

**REALISING THE SOCIO-ECONOMIC RIGHTS OF REFUGEES
UNDER INTERNATIONAL HUMAN RIGHTS LAW: A CASE STUDY
OF SOUTH AFRICA**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE OF MASTERS OF LAW (LLM(I)) IN INTERNATIONAL AND HUMAN
RIGHTS LAW**



BY

TAGUEKOU KENFACK ALEXIE

STUDENT NUMBER: 3277698

PREPARED UNDER THE SUPERVISION OF DR EBENEZER DUROJAYE

AT THE

FACULTY OF LAW

UNIVERSITY OF THE WESTERN CAPE

DECLARATION

I, **Taguekou Kenfack Alexie**, declare that '**Realising the Socio-economic Rights of Refugee under International Human Rights law: A case study of South Africa**', is my work and has not been submitted for any degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced.

Signature: _____

Date: _____

Supervisor: Doctor Ebenezer Durojaye

Signature: _____

Date: _____



DEDICATION

I dedicate this work to the one true God, Lord of heaven and earth. Everything I do, I do in His strength and to His glory.

I also dedicate this work to my mother, and my elder brothers and sisters, who have been a source of hope, without their love, I would never have made it this far.



ACKNOWLEDGMENT

I would firstly like to acknowledge my family. Mother, elder sisters and brothers, you are the best family a man could ask for. I love you all so much. In addition I would like to thank the following people for their valuable support without which this work would not have been successful. First, to my supervisor Dr Ebenezer Durojaye for his support and comments that proved to be valuable. I would also like to thank Professor Leeman for his editing assistance. Thanks are also due to the Haven Night Shelter Organisation with all its staff members, for providing care, shelter and food over the period that preceded the completion of this work.



LIST OF ACRONYMS AND ABBREVIATIONS

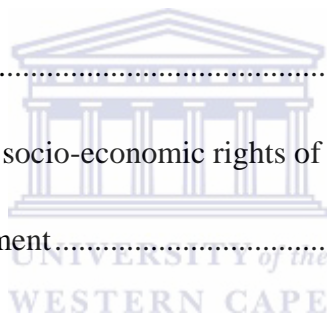
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CESC	Committee on Economic, Social and Cultural Rights
CoRMSA	Consortium for Refugees and Migrants in South Africa
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and political Rights
ICESCR	International Covenant on Economic, Social and Cultural Right
MSF	Médecins Sans Frontières
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Right
UN	United Nations
UNHCR	United Nations High Commissioner
HRC	Human Rights Committee

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGMENT	iv
LIST OF ACRONYMS AND ABBREVIATIONS	v
CHAPTER ONE	1
INTRODUCTION	1
1.1 Background and rationale of the study	1
1.2 Definition of ‘refugee’	3
1.3 Objectives of the study	4
1.4 Research question	5
1.5 Research methodology	5
1.6 Literature review	5
1.8 Overview of chapters	7
THE SOCIO-ECONOMIC RIGHTS OF REFUGEES: AN INTERPRETATION OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS	8
2.1 Introduction	8
2.2 Socio-economic rights under international and regional human rights law	8
2.2.1 The non-discrimination principle	10
2.2.2 Socio-economic rights under the ICESCR	12
2.2.2.1 Right to health care	12
2.2.2.2 Right to education	14

2.2.2.4 State minimum core obligation.....	18
2.2.3 The Convention on the Rights of the Child (CRC).....	21
2.2.4 African regional treaties and refugees rights to access socio-economic rights.....	23
2.3 The socio-economic rights of refugees under international and regional refugee law	
.....	25
2.3.1 United Nations Convention Relating to the Status of Refugee of 1951 and Protocol of 1967 (Protocol Relating to the Status of Refugees).....	26
2.3.2 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).....	28
2.3.3.1 UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.....	30
2.3.3.2 Refugee children: Guidelines on Protection and Care.....	30
CHAPTER THREE	33
SOUTH AFRICAN DOMESTIC LEGAL FRAMEWORK RELEVANT TO THE PROTECTION OF SOCIO-ECONOMIC RIGHTS OF REFUGEES	33
3.1 Introduction.....	33
3.2 South African Constitution	34
3.3 The Refugees Act.....	35
3.4 Court interpretation and enforcement of socio-economic rights	38
3.4.1 Principles of human dignity, equality and non-discrimination	38
3.4.2 Test of progressive realisation of socio-economic rights.....	40
CHAPTER FOUR.....	44

PROBLEMS OF ACCESS TO SOCIO-ECONOMIC RIGHTS FOR REFUGEES IN SOUTH AFRICA	44
4.1 Introduction.....	44
4.2.1 Access to education.....	46
4.2.1.1 Importance of education for refugees.....	46
4.2.1.2 Problems of access to education.....	47
4.2.3 Access to shelter or housing.....	50
4.2.3.1 Acquisition of housing.....	50
4.2.3.2 Access to lease.....	51
4.2.4 Access to health care	52
4.3 Obstacles to the realisation of socio-economic rights of refugees.....	53
4.3.1 Access to a refugee document.....	54
4.3.2 Lack of awareness	54
4.3.3 Xenophobia	56
4.4 Conclusion.....	56
CHAPTER FIVE	58
CONCLUSION AND RECOMMENDATIONS	58
5.1 Conclusion	58
5.2.1 The need for an awareness campaign.....	59
5.2.2 The need to establish a Refugee Council and an intergovernmental body	59
5.2.3 Other specific recommendations	60
BIBLIOGRAPHY.....	62



Books and Chapters in Books	62
Journal articles	64
International and Regional Instruments and Resolutions	66
Unpublished theses and papers	67
REPORTS AND STUDIES	68
Case law	69
Other	69



CHAPTER ONE

INTRODUCTION

1.1 Background and rationale of the study

For a long time, refugee¹ protection has constituted one of the main concerns of the international community. The refugee issue led to the creation, in 1950, of a United Nations High Commissioner for Refugees (UNHCR), and the adoption, in 1951, of a Convention Relating to the Status of Refugees (UN Refugee Convention). The 1951 Convention was later complemented by a Protocol Relating to the Status of Refugees (1967), which was designed to remove the temporal and geographical limitations put by the said Convention on the definition of a refugee. All these efforts were aimed at enabling people who no longer have the benefit of protection against persecution in their own country to turn for protection to the international community.

Regional conventions have also been adopted in order to deal with the refugee problem. For example, the adoption of the Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention), in 1969, was motivated by the wish to find ‘ways and means of alleviating their misery and suffering as well as providing them with a better life and future’.² Forty-four years on, the issues relating to refugees remain unsolved and a study of these issues is still pertinent.

According to the office of the UNHCR, the world’s refugee problem remains one of the most difficult issues facing the world community.³ In Africa, both internal and external conflicts, as well as factors, such as, poverty and environmental disaster, have led to the widespread

¹ For the purposes of this study the term “refugee” includes asylum seekers.

² Preamble of the OUA Refugee Convention.

³ Fact Sheet no 20, *Human Rights and Refugees*. Available at www.ohchr.org/documents/factsheet20en.pdf (accessed 29 November 2013).

phenomenon of refugees in many countries on the continent.⁴ According to several estimates, there are millions of refugees in Africa who are exposed to abuse and who therefore need to be protected in order to ensure that their human rights are not violated.⁵

In southern Africa, since the economic and social breakdown in Zimbabwe, thousands of people have fled that country for South Africa. These refugees face a countless array of challenges, including physical safety, discrimination, and the constant struggle to find food, education, housing and health care.⁶

Refugees are entitled to most of the rights contained in international human rights instruments, as well as to the protection provided for in guidelines, conventions and policies which specifically address the problem of refugees. There is, however, great concern that refugees are abused and exploited as a result of insufficient protection. For example, in South Africa, there have been constant allegations in the news of abuse of refugees in different refugee reception offices as well as at Lindela, the main detention centre for illegal immigrants in South Africa.⁷ There have also been constant allegations in the news regarding access to education, shelter and health care for refugees in South Africa.⁸ Such allegations and many other complaints from refugees prompted an interest in the topic of the research paper.

⁴ Kaime T 'The protection of refugee children under the African human rights system: Finding a durable solutions in international law', in Sloth-Nielson J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 183.

⁵ Nicholson C *A first Call on Available Resources for Child Refugees in South Africa* (2005) 381.

⁶ Handmaker J *Mobilising Social Justice in South Africa Perspectives from Researchers and Practitioners* (2010) 35

⁷ South African Human Rights Commission *Probing-abused of refugees*. Available at www.news24.com/SouthAfrica/news/Sahrc (accessed 29 November 2013).

⁸ South Africa's tourism website describes the country as the 'land of good times and friendly people'. Sadly, Araya Y, a pregnant Somali refugee living in Port Elizabeth, did not experience this side of the country. Instead, when she went to a government district hospital in July 2010 to give birth, she was abused by medical staff and denied care. Available at <http://www.mg.co.za/article/2012-03-16-a-sick-system-abuses-its-refugees/> (accessed 29 November 2013).

1.2 Definition of ‘refugee’

The first definition of the term ‘refugee’ appears in the Statute of the UNHCR and the 1951 UN Refugee Convention.⁹ According to the 1951 UN Refugee Convention and its 1967 Protocol, a refugee is:

‘Any persons who...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence... is unable or, owing to such fear, unwilling to return to it.’¹⁰

The UN Refugee Convention was adopted in the aftermath of World War 2 and was designed to deal with European refugees.¹¹ From that definition it appeared that the drafters of the UN Refugee Convention considered the refugee issue to be a temporary one.¹² There was no possibility to add new categories of refugee within the Convention’s scope.¹³ However, the struggle for independence in Africa revealed the limits of that definition. Consequently, a Protocol was adopted in 1967, aimed at removing the temporal and geographical limitations to the definition of ‘refugee’.¹⁴ The 1951 UN Refugee Convention and its 1967 Protocol are the main international instruments dealing with refugees’ issues, and their definitions have been adopted in many regional conventions with the purpose of improving the situation of refugees.¹⁵ However, the definition of ‘refugee’ in the UN Refugee Convention ‘is not universal and creates certain problems when it comes to its application to new refugees from new areas and notably in the third world’.¹⁶ Thus, African countries decided to expand the

⁹ Aiboni S *Protection of Refugees in Africa* (1978) 30.

¹⁰ Article 1(a) (2) of the 1951 UN Refugee Convention read together with Articles 1(2) and (3) of the 1967 Protocol Relating to the Status of Refugees.

¹¹ The reading of Article 1(b) (1) of the Convention shows that it was primarily aimed at dealing with persons whose situation was a result of ‘events occurring in Europe before 1 January 1951’; See also Murray R *Human Rights in Africa: From the OAU to the African Union* (2004) 187.

¹² Kouroula P *Broadening the Edges: Refugee Definition and International Protection Revisited* (1997)60.

¹³ Kouroula P *Broadening the Edges: Refugee Definition and International Protection Revisited* (1997) 62.

¹⁴ Aiboni S *Protection of refugees in Africa* (1978) 30.

¹⁵ Goodwin G *The refugee in international law* 2ed (1996) 20. See also art 1 of the Convention Governing the Specific Aspect of Refugee problems in Africa.

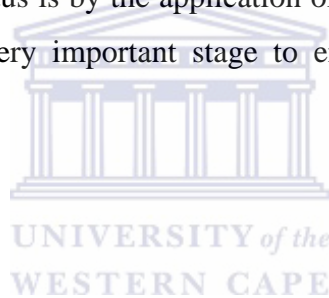
¹⁶ Aiboni S *The protection of refugee in Africa* (1978) 30.

definition to those people forced to flee on account of external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their country of origin or nationality.¹⁷ The breadth of the definition of the term 'refugee' is one of the main characteristic of the OAU Refugee Convention. In that way, a larger category of people is offered protection under the OAU Refugee Convention than under the UN Refugee Convention.¹⁸ With this innovation of the OAU Refugee Convention, all people who are compelled to flee across national borders to escape violence of any kind or even foreign domination generally, and whether or not in fear of persecution, are entitled to the status of refugee in states parties to the OAU Refugee Convention.¹⁹

People who meet the above-mentioned criteria are owed the obligation to be treated in accordance with certain human rights and refugee specific standards.

The determination of refugee status is by the application of the above definition of a refugee to concrete situations. It is a very important stage to enjoying the rights in the asylum country.

1.3 Objectives of the study



The purpose of this study is to outline the socio-economic rights of refugees in South Africa with a particular emphasis on their rights to education, housing and health care. The study aims to explore whether the current treatment of refugees in South Africa is in accordance with existing international norms and standards for the protection of refugees. The study focuses on the realisation of the above-mentioned socio-economic rights in order to measure the treatment. The study also seeks to address the obstacles which prevent the full and proper treatment of refugees, and to make recommendations as to how South Africa can better regulate the treatment of refugees living in its territory. In essence, the study aims to investigate whether there is an inconsistency between the rights of refugees acknowledged in international law, and in South African domestic law and the current situation of refugees in South Africa, and, if so, how this can be remedied.

¹⁷ Article 1(2) of the OAU Refugee Convention.

¹⁸ Aiboni S *The protection of refugee in Africa* (1978) 35.

¹⁹ Aiboni S *The protection of refugee in Africa* (1978) 35.

1.4 Research question

This study poses the following questions:

Does the legal regime in South Africa meet international standards concerning the socio-economic rights of refugees, particularly the rights to education, housing and health care?

To what extent are the provisions of legal instruments relating to the socio-economic rights of refugees in relation to the rights to education, housing and health care being realised in South Africa?

What are the obstacles to the realisation of these rights and how can they possibly be remedied?

1.5 Research methodology

The study is a library based research. It uses primary sources, such as: treaties, statutes, conventions and books, for researching the international law standard on refugees, and the human rights protection that it offers them. Secondary sources, such as: UNHCR Handbooks, UNHCR reports, the internet, newspapers, journal articles and reports from various non-governmental organizations (NGOs), provide information on the actual situation of refugees in South Africa.

1.6 Literature review

Many studies have been conducted on the refugee problem. The right to seek and enjoy asylum, the concept of 'refugee', refugee status, the principle of non-refoulement, international protection, and other refugee related topics have been discussed by many authors. However, there are few books and articles written on the socio-economic rights of refugees. The existing ones focus more on the above-mentioned issues rather than on human rights abuses experienced by refugees in their host country.²⁰

As far as South Africa is concerned, a handful of past LLM students have written on the subject of refugees. In 2000, Mwalimu wrote on the socio-economic rights of refugees in

²⁰ Ferhout R 'Asylum-seeking children: how to implement their right to family life' in Doek J, Vanloom H & Vlaardingerbrock P (eds) *Children on the move: how to implement their rights to family life* (1996)113.

Africa with a focus on children.²¹ In 2007, Sengendo wrote on refugee laws for the protection and survival of the African refugee's child's language of his inheritance in the country of asylum.²² In 2006, Bariboneka wrote on the political participation of refugees as a means to realise the right to repatriation.²³ In 2007, Handmaker J, Anne delahunt L and Klaaren J wrote on advancing refugee protection in South Africa. This book is a well-researched and balanced discussion of South Africa's endeavours to address its refugee problems. The book is divided into three thematic parts in order to guide the reader. It documents the development and implementation of refugee policy in South Africa over a 10 year period from 1996 until 2006. In doing so, the book addresses issues, such as, detention, gender²⁴, children,²⁵ and health.²⁶ It also deals with issues, such as, refugee status determination procedures²⁷, due process in asylum determination,²⁸ as well as efforts to deal with asylum application backlogs²⁹. The present study, however, aims to focus on an aspect of refugees which has not been specifically focussed on in the above-mentioned studies: the treatment of refugees, the challenges they face in accessing their socio-economic rights in the host countries, and how their situation can be improved.

²¹ Mwalimu S *The Socio-economic Rights of Refugees in Africa* (unpublished LLM thesis, University of Pretoria, 2000).

²² Sengendo J *Refugee laws for the protection and survival of the African refugee's child's language of his inheritance in the country of asylum* (unpublished LLM thesis, University of Pretoria, 2007).

