, including a refugee reception centre at Lebombo post across the border with Mozambique.¹¹⁹⁵ Asylum seekers will live in refugee camps contrary to the current policy of local integration that allows refugees to settle into South African society.¹¹⁹⁶ According to the Department of Home Affairs, this policy will separate economic migrants from genuine refugees and speed up the time for processing asylum applications.¹¹⁹⁷ It is submitted that keeping asylum seekers in a refugee camp will limit their freedom of movement and have a negative impact on their social, health and educational services. The Department of Home Affairs should improve its asylum services in order to enhance the current situation of refugees.¹¹⁹⁸ The policy of local integration allows refugees and asylum seeker to exercise their constitutional rights and needs to be maintained.

5.4.4 Unreasonable delays in asylum procedure

The RSDOs often use a flawed refugee determination process and shift the burden to the Refugee Appeal Board and Standing Committee for Refugee Affairs for appeals and reviews respectively.¹¹⁹⁹ This contributes to the prolonged delays in the processing of applications for asylum and has severe impact on refugees when they

¹¹⁹⁵ Kerfoot and Schreier note 1155 above, p. 143.

¹¹⁹⁶ Consortium for Refugees and Migrants in South Africa (CoRMSA), "The Implications of Moving Refugees Reception Offices to the Border Areas", 2013, p. 1. Available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/121126cormsa.pdf> (accessed on 15 October 2019).

¹¹⁹⁷ CoRMSA note 1196 above, p. 2.

¹¹⁹⁸ CoRMSA note 1196 above, p. 2.

¹¹⁹⁹ R. Amit, "No Refuge: Flawed Status Determination and the Failure of South Africa's Refugee System to Provide Protection" (2011) 23 (3) *International Journal of Refugee Law* p. 460.

attempt to access their rights. In the course of their duties, RSDOs rely on the general categories of eligibility in the country of origin rather than an individualised consideration, thus creating refugee and non-refugee producing countries.¹²⁰⁰ It is submitted that they have to consider the provisions of section 3 (a) and (b) of the Refugees Act for both individual and group categories of refugee determination. No person should be denied access to asylum simply because he or she does not come from a refugee producing country.

It is generally accepted that there are unreasonable delays in processing applications for asylum in South Africa. In *Harerimana v Chairperson, RAB and Others*,¹²⁰¹ the applicant took five years to have his application completed and rejected by the RSDO and RAB. He appealed to the Cape Town High Court to review and set aside the decisions of the relevant authorities to reject his application. Davis J held that the RAB was inquorate in hearing the appeal and biased as it actively opposed the review application.¹²⁰² The court found exceptional circumstances to warrant the substitution of its own decision for that of the relevant authority and declared the applicant a refugee in South Africa.¹²⁰³ These unreasonable delays could be avoided if the authorities had performed their duties efficiently.

In *Tshiyombo v RAB and Others*,¹²⁰⁴ the applicant had been in South Africa on an asylum seeker permit for seven and a half years before the RAB finalised his appeal. The court concluded that this unreasonable delay constituted an exceptional

¹²⁰⁰ Amit note 1199 above, p. 460.

¹²⁰¹ *Harerimana v Chairperson, RAB and Others* 2014 5 SA 550 (WCC).

¹²⁰² *Harerimana v Chairperson, RAB and Others* note 1201 above, paras 20, 32 and 33.

¹²⁰³ *Harerimana v Chairperson, RAB and Others* note 1201 above, paras 33 and 43.

¹²⁰⁴ *Tshiyombo v RAB and Others* 2016 4 SA 469 (WCC), para 43.

circumstance to warrant the court to substitute its decision.¹²⁰⁵ Binn-Ward J found that the decision of the RAB was procedurally unfair, irrational and unreasonable.¹²⁰⁶ The court also lamented the systemic conduct of relevant authorities to refuse to comply with court orders in judicial review proceeding regarding refugee matters, discussed the issue of punitive costs and emphasised that the Public Protector should investigate these matters and recommend remedial action to improve the situation.¹²⁰⁷ The court granted asylum to the applicant and directed the respondents to issue a refugee status letter to the applicant within 10 days of the order.¹²⁰⁸ In the premises, it is respectfully submitted that the authorities dealing with refugee issues must adequately perform their functions to ensure that refugees and asylum seekers enjoy their rights.

The *Harerimana* and *Tshiyombo* cases represent many incidents where the RSDO and RAB do not apply the law correctly when dealing with refugee matters. Other incidents include failure to provide adequate reasons¹²⁰⁹ and failure to apply the mind by the relevant authority.¹²¹⁰ These issues have to be addressed to improve access to asylum and assist refugees and asylum seekers to enjoy their rights. Nevertheless, there is another factor that contributes to the unreasonable delays in asylum process.

The former Director-General of the Department of Home Affairs, Mr Mkuseli Apleni, attributed the unreasonable delays in asylum procedure to economic migrants who

¹²⁰⁵ *Tshiyombo v RAB and Others* note 1204 above, para 43.

¹²⁰⁶ *Tshiyombo v RAB and Others* note 1204 above, para 39.

¹²⁰⁷ *Tshiyombo v RAB and Others* note 1204 above, paras 20 and 47.

¹²⁰⁸ *Tshiyombo v RAB and Others* note 1204 above, paras 47.

¹²⁰⁹ Amit note 1199 above, pp. 475 – 477.

¹²¹⁰ Amit note 1199 above, pp. 477 – 487.

come to South Africa and join the asylum process to legalise their sojourn in the country.¹²¹¹ He indicated that only 5 percent of persons who apply for asylum qualify to be refugees and the remaining 95 percent are rejected as they are economic migrants.¹²¹² Furthermore, many foreign nationals cross the Beit Bridge border to Zimbabwe and Maseru border to Lesotho during Easter and Christmas holidays.¹²¹³ Economic migrants do apply for asylum in South Africa and overload the backlogs for asylum applications.¹²¹⁴ For this reason, South Africa does not pay the right attention to conventional refugees. It is submitted that South Africa should have a policy on economic migrants to regularise their sojourn in the country so that it can put more consideration on genuine refugees and asylum seekers. In this way, the unreasonable delays in asylum procedure can be avoided in order to comply with the legal framework in refugee matters.

5.5 Family reunification in refugee matters

A dependant of a refugee is also recognised as a refugee in South Africa.¹²¹⁵ The definition of a dependant in asylum matters includes “the spouse, any unmarried dependant child or any destitute, aged or infirm member of the family of such asylum seeker or refugee”.¹²¹⁶ In order to protect family unit, family members accompanying a recognised refugee are also granted refugee status.¹²¹⁷ However, refugees do not always come to the host state with their family members due to the circumstances

¹²¹¹ P. Ndoro, “SABC News – Xenophobia in South Africa – DG Mkuseli Apleni Explains Home Affairs Immigration Processes. (2 March 2017). Available at <https://www.youtube.com/watch?v=euM1z9uLtk> (accessed on 16 October 2019).

¹²¹² Ndoro note 1211 above.

¹²¹³ Ndoro note 1211 above.

¹²¹⁴ Ndoro note 1211 above.

¹²¹⁵ Refugees Act note 32 above, section 3 (c).

¹²¹⁶ Refugees Act note 32 above, section 1 (definition).

¹²¹⁷ F. Khan, “Reunification of the Refugee Family in South Africa” (2011) 28 (2) *Refugee* p. 78.

of their flights. Families of refugees experience challenges if they cannot be reunited with their family members when they later arrive in South Africa.

The 1951 UN Refugee Convention does not contain any specific provision on the right to family unit, but it is entrenched in other international human rights instruments and humanitarian law.¹²¹⁸ Article 16 of the Universal Declaration on Human Rights¹²¹⁹ and Article 23 the International Covenant on Civil and Political Rights¹²²⁰ contain provisions on the protection of the family unit by states parties. In addition, Article 22 (2) of the Convention on the Rights of the Child¹²²¹ and Article 23 (2) of the African Charter on the Rights and Welfare of the Child¹²²² provide for family reunification of refugee children with their parents. South Africa is a state party to these international and regional instruments and must take positive measures to ensure family reunification for refugees and asylum seekers.

States parties to the 1951 UN Refugee Convention often affirm the principle of family unit.¹²²³ For instance, Belgium has protected family unit by denying the expulsion of the spouse of a Congolese asylum seeker from Belgium.¹²²⁴ In Bosnia and Herzegovina, the Law on Immigration and Asylum¹²²⁵ provides: "Refugee status shall in principle be extended to the spouse and minor children as well as other dependants, if they are living in the same household. Entry visas shall be provided

¹²¹⁸ Khan note 1217 above, p. 78.

¹²¹⁹ Universal Declaration of Human Rights, 1948, Article 16 (1) and (3).

¹²²⁰ International Covenant on Civil and Political Rights, 1966, Article 23 (1).

¹²²¹ Convention on the Rights of the Child, 1989, Article 22 (2).

¹²²² African Charter on the Rights and Welfare of the Child, 1990, Article 23 (2); Khan note 1211 above, p. 81.

¹²²³ Khan note 1217 above, p. 80.

¹²²⁴ Khan note 1217 above, p. 80; *Tshisuala and Tshilele v Belgium* No. 39227, 2 April 1992.

¹²²⁵ Bosnia and Herzegovina: Law on Immigration and Asylum 1999, dated 23 February 1999. Available at <https://www.refworld.org/topic,50ffbce5220,50ffbce5247,3ae6b58e0,0,,LEGISLATION,BIH.html> (accessed on 3 August 2019).

to such dependants of person to whom asylum has been granted.”¹²²⁶ South Africa should incorporate and promote family unit and family reunification in refugee matters¹²²⁷ to ensure the protection of refugees and asylum seekers. Currently, refugees face formidable challenges as the Department of Home Affairs does not encourage family reunion and unit.¹²²⁸ There is no legal provision for a recognised refugee to bring his or her dependants into South Africa.

In *Mzalisi and Others v Ochogwu and Another*,¹²²⁹ an asylum seeker from Nigeria wanted to solemnise a marriage with a South African citizen. The Department of Home Affairs declined to register and recognise his marriage as it was against its policy. The Director-General for Civic Services proclaimed Circular No. 4 of 2016 dealing with the solemnisation and registration of marriages.¹²³⁰ Paragraph 2.1 (b) (iii) (dd) allowed only Home Affairs Marriage Officers to solemnise marriages to refugees and asylum seekers.¹²³¹ Nevertheless, it prohibited asylum seekers whose applications have not been finalised from contemplating marriage.¹²³² Petse DP held that the right to marry implicated the constitutional rights of human dignity and personal liberty.¹²³³ These rights were apparent in the institution of marriage and permitted married couples to fulfil their mutual rights.¹²³⁴ Petse DP concluded that

¹²²⁶ Bosnia and Herzegovina: Law on Immigration and Asylum 1999, dated 23 February 1999, Article 54.

¹²²⁷ Khan note 1217 above, p. 86.

¹²²⁸ Khan note 1217 above, pp. 85 – 86.

¹²²⁹ *Mzalisi NO and Others v Ochogwu and Another* (630/2018) [2019] ZASCA 138.

¹²³⁰ *Mzalisi NO and Others v Ochogwu and Another* note 1229 above, para 4.

¹²³¹ *Mzalisi NO and Others v Ochogwu and Another* note 1229 above, para 22; Circular No. 4 of 2016: Consolidate Procedures for Solemnisation and Registration of Marriages.

¹²³² *Mzalisi NO and Others v Ochogwu and Another* note 1229 above, para 22.

¹²³³ *Mzalisi NO and Others v Ochogwu and Another* note 1229 above, para 23.

¹²³⁴ *Mzalisi NO and Others v Ochogwu and Another* note 1229 above, paras 24 and 28; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC), para 35; *Fourie and Another v Minister of Home Affairs and Another* 2005 3 SA 429 (SCA), para 14.

the prohibition of asylum seekers from registering and solemnising their marriages was inconsistent with the Constitution and invalid.¹²³⁵ Thus asylum seekers can get married and register their marriage. The decision is silent on refugees who want to get married. It is submitted that the Department of Home Affairs should allow refugees and asylum seekers to conclude a contract of marriage of their choice.

5.6 Unaccompanied minor children

Any unaccompanied child who qualifies for refugee status and is in need of care must be brought to the Children's Court for the district where he or she is found.¹²³⁶ The same court may order that the unaccompanied child be assisted in his or her application for asylum.¹²³⁷ Section 28 (c) of the Constitution provides for the right for every child to have basic necessities of life such as "basic nutrition, shelter, basic health care services and social services". In every matter concerning the child his or her best interests are of paramount importance.¹²³⁸ Furthermore, the state has an obligation to provide the child with legal representation if substantial injustice would otherwise result.¹²³⁹ Despite these rights, unaccompanied refugee children often experience challenges in accessing asylum system in South Africa,¹²⁴⁰ as it is demonstrated by the case below.

¹²³⁵ *Mzalisi NO and Others v Ochogwu and Another* note 1229 above, para 38.

¹²³⁶ Refugees Act note 32 above, section 32 (1).

¹²³⁷ Refugees Act note 32 above, section 32 (2).

¹²³⁸ Constitution of the Republic of South Africa, note 1031 above, section 28 (2).

¹²³⁹ Constitution of the Republic of South Africa, 1996, section 28 (h).

¹²⁴⁰ T. Schreier, "Critical Challenges to Protection Unaccompanied and Separated Foreign Children in Western Cape: Lessons Learned at the University of Cape Town Refugee Rights Unit" (2011) 28 (2) *Refuge* p. 65.

In *Jacob van Garderen NO v RAB and Others*,¹²⁴¹ the applicant was appointed as *curator ad litem* to represent three unaccompanied refugee children from the Democratic Republic of Congo to review the decisions of the RAB and RSDO rejecting their applications for asylum. It transpired that, during the proceedings before the RSDO, the applicants were not represented and did not get any proper interpretation services. Botha J granted refugee status to the applicants as they belonged to a particular social group as young girls in the Democratic Republic of Congo.¹²⁴² It is submitted that unaccompanied refugee children must have the necessary assistance in preparing their applications for asylum to ensure the protection of their rights. The state has a direct duty to provide for the socio-economic needs of unaccompanied foreign children as they lack parental care.¹²⁴³ With state assistance, unaccompanied minor refugees can legitimately have access to basic needs for their survival.

Unaccompanied refugee children usually face great challenges when they seek access to basic education, health and social services.¹²⁴⁴ Sometimes they do not get admission to schools as they do not have anybody who will be responsible for their school fees, uniforms and books.¹²⁴⁵ Some principals ask unaccompanied minors to bring their parents or guardian in order to get admission to schools.¹²⁴⁶ Children also experience language barriers when they communicate with other

¹²⁴¹ *Jacob van Garderen NO v RAB and Others* Case No. 30720/2006 (T), unreported judgment delivered on 19 June 2007.

¹²⁴² *Jacob van Garderen NO v RAB and Others* Case No. 30720/2006 (T).

¹²⁴³ *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 (T), para 17.

¹²⁴⁴ L. Meda, R. Sookrajh and B. Maharaj, "Refugee Children in South Africa: Access and Challenges to Achieving Universal Primary Education" (2012) 9 (1) *Africa Education Review* p. 161; C. Nicholson, "A First Call on Available Resources for Child Refugees in South Africa" (2005) 38 *De Jure* p. 77.

¹²⁴⁵ Meda, Sookrajh and Maharaj note 1244 above, p. 162.

¹²⁴⁶ Meda, Sookrajh and Maharaj note 1244 above, p. 162.

persons in South Africa.¹²⁴⁷ From the foregoing, it is apparent that unaccompanied refugee children need assistance from the government and NGOs to overcome obstacles in lodging their application for asylum and refugee status.

5.7 Cessation clause for certain refugees

Section 5 of the Refugees Act deals with situations in which a person can cease to be a refugee. The cessation clause for refugee status can be determined on individual basis or on a group basis for a particular nationality.¹²⁴⁸ A person ceases to qualify for refugee status if he or she voluntarily reavails himself or herself of the protection of his or her country of nationality.¹²⁴⁹ The same also applies if the person reacquires his or her nationality by some voluntary or formal act after having lost it.¹²⁵⁰ Furthermore, a person ceases to be a refugee if he or she has become a citizen of South Africa or acquires the nationality of another country and enjoys the protection of the country of his or her new nationality.¹²⁵¹ Voluntary re-establishment in the country of origin also causes the person to lose his or her refugee status.¹²⁵² In addition, a person ceases to be a refugee if “he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.”¹²⁵³ However, this

¹²⁴⁷ L. Magqibelo, *et al*, “Challenges Faced by Unaccompanied Minor Refugees in South Africa” (2016) 52 (1) *Social Work* p. 75.

¹²⁴⁸ T. Schreier, “Cessation of Refugee Status in South Africa” in F. Khan and T. Schreier (ed.) *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, 2014, p. 115.

¹²⁴⁹ Refugees Act note 32 above, section 5 (1) (a).

¹²⁵⁰ Refugees Act note 32 above, section 5 (1) (b).

¹²⁵¹ Refugees Act note 32 above, section 5 (1) (c).

¹²⁵² Refugees Act note 32 above, section 5 (1) (d).

¹²⁵³ Refugees Act note 32 above, section 5 (1) (e).

provision “does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of his or her nationality.”¹²⁵⁴ In withdrawing the refugee status for the person who ceases to qualify, the relevant authorities must use a fair procedure and comply with the provisions of the Constitution.¹²⁵⁵

The provision of a cessation clause in South Africa complies with those provided for in the Article 1C of the 1951 UN Refugee Convention and Article 1 (4) of the 1969 OAU Refugee Convention. The South African cessation clause has two categories: those that arise as a result of voluntary actions of the refugee and those that are based on the changes in the country of origin causing the circumstances leading to refugee status to cease to exist.¹²⁵⁶ In the second category, a refugee has an opportunity to invoke compelling reasons arising out of the previous persecution for refusing to return to his or her country of nationality.¹²⁵⁷ South Africa has invoked the cessation clause for refugees coming from some countries. In the next section, more examples are elucidated.

5.7.1 Cessation clause for Mozambican refugees

The South African government, Mozambican authorities and UNHCR signed an agreement to implement the cessation clause for Mozambican refugees on 31 December 1996.¹²⁵⁸ This occurred as South Africa was a state party to the 1951 UN Refugee Convention and 1969 OAU Refugee Convention. However, the cessation

¹²⁵⁴ Refugees Act note 32 above, section 5 (2).

¹²⁵⁵ Refugees Act note 32 above, section 36.

¹²⁵⁶ Schreier note 1248 above, p. 116.

¹²⁵⁷ Schreier note 1248 above, p. 116.

¹²⁵⁸ T. Polzer, “Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa” (2007) 19 (1) *International journal of Refugee Law* p. 40.

clause had a little impact on the Mozambican refugees as they did not receive any assistance from the authorities.¹²⁵⁹ Some Mozambican refugees went home and others chose to remain in South Africa. At the request of the UNHCR, the South African government decided to grant amnesty to Mozambican refugees who fled the civil war in Mozambique and wanted to stay in South Africa.¹²⁶⁰ The 1995 Miner's Amnesty and the 1996 SADC Amnesty provided opportunities for many Mozambicans living in South Africa to apply for permanent residence permits.¹²⁶¹ The third exemption implemented in 1999/2000 only targeted Mozambican refugees to apply for a permanent stay in South Africa.¹²⁶² However the cessation clause for Mozambican refugees was comprehensive as it facilitated individuals to repatriate but also accommodated those who wished to remain in South Africa.

5.7.2 Cessation clause for Angolan refugees

In October 2009, the UNHCR recommended the invocation of cessation clause for Angolan refugees who fled civil conflicts between 1961 and 2002 due to fundamental changes in circumstances in that country.¹²⁶³ It indicated that the refugee status for Angolan refugees would formally cease by 30 June 2012.¹²⁶⁴ Subsequently, the South African government announced its intention to invoke the cessation clause for refugees from Angola who fled to South Africa on or before

¹²⁵⁹ Polzer note 1258 above, p. 40.

¹²⁶⁰ Polzer note 1258 above, p. 40; J. Baloro, "The Law and Pattern of the Repatriation of Namibian and South African Refugees: Possible Lessons for a Programme of Repatriation of Mozambican Refugees" (1995) XXVIII *CILSA* p. 137.

¹²⁶¹ Polzer note 1258 above, p. 41.

¹²⁶² Polzer note 1258 above, p. 41.

¹²⁶³ UNHCR, "Implementation of the Comprehensive Strategy for the Angolan Refugee Situation, Including UNHCR Recommendation on the Applicability of the Ceased Circumstances Cessation Clauses", 2012, p. 1.

¹²⁶⁴ UNHCR note 1263 above, p. 1.

2002.¹²⁶⁵ On 31 July 2013, the Standing Committee for Refugee Affairs announced that it was reviewing all refugee status for affected refugees from Angola.¹²⁶⁶ The cessation clause aimed to voluntarily repatriate Angolan refugees, but also to locally integrate those who benefited from exemption proceedings.¹²⁶⁷ Furthermore, South Africa gave an opportunity for Angolan refugees who did not use exemption proceedings to apply for immigration permits to regularise their stay in the country.¹²⁶⁸

In *Mayongo v RAB and Others*,¹²⁶⁹ the applicant was an asylum seeker from Angola who suffered from post-traumatic disorder due to the assassination of his father by the UNITA rebel forces in his country. The RSDO and RAB rejected his application for asylum and indicated that Angola was a peaceful country. He applied unsuccessfully to the Minister for a permanent residence permit as he had compelling reasons not to avail himself of the protection of his country.¹²⁷⁰ The court held that the applicant fell under the compelling reason exception as he had post-traumatic stress syndrome and major depressive disorders arising from the previous persecution.¹²⁷¹ Patel J declared the applicant to be a refugee and ordered the relevant authorities to issue a refugee status permit to the applicant.¹²⁷² This implies

¹²⁶⁵ Schreier note 1248 above, p. 131.

