



Protection of refugee rights in South Africa: challenges and prospects

Tanyaradzwa Sharon Major

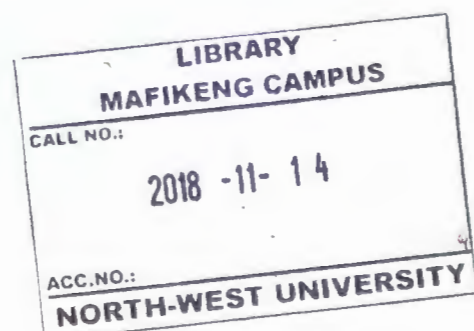
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Declaration by Candidate

I, **Tanyaradzwa Sharon Major**, duly declare that this mini-dissertation for the degree of Master of Laws at the North-West University (Mafikeng Campus) hereby submitted has not been previously tendered by me for a degree at this institution or any other university. I further declare that this mini-dissertation is my work in design, structure and execution and that all the materials contained herein have been acknowledged.

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Declaration by Supervisor

I, **Professor MLM Mbao**, hereby declare that this mini-dissertation by Tanyaradzwa Sharon Major, for the Degree of Master of Laws (LLM), was carried out under my supervision and that it be accepted for examination.

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Professor MLM Mbao

November 2017

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Dedication

To all that I am and to all that I hope to be, I owe it to my mother, Shongedzai P Pfupa. Without you mom, life is meaningless. I owe you my life. I love you with all heart, mum.

To my brother, Rufaro K Major and my sister, Tsitsi L Major, whom I believe embody all things beautiful, pure and creative. I will love you forever.

Abstract

This mini-dissertation investigates the protection of refugees in South Africa; it highlights the legal system in South Africa and how the applicable laws protect refugees. Refugees are recognised as a vulnerable group which requires special attention because they have fled persecution and instability in their country of origin. South Africa is a signatory to international and regional conventions on refugees, thus, it has a primary responsibility to protect its refugees. Article 34 of the 1951 *Convention Relating to the Status of Refugees* calls for host states to integrate refugees. As such, South Africa locally integrates refugees into the community. The study demonstrates that during their stay in South Africa, refugees face challenges to access refugee entitlements despite the fact that they are locally integrated. In most circumstances, refugees have been socially marginalised, left physically at risk and they have been denied even their basic needs such as right to work, education, access to healthcare and are subject to threat of xenophobia. Such violations result in their human rights abuses, as these hinder the enjoyment and protection of their rights. It seems they continue to face more daunting challenges in South Africa than from their country of origin. The findings of this research are expected to contribute to the understanding of the problems facing refugees, policy reviews and refinements and in articulating the broad range of options and interventions open to policy makers in the field which will in turn help to secure such rights. It is therefore recommended that the government of South Africa acts upon its mandate so as to fulfil its international duty to promote and protect the rights of refugees.

Key words: refugees, protection, the rights of refugees, local integration, challenges

List of Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ART	Antiretroviral Therapy
BOR	Bill of Rights
CoRMSA	Consortium for Refugees and Migrants in South Africa
DHA	Department of Home Affairs
HIV	Human Immune Virus
LHR	Lawyers for Human Rights
MDC	Movement for Democratic Change
NGOs	Non-Governmental Organisations
OAU	Organisation of African Unity
RA	Refugees Act
RAJ	Refugee Alliance for Justice
RRO	Refugee Reception Office
RSD	Refugee Status Determination
RSA	Republic of South Africa
SAHRC	South African Human Rights Commission
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner of Refugee

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Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC)

Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape 2015 (3) SA 545 (SCA)

Minister of Home Affairs v Watchenuka 2004 (4) SA 326 SCA

S v Makwanyane and Another 1995 6 BCLR (CC) 2008 (1) SA 232 (T)

Tantoush v Refugee Appeal Board 2008 (1) SA 232 (T)

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African Charter on Human and Peoples Rights (1981)

International Covenant on Economic, Social and Cultural Rights (1966)

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

Statute of the United Nations High Commissioner for Refugee (1950)

Universal Declaration on Human Rights (1948)

United Nations Convention Relating to the Status of Refugees (1951)

United Nations Protocol Relating to the Status of Refugees (1967)

United Nations Convention Relating to the Status of Refugees (1951)

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Chapter 1: Introduction

1.1 Background to the Study

The world's refugee problem is one of the most vexing challenges facing many governments and tends to have one factor in common which is the huge numbers of people involved.¹ The forced displacement of persons across national borders has been one of the most tragic of the twentieth century and has remained with us into the twenty-first century.² The root cause for refugees' displacement from their countries of origin is commonly associated with struggles for political and socio-economic power, wars, religious persecution and human-rights violations.³ According to United Nations High Commissioner for Refugees (UNHCR),⁴ human rights violations are reflected in the largest number of refugees since the Second World War.⁵ By the end of 2016, 65.6 million individuals were forcibly displaced worldwide and it is the highest record so far.⁶ The growth was driven mainly by the Syrian conflict along with other conflicts in the region such as in Iraq and Yemen, as well as in sub-Saharan Africa including Burundi, Central African Republic, Democratic Republic of Congo, South Sudan and Sudan.⁷ The global number of refugees under UNHCR's mandate was estimated to be 17.2 million at the end of 2016.⁸ Such huge refugee flow is an indication of potential human rights problems. Most of these refugees are victims of human rights abuses and internal

¹ Goodwin-Gill G S 1982 *YBI Legal Studies* 291.

² Ahmad 2016 http://www.sau.int/pdf/INTERNATIONAL_REFUGEE_LAW_DNA.pdf 2.

³ Ighodaro *Living the Experience: Migration, Exclusion, and Anti-Racist Practice* 62.

⁴ Herein after UNHCR.

⁵ Myhrvold 2015 *Nursing Ethics* 399.

⁶ UNHCR Global Trends Report 2016 <http://www.unhcr.org/5943e8a34.pdf>. 22.5 million people were refugees at end-2016, 40.3 million internally displaced people, 5.3 million Palestinian refugees registered by UNRWA and 2.8 million asylum-seekers.

⁷ UNHCR Global Trends Report 2016 <http://www.unhcr.org/5943e8a34.pdf>.

⁸ UNHCR Global Trends Report 2016 <http://www.unhcr.org/5943e8a34.pdf>.

conflicts, resulting from political instability and socio-economic inequities.⁹ Therefore, safeguarding human rights in countries of origin is very critical both for prevention and solution to refugee problems.¹⁰

There is no uniform system to depict obligations that states have to refugees and asylum seekers than those delineated in the 1951 *Convention Relating to Status of Refugees*.¹¹ States and international organisations differ on methodology that should be used to determine these obligations.¹² There is no question that every sovereign host state holds the primary responsibility for the protection of refugees within its jurisdiction. In this case, a reasonable assumption would be that it is the authorities and laws of a given state that govern the rights of refugees within its borders. However, most states are reluctant to recognise the rights of refugees probably because the international treaty only prescribes minimum standards that should be met.¹³ In spite of the fact that the principle of *non refoulement*¹⁴ is the cornerstone of international protection that makes it hardly impermissible for a state to avoid its obligations, either by declining to making formal determination of refugee status, or by ignoring the development of the refugee concept in state and international organization practice,¹⁵ most states are still found wanting.

According to the 1951 UN Refugee Convention, a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

⁹ Ogata 1994 <http://www.unhcr.org/admin/hcspeeches/3ae68fac16/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-fiftieth.html>.

¹⁰ Ogata 1994 <http://www.unhcr.org/admin/hcspeeches/3ae68fac16/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-fiftieth.html>.

¹¹ Raveendran 2013 *Notre Dame Law Review* 1279.

¹² Raveendran 2013 *Notre Dame Law Review* 1279.

¹³ Raveendran 2013 *Notre Dame Law Review* 1279.

¹⁴ The principle entails the prohibition against returning a refugee to a territory where his or her life or freedom would be threatened.

¹⁵ Goodwin-Gill G S 1982 *YBI Legal Studies* 297.

group, or political opinion.¹⁶ Such meaning is not comprehensive, thus, an obscure term in international law. This is exacerbated by the fact that it is difficult to distinguish a genuine refugee from economic migrants or terrorists, especially for security concerns in terms of the latter. Public opinion is left with no real sense as to the distinction, special needs and circumstances of refugees.¹⁷ However, refugees have commonly been recognised as a group that is particularly disadvantaged and most vulnerable. International instruments, municipal statutes as well as scholars identify a refugee as a person who has crossed an international frontier because of a well-founded fear for persecution.¹⁸ This uncleared issue on the position of refugees makes it necessary to pay special attention to it and it has become a matter of considerable concern to South Africa.¹⁹

Prior to 1994, there was neither recognition of refugee status nor specific legislation in the Republic of South Africa (RSA) giving effect to the rights of refugees.²⁰ As a result, in 1991, RSA and the UNHCR entered into a basic agreement concerning the “presence, role, legal status, immunities and privileges of the UNHCR and its personnel in South Africa.”²¹ The transition to democracy brought by the Constitution as the supreme law of RSA created a vision for a country in which everyone is treated equally with a specific focus on the fundamental human rights of individuals.²² The birth of the constitutional era brought a gradual flow of refugees into South Africa, who also came in search of protection from persecution, civil strife and political repression in their states of origin. Immediately after gaining independence, South Africa, as a developing state, became viable and relatively safe destination for the victims of human rights abuses.²³

¹⁶ Article 1 of *United Nations Convention Relating to the Status of Refugees* of 1951.

¹⁷ Hathaway “*Temporary Protection of Refugees: Threat or Solution?*” 49.

¹⁸ Shacknove 1985 *Ethics* 274.

¹⁹ Currie and De Waal *The Bill of Rights Handbook* 455.

²⁰ Dugard *International Law: A South African Perspective* 353.

²¹ Dugard *International Law: A South African Perspective* 353.

²² Daven *et al* “The Civil and political Rights of Refugees and Asylum Seekers in South Africa” 203.

²³ Handmaker *et al* (eds) *Perspective on Refugee Protection in South Africa* 5.

At international law level, in 1995, the Republic of South Africa became a signatory to the 1951 Convention, the 1967 *Protocol Relating to the Status of Refugees*²⁴ and the 1969 *Organization of African Unity's (OAU)*²⁵ *Convention Governing the Specific Aspects of Refugee Problem in Africa*. Being a signatory to these regional and international treaties imposes obligations on South Africa to respect and protect the refugees within its borders. In 1998, the *Refugees Act*,²⁶ a legal framework for the protection of refugees, was enacted to give effect to its international obligations enshrined in international treaties to which RSA was a state party and to provide for a new system regarding refugees. This marked a significant landmark in the history of refugee protection in the country.²⁷ Before the enactment of the Act, issues relating to refugees were dealt with under the auspices of the apartheid era *Aliens Control Act*²⁸ which only provided for the control of the admission of foreigners and their departure from South Africa excluding the issue of refugee status and other related matters.²⁹ Section 23 of the Aliens Control Act read with sections 25 and 26 prohibited foreigners from entering or remaining in South Africa without the necessary immigration permit or any temporary residence permit or else they were regarded as “illegal foreigners.” To those who applied for refugee status they were immediately granted a temporary permit subject to various conditions.³⁰

According to 2015 UNHCR Global Trends Report, South Africa is the 10th largest recipient country of asylum³¹ applications worldwide with 62.200 new claims every

²⁴ *United Nations Protocol Relating to the Status of Refugees of 1967.*

²⁵ Hereinafter *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* 1 of 1969 is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 by the Assembly of Heads and Government at the sixth ordinary session of the OAU, now African Union (AU). It entered into force on 20 June 1974.

²⁶ Act 130 of 1998.

²⁷ Handmaker et al (eds) *Perspective on Refugee Protection in South Africa* 6.

²⁸ Act 96 of 1991.

²⁹ Dugard *International Law: A South African Perspective* 358.

³⁰ Dugard *International Law: A South African Perspective* 358.

³¹ An asylum-seeker is an individual seeking international protection and whose refugee status is yet to be determined or whose claim has not yet been definitely evaluated. However, not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker. It is

year.³² The UNHCR fact sheet of 2016 shows that a total of 912 592 people are within its mandate in South Africa. About 114,512 refugees and an estimate of 798,080 asylum seekers are both pending at first-instance and pending appeal.³³ The higher number of asylum-seekers reported in 2015 is the result of updated statistical information on the number of cases pending appeal review. Most of these refugees are from Congo, Democratic Republic of Congo, Burundi, Ethiopia, Rwanda, Somalia and Zimbabwe escaping conflicts in their home countries as a result of persecution as well as security situations and struggle for scarce resources.³⁴ Despite the fact that South Africa has become the largest destination for refugees in the region, it does not confine refugees to camps.³⁵ As such, South Africa locally integrates refugees into the community.

The lack of reception centres, coupled with consistent spread of refugees around South Africa means that they encounter several challenges in the current refugee system, their rights are severely undermined and are subjected to human rights abuses, conflicts and other acts of aggression including xenophobia. They endure “protracted refugee situations,³⁶ secondary refugee flows,³⁷ the extra-territorialisation of migration controls

important to note that in South Africa an asylum seeker is not classified as a refugee until Home Affairs recognizes as such.

³² UNHR Global Trends Report 2015. Although the number of new applications in 2015 was relatively low at 62,200, this statistical adjustment means that South Africa hosted more asylum-seekers than any other country at the end of 2015. However this is said to have dropped considerably since a high of 222,300 in 2009. According to 2012 UNHRC Global Trends Report South Africa was the destination country that received the greatest number of claims for asylum six years prior to 2012.

³³ UNHCR Fact Sheet 2016
<file:///E:/My%20Research/UNHCR%20Reports/UNHCR%20South%20Africa%20Factsheet%20-%20APR16.pdf>.

³⁴ UNHCR Fact Sheet 2016
<file:///E:/My%20Research/UNHCR%20Reports/UNHCR%20South%20Africa%20Factsheet%20-%20APR16.pdf>.