²³ Boriboneka J *political participation of refugees as a means to realize the right to repatriation: the search for durable solution to the refugee problem in Africa* (unpublished LLM thesis, University of Pretoria, 2006).

²⁴ Valdy N, Mofell H 'Protecting the Invisible: the status of women refugees in Southern Africa' in Handmaker J(ed) *Advancing Refugee protection in South Africa* (2007) 187-214.

²⁵ Mayer V, Garderen J & Handmaker L 'Protecting the most vulnerable: using the existing policy Framework to strengthen Protection for Refugee Children' in Handmaker J(ed) *Advancing Refugee Protection in South Africa* (2007) 168-186.

²⁶ Belvedere F, Pigou P & Handmaker J 'Realising Rights: The development of Health and Welfare Policies for Asylum-seekers and refugees in South Africa' in Handmaker J (ed) *Advancing Refugees Protection in South Africa* (2007) 215-242.

²⁷ Klaaren J, Sprigman C 'Refugee status determination procedure in South African Law' in Handmaker J (ed) *Advanced Refugee Protection in South Africa* (2007) 48-61.

²⁸ Hunt L, Kerfoot W 'Due process in asylum determination in South Africa from a practitioner's perspective: difficulties encountered in the interpretation, application and administration of the Refugee Act' in Handmaker J (ed) *Advancing Refugees Protection in South Africa* (2007) 62-89.

²⁹ Handmaker J 'Starting with a clean state? efforts to refugee protection in South Africa' In Handmaker J (ed) *Advancing Refugee Protection in South Africa* (2007) 89-168.

1.7 Scope and limitation of the study

The study outlines the socio-economic rights of refugees in South Africa, with a particular emphasis on their rights to education, housing and health care. The study intends to look at the refugee issue in South African since the coming into force of the South African Refugee Act, 130 of 1998,³⁰ in April 2000. For the purposes of this study, the term ‘refugee’ also refers to asylum seekers. This is justified by the fact that in the specific context of South Africa, refugees and asylum seekers are entitled to the same rights.³¹

1.8 Overview of chapters

Chapter Two is a study of the relevant international law, including ‘hard’ law and ‘soft’ law. It establishes the standards for the treatment of refugees.

Chapter Three is a study of domestic South African law relevant for the protection of refugees.

Chapter Four sets out the challenges refugees face in accessing their socio-economic rights, particularly the rights to education, housing and health care. This chapter establishes how refugees are treated in relation to their socio-economic rights. It also addresses the obstacles which prevent the full realisation of the standards set out in Chapters Two and Three. It highlights specific obstacles which need to be addressed in order to sufficiently realise the socio-economic rights of refugees.

Chapter Five summarises the results of the research, provides concluding remarks and sets out recommendations to overcome the obstacles to the realisation of the socio-economic rights of refugees in South Africa.

³⁰ Refugee Act 130 of 1998.

³¹ Section 22 of the Refugee Act 130 of 1998.

CHAPTER TWO

THE SOCIO-ECONOMIC RIGHTS OF REFUGEES: AN INTERPRETATION OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

2.1 Introduction

The rights of refugees are strongly protected in international and regional refugee conventions, which are exclusively concerned with refugees in their application. Also, more powerful claims can be advanced on behalf of refugees under international and regional human rights law. It is important to note that despite the fact that international refugee law and international human rights law were developed separately, these two are not exclusive.³² The 1951 Refugee Convention and its protocol is a branch of international human rights law.³³ In fact, human rights law is universal and goes beyond the refugee specific rights regime in the refugee conventions. For example, concerning socio economic rights, international human rights law does not distinguish between citizens and non-citizens. South Africa has ratified and is legally bound by various international instruments and is therefore obliged to make sure that the human rights standards contained therein are upheld.

This chapter seeks to interpret the socio-economic rights provisions of different international legal instruments and to examine to what extent these provisions apply to refugees. In addition, it is important when examining the legal framework governing the treatment of refugees to also consider the Guidelines which have been created by the United Nation High Commissioner for Refugees (UNHCR).

2.2 Socio-economic rights under international and regional human rights law

Human rights belong to all human beings,³⁴ and the fact that someone is refugee does not make him anything less than human. In this regard, Zia observes that:

³² Goodwin G 'The international law and human rights: Trends concerning international migrants and refugees' (1989) *International Migration Review*. Available at: <http://www.jstor.org/pss/2546427> (accessed 15 September 2013).

³³ Hathaway J *The Rights of Refugees Under International Law* (2005) 4.

³⁴ Universal Declaration of Human Rights, (hereinafter 'UDHR') Article 2.

‘Once an individual, a human being, becomes a refugee, it is as though he has become a member of another race, some subhuman group. You talk of rights of refugees as though human rights did not exist which are broader and more important. We have forgotten that the ultimate recipient of any progress is supposed to be the individual.’³⁵

Refugees, asylum seekers, as well as other non-citizens in the country are therefore in the same way, entitled without being unfairly discriminated against, to the rights outlined in the Universal Declaration of Human Rights (UDHR)³⁶, International Covenant on Civil and Political Rights (ICCPR)³⁷, and other human rights instrument that have been signed and ratified by South Africa. In fact, the clauses prohibiting discrimination contained in these instruments are expansive and provisions regarding individual rights protections concern all human beings. In its General Comment 15, the Human Rights Committee (HRC) reaffirmed this principle by stressing that the enjoyment of rights under the International Covenant on Economic Social and Cultural Rights (ICESCR) is not limited to citizens of States parties but must be available to all individuals regardless of nationality or statelessness, thereby including refugees.³⁸ This statement was also reiterated by United Nation High Commissioner for Refugees’ Executive Committee in its conclusion 82, where reference is made to the ‘obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugees’ law standards as set out in relevant international instrument’.³⁹

Obligations to realise the socio-economic rights are principally defined by the ICESCR⁴⁰ which is the major treaty on the subject. Although South Africa has not yet ratified the ICESCR, the obligations describe in this treaty are relevant to South Africa because of the correlation between the treaty and the South African Bill of Rights. Moreover, section 39(1) (b) of the constitution compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law.⁴¹ It is also important when examining the legal framework governing the treatment of refugees to consider the Convention on the Rights of the

³⁵ Zia R *Human Rights: The African Context* (1987) 105.

³⁶ Universal Declaration of Human Rights, G.A. Res. 217 A (III). U.N. Doc. A/810, 1948.

³⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 entered into force 23 March 1976.

³⁸ The Human Rights Committee General Comment 15: the position of aliens under the Covenant: 11/04/86.U.N.DOC.HRI/GEN/1/REV (1994) para1.

³⁹ Executive Committee Conclusion 82 (XLVII) of 1997, on safeguarding asylum, para 7.

⁴⁰ GA Res 2200 (xxI) of 16 December 1966. Entered into force 3 January 1976.

⁴¹ Chapter 2 of the constitution.

Child (CRC)⁴² as it contains some specific provisions relating to the rights of refugees children.

Other international human rights instruments that may also assist refugees to claim the enjoyment of socio-economic rights are: the UN Convention on the Elimination of Discrimination against Women (CEDAW) and General Comment 6 by the Committee on CRC which deals with refugee children. However, because of length limitations, these two instruments will not be examined.

2.2.1 The non-discrimination principle

International and regional human rights instruments deal with both citizens and non-citizens. Therefore, they extend protection to refugees. For example, the ICCPR, the UDHR and the ACHPR with few exceptions,⁴³ apply to both nationals and non-nationals. These instruments adopt languages such as ‘everyone’, ‘all persons’ and ‘no one’⁴⁴. Their non-discrimination clauses require each State Party to respect and secure the rights recognised therein to all individuals within its jurisdiction without distinction of any kind, such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁵ Although these instruments do not explicitly mention nationality as a prohibited ground of discrimination, it is clear with the inclusion of the term ‘other status’, that the non-discrimination provisions are unlimited.

The HRC which is the body responsible for monitoring the implementation of the ICCPR has clearly acknowledged that the ICCPR and its non-discrimination clause are applicable to non-nationals. In its General Comment 15 on the Position of Aliens under the Covenant, the HRC asserted:

⁴² The UN General Assembly adopted the Convention on the Rights of the Child and opened it for signature on 20 November 1989. It came into force on 2 September 1990, after it was ratified by the required number of nations.

⁴³ Some rights in the ICCPR are expressly limited to citizens, such as the political rights enumerated in Article 25.

⁴⁴ ICCPR Article 10.

⁴⁵ ICCPR Article 2(1).

‘In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike...’⁴⁶

The ICCPR also contains another equality clause in Article 26, which is not limited to the rights contained in the ICCPR. This clause can operate to combat other kinds of discriminatory measures in areas outside the scope of the provisions of the ICCPR, including socio-economic rights. Although there is no state obligation under the ICCPR to introduce social measures, the HRC has confirmed that existing measures must be applied in a non-discriminatory manner.⁴⁷ This position was also confirmed in General Comment 18 on Non-discrimination.⁴⁸ Article 26 extends non-discrimination protection to socio-economic rights of non-nationals, thereby including refugees. The HRC found that unjustified differences in treatment on the basis of nationality regarding pension rights constituted a violation of the substantive equality clause.⁴⁹

Contrary to the ICCPR, the position of non-citizens under the ICESCR appears to some extent too limited. Although the ICESCR adopts nearly the same language as the ICCPR, there are differences of opinion as to whether the non-discrimination provision in Article 2(2) ICESCR can apply to non-nationals.⁵⁰ Nevertheless, non-citizens, including refugee, cannot be discriminated against at will, and they should benefit from the guarantees in the ICESCR, particularly when they are deprived of the ‘minimum core content’ of their socio-economic rights.⁵¹ In fact, recent practice of the Committee on Economic, Social and Cultural Rights (ESC) indicates that the discriminatory treatment of non-nationals, including refugees, is a

⁴⁶ General Comment 15/27 on the Position of Aliens under the Covenant, U.N. GAOR, Hum. Rts. Comm., 41st Sess., Supp. No. 40, Annex VI, U.N. Doc. A/41/40 (1986) paras 1 and 2.

⁴⁷ Communication No. 172/1984, *Broeks v. Netherlands*, U.N. GAOR, Hum. Rts. Comm., 29th Sess., U.N. Doc. CCPR/C/29/D/172/1984 (1987).

⁴⁸ General Comment 18 on Non-discrimination, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/45/40 (1990) para 12.

⁴⁹ Nowak M, *UN Covenant on Civil and Political Rights ICCPR Commentary* (1993) 21.

⁵⁰ Cholewinski R *Migrant Workers in International Human Rights Law: Their Protection in countries of Employment* (1997) 57-58.

⁵¹ Cholewinski R ‘Economic and social rights of refugees and asylum seekers in Europe’ (2000) *IJGEOILJ* 709.

matter of concern under the ICESCR. In this regard, in its concluding observations concerning Belgium's initial report, the ESC issued the following recommendation:

‘In view of the non-discrimination clauses contained in article 2(2) of the ICESCR, the Committee strongly urges the Government to fully ensure that persons belonging to ethnic minorities, refugees and asylum seekers are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector.’⁵²

However, the recognition of the principle of non-discrimination in these instruments and their possible applicability to non-nationals does not mean that all distinctions between national and non-nationals are prohibited. The HRC recognises that differences in treatment which are based on reasonable and objective criteria will not violate the non-discrimination principle.⁵³ However, distinctions adopted by the laws of a country in the area of socio-economic rights and operating between refugees and nationals that are too severe and disproportionate in their application, cannot be said to be based on reasonable and objective criteria.

2.2.2 Socio-economic rights under the ICESCR

As noted above, socio-economic rights in the ICESCR are guaranteed to ‘everyone’, and thus, in principle, apply to both citizens and non-nationals. Therefore, refugees are also entitled to the safeguards in the ICESCR with regard to such important matters as health care, housing, social assistance, education and employment. However, of particular relevance to this study are the rights to health care, housing and education.

2.2.2.1 Right to health care

One of the basic socio-economic rights, which should be secured for all people regardless of their nationality, is the right to health care. However, only a broad interpretation of this right can guarantee its enjoyment by refugees. In fact, Article 12(1) of the ICESCR provides that ‘States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. Article 2(1) specified that the

⁵² *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium*, U.N. ESCOR, 10th Sess. 27th mtg. U.N. Doc. E/C.12/1994/7 (1994) para 14.

⁵³ General Comment 18 on Non-discrimination, U.N. GAOR, Hum. Rts. Comm, 45th Sess, Supp. No. 40, Annex VI, para. U.N. Doc. A/45/40 (1990) para 15.

full realisation of the right is to be achieved progressively. It is important to note that under the ICESCR, states parties are required to apply a minimum core content of the right immediately and this duty also extends to non-nationals.

As far as refugees and asylum seekers are concerned, health care should be viewed in a broader context. For example, scholars have asserted that:

‘The concept of a right to health emphasises the social and ethical aspects of health care and health status. A right approach to health issues must be based on fundamental human rights principles, particularly the dignity of persons and non-discrimination.’⁵⁴

Therefore, the constant availability of health care to refugees is not enough to satisfy their rights to health care in the absence of other related measures to protect their human dignity.⁵⁵ In other words, specific preventive health care measures need to be taken for refugees.⁵⁶ So, a right to health care would be devoid of significance if refugees are not guaranteed a corresponding right to adequate housing.⁵⁷ The problems experienced by hospitals when discharging patients who are homeless and the probable risks to recovery and health as a result of an early discharge are self-evident.⁵⁸ This extensive interpretation of the right to health care is in line with the health guarantee in the ICESCR.⁵⁹ Moreover, even if the minimum core content of the right of refugees to health care is protected by the host country, and even if it is protected to the same extent as that of nationals, this is still not enough to

⁵⁴ Leary V ‘Justiciability and beyond: Complaint procedures and the right to health’ (1995) 55 *Rev International commission of Jurists* 105 109.

⁵⁵ Leary V *Justiciability and beyond: Complaint procedures and the right to health* (1995) 44.

⁵⁶ General Comment 18/37 on Non-discrimination, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/45/40 (1990) para 12.

⁵⁷ The “indivisible relationship between the right to health and the right to housing” is recognized by the UN Special Rapporteur, Mr. Rajindar Sachar. *The Realization of Economic, Social and Cultural Rights: The Right to Adequate Housing, Final Report Submitted by Mr. Rajindar Sachar, Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 47th Sess., Provisional Agenda Item 8, U.N. Doc. E/CN.4/Sub.2/1995/12 (1995) para 58

⁵⁸ Homeless people experience more health issues than the general population. They also have a higher rate of attendance, and admission to hospital and, once there, problems continue.

⁵⁹ *General Discussion on the Right to Health (Minimum core content and non-discrimination dimensions) as recognized in article 12 of the Covenant*, U.N. ESCOR, Comm. on Econ., Soc., & Cult. Rts., 9th Sess., 41st mtg., U.N. Doc. E/C.12/1993/SR.41 (1993).

meet the special health needs of refugees. For example, one important European non-governmental organization (NGO) has adopted the position that refugees

‘should be provided with specialised treatment for physical and psychological problems related to experiences in the country of origin or arising from the hardships of flight, uprooting and exile (such as guilt and anxieties about family members, uncertainty about the future, and adaptation to a new culture). Doctors assisting asylum seekers should be trained so that symptoms of distress are not mistaken for mental illness. Any counselling of asylum seekers requires cultural sensitivity, clear reassurance of confidentiality, and a high quality of language interpretation.’⁶⁰

Article 12 of the ICESCR only identifies children as a specific vulnerable group in need of special health protection. International human right standards designed to protect the rights of women and children would appear to explicitly sanction the adoption of special measures in respect of the right to health.⁶¹ However, no provisions exist in general international human rights law addressing the specific health problems encountered by refugees regardless of age or gender.

2.2.2.2 Right to education



Education is a basic human right. It is the right that builds the capacity of individuals to claim other rights. The importance of the human right to education has been described by the ESC Committee as follows:

‘Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities... But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.’⁶²

The right of refugees to education in the host country should be considered broadly to include the right of children of refugees to education at all levels of the domestic educational system, as well as the right of adults to vocational training. Article 13 of the ICESCR provides that

⁶⁰ ECRE, Position on the Reception of Asylum Seekers, para 43. Available at <http://www.ecre.org/archive/receptio.html> (accessed 28 June 2013).