¹²⁶⁶ Schreier note 1248 above, pp. 131 – 132; S. Carciotto, "Angolan Refugees in South Africa: Alternatives to Permanent Repatriation?" (2016) 2 (1) *AHMR* p. 362; T. Washinyira, "Angolan Former Refugees Face Uncertain Future", 1 October 2019. Available at <https://www.groundup.org.za/article/angolan-former-refugees-face-uncertain-future/> (accessed on 22 October 2019).

¹²⁶⁷ UNHCR note 1263 above, pp. 3 – 4, Carciotto note 1266 above, p. 382.

¹²⁶⁸ Schreier note 1248 above, p. 132.

¹²⁶⁹ *Mayongo v RAB and Others* [2007] JOL 19645 (T).

¹²⁷⁰ *Mayongo v RAB and Others* note 1269 above, paras 4 and 6.

¹²⁷¹ *Mayongo v RAB and Others* note 1269 above, para 9.

¹²⁷² *Mayongo v RAB and Others* note 1269 above, para 11.

that refugees could still be protected even if the cessation clause had been implemented.

5.7.3 Cessation clause for Liberian refugees

The UNHCR recommended the implementation of the cessation clause to Liberian refugees who fled civil wars in their country from 1989 to 2003.¹²⁷³ The refugee status for Liberian refugees had to formally cease by 30 June 2012.¹²⁷⁴ The implementation strategy for cessation clause included voluntary repatriation, local integration in the host country and other legal arrangement to allow former refugees to continue living in the host states.¹²⁷⁵ The South African government did not declare cessation clause ceased circumstances for Liberian refugees, but it reviewed individual applications to ascertain whether the specific person continued to qualify as a refugee.

5.7.4 Cessation clause for Rwandan refugees

In October 2009, the UNHCR announced a strategy to end the Rwandan refugee situation by 30 June 2013.¹²⁷⁶ It invoked ceased circumstances cessation clause for

¹²⁷³ UNCHR, "Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, Including UNHCR's Recommendation on the Applicability of the Ceased Circumstances Cessation Clauses", 2012, pp. 1 and 6.

¹²⁷⁴ UNCHR, "Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, Including UNHCR's Recommendation on the Applicability of the Ceased Circumstances Cessation Clauses", 2012, p. 6.

¹²⁷⁵ UNCHR, "Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, Including UNHCR's Recommendation on the Applicability of the Ceased Circumstances Cessation Clauses", 2012, pp. 2 – 4.

¹²⁷⁶ UNHCR, "Implementation of the Comprehensive Strategy to the Rwandan Refugee Situation, Including UNHCR's Recommendations on the Applicability of the Ceased Circumstances Cessation Clause", 2011, pp. 1 and 4. Available at <https://www.refworld.org/docid/4f33a1642.html> (accessed on 31 July 2019).

Rwandan refugees who fled ethnic conflicts between 1959 and 1998.¹²⁷⁷ The implementation of the cessation clause was met with delays and was extended to 31 December 2017.¹²⁷⁸ This decision of the UNHCR was questionable as the Rwandan government has, since 2002, repeatedly asked UNHCR to recommend the cessation clause for Rwandan refugees.¹²⁷⁹

The UNHCR insisted that Rwanda was safe for refugees to repatriate, but there were widespread reports of human rights violations that called into question the invocation of the cessation clause.¹²⁸⁰ As a result, some Rwandan refugees had to choose risking *de facto* statelessness and returning home where they felt unsafe and unable to enjoy their basic protections.¹²⁸¹ In Africa, most countries did not agree to implement cessation clause for Rwandan refugees. For instance, in South Africa, the then Minister of Home Affairs, Naledi Pandor, questioned the invocation of the cessation clause.¹²⁸² She indicated that the South African government had informed the UNHCR that it would “conduct its own research into existing conditions in Rwanda and consult with the local Rwandan community before making a decision on invoking the cessation clause.”¹²⁸³ However, South Africa often implements

¹²⁷⁷ UNHCR, “Implementation of the Comprehensive Strategy to the Rwandan Refugee Situation, Including UNHCR’s Recommendations on the Applicability of the Ceased Circumstances Cessation Clause”, 2011, p. 6.

¹²⁷⁸ J. Kanamugire, “Africa Countries in a Fix as Rwandan Refugee Status Ends”. East Africa. 20 January 2018. Available at <https://reliefweb.int/report/rwanda/african-countries-fix-rwanda-refugee-status-ends> (accessed on 31 July 2019).

¹²⁷⁹ G. Cliché-Rivard, “Cessation Clause for Rwandan Refugees Raises Questions” 3 May 2012. Available at <https://www.pambazuka.org/human-security/cessation-clause-rwandan-refugees-raises-questions> (accessed on 31 July 2019).

¹²⁸⁰ L.N. Kingston, “Bringing Rwandan Refugees Home: the Cessation Clause, Statelessness, and Forced Repatriation” (2017) 29 (3) *International Journal of Refugee Law* p. 420.

¹²⁸¹ Kingston note 1280 above, p. 424.

¹²⁸² S. Phillips, “No Consensus on Implementation of Cessation Clause for Rwandan Refugees”. 12 July 2013. Available at <https://www.thenewhumanitarian.org/analysis/2013/07/12/no-consensus-implementation-cessation-clause-rwandan-refugees> (accessed on 31 July 2019).

¹²⁸³ Phillips note 1282 above.

individual cessation clause decisions according to the circumstances in the country of origin.¹²⁸⁴

A declaration of cessation clause for specific category of refugees from a particular country creates a presumption that it is safe for all refugees to return home.¹²⁸⁵ This practice does not consider the different types of persecution each refugee has experienced before his or her flight.¹²⁸⁶ The cessation group category is only appropriate where refugees have been recognised on a group basis.¹²⁸⁷ In practice, countries usually grant refugee status on individual basis and it is unwarranted to invoke group cessation clause for such refugees. The UNHCR and relevant authorities rarely consider how cessation clause may make individuals stateless.¹²⁸⁸ This can occur where a country withdraws refugee status from individuals who refuse to avail themselves of the protection of their country of origin. Thus, they may lack a state that can protect their fundamental human rights and countries must avoid activities creating statelessness for individuals.

5.8 Access to permanent residence for refugees

Refugees Act provides for refugees to apply for permanent residence permits.¹²⁸⁹ It states that a refugee: -

¹²⁸⁴ Refugees Act note 32 above, sections 5 (1) (e), (2) and 36.

¹²⁸⁵ K.E. McMillan, "Uganda's Invocation of Cessation Regarding its Rwandan Refugee Caseload: Lessons for International Protection" (2012) 24 (2) *International Journal of Refugee Law* p. 255.

¹²⁸⁶ McMillan note 1285 above, p. 255.

¹²⁸⁷ McMillan note 1285 above, p. 255.

¹²⁸⁸ McMillan note 1285 above, p. 232.

¹²⁸⁹ Refugees Act note 32 above, section 27 (c), *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 5 SA 51 (C).

is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.¹²⁹⁰

The Aliens Control Act has been repealed and replaced by the Immigration Act 13 of 2002. The UNHCR's *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* indicates that a person becomes a refugee from the moment he or she fulfils the criteria of the definition of a refugee.¹²⁹¹ This often occurs prior to the time the refugee status is officially determined. Therefore, the granting of refugee status does not make an applicant a refugee but declares him or her to be one.¹²⁹² He or she does not become a refugee because of recognition, but is recognised because he or she is a refugee.¹²⁹³ From this general principle, the time frame for a refugee to qualify to apply for an immigration permit should be five years' continuous residence from the time he or she has entered South Africa to seek asylum. This interpretation can alleviate the challenges caused by unreasonable delays that refugees experience in their applications for asylum or refugee status.

Refugees have to apply to the Standing Committee for Refugee Affairs for certification that they will remain refugees indefinitely.¹²⁹⁴ However, there are no criteria or guidelines to indicate that a person will remain a refugee indefinitely.

¹²⁹⁰ Refugees Act note 32 above, section 27 (C).

¹²⁹¹ UNHCR, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status", 2011, p. 9.

¹²⁹² UNHCR note 1291 above, p. 9.

¹²⁹³ UNHCR note 1291 above, p. 9.

¹²⁹⁴ Refugees Act note 32 above, section 27 (C).

Applicants for certification have to give reasons why they will remain refugees indefinitely and will not be able to return to their country of origin.¹²⁹⁵ This refers to the criteria in the definition of a refugee. The indefinite refugee status is not defined in the Refugees Act and courts have not yet provided guidelines in this regard.¹²⁹⁶ This study proposes that it is sufficient if the applicant demonstrates that he or she is still a refugee at the time of his or her application for certification.

The Immigration Act allows refugees to apply for permanent residence permits on other grounds.¹²⁹⁷ However, they must comply with the Refugees Act and have certification letters indicating that they will remain refugees indefinitely.¹²⁹⁸ Furthermore, they must submit other necessary documents including their birth certificates as well as those for their dependants, marriage certificates, police clearance certificates, medical and radiological reports.¹²⁹⁹ The Department of Home Affairs considers the applications and grants permanent residence permits on other grounds. At this stage, they remain refugees as the acquisition of a permanent residence permit does not fall under the category of cessation clause for refugee status.¹³⁰⁰

Permanent residence status may be withdrawn if the holder is convicted of any serious offence or offences in terms of the Immigration Act.¹³⁰¹ The holder of a

¹²⁹⁵ Department of Home Affairs, Application for Certification in Terms of Section 27 (c) of the Refugees Act 130 of 1998, p. 2.

¹²⁹⁶ D. Dass, *et al*, "The Civil and Political Rights of Refugees and Asylum Seekers in South Africa" in F. Khan and T. Schreier (eds). *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, 2014, p. 218.

¹²⁹⁷ Immigration Act note 95 above, section 27 (d); F. Khan, "Permanent Residence" in F. Khan (ed.) *Immigration Law in South Africa*, Claremont, Juta & Co. Ltd, 2018, p. 123.

¹²⁹⁸ Khan note 1297 above, p. 123.

¹²⁹⁹ Khan note 1297 above, p. 123.

¹³⁰⁰ Refugees Act note 32 above, section 36.

¹³⁰¹ Immigration Act note 95 above, section 28 (a); Khan note 1297 above, pp. 127 – 128.

permanent residence permit can also lose his or her permit if he or she does not comply with the terms and conditions attached thereto.¹³⁰² Furthermore, the permanent residence holder cannot live more than three years outside South Africa without losing his or her permit.¹³⁰³ There are exceptions to this general principle, including where the Director-General extends the period in special cases; or when the holder works abroad in the service of the state, he or she is a representative or employee of a person or organisation established in South Africa; or he or she works for an international organisation of which South Africa is a member.¹³⁰⁴ The permanent residence holder can interrupt the period of absence if he or she is admitted and sojourns in South Africa.¹³⁰⁵ The Minister has power to grant an exemption from the requirements of residence for certain residents or class of residents.¹³⁰⁶ Former refugees who hold permanent residence permits must comply with the provisions of the Immigration Act to avoid the withdrawal of their permits. If they lose their residence permits, they risk becoming *de facto* stateless.

In *Khosa and Others v Minister of Social Development and Others*,¹³⁰⁷ the applicants were former refugees from Mozambique who acquired permanent resident permits. They applied unsuccessfully to the Department of Social Development to receive social grants as they were not citizens of South Africa. They challenged the provisions of the Social Assistance Act¹³⁰⁸ and argued that they were inconsistent with the Constitution to the extent that they excluded permanent

¹³⁰² Immigration Act note 95 above, section 28 (b).

¹³⁰³ Immigration Act note 95 above, section 28 (c).

¹³⁰⁴ Immigration Act note 95 above, section 28 (c) (i), (ii) (aa) – (cc).

¹³⁰⁵ Immigration Act note 95 above, section 28 (c) (iv).

¹³⁰⁶ Immigration Act note 95 above, section 28 (c) (iii).

¹³⁰⁷ *Khosa and Others v Minister of Social Development and Others; Mahlauke and Others v Minister of Social Development and Others* 2004 6 SA 505 (CC).

¹³⁰⁸ Social Assistance Act 59 of 1992.

residents from receiving different social grants. Mokgoro J held that the provisions of the Social Assistance Act were inconsistent with the Constitution to the extent that they excluded permanent residents from receiving old age grants, child-support grants and care-dependency grants.¹³⁰⁹ The Constitutional Court read in “permanent residents” in the provisions of Social Assistance Act to cure the gap and ensure that it complied with the Constitution.¹³¹⁰ Therefore, the applicants were entitled to apply and receive old age grants, child-support grants and care-dependency grants.¹³¹¹ Currently, permanent residents who fulfil the necessary requirements can apply and receive social grants from the government.

Once a refugee becomes a permanent resident, like other permanent residents, he or she has all the rights, privileges, duties and obligations of a citizen unless the Constitution prescribes otherwise.¹³¹² In *Larbi-Odam and Others v MEC for Education*,¹³¹³ the applicants were primary school teachers who were permanent residents and temporary residents in South Africa. Regulations 2 (2) provides that “no person shall be appointed as an educator in a state school in a permanent capacity, unless he or she is a South African citizen.”¹³¹⁴ This provision indicated that only South African citizens could be appointed to permanent posts. The

¹³⁰⁹ *Khosa and Others v Minister of Social Development and Others; Mahlauke and Others v Minister of Social Development and Others* note 1307 above, para 98; J. Klaaren, *From Prohibited Immigrants to Citizens – The Origins of Citizens and Nationality in south Africa*, Cape Town, Juta and Co. Ltd, 2017, pp. 212 - 213.

¹³¹⁰ *Khosa and Others v Minister of Social Development and Others; Mahlauke and Others v Minister of Social Development and Others* note 1307 above, para 98.

¹³¹¹ *Khosa and Others v Minister of Social Development and Others; Mahlauke and Others v Minister of Social Development and Others* note 1307 above, para 98.

¹³¹² Immigration Act note 95 above, section 25 (1).

¹³¹³ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* 1998 1 SA 745 (CC); J. Klaaren, “Non-Citizens and Constitutional Equality – *Larbi-Odam v The Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC)” (1998) 14 *SAJHR* p. 286.

¹³¹⁴ Regulations Regarding the Terms and Conditions of Employment of Educator (GN R1743 of 13 November 1995, Regulations 2 (2).

applicants argued that Regulations 2 (2) constituted an unfair discrimination and was invalid according to the interim Constitution.¹³¹⁵ The court *a quo* dismissed the application and they appealed to the Constitutional Court. Mokgoro J held that permanent residents were entitled to compete with South Africans in the employment market.¹³¹⁶ Mokgoro J also concluded that permanent residents merited the full concern of the government concerning the availability of employment opportunities.¹³¹⁷ There should be no discrimination between citizens and permanent residents, unless the posts required citizenship.¹³¹⁸ The Constitutional Court held that Regulation 2 (2) constituted unfair discrimination and could not be validly justified.¹³¹⁹ However, the Constitutional Court limited the order of invalidity to educators appointed to permanent posts.¹³²⁰ This case indicates that permanent residents have full rights to access job opportunities, unless they require political appointments.

5.9 Naturalisation of refugees in South Africa

The South African Citizenship Act provides the acquisition of citizenship by naturalisation where a foreign national acquires the rights and obligations of a citizen.¹³²¹ The candidate must apply in a prescribed manner and fulfil the necessary

¹³¹⁵ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* note 1313 above, p. 746.

¹³¹⁶ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* note 1313 above, para 24.

¹³¹⁷ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* note 1313 above, para 30.

¹³¹⁸ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* note 1313 above, para 31.

¹³¹⁹ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* note 1313 above, para 35.

¹³²⁰ *Larbi-Odam and Others v MEC for Education (North-West Province) and Others* note 1313 above, para 46.

¹³²¹ South African Citizenship Act 88 of 1995, section 4.

requirements.¹³²² He or she must be a holder of a permanent residence permit for a continuous period of at least five years prior to the date of his or her application.¹³²³ In 2012, the Minister of Home Affairs made regulations to increase the required time from five to ten years without the necessary authority.¹³²⁴ As a general rule, the regulations cannot change or amend the original statute and the Minister acted *ultra vires*. The Public Protector has requested the Minister of Home Affairs to review the ten-year period to apply for naturalisation and ascertain that it complies with the five-year period in the Citizenship Act.¹³²⁵ Currently, the Minister of Home Affairs has respected the Public Protector's decision, but the applications for citizenship by naturalisation can take between 13 months and 48 months without being finalised.¹³²⁶ Upon successful application, the candidate receives a certificate of naturalisation and becomes a South African citizen.

Acquisition of citizenship ends refugee status in South Africa.¹³²⁷ The former refugee has full legal and diplomatic protection from his or her new country and becomes part of the national community.¹³²⁸ Former refugees who obtained permanent residence permits have to apply for naturalisation in a prescribed manner whenever they fulfil the necessary requirements.¹³²⁹ Once he or she received a certificate of naturalisation, he or she becomes a South African citizen. The naturalisation of

¹³²² South African Citizenship Act note 1321 above, section 5 (1).

¹³²³ South African Citizenship Act note 1321 above, section 5 (1) (c).

¹³²⁴ Regulations on the South African Citizenship Act, 1995, GN 1122 in GG 36054 of 28 December 2012, reg 3 (2) (a).

¹³²⁵ E. Mabuza, "Mkwebane Says Home Affairs Must Review Naturalisation Regulations", 1 March 2018. Available at <https://www.timeslive.co.za/news/south-africa/2018-03-01-mkhwebane-says-home-affairs-must-review-naturalisation-regulations/> (accessed on 16 October 2019).

¹³²⁶ Mabuza note 1325 above.

¹³²⁷ Refugees Act note 32 above, section 5 (b) and (c).

¹³²⁸ F. Khan, "Citizenship in South Africa" in F. Khan (ed.) *Immigration Law in South Africa*, Claremont, Juta Co. Ltd, 2018, p. 144.

¹³²⁹ South African Citizenship Act note 1321 above, sections 4 and 5.

former refugees complies with Article 34 of the 1951 UN Refugee Convention as it mandates states parties to facilitate the naturalisation and assimilation of refugees in the host state.¹³³⁰ However, former refugees experience challenges when they apply for naturalisation.¹³³¹ For instance, the applicant must submit a police clearance report from his or her country of citizenship.¹³³² He or she has also to submit certified copies of the police clearance of his or her spouse and all children over the age of 16 from the country of origin.¹³³³ Refugees cannot go back to their countries of origin and some refugees cannot even contact or seek assistance from the embassies of their countries. It is submitted that the requirement to submit a police clearance from the country of origin must be waived in order to enable former refugees to apply for certificates of naturalisation.

The South African Citizenship Act states that children born to foreign parents in South Africa qualify for naturalisation when attaining majority if they have lived in South Africa from the date of their birth to becoming major and their birth has been registered in terms of the relevant statute.¹³³⁴ This provision came into effect on 1 January 2013 and was introduced by the Citizenship Amendment Act 7 of 2010. In *Minister of Home Affairs and Others v Ali and Others*,¹³³⁵ there was a dispute on the applicability of section 4 (3) of South African Citizenship Act. The appellants argued that section 4 (3) applied only to individuals born from 1 January 2013. However the respondents maintained that section 4 (3) had a retrospective effect and therefore

¹³³⁰ For more information, see 1951 UN Refugee Convention, Article 34.

¹³³¹ Regulations note 1324 above, Application for Naturalisation.

¹³³² Regulations note 1324 above, Application for Naturalisation.

¹³³³ Regulations note 1324 above, Application for Naturalisation.

¹³³⁴ South African Citizenship Act note 1321above, section 4 (3).

¹³³⁵ *Minister of Home Affairs and Others v Ali and Others* 2019 2 SA 396 (SCA).

applied even for persons who were born before 1 January 2013.¹³³⁶ The Supreme Court of Appeal agreed with the submission of the respondents.¹³³⁷ Mathopo JA held that it was unfairly discriminatory to prevent children born before 1 January 2013 from applying for naturalisation upon attaining majority even if they had lived in South Africa all their lives.¹³³⁸ The learned JA directed the Minister of Home Affairs to make appropriate regulations, within one year of the date of judgment, to allow children born in South Africa to apply for citizenship by naturalisation in terms of section 4 (3).¹³³⁹ Furthermore, he or she had to accept applications on affidavit for citizenship in terms of section 4 (3) pending the promulgation of such regulations.¹³⁴⁰ This decision protects the interest of the children as the individuals concerned know no other country apart from South Africa. The order can also apply to refugees born in South Africa who attain majority without having proper documentations.

Some practices of the Department of Home Affairs are not in the best interest of the child.¹³⁴¹ For instance, refugee children born in South Africa do not receive unabridged birth certificates.¹³⁴² They get a handwritten birth certificate that is not often recognised by government departments in South Africa.¹³⁴³ These children have the right to apply for citizenship by naturalisation when they become majors. They require, *inter alia*, proof of birth registration in terms of Registration of Births and Deaths Act¹³⁴⁴ and a hand written birth certificate is not the correct document.

¹³³⁶ *Minister of Home Affairs and Others v Ali and Others* note 1335 above, paras 26 and 27.

¹³³⁷ *Minister of Home Affairs and Others v Ali and Others* note 1335 above, para 21.

¹³³⁸ *Minister of Home Affairs and Others v Ali and Others* note 1335 above, para 26.