³⁵ Ramjathan-Keoh “The Rights of Refugees and Migrant Workers” 133.

³⁶ A protracted refugee situation is when asylum seekers are trapped between the inability to return to their homes, the lack of determination of the displaced person’s status, and of the unknown actions and obligations of the state to help them. Usually, during a period such displaced persons reside in camps at border regions waiting for their homes to become safe or pending decisions from a government body on their protection status. Raveendran 2013 *Notre Dame Law Review* 1278.

³⁷ Secondary refugee flows are movements of refugees from the state of first entry (also known as “safe third countries”) to other states in order to receive better treatment.

forms of displacement, new wide discrepancies in the recognition and determination of refugee status, contraction of refugee policies and practices by states mechanisms".³⁸ Most of these challenges are exacerbated by the fact that there is confusion surrounding the determination of state obligations to refugees as well as to which specific human rights are afforded to them.

It is against this background that this research is carried out to examine how the problem of refugees can be addressed or at least contained in South Africa with a view to finding ways these refugees can better be integrated in the local community in order to promote their rights. Therefore, basically, the centre of this study is to assess the international protection of refugees in order to identify the full range of states' obligations towards refugees in the South African context.

1.2 Statement of the Problem

South Africa, like all countries that are signatories to international and regional conventions and protocols on refugees, is obliged to offer adequate protection to people who have fled persecution and instability to seek sanctuary within its borders.³⁹ Sergio identifies three main tasks of state institutions in dealing with refugees in their territory, which include political, assistance and protection aspects.⁴⁰ According to him, the political aspect involves enactment of policies through legislation and lack of such specific policies places the refugees at risks particularly of human rights abuse.⁴¹

However, South Africa has "consistently failed to meet its legal mandate."⁴² Its reputation as a safe-haven for refugees has been scarred by outbreaks of xenophobic

³⁸ Raveendran 2013 *Notre Dame Law Review* 1278.

³⁹ Rademeyer 2013 <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

⁴⁰ Ricca *International Migration in Africa: Legal and Administrative Aspects* 145.

⁴¹ Ricca *International Migration in Africa: Legal and Administrative Aspects* 145.

⁴² Rademeyer 2013 <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

violence, murders, widespread corruption, bureaucratic inefficiency and allegations of discriminatory practices and human rights abuses by Home Affairs and immigration officials towards the refugees.⁴³ South Africa's refugee system has constantly failed to meet its legal mandate and regularly acts outside of the law."⁴⁴ This was strongly supported in *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape*⁴⁵ where the Home Affairs was refusing to reopen the Refugee Reception Office (RRO). This was regarded as disobedience to the law and most dangerous thing for a state department and senior officials to wilfully ignore an order of court.⁴⁶

Refugees are victims or potential victims of gross human rights abuses, conflict and other acts of aggression. Failure to provide protection "violates the fundamental tenet of refugee law, suggesting a refugee system that exists in name only."⁴⁷ Thus, in the case of *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*,⁴⁸ the Constitutional Court concluded that refugees are "unquestionably a vulnerable group in our society and their plight calls for compassion."⁴⁹ The excuse given is that Department of Home Affairs⁵⁰ has failed to implement the Act in accordance with the South African Constitution and international law because of lack of resources and funds.⁵¹

⁴³ Rademeyer 2013 <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

⁴⁴ African Centre for Migration and Society Report 2012. <https://www.wits.ac.za/research/research-reports/research-report-2012/>.

⁴⁵ 2015 (3) SA 545 (SCA).

⁴⁶ Para 35 in *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape* 2015 (3) SA 545 (SCA).

⁴⁷ Rademeyer 2013 <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

⁴⁸ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

⁴⁹ Para 28 in *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*. 2007 (4) SA 395 (CC).

⁵⁰ Hereinafter DHA.

⁵¹ Handmaker et al (eds) *Perspective on Refugee Protection in South Africa* 7.

Handmaker argues that it has become clear that, “the South African government is (understandably) frustrated with its inability to give effect to the provisions in the Refugees Act, though unfortunately such frustrations do not always translate into constructive solutions.”⁵² It is against this backdrop that this study is aimed at examining the protection of refugees in South Africa and state’s responsibility to provide adequate protection to refugees. The core questions for this study are: what is the normative status of refugee rights under South African legal system and the human rights obligation of the state in relation to refugee protection? Is the legal framework inadequate to protect the refugees or its weak enforcement mechanism? What is the impact of South African policies on refugees and its implications on the rights of refugees? Therefore, it is paramount to investigate this matter so as to provide clarity on what the legal position is in South Africa concerning the protection of refugees.

1.3 Aims and Objectives of the Study

The aims and objectives of the study are to:

- explicate the existing international and regional theoretical framework on refugees
- analyse the scope and content of the legal protection afforded to refugees in South Africa;
- evaluate the durable solutions with emphasis on local integration in order to effectively accommodate and to protect the rights of refugees; and to
- examine the inherent challenges in enforcing the rights of refugees in South Africa taking into consideration legal, socio-economic and political challenges.

⁵² Handmaker et al (eds) *Perspective on Refugee Protection in South Africa* 8.

1.4 Research Hypothesis

The international and statutory law applicable to refugees in South Africa is strengthened by section 2 of the Constitution which emphasises the supremacy of the Constitution and that all law or conduct that is inconsistent with its provisions will be invalid. Preamble states that "...South Africa belongs to all who live in it, united in our diversity." Section 8 of the Constitution provides that the Bill of Rights applies to all, and binds the legislature, the executive, the judiciary and all organs of state. Subsection 8 (2) extends the binding force of the Bill of Rights to natural persons. Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. This also includes refugees. The underlying hypothesis here is therefore, if the refugees are entitled to full protection of the Constitution, any law acting against such infringes their human rights contained in the South African Constitution as well as the rules or international refugee law.

1.5 Rationale and Justification of the Study

This research is of significance to the legal domain as it lengthens and revives the knowledge base that currently exists in the legal field. By undertaking a theoretical study to see if the law is achieving its objectives, identification of new problems within the existing legislation in the human rights of refugee field may be achieved. The study hopes to bring new insights to an existing area of legal thought and intends to bring some clarity on some discrepancies that exist in as far as the topic is concerned. This can be achieved through an interdisciplinary analysis of legal issues. The results of this study may influence public policy implementation and may influence policymakers to improve their treatment on the protection of refugees and to both plan and respond to the challenges of refugees. It may also help to raise awareness among those (the public in general) who are unacquainted with the import and intent of the Bill of Rights that the refugees are actually entitled to the rights in the Constitution and they require special protection. The research is useful to academics, practitioners and government officials dealing with refugee issues. The study may help future researchers to advance this

area of refugee law by conducting comparative studies between South Africa and other states which also recognise refugee status.

1.6 Literature Review

This section reviews the existing literature, different opinions and approaches of authors to provide benchmarks against which this study can be assessed. It is indisputable that millions of people have fled and some are still fleeing from their homes to escape persecution, civil war, and economic despair and go to live in other countries in order to stabilise their lives and find a safe place for themselves and their families.⁵³ They go to different states to seek asylum. However, states are free to grant refugees either permanent or temporary protection subject to the conditions under which the status is to be enjoyed.⁵⁴ This is because the international treaty only prescribes minimum standards that should be met.⁵⁵ The 1951 *Refugee Convention* of 1957 and the 1967 *Protocol* impose no obligation to grant permanent admission. Thus, it is the discretion of the sovereign state to grant or deny asylum to those within its territory not the absolute right of the individual to be granted asylum.⁵⁶ "Individuals who have been granted refugee status are in a privileged category as it is an entitlement that allows them to move to a safe country for protection and assistance."⁵⁷

Hathaway advocates for temporary protection of refugees.⁵⁸ He argues that this model, "could be an important means to give new life to international refugee protection".⁵⁹ According to him, temporary protection is an important part of a solution to the international refugee protection crisis.⁶⁰ The implementation of refugee law should

⁵³ Weissbrodt and Hortreiter 1999 *Buffalo Human Rights Law Review* 1.

⁵⁴ Handmaker et al (eds) *Perspective on Refugee Protection in South Africa* 44.

⁵⁵ Raveendran 2013 *Notre Dame Law Review* 1279.

⁵⁶ Weissbrodt and Hortreiter 1999 *Buffalo Human Rights Law Review* 1.

⁵⁷ Enwere *Human rights and Refugee Protection in South Africa (1994-2004)* 1.

⁵⁸ Hathaway "Temporary Protection of Refugees: Threat or Solution?" 41.

⁵⁹ Hathaway "Temporary Protection of Refugees: Threat or Solution?" 41.

⁶⁰ Hathaway "Temporary Protection of Refugees: Threat or Solution?" 43.

emphasise individualised state responsibility for a meaningful solution to the refugee crisis.⁶¹ However, his model is debatable. Goodwin-Gill critiques the reformulated model of temporary protection by arguing that:

So far as a state is required to grant that protection, the minimum content of which is *non-refoulement* through time, it is required also to treat the refugee in accordance with such standards as will permit an appropriate solution, whether voluntary repatriation, local integration, or resettlement in another country.⁶²

The duty to protect all refugees from the risk of *refoulement* is of importance to contemporary refugees since they have been generally denied access to the state from which they request protection.⁶³ The *non-refoulement* principle is an exception to the international rule of inherent state sovereignty to forbid the entrance of foreigners into its territory or admit them subject to the conditions it may deem fit.⁶⁴ The 1951 *Refugee Convention* and the 1967 *Protocol* do not impose obligations on states to grant permanent admission but prohibit *refoulement* and emphasise protection of basic human rights for the duration of the risk in the refugee's country of origin. Article 33 of the Refugee Convention prohibits states parties from forcing a refugee to return to a state where such person is likely to suffer persecution, danger to life or freedom would be threatened on the account of race, religion, nationality or political opinions.⁶⁵ The principle of *non-refoulement* guarantees individuals the right not to be forcibly returned to countries where they are faced with persecution.⁶⁶

Scholars have concluded that most states are reluctant to support the *non-refoulement* as a norm of international customary law and it is unlikely to develop in the near future because states fear losing control of their borders.⁶⁷ According to Duffy, despite the fact

⁶¹ Handmaker et al (eds) *Perspective on Refugee Protection in South Africa* 14.

⁶² Goodwin-Gill 1998 *The Refugee in International Law* 204.

⁶³ Hathaway *The Rights of Refugees under International Law* 303.

⁶⁴ Dugard *International Law: A South African Perspective* 352.

⁶⁵ Dugard *International Law: A South African Perspective* 352.

⁶⁶ Weissbrodt and Hortreiter 1999 *Buffalo Human Rights Law Review* 2.

⁶⁷ Hailbronner 2001 *VJIL* 857.

that *refoulement* is prohibited under international human rights and international customary law, there is little evidence that shows that *non-refoulement* has acquired status of *jus cogens*⁶⁸ thus it can be best viewed as the product of wishful legal thinking.⁶⁹ The courts have emphasised that it is unlawful to violate the principle of *non-refoulement*. In the case of *Kabuika v Minister of Home Affairs*,⁷⁰ the court held that its principle would be violated if applicants were returned to their country of origin. However, it is evident that recent practices and policies introduced by DHA have the potential to violate this principle.⁷¹

Taping from the international refugee conventions and the country's transformative *Constitution*, it was not until 1994 that South Africa adopted a Bill of Rights that included refugee rights. Before then, human rights did not enjoy constitutional protection as justiciable rights. Dugard contends that if a foreigner is recognised as a refugee in South Africa, such person is entitled to all the rights prescribed in the *Constitution* except those rights that are specifically reserved for South African citizens.⁷² Section 27⁷³ of the Refugees Act affords refugees some rights. These include right to full legal protection, right to life, human dignity, education, employment, housing, social and health services. However, this assumption is theoretically ideal but practically challenging as in most circumstances refugees are denied access to such rights and privileges.⁷⁴ Refugees are unable to convert these legal entitlements into effective protection. Thus, rights granted in a formal manner are not always respected or enjoyed in practice.⁷⁵ The excuse given is that DHA has failed to implement the Act in accordance with the Constitution and international obligations because of lack of resources and funds.⁷⁶ Amit observes that

⁶⁸ Duffy 2008 *IJRL* 373.

⁶⁹ Hailbronner 2001 *VJIL* 858.

⁷⁰ 1997 (4) SA 341 (C).

⁷¹ Khan "The principle of non-refoulement" 19.

⁷² Dugard *International Law: A South African Perspective* 354.

⁷³ These rights were also emphasized in the case of *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC).

⁷⁴ Enwere *Human Rights and Refugee Protection in South Africa (1994-2004)* 1.

⁷⁵ Daven *et al* "The Civil and political Rights of Refugees and Asylum Seekers in South Africa" 204.

⁷⁶ Handmaker *et al* (eds) *Perspective on Refugee Protection in South Africa* 7.

the refugee system in South Africa exists only to refuse access to the country and it makes no attempt to comply with its mandate of protecting the refugees hence it “functions solely as an instrument of immigration control.”⁷⁷ In *Kiliko v Minister of Home Affairs*⁷⁸ case, the practice of DHA in Western Cape of processing only 20 permits per day was declared inconsistent with the constitutional values of dignity, freedom and security of those seeking refuge in South Africa.

Ramjathan-Keoh claims that South Africa is the “only” African country with urban refugee policy that does not confine refugees to camps.⁷⁹ It enacted a refugee policy aimed at maximising freedom and protection by promoting refugees temporary integration into local communities.⁸⁰ Confining refugees in refugee camps often deprives them of their significant rights like right to freedom of movement, education, skills training and income generating opportunities. Generally, refugees in South Africa are urbanized, well-educated with some form of higher level education and multilingual.⁸¹ However, many South Africans are of the opinion that refugees, “bring disease and despair, perpetuate crime, get involved in smuggling and drug trafficking, pilfer jobs and compete for basic services.”⁸² These are mere misconceptions. Therefore, local integration has proven to be challenging in providing protection for refugees despite their abilities. They have difficulties in accessing employment opportunities because of lack of documents which makes them end up obtaining informal employment. This failure to provide protection “violates the fundamental tenet of refugee law, suggesting a refugee system that exists only in name.”⁸³

⁷⁷ Rademeyer 2013 <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

⁷⁸ 2006 (4) SA 114 (C).