⁶¹ CEDAW, 18 December 1979, Article 12, 1249 U.N.T.S.13.

⁶² General Comment 13, the right to education (art 13) U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 21st Sess., U.N. Doc. E/C.12/1999/10 (1999) para 1.(hereinafter ‘General comment 13’).

the right to education is to be enjoyed by ‘everyone’. There is no qualification preventing refugees and asylum seekers from benefiting from this right. In its General Comment on the Right to Education, the ESC Committee confirmed that ‘the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-national, and irrespective of legal status’.⁶³ This principle is reinforced by the UNESCO Convention against Discrimination in Education⁶⁴ which provides that a country's education should be available to all regardless of nationality. Article 3(e) of the UNESCO Convention clearly requires State Parties ‘to give foreign nationals resident within their territory the same access to education as that given to their own nationals’.⁶⁵ The ESC Committee has also underlined that the freedom ‘to establish and direct all types of educational institutions’ in Article 13(4) of the ICESCR is a right of everyone, including non-nationals.⁶⁶ According to Article 2(1), the full realization of the right to education is to be achieved progressively, even though the ESC Committee has identified the minimum core content of the right to education which has to be applied immediately. This core includes: an obligation to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education complies with the objectives set out in Article 13(1); to provide primary education for all in accordance with Article 13(2) (a); to adopt and put into practice a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the state or third parties, subject to uniformity with ‘minimum educational standards’ (Articles 13(3) and (4)).⁶⁷ Concerning the specific obligations, ICESCR Article 13(2) (a) requires the provision of compulsory primary education to be made ‘available free to all’, thereby including refugees.⁶⁸ This obligation is an immediate duty of States Parties as it is part of the minimum core content of the right to education.⁶⁹

⁶³ CRC Articles 28 and 29.

⁶⁴ Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 9 (entered into force 22 May 1962).

⁶⁵ Convention against Discrimination in Education.

⁶⁶ General Comment 13 para 30.

⁶⁷ General Comment 13 para 57.

⁶⁸ ICESCR Article 13 (2) (b) and (c).

⁶⁹ General Comment 13 para 51.

Taking into account the fact that some State Parties may find it impossible to fulfil this obligation immediately, Article 14 ICESCR requires such parties to implement, within a two-year period, a detailed plan of action for the progressive realisation of this principle. The ESC Committee has also underlined the importance of primary education which is free of charge:

‘The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect.’⁷⁰

More importantly, the right to education should be adapted to the particular needs of refugee children in order to make possible their integration into society and to make sure that they are not placed at an educational disadvantage to the children of nationals.⁷¹ This approach is in line with the objectives of the ICESCR which are to promote the full development of individual personality as well as his effective participation in society. In fact, under the right to education provision of the ICESCR:

‘The States Parties ... agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society...’⁷²

Given the particular needs of refugee children, strict equality with the children of nationals with regard to access to education is not good enough. Any educational problems experienced by the children of refugees need to be counteracted by particular measures in order to make sure that they are not underprivileged with respect to their future training, employment or entry into higher education. However, it is important to note that ‘special measures’ does not mean ‘separate’ education for refugee children. Refugee children must be given access to the state education system at the first opportunity, irrespective of where they are accommodated. When joining schools in the host country, they will require initiation into the new education

⁷⁰ General Comment 11, plans of action for primary education (Article 14) U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 20th Sess., Agenda Item 7, UN Doc. E/C.12/1999/4 (1999) para7.

⁷¹ Cholewinski R *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997) 285-406.

⁷² ICESCR Article 13 (1).

system and extra support to meet their specific linguistic and psycho-social needs.⁷³

Apart from the language of instruction, other appropriate special measures may also include assistance with homework, adaptation classes and intercultural education. Another particular measure may involve the teaching of the language and cultural origin of those refugees. In fact, such a measure would be consistent with a further objective of education identified in Article 29(1) (c) of the CRC:

‘The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.’⁷⁴

Contrary to the rights of children, the educational rights of adult refugees mainly concern vocational training and language instruction. State policies should in no way prevent adult refugees from acquiring new education and skills in the asylum country. All refugees should be entitled to basic training in the language of the host state, since this is an essential factor for living among and developing good relations with the local population.⁷⁵ The right to vocational training and language instruction is also indispensable to the realisation of the right to work, especially when asylum seekers are given the chance to take up employment in the host country. In fact, Article 6(2) of the ICESCR provides that the ‘steps to be taken by a State Party ... to achieve the full realisation of this right shall include technical and vocational guidance and training programs’. In addition, once employed, refugees are entitled under ICESCR Article 7 to ‘the enjoyment of just and favourable conditions of work’, which might well take account of access to vocational training

2.2.2.3 Right to shelter or housing

The right to shelter or housing is one of only three substantive rights that have been interpreted by the ESC Committee.⁷⁶ The Committee declared that this right ‘is of central

⁷³ European Council on Refugees and Exiles ‘Position on the reception of asylum seekers’. Available at <http://www.ecre.org/archive/receptio.html> (accessed 28 June 2013).

⁷⁴ CRC Article 29.

⁷⁵ European Council on Refugees and Exiles ‘Position on the reception of asylum seekers’. Available at <http://www.ecre.org/archive/receptio.html> (accessed 28 June 2013).

⁷⁶ General Comment 4, the right to adequate housing (Article 11(1) of the ICESCR) U.N. ESCOR, 6th Sess., U.N. Doc. E/1992/23 (1991) (hereinafter *General Comment 4*).

importance for the enjoyment of all economic, social and cultural rights'.⁷⁷ For this reason, in the Committee's view, interpretation of the right should be extensive, relating not only to shelter, or 'a roof over one's head', but encompassing 'the right to live somewhere in security, peace and dignity'.⁷⁸ The right applies to everyone 'regardless of age, economic status, group or other affiliation or status and other such factors',⁷⁹ and 'irrespective of income or access to economic resources'.⁸⁰ Moreover, the ESC Committee stated that disadvantaged groups 'should be ensured some degree of priority consideration in the housing sphere'. Although the list of 'disadvantaged groups' did not include refugees and asylum seekers, it left open their inclusion by the terms 'and other groups'.⁸¹ The ESC Committee reiterated its views in its previous revised guidelines on state reporting that every State Party should take steps 'to ascertain the full extent of homelessness and inadequate housing within its jurisdiction' and that comprehensive information should be provided in state reports about 'those groups within society that are vulnerable and disadvantaged with regard to housing'.⁸² Since the adoption of this General Comment, work undertaken by the UN Special Rapporteur on the right to adequate housing confirms that refugees should be given particular attention in relation to their housing rights.⁸³ In addition, the Committee itself has recommended to States Parties that vulnerable groups, including refugees, should be protected from discriminatory treatment within the housing sector.⁸⁴

2.2.2.4 State minimum core obligation

An interpretation of the content of economic and social rights under the ICESCR confirms their application to refugees. However, it is important to note that state obligations in respect of these rights are progressive and not of immediate application as in the case of civil and

⁷⁷ General Comment 4 para 4.

⁷⁸ General Comment 4 para 7.

⁷⁹ General Comment 4 para 6.

⁸⁰ General Comment 4 para 7.

⁸¹ General Comment 4 para 8.

⁸² General Comment 4 para 13.

⁸³ *The Realization of Economic, Social and Cultural Rights. The Right to Adequate Housing, Second Progress Report Submitted by Mr. Rajindar Sachar, Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 46th Sess., Provisional Agenda Item 8, at art. 4, U.N. Doc. E/CN.4/Sub.2/1994/20 (1994).

⁸⁴ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium*, U.N. ESCOR, 10th Sess. 27th mtg. U.N. Doc. E/C.12/1994/7 (1994) para 14.

political rights.⁸⁵ Chenwi observes that ‘despite the socio-economic rights guarantee in various human rights instruments, access is not always provided as universal at the outset.’⁸⁶ This conception draws on the wording of Article 2(1) of the ICESCR, which required each State Party ‘to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant...’ But, the fact that the ICESCR introduces the concept of progressive realisation of socio-economic right does not mean that these rights can be postponed *ad infinitum*.⁸⁷ In fact, the ESC Committee has also asserted that the duty ‘to take steps’ is of immediate application.⁸⁸ Moreover, the ESC Committee has emphasised that each State Party must satisfy the rights contained in the ICESCR at least to a basic level of enjoyment unless it can demonstrate that it simply does not have the resources to fulfil even such a minimum obligation.⁸⁹

The expression in Article 2(1) ‘to the maximum of its available resources’ was also ‘intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance’.⁹⁰ ‘Deliberately retrogressive measures’, such as, for example, the decrease of social assistance payments to asylum seekers and refugees, or a change from cash support to support in kind, ‘would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.⁹¹

Another obligation, which the ESC Committee considers to be of immediate effect, is the

⁸⁵ Chenwi L ‘Upacking ‘progresive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’. Available at <http://www.dejure.up.ac.za/index.php>. (accessed 28 August 2013).

⁸⁶ Chenwi L ‘Upacking ‘progresive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’. Available at <http://www.dejure.up.ac.za/index.php>. (accessed 28 August 2013).

⁸⁷ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Developed in 1997 under the auspices of the International Commission of Jurists and served to elaborate these rights and outline the appropriate remedies) (1998).

⁸⁸ General Comment 3, the nature of States parties’ obligations (Article 2 para.1 of the ICESCR), U.N. Comm. on Econ., Soc. & Cult. Rts., 5th Sess., U.N. Doc. E/1991/23 (1991) para 2.(hereinafter General Comment 3).

⁸⁹ General Comment 3 para 10.

⁹⁰ General Comment 3 para 13.

⁹¹ General Comment 3 para 9.

non-discrimination provision in Article 2(2) of the ICESCR.⁹² Although there are differences of opinion as to whether this non-discrimination provision can be of assistance to non-nationals, the practice of the ESC Committee indicates that Article 2(2) can operate to contest other kinds of discriminatory measures, such as those based on nationality.⁹³ Although the Committee has not yet clarified the application of the non-discrimination principle to non-nationals, at the very least, this group is entitled to the minimum core content of the rights in the ICESCR.⁹⁴ Distinctions based on nationality, therefore, are perhaps permissible, but only to the extent that they do not deny refugees and asylum seekers the very means of survival.

Taking into account this broad interpretation, it is very difficult to see how state measures that completely refuse economic and social entitlements to refugees and asylum seekers, who have no other means of subsistence, can ever be justified. In other words, if the ICESCR were to be interpreted in such a way as not to set up such a minimum core obligation, it would be basically deprived of its *raison d'être*, and be devoid of meaning.⁹⁵

Certain socio-economic rights in the ICESCR, such as, the right to an adequate standard of living, which include a comprehensive range of rights (adequate food, housing⁹⁶ and the right to social security⁹⁷), have also been considered as containing various levels of obligation, including the state obligation to 'be the provider'. This duty is particularly significant with respect to refugees and asylum seekers:

'Asylum seekers, refugees and displaced persons do not have the same opportunity as others to achieve an adequate standard of living on the basis of their own efforts. They therefore require, to a larger extent than the ordinary public, direct provisions, until conditions are established in which they can obtain their own entitlements.'⁹⁸

⁹² General Comment 3 para 1.

⁹³ Cholewinski R *Economic and Social Rights of Refugees and Asylum Seekers in Europe* (2000) 5.

⁹⁴ Matthew C *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 74-173.

⁹⁵ General Comment 3 para 10.

⁹⁶ ICESCR Article 11.

⁹⁷ ICESCR Article 9.

⁹⁸ Asbjorn E *The Right to an Adequate Standard of Living Including the Right to food, in Economic, Social and Cultural Rights: A Textbook* (1995) 105.

Also important to this study is Article 12 which places some important obligations on State Parties. These obligations have been used as interpretive tools and have been confirmed to be a strong means of determining accountability.⁹⁹ These obligations are: to respect, protect and fulfil socio-economic rights. In the case of refugees, the duty to respect would include not denying refugees access to socio-economic rights, whereas the duty to protect would require States to prevent third party violation of these rights. So, State Parties to the ICESCR are under the obligation to put in place measures that would regulate their citizens' behaviour that may negatively affect refugees' realisation of their socio-economic rights. Such behaviours include for example, xenophobic attitudes and other related prejudices.

2.2.3 The Convention on the Rights of the Child (CRC)

The CRC is an international human rights instrument which recognises the human rights of children. It entered into force in September 1989, and was ratified by South Africa on 16 June 1995. Although it is not specially a refugee treaty, its provisions affect refugee children, as the provisions of the CRC are granted to all persons under the age of 18 (Article 1).¹⁰⁰ Article 2 obliges States Parties to make sure that all children, without discrimination in any form, benefit from special protection measures and have access to services such as education and health care. Therefore, any child within a State's jurisdiction is entitled to all the CRC rights without regard to citizenship, immigration status or any other status.¹⁰¹ According to Steinbock,¹⁰² its terms now constitute 'the normative frame of reference for actions concerning refugee children'.

The standards set by the CRC are complete as they cover various aspects of a child's life. Although the realisation of socio-economic rights as mentioned above are dependent upon the availability of resources, the non-discrimination clause in the CRC ensures that whatever

⁹⁹ Dankwa V Flinterman C & Leckie S 'Commentary to the Maastricht guidelines on violation of economic, social and cultural rights' (1998) 20 *Hum Rights Quarterly* 705-730.

¹⁰⁰ European Council on Refugees and Exiles *position on Refugee children*. Available at www.ecre.org/component/downloads/downloads/85.html (accessed 3 July 2013).

¹⁰¹ European Council on Refugee and Exiles *position on Refugee children*. Available at www.ecre.org/component/downloads/downloads/85.html (accessed 3 July 2013).

¹⁰² Steinbock D 'Unaccompanied refugee children in host country foster families' (1996) 8 *International Journal of Refugee Law* 6.

benefits are given to children who are citizens of a State must also be given to children who are refugees in the territory of the State.¹⁰³ The ‘near-universal ratification’ of the CRC has ensured that CRC standards have been agreed to and accepted by most countries of the world.¹⁰⁴ The universality of the instrument is confirmed by the fact that the UNHCR applies the standards of the CRC as Regulatory Principles.¹⁰⁵ It is also important to note that by ratifying the CRC, governments agree to put in place systems to protect children who are separated from parents or caregivers.¹⁰⁶

The socio-economic rights of refugee children are protected under various Articles of the CRC. Article 6 protects the child’s right to life, and requires States Parties to ensure to the maximum extent possible the survival and development of the child. Article 24 recognises the right to the highest attainable standard of healthcare, which includes an obligation on States to take appropriate measures to guarantee the provision of necessary medical assistance and healthcare to all children. Article 27 provides for the right of every child to an adequate standard of living. The CRC makes provision for the full rights and access to education for all children. These rights are contained in Articles 28, 29(1) (c), 30 and 32 of the Convention. The Convention places an obligation on States Parties to make primary education compulsory and free to all, including to non-citizens, thereby refugees.¹⁰⁷

The CRC also contains specific provisions offering protection to refugee children. Article 22 ensures that refugee children receive ‘appropriate protection and humanitarian assistance’ in the enjoyment of their rights.¹⁰⁸ Therefore, refugee children who are not being cared for by their parents are entitled to further protection.¹⁰⁹ According to Article 20, they must be accorded the same protection as any other child permanently or temporarily deprived of his or

¹⁰³ Steinbock D ‘Unaccompanied refugee children in host country foster families’ (1996) 8 *International Journal of Refugee Law* 6.

¹⁰⁴ European Council on Refugees and Exiles *Position on refugee children*. Available at www.ecre.org/component/downloads/downloads/85:html (accessed 3July 2013).

¹⁰⁵ UNHCR *Refugee children: Guidelines on protection and care*. Available at www.unicef.org/.../refugee-children-guidelines-on-protection-and-care (accessed 3July 2013).