¹³³⁹ *Minister of Home Affairs and Others v Ali and Others* note 1335 above, para 27.

¹³⁴⁰ *Minister of Home Affairs and Others v Ali and Others* note 1335 above, para 27.

¹³⁴¹ Khan note 1327 above, p. 141.

¹³⁴² Khan note 1327 above, p. 141.

¹³⁴³ Khan note 1327 above, p. 141.

¹³⁴⁴ Registration of Births and Deaths Act 51 of 1992.

It is submitted that the Department of Home Affairs has to issue refugee children with birth certificates recognised in terms of Registration of Births and Deaths Act.

5.10 White Paper propositions on residence and citizenship

The 2017 White Paper on International Migration prohibits automatic right to permanent residency or citizenship in South Africa.¹³⁴⁵ It introduces a points-based system to ascertain whether the applicant qualifies for a short-term or a long-term visa.¹³⁴⁶ Refugees will be able to apply for a long-term residence visa after ten years of continuous residence in South Africa and the Standing Committee for Refugee Affairs has to certify that they will be refugees indefinitely.¹³⁴⁷ This implies that refugees will no longer have access to permanent residence permits as they will be replaced by a long-term visa.¹³⁴⁸ It is submitted that a long-term visa will not adequately assist refugees to integrate into South Africa. The prohibition of refugees from accessing permanent residence permits and citizenship violates the provisions of Article 34 of the 1951 UN Refugee Convention as it requires states parties to facilitate the assimilation and naturalisation of refugees.

5.11 NGOs involved in refugee matters

There are government institutions that play a crucial role in providing refugee services in the country. They facilitate and assist asylum seekers and refugees to acquire legal documentations and legalise their sojourn in South Africa. Apart from

¹³⁴⁵ White Paper on the International Migration for South Africa, 2017, p. 42.

¹³⁴⁶ White Paper on the International Migration for South Africa, note 1345 above, p. 42.

¹³⁴⁷ White Paper on the International Migration for South Africa, note 1345 above, p. 43.

¹³⁴⁸ White Paper on the International Migration for South Africa, 2017, p. 61.

government institutions, NGOs also participate in refugee issues and try to promote asylum system in South Africa. The NGOs assisting refugees are outlined below.

5.11.1 Scalabrini Centre

Scalabrini Centre is a NGO located in Cape Town and provides assistance to refugees and migrants in accessing documentation and government services.¹³⁴⁹ It mostly assists refugees and asylum seekers to have access to the asylum system.¹³⁵⁰ Furthermore, the Advocacy Programme of the Scalabrini Centre aims to promote the rights and integration of refugees in South Africa by raising awareness, advocating for legislative reform and its proper implementation.¹³⁵¹ Every year, the Scalabrini Centre assists around 2000 applicants mostly refugees and asylum seekers.¹³⁵² The Scalabrini Centre also provides individual advice to refugees and asylum seekers in accessing the rights to education and healthcare. It advocates for systemic change in refugee issues through workshop for government officials, members of refugee communities and engaging strategic litigation.¹³⁵³

The Scalabrini Centre has started a social work component to assist unaccompanied and separated foreign children as well as birth registration.¹³⁵⁴

There is a birth registration project to support parents who are unable to get birth certificates for their children at Home Affairs.¹³⁵⁵ Sometimes social workers

¹³⁴⁹ C. Johnson, "Failed Asylum Seekers in South Africa: Policy and Practice" (2015) 2 (1) *AHMR* p. 206.

¹³⁵⁰ Johnson note 1342 above, p. 206.

¹³⁵¹ M. Madikane, G. Treves and G. Garcia, "Scalabrini Annual Report 2018", 2019, p. 12. Available at <https://scalabrini.org.za/resources/scalabrini-centre-of-cape-town-annual-report-2018-2019-2/> (accessed on 10 August 2019).

¹³⁵² Madikane, Treves and Garcia note 1351 above, p. 12.

¹³⁵³ Madikane, Treves and Garcia note 1351 above, p. 12.

¹³⁵⁴ Madikane, Treves and Garcia note 1351 above, p. 13.

¹³⁵⁵ Madikane, Treves and Garcia note 1351 above, p. 13.

accompany parents to the Department of Home Affairs and Refugee Reception Office. The Scalabrini Centre had advocated for the reopening of the Cape Town Refugee Reception Office to new asylum seekers.¹³⁵⁶ It also participates in the presentations and conferences that aim to promote and strengthen the rights of refugees.

5.11.2 Refugee Rights Unit

The Refugee Rights Unit is located at the University of Cape Town and provide free legal services to refugees and asylum seekers in accessing their documents in South Africa.¹³⁵⁷ Usually, applicants can access legal representation or services by appointment only.¹³⁵⁸ They can get assistance in various refugee matters including access to asylum applications for newcomers, documentation issues, rejected asylum (appeals, reviews, judicial reviews), family reunification, children issues, socio-economic rights, civil rights and durable solutions.¹³⁵⁹ The Refugee Rights Unit plays a significant role in promoting and protecting refugees and asylum seekers' rights specifically for persons who live in the Western Cape.

5.11.3 Lawyers for Human Rights

The Lawyers for Human Rights established a Refugee and Migrant Rights Programme in 1996 as a specialist programme to advocate, strengthen and enforce the rights of asylum seekers, refugees and other marginalised migrants in South

¹³⁵⁶ Madikane, Treves and Garcia note 1351 above, p. 13.

¹³⁵⁷ Anon, "Clinic Work". Available at <http://www.refugeerights.uct.ac.za/law-clinic> (accessed on 11 August 2019).

¹³⁵⁸ Anon note 1357 above.

¹³⁵⁹ Anon note 1357 above.

Africa.¹³⁶⁰ In the course of its activities, the Refugee and Migrant Rights Programme assists refugees and asylum seekers in the asylum application processes in order to acquire legal documents in South Africa. It also uses litigation strategy to ensure the effective function of judicial reviews in refugee matters.¹³⁶¹ Thus, they advocate and promote the rights of refugees who live in Pretoria, Johannesburg and Durban as they have specific offices in these areas.

Apart from specific institutions and NGOs dealing with refugee matters, there are other legal institutions that can assist refugees on *pro bono* basis.¹³⁶² For instance, most law firms have a *pro bono* programme where they assist indigent members of the community in different matters.¹³⁶³ Some refugees and asylum seekers get assistance on *pro bono basis* as they are a vulnerable group in the society. The asylum system needs major changes in government policies to ensure that refugees access their basic rights.

5.12 Summary

This chapter interrogated the integration of refugees in South Africa. From 1994, South Africa became a refugee receiving country. It became a state party to the international and regional legal instruments protecting refugees. In addition, South Africa enacted Refugees Act to receive, host and accommodate refugees and asylum seekers on its territory. Refugees Act exclude from refuge status certain

¹³⁶⁰ Lawyers for Human Rights, "Refugee and Migrants rights Programme (RMRP)". Available at <http://www.lhr.org.za/programme/refugee-and-migrant-rights-programme-rmrp> (accessed on 11 August 2019).

¹³⁶¹ *Lawyers for Human Rights and Others v Minister of Home Affairs and Others* 2004 4 SA 125 (CC).

¹³⁶² *Balonga v RSDO and Others* Case no: 5027/2012 2012 (WCC), unreported judgment delivered on 24 February 2015.

¹³⁶³ In *Balonga v RSDO and Others* note 1362 above, the applicant was assisted to obtain his refugee status by a legal representative on a *pro bono* basis.

fugitives who have committed genocide, war crime and crime against humanity in order to maintain the integrity of the asylum system. Refugees and asylum seekers face challenges in accessing asylum system as some Refugee Reception Offices in major cities (Johannesburg, Cape Town and Port Elizabeth) have been closed to new applicants. As a result, refugees have to travel long distances, pay for their transport costs and accommodations to access asylum system in Pretoria, Durban and Musina. Furthermore, they experience unreasonable delays in the application process as some asylum seekers take 5 to 10 years to obtain refugee status from the Department of Home Affairs. The Department of Home Affairs has a plan to locate the refugee reception centres at the ports of entry and this does not promote refugee rights.

Refugees can apply for permanent residence permits in South Africa after 5 years of continuous residence in the country from the time he or she has been granted refugee status. However, the SCRA have to certify that the applicant will remain a refugee indefinitely. Some refugees can benefit from local integration as a durable solution when cessation clause has been declared by the UNHCR and approved by the hosting state for specific refugees from a particular country. Once former refugees obtain permanent residence permits, they can apply for citizenship by naturalisation after a period of 5 years. However, the applicants face formidable challenges as they are required to produce some documents, such as police clearance, from the country of origin. The process of acquiring permanent residence permits and naturalisation for refugees is long and complicated.

The next chapter discusses the rights of refugees in South Africa. It will cover civil and socio-economic rights of refugees and outline selected rights in more detail.

Chapter 6: Rights of refugees in South Africa

6.1 Introduction

Refugees are entitled to rights set out in the Refugees Act¹³⁶⁴ and the Bill of Rights enshrined in the Constitution.¹³⁶⁵ They are entitled to seek employment and to the same basic health services or basic primary education available in South Africa.¹³⁶⁶ Furthermore, they are entitled to the rights in the Constitution that apply to everyone. These include the rights to equality,¹³⁶⁷ human dignity,¹³⁶⁸ life,¹³⁶⁹ freedom and security of the person,¹³⁷⁰ privacy,¹³⁷¹ freedom of religion,¹³⁷² freedom of expression,¹³⁷³ freedom of association,¹³⁷⁴ freedom of movement and residence,¹³⁷⁵ labour relation issues,¹³⁷⁶ environment,¹³⁷⁷ property,¹³⁷⁸ housing,¹³⁷⁹ health care,¹³⁸⁰ children issues,¹³⁸¹ education,¹³⁸² language,¹³⁸³ culture and religion,¹³⁸⁴ access to information,¹³⁸⁵ just administrative action¹³⁸⁶ and access to court.¹³⁸⁷ These rights

¹³⁶⁴ Refugees Act note 32 above, section 27 (protection and general rights of refugees), section 28 (rights of refugees in respect of removal from the Republic), section 29 (restriction of detention), section 30 (identity document) and section 31 (travel document for refugees).

¹³⁶⁵ Constitution of the Republic of South Africa, note 1031 above, chapter 2.

¹³⁶⁶ Refugees Act note 32 above, section 27 (f) and (g).

¹³⁶⁷ Constitution of the Republic of South Africa, note 1031 above, s 9.

¹³⁶⁸ Constitution of the Republic of South Africa, note 1031 above, s 10.

¹³⁶⁹ Constitution of the Republic of South Africa, note 1031 above, s 11.

¹³⁷⁰ Constitution of the Republic of South Africa, note 1031 above, s 12.

¹³⁷¹ Constitution of the Republic of South Africa, note 1031 above, s 14.

¹³⁷² Constitution of the Republic of South Africa, note 1031 above, s 15.

¹³⁷³ Constitution of the Republic of South Africa, note 1031 above, s 16.

¹³⁷⁴ Constitution of the Republic of South Africa, note 1031 above, s 18.

¹³⁷⁵ Constitution of the Republic of South Africa, note 1031 above, s 21.

¹³⁷⁶ Constitution of the Republic of South Africa, note 1031 above, s 23.

¹³⁷⁷ Constitution of the Republic of South Africa, note 1031 above, s 24.

¹³⁷⁸ Constitution of the Republic of South Africa, note 1031 above, s 25.

¹³⁷⁹ Constitution of the Republic of South Africa, note 1031 above, s 26.

¹³⁸⁰ Constitution of the Republic of South Africa, note 1031 above, s 27.

¹³⁸¹ Constitution of the Republic of South Africa, note 1031 above, s 28.

¹³⁸² Constitution of the Republic of South Africa, note 1031 above, s 29.

¹³⁸³ Constitution of the Republic of South Africa, note 1031 above, s 30.

¹³⁸⁴ Constitution of the Republic of South Africa, note 1031 above, s 31.

¹³⁸⁵ Constitution of the Republic of South Africa, note 1031 above, s 32.

¹³⁸⁶ Constitution of the Republic of South Africa, note 1031 above, s 33.

¹³⁸⁷ Constitution of the Republic of South Africa, note 1031 above, s 34.

are civil and political rights¹³⁸⁸ as well as socio-economic rights for refugees.¹³⁸⁹ It is not possible to evaluate all these rights in a study of this nature and scope. This chapter discusses selected socio-economic rights that have significant impact on refugees. They include access to housing, employment, health care, social assistance and education. These rights have been selected as they play a huge role in the lives of refugees and in ameliorating their situation as refugees.

6.2 Right of access to housing for refugees

The Refugees Act does not provide for access to housing for refugees and they experience challenges in accessing basic needs such as shelter as they do not have any income.¹³⁹⁰ Currently asylum seekers and refugees do not receive any assistance in terms of shelter. Section 26 (1) of the Constitution states that “everyone has the right to have access to adequate housing”. Furthermore, section 28 (1) (c) of the Constitution states that every child has the right to shelter. These rights are not restricted to citizens and it is argued that they also apply to refugees who are present in South Africa.¹³⁹¹ The Housing Act¹³⁹² specifies that South African Parliament recognises that housing fulfils a basic human need. The state must take reasonable legislative and other measures, within its available resources, to achieve

¹³⁸⁸ D. Dass *et al*, “The Civil and Political Rights of Refugees and Asylum Seekers in South Africa” in F. Khan and T. Scheier (eds). *Refugee Law in South Africa*, Cape Town, Juta Co. Ltd, 2014, pp 203 – 219.

¹³⁸⁹ D. Dass, K. Ramjathan-Keogh and F. Khan, “The Socio-Economic rights of refugees and asylum seekers in South Africa’ in F. Khan and T. Scheier (eds). *Refugee Law in South Africa*, Cape Town, Juta and Co. Ltd, 2014, pp. 220 – 223.

¹³⁹⁰ C. Ndinda, Pauline and A. Adibayo, “Housing Experiences of Refugees Policy Implications for South Africa” (2006) 36 (2) *African Insight* p. 85; J.C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge, Cambridge University Press, 2005, p. 820. He argues that the Refugee Convention was not initially intended to expressly address the right of refugees to housing.

¹³⁹¹ Dass, Ramjatham-Keogh and Khan note 1389 above, p. 223.

¹³⁹² Housing Act 107 of 1997, preamble.

the progressive realisation of the right of everyone to have access to adequate housing.¹³⁹³ The Courts have interpreted the right of access to adequate housing in various cases as explicated below.

In *Government of the Republic of South Africa v Grootboom*,¹³⁹⁴ the Constitutional Court discussed and interpreted the reach of section 26 (1) and 28 (1) (c) of the Constitution. The respondents were informal settlers who wanted access to adequate housing and shelter. The government housing development policy was to provide citizens and permanent residents with access to adequate housing.¹³⁹⁵ Yacoob J held that the state was obliged to take positive action to meet the needs of individuals living in extreme condition of poverty, homelessness and intolerable housing.¹³⁹⁶ Apart from the State, other agents within the society had to be enabled to provide access to housing. Therefore, the state had to create the conditions for the realisation of the right of access to adequate housing for all individuals living in all economic levels of society.¹³⁹⁷

The obligation imposed on the state in terms of section 26 (1) of the Constitution was not absolute. In its activities, the state had to consider the three key elements separately: (a) obligation to take reasonable legislative and other measures; (2) to achieve the progressive realisation of the right; and (3) within available

¹³⁹³ Housing Act note 1392 above, preamble.

¹³⁹⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

¹³⁹⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, p. 48.

¹³⁹⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 24.

¹³⁹⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 35

resources.¹³⁹⁸ This meant that all three spheres of government had to cooperate and allocate responsibilities among themselves to ensure the availability of appropriate financial and human resources in order to provide access to adequate housing.¹³⁹⁹ The yardstick was reasonableness, not minimum core, in providing access to housing. Yacoob J concluded that a programme that excluded a significant segment of society could not be reasonable.¹⁴⁰⁰

The learned Justice opined that the Constitution required that everyone to be treated with care and concern as well as respect for his or her dignity.¹⁴⁰¹ The right of access to adequate housing had to be made available not only to a larger number of people but also to a wide range of persons over time.¹⁴⁰² Yacoob J declared that section 26 (2) of the Constitution required the state to invest and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.¹⁴⁰³ Furthermore, the programme had to include reasonable measures to provide relief for people with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.¹⁴⁰⁴ The vulnerability of refugees has been recognised due to their situation when they arrive in South Africa. Most refugees are vulnerable and need

¹³⁹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 38.

¹³⁹⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 39.

¹⁴⁰⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 43.

¹⁴⁰¹ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1395 above, para 44; C. Kavuro, "The Value of Human Dignity in the Refugee Protection" (2019) 5 (1) *African Human Mobility Review* p. 1510.

¹⁴⁰² *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 40.

¹⁴⁰³ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 99.

¹⁴⁰⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* note 1394 above, para 99.

assistance when they reach South Africa, including assistance to access adequate shelter.

In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*,¹⁴⁰⁵ Kandile AJ recognised that refugees constituted a vulnerable group and called for compassion with regards to their vulnerabilities. Individuals became refugees due to events beyond their control. They were often forced to flee their homes to avoid persecution, human rights violations and conflicts in their countries of origin.¹⁴⁰⁶ Most refugees, including their close relatives and friends, had experienced violence on the basis of very personal attributes such as ethnicity or religion.¹⁴⁰⁷ Furthermore, they also suffered trauma related to the displacement in a foreign country.¹⁴⁰⁸ Therefore, the refugee situation implied a special vulnerability since they were persons fleeing from the threat of human rights abuse.¹⁴⁰⁹ As refugees are vulnerable people, they should benefit from access to adequate housing provided by the government, a right also provided in international human rights instruments.

¹⁴⁰⁵ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 28 and 31.

¹⁴⁰⁶ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 28.

¹⁴⁰⁷ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 28.

¹⁴⁰⁸ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 28.

¹⁴⁰⁹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 29.

6.2.1 Housing for refugees in international law

The 1951 UN Refugee Convention provides for housing for refugees.¹⁴¹⁰ With regard to housing, it states that the contracting states “shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”.¹⁴¹¹ The problem with this provision is that there are no other foreign nationals in South Africa in the same position as refugees. The Immigration Act admits and allows non-citizens to stay in the country based on their contribution¹⁴¹² or self-sufficiency.¹⁴¹³ Therefore, there is no comparator as to how refugees should have access to housing.

Article 25 (1) of the Universal Declaration of Human Rights contains the right for everyone to a standard of living, including housing.¹⁴¹⁴ The right to housing for everyone is also provided in Article 11 (1) of the 1996 International Covenant on Economic, Social and Cultural Rights. The Vancouver Declaration on Human Settlements notes that housing is one of the basic needs for human settlements to determine the quality of life.¹⁴¹⁵ Furthermore, the United Nations Conference on Human Settlements¹⁴¹⁶ reaffirms the commitment to the full and progressive realisation of the right to adequate housing and seeks equal access to adequate

¹⁴¹⁰ Convention Relating to the Status of Refugees, note 23 above, Article 21; C. Kavuro, “Housing and Integrating Refugees: South Africa’s Exclusionary Approach” (2019) 40 (1) *Obiter* p. 77.

¹⁴¹¹ Convention Relating to the Status of Refugees, note 23 above, Article 21.

¹⁴¹² Immigration Act note 95 above, s 15 (business visa), s 19 (work visa) and s 21 (corporate visa).

¹⁴¹³ Immigration Act note 95 above, s 11 (visitor’s visa), s 17 (medical treatment visa), s 18 (relative’s visa), and s 20 (retired person visa).

¹⁴¹⁴ Universal Declaration of Human rights, 1948, Article 25 (1).

¹⁴¹⁵ The Vancouver Declaration on Human Settlements, 1976, Preamble. Available at http://mirror.unhabitat.org/downloads/docs/The_Vancouver_Declaration.pdf (accessed on 30 August 2019).

¹⁴¹⁶ United Nations Conference on Human Settlements (Habitat II), 1996, p. 8.

housing for all persons and their families. There is also an obligation to assist individuals who are unable to participate in the national housing markets.¹⁴¹⁷ The Conference endorsed adequate shelter and improvement on human settlements as universal goals.¹⁴¹⁸

Article 27 (3) of the Convention on the Rights of the Child¹⁴¹⁹ creates a duty on states parties to take appropriate measures to assist parents and other persons responsible for the child to get material assistance and support for housing whenever the needs arise. The same provisions for housing also apply to states parties to the African Charter on the Rights and Welfare of the Child.¹⁴²⁰ Finally, Article 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains the right to adequate housing. It imposes an obligation on states parties to grant women access to adequate housing with acceptable living conditions and a healthy environment.¹⁴²¹ The provision of the right of access to housing in international and regional instruments is not restricted to citizens and refugees are also entitled to have access to housing.

6.6.2 African countries' approach for housing refugees: Tanzania and Zambia

Many African states experience tremendous social and economic hardships and they have restricted refugees to refugee camps in remote areas.¹⁴²² As pointed out earlier, Tanzania has been receiving refugees since its independence and most

¹⁴¹⁷ United Nations Conference on Human Settlements (Habitat II), note 1416 above, p. 8.

¹⁴¹⁸ United Nations Conference on Human Settlements (Habitat II), note 1416 above, p. 7.

¹⁴¹⁹ Convention on the Rights of the Child, 1989, Article 27 (3).

¹⁴²⁰ African Charter on the Rights and Welfare of the Child, 1990, Article 20 (2) (a).

¹⁴²¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 16.

