

**A comparative study on the extension of social security protection to non-citizens in
the SADC region and the European Union.**

BY,

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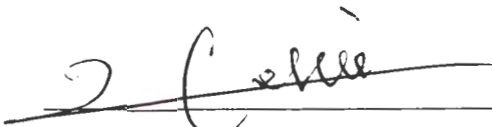
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CANDIDATE'S DECLARATION

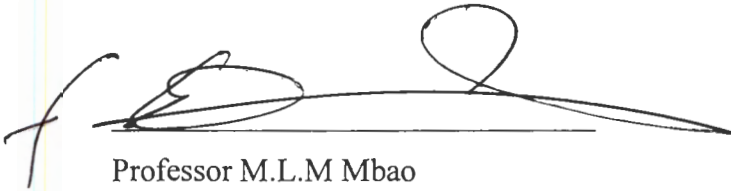
I declare that this dissertation for the Degree of Master of Laws in the North-West University (Mafikeng Campus) hereby submitted, has not previously been submitted by me for a Degree at this or other university, that it is my own work in design and execution and all material contained herein has been duly acknowledged.



DIEUDONNE COFFIE WABO

STATUTORY DECLARATION

I, Professor Melvin L.M Mbao, hereby declare that this dissertation by Dieudonne Coffie Wabo for the Degree of Master of Laws (LLM Labour and Social Security Law) be accepted for examination.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a horizontal line.

Professor M.L.M Mbao

May 2007

ABSTRACT

This study deals with the investigation of the social protection of refugees and asylum seekers in the SADC region and the European Union. The apparent general plight of refugees and asylum seekers calls for, in my view, a well coordinated, sustained and all inclusive activity for their social protection. Often classified unfairly with economic migrants, refugees flee their country not for economic gain but to escape persecution, the threat of imprisonment and even threats to their lives. They need a safe haven where they can recover from mental and physical trauma and rebuild their hopes for a better future. The intolerance that is often at the root of internal displacement and refugee flows is also present in some of the countries that refugees flee to. Instead of finding empathy and understanding, they are often met with mistrust or scorn.

While most refugees want to go home, some cannot safely return. But wherever they are, refugees will always strive to pick up the pieces and start over. The courage and determination demonstrated during their darkest hours will serve them well in rebuilding a new life. Refugees wherever they originate and irrespective of colour, race and creed, are human beings and are entitled to protection under law. They are, invariable, victims of oppression and exploitation in their country of origin and seek asylum in another country primarily to consolidate their struggle against their oppressors at the country of origin. Attention will not only be on the plight of refugees and the causes of their exile, but also on their determination and will to survive and on the contributions they make to their host communities. Let us honour them for these qualities and recognise the richness and diversity they bring to our societies. Let's not forget that some day in the future any one of us could be knocking at a stranger's door hoping to find a safe and friendly shelter. We should extend refugees the same kind of welcome we would like to receive if we were in their position.

Giving fleeing civilians emergency food, shelter and other material assistance is often the first step toward their long term protection and rehabilitation. Countries like Germany

and South Africa that proclaim democracy ought to subscribe and demonstrate by act and deed a commitment to the core values of the democracy, social justice and fundamental human rights. The courts likewise ought to uphold these rights without favour or fear and express themselves unequivocally in ensuring that the rule of law is unimpeded by the executive, legislature and state organs.

TABLE OF CASES

SOUTH AFRICA

- 1) *Baloro and Others v University of Bophuthatswana and Others*, 1995, (4), SA 197 (BOP).
- 2) *Baromoto v. Minister of Home Affairs* 1998 BCLR 562 (W)
- 3) *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T)
- 4) *Johnson v. Minister of Home Affairs* 1997 (2) SA 432 (C).
- 5) *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).
- 6) *Larbi-Odam and Others v MEC for Education (North-West Province) and the Minister of Education*, 1997, BCLR, 1655 (CC).
- 7) *The Scalabrini Centre of Cape Town and Others v The Minister of Social Development and Others*, TPD Case no. 32054/2005 (unreported).
- 8) *Union of Refugee Woman v The Private Security Industry Regulatory Authority and Others*, CCT 39/06 (unreported).
- 9) *Watchenuka v. Minister of Home Affairs* 2003 (1) SA 619 (C).
- 10) *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)

EUROPEAN UNION

- 1) ECJ, judgment of 4 May 1999, case C – 262/96, (1999), ECR.
- 2) *Gaygusuz v. Austria*, application no. 39/1995/545/631, RJD 1996-IV 1129
European Court of Human Rights, judgment of 16 September 1996.
- 3) *Surul judgment*, ECJ of 4 May 1999, case C – 262/96, (1999), ECR.
- 4) Press Release No 51/01 of 11 October 2001, judgments of the Court of Justice in
joined cases C – 95/99 to C – 98/99 and C – 180/99.

TABLE OF ACTS/STATUTES

SOUTH AFRICA

- 1) Aliens Control Act, 96 of 1991.
- 2) Constitution of the Republic of South Africa of 1996.
- 3) Immigration Act No. 13 of 2002.
- 4) Refugees Act 130 of 1998.
- 5) Social Assistance Act 13 of 2004.
- 6) Social Assistance Act 59 of 1992.
- 7) Social Welfare White Paper 1997 GN 1108 in GG 18166.

GERMANY

- 1) Social Security Codex (*Sozialgesetzbuch*)
- 2) Asylum- Seeker Service Law (*Asylbewerberleistungsgesetz*)

- 3) Income Tax Act (*Einkommensteuergesetz*)
- 4) Federal Child Benefit Act (*Bundeskindergeldgesetz*)

REGIONAL AND INTERNATIONAL INSTRUMENTS

- 1) Charter of Fundamental Rights of the European Union 2000.
- 2) Charter of Fundamental Social Rights in SADC 2003.
- 3) Convention on the Rights of the Child 1989.
- 4) Convention Relating to the Status of Stateless Persons 1954.
- 5) Council Directive 2003/9/EC of 2003.
- 6) Council Directive 2004/83/EC of 2004.
- 7) Decision on the Fiftieth Anniversary of the adoption of the 1951 Convention on the Status of Refugees AHG/Dec. 6 (XXXVII) 2001
- 8) Draft Protocol on the Free Movement of Persons in SADC. 15TH March 1996
accessed _____ at
<http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/1996/draftprotocol.htm>
- 9) Draft SADC Code on Social Security.
- 10) Draft Refugee White Paper 1998
- 11) European Social Charter of 1961
- 12) ILO Social Security (Minimum Standards) Convention 102 of 1952.
- 13) International Covenant on Civil and Political Rights, (ICCPR) 1966.
- 14) International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966.
- 15) International Migration Review (1991) IMR

- 16) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969.
- 17) Regulation (EEC) No. 1408/71 of 1971
- 18) SADC Treaty of 1992.
- 19) Treaty of the European Union 1992.
- 20) UN Convention Relating to the Status of Refugees 1951.
- 21) Universal Declaration of Human Rights 1948.

LIST OF ABBREVIATIONS

- | | |
|-----------|--|
| 1) SADC | Southern Africa Development Community |
| 2) EU | European Union |
| 3) UDHR | Universal Declaration of Human Rights |
| 4) UNHCR | United Nations High Commissioner for Refugees |
| 5) OAU | Organisation of African Unity |
| 6) CRC | Convention on the Rights of the Child |
| 7) ILO | International Labour Organisation |
| 8) ICESCR | International Covenant on Economic, Social and Cultural Rights |
| 9) ICCPR | International Covenant on Civil and Political Rights |
| 10) ECT | European Community Treaty |
| 11) ECHR | European Court of Human Rights |

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Finally, my gratitude also goes to God almighty who gave me the strength to complete this study.

DEDICATION

This dissertation is dedicated to my late father Mr Frederick Tante Coffie.

CHAPTER ONE: INTRODUCTION

1.0 BACKGROUND

The concept of social protection could be construed as policies which ensure that all people have adequate economic and social protection during unemployment, ill-health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution.¹ The right to social security is one of the many inalienable rights proclaimed in the Universal Declaration of Human Rights (UDHR)² to which all humanbeings, regardless of citizenship or nationality, are entitled. This right, established by the Declaration of Non-Nationals³, comprises the basis of this study.

A citizen is a subject of a State to whom he or she owes allegiance and is entitled to its protection. A non-citizen is hereby defined as any individual who is not a national of a State in which he or she is present⁴. It is important to expound that there are various categories of non-citizens. According to Alexander P *et al*,⁵ there are various legislated non-citizens living in South

¹ This is the position of the South African Social Welfare White Paper GN 1108 in GG 18166 of 1997.

² UDHR 1948 Article 22 is to the effect that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state of the economic, social and cultural rights indispensable for his dignity and the free development of his personality; Accessed from <http://www.answers.com/topic/social-security>

³ UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live. 1985. Article 8(1) (c) provides that aliens lawfully residing in the territory of a State shall enjoy, in accordance with the national laws, the right to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfill the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State.

⁴ UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, *Ibid* note 3, Article 1.

⁵ Alexander, P, Shindondola, H, "Social Security for Non-Citizens in South Africa: *A Draft Report on Sociological Research*", Rand Afrikaans University: Centre for Sociological Research, at 12.

Africa namely, permanent residents, temporary residents, refugees, asylum seekers and undocumented migrants. Foreigners are mainly projected as a homogeneous group in South Africa, including basically anyone without South African citizenship. This differentiation has raised serious concern as in most cases social policies are aimed at meeting the needs of nationals of the country concerned. As a result, non-citizens are relegated to the background and marginalised, especially when competing for limited resources with citizens. One can say that the plight of non-citizens start from the responsibility which the government owes to its citizens to protect their welfare. Olivier et al⁶ confirm this assertion by stating that the position of non-citizen migrants in social security terms is a problematic theme in general because national social security legislation often contains provisions which adversely affect the social security protection of non-citizen migrants and the nationality condition sometimes apply, which may exclude this group from the personal scope of application of the social security schemes. Usually, migration control is tightened so as to deter the inflow of these people, in particular refugees and asylum seekers who are often believed to become liability or social burden of the host country.

However, it should be borne in mind that refugee protection is not a problem of migration control. It could be said that refugees are conceptually different from migrants as they have lost the protection of their home State. Thus, migration control and refugee protection are separate systems pursuing different goals. The systemic goal of migration control is to manage the inflow, presence, and outflow of non-citizens on state territory. Refugee protection is about the universal safeguarding of a certain level of human rights. Broadly-speaking, the rationale was to safeguard human rights when the country of origin had failed to protect individuals under its jurisdiction. We are hereby left with a formidable

⁶ Olivier *et al* (2003) Social Security: A Legal Analysis, Durban: Lexis Nexis Butterworths at 624.

conflict between the state's prerogative to exclude and the human rights imperative to include.⁷

Among these broad categories of non-citizens, this study is centred on the social security rights of refugees and asylum seekers. In realising this goal, the national, regional and international legal framework of social security protection extending coverage or discriminating against this group of people is essential. The plight of these people has of recent raised serious questions among scholars and there has been a continuous plea to policy makers to include them in the realm of social protection.

In summary, from the above analysis, there is no denying that non-citizens are a vulnerable group in the society and are worthy of social security protection. Recently there has been judicial decisions and statutes extending coverage to this group, but recent studies have also portrayed that the plight of these people especially refugees and asylum seekers has raised the need for policy transformation. This brings us to the urgent need for the relevant institutions concern to adopt a holistic approach in their policy formulation that governs the social security protection of non-citizens.

1.1 STATEMENT OF THE PROBLEM

The position of non-citizens in social security law is a problematic theme in general. In *Larbi-Odam v MEC for Education North-West Province*⁸, Mokgoro J recognised that foreigners have little political muscle and associated herself with the remarks of Wilson J in the Canadian Supreme Court in *Andrews v Law Society of British Columbia*⁹ stating that relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to

⁷ Alston P *et al* (1999) The EU and Human Rights, New York: Oxford University Press Inc at 363-364.

⁸ *Larbi-Odam and Others v Member of Executive Council for Education (North-West Province) and Another* 1998 (1) 745 (CC) Para 19.

⁹ (1989) 56 DLR (4th ed) 1 at 32

having their interests overlooked and their rights to equality and respect violated. They are among those groups in society whose needs and wishes elected officials have no apparent interest in attending to.¹⁰

However, some legislation and the interventions by the courts play a major role in the process of extending social security protection to non-citizens. My area of investigation is focussed on the need to integrated refugees and asylum seekers into the realm of social security protection. The complexity of the legal position of this group of non-citizens in social security is further constrained in view of the fact that it may differ according to the specific labels under which immigrants enter the country. These include asylum seekers, refugees, unaccompanied children, illegal immigrants and economic migrants. The specific position this group have in social security law may sometimes reflect the specific immigration policies that are pursued. This situation is clearly reflected in the social security position of refugees and asylum seekers. The rigidity with which states attempt to control the influx of this category of migrants has had the effect that in almost all countries they have now been fully excluded from the social security system.¹¹ Due to an increase in migration, the need to extend social protection to non-citizens has called for greater attention.

The vulnerability and marginalised situation of non-citizens has raised various questions worth investigating in order to enumerate and appraised the social security policies of the regions in this study. The research questions under investigation include the following:

- Which legal policies govern the social security protection of refugees and asylum seekers?
- Are these policies accessible?
- What are the reactions of policymakers to the questions?

¹⁰ *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* (CCT) 39/06 at 26-27

¹¹ Berghman J *et al* (Eds) (2002) Social Security in Transition, Hague Netherlands: Kluwer Law International at 77 and 87.

-Has there been significant improvement or much is still to be desired?

1.2 RATIONALE OR MOTIVATION OF THE STUDY

Choosing to research on this topic was very inspirational. Not only has this study helped me to understand the concept of social security protection in the SADC region and the European Union, but has gone further in adding to the already existing literature in this area of social security law. Considering the marginalised position of non-citizens in the society, I was pushed with so much anxiety to investigate this problem and recommend ways of ameliorating the inherent inequality of non-citizens compared to citizens. Also, the need to extend social protection to non-citizens has of recent gained both national and international recognition and has led to heated debates on this subject. As a labour and social security law student, I have utilised this opportunity to submit my contribution to this subject of social policy.

1.3 AIMS AND OBJECTIVES OF THE STUDY.

The aim of this study is to investigate and do an appraisal of the existing legal instruments extending social protection to non-citizens with specific reference to what obtains in the SADC region and European Union. A comparative analysis of these legal systems is also vital because in the realm of comparative law, social security systems existing in other countries maybe analysed in order to determine their value to another legal system. The goal of this study is to suggest possible ways by which the broad policy objectives of these instruments can be realised.

In general, this research on social protection of non-citizens will seek to identify the various forms of legal instruments that extend social protection and provide access to non-citizens; identify the gaps and shortcomings in these instruments as far as non-citizens are concerned and finally to provide recommendations aimed at improving social protection to non-citizens.

1.4 SIGNIFICANCE OF THE STUDY.

At the end of this study, it is my wish that non-citizens should be covered by social security laws. The notion of social protection should be crystal clear and unambiguous, and its application and enforcement supported by the fundamental principles of equality and human dignity. An international approach to social protection should be given more weight and general application. Purely national solutions will not suffice as they cannot resolve the multiple and complex problems arising from transnational relations. The courts should adopt an innovative approach and apply policy considerations when interpreting and applying social security laws. An awareness campaign and the provision of legal aid to non-citizens will ease the process of social protection.

Of immense importance is the need for a change of mentality in the manner in which others perceive the need to extend social protection to non-citizens.¹² It is of significant value for the mindset of those who could serve as future legislators and judges to be anti-discriminatory otherwise the efforts to extend social protection to non-citizens will remain an illusion.¹³

¹² As held in the Daily Sun Newspaper dated Thursday the 29 of September 2005 at 43 "*Lawyers, be fair!*" Teboho Chaka. A survey, sampling the opinion of some South Africans provides that: 'the South African transition to democracy has been hailed by the rest of the world as a true political success story. But the legacy of the unjust past can still be seen in the form of starvation and homelessness. Yet some lawyers are deliberately portraying South Africans as second-class citizens in their fight against foreigners wanting to gain access to our social grants. They are forgetting that we sweat blood to create opportunities for South Africans who were denied access to education and skills by the apartheid system. They should rather fight for unemployed parents to get social grants to support their families. Use this as a means to eradicating crimes, instead of helping aliens. Some of this people are trafficking in drugs and committing crimes. Watch out guys, you are creating black on black violence. Let's help them to leave the country. Let them go!'

¹³ This was the subject of an article called "Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa. Human Rights Watch New York, Washington, London, Brussels 1998 stating that although South Africa, since the first democratic elections in 1994, has made remarkable progress towards establishing a free and democratic society based on respect for the human rights of its own citizens, foreigners have largely failed to benefit from these developments and remain subject to serious abuse. Anti-foreigner feelings have also increased alarmingly. Politicians, the press, and the South African public commonly blame foreigners for exacerbating social problems such as rising crime, unemployment, or even the spread of diseases, and undocumented migrants have been subject to abuse by officials from the Department of Home Affairs, the police, and the

The findings and contributions of this work might not result in a spontaneous change in resolving the plight of non-citizens, but the strength, value and credibility to this study will be concentrated on suggestions, recommendations, strategies and capacity-building as to how these problems could be better handled or better still mitigated in the near future.