⁷⁹ Ramjathan-Keoh “The Rights of Refugees and Migrant Workers” 133.

⁸⁰ Landau 2006 *Journal of Refugee Studies* 308.

⁸¹ Rugunanan and Smit R 2011 *Development Southern Africa* 709.

⁸² Rugunanan and Smit R 2011 *Development Southern Africa* 709.

⁸³ Rademeyer 2013 <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

The above review has highlighted that, it is undisputable that scholars argue that indeed refugees require special protection. Additionally, the review has given some hints on how the refugee problem can be tackled in its entirety although challenges still remain in this regard. It is also evidenced that most of the writings were between 1994 and 2008. Writers such as Hathaway, De la Hunt, Handmaker, Khan and Landau have played a significant role in the evolution of refugee law and their studies have provided insight into the field of refugee protection and have contributed to the on-going debate in relation to refugee protection. This research extends the existing body of knowledge on refugee protection in South Africa. In addition, many studies show that there have been much concentration on challenges of a particular group of refugees such as Burundians Congolese, and Zimbabweans. This study thus attempts to examine refugees in South Africa as a whole without focusing on a specific group of refugees as majority writings have presented.

1.7 Research Methodology

The study employs a qualitative approach mainly based on desktop research. Both primary and secondary sources that already exist *inter-alia* the Constitution, legislation, case law, scholarly textbooks, relevant law journal articles, reports on refugees and internet sources relevant to the topic are used. The international, regional and domestic refugee law instruments and human rights Conventions are also examined in addition to the literature. The Sources used are cited and referenced in terms of the style of the *Study Guide for Research Methodology and Dissertation/Theses Writing in Law, Faculty of Law* 2011 edition of the North-West University, Potchefstroom.

1.8 Chapter Outline and Scope of the Study

This study consists of five inter-related chapters:

Chapter 1 is an introductory chapter which provides a full background on the topic, aims and objectives of the study, the importance of the study and the research questions.

Chapter 2 discusses the existing legal framework on the rights of refugees which include International Conventions, Regional Conventions. The definition of the term “refugee” is discussed. The chapter explores the principle of *non refoulement* as the cornerstone of international refugee protection. It also describes and assesses the applicable South African legal system with regard to refugee protection and their rights. This description comports with the constitutional provisions and with the Refugees Act 130 of 1998. Chapter 3 explores the durable solutions to the refugee problems which are local integration, repatriation and resettlement. Main emphasis is given on local integration as the best durable solution to refugee problem. Chapter 4 interrogates the challenges faced by both the state and the refugees in South Africa. Chapter 5 carries the conclusion and recommendations.

1.9 Limitations of the Study

Trying to present, examine, assess and compare then conclude a large subject such as the refugee law and human rights may be a hard task. This is because it has different dimensions at the national and international levels, and also that it comprises a large composition of different areas such as legal, political and economic fields. Nevertheless, the examination of all these areas with the limited scope of this mini-dissertation may give a broad study without depth in the subject matter. The study is emotive by nature and conducting interviews to affected refugees was envisaged risky to the student and expensive. Again, due to time constraints on the part of the student and deadlines to be met, neither refugees nor government officials responsible for the protection of refugees were interviewed. Therefore, the research is limited to the available relevant documents that are found in the school library and databases.

1.10 Ethical Considerations

This is a desktop based research that draws knowledge and analysis from literature, regional and international instruments, case law as well as constitutional and legislative provisions. Therefore, to observe the fundamental and ethical issues, academic work of other scholars referred to in this mini-dissertation has been correctly acknowledged.

Furthermore, the nature of the study did not necessitate interviews; hence it was not necessary to obtain ethical clearance.

Chapter 2: Legal Framework of Refugee Rights and Protection

2.1 Introduction

The democratic era in South Africa was heralded by a supreme Constitution⁸⁴ and this Constitution made a paradigm shift to the South African law. One significant change was in human rights law that was entrenched in the Bill of Rights.⁸⁵ The 1996 South African Constitution enshrines the rights and privileges that constitute fundamental human rights. A number of provisions of the Bill of Rights apply to both citizens and non-citizens equally and universally, protecting all individuals regardless of their nationality or status. The fundamental rights include the right to equality (Section 9), the right to human dignity (Section 10) freedom of movement (Section 21) and freedom and security of a person (Section 12). These rights apply to citizens and non-citizens alike and can be used as critical tools to protect the rights of the refugees in South Africa.⁸⁶ Refugees enjoy all the human rights in the 1996 Constitution except those rights which are reserved for South African citizens only like the right to vote.⁸⁷

South Africa recognises the rights and protection of refugee rights as per international and regional law. The UNHCR gives a specific mandate to all member states to provide 'international protection' to refugees and to seek 'permanent solutions for the problem of refugees.'⁸⁸ South Africa is a state party to a number of universal, regional instruments and established mechanisms which provide for the protection of refugees and their enhancement.⁸⁹ Through its legal framework and institutions, the rights of the refugees are really protected in this country albeit with difficulties as their specific rights are denied to refugees as a result of their lack of status.⁹⁰ For the purpose of this work, the

⁸⁴ *Constitution of the Republic of South Africa* of 1996.

⁸⁵ See Chapter 2 of the 1996 *Constitution*.

⁸⁶ George and Elphick *Promoting Citizens and Preventing Statelessness in South Africa* 21.

⁸⁷ Section 19 of the 1996 *Constitution*.

⁸⁸ Para 1 of Statute of the United Nations High Commissioner for Refugee (UNHCR Statute)1950.

⁸⁹ Gorlick 2000 *Nordic Journal of International Law* 117.

⁹⁰ George and Elphick *Promoting Citizens and Preventing Statelessness in South Africa* 21.

major focus is on UN mechanisms of refugee protection and related regional mechanisms that can be used to enhance the protection of refugees.

According to Goodwin-Gill, the legal framework within which the refugee is located remains characterized, *inter-alia*, by the principle of state sovereignty and related principles of territorial supremacy, and self-preservation, while on the other hand, by competing humanitarian principles deriving from general international law.⁹¹ South Africa, as a sovereign state has a mandate to protect the refugees and against this backdrop, this chapter seeks to provide a legal framework to the study with the aim of providing the basic understanding of issues surrounding refugee's protection. It is, therefore, befitting to start this chapter by defining the concept of refugee, since this study seeks to address the refugee rights.

2.2 Legal meaning of Refugee

The common meaning of refugees is that of persons whose needs are unprotected by the country of origin that has no option but to seek international assistance.⁹² Based on this general meaning, determining who is or is not a refugee may appear to be uncomplicated but in legal and political circles the meaning is considerably more circumscribed.⁹³ The definition of the term "refugees" in international law is less clear and it raises critical issues in the field of international protection.⁹⁴ According to Goodwin-Gill, the term refugee is a term of art with content confirmed by principles of general international law.⁹⁵

⁹¹ Goodwin-Gill G S 1982 *YBI Legal Studies* 291.

⁹² Shacknove 1985 *Ethics* 277.

⁹³ Shacknove 1985 *Ethics* 274.

⁹⁴ Goodwin-Gill G S 1982 *YBI Legal Studies* 296. The definition or any description of the term refugee depends on its function in any particular organisational or state context. In some circumstances the definition may facilitate and justify aid and protection to be given. Goodwin-Gil *The Refugee in International Law* 16.

⁹⁵ Goodwin-Gil *The Refugee in International Law* 15.

Despite the complexity in defining refugees, states have insisted on a fairly restrictive criterion for identifying those who benefit from refugee status or international protection.⁹⁶ Determining the content and scope of refugees in international law, requires examination of treaties and the practice of states taking into consideration various bodies established by the international community to tackle the refugee problem.⁹⁷ Therefore, apart from the inherent difficulty in defining the term refugee, UNHCR⁹⁸ statutory definition remains a point of departure in determining who is entitled to international protection.



2.1.1 Definition of Refugees in 1951 UN Convention and the 1967 Protocol

Article 1 of the 1951 UN Convention endorses a single definition of the term "refugee" which applies to any person:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

From the given definition, many reasons are associated with their flight, *inter-alia*, flight from oppression, threat to life or liberty, deprivation, persecution and wars. This description stipulates what is essential and universal application. It remains of critical importance in determining the basic class of persons entitled to the protection and assistance. However, the UNCHR Convention contains an inherent contradiction. Goodwin-Gill argues that the 1951 Convention proposes a definition of the refugee

⁹⁶ Goodwin-Gil *The Refugee in International Law* 15.

⁹⁷ Goodwin-Gil *The Refugee in International Law* 16.

⁹⁸ It was established in 1951 by General Assembly to provide material assistance and legal international protection and to seek permanent solutions for the refugee problem.

which is individualistic, while at the same time it affirms that the work of the UNHCR shall relate to groups and categories of refugees.⁹⁹ In other words, refugees within the mandate of the High Commissioner do not only include those who can be determined to have a well- founded fear of persecution but also categories of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their state of origin.¹⁰⁰

Nevertheless, the definition of “refugee” by the 1951 Refugee Convention and the 1967 Refugee Protocol is said to be no longer appropriate to the majority of refugees. It provides a definition of refugees which is essentially individualistic, and provides rights on behalf of refugees which can only be understood in the sense of the particular.¹⁰¹ It is based on individual political, religious or racial persecution to the criterion of refugee status excluding refugees fleeing from gross human rights violations and economic conditions (poverty backgrounds).¹⁰² To some extent, this approach is strength as it endorses the notion of individual human rights, whilst on the other hand a weakness as it fails to encompass less well-defined situations of need such as famine, drought, war, or civil strife.¹⁰³ In international law, States have further limited and disfavoured the concept of “economic refugee” but it is coming into use as a consequence of globalisation.¹⁰⁴

2.1.2 Regional Refugee definition: OAU Convention

The 1951 Convection has since been supplemented by the OAU as well as via the progressive development of international human rights law. The definition adopted by OAU is only salient challenge to the proposition that persecution is an essential element

⁹⁹ Goodwin-Gill 1982 *YBI Legal Studies* 295.

¹⁰⁰ Goodwin-Gill 1982 *YBI Legal Studies* 296.

¹⁰¹ Goodwin-Gill 1982 *YBI Legal Studies* 293.

¹⁰² Hailbronner 2001 *VJIL* 857.

¹⁰³ Goodwin-Gill 1988 *Immigration and Nationality Law Review* 386.

¹⁰⁴ Goodwin-Gil *The Refugee in International Law* 15.

for refugee status.¹⁰⁵ That definition after incorporating the UN persecution-based approach, proceeds to state 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.”¹⁰⁶ This is a broader definition which extends protection to persons in need of protection because of serious threat to life, liberty or security of persons in their country of origin as a result of armed conflict or serious public disorder. Consequently, refugees are taken to include members of national liberation movements, colonialism refugees, those fleeing from ethnic and tribal conflicts, wars or those fleeing from human rights violations.¹⁰⁷

The OAU and the UN definitions undoubtedly reflect distinct historical contexts. The UN Convention definition was a response to the European crisis where primarily the persecuted victims were of highly organized predatory states.¹⁰⁸ Hathaway points out two distinctive features of the OAU definition in international refugee law, unlike the UN definition. He argues that the OAU definition leaves open the possibility that the basis for the harm may be indeterminate and includes persons who escape serious disruption of public order “in either part or the whole’ of their country of origin without being compelled to make reasonable efforts to seek protection within a safe part of their own country before fleeing abroad.¹⁰⁹ The OAU refugee definition is therefore the most favourable and preferred because it is wider. A narrow definition will contribute to denial of international protection to those people in direct circumstances whose claim to assistance is impeccable.¹¹⁰

¹⁰⁵ Shacknove 1985 *Ethics* 275.

¹⁰⁶ See Article 1 of OAU *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

¹⁰⁷ Naldi *The Organization of Africa Unity: An Analysis of its Role* 89.

¹⁰⁸ Shacknove 1985 *Ethics* 276.

¹⁰⁹ Hathaway *The Law of Refugee Status* 18.

¹¹⁰ Shacknove 1985 *Ethics* 276.

Although the lack of a clear definition of the term refugee may confer an array of legal and political implications for refugee protection, the 1951 Convention and the 1967 Protocol still remain the principal international instruments benefiting refugees. Their definition has been also adopted by the regional OAU Convention Relating to Refugee Problem in Africa which goes an extra mile to provide the definition of a refugee. Conversely, South Africa has also adopted and defined refugees in terms virtually identical to the Convention and the Protocol in its Refugees Act.

2.3 International and Regional Refugee Protection

International law establishes the right to seek and enjoy asylum principle.¹¹¹ Article 13 of the *Universal Declaration of Human Rights* (UDHR) 1948, provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution,” a right which goes to the root of the refugee problem. This makes it one of the human rights¹¹² as it is like, all other human rights guaranteed by human rights law meant to protect individuals and groups against actions that interfere with formally protecting fundamental freedoms and human dignity. Thus, the state has no option but an obligation to act in ways that prohibit certain action against refugees. Grounded in Article 13 of the UDHR there are two major treaties adopted as centrepieces of international refugee protection today that govern refugee protection. They involve the *Convention Relating to Status of Refugees* of 1951¹¹³ and the *Protocol Relating to the Status of Refugees* of 1967. Originally, the 1951 Convention as a post-Second World War instrument was limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removes these limitations and extends the mandate of the 1951 Convention beyond the initial World War 2 crisis thus giving the Convention universal coverage. The

¹¹¹ Weissbrodt and Hortreiter 1999 *Buffalo Human Rights Law Review* 1.