¹⁴²² OAU Addis Ababa Document on Refugees and Forced Population Displacements in Africa, 1994, para 13. Available at <https://www.refworld.org/docid/3ae68f43c.html> (accessed on 2 September 2019).

refugee camps are located in the western regions of Kagera and Kigoma.¹⁴²³ They include, *inter alia*, Mtabila I & II, Muyovosi, Nyaruguru and Kasulu.¹⁴²⁴ Usually, international assistance agencies provide financial, logistical and organisational support in the establishment of refugee settlements or camps.¹⁴²⁵ Refugees who arrived in Tanzania between 1960s and 1970s were from Rwanda, Congo / Zaire (now Democratic Republic of Congo), Burundi and Uganda.¹⁴²⁶ They benefited from unoccupied cultivable land and lived in planned settlements. These include Katumba, Mishamo, Ulyankulu and Burigi settlements.¹⁴²⁷ Currently, the majority of refugees in Tanzania resides in the three refugee camps of Nyaruguru, Mtendeli and Nduta located in the North-Western area of the country.¹⁴²⁸ Thus, in Tanzania, refugees get access to housing through refugee camps where they live in specific areas. They only stay in refugee camps and do not often establish contacts with Tanzanians.

In Zambia, refugees reside in refugee camps and settlements specifically designated to accommodate them.¹⁴²⁹ Currently, there are three settlements (Mayukwayukwa, Meheba and Ukwimi) and three refugee camps (Nangweshi, Kala

¹⁴²³ L.B. Landau, "Challenge without Transformation: Refugees, Aid and Trade in Western Tanzania" (2004) 41 (1) *Journal of Modern African Studies* p. 37; L. Malkki, "National Geographic: the Rooting of Peoples and the Territorialisation of National Identity Among Scholars and Refugees" (1992) 7 (1) *Cultural Anthropology* p. 25; B. Rutinwa, "The Tanzanian Government Response to the Rwandan Emergency" (1996) 9 (3) *Journal of Refugee Studies* p. 295.

¹⁴²⁴ Landau note 1423 above, p. 37 (Table I)

¹⁴²⁵ A. Armstrong, "Aspects of Refugee Wellbeing in Settlement Schemes: An Examination of the Tanzanian Case" (1988) 1 (1) *Journal of Refugee Studies* p. 58.

¹⁴²⁶ Armstrong note 1425 above, p. 58.

¹⁴²⁷ Armstrong note 1425 above, p. 58.

¹⁴²⁸ E. Anker, "Will Tanzania Remain a Safe Haven for Refugees". Available at <https://www.nrc.no/news/2018/may/will-tanzania-remain-a-safe-haven-for-refugees/> (accessed on 2 September 2019).

¹⁴²⁹ C. Darwin, "Report on the Situation of Refugees in Zambia" 2005, p. 8. Available at https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/20_10_2014_09_30_27_Report-Refugees-Zambia.pdf (accessed on 2 September 2019).

and Mwange).¹⁴³⁰ In Lusaka, the Makeni Transit Centre is administered by the Zambian Red Cross and accommodates asylum seekers whose applications for refugee status have not been finalised. It also assists refugees from the camps who are in Lusaka for educational purpose.¹⁴³¹ Furthermore, the Chilelenje Transit Home caters for sick refugees who are in need of medical assistance that is not available in the camps.¹⁴³² Only refugees who are granted medical, study or work permits by the relevant authorities are allowed to live in urban area.¹⁴³³ Thus, Zambia provides housing for refugees resident in its territory through camps and settlements accessible to the UNHCR. However, refugees have limited freedom of movement and do not easily interact with citizens of Zambia.

6.2.3 European approach for housing refugees: Germany

The European Union has harmonised the asylum policy and each member state is required to provide housing to refugees on their arrivals.¹⁴³⁴ It also implements the principle of equal treatment between individuals irrespective of racial or ethnic origin including with respect to access to housing.¹⁴³⁵ Through these principles and commitments, all member states of the European Union are required to accommodate refugees by giving them shelter. All European governments have

¹⁴³⁰ Darwin note 1429 above, p. 8

¹⁴³¹ Darwin note 1429 above, p. 9.

¹⁴³² Darwin note 1429 above, p. 9.

¹⁴³³ E. Donger *et al*, "Refugee Youth in Lusaka: a Comprehensive Evaluation of Health and Wellbeing" 2017 p. 11. Available at <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/114/2018/05/UNHCR-ZAMBIA-Report1.pdf> (accessed on 2 September 2019).

¹⁴³⁴ Council Directive 2003/9/EC of 28 January 2003, Article 14 (1).

¹⁴³⁵ Council Directive 2000/43/EC of 29 June 2000, Article 3 (1) (h).

developed some policies to improve the housing conditions of their nationals who earn lower incomes as well as specific policies for refugees.¹⁴³⁶

Germany usually provides housing in Centres for every asylum seeker who enters the country.¹⁴³⁷ It has a welcoming culture where there are open and welcome practices for new arrivals, including refugees.¹⁴³⁸ In 2015, Germany expressed its willingness to deal with refugee issues as a strategy for recruitment and economic development.¹⁴³⁹ Volunteer groups do everything necessary to facilitate refugees in obtaining access to society in terms of housing.¹⁴⁴⁰ It is clear that Germany provides housing for refugees upon arrival when they are unable to pay for the cost of accommodation on their own.

However, as pointed out in chapter 4, there are individuals and groups of people who do not welcome refugees into Germany.¹⁴⁴¹ There is a rise in some political parties (Alternative for Germany, AfD) which are opposed to the open door policy for refugees. They have directed xenophobic violence against refugees and exhibit their protests since 2015.¹⁴⁴² Specifically, Germany has recorded different types of unrest and attacks against refugees and refugee housing, including

¹⁴³⁶ S. Matema, *Housing for Refugees in the European Union*, 1999, p. 4. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.1043&rep=rep1&type=pdf> (accessed on 2 September 2019).

¹⁴³⁷ Matema note 1436 above, p. 5.

¹⁴³⁸ U. Humman and S. Karakayali, "Practising Willkommenskultur: Migration and Solidarity in Germany" (2016) 4 (2) *Intersections. EEJSP* p. 70.

¹⁴³⁹ Humman and Karakayali note 1438 above, p. 73.

¹⁴⁴⁰ Humman and Karakayali note 1438 above, p. 81.

¹⁴⁴¹ D. Bencek and J. Strasheim, "Refugees Welcome? A Dataset on Anti-refugee Violence in Germany" 2016 *Research and Politics* p. 2.

¹⁴⁴² Bencet and Strasheim note 1441 above, p. 2; B. Vollmer and S. Karakayali, "The Volatility of the Discourse on Refugees in Germany" (2018) 1 – 2 *Journal of Immigrant and Refugee Studies* p. 129; R. Noack, "Germany Fears Far-Right Violence After Pro-refugee Politician Killed and Other Threatened", 20 June 2019. Available at <https://www.washingtonpost.com/world/2019/06/20/germany-fears-far-right-violence-after-pro-refugee-politician-killed-others-threatened/> (accessed on 23 October 2019).

“demonstrations, assaults, arson attacks, and miscellaneous attacks against refugee housing”.¹⁴⁴³ There is also an incident where some nationals have protested against the construction of a new shelter for refugees.¹⁴⁴⁴ Despite the increase of the far-right party that is against refugees, Germany still receives some refugees and provides them with housing facilities. Refugees also needs to work in order to provide for themselves the basic necessities of life.

6.3 Right to work for refugees in South Africa

The Refugees Act allows refugees to work in South Africa as they are entitled to seek employment.¹⁴⁴⁵ They also enjoy the rights set out in the Bill of Rights in the Constitution.¹⁴⁴⁶ Therefore, they benefit from the labour relations protection provided for in the Constitution. For instance, they have the right to fair labour practice.¹⁴⁴⁷ Once employed, they have the right to form and join a trade union, participate in its activities and programmes as well as the right to strike.¹⁴⁴⁸ However, refugee status permits do not explicitly indicate that refugees are entitled to work.¹⁴⁴⁹ As a result, potential employers do not easily accept nor understand the refugee status permits.¹⁴⁵⁰ These permits are valid for a limited period of two years and refugees frequently experience challenges in securing their extension when they expire.¹⁴⁵¹ Therefore, they face difficulties in employment matters. As pointed out earlier, this

¹⁴⁴³ Bencet and Strasheim note 1441 above, p. 3.

¹⁴⁴⁴ Bencet and Strasheim note 1441 above, p. 3.

¹⁴⁴⁵ Refugees Act note 32 above, s 27 (f).

¹⁴⁴⁶ Refugees Act note 32 above, s 27 (b).

¹⁴⁴⁷ Constitution of the Republic of South Africa, note 1031 above, s 23 (1).

¹⁴⁴⁸ Constitution of the Republic of South Africa, note 1031 above, s 23 (2).

¹⁴⁴⁹ D. Dass, K. Ramjathan-Keogh and F. Khan, “The Socio-Economic Rights of Refugees and Asylum Seekers in South Africa” in F. Khan and T. Schreier (eds). *Refugee Law in South Africa*, Cape Town, Juta & Co. Ltd, 2014, p. 224.

¹⁴⁵⁰ Dass, Ramjathan-Keogh and Khan note 1449 above, p. 224.

¹⁴⁵¹ Refugee Regulations (Forms and Procedure), 2000, reg 15 (2) and (3).

has occurred in the security service industry when refugees wanted to register as security service providers.¹⁴⁵²

6.3.1 Right to work in international instruments

The 1951 UN Refugee Convention provides for wage-earning employment and self-employment for refugees.¹⁴⁵³ Article 17 (1) states that:

The contracting states shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regard the right to engage in wage-earning employment.¹⁴⁵⁴

This provision has been interpreted in the case of *Union of Refugee Women*.¹⁴⁵⁵ Mokgoro and O'Regan JJ opined that Article 17 was not easy to interpret. They held that in South Africa, there were no nationals of a foreign country who were identically situated in the similar circumstances as refugees.¹⁴⁵⁶ Refugee status was unique in South African law and could not be comparable to other categories of non-citizens.¹⁴⁵⁷ The effect could be that Article 17 (1) could not accord any protection to the right to work for refugees in South Africa as there was no identical group of refugees to be compared with.¹⁴⁵⁸ This approach was inconsistent with the spirit and

¹⁴⁵² *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above,

¹⁴⁵³ Convention Relating to the Status of Refugees, note 23 above, Articles 17 and 18.

¹⁴⁵⁴ Convention Relating to the Status of Refugees, note 23 above, Article 17.

¹⁴⁵⁵ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above.

¹⁴⁵⁶ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 108.

¹⁴⁵⁷ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 108.

¹⁴⁵⁸ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 108.

purport of the UN Refugee Convention which sought to confer a limited right to work on refugees.¹⁴⁵⁹

Mokgoro and O'Regan interpreted Article 17 (1) purposefully and in such a way as to give it a meaning containing some substantive protection for refugees.¹⁴⁶⁰ They concluded that recognised refugees were most similarly situated to permanent residents.¹⁴⁶¹ Section 27 (f) of the Refugees Act allowed refugees to seek employment as permanent residents could do.¹⁴⁶² Therefore, Article 17(1) of the UN Refugee Convention afforded refugees the same job opportunities as permanent residents.¹⁴⁶³ This was a minority judgment and appeared to be the preferred interpretation in order to provide the right to work for refugees.

Article 17 (2) of the UN Refugee Convention contains the exclusion of the restriction on access to the labour market. It indicates that the restriction on labour market access does not apply to refugees who have been living in the host country for at least three years, or who are married to South African citizens, or who have children who are South African citizens.¹⁴⁶⁴ In practice, this exclusion does not apply in South African law and policies on refugees.

¹⁴⁵⁹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 108.

¹⁴⁶⁰ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 109.

¹⁴⁶¹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, 109.

¹⁴⁶² *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 109.

¹⁴⁶³ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 109.

¹⁴⁶⁴ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 110; Article 17 (2) (a) – (c) of the Convention Relating to the Status of Refugees, 1951.

The Universal Declaration of Human Rights provides for the right of everyone to work, to freely choose his or her employment and to just and favourable conditions of work.¹⁴⁶⁵ It also states that everyone has the right to equal pay for equal work without any discrimination¹⁴⁶⁶ and periodic holiday with pay.¹⁴⁶⁷ Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights recognises the right to work for everyone and imposes a duty on states parties to take appropriate measures to safeguard this right. Everyone has the right to the enjoyment of just and favourable conditions of work including fair wages and equal remuneration for work of equal value and avoidance of any discrimination between women and men.¹⁴⁶⁸ Furthermore, everyone has an equal opportunity to be promoted in his or her employment, and the working conditions must be safe and healthy.¹⁴⁶⁹ Everyone also has right to reasonable limitation of working hours and remuneration for public holidays.¹⁴⁷⁰ Article 15 of the African Charter on Human and Peoples' Rights provides every individual with the right to work under equitable and satisfactory conditions with equal pay for equal work.

Article 11 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women creates an obligation on states parties to take all appropriate measures to eliminate discrimination against women in employment in order to ensure equality between men and women. The rights to social security and paid

¹⁴⁶⁵ Universal Declaration of Human Rights, 1948, Article 23 (1).

¹⁴⁶⁶ Universal Declaration of Human Rights, note 1465 above, Article 23 (2).

¹⁴⁶⁷ Universal Declaration of Human Rights, note 1465 above, Article 24.

¹⁴⁶⁸ International Covenant on Economic, Social and Cultural Rights, 1966, Article 7 (a) (i).

¹⁴⁶⁹ International Covenant on Economic, Social and Cultural Rights, note 1468 above, Article 7 (b) and (c).

¹⁴⁷⁰ International Covenant on Economic, Social and Cultural Rights, note 1468 above, Article 7 (d).

leave are also available.¹⁴⁷¹ States parties have to safeguard the function of reproduction in the right to protection of health and safety in working conditions.¹⁴⁷² There is a prohibition of the discrimination in the workplace against women on the grounds of marriage or maternity. In this regard, states parties have a duty to take appropriate measures to proscribe dismissal on the grounds of pregnancy, maternity leave and discrimination in dismissals based on marital status.¹⁴⁷³ Women are also specially protected during pregnancy to ensure that the work they do is not harmful to them.¹⁴⁷⁴ Article 13 (c) of the Protocol to the African Charter on Human and Peoples' Rights imposes a duty on states parties to adopt and enforce legislative and other measures to combat and punish sexual harassment in the workplace.¹⁴⁷⁵ In addition, states have to guarantee, through statutes and policies, adequate and paid pre- and post-natal maternity leave in both private and public sectors.¹⁴⁷⁶ The right to work for refugees and asylum seekers in South Africa needs to be examined in more detail and whether South Africa complies with its regional and international instruments to which it is a state party.

¹⁴⁷¹ Convention on the Elimination of All Forms of discrimination Against Women, 1979, Article 11 (e).

¹⁴⁷² Convention on the Elimination of All Forms of discrimination Against Women, note 1471 above, Article 11 (f).

¹⁴⁷³ Convention on the Elimination of All Forms of discrimination Against Women, note 1471 above, Article 11 (2) (a).

¹⁴⁷⁴ Convention on the Elimination of All Forms of discrimination Against Women, note 1471 above, Article 11 (2) (d).

¹⁴⁷⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 13 (c).

¹⁴⁷⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, note 1475 above, Article 13 (i).

6.3.2 Asylum seekers' right to work

The Refugees Act and Regulations do not automatically grant asylum seekers the right to work in South Africa.¹⁴⁷⁷ In September 2000, the Standing Committee for Refugee Affairs took a decision prohibiting asylum seekers to work and study for the first 180 days.¹⁴⁷⁸ After this period, they could apply to lift the restriction. In *Minister of Home Affairs and Others v Watchenuka and Another*,¹⁴⁷⁹ the Supreme Court of Appeal held that the prohibition of work and study for asylum seekers was unconstitutional. In reaching its decisions, the court had to consider some provisions in the Constitution, in particular sections 10, 21, 22, 29 and 36 (1).

Nugent JA stated that human dignity had no nationality and was inherent in all people simply because they were human.¹⁴⁸⁰ A person's dignity had to be respected and protected when he or she happened to be in South Africa.¹⁴⁸¹ The freedom to engage in a productive work was an important component of human dignity to ensure self-esteem and self-worth.¹⁴⁸² However, the right to human dignity was not absolute and could be limited in appropriate circumstances provided in section 36 of the Constitution. Nevertheless, where employment was the only reasonable means for a person to support himself or herself, the prohibition on the right to work could not be justified as it had a negative effect on the person to live without positive humiliation and degradation.¹⁴⁸³ As South Africa did not offer any state support for

¹⁴⁷⁷ Refugee Regulations (Forms and Procedure), 2000, Annexure 3: Asylum Seeker Temporary permit – B1-1692.

¹⁴⁷⁸ Dass, Ramjathan-Keogh and Khan note 1449 above, p. 225.

¹⁴⁷⁹ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 4 SA 326 (SCA), para 24.

¹⁴⁸⁰ *Minister of Home Affairs and Others v Watchenuka and Another* note 1479 above, para 25.

¹⁴⁸¹ *Minister of Home Affairs and Others v Watchenuka and Another* note 1479 above, para 25.

¹⁴⁸² *Minister of Home Affairs and Others v Watchenuka and Another* note 1479 above, para 27.

¹⁴⁸³ *Minister of Home Affairs and Others v Watchenuka and Another* note 1479 above, para 32.

asylum seekers, a destitute individual who applied for asylum had no alternative but to turn to crime, begging or foraging.¹⁴⁸⁴ In such circumstances, the deprivation of the right to work aimed to degrade and humiliate asylum seekers for potential self-fulfilment. Nugent JA held that there was no justification for placing restrictions on the right to work for asylum seekers.¹⁴⁸⁵ Asylum seekers are currently entitled to work and engage in business activities to ensure their dignity and cover their basic needs.

6.3.3 Barriers on the right to work for refugees

South Africa has taken some measures, including legislation and policies, to protect citizens in terms of access to the labour market.¹⁴⁸⁶ Section 22 of the Constitution reserves the right to freely choose a trade, occupation or profession to citizens only. It states that “the practice of a trade, occupation or profession may be regulated by law.”¹⁴⁸⁷ Some statutes have been enacted to regulate certain occupations or professions in a manner that excludes refugees.¹⁴⁸⁸ Only South Africa citizens and permanent residents qualify to perform certain professions.¹⁴⁸⁹ This restriction creates a barrier for refugees to access the labour market and contribute to the economy of the host state.

¹⁴⁸⁴ *Minister of Home Affairs and Others v Watchenuka and Another* note 1479 above, para 32.

¹⁴⁸⁵ *Minister of Home Affairs and Others v Watchenuka and Another* note 1479 above, para 33.

¹⁴⁸⁶ C. Kavuro, “Refugees and Asylum Seekers: Barriers to Accessing South Africa’s Labour Market” (2015) 19 *Law, Democracy and Development* p. 232.

¹⁴⁸⁷ Constitution of the Republic of South Africa, note 1031 above, s 22.

¹⁴⁸⁸ Private Security Industry Regulation Act 56 of 2001, s 23 (1) (a); Employment Services Act 4 of 2014, s 2 (1) (h) (iii).

¹⁴⁸⁹ Legal practice Act 28 of 2014, s 24 (2). Only permanent residents and South African citizens can register as legal practitioners and candidate legal practitioners.

The lack of employment to provide for basic needs is central to the challenges encountered by refugees.¹⁴⁹⁰ They face restrictions in accessing the security industry as this profession requires South African citizenship or permanent residency for registration as security provider.¹⁴⁹¹ In the *Union of Refugee Women* case,¹⁴⁹² the applicant were refugees and asylum seekers in South Africa. They applied to the relevant authorities for registration as security service providers. However, the authorities rejected their applications as they were not citizens nor permanent residents as required by the law.¹⁴⁹³ They challenged their rejection and argued that section 23 (1) (a) of the Private Security Industry Regulation Act was unconstitutional and invalid to the extent that it did not include refugees among individuals who qualified to register as security service providers.¹⁴⁹⁴ Kondile AJ held that the differentiation between citizens and permanent residents, on the one hand, and all foreigners, including refugees, on the other, was rationally connected to a legitimate government purpose, namely that of limiting the eligibility for registration as security service providers to people whose trustworthiness could be objectively verified.¹⁴⁹⁵ Such differentiation was indeed assumed to be a discrimination, but it was not unfair as the right to choose a vocation did not extend to activities protected by a constitutional right available to refugees and other

¹⁴⁹⁰ P. Rugunanan and R. Smit, "Seeking Refuge in South Africa: Challenges Facing a Group of Congolese and Burundian Refugees" (2011) 28 (5) *Development Southern Africa* p. 712.

¹⁴⁹¹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 4.

¹⁴⁹² *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 2.

¹⁴⁹³ Private Security Industry Regulation Act 56 of 2001, s 23 (1) (a).

¹⁴⁹⁴ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 17 and 18.

¹⁴⁹⁵ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 35 and 39.

foreigners.¹⁴⁹⁶ Therefore, section 23 (1) (a) was constitutionally valid and did not violate the applicants' right to equality.¹⁴⁹⁷

Refugees could only register as security service providers if they applied for exemption in terms of section 23 (6) of the Private Security Industry Regulation Act and had to show good cause. The relevant authority had to inform refugee applicants of the various categories of security activities, the possibility and procedure for exemption applications.¹⁴⁹⁸ Kondile AJ held that good cause depended on the particular circumstances of each case.¹⁴⁹⁹ The important considerations included the personal circumstances of the applicant seeking employment in the private security industry; the length of his or her stay in the country as a refugee; the character of the work applied for; whether the applicant had previously worked in a similar or comparable industry or whether he or she had earned the requisite trust in other ways.¹⁵⁰⁰ In considering the application for exemption, the relevant authority had to show a reasonable measure of flexibility.¹⁵⁰¹ Thus refugees could be allowed to work as security service providers under the exemption procedures.