1.5 SCOPE OF THE STUDY.

This study has illuminated and compared the constitutional, statutory and international framework of social protection in the SADC region and European Union. Since non-citizens constitute an extensive group, I have limited my case study to asylum seekers, refugees and non-citizen children. I have likewise focussed on the notion of social assistance as these categories of non-citizens are excluded from social insurance coverage because of its contributory nature (the employer-employee relationship). This study consists of five chapters. Chapter one is an introduction of the study. Chapter two illustrates the position of non-citizens in the South African and SADC social security framework. Chapter three discusses the European Union and German perspectives on social security protection and non-citizens. Chapter four is a comparative study of the two legal systems. Finally, Chapter five sums up and carries our recommendations.

1.6 METHODOLOGY

This study is concerned with the extension of social security protection to non-citizens especially refugees and asylum seekers, a case study in the SADC

army, as well as by the general public. In general, public attention has been focused on the allegedly socio-economic impact of migrants within South Africa, despite the absence of evidence to confirm these. In the process, attention has been diverted from the suffering and exploitation experienced by aliens as a result of official policies and xenophobic attitudes. This report seeks to document the experiences of foreigners in South Africa, including undocumented migrants, legal residents, asylum-seekers, and refugees, in order to add their voices to the debate on migration in South Africa. Human suffering should not be ignored in a country that only recently emerged from a system that degraded basic human rights and human dignity.

region compared to what obtains in the European Union specifically. To make this work a success, I consulted the relevant text books on this subject, internet sources, course materials, national and international social security instruments such as the constitution, statutes, treaties and conventions, relevant statutory and case laws, attending workshops and seminars and a research stay in Germany for comparative perspective. During my stay in Germany at the Marx Plank Institute in Munich and the Goethe University in Frankfurt, I was able to interact with experts in social security law and consulted more sources. Overall, I have adopted a qualitative and comparative approach in which written materials formed the core of my sources.

1.7 LITERATURE REVIEW

The popularity of the term ‘social protection’ is evidenced in the recent plethora of literature and policy debate on the subject. Social protection is said to describe all public and private initiatives that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised; with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups’.¹⁴

According to Van Vugt *et al*,¹⁵ the idea of social security is not a new concept in Europe as it had existed even before 1881 but was first put into statutory form by Imperial Germany under the auspices of Chancellor Otto Von Bismarck. Notwithstanding, the main development of the concept of social security took place in the 20th century, when it finally acquired the status of a socio-economic human right. But, it is the Beveridge Report which comprises the jewel in the crown of the evolution of social security. As a result, two main models of social security were created. Some countries borrowed their social security ideas from

¹⁴ Sabates-Wheeler, R; and Waite, M, (2003) “Migration and Social Protection: A Concept Paper” Sussex: Institute Of Development Studies, accessed from http://www.migrationdrc.org/publications/working_papers/WP-T2.pdf

¹⁵ Van Vugt, PA *et al* (2000) Social Security and Solidarity in the European Union: Facts, Evaluations and Perspectives. Heidelberg, Germany: Physica-Verlag, at 2-3.

these models. The systems of social security in Europe therefore are not based on uniform objectives because of the mixed historical developments.

The relationship of non-citizens to European welfare systems is perhaps one of the most complex yet under-researched areas of contemporary policy. In analysing this relationship, Freeman,¹⁶ suggests that European welfare states are almost uniformly exclusive owing to their citizenship-based provision. Baldwin-Edwards, *et al*¹⁷ argues that different states interact very differently with their immigrant populations. And Soysal¹⁸ claims that European countries are almost uniformly inclusive of their resident aliens owing to the massive impact of international human rights law.

According to Laroque,¹⁹ the term social security was first officially used in the Federal Social Security Act passed by the United States Congress in 1935. The change in terminology from social insurance to social security had more than formal significance for it indicated that social insurance benefits were no longer restricted to insured persons but were being made gradually available, as of right, to those who were not members of the workforce. Social insurance was developing into a system of social protection for all in poverty and need. The growth of social security, Laroque says, can be attributed to the junction of two different currents of thought and action. On the one hand, the trend to fight poverty in the name of morality and justice, the edge to abolish want; on the other hand the increasing effort of the working class to free itself from dependence and the uncertainty about tomorrow which affects all who live on the product of their labour.

¹⁶ Freeman, G (1986) Migration and the Political Economy of the Welfare State AAPSS 485, pp 51-63.

¹⁷ Baldwin-Edwards, M *et al* (1991). European Community Social Policy and the UK, in Manning N (Ed): *Social Policy Review 1990-1991*, Harlow: Longman at 147-168.

¹⁸ Soysal, Y (1994). Limits of Citizenship: Migrants and Post national Membership in Europe, Chicago: University of Chicago Press.

¹⁹ Laroque P (1957) 'From Social Insurance to Social Security: Evolution in France,' *International Labour Review* at 566.

Berghman²⁰ is of the view that the concept of social security originated in the United States as part of Roosevelt's new deal policy. It was further embraced by the Beveridge proposals during the Second World War and has subsequently been adopted in various international conventions on human rights and national constitutions. This concept constitutes the expression of the notion that each citizen is entitled to an adequate standard of living and that the state bears responsibility in this regard. A typical characteristic of the right to social security is its universality. The right presupposes that persons who are in a vulnerable position should be protected not because of their status as a worker, or because of their nationality, but by virtue of their membership of the society.

Timngum²¹ stipulates that recently, forced migration of people fleeing conflicts, wars and other forms of persecutions across international borders may have taken different shapes or signaled different responses at the international, regional and national levels. Debates around states applicability of international, regional and national refugee instruments have centered on how to give meaning to international refugee law, especially on the review and nature of refugee policy development and protection measures to ensure its proper implementation and enforcement. Signatory States may be obliged to protect refugees fleeing all forms of persecution, but this engagement seems to be fading away because of various reasons yet to be understood by human rights experts and activists.

Hailbronner²² suggests the need for a European approach as the refugee problems in Africa, Asia, the Americas and Europe vary widely, and justify a distinct treatment of the European situation. These differences result from the variations in the economic, social and legal cultures of each area. The refugee

²⁰ Berghman, *ibid* note 11 at 78-79.

²¹ Timngum D, "Assisting Urban Refugee Children in South Africa: Humanitarian Challenges to State and Non-State Actors". Presented in the International Studies Association Annual Convention

²² Hailbronner K (2000) Immigration and Asylum Law and Policy of the European Union Hague: Kluwer Law International, at 356.

situation in Europe generally can be characterised by the following factors. First, refugee flows in Europe are predominantly economically motivated, rather than ethnically or politically, while in Africa they are often created by artificial borders and ethnic conflicts. Secondly, forced migration to Europe has increasingly led to immigration with resulting integration problems. Thirdly, for economic reasons, as well as diverging human rights traditions, reception standards in Europe are generally higher than in other continents. Furthermore, in contrast to Africa and Asia, European legal and administrative traditions have generally supported the practice of adjudicating asylum claims on a case-by-case basis.

Alston²³ presupposes that by its very nature, migration and asylum law is situated in the conflict zone between particularism and universalism. In ultimate questions, participants in this discourse have a choice between two foundational paradigms—one striving for the global realisation of human rights and another giving preference to the interests of a certain state population. Provided that resources for the realisation of civil, political, economic, social, and cultural rights are scarce, should we opt for a limited level of their protection for an extensive group or for an extensive level of protection for a limited group? Is the vision of a good life most efficiently attained if an elitist *avant-garde* paves the way, or does justice demand that progress is made at the same pace for everybody? Or, finally, how should the resources of state be distributed?

Paparella²⁴ stresses that reconciling equality of rights with the economic sustainability of welfare systems is the principal challenge confronting social policies at the beginning of the twenty-first century. Conditions and procedures, for migrants and their families, to gain access to the social security systems of the host countries is one of the most relevant aspect of the migration policies

²³ Alston P *et al* 1999 The EU and Human Rights, New York: Oxford University Press Inc at 300.

²⁴ Paparella P, 2004. “*Social Security Coverage for Migrants: Critical Aspects*” Presented at ISSA European Regional Meeting Migrants and Social Protection in Oslo 21-23 April 2004.

adopted by the various host countries. Individual opinions about immigration policies are influenced by expectations concerning the impact of immigrants on the labour market, on public services, and on social security systems. Racist and xenophobic attitudes stem largely from the economic worries of native residents concerning their futures. These attitudes are also conditioned by levels of unemployment in the host countries, where immigrants may consequently come to be regarded as competitors in the job markets. The likelihood that an immigrant will be dependent on a country's social security system is substantially determined by his or her education level, skills endowment, and her socio-economic characteristics of his or her family. The low educational levels and younger average age of immigrants place the overwhelming majority of them at the disadvantage in labour markets, and they constitutes the main determinants of social exclusion and consequent dependence on social security systems. In situations such as these, immigrants may also be perceived as cynical exploiters of the benefits offered by local social security systems. There is further the widespread perception that immigrants are a drain on the resources of social security systems. In view of these considerations there is an evident need for host countries to adopt active reception policies with which to control the characteristics of migrants and contain the impact of immigration on social security systems.

In Watson's²⁵ view, the time has come when we can no longer afford to ignore the migrant. In social security matters, there must be no difference in the treatment of nationals and non-nationals. There is a large and fast growing body of case law on social security emanating from the court of justice in the European Union which found not only the interpretation and implementation of community law but also a real expansion of the rights of the migrant as set out in community legislation. The courts of justice have not hesitated to extend social security rights to migrants, which provide them with real and indeed

²⁵ Watson P (1980) Social Security Law of the European Communities, London: Mansell Publishing.

generous protection. Social security today performs a number of functions. It is, most importantly, a system of income maintenance for those unable to work. In addition, it ensures a basic minimum income for people who never have been and never will be able to provide for themselves. By means of benefits in cash and in kind, social security helps to integrate minority-disadvantaged groups into the normal life of the community. Thus it is an instrument of redistribution of wealth from the rich to the poor.

Olivier²⁶ asserts that neither South African law nor international literature reveals a clear and consistent approach to the concept of social security. However, social security must be distinguished from the wider concept of social protection. Internationally, this concept is increasingly used alongside, as an alternative to, and/or as a wider concept than the notion of social security. According to some commentators, social protection denotes a general system of basic social support which is no longer linked to the regular employment relationship, and which is founded on the conviction that society, as a whole is responsible for its weaker members and denotes a system of general welfare support and protection. It is necessary according to the Committee of Inquiry into a Comprehensive System of Social Security for South Africa to adopt the wider multi-purpose notion of comprehensive social protection, which seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.

Olivier²⁷ further stresses that non-citizens constitute another marginalised group in the social security systems of the region. This is an area where governments and the courts can do much to extend protection to migrants within the region.

²⁶ Olivier MP *et al* (2004) Introduction to Social Security, Durban: Lexis Nexis Butterworths, at 153.

²⁷ Olivier M, Kalula E, Smit N 'Equitable Trade and the Social Dimension in SADC' (Joint Conference IIRA/CIRA 4th Regional Congress of the Americas and 39th Canadian Industrial Relations Association annual meeting: Toronto, 25-29 June 2002 at 60-61. Accessed from <http://www.cira-acri.ca/IIRA%20CIRA%20docs/Olivier,%20Kalula%20and%20Smit.pdf>

As a very minimum, discriminatory provision in social security laws marginalising citizens of other SADC member states should be removed. The sheer extent of the inadequate social protection provisioning in the SADC region and the apparent failure of domestic social security measures to address poverty alleviation meaningfully and to bring about the social inclusion and participation of large numbers and significant categories of people who have effectively been left out needs spontaneous redress. And yet, in view of the extent of migration in the region, it is imperative that a distinct social protection/labour law paradigm in the SADC region be developed holistically and comprehensively in order to address poverty alleviation and social exclusion in the region.

1.8 SUMMARY

This chapter has provided an overview of the structure and form of this study. A platform has actually been created wherein the rest of the investigation is conducted. It is important to indicate that the background information outlined above is just a skeleton but is very vital as it sets the way forward for the next chapter. Chapter two therefore illustrates the social protection policies of SADC and South Africa and the entitlements of non-citizens especially Refugees and Asylum seekers.

CHAPTER TWO: NON-CITIZENS AND SOCIAL SECURITY ENTITLEMENT IN THE SADC REGION

2.0 INTRODUCTION

This chapter provides a legal framework of social protection of Refugees and Asylum seekers in the SADC regional instruments, international framework and South African laws. Various instruments governing social protection is being highlighted with the intention of finding out if they actually include or exclude these groups of non-citizen from their scope of coverage and whether the position in South Africa conforms to the international standards which it has signed and ratified.

As a consequence of the political transition in 1994, the South African legislature has over the past few years enacted several legislations, the judiciary has been busy handing down landmark judgments and the executive branch of government have signed international agreements in an attempt to provide access to the different types of social services for the population. This has led to policy developments and considerations in the area of social security law. The South African government is however faced with the daunting task of extending social security protection to non-citizens despite its huge poverty stricken population. There is no doubt that government initiatives and policies on social protection will be fashioned and designed primarily to meet the needs of its own citizens. It is therefore common knowledge that any law extending social protection to non-citizens might not meet the expectations of this group of people.

According to the findings of University of Pretoria in August 2006, there are approximately 110,000 asylum seekers and 30,000 refugees in South Africa. Asylum seekers are mostly male and well educated, and many hail from DRC, Zimbabwe, Ethiopia, Pakistan, and Somalia.²⁸ Beyond the problems associated

²⁸ Asylum seekers in South Africa and their rights to ARVs United Nations High

with access to refugee status, determination procedures and the inadequate protection such individuals often receive, refugees and asylum seekers in South Africa also have difficulties gaining access to work, education, basic health care services, public relief and assistance, education beyond the primary levels, housing, and permission to practice their professions. The ability of refugees and asylum seekers to secure such social and economic rights is particularly complex in countries like South Africa that face challenges in providing these rights to their own nationals. The insecure legal status of asylum seekers (and occasionally, due to administrative failures, of refugees), the lack of recognition of refugee and asylum seeker documentation by some of those charged with granting access to benefits and rights, as well as racial or ethnic discrimination and xenophobia, place this group in an especially vulnerable position.²⁹

Of utmost significance is the absence of an express constitutional protection of foreigners. According to Olivier³⁰ the apparent lack of protection in the field of social security is one of the causes of social exclusion in South Africa and their position leaves much to be desired. However, the strong link between the equality clause in the Constitution and human dignity³¹ has a far-reaching potential impact on the almost blanket exclusion of non-citizens from almost the whole of the South African social security systems. There are *prima facie* indications that several provisions of the South African social security laws may be found to lack compliance with the equality clause and thus may not survive a constitutional challenge as seen in the Khosa case.³² There are also indications that the unequal, exclusionary and inequitable structure of the present social security system as a whole and in particular elements of the system are not in conformity with the constitutional prohibition of unfair discrimination.

Commissioner for Refugees AIDS & Human Rights Research Unit, University of Pretoria Findings August 2006.

²⁹ Inadequate Protection for Refugees and Asylum Seekers: *Harassment, Mistreatment and Extortion of Asylum Seekers and Refugees by Law Enforcement Agencies* Accessed from <http://hrw.org/reports/2005/southafrica1105/6.htm>

³⁰ Olivier *et al*, *op.cit* note 26 at 152-156.

³¹ Sections 9 and 10 of the 1996 South African Constitution respectively.

³² The Constitution, *Infra* note 46 at 18

In practice there are significant disparities between the law as it is and its implementation such as the Refugee Act and its regulations, the South African Constitution and the various international refugee and human rights conventions which South Africa has signed and ratified. The government's obligations under international refugee and human rights law and the South African constitution, founded on the principles of non-discrimination and human dignity, place a duty on the state to create an enabling environment that allows all persons, including refugees and asylum seekers, to have access to social services. The state has a duty to protect the rights of children, particularly unaccompanied children seeking asylum, including special assistance at the refugee reception offices and access to education and suitable accommodation.

Below are numerous pieces of legislation, case law, regional and international instruments that enumerate the position of refugees and asylum seekers in the South African social security legal framework.

2.1 CONSTITUTIONAL FRAMEWORK

Although the Constitution of South Africa³³ fails to define social security, the concept of social security could be construed as policies, which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs. The domains of social security are poverty prevention, poverty alleviation, social compensation and income distribution.³⁴ In defining the concept of social security, the Committee of Inquiry³⁵ settled on the term Comprehensive Social Protection,³⁶ which seeks to provide the basic needs for all people living in the

³³ Constitution of the Republic of South Africa, Act 108 of 1996.

³⁴ Social Welfare White Paper GN 1108 in GG 18166 of 1997.

³⁵ The Consolidated Report by the Committee of Inquiry into a Comprehensive System of Social Security (Taylor Report) 2002 indicated that the structure of the social security system in South Africa is unequal, exclusionary and inequitable.