¹⁰⁶ General Comment 4 Para 39.

¹⁰⁷ General Comment 4 Para 10.

¹⁰⁸ European Council on Refugee and Exiles *position on refugee children*. Available at www.ecre.org/component/downloads/downloads/85:html (accessed 3July 2013).

¹⁰⁹ UNHCR *Refugee Children: Guidelines on protection and care*. Available at www.unicef.org/.../refugee-children-guidelines-on-protection-and-care... (accessed 13 July 2013).

her family environment. Article 20 provides that such a child is entitled to special protection and assistance from the state. In addition, Article 38(4) provides that State parties should take all feasible measures to protect and care for children who are in their territory and who have been affected by an armed conflict. Refugee children are therefore entitled to special protection under Article 38 if they became refugees due to an armed conflict. Finally, it is important to mention Article 3 of the CRC which provides that the best interests of the child should be considered at all times. In fact, the best interests principle has three main implications for States, agencies and individuals who act on behalf of refugee children. Such parties are under an obligation to protect and assist the child at all times; put the child's welfare ahead of all other considerations; and meet the child's developmental needs.¹¹⁰ According to Ressler et al:

‘Given the widespread adherence to the ‘best interests of the child’ as the guide for decisions in national law and the universal acceptance of this standard in all national legislation concerning children, measures taken by national authorities that are not in conformity with this standard should be regarded as contrary to public policy.’¹¹¹

2.2.4 African regional treaties and refugees rights to access socio-economic rights

The African Charter on Human and Peoples' Rights (ACHPR) is the most important regional treaty which deals with socio-economic rights. The main purpose of the Charter is to promote and protect human rights and basic freedoms on the African continent.¹¹² It was adopted in June 1981 in Kenya. The Charter which at present enjoys region-wide ratification came into force in October 1986.¹¹³ The Charter contains a wide range of provisions pertaining to socio-economic rights. For example, Article 14 provides for the right to property.¹¹⁴ Article 15 grants the right to work and requires from States Parties that every individual shall have the

¹¹⁰ Ressler M *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (1988) 282.

¹¹¹ Ressler M *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (1988) 239.

¹¹² Preamble of ACHPR.

¹¹³ The African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, OAU Doc.CAB/LEG/76/3 rev.5, 1982.

¹¹⁴ ACHPR Article 14.

right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.¹¹⁵ Article 16(1) provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. Subsection (2) of Article 16 places a duty on the State to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick¹¹⁶. Article 17 provides the right to education to every individual.

By using terms such as ‘every individual’, ‘peoples’ and ‘for all’, it can be inferred that refugees were also covered by the ACHPR. Therefore, the ACHPR constitutes an additional source of refugee protection in Africa. Furthermore, the ACHPR Commission has interpreted the ACHPR extensively to promote and protect the rights of refugees, and has emphasised that African States that are not parties to the Refugee Convention but are parties to the Charter, are obliged to respect refugee rights.¹¹⁷ Therefore, it can be deduced from the discussion that despite the fact that the regional treaty is silent on refugees’ rights, refugees can still claim their rights to access education, health care and housing services under this system.

With regard to refugee children, the African Charter on the Rights and Welfare of the Child (ACRWC) is more precise and reflects the same minimum acceptable standards for the treatment of refugee children as the CRC. In addition, many provisions offer a higher standard and thus complement the CRC and ensure a higher standard for the protection of refugee children. For example, the ACRWC in its preamble mentioned the fact that the

‘situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental conditions, natural disasters, armed conflicts, exploitation and hunger, and on account of the child’s physical and mental immaturity he/she needs special care’.

This additional protection is crucial because of the high level of violence and persecution in Africa and more importantly because of the constant migration between African countries.

¹¹⁵ ACHPR Article 15.

¹¹⁶ ACHPR Article 16.

¹¹⁷ *African Institute for Human Rights and Development (on Behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57(ACHPR 2004).

The ACRWC contains some provisions similar to that contained in the CRC with regard to the rights to education and health.¹¹⁸ The ACRWC also provides that State Parties shall take all appropriate measures to eliminate harmful social and cultural practices detrimental to the welfare, dignity and development of the child.¹¹⁹ Article 23(1) deals expressly with refugee children and states:

‘States 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 States are Parties.’

However, contrary to the ICESCR, African regional treaties are silent regarding the standard for the realisation of socio-economic rights. This has led to interesting debates on whether or not these rights are of immediate realisation.¹²⁰

Nonetheless, Mbazira is of the view that this is not a hindrance as many African states are parties to international conventions. He further notes that the national courts and the ACPHR Commission are on many occasions obligated to rely on international treaties and jurisprudence.¹²¹

2.3 The socio-economic rights of refugees under international and regional refugee law

After World War 2, with the founding of the United Nations and the adoption of the Universal Declaration of Human Rights, more attention was paid to refugee problems. Thus,

¹¹⁸ ACRWC Articles 11 and 14.

¹¹⁹ Sloth-Nielsen J ‘Ratification of the Convention on the Rights of the Child: Some implications for South Africa’ (1995) 11 *South African Journal on Human Rights* 331 404.

¹²⁰ Odinkalu C ‘Implementation of economic, social and cultural rights under the ACHPR’ in Evans M & Murray R (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice 1986-2000* (2004) 196.

¹²¹ Mbazira C ‘Enforcing the economic, social & cultural rights in the African Charter on Human and peoples rights’: 20 years of redundancy, progression & significant strides’ (2006) 6 *Africa Human Rights Law Journal* 33 357.

at Geneva in July 1951, the Refugee Convention¹²² was adopted by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. It entered into force in April 1954. The Convention provides for the basic standards of treatment to be accorded to refugees. In January 1967 an Optional Protocol¹²³ was signed by the President of the General Assembly and the UN Secretary General and entered into force in October the same year. The protocol eliminated the geographical limitations on the definition of refugee as contained in the 1951 Convention. This previous definition was focused on the post-Second World War European refugee problem.¹²⁴ South Africa acceded to the Convention and Protocol in January 1996.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted at the OAU's sixth ordinary session in Addis Ababa in September 1969 and entered into force in June 1974. South Africa ratified this Convention in December 1995.

2.3.1 United Nations Convention Relating to the Status of Refugee of 1951 and Protocol of 1967 (Protocol Relating to the Status of Refugees)

The 1951 Convention and the 1967 Protocol are the two most important instruments that specifically provide for the protection of refugee rights under international law. The 1951 Convention increased the strength of the then existing international instruments relating to refugees and extended their scope.¹²⁵ The Refugees Convention affords various rights in the asylum country. The rights granted under the Convention include socio-economic rights, such as, the rights to wage earning employment,¹²⁶ housing, rationing,¹²⁷ public education,¹²⁸ public relief,¹²⁹ and social security.¹³⁰ Social security includes 'legal provisions in respect of

¹²² Convention Relating to the Status of Refugees July 28, 1951, 189 U.N.T.S. 137(hereinafter 'Refugee Convention').

¹²³ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

¹²⁴ UNHCR Introductory note to the Convention and Protocol Relating to the Status of Refugees. Available at www.unhcr.org/3b66c2aa10.html (accessed 26 August 2013).

¹²⁵ Weiss P 'The international protection of refugees' (1954) 48 *The American Journal of International Law* 193 221.

¹²⁶ Refugee Convention Article 17.

¹²⁷ Refugee Convention Article 20.

¹²⁸ Refugee Convention Article 22.

¹²⁹ Refugee Convention Article 23.

...occupational diseases, maternity, sickness ... and any other contingency which, according to national laws or regulations, is covered by a social security scheme'.¹³¹ According to the Convention, refugees are to be given the equivalent of a 'most-favoured-nation' treatment with respect to employment,¹³² and the same treatment as accorded to aliens generally concerning housing.¹³³ Equal treatment with nationals or 'national treatment' is to apply in respect of elementary education,¹³⁴ public relief and social security.¹³⁵ As far as the right to housing is concerned, the 1951 Convention provides:

'As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event not less favourable than that accorded to aliens generally in the same circumstances.'¹³⁶

Contrary to the ICESCR and the ACHPR, no mention is made of 'health care' in the 1951 UN Refugees Convention. This is so because the 1951 Refugees Convention provides a substitute or what Hathaway¹³⁷ calls a 'surrogate protection of basic human rights'. Nevertheless, Article 23 relating to the 'right of access to public relief and assistance' can still be interpreted to broadly include these concerns. These provisions place specific duties and obligations on the State Parties in terms of socio-economic rights for refugees.

Although some countries have entered reservations to the Convention in order to protect the 'national interest', in practice many States do not always implement these reservations. On the contrary, it may be argued that refugees and asylum seekers in South Africa do enjoy an advanced standard of treatment, powered by the Bill of Rights enshrined in the South African Constitution. In this regard it is important to note that Article 5 of the 1951 Convention states: 'Nothing in this Convention shall be deemed to impede any rights and benefits granted by Contracting States to refugees apart from this Convention'. In other words, the Convention encourages States parties to legislate local refugee rights that go beyond the

¹³⁰ Refugee Convention Article 24.

¹³¹ Refugee Convention Article 24.

¹³² Refugee Convention Article 17 and 18.

¹³³ Refugee Convention Article 21.

¹³⁴ Refugee Convention Article Art 22.

¹³⁵ Refugee Convention Article Art 23.

¹³⁶ Refugee Convention Article 21.

¹³⁷ Hathaway J *The Rights of Refugees under International Law* (2005) 4.

Convention's provisions.¹³⁸ Hathaway observes that Article 5 should be read as requiring governments to respect the array of important international human rights accords negotiated in recent years. In addition, he points out that the Convention envisaged the fact that refugees would be protected by additional rights acquired under the ICESCR and other international agreements.¹³⁹ So, Article 5 provides a safety net where the Convention is silent on specific aspects that are essential for improving refugees' dignity.¹⁴⁰ It therefore, stops States from using the 1951 Convention's errors and omissions as a means of evading their responsibilities towards refugees. One of these responsibilities consists of providing refugees with health care services.

2.3.2 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)

A critique of the UN Refugee Convention is that its definition of 'refugee' is too limited. Therefore, this narrow definition does not capture the situation faced by most of the African refugees. It is important to note that the situation of refugees in Africa is generally due to tribal conflicts, socio-economic breakdown and natural disasters, such as famine.¹⁴¹ Taking these particular circumstances into account, the drafters of the OAU Convention on Refugees defined 'refugee' in broader terms. The OAU Convention endorses the definition in the 1951 Convention but goes further by stating that the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹⁴²

The OAU Convention on Refugees also provides a general right to asylum,¹⁴³ a right to be housed in a refugee settlement, and a right to compulsory issuance of travel documents.¹⁴⁴

¹³⁸ Hathaway J *The Rights of Refugees under International Law* (2005) 109.

¹³⁹ Hathaway J *The Rights of Refugees under International Law* (2005) 109.

¹⁴⁰ Hathaway J *The Rights of Refugees under International Law* (2005) 53.

¹⁴¹ Fritsch C & Johnson E 'The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action' (2010) 38 *DEVJILP* 623.

¹⁴² OAU Refugee Convention Article 1(2).

¹⁴³ OAU Refugee Convention Article 3.

However, the OAU Convention on Refugees lacks some of the important provisions contained in the UN Convention on Refugees and in the ICESCR. For example, the OAU Convention on Refugees does not provide for rights to education, housing, and health care. The drafters of the OAU Convention on Refugees implicitly acknowledged that African countries do not have sufficient resources to even provide their own citizens with such services.

However, the absence of socio-economic rights in the OAU Convention could also be better understood by referring to the circumstances under which that Convention was adopted. In fact, Milner proposes that for a good understanding of the African refugee regime, it is necessary to consider the historical aspect of refugee movement in Africa and the relationship between the current African system and the international system.¹⁴⁵ The 1969 OAU Convention on Refugees was a result of the disappointment of African states regarding the international regime, as the 1951 UN Refugee Convention did not take into account the refugee realities in Africa.¹⁴⁶ The adoption of the 1969 OAU Convention was encouraged more by concerns of national security, domestic politics, and international appreciation than humanitarianism.¹⁴⁷ It was a regime preceded by a regime of colonisation and constant struggles for independence by African nations.¹⁴⁸ Refugees in the 1960s and 1970s were fleeing from struggles against apartheid, colonialism and racial domination. This gives a clear explanation for the definition of the term 'refugee' contained in the Convention.¹⁴⁹ It is against this background that the 1969 OAU Convention was developed so as to take into account the realities on the Africa continent. However, before the entry into force of the convention, the 1967 Protocol was enacted and therefore provided solutions for some of the situations faced by the African community. Thus, the Convention became a regional

¹⁴⁴ OAU Refugee Convention Article 6.

¹⁴⁵ Milner J 'Golden age? What golden age? A critical history of African asylum policy' A paper presented to the Centre of Refugee Studies. York University (2004) 3.

¹⁴⁶ Articles 2(3), Article 5 and Article 4 respectively. See also the preamble of the 1969 Convention and Article 1 for the definition of the term 'refugee'.

¹⁴⁷ Milner J 'Golden age? What golden age? A critical history of African asylum policy' A paper presented to the Centre of Refugee Studies. York University (2004) 3.

¹⁴⁸ Milner J 'Golden age? What golden age? A critical history of African asylum policy' A paper presented to the Centre of Refugee Studies. York University (2004) 3.

¹⁴⁹ Crisp J *Africa's Refugees: Patterns, Problems and Policy Challenges*. New Issues in Refugee Research, Working Paper No. 28, Geneva, UNHCR, August 2000.

document complementary to the 1951 Convention and its Protocol.¹⁵⁰ In effect, the 1969 Convention in its preamble calls on State Parties to comply with the 1951 Convention and in the meantime apply their own provisions to refugees in Africa.¹⁵¹

2.3.3 The United Nations High Commissioner for Refugees (UNHCR)

The UNHCR is the institution in charge of promoting and providing international protection to refugees. The Executive Committee (Excom) of UNHCR is the main policy body and responsible for making decisions, known as ‘Excom Conclusions’. These ‘Conclusions’ are not legally binding on State Parties to the Convention, but do provide important guidelines for the protection of refugees and for interpreting the Convention.¹⁵² The UNHCR has issued several policies and guidelines concerning refugees, some of which focus on refugee children.

2.3.3.1 UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum

The Guidelines were created in 1997. According to section 7(1) of the Guidelines, States should make sure that all children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection. Such care includes accommodation in foster homes or special reception centres, where the children are under regular supervision and their well-being is assessed. Such care also includes access to health care. In addition, the Guidelines state that every child should have access to education in their asylum country.

2.3.3.2 Refugee children: Guidelines on Protection and Care

The United Nations High Commissioner for Refugees published the first edition of its Guidelines on Refugee children in 1988. They were initiated by the 1987 Note on Refugee

¹⁵⁰ Resolution CM/Res 88(VII), 1966.

¹⁵¹ Preamble Para 10.

¹⁵² Ressler E *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (1988) 276.

Children, which finally drew a distinction between refugee adults and refugee children,¹⁵³ and acknowledged that more than half of the world's refugees are children.¹⁵⁴ The Guidelines were then updated in 1994 in light of the 1993 UNHCR Policy on Refugee Children. The Guidelines recognised that refugee children are vulnerable and therefore need special care and assistance. The main purpose of the Guidelines is to guide the staff of the UNHCR and other organisations, as well as governments, in dealing with refugee children. According to the UNHCR, the 'Guidelines are not mere suggestions that can be ignored when it is not convenient to follow them, but rather tools for reaching policy objectives'. Therefore, there must be good reasons for rejecting them in a specific situation.¹⁵⁵ Moreover, most of the Guidelines are intended to be universal. In fact, they are based on human rights law, as they were created in light of the CRC and the concept of human rights. As a result, there is an obligation under human rights law to follow these Guidelines.¹⁵⁶

Chapter 5 of the Guidelines deals with shelter, health care and nutrition. It sets out the standards for the quantity of water and quality of shelter and sanitation that should be provided for each refugee child. It also requires that refugee children receive suitable food to ensure nutritional adequacy. The Guidelines state that children must have access to the essential services of a health system including, where necessary, health mechanisms supplementary to the host country's national health services, established specifically for refugee populations.