Mokgoro J and O'Regan J delivered a joint dissenting judgment and held that section 23 (1) (a) was contrary to the South Africa's obligations under international

¹⁴⁹⁶ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 45 and 54.

¹⁴⁹⁷ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 74.

¹⁴⁹⁸ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 79 and 83.

¹⁴⁹⁹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 86.

¹⁵⁰⁰ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 86.

¹⁵⁰¹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 86.

law and unfairly discriminated on the ground of refugee status.¹⁵⁰² They recognised that refugees occupied a position most similar to permanent residents and had to be admitted to the security industry.¹⁵⁰³ The minority judgment is the preferred position as it allows or accords refugees the right to work as security service providers and to earn a living in their activities.

Refugees are not allowed to be permanently employed in the health sector.¹⁵⁰⁴ In *Ndikumdavyi v Valkenberg Hospital*,¹⁵⁰⁵ the applicant was a citizen of Burundi who was recognised as a refugee in South Africa and obtained a Bachelor's degree in Nursing from the University of Western Cape on 13 March 2009. The National Department of Health advised him that he could take up employment in South Africa and had to maintain the validity of his refugee status.¹⁵⁰⁶ He managed to fulfil all other necessary requirements and obtained a permanent employment as a professional nurse at the Valkenberg Hospital since 1 July 2010.¹⁵⁰⁷ On 20 July 2010, the applicant received a letter from the first respondent informing him that according to the policy of the National Department of Health on the Recruitment and Employment of Health Professionals in South Africa, no permanent post could be offered to a foreigner.¹⁵⁰⁸ As a result, the first respondent dismissed the applicant

¹⁵⁰² *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, paras 124 and 125.

¹⁵⁰³ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 99.

¹⁵⁰⁴ *Ndikumdavyi v Valensberg Hospital and Others* (2012) 33 ILJ 2648 (LC); Policy Guideline on the Requirements for Practice of Medical Professionals in South Africa, 2018, para 5.3.4 (c).

¹⁵⁰⁵ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, paras 2 and 3.

¹⁵⁰⁶ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 4.

¹⁵⁰⁷ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, paras 4 and 5.

¹⁵⁰⁸ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 6.

with immediate effect.¹⁵⁰⁹ The applicant challenged the validity of his dismissal in Labour Court.

He argued that the respondent had breached his contract and its action constituted substantively and procedurally unfair dismissal.¹⁵¹⁰ The respondent stated that the contract of employment was void *ab initio* as it was contrary to the policy and there was no dismissal in terms of labour law.¹⁵¹¹ Section 10 (a) of the Public Service Act¹⁵¹² prohibits the appointment of any person in the public service unless he or she is a South African citizen or a permanent resident in South Africa. However, the jurisprudence of the Labour Court favoured the applicant and the contract of employment was not the sole ticket for admission in the golden circle reserved for employees.¹⁵¹³ Bosch¹⁵¹⁴ argued that an employment contract was not required in order to access the protection of section 23 (1) of the Constitution which states that “everyone has the right to fair labour practices”. The worker had to be in a work relationship that could be considered akin to an employment relationship.¹⁵¹⁵ Robkin-Naicker J held that the applicant was an employee in terms of the Labour

¹⁵⁰⁹ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 6.

¹⁵¹⁰ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 7.

¹⁵¹¹ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 15.

¹⁵¹² Public Service Act, 1994.

¹⁵¹³ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 16; *Discovery Health Ltd v CCMA an Others* 2008 7 BLLR 633 (LC), para 49. The employer terminated a contract with a foreigner after learning that he was working without a permit. Although the contract was unlawful, it was not void *ab initio* and the termination constituted dismissal. The foreigner was an employee and entitled to all rights afforded to employees under the Labour Relations Act and the Constitution.

¹⁵¹⁴ C. Bosch, “Can Unauthorised Workers be Regarded as Employees for the Purposes of the Labour Relations Act?” (2006) 27 (7) *ILJ* p. 1351.

¹⁵¹⁵ Bosch note 1514 above, p. 1351; *SA National Defence Union v Minister of Defence and Another* (1999) 20 *ILJ* 2265 (CC).

Relations Act and proceeded to consider whether there had been an unfair dismissal.¹⁵¹⁶

The definition of dismissal meant that “an employer has terminated a contract of employment with or without a notice”.¹⁵¹⁷ Rabkin-Naicker J concluded that there was an unfair termination of employment relationship with the applicant.¹⁵¹⁸ The remedies for unfair dismissal or unfair labour practice were reinstatement, re-employment or payment of compensation to the employee.¹⁵¹⁹ However, the Labour Court was precluded from finding a substantive unfairness in the dismissal as section 10 of the Public Service Act precluded the respondent from employing the applicant in a permanent post.¹⁵²⁰ Generally, the appropriate remedy for unauthorised workers who had been unfairly dismissed was an amount of compensation that was just and equitable in the circumstances.¹⁵²¹ The dismissal of the applicant was procedurally unfair and the Labour Court awarded the applicant 12 months remuneration as compensation.¹⁵²² This case indicates that refugees cannot be employed permanently in the health sector. It is fundamentally wrong to proscribe refugees from acquiring permanent employments when they fulfil all other necessary requirements.

¹⁵¹⁶ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 17.

¹⁵¹⁷ Labour Relations Act 66 of 1995, s. 186 (a).

¹⁵¹⁸ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 26.

¹⁵¹⁹ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 25; Labour Relations Act 66 of 1995, s. 193.

¹⁵²⁰ *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 26.

¹⁵²¹ Bosch note 1514 above, p. 1363.

¹⁵²² *Ndikumdavyi v Valensberg Hospital and Others* note 1504 above, para 28.

Refugees have right to self-employment where they have no other means to support themselves.¹⁵²³ In *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others*,¹⁵²⁴ the applicants were organisations representing refugees and asylum seekers from Somalia and Ethiopia in South Africa. Some members of the applicants owned Spaza or tuck shop businesses. The relevant authorities closed and confiscated the businesses of asylum seekers and refugees who did not have trading permits. Nevertheless, they even closed down the businesses of Ethiopians and Somalis who had permits. The applicants also included a Somali permanent resident. They challenged the decision to close their businesses and sought an order declaring that refugees and asylum seekers had the right to self-employment and the right to apply for and renew permits in terms of the relevant law.¹⁵²⁵ They also sought an order declaring that the closure of the businesses belonging to refugees and asylum seekers with valid permits was unlawful.¹⁵²⁶ In the High Court, Ranchod J dismissed the application and held that section 22 of the Constitution gave the right to self-employment to South African citizens only.¹⁵²⁷ Ranchod J concluded that there was a blanket prohibition on asylum seekers and refugees on the right to self-

¹⁵²³ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* 2015 1 SA 151 (SCA); Article 18 of Refugee Convention Relating to the Status of Refugees, 1951.

¹⁵²⁴ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above.

¹⁵²⁵ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, para 3.

¹⁵²⁶ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, para 3.

¹⁵²⁷ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, para 22.

employment, specifically trading.¹⁵²⁸ The applicants were aggrieved by this decision and appealed to the Supreme Court of Appeal.

Navsa ADP upheld the appeal and found in favour of the applicants by holding that there was no blanket prohibition on the right of refugees and asylum seekers to self-employment.¹⁵²⁹ On the basis of the right to dignity enshrined in the Constitution, the refugees and asylum seekers had the right to self-employment where they had no other means to support themselves.¹⁵³⁰ Therefore, there were no restrictions on refugees and asylum seekers from being granted permits or licenses.¹⁵³¹ Navsa ADP declared accordingly that asylum seekers and refugees had the right to apply for and renew licenses and permits in terms of the applicable legislation and land-use scheme.¹⁵³² He also held that the closure of the businesses owned by asylum seekers and refugees with valid permits was unlawful.¹⁵³³ From this case, it is clear that refugees have the right to self-employment and can establish businesses after acquiring the necessary permits or licenses.

¹⁵²⁸ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, paras 22 and 31.

¹⁵²⁹ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, paras 40 and 43.

¹⁵³⁰ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, paras 22 and 43.

¹⁵³¹ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, para 43.

¹⁵³² *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, para 46.

¹⁵³³ *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* note 1523 above, para 46.

6.3.3. 1 Constitutional imperative to redress the imbalances of the past

It is common cause that the apartheid regime had deeply divided the South African society and benefited a minority group of people.¹⁵³⁴ In the post-apartheid era, the Constitution enshrines the right to equality before the law and obliges the government to take legislative and other measures designed to advance or promote individuals or categories of persons who were previously marginalised and disadvantaged by unfair discrimination in the past.¹⁵³⁵ This indicates that the South African government intends and is committed to eradicate the imbalances of the past and create an equal society where all members of the society are represented. The South Africa government has enacted legislation and adopted policies aimed at advancing the promotion of categories of people who come from the previously disadvantaged communities.¹⁵³⁶ They include Employment Equity Act,¹⁵³⁷ Competition Act,¹⁵³⁸ Broad-Based Economic Empowerment Act,¹⁵³⁹ Preferential Procurement Policy Framework Act,¹⁵⁴⁰ Skills Development Act,¹⁵⁴¹ Skills Development Levies Act,¹⁵⁴² Higher Education Act,¹⁵⁴³ Public Service Act,¹⁵⁴⁴ National Health Act,¹⁵⁴⁵ Marine Living Resources Act,¹⁵⁴⁶ and Mineral and

¹⁵³⁴ C. Kavuro, "Refugees and Asylum Seekers: Barriers to Accessing South African's Labour Market" (2015) 19 *Law, Democracy and Development* p. 249.

¹⁵³⁵ Constitution of the Republic of South Africa, note 1031 above, s. 9 (1) and (2).

¹⁵³⁶ Kavuro note 1534 above, p. 249; A. Thomas, "Employment Equity in South Africa: Lessons From the Global School" (2001) 33 (3) *International Journal of Manpower* pp. 237 – 238; FM. Horwitz and H. Jain, "An Assessment of Employment Equity and Broad Based Black Economic Empowerment Developments in South Africa" (2011) 30 (4) *Equality Diversity and Inclusion: An International Journal* p. 298.

¹⁵³⁷ Employment Equity Act 55 of 1998.

¹⁵³⁸ Competition Act 89 of 1998.

¹⁵³⁹ Broad-Based Economic empowerment Act 53 of 2003.

¹⁵⁴⁰ Preferential Procurement Policy Framework Act 5 of 2000.

¹⁵⁴¹ Skills Development Act 97 of 1998.

¹⁵⁴² Skills Development Levies Act 9 of 1999.

¹⁵⁴³ Higher Education Act 101 of 1997.

¹⁵⁴⁴ Public Service Act, 1994.

¹⁵⁴⁵ National Health Act 61 of 2003.

¹⁵⁴⁶ Marine Living Resources Act 61 of 2003.

Petroleum Resources Development Act.¹⁵⁴⁷ All these Acts restrict policies and benefits in terms of employment to citizens and permanent residents and do not include refugees because of the government objectives they want to achieve.

The Immigration Act requires critical skills and qualifications for a non-citizen to enter the labour market in South Africa.¹⁵⁴⁸ This restriction does not apply to refugees as the Refugees Act entitles them to work in South Africa.¹⁵⁴⁹ However, refugees experience challenges in accessing the labour market in South Africa as laws and policies give preferential treatments to citizens from previously disadvantaged groups and permanent residents. There is a need to develop a policy that allows refugees to work in different fields as they are vulnerable and need to satisfy their basic needs. If refugees are allowed to access the labour market, they will contribute to the development of the host community, country and region.

6.3.3.2 Language barrier in the labour market

Lack of proficiency in English constitutes a major barrier in accessing labour markets opportunities for refugees.¹⁵⁵⁰ Smit and Rugunanan in their study on refugee women in Gauteng have identified that the lack of proficiency in English was a major stumbling block in accessing formal employment and integration into South African community for Congolese and Burundian women.¹⁵⁵¹ They were unable to adequately communicate in English despite living in South Africa for many years.

¹⁵⁴⁷ Mineral and Petroleum Resources Development Act 28 of 2002.

¹⁵⁴⁸ Immigration Act note 95 above, s 19 (4).

¹⁵⁴⁹ Refugees Act note 32 above, s 27 (f).

¹⁵⁵⁰ A. Block, "Refugees in the UK Labour Market: the Conflict Between Economic Integration and Policy Led Labour Market Restriction" (2007) 37 (1) *Journal of Social Policy* pp. 31 – 32; V.L. Van der Berg, "Still Lost in Translation: Language Barriers in South African Health Care Remain" (2016) 58 (6) *South African Family Practice* p. 229.

¹⁵⁵¹ R. Smit and P. Rugunanan, "From Precarious Lives to Precarious Work: the Dilemma Facing Refugees in Gauteng, South Africa" (2014) 45 (2) *South African Review of Sociology* p. 15.

Some young refugees with university degrees in scarce skills such as information technology and nursing could not secure employment due to inadequate proficiency in English.¹⁵⁵² They have to attend language proficiency courses to improve their communication skills in order to access the labour market. That is true of the Netherlands and Germany as indicated earlier.

Smit and Rugunanan found that Zimbabwean refugees could speak English well and were in a better position to secure employment as they could communicate with the local population.¹⁵⁵³ Language proficiency plays a significant role for refugees to access the labour market in the host society. The knowledge of local languages provides an opportunity to communicate with members of the country of asylum.¹⁵⁵⁴ English language skills assist refugees in participating in the labour market. For instance, in Britain, most refugees who manage to work speak English fluently or at the level of simple sentences.¹⁵⁵⁵

As pointed out in chapter 4, in some countries, such as the Netherlands, refugees and asylum seekers are given language proficiency courses.¹⁵⁵⁶ Refugees who have completed integration courses are in a better position to find employment and

¹⁵⁵² Smit and Rugunanan note 1551 above, p. 15; H. Krahn, "Educated and Underemployed: Refugee Integration into the Canadian Labour Market" (2000) 1 (1) *Journal of International Migration and Integration* p. 60.

¹⁵⁵³ Smit and Rugunanan note 1551 above, p. 15.

¹⁵⁵⁴ A. Bloch, "Refugee Settlement in Britain: the Impact of Policy on Participation" (2000) 26 (1) *Journal of Ethnic and Migration Studies* p. 79.

¹⁵⁵⁵ Block note 1554 above, p. 80.

¹⁵⁵⁶ H. Ghorashi and M. van Tilburg, "When is my Dutch Good Enough? Experiences of Refugee Women With Dutch Labour Organizations" (2006) 7 (1) *Journal of International Migration and Integration* p. 68; A. van Heelsum, "Aspirations and Frustrations: Experiences of Recent Refugees in the Netherlands" (2017) 40 (13) *Ethnic and Racial Studies* p. 2137; F. Glastra and P. Vedder, "Learning Strategies of Highly Educated Refugees in the Netherlands: Habitus or Calculations?" 2010 *International Migration* p. 81.

occupy higher job positions than those without.¹⁵⁵⁷ Furthermore, knowledge of the host country's language has a significant role on the educational and occupational development of refugee children.¹⁵⁵⁸ This has an important role in the integration of refugees and their future generations.¹⁵⁵⁹ It is submitted that South Africa should introduce an integration course for refugees where each refugee will learn at least one of the 11 official languages.¹⁵⁶⁰ This will contribute to the integration and social cohesion of refugees in South Africa.

6.3.3.3 Access to banking system or facilities

Refugees need access to bank accounts in order to transact businesses and protect their moneys.¹⁵⁶¹ However, they are excluded from financial sector and banking facilities unable due to lack of the necessary supporting documentations.¹⁵⁶² Currently banks open bank accounts only for citizens, permanent residents and foreigners who live in South Africa with valid permits in their passports.¹⁵⁶³ Due to pressure from lobbying groups, some banks have extended their services to refugees and asylum seekers but the majority of banks are reluctant to open bank accounts for refugees.¹⁵⁶⁴ Banks require an identity number, a foreign passport or employment contract and refugees do not possess such documents.

¹⁵⁵⁷ T. de Vroome and F. van Tubergen, "The Employment Experience of Refugees in the Netherlands" (2010) 44 (2) *International Migration Review* p. 399.

¹⁵⁵⁸ F. van Tubergen, "Determinants of Second Language Proficiency Among Refugees in the Netherlands" (2010) 89 (2) *Social Forces* p. 515.

¹⁵⁵⁹ Van Tubergen note 1558 above, p. 515.

¹⁵⁶⁰ Constitution of the Republic of South Africa, note 1031 above, s 6 (1).

¹⁵⁶¹ Dass, Ramjathan-Keogh and Khan note 1449 above, p. 228.

¹⁵⁶² L.B. Landau, "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy" (2006) 19 (3) *Journal of Refugee Studies* p. 320.

¹⁵⁶³ Landau note 1562 above, p. 320.

¹⁵⁶⁴ Landau note 1562 above, p. 320.

Lack of access to a secure banking system for refugees has serious consequences.¹⁵⁶⁵ For instance, refugees are unable to invest their moneys and make their own income generation strategies.¹⁵⁶⁶ They have to carry their moneys wherever they go or keep cash at their residences and consequently some police officers, specifically the Johannesburg Metro Police, see non-citizens as mobile ATMs.¹⁵⁶⁷ This increases the vulnerability of refugees as criminals may target them and steal their money. It is submitted that refugees need access to banking services in order to avoid unintended consequences of being easy targets for criminals.

6.4 Right to education for refugees

The Refugees Act provides that a refugee is entitled to the same “basic primary education which the inhabitants of the Republic receive from time to time.”¹⁵⁶⁸ In addition, the Constitution states that everyone has the right to a basic education and further education, which the state must take reasonable measures to make it progressively available and accessible.¹⁵⁶⁹ The South African Schools Act¹⁵⁷⁰ creates an obligation for public schools to admit learners and serve their education requirements without any unfair discrimination. There is a prohibition on public schools to refuse admission to a learner on the grounds that his or her parents are unable to pay for school fees determined by the governing body.¹⁵⁷¹ Theoretically, refugees have right to study and can access basic education in South Africa. But, in

¹⁵⁶⁵ Landau note 1562 above, p. 321.

¹⁵⁶⁶ Landau note 1562 above, p. 321.

¹⁵⁶⁷ L.B. Landau, “Analysis: the Foreign Invasion? How the Anti-Immigrant Backlash Makes Us All Unsafe” News 24 – 8 August 2019. Available at <https://www.news24.com/Analysis/analysis-the-foreign-invasion-how-the-anti-immigrant-backlash-makes-us-all-unsafe-20190818> (accessed on 18 September 2019).

¹⁵⁶⁸ Refugees Act note 32 above, s 27 (g).

¹⁵⁶⁹ Constitution of the Republic of South Africa, note 1031 above, s 29 (1).

¹⁵⁷⁰ South African Schools Act 86 of 1996, s 5 (1).

¹⁵⁷¹ South African Schools Act 86 of 1996, s 5 (3).

practice, they face enormous challenges in accessing basic education as they have to pay for the costs of their studies without any available resources in their possession.

The right to education is recognised in international and regional instruments.¹⁵⁷²

The 1951 UN Refugee Convention requires contracting parties to accord the same treatment to refugees as accorded to nationals with respect to elementary education.¹⁵⁷³ Article 28 (1) (a) of the Convention on the Rights of the Child creates an obligation for states parties to provide free and compulsory primary education for everyone.¹⁵⁷⁴ States are encouraged to develop different forms of secondary education as well as vocational education and facilitate access for every child by taking appropriate measures to introduce free education and offer financial assistance for needy children.¹⁵⁷⁵ States parties also have an obligation to “make higher education accessible to all on the basis of capacity by every appropriate means.”¹⁵⁷⁶ They need to take special measures for female, gifted and disadvantaged children to ensure equal access to education for all sections of the community.¹⁵⁷⁷ They also have a duty to take all appropriate measures to ensure

¹⁵⁷² African Charter on Human and Peoples’ Rights, 1981, Article 17; African Charter on the Rights and Welfare of the Child, 1990, Article 11 (1); P. Christie, “The Complexity of Human Rights in Global Times: the Case of the Right to Education in South Africa” (2010) 30 *International Journal of Educational Development* pp. 6 -7.

¹⁵⁷³ Convention Relating to the Status of Refugees, note 23 above, Article 22 (1).

¹⁵⁷⁴ Convention on the Rights of the Child, 1989; International Covenant on Economic, Social and Cultural Rights, 1966, Article 13 (2) (a); Universal Declaration of Human Rights, 1948, Article 26 (1); African Charter on the Rights and Welfare of the Child, 1990, Article 3 (a).

¹⁵⁷⁵ Convention on the Rights of the Child, 1989, Article 28 (1) (b); International Covenant on Economic, Social and Cultural Rights, 1966, Article 13 (2) (b); African Charter on the Rights and Welfare of the Child, 1990, Article 11 (3) (b).

¹⁵⁷⁶ Convention on the Rights of the Child, 1989, Article 1 (c); International Covenant on Economic, Social and Cultural Rights, 1966, Article 13 (2) (c); Universal Declaration of Human Rights, 1948, Article 26 (1); African Charter on the Rights and Welfare of the Child, 1990, Article 11 (3) (c).

¹⁵⁷⁷ African Charter on the Rights and Welfare of the Child, 1990, Article 11 (3) (e).

that children who become pregnant before completing their studies are given a fair opportunity to continue with their studies.¹⁵⁷⁸

Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women¹⁵⁷⁹ prohibits any discrimination against women in respect of education and provides for educational information or advice on family planning. States have a duty to take all necessary measures to protect women and female children from all kinds of abuse including sexual harassment in schools and institutions of learning and punish the perpetrators.¹⁵⁸⁰ All the international and regional provisions on the right to education apply to everyone, including refugees.