³⁶ Comprehensive Social Protection is broader than the traditional concept of social security, and incorporates development strategies and programmes designed to ensure, collectively, at least

country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. The strands of social security include among others social insurance and social assistance. Social insurance is based on contributions from employees and employers whereas social assistance is non-contributory. As a whole, social security embraces protection against damage, and inadequate standard of living and provides a social safety net against destitution.³⁷

According to Malan,³⁸ much of the horrors of apartheid were made possible through a specific formalist interpretation of the law which shielded the legal fraternity from its social responsibilities. The transformation of South Africa to a post-apartheid state is characterised by a strong legal focus. Olivier *et al*³⁹ affirm that the human right abuses which characterised the previous political dispensation in South Africa led to the adoption of two powerful conceptual approaches of constitutionalism and the entrenchment of fundamental rights when the interim and eventually the final Constitution was deliberated in order to avoid a repetition of past injustices and to forge a new culture of accommodation, mutual respect, equality and freedom in South Africa.⁴⁰

Constitutional supremacy has replaced the notion of parliamentary sovereignty in terms of which parliament could enact laws which discriminate against

a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services.

³⁷ "The Right to Social Security" 5th Economic and Social Rights Report Series 2002/2003 Financial Year, South African Human Rights Commission 21st June 2004. Accessed from: http://www.sahrc.org.za/5th_esr_socalsecurity.pdf.

³⁸ Malan N (2004) "Civil society and the right to have access to social security in South Africa" Anthropology and Development Studies, RAU. Accessed from: <http://general.rau.ac.za/sociology/Malan2.pdf>.

³⁹ Olivier *et al*, *op.cit* note 6 at 52.

⁴⁰ In the case of *S v Mhlungu* 1995 7 BCLR 793 (CC) par 111 the Constitutional Court stated that the Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction.

various people and allowed for serious human right abuses.⁴¹ The preamble to the Constitution states that the Constitution as the supreme law of the Republic aims to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person. The Constitution also makes it clear that the State is obliged to respect, protect, promote and fulfill the rights in the Bill of Rights⁴² as they are said to bind the legislature, the executive, the judiciary and all organs of state.⁴³ This Bill of Rights is proclaimed as a cornerstone of democracy in South Africa, enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.⁴⁴

For the first time in South Africa's history, the Constitution compels the state to ensure the progressive realisation of social security. The Constitution in its provisions clearly and unambiguously commits the state to develop a comprehensive social security system. It affirms the universal right to social security, including appropriate social assistance for those unable to support themselves and their dependants,⁴⁵ mandating the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.⁴⁶ The State is allowed a certain degree of latitude in relation to these three aspects. So that the availability of resources is thus a factor in determining whether the State has taken reasonable

⁴¹ Section 2 of the 1996 Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

⁴² Section 7(2).

⁴³ Section 8(1).

⁴⁴ Section 7(1).

⁴⁵ Section 27(1) (C).

⁴⁶ Section 27(2) of the 1996 Constitution is seen as an internal limitation for the right to access to social security. According to section 36(1) of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

measures.⁴⁷ Resource constraints could be a basis for the State justifying its rate of progress in achieving the full realisation of social security rights.⁴⁸ When this obligation imposed on the State is read in conjunction with other Constitutional provisions, the assumption can be made that the fundamental right to access to social security is enforceable.⁴⁹ This assumption is confirmed by the White Paper for Social Welfare.⁵⁰

The right to access to social security is reinforced by other fundamental rights, such as the right to health care services;⁵¹ sufficient food and water;⁵² access to adequate housing;⁵³ basic education;⁵⁴ and the right of children to basic nutrition, shelter, basic health care services and social services.⁵⁵ There are, of course, other fundamental rights, which evidently play a significant role in the context of South African social security, such as the right to equality,⁵⁶ human dignity,⁵⁷ and just administrative action.⁵⁸

These rights together ensure adequate social protection from a constitutional and human rights perspective by their entrenchment in the Bill of Rights.

⁴⁷ *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) par 46.

⁴⁸ Committee reports of the Taylor Committee into a social security system for South Africa. Report No.3 "Constitutional framework of Social Security in South Africa: regulation, protection, enforcement and adjudication.

⁴⁹ As section 2 of the Constitution explicitly states that duties imposed by the Constitution must be performed. This is fortified by section 7(2) which states that the State must respect, protect, promote and fulfill the rights in the Bill of Rights.

⁵⁰ White Paper for Social Welfare 1997 Para 45 states that the general long term objective is to have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes. This would be supported by a well-informed public, which is economically self-reliant, in a country which have active labour market policies aiming at work for all, while accepting that all will not necessarily have formal employment. Where these broad goals cannot be met, social assistance should be a reliable and accessible provider of last resort. A comprehensive and integrated social security policy is needed to give effect to the Constitutional right to social security.

⁵¹ The Constitution of South Africa 1996. Section 27(1) (a).

⁵² Section 27(1) (b).

⁵³ Section 26(1).

⁵⁴ Section 29(1).

⁵⁵ Section 28(1) (c).

⁵⁶ Section 9.

⁵⁷ Section 10.

⁵⁸ Section 33.

Underlying the various international refugee and human rights conventions are the principles of non-discrimination and dignity, core tenets of South Africa's constitutional democracy.⁵⁹ This is further strengthened by the constitutional assertion that the Republic of South Africa is founded on the values, *inter alia*, human dignity, the achievement of equality and the advancement of human rights and freedom.⁶⁰ Even though everybody has the right to have access to social security, the fact is that not everyone is afforded access to social security or basic social services. The state has an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.⁶¹ Other rights which are highly relevant to social security are the right to equality which prohibits direct or indirect discrimination, equal opportunity for everyone before the law, and the right for equal protection and benefit of the law⁶²; the right to life⁶³ and the right to just administrative action.⁶⁴ A number of rights specific to children are also entrenched in the Bill of Rights.⁶⁵ As these administrative rights apply to everyone, the South African state must respect these rights in the administration of social security protection.

The Constitutional Court in its interpretation has extended protection with regard to access to social assistance to everyone, including nationals and certain non-nationals in particular permanent residents.⁶⁶ Interpreting the Constitution

⁵⁹ The Constitution of the Republic of South Africa Act 108 of 1996, section 7(1) states that the Bill of Rights is a cornerstone of democracy in South Africa; it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

⁶⁰ Section 1(a).

⁶¹ Section 7(2).

⁶² Section 9.

⁶³ Section 11.

⁶⁴ Section 33 states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

⁶⁵ Section 28(1) of the South African Constitution recognises the right of every child (define as a person under the age of 18 years) to a name and nationality from birth; to family care; parental care; or appropriate alternative care when removed from the family environment; to basic nutrition; shelter; and basic health care services; and social services; to be protected from maltreatment; neglect; abuse or degradation.

⁶⁶ In *Khosa v. Minister of Social Development and others; Mahlaule and another v. The Minister of Social Development and others*, (2004) 6 BCLR 569 (CC) at Para 47, the Constitutional Court vests the right to social security in everyone. By excluding permanent residents from the scheme for social security, the legislation limits their rights in a manner

literally with an open mind and without fear or favour, one might say that there is no ambiguity in construing the provision of the Constitution in such a manner as to provide social assistance to everyone. Therefore the right of access to social security is guaranteed to everyone and is not expressly restricted to citizens. However, any limitation of this right to citizens would have to pass the test of the general limitations clause of the constitution.⁶⁷ It appears that the limitation clause limits the rights of non-nationals contained in the Bill of Rights. By implication, the protection of citizens becomes a priority and often justified on the grounds that citizens are in desperate need of social services, which are limited and inadequate to cover non-citizens too. It is worth reiterating that the nature of unfair discrimination that many non-nationals faced takes many forms. The common ground for all forms of discrimination against non-nationals is premise on the view that the needs of a country's citizens should take priority as encapsulated in the Batho Pele Principles⁶⁸ and that any admissions of foreigners into the borders of South Africa should not impact adversely on the welfare of the country's citizens, socially, economically and politically.

The Constitution states very clearly where certain rights are for citizens only. In terms of the Constitution the only rights which non-nationals do not have are the following political rights, namely, the right to enter, remain in and to reside anywhere in the Republic; the right to a passport, or the right to choose a trade, occupation or profession freely.⁶⁹ Surprisingly, subsequent statutes and legislations exclude non-citizens from social security entitlements. Even the

that affects their dignity and equality in material respects. Sufficient reason for such invasive treatment of the rights of permanent residents is therefore inconsistent with section 27 (1) (C) of the Constitution.

⁶⁷ Section 36 states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

⁶⁸ Department of Health Policy Document '*The Primary Health Care Package for South Africa: A Set of norms and Standards*' <http://www.health.gov.za/>. The Policy was formulated by the Department of Public Service and worded in such a way that it excludes non-citizens as it clearly states that access to public services is the rightful expectations of all citizens especially those previously disadvantaged.

⁶⁹ Accessed from <http://www.doj.gov.za/2004dojsite/policy/african%20charter/afr-charter02.htm>

courts limit the entitlement thereto to permanent residents. Does it mean that the phrase “everyone” as stipulated in the Constitution has to be understood based on other factors or the drafters of the Constitution erred in their use of the word “everyone”.

The supremacy of the Constitution is worth emphasising as the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the State,⁷⁰ failure to implement it is often a greater consequence to the political, economic and social structure. The Constitutional Court has cautioned against constitutional principles, which may become obsolete or inappropriate as social or economic conditions change.⁷¹ The White Paper on International Migration⁷² recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights owing to the status of a person while in South Africa, including illegal immigrants.⁷³ In fact, even though the Bill of Rights contains a limitation clause, it has long been established in comparative constitutional jurisprudence to which the limitation clause makes reference that the limitation clause may not be invoked to prevent a class of people, however identified, from enjoying the total use and benefits of a given constitutional right. The limitation clause may not limit the exercise of a given right by certain people identified on the basis of criteria contemplated by the equality clause, but can only limit it on the basis of the circumstances, time, manner and place in which the right finds itself to be exercised. Therefore, in the absence of a justifying circumstantial and factual reason, one could not limit the constitutional rights of, for instance, Muslims, or homosexuals or people of

⁷⁰ South African Constitution of 1996 section 8(1).

⁷¹ *NUMSA and others v Bader Bop (Pty) Ltd and another* 2003 (2) BCLR 182 (CC).

⁷² The White Paper on International Migration GN 529 in GG 19920 of 1 April 1999.

⁷³ The Taylor Committee Report into a Social Security system for South Africa.

Last update: 2006-03-17 at 60.

French origin.⁷⁴ On the strength of this argument, one can say that refugees and asylum seekers are constitutionally entitled to core social assistance⁷⁵.

In a nutshell, Strydom⁷⁶ states that although the South African Constitution does not draw a distinction between non-citizens and citizens in its provision of social security, an overview of our social security legislation reveals that, apart from a few exceptions in regard to non-citizens with permanent residence status, non-citizens are largely excluded from our social security legislation.⁷⁷ The pertinent question, which arises, is whether it constitutes unfair discrimination to differentiate on the basis of citizenship in the provision of social security benefits? Besides, like the international instruments, the Constitution of South Africa also draws no distinction between non-citizens and citizens for most of the rights guaranteed in the Bill of Rights. Only the right to enter the country, to obtain a passport, to vote, to stand for office, to form a political party and other political rights are limited to citizens.⁷⁸ The Constitution also guarantees and protects most international recognised human rights, and places upon the state an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.⁷⁹ The question yet to be answered is whether South Africa complies with its international law obligations, a point to which we shall return hereunder.

2.2 STATUTORY FRAMEWORK.

During the apartheid era, South Africa did not accede to the various international refugee conventions and administered its refugee policy on an ad-hoc basis. For instance, South Africa accepted and granted full citizenship status

⁷⁴ White Paper on International Migration "The Treatment of Refugees and Asylum Seekers in South Africa" (1999)

⁷⁵ Olivier M *et al* (2004) *Introduction to Social Security*. Lexis Nexis Butterworths, Durban at 153.

⁷⁶ Strydom *et al* (2001) *Essential Social Security Law*, Cape Town: Juta at 252-253.

⁷⁷ Social Assistance Act 59 of 1992, Section 3 (C) restricts the payment of social grants to South African citizens only.

⁷⁸ The 1996 Constitution of the Republic of South Africa, Sections 19, 20 and 21.

⁷⁹ Section 7(2).

to a large number of mostly white persons fleeing from Rhodesia and Mozambique as the settler colonial systems in these countries crumbled, but refused to offer a similar welcome to black Mozambicans fleeing the South African-sponsored civil war in Mozambique.⁸⁰ To this day, South Africa remains without specific refugee legislation, administering its refugee policy according to improvised procedures under the Aliens Control Act. The improvised nature of these procedures and the lack of clear guidelines have allowed for an unacceptable degree of bureaucratic discretion which can be easily abused.⁸¹ The Aliens Control Act⁸² was the only piece of legislation regulating the movement of non-nationals into South Africa, when in 1993 South Africa signed a first Basic Agreement with United Nations High Commission for Refugees (UNHCR).⁸³ The Aliens Control Act dealt with refugees and asylum seekers in an ad hoc manner. Without statutory basis for determining refugee status, procedures were instead contained in the internal Department of Home Affairs circulars. The procedures could not be readily challenged in the courts of law and there were little recourse to either administrative or judicial appeals.

Following its first democratic elections in 1994, South Africa acceded to and ratified several refugee and human rights treaties. But the two most important documents establishing the rights of asylum seekers and refugees in South Africa are the UN Convention Relating to the Status of Refugees⁸⁴ and the Organisation of African Unity (OAU) Convention Governing the Specific

⁸⁰ Human Rights Watch *Infra* note 81

⁸¹ Human Rights Watch "Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa. New York 1998.

⁸² Government of the Republic of South Africa, Aliens Control Act 96 of 1991.

⁸³ Prior to the government's signing of the 1951 Convention relating to the Status of Refugees, South Africa and UNHCR signed a Basic Agreement (1993) binding the country to observe international refugee norms, such as the right to seek asylum.

⁸⁴ Convention Relating to the Status of Refugees, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons on July 28, 1951, entered into force on April 22, 1974.

Aspects of Refugee Problems in Africa.⁸⁵ South Africa acceded to these Conventions on January 12, 1996 and 1995 respectively. Both the UN Refugee Convention⁸⁶ and the OAU Refugee Convention⁸⁷ impose certain obligations on host states to protect the rights of refugees and asylum seekers, including with regard to status determination and documentation, and uphold certain social and economic rights for refugees. Both Conventions state that their provisions shall be applied without discrimination.⁸⁸ According to Olivier,⁸⁹ South Africa has ratified these Conventions and is, constitutionally bound to comply with their provisions and that these provisions have to be taken into account when the right to access to social security and social assistance, as well as other social security related fundamental rights are interpreted.

The proclamation of the 1998 Draft Refugee White Paper⁹⁰ raised serious concerns and high expectations in the treatment of refugees and asylum seekers. It provided among others that the Government of South Africa is committed to the granting of asylum to refugees; to providing them protection; and to search for solutions in line with their obligations and responsibilities which it assumed under International Law, as well as by incorporating a number of basic principles and standards in the Constitution. It further expressed the

⁸⁵ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its sixth ordinary session, Addis Ababa, September 10, 1969, entered into force June 20, 1974.

⁸⁶ In the 1951 UN Convention, Articles 16, 22, 23 and 24, state parties are specifically obliged to grant refugees either the same treatment as nationals of that state or, as a minimum, the most favourable treatment accorded to nationals of a foreign country in the same circumstances in respect of a variety of different rights.

⁸⁷ The 1969 OAU Convention, Article II(1), does commit member states to use their best endeavours to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

⁸⁸ The 1951 Convention, Article 3, shall applied without discrimination as to race, religion or country of origin; under the 1969 OAU Convention, Article IV, shall apply without discrimination as to race, religion, nationality, membership of a particular social group or political opinion.

⁸⁹ Olivier *et al*, *op.cit* note 26 at 154.

⁹⁰ Draft Refugee White Paper 1998. It states that the formulation of a new policy on refugees within our Democratic Government provides us with a rare and historic opportunity to establish a formal and comprehensive system of refugee protection in South Africa. This system will comprise the policies and principles, which will govern the status, rights and standards of treatment which refugees may claim in South Africa.

government's commitment to securing for refugees in South Africa full legal protection provided for under international law, which included the rights in the Bill of Rights as set out in the Constitution (except for those rights from which non-citizens have been expressly excluded) including self-sufficiency rights, such as the right to work and to education. Whether South Africa has met these broad objectives will be apprehended from the national and international policies of social protection for refugees and asylum seekers and their implementation.