2.4 Conclusion

From the foregoing discussion, it may be concluded that both international human rights law and refugee law offer sufficient protection for the socio-economic rights of refugees. The UNHCR Guidelines (which constitutes 'soft law') reflects these legal standards, as they require treatment of refugees in accordance with the standards set in the international instruments. Refugees must have access to housing, education, health care and all other socio-economic rights. As far as refugee children are concerned, they must receive special

¹⁵³ Cohen C 'The rights of the child: implications for change in the care and protection of refugee children' (1991) 34 *International Journal of Refugee Law* 683.

¹⁵⁴ United Nations High Commissioner for Refugee *Children: Guidelines on Protection and Care* (1994) 5.

¹⁵⁵ United Nations High Commissioner for Refugee *Children: Guidelines on Protection and Care* (1994)15.

¹⁵⁶ United Nations High Commissioner for Refugee *Children: Guidelines on Protection and Care* (1994) 20.

attention, and their best interests must at all times be the primary consideration in any decision affecting their wellbeing. What remains unclear, however, is whether these legal standards are being met.



CHAPTER THREE

SOUTH AFRICAN DOMESTIC LEGAL FRAMEWORK RELEVANT TO THE PROTECTION OF SOCIO-ECONOMIC RIGHTS OF REFUGEES

3.1 Introduction

‘The litmus test of the morality of any society is how it provides for its most vulnerable members.’¹⁵⁷

The objective of this chapter is to examine the compatibility of protection of socio-economic rights afforded to refugees in South Africa with international refugee law and with the relevant international human rights standards as interpreted in chapter 2. Therefore, the chapter provides an overview of the South African legal framework with regard to socio-economic rights of refugees and discusses the extent to which international law has been incorporated into domestic law. In addition, to understand the nature and scope of refugees’ entitlement, the chapter also looks at various decisions on the enforcement of socio-economic rights. At the outset it is important to note that the protection of refugees in South Africa is still a very new concept. In fact, it is only since 1993 that South Africa started to deal with refugee matters that were not related to their own citizens forced into exile by apartheid policies.¹⁵⁸ So, in 1995 South Africa became a party to the 1951 Convention, the 1967 Protocol and the 1969 Convention. As a result, these international instruments became binding on South Africa. After the end of apartheid, South Africa's domestic law provided various avenues by which refugees and asylum seekers can achieve legal status, be protected from abuse and exploitation, and receive humanitarian assistance and services. In particular, the South African Constitution and the Refugees Act 130 of 1998 both contain provisions that would allow for the protection of refugees within South Africa.

¹⁵⁷ Submission of the South African Council of Churches to the Parliamentary Portfolio Committee meeting on Social Development on the Social Assistance Bill [B57-2003].

¹⁵⁸ It is only recently in 1996 that South Africa committed itself to the protection of refugees by ratifying the 1951 United Nations Refugee Convention as well as the 1969 Organization of African Unity Refugee Convention.

3.2 South African Constitution

The ICESCR and the ICCPR were major sources of references for the drafting of the socio-economic provisions in the South African Constitution.¹⁵⁹ As a result the drafters of South Africa's new Constitution provided for a broad range of human and civil rights. The Preamble of the Constitution states: 'We, the people of South Africa . . . believe that South Africa belongs to all who live in it, united in our diversity'.¹⁶⁰ Moreover, Article 9 of the Constitution states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.¹⁶¹ The word 'citizen' does not appear, meaning that non-citizens, including refugees, are entitled to the protections and rights provided in the Constitution. These rights include the right to adequate housing,¹⁶² health care,¹⁶³ social assistance,¹⁶⁴ and education.¹⁶⁵ These provisions imply that the South African government will provide humanitarian services for people in need, including refugees. In *Lawyers for Human Rights and Another v. Minister of Home Affairs* the Constitutional Court held that when the South African Constitution limits rights to citizens, it clearly expresses that limitation. Therefore, because the Constitution did not specifically reserve the aforementioned rights for citizens, all those living within South Africa's borders are entitled to them.¹⁶⁶

The Constitution is more precise with regard to health care provisions. Section 27(1) protects the rights to health care services, including reproductive health care, while section 27(3) protects the right to emergency medical treatment.

As far as children are concerned, the Constitution provides that every child, regardless of country of origin, nationality or legal status, has the right to basic nutrition, shelter, basic

¹⁵⁹ Liebenberg S 'The protection of economic and social rights in domestic legal systems' in Eide A et al(eds) *Economic, social and cultural rights* (2001) 55 79.

¹⁶⁰ Preamble of the South African Constitution 1996.

¹⁶¹ Section 9.

¹⁶² Section 26.

¹⁶³ Section 27.

¹⁶⁴ Section 27.

¹⁶⁵ Section 29.

¹⁶⁶ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (CC) 13-14.

health care services and social services.¹⁶⁷ In addition, every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment; and to be protected from maltreatment, neglect, abuse or degradation.¹⁶⁸

Section 26 protects the right to have access to housing, while section 27 protects the rights to social security and appropriate social assistance. In addition, the Constitution protect in broad terms: the right of everyone to have their dignity respected and protected,¹⁶⁹ the right of everyone to be equal before the law and the right to equal protection, including the full and equal enjoyment of all rights and freedoms.¹⁷⁰ Constitutional provisions that prohibit discrimination¹⁷¹ and that safeguard equality constitute an important way to pursue the extension of rights to non-citizens, as they seem to allow refugees to enjoy the rights and freedoms contained in the Bill of Rights in the same way as ordinary citizens.¹⁷²

Drafters of South Africa's Constitution took the provisions of the Convention on the Rights of the Child into account, including many of the same rights contained in International Law. For example, endorsing the international law standard, section 28(2) states that 'a child's best interests are of paramount importance in every matter concerning the child'. Moreover, as already mentioned above, sections 39(1) and 39(2) require South African courts and legal forums to consider international law, including treaties, when interpreting the Bill of Rights.

3.3 The Refugees Act

The Refugees Act 130 of 1988 as amended in 2008 aims to protect people who have been compelled to leave their countries of origin because of a well-founded fear of persecution, violence, or conflict. The purpose of the Act is:

¹⁶⁷ Section 28.

¹⁶⁸ Section 28(1d).

¹⁶⁹ Section 10.

¹⁷⁰ Sections 9(1) and 9(2).

¹⁷¹ Section 9(3).

¹⁷² Handmaker J *Advancing Refugee Protection in South Africa* (2007) 246.

‘To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate application for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.’¹⁷³

Therefore, the application and interpretation of the Refugees Act should be done with due regard to the 1951 Convention and the 1967 Protocol, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the UDHR, the ICESCR, and other treaties as provided under section 6(1) of the Constitution. The Refugees Act prohibits people to be refused entry into South Africa, expelled, extradited or returned to another country if such a return would result in ‘his or her life, physical safety or freedom [to] be threatened on account of . . . other events seriously disturbing public order in a part or the whole of that country’.¹⁷⁴

Under sections 27(a) and (b) of the Refugees Act refugees are guaranteed the full range of legal protections including those under Chapter 2 of the Constitution: adequate housing, education, access to health care, public relief, and assistance.¹⁷⁵ Furthermore, they are granted identity documents, the right to employment and education, the right to remain in the country pending finalisation of their refugee application, the right to have asylum applications adjudicated in a manner that is lawful, reasonable and procedurally fair, which includes the right to appeal a negative decision on an asylum claim, and the right to freedom of movement and against unlawful arrest or detention.¹⁷⁶

With these important provisions, section 27 affords refugees a considerable amount of rights as the rights contained in Chapter 2 of the Constitution are somewhat extensive and therefore guarantee more than the Refugee Conventions and the ICESCR.

Although section 36 of the Constitution allows for the limitation of these rights, such limitations are only valid to the extent that they are reasonable and justifiable in an open and democratic society based on freedom and equality; and that they do not go against the

¹⁷³ Preamble of Refugees Act 130 of 1998.

¹⁷⁴ Refugees Amendment Act 33 of 2008.

¹⁷⁵ Section 27 Refugees Act no130 of 1998.

¹⁷⁶ Section 27 Refugees Act 130 of 1998.

significant content of the right in question.¹⁷⁷

Moreover, in terms of the Refugees Act, refugees are also entitled to an identity document,¹⁷⁸ and to a South African travel document on application as provided for in section 31. They may also apply for permanent residence after continued residence of five years and proof that they will remain a refugee *ad infinitum*.¹⁷⁹ In turn, refugees and asylum seekers are obliged to abide by the laws of the Republic of South Africa.¹⁸⁰

As far as refugee children are concerned, The Refugees Act requires the government to issue an asylum permit to a refugee child 'who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care as contemplated in the Children's Act'.¹⁸¹ Under the Refugees Act, refugee children should be granted the same protection as national children of South Africa.¹⁸² Therefore, if a refugee child is found in need of care, then, similar to a South African child, the refugee child 'must be placed in a place of safety, his or her personal circumstances investigated by a social worker and a Children's Court inquiry opened, conducted and finalised' in accordance with the Children's Act.¹⁸³

From the above discussion, it is clear that the socio-economic rights of refugees are guaranteed under South African law. This therefore lays the foundation for refugees to claim the fulfilment of these rights within the parameters set by the courts, as will be discussed below.

However, the practical realisation of these basic rights regarding refugee protection has been accompanied by difficulties, and these obstacles and the reality of the current situation of refugees will be thoroughly discussed in the next chapter.

¹⁷⁷ VLA de la Hunt 'Refugees and the Law in South Africa'(1997) 14, paper presented at the International Conference on Xenophobia in Cape Town.

¹⁷⁸ Section 30 Refugees Act 130 of 1998.

¹⁷⁹ Sections 27 (c) and 15 (1) (d).

¹⁸⁰ Section 34 Refugees Act 130 of 1998.

¹⁸¹ Section 155 Children's Act. Under this section, before a child is brought to the Children's Court, a social worker must investigate the case and within 90 days, complete a report stating whether the child is in need of care.

¹⁸² *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 (6) SA 50 (T).

¹⁸³ *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 (6) SA 50 (T).

3.4 Court interpretation and enforcement of socio-economic rights

Socio-economic rights under South African law are justiciable,¹⁸⁴ and the courts have been active in establishing the limiting factor of the right to access socio-economic rights. Even though the significant court decisions on socio-economic rights did not specifically deal with refugees, this does not mean that the state has completely different obligations when refugees are concerned. Through this analysis of the standards established by the courts, the hope is that extensive standards can be established which will result in the concrete realisation of refugee rights and the enhancement of refugee protection.

3.4.1 Principles of human dignity, equality and non-discrimination

Human dignity, equality and non-discrimination are core values of the Constitution, to which all people and state organs in South Africa are duty bound, and ones which they are to endeavour to realise through all their actions.¹⁸⁵ The Constitutional Court has constantly confirmed the importance of equality and human dignity and the achievement of these principles in many cases.

A case related to refugees is that of *Kiliko*,¹⁸⁶ where the Court held that under international law, the state is required to respect the basic human rights of any alien who has entered its territory and any such person is entitled to all the fundamental rights entrenched in the Bill of Rights, except those specifically limited to South African citizens. Therefore this court decision provides guidelines for refugees' entitlements.

Moreover, in *Khosa v Minister of Social Development*¹⁸⁷ the Constitutional Court also applied the non-discrimination principle. In this case, the court was called on to decide on a constitutional challenge to provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act which limit social grants, child support grants, and care dependency grants, respectively, to South African citizens. The applicants were former Mozambican refugees, who sought refuge in South Africa in the 1980s during the civil war in

¹⁸⁴ *Ex parte Chairperson of the constitutional Assembly: In re Certification of the Constitution of RSA*, 1996(4)

¹⁸⁵ See for example amongst others, Sections 7 (1), 9, 10, 36 (1) and 39 (1) (a) of the Constitution.

¹⁸⁶ *Kiliko and Others v Minister of Home Affairs & Others* 2007 1 Sa 97 (C) para 7

¹⁸⁷ *Khosa and Others v Minister of Social Development and Others* 2004 6 BCLR 569 (CC) para 56

Mozambique, and later acquired permanent residence. By application of the constitutional provision, the applicants met all the requirements to qualify for social assistance but could not on the sole ground that they were not South African citizens. Their claim was based on the constitutional provision, which guarantees the right to access to social security to ‘everyone’¹⁸⁸. They argued that their exclusion from the social assistance schemes constituted unfair discrimination. On the other hand, the government contended that ‘the state has an obligation towards its own citizens first, and that preserving welfare grants for citizens only creates an incentive for permanent residents to naturalise’.¹⁸⁹

Reflecting the opinion of the majority, Mokgoro J held that ‘[t]he exclusion of all non-citizens who are destitute... irrespective of their immigration status, fails to distinguish those who have become part of our society and have made their homes in South Africa, and those who have not’. Mokgoro J further noted that it would not be reasonable to treat differently in relation to social assistance people who settled in South Africa, whose families are often in South Africa, and whose children are born there, who have the right to work in South Africa and pay taxes, and who even owe a duty of loyalty to the state. Finally, recalling the provisions of section 7(1) of the Bill of Rights which guarantee the principle of equality, Mokgoro J upheld the request by the applicants and held that the word ‘everyone’ in section 27(1) of the Constitution included permanent residents.¹⁹⁰

In the case of *Watchenuka v. Minister of Home Affairs*¹⁹¹ the judge reaffirmed the principle of equality and respect for human dignity by stressing that:

‘Human dignity has no nationality. It is inherent in all people citizens and non-citizens alike, simply because they are human. And while that person happens to be in this country- for whatever reason- it must be respected, and is protected, by Section 10 of the Bill of Rights. The inherent dignity of all people, like human life itself, is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Right.’

In respect of the importance of having a job and the effect which it has on a person’s dignity, Chaskalson *et al*¹⁹² endorse the following statement:

¹⁸⁸ Section 27 of the Constitution.

¹⁸⁹ *Khosa and Others v Minister of Social Development and Others* 2004 6 BCLR 569 (CC) para 57.

¹⁹⁰ *Khosa and others v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 57.

¹⁹¹ *Watchenuka and Another v Minister of Home Affairs* 2003 (1) SA 619 (C) para 25.

‘Work is one of the fundamental aspects of a person’s life.... An essential component of his or her sense of dignity, self-worth and emotional well-being... highly significant in shaping the....psychological, emotional and physical elements of a person’s dignity and self-respect’.

Using the above standard it is clear that the nature of the obligation on the South Africa government with regard to refugee protection certainly is an extensive one and that the potential exclusion of refugees from access to socio-economic rights would fall short of this standard.

In evaluating the importance of socio-economic jurisprudence in South Africa, Wesson opines that the key judgments, which include *Khosa*, all concern cases of the exclusion of particular groups from socio-economic programmes.¹⁹³

Sloth-Nielsen observes that the *Khosa* case particularly concerns the exclusion of non-citizens from the programme at issue.¹⁹⁴

3.4.2 Test of progressive realisation of socio-economic rights

The state’s obligations regarding the right to access socio-economic rights are dependent upon the availability of resources. Therefore, socio-economic rights under the Constitution may be limited because of a lack of resources. With regard to this point, the Court in the *Soobramoney*¹⁹⁵ case held that the state was under a duty to manage its limited resources in order to address all basic claims made upon it.

Bilchitz¹⁹⁶ opines that measures undertaken by the government in realising socio-economic rights should be judged on whether or not they were aimed at progressive realisation of these rights.

¹⁹² Chaskalson M *Constitutional law of South Africa* (1998) 30.

¹⁹³ Wesson M ‘Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal on Human Rights* 284 305.

¹⁹⁴ Sloth-Nielsen J ‘Extending access to social assistance to permanent residents’ (2004) 9 *ESR Review* 9 11.

¹⁹⁵ *Soobramoney v Minister Of Health, KZN* 1998(1) SA 765.

¹⁹⁶ Blichitz D ‘Towards a reasonable approach to the minimum core: Laying the foundation for future socioeconomic rights and jurisprudence’ (2003)19 *SAJHR* 1 26.