South Africa is a state party to the international and regional instruments dealing with the right to education and is indeed obliged to provide adequate primary education to all children.¹⁵⁸¹ Refugee children have right to primary and secondary education as they enjoy the same rights enshrined in chapter 2 of the Constitution.¹⁵⁸² In South Africa, attending primary school is compulsory up to grade 9.¹⁵⁸³ This should also benefit refugee children to attend school and improve their knowledge. Education is essential for refugees as it is a human right, a tool for

¹⁵⁷⁸ African Charter on the Rights and Welfare of the Child, note 1577 above, Article 11 (6).

¹⁵⁷⁹ Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 10.

¹⁵⁸⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 12 (1) (c).

¹⁵⁸¹ Dass, Ramjathan and Khan note 1449 above, p. 232.

¹⁵⁸² Refugees Act note 32 above, s 27 (b), (g) and Constitution of the Republic of South Africa, note 1031 above, s 29 (1) (a).

¹⁵⁸³ D. Operario *et al*, "Orphanhood and Completion of Compulsory School Education Among Young People in South Africa: Findings From a National Representative Survey" (2008) 18 (1) *Journal of Research on Adolescence* p. 173.

protection, helps to meet psychological needs and builds human capital through the promotion of self-reliance and social and economic development.¹⁵⁸⁴

Studies have shown that refugees experience challenges when they try to access primary education.¹⁵⁸⁵ Some principals do not enrol learners when they realise that the applicants are refugees or asylum seekers.¹⁵⁸⁶ For instance, a study conducted in Pretoria among refugees from Burundi and Democratic Republic of Congo indicated that their children were denied access to government schools due to their refugee status.¹⁵⁸⁷ The lack of documentations is also a problem to enrol in a school as some principals require birth certificate, academic transcripts and a transferring letter from the previous school in order to be admitted.¹⁵⁸⁸ However, there are few schools that enrol refugees for schooling and they use this opportunity to access education.¹⁵⁸⁹ Lack of proper documents is a problem as refugees do not seek such documents before their flight. It is submitted that principals should not deny access to education for refugee children in South Africa.

Unaccompanied refugee children face huge problems when they seek access to basic education and other social and health services.¹⁵⁹⁰ Some school managers do not take such children seriously as they believe they are unable to pay for their education costs and become a burden to the school.¹⁵⁹¹ Some principals tell the prospective learners to look for another school when they hear that he or she is an

¹⁵⁸⁴ L. Meda, R. Sookrajh and B. Maharaj, "Refugee Children in South Africa: Access and Challenges to Achieving Universal Primary Education" (2012) 9 (1) *African Education Review* p. 157.

¹⁵⁸⁵ Meda, Sookrajh and Maharaj note 1584 above, p. 152.

¹⁵⁸⁶ Meda, Sookrajh and Maharaj note 1584 above, p. 160.

¹⁵⁸⁷ Meda, Sookrajh and Maharaj note 1584 above, p. 156.

¹⁵⁸⁸ Meda, Sookrajh and Maharaj note 1584 above, p. 161.

¹⁵⁸⁹ Meda, Sookrajh and Maharaj note 1584 above, p. 161.

¹⁵⁹⁰ Meda, Sookrajh and Maharaj note 1584 above, p. 161.

¹⁵⁹¹ Meda, Sookrajh and Maharaj note 1584 above, p. 161 - 162.

unaccompanied refugee child.¹⁵⁹² In *Mubake and Others v Minister of Home Affairs and Others*,¹⁵⁹³ Mokgoka J held that separated children were the dependants of their primary caregivers in terms of the definition of the term “dependant” in section 1 of the Refugees Act. This indicates that this refugee category can be assisted by the caregivers and receive the relevant asylum documents that can facilitate access to education. Refugee children also need to satisfy their basic necessities of life in order to continue with their education. Learners may drop out if they lack financial support to sustain themselves.¹⁵⁹⁴

The Department of Education has amended its admission policy by indicating that asylum seekers and refugees can be allowed to enrol in public schools.¹⁵⁹⁵ Previously in Tshwane, schools refused to admit asylum seekers and refugee children as the Department of Home Affairs indicated that they required study permits to register in public schools.¹⁵⁹⁶ This requirement was legally wrong as refugees and asylum seekers are entitled to study in South Africa. Other barriers for refugees and asylum seekers to access basic education include “age and grade placing, limited places at schools and language difficulties.”¹⁵⁹⁷ Some refugees come from non-English speaking countries and experience challenges to adjust to education in the English language.

Concerning higher education, the UN Refugee Convention requires contracting states to accord to refugees the same treatment as that accorded to aliens generally

¹⁵⁹² Meda, Sookrajh and Maharaj note 1584 above, p. 162.

¹⁵⁹³ *Mubake and Others v Minister of Home Affairs and Others* 2016 2 SA 220 (GP), para 28.

¹⁵⁹⁴ Meda, Sookrajh and Maharaj note 1584 above, p. 164.

¹⁵⁹⁵ Dass, Ramjathan and Khan note 1449 above, p. 233.

¹⁵⁹⁶ Dass, Ramjathan and Khan note 1449 above, p. 233.

¹⁵⁹⁷ Dass, Ramjathan and Khan note 1449 above, p. 233.

in the same circumstances.¹⁵⁹⁸ Regarding access to tertiary education, they should recognise school certificates, diplomas and degrees, remit fees and charges and award scholarships to refugees.¹⁵⁹⁹ The provision of higher education for refugees is critical to achieve the goals of global education movements for three main reasons.¹⁶⁰⁰ Firstly, it is an instrument of protection in the context of refugees.¹⁶⁰¹ Secondly, higher education contributes to the realization of durable solutions and building of individual refugees' lives.¹⁶⁰² Thirdly, it is a tool for reconstruction.¹⁶⁰³ Generally, the access to higher education contributes not only to the improvement of refugees themselves but also the development of the host country, region and country of origin. They can provide positively contribute in the different activities that they choose to perform.

Generally refugees experience difficulties in accessing higher education.¹⁶⁰⁴ For instance, application process requires documents such as birth certificates, school diplomas, and academic reports that refugees do not possess in exile.¹⁶⁰⁵ They are also treated as international students and have to pay huge school fees.¹⁶⁰⁶ Furthermore, some universities give preference to citizens and enrol a small number of foreign students.¹⁶⁰⁷ This often leads to an insignificant number of international

¹⁵⁹⁸ Convention Relating to the Status of Refugees, note 23 above, Article 22 (2).

¹⁵⁹⁹ Convention Relating to the Status of Refugees, note 23 above, Article 22 (2).

¹⁶⁰⁰ S. Dryden-Peterson, "The Politics of Higher Education for Refugees in a Global Movement for Primary Education" (2010) 27 (2) *Refuge* p. 14.

¹⁶⁰¹ Dryden-Peterson note 1600 above, p. 14.

¹⁶⁰² Dryden-Peterson note 1600 above, p. 14.

¹⁶⁰³ Dryden-Peterson note 1600 above, p. 15.

¹⁶⁰⁴ Dryden-Peterson note 1600 above, p. 13.

¹⁶⁰⁵ Dryden-Peterson note 1600 above, p. 13.

¹⁶⁰⁶ C. Kavuro, "Refugee Rights in South Africa: Addressing Social Injustices in Government Financial Assistance Schemes" (2015) 5 (1) *Afe Babalola University: Journal of Sustainable Development Law and Policy* p. 192.

¹⁶⁰⁷ Dryden-Peterson note 1600 above, p. 13.

students, including refugee students being unable to enrol for higher education in the host state.

Higher education is expensive¹⁶⁰⁸ and students have to pay for school fees, academic requisites, accommodation and food. Access to scholarships, bursaries and study loans is circumscribed to a few number of refugees. The UNHCR administers the DAFI Bursary Programme at global level to a small number of refugee students to pay for their basic needs at universities.¹⁶⁰⁹ Currently, there are no other bursaries and scholarships available to refugees in South Africa apart from DAFI.¹⁶¹⁰ South African government awards National Skills Fund (NSF) and National Student Financial Aid Scheme (NSFAS) bursaries to vulnerable citizens in order to assist them to cover for university education and living expenses.¹⁶¹¹ The criteria to be awarded NSFAS bursary is that the candidate must be both financially needy and academically able.¹⁶¹² There are other bursaries and scholarship programmes restricted to South African citizens only to ensure that they have access to higher education.¹⁶¹³ Refugees are left on their own to make arrangements and pay for their higher education. As they constitute a vulnerable

¹⁶⁰⁸ Dryden-Peterson note 1600 above, p. 11.

¹⁶⁰⁹ Dryden-Peterson note 1600 above, pp. 13 - 14.

¹⁶¹⁰ Dryden-Peterson note 1600 above, p. 13.

¹⁶¹¹ Kavuro note 1606 above, p. 179; R. Jackson, "The National Student Financial Aid Scheme of South Africa" (2002) 11 (1) *The Welsh Journal of Education* p. 83; M. Breier, "From 'Financial Consideration' to 'Poverty': Towards a Reconceptualisation of the Role of Finances in Higher Education Student Drop Out" (2010) 60 (6) *Higher Education* p. 664; S.B. Sader, "Spatialities of Widening Participation: Narratives of First Year Students Receiving Financial Aid" (2017) 31 (1) *South African Journal of Higher Education* p. 230.

¹⁶¹² Jackson note 1611 above, p. 84.

¹⁶¹³ J.M. Tumbo, I.D. Couper and J.A.M. Hugo, "Rural Origin Health Science Students at South African Universities" (2009) 99 (1) *South African Medical Journal* p. 56; G. Wangenge-Ouma, "Funding and the Attainment of Transformation Goals in South Africa's Higher Education" (2010) 36 (4) *Oxford Review of Education* p. 491.

group in South Africa,¹⁶¹⁴ most refugees are unable to financially access higher education. The South African government, universities and financial institutions should make policies that provide funding in terms of bursaries, scholarships and loans to refugees in order to access higher education as they are a vulnerable group and destitute. Mostly, refugees can then obtain study loans which they will pay back when they complete their studies.

6.5 Right to social assistance

The Refugees Act does not specifically provide for the right to social assistance for refugees.¹⁶¹⁵ However, the Constitution stipulates that everyone has the right to have access to sufficient food and water; social security and appropriate social assistance if they are unable to support themselves and their dependants.¹⁶¹⁶ The state has a duty to provide access to social assistance within its available resources.¹⁶¹⁷ After 1994, only South African citizens have the right of access to different social grants.¹⁶¹⁸ Since 2004, in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*,¹⁶¹⁹ Mokgoro J extended the child grants, old age grants and disability grants to permanent residents in South Africa. This only assists former refugees who have acquired permanent resident status.

¹⁶¹⁴ Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 4 SA 395 (CC), paras 28 and 113.

¹⁶¹⁵ Dass, Ramajathan-Keogh and Khan note 1449 above, p. 230.

¹⁶¹⁶ Constitution of the Republic of South Africa, note 1031 above, s 27 (1) (b).

¹⁶¹⁷ Constitution of the Republic of South Africa, note 1031 above, s 27 (2).

¹⁶¹⁸ Social Assistance Act 59 of 1992, sections 3 and 4.

¹⁶¹⁹ *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 6 SA 505 (CC), para 98.

The Social Assistance Act¹⁶²⁰ aims to provide for the administration and payment of social grants in South Africa. It provides different forms of social grants including the child support grant, care dependency grant, foster child grant, disability grant, old age grant and grant in aid.¹⁶²¹ The Minister of Social Development, in collaboration with the Minister of Finance, determines the specific amount for each social grant every year.¹⁶²² For a person to qualify for a social grant, he or she must be a South African citizen or a member of group or category prescribed by the Minister in the government gazette.¹⁶²³ Social grants assist recipients to acquire their basic needs as they do not have any other source of income.

The South African government has extended the old age grant, child support grant and disability grant to refugees alone.¹⁶²⁴ The Department of Home Affairs provides identity documents to refugees and facilitate the application for social grants.¹⁶²⁵ However, refugees do not easily access social grants because they do not often possess birth certificates for children to apply for the grants.¹⁶²⁶ The Department of Social Development experiences challenges in authenticating the income and employment details of refugees in order to establish the means test.¹⁶²⁷ Refugees do not get refugee identity documents at the same time when they are recognised as refugees. Consequently, they experience delays in accessing social grants.

¹⁶²⁰ Social Assistance Act 13 of 2004, s 3 (a).

¹⁶²¹ Social Assistance Act note 1620 above, s 4.

¹⁶²² Social Assistance Act note 1620 above, s 4; GN 490 in GG 42337 of 29 March 2019.

¹⁶²³ Social Assistance Act note 1620 above, s 5 (1) (c).

¹⁶²⁴ Anon, "Teaching Refugees About Social Grants" 11 September 2012. Available at <https://www.gov.za/teaching-refugees-about-social-grants> (accessed on 22 September 2019).

¹⁶²⁵ Anon note 1624 above.

¹⁶²⁶ Anon note 1624 above.

¹⁶²⁷ Anon note 1624 above.

Refugees may have access to social relief from distress when they qualify for such assistance.¹⁶²⁸ Article 23 of the 1951 UN Refugee Convention contains provision for public relief in international law. Contracting parties have a duty to accord refugees the same treatment as their nationals with respect to public relief and assistance.¹⁶²⁹ The Preamble to the Convention on the Rights of the Child¹⁶³⁰ provides that children are entitled to special care and assistance. Furthermore, the special needs of a disabled child have to be provided for free of charge within available resources after considering the parents' financial status.¹⁶³¹ Article 20 (2) (a) of the African Charter on the Rights and Welfare of the Child creates a duty for states parties to take appropriate measures, when there is a need, to assist parents and other responsible persons, to provide assistance and support programmes with regard to nutrition and clothing for the children. This obligation is restricted to the means available to the state and its national conditions.¹⁶³² International law provides for social relief in times of distress and grants for children, including refugee children.

Refugees are entitled to social grants as citizens and permanent residents, but they experience problems in accessing their rights.¹⁶³³ The South African Social Security Agency (SASSA) has turned away refugees who qualify for child social grants because they do not have birth certificates which corresponded to the Home Affairs ID numbers.¹⁶³⁴ The Department of Home Affairs does not issue unabridged birth

¹⁶²⁸ Dass, Ramajathan-Keogh and Khan note 1449 above, p. 231; Social Assistance Act 13 of 2004, s 13.

¹⁶²⁹ Convention Relating to the Status of Refugees, note 23 above, Article 23.

¹⁶³⁰ Convention on the Rights of the Child, 1989.

¹⁶³¹ Convention on the Rights of the Child, 1989, Article 23.

¹⁶³² African Charter on the Rights and Welfare of the Child, 1990, Article 20 (2) (a).

¹⁶³³ T. Washinyira, "Refugees Face Social Grant Barrier" 19 May 2016. Available at <https://www.groundup.org.za/article/refugees-face-social-grant-barrier/> (accessed on 22 September 2019).

¹⁶³⁴ Washinyira note 1633 above.

certificates to foreigners, including refugees.¹⁶³⁵ Therefore, the SASSA's request for birth certificates corresponding with the Home Affairs ID numbers constitutes a denial for refugee children to access social grants. It is submitted that SASSA has to allow social grants for refugee children based on the available birth certificates and refugee status permits.

6.6 Right to health care

The Refugees Act provides that a refugee is entitled to the same basic health services that the inhabitants of the Republic receive from time to time.¹⁶³⁶ They also enjoy the full legal protection of the rights enshrined in Chapter 2 of the Constitution. The right to health care is guaranteed in the Constitution.¹⁶³⁷ It states that everyone has the right to have access to health care services, including reproductive health care¹⁶³⁸ and no one may be refused emergency medical treatment.¹⁶³⁹ The state has a duty to take reasonable legislative and other measures to achieve the progressive realisation of the right to health care services within its available resources.¹⁶⁴⁰

The right to health care can be limited if the restriction complies with the provisions of the Constitution.¹⁶⁴¹ In *Soobramoney v Minister of Health, KZN*,¹⁶⁴² the applicant suffered from irreversible chronic renal failure and only regular renal dialysis could

¹⁶³⁵ Washinyira note 1633 above; B. Davids, "Children Born in SA do not Automatically Qualify for Citizenship", Cape Argus, 10 April 2017. Available at <https://www.sahrc.org.za/index.php/sahrc-media/news/item/607-children-born-in-sa-do-not-automatically-qualify-for-citizenship> (accessed on 30 October 2019).

¹⁶³⁶ Refugees Act note 32 above, s 27 (g).

¹⁶³⁷ Refugees Act note 32 above, s 27 (b).

¹⁶³⁸ Constitution of the Republic of South Africa, note 1031 above, s 27 (1) (a).

¹⁶³⁹ Constitution of the Republic of South Africa, note 1031 above, s 27 (3).

¹⁶⁴⁰ Constitution of the Republic of South Africa, note 1031 above, s 27 (2).

¹⁶⁴¹ Constitution of the Republic of South Africa, note 1031 above, sections 27 and 36.

¹⁶⁴² *Soobramoney v Minister of Health, KZN* 1998 1 SA 765 (CC).

prolong his life. He sought dialysis treatment from the Addington Hospital in Durban but he was not admitted. Due to a lack of adequate resources to provide dialysis treatment for all patients who suffered from chronic renal failure, the hospital made a policy to admit automatically to the renal dialysis programme patients suffering from acute renal failure which could be treated and remedied by renal analysis. The hospital did not admit patients suffering from irreversible chronic renal failure. Chaskalson P held that it was apparent that the obligations imposed on the state to provide health care in terms of section 27 of the Constitution were dependent upon the resources available for such purpose and the corresponding right itself was limited by reason of lack of resources.¹⁶⁴³ He concluded that this lack of resources and the significant demands on them fostered by an extensive lack of access to adequate health care services, an unqualified obligation to meet the need would not be fulfilled.¹⁶⁴⁴ The relevant administrative authority responsible for health services had to make decisions about the funding available for health care and how the limited funds should be spent.¹⁶⁴⁵ These choices involved difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priority to be met.¹⁶⁴⁶ Chaskalson concluded that a court would be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it was to deal with such matters.¹⁶⁴⁷ Thus the right of access to health care services can be constitutionally limited.

¹⁶⁴³ *Soobramoney v Minister of Health, KZN* note 1642 above, para 11.

¹⁶⁴⁴ *Soobramoney v Minister of Health, KZN* note 1642 above, para 11.

¹⁶⁴⁵ *Soobramoney v Minister of Health, KZN* note 1642 above, para 29.

¹⁶⁴⁶ *Soobramoney v Minister of Health, KZN* note 1642 above, para 29.

¹⁶⁴⁷ *Soobramoney v Minister of Health, KZN* note 1642 above, para 29.

The Department of Health has issued a Revenue Directive for hospital fees for refugees and asylum seekers to access basic health care and Anti-Retroviral Treatment (ART).¹⁶⁴⁸ The Directive entitles refugees and asylum seekers to access health care services with or without a permit in the same circumstances as citizens of South Africa. This is a significant development in the right of refugees to access health care service in any place in South Africa.

The right to health is recognised in international and regional instruments.¹⁶⁴⁹ The Universal Declaration of Human Rights states that everyone has the right to a standard of living adequate for the health and well-being of himself or herself and his or her family, including health care.¹⁶⁵⁰ Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights contains the right of everyone to enjoy the highest attainable standard of physical and mental health. States have a duty to create conditions to reduce stillborn-rates and infant mortality.¹⁶⁵¹ Article 24 (1) of the Convention on the Rights of the Child imposes an obligation on states parties to strive to ensure that every child accesses his or her right to health care services. They also have to provide the special needs for disabled children in accessing health care services.¹⁶⁵² Article 16 of the African Charter on Human and Peoples' Rights imposes a duty on states to ensure that every individual has the right to the best attainable state of physical and mental health. They have to take

¹⁶⁴⁸ Department of Health – Revenue Directive – Refugees / Asylum Seekers without a permit. 19th September 2007. Reference: BI 4/29 REFUG/ASYL 8 2007.

¹⁶⁴⁹ CESCR General Comment No. 14. The Right to the Highest Attainable Standard of Health (Art. 12), 2000, para 2.

¹⁶⁵⁰ Universal Declaration of Human Rights, 1948, Article 25 (1).

¹⁶⁵¹ International Covenant on Economic, Social and Cultural Rights, 1966, Article 12 (2) (a).

¹⁶⁵² Convention on the Right of the Child, 1989, Article 23 (3).

reasonable measures to protect the health of their people and provide medical attention when they fall sick.¹⁶⁵³

Furthermore, Article 12 (1) of the Convention on the Elimination of All Forms of Discrimination against Women obliges states parties to take all appropriate measures to eradicate discrimination against women in the field of health care and to ensure equality between men and women in accessing health care services, including family planning. They also have to ensure that women in rural areas have the right to access adequate health care facilities.¹⁶⁵⁴ States parties have an obligation to protect the right to health of women and promote sexual and reproductive health.¹⁶⁵⁵ The provisions of the right to health in international and regional instruments also apply to refugees as they are not restricted to citizens only.

The right of access to health care is recognised for refugees, but they experience unfair discrimination when they approach health facilities for medical treatments or assistance.¹⁶⁵⁶ South African health care professionals often deny health care and treatment to refugees, asylum seekers and other migrants.¹⁶⁵⁷ They do not exhibit job satisfaction as the health profession is stressful and demanding in South Africa.¹⁶⁵⁸ Most South Africans believe that "the right of access to health care

¹⁶⁵³ African Charter on Human and Peoples' Rights, 1981, Article 16.