The Refugee Act of 1998 provides that a refugee enjoys full legal protection, which includes the rights set out in the Bill of Rights of the South African Constitution, and is entitled to seek employment and to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.⁹¹ In general terms, with regards to the rights to work, to health services and primary education, these provisions bring South Africa's domestic law in accordance with their obligations under the Refugee Convention. These include to give refugees the same treatment as nationals of South Africa with regard to elementary education; to give them the same access to rationed products or to public relief and assistance as is afforded to nationals; and to give refugees the most favourable treatment afforded to nationals of a foreign country in the same circumstances as regards the right to work.⁹² Once their status is recognised, refugees are entitled to a wider range of such rights in accordance with the South African Refugees Act and the Refugee Convention that inhabitants of South Africa received.⁹³

South African and international law recognised that asylum seekers are entitled to a limited range of social and economic rights.⁹⁴ Though not binding law, the United Nations High Commissioner for Refugees (UNHCR), in recognizing an

⁹¹ The Refugees Act 130 of 1998 Section 27(b)(f)(g)

⁹² Refugee Convention of 1951. Articles 22, 20, 23 and 17 respectively.

⁹³ See Refugees Act, Art. 27 (g).

⁹⁴ As section 22 of the Refugees Act grants individuals (adults and children) in possession of the Asylum Seeker permit the right to work and study.

obligation on states to safeguard the welfare of the asylum seekers, explicitly concludes that, “asylum seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met.”⁹⁵ In the opening chapter of the Refugees Act, asylum is defined as meaning refugee status recognised in terms of this Act; asylum seeker means a person who is seeking recognition as a refugee in the Republic; and refugee means any person who has been granted asylum in terms of this Act.⁹⁶ Considering that an asylum seeker is an individual who has entered a country with or without the legally required documentation, who seeks to obtain refugee status, and whose status has not yet been determined, they should be considered to have the same rights as refugees, until such time as it is fairly determined that they do not have refugee status. Rather, as a minimum, they should be allowed to work and study so as to develop their personality. This has been made possible under South African law, as asylum seekers are permitted to work and study during the refugee status determination period⁹⁷. In theory, therefore, asylum seekers in South Africa now have the legal right to work and study. In practice it is very difficult for asylum applicants to find work, given the uncertainty of their status and the short period of the temporary permits granted. Even their rights to basic healthcare are uncertain as South African state hospitals currently do not “officially” provide ARVs for asylum seekers, despite the South African Constitution’s guarantee of health care access for all. In addition, some physicians and implementing partners suffer from confusion about the rights of asylum seekers and have

⁹⁵ UNHCR ExCom Conclusion No. 93, op. cit., para. (b) (ii).

⁹⁶ Refugees Act 1998, Chapter 1, Section 1(iv) (v) (xv) respectively.

⁹⁷ In *Watchenuka v Minister of Home Affairs*, 2003(1) SA 619 (C) was appealed by the Department of Home Affairs in *Minister of Home Affairs v Watchenuka* Case No. 10 (2003). In a decision delivered November 28, 2003, the original decision requiring the lifting of the prohibition on work and study was upheld. The Standing Committee on Refugee Affairs issued a directive giving effect to the decision in March 2004.

doubts about adherence and have mixed opinions on the effects of discontinuation.⁹⁸

National efforts to protect refugees and refugee children have been expressed in the South African Bill of Rights. The Bill guarantees equal treatment of all children within the country without any discrimination as to race, gender, nationality or religion. The Refugee Act is the main instrument that protects refugee children in South Africa. The Act specifies that refugees as well as refugee children⁹⁹ will enjoy full protection in terms of rights to access to basic health and primary education services as well as prohibitions to child labour.¹⁰⁰ The Act explicitly acknowledges that unaccompanied children may seek asylum in South Africa, and also spells out that any child who is deemed to be in need of care and protection has to be protected under the Child Care Act No. 74 of 1983.¹⁰¹ A critical analysis on the provision of the Refugees Act which demands equal treatment of refugees and citizens and the Social Assistance Act¹⁰² reveals that the latter fails to mention the position of refugees and it seems from all indications that these groups of people are not covered here. This shows the lack of coherence and inconsistencies in the legislations which are supposed to cater for Refugees.

⁹⁸ Asylum seekers in South Africa and their rights to ARVs United Nations High Commissioner for Refugees AIDS & Human Rights Research Unit, University of Pretoria Findings August 2006. The interviewees of this research include workers in Lawyers for Human Rights, Jesuit Refugee Services, Cape Town Refugee Centre and Treatment Action Campaign.

⁹⁹ Most importantly the African Charter on the Rights and Welfare of the Child adopted in July 1990 and entered into force on 29 November 1999 CAB/LEG/24.9/49 (1990) Available at: www.iss.co.za Article XXIII dealing with Refugee Children provides that State parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian Instruments to which, the states are parties.

¹⁰⁰ Refugees Act 1998, Section 27.

¹⁰¹ Refugees Act, *Ibid* note 100 Section 32.

¹⁰² Social Assistance Act 13 of 2004 section 5 makes South African citizenship a requirement to benefit from the social grants.

The exclusion of foreign children from certain child grants is contrary to the Convention on the Rights of the Child (CRC) which South Africa has signed and ratified.¹⁰³ This Convention makes no distinction between citizen and non-citizen children. It requires that in all actions concerning children, that State shall make the best interests of the child a primary consideration.¹⁰⁴ This rule applies in budget allocation, in the making of laws, and in the administration of the government. In its non-discrimination provision, the Convention require States to respect and ensure the rights set forth in that present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's national, ethnic or social origin.¹⁰⁵ In other words, every child within a State's jurisdiction holds all CRC rights without regard to citizenship, immigration status or any other status. Refugee children, asylum seekers, and rejected asylum seekers are entitled to all the rights of the CRC.¹⁰⁶ In relation to children seeking asylum, States parties shall take appropriate measures to ensure that a child who is considered a refugee in accordance with international and domestic law shall, whether accompanied or unaccompanied, receive appropriate protection and humanitarian assistance in the enforcement of applicable rights set forth in the Convention.¹⁰⁷

More than a decade after the election of South Africa's first democratic government, significant progress has been made in bringing better education, health care, housing and other social amenities to the deprived black majority. Yet poverty is still widespread and income disparities remain enormous, as economic liberalisation and tight budgetary policies complicate efforts to improve living conditions and expand opportunities for the poor.¹⁰⁸ Despite the

¹⁰³ The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of November 20, 1989, entered into force on September 2, 1990, and ratified by South Africa on June 16, 1995.

¹⁰⁴ Convention on the Rights of the Child *ibid* note 103 Article 3.

¹⁰⁵ Convention on the Rights of the Child *Ibid* note 103 Article 2.

¹⁰⁶ Refugee Children: *Guidelines on Protection and Care*. United Nations High Commissioner for Refugees (UNHCR) Geneva 1994 at 21 and 23.

¹⁰⁷ UN Convention on the Rights of the Child, Article 22(1).

¹⁰⁸ From Africa Recovery, Vol.14#4 (January 2001), at 12; accessed from <http://www.un.org/ecosocdev/geninfo/afrec/subjindx/144soafr.htm>.

government efforts to establish an extensive welfare system for the old people, disabled, children in need, foster parents and others too poor to meet their basic requirements, yet, many in need are not still covered. Most social security legislation in South Africa is exclusionary and does not accommodate the needs of the most vulnerable and marginalised people. The self-employed, informally employed, the long-term unemployed, poor people as well as the non-nationals are amongst the categories of persons denied access to social security in contravention of the constitutional provision that everyone who is unable to support himself, should be provided with appropriate social assistance by the state.¹⁰⁹

It is a well axiomatic fact that refugees and asylum seekers are in a helpless and deplorable condition and very few provide for themselves. For this reason, they are unable to afford the basic necessities of life and therefore require social security protection. Their situation is worsened by their ignorance of the law governing social security rights. There has also been insufficient public education regarding the asylum seekers' right to work and study. Many asylum seekers unable to support themselves are left destitute. They are catered for usually by some humanitarian and philanthropic Non-Governmental Organisations such as the Jesuit Refugee Services and Lawyers for Human Rights. Extra measures are needed to ameliorate the plight of this vulnerable group of people. At least, the richer nations should lend their hands and support to the weaker nations to provide social protection to refugees and asylum seekers.

2.3 CASE LAW

The vulnerability of refugees and hence their need for social protection has been raised in a number of South African court cases. Very few judgments have been handed down addressing this problem due to limited cases referred to the courts. The judiciary has however contributed in developing the jurisprudence

¹⁰⁹ Strydom *et al*, *op.cit* note 76 at 252.

in this area of the law. Apart from the fundamental structuring of the courts and the assignment of law-making powers to them, we may assert that the courts and their decisions have gained ever more weight in an ever more complex world.¹¹⁰ During the past decade, the courts in South Africa have handed down few but important judgments relating to the extension of social security rights to foreigners. The decision of the Constitutional Court has developed the jurisprudence in this area of the law to a limited extent as very few cases have been decided with regards to refugees and asylum seekers in social security law.

Since South Africa only acceded to and ratified the various refugee laws after 1994 and the South African Constitution was only adopted in late 1996, many of the rights contained in the visionary documents have not yet been interpreted by the courts of law, let alone by the Constitutional Court, the highest court in South Africa. Only very few decisions which deal with the rights of non-citizens has been handed down by the Constitutional Court so far as will be seen hereunder.

The South African Constitution enshrines the powers of the courts to scrutinize primary legislations and if possible set it aside. Thus the Constitutional Court makes the final decision whether an Act of parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.¹¹¹ The Constitution further states that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and may make any order that is just and equitable.¹¹² In addition to the above constitutional provisions, the Constitution also provides that where there is an infringement of a right in the Bill of Rights, including

¹¹⁰ Bogaert SVD (Ed) (1997) *Social Security, Non-Discrimination and Property*
Belgie-Nederland: Mahklu Uitgevers, Antwerpen-Apeldoorn, 2131.

¹¹¹ The 1996 South African Constitution. Section 167(5).

¹¹² Section 172 (1) (a) and (b).

socio-economic rights, a court making such a determination could grant any appropriate relief, including a declaration of rights.¹¹³ As a result of the extensive powers granted to the court by the Constitution, the right to social protection has been extended to non-citizens and they are protected against unfair discrimination.

In the case of *Baloro and Others v. University of Bophuthatswana and Others*,¹¹⁴ the decision of the interim council of the university of Bophuthatswana placing a moratorium on promotions of non-South African academic staff with valid contracts of employment, while promoting staff members with South African citizenship was declared by the court as a gross violation of section 8(2) of the interim Constitution. The court held that the words 'no person' in section 8(2) applies to non-nationals too and was not restricted to South African citizens only.

In a unanimous judgment in the Constitutional Court case of *Larbi-Odam and Others v The Member of the Executive Council for Education (North-West Province) and Another*,¹¹⁵ the Constitutional Court struck down a provincial law which prohibited foreign citizens from being permanently employed as teachers in state schools. The unanimous judgment found that non-citizens were protected by the Bill of Rights' non-discrimination clause, and that all employment opportunities with the limited exception of politically sensitive positions should be available to permanent residents and South African citizens on an equal basis. It appears that the Constitutional Court's judgment reaffirms the general proposition that all rights contained in the Bill of Rights, with the exception of those specifically limited to citizens, provide protection to non-South Africans as well as South Africans. Thus, the treatment of undocumented migrants, asylum seekers, refugees and other migrants in South Africa should be

¹¹³ Section 38. Accessed from <http://www.ffc.co.za/conf/papers/courts-policy.pdf>.

¹¹⁴ *Baloro and others v University of Bophuthatswana and Others*, 1995, (4), SA 197 (BOP).

¹¹⁵ *Larbi-Odam and Others v MEC for Education (North-West Province) and the Minister of Education*, 1997, BCLR, 1655 (CC).

viewed in the light of the protections provided by the Bill of Rights as well as against international standards. This interpretation is consistent with the Preamble to the Constitution, which envisions a society based on democratic values, social justice and fundamental human rights.

A landmark decision that has had a tremendous impact on the realisation of socio-economic rights is the Constitutional Court judgment of *Khosa and Others v The Minister of Social Development and Other; Mahlaule and Others v The Minister of Social Development and Others*¹¹⁶ in which the exclusionary nature of the present social assistance system came under the scrutiny of the Court. In both matters, the applicants were Mozambican citizens who had acquired permanent residence status in South Africa. All of the applicants would have qualified for social assistance under the Act, if not for the fact that they were not South African citizens.¹¹⁷ The applicants contended that their exclusion from social assistance was inconsistent with the state's obligations under section 27(1) (c) of the constitution to provide everyone with the right of access to social security. They also contended that their exclusion also limited their right to equality and was unfair in terms of section 9 of the Constitution and unjustifiable in terms of section 36 of the Constitution (the general limitation clause).¹¹⁸ The Court confirmed the Grootboom judgment where it was stated that the socio-economic rights in the Constitution are closely related to the founding values of human dignity, equality and freedom.¹¹⁹ The Court found that the term 'everyone' as used in section 27 also includes non-citizens and, for purposes of the case, permanent residents.¹²⁰ The Constitutional Court further stated that the Constitution vests the right to social security in everyone. By excluding permanent residents from the scheme of social security, the legislation limited their rights in a manner that affected their dignity and

¹¹⁶ *Khosa and Others v The Minister of Social Development and Other; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

¹¹⁷ Para 1.

¹¹⁸ Paras 38 and 39.

¹¹⁹ Para 40.

¹²⁰ Para 46.

equality in material respects. Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The exclusion of permanent residents was therefore held to be inconsistent with section 27 of the Constitution. While recognised refugees in South Africa are only granted the right to apply for permanent residency after five years, reading this constitutional decision together with South Africa's obligations under the Refugee Convention, recognised refugees should be considered to be in a similar position to permanent residents. Even the narrowest reading of these provisions argues for affording certain social and economic rights to recognised refugees who have been certified by the Standing Committee for Refugee's Affairs as remaining a refugee indefinitely.

Under South African law, asylum seekers are permitted to work and study during the refugee status determination period. In the first few years of the administration of the Refugees Act, bearers of asylum seeker permits were not allowed to work and study pending determination of their status. Following a legal challenge to the prohibition in *Watchenuka v. Minister of Home Affairs*¹²¹, however, the Standing Committee for Refugee Affairs ruled that all asylum seekers should be allowed to work and study.¹²² On appeal in the Supreme Court, Nugent JA held in his judgment that the freedom to engage in productive work, even where that is not required in order to survive is in deed an important component of human dignity. For mankind is a pre-eminently a social species with an instinct for meaningful association, self-esteem and a sense of self-worth-the fulfillment of what it is to be human is most often bound up with being accepted as socially useful.¹²³

¹²¹ 2003 (1) SA 619 (C)

¹²² The Refugees Act, section 11(h) makes provision for the determination by the Standing Committee for Refugees Affairs of conditions relating to work and study in South Africa under which a permit can be issued. The Committee's decision was issued in a policy decision dated March 30, 2004.

¹²³ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) paras 27 and 32

In a matter presently at the Supreme Court of Appeal between *Union of Refugee Women and Others v The Director: The Private Security Industry Regulatory Authority and Others*,¹²⁴ the applicants aver that actions of first respondent in refusing to register them or in revoking their registration as security service providers on the basis that they are not South African citizens or permanent residents in South Africa as envisaged by Section 23(1) of the Security Industry Act,¹²⁵ were inconsistent with the Constitution and should be set aside. In the alternative, the applicants sought a declaration to the effect that Section 23(1) was inconsistent with the Constitution and therefore invalid. Bosielo J in his judgment concludes by saying that having given this matter the best consideration possible, he was of the view that the criteria laid down in section 23(1) (a) of the Act was lawful, justifiable and rational. He was furthermore of the view that the harsh effect following on the literal and strict application of section 23(1) (a) were sufficiently tampered with or ameliorated by section 23(6) of the Act to an extent that it made section 23(1) (a) not to be inconsistent with the Constitution. According to him, section 23(1) (a) read with section 23(6) created a flexible machinery in terms whereof, in appropriate circumstances and after due considerations, even refugees could be registered as security service providers, provided that their registration was not inimical to the objects of the Act or in conflict with its purpose, amongst which is the necessity to achieve and maintain a trust worthy and legitimate private security industry which shall ensure adequate protection of the fundamental rights to life and security of the people and their properties. Therefore, he found that the

¹²⁴ CCT 39/06 accessed from: <http://www.cfc.org.za/indexa.php?cat=25>

¹²⁵ Private Security Industry Regulation, Act 56 of 2001. The requirements for registrations a security service provider are clearly set out in section 23 (1) (a) which provides that: any natural person applying for registration in terms of section 2 (1) may be registered as a security service provider if the applicant is a fit and proper person to render a security service and is a citizen or has permanent resident status in South Africa. Of crucial importance is section 23 (6) which provides clearly that: despite the provisions of subsections (1) and (2), the Authority may, on good cause shown and on grounds which are not in conflict with the purpose of this Act, and the objects of the authority, register any applicant as a security service provider.

applicants had not made out a case entitling them to the relief they sought.¹²⁶ The Constitutional Court for the sake of justice granted leave to appeal. It was submitted that the effective blanket exclusion of refugees from the private security industry was unconstitutional, inconsistent with the Constitution, 1996 and invalid to the extent that persons who are recognised refugees are excluded.¹²⁷

Furthermore, in the matter of *The Scalabrini Centre of Cape Town and others v The Minister of Social Development and others*,¹²⁸ the Scalabrini Centre of Cape Town, the Coordinating Body of Refugee Communities and four disable refugees, represented by Lawyers for Human Rights¹²⁹ instituted legal proceedings challenging the constitutionality of legislation which exclude disable refugees from receiving disability grants. In the application, which was instituted in the Pretoria High Court, the applicants contended that the legislation regulating social assistance grants was inconsistent with the Constitution and invalid, because it disqualified disabled refugees from getting disability grants. This exclusion infringed their constitutional rights to dignity, non-discrimination and social assistance. Disable refugees are vulnerable both as refugees and as disabled persons. Whereas a number of the persons whom Lawyers for Human Rights were representing became disabled due to criminal and xenophobic attacks, others were injured in the conflict situations in their countries of origin. South Africa is host to approximately 25 000 recognised refugees, of which only about 200 are disabled. Currently, the disability grants amounts to R740 per month. The additional funds to provide disable refugees with grants is negligible, particularly when the amount of money to provide disable refugees in South Africa is viewed against the size of the government's

¹²⁶ Fritz Gaerdes, a lawyer for Human Rights is representing refugees in this matter. Accessed from: <http://www.lhr.org.za/home/SecurityIndustry.php>.