In relation to this, Yacoob J. in the *Grootboom case* gave a clear picture of the circumstance that mandates the state to progressively realise socio-economic rights. In fact, he noted that:

‘This case shows the desperation of hundreds of thousands of people living in deplorable conditions---- the Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health care --- to those unable to support themselves and their dependants. --- Those in need have a corresponding right to demand this to be done. I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resource or to provide these rights immediately. I stress, however, despite all these qualifications, these rights and the Constitution obliges the state to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.’

However, in progressively realising the right to access socio-economic rights, there is a need to be aware of the fact that people have urgent needs which if not met would render the rights as enshrined in the Bill of Rights devoid of meaning.¹⁹⁷ Still, with regard to progressive realisation of socio-economic rights, the Court held that ‘the goal of the Constitution was, however, that the basic needs of all in our society be effectively met and the requirement of progressive realisation meant that the State had to take steps to achieve this goal...’. This meant that sub-sections 27(1) and 27 (2) are linked and should be read together. In other words, accessibility should be progressively facilitated, involving the examination of legal, administrative, operational and financial barriers which should be reduced over time.

This would be relevant to the refugee population that is likely to be rendered extremely vulnerable by continued exclusion.

3.4.3 Test of minimum core obligation

The Constitutional Court has refused to apply the concept of the minimum core approach in the enforcement of socio-economic rights. In fact, in *Minister Of Health & Others v. Treatment Action Campaign & Others*,¹⁹⁸ the Court, referring to the *Grootboom*¹⁹⁹ case, noted that even though Yacoob J indicated that evidence in a particular case may show that

¹⁹⁷ Blichitz D ‘Towards a reasonable approach to the minimum core: Laying the foundation for future socioeconomic rights and jurisprudence’ (2003) 19 *SAJHR* 1 26.

¹⁹⁸ *Minister Of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (5) SA 721.

¹⁹⁹ *Government of South Africa & Others v Grootboom & others* 2001(1) SA 46 CC (2000(11) BCLR 11690.

there is a minimum core of particular services that should be considered in determining if measures adopted by the state are reasonable, socio-economic rights should not be interpreted as granting every individual the right to claim tangible services from the state in particular circumstances. The Court held that the minimum core should be treated as probably being related to reasonableness under section 27 (2) and not as a self- standing right granted under section 27(1). Nevertheless, the Court observed that the state is under an obligation to act reasonably in order to provide access to socio-economic rights in section 27 progressively.

So, the fundamental question with regard to refugees and asylum seekers is: whether the measures taken by the State to realise their socio-economic rights afforded by the Constitution are reasonable. In gauging this, circumstances where many refugees are forced, because of their inability to successfully integrate, to live in extreme poverty, should be taken into account. Also to be taken into consideration is the fact that refugees cannot turn to their own governments through their embassies for assistance nor can they go back to their home countries like other migrants can. As the UNHCR has pointed out, 'being a refugee means more than being an alien. It means living in exile and depending on others for such basic needs as food, clothing and shelter'.²⁰⁰

Refugees are vulnerable forced migrants and their vulnerabilities were recognised by the international community when it adopted a protection system to preserve them from these problems and consequently accorded them the same socio-economic rights as those given to nationals. So, for the South African government as a willing signatory to different international instrument to deny them socio-economic rights would be inhuman, and given the particular circumstances unreasonable and therefore unconstitutional.

3.5 Conclusion

From the above discussion, it is evident that South Africa has adopted sufficient legislative measures to protect and promote the socio-economic rights of refugees as required under Article 2(1) of the ICESCR. However, it is important to note that legislative measures are just one of the steps expected to be taken by States under the ICESCR and other international

²⁰⁰ United Nations High Commissioner for Human Rights, Fact Sheet No 20, *Human Rights and Refugees* 1997. Available at <http://www.unhchr.ch/html/menu6/2/fs20.htm> (accessed 14 September 2013).

instruments. The next chapter discusses how the state has implemented the obligations derived from the international, regional and domestic laws discussed above.



CHAPTER FOUR

PROBLEMS OF ACCESS TO SOCIO-ECONOMIC RIGHTS FOR REFUGEES IN SOUTH AFRICA

4.1 Introduction

‘It is assumed that the way refugees are treated by a particular society is a yardstick by which the observance of human rights generally can be measured and that efforts to improve respect for refugees’ rights can be an entry point for improving the human rights situation for the population as a whole.’²⁰¹

From the above opinion, one can make the point that any effort in promoting the rights of refugees is an investment in a more just society.

The objective of this chapter is to examine the compatibility of protection of socio-economic rights afforded to refugees in South Africa with international refugee law and with the relevant international human rights standards as well as with South African domestic law as interpreted in chapters 2 and 3. The chapter seeks to demonstrate that though the domestic legal framework in South Africa adequately addresses the plight of refugees on paper, the law is not always effectively implemented and enforced. The UNHCR which is the primary actor in charge of the assistance and protection of refugees has used international law as the basis for specific guidelines to protect refugees. These guidelines are not always respected. In fact, they do not constitute ‘hard international law’ and thus there are no sanctions for their non-implementation. According to Ressler, in a number of emergencies, refugees have been left without medical care and shelter. In other instances, relevant national and international laws have been ignored and violated by those who have acted against refugees.²⁰² This chapter also highlights the obstacles which need to be addressed in order to adequately realise the socio-economic rights of refugees living in South Africa.

²⁰¹ Harell B ‘Towards the economic and social “integration” of refugee populations in host countries in Africa’. This document was prepared as a stimulus for discussion at the Stanley Foundation conference ‘Refugee protection in Africa: How to ensure security and development for refugees and hosts’ held in Entebbe, Uganda from 10 November 2002.

²⁰² Ressler E *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (1988) 272.

4.2 Challenges faced by refugees in accessing socio-economic rights

Since the transition to a democratic South Africa in 1994, the country has become a destination for thousands of migrants and refugees from across the African continent.²⁰³ According to the UNHCR, there are more than 200,000 registered refugees in South Africa.²⁰⁴ Most of these refugees face mistreatment at the hands of the police and South African citizens.²⁰⁵ As mentioned earlier, in 2008 the number of refugees entering South Africa considerably increased due to the political and economic crisis in neighbouring Zimbabwe. The problem was described by the South African government as ‘a serious one’ requiring action.²⁰⁶ Moreover, refugees living in South Africa faced increased challenges in 2008 due to the outbreak of xenophobia, and xenophobia related attacks.²⁰⁷ The attacks began in May and resulted in thousands of immigrants and refugees being displaced within the country, many of whom were sheltered in community halls, local shelters and refugee sites across the country.²⁰⁸ These displaced refugees generally have no money or property.²⁰⁹ As a result of this displacement, the government set up various ‘sites’ around the country. However, there were a number of refugee children living in Musina, a town bordering Zimbabwe. According to the 2008 Child Protection Rapid Assessment Report, there were more than 600 refugees living in Musina town. The report further stated that 92 per cent of these refugees were found living on the streets or in other dangerous places, such as the bushes, and yet services for these children were found to be ad hoc and reactive as opposed to

²⁰³ Landau L & Jacobsen K ‘Refugees in the new Johannesburg’ (2004) 19 *Forced Migration Review* 44.

²⁰⁴ UNHCR ‘Global refugee trends: statistical overview of population of refugees in South Africa’ 2012. Available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6> (accessed 8 July 2013).

²⁰⁵ Nyaradzo M *Can a Case be Made for the Provision of Government Funded Social Assistance to Refugees in South Africa? Defining a Constitutional Standard for Refugee Protection in South Africa* (unpublished LLM thesis, University of Cape Town, 2005) 3.

²⁰⁶ Nyaradzo M *Can a Case be Made for the Provision of Government Funded Social Assistance to Refugees in South Africa? Defining a Constitutional Standard for Refugee Protection in South Africa* (unpublished LLM thesis, University of Cape Town, 2005) 3.

²⁰⁷ Maltou P ‘The Creation of Refugee Act: The South African Experience’ in Majodina (ed) *The Challenges of Forced Migration in Southern Africa* (2001) 131.

²⁰⁸ IRIN Africa South Africa: ‘Xenophobic attacks spreading’. Available at www.irinnews.org/report/.../south-africa-Xenophobic-attacks-spreading (accessed 29 November 2013).

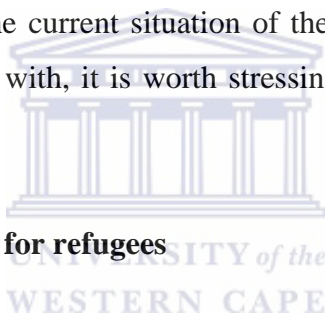
²⁰⁹ Maltou P ‘The creation of Refugee Act: The South African experience’ in Majodina (ed) *The Challenges of Forced Migration in Southern Africa* (2001)131.

proactive.²¹⁰ This section examines the access that refugees have to education, health care and housing in order to address the realisation of their socio-economic.

4.2.1 Access to education

“It is no exaggeration to say that refugee children’s well-being depends to a major degree on their school experiences, successes and failures (...)”²¹¹

The UNHCR stresses that refugee children’s wellbeing is as important as their physical health. It further emphasises that children have a unique psychological characteristic: their personalities are being formed and their coping skills developed daily. Therefore, the disruption and insecurity inherent in refugee situations might harm children’s physical, intellectual, psychological, cultural and social development. The disruption might also lay the foundations for another generation to engage in revenge, conflict and displacement.²¹² This part of the study is devoted to the current situation of the right to education for refugee in South Africa. However, to begin with, it is worth stressing the importance of education for refugees.



4.2.1.1 Importance of education for refugees

Education is a right for all children. Therefore, all people should acquire education regardless of their nationality, status and socio-economic background. Refugee children require education as their basic right. In fact, crisis situations associated with conflict and displacement may cause disruption of children’s lives and uncertainty regarding their future. Refugee children (especially those from Somalia, Democratic Republic of Congo and Burundi) might have been subjected to violence, including seeing their parents and relatives killed. Some might have been recruited or abducted by militias. According to Pinson and Arnot, education works as ‘a strong tool that can be used to heal their psychological and social traumas’.²¹³ Moreover, education builds personal self-reliance and provides for the

²¹⁰ Child Protection Rapid Assessment Musina Municipality Limpopo Province, South Africa August 2008.

²¹¹ Bourgonje P *Education for Refugee and Asylum Seeking Children in OECD countries. Case Studies from Australia, Spain, Sweden and the United Kingdom* (2010) 13.

²¹² UNHCR *Refugee Children: Guidelines on Protection and Care* (1994)38-39.

²¹³ Pinson H& Arnot M ‘Local conceptualisations of the education of asylum seeker and refugee students: From hostile to holistic models’(2010) 14 *International Journal of Inclusive Education* 247 267.

‘human capital’²¹⁴ which is a tool for the economic development of both home and host countries. Appropriate education is a strong foundation for peace, justice and social cohesion.²¹⁵ Education provides hope, stability and a better future for refugees.²¹⁶ The Women’s Refugee Commission stresses that without support for their education and opportunities to develop a livelihood, ‘refugees are left idle and frustrated’.²¹⁷ Bocakova argues that ‘education should be made available and accessible to refugees’.²¹⁸ This means that schools should have qualified and enough staff members to meet the educational needs of refugee children. Schools should also be accessible to all children, irrespective of their status. Refugees need opportunities to complete their education and learn skills which they require in order to develop their lives.²¹⁹

4.2.1.2 Problems of access to education

Legally, refugees living in South Africa are entitled to an education as studied in chapter 3. However, many do not gain access to state schools. The Refugee Act (1998) provides for the right to access education services, but the attainment of education by refugees in South Africa has not been achieved. According to Walton:²²⁰

‘There is ample reason for despair about the progress of inclusive education in South Africa. Despite sound and well-intentioned policies, exclusion from schools and within Schools remain the experience of many children and young people in this country.’

²¹⁴ Pascual M *Key Aspects about Education for Refugee Children* (2003) 231.

²¹⁵ Pascual M *Key Aspects about Education for Refugee Children* (2003) 231.

²¹⁶ Walker S ‘Something to smile about promoting and supporting the educational and recreational needs of refugee children’. Available at www.refugee council.org.uk/Resources/Refugee%20 council/downloads/research reports/smile% 20 report-3.pdf (accessed 9 August 2013).

²¹⁷ Women Refugee Commission ‘*Tapping the potential of displaced youth guidance for non- formal education and livelihoods development policy and practice*. Available at <http://relief web.int/sites/reliefweb.int/files/resources/youth guidance> (accessed 9 August 2013).

²¹⁸ Bocakova M ‘Developing inclusive educational practices for refugee children in the Czech Republic’ (2011) *22 Intercultural Education* 163 175.

²¹⁹ Meda L, Sookrajh R & Maharaj B ‘Refugee in South Africa: Access and challenges to achieving universal primary education’ (2013) *9 Africa Education Review* 152 168.

²²⁰ Walton E *Getting Inclusion Right in South Africa Intervention in School and Clinic* (2011) 244.

Moreover, CoRMSA²²¹ suggested that refugee children often find themselves out of the public education system in South Africa. This situation is due to the fact that most refugees live in poor, informal settlements which make it difficult for their children to access education.²²² Some refugees are marginalised and they find that it is not easy to pursue their educational activities.²²³ The hindrances to children's access to schooling in South Africa include, among other, the lack of infrastructure, incapacity to cover educational costs, and inability to meet enrolment requirements.²²⁴ Another study conducted by CoRMSA reported that 24% of the school age children of refugees are not in school in South Africa and that the reasons for this include: incapacity to afford school fees; lack of officially required documents; inability to afford transport, books or uniforms for school; and finding the local schools full.²²⁵ In addition, principals often impose superficial roadblocks to providing education to refugees. CoRMSA reported that some school administrators in South Africa do not accept refugee children in their schools.²²⁶ For example, they require official documentation to enrol in school (papers which refugee children do not possess). Thus, refugee children are marginalised and denied opportunities to study.

Furthermore, a study conducted by Rugunanan and Smit about refugees from Burundi and Democratic Republic of Congo who are in Pretoria, reported that Burundians and Congolese have difficulties accessing education for their children.²²⁷ These refugee children are denied

²²¹ CoRMSA 'Protecting refugees, asylum seekers and immigrants in South Africa' (2009) Available at www.CoRMSA.org.za (accessed 23 June 2013).

²²² Sirin S, Ryce P 'Cultural incongruence between teachers and families: Implications for immigrant students'. In Grigorenko E & Takanishi R (eds) *Immigration, Diversity and Education* (2010) 52.

²²³ Sidhu R & Taylor S 'Educational provision for refugee youth in Australia: Left to chance' (2007) 43 *Journal of Sociology* 283.

²²⁴ Buckland S 'From policy to practice: The challenges to educational access for non-nationals in South Africa' (2011) 31 *International Journal of Educational Development* 367 373.

²²⁵ CoRMSA 'Protecting refugees, asylum seekers and immigrants in South Africa during 2010'. Available at <http://www.cormsa.org.za/wp-content/uploads/2011/07/CoRMSA-Report-20111.pdf> (accessed 15 July 2013).

²²⁶ CoRMSA 'Protecting refugees, asylum seekers and immigrants in South Africa during 2009'. Available at www.CoRMSA.org.za (accessed 23 June 2013).