¹¹² Wolfgang (Ed) *Understanding Human Rights Manual on Human Rights Education* 466.

¹¹³ The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention.

adoption of 1951 Convention supplemented by the 1967 Protocol is reminiscent of an important milestone to attempt to set the minimum standards of treatment of refugees.

The 1951 Convention has created a system for providing protection to people at risk of persecution in their own countries.¹¹⁴ Article 3 provides that state parties shall apply the provisions of the Convention without discrimination as to race, religion or country of origin of the beneficiary. Rights entrenched include, *inter-alia*, the right to seek employment (Article 17, 18 & 19), to enjoy freedom of movement (Articles 26) and to have access to public services such as education (Article 22), free access to courts of law (Article 16) and provision of administrative assistance by the contracting state authority to allow a refugee to exercise a right under the Convention (Article 25). These rights show that International refugee protection regime is a cohesive system that comprises international laws, institutions and practices that govern refugee crisis.¹¹⁵ However, the 1951 Convention and the subsequent *Protocol on Refugee Status* do not provide procedures for determining refugee status thus it is the state's responsibility to work out its own procedures for assessing the validity of a refugee claim.¹¹⁶

Obligations of states come into effect as soon as the asylum seeker has entered a signatory country.¹¹⁷ The major obligation is that of *non-refoulement*. Article 33 of the 1951 UN Convention provides for the principle of *non-refoulement* which entails that states parties are obliged to refrain from forcing a refugee to return to a state where such person is likely to suffer persecution, danger to life or freedom would be threatened on the account of race, religion, nationality or political opinions.¹¹⁸ Such a duty applies despite the fact that refugee status has been formally recognized or not.

¹¹⁴ Millbank 2000
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

¹¹⁵ Holzer 2013 *Law and Society Review* 842.

¹¹⁶ Ghazaryan 2000 <http://unpan1.un.org/intraloc/groups/...documents.nispacee/unpam005595.pdf>.
Millbank 2000
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

¹¹⁸ Dugard International Law: A South African Perspective 352.

Article 33 has served both as a model and textual foundation for a lot of subsequent human rights treaties that incorporate the principle of non-refoulement.¹¹⁹ It is impermissible for states to avoid their obligations either by declining to make a formal determination of refugee status, or by ignoring the development of the refugee concept in state and international organization practice.¹²⁰ As a result of this principle, it has been argued that a refugee may not be penalised for entering the country illegally.¹²¹ However, there are debates whether the principle of *non-refoulement* has reached the status of international customary law or not. Murray argues that “consistent state practice” endorses the view that the principle of *non-refoulement* has reached the status of customary international law.¹²² Dugard and Van der Wyngaert also note that this principle has reached the status of *ius cogens*¹²³ therefore no derogation is allowed. As such it must override extradition treaties in cases of human rights.¹²⁴ South Africa incorporated this principle of *non-refoulement* under section 2 of its *Refugees Act* 130 of 1998. This is interpreted as an acceptance of its customary law nature hence South Africa is bound by the principle and no derogation is permissible.¹²⁵

There are concerns that are associated with the Convention, mainly that it is unsuitable for third world countries like South Africa. According to Millbank, the 1951 Convention has several weaknesses.¹²⁶ The major problem with the Convention is that it was developed in and for a different era, It was not designed having in mind the mass

¹¹⁹ Weissbrodt and Hortreiter 1999 *Buffalo Human. Rights Law Review* 2.

¹²⁰ Goodwin-Gill G S 1982 *YBI Legal Studies* 296.

¹²¹ Article 31 of the Convention Relating to the Status of Refugees of 1951.

¹²² Murray 1986 *South African Journal on Human Rights* 154.

¹²³ *Ius cogens* or *jus cogens* refers to certain fundamental, overriding principles of international law from which no derogation is ever permitted. The 1969 and 1986 Vienna Conventions stipulate that a treaty is void if it conflicts with *jus cogens* (Article 53 and 64).

¹²⁴ Dugard and Van der Wyngaert *American Journal of International Law* 187.

¹²⁵ Khan “The principle of non-refoulement” 19.

¹²⁶ Millbank 2000

[https://www.apf.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/pubs/rp0001/01RP05](https://www.apf.gov.au/About%20Parliament/Parliamentary%20Departments/Parliamentary%20Library/pubs/rp0001/01RP05).

refugee flows of today, thus it is outdated.¹²⁷ It is over 66 years after its adoption but the Refugee Convention still remains the only international instrument for the protection of refugees.¹²⁸ The Convention only prescribes minimum standards that should be met by states.¹²⁹ Millbank argues that the Convention confers no right of assistance on refugees but only when they enter a signatory country. This means even those with greatest need for protection cannot be afforded such under circumstances. Millbank further mentions that the Convention does not take into account of the impact of political, financial and social factors on receiving states.¹³⁰ UNHCR also acknowledges the problems with the operation of the Convention. It is of the view that opening the Convention for review can lead to restriction rather than expansion of refugee rights.¹³¹ Other commentators argue that, "proposing expanded obligations for governments on top of a Convention based system that is already loudly creaking, is fruitless as such proposals are politically impossible."¹³² Besides its weaknesses, the Refugee Convention has been in existence for decades and its relevance cannot be undermined today. It is still applicable as it was at its inception in 1951 and still outlines normative framework to address contemporary refugee problem.¹³³

Regional treaties such as the OAU Refugee Convention of 1969 are complementary to the UN system. As highlighted above, the regional Convention has a more inclusive definition of the refugee concept than that which applies in other parts of the world. It

¹²⁷ Millbank 2000
https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

¹²⁸ Millbank 2016 <http://tapri.org.au/?p=322&cpge=1>.

¹²⁹ Raveendran 2013 *Notre Dame Law Review* 1279.

¹³⁰ Millbank 2000
https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

¹³¹ Millbank 2000
https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

¹³² Millbank 2000
https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

¹³³ Gorlick 2000 *Nordic Journal of International Law* 120.

was adopted by African governments in order to ensure that cross-border population displacements were managed in a predictable manner and in a way that safeguarded national security and inter-state relations.¹³⁴ This means it seeks to solve the refugee problem and to take into account the unique aspects of their situation in an African context. Unlike the UN Convention which makes no reference to national and security order, the OAU Convention emphasises its humanitarian credentials by declaring the principle of non-refoulement without exception.¹³⁵ It unambiguously states that the repatriation of refugees to their country of origin should take place on a voluntary basis.¹³⁶ In these respects, Africa established new and improved legal standards for the treatment of exiled populations.¹³⁷

2.4 Protection of Refugees under South African Legal System

Under this section, the legal and institutional framework of South Africa regarding protection of refugees is discussed. South Africa has expressed its desire and dedication to be part of the effort of the international community to protect refugees by signing the 1951 Convention, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problem in Africa. It is crucial that the RSA has committed itself to these refugee instruments both at international and regional levels as this demonstrates the desire of the country to assume the shared responsibility of protecting those who are in danger of persecution. In honouring its obligations under international law, RSA enacted the Refugees Act 130 of 1998, an admirable piece of legislation which specifically deals with rights of refugees within its territory and to provide for a new system regarding refugees.

Other than the above mentioned refugee-specific instruments, RSA is also a party to most of international and regional human rights and humanitarian law instruments such

¹³⁴ Crisp 2000 *Journal of Contemporary African Studies* 165.

¹³⁵ Naldi GJ *The Organization of Africa Unity: An Analysis of its Role* 89.

¹³⁶ Article 5 of OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa of 1969.

¹³⁷ Crisp 2000 *Journal of Contemporary African Studies* 160.

as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on Torture, the Convention on the Rights of the Child, The Convention on the Elimination of Discrimination against Women, the 1949 Geneva Conventions and, the African Charter on Human and Peoples Rights, thereby reinforcing protection for refugees. An understanding of international human rights law is important for securing international protection for refugees since these instruments apply to everyone, including refugees, regardless of their legal status. Being a signatory to these regional and international treaties imposes obligations on South Africa to respect and protect the refugees.

2.4.1 South African Constitution of 1996 and the Protection of Refugees

The 1996 *Constitution of the Republic of South Africa* is the supreme law of the country. Section 2 of the Constitution provides for the supremacy of the Constitution thus law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. A Bill of Rights is entrenched in the Constitution and is applicable to all laws. The human rights contained in Chapter 2 of the Constitution in the BOR are perceived as the foundational underpinning of a free and democratic society.¹³⁸ Section 7 (1) of the Constitution declares the BOR as “a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” Although the Constitution does not explicitly provide for the rights of refugees, nor does it mention refugees anywhere, refugees are also bearers of the human rights by virtue of being human beings and these rights inhere in them. The court in *Tantoush v Refugee Appeal Board*¹³⁹ found that “within our constitutional dispensation the BOR is applicable equally to foreigners (refugees) as it is to citizens.” This is strengthened by Section 9(1) which provides that everyone is equal

¹³⁸ Daven *et al* “The Civil and political Rights of Refugees and Asylum Seekers in South Africa” 204.

¹³⁹ 2008 (1) SA 232 (T).

before the law and should receive equal benefit and protection under the law. The court further pointed that:

In terms of section 8(1) of the Constitution the duties imposed by the BOR are binding on the Refugee Status Determination Officer (RSDO) and the Refugee Appeal Board (RAB), both being organs of state exercising public power and performing a public function. To the extent necessary the RSDO and RAB are obliged to interpret legislation and the BOR while promoting the spirit, purport and objects of the BOR and consider international law in terms of section 39 of the Constitution.¹⁴⁰

This means the BOR binds the executive, the judiciary and all organs of state as well as natural or juristic persons to the extent that is applicable taking into account the nature of the right and the nature of any duty imposed by the right.¹⁴¹ The state has a duty to give effect to these rights while an obligation has been imposed upon courts, tribunals and forums entrusted with interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights.¹⁴²

The Supreme Court of South Africa in *Minister of Home Affairs v Watchenuka*¹⁴³ pronounced on the right to work and study. In this case, the court found that the Minister of Home Affairs could not deny asylum seekers the right to work and study as this was found to be unlawful and was set aside. The court held that the freedom to engage in productive work is an important part to human dignity thus while the asylum seeker is in the country he or she must be respected and also protected by section 10¹⁴⁴ of the BOR and human dignity has no nationality as it is inherent in all people, citizens or non-citizens as they are all protected by the South African BOR. Human dignity is one of the foundational principles of the BOR and it constitutes the basis and inspiration for the recognition given to other more specific protections afforded by the BOR.¹⁴⁵ The right to

¹⁴⁰ Para 65 in *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T).

¹⁴¹ Section 8(1) and 8 (2) of the 1996 *Constitution of Republic of South Africa*.

¹⁴² Section 39 (2) of the 1996 *Constitution of Republic of South Africa*.

¹⁴³ 2004 (4) SA 326 SCA.

¹⁴⁴ Everyone has inherent dignity and the right to have their dignity respected.

¹⁴⁵ Para 26 in *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 SCA.

dignity is one right that has been dealt with vastly in the South African jurisprudence. In the *S v Makwanyane and Another*,¹⁴⁶ Chasklason P stated that, “the rights to life¹⁴⁷ and dignity are the most important of all human rights, and the source of all other rights in Chapter 2.” Therefore, the refugees cannot be deprived of these rights as long they are within the borders of South Africa thus the state has a duty to fulfil its obligations concerning these refugees. It is expected that refugee protection regime in South Africa should meet the requisite constitutional standard by ensuring that refugees live in dignity and safety. Any practices and conduct that infringe on the rights of refugees erodes the values proclaimed in the Constitution and Refugees Act. Refugees enjoy all the human rights in the Constitution except the right to vote.

Section 34 of the Constitution grants everyone a right to access courts. It establishes forums to defend the people against the oppressive and unjust laws and practices that are inconsistent with or in violation of the rights enshrined in the Constitution. This means, in cases where refugee rights are violated, it is expected that refugees turn to the court for the safeguarding of their rights. However, the enjoyment of the rights enshrined in the BOR is not absolute and may accordingly be limited in terms of Section 36 of the Constitution. In the case of *Watchenuka*,¹⁴⁸ the limitation clause was summarised as follows:

The protection even of human dignity- that most fundamental of constitution values- is not absolute and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances. It may be limited where the limitation is of general application and is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.”¹⁴⁹

¹⁴⁶ 1995 6 BCLR (CC) par 144.

¹⁴⁷ Section 11 of the 1996 *Constitution of Republic of South Africa* states that; “Everyone has the right to life.”

¹⁴⁸ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 SCA.

¹⁴⁹ Para 28 in *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 SCA.

From the above discussion, the refugee rights are guaranteed by the *Constitution*. In *Lawyers for Human Rights v Minister of Home Affairs and Others*¹⁵⁰ the Constitutional Court confirmed that the BOR protects everyone in the country, including illegal foreign nationals who are also beneficiaries of such rights. The Court held that, “once it is accepted that persons within our territorial boundaries have the protection of our courts, there is no reason why ‘everyone’ should not be given its ordinary meaning and when the Constitution intends to confine rights to citizens it says so.”¹⁵¹ The denial of rights in the Constitution to people inside South Africa violates the values of human dignity, equality and freedom on which the Constitution was founded.¹⁵² As such, it is convincing that refugees are also protected under the BOR. Therefore, there is no doubt that South Africa holds the primary responsibility or rather has a mandate to ensure the protection of refugees within its jurisdiction thus it owes the refugees the duty to protect them.

2.4.2 Refugees Act 130 of 1998

The *Refugees Act* was only passed by Parliament in 1998 and came into force in 2000. With the enactment of the Act, government undeniably demonstrated its resolve to transform and consolidate all refugee laws and regulations within the framework of human rights. Thus, the *Refugees Act* establishes a refugee protection system that is deeply entrenched in human rights values, norms and standards under international conventions on refugees and highlighted by the entrenched Bill of Rights in Chapter 2 of the 1996 Constitution.¹⁵³ The Act provides a regulatory framework for the acceptance, processing of application for refugee status and it regulates ancillary matters in relation to application for refugee status as well as setting out the rights, obligations and entitlements of refugees. It also sets out the standards and procedures which the

¹⁵⁰ 2017 (10) BCLR 1242 (CC).