¹²⁷ At the time of writing the matter was still pending before the Supreme Court of Appeal.

¹²⁸ TPD Case no. 32054/2005.

¹²⁹ Lawyers for Human Rights, is a non-governmental organisation that strives to promote, uphold and strengthens human rights. The organisation has had a proud history since its inception in 1979 of fighting oppression and the abuse of human rights in South Africa.

overall social assistance budget, which amounted to well over R50 Billion in 2005.¹³⁰

Children's lack of access to assistance and social services has raised serious concern. Even when issued with an asylum seeker permit, children do not necessarily receive the assistance that the Department of Social Development is supposed to provide to all children in need of care regardless of their status. Unaccompanied asylum-seeking children in particular experience difficulties in access to protection and social services, including education, due to their lack of well-recognised identity documents.¹³¹

In an important case between *Centre for Child Law and Another v Minister of Home Affairs and Others*¹³² commenced on 3 March 2004, the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela Repatriation Centre. At the time of that application the detained children were being held together with adults also detained at Lindela. They were facing imminent and unlawful deportation. Lawyers for Human Rights-Pretoria Law Clinic acted as the attorneys and counsel for the applicants. The Court granted an interdict preventing the Minister of Home Affairs from proceeding with the deportation of the children.¹³³ In a precedent-setting judgment, Judge Annemarie de Vos castigated the "apathy" of government officials who had failed to act in accordance with South Africa's Constitution, statutory law and their own stated policy and were also in breach of international law. The importance of this judgment is that, it removes any doubt that may have existed about the fact that unaccompanied foreign children should be dealt with under the provisions of the Child Care Act. Judge de Vos indicated that in her view unaccompanied foreign

¹³⁰ Accessed from: www.lhr.org.za

¹³¹ Human Rights Watch "Living on the Margins: Inadequate protection for refugees and asylum seekers in Johannesburg" November 2005 Volume 17, No. 15(A)

¹³² Centre for Child Law and Another v Minister of Home Affairs and Others 2005 (6) SA 50 (T)

¹³³ A summary of the events paragraph 4 to 6.

children should have legal representatives assigned to them by the state in terms of section 28 (1) (h) of the Constitution. Moreover, that the State is under a direct duty to ensure basic socio-economic provision for children who lack family care as do unaccompanied foreign children. There is thus a positive duty on the State to provide those children with the rights and protection set out in section 28 of the South African Constitution.¹³⁴ The judge found that there was a positive duty on government departments to liaise with one another to formulate and implement practical arrangements regarding unaccompanied foreign children found in South Africa. Judge Annemarie de Vos noted that South Africa has recently celebrated the 10th anniversary of the first democratic elections and that “we” as South Africans are justifiably proud of our democracy and the principles enshrined in our Constitution. She also noted that we have an icon in Nelson Mandela whose love for children is internationally known. However, the lofty ideals set out in our constitution and government policy become “hypocritical nonsense” if they are not translated into action by the people who have been appointed and paid by the government to make them a reality. She noted, with deep concern, that the children had remained in detention since February, and she said that government’s failure to act in the best interests of the children was shameful.

In summary, under South Africa’s domestic and international legal framework the minimum social and economic rights that must be afforded to asylum seekers and refugees are the following: Asylum Seekers in possession of a valid permit must enjoy the rights to work and study;¹³⁵ recognized refugees (who are by definition lawfully present in South Africa) must enjoy the right to work and must enjoy the right to basic health services and basic primary education on a par with other South African inhabitants;¹³⁶ recognized refugees must also enjoy the same rights as nationals to public relief and social security;¹³⁷ recognized refugees must also enjoy the same access as other lawfully present non-citizens

¹³⁴ Paragraph 17.

¹³⁵ Refugees Act, section 22.

¹³⁶ See Refugees Act and Refugee Convention, Articles 17 and 22.

¹³⁷ See Refugee Convention, Article 23.

in South Africa to education beyond the primary levels, to housing, and to practice their professions.¹³⁸ The South African government therefore has a duty in terms of constitutional and international law to protect and assist vulnerable refugees, in the same manner that it protects and assists South African citizens.

Despite the legal recognition of these rights, the government of South Africa is failing to meet them. Instead, NGOs, with limited resources, try to meet the basic needs of refugees and asylum seekers who approach them for assistance. While poor conditions are not unique to this category of non-nationals, they are exacerbated particularly for asylum seekers because of their uncertain legal status and fragmented welfare support networks.

2.4 REGIONAL INSTRUMENT OF SOCIAL SECURITY PROTECTION

Given the integration and migration thrust in the Southern African Development Community (SADC), and the aims and purposes enshrined in the SADC Treaty and other instruments, it is imperative that South Africa should engaged in bi or multilateral arrangements in terms of which the social security position of SADC citizens who migrate to South Africa, and South African citizens who migrate to other countries within the SADC region is regulated.¹³⁹ Although one of the most promising, the SADC region is one of the poorest in the world. It is therefore important to identify current social protection measures in this region, and evaluating the extent to which these successfully relate to and address issues of poverty and social exclusion, and enhance the standard and quality of life.¹⁴⁰ The widely recognised right of every individual to equality, dignity, life, health and education has contributed greatly to the renew impetus to develop social security systems. And as a result of a realisation by member states of the poor socio-economic status of the majority of citizens in the region and the need for a renewed response to the increasing poverty levels especially amongst the

¹³⁸ See Refugee Convention, Articles 19, 21, and 22.

¹³⁹ Committee Report No.3: Constitutional Framework of Social Security in South Africa: regulation, protection, enforcement and adjudication, at 61. Accessed from http://www.sarpn.org.za/CountryPovertyPapers/SouthAfrica/taylor/report3_A.pdf.

¹⁴⁰ Committee Report, *Ibid* note 139 at 559.

most vulnerable, social security law is gaining renewed significance in the SADC region.

The SADC member states jointly recognised the need to involve the people in the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law; and that in an increasingly interdependent world, mutual understanding, good neighbourliness, and meaningful co-operation within the countries of the region are indispensable to the realisation of these ideals.¹⁴¹ Social protection is paramount in the objectives of the SADC treaty which includes among others to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.¹⁴² Member states undertake to adopt adequate measures to promote the achievement of the objectives, not to discriminate against any person and any member state, uniform application of this treaty and to accord this treaty the force of national law.¹⁴³ One will doubt why nationality is not stated as a ground for non-discrimination in this treaty. It is respectfully submitted that the inclusion of nationality will strengthen the position of non-citizens, as member states will strive to achieve the goal of the treaty by also including nationality in national laws as a ground for non-discrimination. There is a tendency to assume that if nationality is listed as a 'prohibited ground', then it will be like according citizenship status to non-nationals protected under this ground, the implication being that they will be entitled to all the rights associated with citizenship.¹⁴⁴

The need for a common social security protection in the SADC region is further reiterated in the objectives of the Charter of Fundamental Social Rights in

¹⁴¹ Preamble of the SADC Treaty 1992 at 2.

¹⁴² SADC Treaty of 1992. Article 5(1) (a).

¹⁴³ SADC Treaty *Ibid* note 142 Section 6(1-5).

¹⁴⁴ Draft Paper, Chapter Four, Nationality at 17.

SADC.¹⁴⁵ The Charter also provides for the observation and recognition of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and People's Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments. This Charter elaborates further by stating that member states shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits; and persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to received sufficient resources and social assistance.¹⁴⁶ The Charter therefore extends social protection to both the employed and the unemployed but in the general picture, more emphasis is laid on the employees. Social protection applies to both men and women equally¹⁴⁷. Every worker in the region at the time of retirement who is not entitled to a pension or who does not have other means of subsistence shall be entitled to adequate social assistance.¹⁴⁸ Member states' commitment to international obligations will required appropriate action by ratifying and implementing relevant ILO instruments and as a priority the core ILO Conventions¹⁴⁹.

However, it is clear that neither the SADC Treaty nor the Social Charter in any of the provisions differentiates between citizens and non-citizens. It may thus not be wrong to say that the drafters sought to avoid the notion of citizenship as a qualification to benefit from the objectives of SADC and that member states should take this into consideration when applying the Treaty and the Charter. Olivier, M *et al*¹⁵⁰ states the precarious condition of non-citizens. That the lack of protection granted to non-nationals in the field of social security is one of the

¹⁴⁵ Charter of Fundamental Social Rights in SADC Article 2(1)(e) provides for the promotion and establishment and harmonisation of social security schemes.

¹⁴⁶ Charter of Fundamental Social Rights in SADC Ibid. Article 10(1) (2).

¹⁴⁷ Article 6.

¹⁴⁸ Article 8(b).

¹⁴⁹ Article 5(b).

¹⁵⁰ Olivier *et al*, *Op Cit* note 22 at 47.

root causes of social exclusion in Southern Africa. And the social security and social assistance systems in most of the SADC countries are territorial and nationality based. This serves as an impediment to the development of coherent social security mechanisms in the region. The social security system of Mauritius is however residence based. This could be due to the fact that their population is only 1.2 million people.

The free movement of persons and the right to work within the SADC member states is another vision by SADC.¹⁵¹ A citizen of a member state who acquires right of residence or establishment in the territory of another member state, shall enjoy the same rights and freedoms as citizens in respect of all other conditions of living including security of employment and employment benefits; access to health and recreational facilities; access to education, training facilities and professional advancement; freedom of association, save for such political rights as may be agreed by the summit.¹⁵² Member states also reaffirm their commitment to their obligations under international agreements to which they are parties, especially under the established international principles and standards relating to the treatment of refugees.¹⁵³

In spite of the foregoing SADC instruments and protocols which look very appealing and ambitious, there are still daunting problems of poverty and social exclusion in this region. Lack of general commitment and zeal by SADC member states to co-operate, could be a reason for the slow social security implementation in this region. The vast socio-economic differences and the unidirectional migration towards South Africa, could serve as a barrier to the success of regional co-ordination agreements. Whether SADC member states are respecting the terms in the SADC Treaty and Protocol, is difficult to give an

¹⁵¹ See to this effect the Draft Protocol on the Free Movement of Persons in SADC. 15TH March 1996. Accessed from <http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/1996/draftprotocol.htm>

¹⁵² Draft Protocol on the Free Movement of Persons in SADC *Ibid* note 151 Chapter IX, Article 29.

¹⁵³ Article 45 (c).

accurate appraisal. But one thing for sure is that there are still much to be realised and to accomplish in the area of social security protection in the SADC region. Adequate co-ordination and harmonization of SADC policies and a human right approach to regional integration may have much to be desired. Baseline standards for the region should be adopted taking into consideration the socio-economic and cultural differences of member states. In a nut shell, social inclusion and participation is not an option for large numbers and significant categories of people, because most countries specific social security systems cater exclusively for the whole or part of the formally employed, thereby marginalizing the non-employed workforce, and the provisions of some social assistance and social insurance laws distinguish between non-nationals and nationals.¹⁵⁴

The Draft Code on Social Security in the SADC provides that children and youth in SADC countries constitute the majority of the population and should accordingly be protected in terms of the UN Convention on the Rights of the Child and other international Conventions. Given their particular vulnerable status, children should be entitled to proper and adequate nutrition.¹⁵⁵ The Code further states that self-employed immigrants are to be protected equally with other workers, while illegal residents should at least have a minimum level of coverage, in accordance with national laws. For refugees, protection should be in terms of applicable regional and international instruments.¹⁵⁶

2.5 INTERNATIONAL LAW OBLIGATIONS OF SOUTH AFRICA

All persons in South Africa share a certain set of basic human rights under international law, regardless of their immigration status. International and foreign laws play a significant role in the advancement of non-citizens social security entitlement in South Africa. This is made evident from the

¹⁵⁴ See Social Security within a Regional Context: 'Transforming the Present-Protecting the Future' (Consolidated Report), Chapter 15 at 2.

¹⁵⁵ Draft SADC Code on Social Security, Article 15.

¹⁵⁶ Draft SADC Code on Social Security *Ibid* note 155 Article 16.

Constitutional entrenchment of the relevance of international law in the development of South Africa's jurisprudence. O'Reagan¹⁵⁷ holds the view that the relationship between international and South African domestic law needs to be understood in the context of South African history, and, in particular the history of the international law stand against apartheid. The international political outcry against apartheid and the government of the apartheid regime, coupled with international law developments to give international law effect to that outcry, had a powerful ideological and material impact on the South African politics. That impact is still to be found in our new constitution, which explicitly recognises that international human rights norm, should inform the development of domestic human rights norms.

The Constitution obliges any court, tribunal or forum to consider international law and may consider foreign law when interpreting the Bill of Rights.¹⁵⁸ The importance of this provision is to the effect that South Africa is bound to respect and comply with its international law obligations. This also has an impact on how the courts will have to construe and implement the fundamental rights in the Bill of Rights especially social security rights which is the issue of concern in this study. The courts especially the Constitutional Court have made several comments of international law in their judgments. The courts have held that international law in this context would include international instruments that are binding on South Africa as well as those that are non-binding,¹⁵⁹ and that relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary¹⁶⁰. The Constitution further provides that every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law, when

¹⁵⁷ O'Reagan K. 'International Perspectives on the Interaction of International Law and Domestic Law: A view from South Africa' at 1-2.

¹⁵⁸ South African Constitution Act 108 of 1996. Section 39(1) (b) (c).

¹⁵⁹ *S v Makwanyane and another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at par 35.

¹⁶⁰ *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) par 26.

interpreting any legislation.¹⁶¹ This is to the effect that South African courts must follow the approach of the relevant treaties and conventions, which have been signed and ratified by the nation, but these agreements, have to become law in the Republic by their enactment into national legislation in order to be binding¹⁶².

The influx of refugees and asylum seekers into South Africa prompted the need for international co-operation for their protection. As a result a Basic Agreement between the government of the Republic of South Africa and the United Nations High Commissioner for Refugees in 1993 concluded that refugees should enjoy full legal protection but should not have automatic entitlement to social, economic and welfare rights, provided that they would not be treated any less favourably than aliens generally in the same circumstances.¹⁶³ The United Nation Convention Relating to the Status of Refugees¹⁶⁴ elaborates extensively on social security rights of refugees. It is to the effect that contracting states shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals¹⁶⁵. This also applies to social security rights such as employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme¹⁶⁶. A refugee will also enjoy these right in countries other than that in which he has his habitual residence¹⁶⁷. The provisions of this convention shall be applied to refugees without discrimination as to race, religion or country of

¹⁶¹ Section 233.

¹⁶² Section 231.

¹⁶³ Section 11(d) of the Basic Agreement (Government of the Republic of South Africa and UNHCR) 6 September 1993.

¹⁶⁴ UN Convention Relating to the Status of Refugees 1951.

¹⁶⁵ Article 23.

¹⁶⁶ Article 24.

¹⁶⁷ Article 16.

origin.¹⁶⁸ South Africa acceded to this Convention in 1996 and is therefore bound by its provisions.

The ILO Social Security (minimum standards) Convention¹⁶⁹ provides that non-national residents shall have the same rights as national residents and the need for bilateral and multilateral agreements providing for reciprocity under social security scheme. The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷⁰ provides that the state parties to that Covenant undertakes to guarantee that the rights enunciated in the Covenant will be enjoyed by all without discrimination of any kind, including national or social origin. This Covenant further emphasized that state parties to that Covenant recognised the right of everyone to social security; including social insurance;¹⁷¹ recognise the right of working mothers to adequate social security benefits;¹⁷² and to undertake special measures of protection and assistance for children and young people.¹⁷³

The International Covenant on Civil and Political Rights (ICCPR)¹⁷⁴ is to the effect that there shall be no distinction on the basis of national or social origin in the enjoyment of the rights protected thereto. The International Covenant on the Elimination of All Forms of Racial Discrimination¹⁷⁵ recognises the duty of state parties to prohibit and eliminate racial discrimination in the enjoyment, among others, of the right to social security and social services. The Universal Declaration of Human Rights (UDHR)¹⁷⁶ proclaims the right to social security to everyone as a member of the society. The Declaration further recognise the right of everyone to security in the event of unemployment, sickness, disability,

¹⁶⁸ Article 3.