¹⁶⁵⁴ Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 14 (2) (b).

¹⁶⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 14 (1).

¹⁶⁵⁶ J. Crush and G. Tawodzera, "Medical Xenophobia and Zimbabwean Migrant Access to Public Health Services in South Africa" (2014) 40 (4) *Journal of Ethnic and Migration Studies* p. 655; G. Zihindula and A. Meyer-Weitz, "Lived Experience of Democratic Republic of Congo Refugees Facing Medical Xenophobia in Durban, South Africa" (2017) 52 (4) *Journal of Asian and African Studies* p. 459.

¹⁶⁵⁷ Crush and Tawodzera note 1656 above, p. 657.

¹⁶⁵⁸ Crush and Tawodzera note 1656 above, p. 659.

services should depend on citizenship and legal status”.¹⁶⁵⁹ Furthermore, they believe that access to health care services should be denied to migrants, including refugees, and such individuals have to be removed from the Republic if they are HIV positive.¹⁶⁶⁰ The stereotypes and negative attitudes towards non-citizens are called medical xenophobia¹⁶⁶¹ that needs to be eradicated.

The major challenges for refugees in accessing the right to health care services is lack of proper documentation and language barriers.¹⁶⁶² Some health care workers and medical practitioners do not know refugee status permits as well as other documents issued to foreigners and prevent refugees from accessing health care services.¹⁶⁶³ Refugees can only access medical treatment if they have proper documentations.¹⁶⁶⁴ In addition, language is also a barrier in accessing health care because most refugees are unable to communicate in the local languages preferred by health professionals.¹⁶⁶⁵ Therefore, they cannot effectively communicate their needs and health problems to the relevant medical practitioners.¹⁶⁶⁶ There are no interpretation services at hospitals and health centres and patients need to find their own interpreters.

6.7 Summary

This chapter elaborated on some selected socio-economic rights and their availability to refugees in South Africa. Specifically, it deliberated on the rights to

¹⁶⁵⁹ Crush and Tawodzera note 1656 above, p. 656.

¹⁶⁶⁰ Crush and Tawodzera note 1656 above, p. 656.

¹⁶⁶¹ Crush and Tawodzera note 1656 above, p. 656 and Zihindula and Meyer-Weitz note 1656 above, p. 460.

¹⁶⁶² Zihindula and Meyer-Weitz note 1656 above, p. 462.

¹⁶⁶³ Zihindula and Meyer-Weitz note 1656 above, p. 464.

¹⁶⁶⁴ Zihindula and Meyer-Weitz note 1656 above, p. 465.

¹⁶⁶⁵ Crush and Tawodzera note 1656 above, p. 664.

¹⁶⁶⁶ Crush and Tawodzera note 1656 above, p. 665.

housing, employment or self-employment, education, social services and health care services. Refugees do not enjoy the right to have access to adequate housing in South Africa. They are entitled to seek employment, but find numerous problems when they try to access the right to employment. The government aims to give priority to historically disadvantaged groups or persons, namely blacks, coloured and Indians. The same also applies for funding students in accessing the right to education both basic education and further education. The lack of necessary documents, unaffordable school fees and language barriers prevent refugees from accessing the right to education. Refugees have the right to access social services and health care but they experience challenges when they try to access these rights as elucidated in this chapter.

The next chapter proffers the conclusion and recommendations. It briefly summarises the entire research and derives recommendations from the study designed to improve the current situation.

Chapter 7: Conclusion and recommendations

7.1 Introduction

The study set out to examine the challenges associated with the integration of refugees in South Africa. It analysed the genesis of the refugee problem such as the slave trade, colonialism, religious approaches and the concept of *Ubuntu*. The study established that the current root causes of refugees are civil wars, inter-state wars, gross violations of human rights, lack of democracy, failure to organise or recognise free and fair elections, and environmental degradation. In fact, failed states or economic mismanagement top the list of refugee producing countries.

The study also considered the development of international and regional instruments for protecting asylum seekers and refugees. International refugee law started at the end of First World War and gained international recognition after the Second World War. From its inception, international refugee law aimed at protecting and improving the circumstances of Russian and European refugees after the First World War. The UN adopted its Refugee Convention after the Second World War. Thereafter, African states adopted their own convention to provide for specific aspects of refugees in Africa which included external aggression, occupation, foreign domination and events seriously disturbing public order. The European Union and Latin American states also adopted regional instruments and declarations to deal with refugees.

The study discussed the integration of refugees in selected countries, namely Tanzania, Zambia, the Netherlands and Germany as best examples in providing durable solutions to the refugee problem. The study has evaluated how each of

these countries welcomes, protects and accommodates refugees. Furthermore, the study interrogated the legal framework governing integration of refugees in South Africa, starting with the history of refugees in South Africa, access to asylum, family reunification for refugees, unaccompanied minor refugees, cessation clause, access to permanent residence and naturalisation. Some socio-economic rights of refugees were scrutinised in more detail as they play an important role in the lives of refugees. They include the right of access to adequate housing, right to work, right to education, right to social assistance and right to health care services. The aims of this thesis were to examine the integration of refugees in South Africa and to suggest improvements to the *status quo*. This chapter concludes the thesis by providing our broad findings and recommendations.

7.2 Conclusion

It is common cause that refugees have existed from time immemorial when individuals fled persecution and sought asylum in other countries. Christian and Islamic religions have experienced asylum in their traditions and provided protection for persecuted persons. Colonialism has created many refugees, especially on the African continent. Unfortunately, when African states achieved their independence, the problem of refugees continued to persist due to serious violations of human rights and other associated ills.

The international community realised the need to respond to the problem of refugees and started adopting international conventions to protect and improve the circumstances of refugees. The 1951 UN Refugee Convention only covered Europeans who were refugees on 1 January 1951. This cut-off date was removed in 1967 to extend the provisions of the UN Refugee Convention to refugees from

other continents. There are other international conventions that contain provisions protecting refugees.¹⁶⁶⁷ Furthermore, the Africa Union, European Union and Latin American countries adopted regional instruments, policies and declarations to secure the protection of refugees in their respective regions. This was a realisation that the challenges encountered and experienced by refugees were part of the human condition. However, each state party to the international and regional conventions has to domesticate them into its municipal law in order to ensure refugee protection and grant asylum to individuals who experience persecution. The asylum institution is sacred and excludes from protection individuals who have committed serious crimes such as genocide, war crimes and crimes against humanity.¹⁶⁶⁸ Nevertheless, there is a challenge if these individuals will have to be subjected to torture, inhuman and degrading punishment in their countries of origin.

On the African continent, we have identified success stories with respect to the integration of refugees. Tanzania acquired independence in 1961 and started receiving refugees from its neighbouring countries (Rwanda, Burundi and Democratic Republic of Congo) and members of liberation movements who were fighting colonialism or apartheid to gain independence for their own countries. It kept refugees in designated areas or settlements where they had limited freedom of movement. Tanzanian refugee law does not provide for the naturalisation for refugees. However, the government of Tanzania generated and implemented policies to naturalise refugees from Rwanda, Somalia and Burundi who came to Tanzania during specific periods. For instance, Rwandan refugees who fled in the 1960s acquired naturalisation in the 1980s and Burundian refugees who came to

¹⁶⁶⁷ See chapter 3 – International conventions.

¹⁶⁶⁸ Convention Relating to the Status of Refugees, note 23 above, Article 1 F (a).

Tanzania in 1972 obtained new citizenship in 2012. The policy to grant naturalisation to refugees is a good practice that provides durable solutions for protracted refugee situations. However, Tanzania has declined in its practice to accommodate refugees and forcibly repatriated Rwandan refugees in 1996. In subsequent years, Tanzania also forcibly repatriated refugees from Burundi on several occasions. It is submitted that Tanzania's earlier policies of naturalising protracted refugees from different countries were commendable as they achieved durable solutions by acquiring a new nationality of a country that can protect them as citizens.

Another success story worth emulating with regards to refugees is that of Zambia. It has demonstrated generosity to refugees on its own territory. At the beginning, Zambian refugee law did not encompass naturalisation for refugees. They lived in refugee camps or settlements where they had limited freedom of movement. Nevertheless, Zambia had decided and granted permanent residence permits to 10,000 refugees from Angola and 4,000 Rwandan refugees to end protracted refugee situations or comply with UNHCR cessation clauses. It is submitted that this practice will lead to durable solutions as former refugees who have acquired permanent residence permits will apply for naturalisation whenever they qualify. The current Zambian Refugees Act provides for naturalisation of refugees.

Away from Africa, the Kingdom of the Netherlands receives refugees and provides them with the basic necessities of life such as housing, food and clothes. Refugees have to do integration and language courses in order to assimilate to the Dutch culture and society. The Netherlands provides naturalisation for refugees after they have lived a certain number of years in the country.

Germany accommodates refugees and provides them with basic needs, including food, shelter and clothes. They have to pass an integration courses and learn the German language. Civil society plays a significant role in the integration of refugees in Germany. Germany also provides for the naturalisation of refugees as a durable solution as they acquire the full protection of the host state. However, some naturalists and right wing politicians do not want refugees in Germany. Consequently, Germany has entered into an agreement with Turkey to keep potential refugees in Turkey and prevent them from coming to Germany or going to other European states.

Coming home, South Africa has come from a refugee producing country to a refugee receiving country. It started receiving refugees after 1994 when it became a democratic state. Before the advent of constitutional democracy in 1994, South Africa did not have any specific legislation dealing with refugee issues. The Aliens Control Act governed refugees who arrived in South Africa. They were given papers issued to prohibited persons that allowed them to work and study. Eventually South Africa became a state party to international and regional conventions dealing with refugee matters. To domesticate these conventions, South Africa enacted the Refugees Act in 1998 which came into effect on 1 April 2000. It started issuing asylum seeker permits and refugee status permits to individuals who qualified for asylum. South African refugee law excludes fugitives from justice from protection and in that way ensures the integrity of asylum system.

Asylum seekers and refugees experience challenges in accessing asylum in South Africa. Some specific Refugee Reception Offices in Johannesburg, Cape Town and Port Elizabeth have been closed to new asylum seekers and the Department of

Home Affairs has resisted judicial decisions to re-open these offices. The Johannesburg office was moved to Pretoria and merged with the Desmond Tutu Refugee Reception Office. Currently, refugees and asylum seekers have to travel long distances to renew their permits and access asylum services in Pretoria, Durban and Musina. This has a serious implication on their financial wellbeing and livelihood as they have to pay for their transport costs and accommodations. Furthermore, some refugees do not obtain proper interpretation services when they contact the Department of Home Affairs and this negatively affects the outcomes of their applications. It is submitted that appropriate interpretation services must be provided to refugees in the asylum process.

The Refugees Act provides that a dependant of a refugee is also a refugee. However, this only applies to dependants who arrive in South Africa at the same time as the principal applicant. Dependants of refugees who arrive after the principal applicants had been granted refugee status have to make their own asylum applications. This practice does not promote family unit nor reunification. Minor children who depend on a primary caregiver refugee are also refugees. Unaccompanied minor refugees need assistance to access asylum services and survive.

Cessation clauses have been declared in respect of certain refugees from Mozambique, Angola, Liberia and Rwanda to allow a comprehensive solution of durable solutions for them, including voluntary repatriation to the countries of origin, local integration in the host countries and resettlement in third countries. Most Mozambican refugees managed to acquire South African citizenship by naturalisation. However, a number of refugees from Angola, Liberia and Rwanda

received permanent residency permits to legalise their sojourn in South Africa. It is submitted that when the cessation clause is declared, the concerned refugees who do not repatriate nor resettle in the third country have to be naturalised and acquire South African citizenship.

The Refugees Act provides an opportunity for refugees in South Africa to apply for permanent residence permits. However, the Standing Committee for Refugee Affairs (SCRA) has to certify that the applicant will remain a refugee indefinitely before he or she makes an application. There is no clear indication of what constitutes an indefinite refugee and the applicants for certification do not know what to prove. In addition, the SCRA has one office in Pretoria for the entire country and cannot adequately deal with all the applications for certification for the whole country. It is submitted that the SCRA needs to extend its service to other provinces of the country where refugees are located and employ more personnel to timeously assess applications for certification.

The South African Citizenship Act allows permanent residence permit holders to apply for naturalisation after five years from the time they have obtained their permits. However, applications for naturalisation require documents that most former refugees cannot find such as police clearance from the country of origin. This document is issued by the government of the country a refugee has fled from and sought asylum in the host state. If the government is the one that persecuted a particular refugee, it goes without saying that it will not grant him or her any document or police clearance. It is submitted that the requirement of documents from countries of origin should be waived for former refugees who hold permanent residence permits when they apply for naturalisation.

The Refugees Act does not provide for access to adequate housing for refugees. However, this right can be realised in terms of section 26 (1) of the Bill of Rights in the Constitution. In practice, South Africa does not provide for access to adequate housing for refugees. It is submitted that South Africa has to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of the right of access to adequate housing¹⁶⁶⁹ for certain refugees, specifically women, children and unaccompanied minors.

Refugees are entitled to employment in South Africa as provided for by the Refugees Act. In practice, refugees experience various challenges in accessing their right to employment. Some professions, such as the security industry and the legal profession, are restricted to citizens and permanent residence holders only, therefore excluding refugees. The South African labour market has a policy to redress the imbalances of the past. This policy gives preference to individuals from previously disadvantaged groups or designated groups (black Africans, Coloureds and Indians). For this reason, many statutes give priority to designated groups. Therefore, refugees cannot easily access the right to employment as the government has made one step forward and two steps backwards in providing access to employment for refugees. It is submitted that this policy needs to be rectified to accommodate refugees with regard to employment matters.

Refugees are entitled to basic education. However, some schools do not easily enrol refugee children as they fear that they will be unable to provide for their education costs and become a burden to the institution. Refugee children also do not often possess the necessary documents to secure a place in a school they would want to

¹⁶⁶⁹ *Government of the RSA and Others v Grootboom and others* note 1394 above, para 38.

attend. For instance, they do not have school reports which are required to place learners at the appropriate grade level in a school. In theory, refugees also have access to higher education. But, in practice, they are vulnerable and do not have access to bursaries, scholarships and study loans provided by the government and other private institutions to the indigenes. International law provides for remission of fees and award of scholarships to refugees to enable access to tertiary education.¹⁶⁷⁰ It is submitted that the government of South Africa and private institutions should provide some funding for refugees in order to attend higher education.

Refugees have access to social grants, such as child support grants, disability grants and old age grants. However, they experience excessive difficulties in accessing child support grants as some relevant authorities require unabridged birth certificates that are issued to South Africa citizens only at birth. It is submitted that the Department of Social Services has to accept the relevant, equivalent and appropriate documents that refugees possess when they apply for child support grants and other social support mechanisms.

Refugees are also entitled to health care services. However, they experience challenges in accessing the right to health care services in some hospitals and health clinics. For instance, some nurses refuse to communicate in English and only use their mother tongue when they offer services to refugee patients. Some refugees are also not articulate in English and language becomes a constricting barrier in accessing the right to health. It is submitted that the language barrier could be resolved by providing appropriate interpretation services to assist refugee

¹⁶⁷⁰ Convention Relating to the Status of Refugees, note 23 above, Article 22 (2).

patients to access medical assistance. Personnel for the Health Department should do everything possible to assist refugee patients and avoid discrimination and xenophobic attitudes. In the light of these conclusions, recommendations are derived and submitted below.

7.3 Recommendations

The recommendations are based on the study undertaken in this thesis. They are directed to government departments, UNHCR, legislature, refugees and South African society. General recommendations aim to improve and promote the current conditions for the integration of refugees in South Africa. They deal with the protection of refugees in South Africa while specific recommendations propose refugee law reform. General recommendations are outlined below and these are followed by specific recommendations.

7.3.1 General recommendations

i. *Ubuntu* should be used to welcome and host refugees

Ubuntu means humanness and is commonly observed in African societies. In South Africa, it manifests in human dignity, and is extended to receive and care for strangers.¹⁶⁷¹ The individual needs a community in order to survive because the seminal precept is that a person is only human relative to other human beings. Some proverbs in South Africa indicate hospitality towards foreigners, including refugees. Jurisprudence indicates that South African society has always welcomed strangers. The *Ubuntu* principle demonstrates the inextricable interdependence of individuals

¹⁶⁷¹ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* note 298 above, para 145.

in a society. The concept of *Ubuntu* requires people to be treated with respect and dignity. Public servants and members of the society should practise *Ubuntu* when dealing with people from other countries. It is submitted that the concept of *Ubuntu* should be strengthened and observed by public officials and members of the community when dealing with refugees. This will improve the treatment of refugees and other migrants in South Africa.

ii. The Department of Justice and Correctional Services should prosecute individuals who have committed genocide, war crimes and crimes against humanity

The institution of asylum is sacred and excludes individuals who have committed serious crimes such as genocide, war crimes and crimes against humanity. As a general principle, these individuals should not benefit from asylum. If they are found in South Africa, they must be returned to their home countries. However, they cannot be returned to their home countries if they are going to experience torture, inhuman or degrading treatment and / or gross violations of human rights. In these circumstances, there is no clear indication on how they should be treated. It is submitted that South Africa should prosecute these individuals in order to avoid impunity and continue observing the sanctity of asylum.

iii. The South African government should grant citizenship by naturalisation to refugees who do not repatriate when the UNHCR has declared cessation clause

Cessation clause for ceased circumstances is declared by the UNHCR where it decides that specific refugees from one country can no longer continue to be

refugees. This means that refugees must voluntarily repatriate as the circumstances in their country of origin have fundamentally changed. However, there are refugees who do not want to repatriate voluntarily due to genuine reasons arising out of the previous persecution. They cannot remain refugees forever and need to change their status in the host country.

Currently, South Africa considers permanent residence permits for refugees who cannot voluntarily repatriate to their home countries when the UNHCR has declared that circumstances in their countries have fundamentally changed for the better. However, they still have to successfully apply for certification that they will remain refugees indefinitely. If they acquire permanent residence permits, former refugees do not have any contact or connection with their home countries. They experience limited freedom of movement as they cannot obtain passports from their countries of origin like other permanent residence permit holders. In addition, they face challenges registering their children when they give birth as the Department of Home Affairs requires them to bring passports from their own countries. Former refugees who hold permanent residence permits often apply for naturalisation after five years of continuous residence in the country. It is submitted that the South African government should naturalise refugees who cannot voluntarily repatriate to their home countries when UNHCR has declared cessation clauses. This will allow them to become citizens of the host country, have freedom of movement and register their children when they are born.

iv. The Department of Home Affairs should grant travel documents to former refugees who have acquired permanent residence permits

In South Africa, a person ceases to be a refugee when he or she acquires citizenship of another country and enjoys the protection of his or her new nationality.¹⁶⁷² Former refugees who hold permanent residence permits cannot apply for refugee travel documents. They are unable to obtain passports from their country as they received permanent residence permits via the asylum route. As a result, they experience limitations in exercising their freedom of movement. It is submitted that the Department of Home Affairs should grant travel documents to former refugees who are permanent residence holders in order to facilitate their freedom of movement.

v. The Department of Home Affairs should register as permanent residence holders children of former refugees who obtained permanent residence permits

Applicants who received permanent residence permits via the asylum system encounter challenges in registering their new born babies. The Department of Home Affairs requests parents to go to their respective embassies and apply for passports for their children. Nevertheless, as former refugees, they cannot approach the embassies of their countries of origin. In this circumstance, such children remain without proper documentation to identify themselves. It is submitted that the Department of Home Affairs should issue permanent residence permits at birth to children whose parents obtained permanent residence permits through the asylum procedure.