¹⁵¹ Para 26 in *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (10) BCLR 1242 (CC).

¹⁵² Para 26 in *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (10) BCLR 1242 (CC).

¹⁵³ Mireku 2002 *Law and Politics in Africa, Asia and Latin America* 399.

applicants must meet in order to enjoy refugee status in the territory.¹⁵⁴ As mentioned earlier on, the Act incorporated the exact refugee definition provided by the 1951 Refugee Convention and its Protocol.¹⁵⁵ It is important to note that not every person who flees his or her home in the circumstances referred to in Section 3 of the Act is able to obtain asylum in this country. Some persons who genuinely deserve such protection are denied while those who are granted the refugee status are actually less qualified.

According to Section 21(1) of the Act, an asylum seeker who is seeking recognition as a refugee must apply for asylum before a Refugee Reception Officer (the RRO). Pending such outcome of the application, the RRO is obliged to issue an asylum seeker with a permit entitling her or him to remain in South Africa. Nevertheless, the application for refugee status is tedious and applicants have to endure unreasonable delays and many challenges.¹⁵⁶ In the case of *Director-General: Home Affairs v Dekoba*,¹⁵⁷ the SCA held that Ms Dekoba's (a refugee) arrest and the removal of her permit were entirely unwarranted as was her subsequent treatment. She was lawfully resident in South Africa in terms of an asylum seeker's permit issued in terms of s 22 of the RA but, however, her permit was withdrawn and she was arrested and treated as an illegal immigrant to be deported in terms of the Immigration Act.¹⁵⁸

Section 27 of the Act provides for the protection and general rights of refugees. They are entitled to a formal written recognition of refugee status, full legal protection including the rights set out in the Bill of Rights of the Constitution and remains in the Republic. They are entitled to apply for an immigration permit, an identity document, a South African travel document, seek employment and the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time. It is clear from the Act that the government's intent was to establish a law which

¹⁵⁴ Section 21 of the *Refugees Act* 130 of 1998.

¹⁵⁵ See Chapter 3 of the *Refugees Act* 130 of 1998.

¹⁵⁶ Kanamugire 2016 *Acta Universitatis Danubius* 48.

¹⁵⁷ [2014] ZASCA 71.

¹⁵⁸ 13 of 2002.

treats refugees as human beings with rights rather than simply providing them with protection.¹⁵⁹ However, in practice, these rights are not easily accessible to refugees.

According Section 30 of the Act, a refugee must be issued with a red identity document bearing his/her particulars. Without such proper documentation, it is difficult for refugees to establish their legal status and access their right as South Africa is an identity driven society.¹⁶⁰ This means in South Africa an identity document is crucial to access essential services, such as health and banking services. Despite possession of correct documentation refugees are still subjected to arbitrary arrests and detention, meaning that the existence of documentation does not guarantee protection. As it is a well-known rule, every right comes with responsibilities, refugees in South Africa also bear certain responsibilities such as abiding by the law of South Africa, carrying their refugee identity document and renewing their status every two years before the expiry date. Section 34 provides that a refugee must abide by the law of the Republic which is a corresponding duty to obey the laws of the land. By so doing, it creates not only rights flowing from refugee status but also obligations to show loyalty to the laws of the country.

2.5 Summary of Chapter

From the discussion above, it is evident that effective refugee protection has an important part to play in addressing the problems of refugees. The lack of a clear definition of the term refugee in international law may have implications for refugee protection. The 1951 Convention, 1967 Protocol and the 1969 OAU Convention remain the major international instruments benefiting refugees in South Africa. These international treaties pose duties upon state parties particularly, the obligation to respect the principle of *non-refoulement*. Thus, it is governments themselves which ultimately remain responsible to ensure that refugees are treated as required by the Convention.¹⁶¹

¹⁵⁹ Khan "Local integration: Lessons Learnt and the Way Forward" 3.

¹⁶⁰ Khan "Local integration: Lessons Learnt and the Way Forward" 4.

¹⁶¹ Mewded 2016 *Human Rights Violations in Refugee Camps: Whose Responsibility to Protect? A case of Ethiopia* 19.

Giving effect to the refugee instruments both at international and regional levels, the South African Constitution guarantees the rights of refugees even though they are not explicitly provided for. It is more appropriate that the human rights provided in the Constitution that applies to refugees should be interpreted in light of the 1951 Convention, 1961 Protocol, the OAU Refugee Convention and the international and regional human rights instruments which South Africa is a party to. The *Refugees Act* also plays a significant role by providing for a new system regarding refugees although the Refugee Alliance for Refugee (RAJ) is of the view that this legislation is inadequate to safeguard their rights.¹⁶² Despite the rights granted by the Constitution and the progressive *Refugees Act*, refugee protection in South Africa is still questionable. Continued persecution of refugees constitutes a great violation of the UN Refugee Conventions, Universal Declaration on Humans Rights as well as of the South African Constitution. For the refugee law to survive as a fundamental and dependable system for the protection of refugees, its goal must not be confused with that of immigration. It is therefore, in the interest of refugees to regard refugee protection as a human rights remedy.¹⁶³



¹⁶² Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 2.

¹⁶³ Hathaway "Temporary Protection of Refugees: Threat or Solution?" 49.

Chapter 3: Local Integration of Refugees in South Africa

3.1 Introduction

The 1951 Refugee Convention and 1967 Protocol remain the foundation for the international protection of refugees. Article 34 of the 1951 Convention calls for host states to integrate refugees where refugees are offered permanent asylum and integration into the society by the host government. Generally, local integration into the host society is relatively small as most host governments do not support the policy.¹⁶⁴ South Africa, as party to these international instruments, is one of the few African countries that encourage local integration into urban areas except where the arrival of refugees poses a grave threat to security and welfare.¹⁶⁵ Ramjathan-Keoh claims that SA is the “only” African country with urban refugee policy that does not confine refugees to camps.¹⁶⁶ This means South Africa does not have a mandatory detention policy and has no provision for camps despite being the largest destination for refugees in Africa. Confining refugees in refugee camps often deprives them of their significant rights like right to freedom of movement, education, skills training and income generating opportunities. This hinders them from realising self potential and sets boundaries to their potential to fully contribute towards the economy of the host country.¹⁶⁷

Ramjathan-Keoh is of the opinion that because of the South African urban refugee policy, most people find it an appealing and attractive place to seek asylum.¹⁶⁸ In practice, however, local integration does not always work very well, it has proven to be challenging in providing protection for refugees.¹⁶⁹ For instance, barriers in accessing right such as health and education. Resettlement and repatriation as durable solutions are hardly applied in South Africa. Therefore, it is important to discuss the UN durable

¹⁶⁴ Jacobsen 2001 <http://www.unhcr.org/epau> 3.

¹⁶⁵ Landau 2006 *Journal of Refugee Studies* 308.

¹⁶⁶ Ramjathan-Keoh “The Rights of Refugees and Migrant Workers” 133.

¹⁶⁷ UNHCR 2003 <http://www.unhcr.org/3f1408764.html> 9.

¹⁶⁸ Ramjathan-Keoh “The Rights of Refugees and Migrant Workers” 133.

¹⁶⁹ Ramjathan-Keoh “The Rights of Refugees and Migrant Workers” 133.

solutions respectively and briefly as this may be relevant in finding ways to not only manage the “crisis” but also to enhance the protection of refugees before discussing local integration in South Africa.

3.2 UN Durable Solutions

The UNHCR promotes three basic approaches to addressing refugee problems which are local integration, repatriation and resettlement as part of its core mandate¹⁷⁰ for both protection and the search for solutions in response to refugee flight. Durable solutions influence the protection of the rights of the refugees which they are entitled to under refugee law and human rights law.¹⁷¹ However, neither the Statute of UNHCR nor any other international instrument relating to refugees provides for inherent hierarchy of these durable solutions.¹⁷² Traditionally, the durable solutions were associated with permanent settlement whether in the host country, a third country or the country of origin.¹⁷³ According to Volker Turk:

The very objective of efforts to protect and assist refugees is to find a solution to their plight. This means, for example, that UNHCR is duty bound to remain engaged well beyond the emergency phase. Our understanding of solutions has evolved and now acknowledges the importance of self-reliance and community based activities from the onset of displacement. Where there is no immediate solution available, we must collectively do everything possible to reduce dependency so that populations of concern can lead productive and dignified lives.¹⁷⁴

This means the intention of the durable solutions is to make the international response more reliable and effective, as well as to ensure greater equity in the sharing of responsibilities and burdens.¹⁷⁵ Therefore, it requires governments to devote themselves

¹⁷⁰ UNHCR <http://www.unhcr.org/50a4c17f9.pdf> 186.

¹⁷¹ Jubilut and Madeira 2016 <http://blogs.ise.ac.uk/humanrights/2016/11/21/durable-solutions-for-refugees-principles-and-implementation-strategy-of-a-general-framework/>.

¹⁷² Feller 2001 *IRRC* 598.

¹⁷³ UNHCR <http://www.unhcr.org/50a4c17f9.pdf> 191.

¹⁷⁴ Volker Turk, Director of International Protection, UNHCR 2013.

¹⁷⁵ UNHCR 2003 <http://www.unhcr.org/3f1408764.html> 3.

to protect the refugees. Whilst these durable solutions are viewed as protection tools for refugees, there are no legal entitlements attached thus remains the discretion of states.¹⁷⁶ The existence of the durable solutions as international ideals to refugee conditions come with challenges as they are still rather feeble.¹⁷⁷

3.2.1 Local integration

Local integration is regarded as the most viable durable solution for refugee as it allows refugees to integrate locally into their “countries of first asylum.”¹⁷⁸ It is a process of economic, socio-cultural and legal incorporation of refugees.¹⁷⁹ As a legal process, refugees are granted a progressive wider range of rights and entitlements by the host state.¹⁸⁰ The UNHCR describes integration as a “process by which the refugee is assimilated into the social, economic and legal life of a new national community.”¹⁸¹ Khan also defines that:

local integration is a course of action which allows the refugee or the asylum seeker to lead a meaningful existence within the host state; it therefore must necessarily be a process which allows for the development of the human potential. This does not necessarily mean permanent residence or citizenship.¹⁸²

According to Jacobsen, refugees are *de facto* integrated when they are not in physical danger, are able to sustain livelihoods through access to land or employment, and can support themselves and their families, have access to education, health facilities, and

¹⁷⁶ Jubilut and Madureira 2016 <http://blogs.lse.ac.uk/humanrights/2016/11/21/durable-solutions-for-refugees-principles-and-implementation-strategy-of-a-general-framework/>.

¹⁷⁷ Jubilut and Madureira 2016 <http://blogs.lse.ac.uk/humanrights/2016/11/21/durable-solutions-for-refugees-principles-and-implementation-strategy-of-a-general-framework/>.

¹⁷⁸ Kanamugire 2016 *Acta Universitatis Danubius* 44.

¹⁷⁹ Jacobsen 2001 <http://www.unhcr.org/epau> 1.

¹⁸⁰ Kanamugire 2016 *Acta Universitatis Danubius* 44.

¹⁸¹ UNHCR 2011 *Resettlement Handbook* 28.

¹⁸² Khan 2007 “Local integration: Lessons Learnt and the Way Forward” 2.

housing are socially networked into host communities and there is little distinction between refugees and local communities.¹⁸³

Article 34 of the 1951 Refugee Convention encourages state parties to facilitate the assimilation and naturalisation of refugees. It provides that states shall “make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings”¹⁸⁴ Therefore, states should make policies to facilitate refugees to acquire full protection of the host country by being naturalised. However, the process is not available in many African states as they anticipate that refugees will voluntarily repatriate once the opportunity occurs or their country of origin becomes safe.¹⁸⁵ Host governments are openly opposed to local integration¹⁸⁶ because it is a complex process which places considerable demands on both the individual and the receiving society. Host governments and local populations often treat ethnic, racial and country of origin group differently.¹⁸⁷ African host states are therefore not able to integrate the refugees that they have received on their territory. However, in spite of the challenges of local integration, it allows refugees to contribute socially and economically in the host country.

3.2.2 Resettlement

Resettlement applies where a refugee with specific needs cannot find adequate protection in the country of origin or the country of asylum but can enjoy long-term protection in a third country.¹⁸⁸ In some instances, the granting of refugee status may place heavy burden thus resettlement as a satisfactory solution can only be achieved

¹⁸³ Jacobsen 2001 <http://www.unhcr.org/epau> 9.

¹⁸⁴ See Article 34 of the *Convention Relating to the Status of Refugees of 1951*.

¹⁸⁵ Kanamugire 2016 *Acta Universitatis Danubius* 46.

¹⁸⁶ Kobia and Cranfield “Literature Review: Urban Refugees” 8.

¹⁸⁷ Kobia and Cranfield “Literature Review: Urban Refugees” 8.

¹⁸⁸ UNHCR <http://www.unhcr.org/50a4c17f9.pdf> 197.

through international cooperation.¹⁸⁹ Thus it serves as a “substantive and symbolic gesture of support for host government efforts to contend with mass flows of refugees.”¹⁹⁰

3.2.3 Voluntary Repatriation

Repatriation means that the refugees return home. It is often referred to as the preferred solution. Repatriation should take place on a wholly voluntary basis and in conditions of safety and dignity. In reality, most refugees return to their homes in conditions which do not meet these standards.¹⁹¹ The problem with this solution is that even though it is the most favoured solution by states, return is not an early possibility,¹⁹²

3.3 Local Integration of Refugees in South Africa

From the above discussion, it is evident that while these durable solutions are ideal, they are not meant to be a one size fits all solutions for the protection of refugees thus a state has discretion to choose which solution best applies to it. Voluntary repatriation and resettlement are rarely applied in South Africa.¹⁹³ One of the criteria for resettlement “is failure to integrate locally,” thus local integration must have been used in the first instance.¹⁹⁴ As such, South Africa prefers local integration to meet the needs of the refugees hosted in its country. Unlike in many parts of the continent, South Africa does not have refugee camps for refugees. Refugees are integrated in different parts of the

¹⁸⁹ Kanamugire 2016 *Acta Universitatis Danubius* 46. In some countries like Australia, Canada, New Zealand and United States they have enacted immigration laws that enable them to resettle on their territory each year.