²²⁷ Rugunanan P, Smit R 'Seeking refuge in South Africa: Challenges facing a group of Congolese and Burundian refugees' (2011) 28 *Development Southern Africa* 705 718.

access to government schools because of their refugee status.²²⁸ Another study on the education of refugee children conducted by Women's Refugee Commission states that 'the education and livelihood skills-building needs of crisis-affected, displaced female and male youth have been largely unmet to date'.²²⁹ Moreover, some refugee children face discrimination and exclusion from schools. For example, a newspaper reported that a seven year old refugee child was forced to leave the school because teachers found him to be 'hyperactive'.²³⁰ Finally, the lucky refugees who are able to complete primary and secondary school are very often unable to continue to the university level. In fact, to be eligible for higher education student loans, one must be a South African citizen.²³¹

As far as tertiary education is concerned, it should be noted that there is no policy that is adopted by South Africa to promote refugee and asylum seekers' tertiary education. Refugees and asylum seekers are excluded from benefiting from the South Africa National Student Financial Aid Scheme, which is a policy that was developed and designed to ensure historically disadvantaged and marginalised persons access to tertiary education.²³² As regards access to tertiary education, refugees and asylum seekers are treated as if they are international students who are required by immigration policy to be financially independent.²³³ In other words, the right to education is enjoyed only by refugees and asylum seekers who are able to do so at their own expense. Poor and vulnerable refugees and asylum seekers' education dream cannot be fulfilled. The UNHCR is also not significantly intervening. For example, in the Western Cape Province alone, there are more than 500

²²⁸ Rugunanan P & Smit R 'Seeking refuge in South Africa: Challenges facing a group of Congolese and Burundian refugees' (2011) 28 *Development Southern Africa* 705 718.

²²⁹ Women's Refugee Commission '*Tapping the potential of displaced youth guidance for non-formal education and livelihoods development policy and practice*'. Available at http://reliefweb.int/sites/reliefweb.int/files/resources/youth_guidance_12.2011_final.pdf (accessed 12 July 2013).

²³⁰ Adri-amm P 'School doesn't want this boy' *Bellville/Durbanville Tygertalk* 2 May 2013.

²³¹ Bongani N 'Foreigners marginalised by policy' *Mail & Guardian* 12 February 2012. Available at <http://mg.co.za/article/2012-02-17-foreigners-marginalised-by-policy> (accessed 13 November 2013).

²³² National Student Financial Aid Scheme Act 56 of 1999.

²³³ Section 13(1) (b) (iii) of the Immigration Act 13 of 2002.

tertiary refugee students, and UNHCR financially assists less than 100 refugee students countrywide.²³⁴

4.2.3 Access to shelter or housing

South Africa has an integrative urban refugee policy whereby refugees are encouraged to integrate, instead of being restricted to camps. Refugees are expected to fully integrate themselves into South African society, and are also expected to be self-sufficient and to do so with practically no specific assistance from the government which does not have any public relief program for refugees.²³⁵ The next section explores issues of access to housing for refugees in South Africa. It examines the actual experiences of refugees in accessing housing, and explores the conditions in which they live once able to access housing.

4.2.3.1 Acquisition of housing

The main housing issue concerning refugees living in South Africa is access to a housing subsidy which is a financing scheme introduced by the South African government and which provides a grant to purchase a home or to upgrade an existing dwelling. There are many requirements to meet in order to be eligible. The most important condition is that to be eligible one must be a 'legal South African resident'.²³⁶ The Department of Housing interprets 'legal South African resident' to refer exclusively to South African citizens and permanent residents.²³⁷ This limited interpretation of 'legal South Africans resident' which has not been tested yet against the Constitution clearly bars refugees from accessing housing in South Africa.

²³⁴ Kavuro C 'Reflecting on refugees and asylum seekers tertiary education in South Africa: Tension between refugee protection and education transformation policies'. Available at <http://globaleducationmagazine.wordpress.com/category/ngo/> (accessed 13 July 2013).

²³⁵ There is no refugee camp in South Africa and asylum seekers as well as refugees are entitled to work.

²³⁶ A Resource Guide to Housing in South Africa 1994-2010 Legislation, Policy, Programmes and Practice. Available at www.urbanlandmark.org.za/.../SERI_Housing_Resource_Guide (accessed 28 September 2013).

²³⁷ A resource Guide to Housing in South Africa 1994-2010 Legislation, Policy, Programmes and Practice Available at www.urbanlandmark.org.za/.../SERI_Housing_Resource_Guide (accessed 28 September 2013).

As far as the attitudes of South Africans towards refugees are concerned, many studies have showed that South Africans are opposed to the idea of the state providing housing to refugees. In fact, politicians and South African citizens are generally portrayed as being hostile with regard to refugees and asylum seekers accessing basic needs, such as housing, and refugees have no illusions that they can access state subsidised housing or any other basic services for free.²³⁸

4.2.3.2 Access to lease

Refugees are generally considered illegal migrants in South Africa and are therefore not likely to find well-paying jobs easily, and this poses questions pertaining to their access to housing. In a study carried out in Durban, only 30% of the refugees interviewed were employed, while the other 70% were self-employed. However, those in self-employment experienced different problems, such as, lack of access to credit and banking facilities, because the residence permits that they had suggested the possibility that they were in the country illegally. Furthermore, those who had their own businesses experienced problems, such as, being targeted by criminals upon realisation of the fact that they were non-South Africans, and the fact that people did not want to buy goods from them because of their nationality. Those who were employed were also experiencing problems because trade unions were putting pressure on employers to fire them.²³⁹

Without an income it becomes difficult to access basic needs, such as, food, education, health care and shelter. Finally, lucky refugees and asylum seekers who access accommodation face others types of xenophobic practices. In fact, landlords are generally motivated to increase the quoted rent when they realise that the person applying to rent the accommodation is not South African. In addition, refugees are charged per person living in the accommodation, rather than for the flat as a whole as South Africans would be charged.²⁴⁰ Fear of attack in

²³⁸ A study conducted by Southern African Migration Project showed that 79% of refugees were of the view that they should have equal access to housing, 96% felt there should be equality of access to education, and 79% felt they should have an equal opportunity for employment. See McDonald D & Lephophotho M *The Lives and Times of African Migrants and Immigrants in Post-Apartheid South Africa* (1999) 25.

²³⁹ Fariba S *The Social, Economic and Political Circumstances of Congolese Refugees in Durban*, (unpublished Master's Dissertation, University of Natal 2000) 49-66.

²⁴⁰ Personal experience as an asylum seeker in South Africa since 2009.

the townships obliges many refugees to live in overcrowded rooms in more expensive inner areas of the city.²⁴¹ For example, it is not uncommon for refugees to have more than ten people sharing a room. This situation often requires them to sleep in shifts and make use of bathrooms and hallways.²⁴²

The fact that despite the above discussed provisions of the law, refugees and asylum seekers are barred from the housing subsidy and do not receive any form of public assistance and relief from the government is a cause for concern and calls attention to the need for minimum standards of treatment and protection to be clearly laid down.

4.2.4 Access to health care

Ensuring that everyone has access to health care is of particular importance in South Africa. In fact, it will improve the health and welfare of all residents regardless of their nationality.²⁴³ The Department of Health is the national institution in charge of progressive realisation of refugees' right to access health care services. However, the existing evidence indicates that access to basic health care remains insufficient. For example, while commenting on urban refugee policies, the UNHCR regional representative mentioned the fact that refugee policies have failed to deal with some of the considerable challenges in the realisation of refugees' rights, such as 'access to national public services'.²⁴⁴ Moreover, in a national study that explicitly focused on refugees, it was found that 17% of refugee participants had been denied emergency medical care.²⁴⁵ In addition, different studies and publications have reported incidents where health care employees have displayed biased behaviour towards refugees. For example, a Médecins Sans Frontières (MSF) report to the Gauteng Department of Health includes accounts given by different people as well as that from a medical student who gave a report of some wrong and offensive conduct that he witnessed at the Hillbrow Community

²⁴¹ UNHCR *country operations profile South Africa (2010)*. Available at <http://www.unhcr.org/pages/49e485aa6.html> (accessed 16 August 2013).

²⁴² Personal experience as asylum seeker since 2009.

²⁴³ CoRMSA '*Protecting refugees, asylum seekers and immigrants in South Africa during 2009*'. Available at <http://www.comsa.org.za/research/cormsa-reports/> (accessed 25 July 2013).

²⁴⁴ IRIN *Progress Report 2006*. Available at www.irinnews.org/pdf/irinprogressreport2006.pdf. (accessed 29 July 2013).

²⁴⁵ Belvedere F *National Refugee Baseline Survey: Final Report (2003)*.

Health Clinic by members of the nursing personnel. He claimed that the nursing personnel would intimidate and mistreat refugee patients.²⁴⁶ Furthermore, the UNHCR has also prepared a report of different cases where health professionals 'who are not aware of the law' have displayed xenophobic behaviour towards refugees.²⁴⁷

Apart from academic qualifications, it is critical for health care workers to also possess personal qualities such as understanding and sympathy, and some elementary knowledge of the problems that refugees face in general. The latter may help in changing the health care workers behaviours towards refugees and make them more sympathetic.

4.3 Obstacles to the realisation of socio-economic rights of refugees

This part of the chapter is devoted to a discussion of different obstacles that still obstruct the full realisation of the socio-economic rights of refugees. In fact, the South African government acknowledged in its Policy Paper on Refugee Issues that it did not have the financial means to provide refugees and asylum seekers with material assistance.²⁴⁸ As an alternative, the government committed itself to create an enabling environment, which would facilitate the integration of refugees. This objective was to be achieved through concrete action, such as, the issuing of identity documents, the granting of the right to work and study, and the speeding up of eligibility procedures to guarantee security of status. It also included the raising of public awareness in order to inform South African of the plight of refugees.²⁴⁹

²⁴⁶ MSF 'No refuge, access denied: Medical and humanitarian needs of Zimbabweans in South Africa' (2009). Available at: <http://www.doctorswithoutborders.org/publications/article.cfm?id=3646&cat=special-report> (accessed 16 August 2013).

²⁴⁷ UNHCR 'Realising rights: the development of health and welfare policies for asylum seekers and refugees in South Africa'. Available at www.queensu.ca/samp/sampresources/migrationdocuments/.../dha.pdf (accessed 29 November 2013)

²⁴⁸ Paragraph 4.8.2.2 of the Local Integration Section in the Draft Refugee White Paper.

²⁴⁹ Paragraph 4.8.2.2 of the Local Integration Section of the Draft Refugee White Paper.

4.3.1 Access to a refugee document

South Africa is recognised as an ‘identity driven society’,²⁵⁰ and there is no service one can access in the country without a valid identity document. The Department of Home Affairs is the national institution in charge of the issuing of identity documents to citizens as well as to refugees. Therefore, in order to apply for refugee status, asylum seekers and refugees must report to one of the refugee reception offices. These refugee reception offices have been described as ‘the major stumbling blocks to refugees regularizing their stay in South Africa and translating their legal rights into entitlements’.²⁵¹ This is because refugees and asylum seekers struggle to gain access to these offices.

Another issue is the timeframe within which refugees are able to successfully get their refugee status documents and asylum seeker permits. In fact, the asylum determination process which is supposed to take a minimum of 45 days and a maximum of 180 days to adjudicate an asylum application to finality, often takes up to five or seven years for a refugee to be formally recognised and given refugee status. While waiting for the adjudication, asylum seekers are required to report to the refugee office every three or six month to renew their permit.²⁵² For this reason, employers are reluctant to employ refugees and asylum seekers as they view them as insecure and as being able to only engage in work of a temporary nature.

4.3.2 Lack of awareness

It is the duty of the state to make sure that the rights of refugees, and responsibilities of the government departments, are easily accessible and disseminated throughout the country. It is also the duty of government to make available the information that refugees may need in

²⁵⁰ Khan F ‘Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach’ Available at www.refugeerights.uct.ac.za/.../refugeerights.../patterns_policies_migrati (accessed 16 May 2013).

²⁵¹ Khan F ‘Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach’ Available at www.refugeerights.uct.ac.za/.../refugeerights.../patterns_policies_migrati (accessed 16 May 2013).

²⁵² Personal experience as an asylum seeker since 2009.

order to convert their legal rights to a privilege. Failure of the state to fulfil this obligation results in a serious obstacle to the realisation of the right of refugees.

The CoRMSA has observed that there are only a few departments or public service providers that have policies and behaviours accommodating refugee rights.²⁵³ Moreover, HRW has reported on incidents where hospital personnel have denied refugees access to health care due to their inability to recognise different refugee documents and ignorance of refugee rights in terms of law and policies.²⁵⁴

In a UNHCR report on the development of health and welfare policies for refugees in South Africa, there was concern that there is a lack of consistency amongst government departments in dealing with refugee children. For example, the Children's Court in Johannesburg was not aware that it had jurisdiction over refugee children. The report states that 'the lack of communication between the Departments of Home Affairs and Social Development, as well as the lack of awareness on the part of the Children's Court, has led to a situation where unaccompanied children are falling through the cracks'.²⁵⁵ In addition, Home Affairs staff at the Johannesburg Refugee Reception Office have been accused of not assisting refugee children, and of not communicating with the Department of Welfare when there is a serious case relating to a vulnerable refugee child.²⁵⁶

As far as refugee documents are concerned, it is important to note that these documents are apparently different from documents issued to South African citizens or permanent residents.

²⁵³ CoRMSA 'Protecting refugees, asylum seekers and immigrants in South Africa' (2008) 25 Available at: www.cormsa.org.za/wp-content/uploads/2008/06/cormsa07report.pdf. (accessed 15 August 2013).

²⁵⁴ HRW 'No healing here: violence, discrimination and barriers to health for migrants in South Africa'. A report based on research conducted by Human Rights Watch in Johannesburg, Musina, Pretoria, and surrounding municipalities, and Cape Town (2009). Available at <http://www.hrw.org/en/reports/2009/12/02/no-healing-here-0> (accessed 10 September 2013).

²⁵⁵ UNHCR 'Realising rights: the development of health and welfare policies for asylum seekers and refugees in South Africa'. Available at www.queensu.ca/samp/sampresources/migrationdocuments/.../dha.pdf (accessed 29 November 2013)

²⁵⁶ SAHRC Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals (2010). Available at http://www.pmg.org.za/files/docs/101124sahrcprep_0.pdf (accessed 10 July 2013).

These documents are also generally unknown amongst private and public institutions, including potential employers. It is consequently not an enabling document and although a range of rights is attached to these documents, refugees cannot access these rights. This is mainly due to the fact that the South African government has not done enough to educate South Africans about refugee documents. As a result, refugees struggle to access basic services, such as, health care, housing and education.

4.3.3 Xenophobia

Xenophobic attitudes constitute real hindrances to the full integration of refugees in South Africa. In a survey conducted by the South African Migration Project it was revealed that 87% of South Africans believed that the country was letting in too many foreigners.²⁵⁷ Xenophobia in South Africa might take various dimensions such as: exploitation of refugees in employment and housing matters, exclusion of refugees from engaging meaningfully within their communities, violent attacks against refugees.²⁵⁸

Xenophobia creates an environment that promotes risks to refugees. It also creates barriers to refugees obtaining basic socio-economic rights, such as, healthcare and shelter. By creating fear among refugees, they may turn away from seeking health care, shelter and education, and the more so when they lack appropriate documentation.

4.4 Conclusion

From the foregoing, it appears that there is a discrepancy between the rights of refugees as acknowledged in international instruments, South African domestic law and the practical treatment of refugees. Refugees do not receive adequate attention and their socio-economic rights are not being fully realised. This is due to a lack of awareness, xenophobia and difficult access to a refugee document. These obstacles prevent the full realisation of the fundamental

²⁵⁷ The Southern African Migration Project *Still waiting for the barbarians: South African attitudes to immigrants and immigration* (2002) 13. Available at http://www.politics.uct.ac.za/pol_people/Mattes/Mattes%20SAMP%2014.pdf (accessed 19 November 2013)

²⁵⁸ Khan F 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach'. Available at www.refugeerights.uct.ac.za/.../refugeerights.../patterns_policies_migrati (accessed 16 May 2013).

and guaranteed rights which are available to refugees. It is necessary, therefore, to suggest possible solutions to these ‘stumbling blocks’.



CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study set out to outline the practical treatment of refugees in South Africa by examining their access to socio-economic rights, such as, education, housing and health care, and whether this treatment is in accordance with international and regional legal standards set out in human rights instruments, refugee instruments and the UNHCR Guidelines and Principles. As a study of the relevant international and domestic law revealed, in chapters 2 and 3, the socio-economic rights of refugees in South Africa appear to be relatively well protected, at least on paper, under domestic refugee laws. However, the implementation of these laws as studied in chapter 4 has been far from satisfactory. Refugees still face challenges in accessing education; housing and health care facilities. There is a gap between the rights provided for refugees in South Africa, and the realisation of these rights guaranteed in the law. This study also analysed the obstacles to the full realisation of the socio-economic rights of refugees, and proposed reasons for the lack of full implementation of the rights, including lack of awareness, and xenophobia. In fact, the government has failed to effectively promote, protect and fulfil refugees' rights to access socio-economic services. This failure cannot be attributed to the nature of the obligations and rights established under international, regional and domestic laws. It is just a matter of weak implementation, 'a problem of perception and resolve'.²⁵⁹ This denial in practice by the South African state of socio-economic rights is in conflict with international refugee law and the human rights standards discussed in chapter 2. The study also envisages in the next section recommendations on how the obstacles to implementation can be remedied.

²⁵⁹ Leckie S 'Another step towards indivisibility: Identifying key features of violations of economic, social and cultural rights' (1998) 20 *Hum.Rts.Quarterly* 81 124.

5.2 Recommendations

5.2.1 The need for an awareness campaign

The government must work for a change of behavioural attitudes of South Africans towards refugees. This objective might be reached through a concerted national communication and awareness campaign on refugee rights within the community. For such an awareness campaign to be effective, national authorities, such as, the President and Ministers need to be supportive of the campaign and disposed to be vocal about the need to respect the rights of refugees. As part of the campaign, the government should inform the population in general, about the international conventions and domestic legislation that protect the rights of refugees, and highlight the important contribution that skilled refugees can make to the South African economy. This campaign would help improve the knowledge amongst education staff, health and other welfare officials, as well as the general population, on the difference between refugees and other foreigners. Furthermore, this campaign would help to avoid xenophobic attitudes on the part of health, education and other welfare personnel, as well as the general population. It would also help refugees and asylum seekers to be aware of their rights and look for possible ways to pursue and protect them where the state is unwilling to protect these rights. In fact, awareness of human rights and refugee rights as well as the state obligations to protect these rights are crucial in the struggle for the realisation of the socio-economic rights of refugees in South Africa.

5.2.2 The need to establish a Refugee Council and an intergovernmental body

It is important for the government to establish a Refugee Council as well as an intergovernmental body. The former will include both government and refugees' representatives and will ensure that government representatives are informed of the problems faced by the refugee population and make sure that any new policy initiatives address the needs of refugee in general and the specific plight of refugee children. The latter will help facilitate government co-ordination. In fact, a recent report by the CoRMSA recommended closer collaboration between government departments to ensure that refugees were better protected, as refugee protection requires action from more than one government

department.²⁶⁰ This study endorses this recommendation, as it is evident that any approach to the protection of the rights of refugees requires a multi-party response. Moreover, the role of this body is significant as it is clear from the study that some obstacles to the realisation of socio-economic rights of refugees currently relates to the lack of knowledge by various government departments in dealing with refugees and the lack of referral or co-ordination between these government departments.

5.2.3 Other specific recommendations

With regard to access to education, the attitude of school management teams towards refugees, as mentioned in chapter 4, might be justified by the lack of experience with migrant communities. So, when confronted with refugee children from different national, ethnic and cultural backgrounds, teachers may lack the skills and knowledge to deal with them in the classroom. As South Africa has become the largest recipient of asylum seekers in the world, it is of great significance for school management teams in South Africa to learn how to deal with children from different cultural backgrounds. So, during school management teams' training, attention needs to be paid to issues of multiculturalism in the classroom and also to focus on education for asylum seekers and refugees. School management teams in South Africa should receive background information on refugee issues, such as, information on the process of asylum application, children's background and different challenges refugee children face; and this must be included in initial teacher training in combination with continuing professional development support. In addition, school management teams should be informed about the necessity to give refugees the quality education they are entitled to, like any other South African citizen.

The government should also initiate reporting, accountability, or enforcement strategies for health care facilities and schools to ensure implementation of existing refugee policies. For example, by incorporating human rights monitoring within the work of health professions and initiating a refugees' rights awareness program for training all staff working in health facilities.

²⁶⁰ CoRMSA *Protecting Refugees, Asylum Seekers and immigrants in South Africa during 2010*. Available at <http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Report-2011.pdf> (accessed 12 October 2013).

The government needs to ensure that the Department of Home Affairs specifically leads the establishment of a policy and procedural framework to ensure that refugees' needs are addressed. Training across government departments including Home Affairs, police, social workers, magistrates, and legal practitioners needs to be prioritised and the training needs to ensure that those who work with refugees understand their specific needs.

The above recommendations do not call for the state to go beyond the limiting factor set under international and domestic laws to progressively realise socio-economic rights, but to do what is within its means and power to eliminate the inequalities existing in respect of these rights. If this is done, then refugees' rights can finally be transformed to entitlements. Moreover, bearing in mind that section 7(1) of the Constitution provides that the Bill of Rights is a foundation of democracy and that section 7(2) obliges the state to respect, promote and fulfil the rights in the Bill of Rights, South Africa should move expeditiously and as effectively as possible towards a full realisation of socio-economic rights of refugees in line with the principles of availability, quality and acceptability. Such realisation will certainly depend on resources available and might be subject to distributive justice. However, considering the particular vulnerability of refugees, there is a need to meet the obligations immediately as any denial would render the existing law and policies devoid of meaning

Words count: 18,107 (excluding bibliography and table of contents)

BIBLIOGRAPHY

Books and Chapters in Books

Anderson A Hamilton R Moore D & Loewen S *Education of Refugee Children: Theoretical Perspectives and Best Practice* (2004) York: Routledge Falmer

Arboleda E *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism* (1991) New York: North Holland Publishing

Asbjorn E 'The right to an adequate standard of living including the right to food' in Krause C & Rosas A (eds) *Economic, Social and Cultural Rights: A textbook* (1995) Boston: Martinus Nijhoff Publishers

Asbjorn E Krause C & Rosas A *Economic, Social and Cultural Rights; A Textbook* (1995) Dordrecht: Martinus Nijhoff

Chimni BS (ed) *International Refugee Law: A Reader* (2000) New Delhi: Sage Publications Ltd

Collinson S *Beyond Borders; Western European Migration Policy Towards the 21st century* (1993) Pennsylvania: Pennsylvania State University Press

Craven C *The ICESCR A Perspective on its Development* (1998) Oxford: Clarendon Press

Goodwin G *The Refugee in International Law 2 ed* (1996) Oxford: Clarendon

Harrel B *Imposing Aid: Emergency Assistance to Refugees* (1986) Oxford: Oxford University Press

Hathaway J *The Law of Refugee Status* (1991) USA: Lexis Nexis

Hathaway J *The Rights of Refugees under International Law* (2005) Cambridge: Cambridge University Press

Heyns C & Killander M (eds) *Compendium of Key Human Rights Documents of the African Union* 3ed (2007) Pretoria: Pretoria University Law Press

Jeff H & Lee A *Advancing Refugee Protection in South Africa* (2008) New York: BerghahnBook

Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) Pretoria: Pretoria University Law Press

Kourula P *Broadening the Edges: Refugee Definition and International Protection Revisited* (1997) The Hague: Martinus Nijhoff

Liebenberg S & Pillay K *Socio-Economic Rights in South Africa: A Resource Book* (2000) Bellville: Community Law Centre (UWC)

Matthew C *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) New York: Oxford University Press

Miserez D (ed) *Refugees The Trauma of Exile* (1988) Dordrecht: Martinus Nijhoff Publishers

Odinkalu C 'Implementation of economic, social and cultural rights under the ACHPR' in Evans M & Murray R (eds) *The ACHPR: The System in Practice 1986-2000* (2004) Cambridge: Cambridge University Press

Peter J *Refugee Law in Context: The Exclusion Clause* (1999) Cambridge: Cambridge University Press

Ressler E Boothby N & Steinbock DJ *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (1998) Oxford: Oxford University Press

Sloth-Nielsen J *Children's Rights in Africa: Legal Perspective* (2008) England: Ashgate Publishing Company

Journal articles

Bacakova M 'Developing inclusive educational practices for refugee children in the Czech Republic' (2011) 22 *Intercultural Education* 163

Blichitz D 'Towards a reasonable approach to the minimum core: Laying the foundation for future socioeconomic rights and jurisprudence' (2003) 19 *SAJHR* 1

Buckland S 'From policy to practice: The challenges to educational access for non-nationals in South Africa' (2011) 31 *International Journal of Educational Development* 367

Cholewinski R 'Economic and social rights of refugees and asylum seekers in Europe' (2000) 14 *GEOILJ* 709

Cohen CP 'The rights of the child: Implications for change in the care and protection of refugee children' (1991) 34 *International Journal of Refugee Law* 677

Fritsch C & Johnson E 'The plight of Zimbabwean unaccompanied refugee minors in South Africa: A call for comprehensive legislative action' (2010) 38 *DENJILP* 623

Landau L 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy' (2006) 19 *Journal of Refugee Studies* 308

Leckie S 'Another step towards indivisibility: Identifying key features of violations of economic, social and cultural rights' (1998) 20 *Hum Rts Quarterly* 81

Mbazira C 'Enforcing the economic, social & cultural rights in the African Charter on Human and People's Rights: 20 years of redundancy, progression & significant strides' (2006) 6 *Africa Hum Rts Law J* 33

Meda L Sookrajh R & Maharaj B 'Refugee in South Africa: Access and challenges to achieving universal primary education' (2004) 9 *Africa Education Review* 152

Nicholson C 'A first call on available resources for child refugees in South Africa' 2005 *De Jure* 1

Pinson H & Arnot M 'Local conceptualisations of the education of asylum seeker and refugee students: From hostile to holistic models' (2010) 14 *International Journal of Inclusive Education* 247

Rugunanan P & Smi R 'Seeking refuge in South Africa: Challenges facing a group of Congolese and Burundian refugees' (2011) 28 *Development Southern Africa* 705

Sidhu R & Taylor S 'Educational provision for refugee youth in Australia: Left to chance' (2007) 43 *Journal of Sociology* 283

Sloth-Nielsen J 'Extending access to social assistance to permanent residents' (2004) 5 *ESR Review* Belleville: Community Law Centre (UWC)

Sloth-Nielsen J 'Ratification of the Convention on the Rights of the Child: Some implications for South Africa' (1995) 11 *South African Journal on Human Rights* 404

Steinbock DJ 'Unaccompanied refugee children in host country foster families' (1996) 8 *International Journal of Refugee Law* 6

Taylor S & Sidhu K 'Supporting refugee students in schools: What constitutes inclusive education?' (2012) 16 *International Journal of Inclusive Education* 39

Walton E 'Getting inclusion right in South Africa' (2011) 46 *Intervention in School and Clinic* 240

Weiss P 'The international protection of refugees' (1954) 48 *The American Journal of International Law* 193

Wesson M 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) *South African Journal of Human Rights* 20

International and Regional Instruments and Resolutions

African Charter on Human and Peoples' Rights, adopted 26 June 1981, O.A.U. Doc. CAB/LEG/67/3, Rev. 5 (entered into force 21 October 1986)

African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990), (entered into force 29 November 1999)

CESCR General Comment 14 The Right to the Highest Attainable Standard of Health (Art 12 of the ICESCR) (22nd Session, 2000)

CESCR General Comment 3, The Nature of State Parties Obligations (5th session, 1990) [UN DOC. E/1991/23]

Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, U.N. ESCOR, 10th Sess. 27th mtg. U.N. Doc. E/C.12/1994/7 (1994)

Convention on the Rights of the Child, adopted 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (entered into force 2 Sept 1990)

Convention Relating to the Status of Refugees, adopted 28 July 1951, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (entered into force 22 April 1954)

General Comment 18/37 on Non-discrimination, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/45/40 (1990)

International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316 (1966), 993 U.N.T.S. 171 (entered into force 23 Mar. 1976)

International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976)

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

Protocol Relating to the Status of Refugees (entered into force 4 October 1967)

The Human Rights Committee General Comment 15: The Position of Aliens Under the Covenant: 11/04/86.U.N.DOC.HRI/GEN/1/REV (1994)

Unpublished theses and papers

Boriboneka J *Political Participation of Refugees as a Means to Realize the Right to Repatriation: The Search for Durable Solution to the Refugee Problem in Africa* (unpublished LLM thesis, University of Pretoria 2006)

Livesey T A *Survey on the Extent of Xenophobia Towards Refugee Children* (unpublished Masters dissertation, University of South Africa 2006)

Mwalimu S *The Socio-economic Rights of Refugees in Africa* (unpublished LLM thesis, University of Pretoria 2000)

Sengendo J *Refugee Laws for the Protection and Survival of the African Refugee's Child's Language of His Inheritance in the Country of Asylum* (unpublished LLM thesis, University of Pretoria 2007)

Legislation

Children's Act 38 of 2005

Constitution of the Republic of South Africa Act 1996 Pretoria

Refugee Act 130 of 1998

REPORTS AND STUDIES

Amnesty International *Zimbabwean Refugees face further hardship in South Africa* (1 July 2009) Available at <http://www.amnesty.org.au/refugees/comments/21261/> (accessed 10 June 2013)

Belvedere F *National Refugee Baseline Survey: Final Report* (2003) Johannesburg: Community Agency for Social Enquiry; Japan International Cooperation and UNHCR

CoRMSA *Protecting refugees, asylum seekers and immigrants in South Africa* (18 June 2008). Available at <http://www.lhr.org.za/files/Cormsa%20Report%202008.pdf> (accessed 17 June 2013)

CoRMSA *Protecting refugees, asylum seekers and immigrants in South Africa* (18 June 2009). Available at <http://www.cormsa.org.za/research/cormsa-reports/> (accessed 17 June 2013)

Human Rights Watch *No healing here: violence, discrimination and barriers to health for migrants in South Africa* (2009) A report based on research conducted by Human Rights Watch in Johannesburg, Musina, Pretoria, and surrounding municipalities, and Cape Town. Available at <http://www.hrw.org/en/reports/2009/12/02/no-healing-here-0> (accessed 17 June 2013)

MSF *No refuge, access denied: Medical and humanitarian needs of Zimbabweans in South Africa*. (2 June 2009). Available at <http://www.doctorswithoutborders.org/publications/article.cfm?id=3646&cat=special-report> (accessed 24 June 2013)

Palitza K *Refugees Denied Access to Health Care* (1 July 2009) Available at: <http://ipsnews.net/news.asp?idnews=43029> (accessed 13 June 2013) *The Right to Adequate Housing, Final Report Submitted by Mr. Rajindar Sachar, Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 47th Sess., Provisional Agenda Item 8, U.N. Doc. E/CN.4/Sub.2/1995/12 (1995)

Case law

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)

Khosa v Minister of Social Development 2004(6) BCLR 569(cc)

Kiliko & Others v Minister of Home Affairs & Others {2007} 1All SA 97(C); 2007 4 BCLR 416(C)

LHR v Minister of Home Affairs & Another CCT 18/03

Minister Of Health & Others v Treatment Action Campaign & Otherrs (No 2) 2002 (5) SA 721 2000(4) BCLR 356(T).

Soobramoney v Minister Of Health, KZN 1998(1) SA 76

Watchenuka and Another v The Minister of Home Affairs and two others 2003 (1) SA 619



Other

Kavuro C 'Reflecting on refugees and asylum-Seekers tertiary education in South Africa: tension between refugee protection and education transformation policies' Available at <http://globaleducationmagazine.wordpress.com/category/ngo/> (accessed 13 July 2013)

Khan F 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach' available at www.refugeerights.uct.ac.za/.../refugeerights.../patterns_policies_migrati (accessed 13 July 2013)

Milner J Golden age? What golden age? A critical history of African asylum policy A paper presented to the centre of refugee studies (2004) York University, 28th Jan 2004

Refugee children: Guidelines on protection and care. Available at http://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf (accessed 12 June 2013)

Walker S 'Something to smile about Promoting and supporting the educational and recreational needs of refugee children' (2011). Available at http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/researchreports/SMILE%20report_3.pdf (accessed 12 September 2013)





UNIVERSITY *of the*
WESTERN CAPE