¹⁶⁷² Refugees Act note 32 above, s 5 (1) (c).

vi. The Department of Home Affairs should re-open Refugee Reception Offices in major cities (Johannesburg, Cape Town and Port Elizabeth)

The Department of Home Affairs has closed down Refugee Reception Offices in Cape Town and Port Elizabeth to new asylum seekers. In addition, the Crown Mines Refugee Reception Office in Johannesburg has been closed down completely. It has been relocated to Pretoria and then merged with the Desmond Tutu Refugee Reception Office. Various court decisions have ordered the Department of Home Affairs to re-open Refugee Reception Offices in Port Elizabeth, Cape Town and Johannesburg. However, the Department of Home Affairs has ignored court orders to re-open the above Refugee Reception Offices to new comers or completely to both asylum seekers and refugees. Refugees currently have to travel long distances and pay for transport costs in order to access asylum services. It is submitted that the Department of Home Affairs should respect the rule of law and adhere to court decisions and re-open Refugee Reception Offices in Cape Town, Port Elizabeth and Johannesburg.

vii. The South African government should have a policy on economic migrants to regularise their sojourn

South Africa experiences unreasonable delays in the processing of asylum applications. The Department of Home Affairs only approves 5 percent of asylum applications and rejects the remaining 95 percent as they are economic migrants. Asylum seekers who are rejected often appeal against or review such decisions to the RAB or SCRA respectively. As a result, there is a persistent backlog in the processing of asylum applications. Therefore, South Africa does not pay appropriate consideration and sense of urgency to the plight and frustrations of refugees. In

order to find a solution to the backlog, South Africa should adopt a policy on economic migrants allowing them to legalise their sojourn and work in the country. This will alleviate the burden of the Department of Home Affairs in considering asylum applications for persons who do not qualify for refugee status as they are economic migrants.

viii. The Department of Home Affairs should provide proper interpretation services in the asylum process

It is common cause that language creates a barrier in accessing asylum services. Many refugees do not have sufficient proficiency in English to express themselves when they apply for asylum. They need appropriate and often extensive interpretation services in order to make a proper claim for asylum. Sometimes, the Department of Home Affairs requests individuals to bring their own interpreters when it cannot find an interpreter on its own. This policy jeopardises or compromises the asylum system. It is submitted that the Department of Home Affairs should provide appropriate interpretation services in the asylum application process to ensure adequate and professional services to refugees.

ix. The Department of Home Affairs should promote family reunification

The Refugees Act provides that a dependant of a refugee is also a refugee. However, this only applies to dependants who arrive at the same time as the principal applicant. Dependants who arrive after the principal applicant has been recognised as a refugee have to submit their own individual asylum applications. It is submitted that the Department of Home Affairs should grant refugee status to the dependants of a refugee who arrive after the principal applicant has been granted

refugee status permit. In addition, a refugee cannot marry an asylum seeker as he or she will become a refugee as a dependant. This is a violation of the rights to human dignity as well as freedom and security of the person. It is submitted that refugees should be able to marry any person of their choice regardless of their asylum situation. Furthermore, South Africa should strive to promote family reunification for recognised refugees and facilitate spouses or children to be reunited with their families as it is the case in Tanzania.

x. The Department of Home Affairs should assist unaccompanied refugee children to apply for asylum

Unaccompanied refugee children are vulnerable and face serious challenges. Currently, they are assisted by the Children's Courts and social workers. Nonetheless, the first contact in any asylum claim is the Department of Home Affairs. It is submitted that the Department of Home Affairs should assist unaccompanied refugee children in submitting applications for asylum and having access to other social services. The best interests of the child should always be considered in making a decision on the asylum applications for unaccompanied refugee children.

xi. The Department of Home Affairs should waive the requirement of documents from the country of origin for former refugees when they apply for naturalisation

Permanent residence permit holders are entitled to apply for South African citizenship by naturalisation after five years of continuous residence in the country. This provision also applies to individuals who acquire permanent residency permits

via the asylum system. Some of the documents required in applying for naturalisation include police clearance certificates from the country of origin and renunciation of citizenship if the country of origin does not allow dual citizenship. Former refugees who fled persecution from governments of their countries of origin cannot obtain any document from them. It is submitted that the Department of Home Affairs should waive the requirement for documents from countries of origin for former refugees who qualify to apply for naturalisation.

xii. The Department of Human Settlements should provide access to adequate housing for refugees

Refugees are a vulnerable group in South Africa. They often lose their properties in flights from hotbeds of violence in order to seek asylum. Refugee groups often consist of women, children, unaccompanied minors, disabled and elderly persons who live in desperate and deplorable conditions. The Refugees Act does not provide for access to housing for refugees. However, they are entitled to have access to adequate housing in terms of the Bill of Rights in the Constitution. It is submitted that the Department of Human Settlements should facilitate access to adequate housing for refugees, specifically women, children, unaccompanied minors, disabled and aged people. This could alleviate their living conditions. Establishing refugee camps and settlements as experienced by Zambia and Tanzania should not be implemented in South Africa as they limit freedom of movement for refugees and isolate them from the rest of the population of the host country. Department of Human settlements should facilitate access to adequate housing for refugees within its available resources.

xiii. The Department of Basic Education should facilitate attendance of refugee children in basic education facilities

Refugees are entitled to access basic education at the same level as citizens in South Africa. However, refugee children often experience strictures in accessing basic education. As we pointed out in Chapter Six, some principals do not enrol unaccompanied refugee children and refugee children as they believe such learners will be unable to pay for their education costs and become a burden to the school. Furthermore, refugee children do not always have school reports to enable principals enrol them at the appropriate grade levels. It is submitted that the Department of Basic Education should facilitate the refugee children to enrol and attend in basic education facilities in order to promote the right of access to basic education for every child.

xiv. The Department of Higher Education and private institutions should provide financial assistance to refugees in order to attend further education

Refugee students are vulnerable and require financial assistance to pay for the costs of university education such as school fees, books, accommodation and food. Tertiary education is very expensive in South Africa. Currently, the Department of Higher Education and private companies only give bursaries, scholarships and study loans to South African citizens only. Refugees are unable to obtain financial assistance in order to pursue higher education. International law provides for remission of fees, charges and award of scholarships to refugees to enable their access to higher education.¹⁶⁷³ It is submitted that the Department of Higher

¹⁶⁷³ Convention Relating to the Status of Refugees, note 23 above, Article 22 (2).

Education and private institutions should include refugees among individuals who could benefit from various bursaries, scholarships and study loans. This could promote and encourage refugees to further their education.

xv. The Department of Social Development should provide social grants to refugees

Refugees have the right of access to appropriate social assistance and security if they are unable to support themselves and their dependants. Social grants available to refugees are child support grants, old age grants, foster grants and disability grants. However, refugees experience massive problems in accessing these grants as the Department of Social Services requires documents that refugees do not have, for instance an unbridged birth certificate to access child support grants. It is submitted that the Department of Social Development should facilitate access to social grants by requiring documents that refugees could reasonably obtain.

xvi. The Department of Home Affairs should issue unbridged birth certificates to refugee children

The Department of Home Affairs does not grant unbridged birth certificates to children born in South Africa to foreign parents, including refugees and asylum seekers. Refugee children born in South Africa merely receive handwritten birth certificates from the Department of Home Affairs. Without unbridged birth certificates, they experience constraints and limitations in accessing medical assistance, social grants and education. It is submitted that the Department of Home Affairs should issue unbridged birth certificates to refugee children born in South Africa to facilitate their access to social grants, schooling and medical assistance.

In this way, the Department of Home Affairs will be promoting refugee rights, specifically children's rights.

xvii. Officials in the Department of Health should use language understandable to refugee patients when they seek medical assistance

Refugees are entitled to basic health services like citizens. However, they face language barriers as some employees in hospitals and clinics use their mother tongues when they communicate with refugee patients. Some refugees also do not understand English and are unable to communicate proficiently with medical personnel. It is submitted that medical personnel should use English when they interact with refugee patients and use interpretation services when necessary to ensure adequate diagnosis, communication and services.

xviii. Government of South Africa should remove barriers preventing refugees from accessing labour market

Refugees are entitled to seek employment in South Africa in terms of the Refugees Act. However, the labour market is restricted to citizens and permanent residence holders only, to the exclusion of refugees. The South African government has a policy to promote affirmative action in hiring practices for people from groups which have been historically disadvantaged by unfair discrimination. This means that refugees are excluded from accessing employment on preferential basis as compared to individuals from designated groups and permanent residents. It is common cause that refugees constitute a vulnerable group in South African society. Thus, they should be allowed to have access to employment opportunities at least at the same level as permanent resident holders in South Africa. It is submitted

that the South African government should remove all barriers that prevent refugees from accessing the labour market so that they can have access to various employment opportunities. This will enable refugees to use their talents and contribute to the development of South Africa.

xix. The Department of Home Affairs should increase the personnel for SCRA in order to adequately assess the applications for certification

SCRA is an independent institution dealing with refugee matters, including certification that a refugee will remain a refugee indefinitely. In this regard, it evaluates refugee applications for the whole country. It needs enough personnel in order to appropriately and timeously assess the applications for certifications for individual refugees who want to apply for permanent residence permits. It is recommended that the Department of Home Affairs should decentralise the operations of the SCRA and increase its personnel in order to timeously consider the applications for certifications.

xx. The South African parliament should not prohibit refugees from acquiring permanent residency permits

The 2017 White Paper on International Migration proscribes refugees from automatically acquiring the right to permanent residence or citizenship in South Africa. It makes a provision for refugees to apply for a long-term residence visa after ten years of continuous residence in South Africa and the SCRA has to certify that the applicant will remain a refugee indefinitely. There is no automatic right to permanent residence permits for refugees in South Africa as the SCRA has a duty to certify that the applicant will remain a refugee indefinitely before he or she applies

for a permanent residence permit. It is submitted that the South African parliament should not prohibit refugees from acquiring permanent residence permits and thereafter naturalisation certificates. This will promote the full integration of refugees in South Africa and comply with the international refugee law.

xxi. The UNHCR should advocate naturalisation for certain refugees when it declares cessation clauses

The UNHCR can declare a cessation clause with respect to fundamental changes in the circumstances in refugee producing countries. Such declarations have occurred for certain refugees from Mozambique, Angola, Liberia and Rwanda. A cessation clause means that the circumstances in the country of origin have changed to the point that it is safe for all refugees to voluntarily repatriate. However, there are some refugees who cannot repatriate due to genuine reasons arising from the previous persecution. These individuals cannot continue to be refugees as the UNHCR has declared fundamental changes in circumstances in their home countries. It is submitted that the UNHCR should advocate for citizenship by naturalisation for refugees who cannot voluntarily repatriate when cessation clauses have been declared and approved. This will assist these refugees to become citizens and acquire full protection of their new country.

xxii. The UNHCR should advocate for permanent residence permits for certain refugees affected by fundamental changes in their home countries

Whenever conditions change in refugee producing countries, refugees from affected countries are expected to voluntarily repatriate. However, there are some refugees who do not take advantage of such repatriation due to genuine reasons of fear of

persecution in their home countries. Some host countries do not concur to naturalise refugees from such countries. In these circumstances, the UNHCR should advocate for permanent residence permits for certain refugees who do not want to voluntarily repatriate in the case of cessation of hostilities or fundamental changes in the circumstances of the country of origin. This would prevent former refugees from becoming stateless when conditions have changed in their home countries but are unwilling to voluntarily repatriate.

xxiii. The UNHCR should provide shelter and basic needs for vulnerable refugees

The UNHCR has a mandate to ensure the protection of refugees. Most refugees are destitute as they often lose all their properties during the flight. Refugees who are in dire need of assistance include women, children, unaccompanied minor children, elderly and disabled persons. It is submitted that the UNHCR should provide shelter and basic needs to refugees, specifically the vulnerable groups.

xxiv. The South African government should establish a Refugee Trust Fund

The South African government should establish a Refugee Trust Fund as it is the case in Tanzania and Zambia. The Refugee Trust Fund could then receive moneys and donations to fund activities related to refugee issues. The Refugee Trust Fund can have a legal personality and own its property for the benefits of refugees. The Auditor General can assess the activities of the fund to ensure that moneys acquired are used appropriately.

xxv. The South Africa government should introduce integration courses for refugees

The government of South Africa should introduce integration courses for refugees as it is the case in the Netherlands and Germany. Integration courses have to contain the history, culture and values of South African society. They should also include provisions in the Bill of Rights under Chapter 2 of the Constitution of the Republic of South Africa. In this way, refugees will have adequate knowledge of South Africa and shape their behaviour appropriately.

7.3.2 Specific recommendations

i. Section 4 of the South African Citizenship Act be amended to naturalise refugees who face cessation clause and cannot be voluntarily repatriated to their home countries

Section 4 of the South African Citizenship Act should be amended to grant citizenship by naturalisation to refugees who experience cessation clause, but cannot repatriate due to events arising from the previous persecution in the country of origin. In this regard, it is recommended that the section be amended to read as follows:

“4 (4) - A refugee qualifies to apply for South African citizenship if he or she does not voluntarily repatriate when the UNHCR has declared fundamental changes for ceased circumstances in his or her country of origin. However, the SCRA has to certify that he or she will remain a refugee indefinitely.”

ii. Section 1 of the Refugees Act should be amended to include the definition of “indefinite refugee”

Currently, the Refugees Act does not define the term “indefinite refugee”. A refugee can apply for permanent residence permit in terms of the Immigration Act. However, the SCRA has to certify that he or she will remain a refugee indefinitely. To enable a refugee to know and understand the criteria that he or she must fulfil, the definition of indefinite refugee is needed. In this regard, it is recommended that section 1 of the Refugees Act be amended to read as follows:

“1 - Indefinite refugee – means a person who still satisfies the definition of a refugee when he or she applies for certification that he or she will remain a refugee indefinitely.”

This indicates that the criteria for being a refugee still applies and the candidate must satisfy the conditions of being a refugee at the moment of his or her application.

iii. Section 27 (c) of the Refugees Act be amended to include a provision to the effect that five years’ period for a refugee to apply for a permanent residence permit starts from the time he or she entered South Africa

Currently, a refugee can apply for an immigration permit in terms of the Immigration Act after a period of five years’ continuous residence from the time he or she has been recognised as a refugee. There are unreasonable delays in the processing applications for asylum in South Africa. Furthermore a person becomes a refugee from the time he or she leaves his or her country to seek asylum. The declaration that a person is a refugee does not make him or her a refugee but confirms that he or she is the one. From this principle, it is submitted that section 27 (c) of the

Refugees Act should be amended to provide that a refugee is entitled to apply for an immigration permit after a period of five years from the time he or she entered the Republic of South Africa. In this regard, section 27 (c) should read as follows:

27 (c) - A refugee is entitled to apply for a *permanent residence permit* in terms of the *Immigration Act, 2002*, after five years' continuous residence in the Republic from the date on which he or she *entered South Africa*, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

iv. Section 23 (1) (a) of Private Security Industry Regulation Act be amended to include refugees among persons who can be registered as security service providers

The security service industry employs many people in South Africa and does not require much sophisticated skills. A potential security service provider must be registered in order to seek employment and work in the security industry. As the law stands, only South African citizens and permanent residence holders qualify to register as security service providers. This means that refugees cannot be allowed to work in the security industry as security service providers. It is submitted that section 23 (1) (a) of the Private Security Industry Regulation Act should be amended to include refugees among persons who qualify to register as security service providers in order to work in the security industry. In this regard, section 23 (1) (a) of Private Security Industry Regulation Act should be amended to read as follows:

23 (1) (a) – Any natural person applying for registration in terms of section 21 (1), may be registered as a security service provider if the applicant is a fit and proper person to render a security service, and –

(a) is a citizen or has permanent resident status *or has a refugee status* in South Africa;

Refugees still have to comply with other requirements for registration as security service providers in order to access the labour market in the security industry.

v. Section 24 (2) (b) of Legal Practice Act be amended to include refugees among persons who can practice as legal practitioners in South Africa

The Legal Practice Act 2014 requires admission and enrolment as legal practitioners for persons to work in the legal profession in South Africa. Only South African citizens and permanent residence permit holders qualify to enter the legal profession and practice law. This means that refugees cannot be allowed to work as legal practitioners even if they satisfy all other necessary requirements. It is submitted that section 24 (2) (b) of the Legal Practice Act should be amended to allow qualifying refugees to be admitted and enrolled as legal practitioners in order to practice law in South Africa. In this regard, section 24 (2) (b) of the Legal Practice Act should read as follows:

24 (2) (b) – The High Court must admit to practice and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she -

(a) ...

(b) is a –

(i) South African citizen; or

(ii) Permanent resident in the Republic; or

(iii) Refugee in the Republic;

The above amendment will allow suitably qualified refugees to enrol as legal practitioners and practice law in South Africa.

7.4 Summary

This thesis presented a comprehensive analysis of the law and state practice on the question of integration of refugees in South Africa. In particular, the thesis analysed the genesis of refugee problem, international and regional conventions on refugees, state practices in integrating refugees and reception of refugees in South Africa. The thesis also evaluated the rights of refugees to acquire legal documentations, including refugee status permits, certification letters, permanent residence permits and certificates of naturalisation. Furthermore, the thesis analysed the rights of refugees, specifically the right to have access to adequate housing, the right to employment, the right to education, the rights to basic social and health care services.

The thesis has attempted to make a positive and meaningful contribution to the existing store of knowledge in the integration of refugees and state practices. The thesis is of practical value to refugees, law students, academics, judges, legislators, state officials or departments, legal practitioners and UNHCR. The knowledge constructed and contained in this thesis can assist parliament to intervene and protect the rights of refugees in South Africa. In addition, it is hoped that the recommendations made will play a significant role on promoting the integration of refugees in South Africa.

7.5 Further research agenda

During the course of this study, the author has identified three issues that need further research. They are environmental refugees or climate refugees, xenophobia and corruption in asylum system.

7.5.1 Environmental refugees

Environmental refugees are individuals who have been compelled to leave their habitual residence, temporarily or permanently, because of environmental calamities that undermined their existence or seriously affected the quality of their lives.¹⁶⁷⁴ These calamities can be classified into three categories: disasters, expropriations and deteriorations.¹⁶⁷⁵ Factors that can cause environmental refugees are drought, soil erosion, desertification, deforestation, population pressures, profound poverty and other environmental problems.¹⁶⁷⁶ Environmental refugees exist worldwide especially in developing states of Africa, Asia and Latin America.¹⁶⁷⁷ The Kampala Convention¹⁶⁷⁸ contains provisions preventing displacement induced by projects carried out by public or private actors. However, environmental refugees are not recognised as refugees in international and regional laws. This creates a legal and humanitarian problem, especially if they have crossed

¹⁶⁷⁴ D.C. Bates, "Environmental Refugees? Classifying Human Migrations Caused by Environmental Change" (2002) 23 (5) *Population and Environment* p. 466; R. Ramlogan, "Environmental Refugees: a Review" (1996) 23 (1) *Environmental Conservation* p. 82.

¹⁶⁷⁵ Bates note 1674 above, p. 469; J. McAdam, "Review Essay: From Economic Refugees to Climate Refugees" (2009) 10 *Melbourne Journal of International Law* p. 582.

¹⁶⁷⁶ N. Myers, "Environmental Refugees: a Growing Phenomenon of the 21st Century" (2002) 357 *Phil. Trans. R. Soc. Lond. B* p. 609.

¹⁶⁷⁷ Myers note 1676 above, p. 609.

¹⁶⁷⁸ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009, Article 10.

an internationally recognised border. Further research is needed on environmental refugees to ensure that they are internationally recognised and protected.

7.5.2 Xenophobia towards refugees in South Africa

South Africa experienced major xenophobic tensions and attacks in May 2008.¹⁶⁷⁹ Similar atrocious events also occurred in 2015 and 2019. In these incidents, local residents attacked African foreign nationals, destroyed their houses and looted their businesses.¹⁶⁸⁰ Some individuals lost their lives and others decided to go back to their home countries.

Xenophobia refers to the fear or hatred of foreign nationals and capitalises on the concept of “otherness” in a country.¹⁶⁸¹ It manifests itself in the attitudes of some black South Africans towards other African people.¹⁶⁸² In South Africa, xenophobia relies on myths and stereotypes with respect to the perceived negative impact on

¹⁶⁷⁹ C. Steenkamp, “Xenophobia in South Africa: What Does it Say About Trust?” (2009) 98 (403) *The Round Table* p. 439; J. Hickel, “Xenophobia in South Africa: Order, Chaos, and the Moral Economy of Witchcraft” (2014) 29 (1) *Cultural Anthropology* p. 103.

¹⁶⁸⁰ Steenkamp note 1679 above, p. 439.

¹⁶⁸¹ Hickel note 1679 above, p. 122.

¹⁶⁸² L.B. Landau, K. Ramjathan-Keogh and G. Singh, “Xenophobia in South Africa and Problems Related to it”, 2005, p. 4. Available at https://s3.amazonaws.com/academia.edu.documents/28806095/13_xenophobia.pdf?response-content-disposition=inline%3B%20filename%3DXenophobia_in_South_Africa_and_problems.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20191012%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Date=20191012T190658Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=9245ab31d106bb5729288a7cb0f831fe5279e52c6c3f639fca6f04e850677250 (accessed on 12 October 2019).

black African foreigners. Specifically, they are accused of committing crimes, bringing diseases, stealing employment and swamping social services.¹⁶⁸³ States have a duty to take all the necessary legislative and administrative measures to eradicate all forms of xenophobia and other related exclusionary discrimination.¹⁶⁸⁴ Xenophobia affects refugees and other foreign African migrants. There is a need to conduct a research on the impact of xenophobia on refugees and asylum system in South Africa so that the phenomenon of othering and xenophobia could be eradicated.

7.5.3 Corruption in the asylum system

There have been reports of incidents of corruption in state institutions, especially in the Department of Home Affairs.¹⁶⁸⁵ Corruption is a serious crime and affects detrimentally refugees when they seek assistance from the relevant authorities.¹⁶⁸⁶ Corruption must be eradicated in order to improve the provision of services to

¹⁶⁸³ Steenkamp note 1679 above, pp. 439 – 440.

¹⁶⁸⁴ World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, 2001, para 70.

¹⁶⁸⁵ A. Minnaar, "A Symbiotic Relationship? Organised Crime and Corruption in South Africa", 1999, p. 6. Available at https://www.researchgate.net/profile/Anthony_Minnaar/publication/301899561_A_SYMBIOTIC_RELATIONSHIP_ORGANISED_CRIME_AND_CORRUPTION_IN_SOUTH_AFRICA_MINNAAR-1999/links/572c658a08ae25c48c308b2d.pdf (accessed on 12 October 2019).

¹⁶⁸⁶ R. Amit, "Queue Here for Corruption – Measuring Irregularities in South Africa's Asylum System" 2015 *Lawyers For Human Rights and the African Centre for Migration and Society Report* p. 20. Available at https://s3.amazonaws.com/academia.edu.documents/38314486/queue-here-for-corruption---july-2015.pdf?response-content-disposition=inline%3B%20filename%3DQueue_Here_for_Corruption_Measuring_Irre.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20191012%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Date=20191012T111820Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=d9b1186c93fc83be3e37cd4d6cfe4a17d0bf9f69a771b05c50d4943ef647ad67 (accessed on 12 October 2019)

refugees. Therefore, there is a need to do extensive research on how corruption affects the asylum system in South Africa with a view to eradicating the scourge.

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