¹⁹⁰ Kobia and Cranfield “Literature Review: Urban Refugees” 9.

¹⁹¹ Crisp 2000 *Journal of Contemporary African Studies* 172.

¹⁹² Jacobsen 2001 <http://www.unhcr.org/epau> 1

¹⁹³ Kanamugire 2016 *Acta Universitatis Danubius* 44.

¹⁹⁴ Khan 2007 “Local integration: Lessons Learnt and the Way Forward” 2.

country mainly in the urban centres among the local communities¹⁹⁵ It is regarded as the cornerstone of South African refugee protection with the aim of maximising freedom and protection of refugees.¹⁹⁶ This refugee policy is regulated by the Refugees Act, which allows refugees to 'seek' and 'enjoy' asylum.¹⁹⁷ Refugees should therefore, be guaranteed access to accommodation, medical assistance, food, education and professional and language training. ¹⁹⁸ According to Khan, an enabling environment and a welcoming society are two necessary elements in an urban setting like South Africa to enable refugees enjoy a meaningful existence.¹⁹⁹ This means that if refugees in South Africa are unable to access their rights as prescribed by the Refugee Conventions, Constitution or the Refugees Act, participate in the local economy or live without fear and subject to discrimination, they cannot be considered to be locally integrated.

3.3.1 Determination and Processing of Refugee Status

The legal process of naturalisation is acquired through documentation to support the integration of refugees thus for the refugees to legalise their stay in South Africa they must receive temporary documents from Home Affairs.²⁰⁰ Proper documentation is the only means to establish effective protection.²⁰¹ The Refugees Act mandates the DHA to issue in a right manner permits to refugees and asylum seekers in order to protect their rights and legalise their stay in the country.²⁰² The Act provides that after submission of the application form for refugee status, such application must be processed by the DHA within six months of application. However, the application for refugee status is elongated as it can go beyond the prescribed period.²⁰³ The DHA struggles to process

¹⁹⁵ Khan 2007 "Local integration: Lessons Learnt and the Way Forward" 2.

¹⁹⁶ Landau 2006 *Journal of Refugee Studies* 308.

¹⁹⁷ See Section 27 of the *Refugees Act* 130 of 1998

¹⁹⁸ Ghazaryan "Obstacles to the Integration and Naturalization of Refugees" 4.

¹⁹⁹ Khan 2007 "Local integration: Lessons Learnt and the Way Forward" 3.

²⁰⁰ Kanamugire 2016 *Acta Universitatis Danubius* 49.

²⁰¹ Landau 2006 *Journal for Refugee Studies* 324.

²⁰² See Sections 21-24 of the *Refugee Act* 138 of 1998.

²⁰³ Rugunanan and Smit *Development Southern Africa* 712.

the applications due to huge backlog caused by poor refugee management system.²⁰⁴ Refugees encounter barriers connected to submission of application for refugee status, obtaining refugee status permits and renewal of refugee permit, among others, in the process of getting those permits. Such difficulties of accessing the services of the DHA and the inability of getting the required documents at the right time aggravate their problems in the country. Lack of appropriate documents, leads many refugees being denied critical social services and access to basic rights like right to education, freedom of movement and access to health. As a result, refugees lack legal protection because their rights are not realized without appropriate documents. This therefore, presents a major challenge to the South Africa government to remedy the situation and guarantee the dignity and safety of refugees in order to protect their rights.²⁰⁵

There are also high levels of corruption in the refugee determination process²⁰⁶. In some instances, asylum seekers who have rights under international and national laws are denied the right to file an application unless they are willing to pay bribes.²⁰⁷ Migrants have hijacked the system where they can pay for refugee statuses at the expense of refugees.²⁰⁸ This brings some complexity in distinguishing a genuine refugee from an economic migrant. The public often group refugees together with all other migrants.²⁰⁹ The essential distinction between refugees and other migrants, namely the involuntary nature of the refugee's journey is lost.²¹⁰ Using the same Asylum Seeker Temporary Permit (asylum paper) by both refugees and illegal immigrants is detrimental to genuine refugees because it regards them as migrants.²¹¹ Therefore, they are being denied services they need most like formal existence as this "asylum paper" is not recognised

²⁰⁴ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 4.

²⁰⁵ Rugunanan and Smit 2011 *Development Southern Africa* 712.

²⁰⁶ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 3.

²⁰⁷ Rugunanan and Smit *Development Southern Africa* 709.

²⁰⁸ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 3.

²⁰⁹ Hathaway "Temporary Protection of Refugees: Threat or Solution?" 49.

²¹⁰ Hathaway "Temporary Protection of Refugees: Threat or Solution?" 49.

²¹¹ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 2.

as an official document to access employment within formal sectors or for humanitarian assistance.²¹²

3.3.2 Right to Work

Economic integration assists refugees to satisfy their livelihood by earning an income.²¹³ The Refugee Act allows refugees the right to seek employment in both private and public sectors.²¹⁴ Employment is a synergy of empowerment; it facilitates integration of refugees in South Africa which enables them to become self-sufficient, support their families and regain their dignity and human rights.²¹⁵ However, refugees are prohibited to be employed in certain jobs. Some professions are excluded to refugees and they may be prevented from developing their human potential.²¹⁶ The problem in accessing employment opportunities is aggravated “by lack of identity documents, refugee permits, employer’s ignorance about accepting non- national identity papers, lack of accessible banking services and failure to recognize non-South African qualifications.”²¹⁷ As a result, this makes it difficult for a refugee to obtain a formal or full-time employment. Refugees end up engaging in informal sectors such as operating petty businesses, street trading, hawking despite their qualifications. This results in refugees being involved in illegal activities as drug dealings, theft, among others, in order to earn a living. A meaningful employment will make refugees less dependent on NGOs or government for assistance but rather enables them to contribute to national economy and in poverty alleviation.²¹⁸

²¹² Mwale 2017 “Request for the Establishment of a Judicial Review Court for Refugees” 4.

²¹³ Kanamugire 2016 *Acta Universitatis Danubius* 50.

²¹⁴ Section 27 (f) of the *Refugee Act* 130 of 1998.

²¹⁵ Enwere CO 2006 *Human Rights and Refugee Protection in South Africa (1994-2004)* 104.

²¹⁶ Mwale 2017 “Request for the Establishment of a Judicial Review Court for Refugees” 5.

²¹⁷ Rugunanan and Smit 2011 *Development Southern Africa* 709.

²¹⁸ Enwere CO 2006 *Human Rights and Refugee Protection in South Africa (1994-2004)* 103.

3.3.3 Access to Health

Refugees are granted equal access to important state institutions under the 1951 Refugee Convention. The Convention requires states to treat refugees as they treat aliens and to refrain from discriminating against refugees on the basis of their race, religion or country of origin.²¹⁹ Thus, the 1951 Refugees Convention and its 1966 Protocol, require that refugees be afforded treatment at least as favourable as that of a host country's citizens with respect to a variety of rights.²²⁰ As the basic treaty on states obligations *vis-a-vis* refugees, the 1951 Convention includes provisions on the treatment that states parties must provide to refugees in their territory. The states are required to provide a core minimum of health services without discrimination and must make essential ART drugs available and accessible to migrants on the same terms as citizens.²²¹ International and regional treaties grant all individuals the right to enjoy the highest attainable standard of health.²²² Article XXV(1) of UDHR states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also guarantees everyone the right to the highest attainable standard of health. It further requires states parties to take steps individually and through international cooperation to progressively realise this right via the prevention, treatment, and control of epidemic diseases and the creation of conditions to assure medical service and attention to everyone. Nevertheless, although the relationship between migration and vulnerability to HIV infection has been long recognised, states have basically failed to ensure that migrants have access to HIV treatment.²²³ This is

²¹⁹ Article 3 the *Convention Relating to the Status of Refugees* of 1951.

²²⁰ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 157.

²²¹ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 155.

²²² Amon and Todrys 2009 SUR - *International Journal on Human Rights* 162.

²²³ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 156.

contrary to the commitment that governments²²⁴ made to provide “universal access” to HIV treatment and their specific obligations under international human rights law to “ensure that HIV treatment (specifically, antiretroviral therapy or ART) is provided to migrants as part of their duty to realise the right to health without discrimination, access to ART for migrants remains largely unrealised.”²²⁵

Section 27 of the Constitution provides that everyone has the right to have access to health care services and that no one may be refused emergency medical treatment. Thus, asylum seekers and refugees are guaranteed free care if they are indigent and are assessed in terms of the same means used to evaluate South African citizens.²²⁶ However, people who have migrated to South Africa from other countries do not have adequate access to health care or social support.²²⁷ For instance, despite the fact that individuals with irregular status are afforded a right to free health care including ART, there is evidence that non-citizens are frequently denied ART at public health care institutions.²²⁸ Refugees seeking ARV treatment at local hospitals are often harassed by health care workers, faced with verbal abuse, substandard treatment, and insensitivity by providers, unusually long waiting times, and outright denial of services.²²⁹ Some are illegally charged exorbitant fees for treatment or medication, or told to produce a South African citizenship card in order to receive basic services.²³⁰ Rudolph concedes that medical professionals often refuse to provide free antiretroviral (ARV) treatment to all infected individuals hence government officials are major obstacles to efforts to stem

²²⁴ Under paragraph 37 of the 2001 *Declaration of Commitment on HIV/AIDS*, governments committed themselves “promote and protect all human rights and fundamental freedoms, including the right to the highest attainable standard of physical and mental health.”

²²⁵ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 156.

²²⁶ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 159.

²²⁷ Mtutu *Magazine of the Treatment Action Campaign* 1.

²²⁸ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 155.

²²⁹ Randolph 2012 *Human Rights Brief* 26.

²³⁰ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 160.

the pandemic.²³¹ This denial of access to life-saving drugs violates the rights of refugees to access healthcare under both domestic and international laws.²³²

In *Minister of Health v. Treatment Action Campaign (TAC)*,²³³ the Constitutional Court emphasized that the equal accessibility to AIDS medical treatment is a socio-economic right guaranteed by the Constitution. In this case, the complainants alleged that the refusal of ARV drugs to HIV-positive pregnant women violated the right to healthcare services under sections 27 and 28 of the Constitution. The Court relied on the reasoning in *Government of the Republic of South Africa and Others v Grootboom and Others*,²³⁴ and found that the state must guarantee equal access to health care. The Constitution requires the state to protect these rights within their available resources and ensure enforcement regardless of the complexities to meet such obligations. Therefore, the South African government must take reasonable measures to ensure accessibility of ARV in order to enforce its obligation on right to access healthcare.

3.4 Summary of Chapter

Refugees are a joint responsibility shared amongst the international community, states and host nations communities. The above discussion signifies that the international refugee law promotes local integration to enable refugees to acquire entitlements and several rights so that they can live in dignity in the host states as opposed to repatriation and resettlement. The introduction of camps in South Africa was discouraged hence opted for local integration. However, the South African refugee policy shows almost no state obligations despite its intention to protect the welfare and dignity of those seeking refuge in South Africa.²³⁵ In other words, its explicit obligations are limited to

²³¹ Randolph 2012 *Human Rights Brief* 24.

²³² Randolph 2012 *Human Rights Brief* 24.

²³³ 2002 (5) SA 721 (CC).

²³⁴ 2000 (11) BCLR 1169 (CC).

²³⁵ Landau 2006 *Journal for Refugee Studies* 315.

bureaucratic processes intended to facilitate access and integration.²³⁶ In reality, there are significant obstacles to access refugee entitlements despite the fact that they are locally integrated. The chances of survival are minimal because of the high competition for opportunities and resources. This shows that there are gaps between international refugee protection principles and actual practices that exhibit themselves in form of administrative or political impediments such as poverty, corruption or xenophobia. To that end, protection of refugees in South Africa is a pipeline dream as refugees in the country are faced with a lot of challenges with their human rights being violated by the citizens in general, DHA officers, law enforcement agents, corrupt politicians as well as socio-economic conditions in the country that do not allow to the fulfilment of their entitlements to material support. Generally, such integration is highly beneficial to the host state if refugees are allowed to pursue productive lives without legal restrictions, harassment and insecurity.²³⁷ Therefore, South Africa has an obligation to create measures to implement local integration for the protection of refugees and to improve conditions for urban refugees.

²³⁶ Landau 2006 *Journal for Refugee Studies* 315.

²³⁷ Jacobsen 2006 *Journal of Refugee Studies* 273.

Chapter 4: Challenges and Implementation Drawbacks

4.1 Introduction

Without a question, conflicts or generalised violence and other forms of injustice and suffering that humans cause to others often lead to mass movements of refugees.²³⁸ Thus, humanitarian disasters, mass exoduses or refugee flows are often attributed to violations of human rights.²³⁹ Sight should not be lost of the fact that the UNHCR views “refugee law as part and parcel of the broader international human rights framework.”²⁴⁰ However, while human rights are universally recognised and legally protected, there are worrying tendencies of human rights abuses in general and refugee rights in particular. When it comes to refugee rights, hosting states are obliged to protect refugees within their borders. Feller has observed that:

refugee protection also embraces the safeguarding of basic human rights placed in particular jeopardy in refugee situations —the right to life, liberty and security of person, the right to be free from torture and other cruel or degrading treatment, the right not to be discriminated against, and the right of access to the basics necessary for survival (food, shelter, medical assistance), as well as, at a later point, for self-sufficiency (a livelihood, education, health care).²⁴¹

Yet, in spite of measures to safeguard basic human rights, the treatment of refugees on a world scale has serious and systematic human rights violations.²⁴² The existence of refugee rights is not sufficient to avoid violations of these rights. Xenophobia and intolerance of refugees and asylum-seekers has increased and it contributes to a hostile environment in which ill-treatment of refugees is tolerated or even perceived as acceptable.²⁴³ Edwards further argues that; due to lack of resources, refugees are

²³⁸ Wolfgang (ed) *Understanding Human Rights* 468.