¹⁶⁹ 102 of 1952. Part XII, Article 68.

¹⁷⁰ ICESCR OF 1966. Article 2(2).

¹⁷¹ ICESCR Article 9.

¹⁷² ICESCR Article 10(2).

¹⁷³ ICESCR Article 10(3).

¹⁷⁴ ICCPR of 1966. Article 2((1).

¹⁷⁵ 1965. Article 5(e)(iv).

¹⁷⁶ UDHR 1948. Article 22.

widowhood, old age and other lack of livelihood in circumstances beyond his or her control; motherhood and childhood are entitled to special care and assistance, and children whether born in or out of wedlock shall enjoy the same social protection.¹⁷⁷

One can infer from the relevant international conventions that international human rights law in general places obligations on states in relation to all people without differentiation between citizens and non-citizens.¹⁷⁸ The UDHR, the ICCPR and the ICESCR together are known as the International Bill of Human Rights because they form the foundation of international human rights law and confer the great majority of rights they enumerate to everyone. They all enjoin states to respect and ensure the rights they set out to all the individuals within their territory without discrimination, except where the rights are expressly qualified.¹⁷⁹

South Africa has not ratified either the ICCPR or ICESCR, though it signed both in 1994 and is therefore considered obliged not to act against the spirit and purpose of the Covenants pending ratification. Moreover, many of the rights contained in these treaties and set out in the UDHR are considered to have become part of customary international law, by which South Africa is bound simply as a member of the community of states. South Africa's Constitution recognises the importance of adhering to principles of international law by stating that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.¹⁸⁰

¹⁷⁷ UDHR Article 25(1)(2).

¹⁷⁸ The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa Adopted on 10 September 1969 and entered into force on 20 June 1974, Article IV concerning Non-Discrimination provides that member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.

¹⁷⁹ UDHR, Article 2; ICCPR, Article 2(1); ICESCR, Article 2(2).

¹⁸⁰ Section 232 of the 1996 Constitution of South Africa.

According to Weissbrodt,¹⁸¹ there is a large gap between the rights that international law guarantee to non-nationals and the realities they face. There are institutional and endemic problems faced by this group in many countries. Continued discriminatory treatment of non-citizens demonstrates the need for clear, comprehensive standards governing the rights of this vulnerable group, their implementation by states and more effective monitoring of compliance. Regional and international co-operation through multilateral and bilateral agreements can provide an understanding of refugee problems and possible solutions.

By signing the United Nations and African Union Refugee Conventions and enacting its own Refugees Act in 1998 (adopted in 2000), the South African government has made important strides in protecting people who have been compelled to leave their countries of origin as a result of well-founded fear of persecution, violence, or conflict. Under this legislation, refugees and asylum seekers have, among others, the right to work and study, access to health care, public relief and assistance. All people in South Africa have the right to life-saving medical treatment. Key findings regarding Refugee protection in South Africa commends South Africa for its progressive refugee and asylum legislation dedicated to promoting a just society for all residents. Rather than warehousing refugees in isolated camps or detention facilities, South Africa encourages refugees to live in its cities where they can work and contribute. Despite these positive commitments, refugees and asylum seekers face significant obstacles to protection in South Africa such as accessing government-funded social services.¹⁸²

It is of profound significance for South African laws to be reviewed so as to remove unconstitutional distinctions being drawn between citizens and non-

¹⁸¹ Weissbrodt D (2003) 'Final Report on the Rights of Non-citizens', UN Doc. E/CN.4/Sub.2/2003/23.

¹⁸² NATIONAL CONSORTIUM FOR REFUGEE AFFAIRS "Summary of Key Findings: Refugee Protection in South Africa" 2006 accessed from:
<http://www.migration.wits.ac.za/RefReport2006.pdf>.

citizens. International law deals with the protection of the right to social security in a way that is instructive in the South African Constitutional context. The various international instruments outlined above contain provisions regarding the exercise of this right. Even if they are not legally binding on South Africa, they shall have to be considered for purposes of interpreting the fundamental rights to access to social security.¹⁸³ Social security as guaranteed in the Constitution should protect all people and South Africa should stick to its international obligations. More test cases should be brought before the courts so that jurisprudence should assist in transforming social security law. International and regional perspectives should strive for the inclusion of non-citizens in social protection.¹⁸⁴

2.6 SUMMARY

In summary, it is worthy to note I have examined in this chapter the legal framework of social protection in the SADC region especially the position of refugees and asylum seekers in the context of South Africa looking at the constitutional framework, statutory framework, case law, the SADC regional instruments of social protection and international instruments. In the chapter below, the European Union regional policies of social protection will be examined, international instruments and the position of refugees and asylum seekers in the social protection laws of Germany. In the next chapter, I have discussed the issue of non-citizens and social protection in the European Union.

¹⁸³ Committee Report No.3 of the Taylor Committee into a Social Security System for South Africa. 2006-03-17.

¹⁸⁴ Klinck E (2001). *Transformation and Social Security in South Africa*. Johannesburg, South Africa.

CHAPTER THREE: NON-CITIZENS AND SOCIAL SECURITY ENTITLEMENT IN THE EUROPEAN UNION

3.0 INTRODUCTION

This chapter examines the social protection entitlements of Refugees and Asylum seekers in the European Union and German legal framework. I have therefore discussed the European Union regional policies of social protection, the legal framework of social protection in Germany and the international instruments governing this area of the law. Whether Refugees and Asylum Seekers in this region enjoys social protection or are excluded is ascertained from the wordings of these policies.

The need for providing adequate social protection to refugees and asylum seekers has of recent been a subject of significant importance and recognition by the European Communities. This area of the law has attracted the attention of many scholars, leading to the present bulk of literature on this subject. The commonality of interest among the European Union member states on this subject matter has led to the desire to co-ordinate their social protection laws. This is further buttressed by the growing trend of migration in Europe. Core values of solidarity and cohesion in this region strengthens social policies aimed at solving the aftermath of this global migration flow. Through out the European Union, significant reforms of social protection systems are now under consideration and, in a number of cases, are being introduced in response to rapidly changing social and economic conditions. However, given the common challenges facing member states in this area, there is a considerable value in discussing these issues at European level. The idea of social security has therefore gained utmost attention by the legislators and judiciary leading to policy innovations and development.

The categories of those migrating to this region consist of internal migrants within the EU, third world refugees, and asylum seekers. The bulk of migration by now refers to further categories of migrants, such as migrant workers from outside EU countries and illegal immigrants. A better examination therefore of the European Union social policies will be guided by finding out what is the actual structure of social security of migrants;

what the main problems within the existing system are; and what are the future prospects considering the continuous flow of refugees and asylum seekers to the European Communities.¹⁸⁵

3.1 EUROPEAN UNION REGIONAL POLICIES

According to Magnusson L *et al*,¹⁸⁶ the European Union is primarily a community of states which acts essentially by law-making and its laws apply throughout the territory of the Union and takes precedence over the laws of the Member States. One of the European Union objectives is undoubtedly to promote a high level of social protection.¹⁸⁷ The European Community Treaty (ECT) also has as its objective the promotion of proper social protection and combating exclusion. And that in achieving its objectives, the community shall support and complement the activities of the member states in the following fields of social security and social protection of workers.¹⁸⁸ No mention is made with regards to asylum seekers and refugees as to social protection. The Treaty however provides that in order to establish progressively an area of freedom, security and justice, the Council shall adopt other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries. The Council is further enjoined to adopt minimum standards on the reception of asylum seekers in member states.¹⁸⁹

As part of a programme of measures aiming to establish a common European asylum policy, European Union member states adopted important measures attempting to arrive at an agreed set of minimum standards for the reception of asylum seekers and the social protection of recognized refugees and which also include provisions for their access to

¹⁸⁵ Eichenhofer, E (Ed) (1997) *Social Security of Migrants in the EU of Tomorrow*, Germany: Osnabruck Rasch.

¹⁸⁶ Magnusson, L *et al* (Eds) (2004) *A European Social Citizenship? Precautions for Future Policies from a Historical Perspective*, Brussels: Presses Interuniversitaires Europeennes.

¹⁸⁷ Treaty of the European Union 1992 Article 2 provides that the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

¹⁸⁸ European Community Treaty, Title XI, Chapter 1 dealing with Social Provisions, Article 136 and 137.

¹⁸⁹ European Community Treaty *Ibid* note 188 Title IV, Article 61 and 63.

education and employment. In this light, the 2003 Directive laying down minimum standards for the reception of asylum seekers, states in its Preamble that a common policy of asylum is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. And with respect to the treatment of persons falling within the scope of this Directive, member states are bound by obligations under instruments of international law to which they are party and which prohibit discrimination. Member states are ensure that applicants receive the necessary health care including emergency care and essential treatment of illness or other assistance to applicants who have special needs.¹⁹⁰

Furthermore, the Refugee Qualification and Protection Directive provides minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The main objective of this Directive is on the one hand to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection and, on the other hand, to ensure that a minimum level of benefits is available to these persons in all Member States.¹⁹¹ All European Member States, with the exception of Denmark, have agreed to this Directive, which had to be transposed into their laws by 10th October 2006.¹⁹²

The Council Directive concerning the status of third country nationals who are long term residents provide that long-term residents shall enjoy equal treatment with nationals as regards access to employment and self-employed activity; education and vocational training; social security, social assistance and social protection as defined by national law. Member States may limit equal treatment in respect of social assistance and social protection to core benefits.¹⁹³

¹⁹⁰ Directive 2003/9/EC of 2003. Articles 1 and 15.

¹⁹¹ Council Directive 2004/83/EC 2004. Article 28.

¹⁹² Cholewinski. R, 2004. **Overview of Social and Economic Rights of Refugees and Asylum Seekers in Europe: International Obligations-Education and Employment.** Centre for European Law and Integration, Faculty of Law, University of Leicester, United Kingdom.

¹⁹³ Council Directive 2003/109/EC of 25 November 2003. Article 11, Sections 1 and 4 respectively.

The European Social Charter states in its Preamble that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin. That everyone has the right to benefit from social welfare services; and anyone without adequate resources has the right to social and medical assistance.¹⁹⁴ The appendix to the Charter further explains that the persons covered there include foreigners only in so far as they were nationals of other contracting parties lawfully resident or working regularly within the territory of the contracting party concerned. And that each contracting parties would grant to refugees as defined in the Convention relating to the status of refugees and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable under the obligations accepted by the contracting party under the said convention and under any other existing international instruments applicable to those refugees.

The provision dealing with social security and social assistance in the Charter of Fundamental Rights of the European Union states that the union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by community law and national laws and practices. Also, everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages. And in order to combat social exclusion and poverty, the union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.¹⁹⁵

An interesting characteristic in the European regional instruments is the extension of their provisions to everyone. Everyone here seems to include refugees and asylum seekers. There will obviously be a problem of interpretation of the word everyone as each member state is responsible for the organisation and financing of its own social protection system.

¹⁹⁴ The European Social Charter of 1961. Part 1. Articles 14 and 13.

¹⁹⁵ Charter of Fundamental Rights of the European Union. 2000. Article 34(1) (2) (3).

The lack of strict compliance to this terminology could be as a result of the fact that social policy comes essentially under the authority of the European Union member states. The Union has its own share of authority and responsibility, particularly in setting objectives to be achieved. It is suggested that an interpretation of the principle of subsidiarity that will provide extensive powers to the union as compared to the member states should be preferred. This will eventually allow the Union to define and guarantee the legal framework and financing of social protection at national level.¹⁹⁶

Another relevant instrument is the regulation, binding and directly applicable in all member states. Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the community covers amongst others stateless persons and refugees residing within the territory of one of the member states and these persons shall be subject to the same obligations and enjoy the same benefits under the legislation of any member state as the nationals of that state.¹⁹⁷ This regulation aimed at the coordination of social security schemes, applies to all statutory social insurance schemes and non-contributory benefits.

3.2 INTERNATIONAL FRAMEWORK ON SOCIAL PROTECTION

The complexity that surrounds the extension of social protection to refugees and asylum seekers makes it difficult for single states to deal adequately with this problem. Pursuant to the international legal principle of territorial sovereignty, states possess extensive authority to control the ingress of foreigners into their territory, but the presence of tens of millions of irregular migrants around the world reveals that states often fail to exercise such control in practice. As a result, the international community society is faced with the need to establish standards of appropriate treatment for irregular migrants who are present within the territory of receiving states. In view of the precarious social condition of these individuals, the need for human rights protection in this context is urgent.¹⁹⁸ As such, the development of international law on refugees and asylum is initiated through

¹⁹⁶ Platform of European Social NGOs. "Social Protection: *Adapting to Changing Needs*". June 1998. Accessed from <http://www.socialplatform.org/module/FileLib/SOCIALPROTECTION98ENG.pdf>.

¹⁹⁷ Regulation (EEC) No. 1408/71 of 1971. Articles 2 and 3.

¹⁹⁸ International Migration Review (1991) IMR Volume xxv, No.4

the conclusion of international conventions and by the adoption of non-binding resolutions and recommendations.¹⁹⁹

The Convention relating to the Status of Refugees²⁰⁰ states that the contracting states must accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of certain rights including social security legal provisions of employment, injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws and regulations, is covered by a social security scheme. It is stipulated that the contracting states shall apply the provisions of this convention to refugees without discrimination as to race, religion and country of origin.²⁰¹

The Convention Relating to the Status of Stateless Persons²⁰² is another international instrument adopted to regulate and improve the legal status of stateless persons who are not refugees and therefore not protected by the 1951 convention. This Convention further reiterates the equal treatment of stateless persons and nationals of the contracting states in the provision of social security rights.

Under the auspices of the United Nations, the right to social security has gained considerable recognition as a human right, as enshrined in the Universal Declaration of Human Rights²⁰³ that everyone, as a member of a society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. And that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment,

¹⁹⁹ Hailbronner, *op.cit* note 22 at 357

²⁰⁰ Adopted on 28th July 1951. Articles 24.

²⁰¹ Convention relating to the Status of Refugees 1951. Article 3.

²⁰² Adopted 28th September 1954. Article 24.

²⁰³ UDHR 1948. Articles 22 and 25(1).

sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Social security protection as a human right is further buttressed by the International Covenant on Economic, Social and Cultural Rights²⁰⁴ as it provides that the state parties to the Covenant recognise the right of everyone to social security, including social insurance. It further ensures the right of everyone to an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions.

A further recognition of the right to social security as an international labour standard has been accorded by the International Labour Organization (ILO) and in particular by the Social Security (Minimum Standards) Convention²⁰⁵ which marked a new step in international social security legislation by introducing the objective of a basic level of social security to be attained everywhere in the world, irrespective of the different socio-economic development. The general reluctance by states to ratify this Convention reflects fundamental inadequacies of the implementation of minimum standards social security. However, the recognition of socio-economic rights in general and the inclusion of the right to social security within these rights in particular, indicates that such rights are seen as indispensable for human dignity and the free development of personality.

The decision on the Fiftieth Anniversary of the adoption of the 1951 Convention on the Status of Refugees solemnly reaffirm that the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, as complemented by the OAU 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, constitute the foundation of international refugee law and as such are pivotal in securing refugee protection. The problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states, and that as the grant of asylum may place unduly heavy burdens on host countries, a satisfactory solution of the problem of

²⁰⁴ ICESCR. 1966. Article 9 and 11.

²⁰⁵ ILO Convention No. 102 of 1952.

refugees can only be achieved through international co-operation and responsibility sharing.²⁰⁶

3.3 NON-CITIZENS AND THE SOCIAL SECURITY PROTECTION RIGHTS IN GERMANY

Social security law in Germany is codified in one social security codex, the *Sozialgesetzbuch* which is the main source of social security law in Germany. It aims at guaranteeing human existence, protect family life, and create equal conditions for everyone.²⁰⁷ Social assistance (*Sozialhilfe*) provides a last safety net to protect people from poverty, social exclusion and hardship, it helps individuals and households who are unable to meet their own needs and lack sufficient entitlement under other insurance and welfare systems that come before it. Social assistance is provided so that everyone entitled to it can live in human dignity and covers the minimum needed to maintain a socially acceptable living standard.²⁰⁸ The immigrant population such as asylum seekers, civil war refugees, resettlers from Eastern Europe and unemployed foreign workers making up new groups of claimants created shifting pattern of circumstances necessitating social assistance. This prompted a two-fold legislative response, comprising amendments to bring the Federal Social Assistance Act into line with the changed social situation. A separate law has been passed over the years for specific groups. An Act governing benefits for asylum seekers thus came into force in 1993. This change excluded asylum seekers from eligibility for social assistance under existing Federal Social Assistance legislation. Instead, a new system was established (*Asylbewerberleistungsgesetz*) specifically for asylum seekers, which provided lower levels of assistance under stricter entitlement criteria.²⁰⁹

²⁰⁶ Decision on the Fiftieth Anniversary of the adoption of the 1951 Convention on the Status of Refugees AHG/Dec. 6 (XXXVII) 2001

²⁰⁷ Article 1 of the Sozialgesetzbuch.