²³⁹ Office of the High Commissioner for Human Rights *United Nations Human Rights: A Basic Handbook for UN Staff*. 55.

²⁴⁰ Edwards 2005 <http://doc.rero.ch/record/301137/files/eei011.pdf>.

²⁴¹ Feller 2001 *IRRC* 582.

²⁴² Edwards 2005 <http://doc.rero.ch/record/301137/files/eei011.pdf>.

²⁴³ Edwards 2005 <http://doc.rero.ch/record/301137/files/eei011.pdf>.

denied basic rights in many developing countries.²⁴⁴ As such, while South Africa recognises its international obligation to positively assist refugees through its *Constitution* and policies, in practice, however, this means something different for refugees. It is of course, necessary to bear in mind that rights granted in a formal manner are not always respected or enjoyed in practice. For instance, this is evidenced by the xenophobic violence South Africa witnessed in 2008. South Africa lacks the institutional prerequisites for translating refugees' legal rights into true entitlements.²⁴⁵ Therefore, the chapter examines the problems facing refugees in South Africa, which pose major challenges to South African government, civil society and the international community.

4.2 Challenges in the Protection of Refugee Rights in South Africa

In real life, migrants, including refugees, are faced with many difficulties ranging from discrimination and prejudice to outright violence and intimidation.²⁴⁶ Home Affairs is a major stumbling block for refugees in South Africa.²⁴⁷ The DHA is responsible for implementing refugee policies as well as issuing of appropriate permits and documentations to refugees.²⁴⁸ It has regularly subjected the refugees to physical and mental persecution.²⁴⁹ The DHA's negative attitude towards refugees and recalcitrant behaviour, has resulted in failure to achieve what it seeks, that is, to protect and advance the interests of refugees. There is wilful disregard of the law by the DHA, thus, most of the problems facing refugees are aggravated by such. In 2011 there were six Refugee Reception Offices (RROs) around South Africa which are in Johannesburg, Pretoria, Cape Town, Durban, Musina and Port Elizabeth. The DHA have closed three of those six either completely or to new applications. In the case of *Minister of Home*

²⁴⁴ Edwards 2005 <http://doc.rero.ch/record/301137/files/eei011.pdf>.

²⁴⁵ Landau 2006 *Journal of Refugee Studies* 309.

²⁴⁶ Murray 2003 *Canadian Journal of African Studies* 441.

²⁴⁷ Rugunanan and Smit *Development Southern Africa* 709.

²⁴⁸ Enwere CO 2006 *Human Rights and Refugee Protection in South Africa (1994-2004)* 82.

²⁴⁹ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 2.

*Affairs and Others v Somali Association of South Africa Eastern Cape*²⁵⁰ it was pointed that:

The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons, more especially State departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey the order.²⁵¹

The SCA made it clear that the attitude of police and Home Affairs was unacceptable and contrary to constitutional values of rule of law and the supremacy of the Constitution. Therefore, the refusal of Home Affairs to comply with the High Court order to reopen RRO shows clear lawlessness hence democracy cannot survive if court orders can be shunned and trampled on.

4.2.1 Xenophobic Attacks on Refugees

During the first five years of constitutional democracy, the government embarked on a mission to recognise the special needs and status of refugees according to the prescriptions of international conventions and norms. To this end, the country ambitiously took up its international law obligations towards the protection of refugees in its territory.²⁵² However, the harsh realities of life have dampened the euphoria that was aroused by the changes in government as the country is plagued with the increase in unemployment, HIV and AIDS and crime. The influx of foreign nationals brought along many of the 'social evils' that confronted a new democratic state. The spate of crimes, supposedly committed by foreign nationals in the country, has prompted some citizens to blame crime in general on immigrants.²⁵³ The protection of refugees has proved to be an insurmountable task in South Africa as there are often outbursts of xenophobia

²⁵⁰ 2015 (3) SA 545 (SCA).

²⁵¹ Para 33 in *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape* 2015 (3) SA 545 (SCA).

²⁵² Mireku 2002 *Law and Politics in Africa, Asia and Latin America* 399.

²⁵³ Singh 2013 *Alternation Journal* 215.

attacks on refugees. The rise of xenophobia is attributed to the “country’s apartheid past of racial and class division and hostility, racist immigration policies, a siege mentality and attitudes of exclusivity and superiority towards the rest of Africa.”²⁵⁴ Although apartheid has long been abolished, the South African society is still nursing festering wounds and has deep-rooted scars that remain from the apartheid’s culture of violence. The threat of xenophobia is mainly caused by the misconceptions which the South Africans have about the refugees. The subsistence of xenophobia in South Africa demonstrates the absence of tolerance of other nationals. Wolfgang argues that:

These xenophobic and paranoid attitudes in society are being reinforced by the media and utilised by populist or racist politicians, which results in ever stricter migration and asylum laws and policies and in ignoring or even violating international human rights obligations and commitments to effectively protect persons from persecution.²⁵⁵

The framing of migrants as criminals, job takers and illegal aliens, in the media and in political discourse, according to Pineteh, provides an alternative outlet to exclude foreigners yet the South African Constitution and immigration laws provide legal protection to foreigners.²⁵⁶ These perceptions are opposed to a constitutional clause which explicitly states that, “South Africa belongs to all those who live in it” and the immigration laws grant many migrants the right to belong.²⁵⁷ Such allegations always stoke the anger of citizens who meet instant justice on migrants. The country’s crime levels, escalating unemployment and the alleged abuse of social services, are repeatedly blamed on foreigners.²⁵⁸ These allegations lead to serious strains between South African citizens, law enforcement agents and foreigners.²⁵⁹ It does not come as a surprise that the escalating “youth unemployment and the worsening of social problems such as poverty and crime as a result of unfulfilled political promises, the government

²⁵⁴ Singh 2013 *Alternation Journal* 215.

²⁵⁵ Wolfgang (ed) *Understanding Human Rights* 475.

²⁵⁶ Pineteh 2017 *Cogent Social Sciences* 5.

²⁵⁷ Pineteh 2017 *Cogent Social Sciences* 5.

²⁵⁸ Singh 2013 *Alternation Journal* 214.

²⁵⁹ Singh 2013 *Alternation Journal* 215.



and its citizens seem to have found a scapegoat in African migrants.”²⁶⁰ As such, refugees have often been targets of xenophobic attacks.

Although, local integration is the most popular durable solution in South Africa, this has been difficult especially in 2008 after the May 2008 xenophobic violence as many Zimbabweans were not welcome in the townships. They were forced to live in crime and drug-ridden areas such as Windsor and Hillsborough or to take sanctuary in the visible Central Methodist Church and lived in appalling and unsanitary conditions. The church, the South African Red Cross, and NGOs such as MSF and Lawyers for Human Rights (LHR) were the only significant sources of material support. The UNHCR only played a nominal role by overseeing the asylum system but remained on the borders of debates about how to address those Zimbabweans who fell outside of the 1951 Refugee Convention framework.²⁶¹

Betts explains the presence of many Zimbabweans in South Africa. According to him, between 2005 and 2009, a large number of people fled Zimbabwe in search of sanctuary and the majority fled to South Africa. The precise number is not known but the NGO network Consortium for Refugees and Migrants in South Africa (CoRMSA) estimates that it is between 1 and 9 million, while the South Africa's DHA concurs that there are likely to be 2 million Zimbabweans in the country.²⁶² In accordance with the country's refugee policy, all Zimbabweans were given asylum seeker permits pending refugee status determination (RSD). However, because the majority had fled the country due to economic causes, only about 10 percent of people who fled persecution because of their political affiliation with the opposition Movement for Democratic Change (MDC) were granted refugee status.²⁶³ The lack of alternative forms of protection for the majority who fled the country due to economic causes meant that, despite the situation in Zimbabwe, 90 percent of them were liable to detention and

²⁶⁰ Pineteh 2017 *Cogent Social Sciences* 5.

²⁶¹ Betts 2010 *Global Governance* 369.

²⁶² Betts 2010 *Global Governance* 368.

²⁶³ Betts 2010 *Global Governance* 368.

deportation.²⁶⁴ Nevertheless, the fact of being a migrant or being without legal status does not entail that one is subject to exploitation or violence or to criminal, arbitrary or inhumane treatment. Xenophobia, therefore poses a serious threat to refugee protection and democracy in South Africa by negating the principles of human rights.

4.2.2 Socio-economic Issues

While the international refugee law alongside the international human rights law guarantee refugees a range of important civil, political, economic, social and cultural rights, some of these rights are limited for refugees in South Africa. South Africa is a signatory state to the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁶⁵ and to the International Covenant on Civil and Political Rights (ICCPR).²⁶⁶ More importantly, it is also a party to the 1951 Convention and the 1967 Protocol.²⁶⁷ Above all, South African laws allow refugees access to basic services such as health and education.²⁶⁸ The Constitution grants individuals with irregular legal status a wide range of human rights, including the rights of access to emergency and basic health care.

The application of these instruments varies enormously, based on the national, cultural and socio-economic situations.²⁶⁹ However, "most host states permit discriminatory economic practices against refugees."²⁷⁰ Limited national resources are always a setback in ensuring the maximum protection of refugees. Ramjathan-Keogh has observed that the prevailing socio-economic environment, high rates of unemployment,

²⁶⁴ Betts 2010 *Global Governance* 368.

²⁶⁵ Article 12 of which obligates States Parties to ensure the physical and mental health of every human being within their territory.

²⁶⁶ Articles 6(1) and 26, respectively, require that all persons within the territory of a State Party have the inherent right to life and are entitled to equal protection of the law without discrimination.

²⁶⁷ Article 20 guarantees refugees the exercise of their fundamental rights and freedoms without discrimination and requires that they also be afforded the same treatment as nationals.

²⁶⁸ Ramjathan-Keogh "The Rights of Refugees and Migrant Workers" 132.

²⁶⁹ Edwards 2005 <http://doc.rero.ch/record/301137/files/eei011.pdf>.

²⁷⁰ Holzer 2013 *Law and Society Review* 844.

poor service delivery, and economic inequality, has strained relations between refugees, asylum-seekers and host populations.²⁷¹ For instance, South Africa's progressive refugee policy includes the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services. However, there are practical barriers to fully accessing these rights.²⁷² There is always competition between citizens and refugees in the job market. This strains relationships between them. Although the massive influx of refugees may burden the troubled economy of a host country, it is to be acknowledged that their flow has both positive and negative economic, social, and cultural consequences for both the host population(s) and for the refugees themselves as the refugees usually bring skills which may be useful to the host population.²⁷³

4.2.3 Deportation

Detention and deportation is another challenge facing refugees. The Refugee Convention obliges states to provide refugees with administrative assistance, identity papers and travel documents,²⁷⁴ as discussed earlier. This is a daunting task as some administration officers are not willing to help and that is aggravated by a "combination of inadequate documentation, ignorance, and outright discrimination."²⁷⁵ It is therefore difficult to renew the papers due to mistreatment of refugees by DHA. As a result of inadequate documentation or in the event that a refugee fails to extend the asylum papers on time, he or she is subjected to imprisonment at the Lindela Detention Centre in Johannesburg awaiting their refoulement (deportation).²⁷⁶ This contradicts the integration approach as well as against the obligations of states of non-refoulement provided by the international refugee law. In the case of *Kiliko v Minister of Home Affairs*

²⁷¹ Ramjathan-Keogh "The Rights of Refugees and Migrant Workers" 132.

²⁷² Edwards 2005 <http://doc.rero.ch/record/301137/files/eei011.pdf>.

²⁷³ Wambugu 2003 *Agenda: Empowering Women for Gender Equity* 27.

²⁷⁴ See Article 25, 27 and 29 respectively of the *Convention Relating to the Status of Refugees* of 1951.

²⁷⁵ Landau 2006 *Journal of Refugee Studies* 319.

²⁷⁶ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 4.

²⁷⁷It was held that such arrest and deportation led to the violation of the principle of non-refoulement where the refugees have been unlawfully and unreasonably denied a proper opportunity to submit the asylum application.

4.3 Summary of Chapter

This chapter interrogated the main problems facing refugees in South Africa, which pose major challenges to the South African government, civil society and the international community. It is noted that regardless of the obligations placed by international conventions, regional instruments and domestic law on states to protect the refugees, they still encounter many problems and challenges. The experiences outlined above amount to a derogation of South Africa's responsibility for refugee protection. The reality is that the realisation of refugee rights is hampered by a lot of issues. Lack of resources is a practical barrier to fully accessing these rights. Refugees in South Africa have faced problems which have affected their human rights in particular. They have been socially marginalized, left physically at risk and they have been denied even their basic needs. The challenges have limited the exercise, an enjoyment of their human rights guaranteed by the Constitution, the Refugees Act and other laws. It is apparent that most of the problems facing refugees are aggravated by negative attitude towards refugees and recalcitrant behaviour of DHA as well as lack of proper documents or permits to enable them to access basic rights and other social services. It has been also pointed out that inadequate economic, financial as well as human resources; make it quite difficult for local governments to face the challenges faced by refugees in South Africa.

²⁷⁷ 2006 (4) SA 114 (C).

Chapter 5: Conclusion and Recommendations

5.1 Introduction

This study was designed as an attempt to determine the protection of refugee rights in South Africa. The term “refugee” is always associated with a person who has been granted refugee status by the Department of Home Affairs.²⁷⁸ However, there is no consensus among scholars as they believe that the definition provided in the international instrument does not sufficiently cover all the essential elements of a refugee. Nonetheless, the OAU Convention provides the most preferred definition so far.

In the present study, focus has been laid on the rights of refugees in the South African context and how the government and other stakeholders are trying to protect the rights of the refugees within its borders according to the international, regional and national laws and policies'. South Africa is the main host of refugees particularly in the SADC region although it also hosts refugees from other regions. Its historical background on the issue does not present a good picture as the apartheid era is known for its hostility towards refugees through its repressive laws, with the most known being the *Aliens Control Act* 96 of 1991. The advent of democracy in 1994 opened gates to those who sought refuge in South Africa, running away from persecution on racial, religious and most common, political reasons. This comes with duties and responsibilities to the state as it is required to protect its refugees as prescribed by various international, regional and its national laws. However, this is not an easy task to perform as South Africa prefers local integration as opposed to resettlement and repatriation durable solutions. Hence, the rights of refugees are violated at a larger scale within the country.

²⁷⁸ Malapa and Kiddle *Magazine of the Treatment Action Campaign* 3.

5.2 Summary of the Study

Having abolished apartheid, the South African state has a continuing constitutional duty to create general conditions and systems protecting the right of refugees and fulfil its international duties. The Bill of Rights guarantees the right to full legal protection, the right to life, human dignity, education, employment, housing, social and health services to both citizens and non-citizens. A refugee in South Africa is entitled to all the rights prescribed in the Constitution except those rights that are specifically reserved for the South African citizens.²⁷⁹ Thus, this study found that refugees enjoy special protection under international law.²⁸⁰ The UN Convention as primary purpose is to ensure that the international community provides substitute protection for people who flee their countries of origin for the reason that their own state is reluctant or unable to guarantee access to their most fundamental rights.²⁸¹

The 1951 Convention is a milestone that sets standards for the treatment of refugees.²⁸² This Convention has a legal, political and ethical significance that goes well beyond its specific terms. The legal significance is that it sets out principles concerning the definition of a refugee, the rights of persons which are the basic standards on which principled action can be based. The political significance is highlighted in its provision of a truly universal framework within which states can cooperate and share the responsibility resulting from forced displacement. Ethical significance is seen in its unique declaration by the 145 states parties of their commitment to support and protect the rights of some of the world's most vulnerable and disadvantaged people.²⁸³ Thus, the Convention provides the fundamental tenets of international refugee protection. Among them, Article 20 guarantees refugees the exercise of their fundamental rights and freedoms without discrimination and requires that refugees also be afforded the

²⁷⁹ Dugard *International Law: A South African Perspective* :354.

²⁸⁰ Amon and Todrys 2009 *SUR-International Journal on Human Rights* 157.

²⁸¹ Betts 2010 *Global Governance* 361.

²⁸² Feller 2001 *IRRC* 582.

²⁸³ Feller 2001 *IRRC* 582.

same treatment as nationals. Under Article 12, the International Covenant on Economic, Social and Cultural Rights (ICESCR) obligates states parties to ensure the physical and mental health of every human being within their territory. According to Articles 6(1) and 26, respectively, of the International Covenant on Civil and Political Rights (ICCPR), all persons within the territory of a state party have the inherent right to life and are entitled to equal protection of the law without discrimination. The African Charter on Human and Peoples' Rights protects the rights and freedoms of all people without distinction based on race or ethnicity. These rights include the right to life, the right to health, and the right to non-discrimination. International law also protects fundamental human rights such as access to healthcare and medical treatment. For instance, the Universal Declaration of Human Rights recognises these rights.²⁸⁴ That document though not legally binding, is inspirational as a "common standard of achievement."

South Africa is a signatory to these international instruments and is committed to the protection of the rights and freedoms recognised within them. Thus, in South Africa, refugees are guaranteed the same rights under the Bill of Rights of the South African Constitution similar to the rights of the South African nationals. For instance, migrants in general and refugees in particular have the right to ARV treatment in the country regardless of their legal status, and must be provided free healthcare in cases where they lack the necessary financial resources to get healthcare on their own. Thus, the Government of South Africa is bound by its domestic legal obligations to avail equal access to ARV treatment. The South African Constitution guarantees individuals with irregular legal status an expansive range of human rights, including the rights of access to emergency and basic health care, and ART. Asylum seekers and refugees alike have access to health care.²⁸⁵

²⁸⁴ Article 25 states that; Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

²⁸⁵ Amon and Todrys 2009 SUR - *International Journal on Human Rights* 159.

5.3 Major Findings of the Study

The objective of this research was to investigate the challenges that are encountered in the protection of refugee rights in the democratic South Africa against the backdrop of an elaborate Bill of Rights that grants all rights except those restricted to the citizens like the right to vote. Granting of asylum to people fleeing persecution in foreign lands is one of the earliest practices that accompanied civilisation.²⁸⁶ A person who is forced to flee from her or his country of origin is supposed to apply for asylum in a separate state but the treatment of that person does not rely on the discretion of the receiving state but it is governed by international law and mutual obligation. The findings of the study shows that despite the favourable protection policies and the obligations placed by international conventions, regional instruments and domestic law on states to promote and protect the refugees, implementation of refugee rights remains a problem. The violation of the rights of refugees is soaring in South Africa. The public is unable to distinguish between migrants and refugees. The question that begs for an answer is whether or not unwillingness on the part of the South African government could mean that it is indirectly complicit in the incidence of refugees' abuse in cases of xenophobic attacks as sometimes it shows indifference in denouncing the occurrences.

This study has shown that the notion of intolerance of refugees emanates from a long history of repressive apartheid laws such as the *Aliens Control Act* which prohibited foreigners from entering or remaining in South Africa without the immigration permits and who ever happened to be granted temporary permit was subjected to a host of conditions. This culture led to new threats compounding existing political and security challenges of refugees in South Africa. The study concludes that refugees live in continuous insecurity and are subjects of violence and illegal detentions. They are victims of xenophobia and discrimination.²⁸⁷ There is the need for a cultural change. It is appalling to note that the majority of South Africans still discriminate against their black

²⁸⁶ Ramjathan-Keogh "The Rights of Refugees and Migrant Workers" 1.32.

²⁸⁷ Mtutu *Magazine of the Treatment Action Campaign* 1.



contemporaries in an era of globalisation, much as the world respects the sovereignty of states. It is hereby emphasised that exercising that right should not infringe upon the rights of other members, especially the most vulnerable asylum seekers and refugees. It is necessary to create an understanding of the need to host suffering neighbours because if left unresolved, this will continuously haunt the South African society even in the future.

Access to healthcare services including emergency treatment at public healthcare facilities includes treatment for HIV and AIDS. In spite of the fact that international human rights law has established the right to health and non-discrimination; just a few countries have realised their obligations to provide HIV treatment to non-citizens as well as refugees.²⁸⁸ South African law and the Constitution have guaranteed refugee rights to access adequate mental and physical health care, as required by international treaties but they are continuously violated by medical professionals who refuse to provide refugees with treatment.²⁸⁹ Refugees in South Africa experience systematic difficulties accessing ART. Some public health facilities demand a South African identification document before offering healthcare. They often deny those without identification papers treatment.²⁹⁰ Apparently, the problem is a fractured society erosion of trust in the administration of refugee issues, high crime rate, xenophobia and allegations of “misusing” the right to asylum.²⁹¹ The ever-changing environment and increasing complexity and diversity of refugees provide fertile soil for corruption. The ineffectiveness or corruption of the Home Affairs officers undermines the authority of the law. There is need for the South African government to take positive steps to seriously address these challenges. Similarly, other stakeholders such as UNHRC should provide mitigating ways and try to curb the challenges in the protection of human rights. One challenge lies in the fact that the UNHRC does not have punitive enforcement expertise and it “often acts as a surrogate state administering social power by virtue of its funding,

²⁸⁸ Amon and Todrys 2009 *SUR - International Journal on Human Rights* 155.

²⁸⁹ Randolph 2012 *Human Rights Brief* 24.

²⁹⁰ Amon and Todrys 2009 *SUR - International Journal on Human Rights* 160.

²⁹¹ Wolfgang (ed) *Understanding Human Rights* 475.

public relations campaigns, and services migration programmes, or infrastructure in camps.”²⁹²

The inescapable conclusion appears that refugees impose a variety of security, economic and environmental burdens on the hosting states. As a developing country, South Africa is overwhelmed with prevalent problems such as unemployment and poverty. Poverty and unemployment often lead to practices that undermine law as these two elements erode the dignity of a person. Therefore, the state ought to make poverty and unemployment its key priorities in order to cater for people’s material need so that they do not feel threatened by the presence of refugees.

This study also found that the ineffectiveness of the protection of refugee’s rights is exacerbated by the spate of xenophobic attacks. Xenophobic attacks on refugees undermine the rationality of the state which seeks to protect refugees within its borders. It impinges on both refugees’ rights and national security as they threaten the lives of the refugees. It spreads a systematic model of lawlessness that can lead to uncharacteristic societal behaviour like revolutions if left uncontrolled.²⁹³

5.4 Recommendations

Initiatives to protect refugees’ rights and assert the authority of the state are important steps in the struggle to progressively realise the rights of the refugees in South Africa. There is need for a longer-term vision for the development of standards and regulations of the refugees’ rights. There is also a need to establish a mechanism that will constantly improve on refugee needs not just when there is a current or prevailing refugee crisis. This enables the state abilities to deal with change, risk and uncertainty.

²⁹² Holzer 2013 *Law and Society Review* 843.

²⁹³ Sibanda *Contextualising the Right to Life and the Phenomenon of Mob Justice in South Africa* 64.

Xenophobia threatens the already thin and volatile fabric of society.²⁹⁴ Once a society knows that they can get away with xenophobia there will no longer be scattered incidents of the phenomena but regular incidents that threaten the rights of the refugees, thus in the process the exception will become the general norm.

If the rights of the refugees are to be preserved and their protection progressively realised, there must be action rather than passivity and lethargy on the part of the host government. There is a positive duty on the hosting state to ensure the preservation and protection of the rights of the refugees. The state has the responsibility to protect those within its territory. Thus, the state has to act to ensure that abuse and ill treatment of refugees are reduced and if possible, ultimately eradicated. The following recommendations could be helpful in eradicating challenges in the way of an efficient system for the protection of the rights of the refugees in South Africa. They are presented in point form.

- a. There is need for the government or rather the DHA officials to speed up the processing of applications for refugee status as well as to grant appropriate documents timeously without any delays as the processes are slow and frustrating. This will ensure that refugees have adequate legal protection and have access to their basic rights entitled to them like right to education, work, freedom of movement and access to health. Failure to do so results in the exploitation of refugees.
- b. Efforts should be expanded in preventing practices of ethnical discrimination in the application of refugee status. The government should develop an independent process for refugee status determination. The refugee status determination should be the domain of an impartial and independent expert authority with a sound familiarity with the legal and empirical realities of human

²⁹⁴ Asiamah 2006
http://www.humanrightsinitiative.org/chrinews/2006/instant_justice_is_no_justice_chri_cries.

rights protection, insulated from political intervention. To add on, the government should take immediate steps to end the pervasive corruption in the handling of refugees by the DHA officers, South African Police Service and other agencies. On that note, effective procedures should be established where they do not already exist, and publicised, to enable refugees to file complaints, without fear of retaliation against these bodies.

- c. The government should take all necessary and reasonable steps to ensure that all agencies dealing with refugees emphasize the promotion and protection of their human rights in the fulfilment of their responsibilities to enforce South African refugee laws. The government should take steps to bring national law and practice relating to migration and refugee determination into line with international standards and to put enough institutional structures necessary to ensure that the human rights of women refugees are protected and reserved.
- d. There is a need for the establishment of a Judicial Review Court for Refugees that would grant justice which they have been struggling to access without success.²⁹⁵ A progressive legislation on its own is undoubtedly not enough to safeguard the rights of the refugees therefore it is noble to establish a Judicial Review Court for Refugees. This special court would seek to bring about a quick end to the persecution of refugees in South Africa with impunity by the DHA. Such a court will also bring about a new refugee management system.²⁹⁶ It must be manned by effective and efficient staff who are experts in refugee law.
- e. There is need for awareness programmes to educate the public on refugee issues through the media or any public forum. This is a way of creating a

²⁹⁵ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 1.

²⁹⁶ Mwale 2017 "Request for the Establishment of a Judicial Review Court for Refugees" 2.

welcoming society and one way of tackling xenophobia and their misconceptions about refugees. The South African Human Rights Commission (SAHRC) and other state institutions supporting constitutional democracy should monitor the situations of refugees around South Africa since they are integrated into society. These institutions have to become more proactive with their involvement in the campaigns against attack of refugees. The Commission also has to report on the series of human rights of the refugees and organizing seminars to that effect. In addition, members of the government, including ministers, should publicly condemn the harassment of or attacks on refugees, and call for tolerance, understanding and respect for the human rights of all those living in South Africa.

- f. The government must focus more on solving the root problems, that is, service delivery. This means that policy considerations should include ways to maximise the socio-economic rights of refugees within its available resources. It is the government's primary obligation to protect and address the refugee problems. The government needs to provide the basic needs of refugees.
- g. The government should also work with the UNHCR to supplement, not supplant the Convention, in response to the changed refugee context.²⁹⁷ In addition, for local integration to be a successful durable, UNHCR must forge strong partnerships with the government and capacitate their partners at the same time.
- h. The government must educate medical professionals about the healthcare rights of refugees, establish preventive measures, and produce and manage solutions in order to fulfil its human rights obligations towards refugees.²⁹⁸ These efforts also rectify the existing conflict between xenophobic or misinformed health care

²⁹⁷ Millbank 2001
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05.

²⁹⁸ Randolph 2012 *Human Rights Brief* 28.

professionals and refugees. Health professionals and government officials must be held accountable for any unlawful discrimination against refugees in the provision of ARV treatment.

- i. The government must recommit to the rule of law. There is a pattern of disregarding the law especially by the DHA. The government officials cannot choose when and how to implement the laws but must make RROs accessible to refugees according to the decision in *Somali* case.

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