²⁰⁸ These objectives are enshrined in the opening words of SGB XII. The legislation on social assistance was comprehensively reformed in 2003 and now makes up Book Twelve of the Social Code (SGB XII).

²⁰⁹ Hoskins, D; *et al* (2001) *Social Security at the Dawn of the 21st Century*, Germany: Transaction Publishers at 327.

Asylum seekers are accorded social and health assistance needed while applying for asylum in Germany. The Act on Benefits for Asylum Seekers guarantees to foreigners who qualify food, shelter, clothing, personal hygiene and household goods and appliances. Their daily needs are met as a rule with benefits in kind and are strictly based on need. They are obliged to live in refugee reception facilities for up to six weeks and not more than three months, followed by accommodation in a community facility for asylum seekers. Asylum seekers regard the legal obligation to reside in refugee reception facilities and community facilities as an unjustified restriction of their right to self-determination. As a rule, asylum seekers are not permitted by law to take up employment. Asylum seekers and refugees whose deportation has temporarily been suspended may take up employment after a one year waiting period, if no German nationals or foreigners of equal status are available.²¹⁰

Refugees are guaranteed the rights defined in the Refugee Convention. Foreigners formally recognized as entitled to asylum and refugees enjoy unrestricted access to education, occupation and work. They are accorded the same treatment as nationals with respect to elementary education. Refugees who fulfilled the same qualifying conditions have the same claim to social allowance and child benefits as nationals. Refugees are entitled to integration allowance that is not available to other foreigners.²¹¹

The law that governs asylum seekers' rights to receive social services is the so-called 'Asylum-seeker service law' (*Asylbewerberleistungsgesetz*). The husband, wife and children younger than 18 years have the right to receive these services from the state if they cannot afford the costs of their lives by themselves. A tolerance or a preliminary residence permit is required to get money. Services may be reduced if you came to Germany for getting payments and services only or if your deportation cannot take place and you are responsible for it.²¹² Services can be cancelled and limited to just food. Services are increased with time after a period of more than 36 months; departure or

²¹⁰ Weissbrodt, D 'Final Report on the Rights of Non-Citizens' – Summary of Comments Received from U.N. Member States to Special Rapporteur's Questionnaire, U.N. Doc. E/CN.4.Sub.2/2003/23/Add.4(2003).

²¹¹ Weissbrodt, *Ibid* note 210

²¹² *Asylbewerberleistungsgesetz* Section 1a

deportation is not possible for humanitarian, legal or personal reasons; obtaining a preliminary residence permit.²¹³ Children under age receive the increased services, if at least one of the parents gets them. Increased services may include a better and unrestricted medical care, more money, more coupons and much more other things close to the services that German citizens get through the Social Welfare Assistance (*Sozialhilfe*). The demand for social services ends if the asylum seeker now have enough money and do not need social services any longer; are recognised as refugees and can receive social welfare assistance; receive a residence permit either through marriage; have to leave the country or have been deported.²¹⁴

The law on child benefit is set out in the Income Tax Act (*Einkommensteuergesetz*) and the Federal Child Benefit Act (*Bundeskindergeldgesetz*). Anyone with children who live in Germany can claim child benefit. Foreign citizens are also entitled, as long as they have a valid right of residence or residence permit. European Union citizens or citizens of a member state of the European Economic Area living in Germany have the same right as German citizens. Other foreign citizens can claim child raising allowance if they have a right of residence or a residence permit.²¹⁵

There is a social court which deals with cases of social security. The social court ensures that anyone can have their rights under social welfare law reviewed and enforced through the courts. The social courts mostly judge disputes involving social matters. These include health insurance, occupational accidents and pension insurance, unemployment insurance, compensation and assistance for war victims, and the law relating to severe disabilities. Since January 2005, the social courts have also been the courts of responsible jurisdiction for disputes about basic security benefits for job-seekers and social assistance. Proceedings are free of charge to insured persons in the statutory insurance

²¹³ *Asylbewerberleistungsgesetz*, *Ibid* note 212 section 2

²¹⁴ Information Booklet for Asylum Seekers in Thuringia

²¹⁵ Document published by the Federal Ministry of Labour and Social Affairs. Information as of January 2006. Bonn, Germany.

system, assistance recipients and disabled people. Complainants not in any of these groups must pay a flat rate fee.²¹⁶

According to the *Sachleistungsprinzip*, social aid of 207 euros a month per adult is given to asylum seekers in kind and not in cash. However, Germany's Asylum Seeker Benefit Law states that if a refugee comes to Germany in order to benefit from social welfare, that person can be excluded from the system. Social assistance can be granted to anyone staying in Germany. Only German citizens and anyone who can be treated as German citizen are entitled to full social assistance for example recognized refugees and EU citizens. Despite the horrible conditions asylum seekers have to jump through, they continue to choose Germany as their destination. According to data from UNHCR, Germany remained the third largest asylum-receiving country in 2004. Most of these asylum seekers are from Serbia-Montenegro, the Russian Federation, Turkey, and Iraq.²¹⁷

3.4 JUDICIAL DECISIONS

According to Berghman *J et al*,²¹⁸ it can be said that the social security position of migrants balances between two opposing forces. On the one hand states may be inclined to exclude immigrants from social security thereby reducing the long-term costs of immigration and reaffirming the temporary nature of immigration. On the other hand states must find ways to reconcile the phenomenon of temporary immigration with constitutional values regarding equality of treatment and the right to social security for all. These opposing forces often lead to tensions within the legal system between the legislature and the judiciary. When national treatment falls below certain standards, migrants can invoke national judicial protection in order to improve their position. Indeed it is in this area, that the courts have played a major role in the integration of immigrants in the welfare states.

Through its case law, the European Court of Human Rights has developed into one of the most important instruments for the protection of refugees and asylum seekers in Europe.

²¹⁶ Federal Ministry of Labour and Social Affairs, *Ibid*, note 215

²¹⁷ Fischer K (2005) 'Asylum in Deutschland Printer Friendly Version' Volume 18 No12.

²¹⁸ Berghman *J et al*, *op.cit* note 11 at 86.

Particularly since the end of 1980, the European Court of Human Rights has handed down a number of judgments on a range of issues including social security protection of refugees and asylum seekers. Also, the interface between the European Convention of Human Rights and the UN 1951 Convention relating to the status of refugees has been developed.²¹⁹

The judgment of the European Court of Human Rights in *Gaygusuz v. Austria*²²⁰ dealt with the exclusion of a Turkish national from Austrian unemployment assistance. The applicant was a Turkish national living in Austria and had worked in Austria from 1973 to 1984 when he became unemployed. On account of this, he qualified for an unemployment benefit. After this benefit had expired he claimed emergency. His claim was rejected on the sole ground that he did not have the Austrian nationality. After lengthy legal proceedings in Austria the case was brought before the European Court of Human Rights. According to Mr. Gaygusuz, the refusal to grant emergency assistance constituted a violation of the non-discrimination clause in Article 14 of the ECHR in conjunction with the First Protocol. In its judgment, the Court considered the Austrian emergency assistance as a pecuniary right falling within the scope of possession in Article 1 of Protocol No.1 to the European Convention of Human Rights and could not see any objective and reasonable justification as to the difference between Austrians and non-Austrians.

Furthermore, the *Surul*²²¹ case dealt with a Turkish woman who was entitled to stay in Germany on grounds of immigration law, but was not in the possession of a regular residence permit. In that case, German authorities refused to grant child care allowance because the husband of Mrs Surul only possessed as a student, a limited residence permit but no regular residence permit. The plaintiff relied solely on the principle of non-discrimination on grounds of nationality and invoked Article 9 of the Association Agreement and Article 3(1) in order to be entitled to a social security benefit. The Court

²¹⁹ Council of Europe: *Protection of Vulnerable Groups*. Accessed from http://www.coe.int/t/e/human_rights/awareness/6_human_rights_issues/7_protection_of_vulnerable.asp

²²⁰ European Court of Human Rights, judgment of 16 September 1996, *Gaygusuz v. Austria*, application no. 39/1995/545/631, RJD 1996-IV 1129.

²²¹ ECJ, judgment of 4 May 1999, case C – 262/96, (1999), ECR.

ruled that under the association regime established between Turkey and the EU, it was contrary to the principle of equal treatment to refuse family allowances to Turkish nationals who were as such legally residing in the territory of an EU Member State.

The European Court of Justice has given a ruling in the case of Palestinians, Kurds, Algerians and Moroccans, who with their families traveled to Germany and reside there as stateless persons or refugees.²²² Mrs Khalil and her husband are Palestinians from the Lebanon who, in flight from the civil war in the Lebanon, arrived in Germany in 1984 and 1986 respectively where they have since lived continuously. They have been refused recognition as political refugees.²²³ Mr. Chaaban and his wife are Kurds from the Lebanon who, in flight from the civil war in the Lebanon, arrived in Germany in 1985 where they have since lived continuously. They have been refused recognition as political refugees. Mr. Chaaban, like his children, has Lebanese nationality.²²⁴ Mr. Osseili and his wife arrived in Germany in 1986. Mr. Osseili has a Lebanese travel document for Palestinian refugees. His application for asylum has been unsuccessful.²²⁵ Mr. Nasser holds a Lebanese travel document for Palestinian refugees. He has resided in Germany with his family since 1985. He has been refused recognition as a political refugee. He has had a residence permit since 30 April 1998.²²⁶ Under German law, Mrs Khalil and her husband, Mrs Chaaban, Mr. Osseili and Mr. Nasser are regarded as stateless persons.

Since those persons had the grant of child benefit discontinued under new German legislation during the period from December 1993 to March 1994, they submitted in support of their actions challenging the decisions depriving them of those advantages that they and/or their spouses had to be regarded as stateless persons and, consequently, should enjoy family benefits in accordance with Community law which would enable them to be treated in the same way as German nationals and other nationals of the

²²² Press Release No 51/01 of 11 October 2001, judgments of the Court of Justice in joined cases C – 95/99 to C – 98/99 and C – 180/99. Accessed from: <http://curia.europa.eu/en/actu/communiqués/cp01/affcp0151en.htm>

²²³ Case C-95/99.

²²⁴ Case C-96/99.

²²⁵ Case C-97/99.

²²⁶ Case C-98/99.

member States of the European Union. According to them, payment of those benefits should not have been made conditional on possession of a specific residence document.

Mrs Addou is an Algerian national whose husband, like her children, had Moroccan nationality. He subsequently became a German national by naturalisation, after having enjoyed the status of refugee within the meaning of the Geneva Convention. Mrs Addou and her husband traveled in 1988 from Algeria and Morocco to Germany where they have since lived continuously. They have been refused the right of asylum but, in February 1994, they received a residence authorisation and, in May 1996, a residence permit. Mrs Addou brought an application challenging the refusal of the Land Nordrhein-Westfalen to pay her child-raising allowance. That application was granted by the appeal court which held that the possession of a residence document was immaterial since, as a member of the family of a recognised refugee, Mrs Addou had to be treated in the same way as German nationals and other nationals of the Member States of the European Union, pursuant to Community law.²²⁷

In another German case, Barzani (not his real name) came to Baden-Wurttemberg in 1992 after fleeing South Eastern Turkey with her husband and their two young children. They won political asylum but were not granted German citizenship. After her third child was born, Barzani began receiving federal benefits of about \$315 a month. But when she applied for state child-rearing money, Baden-Wurttemberg officials turned her away. As a Turkish national, they argued, she did not qualify. In a lawsuit against the state, she argued that she and her husband, as legal residents who paid the same taxes as other Germans, were entitled to the same benefits. She won the suit, but has yet to receive the approximately \$2,520 she is owed retroactively. The benefits are being withheld as Baden-Wurttemberg's social welfare office tries to convince Germany's highest court to overturn the decision. Whatever the federal administrative court decides, the ruling will apply to every state with programs that extend payment of child-rearing money to asylum seekers and refugees. Millions of children growing up in Germany will be affected, but

²²⁷ Case C-180/99.

the greatest impact will be on the Turks. They make up the largest immigrant population in the country, and many do not have German citizenship.²²⁸

3.5) SUMMARY

To conclude, it will be important to recount that in this chapter I was looking at the social protection of refugees and asylum seekers as governed by the European regional social policies and also the German social security laws relating to this group of people. This chapter coupled with chapter two will form the basis for comparing the policies governing refugees and asylum seekers in the SADC region and European Union especially Germany and South Africa belonging to the two regional groupings as seen in the immediate chapter below.

²²⁸ Linn A and Yackley AJ 2000 'Germany Shuns Foreign Families' Accessed from: <http://www.salon.com/mwt/feature/2000/01/06/turks/index.html>

CHAPTER FOUR: COMPARATIVE ANALYSIS BETWEEN THE SADC REGION AND EUROPEAN UNION

4.0 INTRODUCTION

This chapter constitutes an important component of this study, which is a comparative perspective of the European Union policies of social protection and the SADC regional policies. The position in Germany and South Africa has also been compared. It is imperative to state that this area of the law is a new concept in the SADC region meanwhile it has existed in the European Union for so many decades. Therefore the vast authorities in the European Union will provide some lessons to develop this area of the law in the SADC region.

In response to the numerous challenges confronting states in extending social protection to refugees and asylum seekers, a comparative analysis of the law and practice relating to asylum seekers and refugees' protection in the SADC region and European Union is the core of this study. At the core of the enquiry embarked upon lies the need to develop a framework for appropriate social protection for this group in both regions. This touches on modalities for coordinating social security systems existing in the SADC region, and the need to develop regional and country specific baseline approaches. Such an investigation is necessitated, increasingly, by indications that SADC is moving towards more extensive regional and economic integration; and that social policy in general and social protection in particular is gaining importance at regional level, against the background of some of the most severe forms of deprivation and social exclusion.²²⁹

This study has enumerated the legal framework of social protection and policy issues of these regions. It is important to note that there is very little to compare between the two regions because of their vast differences in this area of the law considering that social protection is a new concept in the SADC region and also the fact that EU is acting as a supranational entity. The SADC region can however learn from the EU social security policies in order to develop and strengthen their systems. Even at the national level, very

²²⁹ Olivier M (2002) 'Social Security for Migrants: Does the European Union Framework Provide Lessons for Developments in SADC' in Berghman J *et al* (Eds) Social Security in Transition, Hague: Kluwer Law International, at 107.

little have been achieved in the attempts to extend social protection to refugees and asylum seekers in South Africa whereas, Germany at least guarantees statutory protection. South Africa has a lot to learn from the social security laws in Germany.

The choice of refugees and asylum seekers for the purpose of this study denotes the special attention this category of non-citizens required. Selecting South Africa and Germany from their respective regions is because the two legal systems treat refugees and asylum seekers differently as Germany applies a universal grant system that extends coverage to everyone while social protection in South Africa is categorical and limited by statutes to citizens only, thereby providing the need for comparing them. The comparative framework will follow the order of Germany and South Africa, EU and SADC.

4.1 COMPARING THE SOCIAL SECURITY PROTECTION OF REFUGEES AND ASYLUM SEEKERS IN GERMANY AND SOUTH AFRICA

South Africa and Germany host a large number of foreign nationals most especially refugees and asylum seekers. Whereas everyone in Germany receives at least a minimum social protection capable of sustaining their lives, the situation in South Africa is different as social protection is qualified by the citizenship criteria. Apart from some exceptions for foreigners with permanent residence status, non-nationals are mostly excluded from South African social security. This applies to virtually all social assistance benefits, in view of the fact that South African citizenship is one of the eligibility criteria for accessing almost all social assistance benefits such as old age and disability grants. There exist the universal grant system in Germany that extends protection to refugees and asylum seekers. There is possibility for refugees in South Africa to get protection as the Refugees Act clearly guarantees equal treatment with nationals and without discrimination. A court judgment in favour of the four disabled refugees claiming disability grants might serve as a turning point and relief for some refugees in South

Africa.²³⁰ The situation of Asylum seekers is pathetic as they are without any form of social protection.

While child benefit or child raising allowance is given to anyone with children who lives in Germany, the position of non-citizen children in South Africa is an exclusionary one as the child support grant is limited only to South African citizens.²³¹ Those with permanent residents were included as a result of the Khosa judgment. The exclusion of foreign children from the child grants is contrary to the Convention on the Rights of the Child (CRC) which makes no distinction between citizen and non-citizen children. It requires states to give primary consideration in all matters concerning the best interest of the child. South Africa is in terms of the non-discrimination provision of that Convention, bound not to discriminate against children on any basis, inclusive of national origin; in relation to social security; and the provision of particular social assistance programmes.²³²

In Germany, there is a social court which deals with cases of social security. It reviews and enforces the social welfare law and disputes involving social protection. Proceedings are free of charge for the most vulnerable and a flat rate is charged from other applicants. The social courts therefore provide easy access to those who have been denied social protection. There is nothing like a social court in South Africa except for the Legal Aid Board. Access to courts will certainly be very costly to refugees and asylum seekers who cannot even support themselves. Thanks to non-governmental organisations like Lawyers for Human Rights, Treatment Action Campaign and Jesuit Refugee Services who are representing this group of people in court free of charge. However, very few cases concerning social protection of refugees and asylum seekers have been decided by the courts in South Africa.

Asylum seekers can access social and health assistance while applying for asylum in Germany. On certain conditions, asylum seekers are guaranteed food, shelter, clothing,

²³⁰ *Scalabrini Centre of Cape Town and others v The Minister of Social Development and others* TPD Case no. 32054/2005 (unreported).

²³¹ Social Assistance Act 59 of 1992 Section 3(c). The foster child grant is however an exception as only permanent resident status is required.

²³² UN Convention on the Rights of the Child. Articles 2(1), 26 and 27 respectively.

personal hygiene and household goods and appliances. Their daily needs are met as a rule with benefits in kind. They are provided with accommodation in a community facility for asylum seekers and are obliged to stay there with restricted right of movement. This is regarded as an infringement of human dignity and the right to self determination. For years various refugee organisations have charged that conditions prevailing in deportation centres and refugee camps are an insult to human dignity and are evidently aimed at breaking the spirit of those incarcerated and thereby deterring attempts by other undocumented immigrants to enter Germany.²³³ Meanwhile in South Africa, asylum seekers are supposed to cater for their own food, clothing and shelter. They are unprotected but survive by the mercy of some humanitarian organisation such as the Jesuit Refugee Society.

A separate legislation has been enacted that deals exclusively with the social protection of refugees and asylum seekers in Germany. On the contrary, there is no comparable legislation in South Africa for the social protection of refugees and asylum seekers. These categories of non-citizens are not included in almost all the social security legislations in South Africa. It is generally an exclusionary system that fails to respect the social security international obligations of South Africa.

The German Constitution guarantees the right to human dignity and equality before the law.²³⁴ Despite these promising provisions of the Constitution, aliens are still given fewer rights than Germans as evident in the uneven distribution of social security benefits. There are still elements of discrimination as protection is accorded based on the status of the beneficiary. Likewise, underlying the various international refugee and human rights Conventions are the principles of non-discrimination and human dignity, core tenets of South Africa's Constitutional democracy. The Constitutional Court in its interpretation has extended protection with regard to access to social assistance to everyone including

²³³ Sokoll L (2004) 'The Deadly Consequences of Germany Refugee's policy' published by the International Committee of the Fourth International (ICFI). Accessed from: www.org

²³⁴ Basic Law for the Federal Republic of Germany (*Grundgesetz, GG*) in the version promulgated on 23 May 1949 as amended up to 20 December 1993. Article 1 and 3 respectively. Article 3 Paragraph 3 provides that no person shall be prejudiced because of, among other things, birth, race, language, or national origin.

citizens and certain non-citizens in particular permanent residents but not to refugees and asylum seekers.²³⁵ Jurisprudentially the right to equal treatment has already in the area of employment been interpreted to imply that there is no basis to distinguish between foreigners who have obtained permanent resident status and South African citizens and permanent residents should be viewed no differently from South African citizens when it comes to reducing unemployment.²³⁶ Also in other areas of fundamental rights protection the courts have struck down a purported distinction being drawn between citizens and non-citizens as in the event of the applicability of the right to access to courts and the right to human dignity.²³⁷ This is very important as it may legal consequences in the area of social protection as well²³⁸ Refugees and asylum seekers in South Africa have the right to work and study.

4.2 COMPARING THE SOCIAL SECURITY PROTECTION OF REFUGEES AND ASYLUM SEEKERS IN THE EUROPEAN UNION AND SADC REGION

In trying to compare the EU and the SADC social security legal framework extending protection to refugees and asylum seekers, a brief recapitulation of their policies will be examined because it forms the basis for comparing. One of the European Union many objectives is undoubtedly to promote a high level of social protection. The European Community Treaty (ECT) also has as its objective the promotion of proper social protection and combating exclusion. European Union member states adopted important measures to arrive at an agreed set of minimum standards for the reception of asylum seekers and the social protection of recognised refugees including provisions for their access to education and employment Member states shall also ensure that applicants receive the necessary health care including emergency care and essential treatment of illness or other assistance to applicants who have special needs.²³⁹

²³⁵ Although section 27(1) (c) of the 1996 Constitution grants the right to access to social security inclusive of the right to social assistance to everyone, ironically not everyone in South Africa can claim these benefits.

²³⁶ *Larbi-Odam and Others v MEC for Education North-West Province* 1998 (1) SA 745 (CC) para 30-31.

²³⁷ See *Baromoto v. Minister of Home Affairs* 1998 BCLR 562 (W) and *Johnson v. Minister of Home Affairs* 1997 (2) SA 432 (C).

²³⁸ Olivier, *op.cit* note 229 at 119-120.

²³⁹ EU Directive 2003/9/EC of 2003.

An interesting characteristic in the European regional instruments is the extension of their provisions to everyone and the prohibition of discrimination. The European Social Charter provides that the enjoyment of social rights should be secured without discrimination on grounds of national or social origin. That everyone has the right to benefit from social welfare services; and anyone without adequate resources has the right to social and medical assistance.²⁴⁰ The Charter of Fundamental Rights of the European Union recognises and respects the entitlement to social security benefits and social services and that everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in order to combat social exclusion and poverty. The Charter also makes provision for social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.²⁴¹

Everyone here seems to include refugees and asylum seekers. Refugees lawfully staying in a territory are guaranteed the same treatment as is accorded to nationals in respect of certain rights including social security.²⁴² Due to the lack of harmonisation of the social security law in the European Union, the member states are responsible for the formulation and implementation of their social security laws and in most cases the fundamental rights values of equality, human dignity and non-discrimination relevant to social security protection remain in principle. The success of the Minimum Standards Directive for the reception of asylum seekers and the social protection of recognised refugees is yet to be achieved. On the whole, refugees and asylum seekers in the European Union enjoy a certain level of social security protection.

There is neither any coordinated nor harmonised social security protection for refugees and asylum seekers in the SADC region. Both the social security and social assistance systems in most of the SADC countries are, as a rule, nationality based except Mauritius which is residence based. In addition, the exclusion of non-citizens in social security terms serves as an impediment as far the development of coherent social security

²⁴⁰ The European Social Charter of 1961.

²⁴¹ Charter of Fundamental Rights of the European Union. 2000.

²⁴² Convention Relating to the Status of Refugees 1951.

mechanisms in the region is concerned. The precarious position of non-citizens stresses the need for adopting comprehensive measures of social security coordination on a bilateral and preferably multilateral basis.²⁴³

On the contrary to the European situation, the social protection of refugees and asylum seekers by the SADC regional policies is exclusionary though the objectives of the SADC treaty include among others to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.²⁴⁴ Member states undertake to adopt adequate measures to promote the achievement of the objectives, not to discriminate against any person and any member state, uniform application of this treaty and to accord this treaty the force of national law.²⁴⁵ It should be noted that the non discrimination rule contained in this Treaty fails to include discrimination based on nationality or citizenship as in the European instruments.

The need for a common social security protection in the SADC region is further reiterated in the objectives of the Charter of Fundamental Social Rights in SADC.²⁴⁶ This Charter elaborates further by stating that member states shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits and persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to received sufficient resources and social assistance.²⁴⁷ This Charter seems to regulate the social protection of workers more than those who are unemployed and are more in need of social protection such as refugees and asylum seekers.

²⁴³ Olivier, *op.cit* note 229 at 119.

²⁴⁴ SADC Treaty of 1992. Article 5(1) (a).

²⁴⁵ SADC Treaty *Ibid* note 244 Section 6(1-5).

²⁴⁶ Charter of Fundamental Social Rights in SADC. Article 2(1) (e) provides for the promotion and establishment and harmonisation of social security schemes.

²⁴⁷ Charter of Fundamental Social Rights in SADC, *Ibid* note 246 Article 10(1) (2).

Member states commitment to international obligations are required as they are required to take appropriate action to ratify and implement relevant ILO instruments and as a priority the core ILO Conventions.²⁴⁸ So far only the Democratic Republic of Congo has signed this Convention among SADC member states, showing the difficulty to achieve minimum standards of social protection in the region and has culminated to even greater difficulty in realising the coordination of social protection of refugees and asylum seekers at the regional level.

The Draft Code on Social Security in the SADC provides that children and youth in SADC countries constitute the majority of the population and should accordingly be protected in terms of the UN Convention on the Rights of the Child and other international Conventions.²⁴⁹ For refugees, protection should be in terms of applicable regional and international instruments.²⁵⁰ The Code is not binding so its provisions have hardly been given any recognition and as a result there are no uniform rules with regard to the treatment of refugees and asylum seekers in the SADC region.

The free movement of persons and the right to work within the SADC member states is another vision by SADC.²⁵¹ Member states also reaffirm their commitment to their obligations under international agreements to which they are parties, especially under the established international principles and standards relating to the treatment of refugees.²⁵² There has been non-compliance with international obligations with impunity.

One may not be wrong to say that refugees and asylum seekers in the SADC region are virtually unprotected unlike those in the European Union who enjoy a certain and progressive level of social security protection. Social security being a new concept in the SADC region is still developing though in a very slow pace. It is made more complicated

²⁴⁸ Article 5(b) Charter of Fundamental Social Rights in SADC.

²⁴⁹ Draft SADC Code on Social Security, Article 15 provides that given their particular vulnerable status, children should be entitled to proper and adequate nutrition

²⁵⁰ Article 16 Draft SADC Code on Social Security.

²⁵¹ See to this effect the Draft Protocol on the Free Movement of Persons in SADC. 15TH March 1996. Accessed from <http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/1996/draftprotocol.htm>

²⁵² Article 45 (c) Draft Protocol on the Free Movement of Persons in SADC.

by the unidirectional flow of migrants towards South Africa and the vast socio-economic conditions of the SADC member states.

4.3 SUMMARY

In this chapter, I have done a comparative framework on the social protection policies in the European Union and SADC, and what obtains in Germany and South Africa in particular. The comparative analysis was meant purposely to investigate the vast development of the law in the European Union over the years so as to learn and suggest some recommendations worthy to the development of this area of the law in the SADC region and South Africa in particular as seen in the next chapter below.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 CONCLUSIONS

Unlike economic migrants, refugees and asylum seekers without prior arrangements fled their country of origin because of armed conflict, internal strife and systematic violations of human rights to seek refuge elsewhere. They are unable to cater for themselves since most of them are disabled, without qualification, language barrier, stringent immigration laws and discriminatory national legislations. They are usually without food, shelter, clothing and lack access to hospitals. Their only option is reliance on social security protection which is often considered to be a safety net. Where social protection is lacking, philanthropic and humanitarian organisations come in for their rescue. As a result, they are vulnerable and need protection.

The situation of refugees and asylum seekers deserved utmost attention and ways of ameliorating their condition. A decision on which course to take should be a matter of priority. What is at stake is the preparation for such persons for life in society and this is relevant for all persons in that position. Their situation becomes more difficult and onerous by delay in addressing their problem.²⁵³ This study has therefore examined the social security policies of South Africa, Germany, European Union and SADC and the extent to which they extend social protection to this vulnerable group. The persistent suffering and delay in responding to the plight of this people has of recent become a global concern and called for the need to promote a more effective national, regional and international response to this global problem.

While literature is very limited on this area, I draw as widely as possible on a variety of sources and empirical studies from around the world. Importantly, this study has added a framework for thinking about the transformation of social security protection to sufficiently cover refugees and asylum seekers around the world.

²⁵³ Recommendation 1652 (2004) 'Education of Refugees and Internally Displaced Persons' Text adopted by the Standing Committee acting on behalf of the Assembly on 2 March 2004.

5.1 RECOMMENDATIONS

Today's refugees and asylum seekers' situations challenge the international community as never before to improve the global governance structure for this group of people. Improved protection can only be achieved through considerably enhanced multilateral cooperation and through shared commitment to implement new, practical arrangements to address current protection gaps. We need new approaches, tools and standards to underpin the present protection regime and enhance both the legal and physical protection of this vulnerable people.²⁵⁴

It is respectfully submitted that the social protection of refugees and asylum seekers both in the European and the SADC community is fragmented and sometimes tenuous. Not only is the variation between countries very great but the differential protection regimes afforded in different phases of the immigrant cycle, between different legal statuses and between different nationalities is also very great. Since this area of the law is now undergoing or about to undergo radical restructuring, there is the possibility of incorporating this category of non-citizens in a rational ordered manner. It appears that the role of the European Union in developing the social protection rights of this group is crucial. Kofi Annan the former UN Secretary General at the Stockholm International Forum on Combating Intolerance lamented as he recounted that there are some indications that Europe is losing sight of its duty to protect refugees under international law, as set out in the 1951 Convention. This is a source of deep concern to him, and risks having enormous impact on other regions which look to Europe as an example.²⁵⁵

In the light of this, it is apparent that all persons should, by virtue of their essential humanity, enjoy all human rights including social security protection. It is clear that there is a huge gap between the rights that international law guarantee to refugees and asylum seekers and the realities they must face. There are institutional and endemic problems faced by these people in many countries. Continued discriminatory treatment of this

²⁵⁴ Protection Agenda, October 2003, Third Edition, UNHCR Brochure 18/09/03. Accessed from <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3e637b194>

²⁵⁵ Speech made by Kofi Annan at the Stockholm International Forum on Combating Intolerance.

group demonstrates the need for clear, comprehensive standards governing the rights of this vulnerable group, their implementation by states and more effective monitoring of compliance by the international community.²⁵⁶ Social security as guaranteed in the South African Constitution should therefore protect all people. It is submitted that the social security laws be reviewed so as to remove unconstitutional distinctions being drawn between citizens and non-citizens in order to make South African laws compliant with its international law obligations. Otherwise, more test cases should be brought before the courts so that jurisprudence could assist in the transformation of social security law.

Bearing in mind confidentiality requirements regarding the use of data, States should register and document female and male refugees and asylum seekers on their territories on an individual basis as quickly as possible upon their arrival, in a manner which contributes to improving their security, their access to essential services and their freedom of movement. States, UNHCR and other relevant partners could use this data to identify and make specific assistance and protection arrangements, where appropriate, for women, unaccompanied and separated children as well as handicapped refugees and the elderly with greater respect for human rights, democratic values and good governance.²⁵⁷

The protection of the economic and social rights of asylum seekers and refugees in Europe will depend, to a greater extent, on how EU Member States implement the two new Directives setting minimum standards for the reception of asylum seekers and the social protection of recognised refugees by the 10 of October 2006. This building of a common asylum and refugee system for the European Union should fully reflect the principles and obligations of international human rights and refugee law and Europe's humanitarian traditions. The Member States need to recognise the global implications of their actions and ensure that common EU asylum policies serve to strengthen the global refugee protection system and responsibility sharing.

²⁵⁶ Weissbrodt, D 'Final Report on the Rights of Non-citizens' UN Doc. E/CN.4/Sub.2/2003/23 (2003).

²⁵⁷ UNHCR Brochure (Third Edition), "Protection Agenda", October 2003, 18/09/03.

The lack of sufficient statutory coverage of the asylum and refugees social protection rights shows that the trend of governments has been to diminish these rights, whereas courts have been enforcing the established rights and even extending them. Judicial activism is now one of the principal innovating forces in this area.²⁵⁸ There is a need therefore to create a social court or tribunal in South Africa just as in Germany that will deal exclusively with social security issues. It is submitted that this specialised court or tribunal should be accessed free of charge by the most vulnerable people and this might help to bring about a change in the present social exclusion of the marginalised groups in South Africa. As a minimum, a separate legislation on social protection of refugees and asylum seekers should be enacted and clearly define their rights.

South Africa has not effectively or adequately addressed the problem of access to services such as social grants, medical facilities and treatment for HIV and AIDS. Deprived of these services, asylum seekers and refugees remain unprotected and unassisted. There is therefore the urgent need for increase coordination and cooperation between the Department of Home Affairs and other government departments, greater communication between UNHCR, non-governmental organisations as well as asylum seekers and refugee communities and applying innovative methods to facilitate access to social services for refugees and asylum seekers.

The global interest on this area of the law shows that it is time to introduce a global welfare policy, to create global social security systems that are open to everyone²⁵⁹. Since many countries fail to respect their international law obligations with impunity and making international law passive, regional bodies such as the European Union and SADC should be delegated the powers to regulate social security laws rather than the Member States. This will help in the harmonisation, uniform implementation and monitoring of compliance.

²⁵⁸ This has been demonstrated in several cases, for example in the German case of *Molenaar* Case C – 160/96 the court found that the non-exportability of pensions was unconstitutional. Also in Germany, the administrative court of Gottingen found that a recognised refugee and his family expelled for claiming social assistance must be allowed to remain in order that the family remain united (Az: IB 1260/96).

²⁵⁹ Benvenisti, E *et al* (Eds) (2004) *The Welfare State, Globalisation and International Law*, Berlin, Springer – Verlag, at 24.

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